

satisfied any issue in the proceedings is affected by res judicata or issue estoppel, it is not necessary to consider that issue further.

*The scope of the NOPA does not arise*

[149] The disputants have not proved by how much the assessments are wrong. The question of whether they can claim a more

favourable position than they took earlier in the disputes process does not arise.

#### **DECISION**

[150] The disputants' challenge to the assessments is dismissed, and the assessments are upheld without alteration.

#### *Footnotes:*

- 1 Alternatively, a margin on the value of parts exported that also takes account of costs. There was some inconsistency regarding the basis, partly due to the disputants being willing to take a conservative approach.
- 2 *Buckley & Young Ltd v Commissioner of Inland Revenue* [1978] 2 NZLR 485 (CA) at 498.
- 3 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 at [171].
- 4 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 3, at [171].
- 5 2008 \$65,000, 2009 \$78,400, 2010 \$86,200, 2011 \$186,700 and 2012 \$56,600.
- 6 Goods and Services Tax Act 1985, s 11(1)(a)–(c).
- 7 Goods and Services Tax Act, ss 11(3)(a) (zero-rating and the exception) and s 20(3) (the deduction of input tax as defined relevantly in s 3A(1)(c)).
- 8 Affecting GST periods ending 31 October 2008 to 31 August 2009 (six periods).
- 9 Goods and Services Tax Act, s 11(3) bases the quantification on the purchase price.
- 10 *Shiels v Blakeley* [1986] 2 NZLR 262 (CA).
- 11 *Gay v Bruns* [2003] NZAR 547 (CA) at [20].
- 12 *Chief Executive of Ministry of Social Development v Batt* [2004] NZAR 180 (HC).
- 13 *Van Rooy v Minister of National Revenue* 88 DTC 6323 (FCA); and *Golden v The Queen* 2008 TCC 173.
- 14 Tax Administration Act 1994, s 143B.

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**¶7-002] Case 2/2024**  
**(2024) 31 NZTC ¶7-002**  
**Neutral citation: [2024] NZTRA 002**  
**Taxation Review Authority, TRA 002/23**  
**3 April 2024**

*Income tax — Dispute resolution — Statement of position — Response period — Information systems — Designated information systems — Commissioner assessing taxpayer for income tax on omitted income — Taxpayer disputing assessments — Taxpayer issuing statement of position in response to Commissioner's disclosure notice — Investigator issuing email with statement of position attached by due date — Email sent to taxpayer's tax agent at email address — Address for service provided by taxpayer — Investigator unwell and leaving work — Tax agent's email server advising that Commissioner's email not delivered to email address for unspecified reason — "Bounce back" email not seen until investigator returned to work — Investigator re-issuing statement of position which was received by tax agent — Taxpayer arguing re-issued statement of position issued outside response period — Whether Commissioner's email amounting to issue of statement of position for purposes of Tax Administration Act — Whether email deemed to have been received by taxpayer — Whether Commissioner's statement of position issued and received within response period — Tax Administration Act 1994, ss 14F(7), 89AB(5), 89M(6BA) — Contract and Commercial Law Act 2017, s 214.*

This was an application to the Taxation Review Authority (TRA) to determine a preliminary question as to whether the Commissioner had failed to issue a statement of position (SOP) in time.

The Commissioner assessed the taxpayer for income tax on omitted income. The taxpayer commenced a dispute to the assessments. The taxpayer issued a statement of position in response to the Commissioner's disclosure notice. The due date for issuing the Commissioner's SOP was 20 December 2022.

On 16 December 2022, the Commissioner's SOP was sent by email (the first email) and was correctly addressed to the taxpayer's nominated agent's email address. The email was 41.5 MB in size as it had 3 attachments.

The first email was sent just before 3 pm on 16 December 2022. Shortly after sending it, the official left work and did not return due to illness until 21 December 2022. The official therefore did not receive a non-delivery notification until 21 December 2022. After seeing the non-delivery notice, the official emailed the Commissioner's SOP multiple times and ultimately successfully despatched it to the agent in a form that could be accessed by sending three separate emails with the component parts of the SOP.

