New Zealand's Tax Dispute Procedure - Time for a Change

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Comment: New Zealand's Tax Dispute Procedure — Time for a Change

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Criticism is growing that the tax disputes procedure is too lengthy and costly. While fewer substantive cases are reaching the Courts, procedural disputes have greatly increased. Amendments to the disputes procedure in 2003, including the introduction of s 89NTax Administration Act 1994 requiring disputes to reach the Statement of Position stage, have failed to address the problems. A joint submission by the New Zealand Law Society and the New Zealand Institute of Chartered Accountants concludes that "the current disputes procedure is an abject failure … [and] fails the majority of taxpayers" and therefore "fundamental changes are necessary to make the disputes resolution procedure achieve their objectives and operate in a workable way".

This comment reviews a number of the current issues with the disputes procedure, examines recent developments and addresses the concerns raised by critics. It then discusses a number of reform proposals and concludes that the current procedure is flawed, being too lengthy, costly and may cause taxpayers to abandon their dispute. Finally, it proposes that tax disputes be resolved under a similar regime to the successful and efficient family and employment law dispute regimes. Such reform would produce a system that more closely aligns with Sir Ivor Richardson's original vision of an affordable and efficient disputes procedure.

1.0 INTRODUCTION

The statutory disputes procedure in Part IVA of the Tax Administration Act 1994 (TAA 1994) has now been in effect for just over twelve years. The aim of the procedure is to promote an "all cards on the table" approach to dispute resolution, whereby an exchange of information in prescribed forms will enable the parties to understand (and therefore hopefully resolve) any dispute over the interpretation and application of the tax laws.

The disputes procedure was intended to reduce the number of disputes, and therefore the number of cases that resulted in litigation. Inland Revenue said that the procedure is working because the number **[(2008) Vol 14:4 NZJTLP 425, 426]** of disputes coming before the Courts has decreased. In the Government Discussion Document in 2003 reviewing the disputes procedure, Inland Revenue considered that the reduction in cases showed that the procedure was working as intended:

> "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."

Notwithstanding that view, the procedure continues to be subject to criticism from a range of sources.

This comment reviews a number of the current issues that are relevant to the resolution of disputes with Inland Revenue. Given the importance of the statutory disputes procedure, and the limited extent to which taxpayers can avoid its application, a detailed knowledge of the procedure is increasingly important.

The comment examines recent developments in the current procedure and addresses the concerns raised by critics. It then discusses a number of the reform proposals to evaluate their workability. Finally, it concludes that the concept under which Inland Revenue is responsible for administration of its own internal dispute process is problematic and should largely be reconsidered. Instead, it proposes that tax disputes be subjected to a system based on the successful and efficient regimes that apply to family law or employment disputes.

2.0 THE CRITICS

Inland Revenue is correct that the number of substantive tax cases has dramatically reduced. However, many critics doubt whether this decline is due to the efficient working of the procedure. For instance, Shewan noted:

> "[for] most taxpayers, unless the numbers involved are significant, the burden and resulting cost of participating in the dispute resolution procedure are sufficient to dissuade them from proceeding."

Likewise, in an earlier article in this *Journal* proposing substantial reform to the statutory disputes procedure, Blanchard stated:

> "The pre-litigation tax dispute resolution process in New Zealand is highly complicated. It has many stages and creates the potential for disputes to go on for long periods of time at significant cost. …"The disputes procedure is clearly unsatisfactory …"

[(2008) Vol 14:4 NZJTLP 425, 427] Most recently, the Tax Committees of the New Zealand Law Society (NZLS) and the New Zealand Institute of Chartered Accountants (NZICA) made a rare Joint Submission (NZLS/NZICA Joint Submission) to the Minister of Revenue strongly criticising the disputes process and recommending extensive reform. The NZLS/NZICA Joint Submission advised that the Committees "both have serious concerns about the current procedures and believe changes are required urgently."

The NZLS/NZICA Joint Submission continued:

> "We seek some fundamental changes to the legislation which we believe are necessary to make the disputes resolution procedure and the challenge procedures workable. …"The Adjudication unit's process needs to be reconsidered. The lack of efficient decision making is becoming very problematic. …"

Finally, the NZLS/NZICA Joint Submission concluded:

> "Both the Society and NZICA have for some time been concerned about the effectiveness of the disputes resolution procedure and challenge procedures …"… the changes made to the procedure [in 2004] have not in the Society's and NZICA's view resolved the problems with the disputes resolution procedures. …"… the procedures … have not cured the problems identified by the Richardson Committee [in 1993]."

Central to the criticism was the increasing cost of applying the procedure. The NZLS/NZICA Joint Submission noted:

> "[T]he disputes resolution process has led to increased costs for taxpayers, rather than reduced costs. The increased costs apply to taxpayers across the board — small claims and also those in larger cases. … Taxpayers are choosing not to pursue disputes as a consequence. …"… Our experience is that in effect Inland Revenue may issue questionable matters below $25,000 with impunity, as Inland Revenue knows that it will cost the taxpayer more than that to proceed through the disputes resolution process and to challenge Inland Revenue's position in Court. Effectively taxpayers are 'burned off' by the high costs imposed by the disputes resolution procedures."

As a result, the NZLS/NZICA Joint Submission concludes:

> "We are seeking some fundamental changes to the legislation which we believe are necessary to make the disputes resolution procedure achieve their objectives and operate in a workable way."

Yet, while the number of substantive cases has dropped, the number of procedural disputes has grown. Increasingly, litigation revolves around not whether a tax position is correct but how the **[(2008) Vol 14:4 NZJTLP 425, 428]** procedure for resolving that

dispute should be applied. This reflects the importance of the procedure, which is effectively compulsory for both Inland Revenue and the taxpayer.

The author has reviewed the number and type of reported tax cases over the past three years. From 2005 to the present, there was a total of 121 reported cases on procedural issues in the High Court, Court of Appeal and Supreme Court, while over that same period there were only 27 purely substantive cases. Over that same period, the Taxation Review Authority (TRA) has determined 23 procedural cases compared with 29 substantive cases.

This increase in procedural litigation was noted by Crown Law in its *Annual Report* to Parliament for 2007, where it recorded:

> "There are also a steady number of cases involving process. These are often related to the statutory tax disputes process."

Of those procedural disputes, the bulk were won by the Commissioner. Most taxpayers achieve only partial relief at best. In very few cases did the taxpayer succeed entirely.

3.0 THE RELEVANCE OF "REVENUE DELEGATIONS"

As part of the Inland Revenue restructure in 2006, the internal reporting lines and "Revenue Delegations" have also changed. While the Commissioner has responsibility for the collection of taxes and protection of the integrity of the Inland Revenue Acts, he has the power to delegate his various statutory powers and discretions to Inland Revenue officers. He may delegate "all or any of the powers of the Commissioner, except [the] power of delegation." Accordingly, all actions by Inland Revenue rely upon the relevant officer holding the Commissioner's delegation to perform that task.

As a result of this statutory requirement, all actions by an Inland Revenue officer without the necessary delegation are invalid. Common Law rules such as apparent authority or estoppel cannot be relied upon by either Inland Revenue or taxpayers to validate an invalid action.

[(2008) Vol 14:4 NZJTLP 425, 429] The existence of a valid delegation has been tested in two recent cases. In the *Trinity* tax avoidance litigation, the assessing officer did not hold the delegation necessary to impose a shortfall penalty. Accordingly, a special delegation from the Commissioner was granted to her authorising those assessments. Due to the peculiar wording of that special delegation, the taxpayers contested whether it was effective, but the High Court found that it was valid in the circumstances.

By contrast, in *CIR v Russell* the prosecution of Mr JG Russell for failing to provide information requested under s 17 TAA 1994 was quashed on the grounds the officer that laid the charges lacked the correct delegation to do so. With regard to that case, the Judge stated:

> "It seems to me that the Commissioner is entitled to delegate to whatever person he describes in whatever way he describes the person, and that the Commissioner is perfectly entitled to select the level of person to exercise particular powers. … However, more importantly in my view is the actual scope of the delegation which she had and whether, in launching these particular s 17 prosecutions against Mr Russell, she was acting within the precise scope of her delegation. …"

The Judge concluded that:

> "… in my view these particular proceedings are a nullity and that cannot be overcome. In other words, in terms of my views and reasoning the defendant escapes these prosecutions because at material times, Mrs Latimer's actual work did not fit her departmental title, so that she also did not fit the slightly complicated but sophisticated system of delegations. … It follows that all these prosecutions are hereby dismissed."

Interestingly, the problems with the officer's delegations in *Russell* resulted directly from the previous restructuring of Inland Revenue in 1996. When faced with Inland Revenue's Delegations Matrix, the Court noted:

> "… this is why the delegation system which is really quite sophisticated takes a little bit of working out, as at 1st July 1996 the IRD reorganised its structure. New positions were created, old ones abolished. That meant that titles held by people vanished, but those same people got new titles and it was a question of linking up delegated authorities to new titles, in much the same way as had existed previously in relation to actual work."

The *Russell* case demonstrates that a lack of delegation can be a complete answer to an assessment or prosecution. Accordingly, it is often prudent to verify whether the delegation for a particular function was correctly held.

4.0 PROBLEMS WITH THE VALIDITY OF A NOTICE OF PROPOSED ADJUSTMENT OR NOTICE OF RESPONSE

The requirements for a valid notice of proposed adjustment (NOPA) or notice of response (NOR) are set out in the TAA 1994. A NOPA must:

- **[(2008) Vol 14:4 NZJTLP 425, 430]** Be in the prescribed form;
- "[Contain] sufficient detail … to identify the issues" in dispute; and
- Identify the proposed adjustments, provide a "concise" statement of the key facts and the law, and state how the law applies to the facts.

The requirements for a NOR are even less rigorous than a NOPA and simply require the taxpayer to "notify the issuer that the adjustment is rejected." The NOR should also "state concisely" the facts and legal arguments relied upon.

The threshold of what constituted a valid NOPA or NOR from a taxpayer had always been considered low. Provided that the document made the taxpayer's position relatively clear, it was thought to be valid. The recent High Court decision in *Alam and Begum v CIR* explored that assumption.

In that case, the Commissioner issued a NOPA to taxpayers who ran a kiwifruit picking business, proposing to deny GST tax credits for payments to a subcontractor totalling $130,000 based on the taxpayer's lack of documentation. The taxpayer responded with a NOR within the response period, which disputed a number of the facts set out in the NOPA. However, Inland Revenue concluded that the NOPA did not comply with the requirements of s 89G TAA 1994 and therefore was invalid. The taxpayer was thus deemed to have accepted the NOPA and, if so, would have forfeited any further right to dispute the resulting assessment.

The taxpayer sought judicial review of the decision to treat the NOR as invalid. The Court considered whether the NOR complied with s 89G TAA 1994 and the novel grounds of whether the Commissioner had the power to determine the validity of a NOR.

There are a number of cases under which the Commissioner determine whether a NOPA or NOR have been issued within the required timeframe. For instance, in both *Hollis v CIR* and *Balich v CIR* the Court rejected applications for judicial review of the Commissioner's decision to decline to grant an extension on the grounds of "exceptional circumstances" under s 89K TAA 1994. Presumably, if the Commissioner has the power to determine whether a Notice was issued within the response **[(2008) Vol 14:4 NZJTLP 425, 431]** period, then he would likewise have the power to determine if that Notice complies with the minimum statutory requirements.

