TAX INFORMATION BULLETIN

Vol 17, No 3
April 2005

CONTENTS

Inland Revenue
Te Tari Taake

ISSN 0114–7161

BINDING RULINGS

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

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

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

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

PRODUCT RULING – BR PRD 05/01

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

Name of the Person who applied for the Ruling

This Ruling has been applied for by The New Zealand Guardian Trust Company Limited as Trustee of the AMP Superannuation Tracker Fund.

Taxation Laws

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

This Ruling applies in respect of sections BD 2, EE 1, EE 2, EF 1, EF 2 and HH 3(5).

The Arrangement to which this Ruling applies

The Arrangement is the redemption of Units in the AMP Superannuation Tracker Fund ("the Fund") by members who receive securities for their redemption, and those shares are trading stock or revenue account property of that member. Further details of the Arrangement are set out in the paragraphs below:

The AMP Superannuation Tracker Fund

The Fund

1. The AMP Superannuation Tracker Fund ("the Fund") is a registered superannuation scheme under the Superannuation Schemes Act 1989. The Fund is not listed on the New Zealand stock market ("NZX").

2. The Fund has been designed to provide members with a simple and cost effective method of investing in a portfolio with a performance broadly representative of the New Zealand share market.

3. The Trustee of the Fund is the New Zealand Guardian Trust Company Limited ("the Trustee") although the Trust Deed contains provisions for the retirement or removal and replacement of the Trustee.

4. The Manager of the Fund is AMP Investment Management (N.Z.) Ltd ("the Manager"). The Manager invests the investors' contributions into the Fund. The Investment Manager/ Promoter of the Fund is AMP Capital Investors (New Zealand) Ltd ("the Investment Manager"). The Investment Manager purchases securities in the Index, described more particularly in paragraphs 6–8 below. Both the Manager and the Investment Manager are owned by AMP Ltd, incorporated in New South Wales.

5. The Fund was established, as a wholesale registered superannuation scheme, principally for the purpose of paying benefits to persons who are trustees of superannuation schemes registered under the Superannuation Schemes Act 1989 and who elect to invest in the Fund.

Investment policy

6. According to the Members' Booklet of the Fund, dated 29 June 2001:

> The objective of the Scheme is to track the Russell/ Ord Minnett [JB Were] Tradeable Index (the Tradeable Index) as closely as practical. This will be achieved by holding constituent company securities which, as far as possible, match the composition of the Tradeable Index….
>
> The Manager and the Trustee can adopt such other index of securities as they agree from time to time.

7. In accordance with the current Members' Booklet (not being materially different to the draft provided to the Commissioner on 17 January 2005), the Manager and the Trustee have agreed to adopt the NZSX 50 Index ("the Index") administered by New Zealand Exchange Limited. The transition to tracking the Index will occur on 31 January 2005 (refer to paragraph 24(h) below), and the Fund will commence tracking the Index on 1 February 2005. Apart from permitted investments of the cash pool, the Fund will, commencing on 1 February 2005,

only invest in the securities that make up the Index and will continue to track the Index as near as practicable irrespective of whether the sale of the shares will give rise to a profit or loss.

8. Despite the Trust Deed providing that the Manager and Trustee can invest in other Indexes, and apart from permitted investments of the cash pool, the Fund will, having made the transition to the Index, only invest in the securities that make up the Index.

9. The Fund is required to buy and sell shares as required to ensure that it continues to correspond as near as practicable to the Index. Such buying and selling will not be motivated by any intention to derive a profit or gain from such sales. In this regard, Clause 5.3.1A of the Trust Deed states:

> The Fund shall seek to track the Index by investing in Constituent Company Securities as near as practically possible to their weightings in the Index and the Trustee's primary investment duty shall be to seek to achieve this purpose. All other investment duties (express or implied) shall be construed subject to this duty. The Fund and the Trustee shall not have an intention to profit from holding, acquiring or selling Constituent Company Securities.

10. The Trustee and the Manager have confirmed that, to the best of their knowledge, the Fund has complied with the previous rulings (BR Prv 02/04, withdrawn from 30 January 2005, and BR Prd 02/09, withdrawn on 3 February 2005) relating to the Fund.

Adjustments to the Fund

11. The Fund is re-balanced in the following circumstances:

    (a) The Fund's portfolio is monitored regularly, being daily, to ensure that it is tracking the Index. The reference to "Fund's portfolio" means the Constituent Companies held by the Fund.

    (b) The Manager will re-balance the Fund to the Index following any adjustments to the Index. Such re-balancing will occur as soon as possible but in any case within three business days of a change to the composition of the Index.

Management and operation of the Fund

Borrowing

12. Clause 10.3.2 of the Trust Deed provides that:

> The Trustee may not borrow any money for the purposes of the Plan otherwise than for the purpose of satisfying payment of any Administration Expenses in which case the Trustee may borrow money on terms considered appropriate by the Trustee and may charge any or all of the Plan to secure the repayment of any moneys borrowed.

Hedging

13. This Fund only tracks shares quoted on the NZX and hence the Fund will purchase shares in New Zealand dollars. Accordingly, the Fund will not be exposed to foreign exchange risks.

Contributions to the Fund

14. Contributions to the Fund will be by way of parcels of securities or cash. Cash may be accepted in the following circumstances:

    (a) where there is a contemporaneous redemption against which the contribution can be netted off by receiving cash into the Fund and then paying it out on the redemption; or

    (b) to the extent the application cannot be made in securities due to uneven parcel sizes provided the cash pool remains below 0.5% of the total assets of the Fund and, except where the situations listed in paragraph 16 below arise or where the cash is committed to fund an obligation that was known at the time of receipt of the subscription, the cash is converted to Constituent Company Securities as soon as practicably possible.

15. Members wishing to contribute cash may be required to purchase a parcel of securities through a separate arrangement with the Manager, or through other intermediaries (such as brokers and financial advisors).

Cash investments held by the Fund ("cash pool")

16. The proportion of the Fund's assets to be held as the cash pool will not exceed what is strictly necessary in order to fulfil the purposes of the cash pool (as stated in paragraph 17 of this Ruling), and will not in any event exceed 0.5% of the total assets of the Fund, except if:

    (i) the Fund receives a large cash contribution (provided the cash is invested as soon as possible and in any event within three business days); or

    (ii) a member requests a large cash redemption (provided the cash is distributed within three business days of the sale of securities); or

    (iii) the Fund receives a large cash inflow from or in respect of a Constituent Company, such as a distribution due to a pro-rata buyback or takeover or a change in the Constituent Companies of the Index (provided the cash is invested as soon as possible and in any event within three business days); or

    (iv) the Fund holds cash as a result of disposing of securities in the course of and for the purposes of winding up the Fund.

17. The purpose of the cash pool as set out in Clause 5.2.5 of the Trust Deed is:

> The Trustee may maintain or invest in Cash in any amount representing up to five percent (5%) of the Current Fund Value at any time, PROVIDED THAT the investment in Cash shall only be used to facilitate the easier administration of the Fund and to reduce the number of transactions required to be made or to facilitate redemptions from time to time, but may not be used by the Manager or the Trustee to increase the performance of the Fund by maximising the holding of securities considered to be likely to give a high return or minimising the holding of securities considered likely to give a low return.

18. "Cash", as defined in Clause 3 of the Trust Deed includes:

> deposits, or negotiable instruments, in each case having maturities which are not later than the times at which the proceeds of realisation thereof are expected to be required, and on which there is full indefeasible liability of:
>
> (a) a New Zealand registered bank (having the meaning given to that term by the Reserve Bank of New Zealand Act 1989) approved by the Manager for the purpose; or
>
> (b) the New Zealand government.

19. The size and operation of the cash pool will be strictly managed so as to reflect its threefold purpose of:

    (a) allowing funds to accumulate to an appropriate amount for investment, and

    (b) minimising the number of equity security sale and purchase transactions, and

    (c) managing the liquidity of the Fund in respect of meeting its anticipated liabilities and withdrawals.

20. When the cash held by the Investment Manager reaches the minimum investment level, it will be applied to acquire securities to track the Index as soon as possible and in any event within three business days. The Manager has advised that the minimum amount required to enable the purchase of every security in the Index in a marketable and economically sensible sized parcel is approximately $150,000, but may reduce where a lower amount can permit transaction costs to be maintained at the current level (or a level not materially different).

21. It is not envisaged that the amount of cash required to enable the purchase of securities in a marketable and economically sensible sized parcel will change from $150,000 unless there are improvements in share trading systems that make it economic to trade in smaller parcels of shares. This would be beneficial for the Fund as it would be able to invest surplus cash sooner and keep the cash levels in the Fund at a lower level than might otherwise be the case if the Fund is confined to a predetermined minimum parcel size.

22. The Fund does not normally hold cash equivalents. Rather, the cash amounts are normally held in bank deposits and interest is paid on these deposits.

Dividend reinvestment

23. In the event of a dividend reinvestment option being available to the Trustee, the Manager will only accept such an option if it is consistent with tracking the Index. In all other cases, the Manager will decline the option and will always accept the cash dividend that will be immediately allocated to members.

Events that trigger acquisitions or realisations

24. There are certain reasons or events when investments held by the Fund will have to be bought or sold. The Trustee will only dispose of securities (other than cash pool investments):

    (a) If the Fund is voluntarily or involuntarily wound up or if the Trustee is replaced (and this of itself means that there is a technical disposal of securities to the new Trustee and the new Trustee assumes ownership of the same securities held by the previous Trustee immediately before the Trustee is replaced).

    (b) If there is a change in the Index composition and the composition of the Fund no longer tracks the Index or when the Fund is otherwise required to buy and sell securities to maintain tracking.

    (c) When transferring securities to a member if the member redeems Units for securities.

    (d) Where there is no option available to receive dividends in the form of cash, and dividends are received in the form of bonus securities and are converted to cash.

    (e) To satisfy a legal claim against the Fund or Trustee or to meet expenses of the Fund, but only to the extent to which such a claim or expense cannot be met from existing resources.

    (f) If a member or members require cash on redemption of Units and such redemption cannot be met from the cash pool.

    (g) Where securities are purchased in error.

    (h) As a consequence of the Fund ceasing tracking the Russell/JB Were Tradeable Index and commencing tracking the NZSX 50 Index. The Fund will cease tracking the Tradeable Index on 31 January 2005. As near as possible to the close of trading on 31 January 2005, the

Fund will dispose of and acquire all securities as necessary to commence tracking the Index on 1 February 2005, and will do so as soon as possible. If the Fund is unable to dispose of or acquire any necessary securities due to the illiquidity of those securities, the Fund will hold any such securities or cash for only such time as is strictly necessary in order to dispose of or acquire the necessary securities. Up until the time that the Fund ceases to track the Tradeable Index and begins to dispose of and acquire all securities as necessary to track the Index, the Fund will continue to operate in accordance with the previous Ruling BR Prv 02/04 as if that Ruling had not been withdrawn, and BR Prd 02/09.

Redemption of Units

25. A member is only able to dispose of their Units by redeeming them. A member may redeem Units subject to the conditions in Clause 8 of the Trust Deed. Clause 8 requires redemptions to be for amounts of at least $10,000 or all of a member's Units and no member is to be left with less than $100,000 worth of Units. The redemption can be in the form of cash and/or cash equivalents and/or securities.

26. Redemptions are usually made through the transfer of Constituent Company Securities (equal to the value of the Units being redeemed and may also contain a small cash balancing item) but may, in the circumstances described below, be made in cash.

27. In the following circumstances a redemption will be made in cash (where that cash is not committed for other purposes):

    (a) where there is a contemporaneous contribution against which the redemption can be matched; or

    (b) where the cash is sufficient to fund the redemption in full, that redemption will be made from the cash pool; and

    (c) where the cash is not sufficient to fund the redemption in full, the balance of the redemption will be made from securities in the proportions that will ensure that the Fund will continue to match the composition and weighting of the Index as near as practicably possible.

28. Clause 8.3.2 of the Trust Deed provides:

    Every Benefit payable under this clause 8.3 shall be determined by multiplying the Redemption Price calculated on the date of acceptance by the Manager by the number of Units redeemed and become payable to the Member not later than ten (10) Business Days following the date on which the Manager receives the Benefit request or on any later redemption date requested by the Member.

29. Redemption Price is defined in clause 3 of the Trust Deed to mean the "Current Unit Value" less the "Exit Fee".

30. Current Unit Value is defined in clause 3 of the Trust Deed as:

    … on any date an amount that is arrived at by dividing the Current Fund Value by the number of Units on issue on such date …

31. The Current Fund Value is defined in clause 3 of the Trust Deed as:

    The amount calculated by adding as at any time when a valuation is required in relation to the Fund:

    (a) the total of the market value of all Cash, units in the AMP Investments' Tracker Fund and investments of the Fund determined pursuant to clause 6; and
    (b) the income of the Fund due but not yet received; and
    (c) any other amounts which, in the opinion of the Manager, should be included for the purposes of making a fair and reasonable determination of the value of the Fund having due regard to duly accepted accounting practice and accounting principles from time to time;

    and deducting therefrom such amounts:

    (d) as are required to meet liabilities properly attributable to the Fund (actual or contingent and not otherwise allowed for in determining the value of any asset) to the extent that the Manager has decided that provision should be made in the accounts of the Plan;
    (e) as represent Administration Expenses payable by the Trustee or the Manager; and
    (f) which, in the opinion of the Manager, should be included for the purpose of making a fair and reasonable determination of the current value of the Fund having due regard to generally accepted accounting practice and accounting principles current from time to time.

32. Clause 3 of the Trust Deed provides that Market Value in relation to a Constituent Company Security in the Index means:

    … its value as in the Index at any relevant time.

33. Exit Fee is defined in clause 3 of the Trust Deed to mean:

    ... such sum, if any, as the Manager in its absolute discretion may determine (either generally or in relation to a particular Benefit) to be a fair fee payable in relation to the relevant Benefit to provide for the likely per Unit cost of realising Assets to meet that Benefit, having regard to the Manager's estimate of the aggregate of all costs, charges, expenses, disbursements, commissions, brokerage and other usual fees which would be likely to be incurred in respect of the sale or disposal of Assets on the date of calculation of the Redemption Price of Assets to fund a Unit's Redemption Price were sold or disposed of on such date.

Suspension of redemptions

34. Clause 8.5 of the Trust Deed provides that the Manager can suspend redemptions in certain circumstances up to a period not exceeding 20 business days. The Fund will not utilise the power to suspend the redemption of Units except in exceptional circumstances (where and to the extent that it is necessary to do so) being:

    (i) if the Fund is unable to convert sufficient assets into cash, to meet a redemption request; or

    (ii) if the market value of the Units at the time is not a true reflection of the actual value of the Units, due to a suspension in trading of any Constituent Company Securities on any exchange; or

    (iii) if, for reasons beyond its control, the Manager is unable to calculate the redemption price.

    Any such suspension will be for a maximum period of three business days, unless an exceptional circumstance occurs that is beyond the control of the Trustee and the Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund and/or the Manager to recover from that event.

Utilisation of member expenses for tax purposes

35. The Trust Deed has been amended to allow the Trustee to credit a Member's Account with Units in recognition of any tax deduction that the Plan has received as a result of an election by that member under section DI 3(2) of the Income Tax Act 1994. The Trust Deed was amended, by the Second Deed of Amendment dated 1 February 2002, by inserting Clause 12A. Sub-clause 12A.1, which is relevant for the purposes of the Ruling, provides that:

> Where a Member has made an election under section DI 3(2) of the Income Tax Act 1994 ("section DI 3(2)") that any expenditure, which is incurred by the superannuation scheme for which the Member is a trustee (or, in respect of a superannuation scheme constituted under an Act of Parliament, the person appointed to administer the superannuation scheme), be treated as if it were expenditure incurred by the Plan and the Plan has received a tax deduction as a result of that election, the Trustee shall credit to the Member Account of the relevant Member such number of Units as the Trustee considers equitable to recognise such tax deduction. For the avoidance of doubt, the number of units to be issued in normal circumstances would be calculated by reference to the amount determined by dividing the amount of any tax benefit which the Manager considers arises from the tax deduction by the Issue Price applying on the Business Day on which the tax benefit is considered by the Manager to arise.

36. The Fund will always issue Units according to the above Clause and there will be no discretion as to whether the Fund will in fact issue Units in accordance with the above Clause.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following Conditions:

a) The Fund is an investment vehicle primarily for investment into by superannuation funds which are themselves either:

    (i) widely-held investment vehicles for direct investment by natural persons or,

    (ii) vehicles for investment (directly or indirectly) by other superannuation funds that are widely-held vehicles for direct investment by natural persons.

b) The Fund operates in accordance with its Trust Deed dated 10 February 1999, a Members' Booklet not materially different to the draft provided to the Commissioner on 17 January 2005, the Deed of Arrangements dated 10 February 1999 (as amended on 27 August 2001), the Deed of Amendment dated 30 January 2002, and the Second Deed of Amendment dated 1 February 2002.

c) The Fund is a registered superannuation scheme under the Superannuation Schemes Act 1989.

d) The Fund only tracks the Index.

e) Where cash is distributed on redemption its market value will be its nominal value.

f) Where cash equivalents are distributed on redemption, the value of this distribution will be the market value of these cash equivalents.

g) In determining the market value of a security at any time the last sale price for that security, as quoted on the New Zealand stock market at that time, shall be used.

h) The Manager, in determining the Members' entitlement to securities on redemption of Units in the Fund under clause 8.3 of the Trust Deed, shall use the market value of those securities at the valuation time (as defined in the Trust Deed).

i) The formula for calculating the "Current Unit Value" as defined in clause 3 of the Trust Deed will remain unaltered for the period of this ruling.

j) The amounts derived by the Member from the subsequent sale or disposal of securities received on redeeming Units in the Fund will be gross income of the Member.

k) Members do not acquire Units in the Fund for the purpose of acquiring securities.

l) Units in the Fund are not tradeable on a secondary market.

How the Taxation Laws apply to the Arrangement

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

- Pursuant to section HH 3(5) any amounts including securities received by members as a result of redemption of Units in the Fund will not be gross income of the member.
- The cost of any securities acquired by a member on redemption of Units in the Fund is the market value of those Units at the valuation time of the units redeemed less any cash or cash equivalents received.
- The market value of the Units redeemed is equal to the Redemption Price of those Units.
- The cost of a security acquired by a member on the redemption of Units is an allowable deduction under section BD 2 and is deductible:
  - in full in the income year in which the Units are redeemed, if the member acquires the securities as trading stock for the purpose of section EE 1; and
  - in accordance with section EF 2 in the later of the income year in which the securities are disposed of and the income year in which the gross income is derived in respect of the disposition of the securities, if the member acquires the securities as revenue account property other than trading stock.

The period or income year for which this Ruling applies

This Ruling will apply for the period 31 January 2005 to 30 January 2008.

This Ruling is signed by me on the 11th day of February 2005.

Howard Davis
Senior Tax Counsel

PRODUCT RULING – BR PRD 05/03

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

Name of the Person who applied for the Ruling

This Ruling has been applied for by New Zealand Bloodstock Leasing Limited.

Taxation Laws

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

This Ruling applies in respect of sections BD 2(1)(b), BG 1, EF 1, EM 1, EO 2A, FC 8A to FC 10, GB 1, GD 1 and the definitions of "excepted financial arrangement", "hire purchase agreement", "lease", "lease asset" and "operating lease" contained in section OB 1.

The Arrangement to which this Ruling applies

The Arrangement is the leasing of bloodstock by New Zealand Bloodstock Leasing Limited ("NZBL") to its customers for use in breeding bloodstock progeny on the terms provided in the "Bloodstock Lease to Purchase Agreement" (a copy of which was provided to Inland Revenue on 5 December 2002) entered into by NZBL and its customers. Further details of the Arrangement are set out in the paragraphs below.

1. NZBL is a wholly owned subsidiary of New Zealand Bloodstock Limited ("NZB"). NZB established NZBL to expand its business and increase sales of bloodstock in New Zealand by making investment in the bloodstock industry more attractive to existing and new entrants. The availability of leasing reduces the initial level of cash required by existing and new entrants to the bloodstock business to acquire bloodstock.

2. NZBL acquires bloodstock from third party owners, then leases this bloodstock to the customer. Alternatively, the customer purchases the bloodstock from the third party owner, sells it to NZBL, then leases the bloodstock from NZBL. This helps protect NZBL from involvement in any subsequent contractual claims regarding the purchase of the bloodstock from the third party owner. In both cases the transaction as a whole (ie, sale and lease-back) is contemplated by the parties at the outset. In either case, the customer sources the bloodstock, drawing on bloodstock consulting, freight, and insurance services provided by NZB.

3. The terms and duration of leases are based on individual requirements, credit risk, and potential

breeding expectations. Lease periods may vary. A typical lease term is three years for fillies or mares, and two years for colts or stallions.

4. The bloodstock has a residual value under the Bloodstock Lease to Purchase Agreement (the "Residual Value"). The Residual Value is an estimate (at the time of signing the lease) of the value the bloodstock will have at the end of the lease. Where there is an opportunity to secure the rights to sell future progeny through NZB's annual sales (in practical terms this will only be where the bloodstock in question is a mare), NZBL sells the bloodstock to New Zealand Bloodstock Progeny Limited ("NZBP") for the discounted value of the residual value payment. The discounted value is calculated using market rates used by third party companies providing financial facilities. Accordingly, when there is an opportunity to secure the rights to future progeny, NZBP holds title to the bloodstock during the term of the lease, otherwise the title is retained by NZBL.

5. On termination of the lease (the "Lease Termination Date") the customer may purchase the bloodstock for the Residual Value. NZBP or NZBL will transfer title to the customer in return for payment of the Residual Value.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

a) The customer is in the business, as defined in section OB 1, of breeding bloodstock.

b) The customer has entered into the Bloodstock Lease to Purchase Agreement for the sole purpose of breeding from the leased bloodstock and intends to use the leased bloodstock in the production of gross income.

c) The lease payments are genuine, arms-length amounts for the possession and use of the bloodstock.

d) The leased bloodstock is mature for use in breeding and is capable of being used for breeding throughout the period to which each lease payment relates.

e) Any racing undertaken by the leased bloodstock is only incidental to the actual use of the bloodstock for breeding during the lease term.

f) The lessee will have title to any progeny produced during the lease term.

g) The bloodstock becomes the property of the customer only when the customer makes payment of the Residual Value after the Lease Termination Date.

h) The Residual Value of the bloodstock is a reasonable, and the parties' best, estimate of the likely market value of the bloodstock at the Lease Termination Date.

i) The Residual Value amount when paid by the customer is not materially less than the open market value of the bloodstock at the Lease Termination Date.

How the Taxation Law applies to the Arrangement

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

- The bloodstock lease payments are allowable deductions under section BD 2(1)(b) and are not excluded from being deductible under section BD 2(2)(e);
- At the end of an income year, the unexpired portion of any lease payments paid in advance is included in gross income and deductible in the subsequent year (unless excluded from this requirement pursuant to determination by the Commissioner) under section EF 1;
- The valuation and specified writedown provisions in section EM 1 apply to the customer when the bloodstock is purchased by payment of the Residual Value after the Lease Termination Date;
- The cost price of the bloodstock for the purposes of section EM 1 is the Residual Value stated in the Bloodstock Lease to Purchase Agreement;
- Sections BG 1and GB 1 do not apply to the Arrangement to negate or vary any of the above conclusions;
- Section GD 1(1) does not apply to the Arrangement;
- The Accrual Rules in sections EH 19 to EH 59 do not apply to the Arrangement;
- The operating lease provision section EO 2A does not apply to the Arrangement;
- The finance lease provisions in sections FC 8A to FC 8I do not apply to the Arrangement;
- The hire purchase provisions in sections FC 9 and FC 10 do not apply to the Arrangement.

The period or income year for which this Ruling applies

This Ruling will apply for the period 5 December 2002 to 9 February 2005.

This Ruling is signed by me on the 9th day of February 2005.

Martin Smith
Chief Tax Counsel

PRODUCT RULING – BR PRD 05/04

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

Name of the Person who applied for the Ruling

This Ruling has been applied for by New Zealand Bloodstock Leasing Limited.

Taxation Laws

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

This Ruling applies in respect of sections BD 2(1)(b), BG 1, EF 1, EM 1, EO 2A, FC 8A to FC 10, GB 1, GD 1 and the definitions of "excepted financial arrangement", "hire purchase agreement", "lease", "lease asset" and "operating lease" contained in section OB 1.

The Arrangement to which this Ruling applies

The Arrangement is the leasing of bloodstock by New Zealand Bloodstock Leasing Limited ("NZBL") to its customers for use in breeding bloodstock progeny on the terms provided in the "Bloodstock Lease to Purchase Agreement" (a copy of which was provided to Inland Revenue on 2 February 2005) entered into by NZBL and its customers. Further details of the Arrangement are set out in the paragraphs below.

1. NZBL is a wholly owned subsidiary of New Zealand Bloodstock Limited ("NZB"). NZB established NZBL to expand its business and increase sales of bloodstock in New Zealand by making investment in the bloodstock industry more attractive to existing and new entrants. The availability of leasing reduces the initial level of cash required by existing and new entrants to the bloodstock business to acquire bloodstock.

2. NZBL acquires bloodstock from third party owners, then leases this bloodstock to the customer. Alternatively, the customer purchases the bloodstock from the third party owner, sells it to NZBL, then leases the bloodstock from NZBL. This helps protect NZBL from involvement in any subsequent contractual claims regarding the purchase of the bloodstock from the third party owner. In both cases the transaction as a whole (ie, sale and lease-back) is contemplated by the parties at the outset. In either case, the customer sources the bloodstock, drawing on bloodstock consulting, freight, and insurance services provided by NZB.