The taxpayer argued that the Commissioner had failed to issue the SOP within the response period so that the Commissioner was deemed to have accepted the taxpayer's SOP and the dispute was concluded in the taxpayer's favour. An application was made to the TRA to resolve the proceedings concerning the process whereby the Commissioner, by his delegate, had issued a SOP.

The parties agreed that there were three issues which the taxpayer needed to succeed on if the proceedings were to end in the taxpayer's favour at this point. These issues were as follows:

- Did the first email amount to the "issue" of the Commissioner's SOP? If so, the statutory requirement for issue before 20 December 2022 was met which was the end of the matter.
- Was the first email deemed to be received under a statutory provision and properly issued in time for that reason?
- What are the consequences if the first email did not issue the Commissioner's SOP in time?

Held: application dismissed.

1. As the decision meant that the challenge had not been resolved by the preliminary issue, the challenge to the Commissioner's assessments remained to be determined.

*Did the Commissioner's statement of position "issue" in time?*

2. The Commissioner was correct that the SOP was issued within the prescribed period because it "issued" within the meaning of s 89M(6BA) of the Tax Administration Act 1994.

3. The first email with the attached Commissioner's SOP was issued on 16 December when it was sent to the taxpayer's agent's email address.

4. From the perspective of the official issuing the notice, there was nothing more that could reasonably be done to meet the statutory requirement. Further assurances of receipt could always be sought but that was not the statutory requirement.

*Did the Commissioner's SOP "issue" in time because it was deemed to be received*

5. Section 14F(7) of the Tax Administration Act provides that s 214 of the Contract and Commercial Law Act 2017 (CCLA) applies to "determine the time of receipt of an electronic communication". Section 214 of the CCLA provided in the case of a "designated" information system, that an electronic communication is received when it "enters that information system". The "information system" is defined as a "system for producing, sending, receiving, storing, displaying, or otherwise processing electronic communications".

6. The Commissioner's SOP was taken to have been received under s 214(a) of the CCLA on 16 December 2022 and was within the response period. The despatch of a correctly addressed email, which reaches any part of the architecture a user has for receiving email, is deemed to be delivered when it enters the recipient's system.

*The effect of late issue on the Commissioner's statement of position*

7. The taxpayer had failed to establish that the Commissioner had failed to issue the SOP in time.

8. The consequences and potential dispensations from late issue or delivery of documents were clear in parts of the regime relating to the tax dispute procedure. There was, however, no specific provision that applied in this case, either intentionally or by oversight.

*[Headnote by the Wolters Kluwer editors]*

JH Coleman for the taxpayer.

AB Goosen and S Smith for the Commissioner.

Before: Judge Pearson.

**Judge Pearson:**

**Introduction**

[1] The Authority issued a decision on an application to hear a preliminary question and decided to do so. The Disputant wished to argue that the Defendant (Commissioner) failed to issue a critical document in time (the Commissioner's Statement of Position). At that time, the parties agreed that this preliminary point, if resolved in favour of the Disputant, would end the proceeding in the Disputant's favour. However, the Commissioner has shifted from that position and now says it would not resolve the proceedings if the document were not issued in time. The parties agree there are three questions, and the Disputant needs to succeed on all three of them if the proceedings are to end in his favour at this point.

[2] The essential facts are not in dispute, and they are documented. The key elements are:

(a) The parties followed the usual process for advancing a dispute under the Tax Administration Act 1994 (the TAA). That process involves various steps that occur before commencing these proceedings before the Authority.

(b) The present application to resolve the proceedings concerns the process where the Commissioner, by his delegate, issued a Statement of Position. The due date for issuing that Statement of Position was 20 December 2022.

(c) The parties agree the Commissioner prepared a compliant document as his Statement of Position. On 16 December

2022, it was sent to the Disputant's agent by email (the first email).

(d) The 16 December 2022 email was correctly addressed to the Disputant's nominated agent's email address; the email was 41.5 MB in size as it had three attachments (the Commissioner's Statement of Position).

(e) The first email was sent a little before 3 pm on 16 December 2022. Soon after sending it, the official who sent it left work. At that time, she did not see an email that returned saying the first email had not been delivered. It is not contentious that the official did not return to work due to illness until 21 December 2022 and, accordingly, did not see the non-delivery notification until 21 December 2022.

