

11 April 2014

Public Consultation
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ED0162: Requests to amend assessments

1. The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the draft Standard Practice Statement *ED0162: Requests to amend assessments* (the Draft Statement).
2. While the approach taken in the Draft Statement as to the scope of the Commissioner's discretion to amend assessments as contained in section 113 of the Tax Administration Act 1994 is broadly consistent with that set out in the current Standard Practice Statement (SPS 07/03), the Law Society considers the Draft Statement is unduly restrictive as to the scope of the Commissioner's discretion to amend assessments.
3. The Law Society:
 - (a) disagrees with the position set out in the Draft Statement that an error or "genuine error" must first have occurred in order for the Commissioner to be entitled to exercise her discretion under section 113; and
 - (b) considers the limitations set out in the Draft Statement on the circumstances in which the exercise of the discretion can or will be considered by the Commissioner are in some respects unnecessarily restrictive.

Prerequisite for an error or "genuine error"

4. Throughout the Draft Statement reference is made to the requirement that an error must have been made in order for the Commissioner to be entitled to exercise her section 113 discretion to amend an assessment. As a consequence, considerable emphasis is given in the Draft Statement to distinguishing circumstances where a "genuine error" has occurred from those where a taxpayer seeks to resile from what was (or might still be) a legitimate choice for a more favourable outcome.
5. The Law Society submits that it is not a prerequisite for an error or a genuine error to have occurred in order for the Commissioner to be entitled to exercise her discretion under section 113.

6. Section 113 makes no reference to the circumstances that have led to an assessment being incorrect. Rather, it provides that the Commissioner may *at any time* amend an assessment as the Commissioner thinks necessary in order to ensure its correctness.
7. While it might generally be expected that an error will have occurred in order for an assessment to require amendment to ensure its correctness, there will conceivably be situations where no "error" has been made but where, if the status of an assessment is considered, an amendment may be necessary to ensure the correctness of that assessment.
8. The Law Society recognises the point made throughout the Draft Statement that the Commissioner cannot be compelled to exercise her discretion, and accepts that resource constraints mean it will not always be appropriate or possible for the Commissioner to devote the required resources to consideration of the correctness of an assessment.
9. However, where such resources are allocated and an assessment is found to be incorrect, the Law Society does not consider that the Commissioner will be constrained from amending an assessment simply because the parties thought that the assessment was correct at the time it was made (and therefore that no "genuine error" has occurred).
10. As was noted by Wylie J in the recent High Court case of *Arai Korp Ltd v CIR* [2013] NZHC 958 at paragraph 34:

*"Section 113 is clear in its terms. It confers a wide-ranging discretion on the Commissioner. The discretion may be exercised from time to time and at any time. It can be exercised by the Commissioner on her own motion. It can also be exercised at the request of the taxpayer. The discretion is available in order to ensure that an assessment is correct. It does not matter that the tax assessed may already have been paid. **The discretion is not constrained in any way.** It is not expressed to be subject to the prior exercise of the disputes procedure or the challenges procedure. **It does not call for an inquiry into why any assessment is incorrect. It is not necessary to identify who has made the error that has resulted in an assessment being incorrect. It does not distinguish between consequential errors and genuine errors. The focus is on the correctness of an assessment, not on the errors which led to an assessment being incorrect.** The section can be considered to be a "backstop" provision."*

[emphasis added]

11. Accordingly, in order to reflect the High Court's statements, the Law Society recommends that:
 - (a) references throughout the Draft Statement to "genuine errors" be amended, and the "genuine" qualification deleted; and
 - (b) paragraphs 40 and 52 – 54 be amended to reflect that the scope of the Commissioner's discretion is not constrained by the circumstances leading to an assessment being incorrect, and that whether an assessment is amended following either a change in the Commissioner's practice as to the application of the law or the determination of an issue by the courts or the Disputes Review Unit will therefore depend on whether the Commissioner has the resources to devote to consideration of requests by taxpayers to amend assessments.

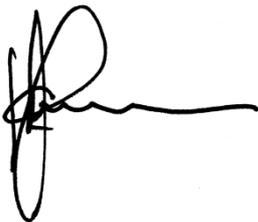
Limitation on when the exercise of the discretion will be considered

12. At paragraph 74 the Draft Statement provides that while the Commissioner is not prevented from exercising her discretion under section 113, the ability of a taxpayer to claim a goods and services input tax credit in a later tax period under section 20(3) of the Goods and Services Tax Act 1985 means that the Commissioner's practice is that she will not consider any request to exercise her discretion to amend an assessment under section 113 if a taxpayer is able to amend a return under section 20(3) of the GST Act.
13. The Law Society submits that a practice not to consider any request to exercise the Commissioner's discretion under section 113 in the specified circumstances is contrary to established administrative law principles, as it may unlawfully fetter the Commissioner's discretion.
14. Accordingly, the Law Society recommends that paragraph 74 of the Draft Statement be amended to state that the Commissioner's *general* practice is not to exercise her discretion under section 113 if amendment is possible under another, specific, provision.
15. The Law Society notes that such qualification – that it is the Commissioner's general practice not to exercise her discretion in such circumstances – appears in the discussion in the Commissioner's item QB 09/04 (referred to in paragraph 74 of the Draft Statement) regarding the relationship between the two sections.

Conclusion

16. This submission was prepared with assistance from the Law Society's Tax Law Committee. If you wish to discuss this further please do not hesitate to contact the committee convenor Neil Russ, through the committee secretary Rhyn Visser (04 463 2962), rhyn.visser@lawsociety.org.nz.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Chris Moore', with a long horizontal flourish extending to the right.

Chris Moore
President