



WEEKLY COMMENT: FRIDAY 25 APRIL 2014

1. This week I will look at the Commissioner's exposure draft ED0162 of the Standard Practice Statement (SPS) *Requests to amend assessments* ("the SPS"), which was issued on 19 February and on which submissions closed last Friday, 11 April. Taxpayers at some time or other get a tax return wrong or receive advice that they have taken an incorrect tax position. Therefore, the procedure for correcting errors is important and useful information. The SPS replaces SPS 07/03 *Requests to Amend Assessments* previously published in *Tax Information Bulletin* Vol. 19, No. 5 (June 2007).
2. It is stated that the SPS should read in conjunction with:
 - (a) SPS 09/02 *Voluntary Disclosures*;
 - (b) SPS 06/03 *Reduction of shortfall penalties for previous behavior*;
 - (c) QB 09/04: *The relationship between section 113 of the TAA and the proviso to section 20(3) of the GST Act*;
 - (d) The item *Correction of minor errors in subsequent returns* in *Tax Information Bulletin* Vol. 22, No. 1 (February 2010).
3. The SPS applies to the exercise of the Commissioner's discretion under s. 113 of the *Tax Administration Act 1994* ("the TAA") to amend assessments. It also explains the relationship between s. 113 and s. 113A of the TAA, and s. 113 of the TAA and s. 20(3) of the *Goods and Services Tax Act 1985* ("the GST Act").
4. It is stated in the SPS that taxpayers cannot, by law, correct errors in their self-assessments by simply filing "amended tax returns". If a taxpayer notices an error in a return that has been filed, they should make an amendment request as set out in the SPS.

A request under section 113 is not a NOPA

5. Section 113 of the TAA states that the Commissioner may amend any assessment as the Commissioner thinks necessary in order to ensure its correctness. If the amendment increases the tax payable, the Commissioner must notify the taxpayer.
6. The Commissioner may amend assessments under s. 113 despite the fact that a taxpayer has not issued a Notice Of Proposed Adjustment ("NOPA") under s. 89D of the TAA.
7. If the request to amend the assessment is within the response period to issue a NOPA, the taxpayer should consider issuing a NOPA to preserve their disputes rights against the

possibility that the Commissioner may decline the exercise of the s. 113 discretion. The Commissioner cannot be compelled to amend assessments.

8. The response period, under s. 89AB of the TAA, for a notice of assessment issued by a taxpayer or by the Commissioner is 4 months starting from the date of issue of the assessment.
9. A default assessment, issued by the Commissioner in the absence of a return under s. 106(1) of the TAA, is a special case. A NOPA cannot be issued to dispute a default assessment. A default assessment can only be disputed by filing a tax return. The tax return filed in response to a default assessment outside the relevant response period will be treated as a request for amendment under s. 113.
10. A NOPA must be issued or, if outside the applicable response period and a tax shortfall is being corrected, a voluntary disclosure can be made, for incorrect tax positions relating to:
 - (a) Non-genuine errors, including instances where a taxpayer wishes to resile from one correct position in favour of another correct position; or
 - (b) Matters of disputed statutory interpretation.
11. It is not discussed what to do in the above situations if outside the applicable response period and a tax refund would result. Presumably a voluntary disclosure can still be made.

What is a “genuine error”

12. It is stated in paragraph 28 that:

“In this SPS, the term “genuine errors” is used to mean incorrect tax positions inadvertently taken in assessments resulting in a tax liability being either overstated or understated. However, if a taxpayer chooses to take a particular tax position under tax laws where legitimate alternatives are available and later wishes to resile from that position in favour of another legitimate alternative, no error has occurred.”

13. It is stated in the SPS that if a taxpayer can show that their tax return incorrectly recorded their decisions under tax laws, the Commissioner would generally amend the affected assessment. The example given is of a choice regarding calculating the proportion of business use of a motor vehicle, and the failure to consistently use a choice legitimately made in a past year in future years. In that case, the Commissioner would amend the assessment in a future year, subject to the general limitations discussed in paragraph 24 onwards below.
14. By contrast, if a taxpayer has made a choice regarding calculating the proportion of business use of a motor vehicle in a past year and later wishes to resile from that position and use one of the alternative (legitimate) calculations for a past year, it is stated in the SPS that the Commissioner cannot amend the taxpayer’s assessment as no genuine error has occurred. However, the revised choice could be used in later years.