(f) After seeing the non-delivery notice, the official emailed the Commissioner's Statement of Position multiple times and ultimately successfully despatched it to the agent in a form he could access by sending three separate emails with the component parts of the Statement of Position.

[3] The parties agree three issues arise:

(a) Did the first email amount to the "issue" of the Commissioner's Statement of Position? If so, the statutory requirement for issue before 20 December 2022 is met, which is the end of the matter.

(b) Was the first email deemed to be received under a statutory provision and properly issued in time for that reason?

(c) What are the consequences if the first email did not issue the Commissioner's Statement of Position in time?

**First Issue: Did the Commissioner's Statement of Position "issue" in time?**

[4] The statutory provision of immediate effect is s 89M(6BA) of the TAA. It materially provides that "The Commissioner must issue a statement of position." The provision contains exceptions, but they are not relevant for present purposes. The event that triggers the obligation is the disputant taxpayer's statement of position, and the Commissioner's statement of position is in reply.

[5] The time for the Commissioner's statement of position is prescribed by s 89AB(5) of the TAA. The material provision is that for the Commissioner's Statement of Position to be within the statutory response period, in this case, "the response period is a 2-month period starting on the date of issue of the initiating notice".

[6] Accordingly, the critical question is whether the Commissioner met the obligation to "issue" the Statement of Position with the first email. The term "issue" is not defined in the TAA. Accordingly, the first question is what "issue" means in the present context.

[7] I note that a point of concern when considering the meaning of "issue" is that it applies to several procedural steps in the TAA and applies to both the Commissioner and taxpayers. It is not likely that the purpose of the legislation is to impose complex obligations on taxpayers, some of whom may not be well equipped to meet complex procedural steps. However, at least concerning the service of documents by electronic means, the provisions relating to taxpayers and the Commissioner are not identical. Documents originating from a taxpayer communicating with the Commissioner have the benefit and obligations of all of Part 4 of the Contract and Commercial Law Act 2017 (the CCLA).<sup>1</sup> Accordingly, the provisions relating to the electronic delivery of documents for the Commissioner are different.<sup>2</sup> Given the different provisions relating to the Commissioner and taxpayers, it is reasonable to assume the Commissioner has a level of technical skill and resources when issuing an important technical document. There is no

imperative to adopt a purposive approach that turns on the standards expected of a potentially less advantaged taxpayer attempting to comply with technical obligations.

[8] The Commissioner contended that various authorities assist in understanding the meaning of "issue" in the present context. He cited:

(a) TRA *Case 31/2010*,<sup>3</sup> which was judicially reviewed at the High Court in *Harris v Commissioner of Inland Revenue*.<sup>4</sup> The submission contended that the two cases are authority for "issue" being the action of the person issuing the statement and does not require receipt to complete the process of issuing. Accordingly, a facsimile message sent and received late in the evening was effectively issued, despite the recipient not reading it or being likely to read it immediately.

(b) In *Commissioner of Inland Revenue v Abattis Properties Ltd*,<sup>5</sup> the Court of Appeal observed "issue" required "the departure of the notice from the department and in a practical sense the giving of notice to the taxpayer".

[9] The authorities do little more than confirm the ordinary meaning of "issue", is something different from "received". The focus is on the actions of the person sending out the notice. In the absence of personal service, where the recipient must have their attention drawn to the served document, there may inevitably be uncertainty regarding the effect of the issuer's actions on the recipient. The authorities deal with different statutory provisions and technologies to those in the present case. However, I understand the Commissioner's argument is that "issue" does not necessarily require receipt in the sense of being accessed and comprehended. He draws support from the principles expressed by the authorities and the ordinary meaning of "issue".

[10] For the Disputant, the argument was more specific. The contention was that "issue" required that the Commissioner's Statement of Position, when sent by email, had to have entered the "designated information system" of the Disputant. Accordingly, the answer turns on the second question from the Disputant's

point of view. The relevant statutory provisions being s 14F(7) of the TAA, which provides s 214 of the Contract and Commercial Law Act 2017 (the CCLA) applies to determine the time of receipt of an electronic communication.

[11] There can be little doubt on the facts of this case that if an electronic communication is deemed to be received due to s 14F(7) of the TAA and s 214 of the CCLA, it has been “issued” by the Commissioner. However, in my view, the Commissioner is correct to say that receipt is not necessarily required for his Statement of Position to have been “issued” under s 89M(6BA). Accordingly, I now consider whether, as the Commissioner contends, it was issued without necessarily being deemed to be received within the prescribed period.

