

Resolving tax disputes: a legislative review

A government discussion document

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Chapter 1

OVERVIEW

Introduction

- 1.1 However well developed a tax system becomes, disputes between taxpayers and Inland Revenue over tax liability are inevitable. The environment within which tax disputes are resolved is, therefore, critical to maintaining an efficient tax administration.
- 1.2 This discussion document is the product of the first review of the legislative framework of the disputes resolution process and is primarily concerned with the pre-assessment phase of the process. It introduces for public consultation proposals for further improving the framework.

Policy objective of the disputes process

- 1.3 The objective of the legislative disputes process is to ensure that an assessment is as correct as is practicable and to deal with any disputes over tax liability fairly, efficiently and quickly. The disputes process is designed to achieve these objectives by ensuring a high level of disclosure of relevant information and discussion between the parties, which encourages them to place “all cards on the table”. The procedures require time and effort to be put into cases early in the process before an assessment which would alter a position in a taxpayer’s return is issued.
- 1.4 The overall objectives of the process have, therefore, been to improve the quality and timeliness of assessments and to reduce the likelihood and grounds for subsequent litigation.

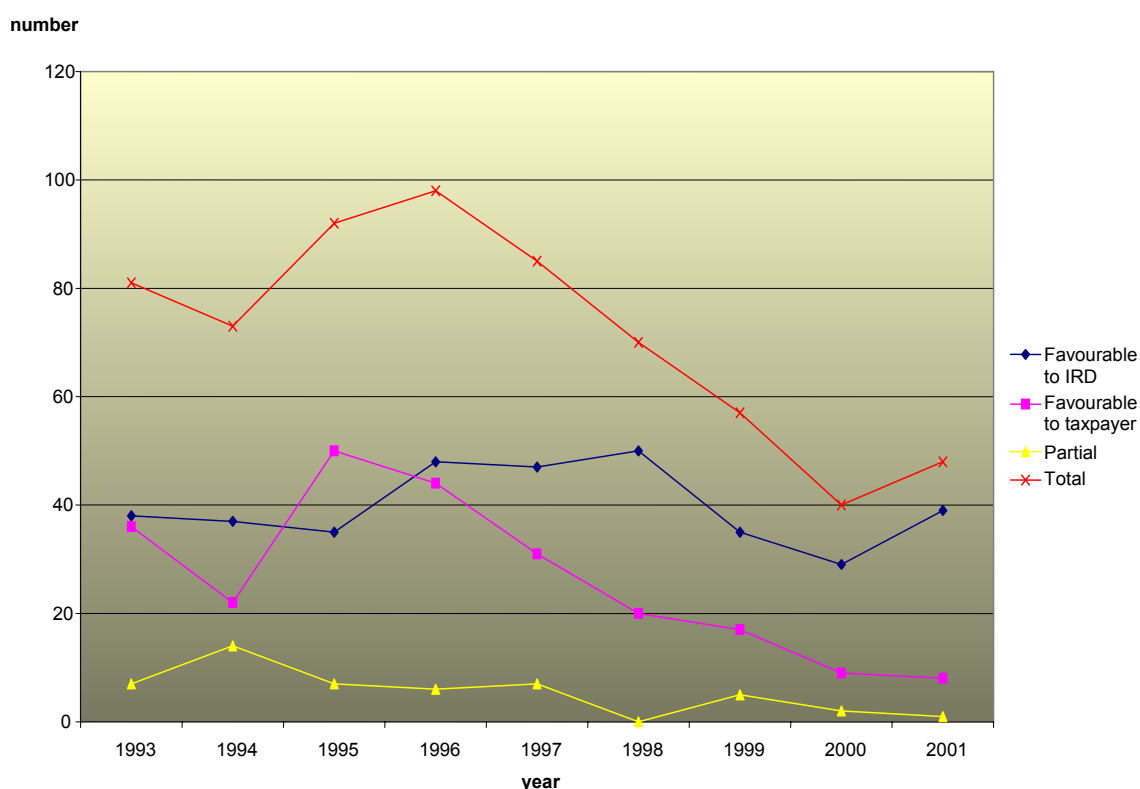
The context of this review

- 1.5 The purpose of this discussion document is to ensure that the government’s objective to make the dispute resolution procedure fairer, faster and generally more efficient is being supported by the legislation. The review will therefore focus on particular ways in which, within this objective, the disputes process can be improved for both taxpayers and Inland Revenue.
- 1.6 The review also provides the first opportunity to address GST issues in the context of developments in tax administration, particularly the recent introduction of self-assessment, which aligned legislation with the practice of taxpayers self-assessing their tax liability.

Is the current process working?

- 1.7 The current process would appear to a significant extent to be meeting its objectives because the number of audited cases that are disputed is decreasing and the cases that are being litigated are also decreasing.
- 1.8 In 1997, the proportion of audited cases giving rise to a dispute was two percent of total cases. This figure dropped to 0.91 percent in 2002.¹ The decrease suggests that the disputes process, combined with Inland Revenue's audit selection process, is reducing the number of disputed cases. This is illustrated in figure 1.

Figure 1: Total results in litigated tax disputes



- 1.9 In 1996, Inland Revenue's Litigation Management unit was established. The unit manages the litigation of disputed tax cases and cases where Inland Revenue's actions are subject to judicial review. Although the number of cases that have proceeded to the disputes phase is lower, it is generally the higher value cases that are being disputed.² In addition, Inland Revenue is increasingly more successful with those cases that are litigated.

¹ Based on data collected by Inland Revenue.

² Inland Revenue Annual Report 2001, for the year ended 30 June 2001, page 94.

- 1.10 These factors indicate that the overall objectives of the disputes process, to improve the quality and timeliness of assessments and to reduce the likelihood and grounds for subsequent litigation, are being met.

The proposals

- 1.11 The discussion document concentrates on further improving the process by ensuring that:
- each step of the disputes process is completed according to the policy intent of the legislation;
 - the documents required throughout the process are drafted to contain relevant information in an efficient way; and
 - legislated time frames are consistent with the objectives of the disputes process.
- 1.12 The disputes process is dependent on an efficient administrative practice. Although this discussion document can improve the framework within which these processes operate, it does not generally address administrative practices. It is therefore important that Inland Revenue also undertakes a review of its administrative practices and policies in relation to the resolution of disputes, which is currently under way.

The scope of the legislative review

- 1.13 As reflected in the structure of this discussion document, the scope of the legislative review covers five broad subject areas:
- the need for Inland Revenue to complete the process as the legislation intended;
 - the content of the Notice of Proposed Adjustment (NOPA), the Notice of Response (NOR) and the Statement of Position (SOP);
 - the increasing incidence of the taxpayer NOPA;
 - the need to align the eight-year refund period with the four-year time bar and associated GST issues; and
 - miscellaneous issues.

SUMMARY OF MAIN PROPOSALS

The main proposals in this discussion document are to:

- clarify that the Commissioner's power to amend an assessment is to be used only in connection with the formal disputes process, except in limited circumstances prescribed in legislation or following an agreed adjustment or other situation in which a NOPA is not required;³
- provide for the ability to simplify the content of the NOPA and the NOR and clarify the role of the SOP;
- provide for the time bar to be suspended for one year, rather than the current six months, when the taxpayer has had difficulty complying with an information request;
- replace the reference to the omission of gross income in relation to the exceptions to the Commissioner's four year statute bar period with a provision which has regard to the conduct of the taxpayer;
- prescribe information that must be contained in taxpayer-initiated NOPAs;
- align the eight-year refund period with the four-year statute bar;
- limit the time in which taxpayers can make GST input tax adjustments to two years, other than when there is an agreed adjustment, and clarify that GST is self-assessed;
- improve the process for test case procedures, so that a case can become a test case before an assessment is issued; and
- repeal the term "disputable decision" to clarify that, other than in specified circumstances, an assessment is the basis of a dispute.