Nevertheless, Woodhouse J ruled in favour of the taxpayers. His Honour decided that, on its face, the taxpayer's NOR clearly demonstrated that it disputed the adjustment proposed in the NOPA and therefore complied with the requirements of s 89G TAA 1994. Whether the NOR had any substantive merit was irrelevant to the statutory criteria:

> "a submission for the Commissioner amounted to a proposition that, unless the response notice advances at least the appearance of an arguable case against what the Commissioner is asserting, then the response notice is effectively a nullity. There are two points to be made in that regard. The first is that the taxpayer is entitled to challenge the Commissioner's proposed reassessment even if the taxpayer does not have much of a case, or any good case. If the taxpayer does not have

> a good case the subsequent procedures set out in Pt IVA [of the TAA 1994] will deal with this."

More controversially, Woodhouse J ruled that the Commissioner had no power at all to determine the validity of Notices issued under Part IVA:

> "… There is no provision in Pt IVA which gives power to the Commissioner to determine whether a response notice complies with s 89G and, following such determination, to reject a notice on the basis that it does not comply. There is no other provision in the Tax Administration Act which gives such power to the Commissioner."It would, perhaps, be unusual for such power to have been given to the Commissioner. Questions of statutory interpretation are for the Courts. More specifically, a power in the Commissioner to determine compliance would be a power for the Commissioner to adjudicate on a question arising in a process in which the Commissioner was one of the parties; that is, the Pt IVA disputes procedures. …"For these reasons I consider that the Commissioner did not have power to reject the notice. In consequence, deemed acceptance under s 89H(1) did not occur."

This ruling would lead to impractical consequences. It would require the Commissioner to effectively accept all and any "Notices" issued by taxpayers, whatever their obvious deficiencies, or seek a declaratory judgment in each instance. Yet that is precisely what Woodhouse J concluded:

> "[I]f the Commissioner wished to challenge the response notice, the appropriate course would have been to make application to the Court for a declaration as to the validity of the response notice."

More fundamentally, the reasoning relied upon by Woodhouse J is open to question, in view of the scheme and purpose of the disputes procedure. As the disputes procedure is pre-assessment, the Commissioner is necessarily both participant and adjudicator of the dispute, as provided for under s 113 TAA 1994. Accordingly, it is for the Commissioner to, at least initially, take responsibility for determining compliance with that procedure, without the need to resort to the Court. It is understood that the decision is under appeal by the Commissioner.

5.0 [(2008) Vol 14:4 NZJTLP 425, 432] CIRCUMSTANCES IN WHICH THE COMMISSIONER IS NOT REQUIRED TO FOLLOW THE DISPUTES PROCEDURE

Section 89C TAA 1994 stipulates that the Commissioner must issue a NOPA before issuing an assessment, except in the circumstances listed in the section. These exceptions encompass instances when it would be redundant, unnecessary, unreasonable or impractical for Inland Revenue to engage in the dispute process before issuing an assessment. Circumstances covered by s 89C TAA 1994 broadly cover situations where:

- The taxpayer agrees to the reassessment;
- The taxpayer has made an obvious mistake and the Commissioner wishes to correct that simple error;
- The taxpayer is in breach of filing obligations, because it has either filed the return late or not filed the return at all;
- The Commissioner is engaged in a dispute with other persons and the outcome of that dispute will have a consequential effect on this taxpayer, either because the taxpayer and those other persons are associated, or because the taxpayer will be affected by a current test case; or
- There is a need to protect the revenue base by assessing without delay.

The Commissioner's decision to invoke s 89C TAA 1994 to raise an immediate assessment rather than commence the disputes procedure is not amenable to dispute or challenge by taxpayers. In *Hieber v CIR*, the High Court confirmed that the Commissioner's decision to dispense with the statutory disputes procedure was not open to challenge in terms of s 138E(1) TAA 1994.

Instead, the decision to invoke any of the exceptions in s 89C is left to the discretion or opinion of the Commissioner and, therefore, cannot be disputed under Part IVA of the TAA 1994 or challenged under Part VIIIA of the same Act. In these cases, the taxpayer's only remedy would appear to be to issue a NOPA disputing the substance of the assessment, rather than the procedure by which it was raised.

If the Commissioner assesses without issuing a NOPA in circumstances in which s 89C TAA 1994 does not apply, the assessment nevertheless seems to be valid. In particular, the legislation itself seems to contemplate that sometimes an assessment will be issued contrary to s 89C by specifically granting to taxpayers the right to issue a NOPA in response to an assessment raised by the Commissioner "whether or not in breach of section 89C."

That point was considered in *Spencer v CIR*, where Paterson J said:

> "[Section 114 TAA 1994] clearly contemplates that assessments made by the Commissioner shall not be affected by reason that any provision of the Act, any other Inland Revenue Act, has not been **[(2008) Vol 14:4 NZJTLP 425, 833]** complied with … Section 89D clearly contemplates that assessments may be issued without compliance with s 89C."

Likewise, in the recent case of *BNZ v CIR* Gendall J considered that, even if the assessment had been issued in breach of s 89C TAA 1994 (which on the facts he rejected), the resulting assessments would nevertheless remain valid. His Honour stated:

> "The disputes procedure can continue notwithstanding the Commissioner's failure to issue a NOPA if required to do so, and the Plaintiffs cannot achieve the ultimate benefit of a quashing of the loss offset assessments in the way they seek. The provisions of section 89D(1)(b) envisage situation where despite breach of section 89C assessments made by the Commissioner are not affected. …"This Court can, without a doubt intervene in the exercise of its judicial review function if a fundamental error of law has occurred. But the non-issue of a NOPA if required under section 89C does not invalidate as a matter of law the assessment."

As already noted, in these circumstances the taxpayer's remedy is to issue a NOPA disputing that assessment.

6.0 COMPLETING THE DISPUTES PROCESS — THE NEW SECTION 89N

Section 89N was introduced into the statutory disputes procedure in 2004. At the time of its enactment, it was intended to cure perceived defects in the operation of Part VIA of the TAA 1994 by ensuring that all disputes completed the full disputes procedure.

It appears that the problem arose because Inland Revenue often issued a NOPA and then immediately proceeded to assess in advance of the time bar without waiting to receive the taxpayer's NOR. When taxpayers contested this practice, the Courts confirmed that it was not only permissible but commensurate with the Commissioner's duties to collect taxes to issue an assessment where the time bar was imminent.

This view reached its zenith in *Sweetline Distributors Ltd v CIR*. In that case, the taxpayer had made clear its willingness to offer time bar waivers for periods coming up to time bar but the Commissioner nevertheless issued an assessment without completing the disputes process. The particular concern in that case was that the taxpayer was taking steps to liquidate assets to avoid paying any resulting tax. However, the judgment was broadly reasoned and, therefore, applicable in all instances.

The High Court upheld the assessments on the grounds that truncating the disputes procedure was an appropriate use of the Commissioner's discretion. More importantly, the Court found that taxpayers have no right to expect that a dispute will be referred to Inland Revenue's Adjudication Unit for determination as the adjudication function was a non-mandatory aspect of the disputes process.

[(2008) Vol 14:4 NZJTLP 425, 434] In effect, the disputes procedure originally required the Commissioner to only issue a NOPA and the issue of a Disclosure Notice and Statement of Position (SOP) were optional at the Commissioner's discretion. Accordingly, taxpayers had no right to require that process to be completed and no expectation that a dispute will be referred to the Adjudication

Unit. It was the perceived unsatisfactory nature of this result that led to the review of the operation of the disputes procedure.

The Discussion Document issued in 2003 acknowledged the Commissioner's ability to truncate the disputes process whenever the time bar was imminent, effectively depriving taxpayers of the opportunity to meaningfully engage with Inland Revenue over the adjustments proposed, contrary to the purposes of the procedure in s 89A TAA 1994. The enactment of s 89N TAA 1994 was then proposed to make completion of the full disputes procedure mandatory.

6.1 Section 89N

Section 89N(2) TAA 1994 stipulates that the Commissioner cannot raise an assessment unless all statutory phases of the disputes process have been completed. Accordingly, when the Commissioner has issued a NOPA, Inland Revenue is required to have received and considered a taxpayer's SOP before an assessment can be raised. This would mean that, even when faced with the impending operation of the statutory time bar, the Commissioner cannot simply raise an assessment without having first completed the statutory disputes procedure. The Commissioner has acknowledged that this may prevent Inland Revenue from reassessing some taxpayers that would otherwise be liable for tax on the merits of the dispute. However, s 113 TAA 1994 has expressly been amended to give effect to that restriction.

Recognising that this strict new obligation could not be met in all instances, s 89N(1) TAA 1994 provides a number of exceptions when the requirement to complete the process does not apply. Many of the exceptions mirror the circumstances in s 89C TAA 1994, under which Inland Revenue need not issue a NOPA in the first instance prior to raising an assessment. These include where the parties agree to the assessment or where Inland Revenue perceives a likelihood of flight by the taxpayer or a risk to the revenue. The more substantive circumstances in which the disputes procedure need not be completed include:

- Where the taxpayer has failed to provide information when requested to do so by the Commissioner under s 17 TAA 1994;
- Where the Commissioner notifies the disputant that, during the course of the dispute, it has committed an offence under an Inland Revenue Act that had the effect of delaying the completion of the disputes process; and
- Where the disputant or a person associated with the disputant has begun judicial review proceedings in relation to the dispute.

The comment addresses each of those exceptions in turn.

6.2 [(2008) Vol 14:4 NZJTLP 425, 435] Failure to Provide Information to the Commissioner when Requested

The potentially widest category of exception is when the taxpayer has failed to provide information requested by Inland Revenue. This exception allows the Commissioner to truncate the disputes procedure where a Section 17 Notice was not complied with by the date specified.

Section 89N TAA 1994 is unclear as to who should determine whether the Notice was complied with. A taxpayer may have genuinely attempted to provide all requested information but, through oversight or caution, has withheld some information that may fall within the scope of the Notice. Is it then entirely up to Inland Revenue to decide what constitutes compliance in each instance? Presumably, a prosecution need not be taken before this exception can be relied upon.

Where the information is available and will be provided by the taxpayer but additional time was required to collate it, the taxpayer may nevertheless have failed to provide the information by the date specified in the Notice. Again, while minimal delays in providing information are normally of little concern, even minor delays beyond the specified date could arguably allow Inland Revenue to invoke the exception. Can Inland Revenue rely on minor or inadvertent failures to truncate the process? Inland Revenue's policy mentions that there needs to be a delay by the taxpayer but there is no guidance as to what the extent of the delay must be.

It has even been alleged that, when faced with the imminent operation of the time bar, Inland Revenue may issue spurious Section 17 Notices in the expectation or hope that the taxpayer would be unable to comply. Obviously, such conduct would be contrary both to the statutory power in s 17 TAA 1994 and to the requirements of the disputes procedure. However, it would require the taxpayer

to prove bad faith or ulterior motive on Inland Revenue's part when issuing the Section 17 Notice. It is suggested that such behaviour would be rare and even more difficult to prove.

As a result of this uncertainty, and in response to the increased use by Inland Revenue of its statutory powers to gather information, the scope of this exception is likely to be rigorously tested.