[12] I am satisfied on the evidence that:

- (a) The email was correctly addressed to the designated email address;
- (b) The official correctly attached the Commissioner’s Statement of Position to the email;
- (c) She sent the email to the designated email address;
- (d) The email with the attachment left Inland Revenue’s mail system bound for the designated email address; and
- (e) I am also satisfied there was nothing the official did or should have reasonably identified that made it implausible that the email with its attachments would be delivered to the designated email address.

[13] Some of those factual elements are elaborated when addressing the second question.

[14] Given the minimal cross-reference to the CCLA provisions (only s 214 for present purposes) I do not rely on the terms of s 213(1)<sup>6</sup> of the CCLA. It would apply to a taxpayer issuing a document to the Commissioner. It provides that an electronic communication is “taken to be dispatched at the time the electronic communication first enters an information system outside the control of the originator”. I note this provision, is one which the TAA does not incorporate for documents issued by the Commissioner. I have done so

because the concept in s 213 may overlap with the meaning of “issue” in s 89M(6BA) of the TAA. Regardless, I must apply only s 89M(6BA).

[15] I am satisfied that the word “issue” in s 89M(6BA) was met by the circumstances set out in paragraph [12]. I do not suggest that the list applies to all circumstances. However, it is closely analogous to the observations of Richardson P in the *Abattis* case where he said that to “issue” in comparable circumstances requires “the departure of the notice from the department and in a practical sense the giving of notice to the taxpayer”.<sup>7</sup> From the perspective of the official issuing the notice, there was nothing more she could reasonably have done to meet the statutory requirement. Of course, further assurances of receipt could always be sought, but that is not the statutory requirement. These provisions relating to giving notice require something less certain than personal service, where it is known that the recipient has actual notice. I am satisfied that first email with the attached Commissioner’s Statement of Position “issued” on 16 December 2022 when it was sent to the Disputant’s agent’s email address.

[16] I recognise that an email did return to the Commissioner giving notice of non-delivery, which was, reasonably, only seen after the end of the period for giving notice. In my view that was irrelevant, at least given the absence of actual knowledge. Inevitably, statutory processes for serving documents are effective whether or not the recipient has notice, unless that is a prescribed requirement.

[17] I conclude the Commissioner is correct that his Statement of Position issued within the prescribed response period because it “issued” within the meaning of s 89M(6BA) of the Tax Administration Act 1994. In case I am wrong regarding what was required to issue the Commissioner’s Statement of Position under s 89M(6BA), I will now consider whether it was deemed to have been received within the response period. If the Statement of Position was deemed to be received in the response period, it seems inevitable it was also issued by that time.

**Second Issue: Did the Commissioner’s Statement of Position “issue” in time because it was deemed to be received.**

[18] The second issue was the subject of a great deal of technical evidence. However, I am very reluctant to conclude that the precise attributes of the parties’ email systems are determinative. It appears likely that the purpose of the statutory provisions is to effect a system where the Commissioner and other users, including taxpayers, accountants, agents, and lawyers, can rely on taking reasonable steps when using email systems to communicate. Unless the wording of the legislation requires a different approach, it is not likely that the effective service of essential documents will turn on the attributes of the brand-specific technology a party is using. Aside from typical users not having high levels of technical knowledge, there are many types of email services and novel platforms that are likely to emerge.

[19] Having made those observations, I will describe what I consider were material features of the passage of the first email. They are:

- (a) The Commissioner maintained a commercial email system appropriate for the large numbers of users within Inland Revenue.
- (b) The Disputant’s agent, a comparatively small organisation compared to Inland Revenue, had a relatively sophisticated email system with attributes similar to Inland Revenue (but catering for far fewer users).
- (c) Other email users may use portable devices, browser-based access, services provided by their internet service provider, or a combination of such services.
- (d) The Disputant’s agent had a “domain”. That was part of his email address, and accordingly, when any email was sent to him with this domain as part of his email address, his domain host needed to provide information that would attach to the email to direct it to its destination.
- (e) The commercial service the Disputant’s agent used was Microsoft Exchange (365 – cloud-based, unless otherwise specified reference to Exchange and Microsoft Exchange refence this platform). A monthly

subscription procures the service, and the service provider gives access to a range of software and data storage hosted remotely from the user’s premises.

