LexisNexis®

Practical Guide to Handling Tax Disputes

Nico Theron

Practical Guide to

HANDLING TAX DISPUTES

Rules of Engagement

Practical Guide to

HANDLING TAX DISPUTES

Nico Theron
Master Tax Practitioner (SA)
BCom Law (cum laude)
BCom Honours Taxation
MCom Taxation
Founder: Unicus Tax Specialists SA

LexisNexis

Members of the LexisNexis Group worldwide

South Africa	LexisNexis (Pty) Ltd www.lexisnexis.co.za
JOHANNESBURG	Building 8, Country Club Estate Office Park, 21 Woodlands Drive, Woodmead, 2191
CAPE TOWN	First Floor, Great Westerford, 240 Main Road, Rondebosch, 7700
DURBAN	215 Peter Mokaba Road (North Ridge Road), Morningside, Durban, 4001
Australia	LexisNexis, CHATSWOOD, New South Wales
Austria	LexisNexis Verlag ARD Orac, VIENNA
Benelux	LexisNexis Benelux, AMSTERDAM
Canada	LexisNexis Canada, MARKHAM, Ontario
China	LexisNexis, BEIJING
France	LexisNexis, PARIS
Germany	LexisNexis Germany, MÜNSTER
Hong Kong	LexisNexis, HONG KONG
India	LexisNexis, NEW DELHI
Italy	Giuffrè Editore, MILAN
Japan	LexisNexis, TOKYO
Korea	LexisNexis, SEOUL
Malaysia	LexisNexis, KUALA LUMPUR
New Zealand	LexisNexis, WELLINGTON
Poland	LexisNexis Poland, WARSAW
Singapore	LexisNexis, SINGAPORE
United Kingdom	LexisNexis, LONDON
United States	LexisNexis, DAYTON, Ohio

ISBN 978 0 639 01267 4 (softback)
978 0 639 01268 1 (ebook)

Printed by Pinetown Printers

Preface

This guide sets out and explains on both a technical and practical level, the remedies available to taxpayers to challenge/dispute assessments raised, and decisions taken by SARS. It also provides guidance on typical grounds which arises from the Tax Administration Act, 2011 ("the TAA") itself for disputing an assessment and decisions by SARS. Every effort was made to comment on and provide the law and practical guidance on prescribed forms and processes as at the end of July 2020. A set of draft rules were published by SARS in 2018 which proposes various changes to the rules governing the objection and appeal remedy detailed in chapters 7 to 11 of this guide. These draft rules have not been finalised and are not in force as at July 2020. Where the draft rules propose changes to the version of the rules discussed in chapter 7 to 11, this is nevertheless mentioned where considered relevant. It should be noted that changes proposed in the draft rules are subject to further change. Amendments have also been proposed to the TAA in the Draft Tax Administration Laws Amendment Bill, 2020 published for comment in July 2020. To the extent that the draft bill proposes changes to sections of the TAA discussed in this guide, such changes were mentioned. It should however be noted that proposed changes in the draft bill are subject to change.

I would like to thank the following people for their assistance and contributions:

- Liezl Zwart, for her internal review, comments, suggestions, research and initial edit of the work. Liezl was also responsible for preparing initial drafts of various sections of the work, in particular in chapters 2, 4, 6, 10 and 11 and various templates insofar as they relate to court procedures.
- Wikus Swart for his internal review, comments and suggestions.
- Surene Theron for internal formatting and support.

I would also like to thank my publisher, LexisNexis, for their support and assistance.

Contents

CHAPTER 1

Introduction and overview

CHAPTER 1

Introduction and overview

Contents

Contents

1.1 Introduction

SARS, in carrying out its duties, routinely raises assessments on taxpayers and makes decisions, both of which could adversely affect taxpayers. The Tax Administration Act[1] (TAA) and the Promotion of Administrative Justice Act[2] (PAJA), read with the Constitution,[3] prescribe the rules SARS must abide by in making decisions, raising assessments and otherwise executing its functions as a statutory body.

In practice, assessments raised, decisions made and other actions by SARS are not necessarily always in line with the prescripts of the TAA or PAJA. Both the TAA and PAJA provide taxpayers with remedies to challenge potentially incorrect assessments, decisions or other actions by SARS.

The chapters that follow will seek to explain the applicable rules, procedures, dispute resolution processes and remedies relating to interactions between SARS and taxpayers, including the rules applicable to the raising of an assessment and the making of a decision and the remedies available to a taxpayer under the TAA and PAJA (where relevant) to dispute or otherwise challenge an assessment or decision by SARS.

It is, however, important to understand that the rules in the TAA which regulate the making of decisions or the raising of assessments, as discussed in remaining chapters, apply only in relation to tax Acts that are subject to the provisions of the TAA. Similarly, the remedies provided for in the TAA apply only to assessments raised and decisions made by SARS under tax Acts that are subject to the TAA.

The paragraphs that follow list the tax Acts that are subject to the provisions of the TAA and provide an overview of the remainder of the chapters.

1.2 Which tax Acts are subject to the TAA?

The tax Acts and specific provisions to which the TAA applies are as follows:[4]

- the Union and Southern Rhodesia Death Duties Act;[5]
- the Transfer Duty Act;[6]
- the Estate Duty Act;[7]
- the Income Tax Act;[8]
- the Value-Added Tax Act;[9]
- section 39 of the Taxation Laws Amendment Act;[10]
- sections 56 and 57 of the Income Tax Act;[11]

---

1 Act 28 of 2011.
2 Act 3 of 2000.
3 Constitution of the Republic of South Africa, 1996.
4 S 4 of the TAA, read with the definition of 'tax Act' in s 1 of the TAA, read with s 4 and sched. 1 of the South African Revenue Services Act 34 of 1997.
5 Act 22 of 1933.
6 Act 40 of 1949.
7 Act 45 of 1955.
8 Act 58 of 1962.
9 Act 89 of 1991.
10 Act 20 of 1994.
11 Act 21 of 1995.

- the Skills Development Levies Act;[12]
- the Unemployment Insurance Contributions Act;[13]
- sections 4 and 28 of the Exchange Control Amnesty and Amendment of Taxation Laws Act;[14]
- the Small Business Amnesty and Amendment of Taxation Laws Act;[15]
- the Second Small Business Amnesty and Amendment of Taxation Laws Act;[16]
- the Diamond Export Levy (Administration) Act;[17]
- the Diamond Export Levy Act;[18]
- the Securities Transfer Tax Act;[19]
- the Securities Transfer Tax Administration Act;[20]
- the Mineral and Petroleum Resources Royalty Act;[21]
- the Mineral and Petroleum Resources Royalty (Administration) Act;[22]
- the Voluntary Disclosure Programme and Taxation Laws Second Amendment Act;[23]
- the TAA itself;
- the Employment Tax Incentive Act;[24]
- the Merchant Shipping (International Oil Pollution Compensation Fund) Administration Act;[25]
- the Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act;[26]
- any regulation, proclamation, government notice or rule issued in terms of the abovementioned legislation or any agreement entered into in terms of the TAA or the Constitution.

It follows that any assessment or decision made by SARS under any of the above Acts, or any other relevant Act, regulation, proclamation, government notice or rule, is regulated by the TAA and that the remedies available under the TAA, as discussed in the following chapters, should be available to the taxpayer in respect of any assessment or decision made by SARS under any of the above Acts.

It should be noted at the outset that, in terms of section 4(3) of the TAA, if, and to the extent that, any of the Acts or provisions listed above is inconsistent with the TAA, the other Act or provision will take preference. Such inconsistencies are not pointed out or discussed in any detail herein.

---

12 Act 9 of 1999.
13 Act 4 of 2002.
14 Act 12 of 2003.
15 Act 9 of 2006.
16 Act 10 of 2006.
17 Act 14 of 2007.
18 Act 15 of 2007.
19 Act 25 of 2007.
20 Act 26 of 2007.
21 Act 28 of 2008.
22 Act 29 of 2008.
23 Act 8 of 2010.
24 Act 26 of 2013.
25 Act 35 of 2003.
26 Act 36 of 2013.

1.3 Overview of parts and chapters

The remaining chapters of this book are divided into three parts, to wit:

- Part I – Administrative grounds;
- Part II – The remedies; and
- Part III – The pay-now-argue-later rule.

Part I is aimed at highlighting SARS's obligations under the TAA and PAJA and explaining that SARS's failure to comply with these obligations may form a basis on which taxpayers may challenge SARS's assessments or decisions, in addition to the grounds arising from the other underlying tax Acts.

Part II details the remedies or mechanisms at a taxpayer's disposal to challenge an assessment or decision by SARS.

Part III consists of chapter 12, which explains the remedies available to a taxpayer to deal with issues associated with the pay-now-argue-later principle.

1.3.1 Part I – Administrative grounds

Part I consists of chapters 2 to 5.

1.3.1.1 Chapter 2 – SARS's pre-assessment obligations

Chapter 2 explains the rules under the TAA that SARS must abide by when SARS intends to raise an assessment following an audit of a taxpayer. Since assessments raised by SARS following an audit often form the subject matter of a challenge by the taxpayer, it is important to understand whether SARS has complied with its obligations and to understand the consequences of SARS's non-compliance: failure by SARS to comply with the prescripts of the TAA may form a basis on which the taxpayer may challenge SARS's assessment when relying on the remedies detailed in Part II.

1.3.1.2 Chapter 3 – Assessments and decisions

Chapter 3 analyses what exactly an assessment is. As assessments form the subject of most disputes with SARS it is important to know what exactly an assessment is. Additionally, there are certain rules that SARS must abide by when providing a taxpayer with a notice of assessment. Failure by SARS to comply with these rules or obligations under the TAA may form a basis on which the taxpayer may challenge an assessment when relying on the remedies detailed in Part II.

1.3.1.3 Chapter 4 – Prescription

Chapter 4 contains a basic exposition of the circumstances under which SARS may 'lift the veil of prescription' and possibly issue an assessment in respect of a tax year or tax period that has already prescribed. Chapter 4 explains what these circumstances are and indicates how, if SARS does lift this proverbial veil despite not being entitled to do so under the TAA, SARS's non-compliance can form a basis on which the taxpayer can challenge the assessment, relying on the remedies detailed in Part II.

1.3.1.4 Chapter 5 – Onus of proof

Chapter 5 contains a discussion of the onus of proof and of the significance thereof in the context of tax disputes. In any challenge against an assessment or decision, the taxpayer, in so far as he/she carries the burden of proof, will have to discharge that onus properly. Chapter 5 sets out the circumstances under which taxpayers carry the burden of proving certain facts or circumstances and provides guidance on how they could go about doing so.

SARS has certain obligations in raising an assessment despite the fact that the taxpayer carries the burden of proof. These obligations are also addressed in chapter 5. It is important to know what SARS's obligations are when it carries the burden of proof in respect of certain things. Failure by SARS to comply with its obligations could also form a basis on which the taxpayer may seek to challenge an assessment when relying on the remedies discussed in Part II.

1.3.2 Part II – The remedies

Part II consists of chapters 6 to 11.

1.3.2.1 Chapter 6 – Remedies other than objection and appeal

Chapter 6 sets out the remedies, other than the remedy of objection and appeal in terms of the TAA, of which taxpayers can avail themselves in seeking to challenge an assessment or decision by SARS. Understanding what these other remedies are and when they are available is important because they may often be more effective than the remedy of objection and appeal and may in many cases be the taxpayer's only option if the remedy of objection and appeal is not available.

1.3.2.2 Chapters 7 to 11 – The objection and appeal remedy

Chapters 7 to 11 contain a detailed analysis of the objection and appeal remedy available to taxpayers for challenging assessments or certain decisions by SARS.

1.3.3 Part III – The pay-now-argue-later rule

Part III consists of chapter 12.

1.3.3.1 Chapter 12 – Tax recovery and clearances

Chapter 12 sets out some possible remedies available to a taxpayer, which may assist in alleviating the burden on the taxpayer of having to pay the full amount of tax assessed before finalization of a tax dispute, and suggests possible ways of ensuring that the taxpayer is nevertheless still shown on SARS's records as being tax-compliant pending the outcome of the tax dispute.

PART I

CHAPTER 2

SARS's pre-assessment obligations

The practical context of this chapter

What is the relevance of SARS's pre-assessment obligations in tax disputes?

Failure by SARS to raise an assessment in compliance with the prescripts of the Tax Administration Act[1] *(TAA) may render the assessment unlawful and invalid on procedural grounds. Stated differently, procedural non-compliance by SARS could render the merits of an assessment moot. If the assessment is found to be unlawful on procedural grounds, it must be reduced. It is submitted that a taxpayer may raise procedural non-compliance with the TAA against such an assessment in lieu of or in addition to other available grounds by means of which the taxpayer can challenge an assessment (see chapters 6 to 10 on these remedies).*

In the context of an assessment following an audit, and subject to certain exceptions,[2] *SARS's pre-assessment obligations are as follows:*

- *SARS must issue a notice of commencement of an audit;*
- *SARS must issue progress reports throughout the duration of the audit, at certain intervals;*
- *SARS must issue a letter of audit findings before an assessment is raised; and*
- *SARS must allow the taxpayer an opportunity to respond to the letter of audit findings before SARS raises an assessment.*

1 Act 28 of 2011. Any reference to a section of an Act, unless otherwise specified or unless the context clearly indicates otherwise, is to be interpreted as a reference to the TAA.

2 An exposition of the exception to these requirements is given in the body of this chapter.

Contents

Table of Examples

2.1 Introduction

The significance of SARS's compliance with the rules governing its pre-assessment obligations in terms of the TAA is often underestimated or overlooked in the context of tax dispute resolution.

Case law suggests that whatever SARS did in the process leading up to the issuing of an assessment can be used by the taxpayer to bolster a case to overturn an assessment or decision by SARS. Failure by SARS to comply with the provisions of the TAA could render an assessment unlawful, irrespective of the merits of the case. Stated differently, whether an amount is taxable or deductible in terms of the underlying provisions of a tax Act (the merits of the case) becomes irrelevant if failure to adhere to prescribed procedures results in the assessment's not having been lawfully and validly issued.

In this chapter, we consider what SARS's pre-assessment obligations are in the context of tax disputes and discuss the consequences for SARS of failing to comply with these obligations. This also necessitates a discussion of the jurisdiction of the Tax Court, which is addressed in the conclusion to this chapter.

2.2 The requirement to inform the taxpayer of the commencement of an audit

Applicable law

Section 40 – Selection for inspection, verification or audit

SARS may select a person for inspection, verification or audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or risk assessment basis.

Section 42(1) – Keeping taxpayer informed

(1) A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit.

In terms of section 40, SARS may select a taxpayer for audit, verification or inspection on the basis of any consideration relevant to the proper administration of a tax Act, including a random or risk assessment basis.

With effect from 17 January 2019,[3] section 42(1) places an obligation on SARS to inform the taxpayer, by way of notice, of the commencement of an audit.

The plain wording of section 42(1) suggests that the requirement to provide a notice of commencement applies in relation to only an 'audit' conducted by SARS. In practice, SARS also often conducts something it refers to as a 'verification'. The TAA clearly distinguishes between an audit and a verification and indeed allows SARS to conduct verifications.

Neither the term 'audit' nor the term 'verification' is defined in the TAA. The word 'audit' can be defined as '*an official examination and verification of accounts and records, especially of financial accounts*'[4] and the term 'verification' as '*the process of research, examination,*

3 The date of promulgation of the Tax Administration Laws Amendment Act 22 of 2018.

4 https://www.dictionary.com/browse/audit?s=t (accessed 8 June 2020).

etc., required to prove or establish authenticity or validity'.[5] An 'audit' can also be construed as '*an official examination of the accounts of a business*'[6] and 'verification' as '*the process of testing or finding out if something is true, real, accurate, etc.*'[7]

The dictionary meanings of 'audit' and 'verification' are very similar. They can, however, possibly be distinguished on the basis that 'audit' suggests an *official* examination whereas 'verification' does not. While this distinguishing factor may, in context, be moot on the basis that all verifications and audits conducted by SARS are 'official' examinations, it is submitted that such an argument (a) loses sight of the context of the word 'official' in the definition of the term 'audit' and of the context of the term 'audit' in the TAA and (b) would render the word 'verification', as used in the TAA, superfluous, which is untenable.

In context, it is submitted that the term 'official' speaks to more formal, more directed examinations by SARS, which means that an audit by SARS is a formal, directed examination. In contrast, a verification is a general process of authentication with reference to, for example, third-party data. Therefore, whilst the terms 'audit' and 'verification' are indeed similar, they are not identical.

In the light of the above, it must follow that the requirement in section 42(1) of the TAA to inform the taxpayer of the commencement of an 'audit' applies only to an 'audit' as referred to in the TAA and not to a 'verification'. It is therefore submitted that SARS must provide the taxpayer with a notice of commencement of an 'audit' under section 42, but that it is not required to do the same in the case of a 'verification'.[8]

Practical issue: When a verification becomes an audit

It often happens in practice that SARS starts its investigation by way of a general authentication process followed by directed examinations into specific issues. It is submitted that in these cases something that started as a verification changes into an audit. When this happens, it is submitted that SARS must provide the taxpayer with a notice of commencement of an audit in terms of section 42(1). Whilst there cannot be a bright-line test for when a verification changes into an audit and each case will have to be considered on its own, Example 2.1 below is illustrative.

EXAMPLE

Example 2.1 – When a verification becomes an audit

SARS starts a verification process, after the submission of a corporate income tax return (ITR14), in terms of which SARS asks the taxpayer to submit the supplementary declaration called IT14SD. After the submission of the IT14SD, SARS sends the taxpayer a letter specifically asking why certain items are considered deductible, why certain items are not taxable, and why an understatement penalty should not be imposed, and requesting relevant proof. It is submitted that when SARS starts asking specific questions like these (but arguably even sooner), the verification has changed into an audit and SARS must notify the taxpayer accordingly in terms of section 42(1).

5 https://www.dictionary.com/browse/verification?s=t (accessed 8 June 2020).
6 https://dictionary.cambridge.org/dictionary/english/audit (accessed 8 June 2020).
7 https://dictionary.cambridge.org/dictionary/english/verification (accessed 8 June 2020).
8 At least not in terms of the TAA. It should be noted, however, that SARS may be required to issue a notice of commencement of verification under the provisions of other legislation, particularly in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In practice, SARS often issues a notice of verification.

Whilst SARS indeed often issues a notice of commencement of verification, such a notice would not satisfy the requirement in terms of section 42(1) when the verification becomes an audit. If a notice of commencement of verification were also to serve as notification of commencement of an audit for the purposes of satisfying the requirement of section 42(1), the terms 'audit' and 'verification' would have to have identical meanings, which, as has already been established, they do not have.

It is submitted that SARS would still have to issue a notice of commencement of an audit, regardless of whether it has issued a notice of commencement of verification, when the verification changes into an audit. In practice, SARS does from time to time issue a notice of commencement of an audit when a verification changes into an audit.

The notice of commencement of an audit should be issued at the commencement of an audit. This raises the question, when exactly does an audit commence for the purposes of the TAA?

2.2.1 Timing of the notice

The word 'commence' is referred to but not defined in the TAA. Its dictionary meaning is '*to begin; start*'[9] or '*to begin something*'[10].

It follows that an audit for the purposes of the TAA commences at the start of an official examination by SARS. The point at which an official examination starts may be difficult to ascertain but not necessarily impossible. It is not inconceivable that, in practice, an official examination may start long before the notice of commencement of an audit is issued. Such a notice issued by SARS after the audit has already commenced would not, however, serve to satisfy the requirement under section 42(1).

2.2.2 Content of the notice

In terms of section 42(1), the notice of commencement of an audit should be provided in a form and manner as may be prescribed by the Commissioner for SARS by public notice.

At the time of writing, no public notice had been issued under section 42(1) of the TAA regarding the content of such a notice. This has resulted in a situation where the taxpayer's constitutional rights and SARS's constitutionally imposed obligations,[11] as given effect to under section 42(1) of the TAA, are in force while no public notice is available to prescribe exactly what should be done to give effect to section 42(1).

In the absence of a public notice, the underlying governing principles of administrative fairness[12] should dictate the contents of the notice of commencement of an audit ('the notice of commencement'). In the premise, consideration should be given to section 33(1) of the Constitution, read with the relevant provisions of PAJA, in determining the minimum requirements in respect of the contents of the notice.

On the basis of the above, it is submitted that the notice of commencement, although it may vary according to the circumstances of each case, should contain at least the following to satisfy the constitutional requirement of just administrative action:

- a statement informing the taxpayer of the commencement of the audit and the basis on which the taxpayer has been selected for audit – in other words, the notice must state

9 https://www.dictionary.com/browse/commence?s=t (accessed 8 June 2020).
10 https://dictionary.cambridge.org/dictionary/english/commence (accessed 8 June 2020).
11 In terms of the Constitution of the Republic of South Africa, 1996.
12 As enshrined in s 33(1) of the Constitution and given effect to by PAJA, which was enacted in terms of s 33(3) of the Constitution.

whether the taxpayer has been selected for audit on a random basis, a risk assessment basis or another consideration relevant to the proper administration of a tax Act;[13]

- a statement specifying the exact scope of the audit, including information such as the tax year(s) or tax period(s) in question and the type(s) of tax under audit;
- a brief explanation of the process and SARS's proposed next steps; and
- any other relevant information based on the circumstances of the case.

Practical issue: Extension or change of audit scope

It often happens in practice that SARS changes or extends the scope of an audit during the course of an existing audit to include, for example, other years of assessment or other periods not originally under audit in accordance with the notice of commencement. It is submitted that under these circumstances SARS must issue another notice of commencement in terms of section 42(1) in respect of the tax year(s) or period(s) not originally included, such extension to the scope of the existing audit arguably representing a new official examination.

2.2.3 The exception to the requirement to issue a notice of commencement

In terms of section 42(5), SARS is not required to provide a notice of commencement of an audit if a senior SARS official has reason to believe that providing the notice of commencement would impede or prejudice the purpose, progress or outcome of the audit. It is submitted that the onus of proving that the issue of the notice would impede or prejudice the purpose, progress or outcome of the audit will rest on SARS.

2.3 The requirement to issue progress reports

Applicable Law

Section 42(1) – Keeping taxpayer informed

(1) A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit.

Section 42(1) of the TAA places an obligation on SARS to provide the taxpayer with a report indicating the stage of completion of the audit. These progress reports must be in the form and manner prescribed by the Commissioner for SARS by public notice. The public notice so issued and in force at the time of writing, Notice 788,[14] states the following:

'*1. General*

1.1 Any word or expression contained in this notice to which a meaning has been assigned in a "tax Act" as defined in section 1 of the Tax Administration Act, 2011 (Act No. 28 of 2011) ("the Act") has the meaning so assigned, unless the context indicated otherwise.

13 Arguably, SARS should also state what the risk assessment is that led to the selection of the taxpayer for audit. Similarly, if SARS states that it has selected the taxpayer for audit on another consideration relevant to the proper administration of a tax Act, it must state what that other consideration is. If SARS were not required to do so, it would create opportunities for SARS to abuse its powers under s 40 – see in this regard *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* (26244/2015) [2017] ZAGPPHC 253 (26 May 2017).

14 1 October 2012, *GG* 35733.

1.2 In this notice, 'commencement date' means the date that the Act comes into operation in terms of section 272(1) of the Act.

2. *Due dates for reports*

A SARS official involved in or responsible for an audit instituted before but not completed by the commencement date or instituted on or after the commencement date, must provide the taxpayer concerned with a report indicating the stage of completion of the audit—

(a) in the case of an audit instituted before the commencement date, within 90 days of the commencement date and within 90 day intervals thereafter; and

(b) in the case of an audit instituted on or after the commencement date, within 90 days of the start of the audit and within 90 day intervals thereafter, until the conclusion of the audit.

3. *Details of report*

The report must include the following details as at the date of the report:

(a) A description of the current scope of the audit;

(b) The stage of completion of the audit; and

(c) Relevant material still outstanding from the taxpayer.'

Notice 788 clearly prescribes:

- when the first progress report falls due;
- the intervals at which subsequent progress reports fall due; and
- the minimum detail to be included by SARS in the progress report.

2.3.1 The timing of progress reports

The timing of progress reports is clear from Notice 788. The first report is due 90 days from the start date of the audit (or within 90 days from the date of commencement of the TAA, i.e. 1 October 2012, if the audit commenced before the TAA came into force) and subsequent reports are due within 90-day intervals thereafter until the conclusion of the audit.

The days referred to in Notice 788 are calendar days as opposed to business days.[15] In other words, days in this context include Saturdays, Sundays and public holidays and are counted exclusive of the first day and inclusive of the last. If the last day falls on a Sunday or public holiday, the last day is not such Sunday or public holiday but the first day thereafter that is not a Sunday or public holiday.[16]

The start of the audit is the date indicated on the notice of commencement of an audit (or an earlier date, if the audit started before the date on the notice) (see paragraph 2.2, above).

2.3.2 The prescribed content of progress reports

Each progress report must contain the following details as at the date of the report:

- a description of the current scope of the audit;
- the stage of completion of the audit; and
- relevant material still outstanding from the taxpayer.

15 Unless a tax Act contains a different definition of the word 'day' or 'days'. See chap. 1 for a list of tax Acts.

16 Notice 788 states that any word or expression used in the notice has the meaning ascribed thereto in a tax Act as defined in s 1 of the TAA (see the list of tax Acts in chap. 1). In the absence of a provision to the contrary in a tax Act, the terms 'day' and 'days' should be interpreted, in accordance with s 4 of the Interpretation Act 33 of 1957, as calendar days unless the last day is a Sunday or a South African public holiday.

Notice 788 does not define or otherwise clarify the amount of detail SARS must provide regarding the description of the current scope of the audit or the stage of completion of the audit.

The content of progress reports must comply with the standard of fair administrative action referred to in paragraph 2.2.2, above. Notice 788 does not replace or in any way detract from the taxpayer's rights or SARS's obligations under section 33 of the Constitution, read with PAJA.

It is submitted that, depending on the facts and circumstances of the case, SARS should include such detail in progress reports as is required for SARS to comply with the requirement of administrative fairness. In this regard, it is submitted that the detail required in respect of the scope and stage of completion for compliance with administrative fairness include at least the following.

As regards the description of the current scope of the audit:

- the exact tax year(s) or tax period(s) in question;
- the exact tax type(s) in question in respect of each year or period;
- exactly what SARS is auditing in respect of the relevant tax year(s) or tax period(s) and tax type(s) in question.

As regards the stage of completion of the audit, in respect of the tax year or tax period and tax type under audit (as set out in the scope), whether:

- any audit work has been performed by SARS since the notice of commencement of the audit (or since the previous progress report);
- what work has been performed since the notice of commencement of the audit (or previous progress report), if any; and
- what work is yet to be performed.

It is submitted that statements on progress reports that indicate the stage of completion simply as 'execution' or 'in progress' are too vague to satisfy SARS's constitutional obligation keep the taxpayer concerned duly informed. Such statements leave the taxpayer none the wiser as to the actual stage of completion of an audit.

Practical issue: Audit vs verification

The plain wording of section 42(1) suggests that the requirement to issue progress reports applies only in relation to an 'audit' conducted by SARS. Indeed, there is no requirement for SARS under the TAA to issue progress reports in respect of a verification. However, as discussed in paragraph 2.2, above, it often happens in practice that a verification changes into an audit. At that point in time, SARS has no choice but to provide progress reports within the timelines indicated above.

2.3.3 The exception to the requirement

In terms of section 42(5), SARS is not required to provide progress reports if a senior SARS official has reason to believe that providing them would impede or prejudice the purpose, progress or outcome of the audit. It is submitted that the onus of proving that the issue of progress reports would impede or prejudice the purpose, progress or outcome of the audit would rest on SARS.

2.4 The requirement to issue a notice of audit findings

Applicable Law

Section 42(2) – Keeping taxpayer informed

(2) Upon conclusion of the audit or a criminal investigation, and where—

(a) the audit or investigation was inconclusive, SARS must inform the taxpayer accordingly within 21 business days; or

(b) the audit identified potential adjustments of a material nature, SARS must within 21 business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment or decision referred to in section 104(2).

Section 42(3) – Keeping taxpayer informed

(3) Upon receipt of the document described in subsection (2)(b), the taxpayer must within 21 business days of delivery of the document, or the further period requested by the taxpayer that may be allowed by SARS based on the complexities of the audit, respond in writing to the facts and conclusions set out in the document.

Section 42(2) of the TAA places an obligation on SARS to inform the taxpayer of the conclusion by SARS of its audit. Section 42(2)(a) states that when the audit is inconclusive SARS must inform the taxpayer accordingly.

When SARS identifies adjustments of a material nature, it must in terms of section 42(2)(b) provide the taxpayer with a document. This document must contain:

- the outcome of the audit; and
- the grounds of SARS's proposed assessment or decisions (if that decision is a decision referred to in section 104(2)).

In practice, the document that must be issued by SARS in terms of section 42(2)(b) is often called a 'letter of audit findings'. References to a letter of audit findings must henceforth, for the purposes of this chapter and others, be construed as meaning the document to be issued in terms of section 42(2)(b).

As stated above, the requirement to issue the letter of audit findings arises only if SARS identified adjustments of a material nature. No materiality number is provided, and no factors are listed in the TAA to establish whether an adjustment is material.

The dictionary meaning of the word 'material' is '*important or having an important effect*'.[17] The word 'important' is in turn defined as '*having great effect or influence*'.[18] From these definitions and in the context of section 42, it can be inferred that an adjustment will be 'material' if it could have a great effect or influence.

It could not have been the intention of the legislature for the materiality of an adjustment to be measured from SARS's perspective. It is therefore submitted that the potential effect of an adjustment on the taxpayer must be great for the adjustment to be material.

17 https://dictionary.cambridge.org/dictionary/english/material (accessed 12 August 2020).
18 https://dictionary.cambridge.org/dictionary/english/important (accessed 12 August 2020).

The test for whether an adjustment could have a 'material' effect on a taxpayer is, it is submitted, subjective and is therefore not something a SARS official can easily determine. This may be the reason why SARS seems, in most cases where adjustments are proposed, to issue a letter of audit findings.

2.4.1 Prescribed content of letters of audit findings

As stated above, the letter of audit findings must contain:

- the outcome of the audit; and
- the grounds for a proposed assessment or decision.

As regards the outcome of the audit, it is submitted that it would be sufficient for SARS simply to state that it has identified adjustments of material nature. This must then be read with SARS's grounds for such proposed adjustments.

What exactly are 'grounds for a proposed adjustment or decision'? In the case of *Commissioner for the South African Revenue Service v Pretoria East Motors (Pty) Ltd*,[19] the SCA held that:

> '*The raising of an additional assessment must be based on proper grounds for believing that, in the case of VAT, there has been an under declaration of supplies and hence of output tax, or an unjustified deduction of input tax. In the case of income tax it must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified. It is only in this way that SARS can engage the taxpayer in an administratively fair manner, as it is obliged to do. It is also the only basis upon which it can, as it must, provide grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the assessment is wrong.*'

SARS is required to provide the letter of audit findings only if it intends to make adjustments of a 'material' nature. A letter of audit findings is invariably a precursor to an additional assessment, or at least to a proposed additional assessment or a decision that is subject to objection and appeal in terms of the TAA. It follows that the words 'grounds for the proposed assessment or decision' in section 42(2)(b) mean, in terms of the *Pretoria East Motors* case, the proper grounds or, stated differently, the basis on which SARS believes that, in the case of VAT, there has been an understatement of output tax or overstatement of input tax or, in the case of income tax, that there is undeclared income or there are overstated expenses.

On a careful reading of section 42(2)(b), it is evident the grounds must be provided for a proposed assessment or proposed decision referred to in section 104(2). In terms of section 104, taxpayers may object to any assessment by which they are aggrieved[20] and to 'decisions' referred to in section 104(2).[21] Therefore the need to provide grounds would arguably arise when an objection lies against such a 'decision' or assessment were SARS to proceed with raising such an assessment or making such a 'decision'.

In terms of rule 6 of the rules promulgated in terms of section 103 of the TAA,[22] taxpayers are entitled to request reasons for anything that is subject to objection and appeal in terms of the TAA (being assessments and section 104(2) 'decisions'). It is well established that the reasons SARS must give a taxpayer in relation to such an assessment or 'decision' are what was referred to in the judgment of the SCA in *Commissioner for South African Revenue*

19 [2014] 76 SATC 293 at para. 11.
20 Not all assessments are subject to objection and appeal – see chap. 7 below.
21 See chap. 7 for a more detailed discussion of s 104.
22 GN 550 in *GG* 37819 of 11 July 2014.

Service v Sprigg Investment 117 CC t/a Global Investment[23] as 'actual reasons' sufficient to enable the taxpayer to formulate an objection.[24] It is submitted therefore that the grounds for SARS's proposed assessment must represent actual reasons: the factual and legal basis on which SARS proposes to raise its assessment that will allow the taxpayer to formulate an objection.

Section 96(2)(b) also uses the words 'grounds for assessment'.[25] In its guide titled *Dispute Resolution: Guide on the Rules Promulgated in terms of Section 103 of the Tax Administration Act, 2011* (2nd issue, dated 20 March 2020),[26] SARS states that in the context of section 96(2)(b) '*Grounds ... generally mean SARS must provide the grounds that enable the taxpayer to determine what has been decided, when, by whom and on what factual and legal basis*' (emphasis added).

2.4.1.1 Special rules for understatement penalties

In accordance with the principle laid down by the SCA in the *Pretoria East Motors* case,[27] SARS is also required, in its letter of audit findings, to provide the proper grounds for the imposition of a proposed understatement penalty.

In *ITC 1926*,[28] the Tax Court held that SARS is required to provide clearly the facts on which it relies for the imposition of an understatement penalty '*in order to place* [the taxpayer] *in a position to know the case that it must meet*'. While the issue before the court was an exception raised by the taxpayer against SARS's rule 31 statement,[29] it is submitted that the same principle should apply to letters of audit findings.[30] It follows that SARS is required in a letter of audit findings to provide the facts on which it bases the imposition of an understatement penalty.

It is not uncommon, in practice, for SARS not to state explicitly the grounds for the imposition of an understatement penalty in a letter of audit findings, presumably because the grounds must be deduced from the letter read as a whole. In this regard is worth noting that in the case of *ABC Trust v Commissioner for the South African Revenue Service*,[31] a matter dealing with prescription, the Tax Court held that:

> '*the paragraphs relied upon by SARS in the finalisation of audit imply that the treatment of capital gains in applicant's 2012 return caused SARS to make an incorrect assessment that did not reflect the full amount of applicant's tax liability. ... in my view that was insufficient because in order to make an objection applicant should not be left with uncertainty as to what SARS has given as its reasons ... What is to be implied from reasons expressed may be ambiguous and subject to later dispute. Hence SARS should have made express in its correspondence stating its reasons what it has clarified and rendered express in the passages of its answering affidavit in these proceedings to which I have referred.*'[32]

---

23 2011 (4) SA 551 (SCA), [2011] 3 All SA 18 (SCA), [2010] ZASCA 172 at paras 13 and 14.

24 See chap. 8 for a detailed discussion of the taxpayer's right to request reasons.

25 For a discussion of s 96, see chap. 3.

26 See para. 5.1 of the Guide.

27 *Commissioner for the South African Revenue Service v Pretoria East Motors (Pty) Ltd* [2014] 76 SATC 293.

28 82 SATC 161.

29 See chap. 10 on rule 31 statements.

30 Interestingly, in this this case SARS argued that it had provided sufficient facts in its pleadings to allow the taxpayer to make a case and that further comments on the facts were not required, as it was a matter of evidence to be led in the court. The court responded as follows: '*Absent the essential facts that SARS relies upon as to why there is gross negligence, the pleadings will simply be a bare denial of gross negligence and that will not be helpful for the purposes of explaining the true dispute that must be resolved on appeal*'.

31 TAdm (00052/2018) (03 May 2019) at paras 28 and 29.

32 Although this passage deals with prescription, it is submitted that the same principle should apply to understatement penalties because, as in the case of prescription, SARS bears the onus of proving the facts on which it relies for the imposition of an understatement penalty.

In light hereof, it is submitted that it will not suffice for SARS to force the taxpayer to deduce the facts on which SARS bases the imposition of an understatement penalty. It is submitted that SARS must expressly state the facts on which it bases the proposed imposition of an understatement penalty and that in the case of such a penalty SARS is required to provide more than merely the 'actual reasons' for the imposition of an understatement penalty. This distinction in the amount of detail SARS is required to provide in respect of understatement penalties is justified, it is submitted, because in terms of section 102(2) SARS bears the onus of proving the facts on which it intends to impose an understatement penalty.[33]

2.4.1.2 Special rules in the case of proposed assessment after prescription

For the same reasons as those provided in paragraph 2.4.1.1 above, it is submitted that SARS has to state expressly the basis on which it intends to lift the veil of prescription.[34] Furthermore, SARS will have to demonstrate the existence of the objective facts that caused it to be 'satisfied' that there was fraud, misrepresentation or non-disclosure of material facts on the part of the taxpayer, which misconduct caused SARS to assess incorrectly the amount of tax paid, resulting in loss to the *fiscus*, in the period of three or five years from the date of the original assessment.

This, it is submitted, is also necessary in the light of the fact that, as explained in chapter 4, the objective existence of misrepresentation, non-disclosure of material facts, or fraud is a prerequisite for the raising of an assessment post-prescription. Moreover, this distinction in the amount of detail SARS is required to provide in respect of prescription is justified, it is submitted, because SARS bears the onus of proving that the requirements for lifting the veil of prescription have been satisfied.[35]

2.4.1.3 Special rules for estimated and jeopardy assessments

In the case of an estimated assessment,[36] SARS has to provide the reasons why it believes its proposed assessment is reasonable. Again, something more is required than mere actual reasons in the letter of audit findings. It is submitted that SARS has to state expressly, in its letter of audit findings, why it believes its estimated assessment is reasonable. The distinction here is, it is submitted, again justified because SARS bears the burden of proving, on a balance of probabilities, that an estimated assessment is reasonable in terms of section 102(2).[37]

SARS also, in terms of section 94(3), bears the onus of proving that making a jeopardy assessment is reasonable.[38] It follows that, if a jeopardy assessment is proposed following an audit, SARS has to state expressly in the letter of audit findings why the making of the jeopardy assessment is reasonable.

33 See chap. 5 on onus of proof.
34 See chap. 4 for a discussion of the circumstances under which SARS may reopen a prescribed assessment.
35 See chap. 5 on onus of proof.
36 See chap. 3 on the different types of assessment.
37 See chap. 5 on onus of proof.
38 See chap. 3 on the different types of assessment.

Practical issue: Grounds required in only the finalisation letter?

It could be argued that the need for the grounds (or the amount of detail required in respect of such grounds), as discussed above, does not arise at the stage when SARS is required to issue a letter of audit findings in terms of section 42(2)(b) but only when SARS issues its finalisation letter.[39] A possible reason for this could be that an assessment is actually made only once the finalisation letter is issued and, at that point in time, the taxpayer would have the right to object to such assessment. If this view were correct, however, it would undermine the very purpose of section 42(2)(b). After all, as stated in the (unreported) judgment in the case of *Brits and Others v CSARS*:[40]

'*once the assessment is done, the* [SARS] *may insist on payment of the assessed amount*'.

Practical issue: New grounds on assessment

It often happens in practice that SARS, after having considered the taxpayer's response to the letter of audit findings, changes the grounds for its assessment. This would be evident from the difference between the letter of audit findings and the finalisation letter issued by SARS.

The question in these circumstances is whether SARS would be required to issue a new letter of audit findings were it to change its grounds for assessment. It is submitted that SARS would usually be required to do so. The mere fact that the taxpayer can lodge an objection to address the new ground(s) for assessment does not negate the taxpayer's right under the TAA to an opportunity to respond *before* SARS raises the assessment. If SARS were not required to issue another letter of audit findings, the very purpose of section 42(2)(b) would again be undermined: SARS would then never have to issue a letter of audit findings, as taxpayers would always have the option to defend themselves by manner of objection. After all, as stated in *Brits and Others v CSARS*:

'*I am not in agreement with these contentions for the simple reason that once the assessment is done, the respondent may insist on payment of the assessed amount*'.

Practical issue: Audits conducted after the conclusion of an audit

It often happens in practice that at some stage after it has issued its letter of audit findings SARS raises further questions, which effectively amounts to an official examination and therefore to an audit. It is submitted that under these circumstances, SARS may be commencing a new audit as the audit findings letter can be issued only on the conclusion of the audit. This may require the issue of another notice of commencement of an audit. If, however, it is not a new audit but the same audit, SARS would evidently not have concluded its audit and the letter of audit findings would therefore have been issued contrary to the provisions of the TAA.

39 A finalisation letter is the letter issued by SARS in practice, after the taxpayer has responded to the letter of audit findings (often seemingly to comply with s 96(2) – as to which, see chap. 3).

40 (2017/44380) [2017] ZAGPJHC (28 November 2017) at para. 11.

2.4.2 The exception to the requirement

In terms of section 42(4) of the TAA, a taxpayer may waive the right to receive a letter of audit findings. In terms of section 42(5), SARS is not required to provide a letter of audit findings if a senior SARS official has reason to believe that providing it would impede or prejudice the purpose, progress or outcome of the audit. In these cases, however, SARS is nevertheless required to provide the taxpayer with a document containing the grounds for assessment or decision referred to in section 104(2), within 21 business days of raising the assessment or making the 'decision'. It is submitted that onus of proving that the issue of the letter of audit findings before the making of the assessment would have impeded or prejudiced the purpose, progress or outcome of the audit rests on SARS.

2.5 The taxpayer's right to respond before an assessment is issued

Applicable Law

Section 42(3) – Keeping taxpayer informed

(3) Upon receipt of the document described in subsection (2)(b), the taxpayer must within 21 business days of delivery of the document, or the further period requested by the taxpayer that may be allowed by SARS based on the complexities of the audit, respond in writing to the facts and conclusions set out in the document.

In terms of section 42(3), SARS must afford the taxpayer an opportunity to respond to the letter of audit findings. The taxpayer must be provided a period of 21 business days to respond. Business days do not include Saturdays, Sundays or public holidays, nor do they include the days between 16 December of a year and 15 January of the following year, both inclusive.[41]

Section 42(3) is silent regarding what exactly the taxpayer must respond to. It is submitted that the taxpayer must respond by demonstrating why the grounds for assessment are wrong – whether they are wrong because of an error in law and/or of fact. It is submitted that the taxpayer would be in a position to do this only if the grounds for the proposed assessment or 'decision' were provided to the taxpayer in the manner set out in paragraph 2.4.1 above.

2.6 Requirements specific to field audits

Applicable Law

Section 41 – Authorisation for SARS official to conduct audit or criminal investigation

(1) A senior SARS official may grant a SARS official written authorisation to conduct a field audit or criminal investigation, as referred to in Part B.

(2) When a SARS official exercises a power or duty under a tax Act in person, the official must produce the authorisation.

(3) If the official does not produce the authorisation, a member of the public is entitled to assume that the official is not a SARS official so authorised.

continued

41 See the definition of 'business day' in s 1.

Section 48 – Field audit or criminal investigation

(1) A SARS official named in an authorisation referred to in section 41 may require a person, with prior notice of at least 10 business days, to make available at the person's premises specified in the notice relevant material that the official may require to audit or criminally investigate in connection with the administration of a tax Act in relation to the person or another person.

(2) The notice referred to in subsection (1) must—

(a) state the place where and the date and time that the audit or investigation is due to start (which must be during normal business hours); and

(b) indicate the initial basis and scope of the audit or investigation.

(3) SARS is not required to give the notice if the person waives the right to receive the notice.

(4) If a person at least five business days before the date listed in the notice advances reasonable grounds for varying the notice, SARS may vary the notice accordingly, subject to conditions SARS may impose with regard to preparatory measures for the audit or investigation.

(5) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for the purposes of trade, under this section without the consent of the occupant.

The term 'field audit' is not defined in the TAA. It is submitted that a field audit is different from a normal audit only in that it is an audit conducted off SARS's premises at the premises of the taxpayer. The requirements specific to a field audit are listed below.

- The SARS official must be authorised by a Senior SARS official to conduct a field audit (section 41(1)).
- The SARS official must always produce the authorisation (section 41(2)), not only when called upon to do so.
- Unless the taxpayer waives this right, SARS must, if it requires specific information during its field audit, notify the taxpayer by way of notice 10 business days in advance of the specific information it will require to conduct its audit. This notice must also include:
  - the place at, date on and time at which the audit is due to start at the taxpayer's premises; and
  - the initial basis and scope of the audit.

2.7 The consequences of SARS's failure to abide by these requirements

In *ITC 1921*,[42] SARS raised additional assessments to:

- disallow certain farming-related expenses which the taxpayer had claimed in his tax return; and
- tax a lump sum received by the taxpayer as other income rather than as a severance benefit.

SARS failed to provide the taxpayer with progress reports and failed to issue its letter of audit findings as required under section 42.

42 81 SATC 373.

The issues to be decided in the Tax Court, in so far as they are relevant here, were whether the audit conducted by SARS and subsequent assessments were valid.

The court held that SARS's failure to provide a letter of audit findings and to provide progress reports '*offends the constitution and the principles of legality*'. The reason for this is that, according to the court, '*Sections 40 and 42 of the Tax Administration Act, No. 28 of 2011 ... clearly give effect to and echo the administrative justice provisions set out in section 33 of the Constitution*'.

The court concluded that because SARS failed to comply with sections 40 and 42 of the TAA, and therefore with the Constitution, SARS's '*decision to conduct an additional assessment without notice, must be set aside as it does not comply with the peremptory prescripts of the applicable legislation and it is also constitutionally unsound. In the circumstances, the assessment is found to be invalid*'.

It follows from this judgment that the provisions of the TAA discussed in this chapter are aimed at giving effect to the Constitution. In *ITC 1921*, SARS failed to adhere properly to the constitutional principle of just administrative action and, because it also failed to abide by its own rules, was perhaps the author of its own fate. The case reinforces the point that it is imperative for SARS not only to succeed on the merits of a tax case but also to follow administratively fair procedures in raising an assessment. Stated differently, SARS must abide by its own rules. Whether the farming expenses properly ranked for deduction in the *ITC 1921* case was, owing to SARS's procedural non-compliance, irrelevant, and the additional assessment was invalid irrespective of the merits.

In the case of *Nondabula v Commissioner for SARS*,[43] the High Court held that SARS:

> '*is a creature of statute and as such it must operate within the four corners of the statutory provisions which empower it.* [SARS] *is governed by and operates in terms of the* [TAA]. *It therefore cannot do anything not specifically provided for in* [the TAA] *or some other legislation nor can it conduct itself contrary to the provisions of the* [the TAA]' (emphasis added).
>
> '*In failing to* [comply with the prescripts of the TAA, SARS] *acted unlawfully and unconstitutionally*'.

In this case, the fate that had befallen SARS was that it was not entitled to take any collection steps against the taxpayer. It is worth noting that the court was not called upon to make a determination on the validity of the assessment but asked to interdict SARS from taking collection steps in respect of a notice of assessment that did not comply with the prescripts of section 96.[44]

In the light of this, it is submitted that the following actions by SARS may render unlawful any additional assessment raised pursuant to an audit:

- failure to issue a notice of commencement of an audit;
- the issue of a deficient notice of commencement of an audit;
- failure to issue progress reports;
- the issue of progress reports that are deficient or out of time;
- failure to issue a letter of audit findings;
- the issue of a deficient letter of audit findings;

43 79 SATC 333.
44 See chap. 3 for a discussion of s 96.

- failure to allow a taxpayer at least 21 business days to respond or failure to provide an opportunity to respond; or
- failure to comply with obligations in respect of a field audit.

2.8 Jurisdiction of the Tax Court/Tax Board

Applicable Law

Section 109 – Jurisdiction of tax board

(1) An appeal against an assessment or 'decision' must in the first instance be heard by a tax board, if—

(a) the tax in dispute does not exceed the amount the Minister determines by public notice; and

(b) a senior SARS official and the 'appellant' so agree.

(2) SARS must designate the places where tax boards hear appeals.

(3) The tax board must hear an appeal at the place referred to in subsection (2) which is closest to the 'appellant's' residence or place of business, unless the 'appellant' and SARS agree that the appeal be heard at another place.

(4) In making a decision under subsection (1)(b), a senior SARS official must consider whether the grounds of the dispute or legal principles related to the appeal should rather be heard by the tax court.

(5) If the chairperson prior to or during the hearing, considering the grounds of the dispute or the legal principles related to the appeal, believes that the appeal should be heard by the tax court rather than the tax board, the chairperson may direct that the appeal be set down for hearing de novo before the tax court.

Section 117 – Jurisdiction of tax court

(1) The tax court for purposes of this Chapter has jurisdiction over tax appeals lodged under section 107.

(2) The place where an appeal is heard is determined by the 'rules'.

(3) The court may hear and decide an interlocutory application or an application in a procedural matter relating to a dispute under this Chapter as provided for in the 'rules'.

If an assessment is found to be invalid in consequence of SARS's failure to comply with the prescripts of the TAA, is the taxpayer allowed to raise SARS's non-compliance in the Tax Court or Tax Board? This question should be addressed because if it is answered in the affirmative the taxpayer can raise non-compliance with the TAA as a defence in its objection.[45]

It is evident from sections 109 and 117 that both the Tax Board and the Tax Court have jurisdiction over appeals. It should be noted that 'appeals' refers to appeals against assessments or 'decisions' by SARS that are subject to objection under section 104, in terms of the rules, and not to appeals to court in the more commonly used sense of the word.[46]

45 See chaps 7 and 10 on objections and appeals.

46 See chaps 7 and 10 for a more detailed discussion of the jurisdiction of the Tax Court and Tax Board.

Non-compliance by SARS with the provisions discussed in this chapter raises questions of administrative law, which arguably fall to be considered by the High Court in terms an application under PAJA, on the basis that such non-compliance arises before the making of an assessment which is subject to objection and appeal. Stated differently, it could be argued that the Tax Court does not have jurisdiction to hear appeals based on non-compliance by SARS with its obligations before an assessment is raised, because it is the assessment itself (and not the non-compliance by SARS before the assessment is raised) that brings the jurisdiction of the Tax Court into existence. Suffice it to state for present purposes, however, that, as the High Court held in the case of *South Atlantic Jazz Festival v Commissioner, South African Revenue Service*:[47]

> '*The fact that the determination of the appeal might entail the tax court in considering the legality of an administrative decision that was integral to the making of the assessment does not deprive the court of its jurisdiction to decide the appeal. To interpret and apply the legislation as requiring the dichotomous procedures enjoined in the argument advanced on behalf of the Commissioner would in many cases defeat the very purpose of the establishment of the specialist tax court. The jurisdiction of the tax court to determine tax appeals is conferred without any limitation in s 117(1) of the TAA. The court must be taken to have been invested with all the powers that are inherently necessary for it to fulfil its expressly provided functions.*'

This was confirmed in *Wingate-Pearse v Commissioner for the South African Revenue Service*.[48]

It is submitted that, in the light of the above, the Tax Court does indeed have jurisdiction to hear appeals when the taxpayer's objection is based on SARS's failure to comply with its pre-assessment obligations.[49]

47 2015 (6) SA 78 (WCC) at para. 23.

48 (29208/15) [2019] ZAGPJHC 218, 2019 (6) SA 196 (GJ), [2019] 4 All SA 601 (GJ) (17 July 2019) at para. 47. See also *Medox Ltd v Commissioner for the South African Revenue Service* (49017/11) [2014] ZAGPPHC 98 (20 February 2014); *Appellant Company (Pty) Ltd v CSARS* IT 13950 (30 January 2017); *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* (26244/2015) [2017] ZAGPPHC 253 (26 May 2017) and *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* (26244/2015) [2020] ZAGPJHC 202 (31 August 2020).

49 In *A Way to Explore v CSARS* [2017] ZAGPPHC 541, [2018] 80 SATC 211, the taxpayer launched a review application under PAJA for an order to set aside certain VAT assessments raised by SARS, which application was based on SARS's failure to comply with its pre-assessment obligations. The following comment by the court, at para. 37, is relevant: '*it is also unfair on the one hand to raise an issue on review which the Applicant did not insist on, or object to, and seemingly excused whilst on the other hand the process it has proceeded with or taken against the assessment (Objection) is still pending. The Applicant has therefore not made a case for the interference of the court before the valid internal process is finalised; see unreported judgment of this Division in* Medox v CSARS' (emphasis added).

PART I

CHAPTER 3

Assessments and decisions

The practical context of this chapter

The relevance of assessments and decisions by SARS

Assessments or decisions by SARS are often the focal point of a dispute with SARS. Understanding what exactly an assessment is and what the taxpayer's rights, and SARS's powers and duties, are in respect of assessments and certain decisions is essential. An assessment that is not raised in accordance with the prescripts of the applicable rules is invalid.

PART I

CHAPTER 3

Assessments and decisions

The practical context of this chapter

The relevance of assessments and decisions by SARS

Assessments or decisions by SARS are often the focal point of a dispute with SARS. Understanding what exactly an assessment is and what the taxpayer's rights, and SARS's powers and duties, are in respect of assessments and certain decisions is essential. An assessment that is not raised in accordance with the prescripts of the applicable rules is invalid.

Contents

Contents

3.1 Introduction

The focal point of many disputes with SARS is an assessment raised or a decision taken by SARS. Understanding exactly what constitutes an assessment is vital to understanding the rules governing a challenge against such an assessment. The same holds true in relation to decisions by SARS.

In addition, the Tax Administration Act[1] (TAA) prescribes rules by which SARS must abide in raising an assessment. Failure by SARS to do so may form a possible ground to challenge an assessment raised by SARS or to prevent SARS from taking collection steps in relation to such assessment.

3.2 What is an assessment and what is the difference between an assessment and a notice of assessment?

Applicable Law

Definition of 'assessment' in section 1 of the TAA

'"assessment" means the determination of the amount of a tax liability or refund by way of self-assessment by the taxpayer or assessment by SARS;'

3.2.1 What exactly is an assessment?

In the case of *Irvin & Johnson (SA) Ltd v Commissioner for Inland Revenue*,[2] the court interpreted the definition of 'assessment' as it read in the Income Tax Act,[3] namely:[4] '*the determination of an amount upon which any tax leviable under this Act is chargeable*'. The Appellate Division, as it then was, held that an assessment is the mental process or act of determining an amount but that such mental act or process becomes an 'assessment' only when it is reduced to writing or, stated differently, when an expressed result of such mental process is made.

In a later case, *ITC 1740*,[5] when the definition of 'assessment' read:

'*"assessment" means the determination by the Commissioner, by way of a notice of assessment served in a manner contemplated in s 106(2)—*

(a) of an amount upon which any tax leviable under this Act is chargeable; or

(b) of the amount of any such tax; or

(c) of any loss ranking for set-off; or

(d) of any assessed capital loss determined in terms of paragraph 9 of the Eighth Schedule',

the court held, with reference to the *Irvin & Johnson* case, that 'what is required is at least a purposeful act, one whereby the document embodying the mental act is intended to be an assessment' before there was an 'assessment' as then defined in the Income Tax Act[6] (ITA).

1 Act 28 of 2011. Unless the context indicates otherwise, any reference to a legislative provision is, for the purposes of this chapter, a reference to the TAA.
2 1946 AD 483.
3 Act 31 of 1941.
4 S 1 of Act 31 of 1941.
5 65 SATC 98.
6 Act 58 of 1962.

In the case of *CSARS v South African Custodial Services (Pty) Ltd*,[7] the court, on the basis of the judgments in *ITC 1740* and therefore also of the judgment in *Irvin & Johnson*, held that a letter issued by SARS setting out adjustments made by SARS constituted an assessment, despite the fact that the letter clearly stated that '*tax assessments will be issued to* [the taxpayer] *in due course*', such letter having reduced to writing the mental process followed by SARS – that is, the determination made by SARS.

The definition of 'assessment' as it currently reads in the TAA also requires '*determination of the amount*'. It is submitted that the jurisprudence discussed above in relation to previous definitions of the same term still applies to the definition of 'assessment' in section 1 of the TAA, the current definition being very similar to previous definitions.

In practice, SARS often, especially following an audit, issues a letter called a 'finalisation letter'. A finalisation letter is typically issued after SARS has issued a letter of audit findings as required under section 42(2)(b)[8] and after the taxpayer has duly responded as required under section 42(3)[9] or failed to respond at all within the prescribed time period. Finalisation letters, it is submitted, almost always constitute assessments in that they contain the expressed result of the mental process followed by SARS and therefore a determination.

3.2.2 A notice of assessment vs an assessment

Section 96(1) of the TAA states that SARS must provide any person who has been assessed with a notice of assessment and the minimum information that such notice must contain.[10]

In practice, and especially in the context of tax disputes following an audit, an assessment is not the same thing as a notice of assessment. An assessment (a determination) is typically made in a finalisation letter or adjustment letter. The notice of assessment is the notice that must be issued in terms of section 96 of the TAA in consequence of the assessment already made (as contained in the finalisation letter). In practice, the notice of assessment is the ITA34, VAT217 or EMP217 etc. issued by SARS. The notice of assessment and the assessment itself are often the same thing, however, especially in the case of original assessments (for example, when there is no audit and no additional assessment).

3.2.3 Each determination constitutes an assessment on its own

The definition of 'assessment' as it read prior to its amendment by Schedule 1 to the TAA was further considered in *First South African Holdings (Pty) Ltd v CSAR*.[11] The facts of the case may be briefly summarised as follows. The taxpayer's taxable income was originally assessed at R15 892 978 for its 2002 year of assessment; however, a balance of assessed loss in the amount of R34 978 418 was carried forward from 2001. In the result, the taxpayer was originally in an overall loss position of R19 085 440 (R15 892 978 – R34 978 418). The original notice of assessment, dated 17 July 2003, duly recorded such overall loss. SARS subsequently, in an additional notice of assessment, dated 12 April 2006, disallowed the balance of assessed loss carried forward from the 2001 year, which meant that the full amount of R15 892 978 fell subject to tax.

Sometime after the additional notice of assessment had been issued, the taxpayer realised that it had overstated its taxable income of R15 892 978. Accordingly, on 24 July 2007 it requested

7 74 SATC 61.
8 See chap. 2 for a discussion of this provision.
9 See chap. 2 for a discussion of this provision.
10 See para. 3.4 for a detailed discussion of the requirement to issue a notice of assessment.
11 73 SATC 221.

a reduced assessment under the now repealed section 79A of the ITA.[12] SARS denied the request on the basis that it was made more than three years after 17 July 2003, being the date of the original notice of assessment. The taxpayer's submission was that the request was made well within three years from the 2006 additional assessment.

The court held that the assessment made by SARS in 2006 was a decrease of a balance of assessed loss carried forward. The additional assessment did not contain a determination of the taxable income of R15 892 978. The determination as to taxable income had already been made in the 2003 assessment and had therefore become final through prescription in 2006.[13] It follows that the only assessment SARS makes in an additional assessment is of those things that SARS changed from the original assessment to the additional assessment. The determinations that SARS has not changed from the original assessment to the additional assessment remain determinations made at the time of the original assessment even though the determinations that did not change from the original assessment to the additional assessment is embodied in the notice of the additional assessment.

This was again confirmed in the case of *Computek (Pty) Ltd v CSARS*,[14] in which a taxpayer who objected to certain penalties raised by SARS sought, at appeal, to include in its appeal a dispute against the capital tax giving rise to the penalties (which tax was not disputed in the objection). The taxpayer argued that since it had objected to the entire VAT217/VAT notice of assessment document, which included the capital tax, it was entitled to raise such new ground at appeal. The court rejected this contention on the basis that, although the penalties and capital tax were embodied in a single notice of assessment, they are separate assessments, being a determination of penalties and a determination of capital tax respectively. Since the taxpayer did not object to the determination of the capital tax, it was barred from raising that determination at appeal.[15]

Practical issue: Provisional tax

In terms of paragraph 19(3) of the Fourth Schedule to the ITA, SARS may increase a taxpayer's provisional tax estimate. In practice, this is typically done in terms of a letter (often referred to as a 'paragraph 19(3) increase letter') issued to the taxpayer, informing the taxpayer of the increase in the estimate and requesting payment of same within a specified time period. When considering the meaning of the term 'assessment', it is evident that such an increase letter constitutes the determination of an amount. While it could be argued that such determination is not of a tax liability but of an estimated tax liability, the term 'tax' is defined in section 1 to include 'any other moneys imposed under a tax Act'.

SARS states in footnote 57 of its Interpretation Note 1 (issue 3) titled: *Provisional Tax Estimates* that '*it is arguable that an increased estimate results in an additional assessment under section 92 of the TA Act, read with the definition of "assessment" in section 1 of that Act*'.

It is worth noting here that an increase, although an assessment, is not subject to objection and appeal. It is important to understand that increase letters do constitute assessments, and that there are remedies available other than objection and appeal under the TAA in respect of assessments.[16]

12 See chap. 6 for a discussion of s 93 of the TAA, which contains a provision similar to the now repealed s 79A of the ITA.
13 See chap. 4 for a discussion of prescription.
14 75 SATC 104.
15 As to new grounds for appeal, see chap. 10.
16 See chap. 6.

3.3 The different types of assessments

The TAA provides for different types of determinations or assessments that can be made by SARS:

- original assessments;
- additional assessments;
- reduced assessments;
- estimated assessments;
- jeopardy assessments; and
- penalty assessments.

Each type of assessment listed above is discussed in detail below.

3.3.1 Original assessments

Applicable Law

Section 91 – Original assessments

(1) If a tax Act requires a taxpayer to submit a return which does not incorporate a determination of the amount of a tax liability, SARS must make an original assessment based on the return submitted by the taxpayer or other information available or obtained in respect of the taxpayer.

(2) If a tax Act requires a taxpayer to submit a return which incorporates a determination of the amount of a tax liability, the submission of the return is an original self-assessment of the tax liability.

(3) If a tax Act requires a taxpayer to make a determination of the amount of a tax liability and no return is required, the payment of the amount of tax due is an original assessment.

(4) If a taxpayer—

(a) does not submit a return; or

(b) is not required to submit a return, and fails to pay the tax required under a tax Act,

SARS may make an assessment based on an estimate under section 95.

(5) If a tax Act requires a taxpayer to submit a return—

(a) the making of an assessment under subsection (4) does not detract from the obligation to submit a return;

(b) the taxpayer in respect of whom the assessment has been issued may, within 30 business days from the date of assessment, request SARS to issue a reduced assessment or additional assessment by submitting a complete and correct return; and

(c) an assessment under subsection (4) is not subject to objection or appeal unless the taxpayer submits the return and SARS does not issue a reduced or additional assessment.

(6) A senior SARS official may extend the period referred to in subsection (5) (b) within which the return must be submitted, for a period not exceeding the period for which a penalty may be automatically increased under section 211 (2).

Section 91 clearly distinguishes between self-assessment-type taxes such as value-added tax and employees' tax (being taxes where the relevant tax return incorporates a determination of a tax liability) and other taxes that are not self-assessment-type taxes (SARS-assessment-type taxes) such as income tax.[17]

In relation to both types of cases, though, section 91 refers to an 'original assessment'. The term 'original assessment' is defined in section 1 to mean an assessment contemplated in section 91. Neither the definition of the term in section 1 nor section 91 itself defines the words 'original assessment'. The word 'assessment' means a determination as discussed in paragraph 3.2.1, above. It accordingly stands to be determined what the word 'original' means in this context.

Something that is 'original' is something 'belonging or pertaining to … a thing at its beginning'[18] or 'existing since the beginning, or [that is] the earliest form of something'.[19] It is submitted that an 'original assessment' should therefore be interpreted as being the first determination of an amount of a tax liability or refund. It is worth noting that an assessment does not constitute an original assessment simply because SARS, on the notice of assessment (ITA34, VAT217, or EMP217), calls it an original assessment. An assessment is an original assessment when it is the first determination of an amount of a tax liability, despite the fact that the notice of assessment itself is called something else, as will appear from the analysis on the different types of assessment discussed below.

3.3.1.1 Original assessments: Self-assessment-type taxes

In terms of section 91, the submission of the relevant return (for example, the VAT201 or EMP201) itself is the first determination of a tax liability or refund – the original assessment.

If the taxpayer does not make such a determination as a result of not submitting the relevant return, SARS can make an estimated assessment in terms of section 95, which estimated assessment, being the first determination of a tax liability or refund, would also be an original assessment.

An original self-assessment is also made by the taxpayer on payment of the relevant tax in circumstances where the taxpayer is not required to file a return.

3.3.1.2 Original assessments: SARS-assessment-type taxes

The first assessment made by SARS following submission of a tax return is an original assessment. It is the first determination of a tax liability or refund made by SARS. An original assessment based on a SARS-assessment-type tax can be made only on the basis of either a return to be submitted by the taxpayer under a tax Act or other information available or obtained in respect of a taxpayer.

---

17 It may be debatable whether corporate income tax is a self-assessment-type tax. Suffice it to state, however, that the corporate tax return (ITR14) does not include a determination of tax liability but includes a determination of the amount on which the tax liability will be determined through original assessment by SARS.

18 https://www.dictionary.com/browse/original?s=ts (accessed on 10 June 2020).

19 https://dictionary.cambridge.org/dictionary/english/original (accessed on 10 June 2020).

3.3.2 Additional assessments

Applicable Law

Section 92 – Additional assessments

If at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus, SARS must make an additional assessment to correct the prejudice.

Additional assessments commonly form the subject matter of a dispute between a taxpayer and SARS. It is therefore important to understand when SARS can raise an additional assessment. If SARS has raised an additional assessment contrary to the prescripts of the TAA, such failure by SARS to comply with the prescripts of the TAA may well form a basis or ground for disputing such assessment. It is also important to understand which part of a notice of assessment constitutes the additional assessment. Furthermore, an additional assessment is normally an assessment that is not fully based on a return submitted by a taxpayer, in which case SARS is required to include specific detail in the actual notice of assessment.[20]

In *Commissioner for the South African Revenue Services v Pretoria East Motors (Pty) Ltd*,[21] the court held that:

> '*The raising of an additional assessment must be based on proper grounds for believing that, in the case of VAT, there has been an under declaration of supplies and hence of output tax, or an unjustified deduction of input tax. In the case of income tax it must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified. It is only in this way that SARS can engage the taxpayer in an administratively fair manner, as it is obliged to do. It is also the only basis upon which it can, as it must, provide grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the assessment is wrong.*'

It is evident from section 92, read with the judgment in *Pretoria East Motors*, that an additional assessment can be made only if (a) another assessment has already been made (whether by way of self-assessment by the taxpayer or assessment by SARS) and (b) SARS has proper grounds for believing that such other assessment does not reflect the correct application of a tax Act, to the prejudice of SARS or the *fiscus*.

3.3.2.1 Meaning of 'proper grounds'

It is submitted that 'proper grounds' means that SARS must have a proper factual and legal basis for believing that the original assessment does not reflect the correct application of a tax Act, to the prejudice of SARS or the *fiscus*. What if SARS does not have such proper grounds but nevertheless proceeds to raise an additional assessment? It is submitted that in such a case the additional assessment would have been issued *ultra vires* – that is, outside the scope of any empowering provision of the TAA – and would therefore be unlawful.[22]

20 See para. 3.4 below for a detailed discussion of this requirement.

21 (291/12) [2014] ZASCA 91 (12 June 2014), [2014] 3 All SA 266 (SCA), 2014 (5) SA 231 (SCA).

22 See *Nondabula v Commissioner for SARS* 79 SATC 333.

Practical issue: Proper grounds obtained after the additional assessment has been raised

It often happens in practice that SARS, after having raised the additional assessment, requests further information, typically in terms of rule 8 of the rules promulgated under section 103. This rule allows SARS to request further information necessary for it to decide the outcome of an objection.[23] Depending on the facts, it may transpire that when SARS made the additional assessment it did not have proper grounds for doing so. It is submitted that under these circumstances, the additional assessment could be said to have been made without the requisite proper grounds.

3.3.2.2 Meaning of 'prejudice to SARS or the *fiscus*'

In *ITC 1908*,[24] the court had to interpret the meaning of the words 'any prejudice to SARS or the *fiscus*' as used in the definition of 'understatement' in section 221. The facts of the case, in so far as they are relevant here, were the following:

- The taxpayer had paid provisional tax in respect of the year of assessment in question.
- When the taxpayer filed its corporate tax return for the same year, it declared itself dormant and filed a so-called 'nil return'. The taxpayer was assessed accordingly in the original assessment.
- SARS investigated and raised additional assessment on the basis that the taxpayer was not, in fact, dormant and had generated taxable income for the year of assessment in question.
- SARS imposed an understatement penalty.

The taxpayer argued that since it had paid the tax assessed by way of provisional tax, there could be no prejudice to SARS or the *fiscus* from the submission of a nil return. While the issue before the court was whether SARS could impose the understatement penalty, an understatement penalty can be imposed only if, amongst other requirements, SARS or the *fiscus* had been prejudiced.

The court held that the prejudice to SARS was in the form of opportunity cost and resource allocation occasioned by the investigation of the taxpayer. The prejudice to the *fiscus*, the court held, was that the money had been paid to the provisional-tax account and, as a result, could not be used by the *fiscus* in its budgetary process.

It follows that the words 'prejudice to SARS or the *fiscus*' have an extremely wide meaning. The meaning derived from *ITC 1908* may be distinguished from the meaning of the expression as used in section 92 on the basis that, in the context of understatement penalties, prejudice to SARS or the *fiscus* must result from the taxpayer's behaviour, such as an incorrect statement in a return. The wording in section 92 requires the prejudice to result from the incorrect application of a tax Act in an assessment. It is submitted therefore that opportunity cost and resource allocation, for example, while indeed perhaps prejudicial to SARS, would not entitle SARS to raise an additional assessment. The taxpayer's incorrect assessment must cause prejudice to SARS before SARS may raise an additional assessment.

3.3.2.3 SARS-assessment-type taxes: Original additional assessment

It is submitted that when SARS raises an additional assessment, such additional assessment will be the first determination made by SARS, to the extent that it differs from the determination

23 For a detailed discussion of this rule, see chap. 9.
24 80 SATC 299.

made by SARS in the original assessment. The additional assessment would therefore contain an initial determination and would to that extent constitute an original assessment as contemplated in section 91.[25] This would be the case despite the fact that the relevant notice of assessment calls itself an 'additional assessment'.[26]

3.3.2.4 Self-assessment-type taxes: Original additional assessment

An assessment raised by SARS on a self-assessment-tax type after the taxpayer has already submitted a return is an original additional assessment to the extent that SARS changes the amounts from the first assessment to the second/additional assessment.[27]

It is worth noting that such original additional assessments are not self-assessments but assessments by SARS, despite the fact that they are made by SARS on a self-assessment-type tax.[28]

An assessment raised by SARS when the taxpayer has not yet filed the relevant tax return is not an original additional assessment. It is simply an original assessment because additional assessments can be made only when an assessment has already been made.

3.3.3 Reduced assessments

Applicable Law

Section 93(1)(a) to (c) – Reduced assessments

(1) SARS may make a reduced assessment if—

(a) the taxpayer successfully disputed the assessment under Chapter 9;

(b) necessary to give effect to a settlement under Part F of Chapter 9;

(c) necessary to give effect to a judgment pursuant to an appeal under Part E of Chapter 9 and there is no right of further appeal;

Section 93(2)

(2) SARS may reduce an assessment despite the fact that no objection has been lodged or appeal noted.

Section 93(1)(a) to (c) provides for reduced assessments to be issued after a successful dispute (that is, after an objection has been allowed or partially allowed, or when an appeal is successful or partially successful), when settlement of a dispute between the taxpayer and SARS has been reached (which could happen at any time during the dispute process) or when a taxpayer wins a case on appeal to a higher court from the Tax Court and no further appeal lies against the decision of that higher court.

Section 93(2) allows for these reduced assessments to be made without the taxpayer's having to lodge an objection or note an appeal. It is worth noting here that only SARS can make a reduced assessment under section 93. It is submitted that there is no such thing a reduced self-assessment by a taxpayer. The taxpayer must follow the remedies detailed in chapters 6 to 10 to move SARS to action under section 93.

A detailed discussion of section 93(1)(d) and (e) is contained in chapter 6.

---

25 Original assessments on SARS-assessment-type taxes can also be based on information available or obtained in respect of a taxpayer (such as information in documents obtained during an audit).

26 This is important to understand considering, for example, the wording in s 99(1), which refers to an original assessment. See also the *First South African Holdings* and *Computek* cases discussed in para. 3.2.3.

27 See in this regard the *First South African Holdings* and *Computek* discussed in para. 3.2.3.

28 This is important in the light of prescription rules, as to which, see chaps 4, 6 and 7.

3.3.4 Jeopardy assessments

Applicable Law

Section 94 – Jeopardy assessments

(1) SARS may make a jeopardy assessment in advance of the date on which the return is normally due, if the Commissioner is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy.

(2) In addition to any rights under Chapter 9, a review application against an assessment made under this section may be made to the High Court on the grounds that—

(a) its amount is excessive; or

(b) circumstances that justify a jeopardy assessment do not exist.

(3) In proceedings under subsection (2), SARS bears the burden of proving that the making of the jeopardy assessment is reasonable under the circumstances.

Understanding when an assessment is a jeopardy assessment is extremely important in the context of a tax dispute since, in terms of section 94(3), SARS bears the burden of proving that the making of a jeopardy assessment is reasonable in the circumstances.[29] In addition, when an assessment constitutes a jeopardy assessment, SARS is required to include specific detail in the notice of assessment.[30]

A jeopardy assessment is an assessment raised before the relevant tax return is due. For example, SARS could raise a jeopardy assessment on income tax before the actual year of assessment has passed or, in the case of VAT and employees' tax, before the VAT/EMP201 is due. SARS can do this only when the Commissioner is satisfied that collection of the tax would be in jeopardy if SARS were to have to wait for the return to fall due. Such an assessment would always be an original assessment.

3.3.5 Estimated assessments

Applicable Law

Section 95 – Estimation of assessments

(1) SARS may make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate if the taxpayer—

(a) fails to submit a return as required; or

(b) submits a return or information that is incorrect or inadequate.

(2) SARS must make the estimate based on information readily available to it.

(3) If the taxpayer is unable to submit an accurate return, a senior SARS official may agree in writing with the taxpayer as to the amount of tax chargeable and issue an assessment accordingly, which assessment is not subject to objection or appeal.

---

29 In the case of a review application in the High Court. It is debatable whether SARS would bear the same onus in the Tax Court seeing as s 94(3) seems to refer to review applications in the High Court. See chap. 5 on onus of proof.

30 See para. 3.4 for a detailed discussion of this requirement.

Understanding when an assessment is an estimated assessment is vitally important in the context of a tax dispute because, in terms of section 102(2), SARS bears the burden of proving that an estimated assessment is reasonable.[31] Furthermore, if the assessment is an estimated assessment, there is specific detail that must be included in the notice of assessment.[32]

In addition, if an assessment is an estimated assessment raised in consequence of a taxpayer's failure to submit a tax return,[33] the taxpayer will first have to submit the tax return before being allowed to object against the assessment.[34] Lastly, knowing when an assessment is an agreed estimated assessment is important because no challenge lies against such an assessment.[35]

An estimated assessment can take the form of an original, an additional or a jeopardy assessment. For an assessment to constitute an 'estimated assessment', it must be based on an estimate.

The word 'estimate' is not defined in the TAA, however. Cambridge Dictionary defines the verb 'estimate' as '*to guess or calculate the cost, size, value, etc. of something*'.[36] The verb 'guess' is in turn defined[37] as 'to give an answer to a particular question when you do not have all the facts and so cannot be certain if you are correct'. It follows that an estimated assessment can be described as a determination made when SARS does not have all the facts and cannot be certain that its determination is accurate. SARS can make such a determination only when the taxpayer:

- has failed to submit a return; or
- has submitted a return or other information that is incorrect or inadequate.

PROPOSED CHANGE IN THE 2020 DRAFT BILL

The Draft Tax Administration Laws Amendment Bill, 2020, published for public comment on 31 July 2020, proposes amending section 95 to allow SARS to issue an estimated assessment when the taxpayer does not submit relevant material to SARS even though SARS has requested the material at least twice. If eventually promulgated in its current form, this amendment will be effective from the date of promulgation. The draft bill is subject to change and no proposed amendments are in force at the time of drafting.

An estimated assessment made under these circumstances cannot be a complete guess. It must be based on information readily available to SARS.[38]

Section 95(3) allows SARS to agree on an assessment with a taxpayer. This can be done only when the taxpayer is unable to submit an accurate return. The ability to agree on an assessment with SARS can be a useful tool to mitigate tax exposure proactively, given the rules associated with the onus of proof.[39]

31 See chap. 5 for a detailed discussion of onus of proof.
32 See para. 3.4 for a discussion of the detail required.
33 See s 91.
34 See chaps 7–9 on objections.
35 See chaps 6 and 7.
36 https://dictionary.cambridge.org/dictionary/english/estimate (accessed 10 June 2020).
37 https://dictionary.cambridge.org/dictionary/english/guess (accessed 10 June 2020).
38 See in this regard *Africa Cash and Carry (Pty) Ltd v C:SARS* 82 SATC 73, discussed in chap. 5. See chap. 5 also on what would be reasonable.
39 See chap. 5.

3.3.6 Penalty assessments

Applicable Law

Definition of 'administrative non-compliance penalty' or 'penalty' in section 208

'administrative noncompliance penalty' or 'penalty' means a 'penalty' imposed by SARS in accordance with this Chapter or a tax Act other than this Act, and excludes an understatement penalty referred to in Chapter 16;

Definition of 'penalty assessment' in section 208

'penalty assessment' means an assessment in respect of—

(a) a 'penalty' only; or

(b) tax and a 'penalty' which are assessed at the same time;

Section 214 – Procedures for imposing penalty

(1) A 'penalty' imposed under Part B or C is imposed by way of a 'penalty assessment', and if a 'penalty assessment' is made, SARS must give notice of the assessment in the format as SARS may decide to the person, including the following—

(a) the noncompliance in respect of which the 'penalty' is assessed and its duration;

(b) the amount of the 'penalty' imposed;

(c) the date for paying the 'penalty';

(d) the automatic increase of the 'penalty'; and

(e) a summary of procedures for requesting remittance of the 'penalty'.

(2) A 'penalty' is due upon assessment and must be paid—

(a) on or before the date for payment stated in the notice of the 'penalty assessment'; or

(b) where the 'penalty assessment' is made together with an assessment of tax, on or before the deadline for payment stated in the notice of the assessment for tax.

(3) SARS must give the taxpayer notice of an adjustment to the 'penalty' in accordance with section 211 (2) or 213 (2).

A percentage-based penalty (for example, a late-payment penalty or an underestimation-of-provisional-tax penalty), a fixed-amount penalty (for example, a penalty for failure to submit a tax return) and a reportable-arrangement and mandatory-disclosure penalty (for failure to report a reportable arrangement) can be imposed only by way of a penalty assessment.[40]

A penalty assessment is an assessment in respect of a penalty only or in respect of both tax and a penalty.[41] Since a penalty assessment can be included in an assessment for tax, SARS could raise the following types of assessment:

- an original assessment including a penalty assessment;
- an additional assessment including a penalty assessment;
- an estimated assessment including a penalty assessment; and
- a jeopardy assessment including a penalty assessment.

40 See chap. 6 for a more detailed discussion of the different types of penalty.
41 Definition of 'penalty assessment', s 208.

3.4 SARS's obligation to give notice of assessment and notice of a penalty assessment

Applicable Law

Section 96 – Notice of assessment

(1) SARS must issue to the taxpayer assessed a notice of the assessment made by SARS stating—

(a) the name of the taxpayer;

(b) the taxpayer's taxpayer reference number, or if one has not been allocated, any other form of identification;

(c) the date of the assessment;

(d) the amount of the assessment;

(e) the tax period in relation to which the assessment is made;

(f) the date for paying the amount assessed; and

(g) a summary of the procedures for lodging an objection to the assessment.

(2) In addition to the information provided in terms of subsection (1) SARS must give the person assessed—

(a) in the case of an assessment described in section 95 or an assessment that is not fully based on a return submitted by the taxpayer, a statement of the grounds for the assessment; and

(b) in the case of a jeopardy assessment, the grounds for believing that the tax would otherwise be in jeopardy.

Section 214

See under paragraph 3.3.6 above.

3.4.1 Notice of assessment

Section 96(1) states that SARS must give any person who has been assessed notice of the assessment. This notice must include:

- the name of the taxpayer;
- the taxpayer's taxpayer reference number (or, one has been allocated, any other form of identification);
- the date of the assessment;
- the amount of the assessment;
- the tax period in relation to which the assessment is made;
- the date for paying the amount assessed; and
- a summary of the procedures for lodging an objection to the assessment.

These items must be included in the actual notice of assessment. In practice, the notice of assessment is the actual ITA34/EMP217/VAT217, etc.

Further, if the assessment being raised by SARS is either an estimated assessment in terms of section 95[42] or an assessment that is not fully based on a return submitted by the taxpayer,[43]

42 See the discussion in para. 3.3.5.

SARS must, in addition to the information required in terms of section 96(1), listed above, also provide, in the notice of assessment itself (that is, in the ITA34/VAT217/EMP217, etc.), a statement of the grounds for the assessment.[44]

When the assessment being raised by SARS is a jeopardy assessment, SARS must, in addition to the information required in terms of section 96(1), also provide the grounds for believing that the collection of the tax would otherwise be in jeopardy.[45]

3.4.1.1 Grounds for assessment and assessments not fully based on a return

It is submitted that most additional assessments are not fully based on a return submitted by a taxpayer. It follows that, in most cases, when SARS raises an additional assessment it is required, in terms of section 96(2), to include in the actual notice of assessment (the ITA34/VAT218/EMP217) the grounds for the assessment.[46]

Certainly, if the additional assessment contains a determination regarding the imposition of an understatement penalty, the determination of the understatement penalty is not fully based on a return submitted by the taxpayer. It is submitted that SARS must always, to the extent that the notice of assessment includes an assessment of understatement penalties, include the grounds for the imposition of the understatement penalty in the notice of assessment.

Practical issue: 'Refer to letter'

In practice, SARS seems to attempt to comply with the requirement in section 96(2), in the case of an additional assessment raised following an audit, by, under 'grounds for assessment' in an ITA34, for example, including the expression 'refer to letter'. Presumably, this refers to the finalisation letter and/or the letter of audit findings. It is doubtful that such a vague reference would satisfy the requirement in section 96(2), but even if it would the grounds provided in a finalisation letter may not be sufficient to constitute 'grounds for assessment'.[47]

3.4.1.2 Notice of a penalty assessment

In terms of section 214, SARS must provide a person assessed to a penalty notice of such penalty assessment. The notice may be provided in any format SARS may decide but must, in terms of section 214,[48] include:

- the non-compliance in respect of which the penalty is assessed and its duration;
- the amount of the penalty imposed;
- the date for paying the penalty;
- the automatic increase of the penalty; and
- a summary of the procedures for requesting remittance of the penalty.

[*continued from previous page*]

43 See the discussion in para. 3.4.1.1.

44 As to the meaning of 'grounds for assessment', see chap. 2.

45 See para. 3.3.4 for a discussion of jeopardy assessments.

46 As to the meaning of 'grounds for assessment', see chap. 2.

47 See chap. 2 on grounds for assessment.

48 This section could possibly be interpreted as saying that SARS need not always provide such particulars as are listed here because the words '*in the format as SARS may decide*' as used in the section give SARS a discretion as to what to include. Such an interpretation would, it is submitted, defeat the purpose of the section which, it is further submitted, is aimed at giving effect to the Constitution, in particular to a person's right to administrative action that is procedurally fair.

3.4.2 Notice of assessment if an assessment includes a penalty assessment

It is submitted that when an assessment includes a penalty assessment, SARS must, in the notice, provide the taxpayer with those particulars, as is required under section 96, and with the particulars provided for in section 214.

3.5 The consequences of SARS's failure to give proper notice of assessment or notice of a penalty assessment and the relevance thereof in a tax dispute

In the case of *Nondabula v Commissioner: SARS*,[49] SARS failed to include the grounds for the assessment in the actual notice of assessment, such assessment having been made under section 95 (the assessment was an estimated assessment). The court held that in failing to do so, SARS acted unlawfully and unconstitutionally.

It is submitted that should SARS fail to include any of the required details listed in section 96 or section 214 in its notice of assessment and/or notice of penalty assessment it would have acted outside the four corners of the TAA and would have acted contrary to the Constitution. It is submitted further that there is no legal basis for not complying with the prescripts of section 96 for, as the court in the *Nondabula* case held, '*the whole of section 96 is couched in peremptory terms, meaning that ...* [SARS] *has no discretion when it comes to section 96*'.

It is worth noting that the court in *Nondabula* did not declare SARS's assessment unlawful or unconstitutional. The court held that SARS's omission or failure to comply with section 96 was unlawful on procedural grounds and granted a prohibitory interdict preventing SARS from taking collection steps in respect of the amount assessed (which was the order sought by the taxpayer in this case). It is debatable whether SARS's failure to comply with the prescripts of section 96 (or with provisions such as section 214, for that matter) would render its assessment unlawful, especially in the light of the fact that an assessment is the determination of an amount, whereas the notice is merely the document issued to notify the taxpayer of such determination.

The purpose of a notice of assessment is, it is submitted, to give effect to section 33 of the Constitution. If SARS fails to comply with section 96 and therefore fails to comply with the Constitution, it is submitted that SARS's assessment must be invalid and unlawful.

Furthermore, in the case of *Singh v Commissioner: SARS*,[50] it was held that a tax debt arises only at such time as notice of an assessment raised by SARS is provided to the taxpayer.[51] It is therefore submitted that if the notice of assessment is deficient because it does not contain all the particulars prescribed by section 96 or section 214 where relevant, SARS would not be allowed to enforce payment of such notice. Such deficient notice would, in effect, be unenforceable. In our experience, SARS will nevertheless try to enforce payment of such a deficient notice of assessment, in which case the taxpayer may consider launching appropriate proceedings in the High Court (as did the taxpayer in *Nondabula*).

49 2018 (3) SA 541 (ECM).
50 65 SATC 203.
51 This was confirmed in *Top Watch (Pty) Ltd v Commissioner of the South African Revenue Service* (2017/4557) [2018] ZAGPJHC 466 (11 June 2018).

3.6 Decisions

SARS's 'decisions' can, in the context of tax dispute resolution, be broken down into two categories:

- 'decisions' that are given effect to in an assessment ('decision assessments'); and
- 'decisions' that are not given effect to in an assessment ('other SARS decisions').

Decision assessments are governed by the rules for assessments.[52]

Other SARS decisions can be further broken down into two sub-categories:

- other decisions that are subject to objection and appeal ('objectionable other decisions'); and
- other decisions that are not subject to objection and appeal ('non-objectionable other decisions').

Objectionable other decisions are those referred to in section 104(2).[53]

Non-objectionable other decisions are all those other SARS decisions not referred to in section 104(2).[54]

52 As to these rules, see paras 3.2 to 3.5.
53 A detailed discussion of these decisions is contained in chap. 7.
54 See chap. 6 for an analysis of the remedies available to challenge non-objectionable other decisions.

PART I

CHAPTER 4

Prescription of assessments

The practical context of this chapter

The Tax Administration Act[1] *(TAA) prescribes limited circumstances under which SARS may alter an assessment that has already prescribed. In practice, SARS often alleges that circumstances under which it can alter a prescribed assessment exist and simply proceeds to alter the assessment. Taxpayers should therefore understand what these circumstances are and how to use prescription as a defence against such an assessment by SARS.*

1 Act 28 of 2011. It should be noted that any reference to a legislative provision in this chapter is a reference to a provision in the TAA unless the contrary is specifically indicated or is readily apparent from the context.

Contents

Table of Examples

4.1 Introduction

In the context of tax dispute resolution, prescription can be viewed from two perspectives: from SARS's perspective and from the taxpayer's perspective.

When considered from the taxpayer's perspective, the question should be whether the taxpayer is barred from challenging an assessment because it has prescribed. The circumstances under which a taxpayer would be barred from challenging an assessment as a result of prescription are discussed in chapters 6 and 7 hereof.

When considered from SARS's perspective, the question should be whether SARS was entitled to raise an assessment even though the original assessment had prescribed. The answer to this question could form a possible basis for the taxpayer to challenge SARS's assessments. Stated differently, if SARS changes an assessment after the assessment has prescribed, the taxpayer can rely on the defence that prescription precludes SARS from changing the assessment. Effective use of this basis for challenging an assessment requires an understanding of exactly when SARS can lift the proverbial veil of prescription.

4.2 When does an assessment prescribe?

Section 99(1) sets out when an assessment prescribes. Section 99(1) is discussed in chapters 6 and 7 in the context of when a taxpayer can no longer challenge SARS's assessment because it has prescribed. Section 99(1) is not discussed again in detail here, but a basic overview of the prescription rules is necessary to place the rest of this chapter in context.

The prescription rules can be classified into two main types:

- time-period-type prescription rules; and
- assessment-type prescription rules.

These are briefly discussed below.

4.2.1 The time-period-type prescription rules

Section 99(1)(a) to (c) contains the time-period-type prescription rules. In terms of these rules, an assessment prescribes after a certain amount of time has elapsed, or, stated differently, when the assessment has reached a certain age. These time periods are:[2]

- three years from the date of issue of the notice of assessment, if the assessment is an assessment by SARS (i.e. assessments that are not self-assessments – for example, assessments on corporate income tax);[3]

EXAMPLE

Example 4.1 – Prescription of SARS assessments

Taxpayer ABC (Pty) Ltd submits its ITR14 return consequent upon which SARS issues a notice of assessment (ITA34) with an issue date of 1 June 2020. The notice of assessment will prescribe three years later, on 31 May 2020.

2 For the purpose of the time periods discussed below, the days between 26 March 2020 and 30 April 2020 should not be counted (clause 7(1)(g) of the Disaster Management Tax Relief Administration Bill, 2020).

3 S 99(1)(a), read with the definition of 'date of assessment' in s 1. See chap. 3 on assessments.

– five years from the date on which the taxpayer submitted a return which contains a determination of the tax liability (i.e. assessments that are self-assessments and for which a return must be submitted – for example, the submission of a VAT201); [4]

EXAMPLE

Example 4.2 – Prescription of self-assessment-type taxes – return required and submitted

Taxpayer ABC (Pty) Ltd submits its VAT201 return on 1 June 2020 in which it declares its VAT liability to be R150 000. The self-assessment will prescribe on 31 May 2025.

– five years from the date on which SARS makes an assessment on a self-assessment-type tax consequent upon the taxpayer's failure to submit a return; [5]

EXAMPLE

Example 4.3 – Prescription of self-assessment-type taxes – return required and not submitted

Taxpayer ABC (Pty) Ltd fails to submit its VAT201 for VAT period May 2020. SARS accordingly raises an assessment on 1 July 2020. That assessment prescribes on 30 June 2025.

– five years from the date of payment of the tax, in the case of a self-assessment-type tax where no return need be submitted, or, if payment was not received, five years from the effective date. [6]

4.2.2 The assessment-type prescription rules

The assessment-type prescription rules are contained in section 99(1)(d) and (e). In terms of these rules, an assessment prescribes if the assessment is a specific type of assessment, irrespective of the age of the assessment. An assessment prescribes if:

– it was made on the basis of a practice generally prevailing at the date of the assessment; [7]

EXAMPLE

Example 4.4 – Assessment based on a practice generally prevailing – additional assessment

Company A is assessed to tax on an assessment in which SARS allowed certain deductions incurred by the taxpayer under SARS's Practice Note 31. The allowance by SARS of the deductions was based on a practice generally prevailing and therefore prescribed at the point in time when SARS issued the assessment, irrespective of the age of the assessment.

– it relates to a dispute which has been resolved through objection and appeal. [8]

4 S 99(1)(b)(i), read with the definition of 'date of assessment' in s 1. See chap. 3 on assessments.
5 S 99(1)(b)(ii), read with the definition of 'date of assessment' in s 1.
6 S 99(1)(c).
7 S 99(1)(d)(i).
8 S 99(1)(e).

EXAMPLE

Example 4.5 – Assessment relating to a resolved dispute

Company A is assessed to tax on an assessment in which SARS disallowed certain expenses. SARS allows the taxpayer's objection and issues a reduced assessment to give effect to SARS's decision to allow the objection under section 93(1)(a). The reduced assessment is issued in respect of a dispute which has been resolved under chapter 9 of the TAA (objections and appeals)[9] and accordingly prescribes on the date on which it is issued, irrespective of the age of the assessment.

Practical issue: Assessments reduced under section 93(1)(d) as opposed to section 93(1)(a)

As discussed in chapter 6, SARS may under certain circumstances reduce an assessment under section 93(1)(d). SARS may also reduce an assessment under section 93(1)(a).[10] A reduced assessment issued under 93(1)(a) is clearly an assessment which relates to a resolved dispute under chapter 9 of the TAA. If SARS reduces an assessment under section 93(1)(d), the assessment arguably does not prescribe under section 99(1)(e) and will only prescribe under section 99(1)(a) when it is older than three years. It happens in practice, from time to time, that SARS simply reduces an assessment under section 93(1)(d) midway through an objection or appeal process. Whilst the taxpayer is ultimately successful with the dispute, an assessment reduced under section 93(1)(d) arguably does not prescribe under section 93(1)(e).

4.3 When can SARS raise an assessment despite prescription?

Section 99(2)(a) to (e) determine when SARS can alter an assessment irrespective of the age of the assessment or of the assessment type. Stated differently, section 99(2)(a) to (e) set out when SARS can change an assessment even though the assessment has prescribed.

As discussed in chapter 5, SARS bears the onus of proving that it may rely on section 99(2)(a) to (e) to lift the proverbial veil of prescription. It is nevertheless extremely important that taxpayers be aware of what the requirements are for SARS to lift the veil of prescription. Taxpayers wishing to use prescription as a defence against an assessment by SARS must raise it specifically as a ground for challenging the assessment.

4.3.1 Misconduct by the taxpayer – section 99(2)(a) and (b)

Applicable Law

Section 92 – Additional assessments

If at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus, SARS must make an additional assessment to correct the prejudice.

continued

9 See chaps 7–10.
10 See chap. 3.

Section 99(2)(a) and (b) – Period of limitations for issuance of assessments

(2) Subsection (1) does not apply to the extent that—

(a) in the case of assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to—

(i) fraud;

(ii) misrepresentation; or

(iii) nondisclosure of material facts;

(b) in the case of self-assessment, the fact that the full amount of tax chargeable was not assessed, was due to—

(i) fraud;

(ii) intentional or negligent misrepresentation;

(iii) intentional or negligent nondisclosure of material facts; or

(iv) the failure to submit a return or, if no return is required, the failure to make the required payment of tax;

Section 99(2)(a) applies to assessments by SARS and section 99(2)(b) to self-assessments by the taxpayer.[11]

The requirements for section 99(2)(a) to apply may be summarized as follows:

- SARS must be satisfied that the full amount of tax chargeable was not assessed (i.e. the assessment SARS is seeking to change, and which has prescribed, must be incorrect);[12] and
- the reason why the assessment is incorrect is:
  - 'misrepresentation'; or
  - 'non-disclosure of material facts'; or
  - 'fraud'.

The requirements of section 99(2)(b), which applies to self-assessments, are identical to those applicable to assessments by SARS, with the notable exception that the misrepresentation or non-disclosure must be either '*intentional or negligent*' in the case of self-assessments.

The words 'misrepresentation', 'non-disclosure of material fact' and 'fraud' are not defined in the TAA. The meaning of the word 'fraud' requires no further analysis, but what exactly 'misrepresentation' and 'non-disclosure of material fact' are warrants further investigation.

4.3.1.1 The meaning of 'misrepresentation'

The word 'misrepresentation' is defined as '*the act of giving false information about something or someone, often in order to get an advantage*'.[13] To 'misrepresent' is '*to give a false or misleading representation of usually with an intent to deceive or be unfair*'[14] or '*to represent incorrectly, improperly, or falsely*'.[15]

---

11 See chap. 3 on assessments.

12 Whilst the requirement that SARS be satisfied does not appear from the wording of s 99(2)(a), it has been stated that SARS's satisfaction is required when s 92 is read with s 99. See in this regard *Wingate-Pearse v Commissioner for the South African Revenue Service* [2019] ZAGPJHC 2018, [2019] 4 All SA 601 (GJ), 2019 (6) SA 196 (GJ).

13 https://dictionary.cambridge.org/dictionary/english/misrepresentation (accessed on 22 June 2020).

14 https://www.merriam-webster.com/dictionary/misrepresent#other-words (accessed on 22 June 2020).

15 https://www.dictionary.com/browse/misrepresentation (accessed on 22 June 2020).

A misrepresentation, then, in its ordinary meaning, is an act of providing false information or making representations about something in a misleading way, usually with an intent to deceive and often to gain an advantage. The ordinary meaning of the word suggests that the existence of an intention to deceive or to get a benefit is not a prerequisite to the existence of 'misrepresentation'. Given the ordinary meaning of the word, a person who simply represents something in an incorrect way may be guilty of misrepresentation, irrespective of whether such incorrect representation was provided in an attempt to mislead and irrespective of whether the information was incorrectly provided in order to gain an advantage. Stated differently, the ordinary meaning of the word suggests that providing incorrect or false information is sufficient to conclude that someone has misrepresented something.

In *ITC 1821*,[16] however, the court held, with reference to judgments in *Natal Estates Ltd v Secretary for Inland Revenue*,[17] and *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk*,[18] that:

> '[SARS] *bears the onus to establish the existence of the deception and the intent to defraud in making a misrepresentation*' (emphasis added)

and that:

> '*The mere fact the taxpayer's witnesses may have been vague in some respect and that she herself might have appeared uncertain on the witness stand falls far short of the proof that would be required to hold that the appellant had set out to ... mislead the respondent by failing to declare her income*' (emphasis added).

In *Commissioner for the South African Revenue Service v Brummeria Renaissance (Pty) Ltd and Others*,[19] the court held that:

> '*It seems to me that these competing contentions must be resolved by having regard to the purpose underlying ss 79(1)* [now section 99 of the TAA] *and 81(5)* [now section 100 of the TAA], *which is obviously to achieve finality. To uphold either of the Commissioner's contentions would undermine that purpose. It is obviously in the public interest that the Commissioner should collect tax that is payable by a taxpayer. But it is also in the public interest that disputes should come to an end – interest* reipublicae ut sit finis litium*; and it would be unfair to an honest taxpayer if the Commissioner were to be allowed to continue to change the basis upon which the taxpayer were assessed until the Commissioner got it right – memories fade; witnesses become unavailable; documents are lost. That is why s 79(1) seeks to achieve a balance: it allows the Commissioner three years to collect the tax, which the legislature regarded as a fair period of time; but it does not protect a taxpayer guilty of fraud, misrepresentation or non-disclosure*' (emphasis added).

It is submitted that in light of the jurisprudence on the now repealed section 79 of the Income Tax Act (which jurisprudence, it is submitted, applies equally to section 99 of the TAA), the presence of an intent to deceive SARS or to get a tax advantage is a prerequisite to the existence of misrepresentation.

If the presence of an intention to deceive SARS or to get a tax advantage were not a prerequisite to the existence of a misrepresentation, any incorrect disclosure made by a taxpayer could always be remedied by SARS after prescription on the basis of 'misrepresentation'. Whilst this may seem reasonable, such a conclusion contradicts the purpose of section 99, which, as

16 69 SATC 205.
17 1975 (4) SA 177 (A).
18 [1986] ZASCA 140.
19 [2007] ZASCA 99, [2007] SCA 99 (RSA), [2007] 4 All SA 1338 (SCA), 2007 (6) SA 601 (SCA).

was held by the Supreme Court of Appeal in the *Brummeria Renaissance* case, is to achieve finality.

It is submitted that the representation of something that is incorrect is not in and of itself sufficient to be a misrepresentation. What is required in addition to the representation's being incorrect is, it is submitted, an intention to deceive or to get a tax advantage.

In the case of self-assessment-type taxes, the misrepresentation must be intentional or negligent before SARS can alter a prescribed assessment. It is debatable whether the addition by the legislature of 'intentional' or 'negligent' before the word 'misrepresentation' in the case of self-assessment-type taxes makes it more difficult for SARS to lift the veil of prescription or less. On the one hand, perhaps the legislature intended to make it more difficult for SARS to lift the veil of prescription, given that self-assessments prescribe only after five years (i.e. SARS has more time to ensure the assessment is correct and the circumstances under which SARS may lift the veil of prescription should therefore be narrower). On the other hand, perhaps the legislature intended to make it easier for SARS to lift the veil of prescription in the case of self-assessment-types taxes because the taxpayer is in complete control of the assessment.

It is evident from the meaning of the word 'misrepresentation' that the existence of intent to deceive and get a tax advantage is an inherent requirement in the context of section 99. On this interpretation, the inclusion by the legislature of the word 'intentional' before word 'misrepresentation' is arguably tautologous. What is clear, however, is that the legislature must, it is submitted, have intended, by the inclusion of the word 'negligent' before the word 'misrepresentation', to make it easier for SARS to lift the veil of prescription in that a negligent misrepresentation arguably lacks the usually required (in the case of assessments by SARS) intent.

Practical issue: Misrepresentation

It appears in practice that SARS takes a different approach to the meaning of misrepresentation. SARS's view appears to be that if a taxpayer makes an incorrect disclosure (on SARS's interpretation of the law), the taxpayer misrepresented, irrespective of the taxpayer's intention and understanding of the law. It is submitted that this practice is not in line with a proper interpretation of the word 'misrepresentation'.

4.3.1.2 The meaning of 'non-disclosure of material fact'

There can be no ambiguity regarding the meaning of non-disclosure: it is simply the failure to disclose. It is submitted that any fact that has a bearing on the accuracy of the assessment in question is a material fact. However, taxpayers can disclose only what they are called upon to disclose, either in the return or upon a request by SARS during, for example, an audit. Taxpayers cannot be guilty of non-disclosure by failing to disclose something they were not required or requested to disclose. It has been held though that whether non-disclosure was intentional or innocent is irrelevant.[20]

4.3.1.3 How and of what must SARS be satisfied?

In *Wingate-Pearse v Commissioner for the South African Revenue Service*,[21] the court concluded that SARS must satisfy itself subjectively on reasonable grounds. Does this mean that the objective existence or non-existence of the taxpayer's misconduct is irrelevant to whether

20 *ITC 1518* 54 SATC 113.

21 [2019] 4 All SA 601 (GJ), 2019 (6) SA 196 (GJ), 82 SATC 21 at para. 61.

SARS may lift the veil of prescription and that the only thing that is required is for SARS to have formulated its opinion on reasonable grounds that there was in fact misconduct? If the objective existence of misconduct is not required, this raises questions regarding the purpose of section 99 and what exactly SARS will have to prove to lift the veil. If SARS's subjective satisfaction of the existence of the taxpayer's misconduct is sufficient, SARS will arguably not be required to prove the existence of the misconduct but only that it is reasonable for SARS to believe that there was misconduct, and SARS will have to prove this on a balance of probabilities.[22] Furthermore, if section 99 was intended to ensure that SARS collects any tax properly due even after prescription, in the case of a dishonest taxpayer, honest taxpayers may suffer a similar fate in that the mere satisfaction, based on reasonable grounds, that misconduct exists does not necessarily mean that objectively there was indeed misconduct.

It is respectfully submitted that SARS's subjective opinion is required only for the purpose of establishing whether the assessment SARS wishes to alter with the issue of an additional assessment is incorrect – this is what section 92 envisages and what is echoed in the opening words of section 99(2)(a) and (b). Indeed, SARS need only be subjectively satisfied on reasonable grounds that the assessment in question is incorrect, as is also envisaged in the judgment of *Commissioner for the South African Revenue Services v Pretoria East Motors (Pty) Ltd.*[23]

It is submitted that section 99(2) adds a further requirement (in addition to the requirement that SARS be subjectively satisfied on reasonable grounds that the assessment in question is incorrect) to the raising of an additional assessment after prescription. This requirement is that the assessment in question be incorrect because of the taxpayer's misconduct. There is no requirement in section 99(2)(a) or (b) that SARS be satisfied of the existence of the misconduct. SARS's subjective opinion is therefore irrelevant to whether, objectively speaking, there was indeed the required misconduct.

It is submitted therefore that the existence or non-existence of the taxpayer's misconduct should in fact be objectively determined by SARS, as is clear from the plain wording of section 99(2)(a) and (b): the taxpayer's misconduct either exists or it does not. It cannot be that SARS is merely required to be satisfied on reasonable grounds that there was fraud, misrepresentation or non-disclosure of material fact.

4.3.1.4 When must SARS be 'satisfied'?

It is submitted that the objective existence of the taxpayer's misconduct is a prerequisite to the raising of an assessment after prescription. The existence of misconduct is a further requirement, in addition to SARS's satisfaction that the assessment to be altered is incorrect. On this interpretation, it is submitted that SARS must establish the misconduct on an objective basis before it can raise the assessment, in the case of an original assessment that has prescribed. SARS cannot simply allege or suspect the misconduct, even if there are reasonable grounds for doing so. It must first establish that the misconduct exists before it can raise the additional assessment and communicate the facts and basis on which it relies for the existence of such misconduct to the taxpayer, in line with the prescripts of sections 42 and 96.[24] In this regard, it is submitted that SARS is also required to state clearly in its letter of audit findings and notice of assessment the alleged causal connection between the taxpayer's misconduct and the incorrect assessment.[25] If SARS fails to do so, it is submitted that SARS will not have

22 See chap. 5 on onus of proof.

23 [2014] ZASCA 91, [2014] 3 All SA 266 (SCA), 2014 (5) SA 231 (SCA) ('*CSARS v Pretoria East Motors*').

24 See chaps 2 and 3 on ss 42 and 96.

25 See, in this regard, *ABC Trust v Commissioner for the South African Revenue Service* TAdm (00052/2018) (03 May 2019) at para. 29, where it was held that: '*However, the passages do not expressly traverse causation. In*

[*continued on next page*]

complied with sections 42 and 96 and that such non-compliance must render SARS's assessment unlawful.[26]

Depending on the facts, it may indeed be difficult for SARS to, in its letter of audit findings and assessment, state clearly the facts and basis for the existence of the misconduct and the requisite causal connection. If SARS avers that the taxpayer misrepresented something and is therefore lifting the veil of prescription, it is submitted that SARS must, in compliance with sections 42 and 96, set out the facts on which it bases its view that the taxpayer intended to deceive SARS and how such deception resulted in the assessment's being incorrect. SARS cannot simply allege an intention to deceive on the basis that the original assessment is incorrect. There could be various reasons for the original assessment's incorrectness, not all of which entail misrepresentation and therefore deceit. A taxpayer may, for example, have held the *bona fide* view that the representations made were what was required of the taxpayer. In such cases, the taxpayer has not set out to deceive and obtain a tax benefit and therefore has not misrepresented anything within the meaning of the word 'misrepresentation' in section 99(2)(a). SARS must therefore, once it has established on reasonable grounds that the assessment is incorrect, also establish whether the incorrect assessment is the result of misrepresentation (i.e. an intention to deceive) before it can raise the assessment.

Whilst this may be more difficult for SARS to do, it is submitted that this is exactly what section 99(2)(a) tries to achieve. SARS has three or five years (depending on the assessment type) to raise an assessment, without having to establish any misconduct. If, however, the assessment prescribes, SARS is required to do more before it can raise the assessment: it must establish the existence of the misconduct before it can raise an assessment. Considering the judgment in the *Wingate-Pearse* case, however, it is likely that SARS will have a different view.

4.3.1.5 Can a taxpayer cure the misconduct?

In the recent judgment of the Tax Court in *ABC Trust v Commissioner for the South African Revenue Service*[27] the court said the following:

> '*what caused Sars in its original assessment and during the period of three years thereafter not to assess the full amount of tax chargeable? If this came about because of the* [taxpayer's misconduct] *then the additional assessment is competent. If* [the failure to correctly assess the taxpayer] *came about for other reasons, such as neglect by Sars or some conduct of the taxpayer not amounting to* [the taxpayer's misconduct] *then the additional assessment is not competent and cannot be made.*'

This passage has been interpreted[28] to mean that, even if a taxpayer is guilty of misconduct, the taxpayer can cure same before the assessment in question prescribes. If the taxpayer cures its misconduct before the assessment prescribes and SARS does not raise an additional

---

[*continued from previous page*]
my view that was insufficient because in order to make an objection applicant should not be left with uncertainty as to what SARS has given as its reasons for substantiating causation. What is to be implied from reasons expressed may be ambiguous and subject to later dispute. Hence SARS should have made express in its correspondence stating its reasons what it has clarified and rendered express in the passages of its answering affidavit in these proceedings to which I have referred.'

26 See chaps 2 and 3 on the consequences of SARS's failure to comply with ss 42 and 96. Whilst authority suggesting otherwise may exist, it is submitted that judgments in this regard were handed down before the coming into force of the TAA, in many cases before the introduction of the Constitution (see e.g. *Natal Estates Ltd v Secretary for Inland Revenue* 1975 (4) SA 177 (A); *ITC 1425* 49 SATC 157), and were based on the now repealed s 79 of the Income Tax Act, which clearly required that SARS be satisfied of the existence of misconduct.

27 TAdm (00052/2018) (03 May 2019).

28 Mzansky, E 'When can taxpayers rely on prescription of assessments?' (2019), https://www.werksmans.com/legal-updates-and-opinions/when-can-taxpayers-rely-on-prescription-of-assessments (accessed on 25 June 2020).

assessment before the original assessment prescribes, the cause of the taxpayer's not being assessed correctly cannot be the taxpayer's misconduct but is SARS's negligence. If the cause is indeed SARS's negligence, SARS cannot lift the veil of prescription. The following example illustrates the point.

EXAMPLE

Example 4.6 – Curing the taxpayer's misconduct

Taxpayer A submits a tax return in which it declares taxable income of R1 000 000 when in fact its taxable income should have been declared as R9 000 000 (the taxpayer disclosing R8 000 000 as exempt income on its tax return in order to pay less tax). SARS raises an original assessment in respect of which it assesses Taxpayer A on taxable income of R1 000 000. When the original assessment is two years old, the taxpayer files a corrected return in which it correctly declares its taxable income as R9 000 000. SARS fails to raise an additional assessment consequent upon the submission of the corrected return. When the original assessment is more than three years old, SARS raises an additional assessment to tax Taxpayer A on taxable income of R9 000 000 based on the taxpayer's misrepresentation in its original return. The question that should be asked, on the basis of the *ABC Trust* case, is: what caused SARS in its original assessment and in the three-year period thereafter not to assess the Taxpayer A correctly? The fact that the taxpayer was not correctly assessed to taxable income of R9 000 000 in the original assessment and in the three years after the original assessment had been issued is not due to the taxpayer's misrepresentation in its original return but to SARS's neglecting to raise an additional assessment when the taxpayer filed the corrected return. SARS's additional assessment is therefore not competent.

The result in the example above, that SARS's additional assessment is not competent, must indeed follow logically on the basis of the passage from the judgment in the *ABC Trust* case. It is respectfully submitted, however, that the point of departure in the passage is questionable. The question that seeks to be answered in the passage from the *ABC Trust* case is: '*what caused Sars* [sic] *in its original assessment and during the period of three years thereafter not to assess the full amount of tax chargeable?*' (emphasis added).

The basis for the addition of the words '*and during the period of three years thereafter*' in the question above is debatable. Section 99(2) clearly provides exceptions to the prescription rules in section 99(1). Section 99(1)(a) provides that an original assessment by SARS prescribes within three years from the date of issue. Section 99(2)(a) must therefore be interpreted with reference to the original assessment. It could therefore be argued that the question should rather be phrased thus: what caused SARS not to assess the taxpayer correctly in the original assessment? If this is the correct question, the argument that a taxpayer can cure any misconduct falls away. The following example illustrates the point.

EXAMPLE

Example 4.7 – Curing the taxpayer's misconduct

Taxpayer A submits a tax return in which it declares taxable income of R1 000 000 when in fact its taxable income should have been declared as R9 000 000 (the taxpayer disclosing R8 000 000 as exempt income on its tax return in order to pay less tax). SARS raises an original assessment in respect of which it assesses Taxpayer A on taxable income of R1 000 000. When the original assessment is two years old, the taxpayer files a corrected return in which it correctly declares its taxable income as R9 000 000. SARS fails to raise an additional assessment consequent upon the submission of the corrected return. When the original assessment is more than three years old, SARS raises an additional assessment to tax Taxpayer A on taxable income of R9 000 000 based on the taxpayer's misrepresentation in its original return. If the correct question is, *what caused SARS not to assess the taxpayer correctly in the original assessment?*, the answer can only be the taxpayer's misrepresentation. The fact that the taxpayer submitted an amended return is irrelevant as to the cause of the original assessment's being incorrect.

4.4 Other circumstances where prescription does not apply

Applicable Law

Section 99(2)(c) to (e), (3) and (4) – Period of limitations for issuance of assessments

(2) Subsection (1) does not apply to the extent that—

(c) SARS and the taxpayer so agree prior to the expiry of the limitations period;

(d) it is necessary to give effect to—

(i) the resolution of a dispute under Chapter 9; or

(ii) . . . . . .

(iii) an assessment referred to in section 93 (1) (d) if SARS becomes aware of the error referred to in that subsection before expiry of the period for the assessment under subsection (1); or

(e) SARS receives a request for a reduced assessment under section 93 (1) (e).

(3) The Commissioner may, by prior notice of at least 30 days to the taxpayer, extend a period under subsection (1) or an extended period under this section, before the expiry thereof, by a period approximate to a delay arising from:

(a) failure by a taxpayer to provide all the relevant material requested within the period under section 46 (1) or the extended period under section 46 (5); or

(b) resolving an information entitlement dispute, including legal proceedings.

(4) The Commissioner may, by prior notice of at least 60 days to the taxpayer, extend a period under subsection (1), before the expiry thereof, by three years in the case of an assessment by SARS or two years in the case of self-assessment, where an audit or investigation under Chapter 5 relates to—

(i) the application of the doctrine of substance over form;

(ii) the application of Part IIA of Chapter III of the Income Tax Act, section 73 of the Value-Added Tax Act or any other general anti-avoidance provision under a tax Act;

(iii) the taxation of hybrid entities or hybrid instruments; or

(iv) section 31 of the Income Tax Act.

Under section 99(2)(c), SARS and the taxpayer may agree to extend the prescription period before the assessment prescribes. In practice, SARS often requests an extension by agreement, typically in cases where the taxpayer causes a delay in providing relevant material. The taxpayer does not have to agree with SARS to an extension of the prescription period if the taxpayer is not so inclined. Suffice it to say, however, that SARS can, in terms of section 99(3), unilaterally extend prescription by a period approximate to the delay caused by the taxpayer's failure to provide relevant material requested under section 46 or to delays caused by information entitlement disputes. If SARS wants to extend prescription under section 99(3), it must give the taxpayer at least 30 days' notice. It is submitted that this notice period must be interpreted as being 30 days before the prescription period lapses.

SARS may also, in terms of section 99(4), unilaterally extend prescription by a period of three years (in the case of assessments by SARS) or two years (in the case of self-assessments) if it is conducting an audit or investigation relating to:

- the application of the doctrine of substance over form;
- the application of the general anti-avoidance rules in the Income Tax Act[29] or section 73 of the Value-Added Tax Act[30] or of any other general anti-avoidance rule under a tax Act;
- the taxation of hybrid entities or hybrid instruments; or
- anything related to transfer pricing under section 31 of the Income Tax Act.

If SARS wants to extend prescription under section 99(4), it must give the taxpayer at least 60 days' notice. It is submitted that this notice period must be interpreted as being 60 days before the prescription period lapses.

Section 99(2)(d)(i)[31] allows SARS to issue a revised assessment if such assessment is necessary to give effect to the resolution of a dispute under chapter 9 of the TAA.[32]

EXAMPLE

Example 4.8 – Assessments after a successful dispute under chapter 9

Taxpayer A objects to an original income tax assessment when the assessment is 29 days old and later appeals against the assessment. The Tax Court, seven years later, allows the taxpayer's appeal. On appeal to the Supreme Court of Appeal, the judgment of the Tax Court is overturned. Whilst the assessment in question has prescribed under section 99(1), SARS may, under section 99(2)(d), issue an additional assessment.

29 Act 58 of 1962.
30 Act 89 of 1991.
31 S 99(2)(d)(iii) is discussed in chap. 6.
32 See chaps 7–10, which cover objections and appeals.

Under section 99(2)(c), SARS and the taxpayer may agree to extend the prescription period before the assessment prescribes. In practice, SARS often requests an extension by agreement, typically in cases where the taxpayer causes a delay in providing relevant material. The taxpayer does not have to agree with SARS to an extension of the prescription period if the taxpayer is not so inclined. Suffice it to say, however, that SARS can, in terms of section 99(3), unilaterally extend prescription by a period approximate to the delay caused by the taxpayer's failure to provide relevant material requested under section 46 or to delays caused by information entitlement disputes. If SARS wants to extend prescription under section 99(3), it must give the taxpayer at least 30 days' notice. It is submitted that this notice period must be interpreted as being 30 days before the prescription period lapses.

SARS may also, in terms of section 99(4), unilaterally extend prescription by a period of three years (in the case of assessments by SARS) or two years (in the case of self-assessments) if it is conducting an audit or investigation relating to:

- the application of the doctrine of substance over form;
- the application of the general anti-avoidance rules in the Income Tax Act[29] or section 73 of the Value-Added Tax Act[30] or of any other general anti-avoidance rule under a tax Act;
- the taxation of hybrid entities or hybrid instruments; or
- anything related to transfer pricing under section 31 of the Income Tax Act.

If SARS wants to extend prescription under section 99(4), it must give the taxpayer at least 60 days' notice. It is submitted that this notice period must be interpreted as being 60 days before the prescription period lapses.

Section 99(2)(d)(i)[31] allows SARS to issue a revised assessment if such assessment is necessary to give effect to the resolution of a dispute under chapter 9 of the TAA.[32]

Example 4.8 – Assessments after a successful dispute under chapter 9

Taxpayer A objects to an original income tax assessment when the assessment is 29 days old and later appeals against the assessment. The Tax Court, seven years later, allows the taxpayer's appeal. On appeal to the Supreme Court of Appeal, the judgment of the Tax Court is overturned. Whilst the assessment in question has prescribed under section 99(1), SARS may, under section 99(2)(d), issue an additional assessment.

29 Act 58 of 1962.
30 Act 89 of 1991.
31 S 99(2)(d)(iii) is discussed in chap. 6.
32 See chaps 7–10, which cover objections and appeals.

PART I

CHAPTER 5

Onus of proof

The practical context of this chapter

Why is onus of proof important?

Ultimately, all disputes with SARS must be decided based on whether either SARS or the taxpayer has discharged the onus of proof resting on it. The legal issues as such might be simple or fairly straightforward, but if the party on whom the onus of proof rests fails to discharge that onus (i.e. fails to present evidence sufficient to discharge the onus of proof) the case will not succeed.

Onus of proof is often used by SARS in raising assessments. The grounds for additional assessments are almost always based on the taxpayer's failure to discharge its onus of proof. Furthermore, SARS has the power to disallow an objection on the sole basis of the taxpayer's failure to discharge its onus of proof. These far-reaching powers are not absolute. There are also requirements for SARS to comply with when exercising its powers. If it fails to do so, its failure could form a ground for challenging SARS's assessment.

What is the onus of proof?

The taxpayer must prove various things, including:

- *that something is exempt or otherwise not taxable;*
- *that an amount is deductible or may otherwise be set off;*
- *the rate of tax applicable;*
- *that an amount qualifies as a reduction against tax payable;*
- *that a valuation is correct; and*
- *that a decision made by SARS which is subject to objection and appeal is incorrect.*

SARS needs to prove various things, including:

- *the facts on which it based the imposition of an understatement penalty;*
- *that an estimated assessment is reasonable;*
- *that it was entitled to 'lift the veil of prescription';*
- *that the making of a jeopardy assessment is reasonable under the circumstances.*

Both SARS and the taxpayer must discharge the burden of proof on a balance of probabilities.