6.3 Commission of an Offence under an Inland Revenue Act

Another category of potential concern is when the Commissioner notifies the taxpayer that it has committed an offence under an Inland Revenue Act. Section 89N TAA 1994 requires only that Inland Revenue "notifies" the taxpayer that an offence has been committed. No prosecution need be brought, let alone succeed, before this exception can be relied upon. The section specifically allows that the decision as to whether an offence has been committed is left to "the Commissioner's opinion". As with questions over the opinion of the Commissioner regarding reopening the time bar, this is a difficult test to overcome, with the onus of proof falling on the taxpayer.

[(2008) Vol 14:4 NZJTLP 425, 436] Finally, it is uncertain what standard must be met to make such a determination. Many offences in the TAA 1994 are absolute liability offences, meaning that no intent by the taxpayer is required. These offences are often trivial, for which prosecution is technically possible but is seldom brought. Examples of such minor offences include:

- Failure to keep all necessary business records;
- Failure to file a tax return by the due date; and
- Failure to provide a GST invoice for every supply.

However, it is important that any offence must have had the effect of delaying the completion of the disputes procedure before it will allow the Commissioner to invoke the exception. It would obviously have been disproportionate if such minor breaches were relied upon by Inland Revenue to truncate a dispute in order to make an assessment before the time bar applied.

6.4 Judicial Review by Taxpayer or Associated Person

The final category is where the taxpayer or a person associated with the taxpayer commences judicial review proceedings. The first point of note with this exception is that the definition of "associated person" that applies to s 89N TAA 1994 is the widest and arguably the most far-reaching under the Income Tax Act 2007.

The second point is that, it is important taxpayers are aware that if they or an associated person bring judicial review proceedings, it could immediately trigger an assessment. Section 89N TAA 1994 is clearly aimed at spurious or lengthy judicial review proceedings designed to delay the completion of the dispute in order to prevent the Commissioner from assessing within the time bar. However, there is no express requirement that the proceedings actually delay the dispute. Rather, the mere fact of filing a review application, even one that was extremely strong, could immediately trigger an assessment.

The Commissioner has commented on this exception in a recent Inland Revenue policy. Although far from clear, the commentary suggests that the Commissioner will apply this exception more narrowly than the express wording of the statute prima facie allows:

> "These exceptions apply to any judicial review proceedings that are brought against the Commissioner. In judicial review proceedings, the parties' resources are likely to be directed away from advancing the dispute through the disputes resolution process. …"Even if the two disputes relate to the same revenue type, section 89N(1)(c)(v) will not apply in some circumstances. For example, the dispute with the taxpayer relates to the tax treatment of **[(2008) Vol 14:4 NZJTLP 425, 437]** entertainment expenditure, whereas the dispute with the person associated with the taxpayer relates to the capital and revenue distinction of merger expenditure. The Commissioner would not regard these two disputes as involving similar issues."

6.5 Whether Exceptions Apply Only When Delay Results

Each of the three exceptions discussed above appear to be aimed at instances where the taxpayer has committed a breach of the TAA 1994 or has otherwise engaged in conduct that had the effect of slowing the progress of the dispute. In each of these exceptions, it is the actions of the taxpayer itself that warrants the Commissioner to not complete the full disputes process.

It is fair to say that these types of circumstances are in keeping with the principle that taxpayers who deliberately try to slow down or subvert the process so that the time bar will intervene to save them, cannot benefit from their efforts. If the Commissioner considers that a taxpayer is attempting to delay the disputes process, the process can be truncated and an assessment can immediately be issued.

It is therefore argued that there must be a causal connection between the taxpayer's behaviour and Inland Revenue's ability to complete the disputes process (even though only a couple of the exceptions expressly say so). If a case inevitably cannot complete the disputes procedure before the time bar applies (because the Commissioner has been tardy in issuing a NOPA), it may not be enough for the Commissioner to point, for example, to an alleged non-compliance with a subsequent Section 17 Notice as grounds for not completing the full process. Inland Revenue should not be able to rely upon trivial failures by the taxpayer that have no effect on the progress of the disputes. To do so would again breach the spirit of the disputes procedure, which s 89N TAA 1994 was enacted to bolster.

6.6 Right to Dispute Whether Exception under Section 89N(1) Applies

The discretion by the Commissioner to invoke any of the exceptions in s 89N(1) TAA 1994 is not excluded from the definition of "disputable decision" and, therefore, would prima facie appear to be amenable to dispute by the taxpayer. However, it is extremely unlikely that a taxpayer could contest whether the exception applied other than in the context of the underlying tax dispute.

In *Vinelight Nominees Ltd v CIR*, the High Court ruled that the taxpayer was not entitled to challenge the Commissioner's decision to reopen the assessment under s 108(2) TAA 1994 in isolation but, instead, had to do so in the context of the substantive dispute. While such a decision by the Commissioner was clearly disputable in respect of the ultimate assessment, it was held not to be a "disputable decision" when made simply as a pre-requisite to issuing a NOPA. The reasoning behind the High Court's decision was that, until a new assessment was actually issued, the reopening of the assessment did not have sufficient impact on the taxpayer's position.

In the case of s 89N(1) TAA 1994, it is likely that an assessment would be issued at the same time as the taxpayer was made aware that the Commissioner considered that one of the exceptions applied. Therefore, a taxpayer would have to raise any dispute regarding the application of that exception together with the underlying challenge against the resulting assessment.

[(2008) Vol 14:4 NZJTLP 425, 438] There is now little scope for taxpayers to bring a separate judicial review against that decision outside the challenge process in Part VIIIA of the TAA 1994, except where it can be shown that the relevant disputable decision has had an immediate effect on a taxpayer's tax position. It follows that, in accordance with the reasoning in *Vinelight*, a decision by the Commissioner under s 89N(1) TAA 1994 could not be separately disputed but should be determined as part of the substantive challenge proceedings.

6.7 Application by Commissioner to High Court

When the Commissioner has reasons for not wishing to complete the full disputes process and no exception applies, he can apply to the High Court for an order allowing him to reassess without having received the taxpayer's SOP or granting further time within which to complete the dispute. There are no criteria in the TAA 1994 as to when it is appropriate for the Court to make such an order.

One argument is that an application to the High Court would be justified only when things have happened that are similar but not identical to those listed in s 89N(1) TAA 1994. It would therefore serve as a catch-all provision to cover all other situations caused by taxpayer behaviour that would delay the dispute. However, the interaction between the exceptions in s 89N(1) and the grounds upon which the Court may grant an order in favour of the Commissioner is not entirely clear.

The only relevant comment in Inland Revenue's Standard Practice Statement 05/03: *Disputes Resolution Process Commenced by the Commissioner of Inland Revenue*, is:

> "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."

The only judicial discussion on when the Commissioner's application to truncate the dispute procedure may be justified is found in *ANZ National Bank Ltd v CIR (No 2)*. There, the High Court considered a wide discretion existed to depart from the disputes procedure and it was not limited only to situations that were similar to the exceptions listed in s 89N(1) TAA 1994:

> "[The taxpayer] submits that the power in [s 89N(3)] is to be exercised only in cases analogous to those set out in [s 89N(1)]. While the issue does not strictly arise for decision here, I incline to the view that, in the scheme of the procedures as a whole, [s 89N(3)] is intended to confer a wider discretion to authorise a departure from the dispute processes, in cases where such a departure may be appropriate, and is not limited to cases where there may be a dispute whether the conditions in [s 89N(1)] have been satisfied, or in situations which are analogous to, but not strictly covered by, that subsection."

The author submits that the above statement is a good indicator of how s 89N TAA 1994 would be applied. Nevertheless, presumably Inland Revenue's conduct during the course of the investigation and **[(2008) Vol 14:4 NZJTLP 425, 439]** dispute may also come under scrutiny when the Court decides whether or not to grant the Commissioner's application under s 89N(3) TAA 1994. For example, if there was unreasonable delay by Inland Revenue in conducting the investigation, which in turn delayed progress of the dispute in advance of the time bar, it would reduce the likelihood of an order being granted.

A further point is that any application to the High Court by the Commissioner automatically extends the time bar until the application is determined, whether or not the Commissioner is ultimately successful. This extra time might arguably provide an opportunity for Inland Revenue to hastily complete the disputes process while the application is pending.

7.0 TAXPAYERS' RIGHT TO HAVE DISPUTES DETERMINED BY ADJUDICATION

Having completed the disputes procedure in accordance with s 89N TAA 1994, does the taxpayer have a right to require the SOPs to be referred to the Adjudication Unit for determination? In effect, taxpayers have argued that the requirement in s 89N TAA 1994 for Inland Revenue to "complete" the disputes process is not satisfied until the Adjudication Unit has ruled on the dispute. The corollary of this argument is the issue of whether, even when all the necessary disputes documents have been exchanged, whether the assessment can be made without referring the dispute to the Adjudication Unit.

The wording of s 89N(2) TAA 1994 prohibits the Commissioner from issuing an assessment under s 113 TAA 1994 until he "considers" the SOP issued by the disputant. However, the meaning of "considers" is uncertain. The Discussion Document, *Resolving Tax Disputes: A Legislative Review*, states that there was never an intention to require the Commissioner to refer matters to the Adjudication Unit because adjudication is an "administrative process".

The Commissioner's policy is that there is a "reasonableness" requirement (even if not expressed in the legislation):

> "However, if the adjudication phase cannot be completed (for example, because the statutory time bar is imminent), section 89N(2)(b) allows the Commissioner to amend an assessment after considering the taxpayer's SOP."Inland Revenue officers must adequately consider the facts and legal arguments in the taxpayer's SOP before they decide whether to amend an assessment. Whether a SOP has been adequately considered will depend on what is a reasonable length of time and level of analysis for that SOP given the circumstances of the case (for example, the complexity of the issues)."

Despite this "reasonableness" test, the policy does not change the aforementioned legal outcome, which is that the Commissioner is not obliged to refer the matter to the Adjudication Unit, nor does a taxpayer have the right to insist on such a referral.

The question of whether a dispute should be referred to Adjudication arose where it related to more than one year. For instance, following a dispute the Commissioner has raised an assessment for the earlier year(s) and the taxpayer has challenged those assessments under Part VIIIA of the TAA 1994. **[(2008) Vol 14:4 NZJTLP 425, 440]** However, later year(s) have not been assessed and the taxpayer still wishes to have the later year(s) determined by Adjudication.

In *Alpe v CIR*, the High Court ruled that in those circumstances, the challenge proceedings for the earlier year(s) should be stayed in order to allow the remaining year(s) to progress through the full disputes process. It stated:

> "[Both] the plaintiffs and the Commissioner should diligently pursue the Dispute Resolution Procedure in relation to income years subsequent to 1996. If the plaintiffs do not accept the outcome of the Dispute Resolution Procedure, in due course it may well be that these issues will have to be litigated, but at that stage the plaintiffs will have had full and fair opportunity to take advantage of the process which was implemented to meet this very type of situation."

This decision implied a right for taxpayers to proceed through the disputes process and have the dispute determined by the Adjudication Unit where possible. However, the more recent decisions of the High Court and Court of Appeal in *ANZ National Bank Ltd v CIR* have demonstrated that that understanding was wrong.

In the *ANZ* case, the Commissioner had reassessed the taxpayer for the first year of an alleged tax avoidance arrangement and the taxpayer had challenged that assessment. The Commissioner declined to issue SOPs for later years and argued the challenge against the earlier years be heard.