(f) The Exchange package in relation to email allows the user or a designated person in the organisation (or external contractor) a high level of control over emails that enter the system. The controls include an ability to prevent an email reaching the designated user after it enters the system. Examples of that control are quarantining emails that may contain a security threat, using a rule to redirect the email (e.g. to a person covering a recipient who is on leave). One of the security-related measures is a setting that will reject emails over a specific size (i.e. the volume of data).

[20] The first email was probably rejected because of the following reasons with these results:

- (a) The settings for the maximum size of emails to send and receive was probably the default setting; if so, an administrator of the Disputant’s agent’s Exchange system could have changed those settings.
- (b) The effect of the setting concerning the maximum size of email accepted probably caused the first email to be rejected within the Disputant’s agent’s Exchange system, due to its size. That system caused a message to be sent to the sender saying the first email was not delivered and the email was not placed in the user’s mailbox.
- (c) The rejection of the message did not create a notice placed in the Disputant’s agent’s personal mailbox.

[21] The two experts who gave evidence for the Disputant and the Commissioner agreed on the preceding facts. The differences between them focused mainly on their respective views of the meaning of the terms in the legislation. However, that is a legal question, not for determination by expert evidence.

[22] The central element in Mr Hogben’s evidence, who the Disputant called, was that unless the first email entered the Disputant’s agent’s “mailbox” (or the most proximate software elements connected to the mailbox), it had not entered the agent’s “information system”. In my view, that is wrong. While both

experts agreed the first email did not enter the agent's mailbox or directly connected software, the evidence established beyond argument that it entered the agent's Exchange system in which he directly or by his designated administrator had a high level of control over inbound emails, including the first email.

[23] The material legislative provisions are:

(a) Section 14F(7) of the TAA provides that s 214 of the CCLA applies to "determine the time of receipt of an electronic communication".

(b) Section 214 of the CCLA provides in the case of a "designated" information system, an electronic communication is received when it "enters that information system".

(c) "Information system" is defined as "a system for producing, sending, receiving, storing, displaying, or otherwise processing electronic communications."<sup>8</sup>

[24] The evidence established that the designation was an email address. It included a domain name that belonged to the Disputant's agent. Accordingly, any email addressed to that email address could only be delivered if the domain name service provider to which the Disputant's agent subscribed provided "DNS"<sup>9</sup> information for the specific email. I am satisfied that was the first part of the designated information system the first email encountered. Without doing so, no email could be delivered to that email address. However, that is not in itself of particular significance in this case, as the email entered the Disputant's agent's Exchange system, which had a capacity for full management of the email.

[25] With the aid of the DNS information, the email travelled through public internet servers. It is a resilient system where one server delivers it to the next, ensuring the email is successfully passed on with its delivery instructions intact. Then, the first email entered the "virtual server", which comprised the hardware and software services allowing the Disputant's agent to produce, send, receive, store, display and otherwise process electronic communications.<sup>10</sup> That was, for the first email, the Microsoft Exchange system, and the Disputant's agent could direct and manage the email flow using that software. Of course, like most software, the administrator could only

adjust some matters and do so within specific parameters. However, I could not conclude that any part of the Disputant's agent's Exchange system as it related to emails was outside of the "information system" defined in s 213 for the purposes of s 214 of the CCLA.

[26] I am accordingly satisfied that the Commissioner's Statement of Position was taken to be received under s 214(a) of the CCLA on 16 December 2022 and was within the response period. Accordingly,

(a) If I am wrong regarding the processes the official took to send it amounting to issuing the first email (for the purpose of s 89M(6BA)); none-the-less

(b) It was received moments later due to the deeming effect of s 214 of the CCLA, and the process of issuing completed by the fact of receipt.

[27] Both experts who gave evidence were experienced and knowledgeable. Mr Hogben, for the Disputant, identified the Mail User Agent (MUA) and Mail Delivery Agent (MDA) as software most closely connected to a user's mailbox. The mailbox is the functionality to allow a user to read the email on a screen, print it, and otherwise use it. Mr Hogben said the first email entered the Exchange system but not the "designated" information system as that was the user's mailbox.