How?

> *With evidence. In practice, and especially when it wants to raise an assessment, make a decision on objection or another decision regarding whether to reduce the assessment, SARS often insists on documents. While this is, perhaps, understandable from SARS's perspective, the mere absence of a document does not necessarily mean that the taxpayer cannot discharge its onus of proof – evidence can take various forms.*

When?

> *For taxpayers, the onus of proof must generally be discharged when SARS calls upon the taxpayer to do to so. In the end, whether the taxpayer has successfully discharged its onus of proof will be determined by the court, but SARS is at liberty to raise assessments and make decisions on objection based on the taxpayer's failure to discharge its onus of proof.*
>
> *For SARS, the onus need be discharged only once a matter ends up in court. However, as stated, there are certain things that SARS must do long before being called upon by a court to discharge its onus of proof.*

Contents

Table of Examples

5.1 Introduction

The onus of proof is vital to all tax disputes. Tax disputes are ultimately decided on the basis of who – the taxpayer or SARS – has discharged the onus of proving certain things. Whether a party has successfully discharged its onus of proof will eventually be made by the court. Sometimes, however, a party might be called upon to prove certain things long before the matter finds its way to court. An understanding of what the onus of proof is, and when or whether SARS or the taxpayer carries that onus, is absolutely vital in dealing with any tax dispute. This chapter examines the onus of proof and when and whether SARS or the taxpayer bears that onus.

Because SARS can raise assessments based on the taxpayer's failure to discharge the onus of proof, or make a decision on objection, or during appeals dealt with under the alternative dispute resolution (ADR) rules,[1] based on whether the taxpayer discharged its onus of proof, it acts as a *quasi*-court, at least in so far as it raises assessments and makes decisions on objection based on onus of proof. While taxpayers can pursue their case on litigation in the Tax Court or Tax Board, the fact remains that an assessment raised or a decision taken by SARS not to allow an objection, based on onus of proof, has a direct external legal effect despite section 164[2] and other remedies available to the taxpayer to mitigate such effect.

Taxpayers, on the other hand, do not have similar powers when SARS bears the onus of proof. A taxpayer cannot, for example, refuse to pay the tax assessed, because SARS has failed to discharge an onus of proof. Similarly, at objection level, the taxpayer does not have the power to decide whether SARS's assessment is incompetent, which decision is based on whether, to the taxpayer's mind, SARS has failed to discharge an onus or proof. When SARS bears the onus of proof, then, it follows that only a court or other judicial forum is empowered to decide whether SARS has successfully discharged the onus. The taxpayer, on the other hand, must in the meantime deal with the consequences of SARS's assessment.

The balance of power clearly seems to favour SARS, placing the taxpayer at a disadvantage before the matter appears before a court. SARS's powers during this time are limited, however, and prejudice to the taxpayer is mitigated, as far as SARS's obligations during this phase of dispute resolution are concerned. SARS's powers come with various obligations. This chapter considers what SARS's obligations are before a matter is heard by a court. Failure by SARS to abide by these obligations could form a ground for challenging SARS's assessment or decision.[3]

---

1 The rules promulgated under s 103 of the Tax Administration Act 28 of 2011 (hereinafter referred to as 'the rules'). Please note that any reference to a provision of an Act in this chapter is a reference to the Act 28 of 2011 unless otherwise specified or indicated.

2 See chap. 12 regarding s 164.

3 Were this not the case the 'power imbalance' in SARS's favour would have clearly undermined the objects and provisions of the Constitution of the Republic of South Africa, 1996 and of other Acts – including the Tax Administration Act (TAA) – designed to give effect to it.

5.2 Who carries the burden of proof and what is it?

Applicable Law

Section 102 – Burden of proof

(1) A taxpayer bears the burden of proving—

(a) that an amount, transaction, event or item is exempt or otherwise not taxable;

(b) that an amount or item is deductible or may be set off;

(c) the rate of tax applicable to a transaction, event, item or class of taxpayer;

(d) that an amount qualifies as a reduction of tax payable;

(e) that a valuation is correct; or

(f) whether a 'decision' that is subject to objection and appeal under a tax Act, is incorrect.

(2) The burden of proving whether an estimate under section 95 is reasonable or the facts on which SARS based the imposition of an understatement penalty under Chapter 16, is upon SARS.

Section 94(3) – Jeopardy assessments

(3) In proceedings under subsection (2), SARS bears the burden of proving that the making of the jeopardy assessment is reasonable under the circumstances.

Section 129(1) and (3) – Decision by tax court

(1) The tax court, after hearing the 'appellant's' appeal lodged under section 107 against an assessment or 'decision', must decide the matter on the basis that the burden of proof as described in section 102 is upon the taxpayer.

(3) In the case of an appeal against an understatement penalty imposed by SARS under a tax Act, the tax court must decide the matter on the basis that the burden of proof is upon SARS and may reduce, confirm or increase the understatement penalty.

Section 102(1) delineates the circumstances in which the burden of proof would be on the taxpayer and what that onus is in terms of what the taxpayer must prove. Sections 102(2) and 94(3) set out when the burden of proof is on SARS and what that onus is for SARS.

The standard of proof in the case of a dispute between SARS and the taxpayer is that of a balance of probabilities.

When the standard of proof is on a balance of probabilities, the onus of proof must be discharged by the party who carries it. It must be discharged in such a manner as to demonstrate that that party's version, or the facts that it must prove, are more likely than what is averred by the other party. In other words, to discharge the onus of proof on a balance of probabilities, the party bearing the onus must show that its version is at least 51% more likely than that of the other party.[4]

4 This standard of proof is much lower than the standard that is typically found in criminal matters, where a case must be proved beyond a reasonable doubt.

5.3 The circumstances in which the taxpayer carries the burden of proof

In terms of section 102(1) the taxpayer carries the burden of proving:

- that something is exempt or otherwise not taxable;
- that an amount is deductible or may otherwise be set off;
- the rate of tax applicable;
- that an amount qualifies as a reduction against tax payable;
- that a valuation is correct; and
- that a decision contemplated in section 104(2) is incorrect.

5.3.1 What must the taxpayer prove?

Simply put, the taxpayer must prove that all the requirements in the relevant underlying tax Act have been satisfied, to claim an exemption or a deduction or to rely on a special tax rate, etc. The following examples illustrate the point.

EXAMPLE

Example 5.1 – Proving that something is exempt (section 102(1)(a))

The taxpayer, Mr A, received remuneration of R1 000 000 for services rendered outside South Africa. In his tax return, Mr A treated the remuneration as exempt in terms of section 10(1)(o)(ii) of the Income Tax Act[5] (ITA).

In terms of section 102(1)(a), Mr A must prove that the amount is exempt.

Mr A therefore needs to prove that all the requirements for the exemption in section 10(1)(o)(ii) of the ITA have been satisfied. He must prove this on a balance of probabilities.

EXAMPLE

Example 5.2 – Proving that an amount is deductible or may otherwise be set off (section 102(1)(b))

ABC (Pty) Ltd, in its VAT201 return, claimed as an input tax credit an amount of R15 000 000.

In terms of section 102(1)(b), ABC (Pty) Ltd has to prove, on a balance of probabilities, that all the requirements for claiming the input tax credit have been satisfied.

While the requirements for claiming an input tax credit may vary from case to case, the requirements are generally as follows.

- The taxpayer must have acquired goods or services and must have been charged with VAT.
- The taxpayer must be in possession of a valid tax invoice or other acceptable supporting document(s) prescribed in the Value-Added Tax Act[6] (VAT Act).

continued

5 Act 58 of 1962.
6 Act 89 of 1991.

EXAMPLE

- The goods or services acquired by the taxpayer must have been acquired wholly (or partly, subject to section 17 of the VAT Act) for consumption, use or supply in the course of making taxable supplies.
- The taxpayer must keep supporting documents as envisaged in section 55 of the VAT Act.

ABC (Pty) Ltd bears the onus of proving satisfaction with these (and possibly other) requirements on a balance of probabilities.

EXAMPLE

Example 5.3 – Proving the rate of tax (section 102(1)(c))

DEF (Pty) Ltd, in its annual tax return, declared itself a small business corporation in terms of section 12E of the ITA and therefore that it should be taxed on the preferential rates applicable to such corporations.

In terms of section 102(1)(c), DEF (Pty) Ltd has to prove, on a balance of probabilities, that all the requirements of section 12E of the ITA have been satisfied.

EXAMPLE

Example 5.4 – Proving that an amount qualifies as a reduction against tax payable (section 102(1)(d))

GHI (Pty) Ltd, a South African tax resident company, paid tax in a country outside South Africa in respect of certain income earned in that foreign country. In its annual tax return, CGI (Pty) Ltd claimed a rebate against tax payable in terms of section 6*quat*(1) of the ITA.

In terms of section 102(1)(c), GHI (Pty) Ltd bears the burden of proving, on a balance of probabilities, that it satisfies all the requirements for claiming a foreign tax credit under section 6*quat*.

EXAMPLE

Example 5.5 – Proving a valuation is correct (section 102(1)(e))

JKL (Pty) Ltd disposed of a capital asset to a connected person for proceeds of R380 000. Being fully aware of paragraph 38 of the Eighth Schedule, JKL (Pty) Ltd calculated its liability for capital gains tax on the basis of proceeds of R380 000 being, according to it, the arm's-length price for the asset disposed of.

In terms of section 102(1)(e), JKL (Pty) Ltd would have to prove, on a balance of probabilities, that R380 000 is the arm's-length price for the asset.

EXAMPLE

Example 5.6 – Proving a decision is incorrect (section 102(1)(f))

Mrs B incurred a penalty for underestimating provisional tax in terms of paragraph 20 of the Fourth Schedule to the ITA. She submitted a request for remittance of the penalty in terms of section 217(3) of the TAA. SARS disallowed the request.

In terms of section 102(1)(f), Mrs B bears the burden of proving that SARS's decision not to allow her request for remittance was incorrect.

There may be cases where the issue in dispute is something that cannot properly be classified as falling into any of the categories in section 102(1)(a) to (f) – for example, when SARS wants to rely on an exception to the requirement to issue a letter of audit findings.[7] It is submitted that under these circumstances, the general rule that the party who alleges carries the burden of proof ('he who alleges must prove') applies.

5.3.2 What can SARS call on a taxpayer to prove?

SARS can only call upon a taxpayer to prove that, for example, the requirements for exemption have been satisfied or that an amount qualifies to be deducted or set off. SARS cannot require the taxpayer to prove arbitrary or irrelevant things in respect of the tax position adopted by the taxpayer.

Practical issue: When specific documents requested by SARS are not available

In practice, it often happens that SARS considers the taxpayer unable to discharge its burden of proof because the taxpayer is unable to produce specific documents requested by SARS, or, stated differently, to produce the specific documentary evidence to satisfy the SARS official or relevant SARS committee concerned. In some cases, the absence of certain documents would indeed make it very difficult, even nearly impossible, for the taxpayer to discharge its onus of proof, but the mere absence of the documents specifically requested by SARS does not necessarily mean that the taxpayer will ultimately be unable to discharge its onus of proof. The following example illustrates this point.

EXAMPLE

Example 5.7 – Absence of specific documents

Mr B is the sole member of a CC. In his 20X1 year of assessment, Mr B received an amount of R4 020 000, deposited into his bank account by the CC. Mr B did not declare this as income in his income tax return for the relevant year of assessment. The reason for not declaring it as income was that, according to Mr B, the amount received constituted a loan. SARS, in its letter of audit findings, proposed to include the R4 020 000 in the taxpayer's gross income and to issue an additional assessment to that effect on the basis that Mr B did not provide a copy of the loan agreement between himself and the CC and therefore did not discharge his onus of proof under section 102.

The mere fact that there exists no written loan agreement does not mean that the amount is not a loan. It does suggest, however, that it may not be a loan. Mr B could, if no formal loan agreement exists, nevertheless discharge his onus of proof by, for example, providing an affidavit setting out his understanding of the terms on which he acquired the funds from the CC, the CC's audited financial statements reflecting the amount as a loan, bank statements indicating that the repayment of the amount, etc.

7 See chap. 2.

Practical issue: SARS holding the taxpayer to a higher standard of proof

Specific documents requested by SARS in practice sometimes also appear to place a higher standard of proof on a taxpayer by effectively requesting the taxpayer to discharge its onus of proof beyond reasonable doubt. As stated in the introduction to this chapter, SARS acts as a kind of *quasi*-court in determining whether the taxpayer has discharged its onus the proof. This is not a power to be exercised lightly nor is it always easy to determine whether the onus has been discharged. Holding the taxpayer to a higher standard than expected is, to some extent at least, understandable (if nothing else). However, taxpayers would do well to identify when this happens and not to abandon their right to challenge SARS's assessments or decisions.

5.3.3 How should the taxpayer discharge its onus?

The taxpayer should discharge its onus by means of evidence. The evidence required will depend on the issues in dispute. Evidence can take various forms such as testimony, bank statements, invoices, IRP5 certificates, proof of payment, affidavits, agreements, or a combination of various things. Understanding the requirements that must be proved is a prerequisite to identifying the appropriate evidence required in pursuit of the case. Stated differently, the substantive law determines the facts that must be proved and direct the evidence required. The following example illustrates the point.

EXAMPLE

Example 5.8 – Discharging the onus of proof

Assume the same facts as in Example 5.1 at the start of this chapter.

One of the requirements in section 10(1)(o)(ii) is that the services must have been rendered outside South Africa. Mr A will, amongst the other requirements of section 10(1)(o)(ii), have to prove that the services were rendered outside South Africa.

If Mr A provides copies of his passport in an attempt to prove that this requirement has been met, he will probably fall short of discharging the onus. Copies of his passport may well prove that Mr A was not in the country, but they do not prove what he did whilst outside the country. Mr A could address this shortfall in his evidence in a couple of ways, depending on the facts. He might consider the following additional evidence: providing a letter from his employer, confirming that Mr A indeed worked and earned the said remuneration whilst outside the country as indicated on his passport.

Should Mr A's IRP5 indicate the remuneration under a source code reserved for salary earned locally, the contradiction would have to be addressed because it clearly casts doubt on other evidence provided. Such a contradiction could possibly be addressed by, for example, the employer's explaining why the source code for local services was used since there may be a valid reason for having done so.

5.3.4 When should the taxpayer discharge its onus?

Unlike the case where SARS bears the onus of proof,[8] the taxpayer may be called upon by SARS to discharge its onus of proof at any time – this is when the taxpayer should discharge

8 See para. 5.4.

the burden of proof resting on it. In practice, SARS typically calls on a taxpayer for the first time to discharge its onus of proof during an audit or verification, or in the form of requests for relevant material. If SARS considers the taxpayer not to have discharged its onus of proof, it is entitled to raise an additional assessment, provided that all other requirements for the making of such an assessment have been met.[9]

The taxpayer will have further opportunities to discharge its onus of proof during the objection stage[10] and again during the appeal stage[11] should the taxpayer challenge the relevant assessment. However, as stated in the introduction to this chapter, the raising of an assessment has a direct effect on the taxpayer – for example, SARS can commence collection steps[12] once an assessment has been raised.[13]

In the case of assessments (and certain decisions) where the taxpayer carries the burden of proof, SARS effectively takes on the roles of the proverbial judge, jury and executioner, until a court intervenes and makes an independent decision about whether the taxpayer has discharged its onus of proof. SARS's power is not obsolete, however, as explained in paragraph 5.3.5 below.

5.3.5 The *Pretoria East Motors* case

At least three main principles can be drawn from the judgment of the Supreme Court of Appeal in the matter of *Commissioner for the South African Revenue Services v Pretoria East Motors (Pty) Ltd*[14] in the context of onus of proof, to wit:

- SARS must have proper grounds for believing that the taxpayer has not been assessed correctly before it can raise an additional assessment (the 'proper-grounds' principle);[15]
- the taxpayer must at all times in the process leading up to the additional assessment and after the assessment know exactly what it is being called upon by SARS to prove (the 'informed-taxpayer' principle);[16] and
- if SARS has based an assessment on the taxpayer's accounts and records but has misconstrued them, the taxpayer would discharge its onus by simply explaining, by way of appropriate evidence, that SARS's understanding is wrong (the 'reduced-onus' principle).[17]

5.3.5.1 The 'proper-grounds' principle

In terms of the proper-grounds principle, SARS cannot simply allege non-compliance by the taxpayer with a particular provision or requirement, to raise an assessment. It must conduct its investigation or audit properly, to establish a proper factual and legal basis for raising an additional assessment, despite the fact that the taxpayer might be the party who carries the burden of proof.

In the context of onus of proof, it is submitted that this principle places an obligation on SARS to consider properly the evidence provided by the taxpayer, despite the fact that the evidence submitted may not necessarily be exactly what SARS asked for, before it can raise an additional assessment. If SARS simply ignores the information, or does not understand it, and

9 See chap. 3.
10 See chaps 7–9.
11 See chap. 10.
12 See chap. 12 on suspension requests.
13 See also *Brits and Three Others v CSARS* (2017/44380, 28 November 2017, unreported).
14 2014 (5) SA 231 (SCA), 76 SATC 293.
15 Ibid. at para. 11.
16 Ibid. at para. 14.
17 Ibid. at para. 14.

nevertheless raises an additional assessment, it engages the taxpayer in an administratively unfair manner tantamount to an abuse of power, which would, it is submitted, render SARS's assessment unlawful.

5.3.5.2 The 'informed-taxpayer' principle

In terms of the informed-taxpayer principle, the taxpayer must know exactly what it is required to prove and must have failed to do so before SARS can raise an additional assessment. In any event, it is only when SARS has specifically called upon a taxpayer to prove something that SARS can be said to have complied with the proper-grounds principle. Unless SARS has specifically requested the taxpayer to prove something (and has met all its other obligations), it cannot simply raise an assessment. The taxpayer would otherwise be in the untenable position of not knowing exactly what it is being called upon to prove. It could be said that issuing an additional assessment under such circumstances would be tantamount to an abuse of power by SARS, which would, it is submitted, render SARS's assessment unlawful.

EXAMPLE

Example 5.9 – The informed-taxpayer principle

If SARS is auditing the taxpayer in Example 5.1, above, to determine whether the taxpayer qualifies for the exemption, it needs to request information from the taxpayer to prove satisfaction of the requirements for the exemption. SARS cannot simply disallow the exemption without having called on the taxpayer to prove that he qualifies. It is submitted that this is so even if SARS has reason to suspect that the taxpayer does not qualify. Whilst the taxpayer can, during the objection stage, prove his case, the fact remains that by that point the assessment would already have been raised, which would have consequences for the taxpayer.

5.3.5.3 The 'reduced-onus' principle

When SARS has clearly misunderstood the accounts or records of the taxpayer and nevertheless raised an additional assessment, it is submitted that it should be sufficient for the taxpayer to approach SARS and explain that SARS's understanding was wrong. Such an explanation could serve to discharge the onus of proof resting on the taxpayer.

If SARS is not satisfied with the explanation provided, it cannot simply raise an assessment. It is submitted that SARS must first apply its mind to the explanation offered by the taxpayer and if '*there are underlying facts in support of that explanation that SARS wishes to place in dispute, then it should indicate clearly what those facts are so that the taxpayer is alerted*'.[18] The following example illustrates the point.

18 Ibid.

EXAMPLE

Example 5.10 – Misunderstanding and the reduced-onus principle

During an audit on a taxpayer's VAT201 for a particular period, SARS requested various documents. The taxpayer responded, providing SARS with, amongst other things, the VAT report prepared by its accounting system for the period in question. In the report, in the column for 'output tax', a net total of R6 000 000 was reflected. The amount, however, was clearly reflected as *negative* R6 000 000. The reason for this was that the accounting system had reduced output tax on sales by the amount of VAT on credit notes and the amount of VAT on credit notes exceeded the amount of output tax on sales. This was also clearly visible from the report. In its VAT201, the taxpayer accordingly declared output tax of Rnil and claimed an input tax credit of R6 000 000, resulting in a refund due to the taxpayer of R6 000 000.

SARS, in raising its assessment, disallowed the input tax of R6 000 000 and raised an assessment of R6 000 000 on output tax on the ground that the amount represents the output tax reflected in the output tax column in the VAT report.

Clearly, in this example, the SARS auditor misconstrued the VAT report. It is sufficient then for the taxpayer, in its objection, to explain the misunderstanding. It is submitted that the objection cannot simply be disallowed on the basis that the taxpayer has failed to discharge its onus of proof by not providing credit notes that would entitle the taxpayer to the input tax.

5.4 The circumstances in which SARS carries the burden of proof

In terms of section 102(2), SARS bears the burden of proving:

- that an estimated assessment in terms of section 95 is reasonable;[19] and
- the facts on which it based the imposition of an understatement penalty.

In terms of section 94(2), SARS bears the burden of proving that the making of a jeopardy assessment is reasonable under the circumstances.

It is also trite that SARS bears the burden of proving that it was at liberty, in terms of section 99(2), to make an additional assessment despite the fact that the original assessment has prescribed.[20]

5.4.1 Reasonability of an estimated assessment

In *Africa Cash & Carry (Pty) Ltd v Commissioner for the South African Revenue Service*,[21] the Supreme Court of Appeal held as follows, regarding the meaning of 'reasonableness' in the context of an estimated assessment:

> '*The Act does not provide any guidance or criteria to determine whether an estimate made by SARS is reasonable. Following what was said in* Head of the Western Cape, Education Department and others v Governing Body of the Point High School and

19 See chap. 3 on assessments.

20 For a detailed discussion of when SARS may 'lift the veil of prescription', see chap. 4.

21 [2019] ZASCA 148 at paras 67–70. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15, 2004 (7) BCLR 687 (CC), 2004 (4) SA 490 (CC); *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* [2002] ZACC 2, 2002 (9) BCLR 891 (CC), 2002 (3) SA 265 (CC).

> others, *in a different context with reference to what is meant by "unreasonableness" in s 6(2)(h) of PAJA, reasonableness would require that SARS strike a balance fairly and reasonably open to it on the facts before it or available to it. If the ... method is one that reasonably could be applied, then a court will not interfere with that decision. What is required for a decision to be justifiable, is that it should be "a rational decision taken lawfully and directed to a proper purpose".*
>
> *Clearly, if the results of a decision are patently distorted, it cannot be reasonable. An estimated assessment by SARS may also not be an "arbitrary guesstimate". If a decision "is so unreasonable that no reasonable person could have so exercised the power", it will be reviewable. In all instances a discretion must "be exercised with care by properly experienced and suitably qualified personnel, since it may otherwise be reduced to an arbitrary guesstimate, with grave consequences for the taxpayer".*
>
> *SARS had to consider all reliable information readily available to it in arriving at the assessments and must have acted rationally, in accordance with principles established in* Bato Star *and* Bel Porto School Governing Body. *Factors relevant to determining whether a decision is reasonable or not would include amongst others the nature of the decision, the identity and expertise of the decision–maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. This list is not exhaustive.*
>
> *The issue is not whether the decision to adopt the ... methodology is necessarily the best decision in the circumstances. What this court has to decide is whether the decision to apply the ... methodology struck a reasonable equilibrium between the applicable principles and objectives sought to be achieved, in the context of the established facts of* [the] *case*' (emphasis added).

While SARS bears the onus of proving that the assessment is reasonable, the taxpayer still carries the burden of proving certain relevant facts such as that, for example, income included in the estimate is not taxable or certain items are deductible.

5.4.2 Understatement penalties

As stated above, section 102 simply provides that SARS bears the onus of proving the facts on which an understatement penalty is based. Section 129(3) states that '*in the case of an appeal against an understatement penalty imposed by SARS under a tax Act, the* [tax court] *must decide the matter on the basis that the burden of proof is upon SARS*'.

In *Purlish Holdings (Pty) Ltd v Commissioner for the South African Revenue Service*,[22] the court held that:

> '*In terms of s 102(2) of the TAA, the burden of proving the facts on which SARS based the imposition of an understatement penalty rests on SARS. Furthermore, the Tax Court is, in terms of s 129(3) of the TAA, enjoined to decide an appeal against an understatement policy* [sic] *on the basis that the burden of proof is upon SARS. Given the aforesaid burden of proof, I am inclined to find merit in the appellant's contention that SARS must not only show that the taxpayer committed the conduct set out in items (a) to (d) of the definition of 'understatement' in s 221 of the TAA, but also that such conduct caused it (SARS) or the fiscus to suffer prejudice*' (emphasis added).

22 (76/2018) [2019] ZASCA 4 (26 February 2019).

SARS must therefore prove:

- the existence of an understatement as defined in section 221;
- that the understatement caused prejudice to SARS; and
- the behaviour described in column 2 of the understatement penalty percentage table in section 223 on which SARS based the imposition of an understatement penalty.

The taxpayer will carry the burden of proving that an understatement resulted from a *bona fide*, inadvertent error if it wants to rely on that basis as a defence against the imposition of a penalty. The taxpayer will also have to prove that a decision by SARS not to remit an understatement penalty for a substantial understatement is incorrect.

5.4.3 What SARS must prove in terms of prescription

It is trite that SARS must prove that it is entitled to lift the proverbial '*veil of prescription*' in respect of tax year(s) or tax period(s) that have already prescribed. It must therefore prove satisfaction of the relevant requirements in section 99(2).[23] It is worth noting here that it is the taxpayer who carries the onus of proving that an assessment has prescribed.

5.4.4 When SARS must discharge its onus

Unlike the case where SARS can raise an additional assessment because of the taxpayer's failure to discharge its onus of proof and demand payment of the tax assessed in the additional assessment, when, for example, SARS raises an additional assessment after the original assessment has prescribed the taxpayer cannot rely on SARS's failure to discharge its onus of proof as a basis for refusing to pay the tax assessed. Furthermore, the taxpayer cannot decide at objection level whether on the basis of SARS's inability to discharge its onus of proof SARS's assessment is competent. Ultimately, only the court can hold SARS to account for failing to discharge its onus of proof. Until then, however, a taxpayer has no choice but to the deal with the consequences of an assessment raised by SARS, despite the fact that SARS bears the onus of proof and despite the fact that SARS may not be able to discharge that onus.

When it comes to assessments raised (and certain decisions made) by SARS, when SARS bears the onus of proof it is effectively the proverbial judge, jury, and executioner, at least until a court eventually intervenes. These powers of SARS are kept in check, however, by at least the following:

- In terms of section 42, SARS is required, following an audit, to provide the taxpayer with a document containing the grounds for assessment. As detailed in chapter 2, SARS must, when it carries the burden of proof, provide detailed grounds for its assessment.
- In terms of section 96, SARS is effectively required in all cases where it bears the onus of proof to provide in its notice of assessment detailed grounds for the assessment.[24] If SARS were not required to do so, opportunities would be created for SARS to abuse its power.

Compliance with these two provisions is crucial to ensuring that SARS does not abuse its powers and act contrary to the provisions of the TAA and the Constitution. SARS's failure to comply with these requirements must, it is submitted, render the assessment concerned invalid.[25]

---

23 See chap. 4 on these requirements. See also *ABC (Pty) Ltd v Commissioner for the South African Revenue Service* [2016] ZATC 4 (12 January 2016).

24 See chap. 3 for a detailed discussion of this requirement.

25 See chaps 2 and 3.

PART II

CHAPTER 6

Remedies other than objection and appeal

The practical context of this chapter

Why rely on other remedies?

An assessment raised by SARS and certain decisions taken by SARS can be reduced or changed only by means of the remedy of objection and appeal under the Tax Administration Act[1] *(TAA), read with the rules,*[2] *(as discussed in chapters 7 to 11) or by means of other remedies, as discussed in this chapter. Stated differently, the only way to challenge an assessment or decision by SARS is to follow either the remedies set out herein or the objection and appeal remedy set out in chapters 7 to 11.*

The remedies discussed in this chapter are, in some cases, more effective than the objection and appeal remedy. They may sometimes be the only remedy available to the taxpayer to challenge an assessment or decision.[3]

A taxpayer's fate is sealed in respect of an assessment or decision by SARS only when neither the remedies discussed herein nor the objection and appeal remedy, discussed in chapters 7 to 11, is available to the taxpayer.

What are these other remedies?

Taxpayers can have an assessment reduced by SARS, or a decision by SARS changed, through:

- *requesting a reduced assessment (in the case of a challenge to an assessment);*
- *requesting a withdrawal of the assessment (in the case of a challenge to an assessment);*
- *requesting an internal review by SARS of its decision (in the case of a challenge to certain decisions);*
- *requesting a reduction of a penalty assessment (in the case of a challenge to a penalty assessment);*
- *requesting remittance of a penalty (in the case of a challenge a penalty assessment); and*
- *requesting remittance of an understatement penalty for substantial understatements (in the case of a challenge to an understatement penalty for a substantial understatement).*

---

1 Act 28 of 2011. Any reference to a legislative provision in this chapter should be construed as a reference to this Act, unless the contrary is specifically indicated or is clear from the context.

2 The rules promulgated under s 103 of the TAA.

3 See chap. 7 on when the objection remedy is not available.

How?

Remedy	***How to use***
Request a reduced assessment	*Send a properly drafted letter to SARS or, when it is available, using the 'Request for Correction' function on SARS eFiling, to change the tax return that gave rise to the assessment in question*
Request withdrawal of the assessment	*Send a properly drafted letter to SARS*
Request an internal review by SARS of its decision	*Send a properly drafted letter to SARS*
Request a reduction of a penalty assessment	*Send a properly drafted letter to SARS*
Request remittance of a penalty	*Complete a Request for Remission (RFR) form on SARS eFiling*
Request remittance of the understatement penalty for substantial understatements	*Complete and submit a NOO (or ADR1) form*

When?

Any time before the assessment becomes final – in some instances, even though the assessment has become final; in the case of remittance requests, before the due date for payment of the penalty.

What if SARS ignores you?

It is possible to complain through the appropriate channel, whether it be the Complaints Management Office or the Office of the Tax Ombud, or to initiate litigation proceedings against SARS.[4]

4 High Court proceedings, in terms of the Uniform Rules of Court, could, for example, involve an application to compel SARS to respond.

Contents

Page

Page

Table of Examples

Table of Examples

6.1 Introduction

Remedies are those things which a taxpayer has at its disposal to have an assessment by SARS reduced or a decision by SARS changed. One of those remedies is the objection and appeal remedy, discussed in detail in chapters 7 to 11. This chapter explains the other remedies that are available to a taxpayer. These further remedies are important because they may, in some cases, be more effective or expedient than the objection and appeal remedy and because they may be the taxpayer's only recourse when the objection and appeal remedy are no longer available.

6.2 Other remedies: an overview

The remedies other than objection and appeal with which an assessment raised by SARS can be challenged to secure a reduced assessment are:

- reduced assessment requests under section 93(1)(d);
- reduced assessment requests under section 93(1)(e);
- withdrawal of assessments under section 98;
- requests for an internal review in terms of section 9; and
- settlement under part F of chapter 9.

In respect of penalties, the remedies other than objection and appeal are:[5]

- requests for remittance of penalties in terms of section 215;
- requests for an altered assessment in terms of section 219;
- requests for remittance of penalties in terms of section 223(3); and
- settlement under part F of chapter 9.

The remedies other than objection and appeal that can be used to get a decision by SARS amended are:

- requests for an internal review in terms of section 9;
- review applications in the High Court under PAJA; and
- settlement under part F of chapter 9.

Each of these remedies is discussed in detail in the paragraphs that follow. The discussion sets out, firstly, when a taxpayer can rely on the relevant remedy and, secondly, when the taxpayer cannot. The discussion then moves to the procedure to be followed in respect of each remedy and finally to what the taxpayer's options are when SARS does not respond, or does not respond favourably, to the taxpayer.

5 It should be noted that, as is also pointed in chap. 7, a taxpayer cannot object to certain penalties without first having exhausted the remedies listed here.

6.3 Reduced assessment requests under section 93(1)(d): when can a taxpayer rely on it

Applicable Law

Section 93(1)(d) – Reduced assessments

(1) SARS may make a reduced assessment if ...

(d) SARS is satisfied that there is a readily apparent undisputed error in the assessment by—

(i) SARS; or

(ii) the taxpayer in a return; or

Section 93(2) – Reduced assessments

(2) SARS may reduce an assessment despite the fact that no objection has been lodged or appeal noted.

Section 105 – Forum for dispute of assessment or decision

A taxpayer may only dispute an assessment or 'decision' as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs.

Section 93(1)(d), read with section 93(2), allows SARS to make a reduced assessment if it is satisfied that the assessment contains a readily apparent, undisputed error, whether that assessment was made by SARS or by the taxpayer[6] and irrespective of whether an objection has been lodged or appeal noted.

While the words 'error', 'readily' and 'apparent' used in section 93(1)(d) are not defined in the TAA, they can be defined follows:

- 'error' as '*a deviation from accuracy or correctness; a mistake, as in action or speech*';[7]
- 'readily' as '*promptly; quickly; easily*';[8] and
- 'apparent' as '*capable of being easily perceived or understood; plain or clear; obvious*'.[9]

The word '*undisputed*' is also not defined in the TAA. Its dictionary meaning is: '*If something is undisputed, everyone agrees about it*'.[10]

It is submitted that the expression '*readily apparent*' must be interpreted not with reference to the error itself but to the undisputed nature of the error. Arguably, an error, in the plain sense of the word, is already something which cannot be disputed.[11]
The words '*readily apparent undisputed error*' must therefore mean a mistake which is easy to see, and therefore that there can be no dispute regarding the fact that there is indeed a mistake in the assessment.

6 See chap. 3 for both SARS-assessment and self-assessment-type taxes.
7 https://www.dictionary.com/browse/error?s=t (accessed 11 June 2010).
8 https://www.dictionary.com/browse/readily?s=t (accessed 11 June 2020).
9 https://www.dictionary.com/browse/apparent?s=t (accessed 11 June 2020).
10 https://dictionary.cambridge.org/dictionary/english/undisputed (accessed 11 June 2020).
11 In the same way that a taxpayer's *bona fides* must be interpreted with reference to the inadvertent nature of an error in phrase '*bona fide* inadvertent error' in s 222(1).

SARS must be 'satisfied' that it is easy to see that there can be no dispute regarding the fact that the assessment contains an error before a taxpayer can successfully rely on section 93(1)(d) to secure a reduced assessment. The use of the expression 'is satisfied' in section 93(1)(d) confers on SARS a discretion similar to the discretion SARS has to raise an additional assessment under section 92.[12]

In *Wingate-Pearse v Commissioner for the South African Revenue Service*,[13] it was held that SARS's discretion is subjective but not unfettered. The court held that an objective approach must be adopted to such subjective discretion. This means that SARS must form its subjective opinion on reasonable grounds.

What is reasonable was interpreted by the court in *Africa Cash & Carry (Pty) Ltd v Commissioner for the South African Revenue Service*[14] as follows:

> 'Reasonableness requires that a balance must be struck between a range of competing considerations in the context of a particular case. The principal enquiry is whether SARS struck a balance fairly and reasonably open to it on the facts before it, or readily available to it.'

As stated above, the word 'error' means '*a deviation from accuracy or correctness; a mistake, as in action or speech*'.[15] If an assessment contains a deviation from accuracy or correctness, it is incorrect.

It follows then that SARS can make a reduced assessment under section 93(1)(d) if, on the facts before it or readily available to it, SARS is of the opinion that it is easy to see that there can be no dispute regarding the fact that the assessment is incorrect. It is submitted that the foregoing encapsulates the requirements for the issuing of a reduced assessment under section 93(1)(d).

SARS, in its *Dispute Resolution Guide*,[16] states the following in respect of reduced assessment requests under section 93(1)(d):

> '*There is a difference between an assessment which is the subject of a substantive dispute and just an error in assessment. A substantive dispute essentially means there is a disagreement between SARS and the taxpayer on the interpretation of either the relevant facts involved or the law applicable thereto, or of both the facts and the law, which arises pursuant to the issue of an assessment.*
>
> If the assessment contains errors, whether caused by SARS or the taxpayer, it is not necessary to object against the assessment *if it is an undisputed error*. …
>
> ***Example – mistake by taxpayer**: A taxpayer forgets to claim retirement annuity contributions as deductions and has the required certificates indicating that such expenditure was incurred. SARS agrees that the taxpayer made an error to his or her own prejudice which can be fixed by the issue of a reduced assessment. The taxpayer in this scenario must follow the request for correction (RFC) procedure.*
>
> *The situation may differ if the taxpayer omitted an amount of income to the prejudice of SARS. Depending on the circumstances, SARS may not always believe that this was simply an error. For example, if the taxpayer only requests a reduced assessment after*

12 See chap. 3 for a discussion of additional assessments.

13 [2019] ZAGPJHC 218, [2019] 4 All SA 601 (GJ), 2019 (6) SA 196 (GJ) at para. 61.

14 [2019] ZASCA 148, [2020] 1 All SA 1 (SCA), 2020 (2) SA 19 (SCA).

15 https://www.dictionary.com/browse/error?s=t (accessed 11 June 2010).

16 *Dispute Resolution Guide: Guide on the Rules Promulgated in terms of Section 103 of the Tax Administration Act, 2011*, 2nd Issue, 20 March 2020, available at https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TAdm-G05%20-%20Dispute%20Resolution%20Guide.pdf (accessed 17 July 2020).

the taxpayer's return is being verified or audited, SARS may believe that the omission was not erroneous and the taxpayer will then have to object.

Example – Mistake by SARS: *The most typical examples are processing errors, such as double counting of an amount of income. SARS will fix this by a reduced assessment if SARS discovered the mistake on its own or if the taxpayer followed the request for correction (RFC) procedure.*'[17]

'*The intention of section 93 is essentially to enable SARS to alter an assessment to rectify processing errors and return completion errors. This section enables SARS to reduce an assessment to rectify these errors even where no objection has been lodged against that assessment.*

...

Before relying on section 93, a taxpayer of course needs to be sure he or she is dealing with a processing or return completion error. If in actual fact the taxpayer should have lodged an objection, the taxpayer may be out of time as a result of first requesting a reduced assessment. Thus, if in doubt, the taxpayer must file an objection. SARS will automatically deal with the objection in terms of section 93 if this is appropriate.'[18]

In its dispute guide SARS creates a distinction between (1) an assessment which is the subject of a substantive dispute and (2) an error in an assessment and then goes on to suggest that a taxpayer can rely on section 93(1)(d) in respect of errors but not in respect of substantive disputes. In the case of substantive disputes, the taxpayer must, in terms of the dispute guide, follow the objection remedy.[19]

A substantive dispute, according to the dispute guide, is when SARS does not agree with the taxpayer's interpretation of the facts or the law or of both the facts and the law. An error, on the other hand, is something like a processing error, or at least so the argument goes.

SARS's view that section 93(1)(d) is not available in respect of what it refers to as 'substantive disputes' may be based on the wording of section 105, which states that a taxpayer may dispute an assessment only through the objection and appeal remedy. As is shown in the judgment of the High Court in *Rampersadh and Another v Commissioner for the South African Revenue Service and Others*[20] (*Rampersadh v CSARS*), this is simply incorrect.

The Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2015 (2015 MO) states, in relation to section 93(1)(d), that (a) '*Section 93(1)(d) of the Tax Administration Act was inserted to allow taxpayers a less formal mechanism to request corrections to their returns and so reduced assessments, without having to follow the objection and appeal route to do so*' (emphasis added) and (b) the expression 'readily apparent' was inserted into section 93(1)(d) because taxpayers have tried to rely on section 93(1)(d) to raise substantive issues in requests under that provision.

As regards (a) above, the plain wording of section 93(1)(d) does not suggest the same purpose as that alluded to in the 2015 MO. The section clearly also applies when there is a readily apparent undisputed error in an assessment made by SARS. If the purpose of section 93(1)(d) was to allow taxpayers to rectify mistakes in a return that caused the incorrect assessment, the legislature could easily have drafted the section to the effect that it applies only to errors in assessments caused by taxpayers. But it did not. The section clearly refers to an error in an assessment by SARS or an error in an assessment by the taxpayer. As regards (b) above, the

17 Ibid. at para. 4.1.
18 Ibid. at para. 4.2.
19 See chaps 7 to 9 on the objection remedy.
20 [2018] ZAKZPHC 36.

insertion of the words 'readily apparent' does not prevent the taxpayer from raising substantive issues. It may make it more difficult for SARS to allow such requests, but it does not prevent the taxpayer from making a request or relying on the section.

In addition, it is respectfully submitted that SARS's interpretation of section 93(1)(d) incorrectly interprets the word 'undisputed' in relation to the word 'error' as opposed to the obviousness of the fact that the error cannot be disputed.

Furthermore, it is submitted that processing errors are not the errors contemplated in section 93(1)(d). If they were, section 93(1)(e), which specifically deals with processing errors, would not have been required, because section 93(1)(d) would have sufficed. Also, it follows logically that when an assessment contains a mistake that the assessment is incorrect. It does not matter why it is ultimately incorrect. If an assessment is incorrect, a reduced assessment must be available, even though no objection or appeal has been noted.

It is submitted that regardless of whether the issue raised in a request for a reduced assessment involves a 'substantive dispute' when SARS agrees with the taxpayer's interpretation, there is no dispute about the fact that the assessment contains a mistake. If SARS is of the view that the assessment does not contain readily apparent undisputed error, indeed SARS cannot allow the request for a reduced assessment but should a court later find that it should have allowed the request, there would similarly be no dispute. It follows that the distinction drawn by SARS between a substantive dispute and an error is artificial and strains the plain the wording of section 93(1)(d).

The judgment in *Crookes Brothers Ltd v Commissioner for the South African Revenue Service*[21] is relevant here. The facts of the case are briefly as follows. The taxpayer, a company, had made certain transfer pricing adjustments in its tax return for the 2015 year of assessment in terms of section 31 of the Income Tax Act[22] (ITA). It later transpired that, according to the taxpayer, it qualified for an exception to the need to make a transfer pricing adjustment in terms of section 31(7) of the ITA as it read at the time, and had therefore overstated its taxable income. Therefore, according to the taxpayer, it should not have made the adjustments. The taxpayer accordingly submitted a request in terms of section 93(1)(d) for a reduction of its original assessment.

SARS ultimately refused the request on the basis that, according to SARS, the requirements for the exception in section 31(7) to apply were not met and that SARS disputed the error. Clearly, then, a 'substantive dispute', to use the words in SARS's dispute guide, arose. SARS did not, however, decline the request on the basis that the taxpayer could not rely on section 93(1)(d) in the circumstances: it declined the request because its interpretation differed from the taxpayer's.

The view adopted by SARS in this case was not that the request made did not relate to an error falling within the ambit of section 93(1)(d). On the basis of the view expressed in the SARS dispute guide quoted above, SARS should have declined the request on the basis that there was no error within the meaning of section 93(1)(d) and, since SARS disagreed with the taxpayer's interpretation, a substantive dispute had arisen and the taxpayer should have objected. It appears that in practice SARS adopts a view different from that stated in its dispute guide.

It is also worth noting that the taxpayer in the *Crookes Brothers* case launched an application to have SARS's decision not to allow its request reviewed and set aside. The taxpayer was not successful in that application, and the court effectively adjudicated the dispute, favouring

21 [2018] 80 SATC 439.
22 Act 58 of 1962.

SARS's interpretation of section 31(7). It should be noted that the application was not dismissed on the basis that the taxpayer was not allowed to request a reduced assessment under the circumstances or that SARS's decision could not be faulted in the light of the aim of section 93.

In *Rampersadh v CSARS*, the High Court confirmed that:

- the remedy under section 93(1)(d) is available to the taxpayer simply by way of a request submitted to SARS;
- the taxpayer has no right to object to or appeal against SARS's decision not to allow the request for a reduced assessment under section 93(1)(d);
- the taxpayer is entitled to launch a review application under PAJA if SARS does not allow the request;
- section 105 of the TAA does not oust the High Court's jurisdiction to hear a review application brought by a taxpayer in consequence of SARS's failure to grant such a request;[23] and
- if SARS is satisfied that the assessment contains a readily apparent undisputed error, it must allow the request despite the section's seemingly providing SARS with a discretion to decide whether to issue a reduced assessment.[24]

It follows that section 93(1)(d) is effectively another way of challenging an assessment, despite section 105 and despite SARS's views in the SARS dispute guide.

It is submitted that nothing prevents a taxpayer from raising any matter, substantive or otherwise, in a reduced assessment request. SARS must consider the taxpayer's request under section 93(1)(d) because, as was held in *Rampersadh v CSARS*, the section does not confer an absolute discretion on SARS. Stated differently, although SARS has a discretion under section 93(1)(d), such discretion does not allow SARS simply to ignore the request. SARS must determine to its satisfaction, on the basis of the information available to it, whether a readily apparent undisputed error exists for, if it is so satisfied, it must allow the request.

6.4 Reduced assessment requests under section 93(1)(d): when a taxpayer cannot rely on it

The taxpayer's chances of success with a reduced assessment request under section 93(1)(d) are slim if the assessment in question does not contain a readily apparent undisputed error.[25] However, the taxpayer's request should also fail, even if the assessment does contain a readily apparent undisputed error, if:

- section 99 operates to prevent SARS from making a reduced assessment because the assessment that contains the error has prescribed; or
- section 100 operates to prevent SARS from making a reduced assessment because the assessment that contains the error is final.

23 Interestingly, the court in the *Rampersadh* case seems not have considered the effect of ss 100 and 99 on requests made under s 93(1)(d). Of particular interest here are ss 100(1)(b), 100(1)(c) and 99(1)(e). For an analysis of the impact of these sections on requests in terms of s 93(1)(d), see paras 6.4.4 and 6.4.1.4.

24 *Rampersadh v CSARS* at para. 25 (*obiter*).

25 See para. 6.3.

6.4.1 Section 99: when the assessment has prescribed

Section 99(1)(a) to (e) provides the general rule for when an assessment prescribes and section 99(2)(a) to (d) provides for exceptions.[26] Specific exceptions to prescription are also often contained in the underlying tax Act – for example, the exception contained in sections 11D(20) and 6*quat*(5) of the ITA.

If an assessment contains a readily apparent undisputed error but that assessment has prescribed and there is no exception to prescription, the taxpayer's request under section 93(1)(d) cannot be allowed no matter how compelling it may be. It is for this reason that the prescription rules and the exceptions thereto should be carefully considered when submission of a request for a reduced assessment under section 93(1)(d) is being contemplated. Paragraphs 6.4.1.1 to 6.4.1.4, below, explain the prescription rules while paragraphs 6.4.1.5 to 6.4.1.8 explain the exceptions.

6.4.1.1 General prescription rule: section 99(1)(a)

Applicable Law

Section 99(1)(a) – Period of limitations for issuance of assessments

(1) An assessment may not be made in terms of this Chapter—

(a) three years after the date of assessment of an original assessment by SARS;

Section 99(1)(a) states that an assessment by SARS prescribes three years after the date of the original assessment[27] – that is, three years after the issue date of the original assessment.[28]

It follows that if an assessment (a) contains an error, (b) is an assessment by SARS and (c) is older than three years, SARS cannot allow the taxpayer's request for a reduced assessment unless one of the exceptions to this three-year prescription rule applies.

It should be noted that 'original assessment' in section 99 also includes original additional assessments.[29]

EXAMPLE

Example 6.1 – Three years and original additional assessments

Assume a taxpayer was originally assessed to tax on taxable income of R1 000 000 on 1 March 2020, which taxable income comprised income of R2 000 000 and expenses of R1 000 000. Following an audit, SARS disallowed R200 000 of the deductions claimed by the taxpayer in its tax return. The taxpayer's taxable income increased accordingly from R1 000 000 to R1 200 000 on the additional assessment. The additional assessment is dated 1 May 2020.

The additional assessment prescribes three years from 1 May 2020 only in respect of the disallowed expenses. The taxpayer cannot count three years from 1 May 2020 to determine whether it can still challenge the income of R2 000 000: the three-year period in respect of the income runs from 1 March 2020.

26 S 99(2)(e), (3) and (4) also contains exceptions to prescription. These provisions are not relevant, however, when a taxpayer may request a reduced assessment even despite prescription.

27 This rule applies to assessments by SARS. See chap. 3 for a discussion of the different types of assessment.

28 See the definition of 'date of assessment' in s 1.

29 See chap. 3.

6.4.1.2 General prescription rule: section 99(1)(b) and (c)

Applicable Law

Section 99(1)(b) and (c) – Period of limitations for issuance of assessments

(1) An assessment may not be made in terms of this Chapter ...

(b) in the case of self-assessment for which a return is required, five years after the date of assessment of an original assessment—

(i) by way of self-assessment by the taxpayer; or

(ii) if no return is received, by SARS;

(c) in the case of a self-assessment for which no return is required, after the expiration of five years from the—

(i) date of the last payment of the tax for the tax period; or

(ii) effective date, if no payment was made in respect of the tax for the tax period;

In terms of section 99(1)(b), an original self-assessment prescribes five years from the date of submission of the relevant return (if a return is required) or, if no return is submitted, five years from the date of an assessment by SARS.[30] Evidently, when a taxpayer does not file a return in respect of a self-assessment-type tax, the prescription periods do not start to run.[31] However, should SARS raise an assessment consequent upon the taxpayer's not having filed a return (in respect of self-assessment type taxes), that assessment would prescribe five years from date of assessment.

It is worth noting that, if SARS raises an assessment in respect of a self-assessment-type tax, the five-year rule applies only if the taxpayer did not submit a return. If the taxpayer submitted a return relating to a self-assessment-type tax and, following an audit, for example, SARS raises an additional assessment, the three-year rule would apply under section 99(1)(a)[32] because such assessment would be an original additional assessment by SARS.

In terms of section 99(1)(c), an assessment raised in respect of a self-assessment-type tax in respect of which no return is required prescribes five years from the date of the payment of the tax for the relevant tax period or, if no payment is made, five years from the effective date. The effective date is the date referred to in section 187(3), (4) or (5).[33]

It follows that if an assessment (a) contains an error, (b) is an assessment on a self-assessment-type tax and (c) is older than five years, SARS cannot allow the taxpayer's request for a reduced assessment unless an exception to the general rule applies.

30 See the definition of 'date of assessment' in s 1.

31 See also *Commissioner for the South African Revenue Service v Char-Trade 117 CC t/a Ace Packaging* [2018] ZASCA 89.

32 As discussed in para. 6.4.1.1.

33 See the definition of 'effective date' in s 1.

6.4.1.3 General prescription rule: section 99(1)(d)(ii) and (iii)[34]

Applicable Law

Section 99(1)(d)(ii) and (iii) – Period of limitations for issuance of assessments

(1) An assessment may not be made in terms of this Chapter ...

(d) in the case of ...

(ii) a reduced assessment, if the preceding assessment was made in accordance with the practice generally prevailing at the date of that assessment; or

(iii) a tax for which no return is required, if the payment was made in accordance with the practice generally prevailing at the date of that payment; ...

In terms of section 99(1)(d) an original assessment prescribes on the date on which it is issued, to the extent that it is based on a practice generally prevailing at that time. This also applies to assessments issued on a self-assessment-type tax in respect of which no return is required, as long as the payment that is made is based on a practice generally prevailing at the time payment is made.

Therefore, if an assessment is based on a practice generally prevailing, the taxpayer should not be able to succeed with a request for a reduced assessment in respect of same. It is submitted that, in practice, the chances of successfully relying on any of the exceptions to avoid SARS raising this prescription rule to decline a request for a reduced assessment under section 93(1)(d) are slim to none.

6.4.1.4 General prescription rule: section 99(1)(e)

Applicable Law

Section 99(1)(e)

(1) An assessment may not be made in terms of this Chapter ...

(e) in respect of a dispute that has been resolved under Chapter 9.

In terms of section 99(1)(e), an assessment issued in respect of a dispute that has been resolved prescribes on the date of resolution of a dispute under chapter 9. This prescription rule applies when, for example, an objection submitted by a taxpayer is allowed, and a reduced assessment is issued to give effect to the allowed objection under section 93(1)(a). The reduced assessment so issued prescribes, under section 93(1)(e), on the date of its issue.

This prescription rule can also apply in cases where a taxpayer's objection to an assessment is disallowed and no appeal is filed (i.e. the taxpayer accepts the assessment previously disputed). When a taxpayer accepts the assessment by not submitting an appeal, the dispute is resolved and the assessment hitherto under dispute prescribes under section 93(1)(e).

The relevance hereof in the context of reduced assessment requests can be explained as follows. Were a taxpayer decides not to appeal against an assessment but instead to submit a reduced assessment request in relation to that assessment, SARS would arguably be prohibited

34 S 99(1)(d)(i) operates to prevent the issue of an additional assessment and is not relevant in this context. It cannot serve to prevent the taxpayer from being successful with a reduced assessment request under s 93(1)(d).

from changing the assessment in question under section 99(1)(e) even if it agreed that there was an error in the assessment.

The facts in *Rampersadh v CSARS* (*supra*) are relevant here. In this case, the taxpayer objected to certain assessments, which objection was disallowed by SARS. When it was out of time to submit an appeal, the taxpayer filed a request for a reduced assessment, under section 93(1)(d). It appears from the judgment that SARS did not raise section 99(1)(e) as a reason why the request could not be allowed. The interpretation of section 99(1)(e) was therefore not considered or pronounced upon by the court. There appears to be no authority on the impact, if any, that section 93(1)(e) may have on requests for reduced assessments in circumstances where the taxpayer does not file an appeal.

It could be argued that a taxpayer who, following an unsuccessful objection, submits a request for a reduced assessment is still disputing the assessment and that therefore the dispute is not resolved and section 99(1)(e) cannot apply. The trouble with that argument is that such further dispute by the taxpayer under the auspices of section 93(1)(d) is not envisaged by chapter 9. The dispute under chapter 9 is arguably resolved if the taxpayer does not file an appeal (an appeal being the step prescribed under chapter 9 of the TAA for continuing to dispute an assessment after an objection has been disallowed).

Section 93(2), however, clearly provides that an assessment may be reduced under section 93(1)(d) even if no appeal has been noted. If section 99(1)(e) were to prevent the making of a reduced assessment in circumstances where the taxpayer has not filed an appeal, it would be in conflict with section 93(2). It is submitted that whatever interpretation is to be followed of section 99(1)(e), it cannot be such as creates a conflict with section 93(2), which is clear and unambiguous. On that basis, it is submitted that section 99(1)(e) cannot prevent a taxpayer from succeeding with a reduced assessment request.

It should be noted, however, that if an assessment is reduced or confirmed, following the resolution of a dispute under chapter 9, and the taxpayer makes a request under section 93(1)(d), in relation to something other than the issue resolved under chapter 9, this prescription rule will not prevent SARS from making a reduced assessment.

6.4.1.5 Prescription exception: section 99(2)(a) and (b)

Applicable Law

Section 99(2)(a) and (b) – Period of limitations for issuance of assessments

(2) Subsection (1) does not apply to the extent that—

(a) in the case of assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to—

(i) fraud;

(ii) misrepresentation; or

(iii) nondisclosure of material facts;

(b) in the case of self-assessment, the fact that the full amount of tax chargeable was not assessed, was due to—

(i) fraud;

(ii) intentional or negligent misrepresentation;

(iii) intentional or negligent nondisclosure of material facts; or

(iv) the failure to submit a return or, if no return is required, the failure to make the required payment of tax;

In terms of section 99(2)(a) none of the general prescription rules applies to an assessment by SARS if, as a result of fraud, misrepresentation or non-disclosure of material facts, the full amount of tax is not assessed to tax.

As regards self-assessment-type taxes, section 99(2)(b) states that if, because of fraud, intentional or negligent misrepresentation or intentional or negligent non-disclosure of material facts, the full amount of tax chargeable is not assessed the self-assessment does not prescribe, even though one or more of the general rules apply.

From a taxpayer's perspective, though, the question that arises is whether the taxpayer can rely on the provisions of section 99(2)(a) and (b) in an attempt to prevent prescription from preventing a reduced assessment.[35]

The wording of section 99(2)(a) and (b) clearly states that the general rule does not apply to the extent that '*the full amount of tax chargeable was not assessed*'. It is submitted that this exception applies only if there should be an increase in the amount assessed originally. A taxpayer requesting a reduced assessment would invariably require a decrease in the amount of tax assessed on the original assessment. It is trite that the purpose of section 99(2)(a) and (b) is to ensure that dishonest taxpayers do not get the benefit of prescription. Allowing a taxpayer to rely on section 99(2)(a) and (b) to try to get a reduced assessment would skew the purpose of section 99(1) and (2).

It must follow, from the above, that a taxpayer cannot rely on the aforementioned exception merely to avoid prescription in an effort to secure a reduced assessment.

6.4.1.6 Prescription exception: section 99(2)(c)

Applicable Law

Section 99(2)(c) – Period of limitations for issuance of assessments

(2) Subsection (1) does not apply to the extent that ...

(c) SARS and the taxpayer so agree prior to the expiry of the limitations period;

Section 99(2)(c) allows the taxpayer and SARS to agree that prescription does not apply. A taxpayer who seeks a reduced assessment may accordingly request that SARS agree that prescription does not apply. There are no rules as to when SARS should so agree with a taxpayer.

For this exception to apply, SARS and the taxpayer would have to reach the agreement before the relevant assessment prescribes. In the light of this, and the fact that there are no rules that govern when SARS should agree with a taxpayer, the exception in section 99(2)(d) may very well be a more effective way of preventing prescription from resulting in the taxpayer's request for a reduced assessment under section 93(1)(d) not being allowed.

35 See chap. 4 for an analysis of this section from SARS's perspective.

6.4.1.7 Prescription exception: section 99(2)(d)(iii)[36]

Applicable Law

Section 99(2)(d)(iii) – Period of limitations for issuance of assessments

(2) Subsection (1) does not apply to the extent that ...

(d) it is necessary to give effect to ...

(iii) an assessment referred to in section 93 (1) (d) if SARS becomes aware of the error referred to in that subsection before expiry of the period for the assessment under subsection (1); or

Under this exception, an assessment will not prescribe if SARS becomes aware of the relevant error in the assessment before the assessment prescribes. It is submitted that a taxpayer can rely on section 93(1)(d), even after prescription, if SARS is made aware of the error before the assessment prescribes. It stands to reason, then, that the reduced assessment request remedy is available indefinitely, as long as SARS is made aware of the error before the assessment prescribes and no other provision prevents the taxpayer from requesting a reduced assessment as discussed above.

6.4.1.8 Prescription exception: sections 11D(20) and 6*quat*(5) of the ITA

Applicable Law

Section 11D(20) of the ITA – Deductions in respect of scientific or technological research and development

(20) (a) A taxpayer may, notwithstanding Chapter 8 of the Tax Administration Act, apply to the Commissioner to allow all deductions provided for under this section in respect of research and development if—

(i) expenditure in respect of that research and development was incurred on or after the date of receipt of an application by the Department of Science and Technology for the approval of that research and development;

(ii) that expenditure was not allowable in respect of a year of assessment solely by reason of the absence of approval of that research and development under subsection (9); and

(iii) that research and development is approved in terms of subsection (9) after that year of assessment.

(b) The Commissioner may, notwithstanding the provisions of sections 99 and 100 of the Tax Administration Act, make a reduced assessment for a year of assessment where expenditure incurred during that year in respect of research and development would have been allowable as a deduction in terms of this section had the approval in terms of subsection (9) been granted during that year of assessment.

Section 6quat(5) of the ITA – Rebate or deduction in respect of foreign taxes on income.

(5) Notwithstanding section 99 (1) or 100 of the Tax Administration Act, an additional or reduced assessment in respect of a year of assessment to give effect to subsections (1) and (1A) may be made within a period that does not exceed six years from the date of the original assessment in respect of that year.

36 S 99(2)(d)(i) is not discussed here. It requires the submission of an objection before it can apply. In the context of a reduced assessment request that exception in s 99(2)(d)(i) is irrelevant.

In terms of section 11D(20), a taxpayer may request a reduced assessment, even after prescription, if the requirements of that subsection have been satisfied.

In terms of section *6quat*(5), a taxpayer may be allowed to request a reduced assessment to allow foreign tax credits as a deduction or credit despite the fact that the assessment has prescribed, provided the request is made within a period of six years from the date of the original assessment.

6.4.2 Finality of assessments

Applicable Law

Section 100(1)(a)(i) – Finality of assessment or decision

(1) An assessment or a decision referred to in section 104 (2) is final if, in relation to the assessment or decision—

(a) it is an assessment described—

(i) in section 95 (1) and no return described in section 91 (5) (b) has been received by SARS; ...

In terms of section 100(1)(a)(i), an assessment made in terms of section 95(1)[37] is final provided no return has been submitted as contemplated section 91(5). It follows that if a taxpayer submits a request for a reduced assessment in respect of an estimated assessment raised under section 95(1) SARS would be unable to issue a reduced assessment because the estimated assessment is final under section 100(1)(a)(i).

Should the taxpayer submit the relevant return to SARS and SARS issue a reduced or additional assessment consequent upon the submission of that return, such reduced or additional assessment would not be final under section 100(1)(a)(i). SARS would therefore not be prohibited from issuing a reduced assessment under section 93(1)(d), provided none of the other rules prevents SARS from doing so.

PROPOSED CHANGE IN THE 2020 DRAFT BILL

The Draft Tax Administration Laws Amendment Bill, 2020, published for public comment on 31 July 2020, proposes to amend section 95 to allow SARS to issue an estimated assessment if the taxpayer does not submit relevant material to SARS after SARS has requested the relevant material at least twice. If eventually promulgated in its current form, this amendment will be effective from the date of promulgation. As explained in the preceding paragraphs, assessments raised in consequence of the taxpayer's failure to submit a return is final under section 100(1)(a)(i). No amendment is proposed to section 100(1)(a) to achieve a similar result for assessments raised where a taxpayer has failed to provide relevant material.[38] It follows, based on the proposed amendments, that an estimated assessment raised in consequence of the taxpayer's failure to submit relevant material to SARS would not be final; therefore a reduced assessment request in respect of such assessment should not fail in consequence of section 100.

continued

37 Estimated assessments made in consequence of the taxpayer's failure to submit a return – see chap. 3.

38 In fact, given the proposed movement of the provisions of s 91(3)–(6) to s 95, without a consequential amendment to s 100, the issue of an estimated assessment for failure to submit a return would also not prevent the taxpayer from relying on any of the other remedies discussed herein to challenge such estimated assessment. This appears to be an oversight which it is suspected will be remedied in the final Bill.

At the time of drafting, it is not clear whether the fact that there is no proposal to amend section 100 in consequence of the amendment to section 95 (and section 91) is an oversight or intentional. It is submitted that there should be no amendment to section 100 in consequence of the amendment to section 95 (and section 91), at least in so far as an estimated assessment would be based on the taxpayer's failure to submit relevant material, as the absence of such an amendment should allow taxpayers an opportunity to challenge an assessment through mechanisms other than objection and appeal.[39] If an assessment raised under section 95 for failure to submit relevant material is also final under section 100, the taxpayer would not have any remedy other than approaching the High Court to challenge such assessment.[40] Whilst the submission of the relevant material would prevent that result, it is not inconceivable that a scenario may arise in which the taxpayer has submitted material which SARS does not consider relevant material. It should be noted that the discussion above relates to a draft Bill which is subject to change.

6.4.3 Finality of assessments: section 100(1)(a)(ii)

Applicable Law

Section 100(1)(a)(ii) – Finality of assessment or decision

(1) An assessment or a decision referred to in section 104(2) is final if, in relation to the assessment or decision—

(a) it is an assessment described ...

(ii) in section 95(3);

In terms section 95(3), if a taxpayer is unable to submit an accurate return, SARS and the taxpayer may agree on an assessment. SARS is not permitted to issue a reduced assessment under section 93(1)(d) if the assessment in respect of which the taxpayer requires a reduction constitutes an agreed assessment, because the agreed assessment is final in terms of section 100(1)(a)(ii).

6.4.4 Finality of assessments: section 100(1)(b) and (c)

Applicable Law

Sections 100(1)(b) and (c) – Finality of assessment or decision

(1) An assessment or a decision referred to in section 104(2) is final if, in relation to the assessment or decision ...

(b) no objection has been made, or an objection has been withdrawn;

(c) after the decision of an objection, no notice of appeal has been filed or a notice has been filed and is withdrawn;

39 Seeing as the taxpayer would not be able to object – see chap. 7.

40 Taxpayers may, however, also consider objecting to the assessment and if the objection is declared invalid because the taxpayer cannot object to such assessment, launching an application under rule 52 of the rules promulgated under s 103 ("the rules") to have the objection declared valid (see chap. 11).

In terms of section 100(1)(b), an assessment is final if no objection is lodged or if an objection is lodged but then withdrawn. In terms of section 100(1)(c), an assessment is final if, after an objection has been lodged, no appeal is noted or an appeal is noted but then withdrawn.

On a plain reading of section 100(1)(b) and (c), the fact that the taxpayer may request a reduced assessment, as confirmed in *Rampersadh v CSARS*, does not mean that the assessment has not become final. On this interpretation, a request for a reduced assessment in the absence of an objection or appeal renders the request moot because, no matter how compelling that request may be, the assessment to which it relates is final, which fact would in turn prevent SARS from issuing a reduced assessment.[41]

Such an interpretation is untenable, however, since it would result in the taxpayer's always having to file an objection or note an appeal if it were to have any chance of ultimately getting a reduced assessment. Section 93(2) clearly provides that a reduced assessment may be issued even though no objection is filed or appeal noted.[42]

It should be noted, however, that a taxpayer who withdraws its objection will not be able thereafter to request a reduced assessment, as the assessment will have become final under section 100. The same applies when a taxpayer notes an appeal but subsequently withdraws it.

6.4.5 Finality of assessments: section 100(1)(d)

Applicable Law

Section 100(1)(d) – Finality of assessment or decision

(1) An assessment or a decision referred to in section 104(2) is final if, in relation to the assessment or decision ...

(d) the dispute has been settled under Part F of Chapter 9;

In terms of section 100(1)(d), when an assessment is issued to give effect to a settlement agreement reached in terms of part F of chapter 9, such assessment is final. It follows that SARS would not be permitted to issue a reduced assessment under section 93(1)(d) if the request relates to an assessment that is issued to give effect to such a settlement agreement. Of course, if the taxpayer identifies an error on the assessment that does not give effect to the settlement agreement, this exclusion would not, prevent the taxpayer from succeeding with a request for a reduced assessment to get such an error remedied.

---

41 See also *Medox Ltd v Commissioner for the South African Revenue Service* [2015] 77 SATC 233.

42 It is true that failure to submit an objection timeously could result in the assessment's being final under s 100(1)(b) only if more than 3 years have elapsed from the date of assessment (s 104(5)(b)) – in other words, after prescription. A request submitted under s 93(1)(d), then, cannot fail simply because no objection has been lodged if the assessment on which a reduction is requested is less than three years old. When considered in this light, the operation of s 100(1)(b) will never result in a reduced assessment request being declined. It would rather be s 99 that would prevent such a request from being successful which in turn renders the impact of s 100(1)(b) on requests for reduced assessments largely academic. If more than 3 years have elapsed, the assessment *may* have prescribed (self-assessments prescribe after 5 years); therefore the application of s 100(1)(b) can indeed be a reason why a request for a reduced assessment cannot be allowed in respect of reduced assessments requests on self-assessment type taxes. Furthermore, an assessment can become final under s 100(1)(c) when more than 75 days have elapsed from the date of the decision to disallow the objection (s 107(2)(b) – see chap. 10). But, if more than 75 days have indeed elapsed, the assessment can become final and s 100(1)(c) before the assessment prescribes. In light hereof, the application of s 100(1)(c) could indeed be a reason why a request for a reduced assessment cannot be allowed.

6.4.6 Finality of assessments: section 100(1)(e) to (g)

Applicable Law

Section 100(1)(e) to (g) – Finality of assessment or decision

(1) An assessment or a decision referred to in section 104(2) is final if, in relation to the assessment or decision ...

(e) an appeal has been determined by the tax board and there is no referral to the tax court under section 115;

(f) an appeal has been determined by the tax court and there is no right of further appeal; or

(g) an appeal has been determined by a higher court and there is no right of further appeal.

In terms of these provisions, once an appeal has been decided by the Tax Board, the Tax Court or a higher court, the assessment to which that appeal relates is final if there is no further right of appeal (or referral to the Tax Court from the Tax Board). So, for example, if a taxpayer wins a case in the Tax Court and secures a reduced assessment and SARS then, on appeal to the High Court, gets the Tax Court's decision overturned, the additional assessment that has to be made cannot be reduced under section 93(1)(d) if the taxpayer has no right of appeal to the Supreme Court of Appeal or Constitutional Court. If there is a right of appeal but the taxpayer does not exercise it, deciding instead to request a reduced assessment under section 93(1)(d), it would appear that SARS would not be prohibited by section 100 from allowing such request. It is submitted, however, that SARS would not be able to reduce an assessment that has been confirmed by a court and hence a request for a reduced assessment in circumstances where a court has confirmed the assessment and the taxpayer does not exercise a right to appeal should not succeed.

6.5 Reduced assessment requests under section 93(1)(d): procedural aspects

There was, at the time of going to print, no prescribed procedure in the TAA for the submission of requests for a reduced assessment under section 93(1)(d).

The TAA does not prescribe a time period within which the taxpayer must request a reduced assessment[43] or within which SARS must respond to such a request. There is also no prescribed submission channel for these requests.

In *Rampersadh v CSARS*, the court held that requests for a reduced assessment simply take the form of a request to SARS.

In the SARS dispute guide, SARS states that the procedure for reduced assessment requests is to submit a corrected tax return (i.e. the Request For Correction (RFC) procedure). In the SARS guide titled *Request for Correction and Notice of Objection Guide* SARS indicates that a corrected return should be filed as follows:

> '*If you want to print a copy of the ...* [tax return to be corrected], *click here (it'll take you to the Adobe download page). You need to then fill it in, sign it and drop it off at a SARS branch or post it to SARS (the address as indicated on your assessment).*

43 See, however, the discussion of prescription in para. 6.4.1 above.

If you submitted your return via eFiling, login to the eFiling site, then click on Services. You will find a question about corrections and objections with a link taking you to the RFC and NOO forms.' [my insertion].

At the time of going to print, the link for downloading the tax return to be corrected did not work, nor was there a question about corrections on the Services page in the eFiling site. On SARS's website[44] it is stated that an RFC may be filed at a SARS branch or

'*will be available through*:

– *eFiling – this channel can be used by eFilers to request, complete and submit the correction.*

- *Logon to eFiling*
- *Select*
  - *Returns*
  - *Returns History*
    - *The applicable type of tax (e.g. Income Tax, VAT, etc.)*
    - *The applicable return/declaration.*
- *Click Open on the far right.*

Once you are on the workpage, select Request Correction: Request Correction.'

It often happens in practice that the above procedure cannot be followed because the 'Request Correction' button on the eFiling site is greyed out. SARS appears to be aware of this problem and states on its website[45] that:

'*If the Request Correction button isn't available (e.g. greyed out), this means that you're not able to submit a request. You will need to lodge an objection.*'

The fact that the button may be greyed out does not necessarily mean the taxpayer is not able to rely on section 93(1)(d) to request a reduced assessment.

In cases where the RFC option is not available (or, in some cases, even where it is available), a request for correction may, as was held in *Rampersadh v CSARS*, take the form of a request typically reduced to writing in a letter that is emailed to SARS.

A decision by SARS not to allow a request in terms of section 93(1)(d) clearly constitutes administrative action.[46] It follows that because a decision by SARS not to allow a request under section 93(1)(d) is administrative action, PAJA sets out what taxpayers' rights are in respect of such request.

In terms of section 3(1) of PAJA, any administrative action that materially or adversely affects a taxpayer's rights must be procedurally fair. In terms of section 3(2)(b), in order to give effect to the right to procedurally fair administrative action, the administrator – SARS, for example – must (subject to certain exceptions) give the person whose rights are affected:

'(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

---

44 https://www.sars.gov.za/ClientSegments/Individuals/What-If-Not-Agree/Pages/Request-for-Corrections-.aspx (accessed 12 June 2020).

45 https://www.sars.gov.za/ClientSegments/Individuals/What-If-Not-Agree/Pages/Request-for-Corrections-.aspx (accessed 12 June 2020).

46 See the *Rampersadh* and *Crookes Brothers* cases.

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.'

Since SARS's decision not to grant a request constitutes administrative action, it should be determined whether the taxpayer concerned has a right that can be materially or adversely affected by the decision, and, if such a right exists, whether it is indeed materially or adversely affected by the decision. It is only when the taxpayer has a right that is materially or adversely affected by a decision not to grant a request in terms of section 93(1)(d) that the taxpayer has the right to procedural fairness under PAJA[47] and that SARS must comply with the requirements under section 3(2)(b) listed above.

Section 93(1)(d) arguably does give taxpayers a right to a reduced assessment (subject to SARS's satisfaction that the requirements have been satisfied) and it does (certainly following the judgment in *Rampersadh v CSARS*) give them the right to request a reduced assessment in terms of that provision. Further still, taxpayers have the right to have a request for a reduced assessment fairly considered. SARS's decision not to grant such a request does, it is submitted, adversely affect the taxpayer's rights.

It is submitted therefore that unless SARS can justify a deviation from the above requirements in terms of section 3(4) of PAJA it will have to:

- provide the taxpayer with notice of its proposed decision to disallow the request for reduced assessment before it makes the decision to disallow the request; and
- provide the taxpayer with a reasonable opportunity to make representations before the request for reduced assessment is disallowed.

It is not inconceivable that SARS may be able to depart from the need to comply with these requirements in the light of the fact that the taxpayer would have been allowed to make representations in its request for a reduced assessment. It is submitted though that it is highly unlikely that SARS would be able to deviate from the requirement to provide the taxpayer with:

- a clear statement of the decision to disallow the request, after the request has been disallowed;
- adequate notice of any right of review or internal appeal, after the request has been made; and
- notice of its right to request reasons, after the decision has been made to disallow the request.

SARS's failure to comply with these requirements may in and of itself constitute a ground for judicial review under section 6 of PAJA.

6.6 Reduced assessment requests under section 93(1)(d): what if SARS does not respond or does not respond favourably?

If SARS does not respond at all to a valid request for a reduced assessment under section 93(1)(d), the taxpayer would be entitled to:

- submit a complaint to the Complaints Management Office (CMO);
- submit a complaint to the Tax Ombud; or

47 A legitimate expectation will suffice, but it is submitted that the taxpayer would not have a legitimate expectation.

– consider launching appropriate litigation proceedings against SARS to secure a response from it.[48]

If SARS does respond but not favourably, the taxpayer may consider either requesting a review of SARS's decision in terms of section 9[49] or launching a review application[50] in the High Court under PAJA.

6.7 Requests for a reduced assessment under section 93(1)(e): when the taxpayer can rely on it

Applicable Law

Section 93(1)(e) – Reduced assessments

(1) SARS may make a reduced assessment if ...

(e) a senior SARS official is satisfied that an assessment was based on—

(i) the failure to submit a return or submission of an incorrect return by a third party under section 26 or by an employer under a tax Act;

(ii) a processing error by SARS; or

(iii) a return fraudulently submitted by a person not authorised by the taxpayer.

Section 105 – Forum for dispute of assessment or decision

A taxpayer may only dispute an assessment or 'decision' as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs.

The circumstances under which section 93(1)(e)(i) applies are self-evident. The following examples are illustrative.

EXAMPLE

Example 6.2 – Section 93(1)(e)(i) – failure by a third party to submit a return

Bank A paid interest to natural person, Mr B, in the amount of R100 000 during Mr B's 202X year of assessment. Bank A is required under section 26 to submit a return to SARS informing SARS of the R100 000 paid to Mr B but fails to do so. SARS calculates the interest to which Mr B is entitled from Bank A to be R120 000 and taxes Mr B accordingly. The only reason for doing so is the absence of the return which had to be issued by the bank. Mr B may therefore, in terms of section 93(1)(e)(i), request a reduced assessment to ensure he is assessed to tax on only R100 000 without having to lodge an objection.

48 It must be reiterated at this point that, where High Court litigation is concerned, proper legal advice and assistance should be sought in order to determine the most appropriate course of action.

49 See para. 6.19.

50 See para. 6.23.

EXAMPLE

Example 6.3 – Section 93(1)(e)(i) – submission of an incorrect return by a third party

Bank A paid interest to a natural person, Mr B, in the amount of R100 000 during Mr B's 202X year of assessment. Bank A is required under section 26 to submit a return to SARS informing SARS of the R100 000 paid to Mr A. Bank A submits the return but declares that it paid Mr B an amount of R1 000 000 in interest. SARS raises an assessment on the basis that Mr B earned interest of R1 000 000. Mr B may request a reduced assessment under section 93(1)(e)(i) without having to object.

EXAMPLE

Example 6.4 – Section 93(1)(e)(i) – failure by an employer to submit a return

Mr B is employed by XYZ (Pty) Ltd. In his 202X year of assessment, Mr B earned remuneration of R1 200 000 from XYZ (Pty) Ltd. XYZ (Pty) Ltd fails to submit the EMP501 for the 202X year of assessment. As a result, SARS assesses Mr B to income tax on R1 500 000, comprising the R1 200 000 he received in remuneration and a further R300 000 he received as a loan from XYZ (Pty) Ltd. Mr B may be entitled to a reduced assessment under section 93(1)(e)(i) without having to lodge an objection.

EXAMPLE

Example 6.5 – Section 93(1)(e)(i) – incorrect return submitted by an employer

Mr B is employed by XYZ (Pty) Ltd. In his 202X year of assessment, Mr B earned remuneration of R1 200 000 from XYZ (Pty) Ltd. XYZ (Pty) Ltd submits the EMP501 for the 202X year of assessment in which it discloses remuneration paid to Mr B of R1 500 000. As a result, SARS assesses Mr B to income tax on R1 500 000, comprising the R1 200 000 he received in remuneration and a further R300 000 he received as a loan from XYZ (Pty) Ltd. Mr B may be entitled to a reduced assessment under section 93(1)(e)(i) without having to lodge an objection.

The circumstances under which section 93(1)(e)(ii) would apply require further analysis. The TAA does not define what a 'processing error' is, and it is by no means clear from the plain wording what was intended by the use of those words.

The Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2015 (2015 MO) states the following in so far as section 93(1)(e) is concerned:

> '*Finality in a tax assessment is important for both taxpayers and SARS, which is why there is a period within which a SARS may revise an assessment to the benefit or otherwise of a taxpayer. This period, which is commonly known as the prescription period, is either three years for taxes assessed by SARS or five years for taxes that are self-assessed by taxpayers. Limited exceptions to prescription apply where fraud, misrepresentation or material non-disclosure exists in a tax return, in order to give effect to the outcome of a dispute resolution process—such as an objection or appeal to a court. The original purpose of the insertion of section 98(1)(d) was to address problems with erroneous assessments which are often only discovered after all prescription periods and remedies have expired and it becomes apparent that it would be inequitable to recover the tax due under such assessments. An example would be that of a retiree who was assessed in error based on incorrect information supplied by an employer or a retirement*

fund, who fell below the tax threshold after retirement and thus ceased to submit returns to SARS and was only traced some years later in order to recover the outstanding tax debt as a result of the incorrect assessment. The insertion of the new paragraph aimed to address this problem by allowing for the withdrawal of assessments in specified narrow circumstances, which were the following:

- *The assessment must be based on a readily apparent factual error by the taxpayer in a return; a processing error by SARS; or a return fraudulently submitted by a person not authorised by the taxpayer;*
- *The assessment imposes an unintended tax debt in respect of an amount that the taxpayer should not have been taxed on;*
- *The recovery of the tax debt under the assessment would produce an anomalous or inequitable result;*
- *There is no other remedy available to the taxpayer; and*
- *It is in the interest of the good management of the tax system.*

However, it immediately became apparent that taxpayers interpreted the section as a general mechanism to address their "old mistakes" in assessments that were final, where the taxpayer could no longer request a reduced assessment or where the objection process as well as appeals to the tax and higher courts had been exhausted. In respect of most of these matters there was no unintended tax debt the recovery of which would be inequitable. In actual fact, if most of the assessments sought to be withdrawn were given effect to, SARS would have had to pay refunds. The insertion of section 98(1)(d) was not intended as a substitute to the above procedures nor as a "post-appeal appeal" remedy, including in one memorable case an attempt to reverse an adverse judgment by the Supreme Court of Appeal. The true intention was to address adverse assessments resulting from factors beyond the control of the taxpayer, for example the failure to submit a return or submission of an incorrect return by a third party under section 26 or by an employer under a tax Act, where the right of the taxpayer to object or seek an extension within the period referred to in section 104(3) has expired. This happens where a taxpayer only becomes aware of the problem after three years and can no longer object against the assessment, which has become final. Accordingly, it is proposed that section 98(1)(d) be deleted in order to avoid the problems discussed and moved to a new section 93(1)(e), in an amended form. See the notes on paragraph 2.49 for a discussion in this regard.'

From the 2015 MO it is evident that '*The original purpose of the insertion of section 98(1)(d) was to address problems with erroneous assessments which are often only discovered after all prescription periods and remedies have expired and it becomes apparent that it would be inequitable to recover the tax due under such assessments*'. The plain wording of section 98(1)(d), as it read at the time, supported this stated intention.

The 2015 MO, however, goes on to state that taxpayers were relying on this remedy in section 98(1)(d) to fix old mistakes after prescription and alludes to the fact that this was not the purpose of section 98(1)(d): '*The true intention was to address adverse assessments resulting from factors beyond the control of the taxpayer*' and '*The insertion of section 98(1)(d) was not intended as a substitute to* [objections and s 93(1)(d) reduced assessment requests]'. These statements, however, contradict the plain wording of section 98(1)(d) as it read at the time.

What is clear from the 2015 MO, though, is that section 93(1)(e), the 'replacement' for section 98(1)(d), was indeed intended to address only adverse assessments resulting from factors beyond the control of the taxpayer and not intended to provide a substitute mechanism for an objection and for a request for a reduced assessment under section 93(1)(d). Therefore, even though the 2015 MO seems to suggest that section 93(1)(e) replaced section 98(1)(d) in

amended form, the amendment was clearly a policy shift and not simply a move of section 98(1)(d) to section 93(1)(e) in amended form, as stated in the 2015 MO.

The plain wording of section 93(1)(e)(i) agrees with the stated intention in that a taxpayer may rely on section 93(1)(e)(i) to request a reduced assessment if the adverse assessment resulted from factors outside the control of the taxpayer, as is clear from Examples 6.2 to 6.5 above. It does not agree with the other stated intention, however: the individual taxpayers in Examples 6.2 to 6.5 would be entitled to object or to request a reduced assessment under section 93(1)(d). Clearly, then, on the basis of the plain wording, the remedy under section 93(1)(e)(i) is in effect a substitute for an objection and for a request under section 93(1)(d) for a reduced assessment.

Section 93(1)(e)(ii) applies when an assessment is incorrect because of a processing error made by SARS. Whatever the nature of the error may be, the plain wording of this provision also aligns with the first stated intention as per the 2015 MO as the error would have been made by SARS (as opposed to the taxpayer) for the taxpayer to rely on it. However, when an assessment is incorrect because of a processing error made by SARS, the taxpayer would be allowed to request a reduced assessment under section 93(1)(d) or may object. On a plain reading of the wording, the remedy under section 93(1)(e)(ii) is, in fact, a substitute for an objection and for a request under section 93(1)(d) for a reduced assessment.

Similarly, section 93(1)(e)(iii) applies only when an assessment was based on a return fraudulently submitted without authorisation from the taxpayer. Again, the plain wording of this provision coincides with the stated intention as per the 2015 MO in part as the assessment would have resulted from factors outside the control of the taxpayer. However, because the taxpayer would have be able to object or request a reduced assessment under section 93(1)(d), section 93(1)(e)(iii) is available as a substitute for section 93(1)(d) and objections.

Once the assessment in question prescribes, however, section 93(1)(e) is no longer a substitute for objections and section 93(1)(d) remedies: at that point, section 93(1)(e) is the only remedy. It seems, then, that the intention was not simply to prevent taxpayers who could have objected or used section 93(1)(d) from relying on section 93(1)(e) but to limit the circumstances under which taxpayers who could have objected or requested reduced assessments before prescription to rely on section 93(1)(e) after prescription to three specific scenarios, the scenarios envisaged in section 93(1)(e)(i) to (iii). Such scenarios are ostensibly of a type '*which* [*is*] *often only discovered after all prescription periods and remedies have expired*'.[51] It is in the light of this purpose that section 93(1)(e)(ii) must be interpreted.

The verb 'process' is defined to mean 'to treat or prepare by some particular series of actions, as in manufacturing' or 'to handle (papers, records, etc.) by systematically organizing them, recording or making notations on them, following up with appropriate action, or the like'.[52] It also means 'to deal with something according to a particular set of actions'[53] and 'to subject to or handle through an established usually routine set of procedures'.[54] The word 'procedure' is in turn defined as 'a particular way of accomplishing something or of acting'.[55]

On the basis of the definitions above, the word 'process' clearly refers to a sequence of actions, or to actions performed in a routine procedure, to achieve some end. In the context of section 93(1)(e), a processing error must mean a mistake made by SARS in the series of

51 The 2015 MO.
52 https://www.dictionary.com/browse/processing?s=t (accessed 12 June 2020).
53 https://dictionary.cambridge.org/dictionary/english/process (accessed 12 June 2020).
54 https://www.merriam-webster.com/dictionary/processing (accessed 12 June 2020).
55 https://www.merriam-webster.com/dictionary/procedures (accessed 12 June 2020).

actions taken by SARS to raise an assessment or an error in the routine procedures followed in the raising of an assessment.

However, to qualify as a processing error within the purview of section 93(1)(e), the mistake made by SARS must be such as is typically discovered only after the assessment has prescribed. SARS seems to suggest in its dispute guide that double counting and typographical errors are processing errors. It is difficult to see how these are the only types of error that are typically discovered only after all prescription periods have lapsed. The ambit of section 93(1)(e)(ii) is arguably wider than what is suggested in the SARS dispute guide.

Section 93(1)(e)(iii) applies when an assessment is based on a return fraudulently submitted by a person not authorised to submit it. In the light of the purpose of section 93(1)(e) as a whole, this, it is submitted, must mean that the return was submitted by a person other than the taxpayer and that the taxpayer had no knowledge of the submission. It is not inconceivable that a taxpayer may conspire with another person to submit a fraudulent return or even negligently permit the submission of a fraudulent return. Under these circumstances, the taxpayer would arguably have authorised the fraudulent submission of the return, or was otherwise in control or capable of controlling the submission of a return, and should not, in the light of the purpose of section 93(1)(e), be able to rely on this provision to secure a reduced assessment.

Practical issue: Returns fraudulently submitted

When a return is fraudulently submitted with a resultant assessment reflecting a refund, the taxpayer cannot rely on section 93(1)(e)(iii) to secure a reduced assessment. If SARS reverses the refund with a resultant understatement penalty through the issue, by SARS, of an additional assessment, such additional assessment is arguably not an assessment based on a return fraudulently submitted without the taxpayer's consent. Rather, the additional assessment is based on the audit or verification conducted by SARS. The taxpayer in this example arguably cannot rely on section 93(1)(e) in respect of such additional assessment. Whilst this may at first appear to be contradictory to the purpose of section 93(1)(e), given that the additional assessment was ultimately caused by the actions of another, the additional assessment in this example is not something that is typically discovered only after the assessment prescribes.[56] The taxpayer may, however, be able to rely on one of the other remedies to challenge the additional assessment provided that it has not prescribed.

PROPOSED CHANGE IN THE 2020 DRAFT BILL

The Draft Tax Administration Laws Amendment Bill, 2020, published for public comment on 31 July 2020, proposes to introduce a section 93(1)(f) which allows SARS to issue a reduced assessment when SARS has raised an estimated assessment in consequence of the taxpayer's failure to submit a return or to submit relevant material to SARS. The draft Bill is subject to change and no proposed amendments were in force at the time of writing.

56 Especially in the light of the requirement that SARS issue a letter of audit findings and include the grounds for assessment in the notice of assessment. See chaps 2 and 3.

6.8 Reduced assessment requests under section 93(1)(e): when the taxpayer cannot rely on it

The only circumstances under which a taxpayer may not rely on section 93(1)(e) are when the circumstances envisaged in section 93(1)(e) do not exist and when an assessment has become final through the operation of section 100.[57] The fact that the assessment may have prescribed is irrelevant since section 99(2)(e) allows for this remedy to operate even after the assessment has prescribed.

6.9 Reduced assessment requests under section 93(1)(e): procedural aspects

The comments in paragraph 6.5 also apply to requests for reduced assessments under section 93(1)(e).

6.10 Reduced assessment requests under section 93(1)(e): what if SARS does not respond or does not respond favourably?

If SARS does not respond at all to a valid request for a reduced assessment under section 93(1)(e), the taxpayer is entitled to:

- submit a complaint to the CMO;
- submit a complaint to the Tax Ombud; or
- launch appropriate litigation proceedings against SARS to force it to respond.

If SARS does respond but not favourably, the taxpayer may request a review of that decision in terms of section 9[58] or launch a review application in the High Court under PAJA.[59]

6.11 Withdrawal of assessments under section 98: when a taxpayer can rely on it

Applicable Law

Section 98 – Withdrawal of assessments

(1) SARS may, despite the fact that no objection has been lodged or appeal noted, withdraw an assessment which—

(a) was issued to the incorrect taxpayer;

(b) was issued in respect of the incorrect tax period; or

(c) was issued as a result of an incorrect payment allocation. ...

(2) An assessment withdrawn under this section is regarded not to have been issued, unless a senior SARS official agrees in writing with the taxpayer as to the amount of tax properly chargeable for the relevant tax period and accordingly issues a revised original, additional or reduced assessment, as the case may be, which assessment is not subject to objection or appeal.

57 On s 100, see paras 6.4.2 to 6.4.6, which apply *mutatis mutandis*.
58 See para. 6.19.
59 See para. 6.23.

Section 98 allows SARS to withdraw an assessment under certain very limited circumstances. Since an assessment withdrawn under section 98 is deemed, in terms of section 98(2), not to have been issued, section 98 is in effect a remedy for removing the liability created by such assessment. The circumstances under which section 98 may apply are self-evident and require no comment.

The SARS dispute guide[60] refers to the now repealed section 98(1)(d)[61] and also to the fact that section 98 operates despite prescription. Section 98(1)(d) was repealed with effect from 8 January 2016[62] and the exception to prescription in respect of section 98 withdrawals amended with effect from the same date. Section 98(1)(d) was 'replaced' on the same date with section 93(1)(e).[63]

The repeal of section 98(1)(d) raised the following question: if an assessment was incorrectly made before 8 January 2016, under circumstances falling within the ambit of the now repealed section 98(1), would the taxpayer still be allowed to rely on that provision today? Whilst the argument may be that a taxpayer must now rely on section 93(1)(e), given that it replaced section 98(1)(d) and that therefore it should not be necessary for the taxpayer to rely on section 98(1)(d) to secure a decrease in the amount assessed, section 93(1)(e) was not simply a replacement for section 98(1)(d) but was clearly a policy shift: it is much more restrictive than section 98(1)(d).

Logically, one would imagine that the taxpayer should be allowed to rely on section 98 in respect of assessments raised prior to 8 January 2016 as other taxpayers would have had access to the remedy under section 98(1)(d) in respect of assessments issued before section 98(1)(d) was repealed. However, section 98(1)(d) was not repealed with effect from 8 January 2016 and in respect of assessments issued on or after that date: it was simply repealed on that date. It follows that the remedy it provided is not available today, even if the assessment was issued before 8 January 2016. The constitutionality of the repeal of section 98 with effect from 8 January 2016 as opposed to with effect from 8 January 2016 and in respect of assessments raised on or after that date may be questioned, especially given that section 93(1)(e) does not achieve the same end as that of section 98(1)(d) despite being labelled in the 2015 MO as section 98(1)(d)'s replacement.

6.12 Withdrawal of assessments under section 98: when a taxpayer cannot rely on it

While it may appear that the remedy under section 98 is available only before the assessment prescribes or becomes final under section 100, it is submitted that this is not the case. Under section 98(2) an assessment withdrawn under section 98(1) is deemed not to have been issued. Accordingly, because it is deemed never to have existed in the first place, such an assessment cannot prescribe or become final. This also seems logical, given the circumstances under which section 98 applies. The following simple example illustrates the point.

60 At para. 4.3.
61 See para. 6.7.
62 The date of the promulgation of the Tax Administration Laws Amendment Act 23 of 2015.
63 See para. 6.7.

EXAMPLE

Example 6.6 – Withdrawals under section 98 post prescription

Mr J Steenhuizen receives an assessment for income tax of R1 000 000. However, the assessment was supposed to have been issued to another Mr J Steenhuizen, who turns out to be the son of the taxpayer to whom the assessment was actually issued. The fact that the assessment has prescribed cannot prevent the withdrawal of that assessment, given that the original purpose of section 98 was to allow a remedy when it would be inequitable to recover the tax assessed.

It follows that a taxpayer can rely on section 98 at any point in time, provided the requirements of 98(1) are complied with.

6.13 Withdrawal of assessments under section 98: procedural aspects

The comments in paragraph 6.5 also apply to requests for withdrawal of assessments under section 98.

6.14 Withdrawal of assessments under section 98: if SARS does not respond or does not respond favourably

If SARS does not respond at all to a valid request for the withdrawal of an assessment under section 98, the taxpayer is entitled to:

- submit a complaint to the CMO;[64]
- submit a complaint to the Tax Ombud;[65] or
- launch appropriate litigation proceedings against SARS to force it to respond.

If SARS does respond but not favourably, the taxpayer may request a review of that decision in terms of section 9[66] or launch a review application in the High Court under PAJA.[67]

64 As to procedure, see SARS's website at: https://www.sars.gov.za/Contact/How-Do-I/Pages/Lodge%20a%-20complaint.aspx.

65 As to procedure, see the Tax Ombud's website at: http://www.taxombud.gov.za/Complaints/Pages/default.aspx.

66 See para. 6.19.

67 See para. 6.23.

6.15 Internal review requests in terms of section 9: when the taxpayer can rely on it in respect of an assessment

Applicable Law

Section 9

(1) A decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act, excluding a decision given effect to in an assessment or a notice of assessment that is subject to objection and appeal, may in the discretion of a SARS official described in paragraph (a), (b) or (c) or at the request of the relevant person, be withdrawn or amended by—

(a) the SARS official;

(b) a SARS official to whom the SARS official reports; or

(c) a senior SARS official.

(2) If all the material facts were known to the SARS official at the time the decision was made, a decision or notice referred to in subsection (1) may not be withdrawn or amended with retrospective effect, after three years from the later of the—

(a) date of the written notice of that decision; or

(b) date of assessment of the notice of assessment giving effect to the decision (if applicable).

(3) A decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act is regarded as made by a SARS official authorised to do so or duly issued by SARS, until proven to the contrary.

The application of section 9 as a remedy to address adverse assessments requires some explanation. Clearly, the section applies only to decisions. It also applies to decisions given effect to in an assessment, provided the assessment is not subject to objection and appeal. An example of such a decision is a decision by SARS to increase a taxpayer's provisional tax estimate under paragraph 19(3) of the Fourth Schedule to the ITA. The taxpayer in such a case can, in terms of section 9, request SARS to review its decision to increase the estimate. However, since the increase constitutes an assessment, it follows that the assessment may be reduced only under section 93, which means that, because section 93(1)(a) to (c) is not an option, the only option is section 93(1)(d) or (e) (in some cases, section 98 may also be an option). Therefore, although section 9 may seem like a remedy to reduce an assessment, the taxpayer would ultimately have to satisfy the requirements of section 93(1)(d) or (e) – or of section 98 – before an assessment falling within the scope of section 9 may be reduced. As regards increases in provisional tax estimates, it is worth quoting here SARS's view as expressed in Interpretation Note 1, *Provisional Tax Estimates*, which states, in footnote 57:

> '*Although it is arguable that an increased estimate results in an additional assessment under section 92 the TA Act, read with the definition of "assessment" in section 1 of that Act, SARS will accept that an increased estimate does not result in an additional assessment for the purposes of the application of section 9 of the TA Act.*'

It follows that, in practice, SARS is willing to reduce an assessment under section 9, despite the wording of section 93, at least as far as provisional tax estimate increases are concerned.

6.16 Internal review requests in terms of section 9: when the taxpayer cannot rely on it in respect of an assessment

A taxpayer cannot rely on section 9 to challenge an assessment if the assessment that gives effect to the decision is subject to objection and appeal and arguably also not when the assessment has become final or prescribes[68] or when the circumstances under section 93(1)(d) and (e) do not exist.[69]

Furthermore, the ability to amend a decision is also limited by a time period, similar to the time periods associated with prescription of assessments. In terms of section 9(2), a decision cannot be withdrawn or amended (with retrospective effect) under section 9(1) within three years from the date of that decision if all material facts were known to the official who made the decision.

6.17 Internal review requests in terms of section 9: procedure – assessments

In practice, taxpayers would request a review under section 9 by submitting a complaint through eFiling to the CMO and selecting the box describing the nature of the complaint as concerning either 'legal and policy' or 'legal counsel'. This was confirmed in the Memorandum on the Objects of the Taxation Laws Amendment Bill, 2017, which stated that '*section 9 operates separately from the dispute resolution process and instead forms a legislative underpinning for SARS' internal complaints resolution procedures, managed by the SARS Complaints Management Office. Details of this process are available on the SARS website*'.

Whilst this process or submission channel used to work, it seems not to any longer, with complaints, which are actually requests for a review of a decision under section 9 typically being rejected by the CMO and the CMO referring the taxpayer back to the official who made the decision in the first place. This process is not effective, especially if the review is required by a senior SARS official. At the time of going to print, no other procedure was prescribed in the TAA or on SARS's website.

In practice, requests can in some cases be emailed to a senior SARS official. At the time of going to print, though, there was no list of email addresses of senior SARS officials.

6.18 Internal review requests in terms of section 9: what if SARS does not respond or does not respond favourably in the context of an assessment?

If SARS does not respond at all to a valid request for the amendment of a decision given effect to in an assessment, the taxpayer may:

- submit a complaint to the CMO;
- submit a complaint to the Tax Ombud; or
- launch appropriate litigation proceedings against SARS to force it to respond.

If SARS does respond but not favourably, arguably the taxpayer's only remedy would be to launch a review application under PAJA.[70]

---

68 See paras 6.4.1.1 to 6.4.1.8 and 6.4.2 to 6.4.6.

69 On the basis that an assessment may be reduced only under s 93. An assessment may not be reduced under s 9.

70 See para. 6.23.

6.19 Internal review requests in terms of section 9: when the taxpayer can rely on it in respect of a decision by SARS

The Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2017 states that section 9 is applicable only to review decisions that are not subject to objection and appeal. The plain wording of section 9 does not clearly state that when an objection lies against a decision the taxpayer cannot request a review of that decision in terms of section 9.

The basis for the submission that section 9 is available only for decisions that are not subject to objection and appeal probably stems from section 105, which states that a decision that is subject to objection and appeal may be disputed only under chapter 9 of the TAA.[71] It follows that the remedy under section 9 is available for review of decisions taken by SARS that are not subject to objection and appeal. These decisions would include, for example:

- a decision not to allow a taxpayer's request for a reduced assessment in terms of section 93(1)(d) and (e) or section 98;
- a decision not to grant Voluntary Disclosure Program (VDP) relief to a taxpayer who applied for VDP relief;
- a decision not to issue a tax clearance certificate/PIN;
- a decision not to allow an objection;[72] and
- a decision not to condone a late request for reasons.

A useful starting point for identifying the decisions falling within the ambit of section 9 is to consider all decisions that are subject to objection and appeal.[73] A decision not listed there and not given effect to in an assessment that is subject to objection and appeal may be reviewed under section 9.

6.20 Internal review requests in terms of section 9: when the taxpayer cannot rely on it in respect of a decision

If a decision is subject to objection and appeal or is a decision that is given effect to in an assessment that is subject to objection and appeal the taxpayer cannot rely on section 9 to have that decision reviewed.

If, however, the decision is not subject to objection and appeal and is not given effect to in an assessment that is subject to objection and appeal the taxpayer can rely on section 9 to request a review of that decision at any point in time, subject only to the three-year limitation period in section 9(2).

As stated in paragraph 6.16, above, SARS cannot withdraw or amend a decision with retrospective effect more than three years after the decision was made if the material facts were known to the official at the time of making the decision.

---

71 Whilst the High Court in *Rampersadh v CSARS* held that s 105 does not oust that court's jurisdiction to hear review applications, it is submitted that s 105 would do just that in the case of a decision that is subject to objection and appeal, 'unless a High Court otherwise directs'.

72 An appeal under s 107 is not an appeal against SARS's decision not to allow the objection; it is an appeal against the assessment. In the true sense, then, an appeal under s 107 is actually a post-objection objection remedy. It is worth noting in support of the fact that an appeal is not an appeal against a decision to disallow an objection that the grounds for SARS's assessment, as defined in rule 1 of the rules – defined in fn 40 above, do not include the reasons for SARS's disallowance of the objection.

73 See chap. 7.

6.21 Internal review requests in terms of section 9: procedure – decisions

Paragraph 6.17, above, applies to requests for reviews of decisions in terms of section 9.

6.22 Internal review requests in terms of section 9: if SARS does not respond or does not respond favourably in the context of a decision

If SARS does not respond at all to a valid request for the amendment of a decision, the taxpayer may:

- submit a complaint to the CMO;
- submit a complaint to the Tax Ombud; or
- launch appropriate litigation proceedings against SARS to force it to respond.

If SARS does respond but not favourably, the taxpayer's only remedy is to approach the High Court with an application for review under PAJA.[74]

6.23 PAJA: when a taxpayer can rely on it in respect of decisions by SARS

A taxpayer can rely on PAJA to have decisions by SARS – or the failure of SARS to make a decision – reviewed if that decision or failure is not subject to objection and appeal and if the decision or failure to make a decision constitutes administrative action as defined in PAJA.

The following are examples of decisions by SARS that are reviewable under PAJA:

- a decision not to grant a request for a reduced assessment under section 93(1)(d)/(e);
- a decision not to withdraw an assessment under section 98; and
- a decision not to grant a suspension of payment request.[75]

This list is by no means exhaustive.

6.24 PAJA: when a taxpayer cannot rely on it in respect of a decision by SARS

Naturally, if the decision is subject to objection and appeal or is not an administrative action, the taxpayer may not launch a review application. There is also a prescribed time period within which a review application must be brought. These time periods are not discussed in this work.

The procedure for bringing a review application under PAJA is a High Court procedure and is therefore not discussed in this work, save for the statement that the Uniform Rules of Court would apply as they do in any other application under PAJA. In this regard, however, taxpayers are reminded of section 11(4) of the TAA, which specifies that taxpayers must give SARS at least 10 business days' notice of their intention to institute proceedings in the High Court. Section 11(5), read with Government Notice 223 in *Government Gazette* 37498 of 31 March 2014, provides the following 'addresses' for service of the notice required under section 11(4):

> '*Notices must be served electronically on SARS, by either (a) e-mail at HighCourtLitigation@sars.gov.za or (b) facsimile: +27 10 208 2092.*'

74 See para. 6.23.

75 See chap. 12 on suspension requests.

6.25 Penalty remittance requests in terms of section 215: when a taxpayer can rely on it

Applicable Law

Section 215 – Procedure to request remittance of penalty

(1) A person who is aggrieved by a 'penalty assessment' notice may, on or before the date for payment in the 'penalty assessment', in the prescribed form and manner, request SARS to remit the 'penalty' in accordance with Part E.

(2) The 'remittance request' must include—

(a) a description of the circumstances which prevented the person from complying with the relevant obligation under a tax Act in respect of which the 'penalty' has been imposed; and

(b) the supporting documents and information as may be required by SARS in the prescribed form.

(3) During the period commencing on the day that SARS receives the 'remittance request', and ending 21 business days after notice has been given of SARS' decision, no collection steps relating to the 'penalty' amount may be taken unless SARS has a reasonable belief that there is—

(a) a risk of dissipation of assets by the person concerned; or

(b) fraud involved in the origin of the non-compliance or the grounds for remittance.

(4) SARS may extend the period referred to in subsection (1) if SARS is satisfied that—

(a) the non-compliance in issue is an incidence of non-compliance referred to in section 216 or 217, and that reasonable grounds exist for the late receipt of the 'remittance request'; or

(b) a circumstance referred to in section 218 (2) rendered the person incapable of submitting a timely request.

(5) If a tax Act other than this Act provides for remittance grounds for a 'penalty', SARS may despite the provisions of section 216, 217 or 218 remit the 'penalty' or a portion thereof under such grounds.

Section 215, when read with sections 220 and 104, provides for a remittance procedure in respect of certain types of penalties. These procedures allow taxpayers to request remittance of certain penalties without having to lodge an objection.

The remedy under section 215, i.e. to request remittance of a penalty, is available for only the following types of penalties:

- fixed-amount penalties imposed for certain non-compliance listed in a public notice under section 210;[76]
- penalties for failure to report a reportable arrangement; and
- penalties for late payment of tax, such as the 10% penalty for late payment of VAT or PAYE.

76 These are penalties imposed for, for example, non-submission of individual or corporate income tax returns.

It is not available in respect of remittance requests for understatement penalties imposed under part A of chapter 16.[77]

The remedy will be effective only if the taxpayer can prove satisfaction of the grounds for remittance under section 215(5), 216, 217 or 218. Each of these is discussed in detail below. Before turning to those grounds, however, it is necessary first to explain briefly the three different types of penalty envisaged in section 215, to put the remittance grounds into context.

6.25.1 Fixed-amount penalties under section 210

A penalty imposed under section 210 is a fixed-amount penalty ranging from a minimum of R250 to a maximum of R16 000, depending on the circumstances. The penalty is imposed monthly for every month that the non-compliance giving rise to it persists, subject to an absolute maximum of 47 months.[78]

The non-compliance to which section 210 applies is non-compliance listed in a public notice. An example of such non-compliance is failure to submit certain personal or corporate income tax returns timeously.

Public notices issued under section 210 can be accessed from SARS's website.

6.25.2 Reportable-arrangement penalties under section 212

A taxpayer who fails to report a reportable arrangement as required under part B of chapter 4 of the TAA is subject to a penalty ranging from a minimum of R50 000 to a maximum of R300 000. Like penalties under section 210, penalties imposed under section 212 are also imposed for every month that the non-compliance persists, subject to a maximum of 12 months.[79]

6.25.3 Percentage-based penalties under section 213

Percentage-based penalties are imposed for failure to pay tax on time. A typical example of such failure is failure to pay VAT or PAYE on time, which attracts a penalty equal to 10% of the VAT or PAYE paid late.[80] Penalties imposed under section 213 are not imposed monthly.

6.25.4 Section 215(5) remittance grounds

Applicable Law

Section 215(5) – Procedure to request remittance of penalty

(5) If a tax Act other than this Act provides for remittance grounds for a 'penalty', SARS may despite the provisions of section 216, 217 or 218 remit the 'penalty' or a portion thereof under such grounds.

In terms of section 215(5), if an underlying tax Act provides grounds for remittance of a penalty, SARS may remit the penalty under such grounds even if the taxpayer has not satisfied the requirements under section 216, 217 or 218.

---

77 See para. 6.33 for remedies other than objection and appeal in respect of understatement penalties.
78 S 211(2).
79 S 212(1).
80 S 213, read with s 39 of the VAT Act and para. 6 of the Fourth Schedule to the ITA.

A typical example of a remittance ground provided for in an underlying tax Act is the remittance grounds provided in paragraph 20(2) of the Fourth Schedule to the ITA for a penalty imposed under paragraph 20(1) of that schedule for underestimation of provisional tax.[81] In terms of paragraph 20(2), SARS may remit a penalty for underestimation of provisional tax if it is satisfied that the estimate was seriously calculated with due regard to the factors having a bearing thereon and was not deliberately or negligently understated. If a taxpayer can prove that it satisfies these requirements of paragraph 20(2), SARS may remit the penalty despite the fact that, for example, it is not a first incidence of non-compliance.[82]

6.25.5 Section 216 remittance grounds

Applicable Law

Section 216 – Remittance of penalty for failure to register

If a 'penalty' is imposed on a person for a failure to register as and when required under this Act, SARS may remit the 'penalty' in whole or in part if—

(a) the failure to register was discovered because the person approached SARS voluntarily; and

(b) the person has filed all returns required under a tax Act.

Section 216 applies only to penalties imposed because of the taxpayer's failure to register for tax in terms of the underlying requirements of a tax Act and only under certain circumstances.

Such penalties for failure to register can only constitute penalties envisaged in section 210, being fixed-amount penalties for non-compliance listed in a public notice. Failure to register for any tax is not listed in a public notice; therefore taxpayers effectively cannot rely on section 216.

6.25.6 Section 217 remittance grounds

Applicable Law

Section 217 – Remittance of penalty for nominal or first incidence of non-compliance

(1) If a 'penalty' has been imposed in respect of—

(a) a 'first incidence' of non-compliance; or

(b) an incidence of non-compliance described in section 210 if the duration of the non-compliance is less than five business days, SARS may, in respect of a 'penalty' imposed under section 210 or 212, remit the 'penalty', or a portion thereof if appropriate, up to an amount of R2 000 if SARS is satisfied that—

(i) reasonable grounds for the non-compliance exist; and

(ii) the non-compliance in issue has been remedied.

continued

81 Even through the penalty is not technically imposed for the late payment of tax but for the underestimation of a provisional tax estimate, it is deemed by para. 20 of the Fourth Schedule to the ITA to be a percentage-based penalty under s 213.

82 A first incidence of non-compliance is one of the grounds for remittance of a percentage-based penalty under s 217. See para. 6.25.6.

> *(2) In the case of a 'penalty' imposed under section 212, the R2 000 limit referred to in subsection (1) is hanged to R100 000.*
>
> *(3) If a 'penalty' has been imposed under section 213, SARS may remit the 'penalty' or a portion thereof, if SARS is satisfied that—*
>
> *(a) the 'penalty' has been imposed in respect of a 'first incidence' of non-compliance, or involved an amount of less than R2 000;*
>
> *(b) reasonable grounds for the non-compliance exist; and*
>
> *(c) the non-compliance in issue has been remedied.*

Section 217 sets out different remittance grounds for the three different types of penalty, to wit fixed-amount penalties,[83] reportable-arrangement penalties[84] and percentage-based penalties.[85] The taxpayer must prove satisfaction of the remittance grounds relevant to the penalty type before SARS has a discretion to remit the penalty. As regards SARS's discretion, it is submitted that if the taxpayer can demonstrate that the grounds for remittance under section 217 exist SARS must remit the penalty.[86]

To qualify for remittance of a penalty imposed under section 210 (i.e. a fixed-amount penalty):

- the non-compliance in relation to which the penalty has been imposed must be a first incidence of non-compliance or must not have lasted for more than five business days;
- there must be reasonable grounds for the non-compliance; and
- the non-compliance in issue has been remedied.

If the taxpayer can demonstrate satisfaction of these requirements, SARS can remit the penalty but only up to a maximum of R2 000,00.

The expression 'first incidence of non-compliance' is defined in section 208 as 'an incidence of non-compliance by a person if no "penalty assessment" under this chapter was issued during the preceding 36 months, whether involving an incidence of non-compliance of the same or different kind and for the purpose of this definition a "penalty assessment" that was fully remitted under section 218 must be disregarded'.

As regards penalty assessments, see chapter 3. It is worth noting that a penalty assessment may be issued on, for example, 1 March 202X for several incidences of non-compliance such as failure by the taxpayer to submit its corporate income tax returns for 2019 and 2020 years of assessment. The penalties imposed on that penalty assessments are for a first incidence of non-compliance despite the fact that it clearly relates to failure to submit more than one tax return. This is explained in Example 6.7.

---

83 See para. 6.25.1.
84 See para. 6.25.2.
85 See para. 6.25.3.
86 In the same way that, as was held in *Rampersadh v CSARS*, SARS must issue a reduced assessment under s 93(1)(d) if it is satisfied that an assessment contains a readily apparent undisputed error.

EXAMPLE

Example 6.7 – Two first incidences of non-compliance

The taxpayer, a company, did not submit income tax returns for its 2019 and 2020 years of assessment on time. The taxpayer received a penalty assessment for both years on 1 March 2020 in terms of which a penalty of R13 000 was imposed for 2019 and R1 000 for 2020. The taxpayer filed the outstanding returns on 31 March 2020. The penalty in respect of the 2019 tax year was imposed for a first incidence of non-compliance as no penalty assessment had been issued to the taxpayer in the period of 36 months before the non-compliance in relation to which the current penalty assessment was issued. The penalty imposed in respect of 2020 is similarly a first incidence of non-compliance as no penalty assessment had been issued in the period of 36 months before the current incidence of non-compliance. Such a conclusion does seem odd, given that the late submission of the 2020 return is the second time the taxpayer failed to comply, but, as strange as it may seem, the plain wording seems to support it. If SARS had issued the penalty assessment for the 2019 year as soon as the taxpayer was non-compliant, as arguably it should have done, the taxpayer's non-compliance in relation to the 2020 year would not have been a first incidence of non-compliance.

A penalty imposed for non-compliance that is not a first incidence of non-compliance may nevertheless be remitted if the non-compliance did not last for more than five business days (and the other requirements have been satisfied), as the following example illustrates.

EXAMPLE

Example 6.8 – Non-compliance that lasts less than five business days

A taxpayer's return is due for submission on Monday. If the taxpayer files the return by Friday of the same week, the taxpayer was non-compliant for only four business days and may therefore qualify for remittance under section 217, provided all the other requirements are satisfied.

If a taxpayer can prove that the non-compliance was a first incidence of non-compliance or an incidence of non-compliance that lasted for less than five business days, SARS can remit the penalty only if there are reasonable grounds for non-compliance. What constitutes reasonable grounds will depend on the facts of the case.[87]

In addition, the non-compliance must be remedied before SARS can remit the penalty. If in Example 6.7 the taxpayer had not submitted the returns, SARS would not have been allowed to remit the penalty. The taxpayer must first submit the outstanding returns.

If all the requirements are satisfied, SARS can remit the penalty but only up to a maximum of R2 000,00.

EXAMPLE

Example 6.9 – Section 217 remittance of section 210 penalty, capped at R2 000,00

Mr A failed to submit his annual income tax return. The return was due on 31 January 202X and the taxpayer is five months late. Assuming SARS imposed a penalty of R1 000 a month, the total penalty would be R5 000,00. If the taxpayer can prove satisfaction of all the grounds listed above, SARS can remit only R2 000,00 of the R5 000,00.

87 See chap. 9, however, on the meaning of 'reasonable grounds'.

The requirements for qualifying for remittance of a penalty imposed under section 212 (for failure to report a reportable arrangement) are the same as those for penalties under section 210, but the maximum amount that may be remitted is R100 000,00 as opposed to R2 000,00.

For a taxpayer to qualify for remittance of a penalty imposed under section 213 (i.e. for failure to pay tax on time):

- the penalty must have been imposed in respect of a first incidence of non-compliance or involve an amount of less than R2 000,00;
- there must be reasonable grounds for the non-compliance; and
- the non-compliance must have been remedied.

There is no monetary limit on the amount that may be remitted of a penalty imposed under section 213.

6.25.7 Section 218 remittance grounds

Applicable Law

Section 218 – Remittance of penalty in exceptional circumstances

(1) SARS must, upon receipt of a 'remittance request', remit the 'penalty' or if applicable a portion thereof, if SARS is satisfied that one or more of the circumstances referred to in subsection (2) rendered the person on whom the 'penalty' was imposed incapable of complying with the relevant obligation under the relevant tax Act.

(2) The circumstances referred to in subsection (1) are limited to—

(a) a natural or human-made disaster;

(b) a civil disturbance or disruption in services;

(c) a serious illness or accident;

(d) serious emotional or mental distress;

(e) any of the following acts by SARS—

(i) a capturing error;

(ii) a processing delay;

(iii) provision of incorrect information in an official publication or media release issued by the Commissioner;

(iv) delay in providing information to any person; or

(v) failure by SARS to provide sufficient time for an adequate response to a request for information by SARS;

(f) serious financial hardship, such as—

(i) in the case of an individual, lack of basic living requirements; or

(ii) in the case of a business, an immediate danger that the continuity of business operations and the continued employment of its employees are jeopardised; or

(g) any other circumstance of analogous seriousness.

SARS may a remit a penalty when the non-compliance to which the penalty relates was causally connected to certain exceptional circumstances listed in section 218(2)(a) to (g). These grounds for remittance apply equally to penalties under sections 210, 212 and 213 and there is no cap on the amount that may be remitted.

It is important to stress that the exceptional circumstances must be the cause of the non-compliance and not the non-compliance the cause of the exceptional circumstances, as appears to be often argued by taxpayers.

6.26 Penalty remittance requests in terms of section 215: when a taxpayer cannot rely on it

A taxpayer cannot rely on section 215 to challenge an assessment or part of an assessment that is not a penalty assessment. A request submitted outside the prescribed time periods (discussed in the paragraph immediately below) will not be successful unless the circumstances prescribed for condonation of such requests exist.

In terms of section 215(1), a request for remittance must be submitted by the due date for payment reflected on the penalty assessment.[88] A request submitted after this date can be considered by SARS only if:

- there are reasonable grounds for the late submission of the request; or
- one of the exceptional circumstances contemplated in section 218 was the cause of the taxpayer's not submitting the request on time.

As to what constitutes reasonable grounds for a delay in submitting a request for remission, see chapter 9 on when SARS must condone a late objection, as the same principles, it is submitted, will apply to the condonation of late requests for remittance of a penalty.

A penalty assessment does not prescribe under section 99[89] nor can it become final under section 100.[90] It follows that as long as the taxpayer can show the existence of the circumstances for condonation the taxpayer can request remittance of a penalty at any point in time.[91]

6.27 Penalty remittance requests in terms of section 215: procedural aspects

Remittance requests must include:

- a description of the circumstances that prevented the taxpayer from complying with the relevant obligation under the relevant tax Act in respect of which the penalty was imposed; and
- such supporting information as may be required, in the prescribed form.

At the time of writing, the form prescribed by SARS was the request for remittance (RFR) form. The form can be accessed on SARS eFiling.

The TAA is silent on how many days SARS can take to make a decision on a request for remission.

88 See chap. 3 on penalty assessments.

89 Prescription applies only to assessments under chap. 8 of the TAA. A penalty assessment is not an assessment issued under chap. 8 but an assessment issued under chap. 15 of that Act. Whilst a penalty assessment can be an assessment to both tax and a penalty, the assessment, to the extent that it relates to tax, is an assessment under chap. 8 and, to the extent that the assessment relates to a penalty, constitutes a penalty assessment under chap. 15.

90 Assessments referred to in s 100 are arguably assessments to which a taxpayer can object. A taxpayer cannot object to a penalty assessment. For a detailed discussion of this issue, see chap. 7.

91 It is submitted that s 219 is not a prescription rule for remittance requests under s 215. S 219 is a remedy similar to reduced assessment requests under s 93(1)(d). A penalty incorrectly imposed should not be remitted, as a remission implies that a penalty has been correctly imposed.

6.28 Penalty remittance requests in terms of section 215: what if SARS does not respond or does not respond favourably?

If SARS does not respond at all to a valid request for remittance of a penalty in terms of section 215, the taxpayer may:

- submit a complaint to the CMO;
- submit a complaint to the Tax Ombud; or
- approach the High Court.

If SARS does respond but not favourably, the taxpayer must follow the objection procedure against the decision not to remit the penalty.[92]

6.29 Request for reduced penalty assessment in terms of section 219: when the taxpayer can rely on it

Applicable Law

Section 219 – Penalty incorrectly assessed

If SARS is satisfied that a 'penalty' was not assessed in accordance with this Chapter, SARS may, within three years of the 'penalty assessment', issue an altered assessment accordingly.