3. The terms and duration of leases are based on individual requirements, credit risk, and potential breeding expectations. Lease periods may vary. A typical lease term is three years for fillies or mares, and two years for colts or stallions.

4. The bloodstock has a residual value under the Bloodstock Lease to Purchase Agreement (the "Residual Value"). The Residual Value is an estimate (at the time of signing the lease) of the value the bloodstock will have at the end of the lease. Where there is an opportunity to secure the rights to sell future progeny through NZB's annual sales (in practical terms this will only be where the bloodstock in question is a mare), NZBL sells the bloodstock to New Zealand Bloodstock Progeny Limited ("NZBP") for the discounted value of the residual value payment. The discounted value is calculated using market rates used by third party companies providing financial facilities. Accordingly, when there is an opportunity to secure the rights to future progeny, NZBP holds title to the bloodstock during the term of the lease, otherwise the title is retained by NZBL.

5. On termination of the lease (the "Lease Termination Date") the customer may purchase the bloodstock for the Residual Value. NZBP or NZBL will transfer title to the customer in return for payment of the Residual Value.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

a) The customer is in the business, as defined in section OB 1, of breeding bloodstock.

b) The customer has entered into the Bloodstock Lease to Purchase Agreement for the sole purpose of breeding from the leased bloodstock and intends to use the leased bloodstock in the production of gross income.

c) The lease payments are genuine, arms-length amounts for the possession and use of the bloodstock.

d) The leased bloodstock is mature for use in breeding and is capable of being used for breeding throughout the period to which each lease payment relates.

e) Any racing undertaken by the leased bloodstock is only incidental to the actual use of the bloodstock for breeding during the lease term.

f) The lessee will have title to any progeny produced during the lease term.

g) The bloodstock becomes the property of the customer only when the customer makes payment of the Residual Value after the Lease Termination Date.

h) The Residual Value of the bloodstock is a reasonable, and the parties' best, estimate of the likely market value of the bloodstock at the Lease Termination Date.

i) The Residual Value amount when paid by the customer is not materially less than the open market value of the bloodstock at the Lease Termination Date.

How the Taxation Law applies to the Arrangement

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

- The bloodstock lease payments are allowable deductions under section BD 2(1)(b) and are not excluded from being deductible under section BD 2(2)(e);
- At the end of an income year, the unexpired portion of any lease payments paid in advance is included in gross income and deductible in the subsequent year (unless excluded from this requirement pursuant to determination by the Commissioner) under section EF 1;
- The valuation and specified writedown provisions in section EM 1 apply to the customer when the bloodstock is purchased by payment of the Residual Value after the Lease Termination Date;
- The cost price of the bloodstock for the purposes of section EM 1 is the Residual Value stated in the Bloodstock Lease to Purchase Agreement;
- Sections BG 1and GB 1 do not apply to the Arrangement to negate or vary any of the above conclusions;
- Section GD 1(1) does not apply to the Arrangement;
- The Accrual Rules in sections EH 19 to EH 59 do not apply to the Arrangement;
- The operating lease provision section EO 2A does not apply to the Arrangement;
- The finance lease provisions in sections FC 8A to FC 8I do not apply to the Arrangement;
- The hire purchase provisions in sections FC 9 and FC 10 do not apply to the Arrangement.

The period or income year for which this Ruling applies

This Ruling will apply for the period 10 February 2005 to 4 December 2007.

This Ruling is signed by me on the 9th day of February 2005.

Martin Smith
Chief Tax Counsel

LEGISLATION AND DETERMINATIONS

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

2005 INTERNATIONAL TAX DISCLOSURE EXEMPTION ITR16

Introduction

Section 61 of the Tax Administration Act 1994 (TAA) requires people to disclose interests they hold in foreign entities.

Under section 61(1) of the TAA, a person who has a control or income interest in a foreign company or an interest in a foreign investment fund (FIF) at any time during the income year must disclose the interest held. However, section 61(2) allows the Commissioner of Inland Revenue to exempt any person or class of persons from this requirement if disclosure is not necessary for the administration of the international tax rules (as defined by section OZ 1) contained in the Income Tax Act 1994 (ITA).

Under section 61(2), the Commissioner has issued an international tax disclosure exemption which applies for the income year ended 31 March 2005. This exemption may be cited as "International Tax Disclosure Exemption ITR16", and the full text appears at the end of this item.

Scope of exemption

The scope of the 2005 disclosure exemption is the same as the 2004 exemption.

Interests held by residents

Disclosure is required by residents for these interests:

- an interest held in a FIF
- an "income interest of 10% or greater" held in a foreign company. The disclosure obligation applies in respect of all foreign companies regardless of the country of residence.

An "income interest of 10% or greater" is defined in section OB 1 of the ITA. For the purposes of determining exemption from disclosure it includes these interests:

1. an income interest held directly in a foreign company
2. an income interest held indirectly through any interposed foreign company
3. an income interest held by an associated person (which is not a controlled foreign company) as defined by section OD 8 (3) of the ITA.

Example

If a husband and wife each hold an income interest of 5% in a Cayman Islands company, the interests would not be exempt from disclosure because the husband and wife are associated persons under section OD 8(3)(d). Under the associated persons test they are each deemed to hold the other's interests, so they each hold an "income interest of 10% or greater" which must be disclosed.

They are not required to account for attributed foreign income or loss under the controlled foreign company rules. However, they would have to account for FIF income or loss under the FIF rules.

In this example the husband and wife must disclose their interests as interests in a foreign company and as interests in a FIF. However, only the FIF interests should be disclosed on an IR 439, IR 440, IR 441, IR 442 or IR 443 forms (see "Overlap of interests" below).

Foreign company interests

A resident who holds a control or income interest in a foreign company must disclose that interest, regardless of the company's country of residence. The 2005 international tax disclosure exemption also makes no distinction about residence, and any interest in a foreign company which is an "income interest of 10% or greater" must be disclosed. Disclosure is to be made on an *Interest in a foreign company disclosure schedule (IR 477)* or *(IR 479)* form.

The disclosure exemption makes no distinction on the residence of a foreign company for these reasons:

- attributed (non-dividend) repatriation rules apply to an "income interest of 10% or greater" in a controlled foreign company (CFC) regardless of the CFC's country of residence.
- to identify tax preferences applied by the taxpayer (whether or not specified in Schedule 3, Part B of the ITA) in respect of an interest held in a foreign company which is resident in a Schedule 3, Part A of the ITA jurisdiction (ie Australia, Canada, Federal Republic of Germany, Japan, Norway, United Kingdom and the United States of America).
- the requirement for a CFC which is resident in a country not listed in Schedule 3, Part A of the ITA to attribute foreign income or loss from 1 April 1993.

Foreign investment fund interests

An interest in a foreign entity must be disclosed if it constitutes an "interest in a foreign investment fund" specified within section CG 15(1) of the ITA. These types of interest must be disclosed:

- rights in a foreign company or anything deemed to be a company for the purposes of the ITA (eg a unit trust)
- an entitlement to benefit from a foreign superannuation scheme
- an entitlement to benefit from a foreign life insurance policy
- an interest in an entity specified in Schedule 4, Part A of the ITA (no entities were listed when this TIB went to press).

However, any interest that does not fall within the above types or which is specifically excluded as an interest in a FIF under section CG 15(2) does not have to be disclosed. The following are listed in section CG 15(2) as exclusions from what constitutes an interest in a FIF:

- an "income interest of 10% or greater" in a CFC (separate disclosure is required of this as an interest in a foreign company)
- an interest in a foreign company that is resident and liable to income tax in a country or territory specified in Schedule 3, Part A of the ITA (ie Australia, Canada, Federal Republic of Germany, Japan, Norway, United Kingdom and the United States of America).
- an interest in an employment-related foreign superannuation scheme
- a qualifying foreign private annuity, unless an election has been made to remain within the FIF regime, by the due date for filing the person's 2004 tax return. See Inland Revenue's booklet *Overseas private pensions (IR 257)* for more information.
- interests in foreign entities held by a natural person other than in that person's capacity as a trustee, if the aggregate cost or expenditure incurred in acquiring the interests remains under $50,000 at all times during the income year
- an interest held by a natural person in a foreign entity located in a country where exchange controls prevent the person deriving any profit or gain or disposing of the interest for New Zealand currency or consideration readily convertible to New Zealand currency
- an interest in a foreign life insurance policy or foreign superannuation scheme acquired by a natural person before he or she became a New Zealand resident for the first time, for a period of up to four years.

A resident who holds an interest in a FIF at any time during the 2005 income year must disclose the interest and calculate FIF income or loss on the form *Interest in foreign investment fund disclosure schedule (IR 439, IR 440, IR 441, IR 442, IR 443)*. The FIF rules allow a person four options to calculate FIF income or loss (accounting profits method, branch equivalent method, comparative value method and deemed rate of return method), so the Commissioner has prescribed four forms to disclose and calculate FIF income or loss from an interest in a FIF using one of the methods. The respective forms to use for whichever FIF income calculation method you choose to apply is as follows;

- IR 439 form for the accounting profits method
- IR 440 form for the branch equivalent method
- IR 441 form for the comparative value method
- IR 442 form for the comparative value method and multiple interests
- IR 443 form for the deemed rate of return method.

Overlap of interests

A situation may arise where a person is required to furnish a disclosure for an interest in a foreign company which is also an interest in a FIF. For example, a person with an "income interest of 10% or greater" in a foreign company which is not a CFC is strictly required to disclose both an interest held in a foreign company and an interest held in a FIF.

However, to meet the disclosure obligations only one disclosure return (either the IR 477 or IR 479 forms or the IR 439, IR 440, IR 441 or IR 443 forms) is required for each interest a person holds in a foreign entity.

Here are the general rules for determining which disclosure return to file:

1. Use the appropriate IR 439, IR 440, IR 441, IR 442 or IR 443 form to disclose all FIF interests, and in particular:
   - an interest in a foreign company which is not resident in a Schedule 3, Part A country and is not a CFC (regardless of the level of interest held)
   - an income interest of less than 10% in a CFC which is not resident in a Schedule 3, Part A country
   - an interest in a foreign life insurance policy or foreign superannuation scheme, regardless of the country or territory in which the entity was resident.

2. Use the IR 477 or IR 479 forms to disclose:

   - an "income interest of 10% or greater" in a foreign company (regardless of the country of residence) that is not being disclosed on the IR 439, IR 440, IR 441, IR 442 or IR 443 forms.

Disclosure is not required on any of the forms for an income interest of less than 10% in a foreign company (whether a CFC or not) which is also not a FIF interest. An example is an interest which is covered by the Schedule 3, Part A exclusion from the FIF rules.

Interests held by non-residents

The 2005 disclosure exemption removes the need for interests held by non-residents in foreign companies and FIFs to be disclosed.

This would apply for example to an overseas company operating in New Zealand (through a branch) in respect of its interests in foreign companies and FIFs.

The purpose of the international tax rules is to make sure that New Zealand residents are taxed on their share of the income of any overseas interests they hold. However, under the international tax rules non-residents are not required to calculate or attribute income under the CFC regime (section CG 6(1) of the ITA 1994). In addition, under section CG 16(4) of the ITA 1994 a non-resident is not to be treated as deriving or incurring any FIF income or loss. The disclosure of non-residents holdings in foreign companies or FIFs is not necessary for the administration of the international tax rules.

Summary

The 2005 international tax disclosure exemption removes the requirement of a resident to disclose an interest held in a foreign company (if the interest is not also an interest in a FIF) that does not constitute an "income interest of 10% or greater" (ie it is less than 10%). The disclosure exemption is not affected by the foreign company's country of residence. Further, an interest in a FIF must be disclosed.

The 2005 disclosure exemption also removes the requirement for a non-resident to disclose interests held in foreign companies and FIFs.

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

This exemption may be cited as "International Tax Disclosure Exemption ITR16"

1. Reference

This exemption is made under section 61(2) of the Tax Administration Act 1994. It details interests in foreign companies in relation to which any person is not required to comply with the requirement in section 61 of the Tax Administration Act 1994 to make disclosure of their interests, for the income year ending 31 March 2005. This exemption does not apply to interests in foreign companies which are interests in foreign investment funds, unless that interest is held by a non-resident of New Zealand.

2. Interpretation

In this exemption, unless the context otherwise requires, expressions used have the same meaning as in section OB 1 of the Income Tax Act 1994 or the international tax rules (as defined by section OZ 1 of the Income Tax Act 1994).

3. Exemption

(i) Any person who has an income interest or a control interest in a foreign company (not being an interest in a foreign investment fund), in the income year ending 31 March 2005, is not required to comply with section 61(1) of the Tax Administration Act 1994 in respect of that interest and that income year, unless the interest held by that person during any accounting period of the foreign company (the last day of which falls within that income year of the person), would constitute an "income interest of 10% or greater", as defined by section OB 1 of the Income Tax Act 1994, as if the foreign company was a controlled foreign company.

(ii) Any non-resident person who has an income interest or a control interest in a foreign company or an interest in a foreign investment fund in the income year ending 31 March 2005, is not required to comply with section 61(1) of the Tax Administration Act 1994 in respect of that interest and that income year if either or both of the following apply:

   - No attributed foreign income or loss arises in respect of that interest in that foreign company by virtue of section CG 6(1) of the Income Tax Act 1994, and/or
   - No foreign investment fund income or loss arises in respect of that interest in that foreign investment fund by virtue of section CG 16(4) of the Income Tax Act 1994.

This exemption is made by me acting under delegated authority from the Commissioner of Inland Revenue pursuant to section 7 of the Tax Administration Act 1994.

This exemption is signed on the 22nd day of March 2005.

Spyros Papageorgiou
Group Manager, Corporates

FOREIGN CURRENCY AMOUNTS – CONVERSION TO NEW ZEALAND DOLLARS

The tables in this item list exchange rates acceptable to Inland Revenue for converting foreign currency amounts to New Zealand dollars under the controlled foreign company (CFC) and foreign investment fund (FIF) rules for the six months ending 31 March 2005.

The conversion rates for the first six months of each income year are published in the *Tax Information Bulletin* following the end of the September quarter, and the rates for the full 12 months are published at the end of each income year.

To convert foreign currency amounts to New Zealand dollars for any country listed, divide the foreign currency amount by the exchange rate shown.

Note
If you need an exchange rate for a country or a day not listed in the following Tables A and B, please contact one of New Zealand's major trading banks.

Round the exchange rate calculations to four decimal places wherever possible.

Table A

Use this table to convert foreign currency amounts to New Zealand dollars for:

- branch equivalent income or loss under the CFC rules pursuant to section CG 11(3)(a) of the Income Tax Act 1994
- FIF income or loss calculated under the branch equivalent method pursuant to sections CG 11(3)(a), CG 16(1)(b) and CG 21 of the Income Tax Act 1994
- foreign tax credits calculated under the branch equivalent method for a CFC under section LC 4(1)(b) of the Income Tax Act 1994
- foreign tax credits calculated under the branch equivalent method for a FIF under sections CG 21(3) and LC 4(1)(b) of the Income Tax Act 1994
- FIF income or loss calculated under the accounting profits, comparative value (except if Table B applies, ie where the market value of the FIF interest as at the end of the income year or/and at the end of the preceding income year is not zero) or deemed rate of return methods under section CG 16(11) of the Income Tax Act 1994.

Key

$$\frac{X}{Y}$$

"x" is the exchange rate on the 15th day of the month, or if no exchange rates were quoted on that day, on the next working day on which they were quoted.

"y" is the average of the mid-month exchange rates for that month and the previous 11 months.

Example 1

A CFC resident in Hong Kong has an accounting period ending on 30 September 2004. Branch equivalent income for the period 1 October 2003 to 30 September 2004 is 200,000 Hong Kong dollars (HKD).

HKD 200,000 ÷ 5.0203 = NZ$39,838.26

A similar calculation would be needed for a FIF using the branch equivalent or accounting profits methods.

Example 2

A taxpayer with a 31 March balance date purchases shares in a Philippines company (which is a FIF) for 350,000 pesos (PHP) on 7 September 2004. Using the comparative value or deemed rate of return methods, the cost is converted as follows:

PHP 350,000 ÷ 36.9816 = NZ$9,464.16

Alternatively, the exchange rate can be calculated by averaging the exchange rates "x" that apply to each complete month in the foreign company's accounting period.

Example 3

A CFC resident in Singapore was formed on 21 April 2004 and has a balance date of 31 March 2005. During the period from 1 May 2004 to 30 September 2004, branch equivalent income of 500,000 Singapore dollars was derived.

(i) Calculating the average monthly exchange rate for the complete months May-September 2004.

(1.0388 + 1.0705 + 1.1093 + 1.1369 + 1.1164) ÷ 5 = 1.09438

(ii) Conversion to New Zealand currency:

SGD 500,000 ÷ 1.09438 = NZ$456,879.69

Table B

Table B lists the end-of-month exchange rates acceptable to Inland Revenue for the six-month period ending 31 March 2005. Use this table for converting foreign currency amounts to New Zealand dollars for:

- Items "a" (market value of the FIF interest on the last day of the income year) and "c" (market value of the FIF interest on the last day of the preceding income year) of the comparative value formula under section CG 18 of the Income Tax Act 1994
- Foreign tax credits paid on the last day of any month calculated under the branch equivalent method for a CFC or FIF under section LC 4(1)(a) of the Income Tax Act 1994.

Example 4

A New Zealand resident with a balance date of 30 September 2004 held an interest in a FIF resident in Thailand. The market value of the FIF interest at 30 September 2004 (item "a" of the comparative value formula) was 500,000 Thailand baht (THB).

THB 500,000 ÷ 27.5882 = NZ $18,123.69

Note
An overseas currency converter is available on our website

http://www.ird.govt.nz/calculators/keyword/overseascurrencies/calculator-overseascurrency.html

Currency rates 2005 – mid month (Rates table type "A")

			15-Apr-04	15-May-04	15-Jun-04	15-Jul-04	15-Aug-04	15-Sep-04	15-Oct-04	15-Nov-04	15-Dec-04	15-Jan-05	15-Feb-05	15-Mar-05
Country	**Currency**	**Code**	**12 month rate**	**12 month rate**	**12 month rate**	**12 month rate**	**12 month rate**	**12 month rate**	**12 month rate**	**12 month rate**	**12 month rate**	**12 month rate**	**12 month rate**	**12 month rate**
Australia	Dollar	AUD	0.8651	0.8737	0.9083	0.9011	0.9284	0.9432	0.9326	0.9016	0.9377	0.9209	0.9078	0.9363
			0.8787	0.8775	0.8809	0.8815	0.8844	0.8898	0.8955	0.8976	0.9030	0.9065	0.9082	0.9130
Bahrain	Dollar	BHD	0.2392	0.2277	0.2349	0.2458	0.2499	0.2492	0.2565	0.2612	0.2666	0.2631	0.2695	0.2774
			0.2339	0.2348	0.2361	0.2381	0.2405	0.2430	0.2456	0.2476	0.2496	0.2501	0.2506	0.2534
Canada	Dollar	CAD	0.8535	0.8382	0.8573	0.8623	0.8699	0.8563	0.8545	0.8279	0.8761	0.8496	0.8831	0.8893
			0.8307	0.8347	0.8416	0.8459	0.8503	0.8554	0.8607	0.8613	0.8632	0.8608	0.8576	0.8598
China	Yuan	CNY	5.2574	5.0083	5.1639	5.4028	5.4964	5.4831	5.6381	5.7404	5.8624	5.7863	5.9233	6.1012
			5.1410	5.1618	5.1912	5.2352	5.2886	5.3429	5.4008	5.4446	5.4887	5.5001	5.5109	5.5720
Denmark	Krone	DKK	3.9460	3.7607	3.8268	3.9131	3.9949	4.0146	4.0906	3.9742	3.9582	3.9551	4.1021	4.0966
			3.8814	3.8855	3.9020	3.9048	3.9148	3.9297	3.9558	3.9553	3.9588	3.9551	3.9559	3.9694
European Community	Euro	EUR	0.5304	0.5059	0.5172	0.5270	0.5378	0.5404	0.5494	0.5347	0.5330	0.5334	0.5515	0.5519
			0.5225	0.5229	0.5253	0.5257	0.5271	0.5291	0.5324	0.5324	0.5326	0.5323	0.5324	0.5344
Fiji	Dollar	FJD	1.0944	1.0985	1.1178	1.1391	1.1662	1.1748	1.1759	1.1658	1.1790	1.1591	1.1790	1.1945
			1.1086	1.1097	1.1127	1.1158	1.1213	1.1281	1.1357	1.1397	1.1447	1.1460	1.1478	1.1537
French Polynesia	Franc	XPF	63.0798	60.1325	61.4617	62.6444	63.9330	66.7307	65.2884	63.5924	63.3310	63.4059	65.5555	65.6159
			62.1083	62.1666	62.4430	62.4916	62.6501	63.0960	63.4948	63.4870	63.5187	63.4781	63.4985	63.7309
Hong Kong	Dollar	HKD	4.9487	4.7019	4.8641	5.0906	5.1847	5.1627	5.3035	5.3928	5.5055	5.4451	5.5802	5.7455
			4.8411	4.8488	4.8769	4.9184	4.9691	5.0203	5.0771	5.1188	5.1611	5.1732	5.1851	5.2438
India	Rupee	INR	27.4679	27.1976	28.0057	29.6489	30.4655	30.1132	30.9121	31.0214	30.9421	30.3132	30.9306	31.7404
			28.0894	28.1110	28.1971	28.4102	28.7187	29.0241	29.3547	29.5803	29.7402	29.7061	29.6691	29.8965
Indonesia	Rupiah	IDR	5,464.8100	5,466.9250	5,852.1600	5,848.9700	6,144.1800	6,037.2150	6,201.0050	6,235.4400	6,596.4200	6,405.5050	6,616.5850	6,911.2100
			5,243.6963	5,294.3567	5,384.1675	5,467.8129	5,561.8875	5,653.7879	5,750.5183	5,824.0883	5,918.7604	5,977.9783	6,039.1488	6,148.3688
Japan	Yen	JPY	68.9880	68.7925	69.3215	71.2041	73.4750	72.5832	74.5957	73.2759	74.7189	71.2224	75.1559	77.4382
			69.3342	69.5008	69.6026	69.7652	70.0695	70.4178	71.2220	71.6399	72.0656	71.9658	72.0801	72.5643
Korea	Won	KOR	734.8550	717.5750	725.5850	752.1500	766.9700	758.5600	779.2850	762.9000	749.3700	729.1550	733.5350	737.6600
			730.3079	732.8467	735.5904	740.5438	746.8792	753.1779	759.6983	761.7813	760.6096	754.2446	747.9350	745.6333
Kuwait	Dollar	KWD	0.1868	0.1780	0.1837	0.1922	0.1954	0.1948	0.2005	0.2045	0.2082	0.2038	0.2087	0.2149
			0.1837	0.1843	0.1851	0.1864	0.1880	0.1898	0.1919	0.1935	0.1951	0.1954	0.1956	0.1976
Malaysia	Ringgit	MYR	2.4136	2.2992	2.3708	2.4804	2.5234	2.5173	2.5885	2.6355	2.6915	2.6566	2.7195	2.8012
			2.3602	2.3697	2.3832	2.4034	2.4279	2.4528	2.4795	2.4996	2.5198	2.5251	2.5300	2.5581
Norway	Krone	NOK	4.3966	4.1587	4.2681	4.4714	4.4448	4.5290	4.5060	4.3500	4.3744	4.3528	4.6288	4.5001
			4.3748	4.3625	4.3842	4.3941	4.4038	4.4249	4.4505	4.4469	4.4520	4.4325	4.4140	4.4150
Pakistan	Rupee	PKR	36.1978	34.5770	35.7888	37.7090	38.7041	38.8654	40.2410	41.0054	41.8035	41.1346	42.1084	43.3236
			35.0810	35.2177	35.4267	35.7567	36.1762	36.6275	37.1507	37.5772	38.3678	38.5650	38.7538	39.2882
Papua New Guinea	Kina	PGK	1.9740	1.8831	1.9337	2.0156	2.0323	1.9925	2.0958	2.1226	2.1428	2.1363	2.1875	2.2233
			2.0381	2.0246	2.0168	2.0164	2.0213	2.0251	2.0386	2.0471	2.0511	2.0485	2.0462	2.0616
Philippines	Peso	PHP	35.2365	33.4681	34.5541	36.1904	36.7816	36.9816	38.0727	38.6794	39.4642	38.7182	38.7699	39.6147
			33.8283	34.1441	34.4615	34.8761	35.2810	35.7134	36.1817	36.5143	36.8531	36.9486	36.9356	37.2109
Singapore	Dollar	SGD	1.0648	1.0388	1.0705	1.1093	1.1369	1.1164	1.1426	1.1429	1.1663	1.1422	1.1704	1.1935
			1.0649	1.0689	1.0746	1.0811	1.0905	1.0985	1.1075	1.1126	1.1181	1.1171	1.1171	1.1245
Solomon Islands	Dollar	SBD	4.7022	4.5580	4.7045	4.8246	4.9821	4.9860	5.0852	5.1075	5.2101	5.1533	5.3023	5.4588
			4.6974	4.7177	4.7422	4.7715	4.8148	4.8608	4.9067	4.9333	4.9605	4.9584	4.9590	5.0062
South Africa	Rand	ZAR	4.1919	4.0632	4.0987	3.9525	4.3125	4.3022	4.4463	4.2427	4.0605	4.2071	4.3224	4.3733
			4.3672	4.3403	4.3057	4.2625	4.2640	4.2656	4.2912	4.2934	4.2904	4.2389	4.2139	4.2144
Sri Lanka	Rupee	LKR	61.7017	59.2343	62.0972	66.5073	68.2051	67.9049	70.3451	72.1202	74.2703	68.4702	70.7447	72.6954
			59.7955	60.1025	60.5962	61.3920	62.3599	63.3966	64.5799	65.5760	66.6298	66.8286	67.0082	67.8580
Sweden	Krona	SEK	4.8698	4.6327	4.7128	4.8410	4.9549	4.9106	4.9949	4.8096	4.7689	4.8131	5.0020	5.0033
			4.7588	4.7630	4.7860	4.7919	4.8044	4.8212	4.8577	4.8591	4.8611	4.8513	4.8503	4.8595
Switzerland	Franc	CHF	0.8238	0.7782	0.7827	0.8019	0.8241	0.8334	0.8495	0.8132	0.8181	0.8251	0.8569	0.8538
			0.8109	0.8128	0.8153	0.8147	0.8162	0.8185	0.8238	0.8219	0.8216	0.8204	0.8196	0.8217
Taiwan	Dollar	TAI	20.8200	20.2850	20.8950	21.9850	22.6000	22.4400	23.0750	22.8750	23.0250	22.3050	22.5700	22.6300
			21.0363	21.0688	21.1321	21.2763	21.4817	21.6950	21.9333	22.0567	22.1504	22.0963	22.0458	22.1254

