

15 June 2022

Public Consultation
Inland Revenue Department

By email: public.consultation@ird.govt.nz

Re: ED0240 – Disputes Process SPS

Introduction

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa welcomes the opportunity to comment on the draft Standard Practice Statement, *Disputes Process* (**'draft SPS'**), which sets out the rights and responsibilities of taxpayers and the Commissioner during the disputes process.
2. This submission has been prepared with the assistance of the Law Society's Tax Law Committee.

General comment

3. The draft SPS replaces SPS 16/05 (Disputes resolution process commenced by the Commissioner of Inland Revenue) and SPS 16/06 (Disputes resolution process commenced by a taxpayer).
4. There are benefits and disadvantages to combining the existing SPSs into a single document. While we welcome a reduction in the total number of pages devoted to disputes commentary, the draft SPS is lengthy and may be inaccessible for taxpayers.
5. Navigation of the draft SPS has been improved by the use of hyperlinked cross-references, however the document now outlines process steps that will not apply, depending on who has initiated the dispute. Readers will need to be diligent in ensuring they are identifying the correct process steps and timelines applicable to the dispute they are engaged in (i.e. taxpayer or commissioner initiated).
6. If the draft SPS is to continue as a single document, it is essential that duplication is removed and that the previous flowcharts or tables (as discussed below) are replicated and hyper-linked to the relevant sections of the document, so that readers can identify the process information applicable to them.
7. There is duplication within the draft SPS, with some matters covered in both the detailed discussion of the various phases of the disputes process, and again within the section '*Other matters that may arise during a dispute*'. For example, there is overlap between paragraphs 46 – 49 and 282 – 289, and between paragraphs 86 – 87 and 323 – 325. Given the length of the document, it is preferable to reduce this duplication.
8. The draft SPS could be improved by including either detailed flowcharts or the table-form process summaries, alongside hyperlinks to the relevant sections of the document. The comprehensive flowcharts of SPS 10/04 and SPS 10/05 were not replicated in SPS 16/05 and

SPS 16/06, which instead moved to table-form summaries of the process with indicative timeframes. The draft SPS now contains only basic flowcharts¹ which, in their current form, omit essential steps² and are too simplified to be of assistance.

Prosecution action during the disputes process, paragraphs 22 to 29

9. The addition of this section is useful. However, the Law Society notes:
- a. Taxpayers have a right not to provide incriminating information or to continue with the disputes process where prosecution action is being considered. This should be made more explicit at paragraph 28, perhaps by rephrasing bullet-point two to explain:
 - i. the taxpayer has the right not to provide incriminating information; and
 - ii. following from this, the taxpayer can choose not to proceed with the disputes process at this time, noting the risks of continuing to do so and the importance of obtaining legal advice.
 - b. Apart from a brief mention (paragraph 29, bullet point 5³) the section does not address the situation in which one party to the civil dispute, typically the Commissioner, is or may become subject to a time bar (for example under section 108 of the Tax Administration Act). If a dispute is also subject to a criminal investigation and prosecution, many years may pass before that prosecution is resolved.
 - c. The section would also benefit from more detail on how the Commissioner will deal with any time-bar issues that might arise if the taxpayer chooses not to proceed with the disputes process at any stage in order to preserve their fair trial rights.

Disputable decisions, paragraphs 296 to 304

10. Paragraph 297, referencing section 3(1) of the TAA, explains that a ‘disputable decision’ includes both an assessment and a decision of the Commissioner under a tax law, subject to some exclusions.
11. Paragraph 298 then broadens this, stating:
- ... even where the tax law does not confer such a discretion or power, the decision may still be a disputable one where the Commissioner’s decision is one that will affect a taxpayer’s rights and obligations under those tax laws.*
12. This could be read as widening the definition, so that a ‘disputable decision’ includes a decision merely *about* a tax law, rather than *under* a tax law. The first example at paragraph 304 demonstrates this, referencing a disputable decision purportedly arising from section YD 1 of the Income Tax Act 2007, which contains no statutory authority under which to make a decision on tax residency. The legislation does not appear to the Law Society to give the Commissioner a power to decide tax residency per se – rather, the Commissioner’s view that a person is or is not resident is reflected in many separate disputable decisions, each of which is separately disputable on grounds which may include a taxpayer’s tax residency status.
13. The Law Society recommends paragraph 298 be removed. The statement itself is of limited assistance beyond what is already outlined in the draft SPS, and its removal will reduce the risk of inconsistent understandings across those who consult the document. In addition, the

¹ For example, the flowchart on page 4.