Section 219 allows SARS to issue an altered assessment, in respect of a penalty or in so far as the assessment constitutes a penalty assessment, if SARS is satisfied that a penalty was not imposed in accordance with the enabling provisions of the TAA. Section 215 seems to suggest that section 219 provides a remittance ground similar to those in sections 216, 217 and 218 since section 215 is the provision that enables SARS to remit the penalty '*in accordance with Part E*', which includes section 219.

However, section 219 appears to be a remedy in and of itself in that it allows SARS to make an altered assessment accordingly, arguably meaning an assessment to reduce the penalty assessment. It does not require the remittance of the penalty under section 215. Furthermore, section 219 envisages circumstances under which a penalty is not correctly imposed. A penalty that has not been correctly imposed cannot properly fall under remittance procedures, as remittance procedures presuppose that the penalty was correctly imposed but that circumstances nevertheless exist for the penalty to be remitted.

The importance of the fact that a request under section 219 for an altered assessment is not a request for remittance, is that the time periods provided for in section 215, regulating when submission of a request for remittance must be made, do not apply to requests under section 219. It follows that requests under section 219 do not have to be made by the due date for payment reflected on the penalty assessment and that the taxpayer would not have to show the existence of either reasonable grounds or exceptional circumstances should the request be made after the due date for payment reflected on the penalty assessment.

92 As to the objection procedure, see chaps 7–10. Whilst the taxpayer may of course approach the High Court, s 105 will oust the court's jurisdiction to entertain the taxpayer, unless the High Court otherwise directs. As to whether the High Court will otherwise direct, see para. 6.39 below.

6.30 Request for reduced penalty assessment in terms of section 219: when the taxpayer cannot rely on it

The taxpayer cannot rely on this remedy if:

- the penalty has been correctly imposed; or
- the penalty has not been correctly imposed but more than three years have elapsed since the date of the penalty assessment.

It seems inequitable that the remittance procedures are available indefinitely as long as the taxpayer can justify the delay in terms of section 215 but, if a taxpayer wants a penalty withdrawn for being incorrectly imposed, the taxpayer must do so within three years.

6.31 Request for reduced penalty assessment in terms of section 219: procedural aspects

It seems the procedures are the same as those for the remittance option under section 215.[93] In submitting the RFR form, taxpayers would do well to note specifically in the request that the request is made under section 219 and should not be construed as a remittance request under section 215, despite the submitted form's being a request for remittance.

6.32 Request for reduced penalty assessment in terms of section 219: when SARS does not respond or does not respond favourably

If SARS does not respond at all to a valid request in terms of section 219, the taxpayer may:

- submit a complaint to the CMO;
- submit a complaint to the Tax Ombud; or
- launch litigious processes against SARS in the High Court.

If SARS does respond but not favourably, the taxpayer cannot follow the objection procedure, as a decision by SARS not to grant a request under section 219 is not subject to objection and appeal. The taxpayer's only possible remedy – on the understanding that all relevant requirements are met – would be to launch a review application under PAJA.

6.33 Request for remittance of penalty in terms of section 223(3): when the taxpayer can rely on it

Applicable Law

Section 223(3) – Understatement penalty percentage table

(3) SARS must remit a 'penalty' imposed for a 'substantial understatement' if SARS is satisfied that the taxpayer—

(a) made full disclosure to SARS of the arrangement, as defined in section 34, that gave rise to the prejudice to SARS or the fiscus by no later than the date that the relevant return was due; and

continued

93 See para. 6.27.

> *(b) was in possession of an opinion by an independent registered tax practitioner that—*
>
> *(i) was issued by no later than the date that the relevant return was due;*
>
> *(ii) was based upon full disclosure of the specific facts and circumstances of the arrangement and, in the case of any opinion regarding the applicability of the substance over form doctrine or the anti-avoidance provisions of a tax Act, this requirement cannot be met unless the taxpayer is able to demonstrate that all of the steps in or parts of the arrangement were fully disclosed to the tax practitioner, whether or not the taxpayer was a direct party to the steps or parts in question; and*
>
> *(iii) confirmed that the taxpayer's position is more likely than not to be upheld if the matter proceeds to court.*

It is clear from the wording of section 223(3) that the provision applies only to penalties imposed for substantial understatements. A penalty imposed for any of the other behaviours listed in the understatement penalty percentage table may not be dealt with under the remittance procedures.

From the plain wording are two further requirements that must be satisfied before the remittance remedy is available in respect of an understatement penalty (for substantial understatements), to wit:

- the taxpayer must have disclosed to SARS the arrangement that gave rise to the understatement before the return was due; and
- the taxpayer must be in possession of an opinion from a registered tax practitioner before the relevant return was due, which opinion meets the requirements set out in section 223(3)(b)(ii).

The transitional arrangements set forth in section 270, particularly in section 270(6B), provide for an exception to the requirement that the opinion must have been issued before the return was due. For understatements in returns that were due before 1 October 2012, the requirement that the opinion must have been issued before the return was due is deemed to have been satisfied. Interestingly, the requirement that the arrangement must have been disclosed before the return was due is not deemed, by section 270 or any other provision in the TAA, to have been satisfied.

The purpose of the transitional provision in section 270(6B) was explained as follows in the Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2013:

> '*As a taxpayer submitting a return before commencement of the Act was not aware of this requirement at that time, this amendment will enable taxpayers seeking remittance of a ''substantial understatement penalty'' in respect of an understatement made before the commencement date of the Act, to use an opinion obtained after the relevant return was submitted.*'

This raises a question: if, in addition to having the opinion before the relevant return was due, the taxpayer is also required to have disclosed the arrangement to SARS before the return was due, did the transitional provision achieve its purpose?

In the draft Response Document from the National Treasury and SARS in respect of comments received on the draft Taxation Laws Amendment Bill, 2013 and draft Tax Administration Laws Amendment Bill, 2013, the following was stated at paragraph 9.3.22:

> '*Comment:*
>
> *The proposed insertion of section 270(6A) is to be welcomed in light of the proposed amendment to section 270(6). The proposed amendment, however, does not go far*

enough. Aside from the requirement to have the opinion by the due date of the return, section 223(3)(a) requires full disclosure of the arrangement, as defined in section 34, to have been made by the due date of the return. As this requirement would have been unknown prior to the effective date it would not have been open to taxpayers to ensure compliance therewith.

Response:

Not accepted. The duty to report a reportable arrangement was inserted in the Income Tax Act in 2006 and taxpayers have been required to report a reportable arrangement in terms of section 80O of the Income Tax Act since then.'

It follows that the requirement that the arrangement must have been disclosed to SARS before the return was due can arise only in cases where the arrangement that gave rise to the understatement was a reportable arrangement at the time the understatement was made. If the arrangement was not reportable at the time, the only requirement for remittance is that the taxpayer was in possession of an opinion before the relevant return was due (unless the return was submitted before the commencement of the TAA, in which case the opinion could have been issued after the return was submitted). If, however, the arrangement that gave rise to the understatement penalty was a reportable (at the time), it is a further requirement that the arrangement must have been reported before the return was due.

6.34 Request for remittance of penalty in terms of section 223(3): when the taxpayer cannot rely on it

A taxpayer may not rely on the remittance procedures in section 223(3) for remittance of a penalty imposed for a behaviour other than substantial understatement. For example, if SARS imposes a penalty for 'reasonable care not taken in completing a return', the taxpayer cannot rely on the remittance procedure.

Furthermore, an understatement penalty is not assessed in a penalty assessment but is assessed in terms of chapter 8 of the TAA, typically, in practice, on an additional assessment. Therefore a taxpayer would be unable to request remittance of an understatement penalty under section 223(3) if the assessment on which the penalty has been imposed becomes final under section 100 or when it prescribes under section 99 (as to which, see paras 6.4.1 and 6.4.2 above).

The TAA is silent on the time period within which a request must be made. It is submitted therefore that a request for remittance under section 223(3) may be made any time before the assessment prescribes under section 99 or becomes final under section 100.[94]

6.35 Request for remittance of penalty in terms of section 223(3): procedural aspects

In contrast to penalties imposed under chapter 15, the TAA is silent on the procedures available for remittance requests under section 223(3). SARS, in its *Guide to Understatement Penalties* at paragraph 11, suggests that the SARS dispute guide or the guide titled *What to do if you Dispute your Assessment* should be consulted for the remittance procedures under section 223(3). But both guides are silent on the procedure for section 223(3) remittance requests and both set out the procedures to be followed for the submission of an objection.

---

94 Since a decision by SARS not to remit an understatement penalty is subject to objection and appeal, the time periods that govern objections and appeals would govern such an objection. It cannot govern the period within which remittance should be requested under s 223(3). A taxpayer cannot object to the imposition of an understatement penalty for a substantial understatement; the taxpayer must first request remittance of the penalty.

It seems that the correct process for requesting remittance is to submit an objection, even though the document submitted is not technically an objection but a request for remittance under section 223(3), which is not governed by the time periods for objection.[95] It follows therefore that the period within which SARS must respond to requests for remittance under section 223(3) is also not prescribed.[96]

6.36 Penalty remittance requests in terms of section 223(3): if SARS does not respond or does not respond favourably

If SARS does not respond at all to a valid request for remittance in terms of section 223(3), the taxpayer may:

- submit a complaint to the CMO;
- submit a complaint to the Tax Ombud; or
- approach the High Court.

If SARS does respond but not favourably, the taxpayer can only follow the objection procedures.[97]

6.37 Settlement in terms of part F of chapter 9: when the taxpayer can rely on it

In terms of part F of chapter 9, SARS may settle any dispute at any point in time. A dispute here means a disagreement between the taxpayer and SARS about the interpretation of the facts or the law, or of both, which disagreement arises in consequence of the raising of an assessment or the making of a decision that is subject to objection and appeal.

When a dispute is settled under this part of the TAA, neither the taxpayer nor SARS accepts the other party's interpretation of the facts or the law, but the disputed liability is compromised by either party. It is not a requirement that the taxpayer object or commence dispute resolution processes[98] before a dispute may be settled.

In fact, section 93(1)(b), read with section 93(2), empowers SARS to reduce an assessment to give effect to a settlement reached under part F of chapter 9 even though no objection has been lodged. However, since SARS cannot be forced into settlement, we strongly advise against relying solely on this remedy to resolve a dispute. In any event, given the circumstances under which SARS may settle a dispute (as set out in sections 146 and 145), the circumstances under which SARS may settle a dispute in the absence of an objection or appeal may be very limited.

No procedures are prescribed for settlement of a dispute with SARS. Whilst section 147 is headed 'Procedure for settlement' it does not provide any guidance on the procedure for settlement. What is clear, however, is that settlement discussions may be initiated by either the taxpayer or SARS, but neither party can be forced into settlement.

95 See chap. 9 for a discussion of these time periods.

96 As to the procedure for submission of an objection, see chap. 9.

97 As to these procedures, see chaps 7 –10. Whilst the taxpayer may of course approach the High Court, s 105 will oust the court's jurisdiction to entertain the taxpayer, unless the High Court otherwise directs. As to whether the High Court will otherwise direct, see para. 6.39 below.

98 See chaps 7–10 on these processes.

6.38 Settlement in term of part F of chapter 9: when the taxpayer cannot rely on it

The taxpayer cannot rely on the settlement remedy if:

- SARS is not willing to engage in settlement discussions; and
- the dispute arises pursuant to the making of a decision by SARS other than a decision that is subject to objection and appeal.

The fact that the assessment or decision may have become final under section 100 or that the assessment has prescribed does not in and of itself prevent the taxpayer or SARS from initiating settlement discussions: an assessment to give effect to a settlement agreement may be made by SARS despite any other provision in the TAA or other tax Act.

6.39 Can a taxpayer dispute an assessment or decision in the High Court?

Section 105 ousts the High Court's jurisdiction to adjudicate on tax disputes unless a High Court directs otherwise. The default position is therefore that a taxpayer cannot dispute an assessment in the High Court (at least not directly). As to when a High Court will allow a taxpayer to dispute an assessment in the High Court is not clear. However, the following extract from the judgment in *Wingate-Pearse v CSARS*[99] suggests that the High Court is unlikely to allow easily a taxpayer to dispute an assessment or decision in the High Court:[100]

> '*The Tax Court is a specialist tribunal composed of persons presiding who possess expertise not ordinarily possessed by a High Court judge sitting alone ...*
>
> *The Tax Court, consisting of a judge of the High Court, an accountant and a representative of the commercial community, is best suited at first instance to deal with tine* [sic] *tax dispute relating to the merits of ... assessments*'.

99 82 SATC 21.

100 See also *Joseph Nyalunga v Commissioner, South African Revenue Service* (90307/2018) [2020] ZAGP (6 May 2020); *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* (26244/2015) [2017] ZAGPPHC 253 (26 May 2017) and *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* (26244/2015) [2020] ZAGPJHC 202 (31 August 2020).

6.38 Settlement in term of part F of chapter 9: when the taxpayer cannot rely on it

The taxpayer cannot rely on the settlement remedy if:

- SARS is not willing to engage in settlement discussions; and
- the dispute arises pursuant to the making of a decision by SARS other than a decision that is subject to objection and appeal.

The fact that the assessment or decision may have become final under section 100 or that the assessment has prescribed does not in and of itself prevent the taxpayer or SARS from initiating settlement discussions: an assessment to give effect to a settlement agreement may be made by SARS despite any other provision in the TAA or other tax Act.

6.39 Can a taxpayer dispute an assessment or decision in the High Court?

Section 105 ousts the High Court's jurisdiction to adjudicate on tax disputes unless a High Court directs otherwise. The default position is therefore that a taxpayer cannot dispute an assessment in the High Court (at least not directly). As to when a High Court will allow a taxpayer to dispute an assessment in the High Court is not clear. However, the following extract from the judgment in *Ringote-Perrse v CSARS*[99] suggests that the High Court is unlikely to allow easily a taxpayer to dispute an assessment or decision in the High Court:[100]

> 'The Tax Court is a specialist tribunal composed of persons presiding who possess expertise not ordinarily possessed by a High Court judge sitting alone ...
>
> The Tax Court, consisting of a judge of the High Court, an accountant and a representative of the commercial community, is best suited at first instance to deal with the [sic] tax dispute relating to the merits of ... assessment.'

---

99 82 SATC 21.

100 See also *Joseph Ndlungu v Commissioner, South African Revenue Service* (9039/2018) [2020] ZADP (6 May 2020); *Curro Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* (26444/2015) [2017] ZAGPPHC 253 (26 May 2017) and *Curro Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* (26444/2015) [2020] ZAGPHC 202 (31 August 2020).

PART II

CHAPTER 7

Objection and appeal overview

The practical context of this chapter

Why object?

An assessment raised and certain decisions taken by SARS can be reduced or changed only through the objection and appeal remedy, as discussed in this chapter. Alternatively, taxpayers can avail themselves of the other remedies discussed in chapter 6.

The objection and appeal remedy is one of the ways (in many cases, the most effective and expeditious way) in which a taxpayer can effect a reduced assessment, and, as a result, achieve a reduced liability, or change to an adverse decision.

A taxpayer's fate is sealed in respect of an assessment or decision only if neither the remedies discussed in chapter 6 nor the objection and appeal remedy discussed in this chapter is available.

What is the objection and appeal remedy?

Objection and appeal is a remedy available to taxpayers as a means to challenge certain assessments raised and certain decisions made and, by implication, liability imposed by SARS.

There are, however, certain instances where taxpayers cannot rely on this remedy – for example, when the assessment a taxpayer seeks to challenge is an agreed assessment or when the assessment in question is raised to give effect to a settlement agreement. Also, in some cases the taxpayer may technically be allowed to object, but the objection has no chance of success for various reasons, typically because the assessment to be challenged is older than three years or the penalty remittance procedures must first be exhausted.

This chapter contains a detailed analysis of when taxpayers can rely on the objection remedy and when they cannot. Relying on this remedy when it is not available will not achieve a reduction in tax liability and would probably only result in wasted costs and time.

How?

By following a series of prescribed steps in a process that starts with the submission of an objection (and, in some cases, a request for reasons) and ends in the assessment or decision's being confirmed or reduced or otherwise changed. Some disputes reach conclusion during the objection phase, a couple of months into the process. Others are resolved only during the appeal phase, which could be years into the process.

Figures 7.1 and 7.2 depict the main steps in each of the objection and appeal phases.

When?

Each step in the process must be completed within a prescribed period of time. Not adhering to these periods could have devastating consequences for the defaulting party (SARS must also, in terms of the rules, adhere to prescribed time periods). The time within which each step must be taken is discussed in chapters 8 to 10.

Contents

Page

Table of Examples

Table of Figures

7.1 Introduction

The objection and appeal remedy is the main remedy provided for in the Tax Administration Act[1] (TAA) by means of which taxpayers can challenge an assessment raised and certain decisions taken by SARS.[2] The objection and appeal remedy is a process regulated by a set of rules promulgated in terms of section 103 of the TAA. The rules contain several steps in a prescribed sequence. There is no way to circumvent the rules in this respect, other than through settlement[3] and certain interlocutory applications,[4] provided that all the requirements of those remedies are met.

All objections and appeals must follow the prescribed steps in the prescribed sequence and within the prescribed time. In practice, some objections may be resolved within a matter of months after only a few of the steps have been taken in the process, while others will take longer and may be resolved only years after initiation of the process and after multiple steps have been completed.

The aim of this chapter is to set out when taxpayers may rely on the objection and appeal remedy and when they may not. This chapter includes a high-level overview of the main steps in each of the objection and appeal processes, from start to finish. Chapters 8 to 10 contain detailed analyses of each step, with reference to the procedures to be followed and the applicable time for each step.

7.2 Objection and appeal remedy: when can the taxpayer rely on it?

Applicable Law

Section 104 – Objection against assessment or decision

(1) A taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment.

(2) The following decisions may be objected to and appealed against in the same manner as an assessment—

(a) a decision under subsection (4) not to extend the period for lodging an objection;

(b) a decision under section 107(2) not to extend the period for lodging an appeal; and

(c) any other decision that may be objected to or appealed against under a tax Act.

(3) A taxpayer entitled to object to an assessment or 'decision' must lodge an objection in the manner, under the terms, and within the period prescribed in the 'rules'.

(4) A senior SARS official may extend the period prescribed in the 'rules' within which objections must be made if satisfied that reasonable grounds exist for the delay in lodging the objection.

continued

1 Act 28 of 2011. Any reference to a legislative provision or tax Act is to be construed as a reference to the TAA unless otherwise specified or the context clearly indicates otherwise.

2 See chap. 6 for a discussion of the other remedies.

3 See chap. 6.

4 See chap. 11.

> *(5) The period for objection must not be so extended—*
>
> *(a) for a period exceeding 30 business days, unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection;*
>
> *(b) if more than three years have lapsed from the date of assessment or the 'decision'; or*
>
> *(c) if the grounds for objection are based wholly or mainly on a change in a practice generally prevailing which applied on the date of assessment or the 'decision'.*

Section 104 sets out what is subject to objection. It is the starting point for establishing whether a taxpayer can rely on the objection and appeal remedy. An objection must be submitted before an appeal can arise.

In terms of section 104, a taxpayer may object to:

- any assessment by which it is aggrieved; and
- certain decisions listed in section 104(2).

7.2.1 Assessments that are subject to objection and appeal

As regards the meaning of the word 'aggrieved' in context,[5] it was held in *ITC 1785*,[6] which was quoted with approval by the Supreme Court of Appeal in *GB Mining and Exploration SA (Pty) Ltd v Commissioner for the South African Revenue Service*[7] that:

> '*the fundamental object of tax legislation is to exact from each citizen his due. What is "due" is, in each case (questions of penalty aside), strictly prescribed by statute and the amount of the taxpayer's taxable income must, in the process of assessment, be accurately determined preparatory to the calculation of the amount which he (or she) is required to hand over to the fiscus. In that light, it is clear that a taxpayer whose taxable income has been determined on an erroneous basis, is always "aggrieved" even if the source of error is entirely attributable to him.*'

It follows that a taxpayer is always aggrieved by any assessment which has not been made in line with the prescripts of the underlying tax Act. Stated differently, a taxpayer is always aggrieved by an incorrect assessment. The SCA in *GB Mining* also held that, even if the assessment is incorrect because of some incorrect information provided by the taxpayer, the taxpayer is nevertheless aggrieved by the assessment, because it is ultimately incorrect, and therefore may object to it.

Whether an assessment is incorrect will depend on the substantive law covering the issues in the assessment and is something that the taxpayer will have to determine on a case-by-case basis.

While section 104 seems to suggest that any assessment by which the taxpayer is aggrieved is subject to objection and appeal, this is not the case: several assessments are not subject to objection and appeal. Furthermore, there are several instances where the taxpayer is technically allowed to object but, because of some other rule, has no chance of succeeding with the objection. Details of these assessments and the rules that may prevent a taxpayer from being successful are covered in paragraph 7.3.

---

5 See chap. 3 on what constitutes as assessment.
6 67 SATC 98.
7 [2014] ZASCA 29, 2015 (4) SA 605 (SCA).

7.2.2 Decisions that are subject to objection and appeal

The decisions by SARS that are subject to objection and appeal are the following:

- a decision not to condone a late objection;
- a decision not to condone a late appeal; and
- any other decision that is specifically made subject to objection and appeal in terms of the TAA or any other underlying tax Act.

The SARS dispute resolution guide[8] sets out in annexure C a summary of the decisions that are subject to objection and appeal in terms of the underlying tax Acts.[9]

7.3 Objection and appeal remedy: when can the taxpayer not rely on it?

A taxpayer cannot rely on the objection and appeal remedy to challenge an assessment if:

- the assessment is specifically excluded from the objection and appeal remedy ('specific objection exclusions'); or
- the assessment does not fall into the specific objection exclusions but some other rule prevents the taxpayer from successfully relying on the objection and appeal remedy to secure a reduced assessment ('other objection exclusions').

A taxpayer cannot rely on the objection and appeal remedy to challenge a decision if:

- the decision is not one of the decisions that are subject to objection and appeal; or
- the decision is one of the decisions that are subject to objection and appeal but some other rule prevents the taxpayer from successfully relying on the objection remedy to secure an amendment to the decision.

7.3.1 Specific objection exclusions: paragraph 19(3) increases

Applicable Law

Paragraph 19(3) of the Fourth Schedule to the Income Tax Act[10]

(3) The Commissioner may call upon any provisional taxpayer to justify any estimate made by the provisional taxpayer in terms of subparagraph (1), or to furnish particulars of the provisional taxpayer's income and expenditure or any other particulars that may be required, and, if the Commissioner is dissatisfied with the said estimate, he or she may increase the amount thereof to such amount as he or she considers reasonable, which increase of the estimate is not subject to objection and appeal.

In terms of paragraph 19(3) of the Fourth Schedule to the Income Tax Act (ITA), SARS may increase a taxpayer's provisional tax estimate. Such an increase constitutes an assessment, but paragraph 19(3) specifically states that the increase is not subject to objection and appeal.

8 *Dispute Resolution Guide: Guide on the Rules Promulgated in terms of section 103 of the Tax Administration Act, 2011*, 2nd Issue, 20 March 2020, available at https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TAdm-G05%20-%20Dispute%20Resolution%20Guide.pdf (accessed 17 July 2020).

9 Annexure C is included as Annexure A of this work.

10 Act 58 of 1962.

Taxpayers therefore cannot rely on the objection and appeal remedy to challenge an increase under paragraph 19(3). One of the other remedies will have to be relied on in respect of such increases.[11]

7.3.2 Specific objection exclusions: Voluntary Disclosure Programme (VDP) assessments

Applicable Law

Section 232 of the TAA – Assessment or determination to give effect to agreement

(1) If a voluntary disclosure agreement has been concluded under section 230, SARS may, despite anything to the contrary contained in a tax Act, issue an assessment or make a determination for purposes of giving effect to the agreement.

(2) An assessment issued or determination made to give effect to an agreement under section 230 is not subject to objection and appeal.

In terms of section 232(1), SARS may issue an assessment to a taxpayer after a VDP agreement has been concluded, which assessment should give effect to the VDP agreement. In terms of section 232(2), such an assessment/determination is not subject to objection and appeal.

In practice, 'VDP assessments' are often issued by SARS, on SARS-assessment-type taxes, months (and sometimes years) before the VDP agreement is concluded. On self-assessment-type taxes such as VAT and PAYE in the context of VDP it is arguable that SARS never actually makes an assessment under the VDP as per section 232(1). These assessments are self-assessments made by the taxpayer, on submission of the relevant 'corrected return', long before the VDP agreement is concluded. In reality, a VDP agreement is often made to give effect to the assessments raised during the VDP application process and not the other way around, as prescribed by section 232(1).

It is questionable, then, whether assessments made during a VDP process are contemplated in section 232(1) at all and therefore whether section 232(2) would ever be of application – to prevent an objection. However, if section 232(2) has no practical effect and the taxpayer is therefore not barred from lodging an objection, successfully disputing such an assessment through the objection and appeal process may, depending on the disclosures made in the VDP application,[12] be difficult but not necessarily impossible.

In addition, assessments issued as part of a VDP process also often include interest for late payment of taxes and/or for underpayment of provisional tax. Even if one accepts that the assessment made in respect of the default being disclosed is made to give effect to a VDP agreement, it is still questionable whether the interest charged on the actual notice of assessment is an assessment made to give effect to a VDP agreement. It is submitted that the interest, being an assessment separate from the assessment of the underlying tax in respect of the default, is not made to give effect to a VDP agreement but is the result of the operation of the relevant interest provisions in the underlying tax Acts. It is arguable that the interest on the notice of assessment issued under a VDP process remains subject to objection and appeal, despite section 232(2), not as an assessment giving effect to a VDP agreement but as an assessment giving effect to the interest provisions in the underlying tax Acts, even though

11 See chap. 6 on these other remedies.

12 The taxpayer may, for example, concede liability.

interest is specifically dealt with in the VDP agreement. It is likely, however, that SARS will take a different view.[13]

The fact that a VDP assessment is not subject to objection and appeal does not in and of itself prevent the taxpayer from relying on any of the other remedies to challenge the relevant assessment.[14] For example, if SARS makes a processing error in raising the assessment under the VDP, the taxpayer may still rely on section 93(1)(e) to have a reduced assessment issued. If the intention was that the taxpayer not be allowed to do so, it would have included something to this effect in section 100.

7.3.3 Specific objection exclusions: section 95(1) estimates

Applicable Law

Section 91(5)(c) – Original assessments

(5) If a tax Act requires a taxpayer to submit a return ...

(c) an assessment under subsection (4) is not subject to objection or appeal unless the taxpayer submits the return and SARS does not issue a reduced or additional assessment.

In terms of section 91(5)(c), an estimated assessment made under section 95 by SARS consequent upon the taxpayer's failure to submit a tax return is not subject to objection or appeal. However, if the taxpayer files the outstanding tax return following the issuance of such estimated assessment and SARS does not issue a reduced or additional assessment following the submission by the taxpayer, the estimated assessment should fall subject to objection or appeal. Should SARS issue a reduced or additional assessment, such reduced or additional assessment would be subject to objection and appeal as would any other assessment.

Section 91 is silent on how long a taxpayer must wait for SARS to issue a reduced or additional assessment after submission of the relevant return. In practice, however, SARS normally issues the relevant reduced or additional assessment as soon as the tax return is filed in respect of SARS-assessment-type taxes and where the return is submitted via eFiling.

On self-assessment tax types, the objection exclusion under section 91(5)(c) may become more complicated. This is best explained by an example.

EXAMPLE

Example 7.1 – Estimated assessments – self-assessment-type taxes

Assume SARS raises an estimated VAT assessment on a taxpayer for the March 202X VAT period in consequence of the taxpayer's failure to submit a return. In the estimated assessment, SARS raises output tax in the amount of R1 000 based on deposits received by the taxpayer in its bank account. The estimated assessment does not take into account any input tax. The taxpayer subsequently submits the VAT return on which it declares its VAT liability to be R500, being the sum of output tax of R1 000 less input tax of R500. This assessment is made by the taxpayer on submission of the return and will reflect as such on the taxpayer's VAT statement of account.

continued

13 See *Medtronic International v CSARS* (33400-19) [2020] ZAGPPHC (17 February 2020), unreported.
14 See chap. 6.

EXAMPLE

Example 7.1 – Estimated assessments – self-assessment-type taxes (*continued*)

It is submitted that such assessment constitutes an original self-assessment as only SARS can make a reduced assessment under section 93,[15] even though, practically speaking, the submission of the return would result in a decrease of liability (at least on the basis of the statement of account). It follows that the submission of the return in respect of self-assessment-type taxes does not allow the taxpayer to file an objection against the estimated assessment, but then the taxpayer would not necessarily do so if, in this example, the liability decreases to the R500 that it should be. If, in the example, SARS believes the liability should be R1 000, SARS would have to raise an additional assessment and such additional assessment would fall subject to objection and appeal.

The fact that the assessment is not subject to objection and appeal does not in and of itself mean that remedies other than objection and appeal are not available. However, since an estimated assessment is also final in terms of section 100(1)(a)(i), the other remedies will also not be available.[16]

PROPOSED CHANGE IN THE 2020 DRAFT BILL

The Draft Tax Administration Laws Amendment Bill, 2020, published for public comment on 31 July 2020, proposes to amend section 95 and section 91 to allow SARS to issue an estimated assessment when the taxpayer does not submit relevant material to SARS if SARS has requested the relevant material at least twice. It is further proposed that if the estimated assessment is raised in consequence of the taxpayer's failure to submit relevant material to SARS the taxpayer will not be able to object to it until such time as the relevant material is provided to SARS. It is not inconceivable that a situation may arise where the taxpayer has provided material to SARS which SARS does not consider relevant material. This will create a dispute between the taxpayer and SARS about whether the material provided is in fact relevant material. No mechanism is proposed in the draft bill to facilitate such disputes (unless taxpayers will be allowed to rely on any of the other remedies – see chapter 6 hereof), which is likely to force taxpayers to approach the High Court. It is submitted that this situation may be remedied either by making a decision by SARS not to allow the taxpayer to object in consequence of the taxpayer's failure to submit relevant material subject to objection under section 104 and consequential amendments throughout the rest of chapter 9 of the TAA and the rules or by allowing the taxpayer to challenge the assessment through any of the other remedies.[17] The draft bill is subject to change and no proposed amendments were in force at the time of writing.

15 See chaps 3 and 6.
16 See chap. 6.
17 See chap. 6.

7.3.4 Specific objection exclusions: section 95(3) agreed estimates

Applicable Law

Section 95(3) – Estimation of assessments

(3) If the taxpayer is unable to submit an accurate return, a senior SARS official may agree in writing with the taxpayer as to the amount of tax chargeable and issue an assessment accordingly, which assessment is not subject to objection or appeal.

In terms section 95(3), if a taxpayer is unable to submit an accurate return, SARS and the taxpayer may agree on an assessment. Such an agreed assessment is, in terms of section 95(3), not subject to objection and appeal.

The fact that the assessment is not subject to objection and appeal does not in and of itself mean that remedies other than objection and appeal are not available.[18] However, since an agreed assessment is final in terms of section 100(1)(a)(ii), the other remedies are not available when such an agreement has been validly concluded.

7.3.5 Specific objection exclusions: section 98(2) replaced assessments

Applicable Law

Section 98(2) – Withdrawal of assessments

(2) An assessment withdrawn under this section is regarded not to have been issued, unless a senior SARS official agrees in writing with the taxpayer as to the amount of tax properly chargeable for the relevant tax period and accordingly issues a revised original, additional or reduced assessment, as the case may be, which assessment is not subject to objection or appeal.

SARS may under certain circumstances, outlined in section 98(1), withdraw an assessment.[19] In terms of section 98(2), SARS may agree in writing with a taxpayer to issue a revised assessment to replace the withdrawn assessment. Such revised assessment is, in terms of section 98(2), not subject to objection and appeal.

The fact that the assessment is not subject to objection and appeal does not in and off itself mean that remedies other than objection and appeal are not available.[20]

7.3.6 Specific objection exclusions: settled assessments

Applicable Law

Section 150(2) – Alteration of assessment or decision on settlement

(2) An altered assessment or 'decision' referred to in subsection (1) is not subject to objection and appeal.

---

18 See chap. 6 on these other remedies.
19 See chap. 6.
20 See chap. 6 on these other remedies.

In terms of section 150(2), an assessment issued to give effect to a settlement agreement reached in terms of part F of chapter 9 of the TAA is not subject to objection and appeal.

The fact that the assessment is not subject to objection and appeal does not in and off itself mean that remedies other than objection and appeal are not available. However, since an assessment given effect to in a settlement agreement is also final in terms of section 100(1)(a)(ii), the other remedies will also not be available.[21]

7.3.7 Specific objection exclusions: remittance procedures to be exhausted first

As discussed in chapter 3, SARS can make an assessment called a penalty assessment for the imposition of penalties under sections 210, 212 and 213.[22] Such a penalty assessment may be assessment of a penalty only or of both tax and a penalty.

As discussed in the beginning of this chapter, a taxpayer who is aggrieved by an assessment may object to it. A taxpayer can be aggrieved by a penalty assessment and, since nothing in the TAA specifically states that a taxpayer may not object to such an assessment, it appears the taxpayer can lodge an objection against a penalty assessment.

In terms of section 215, a taxpayer who is aggrieved by a penalty assessment may also request remittance of the penalty under the provisions of section 215.[23] It follows that a taxpayer can arguably object to a penalty assessment under section 104(1) or request remission under section 215, or indeed do both.

Furthermore, in terms of section 220, a decision by SARS not to remit a penalty is subject to objection and appeal. Read with section 104(2)(c), section 220 clearly provides that an objection lies against a decision not to remit the relevant penalty.

It seems, then, that there are three options at the taxpayer's disposal when it comes to penalties: objection to the penalty assessment in terms of section 104(1), a request for remittance under section 215 and, if remittance does not work, objection to the decision not to remit under section 104(2).

However, section 104(2)(c), read with section 220, is more specific than section 104(1). Section 215 is also more specific than section 104(1). Therefore it is submitted that a taxpayer cannot object to a penalty assessment, despite the wording of section 104(1), which may suggest otherwise. The taxpayer must first request remittance under section 215, in respect of penalties imposed under sections 210, 212 and 213. If the remittance request is not allowed, the taxpayer may object to the decision, under section 104(2)(c).

It follows that a taxpayer cannot object to a penalty assessment.

When a taxpayer receives an assessment which includes a penalty (e.g. an income tax assessment which includes a penalty for underestimation of provisional tax) it is submitted that the taxpayer must request remittance to the extent that the assessment constitutes a penalty assessment (i.e. request remittance of the penalty) and, to the extent that the assessment is not a penalty assessment, may object to that assessment under section 104(1) to the extent necessary.

In the case of an understatement penalty for substantial understatement, section 224 similarly provides that an objection lies against a decision not to remit a penalty for substantial under

21 See chap. 6.
22 See chap. 6 for a discussion of these penalties.
23 As to which, see chap. 6.

statement. However, section 224 also specifically states that a penalty imposed under section 222, which section includes a penalty imposed for substantial understatement, is subject to objection and appeal. It appears, then, that in terms of section 224 a taxpayer may either object to the imposition of an understatement penalty for substantial understatement or request remittance. It is submitted, however, that the taxpayer must first request remittance of an understatement penalty imposed for substantial understatement. Should SARS decide not to remit the penalty, its decision would fall subject to objection and appeal under section 224.

This is very important to understand, considering the onus of proof provisions in section 102,[24] read with section 129. In terms of section 102(2), SARS bears the burden of proving the facts on which it based the imposition of an understatement penalty. In terms of section 129(3), in an appeal against the imposition of understatement penalty, the court must make its decision on the basis that the onus of proof rests upon SARS. When an objection is made against a decision by SARS not to remit the penalty, the appeal will not be against the imposition of the understatement penalty but against the decision not to remit the understatement penalty. Consequently, the onus will be on the taxpayer to prove that the decision by SARS not to remit the penalty is incorrect.

7.3.8 Other objection exclusions: more than three years have elapsed from the date of the assessment or decision

Applicable Law

104(5)(b) – Objection against assessment or decision

(5) The period for objection must not be so extended ...

(b) if more than three years have lapsed from the date of assessment or the 'decision'; or

In terms of section 104(5)(b), SARS cannot condone the late submission of an objection if more than three years have elapsed from the date of the assessment or decision.

This is not a reference to the prescription under section 99.[25] This is important to understand because there are certain circumstances in which, despite the elapsing of a period of three years (or five years), prescription does not apply. There is no exception to the three-year period within which an objection must be made. Furthermore, that three-year period applies equally to SARS-assessment-type and self-assessment-type taxes.

EXAMPLE

Example 7.2 – The three-year objection rule

The taxpayer submits a VAT201 return for a period and declares a liability for that period of R1 000 000. Some four and half years later, it transpires that the taxpayer is actually an entity that is completely exempt from VAT and should never, in fact, have declared any liability at all.

Whilst the self-assessment may not yet have prescribed, more than three years have elapsed from the date of assessment. The taxpayer will therefore not be able to submit an objection against the assessment. (The taxpayer should consider one of the other remedies discussed in chapter 6.)

24 See chap. 5 for a discussion of onus of proof.

25 See chaps 4 and 6 on prescription.

The fact that more than three years have elapsed from the date of assessment does not necessarily mean the taxpayer cannot rely on one of the other remedies to challenge an assessment.[26]

7.3.9 Other objection exclusions: the assessment has prescribed

Applicable Law

Section 99(1)(e) – Period of limitations for issuance of assessments

(1) An assessment may not be made in terms of this Chapter ...

(e) in respect of a dispute that has been resolved under Chapter 9.

Section 99(1)(d)(ii) and (iii) – Period of limitations for issuance of assessments

(1) An assessment may not be made in terms of this Chapter ...

(d) in the case of ...

(ii) a reduced assessment, if the preceding assessment was made in accordance with the practice generally prevailing at the date of that assessment; or

(iii) a tax for which no return is required, if the payment was made in accordance with the practice generally prevailing at the date of that payment;

Assessments prescribe under various circumstances – for example, when a period of three or five years has elapsed from the date of assessment, depending on whether the tax is a SARS-assessment-type or a self-assessment-type tax respectively.[27] These fixed-period prescription rules are largely irrelevant to determining whether an objection can be made, in the light of the three-year objection-exclusion rule under section 104(5) discussed in paragraph 7.3.8 above.

Assessments, however, also prescribe if:

– the assessment that would form the subject matter of an objection was made on the basis of a practice generally prevailing at the time it was made;[28] and
– the assessment was issued following resolution of a tax dispute under chapter 9.[29]

It follows that assessments that have prescribed under the circumstances listed above cannot be reduced. Whilst technically the taxpayer can still object to a prescribed assessment, such objection should not have any chance of succeeding.

The prescription rule under section 99(1)(e) in particular deserves special mention because it highlights the importance of getting an objection right the first time. It is also worth noting that if, during the objection process, the taxpayer secures a reduced assessment in which SARS allows previously disallowed expenses, the assessment, in so far as it relates to the previously disallowed expenses, prescribes under section 99(1)(e). If the taxpayer later discovers that certain income was taxed on the assessment that should not have been taxed, the taxpayer may still object (subject to the exclusions listed herein) because that assessment does

26 See chap. 6.
27 For a detailed discussion of these prescription rules, see chaps 4 and 6.
28 S 99(1)(d)(ii) and (iii). Because s 99(1)(d)(i) operates to prevent the making of an additional assessment it is not considered relevant here. See chap. 4.
29 S 99(1)(e).

not prescribe under section 99(1)(e) despite the fact that both issues are contained in the same notice of assessment.[30]

The fact that the assessment may have prescribed does not necessarily prevent the taxpayer form successfully relying on one of the other remedies.[31]

There is no prescription period in respect of decisions that are subject to objection and appeal. While such a decision by SARS cannot prescribe, any objection to it has to be made within three years from the date of the decision.[32]

7.3.10 Other objection exclusions: an objection was lodged but has been withdrawn

Applicable Law

Section 100(1)(b) – Finality of assessment or decision

(1) An assessment or a decision referred to in section 104(2) is final if, in relation to the assessment or decision ...

(b) no objection has been made, or an objection has been withdrawn;

In terms of section 100(1)(b), once a taxpayer has withdrawn an objection, the assessment is final. It often happens in practice that taxpayers seek professional advice after an objection has been submitted. Considering the importance of an objection,[33] consideration is sometimes given to whether the objection should be withdrawn and replaced with a new one. It is submitted that withdrawing an objection to replace it with a new objection runs the risk of making the assessment final, which would render the subsequent objection futile in that SARS would not be able to alter the assessment no matter how compelling the subsequent objection may be.

When a taxpayer submits but subsequently withdraws an objection, none of the other remedies should yield a positive result for the taxpayer, as the assessment becomes final under section 100(1)(b). If no objection has been filed, though, one of the other remedies may be available.[34]

Exactly when an objection can be considered withdrawn is not clear. Unlike withdrawal of an appeal, for which specific provision is made in the rules,[35] no notice is prescribed for the withdrawal of an objection. Whether an objection has been withdrawn will depend on the facts of the case.

An exception to this rule is when the objection relates to a rebate or deduction for foreign tax credits in terms of section 6*quat*[36] of the Income Tax Act[37] (ITA) or a deduction in terms section 11D[38] of the ITA.

When an objection against a decision that is subject to objection and appeal is submitted but subsequently withdrawn, the decision becomes final under section 100(1)(b). Under these circumstances, it is submitted that no further remedy is available to the taxpayer to challenge the decision.

30 See chap. 3 on assessments.
31 As to these other remedies, see chap. 6.
32 See para. 7.3.8.
33 See chap. 10.
34 See chap. 6.
35 See rule 46, discussed in chap. 10.
36 S 6*quat*(5) of the ITA applies despite s 100 of the TAA.
37 Act 58 of 1962.
38 S 11D(20) of the ITA applies despite s 100 of the TAA.

7.3.11 Other objection exclusions: after the decision has been made on an objection and no appeal is filed or an appeal is filed but withdrawn

Applicable Law

Section 100(1)(c) – Finality of assessment or decision

(1) An assessment or a decision referred to in section 104(2) is final if, in relation to the assessment or decision ...

(c) after the decision of an objection, no notice of appeal has been filed or a notice has been filed and is withdrawn;

A taxpayer must have filed an objection before this exclusion can apply. Therefore the exclusion may be largely irrelevant in the present context. Suffice it say, however, that this exclusion supports the contention that, after an objection has been disallowed, the taxpayer should file an appeal. The taxpayer can, but would be well advised not to file another objection as the assessment would become final under section 100(1)(c) in the absence of an appeal.[39] This is not the case, however, if the subsequent objection relates to a different part of the assessment, which part was not objected to in the first objection.[40]

The fact that, after an objection has been decided, no appeal is noted does not prevent the taxpayer from relying on any of the other remedies for challenging the assessment.[41] If, however, a taxpayer does file an appeal and subsequently withdraws it, the taxpayer will not be able to rely on any of the other remedies, as the underlying assessment will become final. It is submitted that an appeal is withdrawn only when the taxpayer gives SARS notice of such withdrawal under rule 46.[42]

If an objection against a decision that is subject to objection and an appeal is submitted but no appeal filed after the outcome of the objection, the decision is similarly final under section 100(1)(c). Under these circumstances, no further remedy is available to the taxpayer to challenge the decision.

39 An exception to this rule applies when the objection relates to a rebate or deduction for foreign tax credits in terms of s 6*quat* of the ITA or to a deduction in terms s 11D(20) of the ITA, which exception is available despite s 100 of the TAA.

40 In practice, an objection can be submitted on eFiling only if another objection has already been filed if the source code required to be completed on the form for objections (see chap. 9) on the subsequent objection (see discussion on source codes in chap. 9) is different from the source code completed on the form for the first objection. This makes sense because a different source code should relate to a different assessment in the actual notice of assessment. However, when a single source code relates to various issues (e.g. a source code for taxable income), submitting another objection can be problematic.

41 See chap. 6 for such other remedies.

42 See chap. 10 for a discussion of rule 46.

7.3.12 Other objection exclusions: an appeal has been decided through a litigation process and there is no further right of appeal

Applicable Law

Section 100(1)(e) to (g) – Finality of assessment or decision

(1) An assessment or a decision referred to in section 104(2) is final if, in relation to the assessment or decision ...

(e) an appeal has been determined by the tax board and there is no referral to the tax court under section 115;

(f) an appeal has been determined by the tax court and there is no right of further appeal; or

(g) an appeal has been determined by a higher court and there is no right of further appeal.

In terms of section 100(1)(e) to (g), if an appeal has been determined by the Tax Board, Tax Court or a higher court and no further appeal lies[43] from such determination, the assessment is final.[44] An objection would have had to have been submitted to get to an appeal stage in any of these forums. This exclusion may therefore be largely irrelevant in the present context. These provisions support the contention that, after an appeal has been submitted and finally determined, the taxpayer cannot again lodge an objection unless, of course, such objection relates to a different part of the assessment, which part was not objected to originally, and provided that none of the other exclusions applies to prevent the submission of an objection.

Under these circumstances, no further remedy is available to the taxpayer to challenge the assessment. This applies equally to decisions that are subject to objection.

7.3.13 Other objection exclusions: an objection was not lodged within the prescribed time period for doing so and there are no grounds or circumstances for condonation of such late objection

An objection must be submitted within a prescribed period of time, which, at the time of writing, was 30 business days from the date of the assessment.[45] SARS may, however, under certain circumstances condone the late objection on the basis of the existence of reasonable grounds and, in other cases, depending on how late the objection is, of exceptional circumstances which prevented the taxpayer from submitting the objection on time.[46]

If the taxpayer does not submit the objection within the prescribed period and there are no reasonable grounds or exceptional circumstances which caused the late submission, the taxpayer has no chance of obtaining a reduced assessment under the objection and appeal remedy.[47]

---

43 Or, in the case of a matter heard in the Tax Board in the first instance, no 'referral' to the Tax Court is available.

44 Whilst s 100(1)(e) to (g) is listed here as an exclusion, the taxpayer is not barred from submitting an objection under these circumstances, but such objection will have no chance of succeeding.

45 Draft rules released for public comment in 2018 propose to extend this period to 60 days.

46 As to what constitutes reasonable grounds and exceptional circumstances, and when the taxpayer must show only reasonable grounds and when the taxpayer must demonstrate exceptional circumstances in order to secure condonation, see chap. 9.

47 While the taxpayer may approach the Tax Court for an order that a late objection be condoned in some instances, such an application will not be successful if there are no reasonable grounds or exceptional circumstances for the delay in submitting the objection. For a detailed discussion on this Tax Court process, see chap. 11.

In addition, if the objection is not submitted within the prescribed time and the objection is based on a change in a practice generally prevailing, SARS will not be able to extend the period for the lodging of an objection, irrespective of the presence of either reasonable grounds or exceptional circumstances.[48]

The fact that there are no reasonable grounds or exceptional circumstances for the delay in submitting the objection does not mean that the taxpayer cannot rely on one of the other remedies to challenge the assessment.[49]

This exclusion rule applies in the same way to decisions that are subject to objection and appeal. However, there would be no other remedy to challenge such decisions where there are neither reasonable grounds nor expectional circumstances which caused the submission of the objection after the prescribed 30 day time period.

7.3.14 Other objection exclusions: requests for a deferred-payment arrangement in terms of section 167

Section 167 allows a taxpayer to request deferred-payment arrangements in respect of a tax debt under certain circumstances. In the context of tax disputes, this provision is often resorted to when the taxpayer cannot afford to settle immediately the amount of tax in dispute and SARS has not granted a request for suspension of payment.[50] Taxpayers who do not make it clear in their request for deferred-payment arrangements that they are disputing the assessment and therefore their liability for the tax run the risk of conceding to the liability and therefore to the assessment. This could render the objection process effectively unavailable. See also chapter 12 on the role of deferred-payment arrangements in tax disputes.

7.3.15 Other objection exclusion assessments: request for SARS to compromise in terms of section 201

Section 201 allows SARS to compromise a tax debt. A taxpayer who has entered into a compromise agreement as contemplated in section 204 cannot object to the assessment that gave rise to the tax debt so compromised. A taxpayer who has applied for a debt compromise but not yet entered into a compromise agreement also runs the risk of being said to have conceded to the liability. This will render the objection process effectively unavailable.

7.4 Objection and appeal process overview

The objection and appeal process is a series of steps that follow in a prescribed sequence as set out in the rules and the TAA. There are no short cuts and each step must follow, one after the other, within the prescribed time frames. Possible exceptions, where a dispute may be resolved without having gone through all the prescribed steps, include:

- settlement, which can happen at any time in the process (or even before the process starts);[51]
- SARS's conceding or the taxpayer's withdrawing the objection or appeal; or
- the taxpayer's (or SARS's) obtaining a default judgment in consequence of SARS's (or the taxpayer's) failure to abide by the rules.[52]

48 S 104(5)(c).
49 As to these other remedies, see chap. 6.
50 See chap. 12 for a discussion of suspension requests.
51 See chap. 6.
52 For more details on the default judgment procedure, see chap. 11.

The process starts with an objection (or, in some cases, a request for reasons) against an assessment or decision that is subject to objection and appeal and ends in either a confirmed or an altered assessment or decision, with several steps (or possible steps, depending on the case) in between. The steps in the process can, for the sake of convenience, be classified into two main phases: the objection phase and the appeal phase.

The objection phase starts with a request for reasons or with an objection, if the taxpayer did not request reasons, and ends with a decision by SARS either to allow the objection or to disallow it. If SARS allows the objection, the dispute process ends and the entire appeal phase becomes irrelevant. The sections and rules governing the objection phase are detailed in chapters 8 and 9.

Figure 7.1 gives a high-level overview of all the steps in the objection process.

If SARS disallows the objection, or partially allows it, the taxpayer may pursue the case further in the appeal phase, subject to the rules associated therewith. The appeal phase starts with the noting of an appeal, which is filed after a decision by SARS not to allow the objection (or after a decision to allow part of the objection) and ends in either:

- an agreement or settlement between the taxpayer and SARS under the alternative dispute resolution (ADR) procedures regarding the correctness or incorrectness of the assessment or decision, without the need to engage in litigation procedures; or
- a decision by the Tax Board, Tax Court or a higher court regarding the correctness or incorrectness of the assessment or decision.[53]

Figure 7.2 gives a high-level overview of the appeal phase.

53 The sections and rules governing the appeal phase are detailed in chap. 10.

Figure 7.1: High-level overview of the objection phase

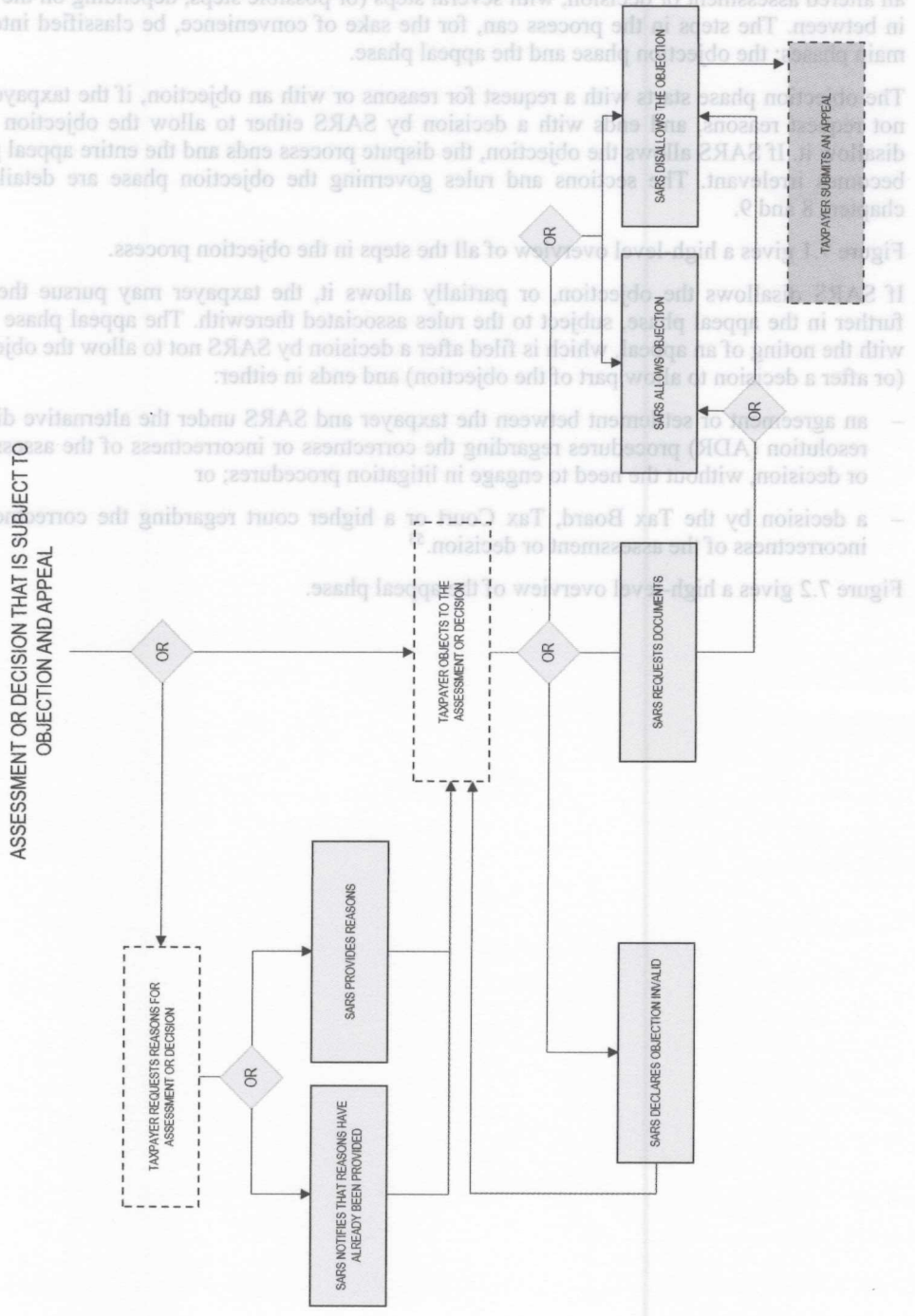


Figure 7.2: High-level overview of the appeal phase

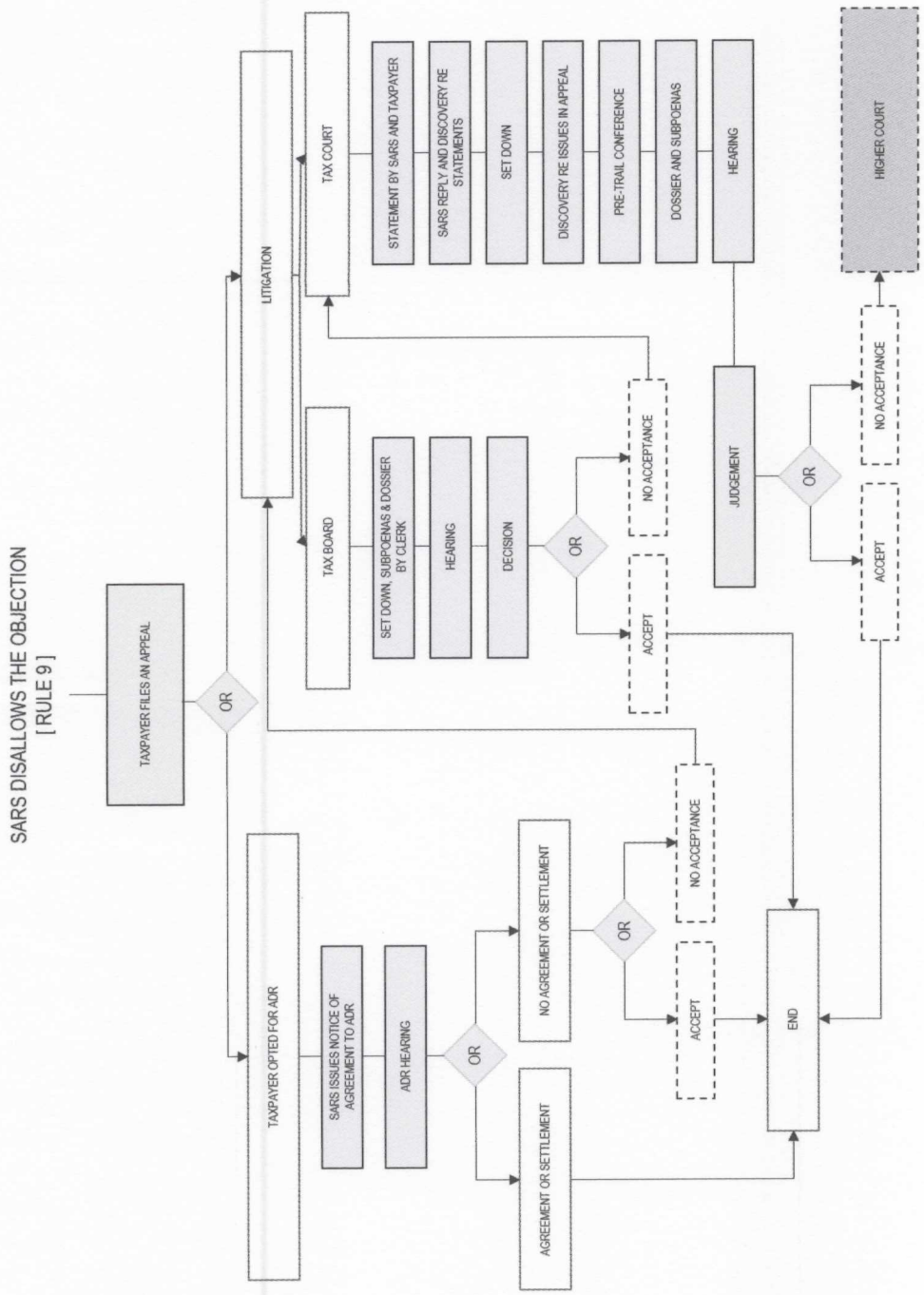


Figure 7.2: High-level overview of the appeal phase

PART II

CHAPTER 8

Reasons

The practical context of this chapter

Why request reasons for an assessment?

> *A request for reasons should serve to delineate the issues in dispute. For the taxpayer, the reasons SARS provides can serve as a reference point to the original grounds on which SARS based its assessment, which may be advantageous for the taxpayer in the event of the dispute's proceeding to the appeal phase.*

For the taxpayer: how and when?

> *The taxpayer must submit a form known as a Request for Reasons (DISP01), if it can be accessed via SARS eFiling. The form can be accessed through eFiling, under the 'Returns History' tab, by clicking on the 'Request for Reasons' button on the relevant work page, or in the tab titled 'Request for Reasons'. If the Request for Reasons (DISP01) form cannot be accessed via eFiling, the taxpayer must deliver a properly drafted letter to SARS at addresses specified by public notice.*[1]
>
> *The taxpayer must submit its Request for Reasons within 30 business days from the date of the assessment or decision by SARS. SARS, in turn, must entertain the request and respond to it. The request may be submitted 30 business days from the date of the assessment or decision but before a total of 75 business days have elapsed from that date if the taxpayer can prove that there were reasonable grounds for failure to submit the request earlier (within the prescribed 30 days). If the taxpayer can prove this, SARS should entertain the request and respond to same within the prescribed time period.*

Consequences for taxpayers who do not comply with these rules

> *SARS is not under an obligation to respond to the request if the taxpayer does not submit the request in time. Moreover, late submission of the taxpayer's request could eventually also lead to the taxpayer's objection being late. If the objection is submitted late, the taxpayer could lose the right to object to the assessment or decision.*[2]

For SARS: how and when?

> *SARS must respond to a request for reasons by the taxpayer that was timeously submitted, within 30 business days from the date of delivery of the request if SARS believes that it has already provided the taxpayer with sufficient reasons, by advising the taxpayer accordingly. If SARS believes that it has not yet provided sufficient reasons, then*

1 The addresses so specified can be found in para. 8.5.3.

2 See chap. 6 in respect of possible remedies of which taxpayers can avail themselves in this situation.

the reasons must be provided to the taxpayer within 45 business days from the date of the request. If SARS requires more time to provide reasons, the taxpayer must be notified accordingly within the 45-day time period. If SARS has abided by this rule, it has an additional 45 days to provide the reasons.

Consequences for SARS if it does not comply

The taxpayer can complain to the Complaints Management Office (CMO) or to the Office of the Tax Ombud but, relative to the consequence for the taxpayer, this would have no significant consequences for SARS. Alternatively, the taxpayer may approach the Tax Court for an order that SARS provide the reasons requested by the taxpayer,[3] *but again, apart from a possible cost order against SARS, the consequences for SARS are usually much less dire than they would for the taxpayer were the taxpayer not to comply with the rules. The taxpayer can apply to the Tax Court for default judgment against SARS on account of SARS's failure to comply with the rules.*[4] *If an application for default judgment under rule 56 of the rules results in a final order against SARS, SARS could effectively forfeit its right to recover the tax assessed or to enforce the relevant decision.*[5]

3 See chap. 11 on this remedy and the procedure for it.
4 The Rules promulgated under s 103 of the Tax Administration Act 28 of 2011.
5 See chap. 11 on the default-judgment remedy and procedure.

Contents

Table of Examples

Table of Figures

Contents

Table of Examples

Table of Figures

8.1 Introduction

As discussed in chapter 7, the objection and appeal remedy involves a process comprising a number of steps. The steps in the process may fall into either the objection phase or the appeal phase. The process commences with the objection phase. The objection phase, in turn, may commence either with a Request for Reasons in respect of a decision or assessment falling subject to objection and appeal or with the submission of an objection by the taxpayer. The taxpayer may request reasons (if there is a need to do so) or object to the assessment without first asking for reasons (if the taxpayer is able to formulate an objection without first having to request reasons).

This chapter sets out the reasons for a taxpayer's requesting reasons; what exactly the taxpayer can request reasons for; how and when reasons must be requested; SARS's duties regarding how and when it must respond to the taxpayer's request; and what the taxpayer's remedies are should SARS not respond to the request or not respond appropriately.

Figure 8.1 illustrates how the request fits into the broader context of the objection phase. Figure 8.3 at the end of this chapter provides a more detailed version.

8.2 The importance of requesting reasons

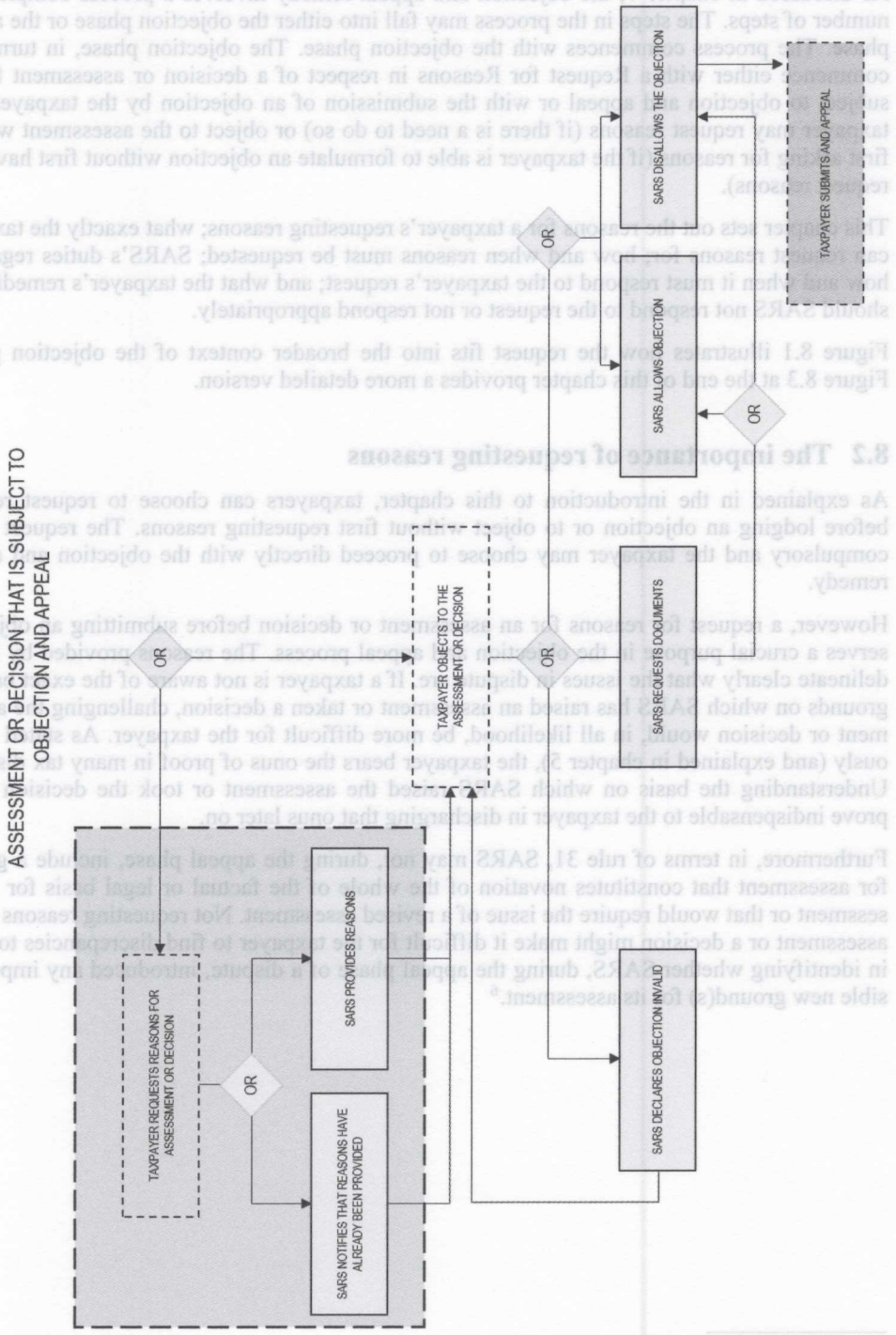
As explained in the introduction to this chapter, taxpayers can choose to request reasons before lodging an objection or to object without first requesting reasons. The request is not compulsory and the taxpayer may choose to proceed directly with the objection and appeal remedy.

However, a request for reasons for an assessment or decision before submitting an objection serves a crucial purpose in the objection and appeal process. The reasons provided by SARS delineate clearly what the issues in dispute are. If a taxpayer is not aware of the exact basis or grounds on which SARS has raised an assessment or taken a decision, challenging the assessment or decision would, in all likelihood, be more difficult for the taxpayer. As stated previously (and explained in chapter 5), the taxpayer bears the onus of proof in many tax disputes. Understanding the basis on which SARS raised the assessment or took the decision could prove indispensable to the taxpayer in discharging that onus later on.

Furthermore, in terms of rule 31, SARS may not, during the appeal phase, include a ground for assessment that constitutes novation of the whole of the factual or legal basis for its assessment or that would require the issue of a revised assessment. Not requesting reasons for an assessment or a decision might make it difficult for the taxpayer to find discrepancies to assist in identifying whether SARS, during the appeal phase of a dispute, introduced any impermissible new ground(s) for its assessment.[6]

6 For a detailed discussion of the new grounds SARS may and may not add in the appeal phase, see chap. 10.

Figure 8.1: The request for reasons in the larger context of the objection and appeal process.



8.3 When reasons may be requested

In terms of rule 6, a taxpayer may request reasons in respect of any decision or assessment that falls subject to objection and appeal.[7] In other words, if an assessment or decision is subject to objection and appeal, the taxpayer is entitled to request reasons for the assessment or decision, regardless of whether some form of reasons has already been provided to the taxpayer in respect of that assessment or decision, for example in SARS's letter of audit findings or finalisation letter.[8] This is supported by the fact when SARS receives a request for reasons it must still formally respond to the taxpayer's request even if it is of the view that sufficient reasons have already been given to the taxpayer.

8.4 Time period within which reasons must be requested

Taxpayers who decide to request reasons before submitting an objection must ensure that they comply with the time periods prescribed in the rules. In terms of the rules, there is a standard time period within which a request must be submitted. The rules also provide for an extended time period in certain cases. The standard time period and the extended time period are discussed separately below.

8.4.1 The standard time period for requesting reasons

A request for reasons must be made within 30 business days from the date of the assessment or decision.[9] Business days exclude Saturdays, Sundays, public holidays and all the days 'between 16 December of each year and 15 January of the following year, both days inclusive' (commonly known as *dies non*).[10]

In terms of clause 7(1)(i) the Disaster Management Tax Relief Administration Bill,[11] the days between 26 March 2020 and 30 April 2020, both inclusive, must also, like the period from 16 December to 15 January, be regarded as *dies non* for the purposes of chapter 9 of the TAA and the rules.[12]

References to days or business days in this chapter must be taken to mean business days as explained in the preceding two paragraphs. Days are always counted exclusive of the first and inclusive of the last.

EXAMPLE

Example 8.1 – Counting days exclusive of the first, inclusive of the last

Mr A received an assessment on 16 January 2020. The first day of the 30-day period within which he could request reasons was 17 January 2020 and the thirtieth day was 27 February 2020.

---

7 Although rule 6 refers only to 'an assessment', the word 'assessment' is defined in rule 1 to include decisions contemplated in s 104(2). See chap. 7 for a discussion of assessments and decisions that are subject to objection and appeal.

8 See chap. 2.

9 Rule 6(2)(c).

10 Definition of 'business day' in s 1.

11 Bill 12 of 2020. The Bill had not been promulgated at the time of writing. If it is promulgated in its current form, the provisions referenced here will be effective from 26 March 2020.

12 Interestingly, the exclusion period from 15 December to 16 January is not by any definition of the word '*dies non*' but the result of the definition of 'business day' in s 1. Arguably, then, the fact that the period from 26 March to 30 April 2020 should be regarded as *dies non* under the Bill should not necessarily mean that that period should not be counted for the purpose of disputes under chap. 9 of the TAA. However, it appears to be the intention that the days between 26 March 2020 to 30 April 2020 should not be counted for the purpose of disputes under chap. 9 of the TAA.

EXAMPLE

Example 8.2 – Excluding the days between 16 December of a year and 15 January of the following year (both days inclusive)

Mr B received an assessment on 15 December 2019. The first day of the 30-day period within which he could request reasons was 16 January 2020.

The date of assessment, in the case of SARS-assessment-type taxes,[13] is the issue date of the notice of assessment.[14] It is important to note here that it is the date of issue of the notice of assessment from which the 30-day period must be counted and not the date of issue of the assessment. As explained in chapter 3, the assessment and the notice of assessment are not always the same thing. An assessment often precedes the notice of assessment.

In the case of a self-assessment-type tax[15] in respect of which a return must be submitted, the date of assessment is the date of submission of the underlying tax return. If no return is required, the date of assessment is the date on which the last payment was made, or, if no payment was made, the effective date.[16]

8.4.2 The extended time period for requesting reasons

The 30-day period within which reasons must be requested may be extended by SARS by a maximum of 45 business days if there are reasonable grounds for the delay in submitting the request for reasons.[17] It follows that a taxpayer could request reasons up to 75 business days[18] after the date of the assessment or decision. It is worth reiterating that if the request is made more than 30 business days but less than a total of 75 business days after the date of the assessment or decision the taxpayer must show that there were reasonable grounds for the delay in submitting the request. SARS has no discretion to condone a request for reasons made more than 75 business days after the date of assessment.

Taxpayers who require an extension of the time within which their request for reasons must be submitted should request such an extension in the request for reasons submitted to SARS if such request is made more than 30 business days from the date of the assessment or decision. Nothing prevents the taxpayer from requesting a time extension before the 30-day period lapses.

If SARS does not grant the time extension, the taxpayer can:

- request a review of SARS's decision in terms of section 9;[19]
- complain to the CMO or Tax Ombud; or
- approach the High Court.[20]

---

13 See chap. 3 on the different types of assessment.
14 Para. (a) of the definition of 'date of assessment' in s 1, read with rule 1.
15 See chap. 3.
16 These are the dates defined in s 187(3) to (5).
17 As to what constitutes reasonable grounds, see chap. 9.
18 I.e. the standard 30 days from the date of assessment plus, where applicable, an extension of an additional 45 days.
19 See chap. 6.
20 The Tax Court arguably does not have jurisdiction to hear applications for an extension to the time period within which reasons may be requested. The application provided for under rule 52(1) applies only in circumstances when agreement on an extension could not have been reached under rule 4. Rule 4 in turn applies only in cases where the rules do not provide for a specific extension period. Since rule 6 does provide for a specific extension period, rule 4 cannot apply and therefore an application cannot be made under rule 52(1). For a detailed discussion of rule 52(1), see chap. 11.

Figure 8.2 illustrates the periods within which reasons may be requested.

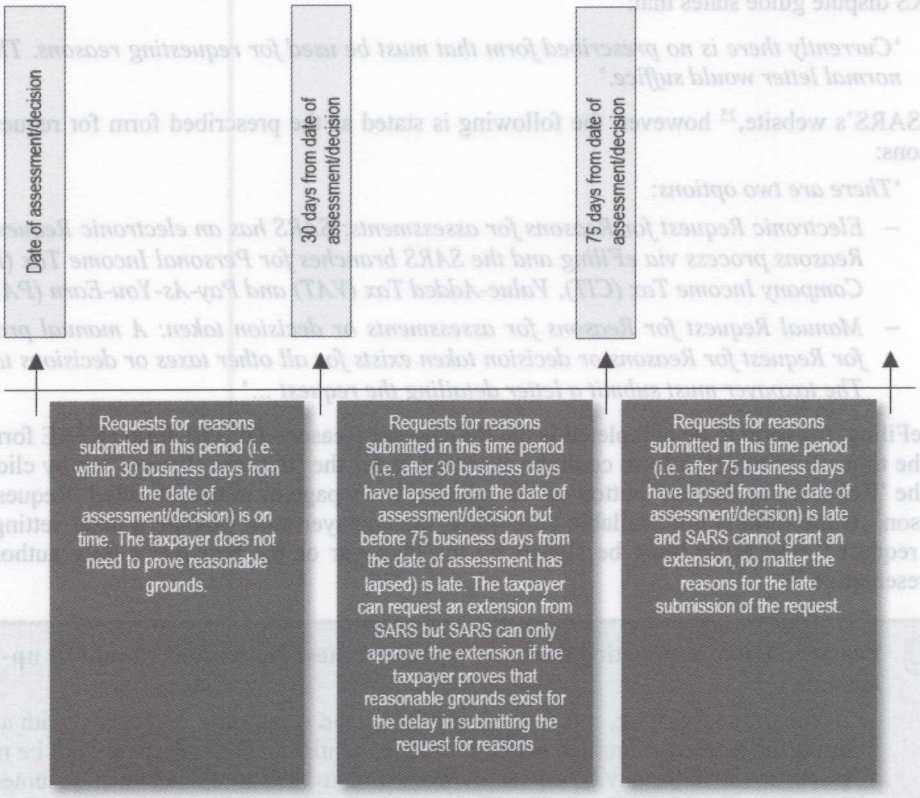


Figure 8.2: Time periods prescribed for requesting reasons.

8.5 How to request reasons

In terms of rule 6 requests for reasons must:

- be in the prescribed form;[21]
- specify an address at which the taxpayer will accept delivery by SARS of the reasons;[22] and
- be delivered to SARS within the time periods discussed in paragraph 8.4 above.[23]

Each of these requirements is discussed separately below.

21 Rule 6(2)(a).
22 Rule 6(2)(b).
23 Rule 6(2)(c).

8.5.1 The prescribed form for requesting reasons

SARS has prescribed a form by for the requesting of reasons,[24] although footnote 46 of the SARS dispute guide states that:

> '*Currently there is no prescribed form that must be used for requesting reasons. Thus a normal letter would suffice.*'

On SARS's website,[25] however, the following is stated as the prescribed form for requesting reasons:

> '*There are two options*:
>
> – *Electronic Request for Reasons for assessments: SARS has an electronic Request for Reasons process via eFiling and the SARS branches for Personal Income Tax (PIT), Company Income Tax (CIT), Value-Added Tax (VAT) and Pay-As-You-Earn (PAYE).*
>
> – *Manual Request for Reasons for assessments or decision taken: A manual process for Request for Reasons or decision taken exists for all other taxes or decisions taken. The taxpayer must submit a letter detailing the request ...*'

On eFiling, the form to be completed is the Request for Reasons DISP01 form (RFRE form).[26] At the time of writing, the form could be accessed under the 'Returns History' tab by clicking on the 'Request For Reason' button on the relevant work page or in the tab titled 'Request for Reason'. If the form is not available on eFiling, the taxpayer must prepare a letter setting out the request.[27] The letter must be signed by the taxpayer or the taxpayer's duly authorised representative.[28]

Practical issue: supporting documents for a request for reasons cannot be uploaded

At the time of writing, it is not possible to upload supporting documents with a request for reasons submitted through eFiling. Whilst it should arguably not be necessary to do so, it may be necessary from time to time to upload such documents. In such cases, when the SARS official who raised the assessment is known (e.g. in the case of an additional assessment following an audit), supporting documents are often sent to the relevant official together with a copy of the RFRE form submitted through eFiling.

---

24 Rule 2(1)(a) read with s 103(3). In terms of s 103(3), the Commissioner for SARS may prescribe forms for the purpose of the rules. These forms need not be prescribed by public notice. In fact, s 103 is silent as to the manner in which the Commissioner must prescribe the forms. In practice, forms are prescribed by notice on SARS's website or in SARS's guides.

25 https://www.sars.gov.za/ClientSegments/Individuals/What-If-Not-Agree/Pages/Request-for-Reasons.aspx (accessed 20 April 2020).

26 https://www.sars.gov.za/ClientSegments/Individuals/What-If-Not-Agree/Pages/default.aspx (accessed 15 June 2020).

27 See the suggested template (template B1) in annexure B.

28 Rule 2(b). While this requirement also applies to requests submitted via eFiling, SARS states in the SARS dispute guide, at para. 3.5, that: '*SARS is comfortable that its "secure and reliable SARS electronic filing services" provide sufficient confidentiality and security to enable the user ID and access code to function as an electronic signature*'.

8.5.2 Specifying an address for delivery of the reasons by SARS

The taxpayer must, in the request, specify an address at which the taxpayer will accept delivery of the reasons by SARS. This could be any address at which the taxpayer will accept delivery, including an email address. The taxpayer is required to provide this address irrespective of the method of delivery of the request for reasons.

8.5.3 Delivery of the request to SARS

If the RFRE form is available through eFiling, the taxpayer must submit it through eFiling.[29] If the form is not available on eFiling, the taxpayer can email, post or hand-deliver the request to specified addresses or hand-deliver the request to any SARS branch. The addresses specified for the purposes of delivery via email, post and hand-delivery (other than hand-delivery to a SARS branch) are as set out below:[30]

'*1.1 Electronic addresses:*

Region	***Email***	***Fax number***
North South Africa: *Gauteng North (includes Tshwane and Centurion), North West, Mpumalanga and Limpopo*	*Contact.north@sars.gov.za*	*(+27) 12 670 6880*
Central South Africa: *(including Midrand, the Greater Johannesburg area, Kempton Park, Boksburg, Vereeniging, and Springs), Free State and Northern Cape*	*Contact.central@sars.gov.za*	*(+27) 10 208 5005*
Eastern South Africa: *Taxpayers residing in KZN and the northern parts of the Eastern Cape (up to and including East London)*	*Contact.east@sars.gov.za*	*(+27) 31 328 6018*
Southern South Africa *Taxpayers residing in the Eastern Cape south of East London and in the Western Cape*	*Contact.south@sars.gov.za*	*(+27) 21 413 8905*

29 Rule 2(c)(ii), read with para. 1 of part B of GN 295 in *GG* 38666 of 31 March 2015.
30 Ibid.

1.2 Postal and physical addresses:

Office	*Postal Address*	*Physical address*
Alberton	*Private Bag X15* *Alberton* *1450*	*St Austell Street* *Mackinnon Crescent* *New Redruth* *Alberton* *1449*
Bellville	*Private Bag X11* *Bellville* *7530*	*Corner of Teddington & De Lange Road* *Bellville* *7530*
Doringkloof	*P O Box 436* *Pretoria* *0001*	*7 Protea Street* *Centurion* *Pretoria* *0157*
Durban	*P O Box 921* *Durban* *4000*	*201 Dr Pixley KaSeme Street* *Durban* *4001*

It should be noted that on 24 August 2020, SARS released a statement on its website in which it is stated that:[31]

"*The following email addresses will cease to exist from 24 August:*

- ...
- *For taxpayers: Contact.central@sars.gov.za, contact.north@sars.gov.za, contact.east@sars.gov.za and contact.south@sars.gov.za*

The new email addresses from 24 August are:

- ...
- ***Contactus@sars.gov.za***"

The fact that SARS notified taxpayers by announcement on their website about a change in the email addresses prescribed by Public Notice (as set out in the table above) does not detract from the fact that in terms of the Public Notice, delivery can only be made at the email addresses listed in the table above (where the request is submitted *via* email). As such, a taxpayer who delivers a request for reasons to the address 'contactus@sars.gov.za' as opposed to, for example, 'contact.north@sars.gov.za' would not have delivered a request for reasons as required under the rules. At the time of writing, the Public Notice which prescribes the email addresses listed in the table above has not been amended but we understand that SARS is looking into amending the public notice in this regard. Until the Public Notice has been amended, taxpayers would be well advised to continue to submit requests for reasons to the email addresses listed in the table above if the request for reasons is submitted *via* email. It would however be practicable to also deliver the request to contactus@sars.gov.za in addition to the other email address set out in the table above.

31 https://www.sars.gov.za/Contact/Pages/Contact-SARS-by-e-mail%20or%20fax%20or%20post.aspx (accessed 24 August 2020).

While it is not necessary, it is courteous and practical to deliver a copy of the letter to the SARS official responsible for raising the assessment, if the details of the official are known, in addition to delivering the letter to the relevant address specified above.

The request is considered delivered to SARS on the date of receipt of the request by SARS.[32] This is not necessarily the date on which SARS recognises the request on its system, which is often a couple of days after the actual date of receipt by SARS. Taxpayers would do well, especially in the case of requests in the form of a manual letter, to record the date of receipt by SARS and keep it as proof of delivery.

8.6 Consequences for the taxpayer of failure to comply with the rules

As is evident from paragraphs 8.4 to 8.5 above, the taxpayer must request reasons in the prescribed form and manner and within the prescribed time. If the taxpayer does not abide by these rules, the request for reasons will not be entertained by SARS (on account of the request's invalidity) and SARS would be under no obligation (under the TAA or the rules) to respond to the request at all. This could mean that the taxpayer may be late with submitting an objection,[33] which could, in turn, result in the taxpayer's losing its right to challenge SARS's assessment or decision.[34]

8.7 The reasons SARS must provide

SARS must provide the reasons necessary to enable the taxpayer to formulate an objection properly. The ambit of the reasons required of SARS is not as wide as it may seem at first glance. In *Commissioner for South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment*,[35] the Supreme Court of Appeal held that SARS is required to provide only the factual and legal basis for its assessment or decision and is not required to explain the rationale behind the assessment or decision.

If SARS provides reasons that do not comply with the prescripts in the *Sprigg Investment* case, the taxpayer may approach the Tax Court for:

- appropriate relief under rule 52(2)(a);[36] and/or
- default judgment under rule 56.[37]

The taxpayer can, of course, also consider approaching the Tax Ombud or the CMO. However, unlike the applications mentioned above, complaints to the CMO or Tax Ombud do not automatically suspend the period within which the taxpayer must, in terms of the rules, object after receiving the deficient reasons.

8.8 When must SARS provide the reasons?

Rule 6 prescribes a standard time period within which SARS must respond and provides for an extended period within which SARS may respond. These periods are discussed separately below.

---

32 Rule 2(2)(b).
33 See in chap. 9 on the periods within which objections must be made.
34 See chap. 7.
35 [2010] ZASCA 172, [2011] 3 All SA 18 (SCA), 2011 (4) SA 551 (SCA).
36 See chap. 11 for a detailed discussion of rule 52(2)(a).
37 See chap. 11 for a detailed discussion of rule 56.

8.8.1 The standard time period within which SARS must provide reasons

If SARS is satisfied that reasons were provided for its assessment before the taxpayer requested them, it must, within 30 business days of receiving the request for reasons, advise the taxpayer accordingly by notice and in such notice refer to the documents containing SARS's reasons for the assessment or decision.[38]

If SARS believes that reasons have not been provided, it must provide the reasons within 45 business days from the date of receipt by SARS of the taxpayer's request for reasons.[39]

8.8.2 The extended time period within which SARS may provide reasons

SARS can extend the 45-day period within which it must provide its reasons by a further 45-day period owing to exceptional circumstances, the complexity of the matter or the principle or amount involved, provided SARS delivers a notice to the taxpayer before the first 45-day period lapses.[40]

There is no specific extension period provided for in the rules to the 30-day period within which SARS must notify the taxpayer that it believes sufficient reasons have been provided. SARS and the taxpayer may, however, agree to an extension of this 30-day period, which agreement may be reached before or after the 30-day period has lapsed.[41]

If SARS does not provide the requested reasons within the prescribed time, the taxpayer may:

- complain to the CMO;
- complain to the Tax Ombud;
- approach the Tax Court for an order compelling SARS to provide the reasons under rule 52(2)(a);[42] and/or
- approach the Tax Court for default judgement under rule 56.[43]

8.9 At what address must SARS provide the reasons?

SARS must send its reasons (or its notice that sufficient reasons have already been provided) to the address specified in the taxpayer's request for reasons,[44] irrespective of whether the request was submitted via eFiling or as a letter.[45] However, if a taxpayer has not specified an address, SARS cannot be faulted for delivering the reasons *via* eFiling, for example.

Should SARS send the reasons (or notice that sufficient reasons have already been provided) to an address not specified in the request for reasons, the reasons would not be delivered as required under the rules and could end up being late. In addition, the period within which the taxpayer is required to object would not start running.

38 Rule 6(4).
39 Rule 6(5).
40 Rules 6(6) and 7.
41 Rule 4(2).
42 See chap. 11 for a detailed discussion of rule 52.
43 See chap. 11 for a detailed discussion of rule 56.
44 See para.8.5.2.
45 Rule 2(c)(i) clearly provides that SARS must deliver documents to the address selected by the taxpayer under the rules or the address that the taxpayer must use under the rules. Rule 6 does not prescribe an address that the taxpayer must use.

8.10 The request for reasons in context

Figure 8.1 at the beginning of this chapter highlights the request for reasons in the larger context of the objection process. In the light of what has been learned in this chapter, that figure, in so far as it involves the request for reasons, can be updated as shown in Figure 8.3.

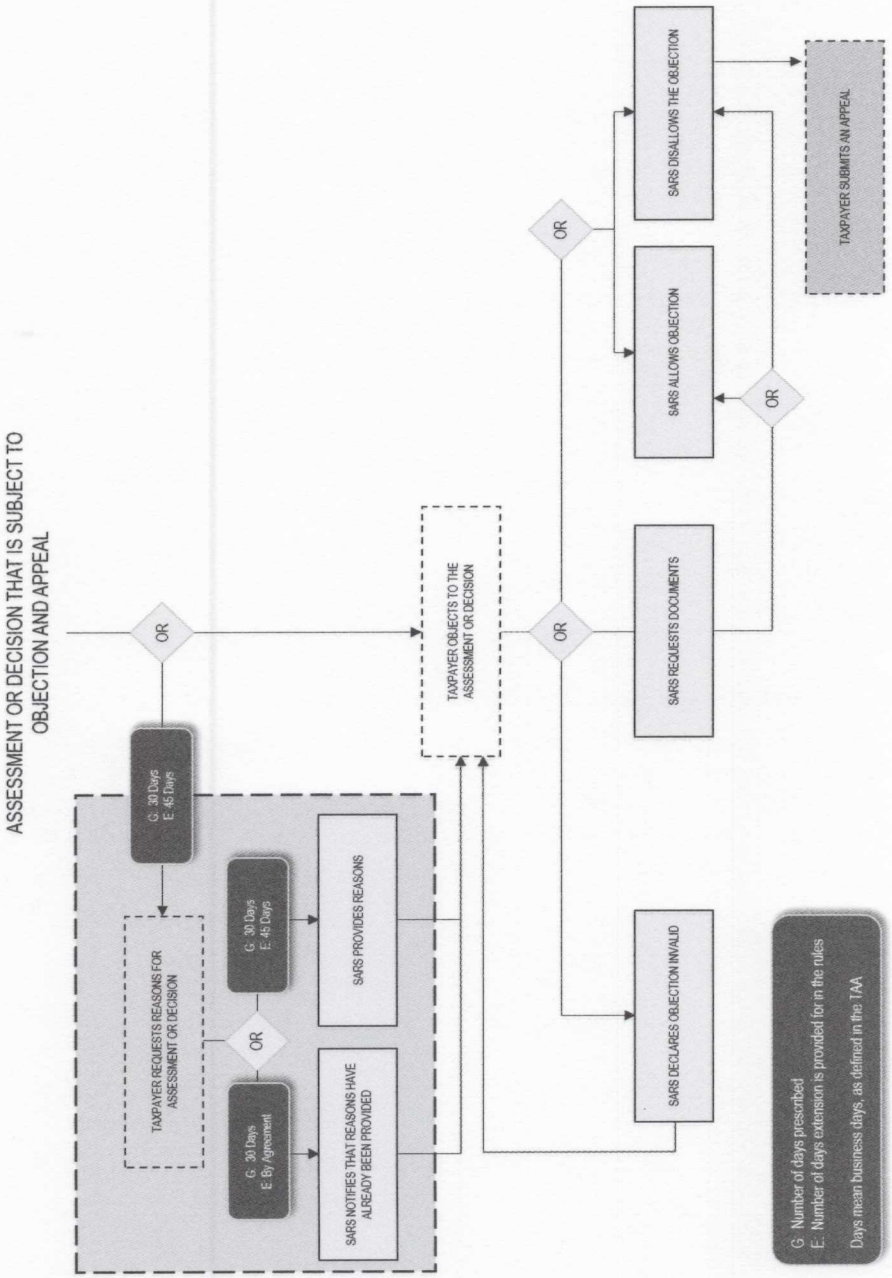


Figure 8.3: The request for reasons in the larger context of the objection and appeal process, updated.

8.10 The request for reasons in context

Figure 8.1 at the beginning of this chapter highlights the request for reasons in the larger context of the objection process. In the light of what has been learned in this chapter, that figure, in so far as it involves the request for reasons, can be updated as shown in Figure 8.3.

Figure 8.3: The request for reasons in the larger context of the objection and appeal process, updated.

PART II

CHAPTER 9

Objection and decision on objection

The practical context of this chapter

For the taxpayer: how to object and when?

The Tax Administration Act[1] *(TAA) provides that the taxpayer can lodge an objection by submitting either a Notice of Objection (DISP01) form (NOO) via eFiling or an ADR1 form to addresses specified in a public notice. The addresses for delivery of the ADR1 form are set out in paragraph 9.3.5 of this chapter. SARS's website prescribes when the taxpayer must use the NOO and when the ADR1 form is appropriate. When to use the NOO form and when to use the ADR1 form is explained in paragraph 9.3.1.*

In terms of the rules,[2] *the NOO or ADR1 form must be submitted within a period of 30 business days from the date of the assessment or decision or, if reasons were requested prior to objection,*[3] *within 30 business days from the date of delivery by SARS of the reasons or of the notice wherein SARS notifies the taxpayer that reasons have already been provided.*

SARS can extend the 30-business-day period within which the taxpayer may object by a further 30 business days if reasonable grounds exist for the taxpayer's delay in submitting the objection, and by a further 30 business days if exceptional circumstances precluded the taxpayer from submitting the objection on time. The time period cannot be extended by more than 3 years from the date of the assessment or decision.

For the taxpayer: consequences of non-compliance

If the taxpayer does not properly deliver the objection to SARS or uses the wrong form, SARS must declare the objection invalid within 30 business days from the date of the objection. If the objection has been declared invalid by SARS, SARS will not make a decision on it. To remedy this, the taxpayer can submit a new objection, provided that the taxpayer does so within a period of 20 business days from the date on which SARS declared the objection invalid.

If the taxpayer fails to object timeously and SARS decides not to extend the time period, SARS will also consider the late objection invalid and will likewise not make a decision on it. The taxpayer's only remedy in these circumstances would be to object to the decision by SARS not to extend the time period and consider the late objection.

---

1 Act 28 of 2011. Any reference to a legislative provision in this chapter is a reference to a provision in the TAA unless otherwise stated or the contrary appears from the context.

2 The Rules promulgated under s 103 of the TAA.

3 See chap. 8.

For SARS: how and when?

> *After receipt of the taxpayer's objection, SARS can request further documents from the taxpayer, declare the objection invalid, or make a decision on the objection. If SARS requires further documents or wants to declare the objection invalid, it must do so within 30 business days from the date of delivery by the taxpayer of the objection. If SARS does not require any further documents from the taxpayer or does not declare the objection invalid in time, it must make its decision within 60 business days from the date of the objection. If, however, SARS does request further documents, its decision on the objection must be delivered to the taxpayer within 45 business days of receiving the documents from the taxpayer. The time frames within which SARS must act may be extended under various circumstances, as discussed more fully in this chapter.*

For SARS: consequences of failure to comply with the rules

> *If SARS fails to deliver timeously the notice of invalidity of the taxpayer's objection, or if it fails to request documents or make a decision on the objection, SARS could find itself facing an application by the taxpayer for default judgment, on account of SARS's non-compliance with the rules.*[4] *SARS's non-compliance could also result in a complaint from the taxpayer to the Complaints Management Office (CMO) and/or to the Tax Ombud.*

4 See chap. 11.

Contents

Table of Examples

Table of Figures

9.1 Introduction

The objection and appeal remedy is a process provided for in the TAA, comprising a number of steps. The various steps in the process are applicable to and may fall into either the objection phase or the appeal phase.[5]

The objection and appeal process starts with the objection phase. The objection phase may commence with the taxpayer's request for reasons in respect of a decision or assessment[6] or with the taxpayer's submission of an objection, without a request for reasons. The taxpayer can either request reasons first and lodge an objection after receiving SARS's response to the request or lodge the objection without first submitting a request for reasons.

This chapter sets out the rules governing the objection phase, including when and how an objection must be submitted by the taxpayer, what SARS can and must do after the objection has been lodged, and how and when SARS and the taxpayer must subsequently act within the ambit of the rules. The discussion also covers the consequences for the taxpayer and for SARS in the event that either party fails to comply with the rules. These rules apply only if the taxpayer is entitled to object to the assessment or decision.[7]

Figure 9.1 provides a high-level illustration of the objection itself and where it fits into the objection phase as a whole. Figure 9.3, at the end of this chapter, presents a more detailed version of Figure 9.1.

9.2 The time period within which taxpayers must object

The rules provide for a standard time period within which the taxpayer must lodge an objection and for an extended time period in certain circumstances. The standard time period and the extended time periods/extensions are discussed separately below.

9.2.1 The standard time period within which a taxpayer must object

As a general rule, an objection must be lodged within 30 business days from the date of an assessment[8] raised or decision made by SARS, if the taxpayer chooses not to submit a request for reasons. When reasons are requested,[9] the taxpayer must lodge its objection within 30 business days from the date of receiving reasons from SARS or from the date of receiving SARS's notice, in response to the request, wherein SARS notifies the taxpayer that reasons have already been provided.[10]

Business days exclude Saturdays, Sundays, public holidays and all the days between 16 December of a year and 15 January of the following year, both days inclusive (this period is commonly referred to as *dies non*). This means that these days are not counted as days for the purposes of the prescribed time periods under the TAA and the rules.[11]

5 See chap. 7 for a full overview.
6 See chap. 8 for details regarding requests for reasons.
7 As to whether a taxpayer can object to an assessment or decision, see chap. 7.
8 Rule 7(1)(a).
9 See chap. 8.
10 Rule 7(1)(b). See chap. 8.
11 See the definition of 'business day' in s 1.

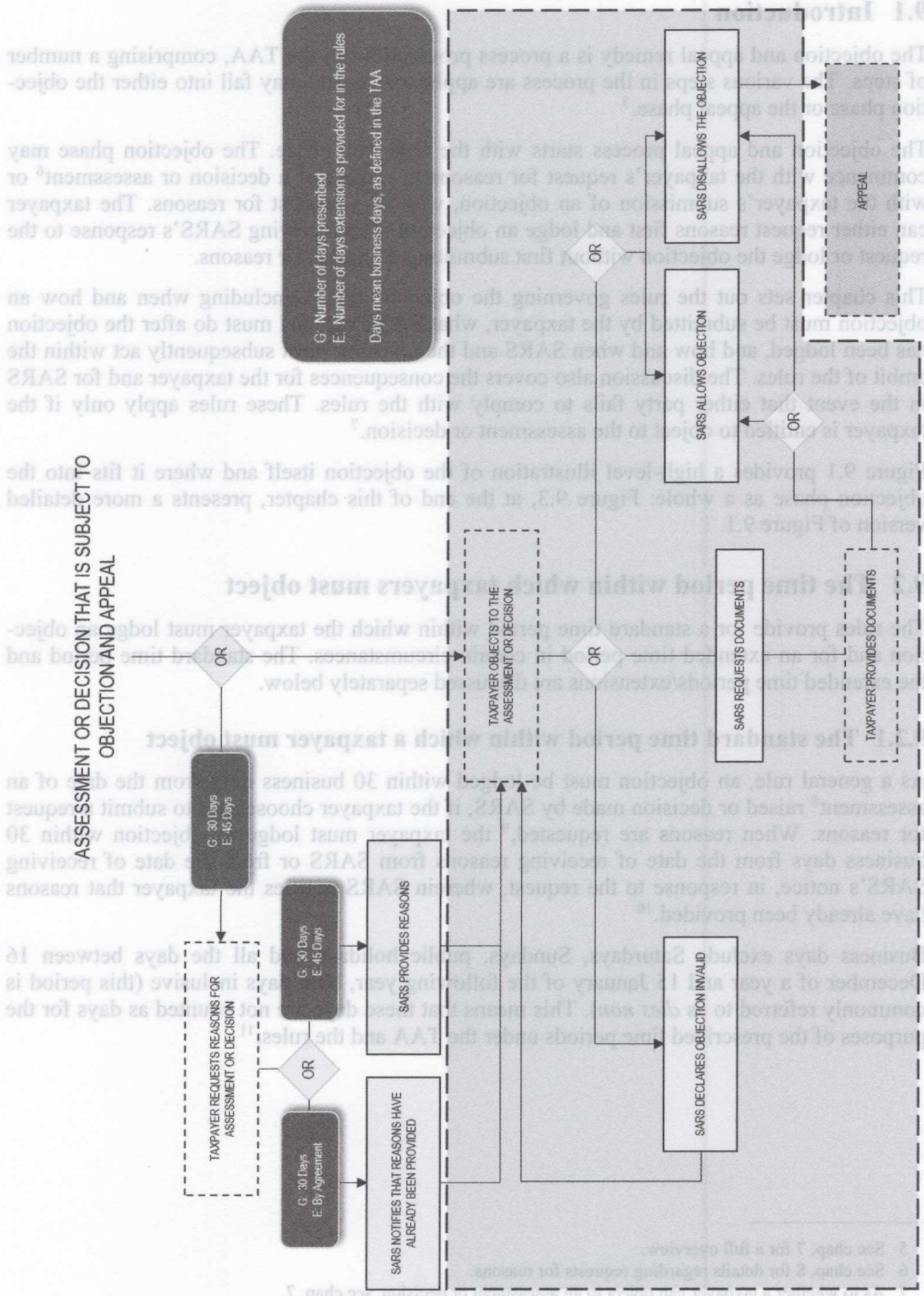


Figure 9.1: The objection in context.

In terms of clause 7(1)(i) the Disaster Management Tax Relief Administration Bill,[12] the days between 26 March 2020 and 30 April 2020, both days inclusive, must also be regarded as *dies non* for the purposes of chapter 9 of the TAA and the rules.[13]

References to days or business days in this chapter must be taken to mean business days as explained above. As a general rule 'days' are counted exclusive of the first day and inclusive of the last day.

EXAMPLE

Example 9.1 – Counting days exclusive of the first, inclusive of the last

Mr A received an assessment on 16 January 2020. The first day of the 30-day period within which he could object was 17 January 2020 and the thirtieth day was on 27 February 2020.

EXAMPLE

Example 9.2 – Excluding the days between 16 December of a year and 15 January of the following year (both days inclusive)

Mr B received an assessment on 15 December 2019. The first day of the 30-day period within which he could object was 16 January 2020 and the last day 27 February 2020.

The date of assessment in the case of SARS-assessment-type taxes[14] is the issue date of the notice of assessment.[15] It is important to note at this point that the 30-day period must be counted from the date of issue of the notice of assessment and not from the date of issue of the assessment. As explained in chapter 3, the assessment and the notice of assessment are not necessarily the same thing.

In the case of a self-assessment-type tax,[16] when a return must be submitted by the taxpayer, the date of assessment is the date of submission of the underlying tax return. When no return is required, it would be the date on which the last payment was made. If no payment has been made, the date of assessment would be the effective date.[17]

12 Bill 12 of 2020. The Bill had not been promulgated at the time of writing. If it is promulgated in its current form, the provisions referenced here will be effective from 26 March 2020.

13 Interestingly, the exclusion period between 15 December and 16 January is not by any definition of the expression '*dies non*' but rather results from the definition of 'business day' in s 1. Arguably, then, the fact that the period from 26 March to 30 April 2020 should be regarded as *dies non* under the Bill should not necessarily mean that it should not be counted for the purpose of disputes under chap. 9 of the TAA. However, it appears to be the intention that the days between 26 March 2020 to 30 April 2020 should not be counted for the purpose of disputes under chap. 9 of the TAA.

14 See chap. 3.

15 Para. (a) of the definition of 'date of assessment' in s 1, read with rule 1.

16 See chap. 3.

17 See s 187(3) to (5).

PROPOSED CHANGE IN THE DRAFT RULES

A set of draft rules under section 103 was released for public comment in 2018, proposing various changes to the current rules discussed herein. The draft rules were not in force at the date of writing. It is worth noting, however, that the draft rules propose, among other things, changing the standard 30-day period for lodging objections to 60 business days, thereby allowing taxpayers a further 30 business days within which to lodge their objections. This chapter, however, is based on the rules as at the date of publication. [18]

9.2.2 The extended time period within which a taxpayer may object

The 30-day period within which the taxpayer must object may be extended by SARS by another 30 business days if the taxpayer can show that there are 'reasonable grounds' for the delay in submitting the objection.[19] This means that if the taxpayer can demonstrate that the delay in lodging an objection was due to 'reasonable grounds', and if the relevant SARS official grants the taxpayer an additional 30 days, the taxpayer would effectively be permitted to submit an objection within a total period of 60 business days. A SARS official may extend the time period for submitting an objection even further, provided that the taxpayer can show that the delay in submitting the objection was due to 'exceptional circumstances'.[20] No extension can be granted, however, once 3 years have elapsed from the date of the assessment or decision.

A taxpayer who does not submit its objection within the prescribed standard 30-day period would have to convince SARS that the delay was due to 'reasonable grounds' or 'exceptional circumstances', depending on how late the taxpayer files the objection. Figure 9.2 depicts both 'when' the taxpayer must convince SARS of certain circumstances and 'what' the taxpayer must prove in order to get an extension for the submission of a late objection.

9.2.2.1 The extended time period: 'exceptional circumstances'

There is no definition of 'exceptional circumstances' in the TAA or the rules. The word 'circumstances' is self-explanatory. The dictionary meaning of the word 'exceptional' is '*forming an exception or rare instance; unusual; extraordinary*'.[21]

In *Norwich Union Life Insurance Society v Dobbs*,[22] the court held that:

> '*The question at once arises, what are "exceptional circumstances"? Now it is undesirable to attempt to lay down any general rule. Each case must be considered upon its own facts. But the language of the clause shows that the exceptional circumstances must arise out of, or be incidental to, the particular action; there was no intention to exempt whole classes of cases from the operation of the general rule. Moreover, when a statute directs that a fixed rule shall only be departed from under exceptional circumstances, the Court, one would think, will best give effect to the intention of the Legislature by taking a strict rather than a liberal view of applications for exemption, and by carefully examining any special circumstances relied upon*' (emphasis added).

18 It is interesting to note that the Tax Ombud Systematic Investigation Report 2020 proposes that the period within which objections must be lodged be changed to 3 years, as opposed to 30 or 60 days, which would remove the need to request condonation if the objection is not filed within the currently prescribed 30-day period.

19 S 104(4).

20 S 104(5)(a).

21 https://www.dictionary.com/browse/exceptional?s=t (accessed 2 April 2020).

22 1912 AD 395 at para. 399.

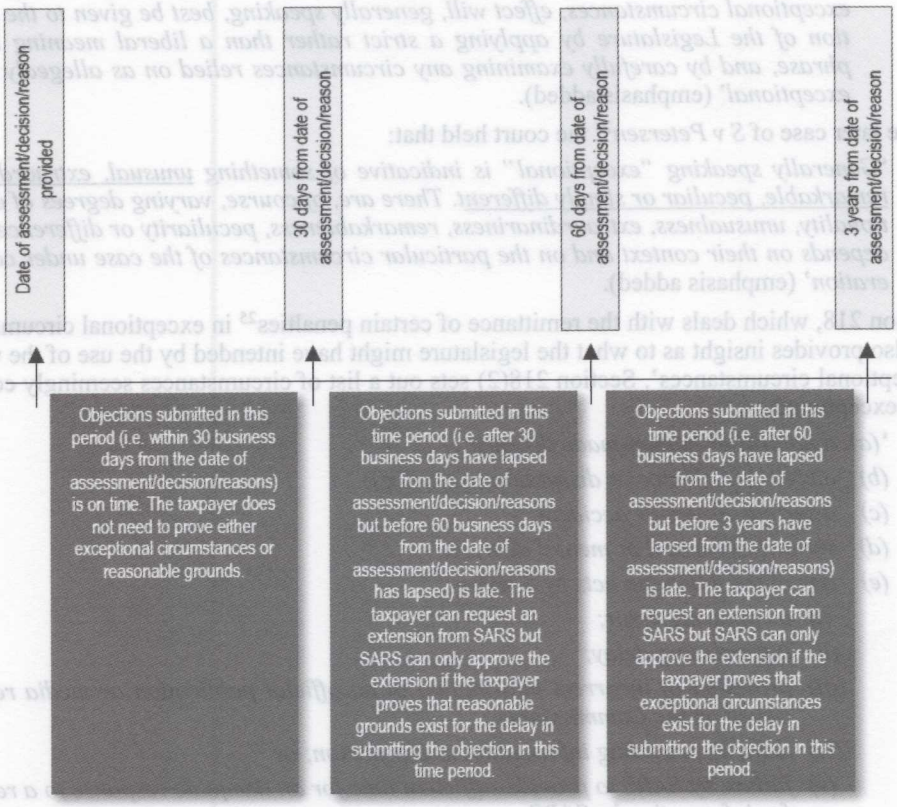


Figure 9.2: Reasonable grounds and exceptional circumstances.

In *MV AIS Mamas Seatrans Maritime v Owners, MV AIS Mamas, and Another*,[23] the court held the following, regarding the meaning of exceptional circumstances in the context of the Admiralty Jurisdiction Regulation Act 105 of 1983:

> '*1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "besonder", "seldsaam", "uitsonderlik", or "in hoë mate ongewoon".*
>
> *2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*
>
> *3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.*
>
> *4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.*

23 2002 (6) SA 150 (C) at 156–157.

5. *Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional*' (emphasis added).

In the later case of *S v Petersen*[24] the court held that:

'*Generally speaking "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration*' (emphasis added).

Section 218, which deals with the remittance of certain penalties[25] in exceptional circumstances, also provides insight as to what the legislature might have intended by the use of the words 'exceptional circumstances'. Section 218(2) sets out a list of circumstances seemingly considered exceptional:

'*(a) a natural or human-made disaster;*

(b) a civil disturbance or disruption in services;

(c) a serious illness or accident;

(d) serious emotional or mental distress;

(e) any of the following acts by SARS—

(i) a capturing error;

(ii) a processing delay;

(iii) provision of incorrect information in an official publication or media release issued by the Commissioner;

(iv) delay in providing information to any person; or

(v) failure by SARS to provide sufficient time for an adequate response to a request for information by SARS

(f) serious financial hardship, such as—

(i) in the case of an individual, lack of basic living requirements; or

(ii) in the case of a business, an immediate danger that the continuity of business operations and the continued employment of its employees are jeopardised; or

(g) any other circumstance of analogous seriousness.'

It is evident from the above that the term 'exceptional circumstances' escapes precise definition. It will probably never be defined. Each case will have to be considered on its own facts. Dictionary definitions, case law and section 218 do, however, provide guidance on the meaning of the term. Taxpayers who require an extension when the objection is more than 60 days late would do well to assess the circumstances that gave rise to the delay in the light of the guidance provided by the courts.

It should also be stressed that taxpayers bear the burden of proving (a) that there were circumstances that could fall to be classified as 'exceptional circumstances' and (b) that those circumstances caused the delay in submitting the objection.[26] The mere existence of exceptional circumstances will not be enough. The cases of *AB CC v CSARS*[27] and *ITC 1883*[28] are both illustrative of the difficulty that this onus presents.

---

24 [2008] ZAWCHC 11, [2008] 3 All SA 301 (C), 2008 (2) SACR 355 (C) at para. 55.

25 See chap. 6.

26 See chap. 5 on onus of proof.

27 Case No. 13635.

28 78 SATC 225.

A question arises as to the role that the prospects of success of a case may play in a request for extension when the objection is more than 60 business days but not more than 3 years late. Section 105 clearly provides that SARS cannot extend the period for lodging an objection by more than 30 days unless the delay was caused by exceptional circumstances. Assuming that good prospects could constitute exceptional circumstances, good prospects can hardly be said to be the cause of the delay in submitting an objection. SARS, in its Interpretation Note 15 (issue 5) of 21 December 2018[29] (IN15) (copy included as Annexure C hereto), however, states that: '*A senior SARS official will take into consideration the fact that an objection may have a good prospect of success*'. It is submitted that in the absence of exceptional circumstances the prospects of success will not be of any assistance to a taxpayer requiring an extension when the objection is more than 60 days late.[30]

9.2.2.2 The extension: what are reasonable grounds?

Like 'exceptional circumstances', the expression 'reasonable grounds' is not defined. There is also no bright-line test to establish what constitutes reasonable grounds. Determining whether the delay in submitting an objection was reasonable entails considering each case on its own facts.[31] SARS's IN15[32] states that:

> '*the requirement of reasonable grounds ... will generally be met if the delay was caused as a result of circumstances beyond the taxpayer's control. Such circumstances may include, for example, a delay as a result of illness of the taxpayer or the taxpayer's representative, the taxpayer being abroad at the time of the issue of the notice of assessment or postal delay ...*
>
> *The following are examples of situations which will not be regarded as a sufficient reason for failure to comply with the requirements of the TA Act in submitting an objection on time:*
>
> - *Ignorance of the law with regard to the period within which an objection must be lodged.*
> - *Failure without good cause by the taxpayer's tax practitioner to lodge the objection on time. The use of a tax practitioner does not absolve the taxpayer from the responsibility of complying with the TA Act.*'

It should be stressed again that taxpayers bear the onus of proving (a) that there were reasonable grounds and (b) that those reasonable grounds caused the delay. A taxpayer might, to use SARS's example from IN15, have been ill when the objection fell due but was well again for three weeks before the objection was eventually filed. While the taxpayer's illness may well constitute reasonable grounds and have been one of the reasons why the taxpayer was late, it was not necessarily (but may have been, depending on the facts) the cause of the further three-week delay when the taxpayer was well again. The taxpayer in this example would also have to provide reasonable grounds for why, in the three-week period when the taxpayer was well, the taxpayer did not file the objection.

---

29 A copy of this Note can be found in annexure C of the present work.

30 In *ITC 1777* 66 SATC 328 the court confirmed that prospects of success are a factor that may be considered in deciding whether to condone the late filing of an objection. However, in that case, the taxpayer was not more than 30 business days late with its objection and therefore needed only to advance reasonable grounds for the delay in submitting the objection. In *ITC 1883* 78 SATC 225, the taxpayer was more than 30 days late and the court mentioned that SARS's Interpretation Note 15 requires that prospects of success on the merits be considered. It is respectfully submitted, however, that such statement is incorrect: SARS's Interpretation Notes, although a practice generally prevailing, is not authority for the conclusion that prospects of success may be relied on for condonation in the absence of 'exceptional circumstances'.

31 *S v Makwanyane* 1995 (6) BCLR 665 (CC), 1995 (3) SA 391 (CC) at 436.

32 See para. 4.2.1.

9.2.2.3 The extension: when must the taxpayer request an extension?

Whilst in practice the request for extension is often made when the objection is filed (in fact, the relevant objection form[33] has a field specifically for this purpose), nothing in the rules or section 104 prevents the taxpayer from requesting the extension prior to submission of the objection. In IN15, SARS also states that: '*a taxpayer may, for example, request an extension if that taxpayer was not in a position to fully formulate and substantiate the grounds of objection within 30 business days because of outstanding information or documentation which would be received only after the expiry of that period*'.[34]

It is submitted that a request for extension made before submission of the objection need simply take the form of a properly drafted letter, which the taxpayer can email to specified email addresses or post or hand-deliver to specified physical addresses or hand-deliver to any SARS branch. The addresses specified for the purpose of delivery via email, post or hand-delivery (other than hand-delivery to a SARS branch) are as set out below.[35]

'*1.1 Electronic addresses:*

Region	***Email***	***Fax number***
North South Africa: *Gauteng North (includes Tshwane and Centurion), North West, Mpumalanga and Limpopo*	*Contact.north@sars.gov.za*	*(+27) 12 670 6880*
Central South Africa: *(including Midrand, the Greater Johannesburg area, Kempton Park, Boksburg, Vereeniging and Springs), Free State and Northern Cape*	*Contact.central@sars.gov.za*	*(+27) 10 208 5005*
Eastern South Africa: *Taxpayers residing in KZN and the northern parts of the Eastern Cape (up to and including East London)*	*Contact.east@sars.gov.za*	*(+27) 31 328 6018*
Southern South Africa *Taxpayers residing in the Eastern Cape south of East London and in the Western Cape*	*Contact.south@sars.gov.za*	*(+27) 21 413 8905*

33 Regarding which see para. 9.3.1.

34 In the previous issue of Interpretation Note 15 (issue 4), the following was stated: '*The extension may be granted after the 30 business day period has elapsed or alternatively, taxpayers can request an extension before the expiry date of that period if aware that the deadline will not be met*'.

35 Rule 2(c)(ii), read with para. 1 of part B of GN 295 in *GG* 38666 of 31 March 2015. No form is prescribed by SARS for requesting an extension before submission of the objection.

1.2 Postal and Physical Addresses:

Office	*Postal Address*	*Physical address*
Alberton	*Private Bag X15* *Alberton* *1450*	*St Austell Street* *Mackinnon Crescent* *New Redruth* *Alberton* *1449*
Bellville	*Private Bag X11* *Bellville* *7530*	*Corner of Teddington &* *De Lange Road* *Bellville* *7530*
Doringkloof	*P O Box 436* *Pretoria* *0001*	*7 Protea Street* *Centurion* *Pretoria* *0157*
Durban	*P O Box 921* *Durban* *4000*	*201 Dr Pixley KaSeme Street* *Durban* *4001*

It should be noted that on 24 August 2020, SARS released a statement on its website in which it is stated that:[36]

"*The following email addresses* ***will cease to exist*** *from 24 August:*

- ...
- *For taxpayers: Contact.central@sars.gov.za, contact.north@sars.gov.za, contact.east@sars.gov.za and contact.south@sars.gov.za*

The new email addresses from 24 August are:

- ...
- ***Contactus@sars.gov.za***"

The fact that SARS notified taxpayers by announcement on their website about a change in the email addresses prescribed by Public Notice (as set out in the table above) does not detract from the fact that in terms of the Public Notice, delivery can only be made at the email addresses listed in the table above (where the request is submitted *via* email). As such, a taxpayer who delivers a request for extension to the address 'contactus@sars.gov.za' as opposed to, for example, 'contact.north@sars.gov.za' would not have delivered a request for extension as required under the rules. At the time of writing, the Public Notice which prescribes the email addresses listed in the table above has not been amended but we understand that SARS is looking into amending the public notice in this regard. Until the Public Notice has been amended, taxpayers would be well advised to continue to submit requests for extension to the email addresses listed in the table above if the request for extension is submitted *via* email. It would however be practicable to also deliver the request to contactus@sars.gov.za in addition to the other email address set out in the table above.

36 https://www.sars.gov.za/Contact/Pages/Contact-SARS-by-e-mail%20or%20fax%20or%20post.aspx (accessed 24 August 2020).

9.2.2.4 Remedies available when SARS does not grant an extension

If SARS does not grant an extension, it will not consider the objection, which may result in the assessment's becoming final. There are remedies available to taxpayers to address such an adverse decision by SARS.

If SARS decides not to grant the extension, the taxpayer can in terms of section 104(2)(a) object to such decision. It is submitted that neither SARS's Complaints Management Office (CMO) nor the Tax Ombud can be of any assistance in these cases and the taxpayer's only remedy is to object to such decision.[37]

If SARS does not make a decision at all, the taxpayer may apply to the Tax Court for an order that the period be extended under rule 52(2)(c).[38] When SARS does not make a decision at all, the CMO and Tax Ombud may be of assistance in obtaining a decision from SARS on the request for an extension if the taxpayer is not inclined to launch a Tax Court application.[39] The rules do not prescribe a time period within which SARS must make a decision whether to grant an extension.[40]

9.3 How the taxpayer must object

The taxpayer must:[41]

- complete the prescribed form in full;[42]
- specify the grounds for objection in detail;[43]
- specify an address where the taxpayer will accept delivery of the decision by SARS;[44]
- sign the prescribed form;[45] and
- deliver the objection to SARS.[46]

Each of these requirements is discussed separately below.

9.3.1 The prescribed form for objections[47]

The SARS dispute guide[48] states that the taxpayer must file either the Notice of Objection DISP01 (NOO) or ADR1 form. On SARS's website[49] a table is provided, indicating when the

37 The CMO has its legislative underpinning in s 9 (Memorandum of Objects of the Tax Administration Laws Amendment Bill, 2017, para. 2.22) – see chap. 6. S 9 is available only in respect of decisions that are not subject to objection and appeal. Since a decision not to extend the period within which an objection and appeal may be lodged is subject to objection and appeal, the taxpayer cannot rely on it. (In *CM v Commissioner for the South African Revenue Service* (TAdm 0035/2019), for example, SARS changed its decision from a decision to condone the late filing of an objection to a decision not to condone such late filing. It is worth noting that a decision to condone the late filing of an appeal is not subject to objection and appeal and hence that SARS may rely on s 9 to change its decision.) Similarly, the Tax Ombud in terms of s 17(c) does not have the authority to review a matter subject to objection and appeal. Furthermore, in terms of s 7 of PAJA, a taxpayer must first exhaust internal remedies before a review application may be brought under PAJA; therefore the taxpayer cannot immediately launch a review application under PAJA to review SARS's decision not condone the late objection.

38 See chap. 11 on such applications.

39 It could be argued that if SARS does not make a decision on whether to grant an extension s 9 cannot apply and therefore that the CMO cannot assist. It is submitted, however, that not making a decision constitutes a decision not to decide, which is not subject to objection and appeal, and hence that the CMO should be able to assist. The Tax Ombud may also assist since a decision not to make a decision relates to an administrative matter relating to an objection (s 17(c)).