Country	Currency	Code	15-Apr-04	15-May-04	15-Jun-04	15-Jul-04	15-Aug-04	15-Sep-04	15-Oct-04	15-Nov-04	15-Dec-04	15-Jan-05	15-Feb-05	15-Mar-05
			12 month rate	12 month rate	12 month rate	12 month rate	12 month rate	12 month rate	12 month rate	12 month rate	12 month rate	12 month rate	12 month rate	12 month rate
Thailand	Baht	THB	24.7299	24.3941	25.2081	26.3351	27.3648	27.1785	27.8917	27.7756	27.7258	26.6975	27.1719	27.9331
			24.7778	24.8111	24.9189	25.0900	25.3490	25.6497	26.0047	26.2430	26.4427	26.4703	26.4853	26.7005
Tonga	Pa'anga	TOP	1.2491	1.2082	1.2338	1.2729	1.3005	1.3142	1.3454	1.3589	1.3736	1.3410	1.3534	1.3761
			1.2756	1.2742	1.2738	1.2750	1.2787	1.2840	1.2913	1.2959	1.3009	1.3014	1.3027	1.3106
United Kingdom	Pound	GBP	0.3547	0.3421	0.3442	0.3519	0.3596	0.3688	0.3790	0.3737	0.3678	0.3739	0.3788	0.3855
			0.3629	0.3618	0.3616	0.3605	0.3599	0.3603	0.3622	0.3622	0.3620	0.3622	0.3628	0.3650
United States	Dollar	USD	0.6353	0.6035	0.6245	0.6533	0.6655	0.6626	0.6814	0.6942	0.7088	0.6992	0.7162	0.7373
			0.6211	0.6235	0.6271	0.6325	0.6391	0.6456	0.6527	0.6579	0.6633	0.6647	0.6660	0.6735
Vanuatu	Vatu	VUV	70.0274	69.1641	71.4584	73.2784	75.0653	75.6842	75.8167	74.9217	75.9016	74.0361	76.3342	76.3942
			71.1827	71.0506	71.2226	71.4607	71.8341	72.2901	72.8024	73.0628	73.3990	73.4431	73.5921	74.0069
Western Samoa	Tala	WST	1.7746	1.7311	1.7628	1.8230	1.8732	1.8737	1.8820	1.8679	1.8685	1.8768	1.8952	1.9152
			1.7851	1.7863	1.7881	1.7936	1.8034	1.8134	1.8240	1.8307	1.8346	1.8364	1.8366	1.8453

Currency rates 2005 – end month (Rates table type "B")

Country	Currency	Code	30-Apr-04	31-May-04	30-Jun-04	31-Jul-04	31-Aug-04	30-Sep-04	31-Oct-04	30-Nov-04	31-Dec-04	31-Jan-05	28-Feb-05	31-Mar-05
Australia	Dollar	AUD	0.8623	0.8846	0.9153	0.9076	0.9301	0.9349	0.9172	0.9131	0.9221	0.9186	0.9175	0.9197
Bahrain	Dollar	BHD	0.2343	0.2378	0.2378	0.2384	0.2449	0.2522	0.2575	0.2693	0.2704	0.2680	0.2720	0.2672
Canada	Dollar	CAD	0.8533	0.8600	0.8498	0.8400	0.8574	0.8510	0.8358	0.8479	0.8638	0.8812	0.8942	0.8629
China	Yuan	CNY	5.1550	5.2275	5.2298	5.2465	5.3804	5.5468	5.6468	5.9237	5.9444	5.8905	5.9730	5.8720
Denmark	Krone	DKK	3.8650	3.8376	3.8759	3.9106	4.0071	4.0404	3.9856	4.0003	3.9122	4.0568	4.0509	4.0798
European Community	Euro	EUR	0.5199	0.5165	0.5230	0.5264	0.5393	0.5434	0.5367	0.5389	0.5264	0.5459	0.5448	0.5481
Fiji	Dollar	FJD	1.1028	1.1135	1.1239	1.1324	1.1530	1.1705	1.1639	1.1688	1.1844	1.1745	1.1815	1.1784
French Polynesia	Franc	XPF	61.7979	61.3965	62.1196	62.5817	64.1622	64.5805	63.8114	64.0451	62.5871	64.8803	64.7663	65.1430
Hong Kong	Dollar	HKD	4.8552	4.9220	4.9258	4.9399	5.0692	5.2246	5.3144	5.5658	5.5809	5.5477	5.6264	5.5302
India	Rupee	INR	27.3076	28.3868	28.6486	29.0965	29.8207	30.5170	30.7888	31.7081	31.1354	30.7719	31.1952	30.7282
Indonesia	Rupiah	IDR	5,467.5150	5,857.9800	5,953.6450	5,822.3100	6,068.57	6,156.35	6,208.81	6,445.25	6,697.63	6,512.39	6,686.52	6,749.06
Japan	Yen	JPY	68.3594	69.5998	68.4199	71.0171	71.4240	74.2577	72.5711	73.5916	73.9295	73.5348	75.7958	76.1728
Korea	Won	KOR	728.6600	735.1150	727.8850	740.3250	748.8500	772.6750	767.4550	749.3300	747.6400	728.7750	727.4150	725.7650
Kuwait	Dollar	KWD	0.1832	0.1859	0.1860	0.1864	0.1915	0.1971	0.2012	0.2105	0.2112	0.2076	0.2106	0.2069
Malaysia	Ringgit	MYR	2.3666	2.3998	2.4010	2.4086	2.4701	2.5465	2.5925	2.7196	2.7292	2.7045	2.7423	2.6959
Norway	Krone	NOK	4.2515	4.2394	4.3308	4.4474	4.5173	4.5368	4.3735	4.3619	4.3411	4.4938	4.4946	4.4819
Pakistan	Rupee	PKR	35.4113	36.2031	36.3917	36.1834	37.8037	39.3807	41.0903	42.3968	42.3474	41.8159	42.4214	41.7238
Papua New Guinea	Kina	PGK	1.9340	1.9608	1.9545	1.9441	1.9672	1.9990	2.0967	2.1880	2.1880	2.1666	2.1921	2.1481
Philippines	Peso	PHP	34.6482	35.0066	35.0931	35.2138	36.1989	37.4399	38.1879	39.8257	40.1006	39.0209	39.1443	38.4972
Singapore	Dollar	SGD	1.0584	1.0718	1.0814	1.0898	1.1122	1.1306	1.1338	1.1694	1.1726	1.1597	1.1748	1.1679
Solomon Islands	Dollar	SBD	4.6873	4.7627	4.7559	4.7626	4.9109	5.0311	5.1020	5.2662	5.2674	5.3014	5.3458	5.2545
South Africa	Rand	ZAR	4.2796	4.1018	3.9867	3.9610	4.3511	4.2974	4.1571	4.1286	4.0600	4.2280	4.1803	4.4510
Sri Lanka	Rupee	LKR	60.8222	62.2056	63.7422	65.1895	66.6820	69.1126	70.7535	74.7293	74.9764	70.1488	71.3952	70.1282
Sweden	Krona	SEK	4.7427	4.6896	4.7484	4.8522	4.9128	4.9189	4.8445	4.7924	4.7456	4.9543	4.9392	4.9986
Switzerland	Franc	CHF	0.8030	0.7895	0.7995	0.8120	0.8312	0.8439	0.8203	0.8162	0.8126	0.8436	0.8381	0.8492
Taiwan	Dollar	TAI	20.6500	21.0450	21.2600	21.5800	22.0250	22.8000	22.8400	23.0300	22.9600	22.6250	22.4900	22.5400
Thailand	Baht	THB	24.6163	25.3855	25.4779	25.9705	26.8076	27.5882	27.7900	27.9785	27.7368	27.1006	27.4326	27.5733
Tonga	Pa'anga	TOP	1.2366	1.2392	1.2433	1.2611	1.2859	1.3278	1.3339	1.3695	1.3764	1.3602	1.3536	1.3413
United Kingdom	Pound	GBP	0.3510	0.3447	0.3497	0.3489	0.3626	0.3725	0.3738	0.3780	0.3728	0.3771	0.3755	0.3774
United States	Dollar	USD	0.6231	0.6322	0.6322	0.6339	0.6505	0.6705	0.6839	0.7227	0.7185	0.7120	0.7220	0.7097
Vanuatu	Vatu	VUV	70.1295	71.3994	71.9849	72.2587	74.7442	75.4080	74.7491	75.1010	75.7951	75.3057	75.7657	76.3202
Western Samoa	Tala	WST	1.7751	1.7886	1.7880	1.8142	1.8396	1.8635	1.8554	1.9075	1.9197	1.8772	1.9116	1.8705

QUESTIONS WE'VE BEEN ASKED

This section of the *TIB* sets out answers to some enquiries we've received. We publish these as they may be of general interest to readers. A general similarity to items published here will not necessarily lead to the same tax result. Each case should be considered on its own facts.

DEDUCTIONS FROM GST OUTPUT TAX FOR SUBSEQUENT CHANGES TO TAXABLE USE

We have been asked to clarify the tests that must be met before a registered person can make deductions from GST output tax for change from non-taxable to taxable use under section 20(3)(e) of the Goods and Services Tax Act 1985 ("the GST Act"). This includes discussion of the requirements under section 21E, amount of deductions under section 21F and timing of deductions under sections 21G and 21H.

(Note: All legislative references in this item are to the GST Act.)

Introduction

In 2000, sections 21E to 21H were inserted into the GST Act. Section 20(3)(e) allows registered persons to make deductions from GST output tax, provided that the tests in section 21E are met and the amount of deductions can be determined under section 21F. Sections 21G and 21H set out when the deductions can be claimed. The policy statements on these legislative provisions were originally set out in *Tax Information Bulletin* Vol 12, No 12 (December 2000).

This item clarifies some issues surrounding the application of sections 21E through to 21H. In particular, for section 21F to apply, sections 21E(2) and 21E(3) are no longer considered to be cumulative requirements.

The following application of the legislation represents the current practice of the Commissioner.

Application of the legislation

The purpose of section 21E is to specify the deductions from GST output tax allowed under section 20(3)(e) for changes from non-taxable to taxable use for:

(a) goods and services acquired or imported by the registered person on which GST has been charged; and

(b) some acquisitions of secondhand goods.

Where the tests in section 21E are met, section 21F applies to determine the amount of deduction from GST output tax allowed under section 20(3)(e).

The requirements for claiming deductions from GST output tax under sections 21E and 21F will apply in relation to changes to taxable use from 1 October 1986, unless a claim for deduction under section 20(3) has been made (whether in a GST return or under the disputes procedures under Part IVA of the Tax Administration Act 1994) and the Commissioner:

(a) has not been notified of the claim, other than by way of inclusion in the registered person's return, and on this basis has not queried the claim in writing before 16 May 2000; or

(b) has not queried the claim in writing before 16 May 2000 but has agreed in writing to the claim before 16 May 2000; or

(c) has queried or considered the claim in writing before 16 May 2000 but has agreed in writing to the claim before 16 May 2000.

Change of use in respect of services and non-secondhand goods

A registered person who has acquired services and non-secondhand goods can make deductions from GST output tax under section 20(3)(e) of the amount allowed under section 21F, if the following requirements in sections 21E(1)(a), 21E(1)(b) and 21E(2) are met:

(a) The goods and services were acquired on or after 1 October 1986 for a principal purpose other than that of making taxable supplies. (See section 21E(1)(a))

Pursuant to section 21E(4), some goods and services are treated as if they were acquired for the principal purpose other than that of making taxable supplies. Generally, section 21E(4) applies if:

(i) section 21 or 21I have treated goods and services (including fringe benefits and entertainment under section 21I) as being supplied by the registered person; or

(ii) goods and services are deemed to have been supplied by a person who ceased to be registered for GST under section 5(3) and the goods or services are subsequently applied by that person for a purpose of making taxable supplies; or

(iii) goods and services are deemed to have been supplied by a person who ceased to be registered for GST under section 5(3) and the goods or services are subsequently applied by a partnership of which the person is a partner for a purpose of making taxable supplies.

(b) The goods and services are then applied for a purpose of making taxable supplies by the registered person, being either the taxpayer or a partnership of which the taxpayer is a member. (See section 21E(1)(b))

This means that section 21F may apply if a partner, on behalf of a partnership, acquires or imports the goods and services for non-taxable purposes and then applies them in the partnership for a purpose of making taxable supplies.

(c) The goods or services when acquired by the person must have been subject to GST under section 8(1). (See section 21E(2)(a))

Alternatively, in the case of imported goods, GST must have been levied under section 12(1) on the importation of the goods by the person. (See section 21E(2)(b))

Change of use in respect of secondhand goods

Where a registered person acquires secondhand goods and changes the use of the goods from non-taxable to taxable, the registered person can claim deductions from GST output tax under section 20(3)(e) in relation to the secondhand goods of the amount allowed under section 21F, if all of sections 21E(1)(a), 21E(1)(b) and 21E(3) are met.

Sections 21E(1)(a) and 21E(1)(b) are discussed above. There are four requirements under section 21E(3):

(a) The secondhand goods were supplied to the registered person by way of sale;

(b) The secondhand goods that were sold to the registered person have always been situated in New Zealand, or in the case of imported goods, have been subject to GST under section 12(1) when imported.

(c) The supply to the registered person was not a taxable supply (that is, GST was not charged on that supply).

(d) The goods have not been supplied to another GST registered person who is the importer of the goods.

Amount of deduction under section 21F

If the requirements under section 21E are met, the person or partnership to whom the goods and services are supplied will be allowed to make a deduction from GST output tax under section 20(3)(e) of the amount allowed under section 21F. The amount of the deduction equals the product of the tax fraction of the lesser of:

(a) The cost of the goods and services, including any tax charged or input tax deduction claimed for the goods and services; and

(b) The open market value of the supply of the goods and services,

multiplied by the percentage extent to which the goods or services are applied for the purpose of making taxable supplies.

Timing of deduction from output tax as calculated under section 21F

Section 21G sets out when a registered person can make a deduction from output tax, as calculated under section 21F. In general, a registered person may make the deduction in each taxable period or in each year in which goods and services are applied for a purpose of making taxable supplies (at the registered person's election).

However, this general timing rule is subject to some exceptions:

(a) Where the goods are capital assets with a cost of less than $18,000, the registered person may make a single deduction from output tax in the taxable period in which the goods are applied for a purpose of making taxable supplies.

(b) Under section 21H, where the goods and services cost $18,000 or more the registered person may apply to the Commissioner to make a single deduction from output tax in the taxable period in which the goods and services are wholly applied for a purpose of making taxable supplies. Acceptance of the registered person's application is at the Commissioner's discretion, although in making his determination the Commissioner must have regard to the factors set out in section 21H(3).

TOWER LIMITED SPIN-OFF – TAX IMPLICATIONS FOR NEW ZEALAND SHAREHOLDERS

TOWER Limited ("TOWER") has recently, in February 2005, sold its Australian Wealth Management businesses to a new company called Australian Wealth Management Limited ("AWM") and offered TOWER shareholders a direct interest in AWM under a scheme of arrangement ("the Spin-off"). The arrangement is described in full in TOWER's Scheme Book, "Proposal to Separate Australian Wealth Management Limited from TOWER Limited and Offers of Shares and Entitlements in Australian Wealth Management Limited", dated on 1 December 2004 and forwarded to all shareholders for consideration ("Scheme Book").

The Spin-off involved the cancellation of a number of shares held by existing shareholders in TOWER in consideration for the distribution by TOWER of the shares it holds in AWM. Following the Spin-off, shareholders hold interests in both TOWER and AWM.

This statement is intended to clarify the New Zealand dividend consequences for shareholders of TOWER in relation to the Spin-off and the status of AWM shares issued to the shareholders under the Spin-off as a result of the cancellation of TOWER shares. This statement is not intended to have any application to the subsequent rights issue made by AWM or the shares that may be acquired as a result of the rights issue. Inland Revenue officers, taxpayers, and practitioners may not rely on this statement to determine the tax treatment of other transactions involving share restructuring or demergers.

On the basis of the information provided by TOWER, including the Scheme Book, and on certain specific conditions advised to TOWER, the Commissioner has concluded the following about the Spin-off. Unless otherwise stated, all statutory references are to the Income Tax Act 1994 [references in boxed parenthesis are to the Income Tax Act 2004 where this applies to a particular taxpayer].

Question 1

Did any part of the distribution of the AWM shares to TOWER shareholders by TOWER as a result of the cancellation of TOWER shares upon the Spin-off constitute a dividend for New Zealand tax purposes?

The receipt of the AWM shares which arose out of the cancellation of TOWER shares will be excluded from being dividends under section CF 2 [CD 3] for New Zealand tax purposes, by virtue of section CF 3(1)(b) [CD 14].

Question 2

Were the AWM shares distributed to shareholders of TOWER, as a result of the cancellation of the TOWER shares, acquired on capital account by those shareholders who held their cancelled TOWER shares on capital account at that time?

The Commissioner is satisfied that the AWM shares distributed to TOWER shareholders were acquired on capital account by the shareholders who held their cancelled TOWER shares on capital account at the time of the Spin-off. Conversely, if the TOWER shares were held as revenue account property, eg as trading stock, the new AWM shares should be regarded as having the same status.

This statement does not consider the application of sections CD 3 [CB 1], CD 4 [CB 3, CB 4], and CD 5 [CA 1]

This statement is to be distinguished from the item on "Company Restructuring: Demergers and Spin-outs" in the *Tax Information Bulletin* Vol 15, No 6 (June 2003), which dealt with certain Australian company demergers, where the tax outcome was different.

LEGAL DECISIONS – CASE NOTES

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

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

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

GST DEREGISTRATION

Case: TRA 011/03

Decision date: 24 March 2005

Act: Goods and Services Tax Act 1985, Tax Administration Act 1994

Keywords: GST deregistration

Summary

The taxpayer was registered for GST and carried on a taxable activity of leasing a block of farmland. On 8 December 1999 he made application for cancellation of his GST registration on the grounds his turnover would be less than $30,000 in the next 12 months. The Commissioner of Inland Revenue (CIR) did not know the taxpayer had entered an agreement to sell part of the land the same day and the application was granted.

After an investigation, the CIR reinstated the registration. He advised the Taxpayer by letter on 10 August 2000 he had done this under section 51(4) of the GST Act 1985, on the grounds that the Taxpayer remained liable to be registered as he had continued to receive rents in excess of the threshold.

The Taxpayer responded with a NOPA on 9 October 2000. The coversheet to the NOPA directed that the response notice be sent to the agent. The CIR mistakenly sent the response notice by post to the accounting firm which had issued it, which had been retained by the Taxpayer's linked accountant to provide advice on the dispute. The Taxpayer claimed the CIR had failed to effect service of his response notice and the NOPA was deemed to be accepted.

The partner of the accounting firm was summonsed as a witness for the CIR. He confirmed in evidence he had received the response notice on 30 November 2000 and had noted his file accordingly. He gave evidence of a meeting with the Taxpayer and his solicitor that day where he had handed over the response notice. The Taxpayer claimed the CIR could not prove this without relying on evidence arising at a meeting protected by legal professional privilege. He also denied this evidence of service was admissible as the CIR had not included it in his statement of position.

The CIR had served an amended statement of position, but a dispute arose as to the scope of a prior agreement relating to the exchange of amended statements of position, and whether or not that agreement extended to the evidence of service of the response notice.

Decision – procedural issues

The Taxation Review Authority ("the Authority") made a finding at paragraphs 230-231 as to the "content and effect of the disputable decision" before him. He found it was the decision to reregister the Taxpayer pursuant to section 51(4) (specifically sections (6) although not referred to) on the grounds the CIR was satisfied that the taxpayer continued to receive rent and GST in the 12 months after deregistration to a value exceeding $30,000. However, in considering whether the Taxpayer was entitled to deregister he proceeded on the basis that section 51, section 52 and section 76 were all at issue (paragraph 161).

The Authority rejected the CIR's submission that the proceedings were out of time (paragraph 155). He also found that if he was wrong in his finding that the challenge was in time, that the CIR had conducted the dispute in a "confusing and contradictory" way, and this was beyond the control of the Taxpayer, so there were exceptional circumstances for not commencing the challenge in time, and he granted leave to commence the challenge on the date it was actually filed (paragraph 159).

The Authority found the CIR's response notice was valid even though it was sent to the wrong address. The Authority did not accept the CIR's submission the consultant accountant was an agent of the Taxpayer because that accountant made it clear to the CIR he did not have authority to accept a notice of response and the cover sheet on the NOPA indicated the response should go to the "agent" and the linked agent was then named (paragraph 41).

He also declined to uphold the Taxpayer's submission that the consultant's evidence that he received the response notice by post on 30 November 2000 and then gave it to the Taxpayer or his solicitor at a meeting with them the same day was inadmissible on the grounds of legal professional privilege. He found at that the evidence failed the first fundamental test in that it did not arise out of the relationship of confidentiality between lawyer and client (paragraph 78).

The Authority held (paragraph 67) the modes of service in section 14 of the Tax Administration Act 1994 are not exclusive. He found that provided the CIR was able to prove the document came to the notice of the Taxpayer in a timely fashion it had been served. On the facts, the inspector posted the letter and response notice on 29 November 2000 (paragraph 96) and it came to the attention of the Taxpayer on 30 November 2000 (paragraph 94).

The Authority found (paragraph 107) the agreement between the parties as to amended statements of position did not extend to the introduction of evidence concerning how the notice of response passed from the consultant to the Taxpayer. However he noted (paragraph 112-113) the CIR did not have to rely on the amended statement of position in this case, as the fact the document came to the attention of the Taxpayer was irrefutable – his advisors responded to it.

Decision – substantive issues

The fundamental point at issue with regard to re-registration was whether the sales were to be taken into account in calculating the threshold for deregistration. The Authority held at paragraph 256 that because of the proviso in section 51(1)(c) of the GST Act, it is not correct to include the sale proceeds of the land in determining whether or not the threshold has been breached.

The issue was dealt with by the *High Court in CIR v Lopas* where it was held a sale in contemplation before an application for deregistration was part of the taxable activity.

The Authority has distinguished the case on the basis the sales were entered into after deregistration, and there was no "arrangement" with any party before deregistration. He took no account of preparatory steps taken by the Taxpayer prior to making the application for deregistration, including entering an agreement to sell part of the land on the same day as he applied for deregistration.

COMMISSIONER'S DECISION NOT TO ALLOW FINANCIAL RELIEF UPHELD

Case:	Mason Clarke v CIR, Christopher John Money v CIR
Decision date:	4 April 2005
Act:	Tax Administration Act 1994
Keywords:	Judicial review, serious hardship, financial relief, maximise revenue

Summary

Two taxpayers sought judicial review of the Commissioner's decision not to allow financial relief. They had accumulated very large debts to the Commissioner made up of outstanding tax, penalties and interest. The Court reviewed the correspondence, offers and counter-offers and held that the Commissioner had exercised his statutory discretions correctly and had not breached any statutory duty.

Facts

Messrs Clarke and Money each applied to the Commissioner under ss 176 and 177 of the Tax Administration Act 1994 ("the TAA") for relief from huge tax debts which they said they could not pay. Both had invested in the Digi-Tech and Salisbury Investment schemes and after reassessment and the imposition of penalties (which were neither disputed nor challenged), by 2004 they owed taxes of $581,000 and $865,000 respectively.

There was a prolonged course of correspondence, information requests, offer and counter offer but Mr Clarke's final position was that he offered a single lump-sum payment of $10,000 in full and final settlement of his tax debts. Mr Money's final offer was $25,000 in full and final settlement. The Commissioner declined these offers and invited the taxpayers to come up with a proposal to address the full quantum of tax, penalties and interest due.

The plaintiffs commenced judicial review proceedings alleging that the Commissioner had breached his duty to accept only what the debtor taxpayers can pay. The Commissioner defended the action saying that his overarching duty is to maximise the revenue.

Decision

Priestly J summarised the correspondence and negotiations between the parties and cited large extracts from the IRD area managers' letters which declined the final offer from each plaintiff. He noted that formal relief had been sought under section 177 TAA but that section 176 obliged the Commissioner to "maximise" the

recovery of tax unless "serious hardship" would result. His Honour also noted the prohibition in section 177C(3) against writing off any outstanding tax where a shortfall penalty for an abusive tax position or evasion had been applied.