The Commissioner argued that the circumstances of the case meant that it was best resolved in the Courts. In particular, he pointed to the substantial amounts of tax involved, the level of complexity of the dispute, and the likelihood of contested facts and experts' opinion as all warranting the challenge to proceed instead of the disputes process.

In reaching its decision, the High Court stated that it "[did] not consider that it is realistic to expect that the matters in issue in these proceedings could be resolved in the Adjudication Unit." It accordingly concluded that the Court was best placed to resolve this dispute. In doing so, it gave weight to "the Commissioner's clearly expressed decision that it is in the public interest not to progress the transactions through the disputes procedures."

While the High Court felt that the position in *Alpe* may be the default position, there was no absolute obligation on the Commissioner to refer cases to the Adjudication Unit where the Court was a more "expeditious and efficient" venue to determine the matters in issue. So, *Alpe* was distinguished from the circumstances in the *ANZ* cases. In reaching that decision, the Court recognised the application of certain indicia, namely:

- The nature and complexity of the transactions;
- **[(2008) Vol 14:4 NZJTLP 425, 441]** The fact that the plaintiffs have not yet made full disclosure or discovery of all the relevant documents;
- The fact that tax avoidance issues are strongly disputed by the plaintiffs; and
- The substantial amounts of core tax at issue in the proceedings and other proceedings already before the Court.

This decision indicates the judicial attitude in the cases prior to the enactment of s 89N TAA 1994 and, arguably, the judicial attitude now. The Court of Appeal confirmed the High Court decision. In a brief but strong judgment, the Court of Appeal went a step further than the High Court and ruled that *Alpe* was wrongly decided, thus overruling that decision. As a result, *Alpe* is no longer good law and there is no obligation on the Commissioner to refer disputes to Adjudication where, pursuant to his obligations under ss 6 and 6A TAA 1994, he considers that the matter should be decided by the Court.

It remains to be seen whether the indicia discussed by the High Court will be used by the Commissioner in determining whether particular cases are referred to Adjudication. The Court of Appeal did not discuss this as it was held to be unnecessary once *Alpe* was overruled. While there is scope for arguing that the *ANZ* decision only applies *once a matter is before the Court*, it seems likely that the discretion to issue an assessment without first referring the matter to Adjudication will be upheld judicially.

Therefore, it seems clear that the meaning of "considers" in the context of s 89N TAA 1994 will not equate to "considered by the Adjudication Unit of [the Office of the Chief Tax Counsel]." The Courts, both before and after the introduction of s 89N TAA 1994, seem to heavily support the Commissioner's right to assess the correct amount of tax and, so long as the statutory requirements of the disputes process are met, taxpayers are unlikely to succeed on a judicial review.

Inland Revenue's policy is that all disputes will continue to be referred to Adjudication. The policy acknowledges that, "as a matter of law, it is not strictly necessary for Inland Revenue officers to send all disputes to the Adjudication Unit for review." Nevertheless, it confirms that:

> "Notwithstanding the above judicial comments, if the parties have not agreed on all the issues at the end of the conference and disclosure phases or to truncate the disputes resolution process under section 89N(1)(c)(viii), it is the Commissioner's policy and practice that *all disputes are to be sent to the Adjudication Unit* for review, irrespective of the complexity or type of issues or amount of tax involved …"

The policy then goes on to explain the limited exceptions to this requirement. These are:

- The Commissioner has considered the taxpayer's SOP for the purposes of s 89N(2)(b) TAA 1994 and referred the dispute to the Adjudication Unit for their preliminary consideration and the Adjudication Unit has determined that it has insufficient time to reach a decision in respect of the dispute before a statutory time bar would prevent an assessment from being increased, or

- **[(2008) Vol 14:4 NZJTLP 425, 442]** Any of the legislative exceptions specified in s 89N(1)(c) TAA 1994 apply so that the Commissioner can amend an assessment without first completing the disputes resolution process, or

- The High Court has made an order that the disputes resolution process can be truncated pursuant to an application made by the Commissioner under s 89N(3) TAA 1994.

These exceptions do not reflect (and are much more restrictive) than any of the grounds relied upon by the High Court in the *ANZ* decision. Most significantly, the policy appears to reject the ratio of both the High Court and the Court of Appeal that some disputes are more efficiently resolved before the Courts. In particular, it states that all disputes will be referred to Adjudication "irrespective of the complexity or type of issues or amount of tax involved."

8.0 THE OPERATION OF THE TIME BAR UNDER THE CURRENT DISPUTES PROCEEDINGS

Another issue regarding the application of s 89N TAA 1994 is what happens to disputes that were not completed prior to the operation of the time bar in s 108 TAA 1994. In most instances, the dispute will simply lapse and the previous assessment will stand. However, what happens when the dispute relates to an issue about which the Commissioner considers the time bar does not apply? For instance, the Commissioner commences a dispute by issuing a NOPA proposing to include additional income that was omitted from the taxpayer's return. If the Commissioner was unable to complete the disputes process before the original time bar applied, such a dispute would normally become time barred. However, because the Commissioner may allege that the time bar does not apply by virtue of the omission of income under s 108(2) TAA 1994, the Commissioner may then reopen that return and continue with the dispute.

In that example, if the parties have exchanged a NOPA and NOR, and held a conference before the time bar applies (but not yet issued and considered a SOP), it appears that the Commissioner can simply reopen the return under s 108(2) TAA 1994 and continue with the dispute by issuing the SOP. The genesis of s 108(2) TAA 1994 is that taxpayers who deliberately mislead the Commissioner or omit income do not enjoy the protection of the statutory time bar. In other words, once the Commissioner forms the opinion that s 108(2) TAA 1994 is met, the statutory time bar simply does not apply. In those circumstances, it is arguable that a new dispute does not have to be started about the application of the time bar but rather Inland Revenue can continue the original dispute until it is completed by the exchange of SOPs.

It appears that the Commissioner would be able to continue with this dispute even where no application has or will be made by the Commissioner under s 89N(3) TAA 1994 for orders that the dispute can be truncated or extra time allowed to complete it. This is because such an application is only required "within the period of time during which the Commissioner would otherwise be required under the Inland Revenue Acts to make an amended assessment." Where the time bar no longer applies, that period of time has not yet and will not expire, and therefore no application is necessary.

[(2008) Vol 14:4 NZJTLP 425, 443] Accordingly, where the time bar elapses in the middle of a dispute and the Commissioner forms an opinion that the time bar does not apply, there is arguably no temporal limitation on completing that dispute. This may come as a surprise given that s 89N TAA 1994 clearly reflects Parliament's intention that the disputes procedure should be completed in a timely manner.

In this way, s 108 TAA 1994 does not over-ride the requirement to complete the dispute procedure in s 89N TAA 1994; it merely provides an open-ended period within which that completion can occur. In that way, those sections can be read together.

9.0 THE RELATIONSHIP BETWEEN SECTIONS 89C AND 89N

Section 89C TAA 1994 stipulates that the Commissioner must issue a NOPA before making an assessment, except in the circumstances listed in the section. These exceptions encompass instances when it would be redundant, unnecessary, unreasonable or impractical for Inland Revenue to engage in the dispute process before issuing an assessment.

While these exceptions are broad, they are not unlimited and, in most instances, the Commissioner is required to issue a NOPA and follow the disputes procedure to completion before making an assessment. However, the Commissioner's decision to invoke one of these exceptions and make an immediate assessment rather than commence the disputes procedure is not amenable to dispute or challenge by taxpayers by virtue of s 138E(1) TAA 1994.

Instead, the decision to invoke any of the exceptions in s 89C TAA 1994 is left to the discretion or opinion of the Commissioner. Where this occurs, the taxpayer's only remedy is to issue a NOPA disputing the substance of the assessment, rather than protesting the procedure by which it was raised.

If the Commissioner assesses without issuing a NOPA in circumstances where s 89C TAA 1994 does not apply, the assessment nevertheless is valid. In particular, the legislation contemplates that sometimes, an assessment will be issued contrary to s 89C TAA 1994. The legislation therefore specifically grants taxpayers the right to issue a NOPA in response to an assessment raised by the Commissioner "whether or not in breach of section 89C." As already noted, in these circumstances the taxpayer's only remedy is to issue a NOPA disputing that assessment under s 89D TAA 1994.

A more complicated question that has not yet arisen (and hopefully never will) is what would happen if the Commissioner knowingly elected to ignore the disputes procedure and issued an assessment in deliberate non-compliance with s 89C TAA 1994. This could occur if, faced with a time bar and an inability to complete the full disputes process (as required by s 89N TAA 1994), Inland Revenue abandoned the whole process and issue an assessment in breach of s 89C TAA 1994.

Such action may be taken by Inland Revenue because, while the Commissioner can validly assess in breach of s 89C TAA 1994 (ie, without having first issued a NOPA), once Inland Revenue has issued a NOPA, then it arguably cannot validly assess in breach of s 89N TAA 1994. The consequences of issuing an assessment in breach of ss 89C and 89N TAA 1994 are different. This is because s 89N(2) **[(2008) Vol 14:4 NZJTLP 425, 444]** uses the same language ("may not amend an assessment") as the time bar provisions in ss 108 and 108A TAA 1994. It therefore follows that the Commissioner has no more ability to assess in breach of s 89N TAA 1994 than he does to assess in breach of the time bar. However, s 89N TAA 1994 applies only when the Commissioner has first issued a NOPA.

On the literal application of the sections, an assessment deliberately issued in breach of s 89C TAA 1994 would be valid while an assessment in breach of s 89N TAA 1994 would not be. This creates a perverse incentive for Inland Revenue, when faced with insufficient time to complete the full disputes procedure within the time bar, to simply resort to s 89C. But this result could render s 89N TAA 1994 impotent because it is predicated on the Commissioner having first issued a NOPA.

It is suggested that in such circumstances, administrative law remedies could well be available to render such an assessment invalid as an abuse of power. The High Court would likely require the Commissioner to complete the disputes process properly within the relevant timeframe, if possible. However, as noted earlier, the onus of proving such a deliberate and calculated breach by Inland Revenue officers would fall on the taxpayer.

This difference is further illustrated by the wording of s 113(1) TAA 1994, which now expressly stipulates that the Commissioner's power to amend an assessment under that section is "subject to section 89N." Accordingly, Inland Revenue cannot rely on its general power of reassessment in s 113 TAA 1994 where it has not completed the disputes procedure in full, in accordance with s 89N TAA 1994.

It has to be remembered that the argument that a taxpayer can get around s 114 TAA 1994 by arguing that the issue is one of procedure, rather than one of substantive "correctness", has been tried and failed in the *Sweetline Distributors* case. In that case, Goddard J held:

> "Furthermore there is the established principle that a correct assessment will not be invalidated simply because procedures have not been followed or because extraneous factors have been taken into account. The principle is that so long as the CIR assessed on a genuine basis, the validity of any assessment made will not be denied. In this way there is a distinction between validity and correctness which is not unimportant. This principle is reflect in s 114 of the Tax Administration Act 1994 which also makes it clear that the validity of an assessment made by the CIR will not be affected by any failure on his part to comply with any of the Acts. Although the applicants attempted to argue that s 114 has no direct application to their case because their challenge is totally directed towards process. The relevance of s 114 cannot be denied."