Application date

- 1.14 In general, the proposals in this discussion document will apply in relation to disputes begun on or after the date the amending legislation is enacted.

³ This proposal does not affect the Commissioner's ability to issue an amended assessment without first issuing a NOPA, as prescribed in section 89C Tax Administration Act 1994.

Submissions

- 1.15 The government invites submissions on the proposals in this discussion document. Submissions should be made by 5 September 2003 and addressed to:

Disputes Review
c/- The General Manager
Policy Advice Division
Inland Revenue Department
PO Box 2198
WELLINGTON

or e-mailed to policy.webmaster@ird.govt.nz

- 1.16 Submissions may be published on the website of the Policy Advice Division of Inland Revenue in the interests of making the information widely available.
- 1.17 Submissions should include a brief summary of major points and recommendations. They should also indicate whether it would be acceptable for officials from Inland Revenue to contact those making submissions and to discuss their submission, if required.
- 1.18 A submission may be the subject of a request under the Official Information Act 1982. The withholding of particular submissions on the grounds of privacy, or for any other reason, will be determined in accordance with that Act. If you feel there is any part of your submission that should be properly withheld under the Act, please indicate this clearly on your submission.

Chapter 2

THE DISPUTES RESOLUTION PROCESS

Background to the current disputes process

- 2.1 The disputes process was introduced in 1996 in response to the recommendations of the Organisational Review of the Inland Revenue Department, which was chaired by Sir Ivor Richardson.⁴
- 2.2 The objection procedures at that time were perceived as deficient in that they did not adequately support the early identification and prompt resolution of issues leading to tax disputes. The Richardson Review recommended that a comprehensive approach to tax disputes be developed with the following objectives:⁵
- “• every practical effort be made to ensure that assessments are correct before they are issued;
 - any dispute be identified at the earliest practical time;
 - communication between the taxpayer and Inland Revenue be direct and open to ensure that all information relevant to the dispute is available as soon as possible; and
 - appropriate independent advice within Inland Revenue be provided at the earliest practical time.”
- 2.3 In response, a pre-assessment phase was introduced, comprising a set of prescribed steps to facilitate the “all cards on the table” approach to tax dispute resolution.
- 2.4 This chapter describes in detail the legislative steps that make up the disputes resolution process.

How does a dispute arise?

- 2.5 A dispute may arise when a taxpayer and Inland Revenue have not reached agreement on a tax position taken in a taxpayer’s self-assessment, and often follows an audit of the taxpayer. If no agreement has been reached on some or all of the issues identified, Inland Revenue will begin the disputes process by issuing a notice of proposed adjustment.

⁴ *Organisational Review of the Inland Revenue Department, Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance)* from the Organisational Review Committee, April 1994.

⁵ *Ibid* p 67.

- 2.6 Alternatively, a taxpayer may dispute his or her own assessment or disputable decision made by the Commissioner by issuing a notice of proposed adjustment.

The time bar

- 2.7 The Tax Administration Act 1994 (TAA) imposes time limits for increasing assessments. If a taxpayer has furnished a return and made an assessment, the Commissioner may not amend the assessment to increase the amount assessed if four years have passed from the end of the income year in which the taxpayer provided the return.⁶ The Commissioner is prevented from refunding amounts of overpaid income tax after eight years from the end of the year in which the original assessment was made.⁷ The Commissioner cannot refund amounts of overpaid GST after eight years from the end of the taxable period in which tax was assessed.⁸
- 2.8 The time bar does not apply if the Commissioner is of the opinion that a return is fraudulent, wilfully misleading or does not mention gross income which is of a particular nature or was derived from a particular source.⁹

The disputes process

- 2.9 Once a dispute has begun, the issuing of a correct assessment should proceed through a series of steps prescribed in Part IVA of the TAA.
- 2.10 Once an assessment is issued the challenge process, involving litigation in the courts, as set out in the TAA begins.
- 2.11 The main legislative elements of the pre-assessment phase of the disputes resolution process are:
- Notice of Proposed Adjustment (NOPA);
 - Notice of Response (NOR); and
 - Disclosure Notice and Statement of Position (SOP).
- 2.12 There are also two important administrative phases in the process – the conference and adjudication phases.
- 2.13 The current application of all these elements is explained in more detail below.

⁶ See section 108 and for GST assessments, section 108A TAA.

⁷ See section MD 1(1), Income Tax Act 1994.

⁸ See section 45, GST Act 1985.

⁹ See section 108(2) TAA.

The Notice of Proposed Adjustment

- 2.14 The NOPA is the first formal step in the disputes process.
- 2.15 The content of a NOPA is prescribed in the TAA and must contain sufficient detail to reasonably inform the recipient of:¹⁰
- the items in a disputable decision or a tax return that the issuer of the notice proposes should be adjusted;
 - the tax laws on which the adjustments are based;
 - an outline of the facts giving rise to the adjustments;
 - the legal issues arising in respect of the adjustments;
 - the propositions of law relied on or distinguished in respect of the adjustments.
- 2.16 The purpose of the NOPA is to ensure that the party receiving the notice is aware of the arguments on which the other party is relying. Reducing these points to writing emphasises the need to review the positions of Inland Revenue or the taxpayer and is intended to foster open and frank discussion early in the resolution process in terms of the “all cards on the table” objective. Providing adequate information also ensures that the NOPA can be responded to fully.
- 2.17 The taxpayer may dispute his or her own assessment by issuing a NOPA within two months after the date of the notice of assessment.

Acceptance of Notice of Proposed Adjustment

- 2.18 If the adjustment is accepted in writing, or the adjustment is deemed to have been accepted, because either Inland Revenue or the taxpayer has not responded in time, the disputes process ends and an amended assessment is issued or the assessment stands.¹¹ No further challenge may be made to that adjustment.¹²
- 2.19 A late response by a taxpayer is deemed to have been received within the response period if exceptional circumstances apply. Exceptional circumstances are circumstances that:¹³
- are beyond the taxpayer’s control; and
 - provide reasonable justification for a late response.

¹⁰ See section 89F TAA.

¹¹ See sections 89H and also 89J TAA.

¹² See section 89I TAA.

¹³ See sections 89K and for the Commissioner 89L TAA.

The Notice of Response

- 2.20 If the taxpayer or Inland Revenue disagrees with one or more of the proposed adjustments in a NOPA, the taxpayer must notify the other party by issuing a NOR within two months¹⁴ of the date of issue of the NOPA. The NOR is the vehicle used by the recipient of the NOPA to formally reply to the proposed adjustment.
- 2.21 The content of the NOR is prescribed in the TAA and must:¹⁵
- specify the items in the NOPA that the recipient considers to be in error;
 - specify the tax laws that are relied on;
 - outline the facts contained in the NOPA that the recipient considers to be in error;
 - outline any further facts on which the recipient relies;
 - outline any additional legal issues that the recipient considers arise in respect of the NOPA; and
 - state the propositions of law relied upon in respect of the response notice.
- 2.22 A failure to comply with the content requirements of a NOR may result in deemed acceptance. For example, the NOPA will be deemed to have been accepted if the NOR merely states that the proposed adjustment is not accepted.

Small claims election

- 2.23 A taxpayer may indicate in his or her NOPA or NOR (in a dispute initiated by the Commissioner) that he or she wishes to be heard before the small claims jurisdiction of the Taxation Review Authority (TRA).¹⁶ The TRA's jurisdiction includes the determination of small claims where the facts are clear and not in dispute, the tax to pay or tax effect is below \$15,000 and no significant legal issues of precedent are involved. The taxpayer is bound by the decision of the TRA.
- 2.24 There is also a standard practice statement which outlines Inland Revenue's criteria for settling small, simple disputes and the administrative procedures within Inland Revenue to fast-track them to resolution.¹⁷

¹⁴ The legislation defines "response period". This is two months from the date of issue of the originating document.

¹⁵ See section 89G(2) TAA.

¹⁶ See section 89E TAA.

¹⁷ Standard practice statement INV-140.