His Honour summarised the factors which the Commissioner must consider:

> "The various statutory duties and discretions imposed and conferred on the defendant by the above provisions are, in my judgment consistent with and probably derived from the obligation contained in section 6 of the Act to protect the integrity of the tax system. Highly relevant too is the Commissioner's duty contained in section 6A(3) which provides:
>
> (3) In collecting the taxes committed to the Commissioner's charge, and notwithstanding anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—
>
> (a) The resources available to the Commissioner; and
>
> (b) The importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and
>
> (c) The compliance costs incurred by taxpayers."

In that light, his Honour noted the limits the Courts had placed on judicial review in tax matters:

> "From both jurisdictional and constitutional standpoints the plaintiffs' claim is a startling one. There is no evidence of the defendant having acted in an irrational or unreasonable manner. The powerful remedy of judicial review cannot be used, in a taxation context, as a quasi-appeal. It is trite to observe that the remedy is a check on unlawfulness and jurisdictional error."

Priestly J supported that proposition with extensive quotes from *Duncan v Commissioner of Inland Revenue* (2004) 21 NZTC 18,735 and *Raynel v Commissioner of Inland Revenue* (2004) 21 NZTC 18, 583.

> "As did Baragwanath J in *Duncan v Commissioner of Inland Revenue* (op cit) the last paragraph in Randerson J's judgment stresses the proper function of judicial review. I emphasise again that there is no evidence suggesting the defendant has failed to consider his relevant statutory obligations. Nor is there evidence that, by declining to accept the sums offered by the plaintiffs and writing off the balance of their respective debts, he was acting irrationally or unreasonably."

Counsel for the plaintiffs submitted that the Commissioner's investigations had not been extensive and had on occasions been premised on erroneous assumptions. He submitted in essence that the onus was on the Commissioner to prove that the plaintiffs could in fact pay more. The Commissioner submitted on the other hand, and his Honour agreed, that the Commissioner merely had to be satisfied that "serious hardship" did not apply and hardship occasioned by an obligation to pay tax didn't count.

His Honour clearly stated that the Commissioner's discretion under section 177(3) (to give financial relief or not) "must be exercised by him and him alone. It is impermissible for the Court to usurp the defendant's functions in that area."

> "Finally, there are the cogent policy considerations contained in *Raynel v Commissioner of Inland Revenue* (op cit). The stance of the defendant, both before and after the issue of these proceedings, as is evidenced in the two letters to the plaintiffs' counsel, does not display irrationality. In the circumstances of these two taxpayers I detect nothing unreasonable. In the exercise of his discretion under section 177 the defendant is fully entitled to consider a whole range of factors including the circumstances which led to the plaintiffs' taxation debts; the nature and extent of the plaintiffs' co-operation and negotiating stance; the speed with which they have provided requested information and the extent of that information; his obligations under section 6 and section 6A(3); and matters of consistency in administration."

Most importantly, his Honour stated that there was no breach of any statutory duty where the Commissioner seeks to recover sums which may not in fact be recoverable. Neither is forcing a taxpayer into bankruptcy inconsistent with the obligation to maximise the recovery of tax.

> "Nor in my judgment is there any breach of the broader and paramount obligation of the Commissioner to uphold the integrity of the tax system required by section 6, nor of his duty under section 6A(3). Particularly in a case such as this, unpalatable outcomes for some taxpayers may be important in promoting voluntary compliance, which is a section 6A(3)(b) consideration."
>
> …

STANDARD PRACTICE STATEMENTS

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

DISPUTES RESOLUTION PROCESS COMMENCED BY THE COMMISSIONER OF INLAND REVENUE – SPS 05/03

Introduction

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

2. Where the taxpayer commences the disputes resolution process, the Commissioner's practice is stated in SPS 05/04 – *Disputes resolution process commenced by a taxpayer*.

3. This Standard Practice Statement consolidates all previous Standard Practice Statements and practices and has been updated for recent changes to the law in the Taxation (Venture Capital and Miscellaneous Provisions) Act 2004. The Commissioner regards this Standard Practice Statement as a reference guide for taxpayers and officers of Inland Revenue. The practices outlined will be followed by officers of Inland Revenue.

Application

4. This Standard Practice Statement applies to disputes commenced on or after 1 April 2005 and replaces the following Standard Practice Statements (these, as revised from time to time, will continue to apply to disputes commenced prior to 1 April 2005):

   - INV-150 *Content standards for Notice of Proposed Adjustment and Notice of Response* published in *Tax Information Bulletin* Vol 11, No 6 (July 1999); and
   - INV-170 *Timeliness in resolving tax disputes* published in *Tax Information Bulletin* Vol 14, No 2 (February 2002).

5. Unless specified otherwise, all legislative references in this Standard Practice Statement are to the Tax Administration Act 1994.

Background

6. The aim of the disputes resolution process is to resolve disputes over tax liability in a fair, effective and timely manner. The disputes resolution process is designed to encourage an "all cards on the table" approach and the resolution of issues without the need for litigation. It ensures that all the relevant evidence, facts, and legal arguments are canvassed before a case goes to court.

7. The disputes resolution process was introduced in 1996. A review of the procedures was carried out in July 2003. Amendments have recently been made to the process to improve the framework within which tax disputes are resolved.

8. In accordance with the objectives of the disputes resolution process, the Commissioner (unless a legislated exception applies) must go through the disputes resolution process before the Commissioner can issue an assessment.

9. The early resolution of a dispute is intended to be achieved through a series of steps prescribed in legislation, the main elements of which are:

   - A notice of proposed adjustment: this is a notice by either the Commissioner or a taxpayer to the other that an adjustment is sought in relation to the taxpayer's self-assessment, the Commissioner's assessment or a disputable decision.
   - A notice of response: this is issued by the party receiving the notice of proposed adjustment with which they disagree.
   - A disclosure notice and statement of position: a disclosure notice triggers the issue of a statement of position. A statement of position contains an outline of facts and propositions of law with sufficient details to support the position taken. A statement is issued by each party. It is an important document because it limits facts and propositions of law which can be relied on (by either party) if the case goes to court.

10. There are also two administrative phases in the process—the conference and adjudication phases. The conference can be formal or informal discussion between Inland Revenue and the taxpayer, to clarify and, if possible, resolve the issues. Adjudication involves the independent consideration of the dispute by Inland Revenue and is the final phase in the process before the taxpayer's assessment is amended (if it is to be amended), and follows the exchange of statements of position. If the dispute has not been already resolved, the Commissioner's practice will be to hold conferences, and refer the dispute to the Adjudication Unit, except in rare circumstances.

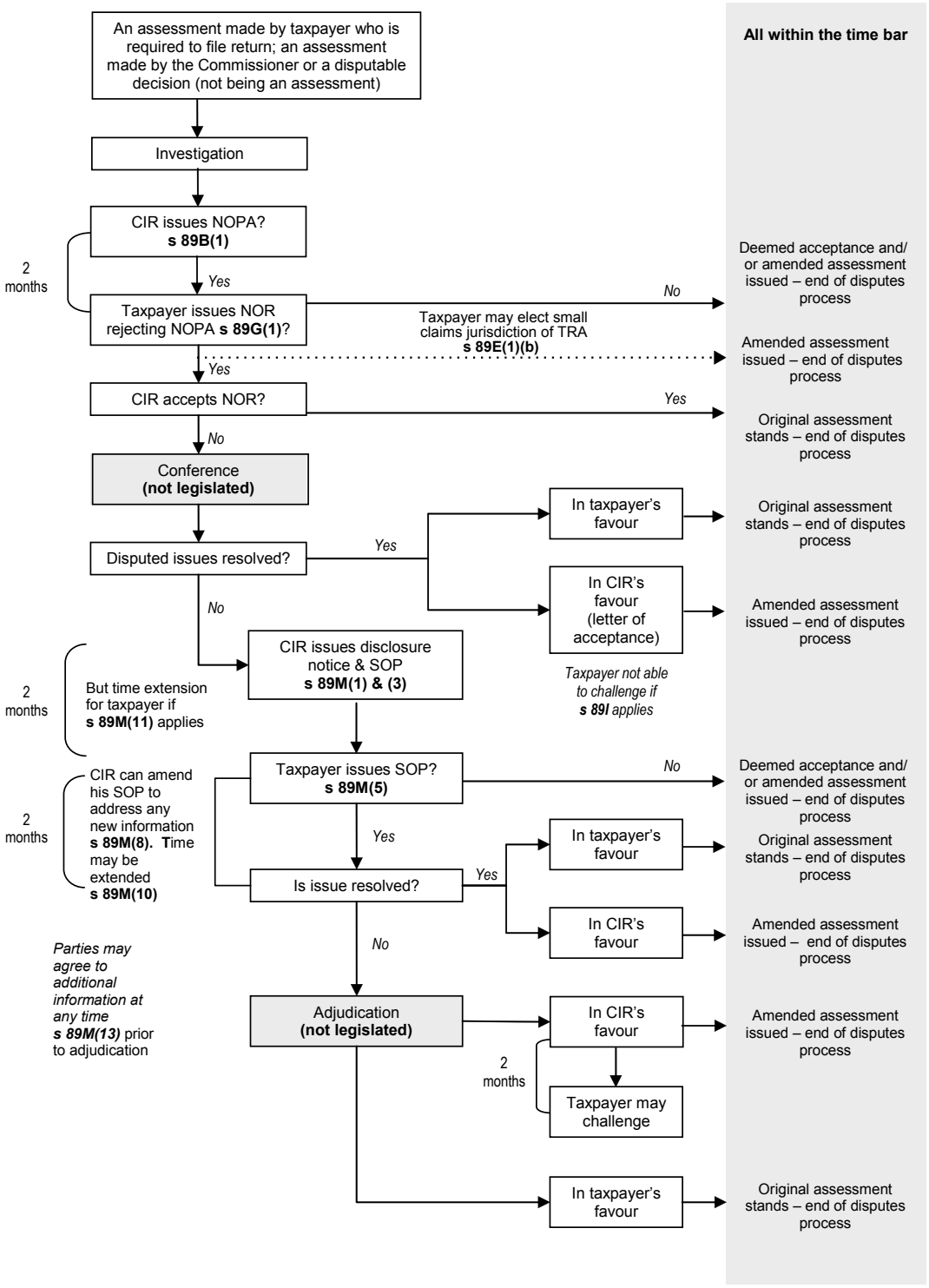
Standard Practice and Analysis

Contents

Disputes resolution process commenced by the Commissioner of Inland Revenue

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

Disputes resolution process commenced by the Commissioner of Inland Revneue



The Commissioner must issue a notice of proposed adjustment before making an assessment of tax

11. Before making an assessment of tax, including shortfall penalties (but excluding interest and civil penalties that are not shortfall penalties) the Commissioner must issue a notice of proposed adjustment ("NOPA"), unless an exception to the requirement for issuing a NOPA under section 89C applies.

12. Nevertheless, even if the Commissioner, in a very unlikely event, made an assessment in breach of section 89C, the assessment would be regarded as valid under section 114.

13. Each exception may apply independently or together depending on the circumstances. The Commissioner may choose to issue a NOPA whether an exception applies or not.

Exceptions

Exception 1: The assessment corresponds with a tax return

14. Section 89C(a) states:

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

15. If there is no difference between the assessment and the return, then there is no dispute and therefore no need for the dispute resolution process. In this circumstance an assessment may be issued by the Commissioner without first issuing a NOPA.

16. Sometimes, there is a deficiency in the taxpayer's return, and the Commissioner needs to generate an assessment. For example, the Commissioner may issue an assessment, where the taxpayer has provided all the income details but omitted to calculate the income tax liability in the return.

Exception 2: Simple or obvious mistake or oversight

17. Section 89C(b) states:

> 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

18. This exception is designed to cover simple calculation errors or oversights generally picked up by Inland Revenue's processing centres with computer edits and simple return checks. This maintains the status quo for the many assessments arising in this situation.

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

- arithmetical errors
- transposition of numbers from one box to another in a tax return
- double counting, such as inadvertently including in the taxpayer's income the same item twice
- when a rebate has not been claimed which the taxpayer is entitled to or was incorrectly calculated, e.g. low income rebate for taxpayers who earn less than $38,000 in an income year.

20. There is no dollar limit to what is "a simple or obvious mistake or oversight" and this may be ascertained on a case by case basis. 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, provided that there is a tax shortfall and the taxpayer has committed one of the culpable acts, e.g. lack of reasonable care.

21. However, "a simple or obvious mistake or oversight" will not include the situation where a taxpayer takes a tax position as a result of:

- A new, beneficial interpretation or favourable new case law; or
- A change of mind (e.g. a taxpayer changes their mind to claim tax depreciation on an asset, while their previous tax position was to elect that asset to not be depreciable property.)

Exception 3: Agreement to amend a previous tax position

22. Section 89C(c) states:

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

23. This situation may arise where either the taxpayer or the Commissioner raises the issue. As no dispute arises, there is no need to issue a NOPA.

24. Where the proposed adjustment is raised by an Inland Revenue officer, this exception will not be used unless the taxpayer accepts the adjustment. For the purpose of section 89C(c), the agreement between the Commissioner and the taxpayer can be oral or in writing, though the Commissioner's practice will generally be to seek an agreement in writing. The section applies if Inland Revenue officers can demonstrate that an agreement on the proposed adjustment has been reached between the Commissioner and the taxpayer.

25. However, it is important to note that if the Commissioner and the taxpayer agree on an adjustment and some other adjustments are still subject to a dispute, the Commissioner must not issue an assessment on the basis of the agreed adjustment.

26. Where a taxpayer proposes an adjustment outside the disputes resolution process and the Commissioner agrees, the particulars will be recorded in writing and must state that the assessment is made in terms of the Commissioner's practice on exercising the discretion under section 113. (The Commissioner's practice in relation to section 113 is stated in a separate Standard Practice Statement.) Shortfall penalties, if applicable, must also be considered.

Exception 4: The assessment otherwise reflects an agreement

27. Section 89C(d) states:

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

28. The same procedures apply here as for section 89C(c). The agreement reached between the Commissioner and the taxpayer can relate to matters other than a tax position previously taken by the taxpayer. For example, the taxpayer has disputed but now agrees that they are a "taxpayer" for the purpose of the definition in section OB 1 of the Income Tax Act 2004. Due to this agreement, the Commissioner issues an assessment to the taxpayer.

Exception 5: Material facts and law identical to court proceeding

29. Section 89C(db) states:

> 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 income year that is at the time the subject of court proceedings

30. This exception applies where a dispute relates to a later income year in which the material facts and issues are the same as an earlier dispute that has been through the disputes resolution process and is the subject of court proceedings. Pursuant to section 89C(db), the Commissioner may issue an assessment to the taxpayer in relation to the later income year, without first issuing a NOPA. As the issues in dispute will be resolved by the Court it is unnecessary to go through the disputes resolution process in respect of the same issue in the later income year.

31. However, the taxpayer, who has been issued an assessment in relation to the later income year under section 89C(db), is not precluded from disputing that assessment.

32. This provision is intended to reduce compliance costs. Despite section 89C(db), the Commissioner may choose to issue a NOPA in relation to the later income year and endeavour to resolve the dispute via the disputes resolution process.

Exception 6: Revenue protection

33. Section 89C(e) states:

> 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

34. This exception is designed to ensure protection of the revenue in the relevant circumstances. Exercise of this exception could be supported by evidence of the "reasonable grounds" relied on (e.g. the taxpayer's correspondence with third parties, the taxpayer's application for emigration to another country, interviews with the taxpayer, etc.)

Exception 7: Taxpayer may be involved in fraudulent activity and may have left New Zealand

35. Section 89C(eb) states:

> The Commissioner has reasonable grounds to believe that the taxpayer has left New Zealand and may have been involved in fraudulent activity

36. This exception is an extension of the exception under section 89C(e) allowing the Commissioner to issue an assessment if he has reasonable grounds to believe that the taxpayer has left New Zealand and may have been involved in fraudulent activity.

37. Exercise of this exception would be supported by evidence of the "reasonable grounds" relied on.

Exception 8: Vexatious or frivolous

38. Section 89C(f) states:

> 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

39. Exercise of this exception would be supported by documentation of:

- the action, or lack of action, giving rise to *the tax position previously taken* (action or inaction subsequent to taking the tax position do not qualify), and
- why that action is considered vexatious or frivolous, and shortfall penalty/prosecution consideration. Examples of a tax position as a result of a vexatious or frivolous act are:

- Lacking in substance – the taxpayer continues to take the same position which had previously been finalised; or
- Motivated by the sole purpose of delay.

40. Where this exception applies, shortfall penalties will need to be considered in respect of the taxpayer's tax position resulting from a vexatious or frivolous act.

Exception 9: TRA or court determination

41. Section 89C(g) states:

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

42. The direction or determination for the purpose of section 89C(g) includes court decisions for the particular taxpayer in relation to a specific tax period, and court decisions on "test cases" that apply to the taxpayer. This exception does not apply, where a taxpayer has taken a similar tax position as that taken by another taxpayer, in respect of whom a judgment has been issued and the case involved is not a "test case" that applies to the first-mentioned taxpayer.

43. A copy of the direction or determination must be retained by the Commissioner to support application of this exception. Assessments to be made, including imposition of shortfall penalties, in these circumstances will generally be completed within two weeks of receipt by Inland Revenue of the written direction or determination.

Exception 10: "Default assessments"

44. Section 89C(h) states:

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

45. An assessment may be made and/or amended without issuing a NOPA where a taxpayer fails to furnish a tax return (commonly known as a "default assessment").

46. Where a taxpayer wants to dispute a default assessment through the disputes resolution process, the taxpayer must, within the applicable response period (i.e. 4 months from the date of issue of the default assessment):

- File a tax return in the prescribed form for the period to which the default assessment relates (refer to section 89D(2) and in the case of GST, refer to section 89D(2C)); and
- Issue a NOPA to the Commissioner in respect of the default assessment.

47. The taxpayer's right to dispute a default assessment is dependent upon the taxpayer first satisfying their statutory obligation to file a tax return. In the case of a default assessment, the requirement to furnish a tax return is an additional requirement of the disputes resolution process. This ensures that all taxpayers have provided the information required by tax law before they are entitled to dispute an assessment. (Note that a taxpayer cannot dispute a "default assessment" unless the two requirements as set out in **paragraph 46** of this Standard Practice Statement are met.)

48. On receipt of the taxpayer's tax return for the default assessment period, the Commissioner may decide not to amend the default assessment on the basis of that tax return, if the Commissioner considers that the taxpayer's tax position is, for example, incorrect or a result of a vexatious or frivolous act.

49. Where an amended assessment has been issued on the basis of the taxpayer's tax return, the Commissioner is not prohibited from conducting further investigation on that assessment, and if necessary, issuing a NOPA to the taxpayer.

Exception 11: Failure to make or account for a deduction

50. Section 89C(i) states:

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

51. This exception is designed to address the situation of PAYE, non-resident contractors withholding tax, resident withholding tax ("RWT") and other tax deductions not deducted, and/or not accounted for to the Commissioner.

52. This exception will not be applied where there is an issue of interpretation (e.g. whether a particular item attracts liability for RWT) and/or shortfall penalties.

Exception 12: Non assessed returns

53. Section 89C(j) states:

> 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

54. Where the taxpayer commences the disputes resolution process and the Commissioner agrees with the taxpayer's proposed adjustments, the Commissioner may issue an assessment without first issuing a NOPA. This exception will not extend to adjustments not proposed by the taxpayer in their NOPA.

Exception 13: Consequential adjustments

55. Section 89C(k) states:

> 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

56. Where a transaction affects more than one taxpayer, whether in the same way or in connected but opposite ways, the Commissioner may reassess all affected parties once an assessment has been issued, or may be issued, to one of the parties. There must be a direct consequential link between the parties before a consequential adjustment can be made. For example:

- Group loss offsets – if a loss company has claimed losses to which it is not entitled and the Commissioner has amended the assessment of the loss to disallow those losses, the Commissioner may issue a separate assessment to the profit company, which has incorrectly offset the losses of the loss company against its profits.
- GST – The supplier and the recipient of a supply have incorrectly assumed a transaction was exempt from GST. The Commissioner subsequently agrees that the recipient of the supply was entitled to GST input tax credits. Then, the Commissioner may issue an assessment to the supplier requiring the supplier to account for output tax on the value of the supply.

57. However in practice the Commissioner may issue a NOPA to all the taxpayers affected in such a case.

Taxpayer may dispute an assessment when the assessment is issued without a NOPA

58. The Commissioner can issue an assessment without first issuing a NOPA under section 89C. (Note that even if the Commissioner, in a very unlikely event, made an assessment in breach of section 89C, the assessment would be regarded as valid under section 114.) Where an assessment is issued by the Commissioner without first issuing a NOPA, the taxpayer may dispute the assessment through the disputes resolution process (Refer to SPS 05/04 – *Disputes resolution process commenced by a taxpayer)*.

59. However, where a NOPA has been issued by the Commissioner to a taxpayer and there is a written agreement from the taxpayer accepting the proposed adjustment or if there is deemed acceptance, then the assessment is not subject to challenge (refer to section 89I).

60. It is important to note that section 89I does not apply when the Commissioner and a taxpayer have reached an agreement on an adjustment prior to entering into the disputes resolution process. The taxpayer may dispute the amended assessment, despite the previous agreement.

Issuing a NOPA by the Commissioner

61. Section 89B specifies when the Commissioner may issue a NOPA.

62. Section 89B states:

> (1) The Commissioner may issue one or more notices of proposed adjustment in respect of a tax return or an assessment.
>
> (2) The Commissioner may issue one notice of proposed adjustment in relation to more than one return period, if, in the Commissioner's opinion, -
>
> (a) The adjustments proposed to each tax return or assessment for the return periods relate exclusively to the same issues or arrangements; or
>
> (b) The adjustments proposed to each tax return or assessment for the return periods relate substantially to the same issues, and the issue of one notice is likely to expedite the issue of the assessments for all of the returns.
>
> (3) The Commissioner may issue a notice of proposed adjustment in relation to more than one return period, more than one issue, and more than one tax type.
>
> …

63. The Commissioner may issue one NOPA for multiple issues, multiple tax types and multiple periods. Alternatively, the Commissioner may issue more than one NOPA for the same issue and period, consistent with the duty to correctly make the assessment within the four-year statutory time period.

64. In an investigation situation, the intended approach will be discussed with the taxpayer. Where the Commissioner intends to issue a NOPA to a taxpayer, the actioning officer will usually advise the taxpayer of this intended approach within 7 days before the date of issuing the NOPA. However, the advice may be given to the taxpayer earlier. Most issues related to the same period and tax type should be kept together in the dispute. The Commissioner may also exercise his statutory powers (e.g. issue section 17 notices) after the commencement of the dispute and will continue to investigate the facts relating to the dispute.

65. It is the Commissioner's practice that if the Commissioner and the taxpayer agree upon some

proposed adjustments and dispute others for the same tax period and tax type, the Commissioner will not issue an assessment on the agreed adjustments until all the disputed issues are resolved (including where the Commissioner does not pursue the disputed issues further) or the Adjudication Unit has determined them. That is, the Commissioner will not issue "partial" or "interim" assessments. However, where the statutory time bar is about to fall due, the Commissioner may issue an assessment on both the agreed adjustments and the proposed adjustments in dispute, provided the requirements in section 89N are met.

66. Where it is practicable, Inland Revenue officers will contact the taxpayer or their tax agent within 10 working days of the issue of the NOPA to ensure that the NOPA has been received. Where the contact is in writing, Inland Revenue officers should comply with section 14. For example, the taxpayer is deemed to have received the written notice if that notice has been sent by post to their usual place of abode or business.

Exceptions to the statutory time bar

(a) Time bar waiver

67. Where it is contemplated that the disputes resolution process may not be completed before the expiry of the statutory time bar period, the Commissioner and the taxpayer may agree in writing to waive the statutory time bar by up to 12 months in order to allow the full disputes resolution process to be applied (section 108B(1)(a)).

68. The taxpayer may also give written notice to the Commissioner and waive the time bar for a further 6 months from the end of the 12-month period. The taxpayer may do so to allow sufficient time for the dispute to go through the adjudication process.

69. The taxpayer must be informed in writing that:

- a NOPA will be issued, and
- the disputes resolution process will be followed.

70. Note that to be effective a waiver of statutory time bar must be agreed in writing on the prescribed *Notice of waiver of time bar (IR775)* form.

71. The waiver of statutory time bar only applies to issues that have been identified and known to the taxpayer and the Commissioner before the original statutory time bar. Other issues that have not been identified will still be subject to the original statutory time bar, except where section 108(2) or 108A(3) applies. (Please refer to paragraph 76 of this Standard Practice Statement)

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

72. Where a NOPA has been issued and the disputes resolution process cannot be completed before the expiry of the statutory time bar period, the Commissioner may apply to the High Court for more time to complete the process (refer to section 89N(3) as discussed later in this Standard Practice Statement).

73. However, where a matter in dispute has been submitted to the Adjudication Unit and the Adjudication Unit does not have sufficient time (i.e. before the expiry of the statutory time bar or further time allowed by the waiver under section 108B(1)) to fully consider the matter, then the Adjudication Unit will return the matter to the actioning officer to make a decision as to whether an assessment should be issued or whether to accept the taxpayer's position. (In short the Commissioner may amend an assessment at any time after the Commissioner has considered the taxpayer's statement of position in relation to the particular period.)

(c) Exceptions under section 89N(1)

74. Where a NOPA has been issued, the Commissioner will follow the disputes resolution process (refer to paragraphs 101 and 102 of this Standard Practice Statement), unless one of the exceptions in section 89N applies (the application of section 89N is discussed in detail later). Administrative approval must be obtained and documented for any departure from the full disputes resolution process.