40 See chap. 11 for a discussion of the difficulties this may hold for bringing an application under rule 52(2)(c).

41 S 104(3), read with rule 7.

42 Rule 7(2)(a).

43 Rule 7(2)(b).

44 Rule 7(2)(c).

45 Rule 7(2)(d).

46 Rule 7(2)(e).

47 Rule 2(1)(a), read with s 103(3).

NOO must be used and when the ADR1 form must be used. An extract of that table is provided in Table 9.1 and was accurate at the time of writing. It should be noted that this table is subject to change, completely at SARS's discretion. Taxpayers would do well to visit SARS's website regularly to ensure that the correct forms are used.

Table 9.1: When to use the DISP01 and ADR1 forms.

Type of Tax	*NOO*	*ADR1*
Personal Income Tax *(Late payment penalties & interest on Provisional Tax and Administrative Penalties)*	✓	✗
Personal Income Tax *(Assessed Tax including additional/ understatement tax, interest and penalty for underpayment of provisional tax, etc.)*	✓	✗
Corporate Income Tax *(Assessed Tax including additional/ understatement tax, interest and penalties, etc.)*	✓	✗
Trust	✗	✓
Value-Added Tax (VAT) *(Including late payment penalty)*	✓	✗
PAYE	✓ *If RFR is declined for late payment penalty*	✗
Payroll Taxes *(Assessment, penalties and interest, etc.)*	✓	✗
All other taxes not listed above *(e.g. STC before 1 April 2011, Donations Tax, Dividends Tax, etc.)*	✗	✓

The NOO form can be accessed through eFiling, under the 'Returns History' tab, by clicking on the 'Dispute' button on the relevant work page or in the tab titled 'Disputes'. The ADR1 form can be accessed on SARS's website or in annexure E of the SARS dispute guide, which can also be accessed from SARS's website.

It is submitted that if the NOO is prescribed by SARS but cannot be filed because of a SARS system error the taxpayer cannot be faulted for filing the ADR1 form, and *vice versa*.[50]

[*continued from previous page*]

48 *Dispute Resolution: Guide on the Rules Promulgated in terms of Section 103 of the Tax Administration Act, 2011* (2nd issue, 20 March 2020) para. 6.4.

49 https://www.sars.gov.za/ClientSegments/Individuals/What-If-Not-Agree/Pages/default.aspx (accessed 23 April 2020).

50 See in this regard comments in para. 9.4 regarding SARS's discretion to condone non-compliance with the rules.

9.3.2 The grounds for objection

The term 'grounds for objection' is not defined in the Act or the rules. It is submitted that grounds for objection must mean the factual and legal basis[51] on which the taxpayer relies for objecting to the assessment or decision.

The level of detail required to ensure that the factual and legal basis is set out in detail will depend on the facts of the case. Ideally the level of detail should also be informed by the fact that the grounds for objection advanced in the objection are the grounds on which the taxpayer would have to rely should the dispute proceed to the appeal phase. Whilst the taxpayer is allowed to add new grounds in the appeal phase, such new grounds may not constitute a new objection against the assessment or part of the assessment not objected to.[52] Whether something will constitute such an impermissible new ground may be very difficult to ascertain[53] and may lead to a dispute within the dispute (i.e. a dispute about whether something is an impermissible new ground) at a later stage in the process, should the case proceed to the appeal phase. Such disputes within a dispute can be avoided by ensuring that the grounds for objection cover all the bases on which the assessment could possibly be challenged and ensuring that all the assessments in the notice of objection that are to be challenged are specifically included in the objection.

When the prescribed form does not provide sufficient space for properly setting out the factual and legal basis for objection (which is very often the case in practice), the taxpayer may attach a letter for that purpose, as is the current practice.

The grounds for objection must also include[54] details of the part or amount of the assessment or decision objected to. As explained in chapter 3, an assessment is each determination made by SARS. The taxpayer must therefore specify exactly what determination the taxpayer is objecting to. The NOO form, when accessed via eFiling, typically assists in ensuring that the taxpayer specifies the amounts objected to since it has tick boxes that correspond to the assessment in question, allowing the taxpayer to identify exactly the amount being objected to.

Practical issue: NOO form

In practice, there are often several issues (for example when the determination on the notice of assessment which the taxpayer intends to place under objection does not have a tick box) associated with ticking boxes to specify the amount/assessment being objected to. These issues, it is submitted, can be addressed by specifying the amount objected to elsewhere in the grounds for objection or in the supporting documents.

The ADR1 form also has tick boxes, but they do not specify the amounts objected to. The tick boxes on the ADR1 form simply specify the nature of the amount. Taxpayers would be well advised to specify the amount in detail in the grounds for objection or supporting documents in order to ensure compliance with the requirement that the taxpayer must specify the amount being objected to.

Ensuring the correct amounts are objected to is vital. A taxpayer cannot simply aver that the objection is submitted against the entire notice of assessment if not all the amounts/determinations made are specified in the grounds for objection.[55]

---

51 See chap. 2 in the context of the grounds for SARS's assessment.
52 Rule 10(2)(C)(iii), read with rule 10(4).
53 See a more detailed discussion of this topic in chap. 10.
54 Rule 7(2)(b)(i) to (iii).
55 See in this regard *Computek (Pty) Ltd v CSARS* 75 SATC 104.

The grounds for objection must therefore be such so as to show the factual and legal basis on which the amount being objected to should be different and what the amount objected to should be, according to the taxpayer.

The grounds for objection must also specify which of SARS's grounds for the assessment or decision the taxpayer is disputing.[56] A taxpayer would require SARS's grounds for the assessment in order to comply with this rule. As discussed in chapters 2 and 3, SARS is required to provide the grounds for its assessment in its letter of audit findings, and in the notice of assessment in certain instances. If SARS fails to do so, the taxpayer would be unable to comply with this rule in many cases. The taxpayer may, however, request reasons for the assessment, to ensure that it complies with the rule.[57]

The taxpayer should, in its grounds for objection, address each of SARS's grounds for assessment to show how on the facts and the law, such ground is incorrect. Simple statements such as 'the taxpayer is entitled to a deduction' or 'the amount is exempt' or 'the supply is zero-rated' do not constitute grounds for objection; rather, they are baseless statements which should not (and most often do not) result in a successful outcome for the taxpayer. If the taxpayer, for example, requires a deduction, the taxpayer must, in its grounds for objection, indicate why, on the basis of the relevant section of the underlying tax Act (and case law etc.) and on the facts, as evidenced by appropriate evidence, the taxpayer is entitled to a deduction.

The grounds for objection must also include documents on which the taxpayer relies to substantiate its grounds for objection (excluding documents already provided to SARS in respect of the disputed assessment).[58] There may, however, be cases where a taxpayer does not require documents to substantiate its grounds for objection – for example, when the facts are common cause and it is simply a matter of legal interpretation that forms the main subject of a dispute. In these cases, the taxpayer may not need any documents to substantiate its grounds for objection and would not have to provide any documents.

Documents to substantiate the grounds for objection are those documents that are, in the opinion of the taxpayer, necessary for the taxpayer to prove its case.[59] The mere statement of something as fact in the grounds for objection will in many cases not be enough to secure a successful outcome for the taxpayer. It should also be noted that if SARS is of the view that the documents provided do not substantiate the grounds for objection, it cannot be said that the taxpayer failed to comply with rule 7(2).[60]

9.3.3 Specifying an address for the delivery by SARS of its decision on objection

This rule applies only if SARS's eFiling system is not used for the submission of an objection. For example, the rule applies when the prescribed form is the ADR1 as such forms are not submitted via eFiling.[61] In the case of an NOO, which is submitted via eFiling, the taxpayer is not required to comply with this rule.

---

56 Rule 7(2)(b)(ii).
57 See chap. 8 on requests for reasons.
58 Rule 7(2)(b)(iii).
59 See chap. 5 for a discussion on onus of proof.
60 This is relevant in the context of rule 7(4) (as to which see, para. 9.4). If SARS is of the view that the documents provided do not substantiate the grounds for objection, it may disallow the objection under rule 9. It cannot declare the objection invalid under rule 7(4). If the rule-maker had intended SARS to be satisfied that the documents substantiate the grounds for objection, it would not have provided for the appeal phase, as an objection would then always either be invalid or allowed.
61 See para. 9.3.5 for the manner of delivery.

9.3.4 Signing the ADR1 or NOO

The taxpayer, or the taxpayer's authorised representative, must sign the prescribed form. In this regard the SARS dispute guide states at paragraph 3.5 that '*SARS is comfortable that its "secure and reliable SARS electronic filing services" provide sufficient confidentiality and security to enable the user ID and access code to function as an electronic signature*'. When the prescribed form is the NOO, which is submitted via eFiling, a physically signed form is not required.

9.3.5 Delivery/submission of the objection to SARS within the time frames indicated in paragraph 9.2

When an address is specified on the assessment or decision, the NOO or ADR1 form must be delivered to the address so specified.[62] This rule, it is submitted, must be interpreted to apply when an address to which objections must be submitted is specifically specified. Addresses are often included on a notice of assessment, but these addresses are not specified as the address to which an objection must be submitted.

When no address is specified, which is the case with most assessments raised and decisions made by SARS, the NOO or ADR1 form must be submitted to an address specified in GN 295 in *Government Gazette* 38666 of 31 March 2015[63] thus:

'*2.1 In the case of personal and corporate income tax, delivery must be made –*

2.1.1 by means of the taxpayer's electronic filing page, if applicable;

2.1.2 by post to any of the addresses mentioned in paragraph 1.2, above; or

2.1.3 by handing it to SARS at any SARS branch office.

2.2 In the case of value-added tax, employees' tax (PAYE) or any other tax delivery must be made –

2.2.1 to any of the addresses mentioned in paragraph 1.1 or 1.2, above; or

2.2.2 by handing it to SARS at any SARS branch office.'

The addresses in paragraphs 1.1 and 1.2 referred to in the extract from the dispute notice above are as set out in the table in paragraph 9.2.2.3 above.

Practical issue: Delivery of objection to a SARS branch

It happens in practice from time to time that SARS branch offices and other offices prescribed in the rules for physical delivery are unwilling to accept delivery of objections by hand, despite the fact that the rules prescribe that method of delivery. This method of delivery is often preferred when the objections contain several documents (for example, where the objection consists of several lever-arch files). The taxpayer may then be forced to deliver the objection to an address that is not necessarily prescribed by the rules. Whilst an objection not delivered to a prescribed address may not be valid, SARS does have discretion to condone such non-compliance with the rules.[64]

62 Rule 7(2)(e).
63 Rule 7(2)(e), read with rule 2(1)(c)(ii).
64 See para. 9.4.

Annexure B contains a suggested template, template B2, which may be used in support of the ADR1 and NOO forms. The template is designed to try ensure that taxpayers comply with all the above requirements. It should be noted that the template does not replace the prescribed form: the prescribed form must still be submitted.

While it is not necessary, it is courteous and practical to deliver a copy of the objection to the SARS officials responsible for raising the assessment or making the decision (if these details are known), in addition to delivering the objection to the prescribed addresses detailed above.

9.4 Consequences of the taxpayer's non-compliance with the rules

In terms of rule 7(4), if the taxpayer delivers an objection that does not comply with rule 7(2),[65] SARS may regard the objection as invalid. If the objection is regarded as invalid by SARS, SARS must provide the taxpayer with a notice of invalidity, within 30 days from the date of delivery of the objection, setting out the basis on which SARS regards the objection as invalid.

The requirement that SARS provide the taxpayer with a notice of invalidity arises only if:

- the objection was submitted via eFiling (typically in the case of the submission of an NOO);
- not submitted via eFiling (typically in the case of submission of the ADR1), if the taxpayer has specified in its objection an address at which it will accept delivery of SARS's decision on the objection;[66] or
- if SARS is in possession of the current address of the taxpayer.[67]

SARS must send the notice of invalidity to eFiling, if the objection was submitted via eFiling (typically in the case of the NOO's being the prescribed form). When eFiling was not used for the submission of the objection (typically when the prescribed form is the ADR1), SARS must send the notice of invalidity to the address specified by the taxpayer in its objection.[68] When the notice is not delivered by SARS to these addresses, it is not delivered in accordance with the rules and therefore has no consequence.

A taxpayer who receives a notice of invalidity may, in terms of rule 7(5), submit a new, valid objection, within 20 business days from the date of delivery of the notice of invalidity, without having to request an extension.[69] If the new objection is also invalid, the taxpayer can submit a further objection but would be required to request an extension if such further objection is not submitted within the standard 30-day time period.[70] Rule 7(4) does not provide for an extension to the 20-day period. Whilst the taxpayer may technically, in terms of rule 4, request an extension to that period, it is submitted that such extension can be granted only if there were reasonable grounds for the delay or exceptional circumstances, depending on how late the taxpayer's objection is at that stage.

It is clear from the wording of rule 7(4) to (6) that the rule-maker intended to provide taxpayers with a limited time frame of 20 business days to remedy their non-compliance with rule 7(2), without any adverse consequence for the taxpayer.

---

65 See para. 9.3.
66 See para. 9.3.3.
67 Rule 7(4)(a) to (c).
68 Rule 2(1)(i), read with rule 7(2)(c). See para. 9.3.3.
69 Rule 7(5), read with rule 7(6). In draft rules issued in 2018, the taxpayer's ability to submit a new objection within 20 business days has been deleted. The draft rules had not, at the time of writing, been promulgated.
70 Rule 7(6). See para. 9.2.

EXAMPLE

Example 9.3 – Invalid objections and rule 7(4)

Taxpayer A submits an invalid objection, 30 days from the date of assessment. Two weeks later, SARS issues a notice of invalidity on the basis that the taxpayer used the incorrect form. The taxpayer may now submit a new objection, on the correct form. The new objection will, however, be late. If the taxpayer submits the new objection within a period of 20 days from the date of the notice of invalidity, the taxpayer is not required to request extension, despite the fact that the new objection is submitted more than 30 days from the date of assessment.

PROPOSED CHANGE IN THE DRAFT RULES

In terms of the draft rules, it is proposed that the taxpayer's ability to submit a new objection within 20 business days, without having to request condonation (in the event that SARS has declared the objection invalid), be taken away. Taxpayers would be forced, in most cases, to request condonation for the late filing of a second valid objection. As stated above, the draft rules were not in force at the time of writing.

The wording of rule 7(4), stating that '*SARS may regard the objection as invalid*' (emphasis added), requires specific analysis. It is submitted that the use of the word 'may' must be interpreted to mean that SARS has a discretion either to regard the objection as invalid because of non-compliance with rule 7(2) or not to regard the objection as invalid despite non-compliance with rule 7(2). Stated differently, the rule-maker must have intended to bestow a discretion on SARS to condone non-compliance with rule 7(2).

This interpretation is supported by the fact that it assists in overcoming practical issues that may arise. For example, the form for objection is the form prescribed by SARS. Such form need not be prescribed by public notice and indeed in practice is not. Rather, the forms for objection are, in practice, prescribed on SARS's website or in SARS's guides. SARS's website and guides are subject to change completely at SARS's discretion and without notice to taxpayers of any change in the prescribed form. Furthermore, SARS's website and guides may be unclear or otherwise ambiguous in respect of what the prescribed form is. For example, in the SARS dispute guide, the form prescribed for objections is the NOO or ADR1, which suggests that either may be used, whereas on SARS's website the ADR1 form is prescribed in some instances and the NOO in others. It is submitted that the rule-maker must have foreseen such practical issues and intended them to be resolved, by granting SARS discretion to condone non-compliance.

There are instances where strict compliance with rule 7(2) is not possible, because, for example, the NOO form is not available on eFiling despite being the prescribed form. If the taxpayer in such circumstances submits the ADR1 form (as opposed to the prescribed NOO), such objection submitted on the ADR1 form must necessarily be invalid, despite the fact that the taxpayer is unable to submit the NOO in order to comply with rule 7(2) unless SARS has a discretion to condone such non-compliance with rule 7(2). In addition, as explained in paragraph 9.3.5 above, it often happens in practice that the taxpayer is unable to deliver the objection to the address specified because SARS's systems are not operational or because a SARS branch refuses to accept an objection despite the fact that it is a prescribed address for delivery. The rule-maker must have foreseen these practical issues and provided SARS with a discretion that could serve to overcome them.

It is submitted that if SARS fails to declare an objection invalid within the prescribed 30-business-day period the objection must be regarded as valid. Stated differently, if SARS

decides not to condone non-compliance with rule 7(2), it must decide and give notice thereof to the taxpayer within 30 business days from the date of delivery of the objection, failing which SARS is deemed to have condoned non-compliance with rule 7(2). This conclusion is supported by the fact that rule 8[71] makes reference to the same 30-business-day period as the time period referred to in rule 7(4).

SARS's discretion under rule 7(4) is not absolute, and the taxpayer does have the remedy under rule 52(2)(b) of approaching the Tax Court on motion to have an objection declared valid, if such objection has been declared invalid by SARS.[72]

SARS must consider each objection delivered to it. It must establish whether an objection complies with rule 7(2) and, if it does not, notify the taxpayer accordingly by way of notice, within 30 days from the date of delivery of the objection. If SARS fails to notify the taxpayer in time, it is submitted that such objection is effectively deemed valid (because SARS has effectively condoned non-compliance with rule 7(2)) and SARS must comply with rule 8 and/or rule 9.

This cannot, however, be taken to mean that an objection delivered to a place other than SARS must be deemed valid if it is not declared invalid under rule 7(4) as rule 7(4) clearly envisages circumstances where the delivery to SARS has taken place.

This also cannot be taken to mean that an objection not delivered within the 30-business-day period is deemed valid if SARS does not declare it invalid within a period of 30 business days. Although the delivery period is mentioned in rule 7(2), it is actually provided for in rule 7(1). SARS has no discretion under rule 7(4) to condone non-compliance with rule 7(1).[73] Rather, SARS must either extend the period within which the objection can be lodged under rule 7(3), read with section 104(4), or not. If SARS does not extend the period, the objection does not comply with rule 7(1). Although SARS may deliver a notice of invalid objection in these circumstances (as is often the case in practice), such notice, it is submitted, cannot be a notice of invalid objection as contemplated in rule 7(4).[74] To conclude that such notices issued under these circumstances are notices envisaged in rule 7(4) effectively means that:

- a taxpayer can simply decide to submit another objection under rule 7(5), to object under section 104(2)(a) or to bring an application under rule 52(2)(b);
- the legislature and rule-maker intended to set a time period within which SARS must decide whether to extend the period for lodging an objection, being 30 business days from the date of delivery of the objection;
- the legislature and rule-maker intended to give SARS an unfettered discretion to condone late submission of an objection; and
- if SARS does not declare the objection invalid within a period of 30 business days from the date of submission of the objection the taxpayer effectively escapes the requirement that objections be submitted within 30 business days and the requirement to prove the existence of exceptional circumstances or reasonable grounds for the delay in submitting an objection.

71 Discussed in para. 9.5.1.

72 See chap. 11 for a detailed discussion of this rule.

73 See also in this regard *CM v Commissioner for the South African Revenue Service* (TAdm 0035/2019).

74 In *CM v Commissioner for the South African Revenue Service* (TAdm 00035/2019) at para. 50 the court stated that SARS may declare an objection invalid for reasons other than non-compliance with rule 7(2) but that such declaration would not be one envisaged in rule 7(4). It is accepted that, at para. 42 of the Tax Court's judgment in this matter, the court stated that a notice of invalid objection issued in consequence of a taxpayer's not submitting its objection in time would be a notice envisaged in rule 7(4). It is submitted, with respect, that the court's conclusion cannot be correct for the reasons set out in the body of this chapter.

This, it is submitted, cannot be correct for the following reasons:

- Objections envisaged in rule 7(5) are objections in which non-compliance with rule 7(2) can in fact be remedied with the submission of a new, valid objection. A taxpayer cannot remedy its failure to object in time with the submission of a further objection under rule 7(5). The only way to 'remedy' such non-compliance is to submit an objection under section 104(2).
- The taxpayer cannot launch an application under rule 52(2)(b)[75] under these circumstances, as doing so would defeat the purpose of section 104(2)(a).
- If the legislature and rule-maker had intended to provide a time period within which SARS must decide either to condone or not to condone the late objection, it would have specified a time period. But it has not done so.
- The circumstances under which SARS may condone a late objection are clearly provided for in section 104(4) and (5) and rule 7(3). It is submitted that the rule-maker intended to give SARS discretion to condone non-compliance with rule 7(2). There are no parameters specifically prescribed within which SARS's discretion under rule 7(4) must be exercised. SARS could arguably exercise its discretion to condone the late submission, regardless of the existence of reasonable grounds or exceptional circumstances, if a notice of invalidity issued in consequence of the taxpayer's failure to object timeously constitutes a notice under rule 7(4).
- The rule-maker and legislature clearly intended to require a taxpayer to request extension for the submission of an objection filed more than 30 business days from the date of the assessment or decision. SARS's failure to inform the taxpayer of its failure to object in time by way of a timely notice cannot absolve the taxpayer of the obligation to request an extension.

The rules do not provide for an extension of the 30-business-day period within which SARS must declare the objection invalid in terms of rule 7(4). The taxpayer may, however, agree on such an extension period with SARS under rule 4. If SARS requires such an extension, it must request it before the period of 30 business days from the date of assessment has lapsed, unless the taxpayer agrees that the extension may be granted after that period has lapsed.76 A taxpayer who submits another objection under rule 7(5) can be said to have effectively agreed to an extension if such notice was not delivered within the prescribed 30-business-day period. If the taxpayer does not so agree, it is submitted that SARS must move to action under rule 8 or 9 within the time periods prescribed under rules 8 or 9. SARS's failure to act within the time periods prescribed under rules 8 or 9 arguably opens SARS up to default judgment applications.[77]

9.5 SARS's obligations in respect of objections

If an objection has not been declared invalid within the prescribed time period (or agreed extended time period), SARS may either request further information under rule 8[78] or must make a decision to allow or disallow the objection under rule 9,[79] without first having requested documents, unless the objection is stayed pending the outcome of a test case.[80] If the objection

75 See chap. 11.
76 Rule 4(2).
77 See chap. 11.
78 See para. 9.5.1.
79 See para. 9.5.2.
80 See para. 9.5.3.

is stayed, SARS is not required to take any action on the objection until such time as the test case is decided.[81]

If, however, SARS declares the objection invalid in time, whether or not such objection has been validly declared invalid, SARS cannot move to action under rule 8 or 9[82] nor can it stay the objection or designate the objection as a test case until such time as the objection has been declared valid either by SARS, following resubmission under rule 7(5), or by the Tax Court, under rule 52(2)(b).

9.5.1 When SARS can request further information – rule 8

In terms of rule 8, if SARS requires additional substantiating documents in order to decide whether to allow or disallow the objection, it may request same from the taxpayer.[83] The request for further documents must be delivered by SARS via eFiling, in cases where eFiling was used for submission of the objection (typically in the case of the submission of an NOO), or to the address specified by the taxpayer in its objection, if eFiling was not used (typically in the case of submission of the ADR1).[84] When the notice is not so sent, it is not delivered and effectively has no consequence.

The documents that SARS may request under rule 8 should not be confused with the relevant material SARS may request under section 46. The documents that SARS may request under rule 8 can be only those necessary for SARS to decide on the issues under objection. That means that SARS can request the documents necessary for it to allow or disallow the objection (or to partially allow it).

It happens in practice, from time to time, that SARS requests documents under rule 8 which are irrelevant to the issues in dispute and which may even suggest that SARS has not actually concluded the audit that gave rise to the assessment under dispute (if the assessment in question was preceded by an audit) or is attempting to audit the taxpayer again or to audit another issue that is not under objection. Identifying when this happens can be very difficult. While SARS may, of course, do all these things, it cannot use rule 8 to do them. There is no real remedy a taxpayer in these cases can use to prevent the request or possible adverse result occasioned by such request. Suffice it say, however, that such requests from SARS may illustrate areas of SARS's non-compliance with the TAA,[85] which may call the validity of the assessment under dispute into question.

The request for documents must be made by SARS within a period of 30 business days from the date of delivery of the objection[86] (unless the objection has been stayed[87] before this 30-business-day period lapsed). If an objection was not submitted in time but SARS granted an extension, the 30-day period within which SARS must call for documents, should it need them, starts to run only from the date on which SARS grants the extension if such extension was requested when the objection was submitted. If the extension was requested and agreed on in advance of submission of the objection, the 30-day period starts to run from the date of submission of the objection.[88]

81 SARS can also designate an objection as a test case, but such designation of an objection has no bearing in the process that must follow, which process is the same as the one SARS must follow when an objection has not been designated as a test case.
82 S 106(1).
83 Rule 8(1).
84 Rule 8(1), read with rule 2(1)(i) and rule 7(2)(c).
85 See chaps 2 and 3.
86 Rule 8(1).
87 See para. 9.5.3.2 on stays.
88 This follows from s 106(1), which states that SARS must only consider an objection that it valid.

The rules do not provide for an extension of the time within which SARS would be allowed to request further documents under rule 8. A taxpayer may, however, in terms of rule 4, agree to an extension with SARS. If SARS wishes to obtain an extension by way of agreement, it must request the extension from the taxpayer before the 30-business-day period lapses unless the taxpayer agrees with SARS that the extension may be requested after the prescribed 30 business-day period has lapsed.[89]

If SARS delivers a request for documents out of time, without having obtained the taxpayer's agreement, the request is not delivered and has no consequence, which means the taxpayer does not have to respond to it. Should the taxpayer not respond to SARS's request under these circumstances, it is submitted that it would not be possible for SARS to make a decision on the objection, as the request for documents, made under rule 8, necessarily means that SARS requires the documents to make a decision.[90] That does not mean that SARS is no longer bound by the time period within which it is to make a decision on the objection under rule 9.[91] Whilst this interpretation may seem to make it is impossible for SARS to comply with rule 9, this is not the case. In terms of rule 52(1), SARS may apply to the Tax Court for an order that the period within which it is allowed to request documents be extended. Such an application will automatically suspend the period within which SARS is required to make a decision on the objection under rule 9.[92] It is submitted therefore that a request for documents made out of time, and which is not condoned by agreement with the taxpayer and to which the taxpayer does not respond, cannot result in a decision under rule 9 without SARS's first obtaining an extension from the Tax Court and obtaining the documents from the taxpayer.[93]

If SARS nevertheless make a decision under these circumstances, the taxpayer may consider launching default judgment proceedings under rule 56[94] in consequence of SARS's failure to comply with the time periods and obligations provided for in the rules.

A taxpayer who responds to a request made out of time by SARS may effectively agree to an extension of the period within which SARS must request documents under rule 8. However, when the taxpayer makes it abundantly clear in its response to the request from SARS that it is not agreeing to an extension, SARS can make a decision on the objection (having obtained the necessary documents) without having to apply to the Tax Court for an extension but would still have to make the decision within 60 business days from the date of delivery of the objection, failing which the taxpayer may consider launching default judgment proceedings under rule 56.[95]

Rule 8(2) provides that the taxpayer must respond to a request from SARS for documents by delivering the documents requested within 30 business days from the date of the request. SARS cannot reduce the period to anything less than 30 business days under any circumstances, even if the taxpayer agrees to such a shortened period.[96] Under rule 8(3) SARS may grant an extension of no more than 20 business days if reasonable grounds are advanced for such

89 Rule 4(2).

90 It could be argued that rule 9(b)(ii) suggests otherwise. However, rule 9(b)(ii) envisages a situation where the request was made on time since a request not made on time and for which no extension has been agreed to is not a request made under rule 8 (unless the Tax Court grants an extension to SARS).

91 See para. 9.5.2.

92 Rules 50(4) and 4(4).

93 Of course, if the documents were requested in relation to a specific matter but there are several issues under dispute, SARS should be able to make its decision in respect of those matter for which no documents are required.

94 See chap. 11.

95 See chap. 11.

96 The draft rules, however, allow for periods to be shortened by agreement between the taxpayer and SARS. The draft rules were not in force at the time of writing.

extension.[97] The taxpayer must accordingly request the extension and prove that there are reasonable grounds. The rules prescribe that such requests must be delivered via eFiling if the objection was submitted via eFiling (typically in the case of submission of an NOO). If the objection was not submitted via eFiling (typically in the case of submission of the ADR1 form), the rules prescribe that delivery must be made to an address prescribed by public notice.[98] Such a request must arguably be delivered to SARS before the 30-business-day period ends.[99]

If SARS does not grant the extension requested, the taxpayer may, in terms of rule 52(2)(d), approach the Tax Court for an order that the period be extended.[100] The Tax Court is not able to grant an extension of more than 20 business days. The taxpayer may also complain to the CMO or the Tax Ombud, if SARS does not grant the extension requested but, unlike the case where the taxpayer launches an application under rule 52, the complaint to the CMO or Tax Ombud will not suspend the period within which the taxpayer must respond to the request for documents.

9.5.2 When and how SARS must make a decision – rule 9

Rule 9 determines when and how SARS must make a decision. Rule 9 provides for a standard time period within which SARS must provide its decision and give notice to the taxpayer and an extended time period within which SARS can provide its decision and give notice to the taxpayer. The two time periods are discussed separately below.

9.5.2.1 The standard time period within which SARS must make a decision

In terms of rule 9, read with section 106, SARS must, within 60 business days after delivery by the taxpayer of an objection, make a decision either to allow or disallow (or partially disallow) the objection and deliver to the taxpayer a notice of its decision.

However, if SARS requests documents under rule 8, it must make the decision within 45 business days after delivery by the taxpayer of the documents and is not required to make its decision within 60 days from the date of delivery of the objection. Even if the documents are not delivered to SARS after a request for same under rule 8, SARS must make its decision on the objection within 45 days after the 30-business-day period in which the documents should have been provided, or within the extended 50-business-day period if the 20-day extension was granted for the delivery of the documents.[101]

When an objection is not submitted in time but SARS grants an extension, the 60-day period within which SARS must make a decision on the objection starts to run only from the date on which SARS grants the extension if such extension was requested when the objection was submitted. When the extension is requested and agreed on in advance of the submission of the objection, the 60-day period starts to run from the date of submission of the objection.[102]

97 As to the meaning of 'reasonable grounds', see para. 9.2.2.2.

98 Rule 8(2), read with rule 2(c)(ii) and with para. 1 of part B of GN 295 in *GG* 38666 of 31 March 2015. See para. 9.3.5 for SARS addresses.

99 Rule 4 only applies where the rules do not provide for a specific extension. As rule 8 does provide for a specific extension period, rule 4(2) cannot apply.

100 See chap. 11 for more detail on this rule.

101 Whilst this may seem to contradict the conclusion in para. 9.5.1, it does not. Rule 9(b)(ii) clearly envisages a situation where the request is made under rule 8. If the request is made late, it is not made under rule 8. The rule-maker must have intended to allow SARS to make a decision without having the information to make a proper decision in the event that the taxpayer does not respond. Such decisions would arguably always have to be to disallow the objection, which cannot be faulted when the taxpayer does not provide the documents properly requested under rule 8.

102 This follows from s 106(1), which states that SARS must only consider an objection that it valid.

The period within which SARS must make a decision on objection, as discussed above, does not apply if the objection has been stayed pending the outcome of a test case.[103]

9.5.2.2 The extended time period within which SARS must make a decision

The 60-business-day period within which SARS must make a decision on objection may be extended by SARS to a maximum of 45 business days owing to exceptional circumstances,[104] the complexity of the case or the principle or amount involved. Such extension must be communicated to the taxpayer before the expiry of the 60-business-day period, by way of notice, which notice must set out the basis for the extension.[105]

If, however, SARS requests documents under rule 8, the rules do not provide for an extension of the standard 45-day period within which SARS must make its decision. SARS may, however, agree on an extended time period with the taxpayer under rule 4.

The period within which SARS must make a decision on objection does not apply if the objection has been stayed pending the outcome of a test case.[106]

The notice of SARS's decision must be delivered via eFiling, if eFiling was used to deliver the objection (typically in the case of submission of an NOO), or to the address specified in the objection, in the case where eFiling was not used for submission of the objection (typically in the case of submission of the ADR1 form). If, for example, SARS delivers a notice stating that the objection has been disallowed but delivers it via eFiling when it should have been sent to the address specified in the objection, SARS cannot hold the taxpayer to the period within which appeals must be lodged.[107]

The notice of outcome must also state the grounds on which SARS disallows or allows the objection. SARS must also include in the notice a summary of the procedures for appeal.[108]

---

103 Rule 12(8). See para. 9.5.3.2.

104 As to the meaning of 'exceptional circumstances', see para. 9.2.2.1.

105 Rule 9(2), read with rule 4(3).

106 Rule 12(8). See para. 9.5.3.2.

107 See chap. 10 on the appeal phase.

108 Rule 7, read with s 106. The reasons/basis for SARS's decision on objection may appear largely irrelevant to the appeal process in the sense that it does not constitute grounds for SARS's assessment and in the sense that, as explained in chap. 10, if a taxpayer appeals following a decision by SARS not to allow the objection, the taxpayer is not appealing against the decision not to allow the objection but simply continuing to challenge SARS's assessment in another forum. However, the basis for SARS's decision on objection is relevant in the appeal phase in rule 10, in terms of which the taxpayer must state the basis for its disagreement with SARS's basis for disallowing the objection. It is submitted that the basis for SARS's decision is also relevant for the purposes of s 93(1)(e) and s 100 (as to which, see chaps 4 and 6) in that the basis for SARS's decision will clearly delineate the issues that prescribe under s 93(1)(e) and the issues which become final under s 100 in the absence of an appeal. If SARS fails to provide a basis for its decision on objection, this may inform a cause for the taxpayer to consider launching default judgment procedures under rule 56 (see chap. 11). The absence of a basis for SARS's decision may also be cause for a review request in terms of s 9 or PAJA (see chap. 6) but unlike an application for default judgment, review requests under s 9 or PAJA does not suspend the period within which a taxpayer must submit an appeal. In the absence of any definition of the word 'basis', exactly what the extent of the basis for SARS's decision ought to be is not clear. It is submitted that the basis must be the basis on which SARS disagrees with the taxpayer's objection and cannot be the grounds for SARS's assessment, which grounds should already have existed at the time SARS raised the assessment under objection. Further, the basis for SARS's decision on objection, it is submitted, should be the factual and legal basis upon which SARS disagrees with the taxpayer's objection as this is the only way in which effect can properly be given to ss 93(1)(e) and 100 and rule 10 of the rules.

Practical issue: Basis for SARS's decision

In practice, SARS seldom provides the basis for its decision to allow an objection as it is supposed to in terms of the rules. The basis for SARS's decision to allow an objection is extremely important, especially in the light of section 99(1)(e).[109] It often also happens in practice that a taxpayer's objection is based on alternative arguments. When SARS disallows an objection, it seldom responds to all the alternative grounds raised. This may form the basis of a review application under section 9 or PAJA.[110]

If SARS does not provide the notice of its decision timeously, the taxpayer may complain to the CMO or Tax Ombud. The taxpayer may also commence default judgment proceedings under rule 56.[111]

9.5.3 When and how SARS may stay an objection/designate an objection as a test case

In terms of section 106(6)(a) and (b), SARS may either designate an objection as a test case or stay the objection pending the outcome of another case which has been designated as test case. The applicable rules are discussed below.

9.5.3.1 Designating an objection as a test case

If SARS wants to designate an objection as a test case, it must do so by way of notice (test case notice) to the taxpayer before making a decision on the objection.[112] Since the rules prescribe time periods within SARS must decide an objection,[113] it follows that SARS must designate a case as a test case and deliver the test case notice before its decision falls due under rule 9, read with section 106. The taxpayer can, however, agree that the case be designated as a test case after SARS's decision on the objection falls due under rule 9.[114]

SARS can designate a case as a test case only if a senior SARS official considers the decision on the objection in question to be determinative of all or a substantial number of other objections, whether on issues of law or fact or both.[115]

The test case notice must be delivered to the taxpayer via eFiling, if eFiling was used to submit the objection (typically the case when an NOO is filed), or, if eFiling was not used to submit the objection (typically the case when an ADR1 form is filed), to the address specified by the taxpayer, under rule 7, in the objection as the address at which it will accept delivery of SARS's decision.[116]

The test case notice issued by SARS must contain all of the following things, as prescribed by rule 12(2):

– the number of and common issues involved in the objections or appeals that the test case is likely to be determinative of;

---

109 See the discussion of s 99(1)(e) in chaps 4, 6 and 7.
110 See chap. 6.
111 See chap. 11 on this process.
112 Rule 12(1)(a).
113 See para. 9.5.2.
114 Whilst rule 9 provides for an extension period, rule 12 does not. The rules do not provide for an extension of the period within which SARS must designate an objection as a test case and, accordingly, rule 4 may be relied on.
115 S 106(6).
116 Rule 2.

- the question of law or fact, or of both law and fact, that, subject to augmentation thereof under rule 34, constitutes the issues to be determined by the test case; and
- a statement on the importance of the test case to the administration of the relevant tax Act.

If the taxpayer does not want its case to be designated a test case, it must, within 30 business days after receiving the test case notice, deliver a notice to SARS in which it notifies SARS of its opposition to SARS's decision to designate the objection as a test case.[117] The notice opposing the test case designation must detail the grounds on which the taxpayer opposes the designation.[118]

The rules do not provide for an extension of the 30-business-day period. It follows that the taxpayer may, under rule 4, agree on an extension with SARS, if an extension is required. If the taxpayer does not deliver its notice to oppose in time, the objection will be treated as a test case.[119]

If the taxpayer properly and timeously delivers the notice opposing the test case designation, SARS may not treat the case as a test case without applying to the Tax Court under rule 52(3) for and obtaining an order that the case be treated as a test case.[120] SARS would have to apply for such an order from the Tax Court within 30 business days from the date of the notice to oppose the test case designation.[121]

Should SARS proceed to apply for an order in the Tax Court, the taxpayer would have an opportunity to oppose such application in accordance part F of the rules.[122]

The designation of a case as a test case and the requisite notices that may be required in these circumstances do not affect the time period within which SARS must make its decision on objection in terms of rule 9. If, however, SARS launches an application in the Tax Court for the case to be designated a test case (in consequence of the taxpayer's opposing the designation), the period within which SARS is required to make a decision on the objection (or to request documents under rule 8) is interrupted.[123]

9.5.3.2 Staying an objection

SARS may stay an objection, pending the outcome of a decision by the Tax Court on another matter that has been designated a test case. This means that SARS is not required to provide its decision on the objection submitted until the test case has been decided, despite the normal time periods prescribed in rules 8 and 9.

SARS can stay an objection only if another case has been designated a test case.[124] A practical issue may arise when SARS has designated a case as a test case and wishes to stay another objection, but the taxpayer whose objection has been designated a test case opposes such designation and SARS has not yet obtained a judgment from the Tax Court. In these circumstances, there is arguably no test case designation and therefore SARS cannot stay the other objection. As SARS can also stay an appeal, this may be only a temporary practical problem for SARS.

---

117 Rule 12(3)(a).
118 Rule 12(3).
119 Rule 12(4).
120 Rule 12(5)(a) and (c). The word 'may' in the opening words of rule 12(5) cannot be taken to mean that SARS may decide not to withdraw its decision to designate the case as a test case and simply proceed to treat the case as a test case without first applying for and obtaining the order from the Tax Court.
121 Rule 12(5).
122 See chap. 11.
123 Rule 50(4).
124 See para. 9.5.3.1.

If SARS wants to stay an objection, it must do so by way of notice to the taxpayer (the stay notice) before making a decision on the objection.[125] Since the rules prescribe time periods within which SARS must decide an objection,[126] it follows that SARS must deliver the stay notice before its decision falls due under rule 9, read with section 106. The taxpayer can, however, agree that the case be stayed after SARS's decision on the objection falls due under rule 9.[127]

The stay notice must be delivered to the taxpayer via eFiling, if eFiling was used to submit the objection (typically in cases where an NOO is filed), or, if eFiling was not used to submit the objection (typically in cases where an ADR1 form is filed), to the address specified by the taxpayer, under rule 7, in the objection as the address at which it will accept delivery of SARS's decision.[128]

The stay notice issued by SARS must contain all of the following things, as prescribed by rule 12(2):

- the number of and common issues involved in the objections or appeals that the test case is likely to be determinative of;
- the question of law or fact, or of both law and fact, that, subject to the augmentation thereof under rule 34, constitutes the issues to be determined by the test case; and
- a statement on the importance of the test case to the administration of the relevant tax Act.

The time period within which SARS needs to make a decision on the objection under rule 9 (or to request further documents) is suspended from the date of the delivery of the stay notice.

If the taxpayer does not want its case to be stayed, the taxpayer must, within 30 business days after receiving the stay notice, deliver to SARS a notice in which it notifies SARS of its opposition to SARS's decision to stay the objection.[129] The rules do not provide for an extension of this 30-business-day period. It follows that the taxpayer may, under rule 4, agree on an extension with SARS. If the taxpayer does not deliver its notice to oppose the stay in time, the objection will be stayed.[130]

If the taxpayer properly and timeously delivers the notice to oppose the stay, SARS may not stay the objection without first applying to the Tax Court under rule 52(3) for and obtaining an order that the objection be stayed.[131] SARS would have to apply for such an order from the Tax Court within 30 business days from the date of the taxpayer's notice of opposition to the stay.[132] However, mere delivery of the notice to oppose the stay does not mean that SARS is then bound by the time periods in rule 9 to decide the objection. It is only if SARS does not, within a 30-day period from the date of receiving the notice to oppose the stay, approach the Tax Court that the time period within which SARS has to decide the objection begins to run again.

If SARS does approach the Tax Court within this time period, the period within which SARS needs to decide the objection essentially remains suspended until judgment on the application

---

125 Rule 12(1)(a).
126 See para. 9.5.2.
127 Whilst rule 9 provides for an extension period, rule 12 does not. The rules do not provide for an extension of the period within which SARS must designate an objection as a test case and, accordingly, rule 4 may apply.
128 Rule 2.
129 Rule 12(3)(b).
130 Rule 12(4).
131 Rule 12(5)(a) and (c). The word 'may' in the opening words of rule 12(5) cannot be taken to mean that SARS may decide not to withdraw its decision to designate the case as a test case.
132 Rule 12(5).

is handed down by the Tax Court or SARS withdraws its decision to stay the objection and/or application in the Tax Court. If SARS obtains an order from the Tax Court staying the objection, the objection is stayed until such time as the test case is determined by the Tax Court.[133] SARS may agree to withdraw its decision to stay, following delivery of the notice to oppose the stay, in which case the time period within which SARS needs to make its decision or request documents begin to run again.

In response to the stay notice, the taxpayer may, in addition to notifying SARS of its opposition to the stay (or in the alternative thereto), also notify SARS that it wants to participate in the test case. If the taxpayer wants to participate in the test case it must deliver to SARS a notice to that effect, within 30 days of receiving the stay notice. SARS must then either grant such participation or, if SARS does not want to grant participation, apply to the Tax Court under rule 52(3) for an order that the taxpayer may not participate in the test case, within 30 days from the date of delivery of the participation notice.

Should SARS proceed to apply for an order in the Tax Court, whether it be for an order to stay an objection or an order preventing the taxpayer from participating in the test case, the taxpayer would have an opportunity to oppose such application in accordance with part F of the rules.[134]

9.6 The objection phase in context

Figure 9.1 at the beginning of this chapter highlights the objection phase in context. In the light of what has been learned in this chapter, that diagram can be updated, as shown in Figure 9.3, to indicate the time periods within which each step must take place.

133 Only the Tax Court can hear test cases.
134 See chap. 11.

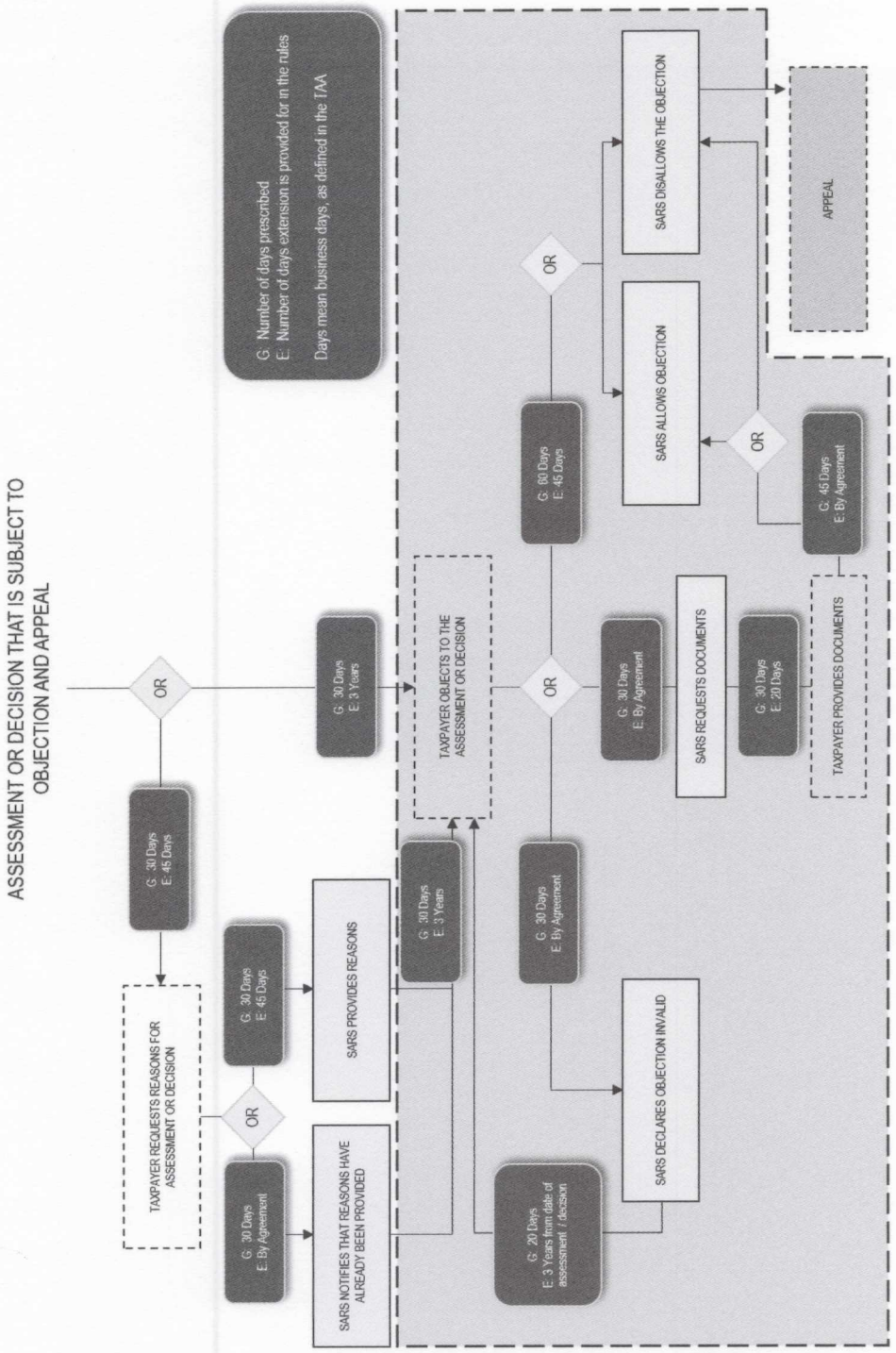


Figure 9.3: The objection phase diagram, updated.

Figure 9.3: The objection phase diagram, updated.

PART II

CHAPTER 10

Appeals

The practical context of this chapter

For the taxpayer: how and when?

By submitting an ADR2 or NOA form. When to use the NOA or ADR2 form is detailed in paragraph 10.4.1. NOA forms are typically submitted via eFiling. ADR2 forms must be submitted to the addresses specified in paragraph 10.4.9.

In terms of the Tax Administration Act[1] (TAA) the NOA or ADR2 form must be submitted within 30 business days from the date of delivery by SARS of the notice in which it indicates its decision to disallow or partially allow the objection. SARS may grant an extension of 21 business days if reasonable grounds exist for the delay and up to a maximum of 45 business days in exceptional circumstances. More than 75 business days after the date of SARS's decision on the objection neither SARS nor the Tax Court can grant an extension for the submission of the appeal.

For the taxpayer: consequences of non-compliance

SARS may, in its own discretion, declare an appeal invalid. An invalid appeal cannot progress to the next step in the appeal phase. A taxpayer can remedy this issue by submitting a new valid appeal together with a request for condonation or extension where necessary.

For SARS: how and when?

This depends on the selection made by the taxpayer on the NOA or ADR2 form. If the taxpayer opted for the appeal to be referred to alternative dispute resolution (ADR) there are certain things SARS must do after submission by the taxpayer of the NOA or ADR2 form.[2]

If the taxpayer did not opt for ADR on the NOA or ADR2 form and the tax in dispute is more than R1 million, the appeal will be dealt with by the Tax Court and SARS must deliver its rule 31 statement to the taxpayer within 45 days from the date of submission of the NOA or ADR2 form.[3]

If the taxpayer did not opt for ADR on the NOA or ADR2 form and the tax in dispute is less than R1 million (and SARS and the taxpayer agree to the jurisdiction of the Tax

---

1 Act 28 of 2011. Any reference to a legislative provision herein is a reference to the TAA unless the contrary is specifically stated or the context clearly suggests otherwise.

2 See para. 10.6.1 on ADR procedures.

3 See para. 10.6.5 for a discussion of the Tax Court procedures.

Board), the appeal will probably be heard by the Tax Board. In this case, unlike matters to be heard by the Tax Court, SARS does not immediately have to do anything (it does not, for instance, have to file something akin to the rule 31 statement as it would have to do in the Tax Court). Rather, it is incumbent upon the taxpayer to apply to the clerk of the Tax Board for setting down of the matter, after submitting the NOA or ADR2 form.[4]

For SARS: consequences of non-compliance with the rules[5]

The taxpayer may apply for default judgment under rule 56 against SARS[6] *or complain to the Complaints Management Office (CMO) or the Office of the Tax Ombud. Otherwise, the taxpayer can rely on the alternative relief set out in the body of this chapter.*

4 See para. 10.6.4 on the Tax Board procedures.

5 The Rules promulgated under s 103 of the Tax Administration Act, GN 550 in *GG* 37819 of 11 July 2014 (hereinafter referred to and referenced as 'the rules'. Any reference to a rule should be construed as a reference to these rules, unless otherwise indicated or unless the context clearly suggests otherwise.

6 See chap. 11.

Contents

Table of Examples

Page

List of Figures

List of Figures

10.1 Introduction

As discussed in chapter 7, the objection and appeal remedy comprises several steps. The steps in this process can fall into either the objection phase or the appeal phase. The objection and appeal remedy, as a process, begins at the objection phase, as more fully discussed in chapters 8 and 9. If the taxpayer's objection is unsuccessful or only partially successful, the taxpayer may proceed to the appeal phase. This chapter looks at that phase.

As stated above, the appeal phase is made up of several steps. The first step, which sets the appeal process into motion, is the submission by the taxpayer of an appeal in terms of the rules. This appeal is also sometimes referred to as a rule 10 notice.[7] The specific rules governing this first step in the appeal are set out in this chapter. With reference to the rules and applicable law, this chapter will also specifically address:

- the rules for submission by the taxpayer of an appeal or rule 10 notice;
- when and how the rule 10 notice must be submitted; and
- what the taxpayer can expect after having duly submitted the rule 10 notice – in other words, what the next steps in the process should be.

10.2 The meaning of the word 'appeal' in the appeal phase of tax dispute resolution

The word 'appeal' in the context of tax dispute resolution proceedings means the appeal submitted by the taxpayer under the rules and the TAA. It does not have the same meaning as the word 'appeal' in other litigious proceedings.[8]

During tax dispute resolution proceedings, when a taxpayer submits a rule 10 notice the taxpayer would still be challenging SARS's underlying assessment or the decision that was placed under objection during the objection phase in the first place. The submission of the rule 10 notice does not change this nor does it mean that the taxpayer's appeal is against SARS's decision to disallow the objection.[9] On the contrary, the appeal phase, for the most part, can be seen as a post-objection objection remedy. By submitting the rule 10 notice, the taxpayer continues to challenge SARS's assessment or decision afresh, in a different forum (which can take the form of alternative dispute resolution or litigation before the Tax Board or Tax Court).

10.3 When the taxpayer must submit an appeal

Rule 10, read with section 107 of the TAA, provides for what can be classified as the standard time period within which appeals must be filed and also for an extended time period. The standard time period and its extension are discussed separately below.

7 For the sake of brevity, and to avoid confusion with regard to the term 'appeal', the appeal will occasionally just be referred to as a rule 10 notice in this chapter.

8 Apart from an appeal to a higher court following a decision by the Tax Court.

9 There are various judgments in which reference is made to the taxpayer's appealing against SARS's decision not to allow the objection. The reference in these judgments to appeals against decisions by SARS to disallow an objection is, with respect, not technically correct.

10.3.1 The standard time period for submitting an appeal

An appeal or a rule 10 notice must be lodged within 30 business days from the date of SARS's decision[10] to disallow or partially disallow the objection. Notice of the decision by SARS on the objection must be properly delivered to the taxpayer by notice, either via eFiling or to the address specified in the objection.[11]

Business days exclude Saturdays, Sundays, public holidays and all the days between 16 December of a year and 15 January of the following year, both days inclusive (this period is commonly referred to as *dies non*). This means that these days are not counted as days for the purposes of the prescribed time periods under the TAA and the rules.[12]

In terms of clause 7(1)(i) the Disaster Management Tax Relief Administration Bill,[13] the days between 26 March and 30 April 2020, both days inclusive, must also be regarded as *dies non* for the purposes of chapter 9 of the TAA and the rules.[14]

References to days or business days in this chapter must be taken to mean business days as explained above. As a general rule 'days' are counted exclusive of the first day and inclusive of the last day.

EXAMPLE

Example 10.1 – Counting days exclusive of the first, inclusive of the last

SARS delivered a notice to Mr A on 16 January 2020, informing him of its decision not to allow his objection. The first day of the 30-day period within which Mr A must submit an appeal was 17 January 2020 and the last (i.e. the 30th) day was 27 February 2020.

10.3.2 The extended time period for submitting an appeal

The 30-day period within which the taxpayer must submit an appeal or rule 10 notice may be extended by SARS by up to 21 business days if there are reasonable grounds for the taxpayer's delay in submitting the appeal[15] and by a period not exceeding 45 business days if exceptional circumstances exist for the delay.[16] A taxpayer who does not submit the appeal or rule 10 notice within the prescribed 30-day period will have to convince SARS of the existence of 'reasonable grounds' for the delay or that the delay was due to 'exceptional circumstances'.[17]

Neither a SARS official nor the Tax Court is at liberty to extend the time period for lodging an appeal beyond a total of 75 business days from the date of SARS's decision to disallow the objection.[18] A higher court may, however, hear an application for such an extension.

10 Rule 10(1)(a).
11 See chap. 9 for more detail.
12 See the definition of 'business day' in s 1.
13 Bill 12 of 2020. The Bill had not been promulgated at the time of writing. If it is promulgated in its current form, the provisions referenced here will be effective from 26 March 2020.
14 Interestingly, the exclusion period between 15 December and 16 January is not by any definition of the expression '*dies non*' but rather results from the definition of 'business day' in s 1. Arguably, then, the fact that the period from 26 March to 30 April 2020 should be regarded as *dies non* under the Bill should not necessarily mean that it should not be counted for the purpose of disputes under chap. 9 of the TAA. However, it appears to be the intention that the days between 26 March to 30 April 2020 should not be counted for the purpose of disputes under chap. 9 of the TAA.
15 S 107(2)(a).
16 S 107(2)(b).
17 As to what constitutes 'reasonable grounds' and 'exceptional circumstances', see chap. 9.
18 See *Commissioner for the South African Revenue Service v Danwet 202 (Pty) Ltd* [2018] ZASCA 38, 2019 (5) SA 63 (SCA).

Figure 10.1 illustrates what the taxpayer must prove, and at what point, in order to secure an extension for the submission of an appeal.

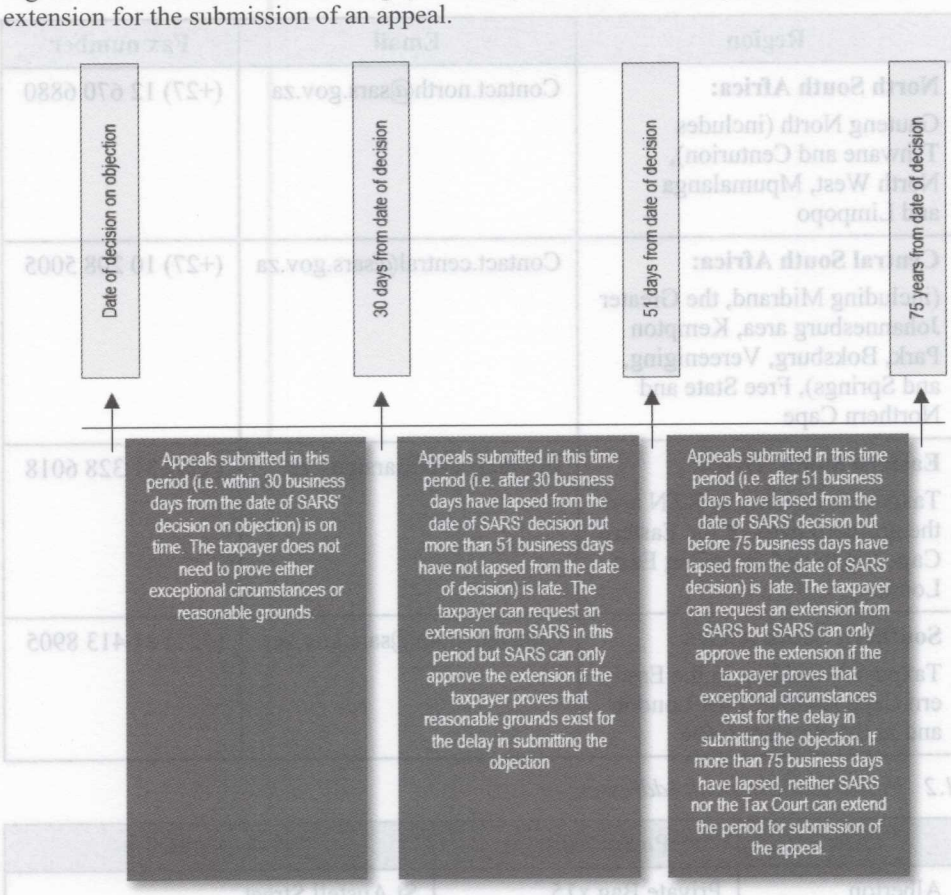


Figure 10.1: Reasonable grounds and exceptional circumstances.

10.3.3 When must the taxpayer request an extension?

In practice, a request for an extension is often made when the appeal is filed. In fact, the appeal form referred to in paragraph 10.4.1 contains a field specifically for this purpose. There is nothing, however, in either the rules or in the TAA to preclude the taxpayer from requesting an extension before submitting an appeal.

It is submitted that a request for extension made before submission of the appeal would simply take the form of a properly drafted letter to SARS, which can be submitted electronically (via email or fax) to specified addresses or by post or hand-delivery to specified postal or physical addresses. The taxpayer may also choose to hand-deliver the request to any SARS branch. The addresses specified for the purpose of delivery via email, fax, post, or hand-delivery (other than hand-delivery to any SARS branch) are as set out below:[19]

19 Rule 2(c)(ii), read with part B of GN 295 in *GG* 38666 of 31 March 2015. There is no prescribed form for requesting an extension before the submission of the appeal. Whilst GN 295 excludes notices of appeal under rule 10, a request for extension submitted before the appeal or rule 10 notice itself is not a notice of appeal.

'*1.1 Electronic addresses:*

Region	Email	Fax number
North South Africa: Gauteng North (includes Tshwane and Centurion), North West, Mpumalanga and Limpopo	Contact.north@sars.gov.za	(+27) 12 670 6880
Central South Africa: (including Midrand, the Greater Johannesburg area, Kempton Park, Boksburg, Vereeniging, and Springs), Free State and Northern Cape	Contact.central@sars.gov.za	(+27) 10 208 5005
Eastern South Africa: Taxpayers residing in KZN and the northern parts of the Eastern Cape (up to and including East London)	Contact.east@sars.gov.za	(+27) 31 328 6018
Southern South Africa Taxpayers residing in the Eastern Cape south of East London and in the Western Cape	Contact.south@sars.gov.za	(+27) 21 413 8905

1.2 Postal and Physical Addresses:

Office	Postal Address	Physical address
Alberton	Private Bag x15 Alberton 1450	St Austell Street Mackinnon Crescent New Redruth Alberton 1449
Bellville	Private Bag X11 Bellville 7530	Corner of Teddington & De Lange Road Bellville 7530
Doringkloof	PO Box 436 Pretoria 0001	7 Protea Street Centurion Pretoria 0157
Durban	PO Box 921 Durban 4000	201 Dr Pixley KaSeme Street Durban 4001

It should be noted that on 24 August 2020, SARS released a statement on its website in which it is stated that:[20]

> "*The following email addresses* ***will cease to exist*** *from 24 August:*
>
> – ...
>
> – *For taxpayers: Contact.central@sars.gov.za, contact.north@sars.gov.za, contact.east@sars.gov.za and contact.south@sars.gov.za*
>
> ***The new email addresses from 24 August are:***
>
> – ...
>
> – ***Contactus@sars.gov.za***"

The fact that SARS notified taxpayers by announcement on their website about a change in the email addresses prescribed by Public Notice (as set out in the table above) does not detract from the fact that in terms of the Public Notice, delivery can only be made at the email addresses listed in the table above (where the request for extension is submitted *via* email). As such, a taxpayer who delivers a request for extension to the address 'contactus@sars.gov.za' as opposed to, for example, 'contact.north@sars.gov.za' would not have delivered the request as required under the rules. At the time of writing, the Public Notice which prescribes the email addresses listed in the table above has not been amended but we understand that SARS is looking into amending the public notice in this regard. Until the Public Notice has been amended, taxpayers would be well advised to continue to submit requests for extension to the email addresses listed in the table above if submitted *via* email. It would, however, be practicable to also deliver the request to contactus@sars.gov.za in addition to the other email address set out in the table above.

10.3.4 Remedies available when SARS does not grant the time extension

If SARS does not grant a taxpayer's request for an extension, SARS will not consider or process the appeal or rule 10 notice. There are remedies of which taxpayers can avail themselves (apart from those discussed in chapter 6) to address such a situation.

If SARS decides not to grant an extension, the taxpayer concerned can, in terms of section 104(2)(b), object to such decision. It is submitted that neither SARS's Complaints Management Office (CMO) nor the Tax Ombud can be of assistance to the taxpayer in these cases. The reason for this is that they lack jurisdiction in terms of the TAA and the rules.[21] An application to the High Court under the Promotion of Administrative Justice Act[22] (PAJA) would similarly not be a viable form of recourse for the taxpayer.[23] The taxpayer's only remedy in the circumstances would be to object to SARS's decision not to grant the extension.

---

20 https://www.sars.gov.za/Contact/Pages/Contact-SARS-by-e-mail%20or%20fax%20or%20post.aspx (accessed: 24 August 2020).

21 The CMO has its legislative underpinning in s 9 (see the Memorandum of Objects of the Tax Administration Laws Amendment Bill, 2017, para. 2.22, and chap. 6 above). S 9 of the TAA is available only in respect of decisions that are not subject to objection and appeal (see chap. 6). Since a decision not to extend the period for the lodging of an appeal is subject to objection and appeal, the taxpayer cannot rely on that section. (In *CM v Commissioner for the South African Revenue Service* TAdm 0035/2019, SARS changed its decision from a decision to condone the late filing of an objection to a decision not to condone the late filing of an appeal. It is worth noting that a decision to condone the late filing of an appeal is not subject to objection and appeal and hence SARS may rely on s 9 to change its decision.) The Tax Ombud similarly, in terms of s 17(c), does not have the authority to review a matter subject to objection and appeal.

22 Act 3 of 2000.

23 On the basis that the taxpayer must object (s 7(2) of PAJA).

If SARS fails to make a decision, the taxpayer may apply to the Tax Court under rule 52(2)(e) for an order that the period be extended.[24] When SARS does not make a decision at all, the CMO and the Tax Ombud may be of assistance in obtaining a decision from SARS on the request for extension.[25] The rules do not prescribe a time period within which SARS must decide whether to grant an extension.

10.4 How the taxpayer must submit an appeal or rule 10 notice

The taxpayer must:[26]

- complete the prescribed form in full;[27]
- specify the grounds for objection on which the taxpayer is appealing;[28]
- specify the basis on which the taxpayer disagrees with SARS's decision not to allow the objection;[29]
- specify any new grounds on which the taxpayer relies on appeal;[30]
- under certain circumstances specify an address at which the taxpayer will accept further correspondence from SARS in respect of the appeal;[31]
- sign the prescribed form;[32]
- indicate whether the taxpayer opts for ADR or litigation;[33]
- under certain circumstances request permission to be represented by a third party;[34] and
- deliver the appeal to SARS within the time period discussed in paragraph 10.3 above.[35]

Each of these requirements is discussed separately below.

10.4.1 The prescribed form for appeals

The form for appeals is prescribed by SARS.[36] SARS's dispute resolution guide[37] states that the taxpayer must file either the NOA or the ADR2 form. On SARS's webpage,[38] a table is provided, indicating when the NOA form needs to be used and when the ADR2 form needs to

24 See chap. 11 on such applications.
25 It stands to reason, though, that SARS's not making a decision is still a decision, a decision not to decide. S 9 would not apply and the decision would not be subject to objection and appeal. The CMO should be able to assist the affected taxpayer. Likewise, the Tax Ombud may be in a position to assist on the basis that a decision not to make a decision relates to an administrative matter relating to an appeal.
26 S 107, read with rule 10.
27 Rule 10(2)(a).
28 Rule 10(2)(c)(ii).
29 Rule 10(2)(c)(ii).
30 Rule 10(2)(c)(iii).
31 Rule 10(2)(b).
32 Rule 10(2)(d).
33 Rule 10(2)(e).
34 S 113(8). Whilst such permission is not technically a requirement, s 113(8) does suggest that permission may be requested 'together with the notice of appeal'. Although the permission may be requested at a later stage, it is prudent to request permission 'together with the notice of appeal'.
35 Rule 10(1).
36 Rule 2(1)(a), read with rule 10(1).
37 *Dispute Resolution: Guide on the Rules Promulgated in terms of Section 103 of the Tax Administration Act, 2011* (2nd issue, 20 March 2020) para. 6.12.
38 https://www.sars.gov.za/ClientSegments/Individuals/What-If-Not-Agree/Pages/default.aspx (accessed 23 April 2020).

be used. An extract of that table is provided below and is accurate at the date of going to print. It should be noted, however, that this is subject to change. Taxpayers would be well-advised to visit SARS's webpage before submitting an appeal, to ensure that they use the correct forms.

Type of Tax	*NOA*	*ADR2*
Personal Income Tax *(Late payment penalties & interest on Provisional Tax and Administrative Penalties)*	✓	✗
Personal Income Tax *(Assessed Tax including additional/ understatement tax, interest and penalty for underpayment of provisional tax, etc.)*	✓	✗
Corporate Income Tax *(Assessed Tax including additional/ understatement tax, interest and penalties, etc.)*	✓	✗
Trust	✗	✓
Value-Added Tax (VAT) *(Including late payment penalty)*	✓	✗
PAYE	✓	✗
Payroll Taxes *(Assessment, penalties and interest, etc.)*	✓	✗
All other taxes not listed above *(e.g. STC before 1 April 2011, Donations Tax, Dividends Tax, ect.)*	✗	✓

The NOA form can be accessed through eFiling, under the 'Returns History' tab, by clicking on the 'Dispute' button on the relevant work page or in the tab titled 'Disputes'. The ADR2 form can be accessed on SARS's website.

10.4.2 Grounds for objection relied on in appeal

In terms of this requirement, the taxpayer must specify which grounds for objection are relied on in the appeal. An appeal or rule 10 notice typically does not detail the grounds for objection[39] again, other than perhaps to clarify the grounds for objection relied on in the appeal, where necessary. Compliance with the requirement to specify the grounds for objection relied on in the appeal is typically achieved by, for example, stating that the grounds for objection relied on in the appeal are those set out in the objection, or specifying the paragraphs or parts of the grounds for objection relied on in the appeal. The NOA and ADR2 forms often do not provide enough space to ensure compliance with this rule. Taxpayers can, as is the currently prevailing practice, attach a letter to the relevant form to resolve the issue.[40]

---

39 As to the meaning of 'grounds for objection', see chap. 9.

40 See Annexure B for a suggested template (Template B3) designed to ensure compliance with the rules.

10.4.3 Basis for disagreeing with SARS's decision

As discussed in chapter 9, SARS must provide the reason(s) for not allowing the taxpayer's objection. The rules prescribe that the taxpayer must, when submitting an appeal, provide the basis for its disagreement with SARS's decision. Interestingly, the reasons for SARS's disallowance and the taxpayer's reasons for disagreeing with SARS's decision appear to be largely irrelevant to the appeal process.[41] The basis for SARS's decision and the taxpayer's reasons for disagreeing with the basis for SARS's decision may, however, be relevant to issues associated with costs in the Tax Court or to reviews under PAJA or section 9 of the TAA.

As mentioned at the beginning of this chapter, a taxpayer appealing after a decision by SARS not to allow the taxpayer's objection is not appealing against SARS's decision not to allow the objection but simply continuing to challenge SARS's assessment in another forum. The basis for SARS's decision not to allow the objection does not in and of itself constitute grounds for SARS's assessment,[42] and it is submitted that the taxpayer's reasons for disagreeing with SARS's decision cannot, in and of itself, constitute a ground for appeal.

10.4.4 New grounds

Taxpayers are entitled to add new grounds for challenging the assessment or decision in their appeal (i.e. grounds not raised in the objection).[43] However, such new grounds may not constitute a new objection to a part of the assessment not objected to (such grounds being referred to as 'impermissible new grounds').[44] Establishing whether a ground is an impermissible new ground gives rise to difficulties in practice. It is submitted that the only reason why these practical difficulties arise is because the previous version of the rules (which no longer apply), was less clear regarding whether a taxpayer could add new grounds and, if the taxpayer could, which grounds could be added. The rules that are currently in force are clear on this aspect. A taxpayer can advance any new grounds at the appeal stage to challenge an assessment, provided that the new grounds relate to an assessment or part of the assessment that was placed under objection.[45] The following examples illustrate the point.

---

41 The reasons/basis for SARS's decision on objection may appear largely irrelevant to the appeal process in the sense that it does not constitute grounds for SARS's assessment and in the sense that, if a taxpayer appeals following a decision by SARS not to allow the objection, the taxpayer is not appealing against the decision not to allow the objection but simply continuing to challenge SARS's assessment in another forum. However, the basis for SARS's decision on objection is relevant in the appeal phase in rule 10, in terms of which the taxpayer must state the basis for its disagreement with SARS's basis for disallowing the objection. It is submitted that the basis for SARS's decision is also relevant for the purposes of s 93(1)(e) and s 100 (as to which, see chaps 4 and 6) in that the basis for SARS's decision will clearly delineate the issues that prescribe under s 93(1)(e) and the issues which become final under s 100 in the absence of an appeal. If SARS fails to provide a basis for its decision on objection, this may inform a cause for the taxpayer to consider launching default judgment procedures under rule 56 (see chap. 11). The absence of a basis for SARS's decision may also be cause for a review request in terms of s 9 or PAJA (see chap. 6) but unlike an application for default judgment, review requests under s 9 or PAJA does not suspend the period within which a taxpayer must submit an appeal. In the absence of any definition of the word 'basis', exactly what the extent of the basis for SARS's decision ought to be is not clear. It is submitted that the basis must be the basis on which SARS disagrees with the taxpayer's objection and cannot be the grounds for SARS's assessment, which grounds should already have existed at the time SARS raised the assessment under objection. Further, the basis for SARS's decision on objection, it is submitted, should be the factual and legal basis upon which SARS disagrees with the taxpayer's objection as this is the only way in which effect can properly be given to ss 93(1)(e) and 100 and rule 10 of the rules.

42 See the definition of 'grounds for assessment' in rule 1. It is worth noting that in the draft rules, it is proposed that SARS's basis for disallowing the objection be required in SARS's rule 31 statement.

43 Rule 10(2)(c)(iii).

44 Rule 10(3).

45 See also *ITC 1912* (2018) 80 SATC 417 paras 20–21, where the Tax Court held as follows: '*A fundamental difficulty in SARS interpretive approach is that it simply does not account for the actual wording of TCR 32(3). In*

[*continued on next page*]

EXAMPLE

Example 10.2 – Impermissible new grounds

SARS raised an additional assessment on taxpayer A in which SARS disallowed certain expenses and added certain amounts to gross income. Taxpayer A objected to the disallowed expenses but not to the inclusion of the amounts in gross income. Following a decision by SARS to disallow the objection, the taxpayer proceeds with the submission of an appeal. In the appeal, the taxpayer also adds grounds for why the income SARS included in gross income is not taxable. These grounds constitute impermissible new grounds because the inclusion of the amounts in gross income was not placed under objection. The taxpayer cannot, at the appeal stage, bring the inclusion of the amounts in gross income into dispute. The taxpayer may, however, subject to the rule governing objections, object to such inclusion, which objection will be dealt with in the objection phase, completely independently of the appeal on the disallowed expenses.

EXAMPLE

Example 10.3 – Permissible new grounds

SARS raised an additional assessment on taxpayer B in which SARS added deposits received by the taxpayer to the taxpayer's gross income and taxed the taxpayer accordingly. The taxpayer objected to such inclusion in gross income on the grounds that the taxpayer did not receive the deposits within the meaning of the word 'received' in the definition of gross income in section 1 of the Income Tax Act.[46] Following SARS's decision to disallow the objection, the taxpayer submits an appeal in which it advances additional grounds to the effect that (i) the deposits are exempt (the exemption ground) and (ii) if the deposits are not exempt and also 'received' for the purposes of the gross income definition the taxpayer is entitled to a section 24C allowance or deduction against such deposits equal to 80% of the deposits received (the section 24C ground).

continued

[*continued from previous page*]

relevant part, and without repeating the entire clause, which is set out earlier, it provides that an appellant taxpayer may not include in its statement: "A ground of appeal that constitutes a new ground of objection against a part or amount of the disputed assessment not objected to under rule 7." (My emphasis). ... The underlined portion of the provision is of significance, and it must be given some meaning. If the purpose of TCR 32(3) is to prohibit new grounds of objection not filed under TCR 7, this would simply be achieved by placing a full stop after the phrase "new ground of objection." But this is not what the provision says. In plain language, it links the prohibited objection ("may not object") to the "part or amount" not "objected to" under TCR 7. This provision can only be read in one way: it prohibits the taxpayer from appealing against "a part or amount" of the assessment that was never objected to when the TCR 7 objection was filed.' Whilst the rule discussed by the court in the extract here is rule 32(3), suffice it to state that rule 32(3)'s wording is almost identical to the wording of rule 10(3).

46 Act 58 of 1962.

EXAMPLE

Example 10.3 – Permissible new grounds (*continued*)

Both of these grounds are new in that they were not raised in the objection. It could be argued that the exemption ground is an impermissible new ground on the basis that it is not a ground for the exclusion of the amount from gross income (as was advanced in the objection) but for the exclusion of the amount from 'income' as defined in the Income Tax Act. However, whilst the taxpayer argued in the objection for the exclusion from 'gross income' and not for the exclusion from income, the taxpayer objected to the assessment, which is the determination of the tax liability consequent upon the inclusion of the deposits in gross income. The exemption ground is aimed at removing the tax liability associated with the deposits by having them treated as exempt income. It is still aimed at the same determination or assessment and is therefore permissible. The section 24C ground could also be argued to be an impermissible new ground on the basis that it is aimed at allowing a deduction (or, more technically, an allowance) as opposed to an exclusion from gross income. However, it is submitted that it is also not an impermissible new ground, for the same reason that the exemption ground constitutes a permissible new ground.

EXAMPLE

Example 10.4 – Impermissible new grounds

SARS raised an additional assessment on taxpayer C in which SARS increased the output VAT of the taxpayer for a certain VAT period on the basis that the taxpayer incorrectly treated certain supplies as zero-rated for VAT purposes in that period. In addition, SARS also imposed an understatement penalty (USP) of 100% for gross negligence on the additional assessment. The taxpayer objected to the assessment on the basis that the supplies properly qualified to be zero-rated under the Value-Added Tax Act.[47] SARS disallowed the objection.

On appeal, the taxpayer adds a new ground to the effect that, if the supplies do not qualify to be zero-rated, the understatement by the taxpayer was the result of a *bona fide* inadvertent error and that therefore the USP may not be imposed. This is clearly a new ground. It is an impermissible new ground on the basis that the taxpayer did not place the USP under objection. Whilst it could be argued that if the taxpayer were successful in objecting to the output tax the USP would fall away (absent any understatement by the taxpayer) and was thus also (albeit indirectly) also placed under objection, it is submitted that that the USP was simply not placed under objection. The USP is a separate determination/assessment by SARS, which was not placed under objection.

47 Act 89 of 1991.

EXAMPLE

Example 10.5 – Permissible new grounds

SARS raised an additional assessment on taxpayer D in which SARS increased the output VAT of the taxpayer for a certain VAT period on the basis that the taxpayer incorrectly treated certain supplies as zero-rated for VAT purposes in that period. In addition, SARS imposed an understatement penalty of 100% for gross negligence on the additional assessment. The taxpayer objected to the assessment on the basis that the supplies properly qualified to be zero-rated under the Value-Added Tax Act. In addition, the taxpayer included a ground in its objection to the effect that the USP should not have been imposed because the understatement was the result of a *bona fide* inadvertent error. SARS disallowed the objection.

On appeal, the taxpayer adds as a new ground to the effect that the USP was unlawfully imposed and that the determination of the USP was therefore unlawful. This is clearly a new ground, but it is a permissible new ground on the basis that the USP was clearly placed under objection.

It might be prudent, if the taxpayer does add new grounds, to attach any documents necessary to substantiate such new grounds, even though attaching documents to substantiate any new grounds is not a legal requirement, as SARS would, in any event, be entitled to request documents relating to such new grounds later in the process, which is likely to extend the period within which the appeal is to be resolved. In Example 10.3, above, the taxpayer may have been well advised to add a copy of the contract on which it relied, to substantiate the section 24C ground.

10.4.5 Specify an address

After submission of the NOA or ADR2 form under rule 10, further correspondence from SARS is typically not delivered through eFiling. At the appeal stage, the process is slightly different from that of the objection phase. In the appeal phase, the submission of an appeal does not usually result in an immediate decision by SARS to allow or disallow the appeal.[48] The taxpayer must therefore, in the appeal itself, specify an address at which the taxpayer will accept delivery of documents for the rest of the appeal process. This rule applies only if eFiling was used to file the appeal (usually when the NOA is the prescribed form).[49]

If the ADR2 form is used to submit the appeal, which is not submitted via eFiling, the rules do not require that an address for delivery of documents by SARS be provided. However, since the ADR2 will typically be filed in the case of submission of an ADR1 in the objection phase and since an address should then have been specified in the objection phase, such an address will be maintained for the delivery of documents by SARS throughout the appeal stage.[50] If the address were to change for any reason (e.g. because the person dealing with the appeal is not the person who dealt with the objection), it is advisable that SARS be timeously notified of the new address in the appeal. Failure to do so could mean that SARS would not be faulted for delivering further notices to the address specified in the objection.

10.4.6 Signing the ADR2 or NOA form

The taxpayer, or the taxpayer's duly authorised representative, must sign the prescribed form. Regarding the submission of NOA forms, which are submitted via eFiling, '*SARS is*

48 As to what happens after submission of the appeal, see para. 10.6.
49 Rule 10(2)(b).
50 That address being the address selected by the taxpayer for the purpose of the rules. See rule 2(c)(i).

comfortable that its "secure and reliable SARS electronic filing services" provide sufficient confidentiality and security to enable the user ID and access code to function as an electronic signature'.[51] It follows that it is not necessary for taxpayers or their representatives to sign NOA forms physically by hand.

10.4.7 Choose ADR or litigation

A taxpayer must, according to the rules, indicate in the appeal or rule 10 notice its willingness to try to resolve the case through ADR. This is done by selecting 'yes' to the statement on the NOA and ADR2 forms that reads: '*Choose to refer to ADR (Alternative Dispute Resolution)*'. Taxpayers not wanting their case to be dealt with under the ADR procedures must select 'yes' next to the statement on the NOA form that reads: '*Choose to refer to litigation*' and 'No' to the statement on the ADR2 form that reads '*choose to refer to ADR (Alternative Dispute Resolution)*'.

The ADR procedures are discussed in detail in paragraph 10.6.1 below. It suffices here to state that an appeal may be decided through ADR, by the Tax Board[52] or by the Tax Court.[53] The ADR procedures are akin to other mediation procedures in general, in being much less formal than litigation proceedings (whether before the Tax Board or a Tax Court). ADR can produce a more expeditious dispute resolution compared to litigation. The ADR procedures envisage a meeting between the taxpayer and SARS, with the aim of resolving the dispute by settlement or agreement.

A taxpayer not wanting to pursue litigation against SARS before the Tax Board or a Tax Court must indicate a preference to make use of the ADR procedures in the prescribed form as indicated above (there may be a further opportunity later in the dispute to rely on ADR even if the taxpayer did not select ADR).[54] It is often (but not always) sensible to try resolve the appeal through the ADR process even if the taxpayer is equally willing to pursue litigation before the Tax Board or a Tax Court. The mere selection of the ADR process in the relevant appeal form does not mean the taxpayer is barred from pursuing its case through litigation after the ADR proceedings are terminated.[55]

As further explained in paragraph 10.6.1, the ADR procedures can be used only if both SARS and the taxpayer agree thereto. Neither the taxpayer nor SARS may insist on the ADR procedures.[56]

10.4.8 Permissions required for the Tax Board

As detailed in paragraph 10.6.4.2, when an appeal proceeds to the Tax Board,[57] which may happen after ADR proceedings are terminated, the taxpayer must, unless the taxpayer will be representing itself/himself/herself, request permission on submission of the appeal to be represented by a third party in the Tax Board (unless the third party is the person who submitted the underlying return relating to the issue in dispute, in which case permission to be represented by such person is not required). Whilst the Chairperson of the Tax Board may allow such request to be made later in the proceedings, it is advisable to request such permission, if it is required, on submission of the appeal, irrespective of whether the taxpayer first

51 SARS dispute guide para. 3.5.
52 See para. 10.6.4.
53 See para. 10.6.5.
54 See para. 10.6.2.
55 Rule 14(1).
56 S 107(5).
57 As to the jurisdiction of the Tax Board, see para. 10.6.3.

opted for ADR. Section 113(8) clearly prescribes that the request to be represented by a third party may be made at the time of the submission of the appeal or rule 10 notice.

As explained in paragraph 10.6.3, the Tax Board has jurisdiction over certain appeals if, amongst other requirements, the taxpayer and SARS agree to the jurisdiction of the Tax Board. Taxpayers who are not amenable to having their case heard in the Tax Board would do well, in their appeal or rule 10 notice or supporting documents, to indicate clearly that they are not agreeable to the jurisdiction of the Tax Board (even if the taxpayer initially opted for ADR).[58]

10.4.9 Delivery or submission of the appeal

The NOA or ADR2 form must be submitted to an address specified in GN 295 of 31 March 2015[59] and within the time period discussed in paragraph 10.3, above. GN 295 provides as following regarding delivery of a notice of appeal:

> '*A notice of appeal under rule 10 must be delivered—*
>
> *3.1 by means of the taxpayer's electronic filing page, if applicable;*
>
> *3.2 to any of the addresses mentioned in paragraph 1.1 or 1.2, above; or*
>
> *3.3 by handing it to SARS at any SARS branch office.*'

When the NOA is the prescribed form, the taxpayer can deliver it by submitting through eFiling. When the ADR2 form is the prescribed form, the taxpayer is not able to submit the appeal through eFiling and must make use of the addresses in paragraph 1.1 and 1.2 of GN 295.

The addresses in paragraph 1.1 and 1.2 of the dispute address notice are:

> '*1.1 Electronic addresses:*

Region	Email	Fax number
North South Africa: Gauteng North (includes Tshwane and Centurion), North West, Mpumalanga and Limpopo	Contact.north@sars.gov.za	(+27) 12 670 6880
Central South Africa: (including Midrand, the Greater Johannesburg area, Kempton Park, Boksburg, Vereeniging, and Springs), Free State and Northern Cape	Contact.central@sars.gov.za	(+27) 10 208 5005

continued

58 This should force SARS to act under rule 31 (discussed in the Tax Court procedures section of this chapter) and within the time periods prescribed.

59 Rule 10(1), read with rule 2(1)(c)(ii).

Region	Email	Fax number
Eastern South Africa: Taxpayers residing in KZN and the northern parts of the Eastern Cape (up to and including East London)	Contact.east@sars.gov.za	(+27) 31 328 6018
Southern South Africa Taxpayers residing in the Eastern Cape south of East London and in the Western Cape	Contact.south@sars.gov.za	(+27) 21 413 8905

1.2 Postal and Physical Addresses:

Office	Postal Address	Physical address
Alberton	Private Bag x15 Alberton 1450	St Austell Street Mackinnon Crescent New Redruth Alberton 1449
Bellville	Private Bag X11 Bellville 7530	Corner of Teddington & De Lange Road Bellville 7530
Doringkloof	PO Box 436 Pretoria 0001	7 Protea Street Centurion Pretoria 0157
Durban	PO Box 921 Durban 4000	201 Dr Pixley KaSeme Street Durban 4001

It should be noted that on 24 August 2020, SARS released a statement on its website in which it is stated that:[60]

"*The following email addresses **will cease to exist** from 24 August:*

- ...
- *For taxpayers: Contact.central@sars.gov.za, contact.north@sars.gov.za, contact.east@sars.gov.za and contact.south@sars.gov.za*

The new email addresses from 24 August are:

- ...
- ***Contactus@sars.gov.za***"

The fact that SARS notified taxpayers by announcement on their website about a change in the email addresses prescribed by Public Notice (as set out in the table above) does not detract

60 https://www.sars.gov.za/Contact/Pages/Contact-SARS-by-e-mail%20or%20fax%20or%20post.aspx (accessed: 24 August 2020).

from the fact that in terms of the Public Notice, delivery can only be made at the email addresses listed in the table above (where the ADR2 is submitted *via* email). As such, a taxpayer who delivers an ADR2 to the address 'contactus@sars.gov.za' as opposed to, for example, 'contact.north@sars.gov.za' would not have delivered the ADR2 as required under the rules. At the time of writing, the Public Notice which prescribes the email addresses listed in the table above has not been amended but we understand that SARS is looking into amending the public notice in this regard. Until the Public Notice has been amended, taxpayers would be well advised to continue to submit ADR2's to the email addresses listed in the table above if submitted *via* email. It would, however, be practicable to also deliver the request to contactus@sars.gov.za in addition to the other email address set out in the table above.

10.5 Consequences when the taxpayer does not comply with the rules

If the taxpayer files an appeal that does not comply with the requirements set out in paragraphs 10.4 above, the appeal is invalid.[61] In these cases, the appeal will not progress to the next step in the appeal phase. Unlike the case with invalid objections,[62] SARS is not under any obligation under the TAA or the rules to notify the taxpayer of an invalid appeal nor can it condone non-compliance with the requirements. It seems, however, to be SARS's practice to notify taxpayers of invalid appeals.

When an appeal is invalid, the taxpayer can file another appeal, together with a request for condonation or an extension, where necessary (bearing in mind that no extension can be granted after 75 business days). Unlike the case with an invalid objection, the rules do not provide any relief for the filing of a new valid appeal without the need to request an extension. It is therefore crucial to ensure that appeals are filed in line with the requirements.

As stated above, Annexure B contains a suggested template (template B3) which may be used in support of the NOA or ADR2 form and is designed in an attempt to ensure compliance with the rules. It should be stressed, however, that template B3 should not be considered a replacement for the NOA or AD2 form, which must still be submitted.

10.6 Steps after submission of an appeal

If the taxpayer has added new grounds in appeal,[63] SARS may request that the taxpayer provide substantiating documents for such new grounds. Such request must be made within 15 business days from the date of delivery of the appeal. SARS must deliver it in the prescribed manner: either to the address specified in the objection, if the objection was not submitted via eFiling, or to the address specified in the appeal.[64]

The rules do not provide for a specific extension of the period within which SARS must call for such further documents. It follows that the taxpayer may agree on an extended period with SARS under rule 4.

The taxpayer must respond to such request from SARS within 15 business days, or within 35 business days if SARS allows an extension to the 15-day time period on the basis of reasonable grounds advanced by the taxpayer.[65]

---

61 S 107(3).
62 See chap. 9.
63 See para. 10.4.4 for a discussion regarding new grounds.
64 See para. 10.4.5.
65 Rule 10(5). As to the meaning of 'reasonable grounds', see chap. 9.

The steps that follow depend on the selection made by the taxpayer on the NOA or ADR2.[66] If the taxpayer opted for ADR in the NOA or ADR2 form, the subsequent steps are prescribed in part C of the rules.[67] If the taxpayer did not opt for ADR, the steps that follow are set out in parts C, D and E of the rules, read with parts C and D of the TAA.[68]

Irrespective of whether or not the taxpayer opted for ADR, SARS may at any time after submission of the appeal, but before judgment is handed down by the Tax Board or Tax Court, concede the appeal[69] or attempt to settle the dispute with the taxpayer.[70] Settlement attempts do not suspend the time periods within which steps must be followed following submission of the appeal except by agreement between the taxpayer and SARS (where extension by agreement is allowed).[71] A taxpayer may similarly at any point in time (but before judgment is handed down by the Tax Court, should the case proceed to the Tax Court) withdraw an appeal. There may, however, be cost implications for SARS or the taxpayer in the event of a concession or withdrawal respectively after the case has been set down for hearing in the Tax Court.[72]

SARS may designate an appeal as a test case or may stay the appeal pending the outcome of a test case. The circumstances under which SARS may select an appeal as a test case or stay an appeal and the procedures that apply where SARS stays an appeal or designates an appeal as a test case are discussed in chapter 9 in relation to objections that are stayed or designated as test cases. The circumstances and procedures discussed in that chapter apply *mutatis mutandis* to appeals discussed in this chapter as is evident from rule 12, which is not repeated here.

10.6.1 Steps after submission of an appeal – ADR selected

As briefly explained in paragraph 10.4.7 above, ADR can be described as a meeting between the taxpayer and SARS in an attempt to resolve the dispute through settlement or agreement without resort to litigation. It is similar to other types of mediation proceedings. The steps in the ADR process may fall into what can simply, for the sake of conveniently discussing the rules associated with ADR, be classified into four phases, to wit:

- the pre-ADR-meeting phase;
- the ADR meeting phase;
- the post-ADR-meeting phase; and
- the post-ADR-termination phase.

The steps and rules applicable in each of the four phases are discussed separately below.

10.6.1.1 The pre-ADR-meeting phase

After submission by the taxpayer of the NOA or ADR2, in which the taxpayer opts to refer the appeal to ADR, SARS must, within 30 business days from date of submission of the appeal, inform the taxpayer by way of notice whether it agrees to ADR for resolution of the appeal (this notice is hereinafter referred to as the 'notice of ADR agreement').[73] In practice, SARS

66 See para. 10.4.7.
67 See para. 10.6.1.
68 See paras 10.6.2–10.6.5.
69 S 107(7).
70 Part F of chap. 9 of the TAA. See chap. 6 above.
71 See in this regard, for example, *ITC 1904* 80 SATC 159.
72 Rules 46 and 47, read with s 130(1)(e).
73 S 107(5), read with rule 13(1).

seems to agree that most appeals are best dealt with under ADR if the taxpayer selected ADR on the ADR2 or NOA form.

The notice of ADR agreement must be delivered by SARS to the address specified in the objection, if eFiling was not used for submission of the appeal (typically when the appeal is submitted on the ADR2 form), or the address specified in the appeal,[74] or to eFiling, if the appeal was submitted through eFiling (typically the case when the NOA form is used to submit the appeal), or the address specified in the appeal.[75]

If SARS notifies the taxpayer within the 30-business-day period from the date of delivery of the appeal that it does not agree to ADR, the steps that follow are as set out in paragraphs 10.6.4 and 10.6.5 below, depending on whether the Tax Board or the Tax Court has jurisdiction to hear the appeal.[76] The taxpayer cannot force SARS to agree to ADR procedures: ADR is available only by agreement between the taxpayer and SARS.[77]

If SARS does not notify the taxpayer within the 30-business-day period from the date of delivery of the appeal that it agrees to ADR, which is often the case in practice, it is submitted that the taxpayer must accept that ADR procedures have not been agreed to and must, should it wish to pursue its appeal, proceed to deal with the appeal in terms of the procedures in the Tax Board or Tax Court.[78] The taxpayer may, however, agree to an extension of the period within which SARS is required to deliver the notice of ADR agreement.[79] If SARS then, within such extended period, delivers its notice of ADR agreement, the ADR process continues to run normally.

If, however, the taxpayer is not agreeable to an extension of the period within which SARS must deliver the notice of ADR agreement, the taxpayer may consider launching default-judgment procedures under rule 56[80] consequent upon SARS's failure to comply with time periods and the obligation to issue the notice of ADR agreement. Whilst a taxpayer would then have to follow the procedures in the Tax Board or Tax Court to deal with the appeal[81] (depending on the outcome of the default judgment application), a default-judgment application will, in terms of rule 50, suspend the period within which the Tax Board or Tax Court processes must run.

It is unfortunate that SARS can effectively force taxpayers to agree to an indefinite extension for delivery of the ADR agreement notice as the other options, being litigation and/or default judgment procedures, are not something that all taxpayers would necessarily want to pursue. The taxpayer's trepidation in this regard may not be due to the case's lack of merit but rather simply due to the fact that the other available procedures (e.g. complaining to the CMO or Tax Ombud about SARS's failure to deliver timeously the notice of ADR agreement) tend to make more financial sense, with litigation often being simply too costly to justify, considering, or depending on, the *quantum* of the amount in dispute. Taxpayers who, for whatever reason, do not want to pursue their case in litigation (or apply for default judgment) would effectively

74 See para. 10.4.5.
75 See para. 10.4.5.
76 As to which has jurisdiction, see para. 10.6.3.
77 S 107(5).
78 See paras 10.6.4 and 10.6.5. This conclusion follows on the basis that all appeals are actually appeals to either the Tax Board or the Tax Court unless the taxpayer and SARS agree to ADR under the rules. Since the rules clearly envisage that agreement must be reached within 30 days, failure by SARS to communicate its agreement means that no agreement is reached within the prescribed time period and hence the appeal must be pursued in the Tax Court or Tax Board.
79 Rule 4.
80 See chap. 11 for a detailed discussion on this process.
81 Unless SARS eventually delivers the notice of ADR agreement and the taxpayer condones the late delivery by agreeing to an extension of the period for delivery of the notice.

find themselves at SARS's mercy as regards the timing of delivery by SARS of the notice of ADR agreement (which, in practice, can be several months after delivery of the appeal by the taxpayer). Whilst the CMO is an option for less litigious taxpayers to call SARS to action, it has proven ineffective in practice. The CMO tends to reject complaints regarding the delayed delivery by SARS of the notice of ADR agreement, on the completely unfounded basis that SARS has 90 days to resolve disputes through ADR. (As will become clear, the 90-day period within which ADR procedures must be completed starts running only from the date of delivery by SARS of the notice of ADR agreement.) The taxpayer may, alternatively, complain to the Tax Ombud.

Practical issue: Notice of ADR agreement

In the event that SARS does not deliver its notice of ADR agreement on time and the taxpayer agrees to an extension but SARS, within such extended period, notifies the taxpayer that is not agreeable to ADR procedures for resolving the dispute, the rules do not provide for an automatic extension of the periods within which the taxpayer must apply for set-down in the Tax Board under rule 11 or for SARS to deliver its rule 31 statement.[82] Whilst the ADR procedures suspend these time periods, the ADR procedures would not commence if ADR is not agreed to by SARS and therefore do not suspend the rule 11 and rule 31 time periods. Whilst rule 15(1) suggests that ADR procedures commence on delivery of the notice of ADR agreement, whether or not SARS agrees to ADR, it is submitted the rule cannot be interpreted to mean that ADR procedures commence even if SARS notifies the taxpayer that it is not agreeable to ADR. This may result in the taxpayer's being late in applying for set-down in the Tax Board under rule 11 or in SARS's being late in delivering its rule 31 statement.

Another interpretation suggests that the extension agreed to by the taxpayer for the delivery by SARS of the ADR notice also extends the periods applicable under rules 11 and 31, but the plain wording of these rules does not support it. The fact that there is no automatic extension or consequent extension to the periods under rules 11 and 31 where the taxpayer has agreed to an extension for the delivery by SARS of the notice of ADR agreement is anomalous and may either require an amendment of the rules or mean that the rule-maker simply did not envisage that any extension to the periods for the issue of the notice of ADR agreement should be required or allowed. After all, the notice of ADR agreement is simply a notice indicating whether or not SARS agrees to ADR and arguably should not take more than 30 business days to deliver. In practice, however, it seems the notices are more often than not delivered outside the prescribed time period, with few, if any, consequences for SARS. It is accepted that the periods under rules 11 and 31 may be extended under rule 4, but the fact is that there is no obligation on either the taxpayer or SARS to agree to such extension, which unnecessarily forces applications under rule 52(1).

If the notice of ADR agreement timeously confirms SARS's agreement to the ADR procedures (within the 30-business-day period from the date of submission of the appeal or such further period as may be agreed to), the rules envisage the following further steps.

The taxpayer and SARS must, within 15 business days from the date of delivery of the notice of ADR agreement (or such further period as may be agreed to), agree on whether a facilitator

82 Rules 11 and 31 are discussed in more detail in the rest of this chapter.

will be required to facilitate the ADR proceedings.[83] Neither the taxpayer nor SARS may insist that a facilitator be appointed to facilitate the ADR proceedings.[84]

If SARS and the taxpayer agree that a facilitator will be required to facilitate ADR proceedings, SARS must within the same 15 business days from date of delivery of the notice of ADR agreement (or such further period as may be agreed to by the taxpayer), appoint a facilitator and notify the taxpayer of who the appointed facilitator is.[85]

Practical issue: Appointment of facilitator

In practice, the process does not always follow exactly the sequence envisaged in the rules discussed above. In practice, SARS decides whether a facilitator will be appointed and communicates its decision to the taxpayer in the notice of ADR agreement. Whilst SARS appears to use no set template for the notice of ADR agreement (which often simply takes the form of an email), the notice typically states that the taxpayer may note its disagreement with the appointment of a facilitator. This appears to be an effort to give effect to the rules in a practical way. Nevertheless, the taxpayer would do well to state whether it agrees or disagrees with the appointment of a facilitator.

A facilitator must, within 20 business days from the date of his or her appointment (or within such further period as may be agreed to by the parties under rule 4),[86] contact SARS and the taxpayer to arrange a place, date and time for the ADR meeting of all three parties. It follows from the above time periods that the facilitator should make contact to set up the meeting no more than 35 business days from the date of delivery of the notice of ADR agreement notice.

While the rules do not prescribe when exactly the meeting date must be, they do provide that ADR proceedings conclude or terminate within a period of 90 business days from the date of delivery of the notice of ADR agreement, unless an extended period is agreed to.[87] It follows that the meeting must be scheduled before that 90-day period lapses, unless the parties agree otherwise.[88]

The facilitator must also, within 20 business days from the date of his or her appointment, notify SARS and the taxpayer of any documents or written submissions which may be required and when such documents or written submissions are required by the facilitator.[89]

---

83 Although rule 16 does not expressly provide for a time period, the time period mentioned here follows on the basis of rule 16(3)(a), read with rule 15(1).

84 Rule 16(2) clearly provides that the use of a facilitator can be achieved only through agreement between the taxpayer and SARS.

85 Rule 16(3)(a).

86 Rule 19(1)(a).

87 Rule 25(1).

88 Rule 15(3).

89 Rule 19(1)(b).

Practical issue: ADR procedures extensions

In practice, the notice of ADR agreement issued by SARS sometimes contains a direct request for an indefinite extension beyond the 90-day period prescribed in the rules. If the taxpayer simply waits for SARS (or the facilitator) to schedule a meeting after the 90 days have lapsed, the taxpayer may tacitly (albeit inadvertently) agree to an extension. If the taxpayer does not wish to agree to an indefinite extension, it would be best for the taxpayer to decline formally SARS's request for an extension or to define a specific extension period to which the taxpayer is willing to agree. When SARS does not specifically request an extension to the 90-day period, the taxpayer should ideally still inform SARS that it is not amenable to negotiate an agreement for extension or inform SARS of the extension period to which the taxpayer is agreeable. This should serve to prevent a situation in which taxpayers find themselves having tacitly agreed to an undetermined or indefinite extension.

The taxpayer himself or herself, when the taxpayer is a natural person, or the representative taxpayer, when the taxpayer is not a natural person, must attend the meeting unless excused by the facilitator in exceptional circumstances.[90] If the taxpayer or representative taxpayer cannot attend the ADR meeting, it is advisable that a request for the taxpayer to be excused from attending the meeting be made during the pre-ADR-meeting phase.

When a facilitator has not been appointed, SARS and the taxpayer must, within 30 business days from the date of delivery of the notice of ADR agreement[91] (or within such further period as may be agreed to under rule 4), agree on a place at, date on and time at which the taxpayer and SARS must convene. SARS must, within the same 30-business-day period, notify the taxpayer of any documents or written submissions which may be required and when such documents or written submissions are required by SARS.[92] In cases where no facilitator has been appointed, permission for the taxpayer to be represented by a third party must be granted by SARS.[93]

Practical issue: Setting a date for the ADR meeting

Since the rules place the obligation on the parties (which include the taxpayer), when no facilitator has been appointed, to agree on a date, time and place for the ADR meeting, it is incumbent upon the taxpayer to make contact with SARS to set a date, time and place, especially if the notice of ADR agreement is silent as to the appointment of a facilitor or expressly states that no facilitator will be appointed.

continued

90 Rule 20(4).

91 Rule 19(2)(a). Although the rule does not state from when the 30 days start to run, it is submitted that it can only be from the date of the ADR agreement notice.

92 Rule 19(1)(b).

93 Rule 20(3). Rule 20 appears to suggest that if no facilitator has been appointed the taxpayer must always be present, irrespective of whether SARS agrees to the taxpayer's being represented by a third party. It appears though as if the intention was that, when a facilitator has been appointed, the facilitator can allow the absence of the taxpayer and, when a facilitator is not appointed, SARS may allow the absence of the taxpayer. This also appears to be how the rules are given effect to in practice. When no facilitator has been appointed, the taxpayer would be well advised to ask SARS to excuse his or her absence if he or she is unable to attend.

Practical issue: Setting a date for the ADR meeting (*continued*)

The notice of ADR agreement typically contains contact details of SARS officials. It is submitted that contacting SARS at such details with the aim of setting the meeting would be sufficient for the taxpayer to show an attempt to comply with the rules. Taxpayers who wait for SARS to set a time (as is often the practice, since the ADR agreement notice typically suggests that SARS will make contact to set a date, time and place within 15 days) may find themselves tacitly agreeing to an extension of the period within which ADR must be resolved. ADR meetings often take months and sometimes even more than a year to be scheduled. Taxpayers should take care to do everything they can to comply with the rules. Not doing so could see taxpayers tacitly or otherwise agreeing to ridiculous extension periods. Taxpayers should also hold SARS to account for failing to abide by the time periods, by, for example, launching default-judgment procedures.[94]

10.6.1.2 The ADR-meeting phase

At the date, time and place agreed to during the pre-ADR-meeting phase, SARS, the taxpayer and, if a facilitator has been appointed, the facilitator must meet. In practice, the ADR meeting is typically at a SARS office but may be a teleconference or video conference if the parties agree.

The meeting typically starts with the taking of attendance of the persons present at the meeting. The persons present at the meeting typically include the SARS official(s) who raised the assessment in question or who made the relevant decision, one or more representatives for SARS (normally but not always from SARS's legal counsel department), the facilitator (if one has been appointed), the taxpayer (unless excused from attending) and the taxpayer's representative(s) (if the required permissions have been obtained). If either the taxpayer (and/or the taxpayer's representative(s)) or the relevant SARS official(s) is absent from proceedings, the facilitator, if a facilitator was agreed upon and duly appointed, may terminate proceedings immediately with notice to the parties.[95] If the proceedings are terminated in this manner, the taxpayer must, if it intends to pursue the matter further, proceed to litigate the case before the Tax Board or in the Tax Court,[96] depending on which has jurisdiction.[97]

Usually after the taking of attendance at the ADR meeting, a SARS official or the facilitator will provide a brief overview of the ADR rules. This is not technically a requirement under the rules, as taxpayers who select ADR in their NOA or ADR2 are deemed to have accepted the ADR rules.[98] In so far not highlighted elsewhere herein, the rules applicable to ADR are:

- Documents tendered or representations made are tendered or made without prejudice to either SARS or the taxpayer.[99] Any concession, for example, made by SARS or the taxpayer during ADR proceedings will not be permissible evidence and cannot be used

94 See chap. 11 on default-judgment proceedings. In *South African Revenue Service v MMY* (Tax Case no. 12013/2012), it was held that: '*taxpayers themselves should not allow matters to drift. If SARS does not comply with a requirement imposed by the rules, a taxpayer is entitled, in terms of Rule 26 [now 56], to bring an application to compel compliance with the Commissioner's obligations. That is the way in which a taxpayer prevents the prejudice which can otherwise arise from lengthy delays in the finalisation of tax disputes ....*'

95 Rule 19(3)(a).

96 See paras 10.6.4 and 10.6.5 for the relevant procedures.

97 See para. 10.6.3 on jurisdiction.

98 Rule 13(2).

99 Rules 14(2) and 22(3)(b) and (c).

against either party in later proceedings. This rule applies from the date of commencement of ADR proceedings, which is the date of delivery of the notice of ADR agreement, until proceedings are terminated.

- The taxpayer and SARS participate in the ADR process with their rights fully reserved under the rules (e.g. the taxpayer can still pursue its case in litigation).[100]
- The ADR meeting may not be electronically recorded by any of the parties.[101]
- If a facilitator has been appointed, no document tendered or representation made to the facilitator in confidence during the ADR proceedings may be made available to the other party without the consent of the disclosing party.[102] Furthermore, any representation made or document tendered by either party during the course of proceedings must be treated as confidential.[103]
- Documents tendered or representations made during the course of proceedings may not be used as evidence in any later proceedings. There are a few logical exceptions to this rule, as listed in rule 22(3)(c).
- SARS, the taxpayer and, the facilitator (if a facilitator has been appointed) may not be compelled by subpoena to disclose documents tendered or presentations made during ADR proceedings.[104]

The taxpayer or SARS formally commences the ADR meeting, by stating its case.

The aim of the meeting is for SARS and the taxpayer to attempt to reach an agreement on whether SARS or the taxpayer is correct or to settle the dispute without either party accepting the other party's position as being correct.[105] The taxpayer, SARS and the facilitator may agree at the commencement of the ADR meeting that if no settlement of agreement is reached the facilitator will provide a written recommendation on how the dispute may be resolved.[106] Such a recommendation is required only if everybody agrees thereto. Neither SARS nor the taxpayer may insist on a recommendation. The recommendation of the facilitator may be used in later proceedings only in so far as it is relevant to costs in the Tax Court.[107]

It often happens in practice that the parties require further information not readily available at the meeting or more time to state properly their respective cases for either an agreement or a settlement to be reached. In these cases, the facilitator may move to adjourn the proceedings and agree that they be resumed at a later date, time and place.[108] Alternatively, SARS and the taxpayer may so agree.[109]

The facilitator, if one has been appointed, does not decide whether the taxpayer or SARS is correct. He or she is simply present to facilitate the discussion between the taxpayer and SARS in an attempt to get the parties to reach either an agreement or a settlement. The

100 Rule 14(1).
101 Rule 20(2).
102 Rule 22(1).
103 Rule 22(3)(a).
104 Rule 22(4).
105 Rules 23 and 24.
106 Rule 21. Although the reference in rule 21 is to the commencement of proceedings, which may appear to mean commencement of proceedings as envisaged in rule 15, it is submitted the rule-maker must have meant commencement of the ADR meeting rather than commencement of ADR procedures as a whole.
107 Rule 21(3).
108 Rule 20(5).
109 Rule 20(5).

facilitator must have the necessary competence to facilitate that discussion and, during the ADR meeting and during the entire time of his or her appointment as facilitator, must also:[110]

- act within the prescripts of the rules governing ADR proceedings and other applicable laws;
- seek a fair, equitable and legal resolution of the dispute between the taxpayer and SARS;
- promote, protect and give effect to the integrity, fairness and efficacy of the ADR process;
- act independently and impartially;
- conduct himself or herself with honesty and integrity and with courtesy to all parties;
- act in good faith; and
- attempt to bring the dispute to an expeditious conclusion.

A facilitator who does not abide by these rules must, at the request of the taxpayer (or of SARS or the facilitator), be removed as facilitator by a senior SARS official and replaced with a newly appointed facilitator within 15 business days from the date of removal of the original facilitator. The senior SARS official will have to be satisfied that the facilitator has not abided by the above listed rules before he or she may remove the facilitator. The taxpayer or SARS may also request the removal of a facilitator for any indication of bias or any conflict of interest.[111]

PROPOSED CHANGE IN THE DRAFT RULES

A set of draft rules under section 103 was released for public comment in 2018. In these draft rules various changes are proposed to the current rules promulgated under section 103. The draft rules were not in force at the time of writing. The draft rules propose to change the 15-day period within which a removed facilitator must be replaced to 5 days.

10.6.1.3 The post-ADR-meeting phase

Within 10 days after conclusion of the meeting (or meetings), the facilitator, if one was appointed, must deliver a report to the taxpayer and SARS, setting out:

- a statement regarding the issues that have been resolved in the meeting;
- a statement regarding the issues on which settlement or agreement was not reached in the meeting; and
- any other point which the facilitator considers necessary.[112]

In practice, these reports seldom seem to be issued despite the fact that they are compulsory. Taxpayers would do well to insist on such a report from the facilitator, if one was appointed.

110 Rule 17(a) to (f) and (h).

111 Rule 16(4)(d), read with rule 18.

112 Rule 20(6) and (7). The rules may also be interpreted to mean that the report from the facilitator is required only after termination of the proceedings. Given that proceedings under part C cease only on termination, as per rule 15, 23 or 24, it is submitted that the rule-maker did not intend to refer to cessation of ADR proceedings as a whole but rather to cessation of the ADR meeting(s). Surely the rule-maker intended this report to be used in, for example, the drawing up of the agreement or settlement agreement, which cannot be done after proceedings have been terminated. The draft rules clear up any further confusion with regard to the report's being due after the meeting(s). It should be noted that ADR proceedings may also be terminated through the effluxion of time when more than 90 days have elapsed from the date of commencement of ADR proceedings (unless an extension has been agreed to). See rule 25(1).

PROPOSED CHANGE IN THE DRAFT RULES

The draft rules propose to make changes to the effect that the facilitator is required to issue an interim report within 5 days after the meeting and a final report within 10 days after proceedings have ceased.

If agreement or settlement was not reached between the taxpayer and SARS during (or after) the ADR meeting(s), ADR proceedings may be terminated by the facilitator, if one was agreed to, or by the taxpayer or SARS, or by agreement between the taxpayer and SARS. Although it is mentioned here, in the post-ADR-meeting phase, nothing prevents such termination from taking place during the ADR meeting.[113]

When the taxpayer or SARS wishes to terminate proceedings without agreeing to such termination with the other party, the party desirous of terminating proceedings must deliver a notice of termination to the other party.[114] It may be advisable to provide such a notice of termination even if agreement regarding termination was reached, given that ADR proceedings are not on record. It is submitted that when the facilitator wishes to terminate proceedings he or she should also provide a notice of termination, albeit that prior notice of such termination by the facilitator is not required. It is worth noting at this point that the facilitator may terminate proceedings at any stage after his or her appointment, for any appropriate reason.[115]

When SARS or the facilitator wishes to terminate proceedings, the requisite notice of termination must be delivered to the taxpayer at the address specified in the objection, if eFiling was not used for submitting the appeal (typically when the appeal was submitted using the ADR2 form), or to the address specified in the appeal.[116] If eFiling was used for the submission of the appeal (typically when the NOA was the form used), the notice must be delivered either via eFiling or to the address specified in the appeal.[117] In practice, such notice is not delivered via eFiling but to the address specified in the appeal.

When the taxpayer wishes to terminate ADR proceedings otherwise than by agreement with SARS, the requisite notice of termination of ADR proceedings must be delivered to SARS at any of the following addresses:[118]

Physical address

Tax Court Litigation
Khanyisa Building, 1st Floor
271 Bronkhorst Street
Nieuw Muckleneuk
0181

Electronic address

Email: taxcourtlitigation@sars.gov.za
Fax: (+27) 12 422 5012.

There is no prescribed form for the notice of termination from the taxpayer. A suggested template (template B4) is attached in Annexure B hereto. While it is not strictly speaking necessary to do so, it would be courteous of the taxpayer to include the SARS official(s) involved in

113 Rule 25.
114 Rule 25(2).
115 Rule 19(3)(d).
116 See para. 10.4.5.
117 See para. 10.4.5.
118 Rule 2, read with para. 4 of GN 295 in *GG* 38666 of 31 March 2015.

the ADR proceedings when delivering the notice of termination, as is often the practice. The notice must, however, according to the rules, be delivered to any of the above listed addresses.

If agreement or settlement was reached during the ADR meeting, a written settlement agreement must be concluded between the taxpayer and SARS to give effect to such agreement or settlement.[119] The agreement should be signed by both parties or their representatives. A taxpayer may, in such an agreement, agree with SARS that SARS or the taxpayer be held liable for costs associated with the appeal.[120] In practice, however, the parties are often reluctant to agree to any costs in the agreement. The agreement must stipulate which issues have been agreed on or settled and which issues have not. The last signature of the agreement terminates ADR procedures.

SARS is then required to issue a revised assessment within 45 business days from the date of conclusion of the agreement.[121] In practice, SARS seldom issues the revised assessment within the prescribed time frame. If SARS fails to issue the required assessment timeously, the taxpayer may approach the Tax Court (and, as a rule, not another court) on notice of motion for an order compelling SARS to issue the revised assessment.[122]

There is no specific time period prescribed for when the agreement must be concluded and signed. However, if the ADR proceedings must be concluded within the prescribed 90-day period, it follows logically that the settlement agreement must be concluded within the same period. A time extension may be agreed upon, but, in the absence of such an extension, the agreement must be signed no later than 90 days after the date of delivery of the ADR agreement notice and the revised assessment issued within 45 days thereafter.

PROPOSED CHANGE IN THE DRAFT RULES

The draft rules propose to change the rules to the effect that SARS is required to issue a revised assessment to give effect to the agreement within 45 days from the date of the last signature of the agreement only if agreement was reached in respect of all issues under appeal.

10.6.1.4 The post-ADR-termination phase

If ADR procedures have been terminated, the taxpayer may pursue its case further, on appeal, in respect of any unresolved issues, in the appropriate forum, being either the Tax Board or the Tax Court.[123] The onus is on the taxpayer to give proper notice of its intention to pursue its appeal further. The time period within which notice must be provided, the manner of notice and the delivery address for such notice depend on whether ADR proceedings were terminated without settlement or agreement or with settlement or agreement.

If ADR proceedings were terminated without settlement or agreement (typically when proceedings were terminated by notice or by the lapse of time), the taxpayer must, if the case is to be heard by the Tax Board, apply for set-down in the Tax Board, within 20 business days from the date of termination.[124] While it is not compulsory when delivering the notice to include the SARS official(s) involved in the ADR proceedings, doing so would be considerate and respectful. It is also advisable for the taxpayer to deliver formally a copy of the notice to SARS

119 Rules 23(2)(a) and 24(2)(b), read with s 147(3).
120 Rules 23(2)(b) and 24(2)(c).
121 Rules 23(3) and 24(3).
122 Rule 52(5)(b). See chap. 11 on applications in the Tax Court.
123 As to which has jurisdiction, see para. 10.6.3.
124 Rule 25(3)(a). See para. 10.6.4.1 for the addresses to which notice must be delivered.

at the correct email address: taxcourtlitigation@sars.gov.za.[125] There is no prescribed form for the notice to pursue the appeal further. A suggested template (template B5) is attached in Annexure B.

If proceedings were terminated without settlement or agreement (in other words, when proceedings were terminated by notice) and the case is to be heard by the Tax Court, the taxpayer must, within 20 business days from date of termination, notify SARS that the taxpayer will pursue its case in the Tax Court. This notice must be delivered by the taxpayer to any of the following addresses:[126]

Physical address

Tax Court Litigation
Khanyisa Building, 1st Floor
271 Bronkhorst Street
Nieuw Muckleneuk
0181

Electronic address

Email: taxcourtlitigation@sars.gov.za
Fax: (+27) 12 422 5012.

There is no prescribed form for this notice. A suggested template (template B6) is attached in Annexure B. It would be courteous to include the SARS official(s) involved in the ADR proceedings when delivering the notice.

When proceedings are terminated by the conclusion of an agreement between the taxpayer and SARS but unresolved issues remain in dispute, the taxpayer must (assuming the taxpayer intends to pursue its case on unresolved issues), if the Tax Board has jurisdiction, notify the clerk of the Tax Board that it is pursuing its case in respect of the unresolved issues in the Tax Board. Such notice must be delivered within 15 business days from the date of signature of the agreement.[127] Again, it would be courteous of the taxpayer to include the SARS official(s) involved in the ADR proceedings when delivering the notice. It is advisable that the notice also be delivered to SARS at taxcourtlitigation@sars.gov.za.

There is no prescribed form for such a notice. A suggested template (template B7) is contained in Annexure B.

If the Tax Court has jurisdiction to hear the appeal after ADR proceedings have been terminated by the signature of an agreement, the taxpayer must within 15 business days from the date of the last signature of the agreement deliver notice to the Registrar of the Tax Court of its intention to pursue unresolved issues in the Tax Court. The addresses for delivery of the notice are as follows:[128]

Physical address

Registrar of the Tax Court
Khanyisa Building, 1st Floor
271 Bronkhorst Street
Nieuw Muckleneuk
0181

---

125 Whilst in normal civil proceedings delivery to the respondent is required in most cases, the Tax Court rules are silent on this aspect.

126 Rule 2, read with para. 4 of GN 295 in *GG* 38666 of 31 March 2015.

127 Rule 23(4). This is not technically a notice for set-down but serves the same purpose, as is evident from rule 26(1)(a). See para. 10.6.4.1 for the addresses to which the notice must be delivered.