Disclosure notice

- 2.25 If the dispute is not resolved because the NOR is not accepted, the Commissioner may issue a disclosure notice. A disclosure notice requires both Inland Revenue and the taxpayer to detail in writing their respective Statements of Position. The disclosure notice is an important document because it triggers the application of the evidence exclusion rule. The evidence exclusion rule limits any challenge by the taxpayer and Inland Revenue to the facts, evidence, issues and propositions of law disclosed in their respective SOPs.
- 2.26 The evidence exclusion rule is subject to a judicial discretion to admit previously undisclosed matters.¹⁸ The applicant must show that he or she could not, with due diligence, have found or discovered this material at the time of delivery of the SOP, and allowing the material is necessary to avoid “manifest injustice.”

The Statement of Position

- 2.27 Each party’s SOP must:¹⁹
- give an outline of the facts on which the party intends to rely;
 - give an outline of the evidence on which the party intends to rely;
 - give an outline of the issues that the party considers will arise; and
 - specify the propositions of law on which the party intends to rely.

Statement of Position in Commissioner-initiated disputes

- 2.28 If the Commissioner initiates the dispute, then the Commissioner must issue a SOP at the same time that a disclosure notice is issued.²⁰ The taxpayer must file his or her own SOP within two months of the disclosure notice.²¹ The taxpayer may apply to the High Court for further time to issue the SOP provided that the taxpayer applies within the same two months and it is unreasonable to reply within that time because the issues in dispute had not previously been discussed.²²
- 2.29 If the taxpayer fails to respond to the Commissioner’s SOP and the taxpayer has not applied to the High Court for more time in which to reply, the taxpayer will be deemed to have accepted the proposed adjustment as detailed in the Commissioner’s SOP or NOPA.²³

¹⁸ See section 138G.

¹⁹ See sections 89M(4) and 89M(6) TAA.

²⁰ See section 89M(3) TAA.

²¹ See section 89M(5) TAA.

²² See section 89M(11) TAA.

²³ See section 89M(7) TAA.

- 2.30 The Commissioner has a right of reply to the taxpayer's SOP²⁴ but must exercise this right within two months of the date of issue of the taxpayer's SOP. Any additional information in the reply then becomes part of the Commissioner's SOP.²⁵

Statement of Position when the taxpayer initiates the dispute

- 2.31 If the taxpayer has initiated the dispute, the taxpayer may issue a statement of position within two months of the date that the Commissioner issues a disclosure notice.²⁶ The Commissioner then has two months to prepare a SOP in reply to the taxpayer's SOP.²⁷
- 2.32 The Commissioner may apply to the High Court for an extension of time to reply to the taxpayer's SOP. The extension may be granted if the Commissioner applies before the expiry of the two-month period in which to respond to the taxpayer's SOP and it is unreasonable to reply within the period owing to the number, complexity or novelty of the matters raised in the taxpayer's SOP.²⁸
- 2.33 The need to apply to the High Court may arise when the taxpayer's SOP refers to facts, issues, evidence or propositions of law that have not previously been disclosed and it is necessary for the Commissioner to obtain and consider these matters.
- 2.34 The taxpayer does not have a right to reply to the Commissioner's SOP. However, the Commissioner and the taxpayer may agree to additional information being added, at any time, to their SOPs.²⁹

Conference

- 2.35 Conferences between the Commissioner and the taxpayer were administratively prescribed following a recommendation by the Richardson Review.
- 2.36 The purpose of the conference, of which there may be more than one, is to facilitate the resolution of any disputed facts and issues that have been raised in the NOPA.
- 2.37 An administrative rather than a legislative process is appropriate because, while the conference phase should be used and encouraged, in limited cases it may not be regarded by the parties as useful and should not, therefore, be mandatory.

²⁴ See section 89M(8) TAA.

²⁵ See section 89M(9) TAA.

²⁶ See section 89M(5) TAA.

²⁷ See section 89M(10) TAA.

²⁸ Ibid.

²⁹ See sections 89M(13) and 89M(14) TAA.

Adjudication

- 2.38 A dispute that is not resolved by the end of the SOP phase is generally referred to the Inland Revenue's Adjudication unit. The function of this unit is to consider the dispute impartially and independently of the audit function.
- 2.39 As the Adjudication unit is a delegated function of the Commissioner, it is not appropriate that it be legislatively prescribed.

Assessment

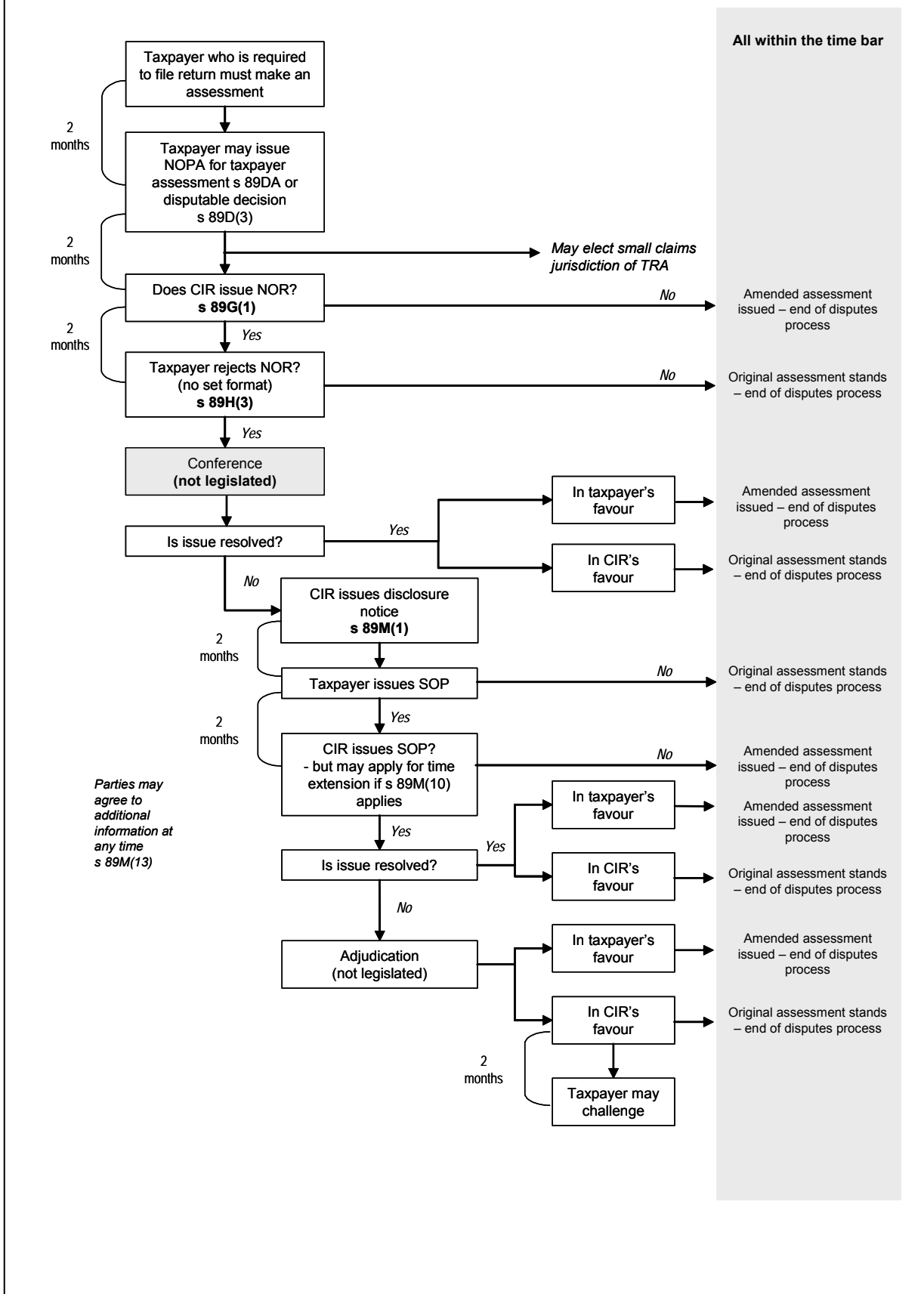
- 2.40 An assessment as amended by the Commissioner is issued after completion of the disputes process, or the original assessment stands.