Limitations on the Commissioner issuing a NOPA

75. The Commissioner may not issue a NOPA where the proposed adjustment is the subject of a challenge or after the expiry of the statutory time bar. Section 89B(4) states:

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

76. The exceptions to the statutory time bar, as set out in sections 108 and 108A, include:

- The taxpayer provides a fraudulent or wilfully misleading return (section 108(2)); or
- The taxpayer has knowingly or fraudulently failed to make a full and true disclosure for determining their GST payable (section 108A(3)).

77. The Commissioner is generally limited to a four-year period within which to increase a taxpayer's assessment following an investigation or in certain other circumstances. In the case of a dispute, the assessment is amended following the process for resolving disputes. The various steps involved in the process would be undertaken within the four-year period.

78. It should be noted that paragraph (a) of section 89B(4) applies to individual proposed adjustments. Where the proposed adjustment is the subject of a court proceeding, the Commissioner cannot issue a NOPA on that proposed adjustment. However, separate NOPAs may be issued to the taxpayer in relation to the same tax period so long as they relate to different adjustments.

79. For example, a taxpayer challenges the deductibility of feasibility expenditure in the 2004 income year pursuant to section 138B. The Commissioner can issue a NOPA to the same taxpayer in relation to the tax treatment of bad debts in the same income year.

Contents of the Commissioner's NOPA

80. A NOPA is the document that commences the disputes resolution process. It is intended to explain in a legal/technical manner what the position of the issuer is in relation to the proposed adjustments. The contents of a NOPA issued by the Commissioner are prescribed in sections 89F(1) and (2).

81. Section 89F states:

> (1) A notice of proposed adjustment must—
>
> (a) contain sufficient detail of the matters described in subsections (2) and (3) to identify the issues arising between the Commissioner and the disputant; and
>
> (b) be in the prescribed form.
>
> (2) A notice of proposed adjustment issued by the Commissioner must—
>
> (a) identify the adjustment or adjustments proposed to be made to the assessment; and
>
> (b) provide a concise statement of the key facts and the law in sufficient detail to inform the disputant of the grounds for the Commissioner's proposed adjustment or adjustments; and
>
> (c) state how the law applies to the facts.
>
> …

82. A NOPA must be in the prescribed form. A NOPA issued by the Commissioner is required to identify in sufficient detail the adjustments proposed and state concisely the facts and law relevant to the adjustment and how the law applies to the facts.

83. The law requires a "concise" statement of the key facts and the law in sufficient detail. The terms "concisely" and "sufficient detail" mean that the document is relatively brief but at the same time is detailed enough to explain all the issues relevant to the dispute.

84. The Commissioner will identify (but not set out in full) relevant legislation and legal principles derived from leading cases. These references should be in sufficient detail to make clear the grounds for the proposed adjustment. Lengthy quotations from cases will be avoided.

85. The Commissioner believes that Inland Revenue has a statutory obligation to inform taxpayers adequately, and recognises that the matters relevant to the dispute will be set out in greater detail at the statement of position phase. In keeping with that obligation, Inland Revenue will always attempt to issue a NOPA which has sufficient details and is of a high standard. A frank and complete exchange of information by both parties is implicit in the spirit and intent of the disputes resolution process.

86. However, the Commissioner's practice will be to ensure that the NOPA is, within those limits, as brief as practicable.

87. The content of a NOPA issued by the Commissioner must satisfy all the requirements in section 89F(2)(a), (b) and (c).

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

88. This includes for each proposed adjustment:

- the income amount or impact of the adjustment, and
- the income year or tax period to which the proposed adjustment relates, and
- a comment as to whether use of money interest will apply, and
- details of any shortfall penalty and any other appropriate penalties of a lesser percentage as alternative arguments—where sufficient admissible evidence is held to support imposition and where such a penalty is justified (by reference to any relevant guidelines).

Shortfall penalties

89. Note that shortfall penalties are a separate item of adjustment and must be explained and supported in the same manner as the underlying tax shortfall.

90. Where there is sufficient evidence to show that shortfall penalties should be imposed, then the shortfall penalties would ordinarily be included in the same NOPA as the substantive issues. This

practice ordinarily applies, unless one of the following exceptions applies:

- Where evidence for the imposition of shortfall penalties does not become available until after the NOPA on the substantive issues has been issued. In such circumstances a NOPA may be issued separately for the shortfall penalty at a later stage.
- Where, prior to entering into the disputes resolution process, a taxpayer has accepted the proposed adjustment in relation to the substantive issues, but has not accepted the imposition of the shortfall penalties, then a NOPA may still be issued by the Commissioner to the taxpayer for the proposed penalties.
- Where the Commissioner receives a voluntary disclosure of the substantive issues from a taxpayer and the only disputed issue is the imposition of shortfall penalty.
- Where prosecution action is being considered and shortfall penalties apply because the taxpayer has committed one of the culpable acts (e.g. evasion), the Commissioner must impose a shortfall penalty.

  Under section 149, where a shortfall penalty has been imposed, the Commissioner may not subsequently prosecute the taxpayer for taking the incorrect tax position. Therefore, if prosecution is being considered as an option, a proposed imposition of a shortfall penalty in a NOPA may (if subsequently imposed) prevent the Commissioner from prosecuting the taxpayer.

  A shortfall penalty may be imposed subsequent to the prosecution.

91. Note that if shortfall penalties are not proposed in a NOPA, the Commissioner cannot propose them at the statement of position phase without first issuing a NOPA in respect of the penalties.

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

Facts

92. A concise statement of facts means focusing on material factual matters relevant to the legal issues. This includes for each proposed adjustment the facts relevant to proving all arguments raised in support of the adjustment, including any facts which are inconsistent with any argument previously raised by the taxpayer.

93. Care should be taken to state all the material facts in brief, so as to avoid irrelevant detail or repetition. For example, where the background to the disputed issues is known to both the Commissioner and the taxpayer, Inland Revenue officers may only need to include a summary of the facts in the NOPA. Where possible, the Commissioner will refer to and/or append any document which has previously set out the facts on which the Commissioner relies.

94. While every attempt will be made to be concise in the Commissioner's NOPA, it will sometimes be necessary to have a more detailed explanation of the material facts, depending on the complexity of the issue.

Law

95. A concise statement of the law refers to an outline of the relevant legislative provisions and principles derived from leading cases, affecting the proposed adjustment.

96. For example, it is sufficient for the Commissioner to explain the nature of the legal arguments, without quoting from case law in a lengthy manner.

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

97. The legal arguments must be applied to the facts to ensure that the proposed adjustments are not statements which appear out of context. The application of the law to the facts must logically support the proposed adjustment and must be stated concisely.

98. The Commissioner will outline all materials and arguments (including alternative arguments) on which it is intended to rely. If more than one argument supports the same or similar outcome, all arguments will be referred to in the NOPA.

Timeframes to complete the disputes resolution process

99. Once the disputes resolution process has commenced (i.e. where a NOPA has been issued by the Commissioner to a taxpayer and the dispute has not been resolved by agreement between the taxpayer and the Commissioner), where practicable, a time line should be negotiated between the taxpayer and Inland Revenue officers involved to ensure timely and efficient progression of the dispute.

100. Negotiating time lines for the timely resolution of disputes is an administrative practice encouraged by the Commissioner. Inland Revenue officers and taxpayers should endeavour to meet the agreed time lines. Where the negotiated time line cannot be achieved, this will be discussed with the taxpayer with a view to agreeing a new time line. However, failure to negotiate an agreed time line or adhere to the agreed time line will not prevent a case from progressing through the disputes resolution process.

101. In addition to the above administrative practice, the Commissioner is bound by section 89N. The law requires that where the Commissioner and the

taxpayer cannot agree on the proposed adjustments, the Commissioner cannot amend an assessment without completing the disputes resolution process, unless one of the exceptions in section 89N applies.

102. Although the adjudication process is not legislated as part of the disputes resolution process, it is the Commissioner's administrative practice to go through the adjudication process for the purpose of resolving a dispute after the statements of position phase, where practicable. However, where the adjudication process cannot be completed (e.g. because the statutory time bar is imminent), the Commissioner can amend an assessment, provided that the taxpayer's statement of position has been considered. This means that Inland Revenue officers should act in good faith and genuinely consider the facts and legal arguments in the taxpayer's statement of position before deciding whether to amend an assessment.

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

103. Where a NOPA has been issued and the dispute has not been resolved between the Commissioner and the taxpayer, the Commissioner can issue an assessment without completing the disputes resolution process under the following circumstances:

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

104. Section 89N(1)(c)(i) states:

> (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:

105. The exception applies where the Commissioner may need to act quickly to issue an assessment where the taxpayer commits an offence under an Inland Revenue Act and causes undue delay in a dispute.

106. 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 advised the taxpayer in writing that in the Commissioner's opinion, the taxpayer has committed an offence under section 143H. As the offence has the effect of delaying the completion of the disputes resolution process, the Commissioner is not required to complete the process and may amend the taxpayer's assessment under section 89N(2).

107. This exception may apply if a taxpayer, in the course of a dispute, wilfully refuses to attend an inquiry under section 19 on the specified date in the Commissioner's notice. The Commissioner can advise the taxpayer in writing that in the Commissioner's opinion, the taxpayer has committed an offence under section 143F and that this has the effect of delaying the completion of the disputes resolution process. If so, the Commissioner may amend the taxpayer's assessment under section 89N(2) without completing the disputes process.

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

108. If the Commissioner has reasonable grounds to believe that a taxpayer or an associated person of the taxpayer seeks to dispose of assets which may be required to meet an outstanding tax liability, the Commissioner may issue an assessment to the taxpayer. Sections 89N(1)(c)(ii) & (iii) state:

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

109. The purpose of the provisions is to address situations where a taxpayer or an associated person of the taxpayer seeks to dispose of assets which may be required to meet an outstanding tax liability or a pending liability, and the issue of an assessment becomes urgent.

110. The above exceptions apply if the taxpayer sought to avoid or delay the payment of tax by taking steps in relation to the existence or location of the taxpayer's assets.

111. In order to issue an assessment on the basis of the above exception, Inland Revenue officers must record any relevant correspondence and evidence (e.g. the directors' written instructions to shift the taxpayer'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 has begun judicial review proceedings in relation to the dispute or an associated person of the taxpayer involved in another dispute involving similar issues has begun judicial review proceedings (section 89N(1)(c)(iv) & (v)).

112. Sections 89N(1)(c)(iv) and (v) state:

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

113. This exception applies to all judicial review proceedings brought against the Commissioner. In judicial review proceedings, the resources of the Commissioner and the taxpayer are likely to be directed away from progressing the dispute through the disputes resolution process.

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

- A taxpayer is involved in a dispute with the Commissioner.
- An associated person of the taxpayer is involved in a separate dispute, which concerns similar issues as those in the dispute between the taxpayer and the Commissioner.
- The associated person of the taxpayer has commenced judicial review proceedings in relation to their dispute.

115. For the purpose of section 89N(1)(c)(v), the associated person of the taxpayer is not involved in similar issues as the taxpayer when the issues are of different revenue types. For example, the dispute between the Commissioner and the taxpayer relates to PAYE issues, whereas the dispute between the Commissioner and the associated person of the taxpayer relates to income tax.

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

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

117. Section 89N(1)(c)(vi) states:

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

118. Generally, information is provided voluntarily to Inland Revenue. However, in situations where this does not occur, the Commissioner may seek information from the taxpayer under a statute, such as sections 17, 18 and 19. (For the Commissioner's practice regarding section 17, please refer to the appropriate Standard Practice Statement). The statutory request will generally set out the time within which the information must be provided.

119. Subject to any statutory privilege from disclosure, where the taxpayer fails to comply with any formal request for information that relates to the dispute (e.g. as a delaying tactic to the progress of the disputes resolution process), the Commissioner may issue an assessment without completing the disputes resolution process.

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

120. Section 89N(1)(c)(vii) states:

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

121. A taxpayer can issue a NOPA to the Commissioner under section 89D (refer to SPS 05/04 – *Disputes resolution process commenced by a taxpayer*). At the same time the taxpayer may elect in their NOPA under section 89E(1)(a) that any of the unresolved dispute will be heard by the Taxation Review Authority acting in its small claims jurisdiction. In that case, the full disputes resolution process need not be followed.

Exception 6: The taxpayer and the Commissioner agree in writing that the dispute should be resolved by the court or Taxation Review Authority without the completion of the dispute resolution process (section 89N(1)(c)(viii)).

122. Section 89N(1)(c)(viii) states:

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

123. Under this exception, where the Commissioner commences the disputes resolution process, the taxpayer and the Commissioner may agree in writing that the dispute should be resolved by the court or Taxation Review Authority prior to the issue of a statement of position by either party. This would occur – for example, if the compliance and administrative costs that the parties might incur in completing the full disputes resolution process would be excessive relative to the amount in dispute.

124. However, this exception does not mean that the taxpayer may bring a challenge proceeding against the Commissioner at any time. Where this exception applies to a dispute commenced by the Commissioner (i.e. after the taxpayer and the Commissioner have reached an agreement), a challenge proceeding under section 138B still requires an exchange of NOPA and notice of response between the Commissioner and the taxpayer, before the taxpayer can bring a challenge proceeding.

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

125. Section 89N(1)(c)(ix) states:

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

126. Section 89O allows for the suspension of a dispute pending the result of a test case. If the section applies, the taxpayer and the Commissioner may agree in writing to suspend the dispute from the date of the agreement until the earliest of:

- the date of the court's decision;
- the date on which the test case is otherwise resolved; or
- the date on which the dispute is otherwise resolved.

127. In agreeing to suspend the disputes resolution process, any statutory time bars affecting the dispute are stayed. The Commissioner may then make an assessment that is consistent with the decision of the test case. (Note that the taxpayer is not precluded from challenging the Commissioner's assessment, even if it is consistent with the decision in the test case.)

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

129. Section 89O(5) states:

> If a suspension is agreed under subsection (2), the period of time during which the Commissioner must make an amended assessment, or perform an action, that is the subject of the suspended dispute is the total of–
>
> (a) the period of time within 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:
> (b) the period of the suspension that is described in sub-section (3).

Exception 8: The Commissioner applies to the High Court for an order to allow more time for completion of the dispute process, or that the dispute process is not required.

130. Section 89N(3) states:

> … [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.

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

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

133. The Commissioner is also required to issue an amended assessment within the time limit specified in section 89N(5). The section states:

> If the Commissioner makes an application under subsection (3), the period of time during which the Commissioner must make an amended assessment is the total of –
>
> (a) the period of time within which the Commissioner, in the absence of the application, would be required to make the amended assessment:
> (b) the period of time that starts on the date on which the Commissioner files the application in the High Court and ends on the earliest of –
> (i) the date of the High Court's decision of the application:
> (ii) the date on which the application is otherwise resolved:
> (iii) the date on which the dispute is otherwise resolved:
> (c) any further period of time that is allowed by an order of a court as a result of the application.

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

135. For example, in the disputes resolution process commenced by the Commissioner, the Commissioner applies to the High Court under section 89N(3) for an order that more time will be allowed to complete the disputes resolution process. The application is made on 1 March 2006. The disputed issue is subject to a statutory time bar on 31 March 2006 and the taxpayer does not agree to extend the time bar under section 108B(1). The Commissioner's application is successful as indicated in a High Court decision on 30 June 2006. The High Court orders that the Commissioner will be allowed five further days to complete the process.

136. The Commissioner must make an amended assessment by 5 July 2006 under section 89N(5). The calculation is as follows:

- The Commissioner would have one month to make the amended assessment prior to the statutory time bar, i.e. 1 March to 31 March 2006 (section 89N(5)(a))

plus

- While there are four months from the date of the Commissioner's application to the date of the High Court decision of that application, i.e. 1 March to 30 June 2006, the period of 1 March to 31 March 2006 has already been counted above. Therefore, only three months, i.e. 1 April to 30 June 2006 will be counted. (section 89N(5)(b))

plus

- There are five further days for the Commissioner to complete the disputes resolution process (section 89N(5)(c)).

137. During the period from 1 March to 5 July 2006, the Commissioner and the taxpayer may continue to attempt resolving the dispute. This may include exchanging statements of position and going through the adjudication process.

138. The above example indicates that the Commissioner has more time to complete the disputes resolution process. The time bar is effectively extended to 5 July 2006.

139. Where the Commissioner applies to the High Court under section 89N(3) for an order to truncate the disputes resolution process, the Commissioner must issue an assessment within the period as calculated under section 89N(5). Applying the same facts in the above example, if the Commissioner succeeds in the High Court application, the Commissioner must make an assessment by 5 July 2006.

Application of the exceptions in section 89N

140. The Commissioner's practice is that Inland Revenue officers and taxpayers will endeavour to resolve the dispute prior to or via the adjudication process. Where this is not possible, and one of the eight exceptions in section 89N applies, the Commissioner may amend or adjust an assessment without going through the whole disputes resolution process, i.e. before the Commissioner or the taxpayer accepts a NOPA, notice of response or statement of position issued by the other, or before the Commissioner considers the taxpayer's statement of position.

141. Then, the taxpayer can challenge the Commissioner's assessment by filing proceedings in the Taxation Review Authority (either acting in its general or small claims jurisdiction) or the High Court within the applicable response period, i.e. within two months starting on the date of issue of the notice of assessment (also refer to paragraph 124 of this Standard Practice Statement.)

Taxpayer's response to the Commissioner's NOPA: Notice of response

142. If the taxpayer disagrees with the Commissioner's proposed adjustment, then under section 89G, the taxpayer must notify the Commissioner that any or all of the proposed adjustments are rejected by issuing a notice of response ("NOR") within the two-month response period, i.e. within two months starting on the date of issue of the Commissioner's NOPA. The Commissioner interprets this as requiring receipt of the NOR. For instance, if a NOPA is issued on 8 April 2005, the taxpayer must notify the Commissioner of the rejection by issuing a NOR to the Commissioner for receipt on or before 7 June 2005. However, taxpayers are encouraged to issue their NOR to the Commissioner as soon as they have completed it.

143. The Commissioner will make reasonable efforts to contact the taxpayer or their tax agent two weeks prior to the expiry of the response period to ascertain whether the taxpayer will issue a NOR in response to the Commissioner's NOPA. Contact may be made by way of a phone call or a letter.

144. The contents of a NOR are prescribed under section 89G(2). The taxpayer must state concisely in the NOR:

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

(b) why the taxpayer considers those facts and arguments are wrong; and

(c) any facts and legal arguments relied upon by the taxpayer; and

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

(e) the quantitative adjustments to any figure referred to in the Commissioner's NOPA that result from the facts and legal arguments relied upon by the taxpayer.

145. Regarding the requirement of facts and legal arguments relied upon by the taxpayer under section 89G(2)(c) to be specified, the taxpayer may refer to legislative provisions, case law and legal arguments raised in the Commissioner's NOPA. There is no requirement that the taxpayer must refer to different legislative provisions, case law and legal arguments.

146. The requirement of quantitative adjustment under section 89G(2)(e) establishes, in the taxpayer's opinion, by how much the Commissioner's adjustment in the NOPA is incorrect. There is no requirement that the amount referred to be exact, however every attempt should be made to ensure that it is as accurate as possible. As the dispute progresses, the amount in dispute may be altered. For example a new figure may be worked out at a conference between the parties.

Deemed acceptance

147. If the taxpayer does not issue a NOR within the two-month response period and there are no exceptional circumstances as defined in section 89K(3), the taxpayer is deemed to have accepted the proposed adjustments in the Commissioner's NOPA. The Commissioner will usually advise the taxpayer of the deemed acceptance two weeks after the expiry of the two-month response period. Section 89H(1) states:

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

Exceptional circumstances under section 89K

148. Section 89K(3) states:

(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.

149. The legislation defines exceptional circumstances very narrowly. Cases on "exceptional circumstances", such as *Treasury Technology Holdings Ltd v CIR* (1998) 18 NZTC 13,752, *Milburn NZ Ltd v CIR* (1998) 18 NZTC 14,005 and *Fuji Xerox NZ Ltd v CIR* (2001) 20 NZTC 17,470 (CA), are also relevant. For example, a taxpayer's misunderstanding or erroneous calculation of the applicable response period will usually not be regarded as an event or a circumstance beyond the taxpayer's control under paragraph (a) of section 89K(3).

150. Late NORs will be accepted only on rare occasions. Some examples of situations that may be considered "exceptional circumstances" beyond the control of a taxpayer are explained in *Tax Information Bulletin* Vol 8, No 3 (August 1996).

151. The exception for lateness as a result of a statutory holiday is self explanatory. The Commissioner can also accept a late NOR if the Commissioner considers that the lateness is minimal, i.e. the document was only one or two days late. Besides the degree of lateness, the Commissioner will consider the following factors when exercising the discretion under section 89K:

- the date on which the NOR was issued; and
- the response period within which the NOR should be issued; and
- the reasons why the taxpayer failed to issue the NOR within the response period; and
- the compliance history of the taxpayer in relation to the tax type under consideration (e.g. has the taxpayer paid tax late or filed late tax returns, late NORs in the past?)

152. For example, a taxpayer issued a NOR to the Commissioner two days later than the applicable "response period". The taxpayer failed to provide a legitimate reason for the lateness. It was also found that the taxpayer had a history of filing late NORs within the minimal lateness allowable (i.e. no more than two days outside the applicable "response period") and had been advised on the calculation of

the "response period" on more than one occasion. Although the lateness was minimal on each occasion, the taxpayer's NOR would not be accepted in this case. This ensures that the exception under section 89K(3)(b)(ii) is not considered to be an extension of the "response period" in all situations.

153. Where an application for consideration of exceptional circumstances is made under section 89K, the reasons for accepting or rejecting it will be documented and the actioning officer will notify the taxpayer of the decision in writing within 15 working days of receipt of the taxpayer's application by Inland Revenue.

154. If the taxpayer's application under section 89K is rejected, the taxpayer will be deemed to have accepted the proposed adjustments in the Commissioner's NOPA. Note that the Commissioner's decision under section 89K is not a "disputable decision".

Receipt of a taxpayer's NOR

155. When a taxpayer's NOR is received, the NOR will usually be forwarded to the actioning officer within five working days of receipt by Inland Revenue. Following receipt, the actioning officer will ascertain and record the following:

- the date of issue of the NOR;
- whether the NOR has been issued within two months starting on the date of issue of the Commissioner's NOPA; and
- the salient features of the NOR including any deficiencies as to content.

156. Where this is practicable, the taxpayer or their tax agent will be informed in writing within 10 working days that the NOR has been received by Inland Revenue either by phone call or in writing.

157. However, where the Commissioner is aware of any deficiencies as to the content of the NOR, the taxpayer or their tax agent will usually be notified of these deficiencies as soon as practicable. They will also be notified again of the expiry date of the response period, by which those deficiencies must be rectified in order for the NOR to be valid. (Note: taxpayers are encouraged to issue their NOR as soon as they have completed it. This is because if an invalid or deficient NOR has been issued close to the expiry date of the response period, the taxpayer may not have sufficient time to rectify the invalidity or deficiency before the end of the response period.)

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

159. Where the NOR is accepted in full, the notice of assessment (if applicable) should usually be issued to the taxpayer within one month of the issue of advice of acceptance of the NOR.

160. If further work is required to be carried out before a decision to accept or reject a NOR can be made, the actioning officer will regularly update the taxpayer or taxpayer's agent on the progress of further analysis or enquiry work being undertaken.

Deficiencies in the contents of a NOR

161. Where a NOR has been received and where Inland Revenue considers there are deficiencies (i.e. the requirements under section 89G(2) are not met), the actioning officer will take reasonable steps to get the information in the NOR corrected before the expiry of the response period. The taxpayer will be notified of the need for the additional information and the impending deadlines.

162. If a NOR is not accepted by the Commissioner because there are alleged deficiencies and the information is not corrected before the response period expires, then it could result in deemed acceptance under section 89H(1), unless the NOR is accepted under one of the exceptional circumstances under section 89K. Deemed acceptance finalises the dispute and the taxpayer will no longer have the right to challenge the adjustments before the High Court or Taxation Review Authority.

Conference

Conduct of a conference

163. Where a dispute remains unresolved following the NOR phase, the conference phase follows. The Commissioner will usually initiate the conference phase within one month after receipt of the taxpayer's NOR. The time suggested for the conference phase is an average of three months. However, the time will vary depending on the facts and the complexity of the specific case.

164. There is no legislative requirement for a conference. The conference phase is an administrative process which aims to clarify and if possible, resolve the issues in the dispute.

165. The conduct of the conference should be as flexible as possible, consistent with the taxpayer's wishes and other factors such as the scope of the audit. Conferences may range from a phone call to several meetings. Discussions in conferences must be recorded or otherwise documented and agreed upon if possible. These may include any agreement on facts, common grounds for the dispute to proceed,

timeframes for completing the disputes resolution process and agreed adjustments.

Legal and other advisers attending a conference

166. If a dispute is not settled earlier, the Commissioner and the taxpayer may want to obtain expert legal or other advice. These advisers may attend any meetings in relation to the dispute. The Commissioner accepts that it is appropriate in these circumstances for a certain amount of "back tracking" to take place, i.e. some items already discussed (but which are not agreed in writing or otherwise accepted) between the parties may be revisited by the newly introduced advisers.

Conference not held or abridged

167. The Commissioner considers the conference phase to be an important part of the disputes resolution process.

168. In some circumstances the Commissioner will not hold further discussions or a conference, even though agreement has not been reached. This does not mean that the disputes resolution process will come to an end, as the disclosure notice and statement of position phase will still be undertaken. Where the dispute is not resolved in the statement of position phase, the Commissioner and the taxpayer will endeavour to have the dispute resolved via the adjudication process.