² Such as rejection of the Commissioner’s NOR, which is not included on the page 4 flowchart, but is an essential step if a taxpayer-initiated dispute is to continue.

³ The Society queries whether the formatting of Paragraph 29 is as intended. The last three bullet points seem to be separate concepts, not the potential contents of the letter from the Commissioner (which the first two bullet points clearly reference).

abovementioned example should be amended to refer to the provision under which the Commissioner issues a decision on tax residency (if there is one) or replaced with an example of a disputable decision which depends on whether the taxpayer is resident.

Exceptional circumstances – paragraphs 310 – 314

14. At noted above, the Law Society considers it important to make clear within the draft SPS that a taxpayer has the right not to provide incriminating information and may choose not to continue with the disputes process where advised the Commissioner is considering prosecution.
15. It is therefore important paragraphs 310 to 314 refer to paragraph 28, which outlines the Commissioner’s view that *‘preserving a taxpayer’s fair trial rights in current or potential criminal proceedings can be an exceptional circumstance.’* Without this information, taxpayers may be inclined to continue the disputes process.

Comment on individual paragraphs

16. In addition to the above, the Law Society has following suggestions in respect of individual paragraphs, outlined below in table form for ease of reference.

Para	Comment
5	There appears to be a typo in this paragraph, which refers to <i>‘a series of phases steps’</i> . Bullet-point two should highlight that it is the Commissioner’s practice to advise taxpayers whether and to what extent a NOR is accepted.
7	This paragraph would benefit from a reference to the paragraphs in the draft SPS dealing with opt out in more detail.
8	The reference to an ‘independent’ review is not strictly correct. The review is internal, though conducted by officers not previously involved in the matter.
17 – 18	Reference to section 113 should be included, given paragraph 18 refers to SPS 20/03 <i>Requests to amend assessments</i> , which covers section 113 requests.
19	This paragraph should note that a NOPA would still be required in these circumstances.
21	For specificity, the words ‘being considered’ (or similar) should be added after ‘adjustment’.
57	This paragraph would benefit from highlighting that a tax return must be provided before or with the NOPA.
60	This contains a typo and should read <i>‘... agrees with the’</i> .
75	This paragraph should make clear the points at which the Commissioner considers they have received a taxpayer’s assessment, i.e. when the tax return is filed.
79	The statutory reference is missing from this paragraph.
85	It may be useful to clarify in this paragraph that a NOPA will <i>usually</i> , but not always consider shortfall penalties, as highlighted at paragraph 306.
114	This paragraph would benefit from noting that time limits apply to issuing further NOPAs.
131	It is worth including that the Commissioner will also be considered to have accepted a NOPA if they do not issue a NOR at all.
135	This paragraph should refer to the exceptional circumstances provided for in section 89K.
157	Reference to NOPAs issued after 29 August 2011 could be placed in a footnote, or otherwise removed.

184	This paragraph should contain a reference and link to the later paragraphs dealing with time bar waiver.
187, 190	These paragraphs would benefit from being more precise as to what agreement is being referred to. For example, is it referring to settlement, an agreement to opt out, or simply any agreement reached in facilitation.
202	This paragraph should also refer to the possibility of the Commissioner issuing a challenge notice.
205	A challenge could be to an assessment <i>or</i> a refusal to amend an assessment.
229	The language of section 89M(11) is 'issues in dispute' rather than 'disputed issue.'
242	This paragraph refers to an 'outline', and then suggests an 'outline' should consist of a 'complete discussion.' This language is inconsistent, making it unclear what is required.
250	This paragraph could be drafted to more clearly identify relevant timeframes, including the Commissioner's.
260	This paragraph should note that when facts are in dispute, the TCO will rely on the conclusions of investigations staff. That is, the TCO will not make determinations on disputed facts.
300	This paragraph states that a decision under section 113 is not disputable because it is a decision made under Part 8A and therefore falls outside of the definition of 'disputable decision.' However, a decision under section 113 is not disputable because it is specifically excluded by section 138E(1)(e)(iv) from having a right of challenge.
308	This should confirm when the Commissioner considers that a document has been received (for example, when posted, emailed).
320	This should include the time limit for filing proceedings with the Taxation Review Authority.
FN 2	This footnote could also refer to paragraphs [349] to [387].

17. Thank you again for the opportunity to provide feedback on this draft SPS. If you have any questions or wish to discuss the Law Society's feedback, please contact aimee.bryant@lawsociety.org.nz.

Ngā mihi nui



Caroline Silk
Vice President