Post - assessment challenge

- 2.41 A taxpayer is entitled to challenge an assessment by beginning proceedings in a court within the response period.³⁰

³⁰ See section 138B(1) TAA.

Figure 3: Process for a dispute initiated by a taxpayer



Chapter 3

COMPLETING THE PROCESS

Key proposals are to:

- clarify that the Commissioner’s power to amend an assessment is to be used in connection with the disputes process, except in limited circumstances prescribed in legislation, or following an agreed adjustment or other situation in which a NOPA is not required;³¹
- provide for the time bar to be suspended for up to one year when a taxpayer has, for any reason, been unable to comply with an information request; and
- limit the current and proposed time bar waiver periods to the issues that are in dispute.

These proposals will provide greater certainty for taxpayers that they will be given time within the statute bar period to respond to Inland Revenue on the issue in dispute. Current limitations of the time bar waiver procedure will also be removed.

3.1 The most important objectives of the disputes process are to ensure that a dispute is resolved as promptly as possible and that an assessment is correct when it is issued. The various steps in the process are designed to facilitate these objectives. For the majority of disputes, these objectives are being met. In some cases, however, the full disputes process has not been completed as the legislation intended. This may result in the issue of an assessment and ensuing litigation before an attempt has been made to resolve the dispute.

Objectives of the process

3.2 A balance between equity and efficiency requires legislative time limits and other constraints in order to achieve finality in respect of a person’s tax position. In other words, correctly quantifying a tax liability is not an absolute value because it must be balanced against finality and certainty.

3.3 The “all cards on the table” objective brings with it an expectation that the statutory processes will be followed by Inland Revenue. However, each step in the process is quite detailed and resource-intensive, especially if issues are identified late in the process. Although the possible imposition of penalties and, more generally, self-assessment underline the importance of the

³¹ This proposal does not affect the Commissioner’s ability to issue an amended assessment without first issuing a NOPA, as prescribed in section 89C TAA.

taxpayer “getting it right first time”, there will invariably be instances where errors are not discovered until some time after a return is filed.

- 3.4 Ensuring that the process is followed without undermining the equity and efficiency objective is paramount for an effective disputes resolution process. The proposals in this chapter are aimed at further ensuring that this objective is met.

The relationship between the disputes and assessment processes

- 3.5 Recent judicial comment clarified that the statutory power to amend assessments at any time, (now section 113 of the Tax Administration Act) is discretionary in nature and its exercise is, therefore, not mandatory.³² However, the circumstances in which the power to amend assessments should be used are still unclear.
- 3.6 A lack of certainty in the relationship between the Commissioner’s power to amend an assessment at any time, subject to the time bar, and the formal disputes process may reinforce this problem. However, the policy intent is that, other than in the case of an agreed adjustment, the formal process must be followed.
- 3.7 Inland Revenue has issued a Standard Practice Statement (INV-510) “Requests to Amend Assessments”, which states that it is not appropriate for the Commissioner to exercise the discretion to amend an assessment under section 113 if the issue is the subject of a current dispute. An assessment may be amended following the completion of the disputes process, to reflect an agreed adjustment, or other situation in which a NOPA is not required.
- 3.8 Standard Practice Statement INV-510 sets out when Inland Revenue will consider an issue that is likely to be an agreed adjustment. It sets out the types of errors that will be considered and what the taxpayer needs to provide to Inland Revenue for an adjustment to be considered.
- 3.9 The Commissioner’s general power under section 113 to amend assessments could, however, be amended so that its role is made more explicit.
- 3.10 An issue that needs to be addressed is that Inland Revenue is not currently required by the legislation to complete all the steps in the formal disputes process. This is a result of the uncertain relationship between section 113 and the rest of the disputes process.

³² *Ronald George Lawton v CIR* (2002) 20 NZTC 17,531.

Inland Revenue's ability to shorten the process

- 3.11 The case of *PLM Software Limited v CIR*³³ confirmed that failure by the Commissioner to comply with the statutory disputes resolution process does not invalidate an assessment made by the Commissioner. The minimum that is necessary under the legislation is to issue a NOPA. In this case the Commissioner issued a NOPA and shortly afterwards issued an assessment as the time bar was imminent. However, the courts have stated that the legislated disputes process "should be given effect wherever possible".³⁴
- 3.12 The curtailment of the process might occur for the following reasons:
- Inland Revenue runs out of time to complete the process because the investigation was begun late in the process.
 - There have been delays by the taxpayer in providing information leading to a reluctance by Inland Revenue to undertake the next step in the process.
 - The taxpayer requests that the investigator not issue a NOPA until certain issues have been resolved. (Although this may be worthwhile, it may also delay the remaining steps in the process.)
 - The taxpayer is reluctant to grant a time bar waiver. This may be because of the risk that Inland Revenue may find more issues in the extended period relating to the return under review.
- 3.13 In any of these circumstances the Commissioner may decide to issue an amended assessment, but the ability of both sides to resolve the issues before the case goes to Court is reduced.
- 3.14 It is important that the steps in the process are followed wherever practical and that the taxpayer have certainty as to the process. At the same time, however, some of the impediments to achieving this need to be addressed by reviewing the current time bar waiver provision.

Proposed treatment

- 3.15 It is proposed that the Commissioner's power to amend assessments under section 113 of the TAA will, other than in legislatively prescribed circumstances, be restricted to cases where the full disputes process has been followed by Inland Revenue, upon Inland Revenue having made an agreed adjustment or in circumstances where a NOPA is not required.³⁵

³³ (2001) 20 NZTC 17,336.

³⁴ *Alpe v CIR* (2001) 20 NZTC 17,372.

³⁵ See section 89C TAA.

- 3.16 In this context, what is meant by “following the full process” is that, generally, the Commissioner will not be able to simply issue an amended assessment after the issue of a NOPA. Instead, the Commissioner must, after issuing a NOPA, give the taxpayer two months to issue a NOR and two months to issue a SOP (after the Commissioner’s SOP has been issued).
- 3.17 Although reference to adjudication will continue, it will not be legislatively prescribed as it was intended to be an administrative process. This was because it was envisaged that the adjudication function would be set up within Inland Revenue. This function would be separate from the audit function and would have as its purpose “...the provision of an impartial application of tax law and a greater application of technical expertise to the affairs of taxpayers prior to the issue of an assessment.”³⁶
- 3.18 Inland Revenue will not be required to complete the full process in certain exceptional circumstances. These circumstances will be provided for in the legislation and will include:
- disputes involving criminal activity;
 - disputes where the taxpayer and/or person associated with the taxpayer (who is involved in a similar issue to that under dispute with the taxpayer) has begun judicial review proceedings;
 - disputes where the taxpayer has intentionally not complied with information requests made earlier in the process or with statutory obligations required in the revenue acts; and
 - the Commissioner obtaining an order from the High Court providing for more time to complete the process or that the full process need not be followed.
- 3.19 This proposal will not prejudice a taxpayer’s ability to challenge the decision to issue an assessment for any of the reasons described above in the normal manner.
- 3.20 The exception to the process for judicial review proceedings is needed for when the parties’ resources are directed away from progressing the dispute through the process towards addressing the facts and issues in the judicial review application. This exception will not apply to judicial review proceedings that are about the application of the time bar.
- 3.21 An order from the High Court may be sought if the Commissioner considers that there are reasonable grounds, other than those specifically prescribed in the legislation, for not following the full statutory process. The court order would either provide for more time to complete the process or, in exceptional cases, that the full process need not be followed.

³⁶ *Resolving tax disputes: proposed procedures – a Government consultative document*, December 1994, p 19.