10.0 THE COURTS' VIEW OF ADJUDICATION DECISIONS

Given Inland Revenue's policy of referring all disputes to the Adjudication Unit, even when not strictly required, it is noteworthy that the Courts have declined to hold the Commissioner to the grounds of assessment contained in an Adjudication Report.

The issue first arose in *Ch'elle Properties (NZ) Ltd v CIR*. The Adjudication Report issued for that dispute expressly found that the test of tax avoidance in s 76Goods and Services Tax Act 1985 was **[(2008) Vol 14:4 NZJTLP 425, 445]** subjective. The TRA also applied a subjective test of avoidance. When the taxpayer appealed, the Commissioner argued that the test under s 76 GSTA 1985 was purely objective. The taxpayers protested this change of ground from the Adjudication Report, contending that the Commissioner was bound to apply the reasoning and grounds contained in the Adjudication Report that resulted in the assessment.

The High Court found that the Commissioner was under no such restriction, and expressly rejected that the Adjudication Report was binding on the Commissioner. The Commissioner was limited only to the facts and propositions of law contained in the SOP and not that of Adjudication:

> "The appellant's submission is that the Commissioner should be confined to the argument which was accepted for the purpose of the adjudication and that he cannot support the finding of avoidance on other grounds including, as I understand the argument, those which found favour with the Authority."… Mr Hayes argues it would be unfair for the Commissioner to be permitted to change his mind and depart from the position adopted in the adjudication report."To the extent that this submission is relied on to challenge the findings of the Authority, it must fail. It was not a ground of appeal. Regardless, I am satisfied that as a matter of law the Commissioner is not bound by the adjudication report and is free to depart from it in argument both before the Authority and on appeal."By s 138G(1) of the Tax Administration Act 1994, the Commissioner is generally precluded from raising, for the purpose of a challenge to his decision, facts and evidence and propositions of law which are not disclosed in his statement of position and that of the disputant. But s 138G makes no reference to an adjudication report and there is no provision in the Act, which could apply to confine the Commissioner to its findings."Ms Ellis said that, notwithstanding the absence of any statutory requirement, the Commissioner would nevertheless, as a matter of good practice, feel bound by the determination of the Adjudication Unit on a particular issue. I consider that to be a reasonable approach. But it is another thing altogether to require the Commissioner to be bound by the reasoning of the Adjudication Unit. Provided the Authority (and this Court) are free to consider an issue, neither party should be prevented from advancing such arguments as they see fit to ensure that the issue is correctly decided. This is consistent with the approach endorsed by Cooke P in *Smith v C of IR*(1987) 9 NZTC 6,118; [1987] 1 NZLR 727 at p 734."

As acknowledged by Inland Revenue, this decision "indicates that, as a matter of law … Inland Revenue officers are not necessarily bound by the Adjudication Unit's decisions." Given the clear wording and compelling reasoning of the decision, such a conclusion is unavoidable.

Accordingly, neither the Commissioner nor the taxpayer is bound to the grounds of assessment set out in the Adjudication Report. Instead, both parties are limited only to the information raised in either party's SOP.

This lack of weight given to an Adjudication Report led Greg Blanchard to conclude that "the adjudication stage serves no useful purpose." Blanchard argues that "where there are legal issues **[(2008) Vol 14:4 NZJTLP 425, 446]** between the parties that will only be resolved by a Court decision and cases [where] there are factual disputes between the parties that will only be resolved by cross-examination … it is less likely that the adjudication stage will resolve the matter." The author of the present article agrees that any attempt to resolve often complex factual and legal disputes based solely on the written documents is flawed.

11.0 COMPARISON OF THE ADJUDICATION PROCESS WITH THE SUMMARY JUDGMENT PROCEDURE

One of the reforms of the disputes process proposed by the NZLS/NZICA Joint Submission was that the Adjudication Unit be empowered to determine factual disputes contained in the parties' SOPs. The NZLS/NZICA Joint Submission suggests:

> "The information provided to the Adjudication Unit is comprehensive, as the Adjudication Unit has access to each [party's] SOP. It makes little sense for the Adjudication Unit to be unable to review those documents and make factual determinations. The [New Zealand Law] Society and NZICA suggest giving the Adjudication Unit the ability to determine factual issues would lead to a more efficient process."

The author strongly opposes this proposal as ill-conceived. Granting the power to determine factual disputes based solely on the SOPs is asking too much. A pointer to the problems such a widened process would cause lies in a comparison with the summary judgment procedure.

Like most common law jurisdictions, New Zealand has a specific procedure under which civil disputes may be fast-tracked in order to be determined in an expeditious manner. Such procedure permits a dispute to be determined without recourse to a full trial. Rather, the dispute is resolved solely upon the parties' pleadings, affidavits and legal submissions, without the need to hear or cross-examine witnesses.

The summary judgment procedure is contained in Rules 135 to 145High Court Rules. That procedure permits a wide range of civil disputes to be determined "on the papers". Based on the principle of "justice delayed is justice denied", it is intended to provide a swift procedure to resolve civil disputes in which one party believes the other has an unarguable or unmeritorious case.

The procedure permits either the plaintiff or the defendant to apply for summary judgment at the time they file their respective pleadings. Affidavits setting out the evidential foundation for their case must then be exchanged. Rule 138(5), which pertains to that affidavit, stipulates:

> "(5) That affidavit—
>
> "(a) Must be by or on behalf of the person making the application:
>
> "(b) **[(2008) Vol 14:4 NZJTLP 425, 447]** If given by or on behalf of the plaintiff, must verify the allegations in the statement of claim to which it is alleged that the defendant has no defence, and must depose to the deponent's belief that the defendant has no defence to the allegations and set out the grounds of that belief:
>
> "(c) If given by or on behalf of the defendant, must show why none of the causes of action in the plaintiff's statement of claim can succeed."

The evidential requirements of that affidavit are similar to those imposed on parties to the statutory disputes procedure for their NOPA, NOR and SOP. These documents respectively provide:

- For the NOPA to "provide a concise statement of the key facts";
- For the NOR to "state concisely the facts … that the issuer of the notice considers are wrong" and "any facts … relied on by the issuer"; and
- For the SOP to "give an outline of the facts on which the Commissioner/disputant intends to rely".

When comparing the evidential requirements for a summary judgment and a tax dispute, two points can be noted. First, the

contents of the affidavits required for summary judgment appear to be more extensive than the "concise statement" or "outline of the facts" required under the disputes procedure. Second, the affidavit is made on oath and therefore, presumably has more weight or veracity than the non-sworn disputes documents. As a result, it is reasonable to conclude that the factual matrix on which a summary judgment must be resolved may be superior to that contained in the disputes documents.

Given that evidential background, the principles behind the summary judgment procedure are instructive. The leading case on the scope of that procedure is the Court of Appeal decision in *Pemberton v Chappell* that stipulates that it may not be used to resolve serious disputes of fact.

The summary judgment procedure is available only where there is no substantial disagreement over questions of fact or credibility. The Courts have made it clear that the procedure is not appropriate where the essential elements of either party's case are disputed in fact. As a result, Courts will refuse summary judgment when important or relevant matters of fact are still in dispute. The venerable *McGechan on Procedure* confirms that:

> "Summary judgment will not be granted where there is a credible dispute since questions of credibility can be determined only when a witness is in the witness-box on oath and cross-examined, and the summary judgment procedure does not permit that method of testing allegations."

So, if there is material disputes of fact which cannot be resolved on the parties' affidavits, summary judgment will be refused. Where experienced Judges have been tempted to apply a "robust approach to disputes of fact" and reach their own determination of facts based upon the papers presented by each **[(2008) Vol 14:4 NZJTLP 425, 448]** party, the senior Courts have consistently over-ruled them. The decision emphasises the need to avoid resolving factual disputes on the papers. In *A-G v Rakiura Holdings Ltd*, Greig J stated:

> "In a matter such as this it would not be normal for a judge to attempt to resolve any conflicts in evidence contained in affidavits or to assess the credibility or plausibility of averments in them."

Following this reasoning, the Court will not normally resolve conflicts between experts in a summary judgment context. In *MacLean v Stewart*, the Court ruled:

> "We do not doubt that [the judges in the lower courts] examined the strength and merits of the respondents' claim most carefully. … We do not consider, however, that it was appropriate for either Judge to enter upon such a detailed inquiry. … we reiterate that such an exercise is inappropriate in the context of a summary judgment application. Indeed, as argument progressed before us it became increasingly clear that the issues could not properly be resolved summarily."

The ratio of these decisions reflects the Court's acknowledgement that disputes of fact or expert evidence may not safely be determined solely on the basis of written evidence. Credibility and explanations drawn out during cross-examination are just as important as the carefully crafted documents prepared by each party. Without that viva voce evidence, it is unwise to rush to judgment.

It is important to remember that this caution against rushing to judgment is made by senior and experienced Judges, whose very profession it is to resolve such issues. These cases consistently warn about the difficulty of attempting to resolve disputes of fact or credibility without the benefit of seeing each witness give evidence and be subject to cross-examination. So, Judges with career experience in legal and judicial practice are careful not to reach judgment on disputed facts on sworn affidavits alone.

This caution ensures that each party has the opportunity to have their disputed view tested at a full trial before a decision is reached. It is therefore argued that unnamed officers of Inland Revenue's Adjudication Unit cannot be in a better position to make decisions over disputed facts or expert evidence than our senior Judges.

Interestingly, the TRA has independently recognised that it is inappropriate to resolve disputes of fact on affidavit evidence along. In *Case X5*, Willy DCJ concluded:

> "In these circumstances it is impossible to say that the disputant's case is so untenable that it cannot succeed. It is plain from the affidavits that there are numerous areas of relevant dispute between the parties which can only be resolved after a hearing of the evidence. Including proof that the Commissioner has in fact issued the assessment claimed by him. Indeed, if the notice of claim is accepted at face value, the disputant cannot even begin to respond to the Commissioner until he receives back all relevant documents." **[(2008) Vol 14:4 NZJTLP 425, 449]** Clearly there is much in contention between the parties before one gets to consider the procedural provisions of the Tax Administration Act."

Based on that authority, it is doubtful whether the proposal in the NZLS/NZICA Joint Submission would have the desired affect.

Interesting, the Courts have also stressed that the summary judgment procedure should not be permitted to stultify the development of the law, and that this may be a good reason for sending a claim in a developing area to trial. In *Westpac Banking Corp v M M Kembla NZ Ltd*, the Court of Appeal suggested that "novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective."

An unfortunate consequence of the current disputes procedure is that decisions by the Adjudication Unit in favour of the taxpayer may never be tested in Court. Called by the Court of Appeal in *ANZ National Bank Ltd v CIR* a process of "win, no lose for the taxpayer", it means some closely balanced issues may not be tested. With Inland Revenue adopting a firm policy of consistency, a taxpayer-friendly position reflected in an Adjudication Report will not then be able to be reconsidered by the Court, as the Adjudication Unit will henceforth consistently rule in all taxpayers' favour each time that issue comes before it.

While laudable in its aims, the consistency policy may inadvertently result in the stultification of the law. There are occasional instances where Inland Revenue policy and practice have been found by the Courts to be incorrect or inapplicable — and the law in those areas has developed as a consequence. Yet, such cases are unlikely to be heard under the present system. While vibrant internal debate may occur within Inland Revenue, the current procedure will, unfortunately, limit the range of arguments and issues that come before the Court, which would hinder the Court's important role in the development and interpretation of tax law overall.