169. Conferences may not be held or may be abridged in one or more of the following situations:

- There may be revenue losses incurred as a result of delaying tactics used by a taxpayer to frustrate the collection of tax.
- The Commissioner is satisfied that the taxpayer or the taxpayer's agent is acting in a frivolous or vexatious manner. For example where, the taxpayer or their agent is setting unreasonable demands as to the time and place, or terms of such meeting(s), or refuses to conduct themselves reasonably at any meeting.
- The taxpayer contests the Commissioner's policy and it is agreed to disagree, or where it is otherwise agreed that a conference would be of no benefit.
- The taxpayer advises the Commissioner that they do not want a conference to be held.

170. Where it is practicable, the decision whether or not the conference phase will be dispensed with or abridged will be communicated in writing to the taxpayer or their tax agent within seven days of that decision being made. The reasons for the decision not to hold, or abridge, any conference must be documented.

Disclosure notices

171. The Commissioner must issue a disclosure notice under section 89M(1), unless the Commissioner is not required to complete the disputes resolution process under section 89N (as discussed above) or the Commissioner has issued a notice of disputable decision that includes or takes account of the adjustment proposed in the NOPA under section 89M(2):

> (1) Unless subsection (2) applies, and subject to section 89N, the Commissioner must issue a disclosure notice in respect of a notice of proposed adjustment to a disputant at the time or after the Commissioner or the taxpayer, as the case may be, issues the notice of proposed adjustment.
>
> (2) The Commissioner may not issue a disclosure notice in respect of a notice of proposed adjustment if the Commissioner has already issued a notice of disputable decision that includes, or takes account of, the adjustment proposed in the notice of proposed adjustment.

172. A disputable decision is :

- an assessment; or
- a decision of the Commissioner 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) and (10) and 89N(3).

173. When issuing a disclosure notice the Commissioner must also provide the disputant with the Commissioner's statement of position (as discussed below) and, include in the disclosure notice a reference to section 138G and the effect of the evidence exclusion rule. Section 89M(3) states:

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

174. Where the Commissioner decides to issue a disclosure notice together with a statement of position, the taxpayer will usually be advised of this within two weeks before the date of issuing the disclosure notice and the statement of position.

Evidence exclusion rule

175. A disclosure notice is the document that triggers the application of the evidence exclusion rule. The rule restricts what the Commissioner and the disputant may raise as evidence in a court challenge to matters raised in their statements of position. (Note that the Commissioner and the taxpayer may refer to evidence that has been raised by either party.) As this is one of the guiding principles of the disputes resolution process, the Commissioner must explain the effect of the evidence exclusion rule and refer to section 138G in the Commissioner's disclosure notice.

176. In a dispute commenced by the Commissioner, section 89M(6B) states that "evidence" in the context of the evidence exclusion rule refers to the available documentary evidence and does not include a list of witnesses or types of witnesses. Therefore the identities of both the taxpayer's and Commissioner's witnesses in sensitive cases will continue to be protected, without undermining the effect of the evidence exclusion rule.

Issue of a disclosure notice

177. It is possible for the Commissioner to issue a disclosure notice at any time on or after the issue of a NOPA by either the taxpayer or the Commissioner.

178. Generally such a notice will be issued after receipt of a NOR following the conference phase and in accordance with the agreed time line between the Commissioner and the taxpayer. Where a disclosure notice is issued earlier (e.g. the facts are clear, the taxpayer agrees, or a conference is not required) the reasons must be documented.

179. When making the decision to issue a disclosure notice prior to completion of the conference phase it must be kept in mind that if the taxpayer comes up with new or novel matters in their statement of position the Commissioner only has two months to reply barring a High Court application (refer to section 89M(8)).

Statement of position

180. Pursuant to section 89M(3), where the Commissioner commences the disputes resolution process, the Commissioner must issue the taxpayer with a statement of position ("SOP") along with the disclosure notice.

181. Where the disputed issue relates to a tax type that is subject to the statutory time bar (e.g. income tax, GST, etc) that falls within the current income year, the Commissioner and the taxpayer will endeavour to complete the disputes resolution process. Where the Commissioner and the taxpayer have issued a SOP to each other and there is insufficient time to complete the adjudication process, the Commissioner and the taxpayer may agree to a statutory time bar waiver. However, if no such agreement is reached, the Commissioner may amend and issue the assessment prior to the statutory time bar, provided that the taxpayer's SOP has been fully considered.

Contents of a statement of position

182. The contents of a SOP are binding. Under the principle of the "evidence exclusion rule" if the matter proceeds to court, the parties are limited to the facts, evidence (excluding oral evidence), issues and propositions of law which are relied on (by either party). 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.

183. Section 89M(4) states:

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

184. The minimum contents requirements of a SOP are an outline of the relevant facts, evidence, issues and propositions of law. However, to enable the Adjudication Unit to successfully reach a decision, it is important that the SOP contains full, complete and detailed submissions. An outline of frank and complete discussion of the issues, the law, arguments and evidence supporting the arguments is implicit in the spirit and intent of the disputes resolution process.

185. In the NOPA phase, it is an intention of the process that the submissions are concise to enable the parties to progress the dispute without incurring huge expense. However, at the SOP phase where the issues have not been resolved and are likely to be presented to a court for resolution, it is envisaged that full, complete and detailed submissions will be made. Under the principles of the evidence exclusion rule, arguments and evidence that are not present in the SOP will be excluded from consideration by a court.

186. The list of evidence that is required to be submitted with the SOP does not include a list of potential witnesses. Section 89M(6B) states:

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

187. Therefore, only documentary evidence needs to be listed in the SOP. Witnesses' identities will continue

to be protected without undermining the effect of the evidence exclusion rule.

188. It must be remembered that if the SOP discusses shortfall penalties any other appropriate penalties of a lesser percentage and reductions for shortfall penalties (e.g. voluntary disclosure, temporary shortfall, reduction for previous behaviour) must also be stated as alternative arguments. This is to ensure that the appropriate penalty is assessed in all cases. However, note that if shortfall penalties are not proposed in a NOPA, the Commissioner cannot propose them at the SOP phase without first issuing a separate NOPA in respect of the shortfall penalties

Receipt of taxpayer's statement of position

189. Where the Commissioner has issued a disclosure notice and SOP, the taxpayer must issue a SOP within the two-month response period starting on the date of issue of the disclosure notice. However, pursuant to section 89M(11), prior to the expiry of the response period, the taxpayer may apply to the High Court for more time to reply to the Commissioner's SOP. The court may accept the application if the taxpayer can demonstrate that the issues in dispute had not previously been discussed between the Commissioner and the taxpayer and thus, it is unreasonable to reply to the Commissioner's SOP within the response period.

190. The Commissioner will make reasonable efforts to contact the taxpayer or their tax agent two weeks prior to the expiry of the response period to ascertain whether the taxpayer will issue a SOP in response to the Commissioner's disclosure notice. Contact can be made by phone or in writing. Where the taxpayer has issued a SOP, it will be forwarded to the actioning officer within five working days of receipt by Inland Revenue. Following receipt, the actioning officer will ascertain and record the following:

- the date of issue of the SOP;
- whether the SOP has been issued within two months starting on the date of issue of the disclosure notice; and
- the salient features of the SOP including any deficiencies as to content.

191. Where it is practicable, a taxpayer's SOP will be acknowledged as received within 10 working days of receipt by Inland Revenue. However, where the Commissioner is aware of any deficiencies as to the content of the SOP, the taxpayer or their tax agent will usually be notified of these deficiencies as soon as practicable. They will also be notified again of the expiry date of the response period, by which those deficiencies must be rectified in order for the SOP to be valid and whether the Commissioner proposes to provide the taxpayer with any additional information.

192. Where a SOP has been issued outside the applicable response period, the taxpayer may apply for consideration of exceptional circumstances under section 89K. The reasons for accepting or rejecting the application will be documented and the actioning officer will make reasonable efforts to notify the taxpayer of the decision in writing within 15 working days of receipt of the taxpayer's application by Inland Revenue.

193. A taxpayer is deemed to have accepted the Commissioner's SOP if they fail to issue a SOP within two months starting on the date of the issue of the disclosure notice and none of the exceptional circumstances under section 89K apply. Where practicable, the Commissioner will make reasonable efforts to notify the taxpayer of the deemed acceptance within two weeks after expiry of the response period for the disclosure notice.

The Commissioner's reply

194. Pursuant to section 89M(8), the Commissioner may, within two months of the issue of the taxpayer's SOP, provide the taxpayer with additional information in response to matters raised by the taxpayer in their SOP.

195. This is intended to cover the situation where a taxpayer raises new or novel information or arguments at this stage and should be confined to these issues. Any additional information must be provided as far as possible in the same format as the SOP of which it becomes a part. If the Commissioner intends to provide the taxpayer with additional information under section 89M(8), the taxpayer or their tax agent will usually be notified of this within two weeks from the receipt of the taxpayer's SOP. However, the time of notification may vary depending on the facts and complexity of the dispute.

196. It must be noted that the taxpayer does not have a right of reply to the additional information provided by the Commissioner, unless there is an agreement between the Commissioner and the taxpayer that additional information will be accepted. (Refer to "Agreement to include additional information" below.)

Agreement to include additional information

197. There is scope to agree to add any additional information to the SOPs. Despite the absence of any statutory time limit, the Commissioner's practice is to allow one month (from the date of the Commissioner's provision of additional information under section 89M(8)) for such agreement to be reached and information provided. However,

this will be applied after taking into account the taxpayer's prior conduct, in particular, whether the taxpayer could have provided the information earlier through the application of due diligence.

198. The Commissioner will also consider the materiality and relevance of the additional information, and its capacity to help resolve the dispute.

199. The primary concern of the disputes resolution process is that both parties apply proper cooperation and due diligence in resolving the matters at issue. Additional information will therefore not be accepted unless proper cooperation and due diligence have been demonstrated.

200. Where a taxpayer requests to have additional information added and the request is declined, the reasons will usually be communicated to the taxpayer or their tax agent. The reasons will also be documented with detailed reference to the taxpayer's conduct, level of cooperation prior to the request and the reason for the information not being provided earlier.

201. Where the additional information is agreed to be added to the SOPs, the agreement will be made subject to the taxpayer agreeing that the Commissioner may include a response to the additional information to the SOP, if required.

Preparation for adjudication

202. Within the disputes resolution process, the role of the Adjudication Unit in Inland Revenue's National Office is to take a fresh look at tax disputes in an impartial and independent manner, and to provide technically accurate decisions. The Commissioner's practice is to refer all disputes to the Adjudication Unit, where practicable.

203. Where the dispute commenced by the Commissioner is not resolved after both the Commissioner and the taxpayer have issued a SOP, the taxpayer may request that an assessment be issued and that they can challenge the Commissioner's assessment by commencing proceedings in a court or Taxation Review Authority under section 138B. In this situation, the dispute will be heard by a court or Taxation Review Authority, rather than going through the adjudication process first.

204. However, where the dispute is referred to the Adjudication Unit in Inland Revenue's National Office, the Commissioner should not issue an assessment prior to the adjudication process. In this situation, the actioning officer will prepare a cover sheet that will note all documents that need to be sent to the Adjudication Unit.

205. The cover sheet together with copies of the documents (NOPA, NOR, notes of conferences, the taxpayer's SOP, the Commissioner's SOP, additional information, material evidence, including expert opinions or specialist advice obtained, together with a schedule of all evidence held) will be sent to the Adjudication Unit.

206. A letter together with a copy of the cover sheet will be issued by the actioning officer to the taxpayer prior to the submissions and evidence being sent to the Adjudication Unit. The cover sheet and the letter are usually completed within one month from the date of issue of the Commissioner's reply to the taxpayer's SOP (if any) or within one month from the expiry date of the response period for the taxpayer's SOP.

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

208. All materials to be forwarded to the Adjudication Unit will usually be forwarded within 12 working days of the issue of the letter to the taxpayer, advising the taxpayer that the materials are being forwarded to the Adjudication Unit.

209. Where an investigation has covered a number of issues, the cover sheet will outline which issues have been agreed upon between the Commissioner and the taxpayer and which issues are still in dispute. The adjudicator is then able to direct their attention to those issues in dispute. The adjudicator will not reconsider those issues that have been agreed upon.

210. The adjudicator usually only considers the materials submitted by the Commissioner and the taxpayer. They do not usually seek out further information, although they may consider additional material which is relevant. However, if the additional material was not contained in the Commissioner or the taxpayer's SOP, and the matter proceeds to litigation, that material cannot be put forward as evidence in court (refer to discussion on the evidence exclusion rule above). The only exception is where the parties to the dispute agree to include it as additional information under section 89M.

Adjudication decision

211. Once the Adjudication Unit has reached a conclusion the taxpayer and the actioning officer will be notified of the decision. The actioning officer will carry out any of the recommendations of the Adjudication Unit and follow up procedures where required. Where applicable, this includes issuing a notice of assessment to the taxpayer.

212. Where a decision is made by the Adjudication Unit against the Commissioner, the Commissioner must follow the Adjudication Unit's decision. The Commissioner is bound by the decision and cannot challenge that decision. The dispute will be at an end.

213. Where a decision is made by the Adjudication Unit against the taxpayer, the taxpayer may challenge the assessment (whether made by the Commissioner or the taxpayer) or the disputable decision.

214. In a disputes resolution process commenced by the Commissioner, the taxpayer if disagreeing with the Adjudicator's decision, may file proceedings in the Taxation Review Authority (either acting in its general or small claims jurisdiction) or the High Court if one of the following conditions under section 138B(1) is met:

    - The assessment includes an adjustment proposed by the Commissioner which the taxpayer has rejected within the response period.
    - Where the assessment is an amended assessment the assessment imposes a fresh liability or increases an existing liability.

215. The taxpayer must file proceedings with the Taxation Review Authority or High Court within the response period, i.e. two months starting on the date of issue of the assessment.

This Standard Practice Statement is signed on 23 March 2005.

Graham Tubb

National Manager
Technical Standards

APPENDIX 1

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

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

Para in the SPS	Key actions	Timeframes
	The Commissioner's notice of proposed adjustment ("NOPA")	
64	Advise the taxpayer that a NOPA will be issued.	Usually within 7 days before the date of issuing the Commissioner's NOPA, but this may happen earlier.
66	Confirm that the taxpayer has received the Commissioner's NOPA (either by phone call or in writing).	Within 10 working days from the date of issuing the Commissioner's NOPA, where practicable.
	Taxpayer's notice of response ("NOR")	
141	The taxpayer issues a NOR within the applicable response period.	Within 2 months from the date of issuing the Commissioner's NOPA, unless one of the "exceptional circumstances" under section 89K applies.
142	Confirm whether the taxpayer will issue a NOR.	Usually 2 weeks before expiry of response period to the Commissioner's NOPA
155	Forward the taxpayer's NOR to the actioning officer.	Usually within 5 working days of receipt of the taxpayer's NOR
156	Acknowledge the receipt of the taxpayer's NOR.	Usually within 10 working days of receipt of the taxpayer's NOR
157	Advise that the taxpayer's NOR is invalid, but the 2-month response period has not expired.	Inland Revenue officers will advise the taxpayer or their agent as soon as they become aware of the invalidity.
153	Consider the application of "exceptional circumstances" under section 89K, where a taxpayer's NOR has been issued outside the applicable response period.	Usually within 15 working days of receipt of taxpayer's application.
147	The taxpayer is deemed to accept the Commissioner's NOPA, as the taxpayer fails to issue a NOR within the applicable response period and none of the "exceptional circumstances" apply in the case of late NOR.	Usually 2 weeks after expiry of the response period to the Commissioner's NOPA.
158	Advise the taxpayer whether the NOR is being considered, has been accepted, rejected in full or part.	Usually within 1 month of receipt of the taxpayer's NOR.

159	If the taxpayer's NOR has been accepted in full, the dispute comes to an end and Inland Revenue will take appropriate actions (e.g. issue an assessment).	Usually within 1 month of the issue of advice of acceptance of the NOR.
	Conference phase (if applicable)	
163	Contact the taxpayer to initiate the conference phase.	A conference usually commences within 1 month from the receipt of the taxpayer's NOR. The suggested average timeframe of the conference phase is 3 months, subject to the facts and complexity of the dispute.
170	Communicate the decision not to hold, or abridge any conference must be documented in writing and conveyed by the Commissioner to the taxpayer or agent.	Usually within 7 days from the Commissioner's decision.
	Disclosure notice and the Commissioner's statement of position ("SOP")	
174	Advise the taxpayer that a disclosure notice and the Commissioner's SOP will be issued.	Usually within 2 weeks before the date of issuing the Commissioner's disclosure notice and SOP.
	Taxpayer's SOP	
189	The taxpayer must issue a SOP within the response period for the disclosure notice.	Within 2 months from the date of issuing the disclosure notice, unless one of the "exceptional circumstances" under section 89K applies.
190	Confirm whether the taxpayer will issue a SOP.	Usually 2 weeks before expiry of response period to the Commissioner's disclosure notice.
190	Forward the taxpayer's SOP to the actioning officer.	Usually within 5 working days of receipt of the taxpayer's SOP.
191	Acknowledge the receipt of the taxpayer's SOP.	Usually within 10 working days of receipt of the taxpayer's SOP.
191	Advise that the taxpayer's SOP is invalid, but the 2-month response period has not expired.	Inland Revenue officers will advise the taxpayer or their agent as soon as they become aware of the invalidity.
192	Consider the application of "exceptional circumstances" under section 89K, where the taxpayer's SOP has been issued outside the applicable response period.	Usually within 15 working days of receipt of taxpayer's application.
193	The taxpayer is deemed to accept the Commissioner's SOP, as the taxpayer fails to issue a SOP within the applicable response period and none of the "exceptional circumstances" apply.	Usually 2 weeks after expiry of the response period for the disclosure notice.
	Addendum to the Commissioner's SOP	
195	Advise the taxpayer whether the Commissioner will provide additional information via addendum to the Commissioner's SOP.	Usually within 2 weeks of receipt of the taxpayer's SOP, subject to the facts and complexity of the dispute.

194	Provide additional information via addendum to the Commissioner's SOP within the response period for the taxpayer's SOP.	Within 2 months from the issue of taxpayer's SOP.
197	Consider a taxpayer's request to add additional information to the taxpayer's SOP.	Usually within 1 month from the date of issue of the Commissioner's addendum.
	Adjudication	
206	Prepare a cover sheet and issue a letter (including a copy of the cover sheet) to the taxpayer to seek concurrence of the materials to be sent to the adjudicator.	Usually within 1 month from the date of issue of the Commissioner's addendum (if any) or within 1 month from the expiry date of the response period for the taxpayer's SOP.
207	The taxpayer responds to the Commissioner's letter.	Within 10 working days from the date of issue of the Commissioner's letter.
208	Forward materials relevant to the dispute to the Adjudication Unit.	Usually within 12 working days from the date of issue of the Commissioner's letter.
	Adjudication of the disputes case.	Usually 4 months from the date of receipt of the dispute file by the Adjudication Unit, subject to the facts and complexity of the dispute.

DISPUTES RESOLUTION PROCESS COMMENCED BY A TAXPAYER – SPS 05/04

Introduction

1. This Standard Practice Statement outlines the taxpayer's rights and responsibilities in respect of an assessment of tax liability or a disputable decision when a taxpayer commences the disputes resolution process.

2. Where the Commissioner commences the disputes resolution process, the Commissioner's practice is stated in SPS 05/03 – *Disputes resolution process commenced by the Commissioner of Inland Revenue.*

3. This Standard Practice Statement consolidates all previous Standard Practice Statements and practices and has been updated for recent changes to the law in the Taxation (Venture Capital and Miscellaneous Provisions) Act 2004. The Commissioner regards this Standard Practice Statement as a reference guide for taxpayers and officers of Inland Revenue. The practices outlined will be followed by officers of Inland Revenue.

Application

4. This Standard Practice Statement applies to disputes commenced on or after 1 April 2005 or in the case of GST disputes, applies to GST return periods starting on or after 1 April 2005. It replaces the following Standard Practice Statements (these, as revised from time to time, will continue to apply to disputes commenced prior to 1 April 2005 or in the case of GST disputes, apply to GST return periods starting prior to 1 April 2005):

   - INV-150 *Content standards for Notice of Proposed Adjustment and Notice of Response* published in *Tax Information Bulletin* Vol 11, No 6 (July 1999); and
   - INV-170 *Timeliness in resolving tax disputes* published in *Tax Information Bulletin* Vol 14, No 2 (February 2002).

5. Unless specified otherwise, all legislative references in this Standard Practice Statement are to the Tax Administration Act 1994.

Background

6. The aim of the disputes resolution process is to resolve disputes over tax liability in a fair, effective and timely manner. The disputes resolution process is designed to encourage an "all cards on the table" approach and the resolution of issues without the need for litigation. It ensures that all the relevant evidence, facts, and legal arguments are canvassed before a case goes to court.

7. The disputes resolution process was introduced in 1996. A review of the procedures was carried out in July 2003. Amendments have recently been made to the process to improve the framework within which tax disputes are resolved.

8. The early resolution of a dispute is intended to be achieved through a series of steps prescribed in legislation, the main elements of which are:

   - A notice of proposed adjustment: this is a notice by either the Commissioner or a taxpayer to the other that an adjustment is sought in relation to the taxpayer's self-assessment, the Commissioner's assessment or a disputable decision.
   - A notice of response: this is issued by the party receiving the notice of proposed adjustment with which they disagree.
   - A disclosure notice and statement of position: a disclosure notice triggers the issue of a statement of position. A statement of position contains an outline of facts and propositions of law with sufficient details to support the position taken. A statement is issued by each party. It is an important document because it limits facts and propositions of law which can be relied on (by either party) if the case goes to court.

9. There are also two administrative phases in the process—the conference and adjudication phases. The conference can be formal or informal discussion between Inland Revenue and the taxpayer, to clarify and, if possible, resolve the issues. Adjudication involves the independent consideration of the dispute by Inland Revenue and is the final phase in the process before the taxpayer's assessment is amended (if it is to be amended), and follows the exchange of statements of position. If the dispute has not been already resolved, the Commissioner's practice will be to hold conferences, and refer the dispute to the Adjudication Unit, except in rare circumstances.

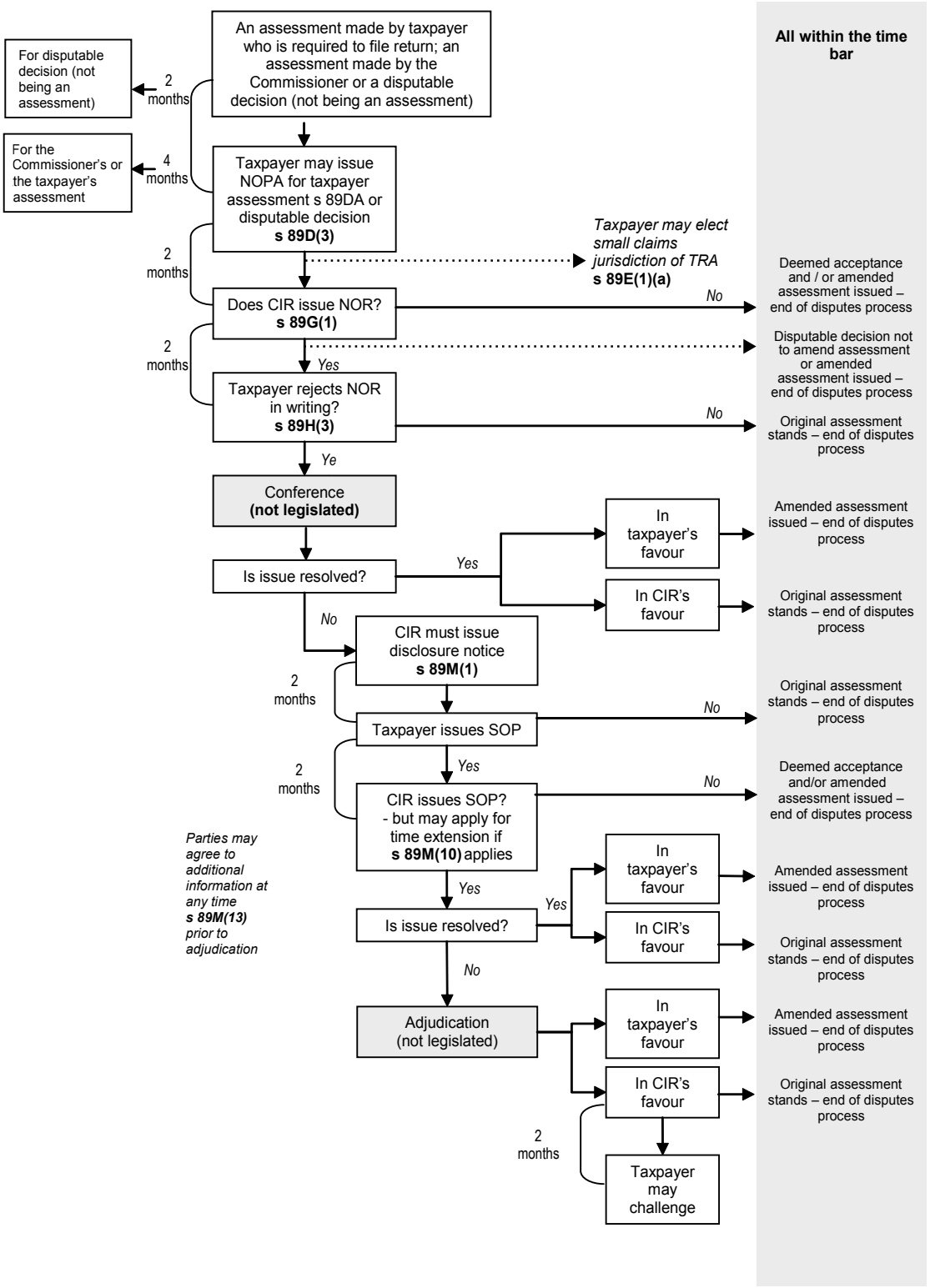
Standard Practice and Analysis

Contents

Disputes resolution process commenced by a taxpayer

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

Disputes resolution process commenced by a taxpayer



Taxpayer assessment

10. Section 92(1) states:

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

11. The above legislative provision applies to the 2002-03 and subsequent income years. Where a taxpayer is required to file a tax return, they must make an assessment of their taxable income and income tax liability, and if applicable, the net loss, terminal tax or refund due.