- 3.22 The proposals will not alter the current override to the statute bar in cases of evasion and omission of a source of income, although the latter override does need to be reviewed, as discussed at the end of this chapter.
- 3.23 The proposed change will include transitional measures to ensure that audits and disputes that have begun at the time of introduction are not affected by the proposal.
- 3.24 Introducing legislation as a way of further distinguishing agreed adjustments and disputes that require a NOPA to be issued has been considered. However, further legislating for such a boundary would require the introduction of more detailed rules and create levels of complexity that legislation is meant to minimise.

The time bar waiver

- 3.25 A taxpayer may agree to extend the four-year time bar by up to six months if more time is required to complete the process.³⁷ The extension takes the form of a waiver, which must be in the prescribed form and signed and delivered to the Commissioner by the taxpayer before the expiry of the relevant four-year period.
- 3.26 The existing time bar waiver period of six months is problematic because:
- in cases where the lack of time arises owing to the non-compliance for whatever reason by the taxpayer with a request for information, six months is likely to be insufficient to complete a process that is not already substantially under way; and
 - taxpayers are reluctant to grant the waiver because of the risk that Inland Revenue may identify new issues in the waiver period in relation to the assessment in dispute.
- 3.27 Any extension to the four-year time bar would be inconsistent with the objective of early resolution in respect of a taxpayer's tax liability. If the need for a waiver has arisen because the taxpayer has not for any reason complied with an information request by Inland Revenue, it could be argued that an assessment should be issued based on the information available within the statute barred period or the waiver period (if applicable), without further attempts to resolve the issue. This would be unsatisfactory, however, because the Commissioner may not have had the vital information needed to issue a correct assessment. The approach would also be inconsistent with the objective of resolving disputes to avoid litigation.

³⁷ See section 108B TAA.

- 3.28 Non-compliance with a request for information may arise because the information is being sought offshore and is difficult to obtain or the taxpayer is otherwise having difficulties providing the information. In such a case, even assuming that the request for information has been made in the early stages of the dispute, the taxpayer's inability to comply with the request will delay the remaining steps in the process.

Proposed treatment

- 3.29 It is proposed that in this situation the Commissioner will suspend the time bar until the information is provided. However, the total length of time for which the time bar is suspended must not exceed one year.
- 3.30 This provides an additional six-month period to the current six-month period to complete the process, a limited extension that takes into account the fact that the information may never be obtained.
- 3.31 Requests for information made under section 17 of the TAA require a person to provide the information set out in a notice by the Commissioner. The appropriate use of section 17 notices by Inland Revenue should ensure that the extended period is used relatively infrequently.
- 3.32 As with the existing waiver period, the one-year period will be available only with the agreement of the taxpayer, although, as proposed earlier, Inland Revenue may decline to follow the full statutory process if a taxpayer has failed to comply with an information request for reasons other than the inability to do so. At the end of the one-year period, Inland Revenue will be required either to issue the assessment or concede the case.
- 3.33 It is proposed that taxpayers' concerns in relation to the granting of waivers be addressed by limiting the extension to further investigation by Inland Revenue only of issues that had been identified by either party and made known to the other before the waiver was granted. The proposal will also clarify that once a time bar waiver has been granted, it cannot be withdrawn.

Exceptions to the time bar

- 3.34 In terms of section 108(2) of the TAA, an assessment can be amended at any time if the return provided by the taxpayer is:
- fraudulent or wilfully misleading; or
 - does not mention gross income which is of a particular nature or was derived from a particular source.

- 3.35 On a literal interpretation, the second limb to this section would apply regardless of whether or not it was the taxpayer's intention to omit gross income. On the other hand, the section will operate effectively only if Inland Revenue uses the discretion while having regard to the behaviour of the taxpayer and the amount of tax at stake, as was suggested in the case of *Babington v CIR*.³⁸ The application of the provision should, therefore, be clarified.
- 3.36 Another concern with the second limb is that while it refers to omission of income, it does not address a range of other aspects inherent in the calculation of a taxpayer's tax liability, such as the overstatement of deductions.
- 3.37 When section 108(2) was introduced it was based on the taxpayer providing the return and the Commissioner making the assessment. With the introduction of self-assessment, taxpayers must assess their own income tax liability. This leaves taxpayers with the responsibility to ensure their assessment is correct and that they have complied with all obligations imposed on them by the tax laws. The section needs to better recognise the shift to self-assessment.

Proposed treatment

- 3.38 It is proposed that the provision relating to the omission of gross income be removed and replaced with a provision which has regard to the conduct of the taxpayer. This is consistent with other parts of the TAA; for example, in the penalties legislation, the taking of an abusive tax position determines the liability to shortfall penalties.
- 3.39 If the abusive tax position in question resulted from the overstatement of deductions by the taxpayer, it is possible that neither limb of section 108(2) would apply. If it is determined that a taxpayer has taken an abusive tax position it would be appropriate, and more consistent with the general scheme of the legislation, to allow the Commissioner the discretion to extend the time bar. This could be achieved, for example, by amending the second limb to refer to negligence and/or material non-disclosure by a taxpayer, as opposed to fraud as provided for in the first limb.
- 3.40 A provision of this nature would give the greater certainty needed as well as better reflecting taxpayers' obligations under self-assessment.
- 3.41 The government recognises that this objective could be achieved in a number of ways and therefore seeks submissions on how best to give section 108(2) a more coherent focus that is consistent with the Act and taxpayers' obligations under it.

³⁸ [1957] NZLR 861 (CA).

Chapter 4

THE STEPS IN THE PROCESS – NOPAS, NORs AND SOPs

Key proposals are to:

- clarify that the NOPA and NOR may be brief documents and require the arguments in those documents to be relevant to the facts;
- clarify that if a dispute reaches the disclosure notice phase, a disclosure notice is to be issued in every case, other than in exceptional circumstances, regardless of whether the Commissioner or taxpayer initiated the dispute; and
- clarify that the SOP contain a list of potential witnesses and a brief description of the witness evidence.

These proposals are intended to ensure that the costs incurred in preparing the various documents are no greater than is necessary for the particular case.

4.1 The disputes process is designed to achieve a high level of disclosure of relevant information and discussion between the Commissioner and taxpayers. Although the process generally achieves this objective, the documentation required at the various stages could be improved in a number of respects. This chapter examines the steps in the process and contains proposals that further ensure that the process is efficient and cost-effective.

Content of NOPAs and NORs

4.2 The current effect of the NOPA and NOR documents is that costs are incurred early in the process because relatively detailed information is required at these stages. The costs are a natural consequence of the time and effort it takes both Inland Revenue and the taxpayer to produce the documents to the standard stipulated in the legislation.

4.3 A certain amount of criticism has been directed at the extent of these costs along the following lines:³⁹

- “ • The process, involving the issue of a NOPA, NOR, conference phase, disclosure notice, statement of position and reference to Adjudication is extremely cumbersome and costly.

³⁹ *Protecting the integrity of the Tax Act: the practitioner's perspective*, 2002 ICANZ Tax Conference, 11 & 12 October 2002, John Shewan; PriceWaterhouseCoopers.

- For most taxpayers, unless the numbers involved are significant, the burden and resulting cost of participating in the dispute resolution process is sufficient to dissuade them from proceeding.
- The time required to move through the dispute resolution process, particularly the delay between the issue by the taxpayer of a response notice and the issue by the Commissioner of a disclosure notice and statement of position, is such that Inland Revenue is forced to issue an assessment to avoid the period becoming statute-barred.”

4.4 Some observations that can be made on these comments in light of the objectives of the disputes process are:

- For either party, the expense and time in preparing the documents should be relative to the amount of tax in dispute.
- Neither party should be placed in the position of having to prepare documents that are more detailed than necessary when the facts and legal arguments in support of their position are relatively persuasive.
- On the other hand, the objective of the disputes process is to identify and/or resolve the dispute early, which necessitates the provision of a certain level of detail.
- In addition, a certain level of disclosure assists in ensuring that both parties adopt a level of caution before advancing to the disputes stage, so that only genuinely arguable cases are taken.
- The small claims process (discussed in chapter 8) is available to reduce the costs in relation to cases that do not warrant the full process.

