

"Agreed adjustment forms – don't sign them!

[for at least not until you have taken professional advice]

August 2011 newsletter

In requiring taxpayers to sign 'agreed adjustment' forms, IRD staff continue to breach standards, including those published by Inland Revenue itself.

From our repeated experience, crucial IRD staff breaches are:

- issuing agreed adjustment forms when there is no agreement
- failing to disclose use of money interest, potential penalties, and even other tax types
- demanding the taxpayer to sign within a very short time
- using other coercive tactics to get taxpayers to sign away their rights

We strongly recommend that before signing such a document you read the contents of this article and if in any doubt seek urgent expert advice.

Further details are set out under the following headings:

Sign an AAF and risk giving away appeal rights

Tax Administration Act

IRD's guidance

Case law

IRD's own administration standards

How IRD actually behaves

IRD's (lack of) response to taxpayer concerns

Key messages

Sign an AAF and risk giving away appeal rights

The so-called "agreed adjustment" form is a very important document, and signing one without knowing its full effect can result in being unable to challenge an incorrect IRD assessment.

Tax Administration Act

Section 89C [Notices Of Proposed Adjustment Required To Be Issued By Commissioner] states (inter alia) that:

The Commissioner must issue a notice of proposed adjustment before the Commissioner makes an assessment, unless—

...

(c) The assessment corrects a tax position previously taken by the taxpayer in a way or manner agreed by the Commissioner and the taxpayer;

Section 89I [Circumstances Where Disputant May Not Challenge Adjustment] states:

A disputant may not challenge an adjustment proposed by the Commissioner if the disputant—

(a) Accepts the adjustment in writing; or

(b) Is deemed to accept the adjustment, and section 89K does not apply.

IRD's guidance

In TIB 8/3 (August 1996) IRD confirmed that an adjudicator will not review previously agreed adjustments.

In the AAF form itself, IRD states:

If the items in this Agreed Adjustment relate to the items outlined in a NOPA, by signing this agreement the person below acknowledges that they have no rights to challenge this adjustment further in terms of section 89I of the Tax Administration Act 1994

We are not clear as to the effect of the opening words "*If the items in this Agreed Adjustment relate to the items outlined in a NOPA*". If the taxpayer has signed an agreement then IRD is not going to issue a NOPA anyway. Either way however it would be very dangerous to sign an 'agreed adjustment' form if you don't actually agree, however this is just what IRD try to force you to do.

Case law

As an illustration of the impact, see for example the 2002 Judicial Review case *Surjeet Singh v CIR* [published by IRD in TIB Vol 14 no 9, available from IRD at www.ird.govt.nz/aboutir/newsletters/tib/vol-14/tib-vol14-09.html]

In IRD's own words:

"The CIR was successful in resisting the application for judicial review.....

....

[The 1998] year could not be challenged as it was the subject of an agreed adjustment signed on 13 April 1999. Section 89I precluded the plaintiff from challenging it."

www.owenstax.com/news/index.

IRD's own administration standards

IRD has itself published various standards of behaviour when it comes to agreed adjustment forms and related matters.

In 1996, in the early days of the (then) new disputes regime, the Institute of Chartered Accountants wrote to IRD with concerns that IRD staff were issuing AAFs where there was no agreement. The then deputy Commissioner assured the Institute that staff were instructed to issue AAFs ONLY where there is genuine agreement. If that instruction was ever given, it seems to have fallen on deaf ears.

In August 1998 IRD stated:

“... a final agreement must contain the following information:

...

- name, address and IRD number of the taxpayer to whom the agreement relates*
- a statement recording the terms of agreement, including who proposed the agreement*
- a statement recording the adjustments covered by the agreement, including the tax type, section of the relevant act and period involved as well as any penal tax and shortfall penalties*
- a statement that the taxpayer acknowledges that by signing the agreement they forfeit any further right to challenge the adjustments covered by the agreement, and that this right has been explained to them”*

[see Tax Information Bulletin, Volume 10, No. 8]

In September 2001 IRD stated:

*“....The Commissioner's practice is to **reach agreement with the taxpayer on any shortfall penalties at the same time as other tax adjustments** and to include these shortfall penalties on the agreed adjustment form unless the taxpayer advises otherwise, or circumstances exist where it is inappropriate to do so, eg prosecution.”*

...

This will allow the taxpayer to know "up front" his or her potential total liability at the time agreement is reached in respect of the adjustments.

*The Commissioner considers it is desirable, from the view of both the taxpayer and Inland Revenue, that there is a swift resolution to taxation matters in dispute. A swift resolution also provides certainty to the taxpayer that **all matters have been dealt with.***

[Tax Information Bulletin, Volume 13, No. 9]

How IRD actually behaves

Despite the above undertakings:

- IRD rarely wait until there is agreement – they just issue the form and try to persuade the taxpayer to sign it
- Interestingly RD does not make the AAF form available to taxpayers – ie doesn't make it easy for a taxpayer to propose an adjustment (we have however provided a template for your use)
- IRD does not always make it easy to understand how it is calculating tax adjustments – eg a multi year 'asset accretion' calculation provided in hard copy (as opposed to a spreadsheet) and in a font that is all but illegible
- We have struck examples of IRD disclosing income tax but leaving out the impact of GST, and/or working for families
- IRD NEVER calculates the impact of use of money interest, which can sometimes be as much as the underlying tax
- IRD often fails to disclose what penalty it is considering – instead extracting agreement from the taxpayer and then ambushing them with penalties later
- At best IRD requires that the AAF is signed and returned within 20 working days (a deadline not supported by legislation), but sometimes encourages the taxpayer to sign on the spot, and in extreme cases we have found IRD demanding the form back in as little as 7 working days
- When challenged, IRD sometimes claims that they have given an extension 'on request', however given the power imbalance between IRD and taxpayers IRD should not be proposing truncated times for taxpayers to agree.

IRD's (lack of) response to taxpayer concerns

We have raised these issues with IRD staff on many occasions, only the most recent being in our May 2011 submission to the Commissioner and Minister of Revenue in respect of IRD audits and communications – see www.owenstax.com/ird-audits-and-communications

The Minister didn't even bother replying. The Commissioner passed it down to third tier staff who then fudged the response

IRD largely ignored most of those submissions, instead inviting us to raise issues with more junior staff, IRD complaints management or the Ombudsmen, most of whom regrettably decline to challenge such IRD staff behaviour.

IRD has indicated informally that it is reviewing the AAF procedure with a view to:

- Making it clear whether it is documenting an agreement or merely proposing an adjustment

www.owenstax.com/news/index.

- Ensuring that all tax types are included
- Providing an estimate of Use of Money Interest

Regrettably however these 'improvements' were all 'promised' by IRD back in 1996 (16 years ago), they haven't yet been delivered, and IRD refuses to give any undertaking as to when they will be administered, or what will happen when staff breach those standards

Key messages

Before signing an agreed adjustment form:

1. Insist on having a reasonable time to consider the implications – at least 20 working days excluding holidays
2. Ensure that IRD has disclosed how it has calculated the proposed adjustments
3. Ensure that IRD has disclosed ALL tax adjustments, and the impact of interest and penalties
4. Ensure that you have enough information and analysis to make a proper decision
5. If in any doubt, get professional advice

Yours sincerely

Jeff Owens
Director