12.0 THE INAPPLICABILITY OF THE FARNSWORTH PRINCIPLE

The High Court's dicta in *Ch'elle* — that an adjudication report issued by the Adjudication Unit is not binding on the Commissioner — presaged the inapplicability of the longstanding *Farnsworth* principle. That principle, named after the case in which it was first adopted, arose under the previous case stated regime. It determined that the Commissioner was precluded from raising a new ground of assessment during the case stated or on appeal. In effect, the Commissioner was limited only to the **[(2008) Vol 14:4 NZJTLP 425, 450]** actual ground of assessment upon which he has assessed the taxpayer and could not later supplement that ground with additional arguments.

Crucially, the principle was based on fairness between the taxpayer and the Commissioner. Under the case stated procedure, the taxpayer was expressly limited to its own grounds of objection to the original assessment. Accordingly, the Courts felt it both proper and necessary to correspondingly limit the Commissioner to the grounds of the original assessment.

However, the new disputes and challenge procedures contained no express restriction on the grounds upon which taxpayers could contest an assessment. Rather, both parties were only subject to the same evidence exclusion rule in s 138G TAA 1994, which limited them to the contents of their SOPs.

The first case to determine whether the restriction arising from the *Farnsworth* principle continued to apply under the new statutory regime was *Zentrum Holdings Ltd v CIR*. Before the TRA, the Commissioner unsuccessfully argued the case only on the original grounds of assessment. However, on appeal the Commissioner sought to expand the grounds to include a new ground of assessment not previous advanced.

When the Commissioner sought to raise the new ground of assessment on appeal, the taxpayer opposed it. However, in that case no SOP had been issued by the parties and therefore not even the new restriction of s 138G TAA 1994 applied. This apparently left the Commissioner free to alter his ground of assessment at any time, contrary to the restrictive *Farnsworth* principle.

The High Court reluctantly upheld the *Farnsworth* principle. Keane J considered the clearly different statutory challenge regime and found that there seemed to be no reason for the continued application of that principle. Nevertheless, his Honour felt bound by it and, therefore, refused to allow the Commissioner's new argument.

In a unanimous judgment, the full Court of Appeal ruled in favour of the Commissioner. The new statutory regime permitted no restriction the Commissioner's grounds to defend an assessment, other than the evidence exclusion rule, which did not apply in that

case. Accordingly, the Commissioner was permitted to raise new grounds to support an existing assessment, subject to the ordinary Court rules limiting amendments to pleadings.

The Headnote in the *NZTC* summarises the Court's reasoning as follows:

> "The Farnsworth principle had no application to the disputes resolution procedures in the Tax Administration Act 1994. The Commissioner and the taxpayer, at the hearing of a challenge, were not restricted to contentions advanced earlier in the dispute resolution process. The earlier Court of **[(2008) Vol 14:4 NZJTLP 425, 451]** Appeal authorities limiting the Commissioner to the grounds of his assessment were based on inference from s 36 of the Inland Revenue Department Act 1974 that the objector shall be limited to the grounds stated in the objection. Under s 138B of the Tax Administration Act, there was no express limit similar to the previous s 36 of the Inland Revenue Department Act."

The taxpayers were granted leave to appeal that decision to the Supreme Court but that appeal was abandoned. This leaves the reasoning of the Court of Appeal's decision as binding authority. In effect, the Commissioner can defend an assessment on any ground included in his or the taxpayer's SOP, in accordance with s 138G TAA 1994 — regardless of whether that ground was upheld in the Adjudication Report. Where no SOP has been issued, there is effectively almost no restriction on what grounds the Commissioner can defend the assessment.

13.0 THE COURT'S OWN POWER OF ASSESSMENT

In addition to the newly-recognised power of the Commissioner to change his grounds of assessment subject only to s 138G TAA 1994, the Courts themselves have been increasingly asserting their own power of assessment, under s 138P TAA 1994. That section permits the hearing authority to:

> "(a) Confirm or cancel or vary an assessment, or reduce the amount of an assessment, or increase the amount of an assessment to the extent to which the Commissioner was able to make an assessment of an increased amount at the time the Commissioner made the assessment to which the challenge relates; or
>
> "(b) Make an assessment which the Commissioner was able to make at the time the Commissioner made the assessment to which the challenge relates, or direct the Commissioner to make such an assessment."

Furthermore, the normal time bar does not apply to any assessment by the hearing authority. However, presumably the hearing authority is also restricted by the ground raised by the parties in their SOPs.

The Courts have increasingly asserted the right to raise an assessment, to remedy any procedural defect in the Commissioner's assessment or to support an assessment on different grounds. Examples of this can be found in a number of cases.

In the High Court *Trinity* litigation, Venning J was faced with a technical argument regarding the content of the Notice of Assessment issued to one of the taxpayers. In dismissing the taxpayer's argument, his Honour stated:

> "At the time that assessment was made on 26 March 2002, the Commissioner was able to make an assessment debiting the refund … All that was required was a further debit entry on the amended assessment issued. The Court can direct the Commissioner to make such amended assessment: **[(2008) Vol 14:4 NZJTLP 425, 452]** s 138P(1)(b). Section 138P(5) confirms that the time bar does not apply to orders of the hearing authority. This Court is the hearing authority for the purposes of s 138P."In the circumstances pursuant to s 138P(1) I direct the Commissioner to make an assessment of Mr Peebles for the 1997 year to provide for the residual income tax due of $724,151.00."

Accordingly, Venning J was comfortable to invoke his own power under s 138P TAA 1994 to remedy any technical defect in what was a substantively correct assessment.

A more extreme example arose in *Beckham v CIR*, where the High Court rejected the Commissioner's primary ground of assessment of proceeds from the sale or land under what was s CD 1(2)(f) ITA 1994. However, the Court upheld the alternative

assessment raised by the TRA under what was s CD 1(2)(e) ITA 1994. That ground of assessment had been raised in the Commissioner's SOP and, therefore, was not precluded under s 138G TAA 1994. Accordingly, the TRA raised that alternative assessment using its power under s 138P TAA 1994.

The Court of Appeal upheld the High Court's decision and endorsed the TRA's power to raise any assessment it considers correct:

> "In *Zentrum* the Full Court held that the Tax Administration Act removed the basis of the decision in *Farnsworth*. In *Zentrum* the Commissioner had assessed the taxpayer under the general anti-avoidance provisions of the Income Tax Act. Before the Authority he maintained that position. On the Commissioner's appeal to the High Court he argued that the transactions were in fact shams. The High Court held that argument was precluded by *Farnsworth*. But this Court held that under the Tax Administration Act the nature of the taxpayer's challenge is an attack on the assessment itself and the Commissioner was not limited to contentions raised earlier in the dispute resolution process. The appeal was allowed."The jurisdiction challenge is inconsistent with s 16, s 138P and the decision in *Zentrum*. It is without merit. The Authority clearly had jurisdiction to substitute an assessment under para (e), albeit for a lesser amount than the Commissioner's original assessment."

The combined effect of these decisions is that the Commissioner is permitted to supplement his ground(s) of assessment, and also that the Court may itself step in to raise the correct assessment where the Commissioner has failed to do so (provided that the correct grounds of assessment are not precluded by s 138G TAA 1994). This is a substantial change from the former procedure, governed by the restrictive *Farnsworth* principle, which narrowed the litigation to the immediate grounds of assessment. This new landscape may require taxpayers and their advisers to anticipate any and all possible grounds of assessment when framing their challenge under Part VIIIA of the TAA 1994.

14.0 [(2008) Vol 14:4 NZJTLP 425, 453] CONSEQUENCES OF DEEMED ACCEPTANCE BY COMMISSIONER

Previously, there had been some arguments around the consequences of any deemed acceptance of a taxpayer's NOPA by the Commissioner. If the Commissioner failed to reject a taxpayer's NOPA, the Commissioner was required to issue a Notice of Assessment (or Notice of Reassessment) that reflected the proposed adjustment. While most practitioners considered that reassessment was then binding on the Commissioner, it was arguable that even if the Commissioner is deemed to accept the taxpayer's NOPA and has issued the resulting assessment in accordance with the NOPA, the matter may not end there. Rather, Inland Revenue could, and apparently sometimes did, commence a new dispute under Part IVA by issuing its own NOPA proposing to reverse the reassessment that it was required to make by virtue of the earlier deemed acceptance.

The confusion has now been resolved by amendments to s 89J(1) TAA 1994, stipulating that any deemed acceptance is now permanently binding on the Commissioner. The amended section mandates that "the Commissioner must include or take account of the adjustment in a notice of assessment issued to the disputant; and any further notice of assessment or further amended assessment issued to the disputant."

Deemed acceptance is therefore binding unless "the Commissioner considers that the disputant in relation to the adjustment was fraudulent or wilfully misled the Commissioner."

The wording of this exception mirrors that in s 108 TAA 1994, which permits the Commissioner to lift the statutory time bar "if the Commissioner is of the opinion that a tax return provided by a taxpayer is fraudulent or wilfully misleading."

Presumably, the similar wording was deliberate and thereby incorporates the body of case law on the scope and application of the time bar provisions into the interpretation of deemed acceptance.

15.0 PROPOSED REFORMS

Another reform of the disputes process proposed by the NZLS/NZICA Joint Submission was that the process should include a mandatory conference, preferably with the participation of an independent mediator. The NZLS/NZICA Joint Submission suggests:

> "Part IVA should be amended to provide that at least one conference is a statutorily required part of the disputes resolution procedure, with an independent mediator … being available to attend. We believe the presence of an independent party

> would provide taxpayers with confidence that a **[(2008) Vol 14:4 NZJTLP 425, 454]** resolution is possible … and would be a useful incentive for some taxpayers to engage in the process."

The author supports this proposal and would even go further. Instead of simply inserting a compulsory mediation into the existing process, it is suggested that the post-NOR phases be abandoned in favour of a dispute resolution system based on the successful and efficient regimes that apply to family law or employment disputes.

These regimes mandate compulsory mediation of all disputes before a judicial officer, before unresolved disputes are referred for judicial determination based largely on affidavit evidence and legal submissions.

The Employment Relations Act 2000 stipulates that members of the Employment Relations Authority "must … first consider whether an attempt has been made to resolve the matter by the use of mediation." Mediation is only not required if the member concludes that it "will not contribute constructively to resolving the matter; or will not, in all the circumstances, be in the public interest; or will undermine the urgent or interim nature of the proceedings." A similar duty is imposed on the Employment Court regarding any appeal. Any direction to mediate by the Authority or Court is compulsory.

If mediation of an employment dispute fails, a different member of the Authority will decide the matter. The Authority has published a Practice Note explaining the procedure it applies, including holding a directions conference to identify the issues in dispute, set a time table for any interlocutory matters, fix a date for the hearing and give any other directions required.

During the hearing, the Authority has inquisitorial powers to call evidence from and examine any person, whether or not a party. Importantly, the Authority may hear and consider any evidence or information, whether or not strictly admissible under the rules of evidence. It may then issue a reasoned written determination setting out the relevant facts, explaining its rulings on relevant issues of law and make any orders necessary to resolve the dispute. These determinations are then subject to appeal to the Employment Court by either party, on a question of law or as a hearing de novo. The **[(2008) Vol 14:4 NZJTLP 425, 455]** Family Courts Rules provide a similar procedure under which the Court can direct the parties to attend a mediation conference chaired by the Judge before any adversarial hearing of unresolved disputes.