4.5 Thus, while a certain level of detail will always be needed in NOPAs and NORs in order to achieve the early resolution of disputes, this detail should be no greater than is necessary in each given case.

4.6 This should, to a large extent, be dealt with administratively by ensuring that the level of detail is appropriate to the case at hand and providing a summary of facts and legal arguments. To complement this, this chapter proposes changes to the legislation to better reflect what is intended to be achieved with NOPAs and NORs.

Proposed treatment

4.7 It is proposed that the content of a NOPA contained in the current legislation be prescribed in the following terms:

- the proposed adjustments to be made to the assessment;
- an outline or brief statement of the facts and legal arguments which give rise to the need for adjustment;

- the tax law relied on; and
 - an outline or brief statement as to how the legal arguments apply to the facts.
- 4.8 Although this prescription retains the substance of the existing requirements, it clarifies that the NOPA may be a brief document. It also removes language such as “propositions of law relied on or distinguished” which overly formalises the required content of the NOPA and therefore reduces the flexibility to adapt the style of the document to the particular circumstances of each case.
- 4.9 The proposed requirement that the legal arguments are applied to the facts will ensure that the proposed adjustment is not a statement which appears out of context in relation to the rest of the document but is, rather, a logical conclusion.
- 4.10 It is proposed that the content of a NOR be similarly prescribed in the following terms:
- an outline or brief statement of the facts and legal arguments in the NOPA that are in error;
 - any alternative facts or legal arguments to be considered;
 - an outline or brief statement as to how those facts apply to the arguments; and
 - reasons for rejection of the NOPA.
- 4.11 This would, again, reduce the formality of the existing language as it appears in the legislation and both allow some flexibility in the precise style of document used and keep the statement of facts in context. It would also clarify that the NOR is confined to the adjustments proposed in the NOPA.
- 4.12 These changes recognise that, where possible, a dispute should be resolved at an early stage, without unnecessary cost and resource expended. They also recognise that not all disputes can be resolved at an early stage, and more cost and resource will be involved to progress the dispute to the more detailed statement of position phase. If this is the case, regular communication with the taxpayer is recommended as noted in the government’s most recent discussion document on the compliance and penalties legislation.⁴⁰ The intended effect of this communication is to assure the taxpayer that Inland Revenue is still trying to resolve the issue, and the matter is progressing.

⁴⁰ *Taxpayer compliance, standards and penalties: a review – a Government discussion document*, August 2001, p 46.

Content of the SOP

- 4.13 If a dispute has not been resolved at the NOPA and NOR stage it will progress to the SOP stage. The SOP forms the basis for a challenge so it is an important document containing much of the detail of the dispute, and a corresponding amount of time must be put into ensuring that the document is as complete and thorough as possible.
- 4.14 The relative importance and the purpose of the SOP, as compared with those of the NOPA and NOR, is not clearly provided for in the legislation as the language is very similar to that provided for in the NOPA.
- 4.15 The SOP should be the document that reflects a detailed analysis of the dispute. It is appropriate that the SOP should be a more considered document than the NOPA and NOR because:
- at that point there is a significantly greater likelihood that the dispute will proceed to litigation; and
 - as the dispute progresses so will the disclosure of information and argument as their relevance becomes more apparent.
- 4.16 It is at the SOP stage of the process where the disclosure notice triggers the evidence exclusion rule. If a disclosure notice is not issued the evidence exclusion rule cannot be relied on.

Proposed treatment

- 4.17 The intended importance of the SOP is already signalled in the existing legislative requirements. However, the current requirements could be improved by:
- clarifying what must be disclosed by way of evidence to be relied on at the hearing, including the extent to which witnesses must be identified; and
 - clarifying that a disclosure notice must be issued in every dispute except in the limited circumstances where the full process is not required to be completed, as discussed in chapter 3.

The evidence required in the SOP

- 4.18 The 1994 government consultative document on proposed procedures for resolving tax disputes stated that “the reference to ‘evidence’ in the SOP context is not intended to require the exchange of full briefs of evidence or exhaustive lists of documents. Rather, it is intended to ensure that both

parties have an appreciation of the availability of evidence on the factual issues in dispute.”⁴¹

- 4.19 This objective remains valid. The evidence exclusion rule is generally perceived as working effectively for both parties. The policy intent of “fairly informing the other party of the issues, facts, evidence and law” is generally well reflected in the legislation and in practice.
- 4.20 A practical issue, however, is the extent to which the legislation requires each party to provide as part of the SOP, and hence be effectively bound by, a list of witnesses. In this respect it is important to recognise the role of the pre-trial stage where strategies will be developed by either party in relation to the presentation of the case. Given the role of the pre-trial stage, it is practical only to require that parties provide in the SOP a list of potential witnesses or types of witness, without necessarily naming the witnesses, and a brief description of the intended nature of their oral evidence.
- 4.21 This would involve a minor legislative clarification only and would not detract from the purpose of the evidence exclusion rule, which is about the nature of the evidence to be given rather than on how that evidence is to be presented.
- 4.22 The main circumstance in which it may not be appropriate to issue a disclosure notice is when a witness needs to be protected, or the name of a person who will give expert evidence is not known at the time. Providing for information in relation to witnesses in more general terms should overcome this problem without detracting from the purpose of the evidence exclusion rule. The legislation can, therefore, be clarified to make the issue of a disclosure notice mandatory, except in disputes where the Commissioner is not required to complete the process, as discussed in chapter 3.

Introducing a time frame for the Commissioner to issue a SOP

- 4.23 Some commentators have suggested that the Commissioner should be required to issue a SOP within a legislated time frame.⁴² One reason given for this is that the taxpayer is limited to two months to prepare a SOP. However, there is provision in the legislation for a time extension to the two-month period at the SOP stage for the taxpayer if the issues in dispute had not previously been discussed between the Commissioner and the taxpayer. The Commissioner may also correspondingly apply for a time extension if it is unreasonable to reply within the response period because of the complexity of issues raised in the taxpayer’s SOP.⁴³

⁴¹ *Resolving tax disputes: proposed procedures – a Government consultative document*, December 1994, p 23.

⁴² Above n 39.

⁴³ See sections 89M(10) and 89M(11), Tax Administration Act 1994.

- 4.24 The main reason that the legislation does not prescribe a time frame for SOPs initiated by the Commissioner is that there needs to be adequate time allowed to determine whether the issue is able to be resolved before litigation. This includes allowing sufficient time for the conference phase, which is an important administrative part of the disputes process.
- 4.25 In an efficiently managed case, excessively rigid time frames may, in fact, signal to the taxpayer that Inland Revenue is focused on meeting the statutory phases of the dispute rather than on taking the time to resolve it.
- 4.26 Although introducing more time limits at the SOP stage would provide taxpayers with more assurance as to how their dispute is progressing, this can also be achieved administratively through greater contact with the taxpayer and the provision of guidelines as to likely time frames. This is consistent with the government's recommendations in the most recent discussion document on the compliance and penalties legislation,⁴⁴ and Inland Revenue's recent standard practice statement (INV-170).

⁴⁴ Above n 40, p 46.

Chapter 5

DISPUTES INITIATED BY THE TAXPAYER

Key proposals are to require taxpayers to:

- supply to the Commissioner detailed information to support a proposed adjustment under a taxpayer NOPA; and
- signal in their return whether they intend to issue a NOPA to their self-assessment when they are aware that they are likely to be doing so.

These proposals ensure that taxpayers will be able to continue to issue a NOPA to their self-assessment but that, in turn, administrative costs for Inland Revenue will be lowered as the detail of the issue is identified, and notice given of the NOPA in relevant cases, at an earlier stage.