128 Rules 2(c)(ii) and 3(1), read with para. 5 of part B of GN 295 in *GG* 38666 of 31 March 2015.

Electronic address

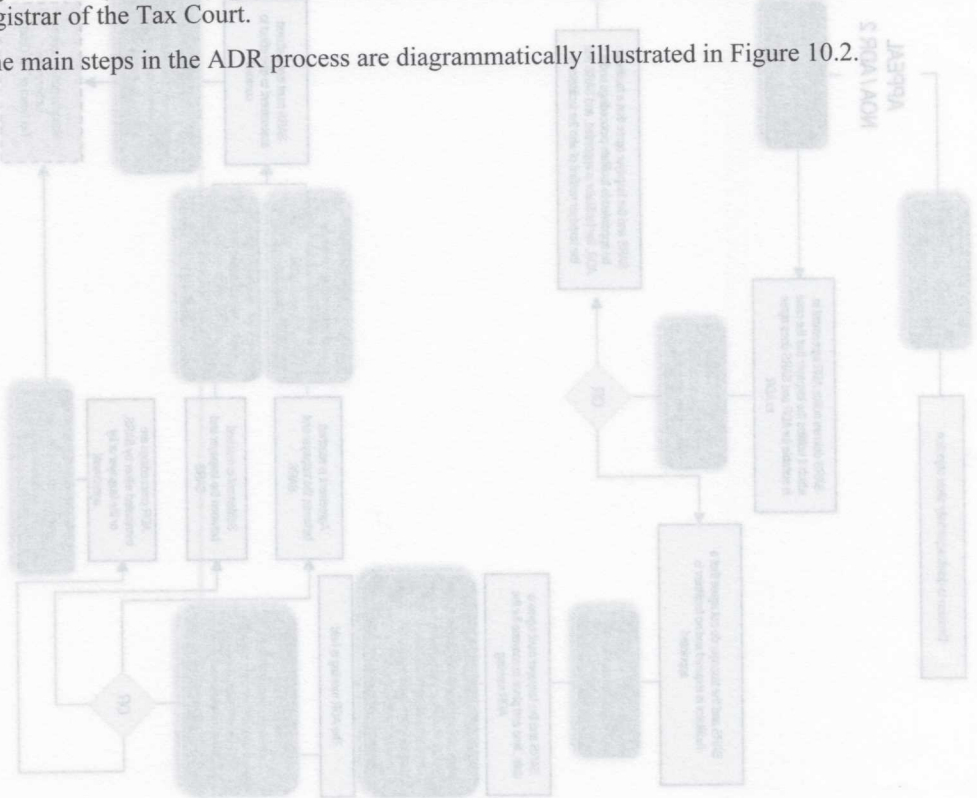
Fax: (+27) 12 422 5012
Email: registrarTaxCourt@sars.gov.za.

There is no prescribed form for this notice. A suggested template (template B8) is included in Annexure B. It would be courteous to include the SARS official(s) involved in the ADR proceedings when delivering the notice. It is arguably a requirement that the notice also be delivered to SARS at taxcourtlitgiation@sars.gov.za.[129]

It is evident from the above that if proceedings are terminated without agreement, the period within which the next step must be followed is 20 business days. If they are terminated by agreement, the period within which the next step must be followed is 15 business days.

In addition, if proceedings are terminated without agreement (by notice) and the Tax Board has jurisdiction, the taxpayer must (if the taxpayer intends to pursue the case further) apply for set-down. If proceedings are terminated with agreement and the Tax Board has jurisdiction to hear unresolved issues, the taxpayer must (if the taxpayer intends to pursue the case further on unresolved issues) simply notify the clerk of the Tax Board (which notice will serve the same purpose as the notice for set-down). If proceedings are terminated without agreement and the Tax Court has jurisdiction, the taxpayer must (if the taxpayer wants to pursue the case further) deliver to SARS notice of its intention to proceed to the Tax Court. If proceedings are terminated by agreement and the Tax Court has jurisdiction over unresolved issues, the taxpayer must (if the taxpayer intends to pursue the case further on unresolved issues) notify the registrar of the Tax Court.

The main steps in the ADR process are diagrammatically illustrated in Figure 10.2.



129 Rule 42.

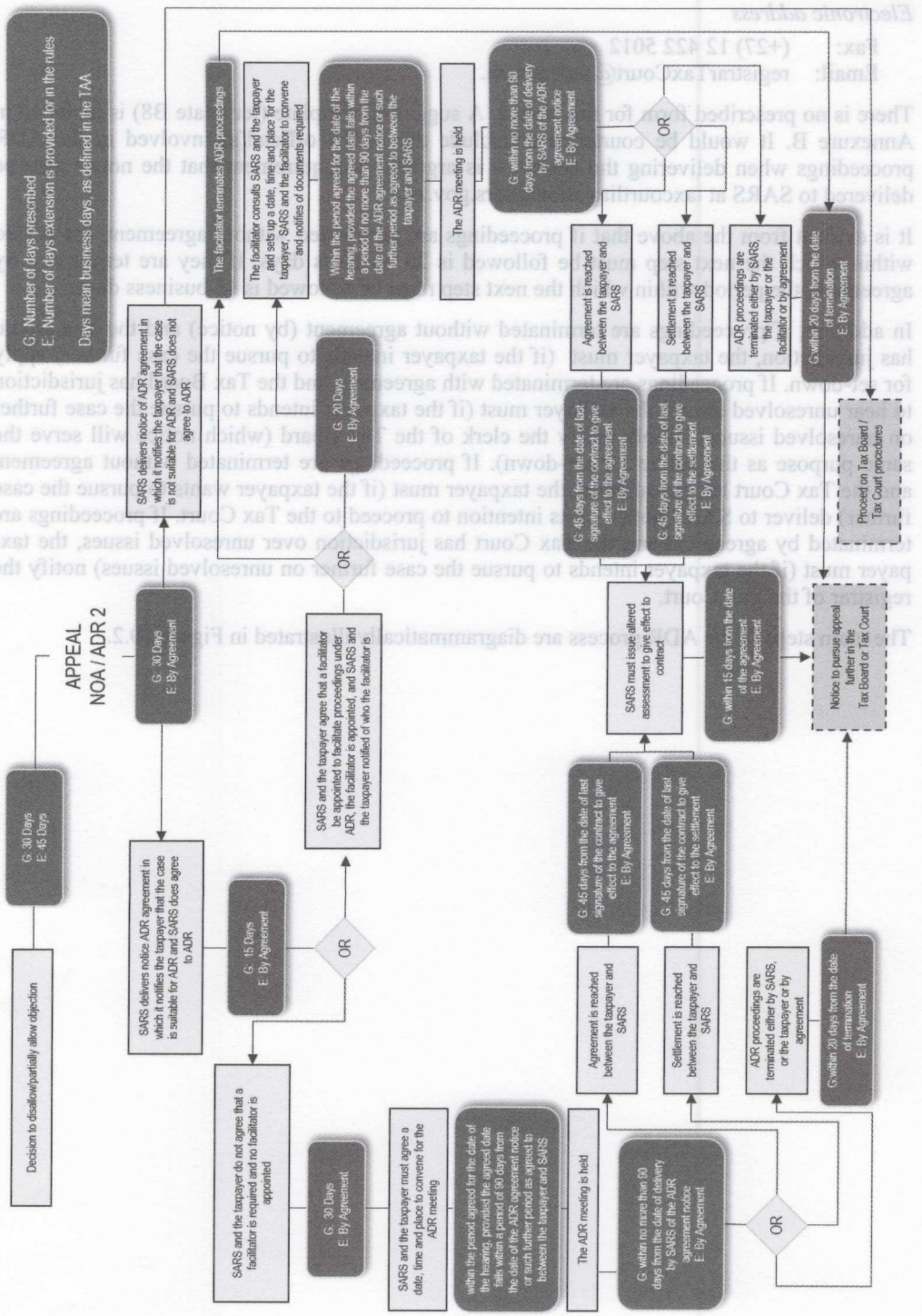


Figure 10.2: ADR proceedings.

10.6.2 Steps after submission of an appeal – ADR not selected

Even if ADR is not selected by the taxpayer on submission of the NOA or ADR2 form, ADR procedures may nevertheless be proposed by SARS. If the taxpayer has not selected ADR on appeal, SARS may, if it considers ADR appropriate for the matter, notify the taxpayer accordingly within 30 business days from the date of delivery of the appeal by the taxpayer (this notice is hereinafter referred to as the notice to propose ADR).[130]

The notice to propose ADR must be delivered to the taxpayer at the address specified in the objection, if eFiling was not used to submit the appeal (typically when the appeal was submitted on the ADR2 form), or to the address specified in the appeal.[131] If eFiling was used for the submission of the appeal (typically when the appeal was submitted on the NOA form), the notice must be delivered via eFiling or to the address specified in the appeal.[132] In practice, these notices are not delivered via eFiling.

The taxpayer must, within 30 business days from the date of delivery of the notice to propose ADR, respond to the notice, indicating whether or not the taxpayer agrees to ADR.[133] As stated above, SARS cannot insist on ADR. The notice from the taxpayer must be delivered to any of the following addresses:

Physical address

Tax Court Litigation
Khanyisa Building, 1st Floor
271 Bronkhorst Street
Nieuw Muckleneuk
0181

Electronic address

Email: taxcourtlitigation@sars.gov.za
Fax: (+27) 12 422 5012.

It would be courteous to include the SARS official(s) who delivered the notice of ADR agreement to the taxpayer in the first place.

If the taxpayer agrees to ADR, the case will be dealt under the ADR procedures discussed in paragraph 10.6.1. It should be noted though, where a taxpayer agrees to ADR proceedings following a notice to propose ADR proceedings that ADR proceedings commence on the date that the taxpayer delivers notice of its agreement to ADR and not when SARS delivers its notice to propose ADR.[134]

If the taxpayer, in its notice, does not agree to ADR, the process that follows depends on whether the Tax Board or Tax Court has jurisdiction over the appeal. Similarly, when SARS does not deliver a notice to propose ADR and the taxpayer has not opted for ADR in the NOA or ADR2, the steps that follow depend on whether the Tax Board or Tax Court has jurisdiction over the appeal.

130 Rule 13(2)(a).
131 See para. 10.4.5.
132 See para. 10.4.5.
133 Rule 13(2)(b).
134 Rule 15(1).

10.6.3 Tax Board or Tax Court?

In terms of section 109, the Tax Board must first hear an appeal when the following four requirements are satisfied:

- the amount of tax in dispute does not exceed the amount determined by public notice;[135]
- a senior SARS official and the taxpayer agree to the jurisdiction of the Tax Board;[136]
- the Chairperson of the Tax Board does not direct the appeal to be heard in the Tax Court;[137] and
- the appeal has not been designated as a test case.[138]

Each of these requirements is discussed separately below.

10.6.3.1 The monetary threshold

At the time of writing, the monetary threshold was R1 000 000,00.[139]

For the purposes of jurisdiction, it is the amount of tax in dispute that should be established first. The word 'tax' includes the capital tax amount, penalties and interest.[140] Therefore, when the capital tax amount, penalties and interest are in dispute, all of the amounts should be added together to determine whether the R1 000 000,00 threshold has been reached.

When the total amount exceeds R1 000 000,00 the Tax Court will have jurisdiction to adjudicate the matter. When the amount is less than R1 000 000,00 the Tax Board may, subject to compliance with the other requirements, have jurisdiction.

10.6.3.2 Agreement regarding jurisdiction

The Tax Board will have jurisdiction to hear the appeal (subject satisfaction of the other requirements) only if both SARS and the taxpayer agree thereto. Neither SARS nor the taxpayer can insist that the appeal be heard in the Tax Board (despite the fact that the tax in dispute may be less than R1 000 000,00).

Section 109(4) sets the considerations that the senior SARS official must take into account when deciding whether to agree to the case's being heard by the Tax Board. It provides that the senior SARS official 'must consider whether the grounds of the dispute or legal principles related to the appeal should rather be heard by the tax court' than the Tax Board.

It is entirely the taxpayer's prerogative to decide whether to agree to the jurisdiction of the Tax Board. The following may assist a taxpayer in making its decision:

- Tax Board procedures are less formal and faster than litigation in the Tax Court and may be less expensive than litigation in the Tax Court. Tax Board procedures may be likened to arbitration proceedings in general litigation (with the notable exception that, unlike most arbitration proceedings, the taxpayer may still pursue the case further in the Tax Court after Tax Board proceedings come to an end).
- Costs cannot be awarded in the Tax Board, irrespective of the decision made by the Chairperson of the Tax Board.

---

135 S 109(1)(a).
136 S 109(1)(b).
137 S 109(5).
138 Rule 12(9).
139 In terms of Gen. N 1196 in *GG* 39490 of 17 December 2015.
140 S 109(1)(a) refers to '*tax in dispute*'. The word 'tax' is defined in s 1 to include the capital tax amount, penalties and interest.

10.6.3.3 The Chairperson's discretion

The Chairperson of the Tax Board may direct that an appeal be heard in the Tax Court at any stage before or during the hearing. It follows that even if the other requirements are satisfied the Tax Board cannot hear the appeal if the Chairperson decides that the appeal must be heard by the Tax Court.

10.6.3.4 The case is not a test case

If an appeal has been designated as a test case, rule 12(9) prescribes that the Tax Court must hear the appeal.[141]

When all four requirements discussed above are satisfied, the Tax Board must hear the appeal first. The case may later be referred to the Tax Court by the taxpayer or SARS,[142] following the decision by the Chairperson of the Tax Board.

As stated above, the Tax Court has jurisdiction over an appeal if the Tax Board must not hear the appeal first. It is worth noting here that all appeals are appeals to the Tax Court unless the ADR or Tax Board process intervenes, in which case that process must first run its course. The intervention of the ADR or Tax Board procedures only apply by agreement to the effect between the taxpayer and SARS. If there is no agreement, the Tax Court process must run its course automatically as it is the default position in the absence of agreement to ADR or Tax Board procedures.

Knowing when the Tax Board must first hear the appeal is important because the procedures of the Tax Board and those of the Tax Court are completely different. Furthermore, if the Tax Board has jurisdiction over the appeal the taxpayer must take the next action, whereas if the Tax Court has jurisdiction SARS must take the next action.

The procedures of the Tax Board and those of the Tax Court are discussed separately below.

10.6.4 Tax Board procedures

The procedures of the Tax Board may, for the sake of convenience, be classified into three phases, to wit:

- the Tax Board pre-trial phase;
- the Tax Board trial phase; and
- the Tax Board post-trial phase.

10.6.4.1 Tax Board pre-trial phase

If ADR procedures were not followed (in other words, the taxpayer opted for 'litigation' on the NOA or ADR2 form and did not agree to ADR after receipt from SARS of the notice to propose ADR), the taxpayer must, within 35 business days from date of delivery of the appeal (the NOA or ADR2 form), request the clerk of the Tax Board to set the matter down for hearing by the Tax Board. This means that the taxpayer must request that a date be allocated for the hearing. The request for set-down must be delivered to any of the addresses in Table 10.1.[143]

141 As to test case designations, see chap. 9.
142 See para. 10.6.4.3.
143 Rule 2(c)(iii), read with rule 3 and part C of GN 295 in *GG* 38666 of 31 March 2015.

Table 10.1: Tax Board contact details.

Office	Physical Address	Electronic Address
Head Office	271 Bronkhorst Street Khanyisa Building Ground Floor Nieuw Muckleneuk Pretoria 0181	Fax (+27) 12 647 2719 Email TaxBoard.HeadOffice@sars.gov.za
Limpopo, North West, and Mpumalanga	SARS – Legal Delivery Support and Partnership (LDS&P) 40 Landdros Maree Street, Polokwane 0699	Fax (+27) 86 575 2630 Email TaxBoard.LimpNWandMP@sars.gov.za
Gauteng North	SARS – Legal Delivery Support and Partnership (LDS&P) Riverwalk Office Park Matroosberg Road Pretoria 0001	Fax (+27) 10 208 3067 Email TaxBoard.GautengNorth@sars.gov.za
Gauteng South	SARS – Legal Delivery Support and Partnership (LDS&P) Alberton Campus Saint Austell Road New Redruth Alberton 1450	Fax (+27) 86 612 1643 Email TaxBoard.GautengSouth@sars.gov.za
Gauteng Central	SARS – Legal Delivery Support and Partnership (LDS&P) Megawatt Park – LBC Office Maxwell Drive Sunninghill	Fax (+27) 86 513 1758 Email TaxBoard.GautengCentral@sars.gov.za
Enforcement	SARS – Legal Delivery Support and Partnership (LDS&P) Megawatt Park – LBC Office Maxwell Drive Sunninghill	Fax (+27) 86 611 3615 Email TaxBoard.TCEI@sars.gov.za

continued

Office	Physical Address	Electronic Address
Western Cape	SARS – Legal Delivery, Support and Partnership (LDS&P) 18th Floor Sanlam Building Project 166 22 Hans Strydom Avenue Cape Town 8001	Fax (+27) 10 208 1961 Email TaxBoard.WesternCape@sars.gov.za
KwaZulu-Natal	SARS – Legal Delivery, Support and Partnership (LDS&P) 7th Floor Albany House 61/62 Margaret Mncadi Avenue (previously Victoria Embankment) Durban 4001	Fax (+27) 86 617 7595 Email TaxBoard.KwaZuluNatal@sars.gov.za
Free State	SARS – Legal Delivery, Support and Partnership (LDS&P) Fedsure Building 49 Charlotte Maxeke Street Bloemfontein 9301	Fax (+27) 501 3201 Email TaxBoard.FreeState@sars.gov.za
Eastern Cape	SARS – Legal Delivery, Support and Partnership (LDS&P) Revenue Building Cnr St Mary's Terrace and Whyte's Road Central Port Elizabeth 6001	Fax (+27) 10 208 3053 Email TaxBoard.EasternCape@sars.gov.za

Whilst in terms of the rules the request can be made to any of the above addresses, section 109(2) and (3) prescribes that the Tax Board must sit at the places designated by SARS. The Tax Board that must hear the appeal will be the Tax Board that sits closest to the place where the taxpayer resides or carries on business (unless SARS and the taxpayer agree otherwise). Presumably, the addresses in Table 10.1 are of the places designated by SARS where the Tax Board sits. Hence, the request for set-down must be delivered to the appropriate address, which would be the address that is closest to the place where the taxpayer resides or carries on business. It is prudent also to deliver the request to SARS at taxcourtlitigation@sars.gov.za.

PROPOSED CHANGE IN THE DRAFT RULES

The draft rules propose to impose on SARS an obligation to apply for set-down if the taxpayer does not apply for set-down within the prescribed 35-business-day period. The proposal is for SARS to apply for the set-down within a period of 30 days from the date of expiry of the 35-day period within which the taxpayer should have applied for set-down. It is further proposed that if SARS does not so apply for set-down (after the taxpayer's failure to apply for it) the clerk of the Tax Board must nevertheless set the matter down and advise the parties accordingly.

There is no prescribed form for a request for set-down. A suggested template (template B9) is attached in Annexure B.

Practical issue: The Tax Board's jurisdiction by agreement

In addition to the monetary threshold,[144] the taxpayer and SARS must agree to the jurisdiction of the Tax Board in order for the Tax Board to have jurisdiction to hear a matter. When a taxpayer has opted for litigation on the NOA or ADR2 form, SARS is not required to assess the *quantum* of the tax in dispute or to inform the taxpayer that it agrees to the jurisdiction of the Tax Board. There is also no explicitly defined time period in the rules within which the taxpayer and SARS must reach agreement on the Tax Board's jurisdiction. This leaves the taxpayer with a dilemma: the taxpayer must apply for set-down of the matter within 35 business days from the date of submission of the NOA or ADR2 form[145] but might not know whether SARS will agree to the jurisdiction of the Tax Board before the 35-business-day period lapses. It is true that the taxpayer can, in the circumstances, apply for set-down based on the likelihood that SARS will agree to the jurisdiction of the Tax Board, but the possibility remains that SARS may decide not to agree. When this happens, the period within which SARS must provide its rule 31 statement is still, as it would be in the case of litigation proceedings in the Tax Court (this aspect is discussed in detail below), 45 days from the date of delivery by the taxpayer of its appeal (the NOA or ADR2 form). It is likely that SARS will be late with the submission of its rule 31 statement under these circumstances. While an extension may be agreed to, the taxpayer is not obliged to agree to one. Should the taxpayer choose not to agree to an extension, SARS would be forced to apply for an extension under rule 52.

Although a taxpayer may not be agreeable to the jurisdiction of the Tax Board even though the tax in dispute does not exceed R1 million, there is no place on the NOA or ADR2 form for the taxpayer to indicate that it does not agree to the jurisdiction of the Tax Board. A taxpayer may, for example, indicate in the supporting documents to its appeal that it is not agreeable to the jurisdiction of the Tax Board.[146] In these cases, the appeal must proceed on the basis of the Tax Court's procedures, and SARS will have to deliver its rule 31 statement within 45 days from the date of delivery by the taxpayer of the NOA or ADR2 form. If the taxpayer in the supporting documents to the appeal indicate that it is not agreeable to

continued

144 See para. 10.6.3.
145 Rule 11(2).
146 See para. 10.4.8 in this regard.

Practical issue: The Tax Board's jurisdiction by agreement (*continued*)

the jurisdiction of the Tax Board, it is likely to result in SARS's being late with its rule 31 statement. Whilst the period within which SARS must deliver its rule 31 statement may be extended by agreement, a taxpayer may not be willing to do so in which case SARS would be forced to apply for extension under rule 52.

It is suggested that the rules require an amendment to address this practical problem and prevent unnecessary applications for extension and default-judgment applications by taxpayers. It is submitted that the practical issues discussed above may possibly be resolved by including a tick box on the NOA or ADR form for 'Tax Board' (in addition to those for 'ADR' and 'litigation') and prescribing a period within which agreement to the jurisdiction of the Tax Board must be reached. An amendment would also be required to rule 31 to give SARS 45 days from the date on which agreement the jurisdiction of the Tax Board should have been reached . This process could operate in a manner similar to that of the process for ADR, where agreement is reached by way of notice.

If the taxpayer first pursued ADR but ADR proceedings were terminated (whether by way of agreement or otherwise), the taxpayer must, as detailed in paragraph 10.6.1.4, deliver notice to the clerk of the Tax Board for set-down (the same practical issue discussed immediately above may arise in these circumstances also).

PROPOSED CHANGE IN THE DRAFT RULES

The draft rules propose to impose an obligation on SARS to apply for set-down if the taxpayer does not do so within the period prescribed following termination of ADR proceedings (i.e. 15 or 20 days from the date of termination, depending on how proceedings were terminated). The proposal is for SARS to apply for set-down within a period of 30 days from the date of expiry of the period of 15 or 21 days, as the case may be, within which the taxpayer should have applied for set-down.

It is further proposed that even if SARS does not apply for set-down in these circumstances the clerk of the Tax Board must nevertheless set the matter down and advise the parties accordingly. This proposal raises a number of potential practical issues that are not discussed here in detail. For example, if the clerk has the power to set the matter down, the clerk may proceed to set a matter down despite the fact that the taxpayer is not desirous of pursuing its case on appeal to the Tax Board. Furthermore, the Tax Board has jurisdiction only if there is agreement to this effect between SARS and a taxpayer. If there is no such agreement, the Tax Board does not have jurisdiction and the clerk should therefore not be able to set the matter down.

If the taxpayer does not timeously deliver the requisite notice or request for set-down, the taxpayer may request an extension from the clerk. If the clerk does not grant an extension, the taxpayer may apply to the Tax Court on notice of motion under rule 52 for an extension.[147]

Following the taxpayer's request for set-down or, if ADR was pursued first, following the notices required to be delivered in the post-ADR-termination phase,[148] the clerk of the Tax

147 See chap. 11.

Board must set the matter down within 30 business days from the date of delivery of the taxpayer's request or of the notices required to be delivered in the post-ADR-termination phase[149] unless a further period has been agreed to.[150]

This does not mean the date for the hearing must be within 30 business days from the date of the request for set-down but rather that the date for the hearing must be allocated within 30 business days from the date of the relevant request or notice. The date allocated will be the date that the clerk in his or her sole discretion allocates.[151]

Once the appeal has been set down, the clerk must deliver notice of the date, place and time for the hearing. This notice must be delivered to SARS and the taxpayer at least 20 business days before the allocated date for the hearing.[152] Delivery to the taxpayer must be to the address specified in the objection, if eFiling was not used to submit the appeal (typically when the appeal was submitted on the ADR2 form), or to the address specified in the appeal.[153] If eFiling was used for the submission of the appeal (typically when the appeal was submitted on the NOA form), the notice must be delivered either via eFiling or to the address specified in the appeal.[154] In practice, these notices are not delivered via eFiling.

The clerk must also deliver a dossier to the taxpayer, SARS and the Chairperson of the Tax Board at least 10 days before the date for the hearing, which dossier must contain:[155]

- all returns by the appellant relevant to the tax period in issue;
- all assessments relevant to the appeal;
- all documents relevant to a request for reasons for the assessment under rule 6;
- the notice of objection under rule 7 and documents, if any, provided under rule 8;
- the notice of disallowance of the objection under rule 9;
- the notice of appeal under rule 10; and
- any order by the Tax Court under part F of the rules relating to the appeal.

Delivery of the dossier to the taxpayer must be to the address specified in the objection, if eFiling was not used to submit the appeal (typically when the appeal was submitted on the ADR2 form), or to the address specified in the appeal.[156] If eFiling was used for the submission of the appeal (typically when the appeal was submitted on the NOA form), the notice must be delivered either via eFiling or to the address specified in the appeal.[157] Unlike proceedings where the Tax Court has jurisdiction (see below), there are no further pleadings before the hearing. The issues before the Tax Board are those contained in the dossier prepared by the clerk of the Tax Board.

The clerk of the Tax Board may also, at the request of the taxpayer, SARS or the Chairperson of the Tax Board, issue subpoenas to persons in order to compel such persons to give evidence or to produce documents relevant to the appeal. The subpoena process is detailed in the Rules

[*continued from previous page*]
148 See para. 10.6.1.4.
149 Rule 26(1)(a).
150 Under rule 4.
151 Rule 26(2).
152 Rule 26(3).
153 See para. 10.4.5.
154 See para. 10.4.5.
155 Rule 27(4)(a)–(g).
156 See para. 10.4.5.
157 See para. 10.4.5.

regulating the Conduct of Proceedings in the Magistrates' Courts of South Africa[158] (the Magistrates' Court rules) and are not discussed herein.

10.6.4.2 Tax Board trial phase

The taxpayer, if the taxpayer is a natural person, must be present at the date, time and place for the hearing. If the taxpayer is not a natural person, the representative taxpayer (e.g. the public officer of the company) must be present at the hearing.[159] The taxpayer may be represented at the hearing by the person who submitted the underlying return associated with the assessment or decision in question.[160] If the taxpayer wishes to be represented at the hearing by a person other than the person who filed the underlying return, the taxpayer must first request permission to be so represented.[161] Section 113(8) provides that such permission must be requested when the taxpayer files the appeal (i.e. typically on submission of the NOA or ADR2 form and irrespective of whether the taxpayer has opted for ADR first) or within such further period as the Chairperson of the Tax Board may allow.[162]

On the date and at the time and place set down for the hearing (as per the notice from the clerk of the Tax Board in the Tax Board pre-trial phase), the taxpayer (and/or the taxpayer's representative), a *senior SARS official* and the Chairperson of the Tax Board convene. The Chairperson of the Tax Board has full discretion over the procedures at the hearing itself.[163] However, both the taxpayer and SARS must be given an opportunity to state their respective cases and to lead evidence (in line with the rules of evidence) where required. This process is normally preceded by the Chairperson stating the issues in appeal.[164] The rules of evidence are not discussed in this work.

Unlike a facilitator in an ADR meeting, the Chairperson of the Tax Board must decide whether to allow or disallow the appeal, depending on whether the taxpayer or SARS has discharged its onus of proof,[165] after the taxpayer and SARS have concluded their cases.[166]

The Tax Board cannot make any decision as to costs: SARS and the taxpayer carry their own costs associated with the appeal before the Tax Board, irrespective of the decision by the Chairperson.[167]

Proceedings before the Chairperson are not public.[168]

10.6.4.3 Tax Board post-trial phase

The Chairperson must, after hearing the taxpayer's appeal, reduce his or her decision on the appeal to writing within 60 business days from the date of the hearing. The clerk of the Tax Board must deliver a copy of the decision to the taxpayer and SARS.[169]

Delivery to the taxpayer must be to the address specified in the objection, if eFiling was not used to submit the appeal (typically when the appeal was submitted on the ADR2 form), or to

158 Rule 27(2).
159 Rule 20(3).
160 S 113(7).
161 S 113(8).
162 See para. 10.4.8.
163 S 113(1).
164 S 113(1) and (3), read with rule 28(2).
165 See chap. 5 on onus of proof.
166 Rule 28(1), read with ss 129 and 114(1).
167 In terms of s 130, only the Tax Court can make an order for costs.
168 S 124, read with rule 28.
169 S 114(2) and (3).

the address specified in the appeal.[170] If eFiling was used for the submission of the appeal (typically when the appeal was submitted on the NOA form), the notice must be delivered either via eFiling or to the address specified in the appeal.[171]

If SARS or the taxpayer is dissatisfied with the decision of the Tax Board, or if the clerk of the Tax Board does not provide the Chairperson's decision within the prescribed 60-business-day period, SARS or the taxpayer may deliver a request to the clerk of the Tax Board for the appeal to be referred to the Tax Court.[172] The party requesting the referral must also deliver a copy of the request to the other party.[173]

The request must be addressed to the relevant clerk of the Tax Board.[174] Delivery of a copy of the request, when the taxpayer is requesting referral, must be delivered to SARS also at any of the following addresses:

Physical address

Tax Court Litigation
Khanyisa Building, 1st Floor
271 Bronkhorst Street
Nieuw Muckleneuk
0181

Electronic address

Email: taxcourtlitigation@sars.gov.za
Fax: (+27) 12 422 5012.

It would be courteous also to deliver a copy of the request to the SARS official involved in the proceedings.

The Chairperson has no discretion to refuse a request for referral that is timeously delivered. A request for referral may perhaps more properly be called a notice of referral. A request for or notice of referral timeously and properly delivered sets the Tax Court procedures in motion from the date of delivery of the request or notice, unless the taxpayer withdraws its appeal.

There is no prescribed form for the notice of referral to the Tax Court. A suggested template (template B10) is contained in Annexure B.

The request for or notice of referral must be made within the following prescribed timelines:

- 21 business days from the date of delivery of the Chairperson's decision; or
- when no decision is delivered within the prescribed 60-business-day period for delivery of the decision of the Chairperson, within 21 business days from the date of expiry of the 60 business days within which the decision should have been delivered.[175]

Section 115 and the rules provide for an extension to the 21-business-day period within which the request for referral to the Tax Court must be made as follows:

- The party requiring extension for delivery of its request for referral must, before the 21-business-day period within which the request should be made, request an extension and

170 See para. 10.4.5.
171 See para. 10.4.5.
172 S 115, read with rule 29(1).
173 Rule 29(1).
174 As to addresses, see para. 10.6.4.
175 S 115(1).

must, in such request, set out the grounds for its request.[176] Such request for extension must be delivered to the relevant clerk of the Tax Board.[177]

- The clerk of the Tax Board must deliver a copy of the request for an extension to the other party (i.e. SARS or the taxpayer, depending on who is requesting referral) and to the Chairperson within 10 business days after receipt of such request.[178]
- The Chairperson must, within 15 business days after receiving a request, allow or disallow the request depending on whether good cause is shown for the extension and inform the clerk accordingly.[179]
- The clerk must deliver to SARS and the taxpayer a copy of the Chairperson's decision within 10 business days after receiving it.[180]

If the notice of referral is not timeously delivered and the Chairperson does not grant an extension, the Tax Court procedures do not begin to run and accordingly the case is effectively not referred to the Tax Court. The taxpayer or SARS (depending on who made the request for extension) may, in these circumstances, approach the Tax Court on notice of motion under rule 53 for an order that the period within which the request for referral must be made be extended.[181]

It should be noted that a referral to the Tax Court is not similar to an appeal in the sense of normal civil proceedings where a court would reconsider the decision of the court *a quo*: a referral to the Tax Court is for the court to hear the appeal *de novo*.

If neither the taxpayer nor SARS requests a referral to the Tax Court after delivery of the decision by the Tax Board, SARS must (if required) issue an assessment, to give effect to the decision of the Tax Board, within 45 business days from the date of delivery by the clerk of that decision.

Section 113 and rule 30 set out the consequences of failing to appear at the hearing. Section 113 and rule 30 are, however, hardly a model of clarity, as is evident from the discussion below.

In terms of section 113(9), if the taxpayer (or the taxpayer's duly authorised representative) fails to appear at the date, time and place of the hearing, SARS may, upon proof of the taxpayer's being notified of the date, time and place of the hearing, request that the Chairperson confirm SARS's assessment (i.e. disallow the taxpayer's appeal). Such an order may be likened to a default judgment.

Section 113(13), however, states that the Chairperson may not grant such an order if he or she is satisfied that sound reasons exist for the taxpayer's failure to appear at the hearing and such reasons are provided within 10 business days from the date for the hearing (or within such further period as may be allowed by the Chairperson in exceptional circumstances). It is submitted that the legislature must have intended that the Chairperson may not summarily, at the date of the hearing, make his or her decision under section 113(9) consequent upon the taxpayer's failure to appear without first allowing the taxpayer at least 10 business days from the date of the hearing (or such further period as may be allowed in exceptional circumstances) to provide reasons.

176 Rule 29(3).
177 Rule 29(3).
178 Rule 29(4).
179 Rule 29(5).
180 Rule 29(5).
181 See chap. 11.

If the legislature intended that the Chairperson be empowered to make an order at the date of the hearing where the taxpayer fails to appear, it must have intended to require the Chairperson to look into the future to establish whether the taxpayer would be providing reasons, whether those reasons would be provided within 10 days and whether those reasons would indeed be sound. Such a conclusion is obviously absurd and could not have been what the legislature intended.

There is no requirement in the TAA or the rules for the Chairperson to notify the taxpayer that the latter failed to appear and has 10 days to provide reasons for its non-appearance at the hearing. The taxpayer is thus expected to be aware that it (a) failed to attend the hearing and (b) has 10 days from the date scheduled for the hearing to provide sound reasons for its failure to appear in order to prevent the Chairperson from making a decision under section 113(9). It is submitted that this is reasonable, given that the decision can be made under section 113(9) only if the taxpayer was aware of the date of the hearing (or, more technically, was properly notified of the date for the hearing).

In terms of rule 30(1), when the Chairperson makes a decision to disallow the taxpayer's appeal in consequence of the taxpayer's failure to appear at the hearing, the taxpayer must, if the taxpayer is desirous of pursuing its case, request that such decision be withdrawn and provide sound reasons for failing to appear. In terms of rule 30(2)(a), such request must be delivered within 10 days from the date of the hearing where the Chairperson disallowed the taxpayer's appeal under section 113(9).

Rule 30(2)(a) suggests that the Chairperson may indeed summarily confirm SARS's assessment under section 113(9) on the date for the hearing. It is submitted that rule 30(2)(a) is in direct conflict with what the legislature must have intended in section 113. It is trite that when an Act conflicts with rules, the Act takes preference. It follows, on that submission, that rule 30(2)(a) is redundant and cannot be given effect to, as it is in conflict with section 113.

In terms of rule 30(2)(b), if the Chairperson disallows the taxpayer's appeal under section 113(9) after the date of the hearing (which, it is submitted, are the only circumstances permitted under section 113), the request for the decision to be withdrawn and the reasons for non-appearance must be delivered by the taxpayer within 10 business days from the date of delivery to the taxpayer of the Chairperson's decision. The time period within which the taxpayer must comply seems unenforceable on the basis that the Chairperson's decision need be reduced to writing under section 114 only after the Chairperson has heard the taxpayer's appeal.

The Chairperson, having made an order under section 113(9), could not have heard the taxpayer's appeal, as the taxpayer would not have been present, hence the decision under section 113(9). It is submitted the legislature must have intended to compel the Chairperson to provide his or her written decision even if such decision is made under section 113(9) without having heard the taxpayer's appeal. Alternatively, rule 30(2)(c) must have been intended for cases where the Chairperson is not required to reduce his or her decision to writing consequent upon such decision having been made without hearing the taxpayer's appeal. Such interpretation either renders rule 30(2)(c) redundant or envisages a situation where the Chairperson indeed provides a written decision without being obligated to do so. It is submitted that the latter interpretation is more correct.

Rule 30(2)(c) stipulates that the request for the withdrawal of decision of the Chairperson (being the decision made under section 113(9)) must be made within 10 days from the date of the taxpayer's becoming aware of the decision of the Tax Board 'in any other case'. The words 'in any other case' should, it is submitted, mean those cases where the Chairperson decided not to reduce his or her decision under section 113(9) to writing and where the taxpayer was accordingly not notified of such decision in terms of section 114.

In light of the analysis above, it is submitted that the steps to be followed when the taxpayer fails to appear at the hearing is as follows:

- SARS may request that the taxpayer's appeal be disallowed, upon proof of delivery to the taxpayer of the notice of set-down.[182]
- If, within 10 days after the date for the hearing (or within such further period as the Chairperson may allow in exceptional cases), the taxpayer fails to provide sound reasons for the taxpayer's failure to appear, the Chairperson may disallow the taxpayer's appeal under section 113(9).
- If the Chairperson has decided to reduce to writing his or her decision under section 113(9), the taxpayer must, should the taxpayer wish to continue to pursue the case, within 10 business days from the date of delivery to the taxpayer of such written decision, request the Chairperson to withdraw his or her decision and provide reasons for its non-appearance and deliver same to the clerk of the Tax Board.[183] The clerk must, within 10 days after delivery of the request by the taxpayer, deliver a copy thereof to SARS and the Chairperson of the Tax Board.[184]
- If the Chairperson has not reduced his or her decision to writing and the taxpayer is therefore not notified, the taxpayer must, should the taxpayer wish to continue to pursue the case, within 10 days after becoming aware of the decision, deliver its request for the decision to be withdrawn and provide reasons for its non-appearance.[185] The clerk of the Tax Board must, within 10 days after delivery of the request by the taxpayer, deliver a copy thereof to SARS and the Chairperson of the Tax Board.
- The Chairperson of the Tax Board must, within 15 days after delivery of the request by the taxpayer, decide whether to withdraw his or her decision depending on whether the reasons provided are sound.[186] A copy of such decision must be delivered to the taxpayer and SARS by the clerk of the Tax Board within 10 days of receipt by the clerk of the Tax Board of the decision by the Chairperson.[187]
- If the decision is not to withdraw the decision made under section 113(9), the taxpayer may not request a referral to the Tax Court: a decision under section 113(9) prevents the taxpayer from being able to request referral of an appeal to the Tax Court. SARS's assessment therefore becomes final unless the taxpayer approaches the Tax Court on notice of motion under rule 53 for an order that the decision of the Tax Board be overturned.[188] If the Chairperson decides to withdraw his or her decision under section 113(9), the clerk of the Tax Board must set the appeal down before the Tax Board again and the process starts afresh, as detailed in the Tax Board pre-trial phase above, unless SARS applies to the Tax Court on notice of motion under rule 53 to overturn a decision of the Tax Board.[189]

It is submitted that the steps to be followed when a senior SARS official fails to appear at the hearing is as follows:

- The taxpayer may request that its appeal be allowed.
- If, within 10 days after the date for the hearing (or within such further period as the Chairperson may allow in exceptional cases), the senior SARS official fails to provide reasons or

182 S 113(9).
183 Rule 30(2)(b).
184 Rule 30(3).
185 Rule 30(2)(c).
186 Rule 30(4).
187 Rule 30(5).
188 S 113(10), read with s 100(1)(e). See chap. 11.
189 See chap. 11.

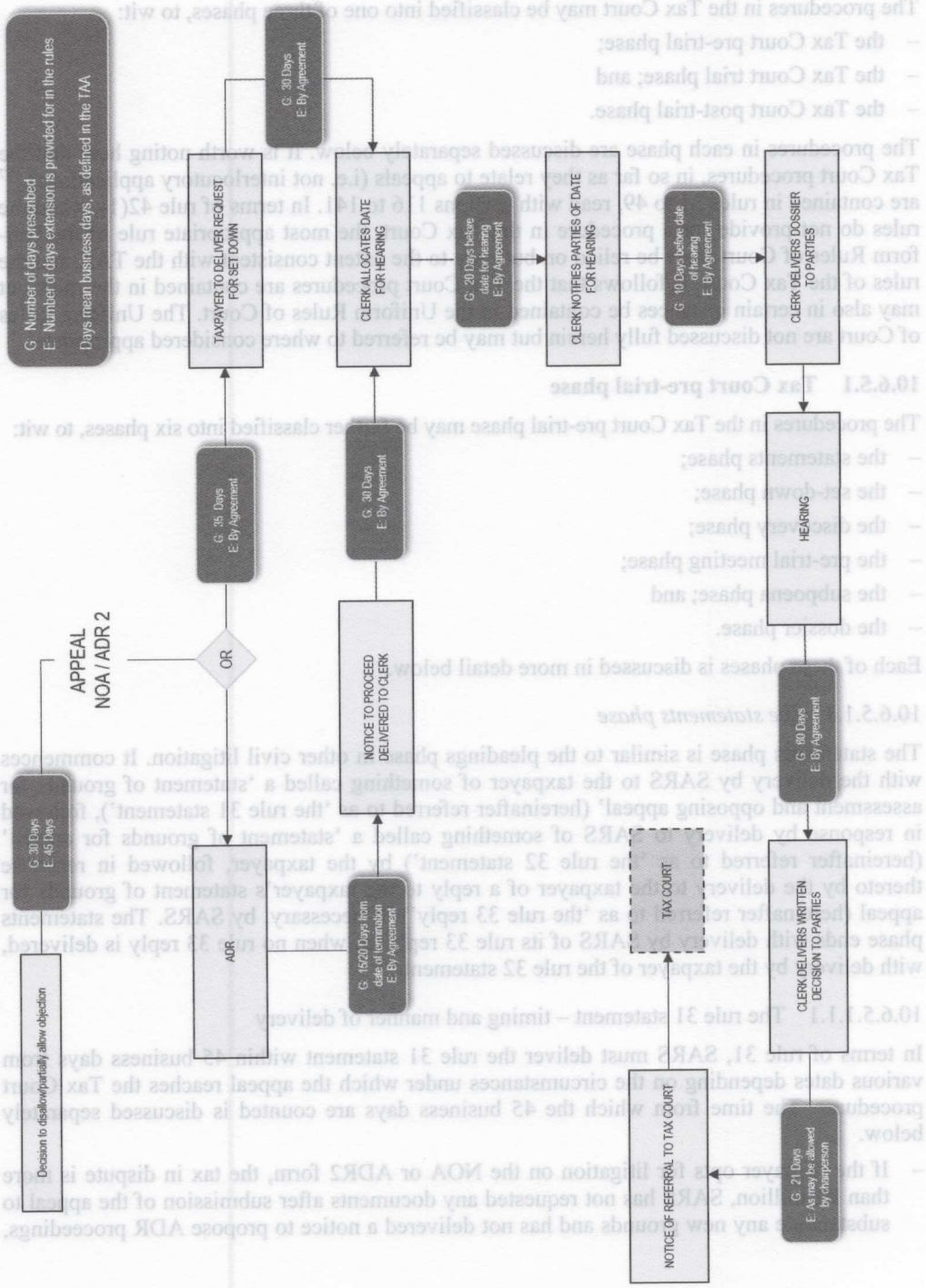
to provide sound reasons for his or her failure to appear, the Chairperson may allow the taxpayer's appeal under section 113(11).

- If the Chairperson decides to reduce to writing his or her decision under section 113(11), the Senior SARS official must, should SARS not want to continue to defend its assessment, within 10 business days from the date of delivery to SARS of such written decision, request the Chairperson to withdraw his or her decision and provide reasons for the SARS official's non-appearance and deliver same to the clerk of the Tax Board.[190] The clerk of the Tax Board must, within 10 days after delivery of such request by the senior SARS official, deliver a copy thereof to the taxpayer and the Chairperson of the Tax Board.[191]
- If the Chairperson has not reduced his or her decision to writing and SARS is therefore not notified, the senior SARS official must, within 10 days after becoming aware of the decision, deliver his or her request for the decision to be withdrawn and provide reasons for his or her non-appearance.[192] The clerk of the Tax Board must, within 10 days after delivery of such request, deliver a copy thereof to the taxpayer and the Chairperson of the Tax Board.
- The Chairperson of the Tax Board must, within 15 days after delivery of the request, decide whether to withdraw his or her decision depending on whether the reasons provided are sound.[193] A copy of such decision must be delivered to the taxpayer and SARS by the clerk of the Tax Board within 10 days of receipt of the decision by the Chairperson.[194]
- If the decision is not to withdraw the decision made under section 113(11), SARS may not request a referral to the Tax Court: a decision under section 113(11) prevents SARS from being able to request referral of an appeal to the Tax Court unless SARS applies to the Tax Court on notice of motion under rule 53 for an order that the decision be overturned.[195] If the Chairperson decides to withdraw his or her decision under section 113(9), the clerk of the Tax Board must set the appeal down before the Tax Board again and the process starts afresh in the Tax Board pre-trial phase (discussed above) unless the taxpayer approaches the Tax Board on notice of motion under rule 53 to have the decision overturned.[196]

The main steps in the Tax Board process are diagrammatically illustrated in Figure 10.3.

190 Rule 30(2)(b).
191 Rule 30(3).
192 Rule 30(2)(c).
193 Rule 30(4).
194 Rule 30(5).
195 S 113(12). See chap. 11.
196 See chap. 11.

Figure 10.3: Tax Board proceedings overview.



10.6.5 Tax Court procedures

The procedures in the Tax Court may be classified into one of three phases, to wit:

- the Tax Court pre-trial phase;
- the Tax Court trial phase; and
- the Tax Court post-trial phase.

The procedures in each phase are discussed separately below. It is worth noting here that the Tax Court procedures, in so far as they relate to appeals (i.e. not interlocutory applications),[197] are contained in rules 31 to 49, read with sections 116 to 141. In terms of rule 42(1), when the rules do not provide for a procedure in the Tax Court, the most appropriate rule of the Uniform Rules of Court must be relied on but only to the extent consistent with the TAA and the rules of the Tax Court. It follows that the Tax Court procedures are contained in the rules but may also in certain instances be contained in the Uniform Rules of Court. The Uniform Rules of Court are not discussed fully herein but may be referred to where considered appropriate.

10.6.5.1 Tax Court pre-trial phase

The procedures in the Tax Court pre-trial phase may be further classified into six phases, to wit:

- the statements phase;
- the set-down phase;
- the discovery phase;
- the pre-trial meeting phase;
- the subpoena phase; and
- the dossier phase.

Each of these phases is discussed in more detail below.

10.6.5.1.1 *The statements phase*

The statements phase is similar to the pleadings phase in other civil litigation. It commences with the delivery by SARS to the taxpayer of something called a 'statement of grounds for assessment and opposing appeal' (hereinafter referred to as 'the rule 31 statement'), followed in response by delivery to SARS of something called a 'statement of grounds for appeal' (hereinafter referred to as 'the rule 32 statement') by the taxpayer, followed in response thereto by the delivery to the taxpayer of a reply to the taxpayer's statement of grounds for appeal (hereinafter referred to as 'the rule 33 reply'), if necessary, by SARS. The statements phase ends with delivery by SARS of its rule 33 reply or, when no rule 33 reply is delivered, with delivery by the taxpayer of the rule 32 statement.

10.6.5.1.1.1 The rule 31 statement – timing and manner of delivery

In terms of rule 31, SARS must deliver the rule 31 statement within 45 business days from various dates depending on the circumstances under which the appeal reaches the Tax Court procedures. The time from which the 45 business days are counted is discussed separately below.

- If the taxpayer opts for litigation on the NOA or ADR2 form, the tax in dispute is more than R1 million, SARS has not requested any documents after submission of the appeal to substantiate any new grounds and has not delivered a notice to propose ADR proceedings,

197 See chap. 11.

or has sent a notice to propose ADR but the taxpayer has not agreed to same, SARS's rule 31 statement falls due 45 business days from the date of submission by the taxpayer of its appeal (the NOA or ADR2 form).[198] When SARS, under the same circumstances, requests further documents to substantiate any new grounds for objection, the rule 31 statement falls due within 45 business days from the date of the delivery to SARS of such documents.

Practical issue: Timing of delivery of the rule 31 statement

When a taxpayer has opted for litigation on the NOA or ADR2 form, the tax in dispute is more than R1 million, SARS has not requested any documents after submission of the appeal to substantiate any new grounds and has delivered a notice to propose ADR but the taxpayer has not agreed to ADR, SARS may very well be late with its rule 31 statement. The notice to propose ADR is due within 30 business days from the date of the appeal and the taxpayer's reply to the notice is due 30 business days later. Therefore, 60 business days would have elapsed from the date of the appeal (i.e. date of submission of the NOA or ADR2 form). If SARS delivers its rule 31 statement only after the taxpayer has informed SARS that the taxpayer is not agreeable to ADR, SARS will be at least 15 business days late with its rule 31 statement. There is no suspension of the period within which SARS is required to deliver its rule 31 statement under these circumstances.

Whilst the taxpayer may agree to an extension, the taxpayer may not be so inclined, which will force SARS to apply for an extension on notice of motion to the Tax Court under rule 52.[199]

- If the taxpayer has opted for litigation on the NOA or ADR2 form and the tax in dispute is less than R1 000 000,00 but the taxpayer and SARS do not agree to the jurisdiction of the Tax Board, SARS's rule 31 statement falls due within 45 business days from the date of submission by the taxpayer of its appeal (the NOA or ADR2 form).[200] When SARS, under the same circumstances, requests further documents to substantiate any new grounds for objection, the rule 31 statement falls due within 45 business days from the date of the delivery to SARS of such documents.
- If the taxpayer opted for litigation but the case was heard by the Tax Board first, SARS must deliver its rule 31 statement within 45 business days from the date of delivery by SARS or the taxpayer of the request or notice of referral to the Tax Board.[201]

Practical issue: Timing of delivery of SARS's rule 31 statement

The Chairperson of the Tax Board may, in terms of section 109(5), direct that the appeal be heard by the Tax Court and may make such decision at any point in time before or during the hearing. Rule 31 does not specifically cater for a time period within which SARS would be required to provide its rule 31 statement under these circumstances. This means SARS would be required to deliver its rule 31 statement within 45 business days from the date of delivery by the taxpayer of its appeal. This is likely to result in SARS's being late. It is proposed that rule 31 requires an amendment to make provision for such scenarios.

198 Rule31(1)(d).
199 See chap. 11.
200 Rule 31(1)(d). See the practical issue in this regard in para. 10.6.4.1.
201 Rule 31(1)(c). See para. 10.6.4.3.

– If the taxpayer opted for ADR on the NOA or ADR2 form and ADR proceedings are terminated following the conclusion of a written agreement or by notice of termination or by agreement, SARS's rule 31 statement falls due within 45 business days from the date that the taxpayer gives notice of its intention to proceed to Tax Court in compliance with rule 25(3) or 24(4).[202]

Practical issue: Timing in the case of notice under rule 23(4)

A taxpayer may also give notice to the registrar of proceeding to the Tax Court under rule 23(4) after ADR proceedings are terminated through signature of an agreement. Oddly enough, rule 31(1)(b) refers only to notices provided under rules 24(4) and 25(3) and therefore does not apply to notices provided under rule 23(4). It appears then that when notice is provided under rule 23(4) SARS will be required to deliver its rule 31 statement within 45 business days from the date of submission of the appeal (the NOA or ADR2 form). It is submitted that it will be practically impossible for SARS to comply with this time period and it is proposed that rule 31 requires an amendment to refer also to notices provided under rule 23(4).

The rule 31 statement must be delivered to the address specified by the taxpayer in the objection, if eFiling was not used to submit the appeal (typically when the appeal was submitted on the ADR2 form), or the address specified in the appeal. If eFiling was used to submit the appeal (typically in the case of submission of an NOA), the statement must be delivered to the address specified by the taxpayer in the appeal.[203]

SARS and the taxpayer may agree on an extension of the time period within which SARS must deliver its rule 31 statement. If SARS does not deliver its statement within the prescribed or extended time period, the taxpayer may commence default-judgment procedures under rule 56.[204] SARS may also, if it failed to deliver its rule 31 statement on time, apply to the Tax Court on motion for postponement and extension of the time period, without first having to request an extension from the taxpayer under rule 4.[205]

10.6.5.1.1.2 The rule 31 statement – prescribed content

The rule 31 statement must, in terms of rule 31, contain the following:

– the grounds for SARS's assessment;[206]
– the legal grounds in rule 10 notice that SARS admits and those it opposes;[207] and
– the material facts and legal grounds upon which SARS relies for opposing the taxpayer's grounds for appeal.[208]

202 Rule 31(1)(b).
203 Whilst technically SARS would be allowed to deliver the rule 31 statement through eFiling, delivery by SARS of the rule 31 statement *via* eFiling does not appear to be the current practice.
204 See chap. 11. In *ITC 1924* 82 SATC 68 SARS applied for default judgment in consequence of the taxpayer's failure to deliver its rule 32 statement timeously. In hearing the taxpayer's application for condonation the court held that, *inter alia*, the taxpayer should not require more time to file its rule 32 statement since the taxpayer should have formulated its grounds for objection which it relied on in the appeal long before the rule 32 statement fell due. It is submitted that the same conclusion should hold true for SARS. SARS must formulate its grounds for assessment long before its rule 31 statement falls due and hence should not require more time to file its rule 31 statement. See also *ITC 1904* 80 SATC 159.
205 See chap. 11.
206 Rule 31(2)(a).
207 Rule 31(2)(b).
208 Rule 31(2)(c).

The grounds for SARS's assessment include the grounds initially set out by SARS (typically in its finalisation letter or adjustment letter, when the assessment in question followed an audit or verification conducted by SARS),[209] and/or the reasons provided for the assessment, when the taxpayer requested reasons,[210] and/or the basis for SARS's decision not to remit a penalty, and/or the basis for SARS's decision that is subject to objection and appeal.[211] It is worth noting that the reasons provided by SARS for the disallowance (or partial allowance) of the taxpayer's objection do not per se constitute grounds for assessment, as they are not included in the definition of 'grounds for assessment' in rule 1.[212]

SARS may, however, in its rule 31 statement add new grounds (being grounds not previously provided by SARS before its statement is issued) for its assessment, provided the new grounds are permissible new grounds for the assessment.[213] Stated differently, SARS is not completely bound to the grounds for assessment provided before the issue of its rule 31 statement (e.g. the grounds provided in the finalisation letter or adjustment letter).

Permissible new grounds for assessment are, in terms of rule 31(3), any new grounds that do not constitute novation of the whole of the factual or legal basis of the disputed assessment or that requires the issue of a revised assessment.

The SARS dispute guide at paragraph 7.3 states the following in respect of new grounds in SARS's rule 31 statement:

> '*SARS may not include in the statement a ground that constitutes a 'novation' of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment. This term is not defined and would accordingly bear its ordinary meaning. According to the Shorter Oxford English Dictionary, 'novate' in a legal context means "the substitution of a new debtor, creditor, contract ... in place of the old one". Applied in the context of assessment, novate would mean that the new ground requires the substitution or replacement of the assessment with a new one. The high court on occasion held that novation takes place as the result of an agreement between parties substituting a new obligation for an existing one, thus cancelling the existing one.*'

SARS thus appears to suggest that novation of the factual or legal basis for an assessment occurs only when a replacement assessment is necessary.

It is respectfully submitted that the rule-maker could not have intended for the words 'novation of the whole of the factual or legal basis' in rule 31(3) to mean something which requires 'the substitution or replacement of the assessment with a new one', as contended by SARS, as this interpretation would render the words 'or which requires the issue of a revised assessment', also used in rule 31(3), superfluous. The interpretation proffered by SARS seems to

209 See chap. 2.

210 See chap. 8.

211 Rule 1, definition of 'grounds for assessment'.

212 It is submitted that the basis for SARS's decision cannot constitute grounds for assessment. SARS must determine the grounds for its assessment at the time of raising the assessment. SARS can only add permissible new grounds to the original grounds.

213 The SARS dispute guide, p. 40, explains SARS's right to add new grounds: '*Rule 31 is formulated in the present tense and it requires, for example, in rule 31(2)(c) that SARS must set out the material facts and legal grounds upon which it "relies" when drafting the statement and not only those previously "relied" on in the grounds of assessment as defined in rule* 1'. It is also worth noting that the draft rules proposes an amendment to rule 31(3), making it absolutely clear that SARS can indeed add a new ground for its assessment provided such new ground does not constitute novation of the whole of the factual or legal basis for the assessment or which requires the issue of a revised assessment.

ignore completely the use by the rule-maker of the word 'or' before the words 'which requires the issue a revised assessment'.

It is submitted that a new ground should be measured against two different and distinct criteria to establish whether such new ground constitutes a permissible or impressible new ground for assessment. This is clear from the use in rule 31(3) of the word 'or' rather than 'and'.[214] Furthermore, when rule 31(3) refers to novation of the factual and legal basis it is referring to novation of the factual or legal basis of the *disputed assessment* which disputed assessment cannot be some other assessment (such as a replaced assessment or substitute assessment) yet to be made. The words 'which requires the issue of a revised assessment' do not refer to the disputed assessment. It is therefore submitted that they envisage a ground that could lead to some assessment other than the disputed assessment.

The first criterion is therefore whether a new ground constitutes novation of the whole of the factual or legal basis for the assessment under dispute and the second whether the new ground would require the issue a revised assessment. If either of these two criteria is met, the new ground is impermissible.

10.6.5.1.1.3 The first criterion of permissibility – novation

The factual or legal basis for a disputed assessment is the grounds for the assessment under dispute. Novation of the whole of the factual or legal basis must therefore be taken to mean novation of the whole of the grounds for the assessment under dispute.

The word 'assessment' is defined in section 1 to mean the determination of the amount of a tax liability or refund.[215] Therefore, on a plain reading of rule 31(3), SARS may not add a ground that amounts to novation of the whole of the grounds for its determination of the amount of the tax liability or refund reflected in the disputed assessment. It is submitted that the words 'novation of the whole of the factual or legal basis of the disputed assessment' envisage a situation where the determined tax liability under dispute remains unchanged (and, as a result, a revised determination is unnecessary), but the factual or legal basis of such determination is novated, meaning that the factual or legal basis of the determination is substituted or replaced as a whole.

It is submitted that if, for example, SARS in an additional income tax assessment originally disallows an expense on the basis that the expense was not incurred in the production of income but later, in its rule 31 statement, changes the basis for that disallowance to, for example, the expense's being non-deductible because the expense is capital in nature, the new ground would constitute a replacement or substitution of the original ground of the determination. Under both grounds in this example, the determined tax liability remains unchanged, but the legal basis for the determined tax liability is novated. The question arises in this example whether such novation constitutes novation of the whole of the factual or legal basis for the assessment. It is submitted that it does. The focus should not be on whether the determined tax liability is novated (in this example it is not) but on whether the factual or legal basis for same is novated (in this example it is). Whilst case law exists suggesting otherwise,[216] these

214 See also in this regard *Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Services* (IT13950) [2017] ZATC 5 (30 January 2017).

215 See chap. 3 on assessments.

216 See, for example, *Warner Lambert SA (Pty) Ltd v Commissioner for SARS* [2003] 65 SATC 346, where the court allowed SARS to change the basis of its assessment in circumstances similar to those discussed in the example above. It is worth noting that the judgment in *Warner Lambert* was delivered before the rules included any wording similar to that of the current rule 31(3).

judgments were handed down on the basis of previous versions of the rules, which did not include the first criterion for permissibility – novation.[217]

It may be said that there is no prejudice to a taxpayer when SARS changes the grounds for its assessment (whether by novation or otherwise):[218] the taxpayer will have an opportunity to address such grounds through the discovery process and the rule 32 statement. Such conclusion, it is respectfully submitted, loses sight of the following:

- All appeals in the Tax Court are necessarily preceded by an assessment or decision by SARS that is subject to objection. Once an assessment is raised, SARS may insist on payment.[219]
- All appeals in the Tax Court must necessarily be preceded by an objection, which objection must be aimed at proving the factual and legal basis of SARS's assessment, at that time, incorrect. If SARS were to be allowed to change its factual and legal basis at the appeal stage, the taxpayer would be required, as early as at the objection phase, to consider all the possible legal grounds on which SARS could have raised the assessment and, on that basis, decide whether an objection should be submitted and pursued on appeal all the way to Tax Court if necessary.
- If SARS, at the appeal stage, changes the grounds for its assessment, it arguably cannot be said to have had the requisite proper grounds for raising the assessment in the first place.[220] The time period within which SARS has to raise an assessment is not prescribed and is, for the most part, subject only to prescription under section 99. This period may, in any event, be extended under certain circumstances.

10.6.5.1.1.4 The second criterion of permissibility – revised assessment

Whilst the expression 'revised assessment' is not defined in the Act, the word 'assessment' is. The word 'assessment' means the determination of the amount of a tax liability or refund. The dictionary meaning of the word 'revised' is '*changed in some ways*'.[221] A changed assessment must therefore mean a changed determination of the amount of a tax liability. In the context of rule 31 and of the rules as a whole, the change must, it is submitted, be measured against the assessment in dispute.

It follows that any ground that would result in a change in the determined tax liability as reflected in the assessment under appeal will constitute an impermissible new ground.[222] Example 10.6 illustrates this point.

---

217 Unlike the *Warner Lambert* case, judgment in the *Lion Match* case was handed down on the basis of the current version of the rules, including rule 31. In the latter case, SARS changed the grounds for its assessment and the taxpayer brought an application to strike the new grounds. SARS, in determining the base cost on the disposal of a pre-valuation-date asset (for capital gains tax purposes), seems to have relied on para. 26 of the Eighth Schedule to the Income Tax Act, 58 of 1962 and determined a market value different to that relied on by the taxpayer. When issuing its rule 31 statement, SARS changed its determination of the market value (on the basis of changes in certain assumptions relevant to the determination of the market value), which resulted in a higher tax liability than was originally determined. The court held that this did not constitute novation. It is respectfully submitted that this conclusion was correct as SARS continued to rely on the same paragraph for its assessment; the legal basis was not novated. This judgment in the *Lion Match* case, however, does not detract from the conclusion reached in the body of this chapter. See also the comments in fn. 213 on 'revised assessment'.

218 See, for example, *ITC 1843* 2010 72 SATC 229.

219 See in this regard *Brits and Three Others v CSARS* (2017/44380), [2017] ZAGPJHC (28 November 2017), unreported.

220 *Commissioner for the South African Revenue Services v Pretoria East Motors (Pty) Ltd* 2014 (5) SA 231 (SCA), 76 SATC 293.

221 https://dictionary.cambridge.org/dictionary/english/revised (accessed 27 May 2020).

222 In the *Lion Match* case, SARS, in its rule 31 statement, sought to add a ground to increase the liability determined relative to the assessment in dispute. The taxpayer argued that such ground was impermissible because it would require SARS to issue a revised assessment. In handing down judgment in favour of SARS, it seems that,

[*continued on next page*]

EXAMPLE

Example 10.6 – New grounds requiring a revised assessment

Assume SARS raises an additional assessment in which it taxes certain manufactured dividends for income tax purposes. It transpires at the appeal stage that SARS had understated the quantum of the manufactured dividends in the additional assessment. SARS seeks to rectify the quantum in its rule 31 statement. The grounds remain the same, it is simply the quantum of the adjustment that SARS seeks to rectify. Such a ground aimed at increasing the quantum of the manufactured dividend would be included in gross income, however, require the issue of a revised determination and would accordingly constitute an impermissible new ground. This does not mean that SARS is unable to tax the correct amount, simply that it cannot add it to the dispute at the appeal stage. A new assessment may be issued which new assessment will be subject to objection and appeal.

In a recent judgment of the Johannesburg Tax Court, handed down by Vally J on 24 February 2020,[223] the court held that SARS cannot argue in the Tax Court for an increase in its assessment. Stated differently, SARS cannot challenge its own assessment in the Tax Court as the TAA simply does not allow SARS to do so. Whilst the rationale for the decision was not that such ground constitutes an impermissible new ground,[224] it is submitted that the judgment nevertheless indirectly supports the conclusion that any ground added by SARS, which ground will require the issue of a revised assessment in which SARS seeks to increase the assessment, constitutes an impermissible new ground for assessment.

In *Purlish Holdings (Pty) Ltd v Commissioner for the South African Revenue Service*,[225] the Supreme Court of Appeal held that the Tax Court may not *mero motu* increase the amount of an understatement penalty; the Tax Court is confined to the issues contained in the rule 31 and 32 statements and the rule 33 reply. It follows that SARS would, in its rule 31 statement, have to include grounds for an increase in the understatement penalty before the Tax Court may act in accordance with section 129(3) to increase the penalty. However, since such a ground

---

[*continued from previous page*]

with respect, the court did not consider the issue of a revised assessment to constitute a separate and distinct requirement from novation. Whilst it is true, as the court stated at para. 55 of the judgment, that nothing prevents SARS from raising a revised assessment, that conclusion, it is respectfully submitted, loses sight of the fact that SARS cannot do so in its rule 31 statement.

223 *ITC 1912* (2018) 80 SATC 417.

224 The rationale for the decision was set out in para. 25 of the judgment: '*Section 129(1) specifically restricts this Court's jurisdiction to hearing "the appellant's appeal" lodged in terms of section 107. It is clear from this that it is the appellant's appeal that has to be before court. Section 129(2) empowers this Court to either "confirm" the assessment, order that it be "altered" or "refer the assessment back" to the respondent for re-evaluation. This can only mean that once this Court has examined the appellant's appeal, it can exercise either one of the three powers. It does not exercise the powers in a vacuum. It only acquires them once the taxpayer has exercised his/her/its rights to appeal against the assessment in terms of section 107. Hence, section 129(1) specifically highlights that the "decision" of the court is taken "after hearing the 'appellant's' appeal". Section 129(2) cannot be divorced from these two sections. It provides the court with remedial powers, but these remedial powers exist in the context sections 107 and 129(1). It is true that section 129(2)(b) empowers the court to "alter" the assessment. Whether the alteration of the assessment involves a downward or upward shift is not a matter we need immediately address. The immediate issue is, when can the alteration take place? Reading sections 107, 129(1) and 129(2) conjunctively I conclude that the alteration can only take place once the appellant's appeal has been heard. This conclusion is fortified by the fact that section 129(1) provides that the appellant bears the onus of proof to show that the assessment is wrong. It alone should show that the assessment is wrong. The respondent, whose assessment is being attacked, is required to defend any attack, but not to prove that the assessment is correct. In the same vein, it cannot be seen to be contending that its own assessment is wrong. If it were to do so, then it would have to bear the onus of showing this. There is no provision in the Act for such a scenario. The reason for that is that the Act does not anticipate the respondent challenging its own assessment.*'

225 (76/2018) [2019] ZASCA 4 (26 February 2019).

would ultimately require the issue of a revised assessment, it would be impermissible, arguably rendering section 129(3) moot. Any interpretation which renders section 129(3) moot, it is submitted, cannot be correct, as under such interpretation mean the rules override the TAA. It is submitted therefore that a ground for increasing an understatement penalty must be an exception to the second criterion of permissibility – revised assessment.

If SARS raises an impermissible new ground in the rule 31 statement, it is submitted that the taxpayer may, if necessary, launch an application to strike out such new ground in the Tax Court in terms of the Uniform Rules of Court.[226]

10.6.5.1.1.5 The rule 32 statement – timing and manner of delivery

A taxpayer must deliver its rule 32 statement within 45 business days from the date of delivery by SARS of:

- SARS's rule 31 statement; or
- SARS's discovery affidavit,[227] if the taxpayer asked SARS to discover any document material to any new ground raised by the latter.

The rule 32 statement must be delivered to SARS at any of the following addresses:[228]

Physical address

Tax Court Litigation
Khanyisa Building, 1st Floor
271 Bronkhorst Street
Nieuw Muckleneuk
0181

Electronic address

Email: taxcourtlitigation@sars.gov.za
Fax: (+27) 12 422 5012.

The rules are silent as to whether delivery to the registrar is also required, although it is arguably a requirement that the rule 32 statement also be delivered to him or her.[229] In any event, such delivery is common practice.

SARS and the taxpayer may agree on an extension for the delivery by the taxpayer of its rule 32 statement. If the taxpayer is unable to secure an extension by agreement, it may launch an application on notice of motion in the Tax Court, under rule 52(1), for an order that the period be extended.[230] The taxpayer may also, if it fails to deliver its rule 32 statement timeously, apply to the Tax Court on notice of motion for postponement and extension under rule 52(6) despite not having tried to secure an extension by agreement with SARS.[231]

10.6.5.1.1.6 The rule 32 statement – content

In terms of rule 32(2)(a) to (c), the rule 32 statement must set out clearly and concisely:

- the grounds upon which the taxpayer appeals;

---

226 Rule 42. See, for example, *ITC 1876* 77 SATC 175. In the *Lion Match* case SARS raised a point *in limine* to the effect that the Tax Court did not have jurisdiction to hear the taxpayer's application to strike certain new grounds raised by SARS in its rule 31 statement. This point was rejected by the court.

227 See para. 10.6.5.1.3.1 on discovery procedures.

228 Rule 2, read with para. 4 of part B of GN 295 in *GG* 38666 of 31 March 2015.

229 See rule 42.

230 See chap. 11.

231 See chap. 11.

- which of the facts or legal grounds contained in SARS's 31 statement are admitted and which are opposed; and
- in respect of the grounds opposed the legal basis for such opposition.

The grounds for appeal are those grounds set out in the appeal (the ADR2/NOA, also referred to as the rule 10 statement), which grounds are, in turn, the grounds for objection relied on in the appeal.[232] The taxpayer may add new grounds in its rule 32 statement but only if those grounds are permissible grounds for appeal.[233] It follows that the taxpayer has two opportunities to add permissible new grounds, once in its rule 10 statement (or, stated differently, when the ADR2/NOA is filed) and again in its rule 32 statement.

There is no prescribed form for the rule 32 statement. A suggested template (template B11) is attached in Annexure B.

10.6.5.1.1.7 The rule 33 statement – timing and manner of delivery

The rule 33 statement must be delivered:

- within 20 business days from date of delivery by the taxpayer of its rule 32 statement; or
- within 15 business days from the date of receipt of the taxpayer's discovery affidavit if SARS asked the taxpayer to discover any document material to any new ground raised by the taxpayer in its rule 32 statement.[234]

The rule 33 reply must be delivered to the address specified by the taxpayer in the objection if eFiling was not used to submit the appeal (typically when the ADR2 was submitted) or to the address specified in the appeal. If eFiling was used to submit the appeal (typically in the case of submission of the NOA), it must be delivered to the address specified by the taxpayer in the appeal.

SARS and the taxpayer may agree on an extension of the time period within which SARS must deliver its rule 33 reply. If SARS does not deliver its rule 33 reply within the prescribed or extended time period, the taxpayer may commence default-judgment procedures under rule 56.[235]

10.6.5.1.1.8 The rule 33 statement – content

The rule 33 reply must set out a clear and concise reply to any new grounds, material facts or applicable law in the rule 32 statement.

When the statements phase ends (with delivery of the rule 33 reply or 32 statement), neither the taxpayer nor SARS may amend its respective statements unless SARS and the taxpayer agree to such amendment.[236] When the taxpayer or SARS is unable to secure agreement for an amendment, the taxpayer may apply on notice of motion to the Tax Court to have the relevant statement amended under rule 52(7).[237]

Whilst the rules seem to allow for any amendment to the statements, it is submitted amendments may not introduce an impermissible new ground for assessment or an impermissible new ground for appeal. In a recent case,[238] a taxpayer sought to introduce a procedural ground

232 See para. 10.4.2.
233 See para. 10.4.4 in respect of permissible new grounds.
234 Rule 33(1). See para. 10.6.5.1.3.1 on discovery procedures.
235 See chap. 11.
236 Rule 35.
237 See chap. 11.
238 *ITC 1899* 79 SATC 315.

as defence against the imposition by SARS of certain penalties for underestimation of provisional tax through an amendment. The taxpayer argued that it was entitled to do so since rule 28 of the Uniform Rules of Court allows for amendment. The taxpayer's application was dismissed on the basis that rule 35, read with rule 52, allows amendments and that the taxpayer could not rely on rule 28 of the Uniform Rules of Court to secure an amendment.

10.6.5.1.2 The set-down phase

In terms of rule 39, the taxpayer must, within 30 business days after delivering its rule 32 statement, apply to the registrar for set-down (i.e. for the registrar to allocate a date for the hearing). If, however, SARS delivers a rule 33 reply, the application for set-down must be made within 30 business days from the date of delivery by SARS of that reply.

The application for set-down must be delivered to any of the following addresses:[239]

Physical address

Registrar of the Tax Court
Khanyisa Building, 1st Floor
271 Bronkhorst Street
Nieuw Muckleneuk
0181

Electronic address

Fax: (+27) 12 422 5012
Email: registrarTaxCourt@sars.gov.za.

The taxpayer must deliver a copy of the request for set-down to SARS at any of the following addresses:[240]

Physical address

Tax Court Litigation
Khanyisa Building, 1st Floor
271 Bronkhorst Street
Nieuw Muckleneuk
0181

Electronic address

Email: taxcourtlitigation@sars.gov.za
Fax: (+27) 12 422 5012.

There is no prescribed form for this application. A suggested template (template B12) is attached in Annexure B.

The registrar may allocate a date in his or her sole discretion and, at least 80 days before the date allocated, must notify SARS and the taxpayer of the date for the hearing.[241]

If the taxpayer does not apply timeously for set-down, SARS must apply for set-down.[242]

---

239 Rule 2(c)(ii), read with rule 3(1) and para. 5 of part B of GN 295 in *GG* 38666 of 31 March 2015.
240 Rule 39(1).
241 Rule 39(3) and (4).
242 Rule 39(2).

The Tax Court that will hear the appeal is the Tax Court that is closest to the place at which the taxpayer resides or carries on business, unless the parties otherwise agree. The Tax Court sits at the following locations:[243]

- Cape Town;
- Grahamstown and Port Elizabeth;
- Kimberley;
- Bloemfontein;
- Pretoria;
- Johannesburg; and
- Durban.

10.6.5.1.3 The discovery, subpoena, pre-trial meeting and dossier phases

10.6.5.1.3.1 *Discovery phase*

The discovery procedures are detailed in rule 36. They are not repeated here in their entirety.

- Discovery procedures are initiated by delivery by SARS or the taxpayer (depending on which party requires discovery) of a notice of discovery.
- There are two points in time at which the taxpayer and SARS may request (by notice) discovery of documents under oath. The first is before the statements phase closes (or, stated differently, before pleadings close)[244] and the other is after the statements phase has closed (or, stated differently, after pleadings have closed).[245]
- A notice of discovery can be delivered to SARS after receipt by the taxpayer of SARS's rule 31 statement (i.e. before pleadings close). Under these circumstances, SARS is required to provide its discovery affidavit in relation only to any new grounds raised by it in its rule 31 statement.
- A notice of discovery may be delivered to the taxpayer by SARS after delivery by the taxpayer of the taxpayer's rule 32 statement (i.e. before pleadings close). Under these circumstances, the taxpayer is required to provide its discovery affidavit in relation only to any new grounds it raised by it in its rule 32 statement.
- A notice of discovery may be delivered by either SARS or the taxpayer after pleadings have closed. Under these circumstances, the party required to discover must discover all documents relating to the issues in appeal, as set out in the rule 31 and 32 statements and rule 33 reply.

10.6.5.1.3.2 *The subpoena phase*

The rules regarding the subpoena of a witness are set out in rule 43. In terms of rule 43, the Uniform Rules of Court apply to subpoenas issued under the TAA rules.

It should be noted that if SARS or the taxpayer intends to rely on expert witnesses during the trial, the rules prescribe that notice to such effect needs to be delivered to the other party at least 30 days before the date for the hearing. In addition, a summary of the expert opinion and of its relevance needs to be delivered to the other party at least 20 days before the date of the

243 S 116, read with Proclamation R27 of 2003 and s 264.
244 Rule 36(1) and (2).
245 Rule 36(3).

hearing.[246] Failing to deliver a notice of intent to rely on expert witnesses or to deliver a summary of the expert's opinion and relevance will result in the defaulting party's being unable to call that expert witness/the expert witnesses to give evidence (unless the parties agree otherwise or the court grants leave to the effect).

10.6.5.1.3.3 *Pre-trial meeting phase*

The rules governing the pre-trial meeting are detailed in rule 38 and are not repeated here.

- The pre-trial meeting is compulsory under the rules.
- It must take place at least 60 business days before the date of the hearing allocated by the registrar.
- It must be arranged by SARS.
- Minutes of the meeting must be provided by SARS within 10 business days of the conclusion of the meeting.

10.6.5.1.3.4 *Dossier phase*

In terms of rule 40, SARS must, at least 30 days before the date of the hearing, deliver to the taxpayer and the registrar an indexed and paginated dossier containing, where applicable:

- all returns submitted by the appellant relevant to the tax period in issue;
- all assessments relevant to the appeal;
- the notice of objection under rule 7 and documents, if any, provided under rule 8;
- the notice of disallowance of the objection under rule 9;
- the notice of appeal under rule 10;
- the rule 31 and 32 statements and the rule 33 reply;
- the minutes of the pre-trial meeting;
- the notice of referral if the case was referred to the Tax Court from the Tax Board; and
- any order by the Tax Court under part F of the rules relating to the appeal.

A copy of the dossier will be provided to the Tax Court by the registrar.

10.6.5.2 Tax Court trial phase

In terms of rule 44, proceedings are commenced by the taxpayer unless the only issue in dispute is the reasonableness of SARS's assessment (in the case of an estimated assessment under section 95) or the facts on which SARS imposed an understatement penalty (other than an understatement penalty for a substantial understatement). These are the cases where, in terms of section 102(2), SARS bears the onus of proof.[247] Oddly enough, when the only issue in dispute is whether SARS was entitled to lift the veil of prescription under section 99(2), the taxpayer nevertheless has to commence proceedings, on a strict reading of rule 44, despite the fact that SARS bears the onus of proof.

The party who must commence proceedings may lead evidence in line with the rules of evidence. Those rules fall outside the scope of the present work.

Once both the taxpayer and SARS have presented all their evidence, the parties may be heard in argument. Thereafter the court must hand down judgment under section 129 of the TAA.

---

246 Rule 37.
247 See chap. 5.

The Tax Court can in terms of section 129 make one of the following orders in respect of appeals:[248]

- an order confirming SARS's assessment or decision;
- an order that the assessment be altered; or
- an order that the assessment be referred back to SARS for further examination and assessment.

It is questionable whether the Tax Court can increase an assessment (except to increase an understatement penalty). Whilst increasing an assessment means 'altering' the assessment, it is submitted that, as was held in *ITC 1912*,[249] the scheme of the TAA does not allow for the court to increase SARS's assessment (except to increase an understatement penalty).

The Tax Court may also make an order as to costs, in the following in the circumstances:[250]

- when SARS's grounds for assessment are held to be unreasonable;
- when the taxpayer's grounds for appeal are held to be unreasonable;
- when the case was referred to the Tax Court from the Tax Board and the Tax Board's decision is substantially confirmed;
- when the hearing is postponed at the request of either party;
- when the taxpayer withdraws the appeal after the date of the hearing has been allocated; or
- when SARS concedes to the appeal after the date of the hearing has been allocated.

It should be noted that notice of concession (by SARS) or withdrawal (by the taxpayer) must be provided in terms of rule 46. When such notice is provided after set-down, it must also indicate whether the party giving it tenders to pay the costs of the other party.[251]

Proceedings in the Tax Court are not public.

10.6.5.3 Tax Court post-trial phase

The taxpayer or SARS may appeal against the decision of the Tax Court, either to the full bench of the High Court or directly to the Supreme Court of Appeal.[252] Sections 133 to 140 set out the rules and procedures for noting such an appeal to the Higher Courts. We do not cover them here, save to mention that when SARS or the taxpayer intends to launch such an appeal, the procedure must be commenced by SARS or the taxpayer (whichever is the appellant), within 21 days from receiving notice from the registrar of the Tax Court's decision (or within such further period as may be allowed by the Tax Court on good cause shown), by lodging with the registrar and serving on the other party a notice of intention to appeal.

It also bears mentioning that, in terms of section 141, either the taxpayer or SARS may abandon the judgment of the Tax Court or a portion thereof.

248 See chap. 11 for interlocutory applications and the orders SARS can make in respect of them.
249 80 SATC 417.
250 S 130.
251 Rule 46.
252 This would be an 'appeal' in the more commonly known sense of the word, where an appeal is launched to a higher court, and not an 'appeal' submitted by the taxpayer. See para. 10.2.

10.7 Right of appearance in the Tax Court

In terms of section 12(2), a senior SARS official who is an admitted and enrolled legal practitioner under the Legal Practice Act[253] may represent SARS in proceedings in the Tax Court (or High Court). Of significance is the fact that section 12 is silent on whether such legal practitioner is required to be practising or to have the right of appearance in the High Court. In practice, SARS employees often represent SARS in proceedings in the Tax Court. Being employed by SARS, such legal practitioners are not expected to be on the practising roll.

Section 12 and the rules are silent on who may represent a taxpayer in the Tax Court. In a 2016 case[254] the Cape Town Tax Court commented as follows:

> '*in terms of s 12 of the Tax Administration Act, SARS must be represented by a senior official who is an admitted advocate or attorney. The same requirements are not applicable to the taxpayer as the taxpayer may be represented by an ordinary layperson*' (emphasis added).

It seems, from the absence of any prescripts regarding who may represent a taxpayer, that a taxpayer may be represented by any layperson. However, the court also noted that:

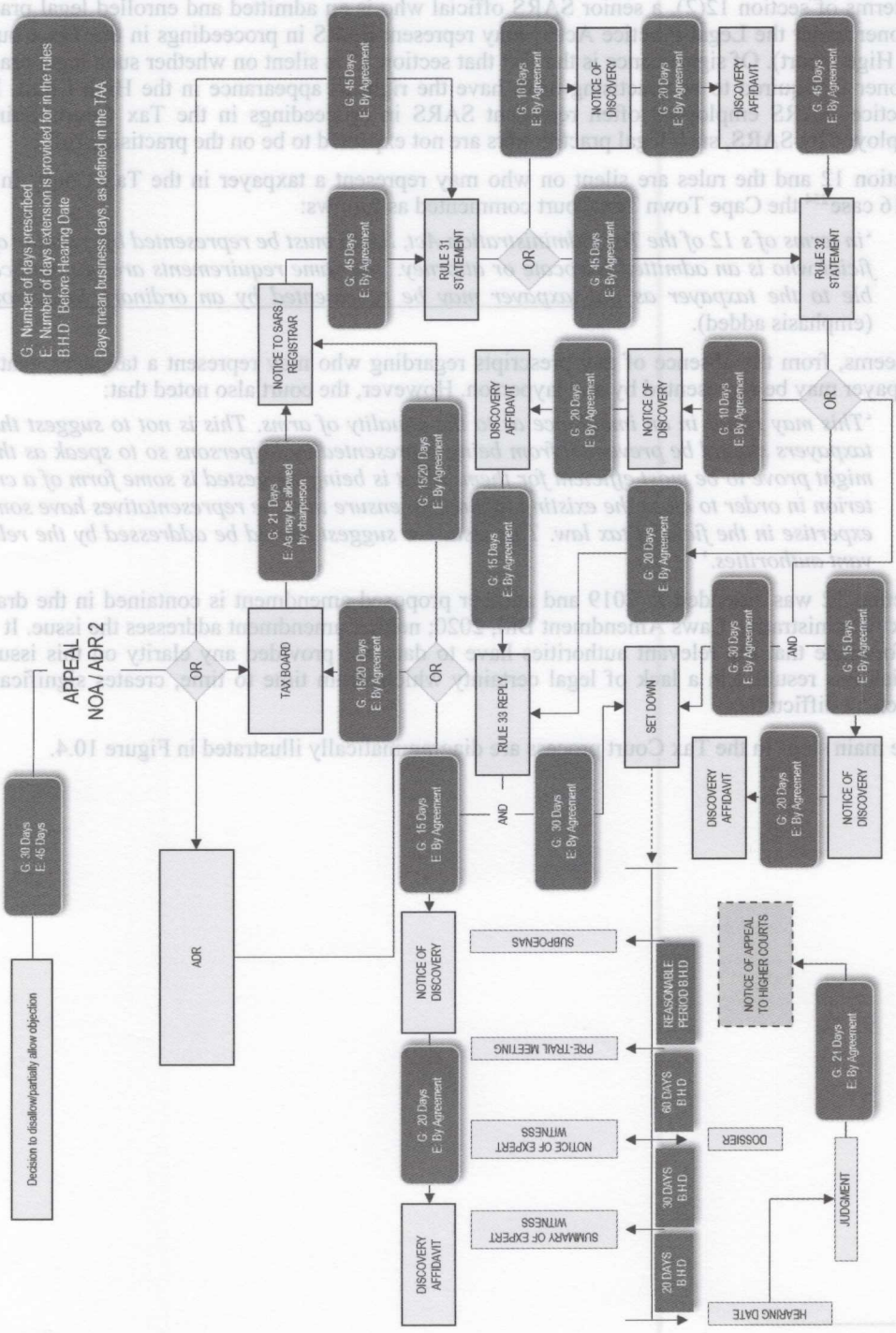
> '*This may result in an imbalance as to the equality of arms. This is not to suggest that taxpayers should be prevented from being represented by laypersons so to speak as this might prove to be most efficient for them. What is being suggested is some form of a criterion in order to close the existing lacunae to ensure that the representatives have some expertise in the field of tax law. This issue we suggest should be addressed by the relevant authorities.*'

Section 12 was amended in 2019 and another proposed amendment is contained in the draft Tax Administration Laws Amendment Bill, 2020; neither amendment addresses the issue. It is unfortunate that the relevant authorities have to date not provided any clarity on this issue, which has resulted in a lack of legal certainty which, from time to time, creates significant practical difficulties.

The main steps in the Tax Court process are diagrammatically illustrated in Figure 10.4.

253 Act 28 of 2014.
254 *ITC 1897* 79 SATC 224 (28 July 2016).

Figure 10.4: Tax Court proceedings overview.



PART II

CHAPTER 11

Interlocutory applications

The practical context of this chapter

For the taxpayer: how and when?

Both SARS and the taxpayer can launch interlocutory applications in terms of the Tax Administration Act[1] *(TAA), read with the rules promulgated under the TAA.*[2] *The specific types of interlocutory applications provided for in the rules are discussed in this chapter. These applications must be brought on notice of motion and founding affidavit. They are thus similar to an application in the High Court.*[3] *A suggested template (template B14) for a notice of motion is included in Annexure B.*

If the taxpayer is the applicant, the application must be brought within 20 days of the date prescribed for the specific type of application.

If the taxpayer is the respondent and wishes to oppose an application by SARS, the taxpayer must deliver a notice of intention to oppose the application within 10 days after SARS delivers its notice of motion and founding affidavit. The taxpayer must deliver its answering affidavit within 15 days from the date of delivery by the taxpayer of its notice of intention to oppose.

For SARS: how and when?

If SARS is the applicant, the application must be brought within 20 days of the date prescribed for the type of application to be made. An application by SARS must also be brought on notice of motion and founding affidavit.

If the SARS is the respondent, and wishes to oppose the application, SARS must deliver a notice of intention to oppose the taxpayer's application within 10 days and must deliver their answering affidavit within 15 days from the date of delivery of the notice of intention to oppose.

---

1 Act 28 of 2011. Any reference to a legislative provision must, for the purposes of this chapter, be construed as a reference to the TAA unless the contrary is specifically stated or appears from the context.

2 The rules promulgated in terms of s 103 of the TAA (the rules). Unless it is otherwise indicated or apparent from the context, any reference to a rule in this chapter is a reference to these rules.

3 In accordance with rule 6 of the Uniform Rules of Court.

PART II

CHAPTER 11

Interlocutory applications

The practical context of this chapter

For the taxpayer: how and when?

Both SARS and the taxpayer can launch interlocutory applications in terms of the Tax Administration Act[1] (TAA), read with the rules promulgated under the TAA.[2] The specific types of interlocutory applications provided for in the rules are discussed in this chapter. These applications must be brought on notice of motion and founding affidavit. They are thus similar to an application in the High Court.[3] A suggested template (template B14) for a notice of motion is included in Annexure B.

If the taxpayer is the applicant, the application must be brought within 20 days of the date prescribed for the specific type of application.

If the taxpayer is the respondent and wishes to oppose an application by SARS, the taxpayer must deliver a notice of intention to oppose the application within 10 days after SARS delivers its notice of motion and founding affidavit. The taxpayer must deliver its answering affidavit within 15 days from the date of delivery by the taxpayer of its notice of intention to oppose.

For SARS: how and when?

If SARS is the applicant, the application must be brought within 20 days of the date prescribed for the type of application to be made. An application by SARS must also be brought on notice of motion and founding affidavit.

If the SARS is the respondent, and wishes to oppose the application, SARS must deliver a notice of intention to oppose the taxpayer's application within 10 days and must deliver their answering affidavit within 15 days from the date of delivery of the notice of intention to oppose.

---

1 Act 28 of 2011. Any reference to a legislative provision must, for the purposes of this chapter, be construed as a reference to the TAA unless the contrary is specifically stated or appears from the context.

2 The rules promulgated in terms of s 103 of the TAA (the rules). Unless it is otherwise indicated or appears from the context, any reference to a rule in this chapter is a reference to these rules.

3 In accordance with rule 6 of the Uniform Rules of Court.

Contents

Table of Examples

Contents

Table of Examples

11.1 Introduction

As mentioned throughout the preceding chapters, the rules promulgated under section 103 of the TAA provide for certain types of application which may be brought on notice of motion in the Tax Court. The applications provided for in the rules, as well as the procedures prescribed in respect of those applications, are detailed in this chapter.

11.2 The different types of applications

The applications provided for in part F of the rules include applications:[4]

- for condonation and extension;[5]
- for reasons;[6]
- to have an invalid objection declared valid;[7]
- for extension of the period for the lodging of an objection;[8]
- for extension of the period for providing substantiating documents;[9]
- for extension of the period for the submission of an appeal;[10]
- regarding test cases and stays;[11]
- to make an agreement or settlement reached through ADR an order of court;[12]
- for the issue of an assessment pursuant to ADR proceedings;[13]
- for condonation and for extension of the period for the filing of pleadings;[14]
- for the amendment of pleadings;[15]
- for costs consequent upon withdrawal of an appeal by the taxpayer or a concession by SARS after an appeal has been set down for hearing;[16]
- for reconsideration of the bill of costs;[17]
- regarding certain decisions made by the Chairperson of the Tax Board;[18] and
- for default judgment.[19]

The circumstances under which each of these applications may be brought in the Tax Court are discussed separately below.

---

4 The following list is not a *numerus clausus* of applications provided for in the rules. For example, applications for the withdrawal of the Chairperson of the Tax Board, for the withdrawal of a member of the Tax Court or for the withdrawal of a subpoena (under rule 54, rule 55 and 52(8) respectively) are not discussed herein.
5 Rule 52(1).
6 Rule 52(2)(a).
7 Rule 52(2)(b).
8 Rule 52(2)(c).
9 Rule 52(2)(d).
10 Rule 52(2)(e).
11 Rule 52(3) and (4).
12 Rule 52(5)(a).
13 Rule 52(5)(b).
14 Rule 52(6).
15 Rule 52(7).
16 Rule 52(9).
17 Rule 52(10).
18 Rule 53.
19 Rule 56.

11.2.1 Applications for condonation and extension

As mentioned in earlier chapters of this book, SARS and the taxpayer may under certain circumstances agree on an extension of the period within which certain steps must be taken by either SARS or the taxpayer in the objection or appeal process. This is specifically provided for in rule 4.

Rule 4 applies when the relevant rule or TAA is silent regarding an extension period. Examples of when a taxpayer and SARS may agree on a time extension under rule 4 include agreements to extend the period within which:

- SARS is required to deliver its notice of invalid objection;[20]
- SARS is required to provide its notice of ADR agreement;[21]
- SARS or the taxpayer must deliver its notice of discovery;[22]
- ADR procedures must be completed;[23] and
- SARS must deliver its rule 31 statement or the taxpayer its rule 32 statements.[24]

The above list is not exhaustive.

When the taxpayer and SARS do not reach an agreement on an extension, the party seeking an extension may approach the Tax Court for an order that the time period be extended and, where necessary or applicable, for an order for condonation.[25]

In *Van Wyk v Unitas Hospital and Another*,[26] the Constitutional Court held as follows, with regard to condonation:

> '*[20] This Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.*
>
> *[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable ...*'

11.2.2 Application for reasons (rule 52(2)(a))

As detailed in chapter 8, a taxpayer may request reasons for an assessment or decision under rule 6. When the taxpayer requests reasons but SARS fails to provide reasons that are sufficient to enable the taxpayer to formulate an objection, the taxpayer may, in terms of rule 52(2)(a), apply to the Tax Court for an order that SARS provide sufficient reasons within such period as may be allowed by the court.[27]

---

20 See chap. 9.
21 See chap. 10.
22 See chap. 10.
23 See chap. 10.
24 See chap. 10.
25 Rule 52(1)(a) and (b).
26 [2007] ZACC 24, 2008 (4) BCLR 442 (CC), 2008 (2) SA 472 (CC).
27 In *ITC 1911* 80 SATC 407, however, a taxpayer unsuccessfully launched an application under 52(2)(a).

11.2.3 Application to have an invalid objection declared valid (rule 52(2)(b))

As detailed in chapter 9, SARS may under certain circumstances declare an objection invalid. When an objection is declared invalid, the taxpayer may in terms of rule 52(2)(b) approach the Tax Court for an order that the objection be treated as valid. This application may be used in cases where SARS refuses to treat an objection as valid as an objection that has been treated as invalid will not be considered by SARS.

Again as explained in chapter 9, a notice of invalidity issued by SARS in consequence of the taxpayer's failure to object timeously is not a notice of invalidity issued under rule 7(4). The question that arises is whether a taxpayer may launch an application under rule 52(2)(b) in these circumstances.

Rule 52(2)(b) does not state that it applies only to notices of invalidity issued under rule 7(4). As was mentioned in *CM v Commissioner for the South African Revenue Service*,[28] a taxpayer may avail itself of rule 52(2)(b) even if the notice of invalidity is not one envisaged in rule 7(4). It is submitted, however, that a taxpayer whose objection has been declared invalid because the objection was not submitted in time cannot rely on rule 52(2)(b), on the basis that if rule 52(2)(b) were to be available in these circumstances, this rule would defeat the purpose of section 104(2)(a). A taxpayer in this situation would have to object to what is, in essence, a decision by SARS not to condone a late objection.

If SARS declares an objection invalid in consequence of the taxpayer's having objected to something that is not subject to objection and appeal, the taxpayer may, it is submitted, avail itself of the application in rule 52(2)(b). An important difference between a situation where SARS declares an objection invalid because the objection was against something that is not subject to objection and appeal and a situation where SARS declares the objection invalid because the objection was late is that, in the first situation, no objection lies against the decision by SARS.

11.2.4 Application for extension of the period for the lodging of an objection or appeal (rule 52(2)(c))

In terms of rule 52(2)(c) of the rules, a taxpayer may apply to the Tax Court for an order that the period for the lodging of an objection be extended if SARS does not extend the period under section 104(4). Also, similarly to rule 52(2)(c), rule 52(2)(e) allows a taxpayer to apply for an order that the period within which the appeal must be lodged be extended if SARS does not grant such an extension. It would appear then that, in addition to being able to object to the decision not to grant an extension for the submission of an objection or appeal,[29] the taxpayer may also decide to bring an application in the Tax Court. This would mean the taxpayer has a choice as to whether to object or to bring an application.

The facts in *Commissioner for the South African Revenue Service v Danwet 202 (Pty) Ltd*[30] were that the taxpayer filed an appeal out of time and SARS did not condone the late submission of the appeal. The taxpayer subsequently approached the Tax Court[31] on application, ostensibly under rule 52(2)(e), for an order that the period for the lodging of the appeal be extended. The taxpayer was successful in the Tax Court. SARS then appealed to the Supreme Court of Appeal (SCA) on the basis that the Tax Court did not have jurisdiction to hear the

28 (TAdm 0035/2019) at para. 51. As to the type of reasons that SARS must provide, see chap. 8.
29 See chap. 7.
30 [2018] ZASCA 38, 2019 (5) SA 63 (SCA).
31 *ABC (Pty) Ltd v Commissioner for the South African Revenue Service* (0018/2016) (27 January 2017).

taxpayer's application in the first place. The SCA agreed and upheld SARS's appeal, setting aside the decision of the Tax Court. The reasoning of the SCA for this conclusion may be summarised as follows:

- A decision by SARS not to condone a late appeal is subject to objection under section 104(2)(b).
- The taxpayer should therefore have lodged an objection under section 104 to SARS's decision not to condone the late appeal.
- If that objection were disallowed, the taxpayer could have appealed against it, in which case the Tax Court would have been able to extend the period for the lodging of an appeal under rule 52,[32] read with section 117(3).
- Since the taxpayer did not object to the decision (but launched an application under rule 52), there could have been no appeal to the Tax Court and, since there could not have been an appeal to the Tax Court, the Tax Court could not have made the order it did.

On the basis of this judgment, it appears that a taxpayer cannot launch an application under rule 52(2)(e) (or rule 52(2)(c)) as an alternative to lodging an objection to the decision not to condone a late appeal (or objection): the taxpayer has to object. The court's reasoning is, with respect, questionable. The court appears to have reasoned and concluded as it did on the supposition that rule 52(2)(e) can be accessed only through an objection and ultimately an appeal under section 107 of the TAA.

The jurisdiction of the Tax Court in terms of section 117 is threefold: to hear appeals under section 107 (section 117(1)), to hear interlocutory applications as provided for in the rules (section 117(3)), and to hear applications in procedural matters. In order to reach the appeal phase in the objection and appeal process, the taxpayer must indeed first object. If a taxpayer objects to a decision not to condone a late appeal and such objection is disallowed, the taxpayer may appeal under section 107 against that decision. The Tax Court may then, in terms of section 129(1), read with section 129(2)(a) and (b), either confirm or alter the decision not to condone the late appeal. Its powers to make a decision originate from section 129(2)(a) and (b) and not from rule 52(2)(e).

With regard to the Tax Court's jurisdiction to hear interlocutory applications, a taxpayer may, in terms of rule 52(2)(e), apply to the Tax Court for an order that the period for the lodging of an appeal be extended. The Tax Court may then, in terms of section 117(3), read with rule 52(2)(e), hear and decide the interlocutory application. The application under rule 52(2)(e) is not dependent on the submission of an objection.

On the basis of the foregoing, the judgment in the *Danwet* case may, with respect, be challenged in that the taxpayer, in that case, launched an application under rule 52(2)(e) and the Tax Court therefore arguably did have jurisdiction to adjudicate the matter under section 117(3).

Nevertheless, the conclusion that the SCA ultimately reached may be correct, not on the basis that the taxpayer should have first objected in order for the court to make an order under rule 52, but on the basis that the application brought by the taxpayer was not one envisaged in rule 52(2)(e).

The wording of rule 52(2)(e) states that the application is available if the period for the lodging of an appeal '*has not been extended by SARS on request by the taxpayer under rule 10*'. The wording of section 104(2) states that '*a decision under section 107(2) not to extend the period*

32 The court refers to rule 53 in its judgment. Taking into account the court's reasoning in the judgment, it is respectfully submitted that the judgment should have referred to rule 52 and not rule 53.

for lodging an appeal' is subject to objection and appeal. Whilst the wording of the two provisions is very similar, it is not identical. It is submitted that if the rule-maker had intended for the application under rule 52(2)(e) to be available as an alternative to the objection remedy it would have used exactly the same wording in rule 52(2)(e) as that used in section 104(2), but the wording is not the same. What is the reason for the different wording?

It has been suggested[33] that rule 52(2)(e) applies only in cases where SARS has not decided whether to condone the late appeal. In other words, the taxpayer can rely on rule 52(2)(e) (and, by implication, rule 52(2)(c)) only in the absence of a decision by SARS regarding condonation. On this interpretation, once a decision has been made by SARS not to condone the late appeal (or objection), the application in rule 52(2)(e) (and, by implication, rule 52(2)(c)) is no longer available.

This explanation seems plausible when one takes into consideration the other applications provided for in rule 52(2). All of them are available in circumstances where SARS has made a decision or has done something under the rules that is not subject to objection and appeal. It seems then that the rule-maker intended to provide a mechanism to mitigate and balance the power imbalance between the rights of the taxpayer and SARS's powers under the rules, in circumstances where the objection and appeal remedy is not available to the taxpayer. It may be argued that rule 52(2)(c) and (e) must be interpreted against a similar backdrop. The conclusion that the applications are available only when SARS fails to make a decision corresponds with the rest of the applications provided for since, in the absence of a decision by SARS, there is nothing that is subject to objection and appeal. Rule 52(2)(c) and (e) should therefore be available to the taxpayer.

However, if rule 52(2)(c) and (e) were to apply only in circumstances where no decision has yet been made by SARS regarding condonation, questions arise as to when, from a practical point of view, the taxpayer must bring the application.[34] Neither the TAA nor the rules provide for a specific time period within which SARS must provide its decision whether to condone the late submission of an objection or appeal. In any event, such an application made by a taxpayer under rule 52(2)(c) and (e) where SARS failed to make a decision on condonation could fairly easily be rendered largely academic by SARS's simply delivering its decision whether to condone.

The exact circumstances under which taxpayers may rely on rule 52(2)(c) and (e) are unclear. Taxpayers may find it difficult to rely successfully on applications under these two provisions as a result of the judgment in *Commissioner for the South African Revenue Service v Danwet 202 (Pty) Ltd* and because there is no provision for a specific time period in the rules, within which SARS must make a decision on a request for condonation by the taxpayer of the late filing of an objection or appeal.

11.2.5 Application for an extension of the period for providing substantiating documents (rule 52(2)(d))

As discussed in chapter 9, SARS may request substantiating documents relating to an objection and the taxpayer must reply by providing them. The applicable rule, rule 8, allows the taxpayer to request an extension from SARS of the period within which the taxpayer is required to provide the relevant documents requested by SARS. If SARS does not grant such extension, the taxpayer may apply to the Tax Court for the extension under rule 52(2)(d). It is submitted that the Tax Court would not be able to grant an extension of more than 20 days, since this is the maximum extension period allowed under rule 8.

---

33 Burt K 'Period of Lodging an Appeal to the Tax Court: A Trap for the Unwary' *Business Tax and Company Law Quarterly* 9(1), March 2018, pp. 16–21.

34 See para. 11.3 on procedure.

11.2.6 Applications regarding tests cases and stays (rule 53(3) and (4))

As discussed in chapter 9 and chapter 10, SARS may stay an objection or appeal until judgment has been handed down by the Tax Court in a test case. SARS may also designate an objection or an appeal as a test case.

If SARS designates a taxpayer's case as a test case, the taxpayer may oppose such designation. Once the taxpayer has notified SARS that it opposes the designation of its case as a test case, SARS can continue to treat the case as a test case only if it secures an order from the Tax Court in which the court orders the case should be treated as a test case. Rule 52(3)(a) provides for applications for an order that a case be treated as a test case by SARS.

If a taxpayer's objection or appeal has been stayed and the taxpayer opposes SARS's decision to stay the objection or appeal, SARS may continue to stay the objection or appeal only if it secures an order from the Tax Court in which the court orders that the objection or appeal is stayed. Rule 52(3)(b) provides for such applications by SARS for an order that the objection or appeal be stayed.

If a taxpayer's objection or appeal has been stayed, the taxpayer may request participation in the test case. SARS must grant such permission, unless SARS obtains an order from the Tax Court that the taxpayer not be allowed to participate in the test case. Rule 52(3)(d) provides for applications by SARS for orders that a taxpayer should not be allowed to participate in a test case.

If SARS decides a taxpayer's objection or appeal on basis of the judgment in the test case, the taxpayer may in terms of rule 52(4) apply for an order from the Tax Court that the decision on the taxpayer's objection and appeal not be made with reference to the judgment in the test case and that the taxpayer's objection or appeal be dealt with normally under the rules.

11.2.7 Applications to make an agreement or settlement reached through ADR an order of court (rule 52(5)(a))

As discussed in chapter 10, certain appeals may be determined through ADR proceedings. When there is a settlement or an agreement between the taxpayer and SARS, the agreement must be reduced to writing and signed by the parties or their respective representatives. Rule 52(5)(a) allows either the taxpayer or SARS to apply to the Tax Court for such written agreement to be made an order of court.

11.2.8 Applications for the issue of an assessment pursuant to ADR proceedings (rule 52(2)(b))

As discussed in chapter 10, certain appeals may be determined through ADR proceedings. When there is a settlement or an agreement, the agreement must be in writing and entered into and signed by the taxpayer and SARS (or by their respective representatives). Rules 24(3) and 23(3) impose an obligation on SARS to issue a revised assessment to give effect to the agreement within 45 business days from the date of the last signature of the agreement. If SARS fails to timeously do so rule 52(5)(b) provides that the taxpayer may apply to the Tax Court for an order compelling SARS to issue the revised assessment.

11.2.9 Applications for condonation and extension of the period for the filing of statements (pleadings) (rule 52(6))

Rule 52(6) specifically provides that SARS and the taxpayer may apply for condonation and postponement associated with the time periods for delivery of the statements under rules 31 and 32 and the rule 33 reply.[35] This rule can be distinguished from rule 52(1) on the basis that rule 52(1) requires that extension first be sought by agreement with the other party before the application may be brought whereas rule 52(6) does not.

11.2.10 Applications for the amendment of statements (pleadings) (rule 53(7))

As discussed in chapter 10, the taxpayer or SARS may under certain circumstances amend its rule 31 or rule 32 statement as well as (where applicable) its rule 33 reply. Such an amendment may, however, be made only if both parties agree thereto. Failing such an agreement, the taxpayer or SARS may, in terms of rule 52(7), apply to the Tax Court for amendment of the relevant statement or reply.

11.2.11 Applications for costs consequent upon withdrawal of an appeal by the taxpayer or a concession by SARS after an appeal has been set down for hearing (rule 52(9))

As discussed in chapter 10, when a taxpayer withdraws an appeal or SARS concedes to an appeal after the appeal has been set down for hearing, such withdrawal or concession must take place by way of notice. Such notice should indicate whether costs are tendered by the party delivering it. If there is no reference to whether costs are tendered by the party delivering the notice, the aggrieved party may approach the Tax Court for relief under rule 52(9) unless the relevant party subsequently agrees to pay costs of the other party.

Rule 52(9) also applies to interlocutory applications.[36] In the result, a party may also apply for an order in respect of costs where the other party concedes to the application or withdraws the application after it has been set down in the Tax Court.[37]

11.2.12 Applications for reconsideration of the bill of costs (rule 52(10))

In terms of rule 47, the registrar of the Tax Court acts as taxing master in respect of costs unless another person has been appointed to act as taxing master. A party dissatisfied with the other party's taxed bill of costs may apply to the Tax Court under rule 52(10) for the reconsideration of such bill of costs.

11.2.13 Applications regarding certain decisions made by the Chairperson of the Tax Board (rule 53(1)(a) and (b) and rule 53(2)(a) and (b))

The Chairperson of the Tax Board may, under certain circumstances, allow or disallow the taxpayer's appeal consequent upon the failure by SARS or the taxpayer (or their respective representatives) to appear at the hearing.[38] Rule 53(1)(a) provides for applications for the review of such decisions by the Chairperson of the Tax Board. The taxpayer or SARS may, however, also apply directly to the Tax Court under rule 53(2)(a) for an order to condone a party's failure to appear at the hearing.

---

35 See chap. 10 for a detailed discussion of rules 31–33.
36 Rule 46 read with rule 50(2) of the rules.
37 Set down procedures for interlocutory applications as discussed in paragraph 11.3.5. below.
38 See chap. 10.

The application provided for in rule 53(1)(a) and the application in rule 53(2)(a) differ in that the latter application is not dependent on the Chairperson's making any decision under section 113(13) of the TAA. In essence, an application under rule 53(2)(a) would accroach the powers of the Chairperson in so far as a decision consequent upon a party's failure to appear is concerned.

As also delineated in chapter 10, a party dissatisfied with the decision of the Tax Board may refer the appeal to the Tax Court. Such a referral needs to be made within a certain number of days. The taxpayer or SARS may, however, before the prescribed number of days has elapsed, request an extension from the Chairperson of the Tax Board of the period within which the referral notice must be delivered. Rule 53(1)(b) provides for applications to the Tax Court for an extension of the period if the Chairperson does not grant such extension. The taxpayer or SARS may also apply directly to the Tax Court for an extension of the time period within which the appeal must be referred to the court.

It is submitted that the difference between the application provided for in rule 53(1)(b) and the application in rule 53(2)(b) is that the latter application is not dependent on the Chairperson's having made any decision regarding extension of the period within which the notice of referral to the Tax Court is required to be delivered. For all intents and purposes, an application under rule 53(2)(b) would exclude the Chairperson of the Tax Board from the proceedings and effectively usurp his or her powers and influence in so far as they relate to extension of the period for referral to the Tax Court.

11.2.14 Applications for default judgment (rule 56)

As discussed throughout this book, the rules stipulate specific time periods. They also impose obligations on both taxpayers and SARS. A party that does not abide by the relevant time periods or obligations imposed under the rules is in default. In the event of such a default the other party – the aggrieved party – may institute default-judgment procedures under rule 56 and make application for default judgment in the Tax Court on account of the defaulting party's non-compliance with the rules.

Before an application under rule 56 may be brought, the aggrieved party must first deliver a notice of intention to apply for default judgment to the defaulting party. The notice must inform the defaulting party of its non-compliance and afford that party an opportunity to remedy the default within 15 days. If the defaulting party does not remedy its default within 15 business days from the date of the notice, the aggrieved party can make application for default judgment under rule 56,[39] in accordance with the procedures discussed in paragraph 11.3.

If the aggrieved party intends to apply for default judgment, it must deliver its notice of intention to apply for default judgment to:[40]

Physical address

Tax Court Litigation
Khanyisa Building, 1st Floor
271 Bronkhorst Street
Nieuw Muckleneuk
0181

39 Rule 56(1).

40 Rule 50(3)(b), read with rules 2 and 56(1)(a) and with para. 4 of Part B of GN 295 in *GG* 38666 of 31 March 2015.

Electronic address

Email: taxcourtlitigation@sars.gov.za
Fax: (+27) 12 422 5012.

There is no prescribed form for a notice of intention to apply for default judgment. A suggested template (template B13) is attached in Annexure B. The rules are silent on whether delivery to the registrar of the Tax Court is also required. It stands to reason, though, that delivery to the registrar and to SARS is indeed a requirement for the notice to be valid.[41] Delivery to the registrar can be effected via e-mail at registrartaxcourt@sars.gov.za.

The following extract from the judgment in *South African Revenue Service v MM*,[42] as quoted by the court in *ITC 1904*,[43] is relevant in the context of default judgments.

> '*This case is characterised by conduct, both on the part of SARS and the taxpayer, in which the rules were not complied with, and in which neither side vigorously followed up these matters to keep the other party to the procedural timetable laid down in the rules. The timetable in the rules is a generous one; far longer periods are permitted for the filing of pleadings, by which I mean the statements in terms of Rule 10 [now 31] and 11 [now 32], than applies in High Court proceedings under the Uniform Rules of Court ... This perhaps takes into account that SARS is a busy governmental agency, and perhaps the rule makers intended it to have more time than applies to High Court litigation. Possibly also the rule maker bore in mind that many tax cases are complicated, and that more care and time might be needed.*
>
> *Despite these generous time periods, one sees time and time again that neither SARS nor the taxpayers comply with them; they simply seem to go along in their own way. This is strongly to be discouraged. SARS, in particular, should take the lead and should display efficiency in the conduct of litigation. It should comply with time periods, and where it does not, it should promptly raise that matter in correspondence, providing reasons and seeking written agreements to extensions.*
>
> *Having said that SARS should take the lead, taxpayers themselves should not allow matters to drift. If SARS does not comply with a requirement imposed by the rules, a taxpayer is entitled, in terms of Rule 26 [now 56], to bring an application to compel compliance with the Commissioner's obligations. That is the way in which a taxpayer prevents the prejudice which can otherwise arise from lengthy delays in the finalisation of tax disputes*' (emphasis added).

Once an application is brought by the aggrieved party, the Tax Court may make an order under section 129(2) (i.e. a final order regarding the dispute) unless good cause is shown by the defaulting party for its failure to comply with the rules. Alternatively, the court may make an order compelling the defaulting party to comply with the relevant rule within such time as the court may direct.[44] There appears to be a mistaken belief that if a defaulting party remedies its non-compliance with the rules after the 15-day period within which it should have done so, following delivery of the aggrieved party's notice of intention to apply for default judgment, the default is remedied and the subsequent application by the aggrieved party rendered academic. This is simply not the case.[45]

41 Rule 42. In the higher courts, under the Uniform Rules of Court, an application must (save for a few exceptions) be delivered not only to the registrar of the court but also to the other parties to the litigation. In any event, it has become the practice for the notice to be delivered to both the registrar and SARS.

42 Tax Case No. 12013/2012 of 13 February 2014.

43 80 SATC 159.

44 Rule 56(2).

45 See, for example, *ITC 1904* 80 SATC 159 in which the taxpayer successfully applied for default judgement in consequence of SARS's failure to deliver its rule 31 statement timeously. In another case, *ITC 1924* 82 SATC

[*continued on next page*]

It is submitted that the Tax Court may grant final relief under rule 56 read with section 129(2) if the defaulting party fails to show good cause for its failure to comply with the rules. There are no further requirements before the court may grant final relief. If the defaulting party can show good cause for its failure to comply, then the court can grant an order compelling the defaulting party to comply with its obligation.

11.3 Procedure

The procedures prescribed for interlocutory applications are set forth in rules 50 and 57 to 63. In these procedures, the applicant may be either SARS or the taxpayer, depending on the type of application, and the person opposing, the respondent, is therefore either the taxpayer or SARS respectively.

11.3.1 Notice of motion (NOM) and founding affidavit

All applications provided for in part F[46] must be brought on notice of motion (NOM) supported by a founding affidavit. The founding affidavit must contain all the relevant facts on which the applicant will rely to demonstrate to the court that it has satisfied all the requirements for the relief prayed for in its NOM. (The NOM, founding affidavit and any annexures, supplementary affidavits, confirmatory affidavits or anything else attached thereto, as the case may be, are hereinafter collectively referred to as 'the application'.[47])

In addition to the relief the applicant prays for, the NOM must:

- indicate an address at which the applicant will accept delivery of further correspondence from the respondent;[48]
- specify a date (which may not be less than 10 business days from the date of delivery of the NOM) on or before which the respondent's notice of intention to oppose the application must be delivered;[49] and
- state that, in the absence of such notice of intention to oppose, the applicant will apply for set-down within 15 business days from the date of delivery of the NOM.

Annexure B contains a template (template B14) of a proposed NOM for applications provided for in the rules and discussed in paragraph 11.2, above, in so far as applications by a taxpayer are concerned.

11.3.2 Delivery of and delivery addresses for the application

When the applicant is the taxpayer, the taxpayer must deliver a copy of the application to both SARS and the registrar of the Tax Court.[50]

[*continued from previous page*]

68, SARS applied for default judgment in consequence of the taxpayer's failure to deliver its rule 32 statement timeously. In hearing the taxpayer's application for condonation, the court held that, amongst other things, the taxpayer should not require more time to file its rule 32 statement, since the taxpayer should have formulated the grounds for objection that it relies on in the appeal long before the rule 32 statement fell due. It is submitted that the same conclusion should hold true for SARS. SARS must formulate its grounds for assessment long before its rule 31 statement falls due, and hence should not require more time to file its rule 31 statement.

46 The applications discussed in para. 11.2.

47 See rule 57(1).

48 Rule 58(a).

49 Rule 58(b).

50 Rule 57(3).

The address for delivery to SARS is any of the following addresses:[51]

Physical address

Tax Court Litigation
Khanyisa Building, 1st Floor
271 Bronkhorst Street
Nieuw Muckleneuk
0181

Electronic address

Email: taxcourtlitigation@sars.gov.za
Fax: (+27) 12 422 5012.

The address for delivery to the registrar is any of the following addresses:

Physical address

Registrar of the Tax Court
Khanyisa Building, 1st Floor
271 Bronkhorst Street
Nieuw Muckleneuk
0181

Electronic address

Fax" (+27) 12 422 5012
Email: RegistrarTaxCourt@sars.gov.za.

11.3.3 Timing of delivery of the application

An interlocutory application must be delivered within a period of 20 business days from the date of the action that gave rise to the application, or the delivery of a notice, document, decision or judgment by the other party, the clerk, the registrar, a Tax Board or Tax Court, or a failure by a party to comply with a certain obligation.[52]

EXAMPLE

Example 11.1 – Timing of the application

SARS makes a decision not to grant an extension to the period within which a taxpayer is required to deliver substantiating documents under rule 8. The taxpayer can, in terms of rule 52(2)(d), apply to the Tax Court for an extension. In this case the application must be brought within 20 days from the date of SARS's decision not to grant the extension.

11.3.4 Notice of intention to oppose (NOITO), answering affidavit and replying affidavit

The respondent must deliver to the applicant a notice of intention to oppose the application (NOITO), within 10 business days from the date of delivery of the application,[53] if it intends to oppose the application. If the taxpayer is the respondent, the NOITO must also indicate an address at which the taxpayer will accept delivery of all further documents and court process.[54]

---

51 Rule 50(3), read with rule 2 and GN 295 in *GG* 38666 of 31 March 2015.
52 Rule 57(2).
53 Rule 60(a).
54 Rule 60(b).

The respondent's answering affidavit must be delivered within 15 business days from the date of delivery of the respondent's NOITO.[55]

The applicant must, should it decide to do so, deliver a replying affidavit within 10 business days from the date of delivery of the respondent's answering affidavit.[56] Further affidavits by the respondent and applicant may be allowed by the Tax Court in its discretion.[57]

11.3.5 Set-down

If the respondent does not provide its NOITO within the 10-day period prescribed by the rules, the applicant may apply for set-down within 15 business days from the date of delivery of the application. The matter can then be set down for hearing by the registrar of the Tax Court (usually the Tax Court in the division closest to the area in which the taxpayer resides or carries on business, although the applicant and the registrar may agree otherwise).[58] While rule 41 suggests that deviation from the normal rule that the application must be heard in the Tax Court sitting closest to the place at which the taxpayer resides or carries on business is possible only by agreement between the parties, the judgment in *ITC 1904*[59] suggests that such agreement is not required when the application is unopposed.

If the respondent does not deliver its answering affidavit within the 15-business-day period prescribed, the applicant may apply for set-down within 5 business days from the date on which the respondent's 15-business-day period lapses.[60] In these circumstances, the case must be set down by the registrar in the Tax Court sitting closest to the area in which the taxpayer resides or carries on business unless the applicant and respondent agree otherwise.[61]

If the applicant does not apply for set-down within the periods referred to above, the respondent may apply for set-down within a period of 10 days from the date on which the period within which the applicant should have applied for set-down lapses.[62]

The registrar must then deliver a notice to both the applicant and the respondent, setting out the allocated date, time and place, at least 10 business days before the allocated date.[63]

Neither the TAA nor the rules specifically indicate which party must apply for set-down in instances where the respondent has delivered both its NOITO and its answering affidavit in time. It is submitted that in these circumstances the applicant, provided that it does so within a reasonable time, would most likely be the party who must apply for set-down.[64]

11.3.6 Judgment

The Tax Court may make an order in line with the applications outlined hereinabove, as provided for in the rules, together with any other order it deems fit including an order as to costs.[65]

The registrar must deliver a copy of the judgment to the applicant and respondent within 10 days of the delivery of the judgment.[66]

---

55 Rule 60(c).
56 Rule 61(1).
57 Rule 61(2).
58 Rule 59(2).
59 80 SATC 159 at para. 64.
60 Rule 62(1).
61 Rule 50(2), read with rule 41.
62 Rule 63.
63 Rules 59(3), 62(2) and 63(2).
64 Rule 42.
65 Rule 50(5).
66 Rules 50(6) and 64(2).

11.4 Appeal against decisions on interlocutory applications

In *Wingate-Pearse v Commissioner of the South African Revenue Service*,[67] the court held that a decision by the Tax Court on interlocutory application is not appealable, despite the fact that SARS also made submissions to the effect that in some cases decisions on interlocutory applications should be appealable. The rationale for the court's decision was that the TAA does not allow for an appeal to lie against decisions in interlocutory applications and that judgments on interlocutory applications lack the required finality.