Interestingly, the Employment Relations Act 2000 describes the aim of its procedure as "delivering speedy, informal and practical justice to the parties." Likewise, the Family Courts Rules describe its procedures as intended "to make it possible for proceedings to be dealt with fairly, inexpensively, simply and speedily as is consistent with justice." This must surely be the aim of all disputes regimes — and can be contrasted with the current tax disputes procedure.

The author proposes that systems of dispute resolution similar to those in the employment and family law jurisdictions could be applied to tax disputes. Any proposed adjustments that were not agreed following exchange of a NOPA and NOR would be subject to compulsory mediation before a member of the (greatly enhanced) TRA. Mediation under the independent guidance of a TRA Judge would best promote genuine dispute resolution. Where agreement or resolution of the dispute under TRA guidance is not possible, the adjustment would then be referred for judicial determination before a different TRA Judge. The TRA could then exercise its powers under s 138P TAA 1994 to "confirm or cancel or vary" the proposed assessment.

Decisions of the TRA, which would effectively replace Adjudication Reports, would then be available for publication in redacted form. Access to Adjudication Reports was another reform proposed by the NZLS/NZICA Joint Submission, a proposal that the author supports. The NZLS/NZICA Joint Submission records:

> "We also note that Inland Revenue is able to and does utilise Adjudication Reports as precedents for future matters for internal staff, while taxpayers have no such access to those reports. … These are currently used internally by Inland Revenue as legal guidance, and the release of these, in redacted form, would provide guidance as to Inland Revenue's view. This would promote voluntary compliance."

The proposed new disputes regime controlled by the TRA would obviously publish its redacted decisions, as it already does. Finally, either party would be permitted to appeal the TRA decision to the High Court. This would allow for the testing and development of tax law, in a manner that is not currently possible.

The effect of this revised procedure would be for the parties to have quicker access to the Courts, rather than have to complete the post-conference phases of the current procedure. This abridged procedure is presently only available for "small claims" involving tax of less than $30,000, but the author suggests that the procedure should be extended to all disputes. As noted by the NZLS/NZICA Joint Submission:

> " **[(2008) Vol 14:4 NZJTLP 425, 456]** [The] cost of preparing documents for the disputes resolution procedure would be better spent on a Notice of Claim and on having the TRA … finally determining the matter. We believe that … taxpayers ought to be able to file a Notice of Claim and proceed directly to the TRA without completing the disputes resolution procedure."

The desire to avoid litigation at all cost has itself resulted in an unnecessarily lengthy and costly process. Blanchard considers the current disputes procedure is now less efficient than the streamlined Court process:

> "In the last decade, major changes have been made to the procedures that apply to resolution of civil disputes in the Courts. Important changes have been made to the civil procedure rules to address concerns about cases taking too long to proceed through the Court systems."

He therefore concludes that "the disadvantages of the [current] process arising from its complexity are such that they are certainly outweighed by any perceived benefits of the process in terms of avoiding litigation."

16.0 CONCLUSION

The NZLS/NZICA Joint Submission concludes that "the current disputes procedure is an abject failure … [and] fails the majority of taxpayers", so urgent change is required. The issues touched on in this article are only a few of the large number of areas of uncertainty currently affecting the disputes resolution process. As time progresses following the enactment of s 89N TAA 1994, no doubt we will see other issues arise as the brittleness of the provision as the wider process continues to be tested. What is certain, however, is that in order to successfully navigate this process, more than just tax technical skill is required.

Most of the issues before the Courts are procedural, many relating directly to the disputes resolution and challenge provisions. It is widely considered that the current procedure is too costly and may cause taxpayers with small claims not to proceed. If so, the disputes procedure is failing at its most basic level. The author proposes that it is now time to reform the system to more closely align it with Sir Ivor Richardson's original vision of establishing an affordable and efficient disputes procedure.

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FOOTNOTES

1 The new procedure applied to all disputes commenced on or after 1 October 1996.

2 The purposes are set out in s 89A TAA 1994.

3 Figures gathered by the New Zealand Institute of Chartered Accountants (NZICA) record that in 1996, the number of cases decided by the Taxation Review Authority (TRA) was 63, but it has dropped to 13 cases in 2006.

4 Inland Revenue, *Resolving Tax Disputes: A Legislative Review — A Government Discussion Document*, (Wellington, July 2003), Ch 1: Overview, p 2, paras 1.7 and 1.8.

5 See *Allen v CIR*[2006] 3 NZLR 1; (2006) 22 NZTC 19,827 (SC).

6 Under the Family Proceedings Act 1980.

7 Under the Employment Relations Act 2000.

8 J Shewan, "Protecting the Integrity of the Tax Act: The Practitioner's Perspective", (Paper presented at the Institute of Chartered Accountants of New Zealand 2002 Tax Conference, Christchurch, 11-12 October 2002).

9 G Blanchard, "The Case for a Simplified Tax Dispute Resolution Process", (2005) Vol 11:4 *New Zealand Journal of Taxation Law and Policy* 417, 417.

10 Taxation Committee of NZLS and National Tax Committee of NZICA, "Joint Submission: The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994", (Wellington, August 2008).

11 Paragraph 1 of the covering letter to the NZLS/NZICA Joint Submission, n 10.

12 Paragraphs 3 and 5(f) of the covering letter to the NZLS/NZICA Joint Submission, n 10.

13 See n 10, p 2; p 4, para 1.4; and p 5, para 2.1.

14 See n 10, p 6, para 2.1(d).

15 See n 10, p 7, para 2.2.

16 Subject to limited exceptions, s 89N TAA 1994 requires the Commissioner to complete the disputes process prior to raising an assessment.

17 See *Allen v CIR*[2006] 3 NZLR 1; (2006) NZTC 19,827 (SC), which requires all taxpayers to invoke the disputes procedure as a prerequisite to commencing challenge proceedings.

18 This rough analysis is based on cases to which the Commissioner was a party reported in Volumes 22 and 23 of the report, *New Zealand Tax Cases*. The author has considered "procedural cases" to include judicial review, interlocutory applications, strike out, discovery, costs, jurisdictional disputes and enlargement of timeframes. It does not include the many liquidation, bankruptcy and criminal proceedings involving the Commissioner.

19 Crown Law, *Report of the Crown Law Office for the Year Ended 30 June 2004*, (Wellington, October 2004), p 10.

20 For example, see the minor win by the taxpayer in *Lupton v CIR*(2007) 23 NZTC 21,204 (HC).

21 *Alam and Begum v CIR*(2008) 23 NZTC 22,006 (HC) is a rare exception and that case is subject to appeal.

22 Revenue Delegations are granted by the Commissioner personally in accordance with s 7 TAA 1994.

23 Pursuant to ss 6 and 6A TAA 1994.

24 Section 7 TAA 1994.

25 See *Cates v CIR*[1982] 1 NZLR 530; (1982) 5 NZTC 61,237; (1982) 5 TRNZ 603 (CA).

26 See *Kemp v CIR*(1999) 19 NZTC 15,110 (HC), where a concluded settlement with a taxpayer was nevertheless overturned by the Court once it became apparent that the Litigation Management Unit lacked the necessary delegation.

27 See the discussion by Venning J in *Accent Management Ltd v CIR*(2005) 22 NZTC 19,027 (HC), pp 19,078-19,081; paras 328-353.

28 *CIR v Russell*(2005) 22 NZTC 19,664 (DC).

29 See n 28, p 19,672, para 29.

30 See n 28, p 19,679, para 65.

31 See n 28, p 19,669, para 10.

32
Section 89F(1) TAA 1994.

33
Section 89F(2) TAA 1994. Under s 89F(3) TAA 1994, a taxpayer's NOPA must contain the same information as the Commissioner's NOPA, except curiously the taxpayer's NOPA does not need to be concise, although it must include copies of all "significantly relevant" documents.

34 Section 89G(1) TAA 1994.

35 Section 89G(2) TAA 1994.

36 See the requirements expected by Inland Revenue for disputes documents in "SPS 08/02 — Disputes Resolution Process

Commenced by a Taxpayer", (2008) Vol 20:6 *Tax Information Bulletin* 65; and "SPS 08/01 — Disputes Resolution Process Commenced by the Commissioner of Inland Revenue", (2008) Vol 20:6 *Tax Information Bulletin* 38.

37 *Alam and Begum v CIR*(2008) 23 NZTC 22,006 (HC).

38 In accordance with s 89I TAA 1994.

39 The response period in s 3 TAA 1994.

40 *Hollis v CIR*(2005) 22 NZTC 19,570 (HC).

41 *Balich v CIR*(2007) 23 NZTC 21,230 (HC).

42 See n 37, p 22,011, para 22.

43 See n 37, p 22,010, paras 15-17.

44 See n 37, p 22,010, para 18.

45 *Hieber v CIR*(2002) 20 NZTC 17,562 (HC).

46 See *Gilchrist v CIR*(2005) 22 NZTC 19,094 (HC).

47 See *Case V17*(2002) 20 NZTC 10,192 (TRA).

48 Sections 89D(1)(b) and 114 TAA 1994.

49 *Spencer v CIR*(2004) 21 NZTC 18,818 (HC).

50 See n 49, p 18,828, para 50.

51 *BNZ v CIR*(2006) 22 NZTC 20,033 (HC).

52 See n 51, p 20,039, paras 23 and 24.

53 Under s 89D TAA 1994.

54 With application to disputes commenced on or after 1 April 2005.

55 See, for example, *PLM Software Ltd v CIR*(2001) 20 NZTC 17,336 (HC).

56 *Sweetline Distributors Ltd v CIR*(2004) 21 NZTC 18,608 (HC).

57 Inland Revenue, *Resolving Tax Disputes: A Legislative Review — A Government Discussion Document*, (Wellington, July 2003).

58 Section 89N(1)(c)(vi) TAA 1994.

59 Inland Revenue, "SPS 08/01: Disputes Resolution Process Commenced by the Commissioner of Inland Revenue", (2008) Vol 20:6 *Tax Information Bulletin* 38.

60 M Lennard, "Managing Disputes with IRD", (NZICA Presentation, November 2006), p 95.

61 Section 89N(1)(c)(i) TAA 1994.

62 For example, see *Auckland Institute of Studies v CIR*(2002) 20 NZTC 17,685 (HC); and *Vinelight Nominees Ltd v CIR*(2005) 22 NZTC 19,519 (HC).

63 Section 143 TAA 1994.

64
As required in s 22 TAA 1994.

65
As required in s 33 TAA 1994.

66
As required in s 24Goods and Services Tax Act 1985.

67 Section 89N(1)(c)(iii) and (v) TAA 1994.

68 Under ss YB 3, YB 4, YB 7, YB 15 and YB 18Income Tax Act 2007. These provisions may, however, be replaced if the Taxation (International Taxation, Life Insurance, and Remedial Matters) Bill 2008 — which introduces new definitions of "associated person" — were enacted.

69 Inland Revenue, "SPS 08/01: Disputes Resolution Process Commenced by the Commissioner of Inland Revenue", (2008) Vol 20:6 *Tax Information Bulletin* 38, p 52, paras 155 and 157.