- 5.1 When the disputes rules were being developed, the government of the day considered that taxpayers should be able to issue a NOPA to an assessment, in circumstances such as where Inland Revenue had issued an assessment without first issuing a NOPA. For example, Inland Revenue might issue an assessment if it was considered that the return contained a simple mistake. The mistake would be corrected and an assessment issued. The taxpayer might, however, be dissatisfied with the outcome. It was considered that the taxpayer should have access to the disputes procedure, rather than pursue the issue through the court system, which is costly and time-consuming.
- 5.2 A taxpayer has a statutory obligation to correctly determine the amount of tax payable if a self-assessment is required.⁴⁵ Therefore taxpayers' ability to amend their own assessments might be seen as inconsistent with the necessary element of finality that characterises an assessment.
- 5.3 The original objective of allowing taxpayer-initiated NOPAs could, therefore, be regarded as limited to the exceptional circumstances of:
- the taxpayer disagreeing with a matter that the Commissioner has regarded as straightforward; or
 - the taxpayer having genuinely, despite his or her best attempts to correctly determine the tax liability, made an error in the return.

⁴⁵ See *Legislating for self-assessment of tax liability: a Government discussion document*, August 1998, and reflected in sections 15B (aa) and 92 TAA 1994 with application to the 2002-03 and subsequent income years.

- 5.4 This is not the way that the taxpayer-initiated NOPA process is necessarily being applied by taxpayers. Instead, it is often being seen as a way of raising a new issue with Inland Revenue in a manner that will ensure that penalties are not imposed.
- 5.5 The wider use of taxpayer-initiated NOPAs has both advantages and disadvantages which need to be further considered.

The advantages of taxpayer-initiated NOPAs

- 5.6 An advantage for taxpayers in being able to dispute their assessment is to eliminate their exposure to shortfall penalties. At present, a taxpayer can file a return on a conservative basis and then file a NOPA on a less conservative basis. As penalties are calculated by reference to the tax position taken in a self-assessment, rather than in a NOPA, the risk of shortfall penalties applying is reduced. For Inland Revenue, the fact that taxpayers can issue a NOPA to their own assessment may mean that issues are identified without the need for investigation and Inland Revenue has the necessary information to resolve them.
- 5.7 Therefore, an advantage of the taxpayer-initiated NOPA is that it provides an opportunity to address an issue before an investigation, which is consistent with the objective of the early resolution of disputes.

Disadvantages of taxpayer-initiated NOPAs

- 5.8 On the other hand, the disadvantages of taxpayer-initiated NOPAs are:
- their potential inconsistency with the objective of self-assessment, which is to correctly determine the amount of tax payable in an assessment; and
 - as a related issue, Inland Revenue's inability to be aware of the extent to which taxpayer-initiated NOPAs are likely to be issued and hence the extent to which it can determine in advance the resources that will be required to respond to them.

Proposed treatment

- 5.9 If the wider use of the taxpayer-initiated NOPA is to continue, the benefits of this wider use will need to be more certain in practice. Although the theoretical advantage of the taxpayer-initiated NOPA is that Inland Revenue obtains the necessary information that may be pertinent to an assessment, it would seem that the extent of the information that is currently provided in these circumstances varies significantly.

- 5.10 It is therefore proposed that the wider use of the taxpayer-initiated NOPA continue but, in addition to the information that will be required in the NOPA, as proposed in chapter 4, the legislation will be amended to require the taxpayer to supply to the Commissioner detailed information to support the NOPA, such as:
- detailed and clear statements as to the facts and legal arguments that give rise to the proposed adjustment; and
 - all material documentary evidence to support the adjustment.
- 5.11 The main advantage of this proposal is that, because of the greater level of detail that will be required, potential disputes may be resolved at an earlier stage (ideally without the need for further investigation).
- 5.12 From Inland Revenue's perspective, the taxpayer's NOPA will usually be the first time it becomes aware of the issue in question. As noted earlier, the unrestricted use of the taxpayer-initiated NOPA may make the disputes process difficult for Inland Revenue to manage, particularly given the constraints of the two-month period to issue a notice of response.
- 5.13 This problem will be alleviated by Inland Revenue's ability to issue briefer notices of response, as outlined in chapter 4, and by the greater level of detail proposed for a taxpayer NOPA, which will better ensure that taxpayers advance only genuinely arguable cases.
- 5.14 It is also proposed that taxpayers who are aware at the time they file their return that they will be issuing a NOPA in relation to that return, be required to signal that intention in the return. This proposal will give Inland Revenue advance notice that there is an issue and will therefore assist in the management of resources. The proposal will not prejudice taxpayers' ability to NOPA their self-assessment within two months if they have not signalled in their return their intention to issue a NOPA.
- 5.15 As indicated in the government's discussion document *Legislating for self-assessment of tax liability*, taxpayers will continue to be limited to a two-month period to issue a NOPA to their self-assessment. Extending the period would be inconsistent with the objective of self-assessment.

Chapter 6

TIME FRAMES

The key proposal is to limit the eight-year refund period to the statute bar period of four years.

This proposal creates greater consistency with time frames for amendment and, more generally, with the objective of earlier certainty.

Four-year time bar

- 6.1 If a taxpayer furnishes an income tax return and an assessment has been made and four years have passed from the end of the income year in which the taxpayer provided the return, the Commissioner may not amend the assessment to increase the amount assessed.⁴⁶ This four-year time bar does not apply in cases where the Commissioner is of the opinion that a return provided by a taxpayer is fraudulent or wilfully misleading or does not mention gross income of a particular nature or source. GST has a similar time bar. The time bar may also be waived by the taxpayer for up to six months in order to resolve a dispute.
- 6.2 Time frames provide certainty and finality in respect of a person's tax position. The finality provided by the four-year statutory time bar is emphasised by the courts as central to tax administration so that after the stipulated period of time taxpayers and Inland Revenue may close their books and dispose of their papers.⁴⁷

Eight-year refund period

- 6.3 If tax has been paid in excess, the excess amount is refunded to the taxpayer. The refund cannot be made after eight years from the year in which the original assessment was made.
- 6.4 The refund period was aligned with the time bar (four years) in 1944. At the time it was considered that there was no reason why the time within which a taxpayer has a right to claim a refund should not be the same as the time within which an assessment could be amended. The refund period was increased to six years in 1957, with the introduction of PAYE, in recognition of the possibility that employers could make mistakes in their calculations. It was increased to eight years in 1968, where it remains today.

⁴⁶ See section 108 TAA 1994.

⁴⁷ *Lloyds Bank Export Finance v CIR* [1992] 2 NZLR 1,6 (PC).

- 6.5 These long periods for refunds were established in an era when the administrative environment was based on assessments carried out by the Commissioner. Departing from four years for a refund was aimed at ensuring taxpayers were not unduly prejudiced by any errors made by employers or the Commissioner when the PAYE scheme was introduced, as systems were not computerized.
- 6.6 In today's commercial environment an eight-year period is inconsistent with the aim of both the disputes resolution process and self-assessment: ensuring that finality in, balanced with a full consideration of, a taxpayer's tax position is reached at the earliest practicable stage.

Proposed treatment

- 6.7 It is proposed that the refund period for income tax and GST be subject to the four-year statute bar for amending assessments. The proposal will remove any doubt about time frames as, currently, the refund period of eight years and the time bar of four years may conflict with each other and create uncertainty as to the finality of a taxpayer's assessment.

Rebates

- 6.8 Currently, taxpayers have eight years within which to claim a rebate. This was intended to align the rebate period with the current refund period. Given the proposal in this discussion document to match the refund period with the four-year time bar, it would be appropriate to similarly align the rebate period with the four-year time bar.

Taxpayer's obligations to keep records

- 6.9 The TAA requires that a business retain records in New Zealand for a period of at least seven years after the end of the income year to which those records relate.⁴⁸ Whether this seven-year period should remain will be considered separately once the outcome of this review is determined.

⁴⁸ See Section 22 TAA.