It could be argued that a final order granted under section 129 by the Tax Court consequent upon a default-judgment application does not lack finality. Yet, on the supposition that default-judgment applications are interlocutory under the Tax Court rules, according to the judgment in the *Wingate-Pearse* case, no appeal lies against such final order. It could also be argued, however, that a final order under section 129 is appealable under section 133 and that therefore, whether the final order is granted under section 129 consequent upon an appeal under section 107 or consequent upon a default-judgment application under rule 56, an appeal should lie against a judgment for final relief under rule 56 read with section 129(2).

11.5 Miscellaneous

An application under part F of the rules suspends all other periods in the rules, from the date of delivery of the NOM until the date of withdrawal of an application, or the date on which the parties agree to terminate proceedings, or the date of delivery of the judgment if proceedings are not withdrawn or terminated by agreement.[68]

67 [2016] ZASCA 160.
68 Rule 50(4).

PART III

CHAPTER 12

Tax recovery and tax clearances

The practical context of this chapter

The great majority of tax disputes initiated by taxpayers are aimed at reducing or eliminating a tax liability which arose in consequence of an assessment raised or a decision made by SARS. Until such time as the taxpayer successfully challenges an assessment and has the tax liability reduced via one of the remedies discussed in chapters 6 to 11 hereof, the tax liability is payable.

Failing to settle the amount of tax pending finalisation of the tax dispute could adversely affect the taxpayer's tax status. Not every taxpayer is able to settle disputed tax amounts immediately. This chapter discusses options available to a taxpayer under the Tax Administration Act[1] (TAA) to address tax liability pending finalisation of the dispute with SARS. The remedies discussed in this chapter include:

- *requesting suspension of payment;*
- *launching a High Court application for judicial review under the Promotion of Administrative Justice Act[2] (PAJA), usually in conjunction with an application to interdict SARS from taking collection steps against the taxpayer; and*
- *approaching SARS to make deferred payment arrangements.*

1 Act 28 of 2011. Any reference to a legislative provision is to be construed as a reference to the TAA unless the contrary is expressly indicated or clear from the context.

2 Act 3 of 2000.

PART III

CHAPTER 12

Tax recovery and tax clearances

The practical context of this chapter

The great majority of tax disputes initiated by taxpayers are aimed at reducing or eliminating a tax liability which arose in consequence of an assessment raised or a decision made by SARS. Until such time as the taxpayer successfully challenges an assessment and has the tax liability reduced via one of the remedies discussed in chapters 6 to 11 hereof, the tax liability is payable.

Failing to settle the amount of tax pending finalisation of the tax dispute could adversely affect the taxpayer's tax status. Not every taxpayer is able to settle disputed tax amounts immediately. This chapter discusses options available to a taxpayer under the Tax Administration Act[1] (TAA) to address tax liability pending finalisation of the dispute with SARS. The remedies discussed in this chapter include:

- requesting suspension of payment;
- launching a High Court application for judicial review under the Promotion of Administrative Justice Act[2] (PAJA), usually in conjunction with an application to interdict SARS from taking collection steps against the taxpayer; and
- approaching SARS to make deferred payment arrangements.

1 Act 28 of 2011. Any reference to a legislative provision is to be construed as a reference to the TAA unless the contrary is expressly indicated or clear from the context.
2 Act 3 of 2000.

Contents

List of Examples

Contents

List of Examples

12.1 Introduction

Tax disputes typically involve some form of tax-related liability which the taxpayer for various reasons cannot settle immediately or the settlement of which the taxpayer cannot avoid by simply launching a dispute in respect of the same. Settlement of such a tax liability pending the outcome of the dispute is often the most convenient way to prevent SARS from taking collection steps against the taxpayer and for the taxpayer to secure a tax clearance certificate/pin (assuming, of course, that the tax in dispute is the only reason the taxpayer is unable to obtain a clearance certificate/pin). In many cases, however, paying the amount, even if it only means parting with the money temporarily, is not always a viable option for the taxpayer. This chapter discusses options available to the taxpayer under the TAA when payment of disputed tax before the relevant dispute has been finalised is not possible.

12.2 The pay-now-argue-later rule and suspension of payment

Applicable Law

Section 164 – Payment of tax pending objection or appeal

(1) Unless a senior SARS official otherwise directs in terms of subsection (3)—

(a) the obligation to pay tax; and

(b) the right of SARS to receive and recover tax,

will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.

(2) A taxpayer may request a senior SARS official to suspend the payment of tax or a portion thereof due under an assessment if the taxpayer intends to dispute or disputes the liability to pay that tax under Chapter 9.

(3) A senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to relevant factors, including—

(a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;

(b) the compliance history of the taxpayer with SARS;

(c) whether fraud is prima facie involved in the origin of the dispute;

(d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus if the disputed tax is not paid or recovered; or

(e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the fiscus.

(4) If payment of tax was suspended under subsection (3) and subsequently—

(a) no objection is lodged;

(b) an objection is disallowed and no appeal is lodged; or

(c) an appeal to the tax board or court is unsuccessful and no further appeal is noted,

the suspension is revoked with immediate effect from the date of the expiry of the relevant prescribed time period or any extension of the relevant time period under this Act.

continued

Applicable Law

***Section 164 – Payment of tax pending objection or appeal* (continued)**

(5) A senior SARS official may deny a request in terms of subsection (2) or revoke a decision to suspend payment in terms of subsection (3) with immediate effect if satisfied that—

(a) after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious;

(b) the taxpayer is employing dilatory tactics in conducting the objection or appeal;

(c) on further consideration of the factors referred to in subsection (3), the suspension should not have been given; or

(d) there is a material change in any of the factors referred to in subsection (3), upon which the decision to suspend payment of the amount involved was based.

(6) During the period commencing on the day that—

(a) SARS receives a request for suspension under subsection (2); or

(b) a suspension is revoked under subsection (5),

and ending 10 business days after notice of SARS's decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.

(7) If an assessment or a decision referred to in section 104 (2) is altered in accordance with—

(a) an objection or appeal;

(b) a decision of a court of law pursuant to an appeal under section 133; or

(c) a decision by SARS to concede the appeal to the tax board or the tax court or other court of law,

a due adjustment must be made, amounts paid in excess refunded with interest at the prescribed rate, the interest being calculated from the date that excess was received by SARS to the date the refunded tax is paid, and amounts short-paid are recoverable with interest calculated as provided in section 187 (1).

(8) The provisions of section 191 apply with the necessary changes in respect of an amount refundable and interest payable by SARS under this section.

In terms of section 164(1), the submission of an objection or an appeal[3] does not suspend the immediate liability for payment of the disputed tax. The obligation to pay the tax despite the taxpayer disputing it has become known colloquially as the pay-now-argue-later rule. This rule provides that the taxpayer must pay the disputed tax immediately and that only later, if, and to the extent that, the taxpayer successfully challenges the tax liability, would SARS have to refund the taxpayer.

A notable exception to this rule under the TAA is when the taxpayer takes the initiative of applying to SARS for suspension of the immediate payment of the tax in dispute pending the outcome of an objection or appeal, by submitting a formal 'suspension of payment request',

3 See chaps 7–10.

and SARS grants such request. If the taxpayer does not make a request for suspension of payment, or if the request is refused by SARS, the pay-now-argue-later rule continues to apply unless automatic suspension in terms of section 164(6), as discussed below, can be relied on.[4]

Section 164(3) sets out specific factors that a senior SARS official must consider in deciding whether to grant the taxpayer's request for suspension of payment. The factors listed in section 164(3) are:

'*(a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;*

(b) the compliance history of the taxpayer ...;

(c) whether fraud is prima facie involved in the origin of the dispute;

(d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus *if the disputed tax is not paid or recovered; or*

(e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the fiscus.'

The list of factors above is not exhaustive. SARS may also take into account factors not specifically listed above in making its decision – for example, the prospects of success of the objection or appeal.

The taxpayer may apply for suspension of payment before the relevant objection or appeal is submitted provided that the taxpayer intends to lodge an objection and appeal.

Once a request for suspension of payment has been granted by SARS, payment of the tax in dispute is suspended until such time as the approval is automatically revoked through the operation of section 164 or until SARS revokes its decision to allow the request, whichever is earlier.

Approval of a request for suspension of payment is automatically revoked if:

- the taxpayer does not submit an objection;
- an objection is disallowed and no appeal is lodged by the taxpayer;
- a decision has been made by the Tax Board and there is no referral to the Tax Court; or
- a decision has been made by the Tax Court and no further appeal to the higher courts is noted.

Automatic revocation takes place when the time periods allowed for the taxpayer to take any of the above-mentioned steps and any extended period (where allowed) lapse. The periods and extended periods applicable in each of the circumstances referred to above are discussed in earlier chapters of this work and are not repeated here. The following example, however, illustrates how and when automatic suspension could take place.

4 When an assessment does not comply with the prescripts of s 96, it is submitted that such assessment is unenforceable (see chap. 3). In the absence of a request for suspension of payment, however, it is likely that SARS will nevertheless take collection steps, which can then be challenged through an appropriate remedy such as an appropriate High Court application – see, for example, *Nondabula v Commissioner for SARS* 79 SATC 333.

EXAMPLE

Example 12.1 – Automatic revocation of an approved suspension request

Taxpayer A submits an objection against an assessment and a request for suspension of payment under section 164. The request for suspension is approved by SARS, but the objection is disallowed. The suspension remains in place until 75 business days from the date of SARS's decision not to allow the objection have elapsed, such 75 business days being the maximum number of days within which Taxpayer A may file an appeal.[5] The suspension, however, may be revoked by SARS sooner.

SARS may revoke a decision to grant suspension:

- when the objection or appeal is submitted and it is evident that the objection or appeal is frivolous or vexatious;
- if the taxpayer is only trying to delay payment of the tax with submission of the objection or appeal;
- if, after reconsideration by SARS of factors in section 164(3), it is evident that SARS incorrectly granted the suspension; and
- if there is a material change in the factors on which the decision to grant suspension was based (for example, if the taxpayer becomes non-compliant after the suspension is granted).

Practical issue: Revocation of suspension requests

It is not uncommon in practice to see SARS revoke a decision to grant suspension as soon as the objection is disallowed. Often revocation even coincides with the date of disallowance of the objection. It is submitted that this practice is not always in line with the provisions of section 164 of the TAA, as it is difficult to imagine what reason(s) SARS could have to believe that the circumstances under which it may revoke a suspension request exist.

A decision by SARS not to grant suspension of payment is not subject to objection and appeal, leaving the taxpayer with no further remedies under the TAA (apart from submitting another request for suspension or a request to review under section 9). Provided that all the other requirements are met, the taxpayer may, however, still have recourse to judicial review under PAJA. This would take the form of a High Court application often accompanied by a High Court application to interdict SARS from taking collection steps pending the review application in terms of PAJA.

Section 164(6) provides that the tax relating to a request for suspension is suspended from the date of delivery of the request by the taxpayer for a period of up to 10 business days from the date SARS makes its decision on the granting of suspension, regardless of whether SARS decides in the taxpayer's favour or against it. Because this suspension is granted *ex lege* under section 164, it is commonly referred to as an 'automatic suspension'. For as long as payment of the disputed tax is automatically suspended under section 164(6), SARS may not take any recovery action against the taxpayer in respect of such tax. If SARS were to proceed with recovery steps contrary to section 164(6), its action could constitute sufficient grounds for the taxpayer to launch appropriate proceedings in the High Court.

The only exception to automatic suspension, i.e. when automatic suspension does to apply, is when SARS has reasonable grounds for believing that there is a risk of dissipation of assets.

5 See chap. 10 on the time periods for appeals.

In practice, requests for suspension of payment can be submitted via eFiling, on a form called a Request for Suspension of Payment, DISP01. There are instances where it is not possible to submit the request for suspension via eFiling, typically in cases where the ADR1 or ADR2 form is the prescribed form for the objection or appeal.[6] SARS suggests on its website that in these cases the request for suspension of payment needs to be submitted at a SARS branch.[7] In practice, however, the suspension request is often emailed to the relevant debt collector at SARS where submission of a suspension request cannot be made via eFiling.

When the request for suspension of payment is submitted via eFiling, the taxpayer has the option of uploading supporting documents together with the DISP01 form. If the DISP01 form does not contain sufficient space for a proper application to be made, a detailed request letter and further documents can be uploaded to eFiling in support of the request, as is the current practice. A suggested template (template B15) for a request letter is attached in Annexure B.

It should be noted that the provisions of section 164 cannot be relied on when a taxpayer is challenging an assessment under any remedy other than by objection and appeal. It follows that the taxpayer cannot be granted a suspension by SARS under section 164 if the taxpayer is relying on any of the remedies discussed in chapter 6, above, to challenge an assessment or decision. A provision similar to section 164 is, however, contained in section 215(3) and applies in relation to penalties.

In terms of section 215(3), which is analogous to section 164, the taxpayer's obligation to pay a fixed-amount penalty, a percentage-based penalty or a reportable-arrangement penalty[8] is also suspended automatically from the date on which the taxpayer submits a request for remittance[9] and remains suspended for 21 businesses days after SARS makes a decision to remit or not to remit the penalty. In effect, then, the submission of a request for remission suspends the obligation to pay these penalties until SARS makes its decision and for another 21 business days thereafter.[10] If SARS does not allow the request for remission, the taxpayer can object to SARS's decision and may then request suspension under section 164.

12.3 Deferred payment arrangements and their place in tax disputes

Applicable Law

Section 167 – Instalment payment agreement

(1) A senior SARS official may enter into an agreement with a taxpayer in the prescribed form under which the taxpayer is allowed to pay a tax debt in one sum or in instalments, within the agreed period if satisfied that—

(a) criteria or risks that may be prescribed by the Commissioner by public notice have been duly taken into consideration; and

(b) the agreement facilitates the collection of the debt.

continued

6 See prescribed forms for objection and appeal in chaps 9 and 10 respectively.

7 https://www.sars.gov.za/ClientSegments/Businesses/Government/Pages/Suspension-of-Payment-and-Waiving-of-Penalties-and-Interest.aspx (accessed 4 June 2020).

8 See chap. 6 for a detailed discussion of these penalties.

9 See chap. 6 for a detailed discussion.

10 This automatic suspension does not apply, however, if SARS has reason to believe that there is a risk of dissipation of assets or that fraud is involved in either the origin of the non-compliance or the grounds for remission (s 215(3)(a) and (b)).

Applicable Law

***Section 167 – Instalment payment agreement* (continued)**

(2) The agreement may contain such conditions as SARS deems necessary to secure collection of tax.

(3) Except as provided in subsections (4) and (5), the agreement remains in effect for the term of the agreement.

(4) SARS may terminate an instalment payment agreement if the taxpayer fails to pay an instalment or to otherwise comply with its terms and a payment prior to the termination of the agreement must be regarded as part payment of the tax debt.

(5) A senior SARS official may modify or terminate an instalment payment agreement if satisfied that—

(a) the collection of tax is in jeopardy;

(b) the taxpayer has furnished materially incorrect information in applying for the agreement; or

(c) the financial condition of the taxpayer has materially changed.

(6) A termination or modification—

(a) referred to in subsection (4) or (5) (a) takes effect as at the date stated in the notice of termination or modification sent to the taxpayer; and

(b) referred to in subsection (5) (b) or (c) takes effect 21 business days after notice of the termination or modification is sent to the taxpayer.

Section 168 – Criteria for instalment payment agreement

A senior SARS official may enter into an instalment payment agreement only if—

(a) the taxpayer suffers from a deficiency of assets or liquidity which is reasonably certain to be remedied in the future;

(b) the taxpayer anticipates income or other receipts which can be used to satisfy the tax debt;

(c) prospects of immediate collection activity are poor or uneconomical but are likely to improve in the future;

(d) collection activity would be harsh in the particular case and the deferral or instalment agreement is unlikely to prejudice tax collection; or

(e) the taxpayer provides the security as may be required by the official.

A taxpayer may in terms of section 167 apply to SARS for an instalment payment arrangement, which provides for payment of a tax debt in one sum at a later date as agreed or in instalments over an agreed period of time. Section 168 sets the parameters within which SARS must exercise its discretion to either allow or disallow such an application.

In the context of a tax dispute, taxpayers often resort to requesting instalment payment arrangements when the taxpayer is unable to secure a suspension under section 164[11] or cannot rely on section 164 whilst challenging SARS's assessment (for example, when the taxpayer requests a reduced assessment under section 93(1)(d)[12]).

11 See para. 12.2.
12 See chap. 6.

The question often arises whether a taxpayer who is disputing liability to pay the tax in question concedes, albeit tacitly, to being liable for that tax, or otherwise waives the right to challenge the assessment or decision giving rise to the tax liability, by requesting a payment arrangement. It is submitted that a request for a deferred payment arrangement should not *per se* have this effect. It is nevertheless recommended that the taxpayer seeking to avail itself of this relief mechanism for payment of tax being disputed make it explicitly clear that the taxpayer is disputing and will continue to dispute the tax liability despite the request for an arrangement.

According to SARS's website,[13] a request for payment arrangements needs to be sent electronically to the following addresses:

- Debt1@sars.gov.za, for the Alberton branch (including Nigel, Germiston, Brakpan, Boksburg, Benoni, Vereeniging and Springs);
- Debt2@sars.gov.za, for Pretoria, Limpopo and North West;
- Debt3@sars.gov.za, for KwaZulu-Natal and the Eastern Cape;
- Debt4@sars.gov.za, for the Western Cape, Northern Cape, and Free State; and
- Debt5@sars.gov.za, for Megawatt Park (including Johannesburg, Roodepoort, Randfontein and Krugersdorp).

12.4 Tax compromises and their place in tax disputes

Applicable Law

Section 200 – Compromise of tax debt

A senior SARS official may authorise the 'compromise' of a portion of a tax debt upon request by a 'debtor', which complies with the requirements of section 201, if—

(a) the purpose of the 'compromise' is to secure the highest net return from the recovery of the tax debt; and

(b) the 'compromise' is consistent with considerations of good management of the tax system and administrative efficiency.

SARS may compromise a tax debt under section 200. This effectively means that the taxpayer and SARS agree that the taxpayer will pay less than the full amount of the tax debt in question in full and final settlement of the entire tax debt. In other words, the portion of the debt not paid is permanently written off. It is submitted that a taxpayer who intends to dispute an assessment that gives rise to a tax debt, or who disputes an assessment giving rise to such debt, in the process of making a compromise application runs the risk of compromising its right to pursue a challenge against the relevant assessment. Certainly, once a compromise agreement has been concluded, the taxpayer is not able to dispute the assessment that gave rise to the liability in the first place.

13 https://www.sars.gov.za/ClientSegments/Individuals/How-Pay/Pages/Owing-SARS-Money.aspx (accessed 4 June 2020).

12.5 Tax clearance certificates

Applicable Law

Section 256 – Tax compliance status

(1) A taxpayer may apply, in the prescribed form and manner, to SARS for third party access to the taxpayer's tax compliance status.

(2) SARS must provide or decline to provide third party access to the taxpayer's tax compliance status within 21 business days from the date the application is submitted or such longer period as may reasonably be required to confirm the correctness of the taxpayer's tax compliance status.

(3) The taxpayer's tax compliance status may only be indicated as compliant if the taxpayer—

(a) is registered for tax as required in terms of a tax Act;

(b) does not have any outstanding tax debt, excluding a tax debt—

(i) contemplated in section 167 or 204; or

(ii) that has been suspended under section 164; or

(iii) that may not be recovered for the period specified in section 164 (6); or

(iv) that does not exceed the amount referred to in section 169 (4) or any higher amount that the Commissioner may determine by public notice; and

(c) does not have any outstanding return, unless an arrangement with SARS has been made for the submission of the return.

(4) An indication of the tax compliance status of a taxpayer must include at least—

(a) the date of the tax compliance status of the taxpayer;

(b) the name and taxpayer reference number of the taxpayer; and

(c) the taxpayer's tax compliance status as at the date referred to in paragraph (a).

(5) Despite the provisions of Chapter 6, SARS may indicate the taxpayer's tax compliance status as at a current date, or a previous date as prescribed by the Minister in a regulation under section 257 (2A), to—

(a) an organ of state; or

(b) a person to whom the taxpayer has provided third party access to the taxpayer's tax compliance status.

(6) SARS may revoke third party access to the taxpayer's tax compliance status if the access—

(a) was issued in error; or

(b) was provided on the basis of fraud, misrepresentation or nondisclosure

of material facts, and SARS has given the taxpayer prior notice and an opportunity to respond to the allegations of at least 10 business days prior to the revocation.

(7) A taxpayer's tax compliance status will be indicated as noncompliant by SARS for the period commencing on the date that the taxpayer no longer complies with a requirement under subsection (3), or such later date as the Commissioner may prescribe, and ending on the date that the taxpayer remedies the noncompliance.

The assessment or, in some cases, decision by SARS results in an outstanding liability. Such outstanding liability will adversely affect the taxpayer's clearance status at SARS unless, of course, the tax in question is paid pending the outcome of the dispute.

When payment of outstanding tax pending finalisation of a tax dispute is not an option for the taxpayer, the taxpayer has the following options at its disposal to secure tax clearance despite the outstanding amount of tax:

- applying for suspension of payment under section 164;[14] or
- requesting an instalment payment arrangement under section 167.[15]

If SARS approves the request for suspension or agrees to a payment arrangement, it may not indicate the taxpayer as non-compliant in respect of the outstanding tax that has been suspended or in respect of which the taxpayer has agreed to payment terms if the taxpayer complies with such payment terms, as the case may be.

It should also be noted that SARS may not refuse to indicate the taxpayer as fully compliant if the automatic suspension is in place under section 164(6) (assuming, of course, that the taxpayer has no other outstanding tax debts or returns).[16]

EXAMPLE

Example 12.2 – Automatic suspension and tax clearance status

Taxpayer B has been assessed to income tax of R1 million. Taxpayer B submits an objection to the assessment and, at the same time, a request for suspension of payment of the R1 million pending the outcome of the objection. Whilst Taxpayer B has an outstanding tax debt on the date of submission of the request for suspension of payment, such debt is suspended under section 164(6) and SARS must therefore indicate the taxpayer as compliant on the date of submission of the request. If SARS declines the request for suspension, it must still reflect Taxpayer B as compliant for a period of 10 business days from the date of the decision to decline the request.

14 See para. 12.2.
15 See para. 12.3.
16 S 256(3)(b)(iii).

The assessment or, in some cases, decision by SARS results in an outstanding liability. Such outstanding liability will adversely affect the taxpayer's clearance status at SARS unless, of course, the tax in question is paid pending the outcome of the dispute.

When payment of outstanding tax pending finalisation of a tax dispute is not an option for the taxpayer, the taxpayer has the following options at its disposal to secure tax clearance despite the outstanding amount of tax:

- applying for suspension of payment under section 164;[14] or
- requesting an instalment payment arrangement under section 167.[15]

If SARS approves the request for suspension or agrees to a payment arrangement, it may not indicate the taxpayer as non-compliant in respect of the outstanding tax that has been suspended or in respect of which the taxpayer has agreed to payment terms if the taxpayer complies with such payment terms, as the case may be.

It should also be noted that SARS may not refuse to indicate the taxpayer as fully compliant if the automatic suspension is in place under section 164(6) (assuming, of course, that the taxpayer has no other outstanding tax debts or returns).[16]

Example 12.2 – Automatic suspension and tax clearance status

Taxpayer B has been assessed to income tax of R1 million. Taxpayer B submits an objection to the assessment and, at the same time, a request for suspension of payment of the R1 million pending the outcome of the objection. Whilst Taxpayer B has an outstanding tax debt on the date of submission of the request for suspension of payment, such debt is suspended under section 164(6) and SARS must therefore indicate the taxpayer as compliant on the date of submission of the request. If SARS declines the request for suspension, it must still reflect Taxpayer B as compliant for a period of 10 business days from the date of the decision to decline the request.

14 See para. 12.2.
15 See para. 12.2.
16 S 256(3)(b)(iii).

Annexures

ANNEXURE A

DECISIONS SUBJECT TO OBJECTION AND APPEAL UNDER TAX ACTS

Transfer Duty Act, 1949	Section 20B(1) and (3)	Decision to apply GAAR: Transactions, operations, schemes or understanding for the obtaining of undue tax benefits. CSARS shall determine the liability for duty as if the transaction, operation, scheme or understanding had not been entered into or carried out, or in such manner as in the circumstances of the case the CSARS deems appropriate for the prevention or diminution of the tax benefit. Any decision of the CSARS under section 20B(1) shall be subject to objection and appeal.
Income Tax Act, 1962	*Sections listed in section 3(4)*:	
	Section 1	Decision relating to definition of 'benefit fund'; "pension fund"; "pension preservation fund"; "provident fund"; "provident preservation fund"; "retirement annuity fund"; and "spouse".
	Section 8(5)(*b*)	Amount deemed by CSARS to have been applied in reduction or towards settlement of the purchase price of a property.
	Section 8(5)(*b*A)	Decision by CSARS that former lessee is deemed to have acquired property for no consideration where the former lessee may use, enjoy or deal with the property as the former lessee deems fit without the payment of consideration; or in the case of a lease without the payment of any rental or other consideration or subject to the payment of any consideration which is nominal in relation to the fair market value of the property.
	Section 10(1)(*c*A)	Decision by CSARS to withdraw the approval of an institution, board, body or company that failed to comply with the requirements set out in this section.
	Section 10(1)(*e*)(i)(*cc*)	Decision by CSARS not to approve an association of persons in terms of this section.
	Section 10(1)(*j*)	Decision by CSARS that a Bank is not resident in the Republic and entrusted by the Government of a territory outside the Republic with the custody of the principal foreign exchange reserves of that territory.
	Section 10(1)(*n*B)	Exempt income: Benefit or advantage accruing to any employee. Decision by CSARS to allow costs incurred by an employee (where the expense is born by the employer) in respect of the sale of his previous residence and in settling in permanent residential accommodation at his new place of residence in consequence of the transfer of the employee from one place of employment to another place of employment or the appointment of the employee as an employee of the employer or the termination of the employee's employment, as exempt income.
	Section 10A(8)	Calculation or recalculation by the CSARS of the capital element of annuity amounts received or accrued to a taxpayer.

continued

Income Tax Act, 1962	Section 11(*e*)	Determination by CSARS as the reasonable and just amount by which the value of any machinery, plant, implements, utensils and articles as owned by the taxpayer and used by the taxpayer for the purpose of his or her trade has been diminished by reason of wear and tear or depreciation during the year of assessment.
	Paragraph (*bb*) of proviso. Determination by CSARS of the probable duration of use or occupation by a to section 11(*f*)	Determination by CSARS of the probable duration of use or occupation by a taxpayer where the taxpayer or the person by whom the right of use or occupation was granted holds a right or option to extend or renew the period of such use or occupation.
	Paragraph (*cc*) of proviso Determination by CSARS of the allowable portion of the amount of the to section 11(*f*)	Determination by CSARS of the allowable portion of the amount of the premium or consideration having regard to the period during which the taxpayer will enjoy the right to use the film, sound recording, advertising matter, patent, design, trade mark, copyright or other property and any other circumstances which in the opinion of the CSARS are relevant.
	Section 11(*g*)	Determination by CSARS of the fair and reasonable value of improvements made by taxpayer.
	Section 11(*g*A)	Determination by CSARS of the probable duration of use of an invention, patent, design, trade mark, copyright, or property or knowledge
	Section 11(*j*)	Determination of a doubtful debt allowance by the CSARS
	Section 11(*l*)(i)	Sum contributed by employer for benefit of employees to any pension fund, provident fund or benefit fund: Determination by CSARS that lump sum contributions shall be deducted in a series of annual instalments and in specific proportions.
	Section 11(*l*)(i)	Determination by CSARS of reasonable amount to be deducted where CSARS is satisfied that aggregate of contributions and the total remuneration accrued to such employee in respect of his employment by the employer is excessive or unjustifiable in relation to the value of the services rendered by that employee to the employer.
	Section 11(*l*)(iii)	Determination by CSARS of fair and reasonable remuneration in relation to the value of the services rendered by an employee to an employer.
	Section 12B(6)	Determination by CSARS of allowable amount in respect of the expired portion of a lease or any portion of the interest or right which has not been disposed of by a lessor.
	Section 12C(1)(*a*),(*b*) and par (*c*) to the proviso	Determination by CSARS whether a process carried on by the taxpayer is similar to a process of manufacture.
	Section 12E(1)	Determination by CSARS whether a process carried on by the taxpayer is similar to a process of manufacture.
	Section 12J(6)	Decision by CSARS to withdraw the approval granted to a venture capital company where that company during the year of assessment failed to comply with the requirements listed in section 12J(5).
	Section 12J(6A)	Decision by CSARS to withdraw the approval granted to a venture capital company does not comply with the requirements of section 12J(6A).
	Section 12J(7)	Decision by CSARS to approve a company as a venture capital company, if the approval was withdrawn and the non-compliance which resulted in the withdrawal has been rectified to the satisfaction of the CSARS.

continued

Income Tax Act, 1962	Section 13(1)(*b*), (*d*), (*d*A), (*f*)	Determination by CSARS whether a process carried on by the taxpayer is similar to a process of manufacture.
	Section 15(*b*)	Determination by CSARS that any expenditure incurred by the taxpayer on prospecting operations (or other incidental expenditure) shall be deducted in a series of annual instalments and in specific proportions.
	Section 22(1)(*a*)	Determination by CSARS of the just and reasonable amount by which the value of trading stock has been diminished by reasons of damage, deterioration, change of fashion, decrease in the market value or for any other reason satisfactory to the CSARS.
	Section 22(3)(*b*)	The further costs which in terms of paragraph (*a*)(i) are required to be included in the cost price of any trading stock shall be such costs as in terms of any generally accepted accounting practice approved by the CSARS should be included in the valuation of such trading stock.
	Section 23H(2)	Decision by the CSARS that the apportionment of expenditure in accordance with section 23H(1) be made in such other manner as to him appears fair and reasonable, if satisfied that the apportionment of the expenditure does not reasonably represent a fair apportionment of such expenditure in respect of the goods, services or benefits to which it relates.
	Section 23K	The CSARS may on application by an acquiring company, issue a directive that section 23K(2) does not apply in respect of an amount of interest incurred as contemplated in that subsection provided certain requirements are met.
	Section 24(2)	Credit agreements and debtors allowance: If at least 25 per cent of the amount payable under an agreement in terms of this section only becomes due and payable on or after the expiry of a period of not less than 12 months after the date of the agreement, the CSARS may make such further allowance as under the special circumstances of the trade of the taxpayer seems to him reasonable, in respect of all amounts which are deemed to have accrued under such agreements but which have not been received at the close of the taxpayer's accounting period.
	Section 24A(6)	A company which not yet been recognised under the provisions of this Act as a public company, may at the request of the taxpayer, be deemed to be a public company, if the CSARS is satisfied that such company will be so recognised.
	Section 24C(1) and (2)	If the income of a taxpayer includes or consists of an amount received by or accrued to him in terms of any contract and the CSARS is satisfied that such amount will be utilised in whole or in part to finance future expenditure which will be incurred by the taxpayer in the performance of his obligations under such contract, taxpayer may deduct an allowance as the CSARS may determine, in respect of so much of such future expenditure as in the opinion of the CSARS relates to the said amount.
	Section 24D(1)	Taxpayer may deduct expenditure actually incurred by the taxpayer, as the CSARS is satisfied was so incurred, directly in the performance of any act ordered, performed or executed under the provisions of the National Key Points Act, 1980, or any National Key Point or Key Point as defined in section 1 of that Act.

continued

Income Tax Act, 1962	Section 24I(1)	The CSARS may prescribe an alternative rate to any of the prescribed rates listed in the definition of "ruling exchange rate" to be applied by a person in such particular circumstances, if such alternative rate is used for accounting purposes in terms of generally accepted accounting practice.
	Section 24I(7)	Gains or losses on foreign exchange transactions: Decision by CSARS that exchange difference or premium or other consideration shall not longer be carried forward to subsequent years of assessment.
	Section 24J(9)	Any company whose business comprises the dealing in instruments, interest rate agreements or option contracts may elect that certain provisions of section 24J, section 24K and section 24L shall not apply. This election shall not take effect unless the CSARS has approved the methodology to be applied by the company to determine the market value in respect of such instruments, interest rate agreements or option contracts and the manner in which such market value is to be taken into account in the determination of the taxable income of the company.
	Section 25A	Where a taxpayer who is married in community of property has lived apart from his spouse in circumstances which, in the opinion of the CSARS, indicate that the separation is likely to be permanent, his taxable income shall be determined at such amount as the CSARS, having regard to the circumstances of the case, determines to be the amount at which such taxpayer's taxable income would have been determined if such taxpayer had not been married in community of property.
	Section 27(2)(*g*)	Determination by CSARS of an allowance in respect of losses suffered by an agricultural co-operative in consequence of physical damage to or deterioration of pastoral, agricultural and other farm products held by such agricultural co-operative on behalf of any control board established under the provisions of the Marketing Act, 1968.
	Section 28(9)	Any deduction contemplated in section 28(7) shall be subject to such adjustments as may be made by the CSARS.
	Section 30(3)(*c*) & (*f*)	The CSARS shall approve a public benefit organisation if satisfied that it was not knowingly a party to, or does not knowingly permit, or has not knowingly permitted, itself to be used as part of any transaction, operation or scheme of which the sole or main purpose is or was the reduction, postponement or avoidance of liability for any tax, duty or levy.
	Section 30(3)(*f*)	The CSARS shall approve a public benefit organisation if satisfied that, in the case of any public benefit organisation which provides funds to any association of persons contemplated in paragraph 10 (iii) of Part 1 of the Ninth Schedule, has taken reasonable steps to ensure that the funds are utilised for the purpose for which it has been provided.
	Section 30(3B)	Where an organisation applies for approval, the CSARS may approve that organisation with retrospective effect, to the extent that the CSARS is satisfied that that organisation during the period prior to its application complied with the requirements of a "public benefit organisation" as defined in section 30(1).

continued

Income Tax Act, 1962	Section 30(8)	The provisions of section 30 shall not, if the CSARS is satisfied that the non- compliance giving rise to the withdrawal contemplated in section 30(5) has been rectified, preclude any organisation from applying for approval in the year of assessment following the year of assessment during which the approval was so withdrawn by the CSARS.
	Section 30A(2)(*c*)	The CSARS must approve a recreational club for the purposes of section 10(1)(*c*O), if the CSARS is satisfied that the club is or was not knowingly a party to, or does not knowingly permit, or has not knowingly permitted, itself to be used as part of any transaction, operation or scheme of which the sole or main purpose is or was the reduction, postponement or avoidance of liability for any tax, duty or levy.
	Section 30A(4)	Where a club applies for approval, the CSARS may approve that club with retrospective effect, to the extent that the CSARS is satisfied that that club during the period prior to its application complied with the requirements of a "recreational club" as defined in section 30A(1).
	Section 30A(5)	Notification by the CSARS of the intention to withdraw the approval of the recreational club if no corrective steps are taken within a period stated in that notice, where the CSARS is satisfied that the recreational club in any material respect or on a continuous or repetitive basis, failed to comply with the provisions of section 30A, or the constitution or other written instrument under which it was established.
	Section 30B(5)	Notification by the CSARS of the intention to withdraw the approval of the entity if corrective steps are not taken within the period stated in the notice, where the CSARS is satisfied that an entity has in any material respect or on a continuous or repetitive basis, failed to comply with this section, or the constitution or written instrument under which it was established,
	Section 31	Determination of tax payable in respect of international transactions to be based on arm's length principle.
	Section 37A(3)	Closure of rehabilitation companies and trusts: Company or trust must be wound-up or liquidated and its assets remaining after the satisfaction of its liabilities must be transferred to an account or trust prescribed by the Cabinet member responsible for mineral resources as approved of by the CSARS if the CSARS is satisfied that such company or trust satisfies the objects of section 37(1)(*a*).
	Section 37A(8)(*a*)	Decision by the CSARS to include an amount equal to twice the market value of all of the property held in the company or trust on the date of the contravention as taxable income if satisfied that the company or trust contravened any provision of this section.
	Section 37A(8)(*b*)	Decision by the CSARS to include the amount contemplated in section 37A(8)(*a*) in the income of the person contemplated in section 37A(1)(*d*) if satisfied that the company or trust contravened any provision of section 37.
	Section 38(2)(*a*)	Decision by CSARS to recognise a company, all classes of whose equity shares are publicly quoted on the specified date by a stock exchange in the list issued under its authority, as a public company if satisfied that the requirements of section 38(2)(*a*) are met.

continued

Income Tax Act, 1962	Section 38(2)(*b*)	Decision by the CSARS to recognise any other company, not being a private company as defined in section 1 of the Companies Act, 2008 (Act No. 71 of 2008), nor a close corporation, as a public company if satisfied that the requirements of section 38(2)(*b*) are met.
	Section 38(4)(*a*)	The general public in relation to any company shall be deemed not to include any relative of any director of the company, unless it is shown to the satisfaction of the CSARS that such relative, if he is not the spouse or minor child of such director, has at all times which the CSARS considers relevant exercised his rights as a shareholder in the company or in any other company through which such relative is interested in the shares of the company, independently of such director.
	Section 38(4)(*b*)	The general public in relation to any company shall be deemed to include any benefit fund, pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund or any trust or institution which in the opinion of the CSARS is of a public character.
	Section 38(4)(*c*)	A person shall be deemed to be interested in only the portion of shares as the CSARS is satisfied such person would be entitled to receive if every company through which that person is interested in those shares were to be wound up or liquidated and the assets of each such company were, without regard to its liabilities, to be distributed among its shareholders.
	Section 38(4)(*d*)	Where persons are jointly interested, whether directly or indirectly, but otherwise than through a direct or indirect interest in the equity shares of a public company, in the shares of any company, each such person shall be deemed to be interested in only such proportion of those shares as the CSARS is satisfied he would be entitled to receive if the joint interest of all such persons in such shares were to be divided between such persons.
	Section 44(13)(*a*)	The provisions of section 44 do not apply where an amalgamated company has not, within a period of 36 months after the date of the amalgamation transaction, or such further period as the CSARS may allow, taken the steps contemplated in section 41(4) to liquidate, wind up or deregister.
	Section 47(6)(*c*)(i)	The provisions of section 47 do not apply where the liquidating company has not, within a period of 36 months after the date of the liquidation distribution, or such further period as the CSARS may allow, taken the steps contemplated in section 41(4) to liquidate, wind up orderegister.
	Section 57	Disposals by companies under donations at the instance of any person: If any property is disposed of by any company at the instance of any person and that disposal would have been treated as a donation had that disposal been made by that person, that property must be deemed to be disposed of under a donation by that person.
	Section 62(1)(*c*)(iii)	Determination of the value of any property in the case of a right of ownership in any movable or immovable property subject to usufructuary or other like interest in favour of any person.
	Section 62(1)(*d*)	Determination of the value of property for purposes of donations tax.

continued

Income Tax Act, 1962	Section 62(2)(*a*)	Determination of the annual value of the right of enjoyment of a property for purposes of donations tax.
	Section 62(4)	If the CSARS is of the opinion that the amount shown in any return as the fair market value of any property is less than the fair market value of that property, he or she may fix the fair market value of that property.
	Section 80B	Determination by the CSARS of the tax consequences of any impermissible avoidance arrangement for any party to that arrangement. The CSARS must make compensating adjustments that the CSARS is satisfied are necessary and appropriate to ensure the consistent treatment of all parties to the impermissible avoidance arrangement.
	Section 103(2)	Transactions, operations or schemes for purposes of avoiding or postponing liability for or reducing amounts of taxes on income.
	Paragraph 6(3) of the First Schedule	Any farmer who classifies any kind of his livestock on a basis other than that applied by a regulation referred to in paragraph 6, may adopt in respect of any class into which he so classifies that livestock such a standard value as may be approved by the CSARS with due regard to the values fixed by regulation.
	Paragraph 7 of the First Schedule	The exercise of an option under paragraph 6 shall be binding upon the farmer in respect of all subsequent returns for income tax purposes, and no standard value fixed by any farmer may be varied by him in respect of any subsequent year of assessment, save with the consent and approval of the CSARS and upon such terms as the CSARS may require.
	Paragraph 9 of the First Schedule	The value to be placed upon produce included in any return shall be such fair and reasonable value as the CSARS may fix.
	Paragraph 13(1)(*a*) and (*b*) of the First Schedule	Decision by CSARS that the cost of the livestock be allowed, at the option of such farmer, as a deduction in the determination of the farmer's taxable income for the year of assessment during which the livestock was so sold, provided certain conditions as set out in the section is met.
	Paragraph 14(2)(*b*) of the First Schedule	Determination by the CSARS of the consideration payable for any plantation disposed of by a farmer in the absence of an agreed amount between the parties to the transaction.
	Paragraph 19 of the First Schedule	Determination by the CSARS of a taxpayer's annual average taxable income from farming.
	Paragraph 20(1) of the First Schedule	Determination of the normal tax chargeable in respect of the taxable income of a taxpayer (other than a company) who derives income from farming operations, made an election as provided in paragraph 20(6) and further proved to the CSARS that certain conditions in this paragraph had been met.
	Paragraph 20(1A) of the First Schedule	Where it is shown by the taxpayer to the satisfaction of the CSARS that the land referred to in paragraph 20(1) was acquired within the period of twelve months after the owner accepted an offer to purchase the land, it shall be deemed for purposes of that paragraph that such land was acquired on the date on which the offer was accepted.
	Paragraph 20(2) of the First Schedule	Determination of the taxpayer's abnormal farming receipts or accruals for the purposes of paragraph 20(1)(*c*).

continued

Income Tax Act, 1962	Paragraph 20(3)(*f*) of the First Schedule	Determination of livestock profits or loss or average livestock profits by the CSARS where the disposals of livestock took place otherwise than in the ordinary course of farming or because of any unusual circumstances.
	Paragraph 4(3) of the Second Schedule	If a person who is a member of a provident fund retires from such fund before he or she reaches the age of 55 years on grounds other than ill-health, any lump sum benefits received by or accrued to such person in consequence of or following upon such retirement shall, unless the CSARS having regard to the circumstances of the case otherwise directs, be assessed to tax not in accordance with the provisions of paragraph 5 but in accordance with the provisions of paragraph 6 of the Schedule.
	Paragraph 14(6) of the Fourth Schedule	Decision by CSARS to impose a penalty where an employer fails to render to the CSARS a return referred to in paragraph 14(3) within the period prescribed in that paragraph.
	Paragraph 18(1)(*d*) of the Fourth Schedule	Exemption from payment of provisional tax of any natural person 65 years or older, provided the CSARS is satisfied that the conditions in paragraph 18(1)(*d*) is met.
	Paragraph 20(1)(*a*) of the Fourth Schedule	Determination of the penalty to be imposed by the CSARS in addition to the normal tax chargeable in respect of the taxpayer's taxable income in the event of taxable income being underestimated.
	Paragraph 20(2) of the Fourth Schedule	Decision by CSARS to remit the penalty if satisfied that the amount of any estimate was seriously calculated with due regard to the factors having a bearing thereon and was not deliberately or negligently understated.
	Paragraph 20A(1) of the Fourth Schedule	Determination of the penalty to be imposed by the CSARS in addition to the normal tax chargeable in respect of the taxpayer's taxable income in the event of failure to submit an estimate of taxable income timeously.
	Paragraph 20A(2) of the Fourth Schedule	Decision by CSARS to remit the penalty if satisfied that the provisional taxpayer's failure to submit an estimate timeously was not due to intent to evade or postpone the payment of provisional tax or normal tax.
	Paragraph 21(2) of the Fourth Schedule	The period referred to in paragraph 21(1)(*a*) shall be reckoned from such date as the CSARS upon application of the taxpayer and having regard to the circumstances of the case may approve.
	Paragraph 24 of the Fourth Schedule	Decision by CSARS to absolve any provisional taxpayer from making payment of provisional tax if satisfied that the taxable income which may be derived by the taxpayer cannot be estimated on the facts available at the time when payment of the amount in question has to be made.
	Paragraph 27(1) of the Fourth Schedule	Determination of the penalty to be imposed by the CSARS on the late payment of provisional tax.
	Paragraph 10(3) of the Sixth Schedule	Decision by CSARS that a person remains a registered micro business where the CSARS is satisfied that the increase in the qualifying turnover to an amount greater than the amount described in paragraph 2 is of a nominal and temporary nature.
	Paragraph 11(2) of the Sixth Schedule	The estimate described in paragraph 11(1)(*a*) may not be less than the taxable turnover of the previous year of assessment unless the CSARS, having regard to the circumstances, agrees to accept the lower estimate.

continued

Income Tax Act, 1962	Paragraph 11(7) of the Sixth Schedule	Where the CSARS is satisfied that the estimate described in paragraph 11(4)(*a*) was not deliberately or negligently understated and was seriously made based on the information available, or is partly so satisfied, the CSARS must waive the penalty charged in terms of paragraph 11(6) in full or in part.
	Paragraph 13 of the Sixth Schedule	Re-determination by the CSARS of the cash equivalent of the value of a tax benefit, if no determination is made, or if such determination appears to be incorrect.
	Paragraph 2(*h*) of the Seventh Schedule	Determination of the value to be placed on the private or domestic use of an asset by an employee where the asset consists of any equipment or machine which the employer concerned allows his employees in general to use from time to time for short periods.
	Paragraph 3(2) of the Seventh Schedule	Determination of the value to be placed on the private use of a motor vehicle where more than one motor vehicle is made available by an employer to a particular employee at the same time and the CSARS is satisfied that each such vehicle was used by the employee primarily for business purposes.
	Paragraph 6(4)(*b*) of the Seventh Schedule	Decision by CSARS to reduce the value placed on the private use of a vehicle where it is proved to the satisfaction of the CSARS that accurate records of distances travelled for business purposes are kept.
	Paragraph 7(6) of the Seventh Schedule	Decision by CSARS to reduce the value placed on the private use of a vehicle where it is proved to the satisfaction of the CSARS that accurate records of distances travelled for private purposes are kept and the employee bears the costs as set out in paragraph 7(8) in relation to such vehicle.
	Paragraph 7(7) of the Seventh Schedule	Consent by the CSARS that a different method of calculation of the cash equivalent or portions thereof may be employed where the CSARS is satisfied that such method achieves substantially the same result as the methods provided in paragraphs 11(1) and (2).
	Paragraph 7(8) of the Seventh Schedule	Decision by CSARS that the apportionment be made in such other manner as appears fair and reasonable, where the CSARS is satisfied that the apportionment of the contribution or payment amongst all employees in accordance with paragraph 12A(2) does not reasonably represent a fair apportionment of that contribution or payment amongst the employees.
	Paragraph 11 of the Seventh Schedule	Paragraph 12A(6)(*e*) will not apply if the company has not, within 36 months of the date on which the debt is reduced or such further period as the CSARS may allow, taken the steps contemplated in section 41(4) to liquidate, wind up, deregister or finally terminate its existence.
	Paragraph 12A(3) of the Seventh Schedule	Circumstances where the CSARS must, after consultation with the recognised exchange and the Financial Services Board determine the market value of a financial instrument.
	Paragraph (*bb*)(A) of proviso to paragraph 12A(6)(*e*) of the Eighth Schedule	Decision by CSARS to adjust the value of an asset if not satisfied with any value at which an asset has been valued.
	Paragraph 29(2A) of the Eighth Schedule	Determination by the CSARS of the annual value of the right of enjoyment of any asset which is subject to any fiduciary, usufructuary or other like interest.

continued

Income Tax Act, 1962	Paragraph 29(7) of the Eighth Schedule	Decision by the CSARS to extend the period within which the contract must be concluded or asset brought into use.
	Paragraph 31(2)(*a*) of the Eighth Schedule	Decision by the CSARS to extend the period by which the contracts must be concluded or assets brought into use.
	Paragraph 65(1)(*d*) of the Eighth Schedule	Re-determination by the CSARS of the cash equivalent of the value of a tax benefit, if no determination is made, or if such determination appears to be incorrect.
	Paragraph 66(1)(*e*) of the Eighth Schedule	Determination of the value to be placed on the private or domestic use of an asset by an employee where the asset consists of any equipment or machine which the employer concerned allows his employees in general to use from time to time for short periods.
	Sections listed in section 32:	
Value-Added Tax Act, 1991	Section 23(7)	Decision by the CSARS notifying that person of the CSARS's refusal to register that person in terms of this Act.
	Section 24(6) or (7)	Decision by the CSARS notifying a person of the CSARS's decision to cancel any registration of that person in terms of this Act or of the CSARS's refusal to cancel such registration.
	Section 17(1)	Decision by the CSARS refusing to approve a method for determining the ratio contemplated in section 17(1).
	Section 50A(3) and (4)	Decision made by the CSARS and served on that person in terms of section 50A(3) or (4) of the Act.
Securities Transfer Tax Act, 2007	Section 9(3)	Decision by the CSARS that any transaction, operation or scheme or understanding was a scheme to obtain an undue tax benefit. The decision is subject to objection and appeal in accordance with Chapter 9 of the Tax Administration Act, 2011.
Mineral and Petroleum Resources Royalty Act, 2008	Section 12(2)	Decision by the CSARS that the disposal, transfer, operation, scheme or understanding would result in the avoidance or postponement of liability for the royalty, or in the reduction of the amount thereof. The decision is subject to objection and appeal in accordance with Chapter 9 of the Tax Administration Act, 2011.
Tax Administration Act, 2011	Section 104(2)(*a*)	Decision by the SARS under section 104(4) not to extend the period for lodging an objection.
	Section 104(2)(*b*)	Decision by the SARS under section 107(2) not to extend the period for lodging an appeal.
	Section 190(6)	Decision by the SARS not to authorise a refund under this section.
	Section 220	Decision by SARS not to remit a 'penalty' imposed under Chapter 15 in whole or in part.
	Section 224	Decision by SARS to impose an understatement penalty under section 222 or a decision by SARS not to remit an understatement penalty under section 223(3).
	Section 231(2)	Decision by a senior SARS official to withdraw voluntary disclosure relief.

ANNEXURE B

TEMPLATE B1

[INSERT DATE]

South African Revenue Service ("SARS")

Via [DELIVERY METHOD]: [INSERT THE RELEVANT ADDRESS AS PER CHAPTER 8]

Via email: [IF THE DETAILS OF THE SARS OFFICIAL/(S) RESPONSIBLE FOR RAISING THE ASSESSMENT/MAKING THE DECSION IS KNOWN, INCLUDE THE EMAIL ADDRESSES HERE][1]

RE: REQUEST FOR REASONS IN TERMS OF RULE 6 OF THE RULES PROMULGATED UNDER SECTION 103 OF THE OF THE TAX ADMINISTRATION ACT 28 OF 2011 ("the TAA")

TAXPAYER: [INSERT TAXPAYER NAME] ("the taxpayer")

TAX REF: [INSERT TAX REFERENCE NUMBER]

TAX TYPE: [SPECIFY TAX TYPE]

TAX PERIODS: [SPECIFY YEAR/(S) OR PERIOD/(S) IN RESPECT OF WHICH REASONS ARE SOUGHT] ("the tax period/(s)")

1. REQUEST FOR REASONS

1.1. We refer to the assessment/(s) raised on the taxpayer with an issue date/issue dates of [INSERT ISSUE DATE/(S)] ("the assessment") (find a copy attached hereto as annexure A)[2]/We refer to the decision made by SARS as per letter addressed to the taxpayer dated [INSERT DATE OF CORRESPONDENCE] ("the decision") (find a copy attached hereto as annexure A);

1.2. Being duly authorised thereto by power of attorney[3] executed in my favour (see Annexure B), I herewith, on behalf of the taxpayer and in terms of rule 6 of the rules promulgated under section 103 of the TAA ("the rules''), request reasons for the assessment/decision.

Should you require any further information, please do not hesitate to contact: [INSERT CONTACT DETAILS].[4]

Yours faithfully,

[SIGNED]

[INSERT NAME][5]

---

1 This is not required under either the rules or the TAA. It does however appear to assist in ensuring SARS complies with the time periods under the rules.

2 Attaching a copy of the assessment is not required under the rules or the TAA. However, it is aimed at making it more convenient for SARS to process the request.

3 The power of attorney is only required if the person submitting the request is not the taxpayer himself/herself (where the taxpayer is a natural person) or the representative taxpayer (if the taxpayer is not a natural person). The power of attorney required by SARS in practice can be accessed from SARS' website.

4 This is not a requirement but serves a very good practical purpose. It is also advisable to provide at least two email addresses and two telephone numbers to ensure SARS has the best chance to reach someone if needed.

CAVEAT: THIS TEMPLATE IS MERELY INTENDED TO SERVE AS A GUIDELINE AND NOT AS A SUBSTITUTE FOR RELEVANT PROFESSIONAL ADVICE AND/OR ASSISTANCE. THE TEMPLATE MAY REQUIRE AMENDMENT AS DICTATED BY THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE. NEITHER THE AUTHOR NOR LEXISNEXIS WILL ACCEPT ANY LIABILITY FOR ANY DAMAGES WHATSOEVER ARISING FROM THE USE OF THIS TEMPLATE

5 The taxpayer/representative taxpayer/the person to whom the power of attorney was provided, must sign the request.

TEMPLATE B2

[INSERT DATE]

South African Revenue Service ("SARS")

Via: e-filing/[INSERT THE RELEVANT ADDRESS AS PER CHAPTER 9 IF THE OBJECTION IS NOT REQUIRED TO BE SUBMITTED VIA E-FILING]

Via email: [IF THE DETAILS OF THE SARS OFFICIAL/(S) RESPONSIBLE FOR RAISING THE ASSESSMENT/MAKING THE DECSION ARE KNOWN, INCLUDE THE EMAIL ADDRESSES HERE]

RE: OBJECTION IN TERMS OF SECTION 104 OF THE TAX ADMINISTRATION ACT 28 OF 2011 ("the TAA")

TAXPAYER: [INSERT TAXPAYER NAME] ("the taxpayer")

TAX REF: [INSERT TAX REFERENCE NUMBER]

TAX TYPE: [SPECIFY TAX TYPE]

TAX PERIODS: [SPECIFY YEAR/(S) OR PERIOD/(S) TO BE PLACED UNDER OBJECTION] ("the tax period/(s)")

1. INTRODUCTION

1.1. We refer to:

1.1.1 the assessment/(s) raised on the taxpayer with an issue date/issue dates of [INSERT ISSUE DATE/(S)] ("the assessment") (find a copy attached hereto as annexure A)[1]/the decision made by SARS as per letter addressed to the taxpayer dated [insert date of correspondence] ("the decision") (find a copy attached hereto as annexure A);

1.1.2 [FURTHER RELEVANT CORRESPONDENCE, FOR EXAMPLE, THE LETTER OF AUDIT FINDINGS, THE RESPONSE BY THE TAXPAYER, THE FINALISATION LETTER ETC.][2]

1.2. Being duly authorised thereto by power of attorney[3] executed in my favour (see Annexure <>), I herewith, on behalf of the taxpayer and in terms of section 104 of the TAA read with rule 7 of the rules promulgated under section 103 of the TAA ("the rules''), object to the assessment/decision, in specific to the following:

1.2.1 [SPECIFY THE SPECIFIC PART OR AMOUNT OF THE ASSESSMENT/DECISION PLACED UNDER OBJECTION] in the amount detailed in table 1.1 below and on the basis fully detailed in the grounds for objection that follow.

---

1 Attaching a copy of the assessment is not required under the rules or the TAA. However, it is aimed at making it more convenient for SARS to deal with the objection if SARS is provided with all the documents relevant to the objection.

2 This is not required under the rules or the TAA. Including copies of these documents is aimed at making it more convenient for SARS to process the objection. In addition, it is a useful way of summarising the sequence of events that culminated in the submission of an objection.

3 The power of attorney is only required if the person submitting the objection is not the taxpayer himself/herself (where the taxpayer is a natural person) or the representative taxpayer (if the taxpayer is not a natural person). The power of attorney required by SARS in practice can be accessed from SARS' website.

Table 1.1: Amounts under dispute as per the additional assessment

Source Code[4]	Description	Amount reflected on Assessment	Amount that should be Reflected	Difference – Increase / (Decrease)
[INSERT]	[INSERT]	[INSERT]	[INSERT]	[INSERT]

1.3. A duly completed NOO/ADR1[5] has been submitted.[6]

1.4. This objection is filed on [INSERT DATE] which is [INSERT NUMBER OF DAYS] after the prescribed time period. The taxpayer accepts that this objection is filed late. The taxpayer requests condonation for the late filing of this objection on the grounds for condonation detailed below.[7]

1.5. In compliance with the rules, the taxpayer specifies the following address at which it will accept delivery by SARS of the notice of outcome of the objection: [SPECIFY ADDRESS].[8]

2. DOCUMENTATION[9]

2.1. We attach hereto:

2.1.1 **Annexure A** – [INSERT DOCUMENT DESCRIPTION];

2.1.2 **Annexure B** – [INSERT DOCUMENT DESCRIPTION]; and

2.1.3 **Annexure C** – [INSERT DOCUMENT DESCRIPTION].

3. GROUNDS FOR THE ASSESSMENT[10]/DECISION

3.1. The grounds for the assessment are:

3.1.1 [INSERT THE GROUNDS FOR SARS' ASSESSMENT/DEICSION THAT IS BEING PLACED UNDER OBJECTION].

4. GROUNDS FOR CONDONATION[11]

4.1. [INSERT GROUNDS].[12]

4 This refers to the source code on the assessment and is used where relevant. This is also a useful practical way of dealing with problems on the prescribed form.

5 Refer to either the NOO/ADR1, depending in which is the prescribed form – see chap. 9. It should be noted that this template does not replace the prescribed form. The prescribed form must still be submitted.

6 It is important to note that the ADR1/NOO form must still be submitted to SARS. This document must be referred to in the NOO/ADR1 form and should be submitted in support of the prescribed form.

7 This is only required if the objection is late. Delete if the objection is not late.

8 This is only required of the objection is not submitted via e-filing (i.e. typically in the cases where the ADR1 is the prescribed form).

9 This is the documentation attached to the objection. The minimum required documents are those required to substantiate the grounds for objection (i.e. the documents required to attempt to discharge the onus of proof). Documents should also be attached, depending on the circumstances, to prove the existence or otherwise of reasonable grounds/exceptional circumstances if the taxpayer's objection is late. Clearly marking the annexures also serves a practical purpose, albeit that doing so is not required.

10 This is the grounds for SARS' assessment or decision. It is not required under either the TAA or the rules to be included. However, including same has several advantages. For example, the objection is aimed at displacing the grounds for SARS' assessment and hence including it here assists the drafter of the objection to ensure that the drafter addresses each of the grounds for SARS' assessment/decision in the objection.

11 Only required if the objection is submitted late.

12 This is where the taxpayer must show that its failure to timeously object was caused by reasonable grounds or exceptional circumstances, depending on how late the objection is. SARS' Interpretation Note 15 provides guidance on what the taxpayer should explain here.

5. GROUNDS FOR OBJECTION

5.1 [INSERT GROUNDS FOR OBJECTION].[13]

Should you require any further information, please do not hesitate to contact: [INSERT CONTACT DETAILS].[14]

Yours faithfully,

[SIGNED]

[INSERT NAME][15]

CAVEAT: THIS TEMPLATE IS MERELY INTENDED TO SERVE AS A GUIDELINE AND NOT AS A SUBSTITUTE FOR RELEVANT PROFESSIONAL ADVICE AND/OR ASSISTANCE. THE TEMPLATE MAY REQUIRE AMENDMENT AS DICTATED BY THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE. NEITHER THE AUTHOR NOR LEXISNEXIS WILL ACCEPT ANY LIABILITY FOR ANY DAMAGES WHATSOEVER ARISING FROM THE USE OF THIS TEMPLATE.

---

13 Bear in mind that the taxpayer must here address all the grounds for SARS' assessment in order to displace same with the required evidence.

14 This is not a requirement but serves a very good practical purpose. It is also advisable to provide at least two email addresses and two telephone numbers to ensure SARS has the best chance to reaching someone to discuss the objection or request documents.

15 The taxpayer/representative taxpayer/the person to whom the power of attorney was provided, must sign. The same person should also sign the ADR1 form on the space provided where the prescribed form is the ADR1.

TEMPLATE B3

[INSERT DATE]

South African Revenue Service ("the respondent")

Via/via [delivery method]:	e-filing/[INSERT THE RELEVANT ADDRESS AS PER CHAPTER 10 IF THE APPEAL IS NOT REQUIRED TO BE SUBMITTED VIA E-FILING]
Via [delivery method]	[IF THE DETAILS OF THE SARS OFFICIAL/(S) RESPONSIBLE FOR RAISING THE ASSESSMENT/MAKING THE DECSION IS KNOWN, INCLUDE THE EMAIL ADDRESSES HERE]

RE: APPEAL IN TERMS OF SECTION 107 OF THE TAX ADMINISTRATION ACT 28 OF 2011 ("the TAA")

TAXPAYER:	[INSERT TAXPAYER NAME] ("the appellant")
TAX REF:	[INSERT TAX REFERENCE NUMBER]
TAX TYPE:	[SPECIFY TAX TYPE]
TAX PERIODS:	[SPECIFY YEAR/(S) OR PERIOD/(S) TO BE PLACED UNDER APPEAL]

1. INTRODUCTION

1.1. I refer you to:

1.1.1 The assessment dated [INSERT DATE OF ASSESSMENT] ("the assessment")/The decision by SARS dated [INSERT DATE OF DECISION] ("the decision").

1.1.2 The objection submitted by the appellant against the assessment/decision dated [INSERT DATE] ("the objection").

1.1.3 [FURTHER RELEVANT CORRESPONDENCE, FOR EXAMPLE, THE REQUEST BY SARS FOR FURTHER DOCUMENTS UNDER RULE 8 AFTER THE OBJECTION WAS SUBMITTED AND THE RESPONSE TO SAME OR THE REDUCED ASSESSMENT ISSUED TO GIVE EFFECT TO THE PARTIAL DISALLOWANCE].

1.1.4 The notice of outcome of objection issued to the appellant dated [INSERT DATE OF THE NOTICE ON WHICH SARS GAVE NOTICE OF ITS DECISION ON OBJECTION] ("the outcome letter").

1.2. Being duly authorised thereto by power of attorney[1] executed in my favour, I herewith, on behalf of the appellant and in terms of section 107 of the TAA read with rule 10 of the rules promulgated under section 103 of the TAA ("the rules''), appeal against the assessment/decision, in specific to the following:

1.2.1 [SPECIFY THE SPECIFIC PART OR AMOUNT OF THE ASSESSMENT/THE DECISION PLACED UNDER APPEAL – FOR EXAMPLE – "the disallowance by SARS of the section 24C allowance"] in the amount/(s) detailed in table 1.1 below and on the basis fully detailed in the grounds set out below.

1 The power of attorney is only required if the person submitting the objection is not the taxpayer himself/herself (where the taxpayer is a natural person) or the representative taxpayer (if the taxpayer is not a natural person). The power of attorney required by SARS in practice can be accessed from SARS' website.

Table 1.1: Amounts under dispute as per the assessment

Source Code[2]	Description	Amount reflected on Assessment	Amount that should be Reflected	Difference – Increase / (Decrease)
[INSERT]	[INSERT]	[INSERT]	[INSERT]	[INSERT]

1.3. A duly completed NOA/ADR2[3] has been submitted.[4]

1.4. This appeal is filed on [INSERT DATE] which is [INSERT NUMBER OF DAYS] after the prescribed time period. The appellant accepts that this appeal is filed late. The appellant requests condonation for the late filing of this appeal on the grounds for condonation detailed below.[5]

1.5. In compliance with the rules, the appellant specifies the following address at which it will accept delivery by the respondent of further correspondence in relation to this appeal: [SPECIFY ADDRESS].[6]

2. DOCUMENTATION[7]

2.1. We attach hereto:

2.1.1 **Annexure A** – the assessment;

2.1.2 **Annexure B** – the objection;

2.1.3 **Annexure C** – the outcome letter; and

2.1.4 **Annexure D** – [INSERT DOCUMENT DESCRIPTION].

3. GROUNDS FOR THE RESPONDENT'S DECISION TO DISSALLOW THE OBJECTION/PARTIALLY DISALLOW THE OBJECTION

3.1. The respondent's grounds for the decision to disallow/partially disallow the objection are:

3.1.1 [INSERT THE GROUNDS FOR SARS' DECISION ON THE OBJECTION][8]

4. GROUNDS FOR CONDONATION[9]

4.1. [INSERT GROUNDS][10]

---

2 This refers to the source code on the assessment and is used where relevant. This is also a useful practical way of dealing with problems on the prescribed form.

3 Refer to either the NOA/ADR2, depending in which is the prescribed form – see chap. 10.

4 It is important to note that the ADR2/NOA form must still be submitted to SARS. This document must be referred to in the NOA/ADR2 form and should be submitted in support of the prescribed form.

5 This is only required if the appeal is late.

6 This is required only if the appeal is submitted via e-filing.

7 This is the documentation attached to the appeal. Ideally, this should be documents necessary to substantiate any new grounds raised in the appeal, the actual objection submitted (together with the annexures thereto, where relevant) and the notice of outcome of objection and other documents necessary to prove the existence of reasonable grounds or exceptional circumstances in cases where the appeal is filed late. Whilst not required per se under the rules, it is helpful in practice to include these documents. This, together with the documents attached to the objection will assist in preparation of the required dossiers should the appeal proceed to tax board or tax court. The list here is not exhaustive and further documents may be added in further annexures as required.

8 This is not required in terms of either the TAA or the rules. Including the grounds for SARS' decision here is however helpful to ensuring the taxpayer addresses each ground on which SARS disallowed the appeal, as is required.

9 Only required if the appeal is filed late.

10 This is where the taxpayer must illustrate (together with proof, for example documentary proof attached) that its failure to timeously appeal was caused by reasonable grounds or exceptional circumstances, depending on how late the appeal is.

5. GROUNDS FOR APPEAL

5.1. The grounds for objection relied on in appeal are [SPECIFY WHICH GROUNDS SET OUT IN THE OBJECTION ARE RELIED UPON IN APPEAL].

6. GROUNDS FOR DISAGREEING WITH SARS' DECISION

6.1. [INSERT ON WHAT BASIS THE TAXPAYER DISAGREES WITH SARS DECISION].

7. NEW GROUNDS

7.1. [INSERT PERMISSIBLE NEW GROUNDS].

8. REPRESENTATION[11]

8.1 The appellant herewith requests permission to be represented by [INSERT THIRD PARTY DETAILS] at the hearing in the tax board/The appellant herewith request permission to be represented by a third party at the hearing in the tax board if, following ADR proceedings, the taxpayer gives notice of its intention to pursue the appeal in the tax board in respect of any unresolved issues.

Should you require any further information, please do not hesitate to contact: [INSERT CONTACT DETAILS].[12]

Yours faithfully,

[SIGN]

[INSERT NAME][13]

CAVEAT: THIS TEMPLATE IS MERELY INTENDED TO SERVE AS A GUIDELINE AND NOT AS A SUBSTITUTE FOR RELEVANT PROFESSIONAL ADVICE AND/OR ASSISTANCE. THE TEMPLATE MAY REQUIRE AMENDMENT AS DICTATED BY THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE. NEITHER THE AUTHOR NOR LEXISNEXIS WILL ACCEPT ANY LIABILITY FOR ANY DAMAGES WHATSOEVER ARISING FROM THE USE OF THIS TEMPALTE.

11 Only required if the tax board will have jurisdiction, the taxpayer requires representation should the dispute proceed to tax board and the person who will represent the taxpayer is not the person who submitted the relevant return.

12 This is not a requirement under the TAA or the rules but serves a very good practical purpose. It is also advisable to provide at least two email addresses and two telephone numbers to ensure SARS has the best chance to reaching someone to discuss the appeal or request documents.

13 The taxpayer/ representative taxpayer/the person to whom the power of attorney was provided, must sign. The same person must also sign the ADR2 form on the space provided.

TEMPLATE B4

[INSERT DATE]

South African Revenue Service ("the respondent")

Via email: taxcourtlitigation@sars.gov.za [OR OTHER ADDRESS SPECIFIED IN CHAPTER 10].

Via email: [IF THE DETAILS OF THE SARS OFFICIAL/(S) INVOLVED IN THE ADR PROCEEDINGS ARE KNOWN, INCLUDE THEM HERE][1]

RE: NOTICE OF TERMINATION OF ADR PROCEEDINGS UNDER RULE 25 OF THE RULES GAZETTED UNDER SECTION 103 OF THE TAX ADMINISTRATION ACT 28 OF 2011 ("the rules")

TAXPAYER: [INSERT TAXPAYER NAME] ("the appellant")

TAX REF: [INSERT TAX REFERENCE NUMBER]

TAX TYPE: [SPECIFY TAX TYPE]

APPEAL REF: [INSERT THE REFERENCE NUMBER ISSUED BY SARS IN RESPECT OF THE APPEAL]

TAX PERIODS: [SPECIFY YEAR/(S) OR PERIOD/(S) TO BE PLACED UNDER OBJECTION] ("the periods")

1. INTRODUCTION

1.1. I refer you to:

1.1.1 the notice addressed to the appellant dated [INSERT DATE] in which the respondent agreed to ADR proceedings in respect of the appeal submitted by the appellant dated [INSERT DATE] in relation to the periods ("the notice of ADR agreement")/The notice of agreement delivered to SARS by the taxpayer dated [INSERT DATE] in which the taxpayer agreed to ADR proceedings in respect of the appeal submitted by the taxpayer dated [INSERT DATE] in relation to the periods ("the ADR acceptance notice"); and

1.1.2 the ensuing ADR meeting held on [INSERT DATE OF ADR MEETING].

2. DOCUMENTATION

2.1. I attach hereto:

2.1.1 **Annexure A** – the ADR agreement notice/the ADR acceptance notice; and

2.1.2 **Annexure B** – the power of attorney.

3. TERMINATION

3.1. The appellant and respondent were unable to reach either settlement or agreement under ADR proceedings.

---

1 This is not required under either the rules or the TAA.

3.2. Being duly authorised thereto by power of attorney executed in my favour ("the power of attorney"),[2] I herewith, on behalf of the appellant notify SARS that the appellant terminates ADR proceedings in terms of rule 25 of the rules.

Yours faithfully,

[SIGNED]

[INSERT NAME][3]

CAVEAT: THIS TEMPLATE IS MERELY INTENDED TO SERVE AS A GUIDELINE AND NOT AS A SUBSTITUTE FOR RELEVANT PROFESSIONAL ADVICE AND/OR ASSISTANCE. THE TEMPLATE MAY REQUIRE AMENDMENT AS DICTATED BY THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE. NEITHER THE AUTHOR NOR LEXISNEXIS WILL ACCEPT ANY LIABILITY FOR ANY DAMAGES WHATSOEVER ARISING FROM THE USE OF THIS TEMPLATE.

2 The power of attorney is only required if the person submitting the objection is not the taxpayer himself/herself (where the taxpayer is a natural person) or the representative taxpayer (if the taxpayer is not a natural person). The power of attorney required by SARS in practice can be accessed from SARS' website.

3 The taxpayer/ representative taxpayer/the person to whom the power of attorney was provided, must sign the request.

TEMPLATE B5

IN THE TAX BOARD OF SOUTH AFRICA

HELD AT _____

CASE NUMBER: _____

In the matter of:

[INSERT TAXPAYER CITATION HERE] APPELLANT

[Tax ref no.: _____]

[Appeal ref no.: _____]

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

NOTICE IN TERMS OF RULE 25(3)(a)
OF THE TAX COURT RULES

KINDLY TAKE NOTICE THAT the appellant has terminated ADR proceedings per notice dated [INSERT DATE]/the respondent has terminated ADR proceedings per notice dated [INSERT DATE]/Mr. or Mrs. [INSERT FACILITATOR NAME] has terminated proceedings per notice dated [INSERT DATE]/ADR proceedings commenced on [INSERT DATE] and that [INSERT AMOUNT OF DAYS] have lapsed from the [INSERT DATE] and that no agreement was reached to extend the period within which ADR proceedings must be finalised and that, therefore, ADR proceedings terminated through the elapse of time.

TAKE FURTHER NOTICE THAT the appellant hereby makes application for set down for hearing of this matter on the earliest available date, being not less than 30 (thirty) days from the delivery hereof, to be allocated by the clerk.

DATED and SIGNED at [PLACE] on this the _____ day of _____ 20____.

_____
[INSERT REPRESENTATIVE NAME]
Representative for the Appellant
[INSERT PHYSICAL ADDRESS OF THE REPRESENTATIVE]
Tel: _____
Fax: _____
Email: _____
Our reference: _____

TO: **THE CLERK OF THE TAX BOARD**
Email: [INSERT APPRORIATE ADDRESS – SEE CHAPTER 10]

AND TO: **THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE**
The Respondent
Email: Taxcourtlitigation@sars.gov.za [1]
Email: [INSERT DETAILS OF SARS OFFICIALS INVOLVED IN THE ADR PROCEEDINGS][2]

CAVEAT: THIS TEMPLATE IS MERELY INTENDED TO SERVE AS A GUIDELINE AND NOT AS A SUBSTITUTE FOR RELEVANT PROFESSIONAL ADVICE AND/OR ASSISTANCE. THE TEMPLATE MAY REQUIRE AMENDMENT AS DICTATED BY THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE. NEITHER THE AUTHOR NOR LEXISNEXIS WILL ACCEPT ANY LIABILITY FOR ANY DAMAGES WHATSOEVER ARISING FROM THE USE OF THIS TEMPLATE.

1 The rules are silent as to whether delivery to SARS is also required. It is practicable to nevertheless deliver to SARS also. It should be noted that the taxpayer can also deliver to the physical address specified in chap. 10.

2 It would be courteous to also deliver a copy to the SARS officials involved in the proceedings. It is, however, not required.

TEMPLATE B6

IN THE TAX COURT OF SOUTH AFRICA

HELD AT _____

CASE NUMBER: _____

In the matter of:

[INSERT TAXPAYER CITATION HERE] APPELLANT

[Tax ref no.: _____]

[Appeal ref no.: _____]

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

NOTICE IN TERMS OF RULE 25(3)(b)
OF THE TAX COURT RULES

KINDLY TAKE NOTICE THAT the appellant has terminated ADR proceedings per notice dated [INSERT DATE]/the respondent has terminated ADR proceedings per notice dated [INSERT DATE]/Mr. or Mrs. [INSERT FACILITATOR NAME] has terminated proceedings per notice dated [INSERT DATE]/ADR proceedings commenced on [INSERT DATE] and that [INSERT AMOUNT OF DAYS] have lapsed from the [INSERT DATE] and that no agreement was reached to extend the period within which ADR proceedings must be finalised and that, therefore, ADR proceedings terminated through the elapse of time.

TAKE FURTHER NOTICE THAT the appellant hereby notifies SARS that the appellant wishes to proceed with the appeal.

DATED and SIGNED at [PLACE] on this the _____ day of _____ 20____.

_____
[INSERT REPRESENTATIVE NAME]

Representative for the Appellant

[INSERT PHYSICAL ADDRESS
OF THE REPRESENTATIVE]

Tel: _____

Fax: _____

Email: _____

Our reference: _____

TO: **THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE**

The Respondent

Email: Taxcourtlitigation@sars.gov.za[1]

Email: [INSERT EMAIL ADDRESSES OF SARS OFFICIALS INVOLVED IN THE ADR PROCEEDINGS][2]

CAVEAT: THIS TEMPLATE IS MERELY INTENDED TO SERVE AS A GUIDELINE AND NOT AS A SUBSTITUTE FOR RELEVANT PROFESSIONAL ADVICE AND/OR ASSISTANCE. THE TEMPLATE MAY REQUIRE AMENDMENT AS DICTATED BY THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE. NEITHER THE AUTHOR NOR LEXISNEXIS WILL ACCEPT ANY LIABILITY FOR ANY DAMAGES WHATSOEVER ARISING FROM THE USE OF THIS TEMPLATE.

1 The taxpayer can also deliver to the physical address specified in chap. 10.

2 It would be courteous to also deliver a copy to the SARS officials involved in the proceedings. It is, however, not required.

TEMPLATE B7

IN THE TAX BOARD OF SOUTH AFRICA

HELD AT _____

CASE NUMBER: _____

In the matter of:

[INSERT TAXPAYER CITATION HERE] APPELLANT

[Tax ref no.: _____]

[Appeal ref no.: _____]

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

NOTICE IN TERMS OF RULE 23(4)/24(4)[1] OF THE TAX COURT RULES

KINDLY TAKE NOTICE THAT an agreement was concluded between the appellant and the respondent following ADR proceedings on [INSERT DATE].

TAKE FURTHER NOTICE THAT there remain unresolved issues in appeal as is evident from the agreement.

TAKE FURTHER NOTICE THAT the appellant hereby notifies the clerk of the tax board that the appellant will pursue its appeal on the unresolved issues in the tax board.

DATED and SIGNED at [PLACE] on this the _____ day of _____ 20____.

_____

[INSERT REPRESENTATIVE NAME]

Representative for the Appellant

[INSERT PHYSICAL ADDRESS OF THE REPRESENTATIVE]

Tel: _____

Fax: _____

Email: _____

Our reference: _____

---

1 Use the appropriate rule. Notice is provided under rule 23(4) if the agreement was not a settlement agreement. Notice is provided under rule 24(4) if the agreement was a settlement agreement.

TO: **CLERK OF THE TAX BOARD**
Email: [INSERT RELEVANT ADDRESS AS PER CHAPTER 10]

AND TO: **THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE**
The Respondent
Email: Taxcourtlitigation@sars.gov.za[2]
Email: [INSERT DETAILS OF SARS OFFICIALS INVOLVED IN THE ADR PROCEEDINGS][3]

CAVEAT: THIS TEMPLATE IS MERELY INTENDED TO SERVE AS A GUIDELINE AND NOT AS A SUBSTITUTE FOR RELEVANT PROFESSIONAL ADVICE AND/OR ASSISTANCE. THE TEMPLATE MAY REQUIRE AMENDMENT AS DICTATED BY THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE. NEITHER THE AUTHOR NOR LEXISNEXIS WILL ACCEPT ANY LIABILITY FOR ANY DAMAGES WHATSOEVER ARISING FROM THE USE OF THIS TEMPLATE.

2 The rules are silent as to whether delivery to SARS is also required. It is practicable to nevertheless deliver to SARS also. The taxpayer can also deliver to the physical address specified in chap. 10.

3 It would be courteous to also deliver a copy to the SARS officials involved in the proceedings. It is, however, not required.

TEMPLATE B8

IN THE TAX COURT OF SOUTH AFRICA

HELD AT _____

CASE NUMBER: _____

In the matter of:

[INSERT TAXPAYER CITATION HERE] APPELLANT

[Tax ref no.: _____]

[Appeal ref no.: _____]

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

NOTICE IN TERMS OF RULE 23(4)/24(4)[1] OF THE TAX COURT RULES

KINDLY TAKE NOTICE THAT an agreement was concluded between the appellant and the respondent following ADR proceedings on [INSERT DATE].

TAKE FURTHER NOTICE THAT there remain unresolved issues in appeal as is evident from the agreement.

TAKE FURTHER NOTICE THAT the appellant hereby notifies the registrar of the above honourable court that the appellant will pursue its appeal on the unresolved issues in the above honourable court.

DATED and SIGNED at [PLACE] on this the _____ day of _____ 20____.

_____
[INSERT REPRESENTATIVE NAME]

Representative for the Appellant

[INSERT PHYSICAL ADDRESS OF THE REPRESENTATIVE]

Tel: _____

Fax: _____

Email: _____

Our reference: _____

1 Use the appropriate rule. Notice is provided under rule 23(4) if the agreement was not a settlement agreement. Notice is provided under rule 24(4) if the agreement was a settlement agreement.

TO: **REGISTRAR OF THE TAX COURT**
Email: RegistrarTaxCourt@sars.gov.za[2]

AND TO: **THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE**
The Respondent
Email: Taxcourtlitigation@sars.gov.za [3]
Email: [INSERT DETAILS OF SARS OFFICIALS INVOLVED IN THE ADR PROCEEDINGS][4]

CAVEAT: THIS TEMPLATE IS MERELY INTENDED TO SERVE AS A GUIDELINE AND NOT AS A SUBSTITUTE FOR RELEVANT PROFESSIONAL ADVICE AND/OR ASSISTANCE. THE TEMPLATE MAY REQUIRE AMENDMENT AS DICTATED BY THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE. NEITHER THE AUTHOR NOR LEXISNEXIS WILL ACCEPT ANY LIABILITY FOR ANY DAMAGES WHATSOEVER ARISING FROM THE USE OF THIS TEMPLATE.

2 The taxpayer can also deliver to the physical address specified in chap. 10.
3 The rules are silent as to whether delivery to SARS is required. It is arguable that delivery to SARS is required (rule 42). The taxpayer can also deliver to the physical address specified in chap. 10.
4 It would be courteous to also deliver a copy to the SARS officials involved in the proceedings. It is, however, not required.

TEMPLATE B9

IN THE TAX BOARD OF SOUTH AFRICA

HELD AT _____

CASE NUMBER: _____

In the matter of:

[INSERT TAXPAYER CITATION HERE] APPELLANT

[Tax ref no.: _____]

[Appeal ref no.: _____]

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

NOTICE IN TERMS OF RULE 11(2)
OF THE TAX COURT RULES

KINDLY TAKE NOTICE THAT the appellant has filed an appeal under rule 10 dated [INSERT DATE] and has not opted for ADR and is not agreeable to ADR proceedings for the resolution of this matter.

TAKE FURTHER NOTICE THAT the tax in dispute does not exceed R1 million.

TAKE FURTHER NOTICE THAT the appellant agrees to the jurisdiction of the Tax Board.

TAKE FURTHER NOTICE THAT the appellant hereby makes application for set down for hearing of this matter on the earliest available date, being not less than 30 (thirty) days from the delivery hereof, to be allocated by the clerk.

DATED and SIGNED at [PLACE] on this the _____ day of _____ 20____.

_____
[INSERT REPRESENTATIVE NAME]

Representative for the Appellant

[INSERT PHYSICAL ADDRESS OF THE REPRESENTATIVE]

Tel: _____

Fax: _____

Email: _____

Our reference: _____

TO: **THE CLERK OF THE TAX BOARD**
Email: [INSERT APPRORIATE ADDRESS – SEE CHAPTER 10]

AND TO: **THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE**
The Respondent
Email: Taxcourtlitigation@sars.gov.za[1]

CAVEAT: THIS TEMPLATE IS MERELY INTENDED TO SERVE AS A GUIDELINE AND NOT AS A SUBSTITUTE FOR RELEVANT PROFESSIONAL ADVICE AND/OR ASSISTANCE. THE TEMPLATE MAY REQUIRE AMENDMENT AS DICTATED BY THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE. NEITHER THE AUTHOR NOR LEXISNEXIS WILL ACCEPT ANY LIABILITY FOR ANY DAMAGES WHATSOEVER ARISING FROM THE USE OF THIS TEMPLATE.

1 The rules are silent as to whether delivery to SARS is also required. It is practicable to nevertheless deliver to SARS also. The taxpayer can also deliver to the physical address specified in chap. 10.

TEMPLATE B10

IN THE TAX BOARD OF SOUTH AFRICA

HELD AT _____

CASE NUMBER: _____

In the matter of:

[INSERT TAXPAYER CITATION HERE] APPELLANT

[Tax ref no.: _____]

[Appeal ref no.: _____]

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

NOTICE IN TERMS OF SECTION 115 OF THE TAX ADMINISTRATION ACT 28 OF 2011 READ WITH RULE 29(1) OF THE TAX COURT RULES

KINDLY TAKE NOTICE THAT the appellant received the decision of the chairperson of the tax board in the above matter on [INSERT DATE]/the appellant has not received the decision of the chairperson in the above matter, which decision was due on [INSERT DATE].

KINDLY TAKE FURTHER NOTICE THAT the appellant herewith requests for the above matter to be referred to the tax court.

DATED and SIGNED at [PLACE] on this the _____ day of _____ 20____.

_____

[INSERT REPRESENTATIVE NAME]

Representative for the Appellant

[INSERT PHYSICAL ADDRESS OF THE REPRESENTATIVE]

Tel: _____

Fax: _____

Email: _____

Our reference: _____

TO: **THE CLERK OF THE TAX BOARD**
Email: [INSERT APPRORIATE ADDRESS – SEE CHAPTER 10]

AND TO: **THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE**
The Respondent
Email: Taxcourtlitigation@sars.gov.za[1]

CAVEAT: THIS TEMPLATE IS MERELY INTENDED TO SERVE AS A GUIDELINE AND NOT AS A SUBSTITUTE FOR RELEVANT PROFESSIONAL ADVICE AND/OR ASSISTANCE. THE TEMPLATE MAY REQUIRE AMENDMENT AS DICTATED BY THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE. NEITHER THE AUTHOR NOR LEXISNEXIS WILL ACCEPT ANY LIABILITY FOR ANY DAMAGES WHATSOEVER ARISING FROM THE USE OF THIS TEMPLATE.

1 The taxpayer can also deliver to the physical address specified in chap. 10.

TEMPLATE B11

IN THE TAX COURT OF SOUTH AFRICA

HELD AT _____

CASE NUMBER: _____

In the matter of:

[INSERT TAXPAYER CITATION HERE] APPELLANT

[Tax ref no.: _____]
[Appeal ref no.: _____]

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

STATEMENT OF GROUNDS OF APPEAL IN TERMS OF RULE 32 OF THE TAX COURT RULES

1.

The appellant hereby sets out its Grounds of Appeal in terms of Rule 32 of the Rules Promulgated Under Section 103 of the TAA (the "Rules") and answers to the allegations contained in the Respondent's Statement of Grounds of Assessment and Opposing Appeal in Terms of Rule 31 of the Rules, dated [INSERT DATE] ("the rule 31 statement").

GROUNDS OF APPEAL

2.

[INSERT THE TAXPAYER'S GROUNDS FOR APPEAL AS WELL AS THE FACTS AND LEGAL BASIS FOR SAME]

RESPONSE TO THE RESPONDENT'S STATEMENT OF GROUNDS OF ASSESSMENT AND OPPOSING APPEAL

3.

The rule 31 statement will now be addressed.

4.

***AD* PARAGRAPH/(S) [INSERT PARAGRPAH NUMBER]**

[STATE WHETHER THE GROUNDS FOR ASSESSMENT IN THE RELEVANT PARAGRPAH OF SARS' RULE 31 STATEMMENT ARE ADMITTED OR OPPOSED AND WHERE OPPOSED, ON WHAT FACTUAL AND LEGAL BASIS THE TAXPAYER OPPOSES]

DATED and SIGNED at [PLACE] on this the _____ day of _____ 20____.

_____
[INSERT REPRESENTATIVE NAME]

Representative for the Appellant

[INSERT PHYSICAL ADDRESS
OF THE REPRESENTATIVE]

Tel: _____

Fax: _____

Email: _____

Our reference: _____

TO: THE REGISTRAR OF THE TAX COURT
Email: RegistrarTaxCourt@sars.gov.za[1]

AND TO: THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE
The Respondent
Email: taxcourtlitigation@sars.gov.za[2]

CAVEAT: THIS TEMPLATE IS MERELY INTENDED TO SERVE AS A GUIDELINE AND NOT AS A SUBSTITUTE FOR RELEVANT PROFESSIONAL ADVICE AND/OR ASSISTANCE. THE TEMPLATE MAY REQUIRE AMENDMENT AS DICTATED BY THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE. NEITHER THE AUTHOR NOR LEXISNEXIS WILL ACCEPT ANY LIABILITY FOR ANY DAMAGES WHATSOEVER ARISING FROM THE USE OF THIS TEMPLATE.

1 The rules are silent as to whether delivery to the registrar is required. It is arguable that delivery to the registrar is required (rule 42). The taxpayer can also deliver to the physical address specified in chap. 10.
2 The taxpayer can also deliver to the physical address specified in chap. 10.

TEMPLATE B12

IN THE TAX COURT OF SOUTH AFRICA

HELD AT _____

CASE NUMBER: _____

In the matter of:

[INSERT TAXPAYER CITATION HERE] APPELLANT

[Tax ref no.: _____]

[Appeal ref no.: _____]

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

APPLICATION FOR SET DOWN FOR HEARING IN TERMS OF RULE 39 OF THE TAX COURT RULES

KINDLY TAKE NOTICE THAT the appellant having delivered its rule 32 statement on [INSERT DATE]/the respondent having delivered its rule 33 reply on [INSERT DATE], the appellant hereby makes application for set down for hearing of this matter on the earliest available date to be allocated by the Registrar of the above Honourable Court.

DATED and SIGNED at [PLACE] on this the _____ day of _____ 20____.

_____

[INSERT REPRESENTATIVE NAME]

Representative for the Appellant

[INSERT PHYSICAL ADDRESS OF THE REPRESENTATIVE]

Tel: _____

Fax: _____

Email: _____

Our reference: _____

TO: **THE REGISTRAR OF THE TAX COURT**
Email: RegistrarTaxCourt@sars.gov.za[1]

AND TO: **THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE**
The Respondent
Email: taxcourtlitigation@sars.gov.za[2]

CAVEAT: THIS TEMPLATE IS MERELY INTENDED TO SERVE AS A GUIDELINE AND NOT AS A SUBSTITUTE FOR RELEVANT PROFESSIONAL ADVICE AND/OR ASSISTANCE. THE TEMPLATE MAY REQUIRE AMENDMENT AS DICTATED BY THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE. NEITHER THE AUTHOR NOR LEXISNEXIS WILL ACCEPT ANY LIABILITY FOR ANY DAMAGES WHATSOEVER ARISING FROM THE USE OF THIS TEMPLATE.

1 The taxpayer can also deliver to the physical address specified in chap. 10.
2 The taxpayer can also deliver to the physical address specified in chap. 10.

TEMPLATE B13

IN THE TAX COURT OF SOUTH AFRICA

HELD AT _____

CASE NUMBER: _____

In the matter of:

[INSERT TAXPAYER CITATION HERE] APPLICANT

[Tax ref no.: _____]

[Appeal ref no.: _____]

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

NOTICE OF INTENTION TO APPLY FOR DEFAULT JUDGMENT IN TERMS OF RULE 56(1)(a) OF THE TAX COURT RULES

KINDLY TAKE NOTICE THAT the [SET FORTH THE DEFAULT BY SARS]

TAKE FURTHER NOTICE THAT the applicant intends to apply for default judgment in the above Honourable Court for final relief in terms of section 129(2) of the Tax Administration Act, No. 28 of 2011 in the event that the respondent does not remedy the defaults herein detailed within 15 (fifteen) days from the date of this notice.

TAKE FURTHER NOTICE THAT that 15 days from date of this notice will lapse on [INSERT DATE].

DATED and SIGNED at [PLACE] on this the _____ day of _____ 20____.

_____

[INSERT REPRESENTATIVE NAME]

Representative for the Appellant

[INSERT PHYSICAL ADDRESS OF THE REPRESENTATIVE]

Tel: _____

Fax: _____

Email: _____

Our reference: _____

TO: **THE REGISTRAR OF THE TAX COURT**
Email: RegistrarTaxCourt@sars.gov.za[1]

AND TO: **THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE**
The Respondent
Email: taxcourtlitgiation@sars.gov.za[2]

CAVEAT: THIS TEMPLATE IS MERELY INTENDED TO SERVE AS A GUIDELINE AND NOT AS A SUBSTITUTE FOR RELEVANT PROFESSIONAL ADVICE AND/OR ASSISTANCE. THE TEMPLATE MAY REQUIRE AMENDMENT AS DICTATED BY THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE. NEITHER THE AUTHOR NOR LEXISNEXIS WILL ACCEPT ANY LIABILITY FOR ANY DAMAGES WHATSOEVER ARISING FROM THE USE OF THIS TEMPLATE.

1 The rules are silent as to whether delivery to the registrar is required. It is arguable that delivery to the registrar is required (rule 42). The taxpayer can also deliver to the physical address specified in chap. 10.
2 The taxpayer can also deliver to the physical address specified in chap. 10

TEMPLATE B14

IN THE TAX COURT OF SOUTH AFRICA

HELD AT _____

CASE NUMBER: _____

In the matter of:

[INSERT TAXPAYER CITATION HERE] APPLICANT

[Tax ref no.: _____]

[Appeal ref no.: _____]

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

NOTICE OF MOTION

IN TERMS OF RULE [INSERT RELEVANT RULE HERE] **OF THE TAX COURT RULES**

KINDLY TAKE NOTICE THAT the Applicant intends to make application to the above Honourable Court on the earliest available date, to be allocated by the Registrar of the Honourable Court, as soon as the Applicant/the Representative for the Applicant may be heard, for an order in the following terms:

1. That [INSERT HERE THE RELEVANT RELIEF SOUGHT];
2. Costs of suit [ONLY INCLUDE WHERE APPROPRIATE]; and
3. Further and/or alternative relief.

TAKE FURTHER NOTICE THAT the founding affidavit of the Applicant [and supplementary affidavits where relevant, as well as any annexures thereto where relevant][1] will be used in support of the order(s) sought.

TAKE FURTHER NOTICE that the applicant has appointed [INSERT REPRESENTATIVE'S DETAILS AND PHYSICAL AND/OR EMAIL ADDRESS HERE], at which address the applicant will accept notice and service of all process in these proceedings.

TAKE FURTHER NOTICE that if the Respondent intends opposing this application, the Respondent is required:

(a) to notify the applicant/the applicant's representatives in writing on or before [INSERT THE DATE THAT FALLS 10 BUSINESS DAYS FROM THE DATE OF DELIVERY OF THIS NOM HERE]; and

(b) within 15 (fifteen) days after the Respondent has given notice of the Respondent's intention to oppose the application, to file the Respondent's answering affidavit(s), if any.

---

1 Use where relevant.

TAKE FURTHER NOTICE that if no notice of intention to oppose this application or answering affidavit is delivered, an application for set down in terms of rule 59 or rule 62, respectively, will be delivered to the registrar of the above Honourable Court within no sooner than 5 business days from the date on which your notice to oppose or answering affidavit became due.

DATED and SIGNED at [PLACE] on this the _____ day of _____ 20____.

_____
[INSERT REPRESENTATIVE NAME]

Representative for the Appellant

[INSERT PHYSICAL ADDRESS
OF THE REPRESENTATIVE]

Tel: _____

Fax: _____

Email: _____

Our reference: _____

TO: THE REGISTRAR OF THE TAX COURT

Email: RegistrarTaxCourt@sars.gov.za[2]

AND TO: THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE

The Respondent

Email: taxcourtlitgiation@sars.gov.za[3]

CAVEAT: THIS TEMPLATE IS MERELY INTENDED TO SERVE AS A GUIDELINE AND NOT AS A SUBSTITUTE FOR RELEVANT PROFESSIONAL ADVICE AND/OR ASSISTANCE. THE TEMPLATE MAY REQUIRE AMENDMENT AS DICTATED BY THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE. NEITHER THE AUTHOR NOR LEXISNEXIS WILL ACCEPT ANY LIABILITY FOR ANY DAMAGES WHATSOEVER ARISING FROM THE USE OF THIS TEMPLATE.

2 The rules are silent as to whether delivery to the registrar is required. It is arguable that delivery to the registrar is required (rule 42).

3 The taxpayer can also deliver to the physical address specified in chap. 10.

TEMPLATE B15

[INSERT DATE]

South African Revenue Service ("SARS")

Via: e-filing/SARS branch

RE: SUSPENSION OF PAYMENT REQUEST IN TERMS OF SECTION 164 OF THE TAX ADMINISTRATION ACT 28 OF 2011 ("the TAA")

TAXPAYER: [INSERT TAXPAYER NAME] ("the taxpayer")
TAX REF: [INSERT TAX REFERENCE NUMBER]
TAX TYPE: [SPECIFY TAX TYPE]
TAX PERIODS: [SPECIFY YEAR/(S) OR PERIOD/(S) TO BE PLACED UNDER OBJECTION/ APPEAL]

1. INTRODUCTION

1.1. We refer you to:

1.1.1 The notice of assessment with an issue date of [INSERT ISSUE DATE] ("the assessment"); and

1.1.2 the statement of account dated [INSERT DATE] issued by SARS to the taxpayer ("the statement of account") reflecting an alleged liability towards SARS in the amount of [INSERT THE AMOUNT FOR WHICH SUSPENSION IS REQURIED] which arises in consequence of the assessment ("the alleged tax liability").

1.2 The taxpayer is aggrieved by the assessment and intends to object/has objected per objection dated [INSERT DATE]/appeal/has appealed per appeal dated [INSERT DATE] against the assessment in terms of section 104/107 of the TAA read with rule 6/10 of rules promulgated under section 103 of the TAA ("the rules").

1.3 Being duly authorised thereto by power of attorney executed in[1] my favour ("the power of attorney"), I herewith, on behalf of the taxpayer and in terms of section 164 of the TAA, request that payment of the alleged tax liability and any subsequent interest raised by SARS in respect of same be suspended pending the outcome of the dispute on grounds detailed below.

2. DOCUMENTS[2]

2.1 We attach hereto:

2.1.1 **Annexure A** – the assessment;

2.1.2 **Annexure B** – the statement of account;

2.1.3 **Annexure C** – The power of attorney; and

2.1.4 **Annexure D** – [INSERT DOCUMENT DESCRIPTION].

---

1 The power of attorney is only required if the person submitting the request for suspension of payment is not the taxpayer himself/herself (where the taxpayer is a natural person) or the representative taxpayer (if the taxpayer is not a natural person). The power of attorney required by SARS in practice can be accessed from SARS' website.

2 The documents attached will depend on the facts of the case. Typically included is proof of financial hardship, undertakings re disposal of assets and security (if provided).

3. GROUNDS FOR SUSPENSION OF PAYMENT

3.1. Section 164(3) of the TAA states:

> *"A senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to relevant factors, including—*
>
> *(a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;* [hereinafter referred to as "factor one"]
>
> *(b) the compliance history of the taxpayer with SARS;* [hereinafter referred to as "factor two"]
>
> *(c) whether fraud is prima facie involved in the origin of the dispute;* [hereinafter referred to as "factor three"]
>
> *(d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus if the disputed tax is not paid or recovered; or* [hereinafter referred to as "factor four"]
>
> *(e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the fiscus."* [hereinafter referred to as "factor five"] [Own underlining and insertion].

3.2. *Factor one*:

3.2.1 [INSERT HERE WHY THE DIPSUTED TAX WILL NOT BE IN JEOPARDY IF SARS WERE TO GRANT THE REQUEST FOR SUSPENSION AND WHY THERE IS NO RISK OF DISSEPATION OF ASSETS (ATTACH APPORAITE PROOF). IT MAY BE WORTHWHILE PROVIDING AN UNDERTAKING TO INFORM SARS OF THE DISPOSAL OF ANY MATERIAL ASSETS TO ALLOW SARS TO CONTINOUSLY ASSESS ITS DECISION TO GRANT SUSPENSION].

3.3. *Factor two*:

3.3.1 [IF THE TAXPAYER IS FULLY COMPLIANT (APART FROM THE OUTSTANDING LIABILITY TO WHICH THIS REQUEST RELATES), SIMPLY STATE HERE THAT THE TAXPAYER IS FULLY COMPLIANT APART FROM THE ALLEGED TAX LIABILITY. IF THE TAXPAYER IS NOT SO COMPLIANT IT IS ADVISABLE TO MAKE THE TAXPAYER FULLY COMPLIANT BEFORE SUBMITTING THIS REQUEST. IN PRACTICE, A TAXPAYER'S NON-COMPLIANCE IS ALMOST CERTAIN TO RESULT IN THE REQUEST FOR SUPENSION BEING DECLINED. IF IT IS NOT POSSIBLE TO GET THE TAXPAYER FULLY COMPLIANT BEFORE SUBMISSION OF THE SUSPENSION REQUEST, EXPLAIN THE REASON FOR THE NON-COMPLIANCE AND CONSIDER COMITTING IN THE REQUEST TO A DATE BY WHICH THE TAXPAYER WILL BE FULLY COMPLIANT].

3.4. *Factor three*:

3.4.1 [TYPICALLY, A SIMPLE STATEMENT TO EFFECT THAT THERE IS NO FRAUD INVOLVED IN THE ORIGIN OF THE DISPUTE, AS IS EVIDENT FROM SARS' GROUNDS FOR ASSESSMENT IS SUFFICIENT].

3.5. *Factor four*:

3.5.1 [THE TAXPAYER SHOULD EXPLAIN HERE WHY PAYMENT OF THE DIPSUTED TAX WILL RESULT IN IRREPRABLE FINANCIAL HARDSHIP AND SUPPORT THE EXPLANATIONS WITH APPRORIATE PROOF. A MERE STATEMENT THAT PAYMENT WILL RESULT IN IRREPERABLE FINANCIAL HARDSHIP IS UNLIKLY TO BE OF ANY ASSISTANCE TO THE TAXPAYER].

3.6. *Factor five*:

3.6.1 [IF POSSIBLE, TENDER SECURITY. THE SECURITY TENDERED SHOULD IDEALLY BE SUFFICENT TO COVER THE ENTIRE ALLEGED TAX LIABILITY (THE SECURITY TENDERED AND THE MANNER OF SECURITY WILL DEPEND ON THE FACTS). FAILING THAT, SECURITY SHOULD IDEALLY BE TENDERED FOR AT LEAST THE CAPITAL TAX (I.E. THE TAX EXCLUDING PENALTIES AND INTEREST].

3.7. *Factor six*:

3.7.1 [THE TAXPAYER MAY ADD ANY OTHER FACTOR THAT MAY BE OF ASSISTANCE IN SECURING A SUSPENSION. THIS TYPICALLY INCLUDES A BRIEF EXPLANATION OF THE PROSPECTS OF SUCCESS (WITH REFERENCE TO THE OBJECTION/APPEAL) IF THESE HAVE ALREADY SUBMITTED AT THE TIME OF REQUESTING SUSPENSION].

Should you require any further information or explanations, please do not hesitate to contact [INSERT CONTACT DETAILS][3]

Yours faithfully,

[SIGNED]

[INSERT NAME]

CAVEAT: THIS TEMPLATE IS MERELY INTENDED TO SERVE AS A GUIDELINE AND NOT AS A SUBSTITUTE FOR RELEVANT PROFESSIONAL ADVICE AND/OR ASSISTANCE. THE TEMPLATE MAY REQUIRE AMENDMENT AS DICTATED BY THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE. NEITHER THE AUTHOR NOR LEXISNEXIS WILL ACCEPT ANY LIABILITY FOR ANY DAMAGES WHATSOEVER ARISING FROM THE USE OF THIS TEMPLATE.

3 This is not a requirement but serves a very good practical purpose. It is also advisable to provide at least two email addresses and two telephone numbers to ensure SARS has the best chance to reach someone if needed.

ANNEXURE C

Interpretation Note: No. 15 (issue 5) – 21 December 2018

[Replaces Issue 1 dated 18 June 2003, Issue 2 dated 8 November 2004, Issue 3 dated 10 July 2013 and Issue 4 dated 20 November 2014.]

ACT: TAX ADMINISTRATION ACT 28 OF 2011

SECTION: SECTIONS 104 AND 107

SUBJECT: EXERCISE OF DISCRETION IN CASE OF LATE OBJECTION OR APPEAL

Preamble

In this Note unless the context indicates otherwise –

- **"assessment"** means an assessment as defined in section 1, namely, the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS;
- **"decision"** means a decision referred to in section 104(2);
- **"Income Tax Act"** means the Income Tax Act 58 of 1962;
- **"rules"** mean the rules referred to in section 103 which were made by the Minister, after consultation with the Minister of Justice and Constitutional Development, and published in Government Notice 550 in the *Government Gazette* 37819 of 11 July 2014;
- **"section"** means a section of the TA Act;
- **"senior SARS official"** means a senior SARS official referred to in section 6(3);
- **"TA Act"** means the Tax Administration Act 28 of 2011;
- **"taxpayer"** means a "taxpayer" as defined in section 151; and
- any other word or expression bears the meaning ascribed to it in the TA Act.

1. Purpose

This Note provides guidance on the factors that a senior SARS official will take into account when deciding whether to extend the period for lodging an objection under section 104(4) or an appeal under section 107(2). It also serves to highlight that the period during which an objection or appeal may be lodged is limited.

2. Background

A taxpayer who is aggrieved –

- by an assessment made on the taxpayer; or
- by certain decisions made under the TA Act or tax Acts,[1]

may object to and appeal against those assessments or decisions under the TA Act.

An objection against an assessment or decision must be lodged in the manner, under the terms and within the period prescribed in the rules.[2]

A person whose objection has been disallowed may appeal to the tax board or tax court against that outcome and in such event the appeal must be lodged in the manner, under the terms and within the periods prescribed in the TA Act and the rules.[3]

A senior SARS official may, within prescribed limits, extend the period prescribed in the rules within which an objection or appeal must be lodged.

1 S 104(2).
2 S 104(3).
3 S 107(1).

The objection and appeal procedures, which are contained in the TA Act and the rules, apply to any dispute under, amongst others, the following tax Acts[4] administered by the Commissioner –

- Diamond Export Levy Act 15 of 2007
- Diamond Export Levy (Administration) Act 14 of 2007
- Employment Tax Incentive Act 26 of 2013
- Estate Duty Act 45 of 1955
- Income Tax Act 58 of 1962
- Mineral and Petroleum Resources Royalty Act 28 of 2008
- Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008
- Securities Transfer Tax Act 25 of 2007
- Securities Transfer Tax Administration Act 26 of 2007
- Skills Development Levies Act 9 of 1999
- Tax Administration Act 28 of 2011
- Transfer Duty Act 40 of 1949
- Unemployment Insurance Contributions Act 4 of 2002
- Value-Added Tax Act 89 of 1991

The Customs and Excise Act 91 of 1964 contains its own provisions relating to dispute resolution.

3. The law

The relevant sections of the TA Act and the rules are reproduced in **Annexure B**.

4. Objections

4.1 Section 104

Section 104(3) stipulates the requirements for a valid objection. It requires that the objection must be lodged in the manner, under the terms and within the period prescribed in the rules.

An aggrieved taxpayer may, before lodging an objection, request the reasons for the assessment as provided for under rule 6(1). Under rule 6(2) this request must –

- be in the prescribed form and manner;
- specify the taxpayer's delivery address; and
- be delivered to SARS within 30 days from the date of assessment.[5]

Rule 7 deals with objections and, more specifically, provides the manner and terms for lodging a valid objection. Rule 7(1) deals with the timing of the objection and provides that a notice of objection must be delivered to the Commissioner within 30 days after –

- the date of the assessment or decision when no reasons for the assessment are requested by the taxpayer;
- the delivery of a notice by SARS under rule 6(4) stating that adequate reasons for the assessment had been provided; or
- the delivery of a notice by SARS providing the reasons for the assessment as requested by a taxpayer under rule 6.

The term "day", as defined in rule 1, means –

> "a 'business day' as defined in section 1 of the [TA] Act".

The term "business day" is defined in section 1 as –

> "a day which is not a Saturday, Sunday or public holiday, and for purposes of determining the days or a period allowed for complying with the provisions of Chapter 9, excludes the days between 16 December of each year and 15 January of the following year, both days inclusive;".

---

4 The term "tax Act" is defined in s 1 and means the TA Act or an Act, or portion of an Act, referred to in s 4 of the SARS Act, excluding the Customs and Excise Act.

5 See **Annexure B** for the definition of "date of assessment".

Since the term "day" in the rules means a "business day" as defined in the TA Act, "business day" will be used for purposes of this Note.

An objection that is *not lodged* within the time limit of 30 business days will generally be regarded by SARS as an invalid objection.[6] Under section 104(4), a senior SARS official[7] may extend the period for lodging an objection if satisfied that reasonable grounds exist for the delay in lodging the objection.[8] The extension will run from the expiry of the 30 business day period stipulated in the rules, irrespective of when the request is made or granted. A taxpayer may, for example, request an extension if that taxpayer was not in a position to fully formulate and substantiate the grounds of objection within 30 business days because of outstanding information or documentation which would be received only after the expiry of that period.

The TA Act does not prescribe the manner in which the discretion to extend the period for lodging an objection under section 104(4) should be exercised. The senior SARS official's decision must comply with the requirements for administrative justice which are contained in section 33 of the Constitution of the Republic of South Africa[9] read with the Promotion of Administrative Justice Act.[10] In particular, the senior SARS official's decision must be reasonable. Essentially, for a decision to be reasonable, the senior SARS official is required to consider all relevant matters. In considering the limitation of constitutional rights, the Constitutional Court held that there is no absolute standard which can be laid down for determining reasonableness and necessity and that, although principles can be established, the application of those principles to particular circumstances can be done only on a case-by-case basis.[11]

For the purpose of considering an extension of the period for lodging an objection, the senior SARS official is required to consider all relevant matters. These would include –

- the reasons for the delay;
- the length of the delay;
- the prospects of success on the merits; and
- any other relevant factor, for example, SARS's interest in the determination of the final tax liability in view of the broader public interest relating to budgeting and fiscal planning.

Despite these factors being relevant to the exercise of a discretion, they are neither all-embracing nor individually decisive and each case must be considered on its merits.

4.2 Factors relevant to the exercise of the senior SARS official's discretion in considering a request to extend the period in which to lodge an objection

4.2.1 The reasons for the delay

A request for an extension of the period in which to lodge an objection must state the actual circumstances and the reasons for failure to lodge the objection in full within the time limit. Without detailed reasons being furnished, the senior SARS official will not be in a position to exercise the discretion to extend the period in which to lodge the objection.

For example, the requirement of reasonable grounds (see **4.1**) will generally be met if the delay was caused as a result of circumstances beyond the taxpayer's control. Such circumstances may include, for example, a delay as a result of illness of the taxpayer or the taxpayer's representative, the taxpayer being abroad at the time of the issue of the notice of assessment or postal delays. Whether or not these circumstances amount to exceptional circumstances and therefore support an extension exceeding 30 days (see **4.3**) will depend on the facts and detail of the particular case.

---

6 Rule 7(1), (2) and (4).

7 S 6(3) requires powers and duties exercised by a senior SARS official to be exercised by the Commissioner, a SARS official with specific written authority from the Commissioner or a SARS official occupying a post designated by the Commissioner.

8 See **4.3** for the limitations relating to the period of the extension.

9 108 of 1996.

10 3 of 2000.

11 *S v Makwanyane* 1995 6 BCLR 665 (CC), 1995 (3) SA 391 (CC) at 436.

Circumstances which can constitute reasonable or exceptional grounds are not limited to the examples given above. It is impractical to give a list of circumstances which will always constitute reasonable or exceptional grounds. Taxpayers must consider their particular facts and circumstances and identify circumstances which support the request for an extension in which to submit an objection, including the period of requested extension. Each case must be considered on its merits.

The following are examples of situations which will not be regarded as a sufficient reason for failure to comply with the requirements of the TA Act in submitting an objection on time –

- Ignorance of the law with regard to the period within which an objection must be lodged.
- Failure without good cause by the taxpayer's tax practitioner to lodge the objection on time. The use of a tax practitioner does not absolve the taxpayer from the responsibility of complying with the TA Act.[12]

4.2.2 The length of the delay

In addition to the reasons for the delay (see **4.2.1**), the taxpayer must justify the period of the delay and the extension sought. The longer the extension sought, the more likely it is that the justification and supporting evidence will need to be more detailed. The extension of the period for lodging an objection is not a right and it is therefore incumbent upon the taxpayer to substantiate the request for the extension.

4.2.3 The prospects of success on the merits

A senior SARS official will take into consideration the fact that an objection may have a good prospect of success. *However*, the strength of a taxpayer's case and the validity of the grounds of objection are not decisive factors and do not detract from the taxpayer's obligation to furnish acceptable reasons for the delay in lodging an objection. In *Mtshali & Others v Buffalo Conservation 97 (Pty) Ltd*[13] the court confirmed that the prospect of success is one of the factors which must be weighed against all the factors but that there are instances in which condonation should not be granted even if there are reasonable prospects of success, for example, a flagrant and gross disregard of the rules.

In ITC 1777, Galgut DJP stated the following –[14]

> "In an application to set aside a default judgment or for condonation of a party's failure to comply with a rule of court in time, our law requires the party concerned to show 'good cause' for his failure to take the necessary step timeously. To show good cause he must not only explain the reason for his failure. He must also show that he has a reasonable prospect of success on the merits of the litigation at issue; he must have what is called a *prima facie* case … In these regards the reported cases establish the approach that the stronger the party's case is on his prospects of success, the more lenient the court will be in regard to the excuses for his default; and conversely, the weaker his explanation for his default, the stronger his prospects of success on the merits, in the abovesaid sense, must be."

4.3 Limitation on the extension of time to lodge an objection

Section 104(5) places a limitation on the extension of time that a senior SARS official may grant for the lodging of an objection. The extension of the period for lodging an objection is prohibited –

- for a period exceeding 30[15] business days unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay. If there are exceptional circumstances, the period will be extended for more than 30 business days but not exceeding the three years mentioned below. The 30 business days are calculated from the end of the 30-day period referred to in **4.1**. In other words, the period for lodging an objection may

12 S 153(3).
13 (250/2017) [2017] ZASCA 127 (29 September 2017).
14 (2004) 66 SATC 328 (N) at 333.
15 S 104(5) was amended by s 57 of the Tax Administration Laws Amendment Act 16 of 2016 with effect from 19 January 2017. Before the amendment, this period was 21 days.

not exceed 60 business days after the date of assessment or decision, the delivery of a notice under rule 6(4) or the delivery of the notice providing the reasons for the assessment under rule 6;

- if more than three years have lapsed from the date of the assessment or the decision; or
- if the grounds for the objection are based wholly or mainly on a change in a practice generally prevailing which applied on the date of the assessment or decision.

The term "exceptional circumstances" is not defined for the purposes of section 104. Consideration must therefore be given to its ordinary grammatical meaning, taking into account the context in which it appears and the purpose to which it is directed.

The online *Oxford Dictionaries*[16] defines the word "exceptional" as follows –

> "1 Unusual; not typical."

The circumstances referred to must thus be of such a nature that they would be considered as being something out of the ordinary and of an unusual nature. In a criminal bail case, the Constitutional Court was required to consider what constituted exceptional circumstances and stated the following –[17]

> "In this regard I am not persuaded that there is any …validity in the complaint raised … that the term 'exceptional circumstances' is so vague that an applicant … does not know what it is that has to be established. … In any event, one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation. If something can be imagined and outlined in advance, it is probably because it is not exceptional."

In a shipping case involving the Admiralty Jurisdiction Regulation Act 105 of 1983, Thring J stated that the following points emerged from an examination of the authorities –[18]

> "1. What is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; 'besonder', 'seldsaam', 'uitsonderlik', or 'in hoë mate ongewoon'.
>
> 2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
>
> 3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
>
> 4. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
>
> 5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional."

It is impractical to give a list of circumstances which will either always constitute or not constitute exceptional grounds. Taxpayers must consider their particular facts and circumstances and identify appropriate circumstances. Each case must be considered according to its merits in order to determine whether the reasons for requesting an extension of more than 30 business days are exceptional and justify the requested extension.

For example, exceptional circumstances may include –

- a natural or human-made disaster;
- a civil disturbance or disruption in services;
- a serious illness or accident; and
- serious emotional or mental distress.

---

16 https://en.oxforddictionaries.com/definition/exceptional [Accessed 20 November 2018].

17 *S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC), 1999 (4) SA 623 (CC) at 669.

18 *MV AIS Mamas Seatrans Maritime v Owners, MV AIS Mamas, and Another* 2002 (6) SA 150 (C) at 156–157. See also *S v Peterson* 2008 (2) SACR 355 (C).

The mere existence of one of these factors is not sufficient. The taxpayer would need to demonstrate that the factor was the reason for the delay.

In the criminal bail case mentioned above, it was also stated that –[19]

> "In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond, and generically different from those enumerated."

In the context of this case, under section 60(11)(*a*) of the Criminal Procedure Act 51 of 1977, an accused could not be granted bail unless such person satisfied the court that exceptional circumstances existed which in the interests of justice permitted such person's release on bail. The example the court gave to expand on the statement in the quote above was that an accused could establish that there were exceptional circumstances relating to such person's emotional condition which rendered it in the interests of justice that release on bail be permitted notwithstanding the severity of the case. The point being made is that an ordinary circumstance, such as emotional condition, can be present to an exceptional degree and give rise to exceptional circumstances.[20] This is not to suggest that it is easy hurdle to overcome, but it can be done depending on the facts of the case.

The term "practice generally prevailing" as used in section 104(5)(*c*) is defined in section 1 and has the meaning assigned in section 5. Section 5(1) provides that a practice generally prevailing is a practice set out in an official publication regarding the application or interpretation of a tax Act. An "official publication" is defined in section 1 as a binding general ruling, interpretation note, practice note or public notice issued by a senior SARS official or the Commissioner. It does not include a guide or brochure.

The objection process and timeframes are illustrated in **Annexure A**.

4.4 Applying for an extension of time in which to lodge an objection

The obligation to provide facts and arguments supported by documentation and evidence when submitting an application for an extension of the period in which to lodge an objection lies with the taxpayer. SARS bears no responsibility, but reserves the right to make further enquiries.

In ITC 1795[21] the taxpayer failed to provide proof of the expenses claimed and the Commissioner accordingly denied the objection. The taxpayer then lodged a late appeal and failed to provide valid reasons for the delay in noting the appeal. The court held that based on the facts and circumstances of the case the Commissioner was correct in not entertaining the late lodgement.

In ITC 1883, Satchwell J stated the following –[22]

> "The onus is therefore on the appellant to satisfy the court that 'exceptional circumstances exist which give rise to the delay in lodging the objection'. This means that unusual facts must be proven which have a causal connection to the delay which resulted."

The court also found that proof of certain facts which caused the delay was required and that while certain arguments had been raised, they had not been based on documents or proof.

The importance of a taxpayer submitting a proper detailed application for an extension of time in which to lodge an objection or appeal cannot be overemphasised. A properly compiled application for an extension of time in which to lodge an objection or appeal does not mean SARS will immediately proceed with considering the underlying objection or appeal. SARS must first consider the request for an extension and, if granted, consideration of the underlying objection or appeal can proceed.

---

19 *S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC), 1999 (4) SA 623 (CC) at 669.

20 See Footnote 103 to the example on page 669 of *S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) judgement for more detail.

21 (2005) 67 SATC 297 (G).

22 78 SATC 225 at 227.

4.5 Refusal to grant an extension

A taxpayer may object and appeal against a decision of a senior SARS official not to grant an extension of the period in which to submit an objection or lodge an appeal.[23]

Under section 104(5) (see **4.3**) a senior SARS official may not grant an extension of the period to lodge an objection if more than three years have elapsed from the date of the assessment or the decision. In these circumstances, the senior SARS official does not make a decision not to grant an extension. The request for condonation or an extension is simply denied by operation of law. If more than three years have elapsed there is no decision under section 104(4) which is subject to objection and appeal and, even if there was a decision, under section 104(5)(*b*) the senior SARS official cannot allow the objection.[24] This means that an objection which is delivered to SARS more than three years after the date of the assessment or decision is invalid and cannot be considered.

4.6 Periods in which to resubmit invalid objections

Rule 7(4) provides that SARS may regard an objection as invalid if a taxpayer did not deliver an objection in the manner and terms set out in rule 7(2).[25] SARS must generally[26] notify the taxpayer and state the grounds for invalidity in a notice which must generally[27] be issued to the taxpayer within 30 business days of delivery of the invalid objection. Such taxpayer may, under rule 7(5), submit a new objection within a period of 20 business days of the delivery of the notice without having to apply for an extension. However, a taxpayer who does not submit a new objection or who submits a new objection which does not comply with the requirements of rule 7(2) within the 20 business day period, may then submit a new and valid objection only with an application for an extension of the period in which to lodge an objection *under section 104(4).*[28]

5. Appeal – extension of the period in which an appeal against an unsuccessful objection may be lodged

Any taxpayer who has lodged an objection to an assessment or decision and who is dissatisfied with SARS's decision to disallow the objection in whole or in part under section 106(2), may appeal against that decision within 30 business days[29] after the delivery of the notice informing the taxpayer of the decision under section 106(4).