Information required in a request to amend an assessment

15. Paragraph 34 of the SPS sets out the information required as follows:
 - (a) The tax types and periods containing the errors;
 - (b) The amount of tax in error;

- (c) A description of the errors including the background circumstances and the reasons for their occurrence;
 - (d) The nature of the errors, including any relevant tax laws;
 - (e) How and why the errors were identified;
 - (f) Where relevant, details of any incorrect advice given directly to the taxpayer by Inland Revenue and how the taxpayer relied on that advice;
 - (g) The action required to ensure correctness; and
 - (h) Any relevant documents and records or other information supporting the amendment requests.
16. In a number of respects, the information listed is very similar to the information required for a voluntary disclosure. In fact, given that there is no prescribed form to complete for a request to amend an assessment, it is probably not bad practice to use the voluntary disclosure form IR 281 as a template to follow when making the request.
17. Not all of the above information will be relevant or required on every occasion. However, persuading Inland Revenue to make the amendment will be the paramount criterion from the taxpayer's perspective. In order to do that, it will be necessary to comply with the following criteria set out in paragraph 41 of the SPS:
- (a) The amendment requests are clear, that is, the errors are clearly identified, both factually and legally;
 - (b) The taxpayer has provided all relevant information to ensure that the Commissioner can make a correct assessment;
 - (c) The Commissioner has verified the errors as genuine.
18. In addition to the above:
- (a) The amendments must be made within the relevant time limits (refer to paragraph 28 onwards below); and
 - (b) None of the other limitations must apply (refer to paragraph 24 onwards below).

Method for making the request: telephone vs writing

19. Requests can be made by telephone, if they meet the requirements in the SPS, otherwise, they must be made in writing. In all cases, the telephone number to call is one of Inland Revenue's 0800 numbers.
20. The following types of requests can be made by telephone (or in writing – telephone is not mandatory):
- (a) A request to correct obvious errors, such as arithmetic and transposition errors;
 - (b) A request to correct errors other than obvious errors, in respect of individual tax returns (IR 3) if the tax effect of the adjustment is \$10,000 or less;
 - (c) A request to correct errors other than obvious errors, in respect of company tax returns (IR 4) trusts (IR 6), partnerships (IR 7), Maori authorities (IR 8), or any other income tax return (other than an IR 3 individual income tax return) where the tax effect of the adjustment request is \$10,000 or less - however, the department may ask that these

requests be put in writing especially where, for instance, there are consequential adjustments that may need to be made to other returns or taxpayers;

(d) Requests to amend assessments in respect of tax returns for any other revenue (GST, FBT or PAYE for instance) where the tax effect of the adjustment request is \$10,000 or less.

21. Note that, other than for an obvious error such as arithmetic or transposition error, the ability to accept an amendment request by telephone is limited to those calls that are received by the department at a site that has call recording, so that there is a clear record of the amendment request. For practical purposes, this means that a taxpayer will need to call using one of the department's 0800 numbers. Where a call is received by a site that does not have call recording the taxpayer may be asked to put their request in writing.

22. The following types of requests must be made in writing:

(a) Requests to adjust individual income tax returns (IR 3), where the tax effect of the adjustment is greater than \$10,000;

(b) Requests to amend income tax returns of companies (IR 4), trusts (IR 6), partnerships (IR 7), Maori authorities (IR 8), or any other income tax return (other than an IR 3 individual income tax return) where the tax effect of the adjustment request is more than \$10,000;

(c) Requests to amend tax returns for any other revenue (GST, FBT or PAYE for instance) where the tax effect of the adjustment is greater than \$10,000.

Consideration of the amendment request by Inland Revenue

23. It is stated in the SPS that not all requested amendments will necessarily be corrected. Ultimately, the allocation of resources will be determined on a case-by-case basis. The factors the Commissioner considers are relevant in assessing whether a requested amendment will be corrected are:

(a) The reasons for the error(s);

(b) The amount of time which has passed since the error was made – the longer the time that has passed, the more difficult it may be to independently verify the taxpayer's request;

(c) The resources required or difficulty faced by the Commissioner in verifying the error – the Commissioner will not consider requests relating to complex unresolved issues such as issues being litigated or proposed new legislation, or when statutory interpretation is at issue; and

(d) The relative importance or amount of the amendment sought – the amount of tax at stake may be a relevant issue.