Chapter 7

TIME FRAMES AND GST

Key proposals are to:

- limit to two years the period for which taxpayers are able to make late claims for input tax adjustments, other than where there is an agreed adjustment; and
- legislate more explicitly that GST is a self-assessed tax.

These proposals provide certainty for taxpayers when late claims for input tax credits are made and reduce the revenue risks of the current uncertain time frames.

- 7.1 Taxpayers assess their own GST liability and pay GST at the time a return is made. The Commissioner is required to make an assessment only if a taxpayer has failed to file a return, or if the Commissioner is dissatisfied with a taxpayer's return, or if asked to do so by a taxpayer. The Commissioner cannot increase a tax assessment or make an assessment after four years from the end of the GST return period in respect of which the GST tax return was provided or assessment made.⁴⁹
- 7.2 Registered persons must calculate the tax payable by them under the GST Act. Output tax must be attributed to a taxable period and in calculating the amount of tax payable in each taxable period a registered person must deduct from the amount of output tax the amount of input tax credits allowed. The taxable period within which output tax and input tax is attributed is dependent on the accounting basis of the registered person. If a taxpayer uses the invoice or hybrid basis of accounting for GST, output tax is attributed to the period in which the supplies are made determined under the time of supply rules. If the payments basis is used, output tax is attributed to each period in which payment is received.

Time frames for making and amending assessments

- 7.3 Currently, if a registered person has paid excess GST and an assessment has been made, the Commissioner may refund the tax, provided that eight years have not passed after the end of the taxable period in which the tax was assessed.

⁴⁹ See section 108A TAA.

- 7.4 It is unclear, however, how the time bar provisions in the Tax Administration Act and the refund provisions in the GST Act apply to situations where:
- a registered person is not satisfied with a return and requests the Commissioner to amend the return; and
 - no assessment has been made by the Commissioner.
- 7.5 It is clear that time limits for amending a GST liability apply when an assessment has been made by the Commissioner.

Proposed treatment

- 7.6 It is proposed that the GST Act be amended to provide more expressly for GST self-assessment, in line with the legislation that has introduced self-assessment for income tax.
- 7.7 This will formalise the treatment of GST as being self-assessed. The Commissioner's power to make initial assessments will be restricted to the making of a default assessment. The Commissioner will be able to amend assessments after taxpayers have made the initial assessment of their tax liability.
- 7.8 Initial and amending assessments will be restricted to the four-year statutory time bar period.
- 7.9 This proposal, combined with aligning the eight-year refund period with the four-year time bar, as discussed in chapter 6, will help to clarify the time frame issue when seeking a GST adjustment that is agreed between the taxpayer and the Commissioner.

Adjustments for input tax

- 7.10 The Commissioner may not make or amend an assessment to increase a GST liability if four years have passed from the end of the return period in respect of which the taxpayer's GST return was provided or assessment made.⁵⁰ On the other hand, under section 20(3) of the GST Act, taxpayers may have an unlimited time in which to claim input tax credits which have not been previously deducted. The adjustment may be made in current period returns. There is no clear differentiation for these adjustments between those that would be disputed by Inland Revenue and those that would be agreed adjustments.

⁵⁰ See section 108A TAA.

Proposed treatment

- 7.11 In cases where the amendment sought by the taxpayer may give rise to a dispute, the general period for raising a NOPA is two months after the self-assessment. The government recognises that claiming GST input tax credits may depend on the taxpayer's ability to obtain a tax invoice, so a longer period of two years would be more appropriate in these cases. A two-year period is also consistent with business practice, which often involves the annual reconciliation of GST against financial accounts.
- 7.12 Adjustments agreed between the Commissioner and the taxpayer, including those for simple or obvious mistakes and oversights, could, under the general time frame proposed for refunds, be made within four years of the return being furnished and assessment made.

Chapter 8

OTHER ISSUES

Key proposals are to:

- remove the term “disputable decision”, which now encompasses an “assessment” in recognition that, other than in specified circumstances, an assessment is the basis of a dispute;
- extend the application of the test case procedures so they can be used earlier in the disputes process, rather than only in the context of challenging an assessment through court proceedings; and
- ensure that the fast-tracking procedure to resolve small disputes is used in appropriate cases.

Disputable decision

- 8.1 When the disputes legislation was being introduced the government of the day considered that some determinations made by the Commissioner were so closely associated with quantifying a person’s tax for a year that they required objection rights. These decisions were not necessarily represented in an “assessment” so were included in the disputes procedures by the use of the term “disputable decision”.
- 8.2 The term “disputable decision” is defined to mean an assessment and particular decisions made by the Commissioner under tax laws such as loss determinations, which may not be represented in an assessment. The definition has been widely drafted, leading to arguments that all decisions made by the Commissioner could be “disputable decisions”, which are subject to the disputes process.

Proposed treatment

- 8.3 Because of the uncertain ambit of the term, it is proposed to repeal the references to “disputable decision” and replace them with the term “assessment.” This recognises that in most circumstances it is the assessment that forms the basis of a dispute.
- 8.4 However, there may still be particular circumstances that require dispute rights when no “assessment” is issued in respect of a taxpayer – for example:

- a decision that determines a person’s tax status, such as whether a taxpayer is an “employee” or an “independent contractor”, which is relevant to the application of the PAYE rules and the person’s ability to claim deductions; and
- when an assessment is issued to a person other than the person wishing to dispute the assessment. If a mortgagor’s goods are sold, GST payable on the supply is paid by, and the assessment issued to, the mortgagee, not the mortgagor, who may wish to dispute the assessment.

8.5 These circumstances would need to be specifically provided for to allow them to be disputed through the disputes process.

Test cases

8.6 Test case procedures apply only when a matter reaches the court proceedings stage. This is because in order to prevent the time bar running, an assessment must be issued before a case can be designated as a test case. In some circumstances, such as where a large number of taxpayers are involved in a particular investment product, the inability to designate a case as a test case earlier in the process can result in excessive administrative and compliance costs.

Proposed treatment

8.7 It is proposed that test case procedures be available in respect of the dispute resolution rules as well as in relation to the challenge rules.

8.8 Court proceedings may be stayed where a test case is likely to determine all or most of the issues in a group of similar cases,⁵¹ as the statute bar rules do not apply in relation to matters put before the courts for final determination.

8.9 Groups of cases that share similar facts or questions of law should be able to be progressed through the disputes procedures depending on the outcome of a representative or test case, just as is possible in relation to court proceedings.

8.10 In that case, the statute bar would be suspended while the test case is progressed so as not to prejudice taxpayers whose cases are dependent on the test case. This would provide an equivalent treatment for the exception to the statute bar rules provided in respect of court proceedings.

8.11 The Commissioner will not be required to obtain the taxpayer’s consent to stay the taxpayer’s dispute. However, the same safeguard that applies to taxpayers in the challenge rules to seek a hearing despite the stay, will also apply in respect of the dispute rules. When the taxpayer’s case raises

⁵¹ See section 138Q TAA.

additional issues to those in the test case it will be made clear that these will be treated independently.

Fast-tracking small disputes

- 8.12 A taxpayer is entitled to elect to have a dispute heard by the small claims jurisdiction of the Taxation Review Authority (TRA). This election can be made in the taxpayer's NOPA or NOR. Alternatively, an administrative procedure for fast-tracking small disputes, based on the TRA criteria of a small, simple dispute is available. This process is detailed in standard practice statement INV-140 "Fast tracking small simple disputes".
- 8.13 The disputes process should be flexible to cater for all types of tax disputes, including small disputes that are capable of being resolved quickly. The options for resolving small, simple disputes do not appear to be sufficiently widely used.

Proposed treatment

- 8.14 The small claims procedure is in place to facilitate the resolution of small, simple disputes. The current complexities in the fast-tracking procedure can be addressed by reviewing the administrative guidelines for using the process. Greater availability and use of this procedure will further promote the objective of resolving disputes quickly so as to reduce any unnecessary complexity in the system.