A senior SARS official may extend the period of 30 business days prescribed by the rules within which to lodge an appeal by –

- 21 business days if satisfied that reasonable grounds exist for the delay in noting the appeal;[30] or
- up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days.[31]

The factors relevant to the exercise of a discretion in extending the period in which to lodge an objection are also relevant to the exercise of a discretion in extending the period to lodge an appeal. As indicated in **4.1**, these factors are neither all-embracing nor individually decisive and each case will be considered on its merits.

---

23 S 104(2)(*a*) and (*b*).

24 Taxpayers wishing to dispute that there is no decision in these circumstances and, if successful, ask the tax court to consider the appropriateness of the "decision" must follow the procedural requirement of lodging an objection against SARS's "decision" – see *CSARS v Danwet 202 (Pty) Ltd* (Case 399/2017) [2018] ZASCA 38 (28 March 2018) which held that the tax court did not have the jurisdiction to consider a matter in respect of which the taxpayer had not lodged an objection under s 104(3).

25 An objection that is not lodged within the time limit of 30 business days will generally be regarded by SARS as an invalid objection.

26 Under rule 7(4)(*a*)-(*c*) the obligation to notify the taxpayer as indicated exists if the taxpayer used a SARS electronic filing service for lodging the objection and has an electronic filing page, if the taxpayer specified an address required under rule 7(2)(*c*) or if SARS is in possession of the taxpayer's current address.

27 As above.

28 Rule 7(6).

29 Rule 10(1).

30 S 107(2)(*a*).

31 S 107(2)(*b*).

The extension, if granted, will run from the expiry of the 30 business day period stipulated in the rules, irrespective of when the request is made or granted. Therefore, if exceptional circumstances exist and the senior SARS official extends the period by 45 business days it means the taxpayer must appeal the decision within 75 business days [30 days under rule 10(1)(*a*) and extension to the period of 45 business days under section 107(2)(*a*)] after the delivery of the notice informing the taxpayer of the decision under section 106(4).[32]

Under section 107(2) a senior SARS official may not grant an extension of the period to lodge an appeal if 75 days have elapsed after the notice of disallowance of the objection under Rule 9. In these circumstances, the senior SARS official does not make a decision not to grant an extension.[33] The request for condonation or an extension is simply denied by operation of law. If 75 days have elapsed, there is no decision under section 107(2) which is subject to objection and appeal and, even if there was a decision, under section 107(2)(*b*) the senior SARS official cannot allow the objection.[34] This means a notice of appeal which is delivered to SARS more than 75 days after the date of the assessment or decision is invalid and cannot be considered.

6. Conclusion

An objection against an assessment or decision must be lodged within 30 business days of the date of assessment or decision unless the taxpayer requested reasons for the assessment in which case the period runs from a later date. Similarly, an appeal against the disallowance of an objection must be lodged within 30 business days after delivery of the notice of disallowance of the objection.

A senior SARS official may extend the date for lodging an objection by –

- 30 business days if satisfied that reasonable grounds exist for the delay in lodging the objection; and
- between 31 business days and three years if satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection.

No extension can be granted for –

- a delay of more than three years from the date of assessment or decision; or
- an objection that relates to a change in the practice generally prevailing at the date of assessment or decision.

A senior SARS official may extend the date for lodging an appeal by –

- 21 business days, if satisfied that reasonable grounds exist for the delay; or
- up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days.

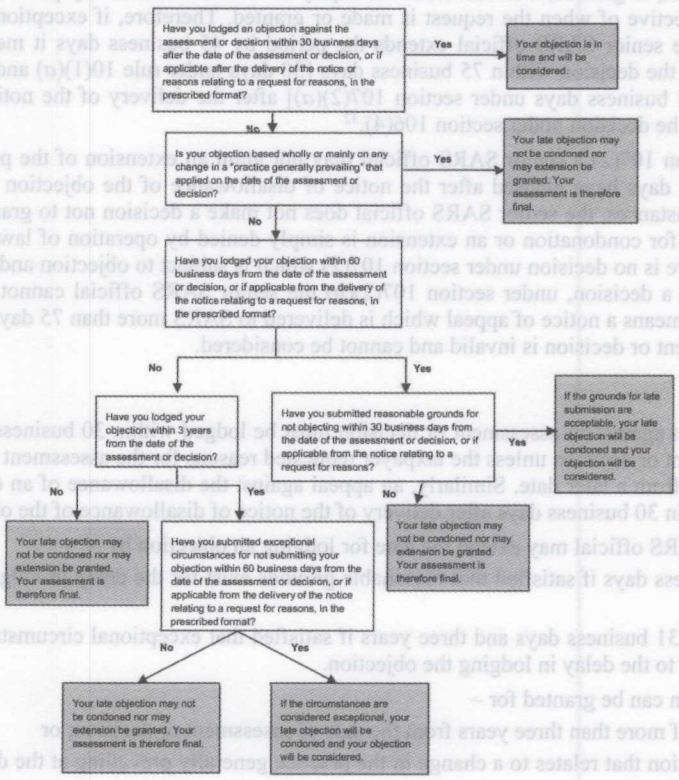
ANNEXURE A – Objection process and timeframes

The objection process and timeframes can be illustrated as follows:

32 We note with respect that this interpretation differs to the judgement in the unreported Case 0018/2016, Gauteng Tax Court, 27 January 2017. The judgement was taken on appeal in *CSARS v Danwet* (399/2017) [2018] ZASCA 38 (28 March 2018) and overturned. In the latter case, the SCA found the tax court did not have jurisdiction to hear the matter.

33 In paragraph 12 of the judgment of *CSARS v Danwet* (399/2017) [2018] ZASCA 38 (28 March 2018), in an *obiter* remark, the judge stated that a decision in terms of s 107(2) is a "decision" for purposes of s 104(2) and s 129(2). Whether or not an operation of law in the context of s 104(2) in fact constituted a decision for purposes of s 104(2) was not an issue put before the court.

34 Taxpayers wishing to dispute that there is no decision in these circumstances and, if successful, ask the tax court to consider the appropriateness of the "decision" must follow the procedural requirement of lodging an objection against SARS's "decision" – see *CSARS v Danwet 202 (Pty) Ltd* (Case 399/2017) [2018] ZASCA 38 (28 March 2018) which held that the tax court did not have the jurisdiction to consider a matter in respect of which the taxpayer had not lodged an objection under s 104(3).



ANNEXURE B – The law

Definition of "date of assessment" in section 1

"date of assessment" means—

(*a*) in the case of an assessment by SARS, the date of the issue of the notice of assessment; or

(*b*) in the case of self-assessment by the taxpayer—

(i) if a return is required, the date that the return is submitted; or

(ii) if no return is required, the date of the last payment of the tax for the tax period or, if no payment was made in respect of the tax for the tax period, the effective date;

Section 104

104. Objection against assessment or decision.—(1) A taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment.

(2) The following decisions may be objected to and appealed against in the same manner as an assessment—

(*a*) a decision under subsection (4) not to extend the period for lodging an objection;

(*b*) a decision under section 107(2) not to extend the period for lodging an appeal; and

(*c*) any other decision that may be objected to or appealed against under a tax Act.

(3) A taxpayer entitled to object to an assessment or 'decision' must lodge an objection in the manner, under the terms, and within the period prescribed in the 'rules'.

(4) A senior SARS official may extend the period prescribed in the 'rules' within which objections must be made if satisfied that reasonable grounds exist for the delay in lodging the objection.

continued

(5) The period for objection must not be so extended—

(*a*) for a period exceeding 30 business days, unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection;

(*b*) if more than three years have lapsed from the date of assessment or the 'decision'; or

(*c*) if the grounds for objection are based wholly or mainly on a change in a practice generally prevailing which applied on the date of assessment or the 'decision'.

Section 107(1) to (3)

107. Appeal against assessment or decision.—(1) After delivery of the notice of the decision referred to in section 106 (4), a taxpayer objecting to an assessment or 'decision' may appeal against the assessment or 'decision' to the tax board or tax court in the manner, under the terms and within the period prescribed in this Act and the 'rules'.

(2) A senior SARS official may extend the period within which an appeal must be lodged for—

(*a*) 21 business days, if satisfied that reasonable grounds exist for the delay; or

(*b*) up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days.

(3) A notice of appeal that does not satisfy the requirements of subsection (1) is not valid.

Definition of "deliver" in rule 1

"deliver" means to issue, give, send or serve a document to the address specified for this purpose under these rules, in the following manner—

(*a*) by SARS, the clerk or the registrar, in the manner referred to in section 251 or 252 of the Act, except the use of ordinary post;

(*b*) by SARS, if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment, by posting it on the electronic filing page of the taxpayer or appellant; or

(*c*) by the taxpayer or appellant, by—

(i) handing it to SARS, the clerk or the registrar;

(ii) sending it to SARS, the clerk or the registrar by registered post;

(iii) sending it to SARS, the clerk or the registrar by electronic means to an e-mail address or telefax number; or

(iv) if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment, submitting it through the SARS electronic filing service.

Rule 7 – Objection against assessment

(1) A taxpayer who may object to an assessment under section 104 of the Act, must deliver a notice of objection within 30 days after—

(*a*) delivery of a notice under rule 6(4) or the reasons requested under rule 6; or

(*b*) where the taxpayer has not requested reasons, the date of assessment.

(2) A taxpayer who lodges an objection to an assessment must—

(*a*) complete the prescribed form in full;

(*b*) specify the grounds of the objection in detail including—

(i) the part or specific amount of the disputed assessment objected to;

(ii) which of the grounds of assessment are disputed; and

(iii) the documents required to substantiate the grounds of objection that the taxpayer has not previously delivered to SARS for purposes of the disputed assessment;

(*c*) if a SARS electronic filing service is not used, specify an address at which the taxpayer will accept delivery of SARS's decision in respect of the objection as well as all other documents that may be delivered under these rules;

(*d*) sign the prescribed form or ensure that the prescribed form is signed by the taxpayer's duly authorised representative; and

(*e*) deliver, within the 30 day period, the completed form at the address specified in the assessment or, where no address is specified, the address specified under rule 2.

continued

(3) The taxpayer may apply to SARS under section 104(4) for an extension of the period for objection.

(4) Where a taxpayer delivers an objection that does not comply with the requirements of sub-rule (2), SARS may regard the objection as invalid and must notify the taxpayer accordingly and state the ground for invalidity in the notice within 30 days of delivery of the invalid objection, if—

(*a*) the taxpayer used a SARS electronic filing service for the objection and has an electronic filing page;

(*b*) the taxpayer has specified an address required under sub-rule (2)(*c*); or

(*c*) SARS is in possession of the current address of the taxpayer.

(5) A taxpayer who receives a notice of invalidity may within 20 days of delivery of the notice submit a new objection without having to apply to SARS for an extension under section 104(4).

(6) If the taxpayer fails to submit a new objection or submits a new objection which fails to comply with the requirements of sub-rule (2) within the 20 day period, the taxpayer may thereafter only submit a new and valid objection together with an application to SARS for an extension of the period for objection under section 104(4).

Rule 10(1) – Appeal against assessment

(1) A taxpayer who wishes to appeal against the assessment to the tax board or tax court under section 107 of the Act must deliver a notice of appeal in the prescribed form and manner within—

(*a*) 30 days after delivery of the notice of disallowance of the objection under rule 9; or

(*b*) the extended period pursuant to an application under section 107(2).

ANNEXURE D

GN 295 of 31 March 2015: Notice of addresses at which a document, notice or request is to be delivered or made for purposes of rule 2 (*c*) (ii) and rule 3 (1) read together with rule 2 (*c*) (iii) of the rules promulgated in terms of section 103 of the Act
(*Government Gazette* No. 38666)

SOUTH AFRICAN REVENUE SERVICE

I, Thomas Swabihi Moyane, Commissioner for the South African Revenue Service, hereby specify, in the Schedule hereto, the addresses at which a document or notice must be delivered or a request must be made for purposes of rule 2 (*c*) (ii) and rule 3 (1) read together with rule 2 (*c*) (iii) of the rules promulgated in terms of section 103 of the Tax Administration Act, 2011.

(Signed)
T S MOYANE
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE

SCHEDULE

A. General

In this notice, unless the context indicates otherwise, any word or expression to which a meaning has been assigned in section 1 of the Tax Administration Act, 2011, or the dispute resolution rules promulgated under section 103 of that Act (the "Rules" or "Rule"), has the meaning so assigned.

B. Delivery to the South African Revenue Service under rule 2 (1) (*c*) (ii)

Where a document or notice is required to be delivered or a request is required to be made to the South African Revenue Service under the Rules and no specific address is specified under the Rules for this purpose, the document or notice must be delivered or the request must be made to any of the following addresses:

1. Any document, notice or request (excluding a notice of objection under rule 7, notice of appeal under rule 10, any document where a SARS electronic filing service is available for delivery, any document relating to the dispute process after delivery of a notice of appeal under rule 10 and any document or application in terms of Part F of the Rules):

1.1 Electronic addresses:

Region	Email	Fax number
North South Africa: Gauteng North (includes Tshwane and Centurion), North West, Mpumalanga and Limpopo	Contact.north@sars.gov.za	(+27) 12 670 6880
Central South Africa: (including Midrand, the Greater Johannesburg area, Kempton Park, Boksburg, Vereeniging and Springs), Free State and Northern Cape	Cotact.central@sars.gov.za	(+27) 10 208 5005

continued

Region	Email	Fax number
Eastern South Africa: Taxpayers residing in KZN and the northern parts of the Eastern Cape (up to and including East London)	Contact.east@sars.gov.za	(+27) 31 328 6018
Southern South Africa: Taxpayers residing in the Eastern Cape south of East London and in the Western Cape	Contact.south@sars.gov.za	(+27) 21 413 8905

1.2 Postal and Physical Addresses:

Office	Postal Address	Physical address
Alberton	Private Bag X15 Alberton 1450	St Austell Street MacKinnon Crescent New Redruth Alberton 1449
Bellville	Private Bag X11 Bellville 7530	Corner of Teddington & De Lange Road Bellville 7530
Doringkloof	P O Box 436 Pretoria 0001	7 Protea Street Centurion Pretoria 0157
Durban	P O Box 921 Durban 4000	201 Dr Pixley KaSeme Street Durban 4001

1.3 Handing it to SARS at any SARS branch office.

2. Delivery of a notice of objection under rule 7

2.1 In the case of personal and corporate income tax, delivery must be made—

2.1.1 by means of the taxpayer's electronic filing page, if applicable;

2.1.2 by post to any of the addresses mentioned in paragraph 1.2, above; or

2.1.3 by handing it to SARS at any SARS branch office.

2.2 In the case of value-added tax, employees tax (PAYE) or any other tax delivery must be made—

2.2.1 to any of the addresses mentioned in paragraph 1.1 or 1.2, above; or

2.2.2 by handing it to SARS at any SARS branch office.

3. Delivery of a notice of appeal under rule 10

A notice of appeal under rule 10 must be delivered—

3.1 by means of the taxpayer's electronic filing page, if applicable;

3.2 to any of the addresses mentioned in paragraph 1.1 or 1.2, above; or

3.3 by handing it to SARS at any SARS branch office.

4. Delivery of any document, notice or making a request relating to the dispute process after delivery of a notice of appeal or an application in terms of Part F of the Rules

Any document, notice or request relating to the dispute process after delivery of a notice of appeal or an application in terms of Part F of the Rules, must be delivered or made to any of the following addresses:

4.1. *Physical address:*
Tax Court Litigation
Khanyisa Building, 1st Floor
271 Bronkhorst Street
Nieuw Muckleneuk
0181

4.2 *Electronic address:*
(Email) taxcourtlitigation@sars.gov.za
(Fax) (+27) 12 422 5012

5. Registrar of the tax court (rule 3 (1) read with rule 2 (1) (*c*) (iii))

Any document or notice required to be delivered or any request required to be made to the registrar of the tax court under the Rules must be delivered or made to any of the following addresses:

5.1 *Physical address:*
Registrar of the tax court
Khanyisa Building, 1st Floor
271 Bronkhorst Street
Nieuw Muckleneuk
0181

5.2 *Electronic addresses:*
(Fax) (+27) 12 422 5012
(Email) RegistrarTaxCourt@sars.gov.za

C. Clerk of the tax board

Any document or notice required to be delivered or request required to be made to the clerk of the tax board under the Rules must be delivered or made to any of the following addresses:

SARS Region	Physical address	Electronic addresses
Head Office	271 Bronkhorst street Khanyisa Building, Ground Floor Nieuw Muckleneuk **Pretoria** 0181	**Fax** (+27) 12 647 2719 **Email** TaxBoard.HeadOffice@sars.gov.za
Limpopo, North West, and Mpumalanga	SARS – Legal Delivery, Support and Partnership (LDS&P) 40 Landdros Maree Street **Polokwane** 0699	**Fax** (+27) 86 575 2630 **Email** TaxBoard.LimpNWandMP@sars.gov.za

continued

SARS Region	Physical address	Electronic addresses
Gauteng North	SARS – Legal Delivery, Support and Partnership (LDS&P) Riverwalk Office Park Matroosberg Road **Pretoria** 0001	**Fax** (+27) 10 208 3067 **Email** TaxBoard.GautengNorth@sars.gov.za
Gauteng South	SARS – Legal Delivery, Support and Partnership (LDS&P) Alberton Campus Saint Austell Road New Redruth **Alberton** 1450	**Fax** (+27) 86 612 1643 **Email** TaxBoard.GautengSouth@sars.gov.za
Gauteng Central	SARS – Legal Delivery, Support and Partnership (LDS&P) Megawatt Park – LBC Office Maxwell Drive **Sunninghill**	**Fax** (+27) 86 513 1758 **Email** TaxBoard.GautengCentral@sars.gov.za
Enforcement	SARS – Legal Delivery, Support and Partnership (LDS&P) Megawatt Park – LBC Office Maxwell Drive **Sunninghill**	**Fax** (+27) 86 611 3615 **Email** TaxBoard.TCEI@sars.gov.za
Western cape	SARS – Legal Delivery, Support and Partnership (LDS&P) 18th Floor Sanlam Building Project 166 22 Hans Strydom Avenue **Cape Town** 8001	**Fax** (+27) 10 208 1961 **Email** TaxBoard.WesternCape@sars.gov.za
KwaZulu-Natal	SARS – Legal Delivery, Support and Partnership (LDS&P) 7th Floor Albany House 61/62 Margaret Mncadi Avenue (previously Victoria Embankment) **Durban** 4001	Fax (+27) 86 617 7595 **Email** TaxBoard.KwaZuluNatal@sars.gov.za
Free State	SARS – Legal Delivery, Support and Partnership (LDS&P) Fedsure Building 49 Charlotte Maxeke Street **Bloemfontein** 9301	**Fax** (+27) 501 3201 **Email** TaxBoard.FreeState@sars.gov.za

continued

SARS Region	Physical address	Electronic addresses
Eastern Cape	SARS – Legal Delivery, Support and Partnership (LDS&P) Revenue Building Cnr St Mary's Terrace and Whyte's Road Central **Port Elizabeth** 6001	**Fax** (+27) 10 208 3053 **Email** TaxBoard.EasternCape@sars.gov.za

ANNEXURE E

GN 550 of 11 July 2014: Rules promulgated under section 103 of the Act, prescribing the procedures to be followed in lodging an objection and appeal against an assessment or a decision subject to objection and appeal referred to in section 104 (2) of that Act, procedures for alternative dispute resolution, the conduct and hearing of appeals, application on notice before a Tax Court and Transitional Rules
(*Government Gazette* No. 37819)

SOUTH AFRICAN REVENUE SERVICE

In terms of section 103 of the Tax Administration Act, 2011, I, Nhlanhla Musa Nene, the Minister of Finance, after consultation with the Minister of Justice and Constitutional Development, hereby prescribe in the Schedule hereto, the rules governing the procedures to lodge an objection and appeal against an assessment or decision under Chapter 9 of the Act, the procedures for alternative dispute resolution and the conduct and hearing of appeals before a Tax Board or Tax Court.

(Signed)
NM NENE
MINISTER OF FINANCE

SCHEDULE

Part A

General provisions

1. Definitions
2. Prescribed form and manner and date of delivery
3. Office of clerk of tax board and registrar of tax court
4. Extension of time periods
5. Index and pagination of documents

Part B

Reasons for assessment, objection, appeal and test cases

6. Reasons for assessment
7. Objection against assessment
8. Request for substantiating documents after objection lodged
9. Decision on objection
10. Appeal against assessment
11. Appeal to tax board or tax court
12. Test cases

Part C

Alternative dispute resolution

13. Notice of alternative dispute resolution
14. Reservation of rights
15. Period of alternative dispute resolution
16. Appointment of facilitator
17. Conduct of facilitator
18. Conflict of interest of facilitator
19. Determination and termination of proceedings by facilitator

Part D

Procedures of tax board

Part E

Procedures of tax court

Part F

Applications on notice

Part G

Transitional arrangements

Part A

General provisions

1. Definitions.—In these rules, unless the context indicates otherwise, a term which is assigned a meaning in the Act, has the meaning so assigned, and the following terms have the following meaning—

"appellant" means a taxpayer who has noted an appeal under section 107 of the Act against an assessment as defined in these rules;

"assessment" includes, for purposes of these rules, a decision referred to in section 104 (2) of the Act;

"clerk" means the clerk of the tax board appointed under section 112 of the Act;

"day" means a "business day" as defined in section 1 of the Act;

"deliver" means to issue, give, send or serve a document to the address specified for this purpose under these rules, in the following manner—

(*a*) by SARS, the clerk or the registrar, in the manner referred to in section 251 or 252 of the Act, except the use of ordinary post;

(*b*) by SARS, if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment, by posting it on the electronic filing page of the taxpayer or appellant; or

(*c*) by the taxpayer or appellant, by—

(i) handing it to SARS, the clerk or the registrar;

(ii) sending it to SARS, the clerk or the registrar by registered post;

(iii) sending it to SARS, the clerk or the registrar by electronic means to an e-mail address or telefax number; or

(iv) if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment, submitting it through the SARS electronic filing service;

"document" means a document as defined in the Act, and includes—

(*a*) an agreement between the parties under these rules, whether in draft or otherwise;

(*b*) a request or application under these rules; and

(*c*) a notice required under these rules;

"electronic address" has the meaning assigned in the rules for electronic communication issued under section 255 of the Act;

"electronic filing page" has the meaning assigned in the rules for electronic communication issued under section 255 of the Act;

"grounds of assessment", for purposes of these rules, include any—

(*a*) grounds of assessment referred to in section 42 (6) or section 96 (2) of the Act;

(*b*) grounds for a decision by SARS not to remit an administrative non-compliance penalty under Part E of Chapter 15 of the Act;

(*c*) grounds for a decision by SARS not to remit a substantial understatement penalty under section 223 (3) of the Act;

(*d*) grounds for a decision referred to in section 104 (2) of the Act; and

(*e*) reasons for assessment provided by SARS under rule 6 (5);

"party" means—

(*f*) for purposes of an objection, the taxpayer or SARS;

(*g*) for purposes of an appeal to the tax board or tax court, the appellant or SARS; and

(*h*) for purposes of an application under Part F, the applicant or the respondent;

(Editorial Note: Numbering as per original *Government Gazette*.)

"parties" means—

(*a*) for purposes of an objection, the taxpayer and SARS;

(*b*) for purposes of an appeal to the tax board or tax court, the appellant and SARS; and

(*c*) for purposes of an application under Part F, the applicant and the respondent;

"registrar" means the registrar of the tax court appointed under section 121 of the Act;

"Rules Board for Courts of Law Act" means the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985);

"SARS electronic filing service" has the meaning assigned in the electronic communication rules issued under section 255 of the Act;

"sign" or **"signature"** has the meaning assigned in the electronic communication rules issued under section 255 of the Act to an electronic signature, where a party—

(*a*) uses electronic means to deliver a document at an electronic address provided by the other party, the clerk or the registrar for this purpose; or

(*b*) uses a SARS electronic filing service to lodge an objection or note an appeal under these rules;

"Superior Courts Act" means the Superior Courts Act, 2013 (Act No. 10 of 2013);

"the Act" means the Tax Administration Act, 2011 (Act No. 28 of 2011); and

"these rules" means the rules reflected in this Schedule made under section 103 of the Act.

2. Prescribed form and manner and date of delivery.—(1) A document, notice or request required to be delivered or made under these rules must be—

(*a*) in the form as may be prescribed by the Commissioner under section 103 of the Act;

(*b*) in writing and be signed by the relevant party, the party's duly authorised representative, the clerk or the registrar, as the case may be; and

(*c*) delivered to the address that—

(i) the taxpayer or appellant must use or has selected under these rules;

(ii) SARS has specified under these rules or, in any other case, the Commissioner has specified by public notice as the address at which the documents must be delivered to SARS; or

(iii) is determined under rule 3 as the address of the clerk or the registrar.

(2) For purposes of these rules, the date of delivery of a document—

(*a*) in the case of delivery by SARS, the clerk or the registrar, is regarded as the date of delivery of the document in the manner referred to in the definition of "deliver" in rule 1, but subject to section 253; and

(*b*) in the case of delivery by the taxpayer, appellant or applicant (other than SARS), is regarded as the date of the receipt of the document by SARS, the clerk or the registrar.

3. Office of clerk of tax board and registrar of tax court.—(1) The location of the office of the clerk and the registrar will be determined by a senior SARS official from time to time by public notice.

(2) The office of the clerk and the registrar will be open every Monday to Friday, excluding public holidays, from 08h00 to 16h00.

4. Extension of time periods.—(1) Except where the extension of a period prescribed under the Act or these rules is otherwise regulated in Chapter 9 of the Act or these rules, a period may be extended by agreement between—

(*a*) the parties;

(*b*) a party or the parties and the clerk; or

(*c*) a party or the parties and the registrar.

(2) A request for an extension must be delivered to the other party before expiry of the period prescribed under these rules unless the parties agree that the request may be delivered after expiry of the period.

(3) If SARS is afforded a discretion under these rules to extend a time period applicable to SARS, SARS must in the notice of the extension state the grounds of the extension.

(4) If a period is extended under this rule by an agreement between the parties or a final order pursuant to an application under Part F, the period within which a further step of the proceedings under these rules must be taken commences on the day that the extended period ends.

5. Index and pagination of documents.—(1) In all proceedings before the tax board and tax court, all documents required to be delivered under these rules must be—

(*a*) if drafted under these rules, divided into paragraphs numbered consecutively;

(*b*) paginated by the party who seeks to put them before the tax board or tax court; and

(*c*) as far as practical, arranged in chronological order.

(2) All documents must be accompanied by an index that corresponds with the sequence of the paginated documents and the index must contain sufficient information to enable the tax board or tax court to identify every document without having to refer to the document itself.

(3) If additional documents are filed after the index has been completed, the party who files additional documents must paginate them following the method of original pagination, and compile a supplementary index describing the additional documents.

(4) Unless the parties agree otherwise, the party who produces the paginated documents and index must make the number of copies specified by the clerk or the registrar of the original and any supplementary documents, as well as the related index, and deliver a copy to the clerk or registrar and to the other party.

(5) A document delivered electronically must comply with the rules for electronic communication issued under section 255 of the Act.

Part B

Reasons for assessment, objection, appeal and test cases

6. Reasons for assessment.—(1) A taxpayer who is aggrieved by an assessment may, prior to lodging an objection, request SARS to provide the reasons for the assessment required to enable the taxpayer to formulate an objection in the form and manner referred to in rule 7.

(2) The request must—

(*a*) be made in the prescribed form and manner;

(*b*) specify an address at which the taxpayer will accept delivery of the reasons; and

(*c*) be delivered to SARS within 30 days from the date of assessment.

(3) The period within which the reasons must be requested by the taxpayer may be extended by SARS for a period not exceeding 45 days if a SARS official is satisfied that reasonable grounds exist for the delay in complying with that period.

(4) Where a SARS official is satisfied that the reasons required to enable the taxpayer to formulate an objection have been provided, SARS must, within 30 days after delivery of the request, notify the taxpayer accordingly which notice must refer to the documents wherein the reasons were provided.

(5) Where in the opinion of a SARS official the reasons required to enable the taxpayer to formulate an objection have not been provided, SARS must provide the reasons within 45 days after delivery of the request for reasons.

(6) The period for providing the reasons may be extended by SARS if a SARS official is satisfied that more time is required by SARS to provide reasons due to exceptional circumstances, the complexity of the matter or the principle or the amount involved.

(7) An extension may not exceed 45 days and SARS must deliver a notice of the extension to the taxpayer before expiry of the 45 day period referred to in sub-rule (5).

7. Objection against assessment.—(1) A taxpayer who may object to an assessment under section 104 of the Act, must deliver a notice of objection within 30 days after—

(*a*) delivery of a notice under rule 6 (4) or the reasons requested under rule 6; or

(*b*) where the taxpayer has not requested reasons, the date of assessment.

(2) A taxpayer who lodges an objection to an assessment must—

(*a*) complete the prescribed form in full;

(*b*) specify the grounds of the objection in detail including—

(i) the part or specific amount of the disputed assessment objected to;

(ii) which of the grounds of assessment are disputed; and

(iii) the documents required to substantiate the grounds of objection that the taxpayer has not previously delivered to SARS for purposes of the disputed assessment;

(*c*) if a SARS electronic filing service is not used, specify an address at which the taxpayer will accept delivery of SARS's decision in respect of the objection as well as all other documents that may be delivered under these rules;

(*d*) sign the prescribed form or ensure that the prescribed form is signed by the taxpayer's duly authorised representative; and

(*e*) deliver, within the 30 day period, the completed form at the address specified in the assessment or, where no address is specified, the address specified under rule 2.

(3) The taxpayer may apply to SARS under section 104 (4) for an extension of the period for objection.

(4) Where a taxpayer delivers an objection that does not comply with the requirements of sub-rule (2), SARS may regard the objection as invalid and must notify the taxpayer accordingly and state the ground for invalidity in the notice within 30 days of delivery of the invalid objection, if—

(*a*) the taxpayer used a SARS electronic filing service for the objection and has an electronic filing page;

(*b*) the taxpayer has specified an address required under sub-rule (2) (*c*); or

(*c*) SARS is in possession of the current address of the taxpayer.

(5) A taxpayer who receives a notice of invalidity may within 20 days of delivery of the notice submit a new objection without having to apply to SARS for an extension under section 104 (4).

(6) If the taxpayer fails to submit a new objection or submits a new objection which fails to comply with the requirements of sub-rule (2) within the 20 day period, the taxpayer may thereafter only submit a new and valid objection together with an application to SARS for an extension of the period for objection under section 104 (4).

8. Request for substantiating documents after objection lodged.—(1) Within 30 days after delivery of an objection, SARS may require a taxpayer to produce the additional substantiating documents necessary to decide the objection.

(2) The taxpayer must deliver the documents within 30 days after delivery of the notice by SARS.

(3) If reasonable grounds for an extension are submitted by the taxpayer, SARS may extend the period for delivery of the requested document for a further period not exceeding 20 days.

9. Decision on objection.—(1) SARS must notify the taxpayer of the allowance or disallowance of the objection and the basis thereof under section 106 (2) of the Act within—

(*a*) 60 days after delivery of the taxpayer's objection; or

(*b*) where SARS requested supporting documents under rule 8, 45 days after—

(i) delivery of the requested documents; or

(ii) if the documents were not delivered, the expiry of the period within which the documents must be delivered.

(2) SARS may extend the 60 day period for a further period not exceeding 45 days if, in the opinion of a senior SARS official, more time is required to take a decision on the objection due to exceptional circumstances, the complexity of the matter or the principle or the amount involved.

(3) If a period is extended the official must, before expiry of the 60 day period, inform the taxpayer that the official will decide on the objection within a longer period not exceeding 45 days.

10. Appeal against assessment.—(1) A taxpayer who wishes to appeal against the assessment to the tax board or tax court under section 107 of the Act must deliver a notice of appeal in the prescribed form and manner within—

(*a*) 30 days after delivery of the notice of disallowance of the objection under rule 9; or

(*b*) the extended period pursuant to an application under section 107 (2).

(2) A notice of appeal must—

(*a*) be made in the prescribed form;

(*b*) if a SARS electronic filing service is used, specify an address at which the appellant will accept delivery of documents when the SARS electronic filing service is no longer available for the further progress of the appeal;

(*c*) specify in detail—

(i) in respect of which grounds of the objection referred to in rule 7 the taxpayer is appealing;

(ii) the grounds for disputing the basis of the decision to disallow the objection referred to in section 106 (5); and

(iii) any new ground on which the taxpayer is appealing;

(*d*) be signed by the taxpayer or the taxpayer's duly authorised representative; and

(*e*) indicate whether or not the taxpayer wishes to make use of the alternative dispute resolution procedures referred to in Part C, should the procedures under section 107 (5) be available.

(3) The taxpayer may not appeal on a ground that constitutes a new objection against a part or amount of the disputed assessment not objected to under rule 7.

(4) If the taxpayer in the notice of appeal relies on a ground not raised in the objection under rule 7, SARS may require a taxpayer within 15 days after delivery of the notice of appeal to produce the substantiating documents necessary to decide on the further progress of the appeal.

(5) The taxpayer must deliver the documents within 15 days after delivery of the notice by SARS unless SARS extends the period for delivery for a further period not exceeding 20 days if reasonable grounds for an extension are submitted by the taxpayer.

11. Appeal to tax board or tax court.—(1) Where—

(*a*) the provisions of section 109 (1) of the Act apply, the appeal must be dealt with by the tax board under Part D; or

(*b*) the chairperson of the tax board directs an appeal to the tax court under section 109 (5) or the provisions of section 117 apply, the appeal must be dealt with by the tax court under Part E.

(2) If no alternative dispute resolution procedures under Part C are pursued, the appellant must, if the appeal is to be dealt with by the tax board, within 35 days of delivery of the notice of appeal request the clerk to set the matter down before the tax board under rule 26.

12. Test cases.—(1) A senior SARS official must upon designating an objection or appeal as a test case or staying a similar objection or appeal by reason of a designation under section 106 (6) of the Act, inform the taxpayers or appellants accordingly by notice before—

(*a*) the objection is decided under rule 9;

(*b*) if the appeal is to be dealt with by the tax board, a decision by the chairperson of the tax board is given under section 114; or

(*c*) if the appeal is to be dealt with by the tax court, the appeal is heard by the tax court.

(2) The notice must set out—

(*a*) the number of and common issues involved in the objections or appeals that the test case is likely to be determinative of;

(*b*) the question of law or fact or both law and fact that, subject to the augmentation thereof under rule 34, constitute the issues to be determined by the test case; and

(*c*) the importance of the test case to the administration of the relevant tax Act.

(3) The taxpayer or appellant concerned may within 30 days of delivery of the notice, deliver a notice—

(*a*) opposing the decision that an objection or appeal is designated as a test case;

(*b*) opposing the decision that an objection or appeal is stayed pending the final determination of a test case on a similar objection or appeal before the tax court; or

(*c*) if the objection or appeal is to be stayed, requesting a right of participation in the test case,

which notice must set out the grounds of opposition or for participation, as the case may be.

(4) If no notice under sub-rule (3) is received by SARS, the designation of the test case or suspension of the objection or appeal by reason of the designation is regarded as final.

(5) Within 30 days after receipt of a notice under sub-rule (3) a senior SARS official may—

(*a*) withdraw the decision to select the objection or appeal as a test case or to stay the objection or appeal pending the outcome of a test case;

(*b*) agree that a taxpayer or appellant requesting participation may do so; or

(*c*) apply to the tax court under Part F for an order under rule 52.

(6) The stay of an objection or appeal terminates on the date of the—

(*a*) expiry of the 30 day period prescribed under sub-rule (5), if a taxpayer or appellant has delivered a notice under sub-rule (3) and the senior SARS official has not within the 30 day period withdrawn the decision under sub-rule (5) (*a*) or made an application under sub-rule (5) (*c*);

(*b*) delivery of the notice by the official that the decision has been withdrawn under sub-rule (5) (*a*);

(*c*) agreement between the taxpayer or appellant and the official that the stay of the objection or appeal is terminated; or

(*d*) dismissal by the tax court, or higher court dealing with an appeal against the decision of the tax court under rule 52, of an application by the official under sub-rule (5) (*c*).

(7) For the period during which an objection or appeal is stayed under section 106 (6) (*b*)—

(*a*) a period prescribed under these rules (other than under this rule) in relation to the objection or appeal does not apply; and

(*b*) if the staying of an objection or appeal terminates, a period prescribed under these rules is treated as if the period was extended by the same period that the suspension of the objection or appeal was in effect.

(8) Proceedings in an objection or appeal under these rules which have been instituted but not determined by the tax board, tax court or any other court of law are stayed with effect from delivery of the notice under sub-rule (1) until the stay of an objection or appeal is terminated under sub-rule (6).

(9) A test case designated under section 106 (6) must be heard by the tax court constituted under section 118 (5) and if not so designated, the tax court constituted under section 118 (1).

(10) For purposes of a cost order by the tax court, or higher court dealing with an appeal against the judgment of the tax court, in a test case designated under section 106 (6), the appellants in the test case include—

(*a*) the appellant whose appeal was selected as the test case; and

(*b*) a taxpayer or appellant who participated in the test case.

(11) In the event that a tax court under section 130, or a higher court dealing with an appeal against the judgment of the tax court in the test case, awards costs and—

(*a*) SARS is substantially successful in a test case, the appellants in the test case will be responsible for their legal costs on the proportionate basis as may be determined by the tax court; or

(*b*) the appellants are substantially successful in a test case, SARS will be liable for the legal costs of the appellants and the taxpayers whose objections or appeals were stayed on the proportionate basis as may be determined by the tax court.

Part C

Alternative dispute resolution

13. Notice of alternative dispute resolution.—(1) If the appellant has in a notice of appeal indicated a willingness to participate in alternative dispute resolution proceedings under this Part in an attempt to resolve the dispute, SARS must inform the appellant by notice within 30 days of receipt of the notice of appeal whether or not the matter is appropriate for alternative dispute resolution.

(2) If the appellant has not indicated in the notice of appeal that the appellant wishes to make use of alternative dispute resolution under this Part, but SARS is satisfied that the matter is appropriate for alternative dispute resolution and may be resolved by way of the procedures referred to in this Part—

(*a*) SARS must inform the appellant accordingly by notice within 30 days of receipt of the notice of appeal; and

(*b*) the appellant must within 30 days of delivery of the notice by SARS deliver a notice stating whether or not the appellant agrees thereto.

(3) An appellant who requests alternative dispute resolution or agrees thereto, is regarded as having accepted the terms of alternative dispute resolution set out in this Part.

14. Reservation of rights.—(1) The parties participate in alternative dispute resolution proceedings under this Part with full reservation of their respective rights in terms of the procedures referred to in the other Parts of these rules.

(2) Subject to rule 22 (3) (*c*), any representations made or documents submitted in the course of the alternative dispute resolution proceedings will be without prejudice.

15. Period of alternative dispute resolution.—(1) The period within which the alternative dispute resolution proceedings under this rule are conducted commences on the date of delivery of the notice by SARS under rule 13 (1) or the notice by the appellant under rule 13 (2) (*b*), and ends on the date the dispute is resolved under rule 23 or 24 or the proceedings are terminated under rule 25.

(2) The period referred to in sub-rule (1) interrupts the periods prescribed for purposes of proceedings under rule 12 and Parts D, E and F of these rules.

(3) The parties must finalise the alternative dispute resolution proceedings within 90 days after the commencement date referred to in sub-rule (1).

16. Appointment of facilitator.—(1) A senior SARS official must establish a list of facilitators of alternative dispute resolution proceedings under this Part and a person included on the list—

(*a*) may be a SARS official;

(*b*) must be a person of good standing of a tax, legal, arbitration, mediation or accounting profession who has appropriate experience in such fields; and

(*c*) must comply with the duties under rule 17.

(2) A facilitator is only required to facilitate the proceedings if the parties so agree.

(3) Where the parties agree to use a facilitator, a senior SARS official must appoint a person from the list of facilitators—

(*a*) within 15 days after the commencement date of the proceedings under rule 15; or

(*b*) within 5 days after the removal of a facilitator under sub-rule (4) or the withdrawal of a facilitator under rule 18 (2);

and give notice thereof to the appellant and the SARS official to whom the appeal is allocated.

(4) A senior SARS official may not remove the facilitator appointed for the proceedings once the facilitator has commenced with the proceedings, save—

(*a*) at the request of the facilitator;

(*b*) by agreement between the parties;

(*c*) at the request of a party and if satisfied that there has been misconduct, incapacity, incompetence or non-compliance with the duties under rule 17 by the facilitator; or

(*d*) under the circumstances referred to in rule 18.

(5) A senior SARS official may request a party to submit evaluations of the facilitation process, including an assessment of the facilitator, which evaluations are regarded as SARS confidential information.

17. Conduct of facilitator.—A person appointed to facilitate the proceedings under this Part has a duty to—

(*a*) act within the prescripts of the proceedings under this Part and the law;

(*b*) seek a fair, equitable and legal resolution of the dispute between the appellant and SARS;

(*c*) promote, protect and give effect to the integrity, fairness and efficacy of the alternative dispute resolution process;

(*d*) act independently and impartially;

(*e*) conduct himself or herself with honesty, integrity and with courtesy to all parties;

(*f*) act in good faith;

(*g*) decline an appointment or obtain technical assistance when a case is outside the field of competence of the facilitator; and

(*h*) attempt to bring the dispute to an expeditious conclusion.

18. Conflict of interest of facilitator.—(1) A facilitator will not solely on account of his or her liability to tax and, if applicable, employment by SARS be regarded as having a personal interest or a conflict of interest in proceedings in which he or she is appointed to facilitate.

(2) A facilitator must withdraw from the proceedings as soon as the facilitator becomes aware of a conflict of interest which may give rise to bias which the facilitator may experience with the matter concerned or other circumstances that may affect the facilitator's ability to remain objective for the duration of the proceedings.

(3) Either party may request the senior SARS official who appointed the facilitator to withdraw the facilitator on the basis of conflict of interest or other indications of bias and, if the parties so agree, appoint a new facilitator to continue the proceedings.

19. Determination and termination of proceedings by facilitator.—(1) The facilitator must, after consulting the appellant and the SARS official involved in the alternative dispute resolution proceedings—

(*a*) within 20 days of the facilitator's appointment, determine a place, date and time at which the parties must convene the alternative dispute resolution meeting and notify the parties accordingly in writing; and

(*b*) if required, notify each party in writing which written submissions or any other document should be furnished or exchanged and when the submissions or documents are required.

(2) Where a facilitator has not been appointed, the parties must—

(*a*) within 30 days determine a place, date and time at which the parties must convene the alternative dispute resolution meeting; and

(*b*) if required, notify the other party in writing which written submissions or any other document should be furnished or exchanged and when the submissions or documents are required.

(3) The facilitator may summarily terminate the proceedings without prior notice—

(*a*) if a party fails to attend the meeting;

(*b*) if a party fails to carry out a request under sub-rule (1) (*b*);

(*c*) if of the opinion that the dispute cannot be resolved through such proceedings; or

(*d*) for any other appropriate reason.

20. Proceedings before facilitator.—(1) The alternative dispute resolution proceedings before the facilitator must be conducted in accordance with the procedures set out in this Part.

(2) A facilitator or a party is not required to record the proceedings and the proceedings may not be electronically recorded.

(3) During the proceedings the appellant, if a natural person or if a representative taxpayer within the meaning of section 153 of the Act, must be personally present or participate by telephonic or video conferencing and, if SARS so agrees, may be represented by a representative of the appellant's choice.

(4) If a facilitator was appointed, the facilitator, in exceptional circumstances, may allow the appellant to be represented in the appellant's absence by a representative of the appellant's choice.

(5) The meeting may be—

(*a*) concluded at the instance of the facilitator or if the parties so agree; and

(*b*) if both parties and the facilitator, if appointed, agree, resumed at the place, date or time determined by the parties and which suits the facilitator.

(6) If a facilitator was appointed, the facilitator must at the conclusion of the meeting deliver a report that records—

(*a*) the issues which were resolved;

(*b*) the issues upon which agreement or settlement could not be reached; and

(*c*) any other point which the facilitator considers necessary.

(7) The facilitator must deliver the report to the taxpayer and SARS within 10 days of the cessation of the proceedings.

21. Recommendation by facilitator.—(1) SARS, the appellant and the facilitator may agree at the commencement of the proceedings that, if no agreement or settlement is ultimately reached between the parties, the facilitator may make a written recommendation at the conclusion of the proceedings.

(2) The facilitator must deliver the recommendation to the parties with 30 days after the termination of the proceedings under rule 25 unless the parties agree to an extension of this period.

(Editorial Note: Wording as per original *Government Gazette*. It is suggested that the word "with" is intended to be "within".)

(3) A recommendation by a facilitator will not be admissible during any subsequent proceedings including court proceedings unless it is required by the tax court for purposes of deciding costs under section 130 of the Act.

22. Confidentiality of proceedings.—(1) Representations made or documents tendered to the facilitator in confidence by a party during the course of the facilitation should be kept by the facilitator in confidence and not be disclosed to the other party except with the consent of the party that disclosed the information.

(2) A facilitator who is not a SARS official will be regarded as such for purposes of Chapter 6 of the Act.

(3) The proceedings under this rule will not be one of record, and any representation made or document tendered in the course of the proceedings—

(*a*) is subject to the confidentiality provisions of Chapter 6;

(*b*) is made or tendered without prejudice; and

(*c*) may not be made or tendered in any subsequent proceedings as evidence by a party, except—

(i) with the knowledge and consent of the party who made the representation or tendered the document;

(ii) if such representation or document is already known to, or in the possession of, that party;

(iii) if such representation or document is obtained by the party otherwise than under the proceedings in terms of this rule; or

(iv) if a senior SARS official is satisfied that the representation or document is fraudulent.

(4) Unless a court otherwise directs, no person may—

(*a*) subject to the circumstances listed in sub-rule (3) (*c*), subpoena a person involved in the alternative dispute resolution proceedings in whatever capacity to compel disclosure of any representation made or document tendered in the course of the proceedings;

(*b*) subpoena the facilitator to compel disclosure of any representation made or document tendered in the course of the proceedings in any other proceedings; or

(*c*) subpoena the facilitator during or after termination of the proceedings under rule 25 to explain or defend a recommendation made under rule 21.

23. Resolution of dispute by agreement.—(1) A dispute which is subject to the procedures under this rule may be resolved by agreement whereby a party accepts, either in whole or in part, the other party's interpretation of the facts or the law applicable to those facts or both.

(2) An agreement under this rule—

(*a*) must be recorded in writing and signed by the appellant and the SARS official duly authorised to do so;

(*b*) must relate to the appeal as a whole, including costs;

(*c*) if not all issues in dispute were resolved, must stipulate those areas in dispute—

(i) that are resolved; and

(ii) that could not be resolved and on which the appellant may continue the appeal to the tax board or tax court;

(*d*) may be made an order of court either with the consent of both parties, or on application to the tax court by a party under Part F; and

(*e*) must be reported internally in SARS in the manner as may be required by the Commissioner.

(3) Where an agreement is concluded, SARS must issue an assessment to give effect to the agreement within a period of 45 days after the date of the last signing of the agreement.

(4) If the appellant wishes to pursue the appeal on the unresolved issues to the tax board or tax court, the appellant must deliver a notice to this effect to the clerk or registrar, as the case may be, within 15 days of the date of the agreement.

24. Resolution of dispute by settlement.—(1) Where the parties are, despite all reasonable efforts, unable to resolve the dispute under rule 23, the parties may attempt to settle the matter in accordance with Part F of Chapter 9 of the Act.

(2) A settlement under Part F of Chapter 9 pursuant to proceedings under this Part—

(*a*) is subject to the approval of the senior SARS official referred to in section 147 of the Act;

(*b*) must be recorded in writing and signed by the appellant and the senior SARS official;

(*c*) must relate to the appeal as a whole, including costs;

(*d*) if not all issues in dispute were settled, must stipulate those areas in dispute—

(i) that are resolved; and

(ii) that could not be resolved and on which the appellant may continue the appeal to the tax board or tax court;

(*e*) may be made an order of court either with the consent of both parties, or on application to the tax court by a party under Part F; and

(*f*) must be reported in the manner referred to in section 149.

(3) Where a settlement is concluded, SARS must issue the assessment referred to in section 150 to give effect to the settlement within a period of 45 days after the date of the last signature of the settlement.

(4) If the appellant wishes to pursue the appeal on the unresolved issues to the tax board or tax court, the appellant must deliver a notice to this effect to the clerk or registrar, as the case may be, within 15 days of the date of the settlement.

25. Termination of proceedings.—(1) The alternative dispute resolution proceedings are terminated on the day after the expiry of the 90 day period under rule 15, unless the parties agreed that this period may be extended.

(2) Before expiry of the 90 day period under rule 15 or any extension thereof, if no agreement under rule 23 or settlement under rule 24 is concluded, the alternative dispute resolution proceedings are terminated on the date that—

(*a*) the facilitator terminates the proceedings under rule 19;

(*b*) the parties so agree; or

(*c*) a party delivers a notice of termination to the other party.

(3) If alternative dispute resolution proceedings are terminated under this rule, the appellant must within 20 days of the date of the termination—

(*a*) if the appeal is to be dealt with by the tax board, request the clerk to set the matter down before the tax board under rule 26; or

(*b*) if the appeal is to be dealt with by the tax court, give notice to SARS that the appellant wishes to proceed with the appeal.

Part D

Procedures of tax board

26. Set down of appeal before tax board.—(1) The clerk must set an appeal down before the tax board within 30 days after receipt of—

(*a*) a notice by the appellant under rule 11 (2) (*a*), 23 (4), 24 (4) or 25 (3);

(Editorial Note: Wording as per original *Government Gazette*.)

(*b*) a decision by the chairperson to condone non-appearance before the tax board under rule 30; or

(*c*) an order by the tax court to condone non-appearance before the tax board under rule 53.

(2) The clerk in his or her sole discretion may allocate a date for the hearing.

(3) The clerk must give the parties written notice of the date, time and place for the hearing of the appeal at least 20 days before the hearing.

27. Subpoenas and dossier to tax board.—(1) At the request of either party, or if a tax board directs, a subpoena may be issued by the clerk requiring a person to—

(*a*) attend the hearing of the appeal for the purpose of giving evidence in connection with the appeal; and

(*b*) produce any specified document which may be in that person's possession or under that person's control and which is relevant to the issues in appeal.

(2) The Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa issued under the Rules Board for Courts of Law Act will apply in respect of subpoenas issued under this rule.

(3) A witness or document subpoenaed must be relevant to the issues in appeal as reflected in the grounds of assessment, notice of objection, notice of disallowance of objection and notice of appeal.

(4) At least 10 days before the hearing of the appeal or as otherwise agreed between the parties, the clerk must prepare and deliver a dossier to the chairperson and the parties containing copies of—

(*a*) all returns by the appellant relevant to the tax period in issue;

(*b*) all assessments relevant to the appeal;

(*c*) all documents relevant to a request for reasons for the assessment under rule 6;

(*d*) the notice of objection under rule 7 and documents, if any, provided under rule 8;

(*e*) the notice of disallowance of the objection under rule 9;

(*f*) the notice of appeal under rule 10; and

(*g*) any order by the tax court under Part F relating to the appeal.

(5) The dossier must be prepared in accordance with the requirements of rule 5.

28. Procedures in tax board.—(1) Sections 122, 123, 124, 126, 127, 128 and 129 of the Act apply, with the necessary changes, to the tax board and the chairperson.

(2) A party must present all evidence, including leading witnesses, on which the party's case is based and must adhere to the rules of evidence.

(3) At the conclusion of the evidence, the parties may be heard in argument.

(4) The clerk must as required under section 114 (3) deliver of a copy of the tax board's decision to both parties within 10 days of receipt of the decision.

(Editorial Note: Wording as per original *Government Gazette*. It is suggested that the phrase "deliver of a copy" is intended to be "deliver a copy".)

(5) If no referral of the appeal to the tax court is requested under rule 29, SARS must, if required, issue the assessment to give effect to the decision of the tax board within a period of 45 days after delivery of a copy of the tax board's decision by the clerk.

29. Referral of appeal from tax board to tax court.—(1) A party requiring an appeal to be referred to the tax court for a *de novo* hearing under section 115 of the Act must deliver a notice to the clerk requesting the referral and deliver a copy thereof to the other party.

(2) The referral notice must be delivered within the 21 day period prescribed under section 115 or the period extended under this rule—

(*a*) after delivery by the clerk of the tax board's decision under rule 28 (4) or decision to extend the period under sub-rule (5);

(*b*) after delivery by the registrar of the tax court's decision to extend the period under rule 53; or

(*c*) the expiry of the 60 day period within which the chairperson must deliver the decision under section 114 (2).

(3) If the party seeking the referral is unable to deliver the notice within the prescribed period, the party may within the 21 day period prescribed under section 115 deliver a request for an extension by the chairperson under section 115 (1) to the clerk, setting out the grounds for the extension or delay.

(4) The clerk must within 10 days of receipt of the request, deliver the request to the relevant chairperson and a copy thereof to the other party.

(5) The chairperson must determine whether good cause exists for the extension and must make a decision within 15 days of receipt of the request and inform the clerk accordingly, and the clerk must notify the parties within 10 days of delivery of the decision of the chairperson.

30. Reasons for non-appearance at tax board hearing.—(1) If the chairperson confirms an assessment under section 113 (9) of the Act or allows an appeal under section 113 (11), a party who failed to appear at the hearing of the board must provide the reasons referred to in section 113 (13) for the non-appearance and request that the chairperson withdraws the tax board's decision.

(2) The request must set out the reasons for the non-appearance and must be delivered to the clerk within 10 days after—

(*a*) if the tax board decided the matter on the day of the hearing when the party failed to appear, the date of the hearing;

(*b*) if the tax board decided the matter after the day of the hearing, the date of delivery of a copy of the tax board's decision; or

(*c*) in any other case, the date that the party becomes aware of the tax board's decision.

(3) The clerk must within 10 days of receipt of the request deliver the application to the chairperson and a copy thereof to the other party.

(4) The chairperson must determine whether the party's non-appearance is due to sound reasons and must make a decision within 15 days of receipt of the request and inform the clerk accordingly.

(5) The clerk must deliver the chairperson's decision to the parties within 10 days of receipt of the decision.

Part E

Procedures of tax court

31. Statement of grounds of assessment and opposing appeal.—(1) SARS must deliver to the appellant a statement of the grounds of assessment and opposing the appeal within 45 days after delivery of—

(*a*) the documents required by SARS under rule 10 (4);

(*b*) if alternative dispute resolution proceedings were followed under Part C, the notice by the appellant of proceeding with the appeal under rule 24 (4) or 25 (3);

(*c*) if the matter was decided by the tax board, the notice of a *de novo* referral of the appeal to the tax court under rule 29 (2); or

(*d*) in any other case, the notice of appeal under rule 10.

(2) The statement of the grounds of opposing the appeal must set out a clear and concise statement of—

(*a*) the consolidated grounds of the disputed assessment;

(*b*) which of the facts or the legal grounds in the notice of appeal under rule 10 are admitted and which of those facts or legal grounds are opposed; and

(*c*) the material facts and legal grounds upon which SARS relies in opposing the appeal.

(3) SARS may not include in the statement a ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment.

32. Statement of grounds of appeal.—(1) The appellant must deliver to SARS a statement of grounds of appeal within 45 days after delivery of—

(*a*) the required documents by SARS, where the appellant was requested to make discovery under rule 36 (1); or

(*b*) the statement by SARS under rule 31.

(2) The statement must set out clearly and concisely—

(*a*) the grounds upon which the appellant appeals;

(*b*) which of the facts or the legal grounds in the statement under rule 31 are admitted and which of those facts or legal grounds are opposed; and

(*c*) the material facts and the legal grounds upon which the appellant relies for the appeal and opposing the facts or legal grounds in the statement under rule 31.

(3) The appellant may not include in the statement a ground of appeal that constitutes a new ground of objection against a part or amount of the disputed assessment not objected to under rule 7.

33. Reply to statement of grounds of appeal.—(1) SARS may after delivery of the statement of grounds of appeal under rule 32 deliver a reply to the statement within—

(*a*) 15 days after the appellant has discovered the required documents, where the appellant was requested to make discovery under rule 36 (2); or

(*b*) 20 days after delivery of the statement under rule 32.

(2) The reply to the statement of grounds of appeal must set out a clear and concise reply to any new grounds, material facts or applicable law set out in the statement.

34. Issues in appeal.—The issues in an appeal to the tax court will be those contained in the statement of the grounds of assessment and opposing the appeal read with the statement of the grounds of appeal and, if any, the reply to the grounds of appeal.

35. Amendments of statements.—(1) The parties may agree that a statement under rule 31, 32 or 33 be amended.

(2) If the other party does not agree to the amendment, the party who requires an amendment may apply to the tax court under Part F for an order under rule 52.

36. Discovery of documents.—(1) The appellant may, within 10 days after delivery of the statement under rule 31, deliver a notice of discovery to SARS requesting it to make discovery on oath of any document material to a ground of the assessment or opposing the appeal specified in the statement under rule 31 not set out in the grounds of assessment as defined in rule 1, to the extent that such document is required by the appellant to formulate its grounds of appeal under rule 32.

(2) SARS may within 10 days after delivery of the statement under rule 32, deliver a notice of discovery requesting the appellant to make discovery on oath of any document material to a ground of appeal in the statement under rule 32 and not set out in the grounds of assessment, to the extent such document is required by SARS to formulate its grounds of reply under rule 33.

(3) A party may within 15 days after delivery of the statement under rule 32 or 33, as the case may be, deliver a notice of discovery to the other party requesting that party to—

(*a*) make discovery on oath of all documents relating to the issues in appeal as referred to in rule 34; and

(*b*) if required and reasonable, produce specified documents in a specified manner, including electronically.

(4) A party to whom a notice of discovery has been delivered must make discovery on oath of all documents relating to a request under sub-rule (1) or (2) or the issues in appeal, as the case may be, within 20 days after delivery of the discovery notice, specifying separately—

(*a*) the documents in or under the party's possession or control, or in or under the control of that party's agent;

(*b*) the documents which were previously in the party's possession or control, or under the control of the party's agent, but which are no longer in the party's possession or control or that of the party's agent; and

(*c*) the documents in respect of which the party has a valid objection to produce.

(5) After delivery of the documents, the production or inspection of the documents must take place at a venue and in a manner that the parties agree on.

(6) If either party believes that, in addition to the documents disclosed, there are other documents in possession of the other party that may be relevant to a request under sub-rule (1) or (2) or the issues in appeal, as the case may be, that have not been discovered, then that party may give notice of further discovery within 10 days of the discovery under sub-rule (4), or of the inspection of the documents under sub-rule (5), to that other party requiring the other party to within 10 days—

(*a*) make the further documents available for inspection; or

(*b*) state under oath that the documents requested are not in that party's possession, in which event the party must state their whereabouts, if known.

(7) A document not disclosed pursuant to a notice of discovery may not, unless the tax court in the interest of justice otherwise directs, be used for any purpose at the appeal by the party who failed to make disclosure, but the other party may use such document.

(8) A document referred to in sub-rule (7) does not include a document specifically prepared to assist the court in understanding the case of the relevant party and which is not presented as evidence in the appeal.

37. Notice of expert witness.—Neither party may, save with the leave of the tax court or if the parties so agree, call a person as a witness to give evidence as an expert, unless that party has—

(*a*) not less than 30 days before the hearing of the appeal delivered a notice to the other party and the registrar of the party's intention to do so; and

(*b*) not less than 20 days before the hearing of the appeal delivered to the other party and the registrar a summary of the expert's opinions and the relevance thereof to the issues in appeal under rule 34.

38. Pre-trial conference.—(1) SARS must arrange for a pre-trial conference to be held by not later than 60 days before the hearing of the appeal.

(2) During the pre-trial conference the parties must attempt to reach consensus on—

(*a*) what facts are common cause and what facts are in dispute;

(*b*) the resolution of preliminary points that either party intends to take;

(*c*) the sufficiency of the discovery process;

(*d*) the preparation of a paginated bundle of documents;

(*e*) the manner in which evidence is to be dealt with, including an agreement on the status of a document and if a document or a part thereof, will serve as evidence of what it purports to be;

(*f*) whether evidence on affidavit will be admitted and the waiver of the right of a party to cross-examine the deponent;

(*g*) expert witnesses and the evidence to be given in an expert capacity;

(*h*) the necessity of an inspection *in loco*;

(*i*) an estimate of the time required for the hearing and any means by which the proceedings may be shortened; and

(*j*) if the dispute could be resolved or settled in whole or in part.

(3) This conference must take place at the SARS office determined by SARS unless the parties agree that it may take place at a different venue.

(4) SARS must within 10 days of the conclusion of the pre-trial conference prepare and deliver to the appellant a minute setting out the parties' discussion and an agreement reached in respect of each matter referred to in sub-rule (2).

(5) Where the appellant does not agree with the content of the minute, the appellant must, within 10 days of delivery of the minute by SARS, deliver a differentiating minute to SARS setting out with which statements in the minute by SARS the appellant does not agree and why.

39. Set down of appeal for hearing before tax court.—(1) The appellant must apply to the registrar to allocate a date for the hearing of the appeal within 30 days after delivery of the appellant's statement of grounds of appeal under rule 32 or SARS's reply under rule 33, as the case may be, and give notice thereof to SARS.

(2) If the appellant fails to apply for the date within the prescribed period, SARS must apply for a date for the hearing within 30 days after the expiry of the period.

(3) The registrar in his or her sole discretion may allocate a date for the hearing.

(4) The registrar must deliver to the parties a written notice of the time and place appointed for the hearing of the appeal at least 80 days before the hearing of the appeal.

40. Dossier to tax court.—(1) At least 30 days before the hearing of the appeal, or as otherwise agreed between the parties, SARS must deliver to the appellant and the registrar a dossier containing copies, where applicable, of—

(*a*) all returns by the appellant relevant to the year of assessment in issue;

(*b*) all assessments by SARS relevant to the issues in appeal;

(*c*) the appellant's notice of objection against the assessment;

(*d*) SARS's notice of disallowance of the objection;

(*e*) the appellant's notice of appeal;

(*f*) SARS's statement of grounds of assessment and opposing the appeal under rule 31;

(*g*) the appellant's statement of grounds of appeal under rule 32;

(*h*) SARS's reply to the appellant's statement of grounds of appeal under rule 33, if any;

(*i*) SARS's minute of the pre-trial conference and, if any, the appellant's differentiating minute;

(*j*) any request for a referral from a tax board decision to the tax court under rule 29; and

(*k*) any order by the tax court under Part F or a higher court in an interlocutory application or application on a procedural matter relating to the objection or the appeal.

(2) The dossier must be prepared in accordance with the requirements of rule 5.

(3) The registrar must deliver copies of the dossier to the tax court at least 20 days before the hearing of the appeal.

41. Places at which tax court sits.—(1) The Judge-President of the Division of the High Court with jurisdiction in the area where a tax court has been established under section 116 of the Act must—

(*a*) determine the place and the times of the sittings of the tax court in that area by arrangement with the registrar under section 117 (2); and

(*b*) allocate a judge or an acting judge of the High Court as the president of the tax court for each sitting.

(2) The tax court established in the area which is nearest to the residence or principal place of business of the appellant must hear and determine an appeal or application under Part F by the appellant, unless—

(*a*) the parties agree that the appeal or application be heard by a tax court sitting in another area; or

(*b*) the tax court, on application by a party under Part F, orders that the appeal or application be heard and disposed of in that tax court if—

(i) there are reasonable grounds to determine the matter in that tax court; and

(ii) approved by the Judge-President of the Division of the High Court with jurisdiction in the area where that tax court sits.

42. Procedures not covered by Act and rules.—(1) If these rules do not provide for a procedure in the tax court, then the most appropriate rule under the Rules for the High Court made in accordance with the Rules Board for Courts of Law Act and to the extent consistent with the Act and these rules, may be utilised by a party or the tax court.

(2) A dispute that arises during an appeal or application under Part F concerning the use of a rule of the high court must be dealt with by the president of the tax court as a matter of law under section 118 (3) of the Act.

43. Subpoena of witnesses to tax court.—(1) At the request of either party, or if a tax court directs, a subpoena may be issued by the registrar requiring a person to attend the hearing of the appeal for the purpose of giving evidence in connection with an appeal.

(2) The subpoena may require the person subpoenaed to produce any specified document which may be in that person's possession or under that person's control and which is relevant to the issues in appeal.

(3) A witness or document subpoenaed must be relevant to the issues in appeal under rule 34.

(4) The Rules for the High Court made in accordance with the Rules Board for Courts of Law Act governing the service of subpoenas in civil matters in the high court will apply in respect of subpoenas issued under this rule.

44. Procedures in tax court.—(1) At the hearing of the appeal, the proceedings are commenced by the appellant unless—

(*a*) the only issue in dispute is whether an estimate under section 95 of the Act on which the disputed assessment is based, is reasonable or the facts upon which an understatement penalty is imposed by SARS under section 222 (1); or

(*b*) SARS takes a point *in limine*.

(2) A party—

(*a*) must present all evidence, including leading witnesses, on which the party's case is based and must adhere to the rules of evidence; and

(*b*) may present a document specifically prepared to assist the court in understanding the case of the party and which is not presented as evidence in the appeal.

(3) At the conclusion of the evidence, the parties may be heard in argument and the party heard first may reply to new points raised in the argument presented by the other party or to other points with the leave of the president of the tax court.

(4) The hearing of an appeal may be adjourned by the president of the tax court from time to time to a time and place that the tax court deems convenient.

(5) The tax court may reserve its decision until a later date and where the decision is reserved, the judgment must be delivered by the president of the tax court in the manner considered fit.

(6) The registrar must by notice deliver the written judgment of the tax court to the parties within 21 days of delivery thereof.

(7) If a party or a person authorised to appear on the party's behalf fails to appear before the tax court at the time and place appointed for the hearing of the appeal, the tax court may decide the appeal under section 129 (2) upon—

(*a*) the request of the party that does appear; and

(*b*) proof that the prescribed notice of the sitting of the tax court has been delivered to the absent party or absent party's representative,

unless a question of law arises, in which case the tax court may call upon the party that does appear for argument.

45. Postponement or removal of case from roll.—(1) If the parties agree to postpone the hearing of the appeal that has been set down for hearing, or to have that appeal removed from the tax court's roll, the party initiating the proceedings must notify the registrar thereof.

(2) An application by a party to postpone or remove an appeal from the roll, which is opposed by the other party, may be heard and determined by the president of the tax court in the manner referred to in section 118 (3) of the Act and the president may make an appropriate cost order under section 130 (3).

46. Withdrawal or concession of appeal or application.—(1) If at any time before it has been set down under rule 39 an appeal or application under Part F is withdrawn by the appellant or conceded by SARS under section 107 of the Act, notice of the withdrawal or concession, whichever is applicable, must be given to the other party.

(2) If an appeal or application has been set down for hearing under rule 39, or is part-heard, and the appellant withdraws or SARS concedes the appeal or application, the relevant party must—

(*a*) deliver a notice of withdrawal or concession, whichever is applicable, to the other party and to the registrar; and

(*b*) in such notice, indicate whether or not the party consents to pay the costs of the other party.

47. Costs.—(1) Where the tax court makes an order as to costs or if a consent to pay costs is made by a party under these rules, at the request of a party, the registrar may—

(*a*) perform the functions and duties of a taxing master; or

(*b*) at the request of the tax court or the party, appoint any other person to act as taxing master on such terms and for such period as the registrar considers appropriate.

(2) The registrar must be satisfied that the person appointed by the registrar to act as taxing master is suitably qualified or experienced to perform the functions and duties of a taxing master.

(3) The fees, charges and rates to be allowed by the tax court are, as far as applicable, those fixed by the tariff of fees and charges in cases heard before the Division of the High Court within which area of jurisdiction the tax court sits.

48. Witness fees.—(1) A witness in proceedings before the tax court is entitled to be paid in accordance with the tariff of allowances prescribed by the Minister of Justice and Constitutional Development and published under section 37 of the Superior Courts Act.

(2) A tax court may, at the request of a party, order that no allowances or only a portion of the prescribed allowances be paid to a witness.

49. Request for recordings.—(1) If the appellant requires from the registrar under section 134 (3) of the Act—

(*a*) a transcript of the evidence or part thereof given at the hearing of the appeal; or

(*b*) a copy of the recording of the evidence or a part thereof given at the hearing of the appeal for purposes of private transcription,

the appellant must pay to the registrar the costs as prescribed by the Commissioner in a public notice issued under section 134 (3).

(2) The appellant must pay the costs as follows—

(*a*) if a transcript is required, payment must be made within 20 days of delivery of the transcript and the invoice by the registrar; or

(*b*) if a copy of the recording of the evidence is required, payment in full must be made upon receipt of the copy and invoice by the registrar.

Part F

Applications on notice

50. Procedures under this Part.—(1) For the purpose of this Part—

(*a*) the party bringing the application is the applicant and the party against whom relief is sought is the respondent; and

(*b*) a reference to the tax court means the president of the tax court acting in the manner referred to in section 118 (3) of the Act.

(2) The rules referred to in Parts A to E and G, to the extent applicable and together with the necessary changes as required by the context, apply to this Part.

(3) A document required to be delivered under this Part must be delivered—

(*a*) to the registrar at the address specified by public notice under rule 3;

(*b*) to SARS at the address specified under rule 2 (1); or

(*c*) to the taxpayer or appellant, at the address specified under rule 2 (1).

(4) An application under this Part, unless the context otherwise indicates, interrupts the periods prescribed for purposes of proceedings under Parts A to E of these rules for the period commencing on the date of delivery of a notice of motion under rule 57 and ending on the date of—

(*a*) delivery of a notice of withdrawal of the application by the applicant;

(*b*) an agreement between the applicant and respondent to terminate proceedings under this Part; or

(*c*) delivery of the judgment of the tax court to the parties.

(5) The tax court hearing an application under this Part may—

(*a*) make an order as referred to in this Part, together with any other order it deems fit, including an order as to costs; and

(*b*) reserve its decision until a later date and where the decision is reserved, the judgment must be delivered by the president of the tax court in the manner considered fit.

(6) The registrar must by notice deliver the written judgment of the tax court to the applicant and the respondent within 10 days of delivery thereof.

51. Application provided for in Act.—(1) An application to the tax court provided for in the Act must, unless otherwise specified, be brought in the manner provided for in this Part.

(2) An interlocutory application relating to an objection or appeal must, unless the tax court before which an appeal is set down otherwise directs, be brought in the manner provided for in this Part.

52. Application provided for under rules.—(1) A party who failed to obtain an extension of a period by agreement with the other party, the clerk or the registrar, as the case may be, under rule 4 may apply to the tax court under this Part for an order, on good cause shown—

(*a*) condoning the non-compliance with the period; and

(*b*) extending the period for the further period that the tax court deems appropriate.

(2) A taxpayer or appellant may apply to a tax court under this Part—

(*a*) if SARS fails to provide the reasons under rule 6 required to enable the taxpayer to formulate an objection under rule 7, for an order that SARS must provide within the period allowed by the court the reasons regarded by the court as required to enable the taxpayer to formulate the objection;

(*b*) if an objection is treated as invalid under rule 7, for an order that the objection is valid;

(*c*) if the period of time to lodge an objection to an assessment has not been extended by SARS under section 104 (4) on request by the taxpayer under rule 7, for an order extending the period within which an objection must be lodged by a taxpayer;

(*d*) if the period of time to provide documents to substantiate an objection requested by SARS has not been extended under rule 8, for an order extending the period within which the information must be provided by the taxpayer; or

(*e*) if the period of time to lodge an appeal to an assessment has not been extended by SARS under section 107 (2) of the Act on request by the taxpayer under rule 10, for an order extending the period within which an appeal must be lodged by an appellant.

(3) SARS may for purpose of rule 12 apply to a tax court under this Part for an order—

(*a*) that an objection or appeal be selected as test case;

(*b*) that an objection or appeal be stayed pending the determination of the test case;

(*c*) if in dispute, what are the issues that will be determined in the test case; or

(*d*) that a taxpayer or appellant requesting participation in the test case should not be allowed to do so.

(4) A taxpayer may apply, if SARS does not agree, to the tax court for an order that the judgment in a test case is not determinative of the issues in that taxpayer's objection or appeal and that the taxpayer may pursue its objection and appeal under these rules.

(5) A party to an agreement under rule 23 or a settlement under rule 24 pursuant to alternative dispute resolution proceedings under Part C, may apply to a tax court under this Part for an order that—

(*a*) the agreement or settlement be made an order of court; or

(*b*) if SARS fails to issue the assessment to give effect to an agreement or settlement within the period prescribed under rule 23 (3) or 24 (3), as the case may be, SARS must issue the assessment.

(6) A party who failed to deliver a statement as and when required under rule 31, 32 or 33, may apply to the tax court under this Part for an order condoning the failure to deliver the statement and the determination of a further period within which the statement may be delivered.

(7) A party seeking an amendment of a statement under rule 35, may apply to the tax court under this Part for an appropriate order, including an order concerning a postponement of the hearing.

(8) A person who is of the view that the issue of a subpoena under rule 27 or 43 constitutes an abuse of process may apply to the tax court under this Part for the withdrawal of the subpoena.

(9) If a notice of withdrawal or concession is delivered under rule 46 after the appeal or application has been set down for hearing without a consent to pay the other party's costs, the aggrieved party may apply to the tax court under this Part for an order as to costs under section 130 (1) (*e*).

(10) A party may apply to the tax court under this Part for an order as to the reconsideration of items or portions of items in a bill of costs taxed by the registrar or the person appointed to act as taxing master under rule 47 and whether items or portions of items in the bill of costs taxed may be allowed, reduced or disallowed.

53. Application against decision by chairperson of tax board.—(1) A party may, despite the procedures set out in Part D, apply to a tax court against a decision by a chairperson of a tax board that concerns—

(*a*) the non-appearance of a person at a hearing of the tax board under section 113 (13) of the Act; or

(*b*) the extension of the period within which a request to refer a tax board decision to the tax court under section 115 must be made.

(2) A party may apply to the tax court to may make an order—

(*a*) condoning a party's non-appearance at a tax board hearing; or

(*b*) allowing a party's request for extension of the referral of the appeal to the tax court.

(Editorial Note: Wording as per original *Government Gazette*.)

54. Application for withdrawal of chairperson of tax board.—(1) An application for the withdrawal of a chairperson of the tax board under section 111 (7) of the Act may be made to—

(*a*) that chairperson before or during the hearing of the appeal by the tax board; or

(*b*) if the application made to that chairperson was refused, the tax court in the manner provided for in this Part.

(2) For purpose of the application to the tax court by the applicant, the chairperson must postpone the hearing *sine die*.

(3) The tax court to which an application is made may order the withdrawal of the chairperson if satisfied that there—

(*a*) is a conflict of interest on the part of the chairperson that may reasonably be regarded as giving rise to bias which the chairperson may experience with the case concerned; or

(*b*) are other circumstances that may reasonably be regarded as giving rise to bias and affect the chairperson's ability to remain objective for the duration of the case,

together with any other order it deems fit, including an order as to costs.

(4) The applicant must within 10 days of delivery of the judgment of the tax court by the registrar under rule 50 (6), request the clerk to convene or reconvene, as the case may be, the tax board under rule 26.

55. Application for withdrawal of member of tax court.—(1) An application for the withdrawal of a member of the tax court under section 122 of the Act, may be made in the manner provided for in this Part to—

(*a*) if the appeal has been set down under rule 39, the tax court where the appeal has been set down; or

(*b*) if the appeal has not been set down under rule 39, the tax court where the application is set down under this Part.

(2) If an application for the withdrawal of a member of the tax court is made—

(*a*) after the appeal has been set down but before the hearing, the applicant must request the registrar to postpone the hearing of the appeal *sine die*; or

(*b*) during the hearing of the appeal, the tax court must postpone the hearing of the appeal *sine die*.

(3) The tax court to which an application is made under this rule may order the withdrawal of the member if satisfied that there—

(*a*) is a conflict of interest on the part of the member that may reasonably be regarded as giving rise to bias which the member may experience with the case concerned; or

(*b*) are other circumstances that may reasonably be regarded as giving rise to bias and affect the member's ability to remain objective for the duration of the case.

(4) If an application for the withdrawal of a member of the tax court is successful, the applicant must within 10 days of delivery of the order of the tax court by the registrar, request the registrar to set the appeal down under rule 39.

(5) The registrar after receipt of the notice of the applicant requesting set down, must select another person from the panel of members of the tax court established under section 120 for the hearing of the appeal.

56. Application for default judgment in the event of non-compliance with rules.—(1) If a party has failed to comply with a period or obligation prescribed under these rules or an order by the tax court under this Part, the other party may—

(*a*) deliver a notice to the defaulting party informing the party of the intention to apply to the tax court for a final order under section 129 (2) of the Act in the event that the defaulting party fails to remedy the default within 15 days of delivery of the notice; and

(*b*) if the defaulting party fails to remedy the default within the prescribed period, apply, on notice to the defaulting party, to the tax court for a final order under section 129 (2).

(2) The tax court may, on hearing the application—

(*a*) in the absence of good cause shown by the defaulting party for the default in issue make an order under section 129 (2); or

(*b*) make an order compelling the defaulting party to comply with the relevant requirement within such time as the court considers appropriate and, if the defaulting party fails to abide by the court's order by the due date, make an order under section 129 (2) without further notice to the defaulting party.

57. Notice of motion and founding affidavit.—(1) Every application must be brought on notice of motion which must set out in full the order sought, be signed by the applicant or the applicant's representative and be supported by a founding affidavit that contains the facts upon which the applicant relies for relief.

(2) An application must be brought within 20 days after the date of the action, including the delivery of a notice, document, decision or judgment by a party, the clerk, the registrar, a tax board or a tax court or a failure to do so, giving rise to an application under this Part or the Act.

(3) Copies of the notice of motion and founding affidavit, together with all annexures, must be delivered to the registrar and the respondent.

58. Address and due date.—In the notice of motion, the applicant must—

(*a*) indicate an address, if different from the address referred to in rule 50 (3), at which the applicant will accept notice and delivery of all documents in proceedings under this Part;

(*b*) set forth a day, not less than 10 days after delivery thereof to the respondent, on or before which the respondent is required to notify the applicant, whether the respondent intends to oppose that application; and

(*c*) state that if no such notification is given, the application will be set down for hearing on the first available day determined by the registrar, being not less than 15 days after service of that notice on the respondent.

59. Set down for hearing where no intention to oppose.—(1) If the respondent does not, on or before the day set out in the notice under rule 58 (*b*), deliver to the applicant a notice of intention to oppose the application, the applicant may apply to the registrar to set the matter down.

(2) An application must be heard by a tax court having jurisdiction within any area in which the appellant resides or carries on business unless the applicant and the registrar agree that it be heard in another area.

(3) The registrar must deliver to the parties a written notice of the time and place appointed for the application at least 10 days before the date on which it has been set down.

60. Notice of intention to oppose and answering affidavit.—If the respondent wishes to oppose the grant of an order sought in the notice of motion, the respondent must—

(*a*) on or before the day set out in the notice under rule 58 (*b*), deliver to the applicant and the registrar a notice of intention to oppose the application;

(*b*) if the respondent is the taxpayer or the appellant, indicate in the notice of intention to oppose the application an address, if different from the address referred to in rule 50 (3), at which the respondent will accept notice and delivery of all documents in proceedings under this Part; and

(*c*) within 15 days of notifying the applicant of the intention to oppose the application, deliver an answering affidavit, if any, together with relevant annexures, to the applicant and the registrar.

61. Replying affidavit.—(1) Within 10 days of delivery of the respondent's answering affidavit under rule 60 (*c*), the applicant may deliver a replying affidavit to the respondent and the registrar.

(2) The tax court may in its discretion permit further affidavits to be filed.

62. Set down for hearing where no answering affidavit.—(1) If no answering affidavit is delivered by the respondent within the period referred to in rule 60 (*c*), the applicant may within 5 days of the expiry of that period apply to the registrar to set the application down.

(2) The registrar must deliver to the parties a written notice of the time and place appointed for the application at least 10 days before the date on which it has been set down.

63. Application for set down by respondent.—(1) If the applicant fails to apply to the registrar for set down of the application within the period referred to in rule 59 or 62, as the case may be, the respondent may apply to the registrar to allocate a date for the application within 10 days of the expiry of the period referred to in rule 59 or 62.

(2) The registrar must deliver to the parties a written notice of the time and place appointed for the application at least 10 days before the date on which it has been set down.

64. Judgment by tax court.—(1) The tax court after hearing an application under this Part may reserve its decision until a later date and where the decision is reserved, the judgment must be delivered by the tax court in the manner considered fit.

(2) The registrar must by notice deliver the written judgment of the tax court to the parties, or the clerk of the tax board if appropriate, within 10 days of delivery thereof.

Part G

Transitional arrangements

65. Definitions.—Any meaning given to a word or expression in the Act and Part A to F must, unless the context otherwise indicates, bear the same meaning in this Part, and—

"Income Tax Act" means the Income Tax Act, 1962 (Act No. 58 of 1962); and

"the previous rules" means the rules promulgated under section 107A of the Income Tax Act and repealed under section 269 (1) of the Act with effect from the date that these rules commence.

66. Application of rules to prior or continuing action.—(1) Subject to this Part, these rules apply to an act or proceeding taken, occurring or instituted before the commencement date of these rules, but without prejudice to the action taken or proceedings conducted before the commencement date of the comparable provisions of these rules.

(2) A request for reasons, objection, appeal to the tax board or tax court, alternative dispute resolution, settlement discussions, interlocutory application or application in a procedural matter taken or instituted under the previous rules but not completed by the commencement date of these rules, must be continued and concluded under these rules as if taken or instituted under these rules.

(3) A document delivered by the taxpayer, appellant, SARS, clerk or registrar under the previous rules, must be regarded as delivered in terms of the comparable provision of these rules, as from the date that the document was issued or delivered under the previous rules.

(4) If, before the commencement of these rules and before an appeal has been heard by the tax court a statement of grounds of appeal by the taxpayer under rule 11 of the previous rules has been delivered, SARS may deliver a reply to the statement under rule 33.

67. Applications of new procedures.—A party in a dispute which has not been decided on by a tax board or a tax court before the commencement of these rules may use a procedure provided for in these rules provided that—

(*a*) the procedure sought to be used follows in sequence after the last action taken by either of the parties; and

(*b*) the period contained in the relevant previous rule has not expired, counting from the commencement date of these rules.

68. Completion of time periods.—(1) If the period for an application, objection or appeal prescribed under the previous rules had expired before the commencement date of these rules, nothing in these rules may be construed as enabling the application, objection or appeal

to be made under these rules by reason only of the fact that a longer period may be prescribed under these rules.

(2) If the previous rules prescribed a period within which a party, clerk or registrar must deliver a document, and that period expires after the commencement date of these rules, the first day of the prescribed period for any further procedures under these rules is regarded as commencing on the day after the last day of that expired period.

(3) If an objection or an appeal could have been lodged before the commencement date of these rules but is lodged after the period prescribed under the previous rules, an application for the condonation of the late lodging of the objection or appeal must be considered under these rules.

ANNEXURE F

TAX ADMINISTRATION ACT NO. 28 OF 2011

[ASSENTED TO: 2 JULY, 2012]
[DATE OF COMMENCEMENT: 1 OCTOBER, 2012]
(Unless otherwise indicated)
(*English text signed by the President*)

This Act has been updated to *Government Gazette* 42952 dated 15 January, 2020.

as amended by

Tax Administration Laws Amendment Act, No. 21 of 2012
[deemed to have come into operation on 1 October, 2012, unless otherwise indicated]
Employment Tax Incentive Act, No. 26 of 2013
Tax Administration Laws Amendment Act, No. 39 of 2013
Tax Administration Laws Amendment Act, No. 44 of 2014
Tax Administration Laws Amendment Act, No. 23 of 2015
Tax Administration Laws Amendment Act, No. 16 of 2016
Tax Administration Laws Amendment Act, No. 13 of 2017
Tax Administration Laws Amendment Act, No. 22 of 2018
Tax Administration Laws Amendment Act, No. 33 of 2019
[with effect from 15 January, 2020, unless otherwise indicated]

pending amendment by

Tax Administration Laws Amendment Act, No. 44 of 2014
Tax Administration Laws Amendment Act, No. 23 of 2015

EDITORIAL NOTE

Please note that the commencement of this Act, as per Proclamation No. 51 in *Government Gazette* 35687 dated 14 September, 2012, is read in conjunction with South African Revenue Service Interpretation Note No. 68 dated 7 February, 2013 (date of first issue: 16 November, 2012).

ACT

To provide for the effective and efficient collection of tax; to provide for the alignment of the administration provisions of tax Acts and the consolidation of the provisions into one piece of legislation to the extent practically possible; to determine the powers and duties of the South African Revenue Service and officials; to provide for the delegation of powers by the Commissioner; to provide for the authority to act in legal proceedings; to determine the powers and duties of the Minister of Finance; to provide for the establishment of the office of the Tax Ombud; to determine the powers and duties of the Tax Ombud; to provide for registration requirements; to provide for the submission of returns and the duty to keep records; to provide for reportable arrangements; to provide for the request for information; to provide for the carrying out of an audit or investigation by the South African Revenue Service; to provide for inquiries; to provide for

powers of the South African Revenue Service to carry out searches and seizures; to provide for the confidentiality of information; to provide for the South African Revenue Service to issue advance rulings; to make provision in respect of tax assessments; to provide for dispute resolution; to make provision for the payment of tax; to provide for the recovery of tax; to provide for the South African Revenue Service to recover interest on outstanding tax debts; to provide for the refund of excess payments; to provide for the write-off and compromise of tax debts; to provide for the imposition and remittance of administrative non-compliance penalties; to provide for the imposition of understatement penalties; to provide for a voluntary disclosure programme; to provide for criminal offences and sanctions; to provide for the reporting of unprofessional conduct by tax practitioners; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows—

ARRANGEMENT OF SECTIONS

[Arrangement of Sections amended by s. 87 of Act No. 39 of 2013 and by s. 26 of Act No. 33 of 2019.]

(Editorial Note: The wording of certain sections in the Arrangement of Sections below have been changed from the original words published in the *Gazette* to reflect the actual section headings that appear within the Act.)

Sections

Part E
Powers and Duties of Minister

Part F
Powers and Duties of Tax Ombud

CHAPTER 3
REGISTRATION

CHAPTER 4
RETURNS AND RECORDS

Part A
General

Part B
Reportable Arrangements

CHAPTER 5
INFORMATION GATHERING

Part A
General Rules for Inspection, Verification, Audit and Criminal Investigation

Part B
Inspection, Request for Relevant Material, Audit and Criminal Investigation

Part C
Inquiries

Part D
Search and Seizure

CHAPTER 6
CONFIDENTIALITY OF INFORMATION

Part C
Permanent Write Off of Tax Debt

Part D
Compromise of Tax Debt

Part E
Records and Reporting

CHAPTER 15
ADMINISTRATIVE NON-COMPLIANCE PENALTIES

Part A
General

Part B
Fixed Amount Penalties

Part C
Percentage Based Penalty

Part D
Procedure

Part E
Remedies

CHAPTER 16
UNDERSTATEMENT PENALTY

Part A
Imposition of Understatement Penalty

Part B
Voluntary Disclosure Programme

CHAPTER 17
CRIMINAL OFFENCES

CHAPTER 18
REGISTRATION OF TAX PRACTITIONERS AND REPORTING OF UNPROFESSIONAL CONDUCT

CHAPTER 19
GENERAL PROVISIONS

CHAPTER 20
TRANSITIONAL PROVISIONS

CHAPTER 1
DEFINITIONS

1. Definitions.—In this Act, unless the context indicates otherwise, a term which is assigned a meaning in another tax Act has the meaning so assigned, and the following terms have the following meaning—

"additional assessment" is an assessment referred to in section 92;

"administration of a tax Act" has the meaning assigned in section 3 (2);

"administrative non-compliance penalty" has the meaning assigned in section 208;

"assessment" means the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS;

"asset" includes—

(*a*) property of whatever nature, whether movable or immovable, corporeal or incorporeal; and

(*b*) a right or interest of whatever nature to or in the property;

[Definition of "asset" inserted by s. 36 (*a*) of Act No. 21 of 2012.]

"biometric information" means biological data used to authenticate the identity of a natural person by means of—

(*a*) facial recognition;

(*b*) fingerprint recognition;

(*c*) voice recognition;

(*d*) iris or retina recognition; and

(*e*) other, less intrusive biological data, as may be prescribed by the Minister in a regulation issued under section 257;

"business day" means a day which is not a Saturday, Sunday or public holiday, and for purposes of determining the days or a period allowed for complying with the provisions of Chapter 9, excludes the days between 16 December of each year and 15 January of the following year, both days inclusive;

"Commissioner" means the Commissioner for the South African Revenue Service appointed in terms of section 6 of the SARS Act or the Acting Commissioner designated in terms of section 7 of that Act;

"company" has the meaning assigned in section 1 of the Income Tax Act;

"connected person" means a connected person as defined in section 1 of the Income Tax Act;

"customs and excise legislation" means the Customs and Excise Act, 1964 (Act No. 91 of 1964), the Customs Duty Act, 2014 (Act No. 30 of 2014), or the Customs Control Act, 2014 (Act No. 31 of 2014);

[Definition of "customs and excise legislation", previously "Customs and Excise Act", substituted by s. 33 (*a*) of Act No. 23 of 2015.]

"date of assessment" means—

(*a*) in the case of an assessment by SARS, the date of the issue of the notice of assessment; or

(*b*) in the case of self-assessment by the taxpayer—

(i) if a return is required, the date that the return is submitted; or

(ii) if no return is required, the date of the last payment of the tax for the tax period or, if no payment was made in respect of the tax for the tax period, the effective date;

"date of sequestration" means—

(*a*) the date of voluntary surrender of an estate, if accepted by a court; or

(*b*) the date of provisional sequestration of an estate, if a final order of sequestration is granted by a court;

"Diamond Export Levy Act" means the Diamond Export Levy Act, 2007 (Act No. 15 of 2007);

"Diamond Export Levy (Administration) Act" means the Diamond Export Levy (Administration) Act, 2007 (Act No. 14 of 2007);

"document" means anything that contains a written, sound or pictorial record, or other record of information, whether in physical or electronic form;

"effective date" is the date described in section 187(3), (4) and (5) of this Act, or the date from when interest is otherwise calculated under a tax Act;

[Definition of "effective date" substituted by s. 36 (*b*) of Act No. 21 of 2012.]

"Estate Duty Act" means the Estate Duty Act, 1955 (Act No. 45 of 1955);

"fair market value" means the price which could be obtained upon a sale of an asset between a willing buyer and a willing seller dealing at arm's length in an open market;

"income tax" means normal tax referred to in section 5 of the Income Tax Act;

"Income Tax Act" means the Income Tax Act, 1962 (Act No. 58 of 1962);

"information" includes information generated, recorded, sent, received, stored or displayed by any means;

"international tax agreement" means—

(*a*) an agreement entered into with the government of another country in accordance with a tax Act; or

(*b*) any other agreement entered into between the competent authority of the Republic and the competent authority of another country relating to the automatic exchange of information under an agreement referred to in paragraph (*a*);

[Definition of "international tax agreement" substituted by s. 37 (*a*) of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

"international tax standard" means—

(*a*) the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters;

(*b*) the Country-by-Country Reporting Standard for Multinational Enterprises specified by the Minister; or

(*c*) any other international standard for the exchange of tax-related information between countries specified by the Minister,

subject to such changes as specified by the Minister in a regulation issued under section 257;

[Definition of "international tax standard" inserted by s. 33 (*b*) of Act No. 23 of 2015.]

"jeopardy assessment" is an assessment referred to in section 94;

"judge" means a judge of the High Court of South Africa, whether in chambers or otherwise;

"magistrate" means a judicial officer as defined in section 1 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), whether in chambers or otherwise;

"Mineral and Petroleum Resources Royalty (Administration) Act" means the Mineral and Petroleum Resources Royalty (Administration) Act, 2008 (Act No. 29 of 2008);

"Minister" means the Minister of Finance;

"official publication" means a binding general ruling, interpretation note, practice note or public notice issued by a senior SARS official or the Commissioner;

"original assessment" is an assessment referred to in section 91;

"outstanding tax debt" means a tax debt not paid by the day referred to in section 162;

[Definition of "outstanding tax debt" inserted by s. 30 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

"practice generally prevailing" has the meaning assigned in section 5;

"premises" includes a building, aircraft, vehicle, vessel or place;

"prescribed rate" has the meaning assigned in section 189 (3);

"presiding officer" is the person referred to in section 50 (1);

"Promotion of Access to Information Act" means the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000);

"public notice" means a notice published in the *Government Gazette*;

"public officer" is an officer referred to in section 246 (1), (2) and (3);

"reduced assessment" is an assessment referred to in section 93;

"registered tax practitioner" means a person registered under section 240;

[Definition of "registered tax practitioner" inserted by s. 36 (*c*) of Act No. 21 of 2012.]

"relevant material" means any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act as referred to in section 3;

[Definition of "relevant material" substituted by s. 30 (*b*) of Act No. 39 of 2013 and by s. 37 (*b*) of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

"reportable arrangement" has the meaning assigned in section 35;

"representative taxpayer" has the meaning assigned in section 153 (1);

"responsible third party" has the meaning assigned under section 158;

"return" means a form, declaration, document or other manner of submitting information to SARS that incorporates a self-assessment, is a basis on which an assessment is to be made by SARS or incorporates relevant material required under section 25, 26 or 27 or a provision under a tax Act requiring the submission of a return;

[Definition of "return" substituted by s. 30 (*c*) of Act No. 39 of 2013 and by s. 37 (*c*) of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

"SARS" means the South African Revenue Service established under the SARS Act;

"SARS Act" means the South African Revenue Service Act, 1997 (Act No. 34 of 1997);

"SARS confidential information" has the meaning assigned under section 68 (1);

"SARS official" means—

(*a*) the Commissioner;

(*b*) an employee of SARS; or

(*c*) a person contracted or engaged by SARS, other than an external legal representative, for purposes of the administration of a tax Act and who carries out the provisions of a tax Act under the control, direction or supervision of the Commissioner;

[Para. (*c*) substituted by s. 36 (*d*) of Act No. 21 of 2012 and by s. 47 of Act No. 16 of 2016.]

"Securities Transfer Tax Act" means the Securities Transfer Tax Act, 2007 (Act No. 25 of 2007);

"Securities Transfer Tax Administration Act" means the Securities Transfer Tax Administration Act, 2007 (Act No. 26 of 2007);

"self-assessment" means a determination of the amount of tax payable under a tax Act by a taxpayer and—

(*a*) submitting a return which incorporates the determination of the tax; or

(*b*) if no return is required, making a payment of the tax;

"senior SARS official" is a SARS official referred to in section 6 (3);

"serious tax offence" means a tax offence for which a person may be liable on conviction to imprisonment for a period exceeding two years without the option of a fine or to a fine exceeding the equivalent amount of a fine under the Adjustment of Fines Act, 1991 (Act No. 101 of 1991);

"shareholder" means a person who holds a beneficial interest in a company as defined in the Income Tax Act;

[Definition of "shareholder" substituted by s. 36 (*e*) of Act No. 21 of 2012.]

"Skills Development Levies Act" means the Skills Development Levies Act, 1999 (Act No. 9 of 1999);

"tax", for purposes of administration under this Act, includes a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act;

"taxable event" means an occurrence which affects or may affect the liability of a person to tax;

"tax Act" means this Act or an Act, or portion of an Act, referred to in section 4 of the SARS Act, excluding customs and excise legislation;

[Definition of "tax Act" substituted by s. 37 (*d*) of Act No. 44 of 2014 and by s. 33 (*c*) of Act No. 23 of 2015.]

"tax board" means a tax board established under section 108;

"tax court" means a court established under section 116;

"tax debt" means an amount referred to in section 169 (1);

[Definition of "tax debt" substituted by s. 30 (*d*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

"tax offence" means an offence in terms of a tax Act or any other offence involving—

(*a*) fraud on SARS or on a SARS official relating to the administration of a tax Act; or

(*b*) theft of moneys due or paid to SARS for the benefit of the National Revenue Fund;

[Definition of "tax offence" substituted by s. 37 (*e*) of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

"Tax Ombud" is the person appointed by the Minister under section 14;

"tax period" means, in relation to—

(*a*) income tax, a year of assessment as defined in section 1 of the Income Tax Act;

(*b*) provisional tax or employees' tax, skills development levies as determined in section 3 of the Skills Development Levies Act, and contributions as determined in section 6 of the Unemployment Insurance Contributions Act, the period in respect of which the amount of tax payable must be determined under the relevant tax Act;

(*c*) value-added tax, a tax period determined under section 27 of the Value-Added Tax Act or the period or date of the taxable event in respect of which the amount of tax payable must be determined under that Act;

(*d*) royalty payable on the transfer of minerals and petroleum resources, a year of assessment as defined in section 1 of the Mineral and Petroleum Resources Royalty (Administration) Act;

(*e*) the levy on diamond exports as determined under section 2 of the Diamond Export Levy Act, the assessment period referred to in section 1 of the Diamond Export Levy (Administration) Act;

(*f*) securities transfer tax, the period referred to in section 3 of the Securities Transfer Tax Administration Act;

(*g*) any other tax, the period or date of the taxable event in respect of which the amount of tax payable must be determined under a tax Act; or

(*h*) a jeopardy assessment, the period determined under this Act;

"taxpayer" has the meaning assigned under section 151;

"taxpayer information" has the meaning assigned under section 67 (1) (*b*);

"taxpayer reference number" is the number referred to in section 24;

"thing" includes a corporeal or incorporeal thing;

"this Act" includes the regulations and a public notice issued under this Act;

"Transfer Duty Act" means the Transfer Duty Act, 1949 (Act No. 40 of 1949);

"understatement penalty" means a penalty imposed by SARS in accordance with Part A of Chapter 16;

"Unemployment Insurance Contributions Act" means the Unemployment Insurance Contributions Act, 2002 (Act No. 4 of 2002);

"Value-Added Tax Act" means the Value-Added Tax Act, 1991 (Act No. 89 of 1991);

"withholding agent" has the meaning assigned under section 156.

CHAPTER 2
GENERAL ADMINISTRATION PROVISIONS

Part A
In General

2. Purpose of Act.—The purpose of this Act is to ensure the effective and efficient collection of tax by—

(*a*) aligning the administration of the tax Acts to the extent practically possible;

(*b*) prescribing the rights and obligations of taxpayers and other persons to whom this Act applies;

(*c*) prescribing the powers and duties of persons engaged in the administration of a tax Act; and

(*d*) generally giving effect to the objects and purposes of tax administration.

3. Administration of tax Acts.—(1) SARS is responsible for the administration of this Act under the control or direction of the Commissioner.

(2) Administration of a tax Act means to—

(*a*) obtain full information in relation to—

(i) anything that may affect the liability of a person for tax in respect of a previous, current or future tax period;

(ii) a taxable event; or

(iii) the obligation of a person (whether personally or on behalf of another person) to comply with a tax Act;

(*b*) ascertain whether a person has filed or submitted correct returns, information or documents in compliance with the provisions of a tax Act;

(*c*) establish the identity of a person for purposes of determining liability for tax;

(*d*) determine the liability of a person for tax;

(*e*) collect tax debts and refund tax overpaid;

[Para. (*e*) substituted by s. 31 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*f*) investigate whether a tax offence has been committed, and, if so—

(i) to lay criminal charges; and

(ii) to provide the assistance that is reasonably required for the investigation and prosecution of the tax offence;

[Para. (*f*) substituted by s. 37 (*a*) of Act No. 21 of 2012.]

(*g*) enforce SARS' powers and duties under a tax Act to ensure that an obligation imposed by or under a tax Act is complied with;

(*h*) perform any other administrative function necessary to carry out the provisions of a tax Act;

[Para. (*h*) amended by s. 34 (*a*) of Act No. 23 of 2015.]

(*i*) give effect to the obligation of the Republic to provide assistance under an international tax agreement; and

[Para. (*i*) amended by s. 34 (*a*) of Act No. 23 of 2015.]

(*j*) give effect to an international tax standard.

[Para. (*j*) added by s. 34 (*a*) of Act No. 23 of 2015.]

(3) If SARS, in accordance with—

(*a*) an international tax agreement—

(i) received a request for, is obliged to exchange or wishes to spontaneously exchange information, SARS may disclose or obtain the information for transmission to the competent authority of the other country as if it were relevant material required for purposes of a tax Act and must treat the information obtained as taxpayer information;

(ii) received a request for the conservancy or the collection of an amount alleged to be due by a person under the tax laws of the requesting country, SARS may deal with the request under the provisions of section 185; or

(iii) received a request for the service of a document which emanates from the requesting country, SARS may effect service of the document as if it were a notice, document or other communication required under a tax Act to be issued, given, sent or served by SARS; or

(*b*) an international tax standard, obtained information of a person, SARS may retain the information as if it were relevant material required for purposes of a tax Act and must treat the information obtained as taxpayer information.

[Sub-s. (3) amended by s. 37 (*b*) of Act No. 21 of 2012 and by s. 38 of Act No. 44 of 2014 and substituted by s. 34 (*b*) of Act No. 23 of 2015.]

4. Application of Act.—(1) This Act applies to every person who is liable to comply with a provision of a tax Act (whether personally or on behalf of another person) and binds SARS.

(2) If this Act is silent with regard to the administration of a tax Act and it is specifically provided for in the relevant tax Act, the provisions of that tax Act apply.

(3) In the event of any inconsistency between this Act and another tax Act, the other Act prevails.

5. Practice generally prevailing.—(1) A practice generally prevailing is a practice set out in an official publication regarding the application or interpretation of a tax Act.

(2) Despite any provision to the contrary contained in a tax Act, a practice generally prevailing set out in an official publication, other than a binding general ruling, ceases to be a practice generally prevailing if—

(*a*) the provision of the tax Act that is the subject of the official publication is repealed or amended to an extent material to the practice, from the date the repeal or amendment becomes effective;

(*b*) a court overturns or modifies an interpretation of the tax Act which is the subject of the official publication to an extent material to the practice from the date of judgment, unless—

(i) the decision is under appeal;

(ii) the decision is fact-specific and the general interpretation upon which the official publication was based is unaffected; or

(iii) the reference to the interpretation upon which the official publication was based was *obiter dicta*; or

(*c*) the official publication is withdrawn or modified by the Commissioner, from the date of the official publication of the withdrawal or modification.

(3) A binding general ruling ceases to be a practice generally prevailing in the circumstances described in section 85 or 86.

Part B

Powers and Duties of SARS and SARS Officials

6. Powers and duties.—(1) The powers and duties of SARS under this Act may be exercised for purposes of the administration of a tax Act.

(2) Powers and duties which are assigned to the Commissioner by this Act must be exercised by the Commissioner personally but he or she may delegate such powers and duties in accordance with section 10.

(3) Powers and duties required by this Act to be exercised by a senior SARS official must be exercised by—

(*a*) the Commissioner;

(*b*) a SARS official who has specific written authority from the Commissioner to do so; or

(*c*) a SARS official occupying a post designated by the Commissioner in writing for this purpose.

[Para. (*c*) substituted by s. 38 (*a*) of Act No. 21 of 2012.]

(4) The execution of a task ancillary to a power or duty under subsection (2) or (3) may be done by a SARS official under the control of an official referred to in subsection (3) (*a*), (*b*) or (*c*).

[Sub-s. (4) amended by s. 38 (*b*) of Act No. 21 of 2012 and substituted by s. 35 of Act No. 23 of 2015.]

(5) Powers and duties not specifically required by this Act to be exercised by the Commissioner or by a senior SARS official, may be exercised by a SARS official.

[Sub-s. (5) substituted by s. 38 (*c*) of Act No. 21 of 2012.]

(6) The Commissioner may by public notice specify that a power or duty in a tax Act other than this Act must be exercised by the Commissioner personally or a senior SARS official.

7. Conflict of interest.—The Commissioner or a SARS official may not exercise a power or become involved in a matter pertaining to the administration of a tax Act, if—

(*a*) the power or matter relates to a taxpayer in respect of which the Commissioner or the official has or had, in the previous three years, a personal, family, social, business, professional, employment or financial relationship presenting a conflict of interest; or

(*b*) other circumstances present a conflict of interest,

that will reasonably be regarded as giving rise to bias.

8. Identity cards.—(1) SARS may issue an identity card to each SARS official exercising powers and duties for purposes of the administration of a tax Act.

[Sub-s. (1) substituted by s. 39 of Act No. 21 of 2012.]

(2) When a SARS official exercises a power or duty for purposes of the administration of a tax Act in person outside SARS premises, the official must produce the identity card upon request by a member of the public.

[Sub-s. (2) substituted by s. 39 of Act No. 21 of 2012.]

(3) If the official does not produce the identity card, a member of the public is entitled to assume that the person is not a SARS official.

9. Decision or notice by SARS.—(1) A decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act, excluding a decision given effect to in an assessment or a notice of assessment that is subject to objection and appeal, may in the discretion of a SARS official described in paragraph (*a*), (*b*) or (*c*) or at the request of the relevant person, be withdrawn or amended by—

(*a*) the SARS official;

(*b*) a SARS official to whom the SARS official reports; or

(*c*) a senior SARS official.

[Sub-s. (1) substituted by s. 22 (*a*) of Act No. 13 of 2017.]

(2) If all the material facts were known to the SARS official at the time the decision was made, a decision or notice referred to in subsection (1) may not be withdrawn or amended with retrospective effect, after three years from the later of the—

(*a*) date of the written notice of that decision; or

(*b*) date of assessment of the notice of assessment giving effect to the decision (if applicable).

(3) A decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act is regarded as made by a SARS official authorised to do so or duly issued by SARS, until proven to the contrary.

[Sub-s. (3) added by s. 22 (*b*) of Act No. 13 of 2017.]

Part C
Delegations

10. Delegations by the Commissioner.—(1) A delegation by the Commissioner under section 6 (2)—

(*a*) must be in writing;

(*b*) becomes effective only when signed by the Commissioner;

[Para. (*b*) substituted by s. 32 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*c*) is subject to the limitations and conditions the Commissioner may determine in making the delegation;

(*d*) may either be to—

(i) a specific individual; or

(ii) the incumbent of a specific post; and

(*e*) may be amended or withdrawn by the Commissioner.

(2) A delegation does not divest the Commissioner of the responsibility for the exercise of the delegated power or the performance of the delegated duty.

Part D
Authority to Act in Legal Proceedings

11. Legal proceedings involving Commissioner.—(1) No SARS official may institute or defend civil proceedings on behalf of the Commissioner unless authorised to do so under this Act or by the Commissioner or by the person delegated by the Commissioner under section 6 (2).

[Sub-s. (1) substituted by s. 36 of Act No. 23 of 2015.]

(2) For purposes of subsection (1), a SARS official who, on behalf of the Commissioner, institutes litigation, or performs acts which are relied upon by the Commissioner in litigation, is regarded as duly authorised until proven to the contrary.

(3) An amount due or payable as a result of a cost order in favour of SARS recovered by the State Attorney resulting from any civil proceedings under this Act must be paid to the National Revenue Fund.

[Sub-s. (3) substituted by s. 40 of Act No. 21 of 2012, by s. 33 (*b*) of Act No. 39 of 2013 and by s. 48 of Act No. 16 of 2016.]

(4) Unless the court otherwise directs, no legal proceedings may be instituted in the High Court against the Commissioner, unless the applicant has given the Commissioner written notice of at least 10 business days of the applicant's intention to institute the legal proceedings.

[Sub-s. (4) added by s. 33 (*c*) of Act No. 39 of 2013 and substituted by s. 27 of Act No. 33 of 2019.]

(5) The notice or any process by which the legal proceedings referred to in subsection (4) are instituted, must be served at the address specified by the Commissioner by public notice.

[S. 11 amended by s. 33 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012. Sub-s. (5) added by s. 33 (*c*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

12. Right of appearance in proceedings.—(1) Despite any law to the contrary, a senior SARS official may on behalf of SARS or the Commissioner in proceedings referred to in a tax Act, appear *ex parte* in a judge's chambers in the tax court or in a High Court.

(2) A senior SARS official may appear in the tax court or a High Court only if the person is a legal practitioner duly admitted and enrolled under the Legal Practice Act, 2014 (Act No. 28 of 2014).

[Sub-s. (2) substituted by s. 28 of Act No. 33 of 2019.]

Part E
Powers and Duties of Minister

13. Powers and duties of Minister.—(1) The powers conferred and the duties imposed upon the Minister by or under the provisions of a tax Act may—

(*a*) be exercised or performed by the Minister personally; and

(*b*) except for the powers under sections 14 and 257, be delegated by the Minister to the Deputy Minister or Director-General of the National Treasury.

(2) The Director-General may in turn delegate the powers and duties delegated to the Director-General by the Minister to a person under the control, direction or supervision of the Director-General.

14. Power of Minister to appoint Tax Ombud.—(1) The Minister must appoint a person as Tax Ombud—

(*a*) for a term of five years, which term may be renewed; and

[Para. (*a*) substituted by s. 49 of Act No. 16 of 2016.]

(*b*) under such conditions regarding remuneration and allowances as the Minister may determine.

(2) The person appointed under subsection (1) or (3) may be removed by the Minister for misconduct, incapacity or incompetence.

(3) During a vacancy in the office of Tax Ombud, the Minister may designate a person in the office of the Tax Ombud to act as Tax Ombud.

(4) No person may be designated in terms of subsection (3) as acting Tax Ombud for a period longer than 90 days at a time.

(5) A person appointed as Tax Ombud—

(*a*) is accountable to the Minister;

(*b*) must have a good background in customer service as well as tax law; and

(*c*) may not at any time during the preceding five years have been convicted (whether in the Republic or elsewhere) of—

(i) theft, fraud, forgery or uttering a forged document, perjury, an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004); or

(ii) any other offence involving dishonesty,

for which the person has been sentenced to a period of imprisonment exceeding two years without the option of a fine or to a fine exceeding the amount prescribed in the Adjustment of Fines Act, 1991 (Act No. 101 of 1991).

Part F

Powers and Duties of Tax Ombud

15. Office of Tax Ombud.—(1) The Tax Ombud must appoint the staff of the office of the Tax Ombud who must be employed in terms of the SARS Act.

[Sub-s. (1) substituted by s. 50 (*a*) of Act No. 16 of 2016.]

(2) When the Tax Ombud is absent or otherwise unable to perform the functions of office, the Tax Ombud may designate another person in the office of the Tax Ombud as acting Tax Ombud.

(3) No person may be designated in terms of subsection (2) as acting Tax Ombud for a period longer than 90 days at a time.

(4) The expenditure connected with the functions of the office of the Tax Ombud is paid in accordance with a budget approved by the Minister for the office.

[Sub-s. (4) substituted by s. 50 (*b*) of Act No. 16 of 2016.]

16. Mandate of Tax Ombud.—(1) The mandate of the Tax Ombud is to—

(*a*) review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS; and

(*b*) review, at the request of the Minister or at the initiative of the Tax Ombud with the approval of the Minister, any systemic and emerging issue related to a service matter or the application of the provisions of this Act or procedural or administrative provisions of a tax Act.

[Sub-s. (1) substituted by s. 51 of Act No. 16 of 2016.]

(2) In discharging his or her mandate, the Tax Ombud must—

(*a*) review a complaint and, if necessary, resolve it through mediation or conciliation;

(*b*) act independently in resolving a complaint;

(*c*) follow informal, fair and cost-effective procedures in resolving a complaint;

(*d*) provide information to a taxpayer about the mandate of the Tax Ombud and the procedures to pursue a complaint;

(*e*) facilitate access by taxpayers to complaint resolution mechanisms within SARS to address complaints; and

(*f*) identify and review systemic and emerging issues related to service matters or the application of the provisions of this Act or procedural or administrative provisions of a tax Act that impact negatively on taxpayers.

17. Limitations on authority.—The Tax Ombud may not review—

(*a*) legislation or tax policy;

(*b*) SARS policy or practice generally prevailing, other than to the extent that it relates to a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS;

(*c*) a matter subject to objection and appeal under a tax Act, except for an administrative matter relating to such objection and appeal; or

(*d*) a decision of, proceeding in or matter before the tax court.

(Editorial Note: Wording as per original *Government Gazette*.)

18. Review of complaint.—(1) The Tax Ombud may review any issue within the Tax Ombud's mandate on receipt of a request from a taxpayer.

(2) The Tax Ombud may—

(*a*) determine how a review is to be conducted; and

(*b*) determine whether a review should be terminated before completion.

(3) In exercising the discretion set out in subsection (2), the Tax Ombud must consider such factors as—

(*a*) the age of the request or issue;

(*b*) the amount of time that has elapsed since the requester became aware of the issue;

(*c*) the nature and seriousness of the issue;

(*d*) the question of whether the request was made in good faith; and

(*e*) the findings of other redress mechanisms with respect to the request.

(4) The Tax Ombud may only review a request if the requester has exhausted the available complaints resolution mechanisms in SARS, unless there are compelling circumstances for not doing so.

(5) To determine whether there are compelling circumstances, the Tax Ombud must consider factors such as whether—

(*a*) the request raises systemic issues;

(*b*) exhausting the complaints resolution mechanisms will cause undue hardship to the requester; or

(*c*) exhausting the complaints resolution mechanisms is unlikely to produce a result within a period of time that the Tax Ombud considers reasonable.

(6) The Tax Ombud must inform the requester of the results of the review or any action taken in response to the request, but at the time and in the manner chosen by the Tax Ombud.

19. Reports by Tax Ombud.—(1) The Tax Ombud must—

(*a*) report directly to the Minister;

(*b*) submit an annual report to the Minister within five months of the end of SARS' financial year; and

(*c*) submit a report to the Commissioner quarterly or at such other intervals as may be agreed.

(2) The reports must—

(*a*) contain a summary of at least ten of the most serious issues encountered by taxpayers and identified systematic and emerging issues referred to in section 16 (2) (*f*), including a description of the nature of the issues;

(*b*) contain an inventory of the issues described in subparagraph (*a*) for which—

(Editorial Note: Wording as per original *Government Gazette*. It is suggested that the word "subparagraph" is intended to be "paragraph".)

(i) action has been taken and the result of such action;

(ii) action remains to be completed and the period during which each item has remained on such inventory; or

(iii) no action has been taken, the period during which each item has remained on such inventory and the reasons for the inaction; and

(*c*) contain recommendations for such administrative action as may be appropriate to resolve problems encountered by taxpayers.

(3) The Minister must table the annual report of the Tax Ombud in the National Assembly.

20. Resolution and recommendations.—(1) The Tax Ombud must attempt to resolve all issues within the Tax Ombud's mandate at the level at which they can most efficiently and effectively be resolved and must, in so doing, communicate with SARS officials identified by SARS.

(2) The Tax Ombud's recommendations are not binding on a taxpayer or SARS, but if not accepted by a taxpayer or SARS, reasons for such decision must be provided to the Tax Ombud within 30 days of notification of the recommendations and may be included by the Tax Ombud in a report to the Minister or the Commissioner under section 19.

[Sub-s. (2) substituted by s. 52 of Act No. 16 of 2016.]

21. Confidentiality.—(1) The provisions of Chapter 6 apply with the changes required by the context for the purpose of this Part.

(2) SARS must allow the Tax Ombud access to information in the possession of SARS that relates to the Tax Ombud's powers and duties under this Act.

(3) The Tax Ombud and any person acting on the Tax Ombud's behalf may not disclose information of any kind that is obtained by or on behalf of the Tax Ombud, or prepared from information obtained by or on behalf of the Tax Ombud, to SARS, except to the extent required for the purpose of the performance of functions and duties under this Part.

CHAPTER 3
REGISTRATION

22. Registration requirements.—(1) A person—

(*a*) obliged to apply to; or

(*b*) who may voluntarily,

register with SARS under a tax Act must do so in terms of the requirements of this Chapter or, if applicable, the relevant tax Act.

(2) A person referred to in subsection (1) must—

(*a*) apply for registration within the period provided for in a tax Act or, if no such period is provided for, 21 business days of so becoming obliged or within the further period as SARS may approve in the prescribed form and manner;

(*b*) apply for registration for one or more taxes or under section 26 (3) in the prescribed form and manner; and

[Para. (*b*) substituted by s. 37 (*a*) of Act No. 23 of 2015.]

(*c*) provide SARS with the further particulars and any documents as SARS may require for the purpose of registering the person for the tax or taxes or under section 26 (3).

[Para. (*c*) substituted by s. 37 (*a*) of Act No. 23 of 2015.]

(3) A person registered or applying for registration under a tax Act may be required to submit biometric information in the prescribed form and manner if the information is required to ensure—

(*a*) proper identification of the person; or

(*b*) counteracting identity theft or fraud.

(4) A person who applies for registration in terms of this Chapter and has not provided all particulars and documents required by SARS, may be regarded not to have applied for registration until all the particulars and documents have been provided to SARS.

(5) Where a person that is obliged to register with SARS under a tax Act fails to do so, SARS may register the person for one or more tax types as is appropriate under the circumstances or for purposes of section 26 (3).

[Sub-s. (5) substituted by s. 37 (*b*) of Act No. 23 of 2015.]

23. Communication of changes in particulars.—A person who has been registered under section 22 must communicate to SARS within 21 business days any change that relates to—

(*a*) postal address;

(*b*) physical address;

(*c*) representative taxpayer;

(*d*) banking particulars used for transactions with SARS;

(*e*) electronic address used for communication with SARS; or

(*f*) such other details as the Commissioner may require by public notice.

24. Taxpayer reference number.—(1) SARS may allocate a taxpayer reference number in respect of one or more taxes to each person registered under a tax Act or this Chapter.

(2) SARS may register and allocate a taxpayer reference number to a person who is not registered.

(3) A person who has been allocated a taxpayer reference number by SARS must include the relevant reference number in all returns or other documents submitted to SARS.

(4) SARS may regard a return or other document submitted by a person to be invalid if it does not contain the reference number referred to in subsection (3) and must inform the person accordingly if practical.

CHAPTER 4
RETURNS AND RECORDS

Part A
General

25. Submission of return.—(1) A person required under a tax Act or by the Commissioner to submit or who voluntarily submits a return must do so—

(*a*) in the prescribed form and manner; and

(*b*) by the date specified in the tax Act or, in its absence, by the date specified by the Commissioner in the public notice requiring the submission.

[Sub-s. (1) amended by s. 34 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(2) A return must contain the information prescribed by a tax Act or the Commissioner and be a full and true return.

(3) A return must be signed by the taxpayer or by the taxpayer's duly authorised representative and the person signing the return is regarded for all purposes in connection with a tax Act to be cognisant of the statements made in the return.

(4) Non-receipt by a person of a return form does not affect the obligation to submit a return.

(5) SARS may, prior to the issue of an original assessment by SARS, request a person to submit an amended return to correct an undisputed error in a return.

(6) SARS may extend the time period for filing a return in a particular case, in accordance with procedures and criteria in policies published by the Commissioner.

(7) The Commissioner may also extend the filing deadline generally or for specific classes of persons by public notice.

(8) An extension under subsection (6) or (7) does not affect the deadline for paying the tax.

26. Third party returns.—(1) The Commissioner may by public notice, at the time and place and by the due date specified, require a person who employs, pays amounts to, receives amounts on behalf of or otherwise transacts with another person, or has control over assets of another person, to submit a return by the date specified in the notice.