12. Similar requirements apply to taxpayers who are required to file GST returns under the Goods and Services Tax Act 1985 ("the GST Act"). For GST return periods beginning on or after 1 April 2005, these taxpayers are required to make an assessment of the amount of GST payable. Section 92B(1) states:

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

13. For both income tax and GST assessments made by taxpayers, the date of assessment is that on which Inland Revenue receives the return from a taxpayer.

14. Inland Revenue's practice is that when the taxpayer's assessment is received, the return is stamped with the date of receipt either electronically or manually. This date is then entered into Inland Revenue's computerised database. Once this date is entered into the computerised database, a return acknowledgment form is generated and sent to the taxpayer. This practice ensures that the taxpayer will have a clear record of the date of their assessment.

Assessment made by the Commissioner

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

16. The Commissioner will not make an assessment without first issuing a notice of proposed adjustment ("NOPA") to a taxpayer, unless an exception to the requirement for issuing a NOPA under section 89C applies. (Nevertheless, even if the Commissioner, in a very unlikely event, made an assessment in breach of section 89C, the assessment would be regarded as valid under section 114.)

17. Where the Commissioner issues an assessment without first issuing a NOPA, the taxpayer may issue a NOPA to the Commissioner in respect of that assessment. The exceptions under section 89C are explained in the Commissioner's practice as stated in SPS 05/03 – *Disputes resolution process commenced by the Commissioner of Inland Revenue.*

A taxpayer may issue a NOPA to the Commissioner

18. A taxpayer may issue a NOPA to the Commissioner in the following five situations:

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

19. Section 89D(1) states:

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

20. Where the Commissioner issues a notice of assessment without first issuing a NOPA to a taxpayer, and the notice of assessment does not relate to a "default assessment", the taxpayer may issue to the Commissioner for receipt a NOPA in respect of the assessment. Taxpayers' responses to default assessments are discussed in **Situation 2: NOPA in respect of the Commissioner's default assessment.**

21. The taxpayer's NOPA must be issued within the applicable "response period" as defined in section 3(1), i.e. within the four-month period starting on the date of the Commissioner's notice of assessment. For instance, if the Commissioner's notice of assessment is made on 8 April 2005, the taxpayer may issue a NOPA in respect of the assessment to the Commissioner for receipt on or before 7 August 2005.

22. The taxpayer's right to issue a NOPA under section 89D(1) would not be affected, even if the Commissioner, in a very unlikely event, made the assessment in breach of section 89C. The assessment will be regarded as valid under section 114.

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

Default assessment other than GST

23. Section 89D(2) states:

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

24. Where a taxpayer has not filed a tax return, the Commissioner may make an assessment (commonly known as a "default assessment") without first issuing a NOPA to a taxpayer.

25. Where a taxpayer wants to dispute a default assessment through the disputes resolution process, the taxpayer must, within the applicable response period (i.e. 4 months from the date of issue of the default assessment):

    - File a tax return in the prescribed form for the period to which the default assessment relates (refer to section 89D(2)); and
    - Issue a NOPA to the Commissioner for receipt in respect of the default assessment.

26. In the case of a default assessment, the requirement to furnish a tax return is an additional requirement of the disputes resolution process. This ensures that all taxpayers have provided the information required by tax law before they are entitled to dispute an assessment. (Note that a taxpayer cannot dispute a "default assessment" unless the requirements as set out in paragraph 25 of this Standard Practice Statement are met.)

27. On receipt of the taxpayer's tax return for the default assessment period, the Commissioner may decide not to amend the default assessment on the basis of that tax return, if the Commissioner considers that the taxpayer's tax position is, for example, incorrect or a result of a vexatious or frivolous act or does not meet a reasonable standard. However, where an amended assessment has been issued on the basis of the taxpayer's tax return, the Commissioner is not prohibited from conducting further investigation on that assessment, and if necessary, issuing a NOPA to the taxpayer.

GST default assessment

28. Similar rules apply to a taxpayer's NOPA in respect of a GST default assessment.

29. Section 89D(2C) states:

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

30. Where a taxpayer has not filed a GST return, the Commissioner may make a GST assessment (commonly known as a "GST default assessment") without first issuing a NOPA to a taxpayer.

31. Where a taxpayer wants to dispute a GST default assessment through the disputes resolution process, the taxpayer must, within the applicable response period (i.e. four months from the date of the issue of the GST default assessment):

    - File a GST return for the period to which the GST default assessment relates (refer to section 89D(2C)); and
    - Issue a NOPA to the Commissioner for receipt in respect of the GST default assessment.

32. Section 89D(2C) applies for GST return periods that begin on or after 1 April 2005.

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

33. Section 89D(2B) states:

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

34. The above section applies to a taxpayer who derives income only from salary and wages, interest and dividends and where the taxpayer will receive an income statement from the Commissioner under section 80D(1).

35. In general, where the taxpayer considers that the income statement is incorrect, the taxpayer must inform the Commissioner of the reasons and provide the relevant information to correct the income statement under section 80F(1). This has to be done within the statutory time limit, being the later of the taxpayer's terminal tax date for the income year to which the income statement relates and two months after the date the income statement is issued.

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

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

38. Where a taxpayer wants to dispute a deemed assessment under section 80H, the taxpayer must, within the applicable response period (i.e. within four months from the date of the issue of the deemed assessment):

    - File an amended income statement for the assessment period; and
    - Issue a NOPA to the Commissioner for receipt in respect of the assessment.

Situation 4: NOPA in respect of disputable decision

39. Section 89D(3) states:

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

40. The term "disputable decision" is defined in section 3(1) to mean an assessment and a decision of the Commissioner under a tax law. The definition also includes exceptions to what is a disputable decision. Section 3(1) on the definition of "disputable decision" defines the term as:

> (a) An assessment:
> (b) A decision of the Commissioner under a tax law, except for a decision –
> (i) To decline to issue a binding ruling under Part VA; or
> (ii) That cannot be the subject of an objection under Part VIII; or
> (iii) That cannot be challenged under Part VIIIA; or
> (iv) That is left to the Commissioner's discretion under sections 89K, 89L, 89M(8) and (10) and 89N(3)

41. A "decision of the Commissioner under a tax law" generally refers to a tax law which specifically gives the Commissioner a discretion or power. Subparagraph (iv) excludes from the definition of "disputable decision" decisions left to the Commissioner's discretion that occur specifically under the disputes legislation contained in Part IVA of the TAA. For example:

- A taxpayer issues a late NOPA to the Commissioner and the Commissioner refuses to exercise the discretion to accept it as a NOPA issued within the response period under section 89K. The refusal to exercise the Commissioner's discretion is not a disputable decision.
- After receiving the taxpayer's statement of position, the Commissioner provides the taxpayer with additional information under section 89M(8). The decision to provide this additional information is not a disputable decision.
- The Commissioner refuses to exercise the discretion under section 113 to amend a taxpayer's income tax assessment. This decision cannot be challenged under section 138E(1)(e)(iv) and is therefore, not a disputable decision.

42. The above exceptions ensure that only substantive issues are disputed as disputable decisions and that procedural sections of the disputes resolution process do not in themselves give rise to disputes.

43. Pursuant to section 89D(3), a taxpayer may issue to the Commissioner a NOPA in respect of a disputable decision, other than an assessment. For example:

- A taxpayer who is a natural person may dispute the Commissioner's decision under section OE 1 of the Income Tax Act 2004 that they are resident in New Zealand for taxation purposes.
- Under section NC 1(2) of the Income Tax Act 2004, the Commissioner can determine whether, and to what extent, a payment is subject to PAYE. It is not possible to dispute such a determination. However, where an employer or an employee receives an assessment of tax deductions, they may dispute the assessment on the ground that a section NC 1(2) determination on which it is founded is wrong in fact or in law.

44. The NOPA must be issued for the Commissioner's receipt within the applicable response period, i.e. within the two-month period starting on the date of issue of the notice of disputable decision (not being an assessment).

Situation 5: NOPA in respect of an assessment made by a taxpayer

45. Section 89DA(1) states:

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

46. The above legislative provision applies to taxpayers' income tax assessments for the 2002-03 and subsequent income years. A taxpayer who is required to file a tax return must make an assessment of their taxable income and income tax liability under section 92(1).

47. Section 89DA(1) also applies to taxpayer's GST assessments for the GST return periods beginning on or after 1 April 2005. A taxpayer who is required to file a GST return must make an assessment of the amount of GST payable for the return period under section 92B(1).

48. Section 89DA(1) allows a taxpayer to issue to the Commissioner a NOPA in respect of their own assessment of tax. The NOPA must be issued for the Commissioner's receipt within the applicable response period, i.e. within the four-month period starting on the date on which Inland Revenue receives the taxpayer's notice of assessment.

Proposed adjustments – input tax credits

49. Where a taxpayer receives a taxable supply and omits to claim a deduction from output tax under section 20(3) of the GST Act, the taxpayer may have two options.

50. First, the taxpayer may propose an adjustment by issuing a NOPA to the Commissioner within the applicable response period.

51. Alternatively, the taxpayer may claim a deduction from output tax in a later GST return period under section 20(3) of the GST Act. There is an unqualified two-year period to claim an input tax credit in a current period return. Pursuant to paragraph (a) of the proviso to section 20(3) of the GST Act (which can be found after paragraph (i) of the section), the two-year period is calculated from the earlier of:

- The date of payment for the taxable supply to which the input tax credit relates; and
- The date of issue of a tax invoice in relation to that taxable supply

52. However, pursuant to the proviso to section 20(3) of the GST Act, the taxpayer may have an unlimited time to claim the input tax credit if the taxpayer's failure to make the deduction under that section arises from one of the following reasons:

- An inability of the registered person to obtain a tax invoice;
- A dispute over the proper amount of the payment for the taxable supply to which the deduction relates;
- A mistaken understanding on the part of registered person that the supply to which the deduction relates was not a taxable supply;
- A clear mistake or simple oversight of the registered person.

53. For example, a taxpayer is registered for GST. They pay GST on an invoice basis and file monthly GST returns. In May 2005, they receive a tax invoice in respect of a taxable supply. However, the taxpayer omits to claim the input tax credits in respect of that taxable supply in the May 2005 GST return period. The reason for the omission is that the taxpayer has misplaced the tax invoice in one of their business files. The taxpayer has found the tax invoice in December 2007.

54. The taxpayer has two options. First, they may propose an adjustment to an input tax credit in the May 2005 GST period by issuing a NOPA to the Commissioner. However, the NOPA will be issued outside the four-month response period. Unless one of the "exceptional circumstances" in section 89K applies, the Commissioner will not accept the taxpayer's NOPA outside the response period. The Commissioner will consider the taxpayer's case under section 113. The Commissioner's practice in relation to section 113 is stated in a separate Standard Practice Statement.

55. The second option is that the taxpayer may claim a deduction from output tax in the current GST return period under section 20(3) of the GST Act. In this example, the taxpayer's omission is due to a simple oversight of the taxpayer. Therefore, the two-year restriction on claiming the deduction does not apply.

56. The term "clear mistake or simple oversight" is interpreted in a similar manner to that in section 89C(b).

57. There is no dollar limit to what is "a simple or obvious mistake or oversight" and this may be ascertained on a case by case basis.

58. However, "a simple or obvious mistake or oversight" will not include a taxpayer's GST position taken as a result of:

- A new, beneficial interpretation or favourable new case law; or
- A change of mind (e.g. a taxpayer has taken the tax position that the sale of business is a supply of a going concern and therefore, zero-rated for GST purposes, but later changes their mind and wants to treat the supply as a standard-rated supply.)

Contents of a taxpayer's NOPA

59. A NOPA is the document that commences the disputes resolution process. It is intended to explain in a legal/technical manner what the position of the issuer is in relation to the proposed adjustments. The contents of a NOPA issued by a taxpayer are prescribed in sections 89F(1) and (3).

60. Section 89F states:

> (1) A notice of proposed adjustment must–
> (a) contain sufficient detail of the matters described in subsections (2) and (3) to identify the issues arising between the Commissioner and the disputant; and
> (b) be in the prescribed form.
>
> …
>
> (3) A notice of proposed adjustment issued by a disputant must–
> (aa) identify the adjustment or adjustments proposed to be made to the assessment; and
> (a) provide a statement of the facts and the law in sufficient detail to inform the Commissioner of the grounds for the disputant's proposed adjustment or adjustments; and
> (b) state how the law applies to the facts; and

(c) include copies of the documents of which the disputant is aware at the time that the notice is issued that are significantly relevant to the issues arising between the Commissioner and the disputant.

61. A NOPA must be in the prescribed form. The taxpayer is required to use a *Notice of proposed adjustment (IR 770)*. This can be found on Inland Revenue's website www.ird.govt.nz In order to support the proposed adjustment in the NOPA, the taxpayer is required to provide a statement of the facts and the law in sufficient detail, state how the law applies to the facts and include copies of the documents that are significantly relevant to the dispute and that the taxpayer is aware when issuing their NOPA.

62. The law requires a statement of the facts and the law in sufficient detail. The term "sufficient detail" is intended to convey a document that contains an adequate amount of analysis of the law and facts relevant to the dispute. This means enough discussion of the law to enable the Commissioner to clearly understand the proposed adjustment.

63. The Commissioner believes that the purpose of requiring the taxpayer to "provide a statement of the facts and the law in sufficient detail" is to ensure that the taxpayer has fully considered an issue before raising it in a NOPA.

64. If the taxpayer provides sufficient information to support the proposed adjustment in their NOPA, this will facilitate a speedy resolution to the dispute, thus also reduce administrative and compliance costs.

Identify the proposed adjustment – Section 89F(3)(aa)

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

- the amount or impact of the adjustment, and
- income year or tax period to which the proposed adjustment relates.

66. The proposed adjustment should be set out as specifically as possible. For example: "increase the 2003 repairs and maintenance expenditure by $3,000"; "increase the deduction from GST output tax by $4,000", etc.

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

Facts

67. This includes for each proposed adjustment the facts relevant to proving all arguments raised in support of the adjustment, including any facts which are inconsistent with any argument previously raised by the Commissioner.

68. It is important for the taxpayer to state all the relevant material facts clearly and with an adequate amount of details. In a taxpayer's dispute, the taxpayer usually has good understanding of the background and the facts. Disclosure of the background and facts at the NOPA phase helps to resolve the dispute at an earlier stage. However, the taxpayer should not overstate the facts with irrelevant detail or repetition.

69. In a complex case, the Commissioner expects the taxpayer to go through the relevant facts step by step. The taxpayer should also assist the Commissioner in understanding the background and the facts to the dispute, so as to facilitate a speedy resolution of the case. It is unhelpful and can cause delay if the Commissioner has to second guess the factual basis of the taxpayer's case.

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

Law

71. This includes for each proposed adjustment the section or sections relied on including where a section has multiple independent parts, the applicable subsection(s).

72. It is important for the taxpayer to include in their NOPA an adequate amount of analysis of applicable legal principles or tests. Where possible these should be supported by case authority with full citations. For example, in a dispute that involves the tax treatment of a trade-tie payment, the taxpayer must apply the legal principles in a leading case such as *Birkdale Service Station v CIR* [2001] 1 NZLR 293. A mere reference to "tax cases on trade-tie payment" in the taxpayer's NOPA will not satisfy section 89F(3)(a). On the other hand, it is not necessary to laboriously describe large numbers of precedent cases.

How the law applies to the facts – Section 89F(3)(b)

73. The legal arguments must be applied to the facts to ensure that the proposed adjustments are not statements which appear out of context in relation to the rest of the documents. The application of the law to the facts must logically support the proposed adjustment and must be stated clearly and in detail.

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

Include copies of the documents in support of the adjustment – Section 89F(3)(c)

75. The taxpayer is required to provide full copies of the documents that are significantly relevant to the dispute and that are known to the taxpayer when the NOPA is issued. This ensures that the Commissioner has all the relevant information necessary to respond to the NOPA.

76. For example:

- A taxpayer proposes an adjustment on GST input tax credits in their NOPA. The taxpayer must provide copies of the relevant tax invoices as documentary evidence in their NOPA.
- A taxpayer's dispute involves a sale of land transaction. The taxpayer must provide copies of the sale and purchase agreement and other relevant correspondence between the vendor and the purchaser as documentary evidence in their NOPA.

77. However, the taxpayer's NOPA will not be invalid by reason of not providing all the documentary evidence in their NOPA. In some cases, new documentary evidence may emerge, as the dispute progresses. For example:

- A dispute involves overseas parties who hold relevant documents outside of New Zealand.
- The documentation is quite old and may have been misplaced.

78. The taxpayer may not be aware of these documents when the NOPA was issued. The Commissioner and the taxpayer can then exchange this new evidence when it becomes known or available.

79. Where the taxpayer is aware of a particular document which is significantly relevant to the dispute, but has difficulty in obtaining a copy of it, the taxpayer should include the following matters in their NOPA:

- The nature of the document and its relevance to the disputes;
- The reasonable steps taken by the taxpayer to obtain a copy of the document; and
- The expected date of making the document available to the Commissioner.

80. However, the practice allowed in the immediate preceding paragraph should not be considered as dispensing with the requirements under section 89F(3)(c). The Commissioner expects the taxpayer to send a copy of the relevant documents mentioned in the taxpayer's NOPA. The Commissioner may reject the proposed adjustments if the taxpayer fails to do so.

Election of small claims jurisdiction of taxation review authority

81. A taxpayer can issue a NOPA to the Commissioner and elect in the NOPA that any unresolved dispute will be heard by the Taxation Review Authority acting in the small claims jurisdiction under section 89E(1)(a), if the following requirements are met:

- The taxpayer's NOPA is issued under section 89D, i.e. in respect of the Commissioner's assessment, a deemed assessment under section 80H or a "disputable decision" (not being an assessment); and
- The amount in dispute is $30,000 or less.

Receipt of taxpayer's NOPA

82. When a taxpayer's NOPA is received, the NOPA will usually be assigned to an actioning officer within five working days of receipt by Inland Revenue. Following receipt, the actioning officer will ascertain and record the following:

- The date of issue of the NOPA, whether the NOPA has been issued within the applicable response period and the date by which a response is required to be issued; and
- The salient features of the NOPA including any deficiencies as to content.

83. Where this is practicable, the taxpayer or their tax agent will be informed within 10 working days that the NOPA has been received by Inland Revenue either by phone call or in writing.

84. However, where the Commissioner is aware of any deficiencies as to the content of the NOPA, the taxpayer or their tax agent will usually be notified of these deficiencies as soon as practicable. They will also be notified of the expiry date of the response period, by which those deficiencies must be rectified in order for the NOPA to be valid. (Note: taxpayers are encouraged to issue their NOPA as soon as they have completed it. This is because if an invalid or deficient NOPA has been issued close to the expiry date of the response period, the taxpayer may not have sufficient time to rectify the invalidity or deficiency before the end of the response period.)

Deficiencies in the contents of a NOPA

85. Where a NOPA has been received and where Inland Revenue considers there are deficiencies (i.e. the requirements under section 89F(3) are not met), the actioning officer will take reasonable steps to obtain the information in the NOPA corrected before the expiry of the response period. The taxpayer will be notified of the need for the additional information and the impending crucial deadlines.

86. If a NOPA is not accepted by the Commissioner because there are deficiencies and the information is not corrected before the response period expires, the taxpayer will be treated as if the dispute has never been initiated (unless a late NOPA is issued and subsequently accepted by the Commissioner under one of the exceptional circumstances under section 89K). The reasons for not accepting the NOPA will be documented and the actioning officer will notify the taxpayer of these reasons in writing within 15 working days from the expiry of the response period for issuing a taxpayer's NOPA.

NOPA issued by a taxpayer outside the applicable response period

87. Unless an "exceptional circumstance" in section 89K arises, the Commissioner will not accept a NOPA issued by a taxpayer under section 89D or section 89DA outside the applicable response period.

Exceptional circumstances under section 89K

88. The legislation defines exceptional circumstances very narrowly. Cases on "exceptional circumstances", such as *Treasury Technology Holdings Ltd v CIR* (1998) 18 NZTC 13,752, *Milburn NZ Ltd v CIR* (1998) 18 NZTC 14,005 and *Fuji Xerox NZ Ltd v CIR* (2001) 20 NZTC 17,470 (CA), are also relevant. For example, a taxpayer's misunderstanding or erroneous calculation of the applicable response period will usually not be regarded as an event or a circumstance beyond the taxpayer's control under paragraph (a) of section 89K(3).

89. Late NOPAs will be accepted only on rare occasions. Some examples of situations that may be considered "exceptional circumstances" beyond the control of a taxpayer are explained in *Tax Information Bulletin* Vol 8, No 3 (August 1996).

90. Section 89K(3) states:

> (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.

91. The exception for lateness as a result of a statutory holiday is self explanatory. The Commissioner can also accept a late NOPA if the Commissioner considers that the lateness is minimal, i.e. the document was only one or two days late. Besides the degree of lateness, the Commissioner will consider the following factors when exercising the discretion under section 89K:

- the date on which the NOPA was issued; and
- the response period within which the NOPA should be issued; and
- the reasons why the taxpayer failed to issue the NOPA within the response period; and
- the compliance history of the taxpayer in relation to the tax type under consideration (e.g. has the taxpayer paid tax late or filed late tax returns, late NOPAs in the past?)

92. For example, a taxpayer issued a NOPA to the Commissioner two days later than the applicable "response period". The taxpayer failed to provide a legitimate reason for the lateness. It was also found that the taxpayer had a history of filing late NOPAs within the minimal lateness allowable (i.e. no more than two days outside the applicable "response period") and had been advised on the calculation of the "response period" on more than one occasion. Although the lateness was minimal on each occasion, the taxpayer's NOPA would not be accepted in this case. This ensures that the exception under section 89K(3)(b)(ii) is not considered to be an extension of the "response period" in all situations.

93. Where an application for consideration of exceptional circumstances is made under section 89K, the reasons for accepting or rejecting it will be documented and the actioning officer will notify the taxpayer of the decision in writing within 15 working days of receipt of the taxpayer's application by Inland Revenue.

94. If the taxpayer's application under section 89K is rejected, the validity of the taxpayer's tax position must nevertheless be considered in terms of the Commissioner's practice on applying section 113. The Commissioner's practice on the application of section 113 is set out in a separate Standard Practice Statement. Also note that the Commissioner's decision under section 89K is not a "disputable decision".

Timeframes to complete the disputes resolution process

95. Once the disputes resolution process has commenced (i.e. where a NOPA has been issued by the taxpayer to the Commissioner and the dispute has not been resolved by agreement between the taxpayer and the Commissioner), where practicable, a time line should be negotiated between the taxpayer and Inland Revenue officers involved to ensure timely and efficient progression of the dispute.

96. Negotiating time lines for the timely resolution of disputes is an administrative practice encouraged by the Commissioner. Inland Revenue officers and taxpayers should endeavour to meet the agreed time lines. Where the negotiated time line cannot be achieved, this will be discussed with the taxpayer with a view to agreeing a new time line. However, failure to negotiate an agreed time line or adhere to the agreed time line will not prevent a case from progressing through the disputes resolution process.

97. In addition to the above administrative practice, the Commissioner is bound by section 89N. The law requires that where the Commissioner and the taxpayer cannot agree on the proposed adjustments, the Commissioner cannot amend an assessment without completing the disputes resolution process, unless one of the exceptions in section 89N applies. These exceptions are explained in the Commissioner's practice as stated in SPS 05/03 – *Disputes resolution process commenced by the Commissioner of Inland Revenue.*

98. Although the adjudication process is not legislated as part of the disputes resolution process, it is the Commissioner's administrative practice to go through the adjudication process for the purpose of resolving a dispute after the statements of position phase, where practicable. However, where the adjudication process cannot be completed (e.g. because the statutory time bar is imminent), the Commissioner can amend an assessment, provided that the taxpayer's statement of position has been considered. This means that Inland Revenue officers should act in good faith and genuinely consider the facts and legal arguments in the taxpayer's statement of position before deciding whether to amend an assessment.

The Commissioner's response to a taxpayer's NOPA: Notice of response

99. If the Commissioner disagrees with the taxpayer's proposed adjustment, then under section 89G, the Commissioner must notify the taxpayer that any or all of the proposed adjustments are rejected by issuing a notice of response ("NOR") within the two-month response period, i.e. within two months starting on the date of issue of the taxpayer's NOPA. The Commissioner interprets this as requiring receipt of the NOR by the taxpayer. For instance, if a taxpayer issues a NOPA on 8 April 2005, the Commissioner must notify the taxpayer of the rejection by issuing a NOR to the taxpayer for receipt on or before 7 June 2005.

100. Where it is practicable (e.g. the issue in dispute is straight-forward), the Commissioner will make reasonable efforts to contact the taxpayer or their tax agent within two weeks prior to the expiry of the response period for the taxpayer's NOPA and advise whether the Commissioner intends to respond to the NOPA by issuing a NOR. Contact may be made by way of a phone call or a letter.

101. The contents of a NOR are prescribed under section 89G(2). The Commissioner must state concisely in the NOR:

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

    (b) why the Commissioner considers those facts and arguments to be wrong; and

    (c) any facts and legal arguments relied upon by the Commissioner; and

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

    (e) the quantitative adjustments to any figure referred to in the taxpayer's NOPA that result from the facts and legal arguments relied upon by the Commissioner.