[28] While both experts (Mr Hogben for the Disputant and Mr Walton for the Commissioner) essentially agreed on the architecture of the Exchange system, I find Mr Hogben's claim that a specific mailbox is the "designated" information system is not a correct application of the CCLA. Essential parts of the Disputant's agent's email addressing and delivery process were:

(a) The DNS information needed for an email to reach the recipient's Exchange system.

(b) The Exchange system, which received the first email could send it to any mailbox in the system (or several of mailboxes), redirected to a different system, rejected it due to size, quarantine if as a security measure and the like.

[29] The DNS and Exchange systems were controlled by the Disputant's agent, and are, in my view, part of the relevant designated

information system under the definitions in the CCLA, as set out above in paragraph [23]. They deal with delivering and processing the first email on 16 December 2022.

[30] It is not necessary or appropriate to explore the attributes of the mail system in more detail, as I have noted systems vary and it is unlikely that the CCLA's application will turn on fine technical details. The legislation is highly consistent with the despatch of a correctly addressed email, which reaches any part of the architecture a user has for receiving email is deemed to be delivered when it enters the recipient's system. I cannot conclude it must reach a specific part of that system, that is not how the CCLA is expressed.<sup>11</sup>

### **Third Issue: The effect of late issue of the Commissioner's Statement of Position**

[31] I have found that at two levels, the Disputant has failed to establish the Commissioner failed to issue his Statement of Position in time. It is not necessary for me to consider the effect of failure to serve it in time.

[32] The consequences and potential dispensations from late issue or delivery of documents are clear in parts of the regime relating to the tax dispute procedure. It has become evident that there is no specific provision that applies in this case, either intentionally or by oversight. As matters stand, there are assessments of tax the Commissioner

has made, and for the Disputant to have anything other than a pyrrhic victory, he must negate those assessments. Simply ending the challenge proceeding leaves the assessments intact; he needs the challenge process to overturn the assessments.

[33] The opposing views are:

- (a) The Commissioner says that the period for issuing his Statement of Position is a mandate without a remedy for breach; and
- (b) The Disputant says that failure to comply ends the challenge process and expunges the Commissioner's assessments.

[34] Potentially, significant issues arise, but I do not consider I should express a view on them when I have found they do not arise in this case. The statutory consequences involve complex issues such as whether the Commissioner's default would restrict argument on grounds omitted from a statement of position, the status of a late statement of position and the like. They are matters of principle to decide on facts where the questions arise.

### **Decision**

[35] The application to determine the Commissioner's Statement of Position issued late, and therefore these proceedings are at an end, is dismissed.

#### *Footnotes:*

- 1 See s 14F(3) of the TAA, applies all of Part 4 of the Contract and Commercial Law Act 2017 when communicating electronically with the Commissioner. Compare with s 14F(2) which specifies how the Commissioner communicates with the taxpayer and applies only part of Part 4 of that Act.
- 2 Compare s 213 of the Contract and Commercial Law Act 2017, time of dispatch requires the electronic communication to enter an information system outside that of the originator; with s 214 where 'receipt' is when the electronic communication enters the information system set up by the addressee for the purpose of receiving electronic communications. Section 14F(7) of the Tax Administration Act 1994 requires that, s 214 of the Contract and Commercial Law Act 2017 is the governing provision, meaning 'time of receipt' is used to ascertain the communication through electronic means with the taxpayer.
- 3 *TRA No. 31/10* [2012] NZTRA 3.
- 4 *Harris v Commissioner of Inland Revenue* [2014] NZHC 151.
- 5 *Commissioner of Inland Revenue v Abattis Properties Ltd* (2001) 20 NZTC 17,013 (CA) at [5].
- 6 Contract and Commercial Law Act 2017, s 213(2) has a material definition including s 214, which is material in this case.
- 7 *Commissioner of Inland Revenue v Abattis Properties Ltd* as above n 5, at [5].
- 8 Contract and Commercial Law Act 2017, ss 209 and 213(2).
- 9 Domain Name System.
- 10 See Contract and Commercial Law Act 2017, s 213.
- 11 Contract and Commercial Law Act 2017, ss 209 and 213(2).