General limitations on the Commissioner's discretion to amend assessments

24. When taxpayers request assessment amendments to reflect court decisions affecting themselves or other taxpayers, the Commissioner will not necessarily amend the assessments. However, the Commissioner will consider all relevant factors including whether:

(a) A taxpayer has consistently asserted that they are entitled to take tax positions reflecting a court decision;

(b) A taxpayer has been associated with claims or actions against Inland Revenue on issues relevant to the request;

- (c) Inland Revenue has advised the taxpayer that the outcome of a particular issue would apply to them; and
 - (d) Inland Revenue has previously advised the taxpayer directly in relation to particular matters and the taxpayer has acted on that advice, which has later proved to be incorrect.
25. Where the Commissioner has issued assessments to a taxpayer after commencing a dispute but prior to determination of the issue by the Disputes Review Unit who subsequently reach conclusions on another period or periods, the Commissioner will apply those conclusions, subject to there being no factual differences or other differentiating circumstances, and amend any assessed periods where:
- (a) The dispute is in relation to the same issue; and/or
 - (b) The Disputes Review Unit has determined the issue in favour of the taxpayer.
26. Generally, the Commissioner will not amend an assessment where the taxpayer has made an amendment request because of a change in the Commissioner's practice in administering the tax laws. This is because the Commissioner does not usually backdate the application of a change in practice. However, it is stated in the SPS that where the Commissioner does backdate a change in practice in a concessionary way, the application of the new practice will be made clear to taxpayers.
27. When an amendment request is the subject of a current dispute under Part IVA of the TAA, the Commissioner will not amend the assessment unless it is to reflect an agreed adjustment as part of the disputes process, and there are no other disputed issues in the period to which the agreed adjustments relate.

Time limits on increasing assessments and on income tax and GST refunds

28. The Commissioner cannot increase previously assessed amounts:
- (a) Under s. 108 of the TAA, in respect of income tax, if four years have elapsed from the end of the tax year when the income tax returns were filed, unless the Commissioner considers those tax returns:
 - (i) Are fraudulent or misleading; or
 - (ii) Omit income for which tax returns must be provided, that is of a particular nature, or was derived from a particular source.
 - (b) Under s. 108(1A) of the TAA, in respect of issuing an income statement if four years have passed since the end of the tax year that follows the tax year to which the income statement would apply;
 - (c) Under s. 108A, in respect of increasing a GST assessment, if four years have elapsed from the end of the GST return period in which the GST returns were provided, unless the Commissioner considers that the taxpayers have knowingly or fraudulently failed to disclose to the Commissioner all of the material facts needed to determine the amount of GST payable for a GST return period – however, this four-year period is extended if a taxpayer successfully challenges a Commissioner's refusal under s. 89K(4).
29. Under s. RM 2 of the *Income Tax Act 2007* ("the Act"), the Commissioner cannot refund amounts of overpaid income tax, including amounts arising from amendments made under s. 113 of the TAA, if four years have elapsed from the end of the tax year in which the taxpayers provided the tax returns.

30. Under s. 45 of the GST Act, the Commissioner cannot refund amounts of overpaid GST in the following circumstances:
- (a) Four years have elapsed from the end of the taxable period to which the assessment relates; or
 - (b) Four years have elapsed from the end of the year in which an assessment was amended; or
 - (c) Four years have elapsed from the end of the year in which the refunds was made, where the Commissioner is satisfied that the taxpayer did not receive a refund that they were clearly entitled to, either through changing from a payments basis to an invoice basis (or vice versa, or because input tax exceeded output tax.
31. However, the time period for a GST refund is extended by a further 4 years, and potentially longer under s. 45(4) of the GST Act if:
- (a) The GST overpayment arose from a clear mistake or simple oversight by the taxpayer, and
 - (b) Either the refund is made within the 4-year period beginning from the end of the first 4-year period referred to in paragraph 30 above, or the Commissioner receives the refund request before or within the four years following the end of the initial 4-year period referred to in paragraph 30 above.

Section 113A of the TAA

32. Section 113A of the TAA allows taxpayers to correct minor errors made in income tax, FBT and GST returns, in the next return that is due after the discovery of the error. Therefore, the Commissioner's view is that where s. 113A applies, the Commissioner will not amend assessments under s. 113.
33. A minor error is defined as an error that was caused by a clear mistake, simple oversight, or mistaken understanding on the taxpayer's part and that, for a single return, causes a discrepancy in the assessment of that return of \$500 or less. For the purposes of calculating the \$500 discrepancy, minor errors for each income tax, FBT and GST returns are treated separately.

The proviso to s. 20(3) of the GST Act

34. The proviso to s. 20(3) of the GST Act gives taxpayers the option of claiming input tax deductions in a period later than the period to which they relate. Again, the Commissioner's view is that where the proviso to s. 20(3) applies, the Commissioner will not amend assessments under s. 113.



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