102. The requirement of quantitative adjustment under section 89G(2)(e) establishes, in the Commissioner's opinion, by how much the taxpayer's adjustment in the NOPA is incorrect. There is no requirement that the amount referred to be exact, however every attempt should be made to ensure that it is as accurate as possible. As the dispute progresses, the amount in dispute may be altered. For example a new figure may be worked out at a conference between the parties.

103. Nevertheless, the Commissioner believes that Inland Revenue has a statutory obligation to inform the taxpayers adequately. In keeping with that obligation, where the Commissioner issues a NOR to reject the proposed adjustments in the taxpayer's

NOPA, the NOR will be relatively brief but at the same time detailed enough to cover all the relevant facts, quantitative adjustments, issues and law.

Deemed acceptance

104. If the Commissioner does not issue a NOR within the two-month response period, the Commissioner is deemed to have accepted the proposed adjustments in the taxpayer's NOPA. Section 89H(2) states:

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

Exception to deemed acceptance

105. Notwithstanding section 89H(2), the Commissioner may apply to the High Court for an order allowing him to issue a NOR outside the two-month response period. Section 89L applies only if an exceptional circumstance applies or has prevented the Commissioner from issuing the NOR to the taxpayer within the response period.

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

> (a) Is an event or circumstance beyond the control of the Commissioner or an officer of the Department that provides the Commissioner with a reasonable justification for not rejecting an adjustment proposed by a disputant within the response period; and
> (b) Without limiting paragraph (a), includes a change to a tax law, or a new tax law, or a decision of a court in respect of a tax law, that is enacted or made within the response period.

107. For example:

- During the applicable response period to a taxpayer's NOPA, a flood occurred and damaged one of the Inland Revenue offices. The taxpayer's NOPA was also lost in the flood. Inland Revenue officers could not obtain another copy of the NOPA within the applicable response period. The absence of information has prevented the Commissioner from forming a view on the subject matter in dispute. The Commissioner may apply for a High Court order under section 89L for further time to issue a NOR.
- In a NOPA issued to the Commissioner, a taxpayer proposes to claim additional tax depreciation on computer software. During the two-month response period, a High Court decision was made in respect of another taxpayer. The High Court held that such depreciation claim amounted to tax avoidance and should be disallowed. The Commissioner may apply to the High Court for further time to issue a NOR to the taxpayer, so as to consider the full effect of the High Court decision.

Implication of section 89J

108. Where the Commissioner accepts or is deemed to accept the proposed adjustments in the taxpayer's NOPA, the Commissioner must include or take account of the adjustments in a notice of assessment issued to the taxpayer. The dispute is brought to an end.

Rejection of the Commissioner's NOR

109. Where the Commissioner has issued a NOR under section 89G to reject the proposed adjustments in the taxpayer's NOPA, the taxpayer must reject the Commissioner's NOR within the applicable response period, i.e. within two months starting on the date of the Commissioner's NOR. Otherwise, the taxpayer is deemed to have accepted the Commissioner's NOR under section 89H(3) and the dispute comes to an end.

110. The Commissioner will make reasonable efforts to contact the taxpayer or their tax agent two weeks prior to the expiry of the response period for the Commissioner's NOR to ascertain whether the taxpayer will reject the Commissioner's NOR in writing. Contact may be made by way of a phone call or in writing.

111. The taxpayer must reject the Commissioner's NOR in writing. Where it is practicable, the taxpayer's rejection will be forwarded to the actioning officer within five working days of receipt by Inland Revenue and will be acknowledged as received within 10 working days.

112. In the case of deemed acceptance (i.e. where the taxpayer has not rejected the Commissioner's NOR in writing), the Commissioner will make reasonable efforts to advise the taxpayer of this within two weeks after the expiry of the response period to the Commissioner's NOR.)

Conference

Conduct of a conference

113. Where a dispute remains unresolved following the taxpayer's rejection of the Commissioner's NOR, the conference phase follows. The Commissioner will usually initiate the conference phase within one month of receipt of the notice of rejection of the Commissioner's NOR. The time suggested for the conference phase is an average of three months. However, the time will vary depending on the facts and the complexity of the specific case.

114. There is no legislative requirement for a conference. The conference phase is an administrative process which aims to clarify and if possible, resolve the issues in the dispute.

115. The conduct of the conference should be as flexible as possible, consistent with the taxpayer's wishes and other factors such as the scope of the audit. Conferences may range from a phone call to several meetings. Discussions in conferences must be recorded or otherwise documented and agreed upon if possible. These may include any agreement on facts, common grounds for the dispute to proceed, timeframes for completing the disputes resolution process and agreed adjustments.

Legal and other advisers attending a conference

116. If a dispute is not settled earlier, the Commissioner and the taxpayer may want to obtain expert legal or other advice. These advisers may attend any meetings in relation to the dispute. The Commissioner accepts that it is appropriate in these circumstances for a certain amount of "back tracking" to take place, i.e. some items already discussed (but which are not agreed in writing or otherwise accepted) between the parties may be revisited by the newly introduced advisers.

Conference not held or abridged

117. The Commissioner considers the conference phase to be an important part of the disputes resolution process.

118. In some circumstances the Commissioner will not hold further discussions or a conference, even though agreement has not been reached post the taxpayer's rejection of the Commissioner's NOR. This does not mean that the disputes resolution process will come to an end, as the disclosure notice and statement of position phase will still be undertaken. Where the dispute is not resolved in the statement of position phase, the Commissioner and the taxpayer will endeavour to have the dispute resolved via the adjudication process.

119. Conferences may not be held or may be abridged in one or more of the following situations:

- There may be revenue losses incurred as a result of delaying tactics used by a taxpayer to frustrate the collection of tax.
- The Commissioner is satisfied that the taxpayer or the taxpayer's agent is acting in a frivolous or vexatious manner. For example where, the taxpayer or their agent is setting unreasonable demands as to the time and place, or terms of such meeting(s), or refuses to conduct themselves reasonably at any meeting.
- The taxpayer contests the Commissioner's policy and it is agreed to disagree, or where it is otherwise agreed that a conference would be of no benefit.
- The taxpayer advises the Commissioner that they do not want a conference to be held.

120. Where it is practicable, the decision whether or not the conference phase will be dispensed with or abridged will be communicated in writing to the taxpayer or their tax agent within seven days of that decision being made. The reasons for the decision not to hold, or abridge, any conference must be documented.

Disclosure notices

121. The Commissioner must issue a disclosure notice under section 89M(1), unless the Commissioner is not required to complete the disputes resolution process under section 89N (as discussed in SPS 05/03 – *Disputes resolution process commenced by the Commissioner of Inland Revenue*). Another restriction on issue of a disclosure notice by the Commissioner is set out in section 89M(2). The Commissioner may not issue a disclosure notice in respect of a taxpayer's NOPA if the Commissioner has already issued a notice of disputable decision that includes or takes account of the adjustment proposed in that NOPA. Sections 89M(1) and (2) state:

> (1) Unless subsection (2) applies, and subject to section 89N, the Commissioner must issue a disclosure notice in respect of a notice of proposed adjustment to a disputant at the time or after the Commissioner or the taxpayer, as the case may be, issues the notice of proposed adjustment.
>
> (2) The Commissioner may not issue a disclosure notice in respect of a notice of proposed adjustment if the Commissioner has already issued a notice of disputable decision that includes, or takes account of, the adjustment proposed in the notice of proposed adjustment.

122. A disputable decision is:

- an assessment; or
- a decision of the Commissioner 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) and (10) and 89N(3).

(Refer to paragraphs 40 to 42 in this Standard Practice Statement.)

123. Where the Commissioner decides to issue a disclosure notice, the taxpayer will usually be advised of this within 2 weeks from the date of the issue of the Commissioner's disclosure notice.

Evidence exclusion rule

124. A disclosure notice is the document that triggers the application of the evidence exclusion rule. The rule restricts what the Commissioner and the disputant may raise as evidence in a court challenge to matters raised in their respective statements of position. (Note that the Commissioner and the taxpayer may refer to evidence that has been raised by either party.) As this is one of the guiding principles of the disputes resolution process, the Commissioner must explain the effect of the evidence exclusion rule and refer to section 138G in the Commissioner's disclosure notice.

125. In a dispute commenced by a taxpayer, section 89M(6B) states that "evidence" in the context of the evidence exclusion rule refers to the available documentary evidence and does not include a list of potential witnesses or types of witnesses. Therefore the identities of both the taxpayer's and the Commissioner's witnesses in sensitive cases will continue to be protected, without undermining the effect of the evidence exclusion rule.

Issue of a disclosure notice

126. It is possible for the Commissioner to issue a disclosure notice at any time on or after the issue of a NOPA by either the taxpayer or the Commissioner.

127. Generally such a notice will be issued after receipt of a NOR and its rejection, following the conference phase and in accordance with the agreed time line between the Commissioner and the taxpayer. Where a disclosure notice is issued earlier (e.g. the facts are clear, the taxpayer agrees, or a conference is not required) the reasons must be documented.

Statement of position

128. Pursuant to section 89M(5), where a taxpayer commences a dispute and the Commissioner issues a disclosure notice, the taxpayer must issue the Commissioner with a statement of position ("SOP") in the prescribed form *Statement of Position (IR 773)* within the response period, i.e. within two months starting on the date of issue of the disclosure notice.

129. Unless an "exceptional circumstance" in section 89K applies, where the taxpayer issues the Commissioner with a SOP outside the response period, the dispute will be treated as if it has not been commenced by the taxpayer. The Commissioner is not required to issue an assessment to include or take account of the taxpayer's proposed adjustments. Section 89M(7)(b) states:

> (7) A disputant who does not issue a statement of position in the prescribed form within the response period for the statement of position, is treated as follows:
>
> …
>
> (b) if the disputant has proposed the adjustment to the assessment, the disputant is treated as not having issued a notice of proposed adjustment.

Contents of taxpayer's statement of position

130. The contents of a SOP are binding. Under the principle of the "evidence exclusion rule" if the matter proceeds to court, the parties are limited to the facts, evidence (excluding oral evidence), issues and propositions of law which are relied on (by either party). The SOP must be in the prescribed form and must contain sufficient detail to fairly inform the Commissioner of the facts, evidence, issues and propositions of law that the taxpayer wishes to rely on.

131. Section 89M(6) states:

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

132. The minimum contents requirements of a SOP are an outline of the relevant facts, evidence, issues and propositions of law. However, to enable the Adjudication Unit to successfully reach a decision, it is important that the SOP contains full, complete and detailed submissions. An outline of frank and complete discussion of the issues, the law, arguments and evidence supporting the arguments is implicit in the spirit and intent of the disputes resolution process.

133. Under the principles of the evidence exclusion rule, arguments and evidence that are not present in the SOP will be excluded from consideration by a court.

134. The list of evidence that is required to be submitted with the SOP does not include a list of potential witnesses. Section 89M(6B) states:

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

135. Therefore, only documentary evidence needs to be listed in the SOP. Witnesses' identities will continue to be protected without undermining the effect of the evidence exclusion rule.

Receipt of taxpayer's statement of position

136. The Commissioner will make reasonable efforts to contact the taxpayer or their tax agent two weeks prior to the expiry of the response period to ascertain whether the taxpayer will issue a SOP in response to the Commissioner's disclosure notice. Contact can be made by phone or in writing. Where the taxpayer has issued a SOP, it will be forwarded to the actioning officer within five working days of receipt by Inland Revenue. Following receipt, the actioning officer will ascertain and record the following:

- the date of issue of the SOP;
- whether the SOP has been issued within two months starting on the date of issue of the disclosure notice; and
- the salient features of the SOP including any deficiencies as to content.

137. Where it is practicable, a taxpayer's SOP will be acknowledged as received within 10 working days of receipt by Inland Revenue. However, where the Commissioner is aware of any deficiencies as to the content of the SOP, the taxpayer or their tax agent will usually be notified of these deficiencies as soon as practicable. They will also be notified again of the expiry date of the response period, by which those deficiencies must be rectified in order for the SOP to be valid and whether the Commissioner intends to issue a SOP in reply to the taxpayer's SOP.

138. Where a SOP has been issued outside the applicable response period, the taxpayer may apply for consideration of exceptional circumstances under section 89K. The reasons for accepting or rejecting the application will be documented and the actioning officer will make reasonable efforts to notify the taxpayer of the decision in writing within 15 working days of receipt of the taxpayer's application by Inland Revenue.

139. As mentioned above, the dispute will be treated as if it has not been commenced by the taxpayer, if they fail to issue a SOP within two months starting on the date of the issue of the disclosure notice and none of the exceptional circumstances under section 89K apply. Where practicable, the Commissioner will make reasonable efforts to notify the taxpayer of this within two weeks after expiry of the response period for the disclosure notice.

Commissioner's statement of position

140. Where the dispute remains unresolved, the Commissioner will usually issue the taxpayer with a SOP in reply to the taxpayer's SOP within the response period, i.e. within two months starting on the date of issue of the taxpayer's SOP.

141. However, the Commissioner may apply to the High Court for further time to reply to the taxpayer's SOP under section 89M(10), provided the application is made before expiry of the response period, and the Commissioner considers it unreasonable to reply within the response period because of the number or complexity or novelty of matters raised in the taxpayer's SOP.

142. Such applications are expected to be rare but may arise where a taxpayer is less than co-operative with supplying information, and/or has failed to maintain proper and adequate records.

143. The Commissioner's 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.

144. Section 89M(4) states:

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

145. In addition to the Commissioner's SOP, it is possible for the Commissioner to provide the taxpayer with additional information in response to matters raised in the taxpayer's SOP under section 89M(8) within two months starting on the date of issue of the taxpayer's SOP. This is intended to cover the situation where the Commissioner has already issued a SOP within the applicable response period and then new evidence becomes available before the expiry of the response period. Any additional information must be provided as far as possible in the same format as the SOP of which it becomes a part.

146. However, in a dispute commenced by a taxpayer, the Commissioner will endeavour to include all the relevant details (including any additional information) in the Commissioner's SOP.

147. It must be noted that the taxpayer does not have a right of reply to the additional information provided by the Commissioner or the Commissioner's SOP, unless there is an agreement between the Commissioner and the taxpayer that additional information will be accepted. (Refer to "Agreement to include additional information" below.)

Agreement to include additional information

148. There is scope to agree to add any additional information to the SOPs. Despite the absence of any statutory time limit, the Commissioner's practice is to allow one month (from the date of the issue of the Commissioner's SOP or the date of the provision of additional information by the Commissioner under section 89M(8)) for such agreement to be reached and information provided. However, this will be applied after taking into account the taxpayer's prior conduct, in particular, whether the taxpayer could have provided the information earlier through the application of due diligence.

149. The Commissioner will also consider the materiality and relevance of the additional information, and its capacity to help resolve the dispute.

150. The primary concern of the disputes resolution process is that both parties apply proper cooperation and due diligence in resolving the matters at issue. Additional information will therefore not be accepted unless proper cooperation and due diligence have been demonstrated.

151. Where a taxpayer requests to have additional information added and the request is declined, the reasons will usually be communicated to the taxpayer or their tax agent. The reasons will also be documented with detailed reference to the taxpayer's conduct, level of cooperation prior to the request and the reason for the information not being provided earlier.

152. Where the additional information is agreed to be added to the SOPs, the agreement will be made subject to the taxpayer agreeing that the Commissioner may include a response to the additional information to the SOP, if required.

Preparation for adjudication

153. Within the disputes resolution process, the role of the Adjudication Unit in Inland Revenue's National Office is to take a fresh look at tax disputes in an impartial and independent manner, and to provide technically accurate decisions. The Commissioner's practice is to refer all disputes to the Adjudication Unit, where practicable. (Please refer to paragraph 154 of this Standard Practice Statement.)

154. Where the dispute commenced by the taxpayer is not resolved after both the taxpayer and the Commissioner have issued a SOP, the taxpayer may challenge the assessment by commencing proceedings in a court or Taxation Review Authority under section 138B(3). In this situation, the dispute will be heard by a court or Taxation Review Authority, rather than going through the adjudication process first.

155. A challenge under section 138B(3) can be made if the Commissioner has, within the applicable response period, rejected the taxpayer's proposed adjustments and does not subsequently issue an amended assessment. Pursuant to section 138B(3)(c), the decision to not issue an amended assessment is a disputable decision which can be challenged. A challenge under section 138C can be made if the Commissioner has, within the applicable response period, rejected the taxpayer's proposed adjustments in respect of the disputable decision.

156. However, where the dispute is referred to the Adjudication Unit in Inland Revenue's National Office, the actioning officer will prepare a cover sheet that will note all documents that need to be sent to the Adjudication Unit.

157. The cover sheet together with copies of the documents (NOPA, NOR, notes of conferences, the taxpayer's SOP, the Commissioner's SOP, additional information, material evidence, including expert opinions or specialist advice obtained, together with a schedule of all evidence held) will be sent to the Adjudication Unit.

158. A letter together with a copy of the cover sheet will be issued by the actioning officer to the taxpayer prior to the submissions and evidence being sent to the Adjudication Unit. The cover sheet and the letter are usually completed within one month from the date of issue of the Commissioner's SOP or the Commissioner's additional information provided under section 89M(8).

159. The purpose of this letter would be to seek concurrence on the material to be sent to the adjudicator—primarily in regard to documentary evidence that has been disclosed at the SOP phase. This letter will allow no more than 10 working days for response.

160. All materials to be forwarded to the Adjudication Unit will usually be forwarded within 12 working days of the issue of the letter to the taxpayer, advising the taxpayer that the materials are being forwarded to the Adjudication Unit.

161. Where an investigation has covered a number of issues, the cover sheet will outline which issues have been agreed upon between the Commissioner and the taxpayer and which issues are still in dispute. The adjudicator is then able to direct their attention to those issues in dispute. The adjudicator will not reconsider those issues that have been agreed upon.

162. The adjudicator usually only considers the material submitted by the Commissioner and the taxpayer. They do not usually seek out further information, although they may consider additional material which is relevant. However, if the additional material was not contained in the Commissioner or the taxpayer's SOP, and the matter proceeds

to litigation, that material cannot be put forward as evidence in court (refer to discussion on the evidence exclusion rule above). The only exception is where the parties to the dispute agree to include it as additional information under section 89M.

Adjudication decision

163. Once the Adjudication Unit has reached a conclusion the taxpayer and the actioning officer will be notified of the decision. The actioning officer will carry out any of the recommendations of the Adjudication Unit and follow up procedures where required. Where applicable, this includes issuing a notice of assessment to the taxpayer.

164. Where a decision is made by the Adjudication Unit against the Commissioner, the Commissioner must follow the Adjudication Unit's decision. The Commissioner is bound by the decision and cannot challenge that decision. The dispute will be at an end.

165. Where a decision is made by the Adjudication Unit against the taxpayer, the taxpayer may challenge the assessment (whether made by the Commissioner or the taxpayer).

166. In a dispute resolution process commenced by a taxpayer, the taxpayer if disagreeing with the Adjudicator's decision, may file proceedings in the Taxation Review Authority (either acting in its general or small claims jurisdiction) or the High Court if one of the following conditions is met:

    - the assessment was the subject of an adjustment proposed by the taxpayer which the Commissioner has rejected (section 138B(3)); or
    - a disputable decision other than an assessment was the subject of an adjustment proposed by the taxpayer that the Commissioner has rejected (section 138C).

167. The taxpayer must file proceedings with the Taxation Review Authority or High Court within the response period, i.e. two months starting on the date of issue of the assessment.

This Standard Practice Statement is signed on 23 March 2005.

Graham Tubb
National Manager
Technical Standards

APPENDIX 1

Disputes resolution process commenced by a taxpayer: indicative administrative timeframes

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

Para in the SPS	Key actions	Timeframes
	The taxpayer's notice of proposed adjustment ("NOPA")	
21,25, 31,38, 44 and 48	Taxpayer's response period to issue a NOPA in respect of an assessment or a disputable decision (not being an assessment).	Within 4 months from the date of the assessment or within 2 months from the date of the disputable decision (not being an assessment).
82	Forward the taxpayer's NOPA and assign it to an actioning officer.	Usually within 5 working days of receipt of the taxpayer's NOPA.
83	Acknowledge the receipt of the taxpayer's NOPA (either by phone call or in writing).	Usually within 10 working days of receipt of the taxpayer's NOPA.
84	Advise that the taxpayer's NOPA is invalid, but the applicable response period has not expired.	Inland Revenue officers will advise the taxpayer or their agent as soon as they become aware of the invalidity.
86	Advise the taxpayer in writing that their NOPA is invalid and that the taxpayer has not rectified the invalidity within the applicable response period.	Usually within 15 working days from expiry of the applicable response period for issuing a taxpayer's NOPA.
93	Consider the application of "exceptional circumstances" under section 89K, where a taxpayer's NOPA has been issued outside the applicable response period.	Usually within 15 working days of receipt of taxpayer's application.
	Commissioner's notice of response ("NOR")	
100	Advise the taxpayer (either by phone call or in writing) whether the Commissioner intends to issue a NOR.	Usually within 2 weeks before expiry of the response period to the taxpayer's NOPA.
99	The Commissioner issues a NOR.	Within 2 months starting on the date of issue of the taxpayer's NOPA.
	Taxpayer's rejection of the Commissioner's NOR in writing	
110	Confirm whether the taxpayer will reject the Commissioner's NOR.	Usually 2 weeks prior to expiry of the response period to the Commissioner's NOR.
109	The taxpayer rejects the Commissioner's NOR in writing.	Within 2 months from the date of issuing the Commissioner's NOR.
111	Forward the taxpayer's rejection of the Commissioner's NOR to the actioning officer.	Usually within 5 working days of receipt of the taxpayer's rejection.
111	Acknowledge the receipt of the taxpayer's rejection of the Commissioner's NOR.	Usually within 10 working days of receipt of the taxpayer's rejection.

112	A taxpayer is deemed to accept the Commissioner's NOR, as the taxpayer fails to reject the NOR within the applicable response period and none of the "exceptional circumstances" apply.	2 weeks after expiry of response period to the Commissioner's NOR.
	Conference phase	
113	Contact the taxpayer to initiate the conference phase.	A conference usually commences within 1 month of receipt of the taxpayer's rejection of the Commissioner's NOR. The suggested average timeframe of the conference phase is 3 months, subject to the facts and complexity of the dispute.
120	Communicate the decision not to hold, or abridge any conference must be documented in writing and conveyed by the Commissioner or agent.	Usually within 7 days from the Commissioner's decision.
	Disclosure notice	
123	Advise the taxpayer that a disclosure notice will be issued.	Usually within 2 weeks from the date of the issue of the Commissioner's disclosure notice.
	Taxpayer's statement of position ("SOP")	
128	The taxpayer must issue a SOP within the response period for the disclosure notice.	Within 2 months from the date of issuing the disclosure notice, unless one of the "exceptional circumstances" under section 89K applies.
136	Confirm whether the taxpayer will issue a SOP.	Usually 2 weeks before expiry of response period to the disclosure notice.
136	Forward the taxpayer's SOP to the actioning officer.	Usually within 5 working days of receipt of the taxpayer's SOP.
137	Acknowledge the receipt of the taxpayer's SOP.	Usually within 10 working days of receipt of the taxpayer's SOP.
137	Advise that the taxpayer's SOP is invalid, but the 2-month response period has not expired.	Inland Revenue officers will advise the taxpayer or their agent as soon as they become aware of the invalidity.
138	Consider the application of "exceptional circumstances" under section 89K, where a taxpayer's SOP has been issued outside the applicable response period.	Usually within 15 working days of receipt of taxpayer's application.
139	A taxpayer is treated as if it has not been commenced at all, if the taxpayer fails to issue a SOP within the applicable response period and none of the "exceptional circumstances" apply.	Usually 2 weeks after expiry of the response period to the disclosure notice.
	The Commissioner's SOP	
140	Issue the Commissioner's SOP.	Within 2 months from the date of issuing the taxpayer's SOP, unless an application to the High Court has been made.
	The Commissioner's addendum	
145	Provide additional information via addendum to the Commissioner's SOP within the response period for the taxpayer's SOP.	Where applicable, within 2 months from the issue of taxpayer's SOP.
148	Consider a taxpayer's request to add additional information to the taxpayer's SOP.	Usually within 1 month from the date of issue of the Commissioner's SOP or the date of issue of the Commissioner's addendum

	Adjudication	
158	Prepare a cover sheet and issue a letter (including a copy of the cover sheet) to the taxpayer to seek concurrence of the materials to be sent to the adjudicator.	Usually within 1 month from the date of issue of the Commissioner's addendum (if any) or within 1 month from the expiry date of the response period for the taxpayer's SOP.
159	The taxpayer responds to the Commissioner's letter.	Within 10 working days from the date of issue of the Commissioner's letter.
160	Forward materials relevant to the dispute to the Adjudication Unit.	Usually within 12 working days from the date of issue of the Commissioner's letter.
	Adjudication of the disputes case.	Usually 4 months from the date of receipt of the dispute file by the Adjudication Unit, subject to the facts and complexity of the dispute.

REGULAR FEATURES

DUE DATES REMINDER

May 2005

20 **Employer deductions**

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

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

31 GST return and payment due

June 2005

20 **Employer deductions**

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

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

30 GST return and payment due

These dates are taken from Inland Revenue's *Smart business tax due date calendars 2004–2005 and 2005–2006*. These calendars reflect the due dates for small employers only—less than $100,0000 PAYE and SSCWT deductions per annum.

INLAND REVENUE NATIONAL OFFICE PO BOX 2198 WELLINGTON TELEPHONE (04) 498 5800