70 Section 3(1) TAA 1994. By comparison, the decision to make an application to the High Court under s 89N(3) TAA 1994 is expressly excluded from that definition.

71 *Vinelight Nominees Ltd v CIR*(2005) 22 NZTC 19,519 (HC).

72 As defined in s 3 TAA 1994.

73 Lifting the time bar is required before a NOPA can be issued, by virtue of s 89B(4) TAA 1994.

74 See *Douglas v CIR*(2000) 19 NZTC 15,971 (HC).

75 Section 89N(3) TAA 1994.

76 Inland Revenue, "Disputes Resolution Process Commenced by the Commissioner of Inland Revenue — SPS 05/03", (2005) Vol 17:3 *Tax Information Bulletin* 27. This Standard Practice Statement applied until 13 June 2008.

77 See n 76, p 40, para 131.

78 *ANZ National Bank Ltd v CIR (No 2)*(2006) 22 NZTC 19,835 (HC).

79 See n 78, p 19,840, para 13.

80 Section 89N(5) TAA 1994.

81 Inland Revenue, *Resolving Tax Disputes: A Legislative Document — A Government Discussion Document*, (Wellington, July 2003), p 18, para 3.17.

82 Inland Revenue, "SPS 08/01: Disputes Resolution Process Commenced by the Commissioner of Inland Revenue", (2008) Vol 20:6 *Tax Information Bulletin* 38, p 51, paras 143-144.

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

84 See n 83, p 17,378, para 38.

85 *ANZ National Bank Ltd v CIR*(2006) 22 NZTC 19,987 (HC); and *CIR v ANZ National Bank Ltd*(2007) 23 NZTC 21,167 (CA).

86 This dispute arose prior to the commencement of s 89N TAA 1994.

87 *ANZ National Bank Ltd v CIR (No 2)*(2006) 22 NZTC 19,835 (HC), p 19,841; para 18.

88 See n 87, p 19,842, para 23.

89 *CIR v ANZ National Bank Ltd*(2007) 23 NZTC 21,167 (CA).

90 Inland Revenue, "SPS 08/01: Disputes Resolution Process Commenced by the Commissioner of Inland Revenue", (2008) Vol 20:6 *Tax Information Bulletin* 38.

91 See n 90, p 62, para 285.

92 See n 90, pp 62-63, para 286.

93 Inland Revenue, "SPS 08/01: Disputes Resolution Process Commenced by the Commissioner of Inland Revenue", (2008) Vol 20:6 *Tax Information Bulletin* 38, pp 62-63, para 286.

94 See the difficulty posed by this issue under s 89B(4) TAA 1994 in *Vinelight Nominees Ltd v CIR*(2005) 22 NZTC 19,519 (HC).

95 Section 89N(4) TAA 1994.

96 See the discussion of the scope and application of s 89C TAA 1994 in section 5 above.

97 See *Hieber v CIR*(2002) 20 NZTC 17,562 (HC); and *Spencer v CIR*(2004) 21 NZTC 18,818 (HC).

98 See *Gilchrist v CIR*(2005) 22 NZTC 19,094 (HC).

99 See *Case V17*(2002) 20 NZTC 10,192 (TRA).

100 Sections 89D(1)(b) and 114 TAA 1994.

101 Which states that an assessment is not invalidated by a failure to comply with a provision in the TAA 1994.

102 *Sweetline Distributors Ltd v CIR*(2004) 21 NZTC 18,608 (HC).

103 See n 102, pp 18,617-18,618, para 49.

104 *Ch'elle Properties (NZ) Ltd v CIR*[2004] 3 NZLR 274; (2004) 21 NZTC 18,618 (HC).

105 See n 104, pp 280-281; pp 18,623-18,624, paras 28-32.

106 Inland Revenue, "SPS 08/01: Disputes Resolution Process Commenced by the Commissioner of Inland Revenue", (2008) Vol 20:6 *Tax Information Bulletin* 38, p 62, para 285.

107 See *CIR v Delphi Fishing Co Ltd*(2004) 21 NZTC 18,525 (HC).

108 G Blanchard, "The Case For A Simplified Tax Dispute Resolution Process", (2005) Vol 11:4 *New Zealand Journal of Taxation Law and Policy* 417, p 438.

109 See n 108, p 438.

110 Taxation Committee of NZLS and National Tax Committee of NZICA, "Joint Submission: The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994", (Wellington, August 2008), p 16, para 3.34.

111 Rule 138(5)High Court Rules.

112
Section 89F(2)(b) TAA 1994.

113
Section 89G(2)(a) TAA 1994.

114
Section 138M(4) and (5) TAA 1994.

115 *Pemberton v Chappell*(1986) 1 PRNZ 183; [1987] 1 NZLR 1 (CA).

116 Brookers Ltd, *McGechan on Procedure*, (Wellington, Brookers Ltd), para HR136.03.

117 For instance, in *A-G v Jones*(2001) 15 PRNZ 347 (CA).

118 See *A-G v Jones*(2003) 16 PRNZ 715; [2004] 1 NZLR 433 (PC), which overturned the Court of Appeal decision (n 117).

119 *A-G v Rakiura Holdings Ltd*(1986) 1 PRNZ 12 (HC).

120 See n 119, p 14.

121 *MacLean v Stewart*(1997) 11 PRNZ 66 (CA).

122 See n 121, pp 68-69.

123 *Case X5*(2005) 22 NZTC 12,076 (TRA).

124 See n 123, p 12,078, paras 17 and 18.

125 For instance, see *BNZ v Maas-Geesteranus*(1991) 4 PRNZ 689 (CA), and *Westpac Banking Corp v M M Kembla NZ Ltd*(2000)

14 PRNZ 631; [2001] 2 NZLR 298 (CA).

126 *Westpac Banking Corp v M M Kembla NZ Ltd*(2000) 14 PRNZ 631; [2001] 2 NZLR 298 (CA).

127 See n 126, p 647; p 313, para 62.

128 *ANZ National Bank Ltd v CIR*(2006) 22 NZTC 19,987 (HC), and *CIR v ANZ National Bank Ltd*(2007) 23 NZTC 21,167 (CA).

129 For instance, see *Allen v CIR*[2006] 3 NZLR 1; (2006) 22 NZTC 19,827 (SC).

130 *Ch'elle Properties (NZ) Ltd v CIR*[2004] 3 NZLR 274; (2004) 21 NZTC 18,618 (HC), 280-281; 18,623-18,624; paras 30-32.

131 *CIR v VH Farnsworth Ltd*[1984] 1 NZLR 428; (1984) 6 NZTC 61,770; (1984) 7 TRNZ 77 (CA).

132 Found in Part VIII of the TAA 1994, applying to disputes commenced before 1 October 1996.

133 See s 36Inland Revenue Department Act 1974.

134 See *BASF New Zealand Ltd v CIR*(1995) 17 NZTC 12,136; (1995) 19 TRNZ 594 (HC). The principle was applied as recently as *FB Duvall Ltd v CIR*(2000) 19 NZTC 15,658 (CA).

135 *CIR v Zentrum Holdings Ltd*[2006] 1 NZLR 710; (2005) 22 NZTC 19,510 (HC).

136 *Case X1*(2005) 22 NZTC 12,001 (TRA).

137 The dispute had commenced prior to 1 April 2005 and, therefore, was not subject to the obligation under s 89N TAA 1994 for the Commissioner to issue a SOP and to consider the taxpayer's SOP prior to raising an assessment.

138 See n 135.

139 *CIR v Zentrum Holdings Ltd*[2007] 1 NZLR 145; (2006) 22 NZTC 19,912 (CA).

140 *Zentrum Holdings Ltd v CIR*(2006) 22 NZTC 20,051 (SC).

141 In accordance with *Ch'elle Properties (NZ) Ltd v CIR*[2004] 3 NZLR 274; (2004) 21 NZTC 18,618 (HC).

142 Section 138P(1) TAA 1994.

143 Section 138P(5) TAA 1994.

144 *Accent Management Ltd v CIR*(2005) 22 NZTC 19,027 (HC).

145 See n 144, pp 19,085-19,086, paras 382-383.

146 See also Venning J's application of s 138P TAA 1994 to another of the plaintiffs at p 19,086, para 387.

147 *Beckham v CIR*(2007) 23 NZTC 21,499 (HC), on appeal from *Case X9*(2005) 22 NZTC 12,123 (TRA), and *Case X13*(2005) 22 NZTC 12,193 (TRA).

148 Now s CB 10Income Tax Act 2007.

149 Now s CB 12Income Tax Act 2007.

150 *Beckham v CIR*(2008) 23 NZTC 22,066 (CA), pp 22,072-22,073; paras 30-31.

151 See M Keating, "Deemed Acceptance of Taxpayers' Notices of Proposed Adjustment", (2005) Vol 11:4 *New Zealand Journal of Taxation Law and Policy* 397.

152 Section 89J TAA 1994.

153 For example, see the facts in *MR Forestry (No 1) Trust Ltd v CIR*(2006) 22 NZTC 19,954 (HC).

154 Section 89J(2) TAA 1994.

155 Section 108(2) TAA 1994.

156 Such cases as *Maxwell v CIR (No 2)*[1962] NZLR 683 (SC and CA), and *Auckland Institute of Studies Ltd v CIR*(2002) 20

NZTC 17,685 (HC).

157 Taxation Committee of NZLS and National Tax Committee of NZICA, "Joint Submission: The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994", (Wellington, August 2008), p 10, para 3.14(a).

158 Under the Family Proceedings Act 1980.

159 Under the Employment Relations Act 2000.

160 Section 159(1)Employment Relations Act 2000.

161 Section 159(1)(b)Employment Relations Act 2000.

162 Section 188Employment Relations Act 2000.

163 *Young v Bathurst Motors (2000) Ltd*(unreported, Employment Relations Authority, AA160/02, 28 May 2002, YS Oldfield).

164 "Practice Note: Employment Relations Authority — Steps to be Taken in Proceedings" [2001] 1 ERNZ 103.

165 Section 160(1)Employment Relations Act 2000.

166 Section 160(2)Employment Relations Act 2000.

167 The need for the Employment Tribunal to give reasoned decisions was found in *Lakeland Health Ltd v Joseph*[1997] ERNZ 425 (EC).

168 Section 174Employment Relations Act 2000.

169 Section 179Employment Relations Act 2000.

170 Rules 174 and 175 Family Courts Rules.

171 Section 174Employment Relations Act 2000.

172 Rule 3 Family Courts Rules.

173 Taxation Committee of NZLS and National Tax Committee of NZICA, "Joint Submission: The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994", (Wellington, August 2008), p 16, para 3.35.

174 Section 89E TAA 1994 and these determinations are currently unable to be appealed by either party.

175 See n 173, para 3.41.

176 G Blanchard, "The Case For A Simplified Tax Dispute Resolution Process", (2005) Vol 11:4 *New Zealand Journal of Taxation Law and Policy* 417, p 437.

177 See n 176, p 437.

178 Taxation Committee of NZLS and National Tax Committee of NZICA, "Joint Submission: The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994", (Wellington, August 2008), Appendix A: The Costs of the Procedures and the Impact on Tax Litigation, p 29.

179 Organisational Review Committee, *Organisational Review of the Inland Revenue Department: Report to the Minister of Revenue (and on Tax Policy, also to the Minister of Finance) from the Organisational Review Committee*, (Wellington, April 1994).