[Sub-s. (1) substituted by s. 35 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(2) A person required under subsection (1) to submit a return must do so in the prescribed form and manner and the return must—

(*a*) contain the information prescribed by the Commissioner;

(*b*) be a full and true return; and

(*c*) for purposes of providing the information required in the return, comply with the due diligence requirements as may be prescribed in a tax Act, an international tax agreement, an international tax standard or by the Commissioner in a public notice consistent with the international tax agreement or the international tax standard.

[S. 26 substituted by s. 41 of Act No. 21 of 2012. Sub-s. (2) substituted by s. 39 of Act 44 of 2014 deemed to have come into operation on 1 October, 2012. Para. (*c*) substituted by s. 38 (*a*) of Act No. 23 of 2015.]

(3) The Commissioner may, by public notice, require a person to apply to register as a person required to submit a return under this section, an international tax agreement or an international tax standard.

[Sub-s. (3) added by s. 38 (*b*) of Act No. 23 of 2015.]

(4) If, in order to submit a return under subsection (1) and to comply with the requirements of this section, a person requires information, a document or thing from another person, the other person must provide the information, document or thing so required within a reasonable time.

[Sub-s. (4) added by s. 38 (*b*) of Act No. 23 of 2015.]

27. Other returns required.—(1) A senior SARS official may require a person to submit further or more detailed returns regarding any matter for which a return under section 25 or 26 is required or prescribed by a tax Act.

(2) A person required under subsection (1) to submit a return must do so in the prescribed form and manner and the return must contain the information prescribed by the official and must be a full and true return.

[S. 27 substituted by s. 42 of Act No. 21 of 2012 and by s. 36 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

28. Statement concerning accounts.—(1) SARS may require a person who submits financial statements or accounts prepared by another person in support of that person's submitted return, to submit a certificate or statement by the other person setting out the details of—

(*a*) the extent of the other person's examination of the books of account and of the documents from which the books of account were written up; and

(*b*) whether or not the entries in those books and documents disclose the true nature of the transactions, receipts, accruals, payments or debits in so far as may be ascertained by that examination.

(2) A person who prepares financial statements or accounts for another person must, at the request of that other person, submit to that other person a copy of the certificate or statement referred to in subsection (1).

29. Duty to keep records.—(1) A person must keep the records, books of account or documents that—

(*a*) enable the person to observe the requirements of a tax Act;

(*b*) are specifically required under a tax Act or by the Commissioner by public notice;

[Para. (*b*) substituted by s. 43 (*a*) of Act No. 21 of 2012.]

(*c*) enable SARS to be satisfied that the person has observed these requirements.

(2) The requirements of this Act to keep records, books of account or documents for a tax period apply to a person who—

(*a*) has submitted a return for the tax period;

(*b*) is required to submit a return for the tax period and has not submitted a return for the tax period; or

(*c*) is not required to submit a return but has, during the tax period, received income, has a capital gain or capital loss, or engaged in any other activity that is subject to tax or would be subject to tax but for the application of a threshold or exemption.

[Sub-s. (2) amended by s. 43 (*b*) of Act No. 21 of 2012.]

(3) Records, books of account or documents need not be retained by the person described in—

(*a*) subsection (2) (*a*), after a period of five years from the date of the submission of the return; and

(*b*) subsection (2) (*c*), after a period of five years from the end of the relevant tax period.

[Sub-s. (3) amended by s. 43 (*c*) of Act No. 21 of 2012.]

30. Form of records kept or retained.—(1) The records, books of account, and documents referred to in section 29, must be kept or retained—

(*a*) in their original form in an orderly fashion and in a safe place;

(*b*) in the form, including electronic form, as may be prescribed by the Commissioner in a public notice; or

(*c*) in a form specifically authorised by a senior SARS official in terms of subsection (2).

(2) A senior SARS official may, subject to the conditions as the official may determine, authorise the retention of information contained in records, books of account or documents referred to in section 29 in a form acceptable to the official.

31. Inspection of records.—The records, books of account and documents referred to in section 29 whether in the form referred to in section 30 (1) or in a form authorised under section 30 (2), must at all reasonable times during the required periods under section 29, be open for inspection by a SARS official in the Republic for the purpose of—

(*a*) determining compliance with the requirements of sections 29 and 30; or

(*b*) an inspection, audit or investigation under Chapter 5.

32. Retention period in case of audit, objection or appeal.—Despite section 29 (3), if—

(*a*) records, books of account or documents are relevant to an audit or investigation under Chapter 5 which the person, subject to the audit or investigation has been notified of or is aware of; or

[Para. (*a*) substituted by s. 44 (*a*) of Act No. 21 of 2012.]

(*b*) a person lodges an objection or appeal against an assessment or decision under section 104 (2),

the person must retain the records, books of account or documents relevant to the audit, investigation, objection or appeal until the audit or investigation is concluded or the assessment or the decision becomes final.

[S. 32 amended by s. 44 (*b*) of Act No. 21 of 2012.]

33. Translation.—(1) In the case of information that is not in one of the official languages of the Republic, a senior SARS official may by notice require a person who must furnish the information to SARS, to produce a translation in one of the official languages determined by the official within a reasonable period.

(2) A translation referred to in subsection (1) must—

(*a*) be produced at a time and at the place specified by the notice; and

(*b*) if required by SARS, be prepared and certified by a sworn and accredited translator or another person approved by the senior SARS official.

Part B

Reportable Arrangements

34. Definitions.—In this Part and in section 212, unless the context indicates otherwise, the following terms, if in single quotation marks, have the following meanings—

'arrangement' means any transaction, operation, scheme, agreement or understanding (whether enforceable or not);

'financial benefit' means a reduction in the cost of finance, including interest, finance charges, costs, fees and discounts on a redemption amount;

'financial reporting standards' means, in the case of a company required to submit financial statements in terms of the Companies Act, 2008 (Act No. 71 of 2008), financial reporting standards prescribed by that Act, or, in any other case, the International Financial Reporting Standards or appropriate financial reporting standards that provide a fair presentation of the financial results and position of the taxpayer;

[Definition of 'financial reporting standards' substituted by s. 37 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

'participant', in relation to an 'arrangement', means—

(*a*) a 'promoter';

(*b*) a person who directly or indirectly will derive or assumes that the person will derive a 'tax benefit' or 'financial benefit' by virtue of an 'arrangement'; or

(*c*) any other person who is party to an 'arrangement' listed in a public notice referred to in section 35 (2);

[Definition of 'participant' substituted by s. 40 (1) (*a*) of Act No. 44 of 2014 and by s. 39 of Act No. 23 of 2015.]

'pre-tax profit', in relation to an 'arrangement', means the profit of a 'participant' resulting from that 'arrangement' before deducting normal tax, which profit must be determined in accordance with 'financial reporting standards' after taking into account all costs and expenditure incurred by the 'participant' in connection with the 'arrangement' and after deducting any foreign tax paid or payable by the 'participant' in connection with the 'arrangement';

'promoter', in relation to an 'arrangement', means a person who is principally responsible for organising, designing, selling, financing or managing the 'arrangement';

[Definition of 'promoter' substituted by s. 40 (1) (*b*) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015.]

'reportable arrangement' means an 'arrangement' referred to in section 35 (1) or 35 (2) that is not an excluded 'arrangement' referred to in section 36;

[Definition of 'reportable arrangement' inserted by s. 40 (1) (*c*) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015.]

'tax benefit' means the avoidance, postponement, reduction or evasion of a liability for tax.

[Definition of 'tax benefit' substituted by s. 40 (1) (*d*) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015.]

(Editorial Note: Please note that the amendment of s. 34 by s. 45 of Act No. 21 of 2012 cannot be effected because all instances of the word 'arrangement' have single quotation marks.)

35. Reportable arrangements.—(1) An 'arrangement' is a 'reportable arrangement' if a person is a 'participant' in the 'arrangement' and the 'arrangement'—

(*a*) contains provisions in terms of which the calculation of 'interest' as defined in section 24J of the Income Tax Act, finance costs, fees or any other charges is wholly or partly dependent on the assumptions relating to the tax treatment of that 'arrangement' (otherwise than by reason of any change in the provisions of a tax Act);

(*b*) has any of the characteristics contemplated in section 80C (2) (*b*) of the Income Tax Act, or substantially similar characteristics;

(*c*) gives rise to an amount that is or will be disclosed by any 'participant' in any year of assessment or over the term of the 'arrangement' as—

(i) a deduction for purposes of the Income Tax Act but not as an expense for purposes of 'financial reporting standards'; or

(ii) revenue for purposes of 'financial reporting standards' but not as gross income for purposes of the Income Tax Act;

(*d*) does not result in a reasonable expectation of a 'pre-tax profit' for any 'participant'; or

(*e*) results in a reasonable expectation of a 'pre-tax profit' for any 'participant' that is less than the value of that 'tax benefit' to that 'participant' if both are discounted to a present value at the end of the first year of assessment when that 'tax benefit' is or will be derived or is assumed to be derived, using consistent assumptions and a reasonable discount rate for that 'participant'.

[Sub-s. (1) amended by s. 41 (1) (*a*) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015.]

(2) An 'arrangement' is a 'reportable arrangement' if the Commissioner has listed the 'arrangement' in a public notice.

[Sub-s. (2) substituted by s. 41 (1) (*b*) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015.]

(3) . . . . . .

[Sub-s. (3) deleted by s. 41 (1) (*c*) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015.]

36. Excluded arrangements.—(1) An 'arrangement' is an excluded 'arrangement' if it is—

(*a*) a debt in terms of which—

(i) the borrower receives or will receive an amount of cash and agrees to repay at least the same amount of cash to the lender at a determinable future date; or

(ii) the borrower receives or will receive a fungible asset and agrees to return an asset of the same kind and of the same or equivalent quantity and quality to the lender at a determinable future date;

[Para. (*a*) amended by s. 46 of Act No. 21 of 2012.]

(*b*) a lease;

(*c*) a transaction undertaken through an exchange regulated in terms of the Financial Markets Act, 2012 (Act No. 19 of 2012); or

[Para. (*c*) substituted by s. 40 of Act No. 23 of 2015.]

(*d*) a transaction in participatory interests in a scheme regulated in terms of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002).

(2) Subsection (1) applies only to an 'arrangement' that—

(*a*) is undertaken on a stand-alone basis and is not directly or indirectly connected to any other 'arrangement' (whether entered into between the same or different parties); or

(*b*) would have qualified as having been undertaken on a stand-alone basis as required by paragraph (*a*), were it not for a connected 'arrangement' that is entered into for the sole purpose of providing security and if no 'tax benefit' is obtained or enhanced by virtue of the security 'arrangement'.

(3) Subsection (1) does not apply to an 'arrangement' that is entered into—

(*a*) with the main purpose or one of its main purposes of obtaining or enhancing a 'tax benefit'; or

(*b*) in a specific manner or form that enhances or will enhance a 'tax benefit'.

(4) The Commissioner may determine an 'arrangement' to be an excluded 'arrangement' by public notice.

[Sub-s. (4) substituted by s. 42 (1) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015.]

37. Disclosure obligation.—(1) The information referred to in section 38 in respect of a 'reportable arrangement' must be disclosed by a person who—

(*a*) is a 'participant' in an 'arrangement' on the date on which it qualifies as a 'reportable arrangement', within 45 business days after that date; or

(*b*) becomes a 'participant' in an 'arrangement' after the date on which it qualifies as a 'reportable arrangement', within 45 business days after becoming a 'participant'.

[Sub-s. (1) substituted by s. 43 (1) (*a*) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015.]

(2) . . . . .

[Sub-s. (2) deleted by s. 43 (1) (*a*) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015.]

(3) A 'participant' need not disclose the information if the 'participant' obtains a written statement from any other 'participant' that the other 'participant' has disclosed the 'reportable arrangement'.

[Sub-s. (3) amended by s. 47 of Act No. 21 of 2012 and substituted by s. 43 (1) (*a*) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015.]

(4) . . . . .

[Sub-s. (4) deleted by s. 43 (1) (*b*) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015.]

(5) SARS may grant extension for disclosure for a further 45 business days, if reasonable grounds exist for the extension.

38. Information to be submitted.—The following information in relation to a 'reportable arrangement', must be submitted in the prescribed form and manner and by the date specified:

(*a*) a detailed description of all its steps and key features, including, in the case of an 'arrangement' that is a step or part of a larger 'arrangement', all the steps and key features of the larger 'arrangement';

(*b*) a detailed description of the assumed 'tax benefits' for all 'participants', including, but not limited to, tax deductions and deferred income;

(*c*) the names, registration numbers, and registered addresses of all 'participants';

(*d*) a list of all its agreements; and

(*e*) any financial model that embodies its projected tax treatment.

[S. 38 amended by s. 44 (1) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015.]

39. Reportable arrangement reference number.—SARS must, after receipt of the information contemplated in section 38, issue a "reportable arrangement" reference number to each "participant" for administrative purposes only.

[S. 39 substituted by s. 45 (1) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015.]

CHAPTER 5
INFORMATION GATHERING

Part A

General Rules for Inspection, Verification, Audit and Criminal Investigation

40. Selection for inspection, verification or audit.—SARS may select a person for inspection, verification or audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis.

41. Authorisation for SARS official to conduct audit or criminal investigation.—(1) A senior SARS official may grant a SARS official written authorisation to conduct a field audit or criminal investigation, as referred to in Part B.

(2) When a SARS official exercises a power or duty under a tax Act in person, the official must produce the authorisation.

(3) If the official does not produce the authorisation, a member of the public is entitled to assume that the official is not a SARS official so authorised.

42. Keeping taxpayer informed.—(1) A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit.

[Sub-s. (1) substituted by s. 48 (*a*) of Act No. 21 of 2012 and by s. 16 of Act No. 22 of 2018.]

(2) Upon conclusion of the audit or a criminal investigation, and where—

(*a*) the audit or investigation was inconclusive, SARS must inform the taxpayer accordingly within 21 business days; or

(*b*) the audit identified potential adjustments of a material nature, SARS must within 21 business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment or decision referred to in section 104 (2).

(3) Upon receipt of the document described in subsection (2) (*b*), the taxpayer must within 21 business days of delivery of the document, or the further period requested by the taxpayer that may be allowed by SARS based on the complexities of the audit, respond in writing to the facts and conclusions set out in the document.

(4) The taxpayer may waive the right to receive the document.

(5) Subsections (1) and (2) (*b*) do not apply if a senior SARS official has a reasonable belief that compliance with those subsections would impede or prejudice the purpose, progress or outcome of the audit.

(6) SARS may under the circumstances described in subsection (5) issue the assessment or make the decision referred to in section 104 (2) resulting from the audit and the grounds of the assessment or decision must be provided to the taxpayer within 21 business days of the assessment or the decision, or the further period that may be required based on the complexities of the audit or the decision.

[Sub-s. (6) substituted by s. 48 (*b*) of Act No. 21 of 2012.]

42A. Procedure where legal professional privilege is asserted.—(1) For purposes of Parts B, C and D, if a person alleges the existence of legal professional privilege in respect of relevant material required by SARS, during an inquiry or during the conduct of a search and seizure by SARS, the person must provide the following information to SARS and, if applicable,

the presiding officer designated under section 51 or the legal practitioner referred to in section 64:

(*a*) a description and purpose of each item of the material in respect of which the privilege is asserted;

(*b*) the author of the material and the capacity in which the author was acting;

(*c*) the name of the person for whom the author referred to in paragraph (*b*) was acting in providing the material;

(*d*) confirmation in writing that the person referred to in paragraph (*c*) is claiming privilege in respect of each item of the material;

(*e*) if the material is not in possession of the person referred to in paragraph (*d*), from whom did the person asserting privilege obtain the material; and

(*f*) if the person asserting privilege is not the person referred to in paragraph (*d*), under what circumstances and instructions regarding the privilege did the person obtain the material.

[Sub-s. (1) amended by s. 29 of Act No. 33 of 2019.]

(2) A person must submit the information required under Part B to SARS at the place, in the format and within the time specified by SARS, unless SARS extends the period based on reasonable grounds submitted by the person.

(3) If SARS disputes the assertion of privilege upon receipt of the information—

(*a*) SARS must make arrangements with a practitioner from the panel appointed under section 111 to take receipt of the material;

(*b*) the person asserting privilege must seal and hand over the material in respect of which privilege is asserted to the practitioner;

(*c*) the practitioner must within 21 business days after being handed the material make a determination of whether the privilege applies and may do so in the manner the practitioner deems fit, including considering representations made by the parties;

(*d*) if a determination of whether the privilege applies is not made by the practitioner or a party is not satisfied with the determination, the practitioner must retain the relevant material pending final resolution of the dispute by the parties or an order of court; and

(*e*) any application to a High Court must be instituted within 30 days of the expiry of the period of 21 business days, failing which the material must be handed to the party in whose favour the determination, if any, was made.

(4) The appointed practitioner—

(*a*) is not regarded as acting on behalf of either party;

(*b*) must personally take responsibility for the safekeeping of the material;

(*c*) must give grounds for the determination under subsection (3) (*d*); and

(*d*) must be compensated in the same manner as if acting as chairperson of the tax board.

[S. 42A inserted by s. 41 of Act No. 23 of 2015.]

43. Referral for criminal investigation.—(1) If at any time before or during the course of an audit it appears that a taxpayer may have committed a serious tax offence, the investigation of the offence must be referred to a senior SARS official responsible for criminal investigations for a decision as to whether a criminal investigation should be pursued.

[Sub-s. (1) substituted by s. 49 of Act No. 21 of 2012.]

(2) Relevant material obtained under this Chapter from the taxpayer after the referral, must be kept separate from the criminal investigation.

[Sub-s. (2) substituted by s. 49 of Act No. 21 of 2012.]

(3) If an investigation is referred under subsection (1) the relevant material and files relating to the case must be returned to the SARS official responsible for the audit if—

(*a*) it is decided not to pursue a criminal investigation;

(*b*) it is decided to terminate the investigation; or

(*c*) after referral of the case for prosecution, a decision is made not to prosecute.

44. Conduct of criminal investigation.—(1) During a criminal investigation, SARS must apply the information gathering powers in terms of this Chapter with due recognition of the taxpayer's constitutional rights as a suspect in a criminal investigation.

(2) In the event that a decision is taken to pursue the criminal investigation of a serious tax offence, SARS may make use of relevant material obtained prior to the referral referred to in section 43.

(3) Relevant material obtained during a criminal investigation may be used for purposes of audit as well as in subsequent civil and criminal proceedings.

[Sub-s. (3) substituted by s. 17 of Act No. 22 of 2018.]

Part B

Inspection, Request for Relevant Material, Audit and Criminal Investigation

45. Inspection.—(1) A SARS official may, for the purposes of the administration of a tax Act and without prior notice, arrive at a premises where the SARS official has a reasonable belief that a trade or enterprise is being carried on and conduct an inspection to determine only—

(*a*) the identity of the person occupying the premises;

(*b*) whether the person occupying the premises is registered for tax; or

(*c*) whether the person is complying with sections 29 and 30.

(2) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for the purposes of trade, under this section without the consent of the occupant.

46. Request for relevant material.—(1) SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires.

(2) A senior SARS official may require relevant material in terms of subsection (1)—

(*a*) in respect of taxpayers in an objectively identifiable class of taxpayers; or

(*b*) held or kept by a connected person, as referred to in paragraph (*d*) (i) of the definition of "connected person" in the Income Tax Act, in relation to the taxpayer, located outside the Republic.

[Sub-s. (2) substituted by s. 42 (*a*) of Act No. 23 of 2015.]

(3) A request by SARS for relevant material from a person other than the taxpayer is limited to material maintained or kept or that should reasonably be maintained or kept by the person in relation to the taxpayer.

[Sub-s. (3) substituted by s. 50 (*a*) of Act No. 21 of 2012, by s. 42 (*a*) of Act No. 23 of 2015 and by s. 30 of Act No. 33 of 2019.]

(4) A person or taxpayer receiving from SARS a request for relevant material under this section must submit the relevant material to SARS at the place, in the format (which must be reasonably accessible to the person or taxpayer) and—

(*a*) within the time specified in the request; or

(*b*) if the material is held by a connected person referred to in subsection (2) (*b*), within 90 days from the date of the request, which request must set out the consequences referred to in subsection (9) of failing to do so.

[Sub-s. (4) substituted by s. 46 of Act No. 44 of 2014 and by s. 42 (*a*) of Act No. 23 of 2015.]

(5) If reasonable grounds for an extension are submitted by the person or taxpayer, SARS may extend the period within which the relevant material must be submitted.

[Sub-s. (5) substituted by s. 50 (*b*) of Act No. 21 of 2012 and by s. 42 (*a*) of Act No. 23 of 2015.]

(6) Relevant material required by SARS under this section must be referred to in the request with reasonable specificity.

(7) A senior SARS official may direct that relevant material—

(*a*) be provided under oath or solemn declaration; or

(*b*) if required for purposes of a criminal investigation, be provided under oath or solemn declaration and, if necessary, in accordance with the requirements of section 212 or 236 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

[Sub-s. (7) substituted by s. 38 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(8) A senior SARS official may request relevant material that a person has available for purposes of revenue estimation.

(9) If a taxpayer fails to provide material referred to in subsection (2) (*b*), the material may not be produced by the taxpayer in any subsequent proceedings, unless a competent court directs otherwise on the basis of circumstances outside the control of the taxpayer and any connected person referred to in paragraph (*d*) (i) of the definition of "connected person" in the Income Tax Act, in relation to the taxpayer.

[Sub-s. (9) added by s. 42 (*b*) of Act No. 23 of 2015.]

47. Production of relevant material in person.—(1) A senior SARS official may, by notice, require a person, whether or not chargeable to tax, an employee of the person or a person who holds an office in the person to attend in person at the time and place designated in the notice for the purpose of being interviewed by a SARS official concerning the tax affairs of the person, if the interview—

(*a*) is intended to clarify issues of concern to SARS—

(i) to render further verification or audit unnecessary; or

(ii) to expedite a current verification or audit; and

(*b*) is not for purposes of a criminal investigation.

[Sub-s. (1) substituted by s. 43 of Act No. 23 of 2015.]

(2) The senior SARS official issuing the notice may require the person interviewed to produce relevant material under the control of the person during the interview.

(3) Relevant material required by SARS under subsection (2) must be referred to in the notice with reasonable specificity.

(4) A person may decline to attend an interview, if the distance between the place designated in the notice and the usual place of business or residence of the person exceeds the distance prescribed by the Commissioner by public notice.

48. Field audit or criminal investigation.—(1) A SARS official named in an authorisation referred to in section 41 may require a person, with prior notice of at least 10 business days, to make available at the person's premises specified in the notice relevant material that the official may require to audit or criminally investigate in connection with the administration of a tax Act in relation to the person or another person.

(2) The notice referred to in subsection (1) must—

(*a*) state the place where and the date and time that the audit or investigation is due to start (which must be during normal business hours); and

(*b*) indicate the initial basis and scope of the audit or investigation.

(3) SARS is not required to give the notice if the person waives the right to receive the notice.

(4) If a person at least five business days before the date listed in the notice advances reasonable grounds for varying the notice, SARS may vary the notice accordingly, subject to conditions SARS may impose with regard to preparatory measures for the audit or investigation.

(5) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for the purposes of trade, under this section without the consent of the occupant.

49. Assistance during field audit or criminal investigation.—(1) The person on whose premises an audit or criminal investigation is carried out and any other person on the premises, must provide such reasonable assistance as is required by SARS to conduct the audit or investigation, including—

(*a*) making available appropriate facilities, to the extent that such facilities are available;

(*b*) answering questions relating to the audit or investigation including, if so required, in the manner referred to in section 46 (7); and

[Para. (*b*) substituted by s. 44 of Act No. 23 of 2015.]

(*c*) submitting relevant material as required.

[Sub-s. (1) amended by s. 51 (*a*) of Act No. 21 of 2012.]

(2) No person may without just cause—

(*a*) obstruct a SARS official from carrying out the audit or investigation; or

(*b*) refuse to give the access or assistance as may be required under subsection (1).

(3) The person may recover from SARS after completion of the audit or criminal investigation (or, at the person's request, on a monthly basis) the cost for the use of photocopying facilities in accordance with the fees prescribed in section 92 (1) (*b*) of the Promotion of Access to Information Act.

[Sub-s. (3) substituted by s. 51 (*b*) of Act No. 21 of 2012.]

Part C
Inquiries

50. Authorisation for inquiry.—(1) A judge may, on application made *ex parte* and authorised by a senior SARS official grant an order in terms of which a person described in section 51 (3) is designated to act as presiding officer at the inquiry referred to in this section.

[Sub-s. (1) substituted by s. 47 of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

(2) An application under subsection (1) must be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.

(3) A senior SARS official may authorise a person to conduct an inquiry for the purposes of the administration of a tax Act.

51. Inquiry order.—(1) A judge may grant the order referred to in section 50 (1) if satisfied that there are reasonable grounds to believe that—

(*a*) a person has—

(i) failed to comply with an obligation imposed under a tax Act;

(ii) committed a tax offence; or

(iii) disposed of, removed or concealed assets which may fully or partly satisfy an outstanding tax debt; and

(*b*) relevant material is likely to be revealed during the inquiry which may provide proof of the failure to comply, of the commission of the offence or of the disposal, removal or concealment of the assets.

[Sub-s. (1) substituted by s. 45 of Act No. 23 of 2015.]

(2) The order referred to in subsection (1) must—

(*a*) designate a presiding officer before whom the inquiry is to be held;

(*b*) identify the person referred to in subsection (1) (*a*);

(*c*) refer to the alleged non-compliance, the commission of the offence or the disposal, removal or concealment of assets to be inquired into;

(*d*) be reasonably specific as to the ambit of the inquiry; and

(*e*) be provided to the presiding officer.

[Sub-s. (2) substituted by s. 45 of Act No. 23 of 2015.]

(3) A presiding officer must be a person appointed to the panel described in section 111.

52. Inquiry proceedings.—(1) The presiding officer determines the conduct of the inquiry as the presiding officer thinks fit.

(2) The presiding officer must ensure that the recording of the proceedings and evidence at the inquiry is of a standard that would meet the standard required for the proceedings and evidence to be used in a court of law.

(3) A person has the right to have a representative present when that person appears as a witness before the presiding officer.

53. Notice to appear.—(1) The presiding officer may, by notice in writing, require a person, whether or not chargeable to tax, to—

(*a*) appear before the inquiry, at the time and place designated in the notice, for the purpose of being examined under oath or solemn declaration; and

(*b*) produce any relevant material in the custody of the person.

(2) If the notice requires the production of relevant material, it is sufficient if the relevant material is referred to in the notice with reasonable specificity.

54. Powers of presiding officer.—The presiding officer has the same powers regarding witnesses at the inquiry as are vested in a president of the tax court under sections 127 and 128.

[S. 54 substituted by s. 39 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

55. Witness fees.—The presiding officer may direct that a person receive witness fees to attend an inquiry in accordance with the tariffs prescribed in terms of section 51*bis* of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944).

56. Confidentiality of proceedings.—(1) An inquiry under this Part is private and confidential.

(2) The presiding officer may, on request, exclude a person from the inquiry if the person's attendance is prejudicial to the inquiry.

(3) Section 69 applies with the necessary changes to persons present at the questioning of a person, including the person being questioned.

(4) Subject to section 57 (2), SARS may use evidence given by a person under oath or solemn declaration at an inquiry in a subsequent proceeding involving the person or another person.

57. Incriminating evidence.—(1) A person may not refuse to answer a question during an inquiry on the grounds that it may incriminate the person.

(2) Incriminating evidence obtained under this section is not admissible in criminal proceedings against the person giving the evidence, unless the proceedings relate to—

(*a*) the administering or taking of an oath or the administering or making of a solemn declaration;

(*b*) the giving of false evidence or the making of a false statement; or

(*c*) the failure to answer questions lawfully put to the person, fully and satisfactorily.

58. Inquiry not suspended by civil or criminal proceedings.—Unless a court orders otherwise, an inquiry relating to a person referred to in section 51 (1) (*a*) must proceed despite the fact that a civil or criminal proceeding is pending or contemplated against or involves the person, a witness or potential witness in the inquiry, or another person whose affairs may be investigated in the course of the inquiry.

Part D
Search and Seizure

59. Application for warrant.—(1) A senior SARS official may, if necessary or relevant to administer a tax Act, authorise an application for a warrant under which SARS may enter a premises where relevant material is kept to search the premises and any person present on the premises and seize relevant material.

(2) SARS must apply *ex parte* to a judge for the warrant, which application must be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.

(3) Despite subsection (2), SARS may apply for the warrant referred to in subsection (1) and in the manner referred to in subsection (2), to a magistrate, if the matter relates to an audit or investigation where the estimated tax in dispute does not exceed the amount determined in the notice issued under section 109 (1) (*a*).

60. Issuance of warrant.—(1) A judge or magistrate may issue the warrant referred to in section 59 (1) if satisfied that there are reasonable grounds to believe that—

(*a*) a person failed to comply with an obligation imposed under a tax Act, or committed a tax offence; and

(*b*) relevant material likely to be found on the premises specified in the application may provide evidence of the failure to comply or commission of the offence.

(2) A warrant issued under subsection (1) must contain the following—

(*a*) the alleged failure to comply or offence that is the basis for the application;

(*b*) the person alleged to have failed to comply or to have committed the offence;

(*c*) the premises to be searched; and

(*d*) the fact that relevant material as defined in section 1 is likely to be found on the premises.

(3) The warrant must be exercised within 45 business days or such further period as a judge or magistrate deems appropriate on good cause shown.

61. Carrying out search.—(1) A SARS official exercising a power under a warrant referred to in section 60 must produce the warrant, and if the owner or person in control of the premises is not present, the SARS official must affix a copy of the warrant to the premises in a prominent and visible place.

[Sub-s. (1) substituted by s. 52 of Act No. 21 of 2012.]

(2) Subject to section 63, a SARS official's failure to produce a warrant entitles a person to refuse access to the official.

(3) The SARS official may—

(*a*) open or cause to be opened or removed in conducting a search, anything which the official suspects to contain relevant material;

(*b*) seize any relevant material;

(*c*) seize and retain a computer or storage device in which relevant material is stored for as long as it is necessary to copy the material required;

(*d*) make extracts from or copies of relevant material, and require from a person an explanation of relevant material; and

(*e*) if the premises listed in the warrant is a vessel, aircraft or vehicle, stop and board the vessel, aircraft or vehicle, search the vessel, aircraft or vehicle or a person found in the vessel, aircraft or vehicle, and question the person with respect to a matter dealt with in a tax Act.

(4) The SARS official must make an inventory of the relevant material seized in the form, manner and at the time that is reasonable under the circumstances and provide a copy thereof to the person.

(5) The SARS official must conduct the search with strict regard for decency and order, and may search a person if the official is of the same gender as the person being searched.

(6) The SARS official may, at any time, request such assistance from a police officer as the official may consider reasonably necessary and the police officer must render the assistance.

(7) No person may obstruct a SARS official or a police officer from executing the warrant or without reasonable excuse refuse to give such assistance as may be reasonably required for the execution of the warrant.

(8) If the SARS official seizes relevant material, the official must ensure that the relevant material seized is preserved and retained until it is no longer required for—

(*a*) the investigation into the non-compliance or the offence described under section 60 (1) (*a*); or

(*b*) the conclusion of any legal proceedings under a tax Act or criminal proceedings in which it is required to be used.

62. Search of premises not identified in warrant.—(1) If a senior SARS official has reasonable grounds to believe that—

(*a*) the relevant material referred to in section 60 (1) (*b*) and included in a warrant is at premises not identified in the warrant and may be removed or destroyed;

(*b*) a warrant cannot be obtained in time to prevent the removal or destruction of the relevant material; and

(*c*) the delay in obtaining a warrant would defeat the object of the search and seizure,

a SARS official may enter and search the premises and exercise the powers granted in terms of this Part, as if the premises had been identified in the warrant.

(2) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this section without the consent of the occupant.

63. Search without warrant.—(1) A senior SARS official may without a warrant exercise the powers referred to in section 61 (3)—

(*a*) if the owner or person in control of the premises so consents in writing; or

(*b*) if the senior SARS official on reasonable grounds is satisfied that—

(i) there may be an imminent removal or destruction of relevant material likely to be found on the premises;

(ii) if SARS applies for a search warrant under section 59, a search warrant will be issued; and

(iii) the delay in obtaining a warrant would defeat the object of the search and seizure.

(2) A SARS official must, before carrying out the search, inform the owner or person in control of the premises—

(*a*) that the search is being conducted under this section; and

(*b*) of the alleged failure to comply with an obligation imposed under a tax Act or tax offence that is the basis for the search.

(3) Section 61 (4) to (8) applies to a search conducted under this section.

(4) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this section without the consent of the occupant.

(5) If the owner or person in control of the premises is not present, the SARS official must inform such person of the circumstances referred to in subsection (2) as soon as reasonably possible after the execution of the search and seizure.

[Sub-s. (5) added by s. 53 of Act No. 21 of 2012.]

64. Legal professional privilege.—(1) If SARS foresees the need to search and seize relevant material that may be alleged to be subject to legal professional privilege, SARS must arrange for a legal practitioner from the panel appointed under section 111 to be present during the execution of the warrant.

[Sub-s. (1) substituted by s. 31 of Act No. 33 of 2019.]

(2) A legal practitioner with whom SARS has made an arrangement in terms of subsection (1) may appoint a substitute legal practitioner to be present on the appointing legal practitioner's behalf during the execution of a warrant.

[Sub-s. (2) substituted by s. 31 of Act No. 33 of 2019.]

(3) If, during the carrying out of a search and seizure by SARS, a person alleges the existence of legal professional privilege in respect of relevant material and a legal practitioner is not present under subsection (1) or (2), SARS must seal the material, make arrangements

with a legal practitioner from the panel appointed under section 111 to take receipt of the material and, as soon as is reasonably possible, hand over the material to the legal practitioner.

[Sub-s. (3) substituted by s. 31 of Act No. 33 of 2019.]

(4) A legal practitioner referred to in subsections (1), (2) and (3)—

(*a*) is not regarded as acting on behalf of either party; and

(*b*) must personally take responsibility—

(i) in the case of a warrant issued under section 60, for the removal from the premises of relevant material in respect of which legal privilege is alleged;

(ii) in the case of a search and seizure carried out under section 63, for the receipt of the sealed information; and

(iii) if a substitute legal practitioner in terms of subsection (2), for the delivery of the information to the appointing legal practitioner for purposes of making the determination referred to in subsection (5).

[Sub-s. (4) substituted by s. 31 of Act No. 33 of 2019.]

(5) The legal practitioner referred to in subsection (1) or (3) must, within 21 business days, make a determination of whether the privilege applies and may do so in the manner the legal practitioner deems fit, including considering representations made by the parties.

[Sub-s. (5) substituted by s. 31 of Act No. 33 of 2019.]

(6) If a determination of whether the privilege applies is not made under subsection (5) or a party is not satisfied with the determination, the legal practitioner must retain the relevant material pending final resolution of the dispute by the parties or an order of court.

[Sub-s. (6) substituted by s. 31 of Act No. 33 of 2019.]

(7) The legal practitioner from the panel appointed under section 111 and any legal practitioner acting on behalf of that legal practitioner referred to in subsection (1) must be compensated in the same manner as if acting as Chairperson of the tax board.

[Sub-s. (7) substituted by s. 31 of Act No. 33 of 2019.]

65. Person's right to examine and make copies.—(1) The person to whose affairs relevant material seized relates, may examine and copy it.

(2) Examination and copying must be made—

(*a*) at the person's cost in accordance with the fees prescribed in accordance with section 92 (1) (*b*) of the Promotion of Access to Information Act;

(*b*) during normal business hours; and

(*c*) under the supervision determined by a senior SARS official.

66. Application for return of seized relevant material or costs of damages.—(1) A person may request SARS to—

(*a*) return some or all of the seized material; and

(*b*) pay the costs of physical damage caused during the conduct of a search and seizure.

(2) If SARS refuses the request, the person may apply to a High Court for the return of the seized material or payment of compensation for physical damage caused during the conduct of the search and seizure.

(3) The court may, on good cause shown, make the order as it deems fit.

(4) If the court sets aside the warrant issued in terms of section 60 (1) or orders the return of the seized material, the court may nevertheless authorise SARS to retain the original or a copy of any relevant material in the interests of justice.

CHAPTER 6
CONFIDENTIALITY OF INFORMATION

67. General prohibition of disclosure.—(1) This Chapter applies to—

(*a*) SARS confidential information as referred to in section 68 (1); and

(*b*) taxpayer information, which means any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information.

(2) An oath or solemn declaration undertaking to comply with the requirements of this Chapter in the prescribed form, must be taken before a magistrate, justice of the peace or commissioner of oaths by—

(*a*) a SARS official and the Tax Ombud, before commencing duties or exercising any powers under a tax Act; and

(*b*) a person referred to in section 70 who performs any function referred to in that section, before the disclosure described in that section may be made.

(3) In the event of the disclosure of SARS confidential information or taxpayer information contrary to this Chapter, the person to whom it was so disclosed may not in any manner disclose, publish or make it known to any other person who is not a SARS official.

(4) A person who receives information under section 68, 69, 70 or 71, must preserve the secrecy of the information and may only disclose the information to another person if the disclosure is necessary to perform the functions specified in those sections.

(5) The Commissioner may, for purposes of protecting the integrity and reputation of SARS as an organisation and after giving the taxpayer at least 24 hours' notice, disclose taxpayer information to the extent necessary to counter or rebut false allegations or information disclosed by the taxpayer, the taxpayer's duly authorised representative or other person acting under the instructions of the taxpayer and published in the media or in any other manner.

68. SARS confidential information and disclosure.—(1) SARS confidential information means information relevant to the administration of a tax Act that is—

(*a*) personal information about a current or former SARS official, whether deceased or not;

(*b*) information subject to legal professional privilege vested in SARS;

(*c*) information that was supplied in confidence by a third party to SARS the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source;

(*d*) information related to investigations and prosecutions described in section 39 of the Promotion of Access to Information Act;

(*e*) information related to the operations of SARS, including an opinion, advice, report, recommendation or an account of a consultation, discussion or deliberation that has occurred, if—

(i) the information was given, obtained or prepared by or for SARS for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; and

(ii) the disclosure of the information could reasonably be expected to frustrate the deliberative process in SARS or between SARS and other organs of state by—

(*aa*) inhibiting the candid communication of an opinion, advice, report or recommendation or conduct of a consultation, discussion or deliberation; or

(*bb*) frustrating the success of a policy or contemplated policy by the premature disclosure thereof;

(*f*) information about research being or to be carried out by or on behalf of SARS, the disclosure of which would be likely to prejudice the outcome of the research;

(*g*) information, the disclosure of which could reasonably be expected to prejudice the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic, including a contemplated change or decision to change a tax or a duty, levy, penalty, interest and similar moneys imposed under a tax Act or the Customs and Excise Act;

(*g*) information, the disclosure of which could reasonably be expected to prejudice the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic, including a contemplated change or decision to change a tax or a duty, levy, penalty, interest and similar moneys imposed under a tax Act;

(Pending amendment: Para. (*g*) to be substituted by s. 46 (1) of Act No. 23 of 2015 with effect from the date on which the Customs Control Act, 2014 comes into operation – date not determined.)

(Date of commencement to be proclaimed.)

(*h*) information supplied in confidence by or on behalf of another state or an international organisation to SARS;

(*i*) a computer program, as defined in section 1 (1) of the Copyright Act, 1978 (Act No. 98 of 1978), owned by SARS;

[Para. (*i*) amended by s. 40 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*j*) information relating to the security of SARS buildings, property, structures or systems; and

[Para. (*j*) amended by s. 40 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*k*) information relating to the verification or audit selection procedure or method used by SARS, the disclosure of which could reasonably be expected to jeopardise the effectiveness thereof.

[Para. (*k*) added by s. 40 (*c*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(2) A person who is a current or former SARS official—

(*a*) may not disclose SARS confidential information to a person who is not a SARS official;

(*b*) may not disclose SARS confidential information to a SARS official who is not authorised to have access to the information; and

(*c*) must take the precautions that may be required by the Commissioner to prevent a person referred to in paragraph (*a*) or (*b*) from obtaining access to the information.

(3) A person who is a SARS official or former SARS official may disclose SARS confidential information if—

(*a*) the information is public information;

(*b*) authorised by the Commissioner;

(*c*) disclosure is authorised under any other Act which expressly provides for the disclosure of the information despite the provisions in this Chapter;

(*d*) access has been granted for the disclosure of the information in terms of the Promotion of Access to Information Act; or

(*e*) required by order of a High Court.

69. Secrecy of taxpayer information and general disclosure.—(1) A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official.

(2) Subsection (1) does not prohibit the disclosure of taxpayer information by a person who is a current or former SARS official—

(*a*) in the course of performance of duties under a tax Act or customs and excise legislation, such as—

(i) to the South African Police Service or the National Prosecuting Authority, if the information relates to, and constitutes material information for the proving of, a tax offence;

(ii) as a witness in civil or criminal proceedings under a tax Act; or

(iii) the taxpayer information necessary to enable a person to provide such information as may be required by SARS from that person;

[Para. (*a*) amended by s. 47 of Act No. 23 of 2015.]

(*b*) under any other Act which expressly provides for the disclosure of the information despite the provisions in this Chapter;

(*c*) by order of a High Court; or

(*d*) if the information is public information.

(3) An application to the High Court for the order referred to in subsection (2) (*c*) requires prior notice to SARS of at least 15 business days unless the court, based on urgency, allows a shorter period.

(4) SARS may oppose the application on the basis that the disclosure may seriously prejudice the taxpayer concerned or impair a civil or criminal tax investigation by SARS.

(5) The court may not grant the order unless satisfied that the following circumstances apply—

(*a*) the information cannot be obtained elsewhere;

(*b*) the primary mechanisms for procuring evidence under an Act or rule of court will yield or yielded no or disappointing results;

(*c*) the information is central to the case; and

(*d*) the information does not constitute biometric information.

(6) Subsection (1) does not prohibit the disclosure of information—

(*a*) to the taxpayer; or

(*b*) with the written consent of the taxpayer, to another person.

(7) Biometric information of a taxpayer may not be disclosed by SARS except under the circumstances described in subsection (2) (*a*) (i).

(8) The Commissioner may, despite the provisions of this section, disclose—

(*a*) the name and taxpayer reference number of a taxpayer;

(*b*) a list of—

(i) pension funds, pension preservation funds, provident funds, provident preservation funds and retirement annuity funds as defined in section 1 (1) of the Income Tax Act; and

(ii) public benefit organisations approved for the purposes of sections 18A and 30 of the Income Tax Act;

[Para. (*b*) substituted by s. 53 of Act No. 16 of 2016.]

(*c*) the name and tax practitioner registration number of a registered tax practitioner; and

(*d*) taxpayer information in an anonymised form.

[Sub-s. (8) amended by s. 41 (*a*) – (*c*) of Act No. 39 of 2013 and substituted by s. 48 of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

70. Disclosure to other entities.—(1) A senior SARS official may provide to the Director-General of the National Treasury taxpayer information or SARS information in respect of—

(*a*) a taxpayer which is an—

(i) institution referred to in section 3 (1) of the Public Finance Management Act, 1999 (Act No. 1 of 1999); or

(ii) entity referred to in section 3 of the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003),

to the extent necessary for the Director-General to perform the functions and exercise the powers of the National Treasury under those Acts; and

(*b*) a class of taxpayers to the extent necessary for the purposes of tax policy design or revenue estimation.

(2) A senior SARS official may disclose to—

(*a*) the Statistician-General the taxpayer information as may be required for the purpose of carrying out the Statistician-General's duties to publish statistics in an anonymous form;

(*b*) the Chairperson of the Board administering the National Student Financial Aid Scheme, the name and address of the employer of a person to whom a loan or bursary has been granted under that scheme, for use in performing the Chairperson's functions under the National Student Financial Aid Scheme Act, 1999 (Act No. 56 of 1999);

(*c*) a commission of inquiry established by the President of the Republic of South Africa under a law of the Republic, the information to which the Commission is authorised by law to have access;

[Para. (*c*) amended by s. 42 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*d*) to an employer (as defined in the Fourth Schedule to the Income Tax Act) of an employee (as defined in the Fourth Schedule), but only the income tax reference number, identity number, physical or postal address of that employee and such other non-financial information in relation to that employee, as that

employer may require in order to comply with its obligations in terms of a tax Act; and

[Para. (*d*) amended by s. 42 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*e*) a recognised controlling body (as defined in section 239) of a registered tax practitioner, such information in relation to the tax practitioner as may be required to verify that sections 240A (2) (*a*) and 240A (3) are being given effect to.

[Para. (*e*) added by s. 42 (*c*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*f*) the Department of Labour, the name and contact details of all employers registered for employees' tax and eligible to receive the employment tax incentive in terms of section 2 of the Employment Tax Incentive Act, 2013.

[Para. (*f*) added by s. 13 of Act No. 26 of 2013 with effect from 1 January, 2014.]

(3) A senior SARS official may disclose to—

(*a*) the Governor of the South African Reserve Bank, or other person to whom the Minister delegates powers, functions and duties under the Exchange Control Regulations, 1961, issued under section 9 of the Currency and Exchanges Act, 1933 (Act No. 9 of 1933), the information as may be required to exercise a power or perform a function or duty under the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), or those Regulations;

(*b*) the Financial Sector Conduct Authority, the information as may be required for the purpose of carrying out the Financial Sector Conduct Authority's duties and functions under the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017);

[Para. (*b*) substituted by s. 18 (1) of Act No. 22 of 2018 deemed to have come into operation on 1 April, 2018.]

(*c*) the Financial Intelligence Centre, the information as may be required for the purpose of carrying out the Centre's duties and functions under the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001); and

(*d*) the National Credit Regulator, the information as may be required for the purpose of carrying out the Regulator's duties and functions under the National Credit Act, 2005 (Act No. 34 of 2005).

(4) A senior SARS official may disclose to an organ of state or institution listed in a regulation issued by the Minister under section 257, information to which the organ of state or institution is otherwise lawfully entitled to and for the purposes only of verifying the correctness of the following particulars of a taxpayer—

(*a*) name and taxpayer reference number;

(*b*) any identifying number;

(*c*) physical and postal address and other contact details;

(*d*) employer's name, address and contact details; and

(*e*) other non-financial information as the organ of state or institution may require for purposes of verifying paragraphs (*a*) to (*d*).

(5) The information disclosed under subsection (1), (2) or (3) may only be disclosed by SARS or the persons or entities referred to in subsection (1), (2) or (3) to the extent that it is—

(*a*) necessary for the purpose of exercising a power or performing a regulatory function or duty under the legislation referred to in subsection (1), (2) or (3); and

(*b*) relevant and proportionate to what the disclosure is intended to achieve as determined under the legislation.

[Sub-s. (5) substituted by s. 48 of Act No. 23 of 2015.]

(6) SARS must allow the Auditor-General to have access to information in the possession of SARS that relates to the performance of the Auditor-General's duties under section 4 of the Public Audit Act, 2004 (Act No. 25 of 2004).

(7) Despite subsections (1) to (5), a senior SARS official may not disclose information under this section if satisfied that the disclosure would seriously impair a civil or criminal tax investigation.

71. Disclosure in criminal, public safety or environmental matters.—(1) If so ordered by a judge under this section, a senior SARS official must disclose the information described in subsection (2) to—

(*a*) the National Commissioner of the South African Police Service, referred to in section 6 (1) of the South African Police Service Act, 1995 (Act No. 68 of 1995); or

(*b*) the National Director of Public Prosecutions, referred to in section 5 (2) (*a*) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998).

(2) Subsection (1) applies to information which may reveal evidence—

(*a*) that an offence (other than a tax offence) has been or may be committed in respect of which a court may impose a sentence of imprisonment exceeding five years;

(*b*) that may be relevant to the investigation or prosecution of the offence; or

(*c*) of an imminent and serious public safety or environmental risk.

(3) A senior SARS official may, if of the opinion that—

(*a*) SARS has information referred to in subsection (2);

(*b*) the information will likely be material to the prosecution of the offence or avoidance of the risk; and

[Para. (*b*) substituted by s. 54 of Act No. 21 of 2012.]

(*c*) the disclosure of the information would not seriously impair a civil or criminal tax investigation,

make an *ex parte* application to a judge in chambers for an order authorising SARS to disclose the information under subsection (1).

(4) The National Commissioner of the South African Police Service, the National Director of Public Prosecutions or a person acting under their respective direction and control, if—

(*a*) carrying out an investigation relating to an offence or a public safety or environmental risk referred to in subsection (2); and

(*b*) of the opinion that SARS may have information that is relevant to that investigation,

may make an *ex parte* application to a judge in chambers for an order requiring SARS to disclose the information referred to in subsection (2).

(5) SARS must be given prior notice of at least 10 business days of an application under subsection (4) unless the judge, based on urgency, allows a shorter period and SARS may oppose the application on the basis that the disclosure would seriously impair or prejudice a civil or criminal tax investigation or other enforcement of a tax Act by SARS.

72. Self incrimination.—(1) A taxpayer may not refuse to comply with his or her obligations in terms of legislation to complete and file a return or an application on the grounds that to do so might incriminate him or her, and an admission by the taxpayer contained in a return, application, or other document submitted to SARS by a taxpayer is admissible in criminal proceedings against the taxpayer for a tax offence, unless a competent court directs otherwise.

(2) An admission by the taxpayer of the commission of a tax offence obtained from a taxpayer under Chapter 5 is not admissible in criminal proceedings against the taxpayer, unless a competent court directs otherwise.

[S. 72 substituted by s. 55 of Act No. 21 of 2012.]

73. Disclosure to taxpayer of own record.—(1) A taxpayer or the taxpayer's duly authorised representative is entitled to obtain—

(*a*) a copy, certified by SARS, of the recorded particulars of an assessment or decision referred to in section 104 (2) relating to the taxpayer;

(*b*) access to information submitted to SARS by the taxpayer or by a person on the taxpayer's behalf;

[Para. (*b*) amended by s. 43 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*c*) information, other than SARS confidential information, on which the taxpayer's assessment is based; and

[Para. (*c*) substituted by s. 43 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*d*) other information relating to the tax affairs of the taxpayer.

[Para. (*d*) added by s. 43 (*c*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(2) A request for information under subsection (1) (*d*) must be made under the Promotion of Access to Information Act.

[Sub-s. (2) substituted by s. 43 (*d*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(3) .....

[Sub-s. (3) deleted by s. 43 (*e*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

74. Publication of names of offenders.—(1) The Commissioner may publish for general information the particulars specified in subsection (2), relating to a tax offence committed by a person, if—

(*a*) the person was convicted of the offence; and

(*b*) all appeal or review proceedings relating to the offence have been completed or were not instituted within the period allowed.

(2) The publication referred to in subsection (1) may specify—

(*a*) the name and area of residence of the offender;

(*b*) any particulars of the offence that the Commissioner thinks fit; and

(*c*) the particulars of the fine or sentence imposed.

CHAPTER 7
ADVANCE RULINGS

75. Definitions.—In this Chapter, unless the context indicates otherwise, the following terms, if in single quotation marks, have the following meanings—

'advance ruling' means a 'binding general ruling', a 'binding private ruling' or a 'binding class ruling';

'applicant' means a person who submits an 'application' for a 'binding private ruling' or a 'binding class ruling';

'application' means an application for a 'binding private ruling' or a 'binding class ruling';

'binding class ruling' means a written statement issued by SARS regarding the application of a tax Act to a specific 'class' of persons in respect of a 'proposed transaction';

'binding effect' means the requirement that SARS interpret or apply the applicable tax Act in accordance with an 'advance ruling' under section 82;

'binding general ruling' means a written statement issued by a senior SARS official under section 89 regarding the interpretation of a tax Act or the application of a tax Act to the stated facts and circumstances;

'binding private ruling' means a written statement issued by SARS regarding the application of a tax Act to one or more parties to a 'proposed transaction', in respect of the 'transaction';

'class' means—

(*a*) shareholders, members, beneficiaries or the like in respect of a company, association, pension fund, trust, or the like; or

(*b*) a group of persons, that may be unrelated and—

(i) are similarly affected by the application of a tax Act to a 'proposed transaction'; and

(ii) agree to be represented by an 'applicant';

'class member' and **'class members'** means a member or members of the 'class' to which a 'binding class ruling' applies;

'non-binding private opinion' means informal guidance issued by SARS in respect of the tax treatment of a particular set of facts and circumstances or 'transaction', but which does not have a 'binding effect' within the meaning of section 88;

'proposed transaction' means a 'transaction' that an 'applicant' proposes to undertake, but has not agreed to undertake, other than by way of an agreement that is subject to a suspensive condition or is otherwise not binding; and

'transaction' means any transaction, deal, business, arrangement, operation or scheme and includes a series of transactions.

76. Purpose of advance rulings.—The purpose of the 'advance ruling' system is to promote clarity, consistency and certainty regarding the interpretation and application of a tax Act by creating a framework for the issuance of 'advance rulings'.

77. Scope of advance rulings.—SARS may make an 'advance ruling' on any provision of a tax Act.

78. Private rulings and class rulings.—(1) SARS may issue a 'binding private ruling' upon 'application' by a person in accordance with section 79.

(2) SARS may issue a 'binding class ruling' upon 'application' by a person in accordance with section 79.

(3) SARS may make a 'binding private ruling' or 'binding class ruling' subject to the conditions and assumptions as may be prescribed in the ruling.

(4) SARS must issue the ruling to the 'applicant' at the address shown in the 'application' unless the 'applicant' provides other instructions, in writing, before the ruling is issued.

(5) A 'binding private ruling' or 'binding class ruling' may be issued in the prescribed form and manner, must be signed by a senior SARS official and must contain the following—

(*a*) a statement identifying it as a 'binding private ruling' or as a 'binding class ruling' made under this section;

(*b*) the name, tax reference number (if applicable), and postal address of the 'applicant';

(*c*) in the case of a 'binding class ruling', a list or a description of the affected 'class members';

(*d*) the relevant statutory provisions or legal issues;

(*e*) a description of the 'proposed transaction';

(*f*) any assumptions made or conditions imposed by SARS in connection with the validity of the ruling;

(*g*) the specific ruling made; and

(*h*) the period for which the ruling is valid.

(6) In the case of a 'binding class ruling', the 'applicant' alone is responsible for communicating with the affected 'class members' regarding the 'application' for the ruling, the issuance, withdrawal or modification of the ruling, or any other information or matter pertaining to the ruling.

79. Applications for advance rulings.—(1) An 'application' must be made in the prescribed form and manner.

(2) An 'application' for a 'binding private ruling' may be made by one person who is a party to a 'proposed transaction', or by two or more parties to a 'proposed transaction' as co-applicants, and if there is more than one 'applicant', each 'applicant' must join in designating one 'applicant' as the lead 'applicant' to represent the others.

(3) An 'application' for a 'binding class ruling' may be made by a person on behalf of a 'class'.

(4) An 'application' must contain the following minimum information—

(*a*) the 'applicant's' name, applicable identification or taxpayer reference number, postal address, email address, and telephone number;

(*b*) the name, postal address, email address and telephone number of the 'applicant's' representative, if any;

(*c*) a complete description of the 'proposed transaction' in respect of which the ruling is sought, including its financial implications;

(*d*) a complete description of the impact the 'proposed transaction' may have upon the tax liability of the 'applicant' or any 'class member' or, if relevant, any connected person in relation to the 'applicant' or any 'class member';

(*e*) a complete description of any 'transaction' entered into by the 'applicant' or 'class member' prior to submitting the 'application' or that may be undertaken after the completion of the 'proposed transaction' which may have a bearing on the tax consequences of the 'proposed transaction' or may be considered to be part of a series of 'transactions' involving the 'proposed transaction';

(*f*) the proposed ruling being sought, including a draft of the ruling;

(*g*) the relevant statutory provisions or legal issues;

(*h*) the reasons why the 'applicant' believes that the proposed ruling should be granted;

(*i*) a statement of the 'applicant's' interpretation of the relevant statutory provisions or legal issues, as well as an analysis of relevant authorities either considered by the 'applicant' or of which the 'applicant' is aware, as to whether those authorities support or are contrary to the proposed ruling being sought;

(*j*) a statement, to the best of the 'applicant's' knowledge, as to whether the ruling requested is referred to in section 80;

(*k*) a description of the information that the 'applicant' believes should be deleted from the final ruling before publication in order to protect the confidentiality of the 'applicant' or 'class members';

(*l*) the 'applicant's' consent to the publication of the ruling by SARS in accordance with section 87;

[Para. (*l*) amended by s. 56 (*a*) of Act No. 21 of 2012.]

(*m*) in the case of an 'application' for a 'binding class ruling'—

(i) a description of the 'class members'; and

(ii) the impact the 'proposed transaction' may have upon the tax liability of the 'class members' or, if relevant, any connected person in relation to the 'applicant' or to any 'class member'.

(*n*) a statement confirming that the 'applicant' complied with any registration requirements under a tax Act, with regard to any tax for which the 'applicant' is liable, unless the 'application' concerns a ruling to determine if the 'applicant' must register under a tax Act; and

[Para. (*n*) added by s. 56 (*b*) of Act No. 21 of 2012.]

(*o*) a statement confirming that all returns required to be rendered by that 'applicant' in terms of a tax Act have been rendered and any tax has been paid or arrangements acceptable to SARS have been made for the submission of any outstanding returns or for the payment of any outstanding tax debt.

[Para. (*o*) added by s. 56 (*b*) of Act No. 21 of 2012 and substituted by s. 44 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(5) SARS may request additional information from an 'applicant' at any time.

(6) An 'application' must be accompanied by the 'application' fee prescribed under section 81.

(7) SARS must provide an 'applicant' with a reasonable opportunity to make representations if, based upon the 'application' and any additional information received, it appears that the content of the ruling to be made would differ materially from the proposed ruling sought by the 'applicant'.

(8) An 'applicant' may withdraw an 'application' for a ruling at any time.

(9) A co-applicant to a 'binding private ruling' referred to in subsection (2) may withdraw from an 'application' at any time.

(10) A withdrawal does not affect the liability to pay fees under section 81.

80. Rejection of application for advance ruling.—(1) SARS may reject an 'application' for an 'advance ruling' if the 'application'—

(*a*) requests or requires the rendering of an opinion, conclusion or determination regarding—

(i) the market value of an asset;

(ii) the application or interpretation of the laws of a foreign country;

(iii) the pricing of goods or services supplied by or rendered to a connected person in relation to the 'applicant' or a 'class member';

(iv) the constitutionality of a tax Act;

(v) a 'proposed transaction' that is hypothetical or not seriously contemplated;

(vi) a matter which can be resolved by SARS issuing a directive under the Fourth Schedule or the Seventh Schedule to the Income Tax Act;

[Sub-para. (vi) substituted by s. 57 of Act No. 21 of 2012.]

(vii) whether a person is an independent contractor, labour broker or personal service provider; or

(viii) a matter which is submitted for academic purposes;

(*b*) contains—

(i) a frivolous or vexatious issue;

(ii) an alternative course of action by the 'applicant' or a 'class member' that is not seriously contemplated; or

(iii) an issue that is the same as or substantially similar to an issue that is—

(*aa*) currently before SARS in connection with an audit, investigation or other proceeding involving the 'applicant' or a 'class member' or a connected person in relation to the 'applicant' or a 'class member';

(*bb*) the subject of a policy document or draft legislation that has been published; or

(*cc*) subject to dispute resolution under Chapter 9;

(*c*) involves the application or interpretation of a general or specific anti-avoidance provision or doctrine;

(*d*) involves an issue—

(i) that is of a factual nature;

(ii) the resolution of which would depend upon assumptions to be made regarding a future event or other matters which cannot be reasonably determined at the time of the 'application';

(iii) which would be more appropriately dealt with by the competent authorities of the parties to an agreement for the avoidance of double taxation;

(iv) in which the tax treatment of the 'applicant' is dependent upon the tax treatment of another party to the 'proposed transaction' who has not applied for a ruling;

(v) in respect of a 'transaction' that is part of another 'transaction' which has a bearing on the issue, the details of which have not been disclosed; or

(vi) which is the same as or substantially similar to an issue upon which the 'applicant' has already received an unfavourable ruling;

(*e*) involves a matter the resolution of which would be unduly time-consuming or resource intensive; or

(*f*) requests SARS to rule on the substance of a 'transaction' and disregard its form.

(2) The Commissioner may publish by public notice a list of additional considerations in respect of which the Commissioner may reject an 'application'.

(3) If SARS requests additional information in respect of an 'application' and the 'applicant' fails or refuses to provide the information, SARS may reject the 'application' without a refund or rebate of any fees imposed under section 81.

81. Fees for advance rulings.—(1) In order to defray the cost of the 'advance ruling' system, the Commissioner may by public notice prescribe fees for the issuance of a 'binding private ruling' or 'binding class ruling', including—

(*a*) an 'application' fee; and

(*b*) a cost recovery fee.

(2) Following the acceptance of an 'application' SARS must, if requested, provide the 'applicant' with an estimate of the cost recovery fee anticipated in connection with the 'application' and must notify the 'applicant' if it subsequently appears that this estimate may be exceeded.

(3) The fees imposed under this section constitute fees imposed by SARS within the meaning of section 5 (1) (*h*) of the SARS Act, and constitute funds of SARS within the meaning of section 24 of that Act.

(4) If there is more than one 'applicant' for a ruling in respect of a 'proposed transaction' SARS may, upon request by the 'applicants', impose a single prescribed fee in respect of the 'application'.

82. Binding effect of advance rulings.—(1) If an 'advance ruling' applies to a person in accordance with section 83, then SARS must interpret or apply the applicable tax Act to the person in accordance with the ruling.

(2) An 'advance ruling' does not have 'binding effect' upon SARS in respect of a person unless it applies to the person in accordance with section 83.

(3) A 'binding general ruling' may be cited by SARS or a person in any proceedings, including court proceedings.

(4) A 'binding private ruling' or 'binding class ruling' may not be cited in any proceeding, including court proceedings, other than a proceeding involving an 'applicant' or a 'class member', as the case may be.

(5) A publication or other written statement issued by SARS does not have 'binding effect' unless it is an 'advance ruling'.

83. Applicability of advance rulings.—A 'binding private ruling' or 'binding class ruling' applies to a person only if—

(*a*) the provision or provisions of the Act at issue are the subject of the 'advance ruling';

(*b*) the person's set of facts or 'transaction' are the same as the particular set of facts or 'transaction' specified in the ruling;

(*c*) the person's set of facts or 'transaction' fall entirely within the effective period of the ruling;

(*d*) any assumptions made or conditions imposed by SARS in connection with the validity of the ruling have been satisfied or carried out;

(*e*) in the case of a 'binding private ruling', the person is an 'applicant' identified in the ruling; and

(*f*) in the case of a 'binding class ruling', the person is a 'class member' identified in the ruling.

84. Rulings rendered void.—(1) A 'binding private ruling' or 'binding class ruling' is void *ab initio* if—

(*a*) the 'proposed transaction' as described in the ruling is materially different from the 'transaction' actually carried out;

(*b*) there is fraud, misrepresentation or non-disclosure of a material fact; or

(*c*) an assumption made or condition imposed by SARS is not satisfied or carried out.

(2) For purposes of this section, a fact described in subsection (1) is considered material if it would have resulted in a different ruling had SARS been aware of it when the original ruling was made.

85. Subsequent changes in tax law.—(1) Despite any provision to the contrary contained in a tax Act, an 'advance ruling' ceases to0 be effective if—

(*a*) a provision of the tax Act that was the subject of the 'advance ruling' is repealed or amended in a manner that materially affects the 'advance ruling', in which case the 'advance ruling' will cease to be effective from the date that the repeal or amendment is effective; or

(*b*) a court overturns or modifies an interpretation of the tax Act on which the 'advance ruling' is based, in which case the 'advance ruling' will cease to be effective from the date of judgment unless—

(i) the decision is under appeal;

(ii) the decision is fact-specific and the general interpretation upon which the 'advance ruling' was based is unaffected; or

(iii) the reference to the interpretation upon which the 'advance ruling' was based was *obiter dicta*.

(2) An 'advance ruling' ceases to be effective upon the occurrence of any of the circumstances described in subsection (1), whether or not SARS publishes a notice of withdrawal or modification.

86. Withdrawal or modification of advance rulings.—(1) SARS may withdraw or modify an 'advance ruling' at any time.

(2) If the 'advance ruling' is a 'binding private ruling' or 'binding class ruling', SARS must first provide the 'applicant' with notice of the proposed withdrawal or modification and a reasonable opportunity to object to the decision.

(3) SARS must specify the date the decision to withdraw or modify the 'advance ruling' becomes effective, which date may not be earlier than the date—

(*a*) the decision is delivered to an 'applicant', unless the circumstances in subsection (4) apply; or

(*b*) in the case of a 'binding general ruling', the decision is published.

(4) SARS may withdraw or modify a 'binding private ruling' or a 'binding class ruling' retrospectively if the ruling was made in error and if—

(*a*) the 'applicant' or 'class member' has not yet commenced the 'proposed transaction' or has not yet incurred significant costs in respect of the arrangement;

(*b*) a person other than the 'applicant' or 'class member' will suffer significant tax disadvantage if the ruling is not withdrawn or modified retrospectively and the 'applicant' will suffer comparatively less if the ruling is withdrawn or modified retrospectively; or

(*c*) the effect of the ruling will materially erode the South African tax base and it is in the public interest to withdraw or modify the ruling retrospectively.

87. Publication of advance rulings.—(1) A person applying for a 'binding private ruling' or 'binding class ruling' must consent to the publication of the ruling in accordance with this section.

(2) A 'binding private ruling' or 'binding class ruling' must be published by SARS for general information in the manner and in the form that the Commissioner may prescribe, but without revealing the identity of an 'applicant', 'class member' or other person identified or referred to in the ruling.

(3) Prior to publication, SARS must provide the 'applicant' with a draft copy of the edited ruling for review and comment.

(4) SARS must consider, prior to publication, any comments and proposed edits and deletions submitted by the 'applicant', but is not required to accept them.

(5) An 'applicant' for a 'binding class ruling' may consent in writing to the inclusion of information identifying it or the proposed transaction in order to facilitate communication with the 'class members'.

(6) The application or interpretation of the relevant tax Act to a 'transaction' does not constitute information that may reveal the identity of an 'applicant', 'class member' or other person identified or referred to in the ruling.

(7) SARS must treat the publication of the withdrawal or modification of a 'binding private ruling' or 'binding class ruling' in the same manner and subject to the same requirements as the publication of the original ruling.

(8) Subsection (2) does not—

(*a*) require the publication of a ruling that is materially the same as a ruling already published; or

(*b*) apply to a ruling that has been withdrawn before SARS has had occasion to publish it.

(9) If an 'advance ruling' has been published, notice of the withdrawal or modification thereof must be published in the manner and media as the Commissioner may deem appropriate.

88. Non-binding private opinions.—(1) A 'non-binding private opinion' does not have 'binding effect' upon SARS.

(2) A 'non-binding private opinion' may not be cited in any proceedings including court proceedings, other than proceedings involving the person to whom the opinion was issued.

89. Binding general rulings.—(1) A senior SARS official may issue a 'binding general ruling' that is effective for either—

(*a*) a particular tax period or other definite period; or

(*b*) an indefinite period.

(2) A 'binding general ruling' must state—

(*a*) that it is a 'binding general ruling' made under this section;

(*b*) the provisions of a tax Act which are the subject of the 'binding general ruling'; and

(*c*) either—

(i) the tax period or other definite period for which it applies; or

(ii) in the case of a 'binding general ruling' for an indefinite period, that it is for an indefinite period and the date or tax period from which it applies.

(3) A 'binding general ruling' may be issued as an interpretation note or in another form and may be issued in the manner that the Commissioner prescribes.

(4) A publication or other written statement does not constitute and may not be considered or treated as a 'binding general ruling' unless it contains the information prescribed by subsection (2).

90. Procedures and guidelines for advance rulings.—The Commissioner may issue procedures and guidelines, in the form of 'binding general rulings', for implementation and operation of the 'advance ruling' system.

CHAPTER 8
ASSESSMENTS

91. Original assessments.—(1) If a tax Act requires a taxpayer to submit a return which does not incorporate a determination of the amount of a tax liability, SARS must make an original assessment based on the return submitted by the taxpayer or other information available or obtained in respect of the taxpayer.

(2) If a tax Act requires a taxpayer to submit a return which incorporates a determination of the amount of a tax liability, the submission of the return is an original self-assessment of the tax liability.

(3) If a tax Act requires a taxpayer to make a determination of the amount of a tax liability and no return is required, the payment of the amount of tax due is an original assessment.

(4) If a taxpayer—

(*a*) does not submit a return; or

(*b*) is not required to submit a return, and fails to pay the tax required under a tax Act,

SARS may make an assessment based on an estimate under section 95.

[Sub-s. (4) substituted by s. 32 of Act No. 33 of 2019.]

(5) If a tax Act requires a taxpayer to submit a return—

(*a*) the making of an assessment under subsection (4) does not detract from the obligation to submit a return;

(*b*) the taxpayer in respect of whom the assessment has been issued may, within 30 business days from the date of assessment, request SARS to issue a reduced assessment or additional assessment by submitting a complete and correct return; and

(*c*) an assessment under subsection (4) is not subject to objection or appeal unless the taxpayer submits the return and SARS does not issue a reduced or additional assessment.

[Sub-s. (5) substituted by s. 58 (*a*) of Act No. 21 of 2012.]

(6) A senior SARS official may extend the period referred to in subsection (5) (*b*) within which the return must be submitted, for a period not exceeding the period for which a penalty may be automatically increased under section 211 (2).

[Sub-s. (6) added by s. 58 (*b*) of Act No. 21 of 2012.]

92. Additional assessments.—If at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the *fiscus*, SARS must make an additional assessment to correct the prejudice.

93. Reduced assessments.—(1) SARS may make a reduced assessment if—

(*a*) the taxpayer successfully disputed the assessment under Chapter 9;

(*b*) necessary to give effect to a settlement under Part F of Chapter 9;

[Para. (*b*) substituted by s. 45 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*c*) necessary to give effect to a judgment pursuant to an appeal under Part E of Chapter 9 and there is no right of further appeal;

[Para. (*c*) amended by s. 49 of Act No. 23 of 2015.]

(*d*) SARS is satisfied that there is a readily apparent undisputed error in the assessment by—

(i) SARS; or

(ii) the taxpayer in a return; or

[Para. (*d*) substituted by s. 49 of Act 23 of 2015.]

(*e*) a senior SARS official is satisfied that an assessment was based on—

(i) the failure to submit a return or submission of an incorrect return by a third party under section 26 or by an employer under a tax Act;

(ii) a processing error by SARS; or

(iii) a return fraudulently submitted by a person not authorised by the taxpayer.

[Para. (*e*) inserted by s. 49 of Act No. 23 of 2015.]

(2) SARS may reduce an assessment despite the fact that no objection has been lodged or appeal noted.

94. Jeopardy assessments.—(1) SARS may make a jeopardy assessment in advance of the date on which the return is normally due, if the Commissioner is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy.

(2) In addition to any rights under Chapter 9, a review application against an assessment made under this section may be made to the High Court on the grounds that—

(*a*) its amount is excessive; or

(*b*) circumstances that justify a jeopardy assessment do not exist.

(3) In proceedings under subsection (2), SARS bears the burden of proving that the making of the jeopardy assessment is reasonable under the circumstances.

95. Estimation of assessments.—(1) SARS may make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate if the taxpayer—

(*a*) fails to submit a return as required; or

(*b*) submits a return or information that is incorrect or inadequate.

(2) SARS must make the estimate based on information readily available to it.

(3) If the taxpayer is unable to submit an accurate return, a senior SARS official may agree in writing with the taxpayer as to the amount of tax chargeable and issue an assessment accordingly, which assessment is not subject to objection or appeal.

96. Notice of assessment.—(1) SARS must issue to the taxpayer assessed a notice of the assessment made by SARS stating—

(*a*) the name of the taxpayer;

(*b*) the taxpayer's taxpayer reference number, or if one has not been allocated, any other form of identification;

(*c*) the date of the assessment;

(*d*) the amount of the assessment;

(*e*) the tax period in relation to which the assessment is made;

(*f*) the date for paying the amount assessed; and

(*g*) a summary of the procedures for lodging an objection to the assessment.

(2) In addition to the information provided in terms of subsection (1) SARS must give the person assessed—

(*a*) in the case of an assessment described in section 95 or an assessment that is not fully based on a return submitted by the taxpayer, a statement of the grounds for the assessment; and

(*b*) in the case of a jeopardy assessment, the grounds for believing that the tax would otherwise be in jeopardy.

97. Recording of assessments.—(1) The particulars of an assessment and the amount of tax payable thereon must be recorded and kept by SARS.

(2) A notice of assessment issued by SARS is regarded as made by a SARS official authorised to do so or duly issued by SARS, until proven to the contrary.

(3) The record of an assessment is not open to public inspection.

(4) The record of an assessment, including the return or records on which it was based, whether in electronic format or otherwise, may be destroyed by SARS after seven years from the date of assessment or the expiration of a further period that may be required—

(*a*) by the Auditor-General;

(*b*) as a result of the application of section 99 (2) (*c*); or

(*c*) for purposes of a verification, audit or criminal investigation under Chapter 5 or a dispute under Chapter 9.

[Sub-s. (4) substituted by s. 54 of Act No. 16 of 2016.]

98. Withdrawal of assessments.—(1) SARS may, despite the fact that no objection has been lodged or appeal noted, withdraw an assessment which—

(*a*) was issued to the incorrect taxpayer;

(*b*) was issued in respect of the incorrect tax period; or

[Para. (*b*) amended by s. 46 (*a*) of Act No. 39 of 2013 and by s. 50 of Act No. 23 of 2015.]

(*c*) was issued as a result of an incorrect payment allocation.

[Para. (*c*) amended by s. 46 (*b*) of Act No. 39 of 2013 and by s. 50 of Act No. 23 of 2015.]

(*d*) .....

[Para. (*d*) added by s. 46 (*c*) of Act No. 39 of 2013 and deleted s. 50 of Act No. 23 of 2015.]

(2) An assessment withdrawn under this section is regarded not to have been issued, unless a senior SARS official agrees in writing with the taxpayer as to the amount of tax properly chargeable for the relevant tax period and accordingly issues a revised original, additional or reduced assessment, as the case may be, which assessment is not subject to objection or appeal.

[Sub-s. (2) substituted by s. 46 (*d*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

99. Period of limitations for issuance of assessments.—(1) An assessment may not be made in terms of this Chapter—

(*a*) three years after the date of assessment of an original assessment by SARS;

(*b*) in the case of self-assessment for which a return is required, five years after the date of assessment of an original assessment—

(i) by way of self-assessment by the taxpayer; or

(ii) if no return is received, by SARS;

(*c*) in the case of a self-assessment for which no return is required, after the expiration of five years from the—

(i) date of the last payment of the tax for the tax period; or

(ii) effective date, if no payment was made in respect of the tax for the tax period;

(*d*) in the case of—

(i) an additional assessment if the—

(*aa*) amount which should have been assessed to tax under the preceding assessment was, in accordance with the practice generally prevailing at the date of the preceding assessment, not assessed to tax; or

[Item (*aa*) substituted by s. 59 of Act No. 21 of 2012.]

(*bb*) full amount of tax which should have been assessed under the preceding assessment was, in accordance with the practice, not assessed;

(ii) a reduced assessment, if the preceding assessment was made in accordance with the practice generally prevailing at the date of that assessment; or

(iii) a tax for which no return is required, if the payment was made in accordance with the practice generally prevailing at the date of that payment; or

(*e*) in respect of a dispute that has been resolved under Chapter 9.

[Sub-s. (1) amended by s. 51 (*a*) of Act No. 23 of 2015.]

(2) Subsection (1) does not apply to the extent that—

(*a*) in the case of assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to—

(i) fraud;

(ii) misrepresentation; or

(iii) non-disclosure of material facts;

(*b*) in the case of self-assessment, the fact that the full amount of tax chargeable was not assessed, was due to—

(i) fraud;

(ii) intentional or negligent misrepresentation;

(iii) intentional or negligent non-disclosure of material facts; or

(iv) the failure to submit a return or, if no return is required, the failure to make the required payment of tax;

(*c*) SARS and the taxpayer so agree prior to the expiry of the limitations period;

[Para. (*c*) amended by s. 51 (*b*) of Act No. 23 of 2015.]

(*d*) it is necessary to give effect to—

(i) the resolution of a dispute under Chapter 9; or

[Sub-para. (i) amended by s. 55 of Act No. 16 of 2016.]

(ii) . . . . . .

[Sub-para. (ii) deleted by s. 55 of Act No. 16 of 2016.]

(iii) an assessment referred to in section 93 (1) (*d*) if SARS becomes aware of the error referred to in that subsection before expiry of the period for the assessment under subsection (1); or

[Para. (*d*) amended by s. 47 (*a*)–(*c*) of Act No. 39 of 2013 and substituted by s. 51 (*b*) of Act No. 23 of 2015.]

(*e*) SARS receives a request for a reduced assessment under section 93 (1) (*e*).

[Para. (*e*) inserted by s. 51 (*b*) of Act No. 23 of 2015.]

(3) The Commissioner may, by prior notice of at least 30 days to the taxpayer, extend a period under subsection (1) or an extended period under this section, before the expiry thereof, by a period approximate to a delay arising from:

(*a*) failure by a taxpayer to provide all the relevant material requested within the period under section 46 (1) or the extended period under section 46 (5); or

(*b*) resolving an information entitlement dispute, including legal proceedings.

[Sub-s. (3) added by s. 51 (*c*) of Act No. 23 of 2015.]

(4) The Commissioner may, by prior notice of at least 60 days to the taxpayer, extend a period under subsection (1), before the expiry thereof, by three years in the case of an assessment by SARS or two years in the case of self-assessment, where an audit or investigation under Chapter 5 relates to—

(i) the application of the doctrine of substance over form;

(ii) the application of Part IIA of Chapter III of the Income Tax Act, section 73 of the Value-Added Tax Act or any other general anti-avoidance provision under a tax Act;

(iii) the taxation of hybrid entities or hybrid instruments; or

(iv) section 31 of the Income Tax Act.

[Sub-s. (4) added by s. 51 (*c*) of Act No. 23 of 2015.]

100. Finality of assessment or decision.—(1) An assessment or a decision referred to in section 104 (2) is final if, in relation to the assessment or decision—

(*a*) it is an assessment described—

(i) in section 95 (1) and no return described in section 91 (5) (*b*) has been received by SARS; or

(ii) in section 95 (3);

(*b*) no objection has been made, or an objection has been withdrawn;

(*c*) after the decision of an objection, no notice of appeal has been filed or a notice has been filed and is withdrawn;

[Para. (*c*) substituted by s. 33 of Act No. 33 of 2019.]

(*d*) the dispute has been settled under Part F of Chapter 9;

(*e*) an appeal has been determined by the tax board and there is no referral to the tax court under section 115;

(*f*) an appeal has been determined by the tax court and there is no right of further appeal; or

(*g*) an appeal has been determined by a higher court and there is no right of further appeal.

(2) Subsection (1) does not prevent SARS from making an additional assessment, but in respect of an amount of tax that has been dealt with in a disputed assessment referred to in—

(*a*) subsection (1) (*d*), (*e*) and (*f*), if the relevant period under section 99 (1) (*a*), (*b*) or (*c*) has expired, SARS may only make an additional assessment under the circumstances referred to in section 99 (2) (*a*) and (*b*); and

[Para. (*a*) substituted by s. 56 of Act No. 16 of 2016.]

(*b*) subsection (1) (*g*), SARS may not make an additional assessment.

CHAPTER 9
DISPUTE RESOLUTION

Part A
General

101. Definitions.—In this Chapter, unless the context indicates otherwise, the following terms, if in single quotation marks, have the following meanings—

'appellant', except in Part E of this Chapter, means a person who has noted an appeal against an assessment or 'decision' under section 107;

'decision' means a decision referred to in section 104 (2);

'registrar' means the registrar of the tax court; and

'rules' mean the rules made under section 103.

102. Burden of proof.—(1) A taxpayer bears the burden of proving—

(*a*) that an amount, transaction, event or item is exempt or otherwise not taxable;

(*b*) that an amount or item is deductible or may be set off;

[Para. (*b*) substituted by s. 23 of Act No. 13 of 2017.]

(*c*) the rate of tax applicable to a transaction, event, item or class of taxpayer;

(*d*) that an amount qualifies as a reduction of tax payable;

(*e*) that a valuation is correct; or

(*f*) whether a 'decision' that is subject to objection and appeal under a tax Act, is incorrect.

(2) The burden of proving whether an estimate under section 95 is reasonable or the facts on which SARS based the imposition of an understatement penalty under Chapter 16, is upon SARS.

103. Rules for dispute resolution.—(1) The Minister may, after consultation with the Minister of Justice and Constitutional Development, by public notice make 'rules' governing the procedures to lodge an objection and appeal against an assessment or 'decision', and the conduct and hearing of an appeal before a tax board or tax court.

(2) The 'rules' may provide for alternative dispute resolution procedures under which SARS and the person aggrieved by an assessment or 'decision' may resolve a dispute.

(3) The Commissioner may prescribe the form of a document required to be completed and delivered under the 'rules'.

[Sub-s. (3) added by s. 48 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

Part B
Objection and Appeal

104. Objection against assessment or decision.—(1) A taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment.

(2) The following decisions may be objected to and appealed against in the same manner as an assessment—

(*a*) a decision under subsection (4) not to extend the period for lodging an objection;

(*b*) a decision under section 107 (2) not to extend the period for lodging an appeal; and

(*c*) any other decision that may be objected to or appealed against under a tax Act.

(3) A taxpayer entitled to object to an assessment or 'decision' must lodge an objection in the manner, under the terms, and within the period prescribed in the 'rules'.

(4) A senior SARS official may extend the period prescribed in the 'rules' within which objections must be made if satisfied that reasonable grounds exist for the delay in lodging the objection.

(5) The period for objection must not be so extended—

(*a*) for a period exceeding 30 business days, unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection;

[Para. (*a*) substituted by s. 57 of Act No. 16 of 2016.]

(*b*) if more than three years have lapsed from the date of assessment or the 'decision'; or

(*c*) if the grounds for objection are based wholly or mainly on a change in a practice generally prevailing which applied on the date of assessment or the 'decision'.

105. Forum for dispute of assessment or decision.—A taxpayer may only dispute an assessment or 'decision' as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs.

[S. 105 substituted by s. 52 of Act No. 23 of 2015.]

106. Decision on objection.—(1) SARS must consider a valid objection in the manner and within the period prescribed under this Act and the 'rules'.

(2) SARS may disallow the objection or allow it either in whole or in part.

(3) If the objection is allowed either in whole or in part, the assessment or 'decision' must be altered accordingly.

(4) SARS must, by notice, inform the taxpayer objecting or the taxpayer's representative of the decision referred to in subsection (2), unless the objection is stayed under subsection (6) in which case notice of this must be given in accordance with the 'rules'.

(5) The notice must state the basis for the decision and a summary of the procedures for appeal.

(6) If a senior SARS official considers that the determination of the objection or an appeal referred to in section 107, whether on a question of law only or on both a question of fact and a question of law, is likely to be determinative of all or a substantial number of the issues involved in one or more other objections or appeals, the official may—

(*a*) designate that objection or appeal as a test case; and

(*b*) stay the other objections or appeals by reason of the taking of a test case on a similar objection or appeal before the tax court,

in the manner, under the terms, and within the periods prescribed in the 'rules'.

107. Appeal against assessment or decision.—(1) After delivery of the notice of the decision referred to in section 106 (4), a taxpayer objecting to an assessment or 'decision' may appeal against the assessment or 'decision' to the tax board or tax court in the manner, under the terms and within the period prescribed in this Act and the 'rules'.

(2) A senior SARS official may extend the period within which an appeal must be lodged for—

(*a*) 21 business days, if satisfied that reasonable grounds exist for the delay; or

(*b*) up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days.

(3) A notice of appeal that does not satisfy the requirements of subsection (1) is not valid.

(4) If an assessment or 'decision' has been altered under section 106 (3), the assessment or 'decision' as altered is the assessment or 'decision' against which the appeal is noted.

(5) By mutual agreement, SARS and the taxpayer making the appeal may attempt to resolve the dispute through alternative dispute resolution under procedures specified in the 'rules'.

(6) Proceedings on the appeal are suspended while the alternative dispute resolution procedure is ongoing.

(7) SARS may concede an appeal in whole or in part before—

(*a*) the matter is heard by the tax board or the tax court; or

(*b*) an appeal against a judgment of the tax court or higher court is heard.

[Sub-s. (7) added by s. 60 of Act No. 21 of 2012.]

Part C
Tax Board

108. Establishment of tax board.—(1) The Minister may by public notice—

(*a*) establish a tax board or boards for areas that the Minister thinks fit; and

(*b*) abolish an existing tax board or establish an additional tax board as circumstances may require.

(2) Tax boards are established under subsection (1) to hear appeals referred to in section 107 in the manner provided in this Part.

109. Jurisdiction of tax board.—(1) An appeal against an assessment or 'decision' must in the first instance be heard by a tax board, if—

(*a*) the tax in dispute does not exceed the amount the Minister determines by public notice; and

(*b*) a senior SARS official and the 'appellant' so agree.

(2) SARS must designate the places where tax boards hear appeals.

(3) The tax board must hear an appeal at the place referred to in subsection (2) which is closest to the 'appellant's' residence or place of business, unless the 'appellant' and SARS agree that the appeal be heard at another place.

(4) In making a decision under subsection (1) (*b*), a senior SARS official must consider whether the grounds of the dispute or legal principles related to the appeal should rather be heard by the tax court.

(5) If the chairperson prior to or during the hearing, considering the grounds of the dispute or the legal principles related to the appeal, believes that the appeal should be heard by the tax court rather than the tax board, the chairperson may direct that the appeal be set down for hearing *de novo* before the tax court.

110. Constitution of tax board.—(1) A tax board consists of—

(*a*) the chairperson, who must be a legal practitioner from the panel appointed under section 111; and

[Para. (*a*) substituted by s. 34 of Act No. 33 of 2019.]

(*b*) if the chairperson, after considering any representations by a senior SARS official or the taxpayer, considers it necessary—

(i) an accountant who is a member of the panel referred to in section 120; and

(ii) a representative of the commercial community who is a member of the panel referred to in section 120.

[Para. (*b*) amended by s. 24 of Act No. 13 of 2017.]

(2) Sections 122, 123, 124, 126, 127, 128 and 129 apply, with the necessary changes, and under procedures determined in the 'rules', to the tax board and the chairperson.

[Sub-s. (2) substituted by s. 49 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

111. Appointment of chairpersons.—(1) The Minister must, in consultation with the Judge-President of the Division of the High Court with jurisdiction in the area where the tax board is to sit, by public notice appoint legal practitioners to a panel from which a chairperson of the tax board must be nominated from time to time.

[Sub-s. (1) substituted by s. 35 of Act No. 33 of 2019.]

(2) The persons appointed under subsection (1)—

(*a*) hold office for five years from the date the notice of appointment is published in the public notice;

(*b*) are eligible for re-appointment as the Minister thinks fit; and

(*c*) must be persons of good standing who have appropriate experience.

[Sub-s. (2) substituted by s. 53 of Act No. 23 of 2015.]

(3) The Minister may terminate an appointment made under this section at any time for misconduct, incapacity or incompetence.

(4) A member of the panel must be appointed as chairperson of a tax board.

(5) A chairperson will not solely on account of his or her liability to tax be regarded as having a personal interest or a conflict of interest in any matter upon which he or she may be called upon to adjudicate.

(6) A chairperson must withdraw from the proceedings as soon as the chairperson becomes aware of a conflict of interest which may give rise to bias which the chairperson may experience with the case concerned or other circumstances that may affect the chairperson's ability to remain objective for the duration of the case.

(7) Either party may ask for withdrawal of the chairperson on the basis of conflict of interest or other indications of bias, under procedures provided in the 'rules'.

112. Clerk of tax board.—(1) The Commissioner must appoint a clerk of the tax board.

(2) The clerk acts as convener of the tax board.

(3) If no chairperson is available in the jurisdiction within which the tax board is to be convened, the clerk may convene the tax board with a chairperson from another jurisdiction.

(4) The clerk of the tax board must, within the period and in the manner provided in the 'rules', submit a notice to the members of the tax board and the 'appellant' specifying the time and place for the hearing.

113. Tax board procedure.—(1) Subject to the procedure provided for by the 'rules', the chairperson determines the procedures during the hearing of an appeal as the chairperson sees fit, and each party must have the opportunity to put the party's case to the tax board.

(2) The tax board is not required to record its proceedings.

(3) The chairperson may, when the proceedings open, formulate the issues in the appeal.

(4) The chairperson may adjourn the hearing of an appeal to a convenient time and place.

(5) A senior SARS official must appear at the hearing of the appeal in support of the assessment or 'decision'.

(6) At the hearing of the appeal the 'appellant' must—

(*a*) appear in person in the case of a natural person; or

(*b*) in any other case, be represented by the representative taxpayer.

(7) If a third party prepared the 'appellant's' return involved in the assessment or 'decision', that third party may appear on the 'appellant's' behalf.

(8) The 'appellant' may, together with the notice of appeal, or within the further period as the chairperson may allow, request permission to be represented at the hearing otherwise than as referred to in subsection (6).

(9) If neither the 'appellant' nor anyone authorised to appear on the 'appellant's' behalf appears before the tax board at the time and place set for the hearing, the tax board may confirm the assessment or 'decision' in respect of which the appeal has been lodged—

(*a*) at the request of the senior SARS official; and

[Para. (*a*) substituted by s. 25 of Act No. 13 of 2017.]

(*b*) on proof that the 'appellant' was furnished with the notice of the sitting of the tax board.

(10) If the tax board confirms an assessment or 'decision' under subsection (9), the 'appellant' may not thereafter request that the appeal be referred to the tax court under section 115.

(11) If the senior SARS official fails to appear before the tax board at the time and place set for the hearing, the tax board may allow the 'appellant's' appeal at the 'appellant's' request.

(12) If the tax board allows the appeal under subsection (11), SARS may not thereafter refer the appeal to the tax court under section 115.

(13) Subsections (9), (10), (11) and (12) do not apply if the Chairperson is satisfied that sound reasons exist for the non-appearance and the reasons are delivered by the 'appellant' or SARS to the clerk of the tax board within 10 business days after the date determined for the hearing or the longer period as may be allowed in exceptional circumstances.

114. Decision of tax board.—(1) The tax board, after hearing the 'appellant's' appeal against an assessment or 'decision', must decide the matter in accordance with this Chapter.

(2) The Chairperson must prepare a written statement of the tax board's decision that includes the tax board's findings of the facts of the case and the reasons for its decision, within 60 business days after conclusion of the hearing.

(3) The clerk must by notice in writing submit a copy of the tax board's decision to SARS and the 'appellant'.

115. Referral of appeal to tax court.—(1) If the 'appellant' or SARS is dissatisfied with the tax board's decision or the Chairperson fails to deliver the decision under section 114 (2) within the prescribed 60 business day period, the 'appellant' or SARS may within 21 business days, or within the further period as the Chairperson may on good cause shown allow, after the date of the notice referred to in section 114 (3) or the expiry of the period referred to in section 114 (2), require, in writing, that the appeal be referred to the tax court for hearing.

(2) The tax court must hear *de novo* a referral of an appeal from the tax board's decision under subsection (1).

Part D
Tax Court

116. Establishment of tax court.—(1) The President of the Republic may by proclamation in the *Gazette* establish a tax court or additional tax courts for areas that the President thinks fit and may abolish an existing tax court as circumstances may require.

(2) The tax court is a court of record.

117. Jurisdiction of tax court.—(1) The tax court for purposes of this Chapter has jurisdiction over tax appeals lodged under section 107.

(2) The place where an appeal is heard is determined by the 'rules'.

(3) The court may hear and decide an interlocutory application or an application in a procedural matter relating to a dispute under this Chapter as provided for in the 'rules'.

[Sub-s. (3) substituted by s. 50 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

118. Constitution of tax court.—(1) A tax court established under this Act consists of—

(*a*) a judge or an acting judge of the High Court, who is the president of the tax court;

(*b*) an accountant selected from the panel of members appointed in terms of section 120; and

(*c*) a representative of the commercial community selected from the panel of members appointed in terms of section 120.

(2) If the appeal involves—

(*a*) a complex matter that requires specific expertise and the president of the tax court so directs after considering any representations by a senior SARS official or the 'appellant', the representative of the commercial community referred to in subsection (1) (*c*) may be a person with the necessary experience in that field of expertise;

(*b*) the valuation of assets and the president of the tax court, a senior SARS official or the 'appellant' so requests, the representative of the commercial community referred to in subsection (1) (*c*) must be a sworn appraiser.

[Sub-s. (2) amended by s. 51 (*a*) and (*b*) of Act No. 39 of 2013 and substituted by s. 58 of Act No. 16 of 2016.]

(3) If an appeal to the tax court involves a matter of law only or is an interlocutory application or application in a procedural matter under the 'rules', the president of the court sitting alone must decide the appeal.

[Sub-s. (3) substituted by s. 51 (*c*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(4) The President of the court alone decides whether a matter for decision involves a matter of fact or a matter of law.

(5) The Judge-President of the Division of the High Court with jurisdiction in the area where the relevant tax court is situated, may direct that the tax court consist of three judges or acting judges of the High Court (one of whom is the president of the tax court) and the members of the court referred to in subsections (1) (*b*) and (*c*) and (2), where necessary, if—

(*a*) the amount in dispute exceeds R50 million; or

(*b*) SARS and the 'appellant' jointly apply to the Judge-President.

119. Nomination of president of tax court.—(1) The Judge-President of the Division of the High Court with jurisdiction in the area for which a tax court has been constituted must nominate and second a judge or an acting judge of the division to be the president of that tax court.

(2) The Judge-President must determine whether the secondment referred to in subsection (1) applies for a period, or for the hearing of a particular case.

(3) A judge will not solely on account of his or her liability to tax be regarded as having a personal interest or a conflict of interest in any matter upon which he or she may be called upon to adjudicate.

120. Appointment of panel of tax court members.—(1) The President of the Republic by proclamation in the *Gazette* must appoint the panel of members of a tax court for purposes of section 118 (1) (*b*) and (*c*) for a term of office of five years from the date of the relevant proclamation.

(2) A person appointed in terms of subsection (1) must be a person of good standing who has appropriate experience.

(3) A person appointed in terms of subsection (1) is eligible for reappointment for a further period or periods as the President of the Republic may think fit.

(4) The President of the Republic may terminate the appointment of a member under this section at any time for misconduct, incapacity or incompetence.

(5) A member's appointment lapses in the event that the tax court is abolished under section 116 (1).

(6) A member of the tax court must perform the member's functions independently, impartially and without fear, favour or prejudice.

121. Appointment of registrar of tax court.—(1) The Commissioner appoints the 'registrar' of the tax court.

(2) A person appointed as 'registrar' and persons appointed in the 'registrar's' office are SARS employees.

(3) The 'registrar' and other persons referred to in subsection (2) must perform their functions under this Act and the 'rules' independently, impartially and without fear, favour or prejudice.

122. Conflict of interest of tax court members.—(1) A member of the court must withdraw from the proceedings as soon as the member becomes aware of a conflict of interest which may give rise to bias which the member may experience with the case concerned or other circumstances that may affect the member's ability to remain objective for the duration of the case.

(2) Either party may ask for withdrawal of a member on the basis of conflict of interest or other indications of bias, under procedures provided in the 'rules'.

(3) A member of the court will not solely on account of his or her liability to tax be regarded as having a personal interest or a conflict of interest in the case.

123. Death, retirement or incapability of judge or member.—(1) If at any stage during the hearing of an appeal, or after hearing of the appeal but before judgment has been handed down, one of the judges dies, retires or becomes otherwise incapable of acting in that capacity, the hearing of an appeal must be heard *de novo*.

(2) If the tax court has been constituted under section 118 (5), the hearing of the appeal referred to in subsection (1) must proceed before the remaining judges and members, if the remaining judges constitute the majority of judges before whom the hearing was commenced.

(3) If at any stage during or after the hearing of an appeal but before judgment has been handed down, a member of the tax court dies, retires or becomes incapable of acting in that capacity, the hearing of the appeal must proceed before the president of the tax court, any other judges, the remaining member, and, if the president deems it necessary, a replacement member.

(4) The judgment of the remaining judges and members referred to in subsection (1) or (3) is the judgment of the court.

124. Sitting of tax court not public.—(1) The tax court sittings for purposes of hearing an appeal under section 107 are not public.

(2) The president of the tax court may in exceptional circumstances, on request of any person, allow that person or any other person to attend the sitting but may do so only after taking into account any representations that the 'appellant' and a senior SARS official, referred to in section 12 appearing in support of the assessment or 'decision', wishes to make on the request.

125. Appearance at hearing of tax court.—(1) A senior SARS official referred to in section 12 may appear at the hearing of an appeal in support of the assessment or 'decision'.

(2) .....

[Sub-s. (2) deleted by s. 26 of Act No. 13 of 2017.]

126. Subpoena of witness to tax court.—SARS, the 'appellant' or the president of a tax court may subpoena any witness in the manner prescribed in the 'rules', whether or not that witness resides within the tax court's area of jurisdiction.

127. Non-attendance by witness or failure to give evidence.—(1) A person subpoenaed under section 126 is liable to the fine or imprisonment specified in subsection (2), if the person without just cause fails to—

(*a*) give evidence at the hearing of an appeal;

(*b*) remain in attendance throughout the proceedings unless excused by the president of the tax court; or

(*c*) produce a document or thing in the person's possession or under the person's control according to the subpoena.

(2) The president of the tax court may impose a fine or, in default of payment, imprisonment for a period not exceeding three months, on a person described in subsection (1) upon being satisfied by—

(*a*) oath or solemn declaration; or

(*b*) the return of the person by whom the subpoena was served,

that the person has been duly subpoenaed and that the person's reasonable expenses have been paid or offered.

(3) The president of the tax court may, in addition to imposing a fine or imprisonment under subsection (2), issue a warrant for the person to be apprehended and brought to give evidence or to produce the document or thing in accordance with the subpoena.

(4) A fine imposed under subsection (2) is enforceable as if it were a penalty imposed by a High Court in similar circumstances and any laws applicable in respect of a penalty imposed by a High Court apply with the necessary changes in respect of the fine.

(5) The president of the tax court may, on good cause shown, remit the whole or any part of the fine or imprisonment imposed under subsection (2).

(6) The president of the tax court may order the costs of a postponement or adjournment resulting from the default of a witness, or a portion of the costs, to be paid out of a fine imposed under subsection (2).

128. Contempt of tax court.—(1) If, during the sitting of a tax court, a person—

(*a*) wilfully insults a judge or member of the tax court;

(*b*) wilfully interrupts the tax court proceedings; or

(*c*) otherwise misbehaves in the place where the hearing is held,

the president of a tax court may impose upon that person a fine or, in default of payment, imprisonment for a period not exceeding three months.

(2) An order made under subsection (1) must be executed as if it were an order made by a Magistrate's Court under similar circumstances, and the provisions of a law which apply in respect of such an order made by a Magistrate's Court apply with the necessary changes in respect of an order made under subsection (1).

129. Decision by tax court.—(1) The tax court, after hearing the 'appellant's' appeal lodged under section 107 against an assessment or 'decision', must decide the matter on the basis that the burden of proof as described in section 102 is upon the taxpayer.

(2) In the case of an assessment or 'decision' under appeal or an application in a procedural matter referred to in section 117 (3), the tax court may—

(*a*) confirm the assessment or 'decision';

(*b*) order the assessment or 'decision' to be altered;

[Para. (*b*) amended by s. 19 (*a*) of Act No. 22 of 2018.]

(*c*) refer the assessment back to SARS for further examination and assessment; or

[Para. (*c*) amended by s. 19 (*b*) of Act No. 22 of 2018.]

(*d*) make an appropriate order in a procedural matter.

[Sub-s. (2) amended by s. 52 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012. Para. (*d*) added by s. 19 (*c*) of Act No. 22 of 2018.]

(3) In the case of an appeal against an understatement penalty imposed by SARS under a tax Act, the tax court must decide the matter on the basis that the burden of proof is upon SARS and may reduce, confirm or increase the understatement penalty.

[Sub-s. (3) substituted by s. 52 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(4) If SARS alters an assessment as a result of a referral under subsection (2) (*c*), the assessment is subject to objection and appeal.

(5) Unless a tax court otherwise directs, a decision by the tax court in a test case designated under section 106 (6) is determinative of the issues in an objection or appeal stayed by reason of the test case under section 106 (6) (*b*) to the extent determined under the 'rules'.

[Sub-s. (5) added by s. 52 (*c*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

130. Order for costs by tax court.—(1) The tax court may, in dealing with an appeal under this Chapter and on application by an aggrieved party, grant an order for costs in favour of the party, if—

(*a*) the SARS grounds of assessments or 'decision' are held to be unreasonable;

(*b*) the 'appellant's' grounds of appeal are held to be unreasonable;

(*c*) the tax board's decision is substantially confirmed;

(*d*) the hearing of the appeal is postponed at the request of the other party; or

(*e*) the appeal is withdrawn or conceded by the other party after the 'registrar' allocates a date of hearing.

(2) The costs awarded by the tax court under this section must be determined in accordance with the fees prescribed by the rules of the High Court.

[Sub-s. (2) substituted by s. 53 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(3) The tax court may make an order as to costs provided for in the 'rules' in—

(*a*) a test case designated under section 106 (5); or

(*b*) an interlocutory application or an application in a procedural matter referred to in section 117 (3).

[Sub-s. (3) deleted by s. 61 of Act No. 21 of 2012 and added by s. 53 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

131. Registrar to notify parties of judgment of tax court.—The 'registrar' must notify the 'appellant' and SARS of the court's decision within 21 business days of the date of the delivery of the written decision.

132. Publication of judgment of tax court.—A judgment of the tax court dealing with an appeal under this Chapter must be published for general information and, unless the sitting of the tax court was public under the circumstances referred to in section 124 (2), in a form that does not reveal the 'appellant's' identity.

Part E

Appeal Against Tax Court Decision

133. Appeal against decision of tax court.—(1) The taxpayer or SARS may in the manner provided for in this Act appeal against a decision of the tax court under sections 129 and 130.

(2) An appeal against a decision of the tax court lies—

(*a*) to the full bench of the Provincial Division of the High Court which has jurisdiction in the area in which the tax court sitting is held; or

(*b*) to the Supreme Court of Appeal, without an intermediate appeal to the Provincial Division, if—

(i) the president of the tax court has granted leave under section 135; or

[Sub-para. (i) substituted by s. 54 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(ii) the appeal was heard by the tax court constituted under section 118 (5).

134. Notice of intention to appeal tax court decision.—(1) A party who intends to lodge an appeal against a decision of the tax court (hereinafter in this Part referred to as the appellant) must, within 21 business days after the date of the notice by the 'registrar' notifying the parties of the tax court's decision under section 131, or within a further period as the president of the tax court may on good cause shown allow, lodge with the 'registrar' and serve upon the opposite party or the opposite party's legal practitioner or agent, a notice of intention to appeal against the decision.

[Sub-s. (1) substituted by s. 36 of Act No. 33 of 2019.]

(2) A notice of intention to appeal must state—

(*a*) in which division of the High Court the appellant wishes the appeal to be heard;

(*b*) whether the whole or only part of the judgment is to be appealed against (if in part only, which part), and the grounds of the intended appeal, indicating the findings of fact or rulings of law to be appealed against; and

(*c*) whether the appellant requires a transcript of the evidence given at the tax court's hearing of the case in order to prepare the record on appeal (or if only a part of the evidence is required, which part).

(3) If the appellant is the taxpayer and requires a—

(*a*) transcript of the evidence or a part thereof from the 'registrar', the appellant must pay the fees prescribed by the Commissioner by public notice; or

(*b*) copy of the recording of the evidence or a part thereof from the 'registrar' for purposes of private transcription, the appellant must pay the fees prescribed by the Commissioner in the public notice.

(4) A fee paid under subsection (3) constitutes funds of SARS within the meaning of section 24 of the SARS Act.

135. Leave to appeal to Supreme Court of Appeal against tax court decision.—(1) If an intending appellant wishes to appeal against a decision of the tax court to the Supreme Court of Appeal, the 'registrar' must submit the notice of intention to appeal lodged under section 134 (1) to the president of the tax court, who must make an order granting or refusing leave to appeal having regard to the grounds of the intended appeal as indicated in the notice.

[Sub-s. (1) substituted by s. 62 of Act No. 21 of 2012.]

(2) If the president of the tax court cannot act in that capacity or it is inconvenient for the president to act in that capacity for purposes of this section, the Judge-President of the relevant Division of the High Court may nominate and second another judge or acting judge to act as president of the tax court for that purpose.

(3) Subject to leave to appeal to the Supreme Court of Appeal in terms of section 17 of the Superior Courts Act, 2013 (Act No. 10 of 2013), an order made by the president of the tax court under subsection (1) is final.

[Sub-s. (3) substituted by s. 54 of Act No. 23 of 2015.]

136. Failure to lodge notice of intention to appeal tax court decision.—(1) A person entitled to appeal against a decision of the tax court, who has not lodged a notice of intention to appeal within the time and in the manner required by section 134, abandons, subject to any right to note a cross appeal, the right of appeal against the decision.

(2) A person who under section 134 lodged a notice of intention to appeal against a decision of the tax court but who has subsequently withdrawn the notice, abandons the right to note an appeal or cross-appeal against the decision.

137. Notice by registrar of period for appeal of tax court decision.—(1) After the expiry of the time allowed under section 134 (1) for the lodging of a notice of intention to appeal, the 'registrar' must—

(*a*) give notice to a person who has lodged a notice of intention to appeal which has not been withdrawn, that if the person decides to appeal, the appeal must be noted within 21 business days after the date of the 'registrar's' notice; and

(*b*) supply to the person referred to in paragraph (*a*) a certified copy of an order that the president of the tax court made under section 135 which is the subject of the intended appeal.

(2) The 'registrar' may not give notice under subsection (1) (*a*) until the order has been made or the transcript has been completed if—

(*a*) it appears that the president of the tax court will make an order under section 135; or

(*b*) an intending appellant requires a transcript of evidence given at the hearing of the case by the tax court as envisaged in section 134 (2) (*c*).

(3) If the opposite party is not also an intending appellant in the same case, the 'registrar' must provide to the opposite party copies of the notice and any order referred to in subsection (1) (*a*) and (*b*).

138. Notice of appeal to Supreme Court of Appeal against tax court decision.—(1) If a person has—

(*a*) appealed to the Supreme Court of Appeal from a court established under section 118 (5);

(*b*) been granted leave to appeal to the Supreme Court of Appeal under section 135; or

(*c*) successfully petitioned to the Supreme Court of Appeal for leave to appeal,

the appeal which a party must note against a decision given in the relevant case must be noted to that Court.

(2) If the notice of intention to appeal was noted to the High Court or leave to appeal to the Supreme Court of Appeal has been refused under section 135, the party who lodged the notice of intention to appeal must note an appeal to the appropriate Provincial Division of the High Court.

(3) The notice of appeal must be lodged within the period referred to in section 137 (1) (*a*) or within a longer period as may be allowed under the rules of the court to which the appeal is noted.

(4) A notice of appeal must be in accordance with the requirements in the rules of the relevant higher court.

139. Notice of cross-appeal of tax court decision.—(1) A cross-appeal against a decision of the tax court in a case in which an appeal has been lodged under section 138, must be noted by lodging a written notice of cross-appeal with the 'registrar', serving it upon the opposite party or the opposite party's legal practitioner and lodging it with the registrar of the court to which the cross-appeal is noted.

[Sub-s. (1) substituted by s. 37 of Act No. 33 of 2019.]

(2) The notice of cross-appeal must be lodged within 21 business days after the date the appeal is noted under section 138 or within a longer period as may be allowed under the rules of the court to which the cross-appeal is noted.

(3) A notice of cross-appeal must state—

(*a*) whether the whole or only part of the judgment is appealed against, and if a part, which part;

(*b*) the grounds of cross-appeal specifying the findings of fact or rulings of law appealed against; and

(*c*) any further particulars that may be required under the rules of the court to which the cross-appeal is noted.

140. Record of appeal of tax court decision.—(1) The record lodged with a court to which an appeal against a decision of a tax court is noted, includes all documents placed before the tax court under the 'rules'.

(2) Documents submitted in the tax court which do not relate to the matters in dispute in the appeal may be excluded from the record with the consent of the parties.

141. Abandonment of judgment.—(1) A party may, by notice in writing, lodged with the 'registrar' and the opposite party or the opposite party's legal practitioner or agent, abandon the whole or a part of a judgment in the party's favour.

[Sub-s. (1) substituted by s. 38 of Act No. 33 of 2019.]

(2) A notice of abandonment becomes part of the record.

Part F
Settlement of Dispute

142. Definitions.—In this Part, unless the context indicates otherwise, the following terms, if in single quotation marks, have the following meanings—

'dispute' means a disagreement on the interpretation of either the relevant facts involved or the law applicable thereto, or of both the facts and the law, which arises pursuant to the issue of an assessment or the making of a 'decision'; and

'settle' means to resolve a 'dispute' by compromising a disputed liability, otherwise than by way of either SARS or the person concerned accepting the other party's interpretation of the facts or the law applicable to those facts or of both the facts and the law, and **'settlement'** must be construed accordingly.

[Definition of 'settle' substituted by s. 63 of Act No. 21 of 2012.]

143. Purpose of Part.—(1) A basic principle in tax law is that it is the duty of SARS to assess and collect tax according to the laws enacted by Parliament and not to forgo a tax which is properly chargeable and payable.

(2) Circumstances may require that the strictness and rigidity of this basic principle be tempered, if such flexibility is to the best advantage of the State.

(3) The purpose of this Part is to prescribe the circumstances in which it is appropriate for SARS to temper the basic principle and 'settle' a 'dispute'.

144. Initiation of settlement procedure.—(1) Either party to a 'dispute' may initiate a 'settlement' procedure by communication with the other party.

(2) Neither SARS nor the taxpayer has the right to require the other party to engage in a 'settlement' procedure.

145. Circumstances where settlement is inappropriate.—It is inappropriate and not to the best advantage of the State to 'settle' a 'dispute' if in the opinion of SARS—

(*a*) no circumstances envisaged in section 146 exist and—

(i) the action by the person concerned that relates to the 'dispute' constitutes intentional tax evasion or fraud;

(ii) the 'settlement' would be contrary to the law or a practice generally prevailing and no exceptional circumstances exist to justify a departure from the law or practice; or

(iii) the person concerned has not complied with the provisions of a tax Act and the non-compliance is of a serious nature;

(*b*) it is in the public interest to have judicial clarification of the issue and the case is appropriate for this purpose; or

(*c*) the pursuit of the matter through the courts will significantly promote taxpayer compliance with a tax Act and the case is suitable for this purpose.

146. Circumstances where settlement is appropriate.—The Commissioner may, if it is to the best advantage of the state, 'settle' a 'dispute', in whole or in part, on a basis that is fair and equitable to both the person concerned and to SARS, having regard to—

(*a*) whether the 'settlement' would be in the interest of good management of the tax system, overall fairness, and the best use of SARS' resources;

(*b*) SARS' cost of litigation in comparison to the possible benefits with reference to the prospects of success in court;

[Para. (*b*) substituted by s. 55 of Act No. 23 of 2015.]

(*c*) whether there are any—

(i) complex factual issues in contention; or

(ii) evidentiary difficulties,

which are sufficient to make the case problematic in outcome or unsuitable for resolution through the alternative 'dispute' resolution procedures or the courts;

(*d*) a situation in which a participant or a group of participants in a tax avoidance arrangement has accepted SARS' position in the 'dispute', in which case the 'settlement' may be negotiated in an appropriate manner required to unwind existing structures and arrangements; or

(*e*) whether 'settlement' of the 'dispute' is a cost-effective way to promote compliance with a tax Act by the person concerned or a group of taxpayers.

147. Procedure for settlement.—(1) A person participating in a 'settlement' procedure must disclose all relevant facts during the discussion phase of the process of 'settling' a 'dispute'.

(2) A 'settlement' is conditional upon full disclosure of material facts known to the person concerned at the time of 'settlement'.

(3) A disputes 'settled' in whole or in part must be evidenced by an agreement in writing between the parties in the prescribed format and must include details on—

(*a*) how each particular issue is 'settled';

(*b*) relevant undertakings by the parties;

(*c*) treatment of the issue in future years;

(*d*) withdrawal of objections and appeals; and

(*e*) arrangements for payment.

(4) The agreement must be signed by a senior SARS official.

(5) SARS must, if the 'dispute' is not ultimately 'settled', explain to the person concerned the further rights of objection and appeal.

(6) The agreement and terms of a 'settlement' agreement must remain confidential, unless their disclosure is authorised by law or SARS and the person concerned agree otherwise.

148. Finality of settlement agreement.—(1) The settlement agreement represents the final agreed position between the parties and is in full and final 'settlement' of all or the specified aspects of the 'dispute' in question between the parties.

(2) SARS must adhere to the terms of the agreement, unless material facts were not disclosed as required by section 147 (1) or there was fraud or misrepresentation of the facts.

(3) If the person concerned fails to pay the amount due pursuant to the agreement or otherwise fails to adhere to the agreement, a senior SARS official may—

(*a*) regard the agreement as void and proceed with the matter in respect of the original disputed amount; or

(*b*) enforce collection of the 'settlement' amount under the collection provisions of this Act in full and final 'settlement' of the 'dispute'.

149. Register of settlements and reporting.—(1) SARS must—

(*a*) maintain a register of all 'disputes' that are 'settled' under this Part; and

(*b*) document the process under which each 'dispute' is 'settled'.

(2) The Commissioner must provide an annual summary of 'settlements' to the Auditor-General and to the Minister.

(3) The summary referred to in subsection (2) must be submitted by no later than the date on which the annual report for SARS is submitted to Parliament for the year and must—

(*a*) be in a format which, subject to section 70 (5), does not disclose the identity of the person concerned; and

(*b*) contain details, arranged by main classes of taxpayers or sections of the public, of the number of 'settlements', the amount of tax forgone, and the estimated savings in litigation costs.

150. Alteration of assessment or decision on settlement.—(1) If a 'dispute' between SARS and the person aggrieved by an assessment or 'decision' is 'settled' under this Part, SARS may, despite anything to the contrary contained in a tax Act, alter the assessment or 'decision' to give effect to the 'settlement'.

(2) An altered assessment or 'decision' referred to in subsection (1) is not subject to objection and appeal.

CHAPTER 10
TAX LIABILITY AND PAYMENT

Part A
Taxpayers

151. Taxpayer.—In this Act, taxpayer means—

(*a*) a person who is or may be chargeable to tax or with a tax offence;

[Para. (*a*) substituted by s. 59 (1) of Act No. 16 of 2016 deemed to have come into operation on 1 October, 2012.]

(*b*) a representative taxpayer;

(*c*) a withholding agent;

(*d*) a responsible third party; or

(*e*) a person who is the subject of a request to provide assistance under an international tax agreement.

152. Person chargeable to tax.—A person chargeable to tax is a person upon whom the liability for tax due under a tax Act is imposed and who is personally liable for the tax.

153. Representative taxpayer.—(1) In this Act, a representative taxpayer means a person who is responsible for paying the tax liability of another person as an agent, other than as a withholding agent, and includes a person who—

(*a*) is a representative taxpayer in terms of the Income Tax Act;

(*b*) is a representative employer in terms of the Fourth Schedule to the Income Tax Act; or

(*c*) is a representative vendor in terms of section 46 of the Value-Added Tax Act.

(2) Every person who becomes or ceases to be a representative taxpayer (except a public officer of a company) under a tax Act, must notify SARS accordingly in such form as the Commissioner may prescribe, within 21 business days after becoming or ceasing to be a representative taxpayer, as the case may be.

(3) A taxpayer is not relieved from any liability, responsibility or duty imposed under a tax Act by reason of the fact that the taxpayer's representative—

(*a*) failed to perform such responsibilities or duties; or

(*b*) is liable for the tax payable by the taxpayer.

154. Liability of representative taxpayer.—(1) A representative taxpayer is, as regards—

(*a*) the income to which the representative taxpayer is entitled;

(*b*) moneys to which the representative taxpayer is entitled or has the management or control;

(*c*) transactions concluded by the representative taxpayer; and

(*d*) anything else done by the representative taxpayer,

in such capacity—

(i) subject to the duties, responsibilities and liabilities of the taxpayer represented;

(ii) entitled to any abatement, deduction, exemption, right to setoff a loss, and other items that could be claimed by the person represented; and

(iii) liable for the amount of tax specified by a tax Act.

(2) A representative taxpayer may be assessed in respect of any tax under subsection (1), but such assessment is regarded as made upon the representative taxpayer in such capacity only.

155. Personal liability of representative taxpayer.—A representative taxpayer is personally liable for tax payable in the representative taxpayer's representative capacity, if, while it remains unpaid—

(*a*) the representative taxpayer alienates, charges or disposes of amounts in respect of which the tax is chargeable; or

(*b*) the representative taxpayer disposes of or parts with funds or moneys, which are in the representative taxpayer's possession or come to the representative taxpayer after the tax is payable, if the tax could legally have been paid from or out of the funds or moneys.

156. Withholding agent.—In this Act, withholding agent means a person who must under a tax Act withhold an amount of tax and pay it to SARS.

157. Personal liability of withholding agent.—(1) A withholding agent is personally liable for an amount of tax—

(*a*) withheld and not paid to SARS; or

(*b*) which should have been withheld under a tax Act but was not so withheld.

(2) An amount paid or recovered from a withholding agent in terms of subsection (1) is an amount of tax which is paid on behalf of the relevant taxpayer in respect of his or her liability under the relevant tax Act.

158. Responsible third party.—In this Act, responsible third party means a person who becomes otherwise liable for the tax liability of another person, other than as a representative taxpayer or as a withholding agent, whether in a personal or representative capacity.

159. Personal liability of responsible third party.—A responsible third party is personally liable to the extent described in Part D of Chapter 11.

160. Taxpayer's right to recovery.—(1) A representative taxpayer, withholding agent or responsible third party who, as such, pays a tax is entitled—

(*a*) to recover the amount so paid from the person on whose behalf it is paid; or

(*b*) to retain out of money or assets in that person's possession or that may come to that person in that representative capacity, an amount equal to the amount so paid.

(2) Unless otherwise provided for in a tax Act, a taxpayer in respect of whom an amount has been paid to SARS by a withholding agent under a tax Act or by a responsible third party under section 179, is not entitled to recover from the withholding agent or responsible third party the amount so paid but is entitled to recover the amount of an unlawful or erroneous payment from SARS.

[S. 160 amended by s. 27 of Act No. 13 of 2017. Sub-s. (2) substituted by s. 55 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

161. Security by taxpayer.—(1) A senior SARS official may require security from a taxpayer to safeguard the collection of tax by SARS, if the taxpayer—

(*a*) is a representative taxpayer, withholding agent or responsible third party who was previously held liable in the taxpayer's personal capacity under a tax Act;

(*b*) has been convicted of a tax offence;

(*c*) has frequently failed to pay amounts of tax due;

(*d*) has frequently failed to carry out other obligations imposed under any tax Act which constitutes non-compliance referred to in Chapter 15; or

(*e*) is under the management or control of a person who is or was a person contemplated in paragraphs (*a*) to (*d*).

(2) If security is required, SARS must by written notice to the taxpayer require the taxpayer to furnish to or deposit with SARS, within such period that SARS may allow, security for the payment of any tax which has or may become payable by the taxpayer in terms of a tax Act.

(3) The security must be of the nature, amount and form that the senior SARS official directs.

(4) If the security is in the form of cash deposit and the taxpayer fails to make such deposit, it may—

(*a*) be collected as if it were an outstanding tax debt of the taxpayer recoverable under this Act; or

[Para. (*a*) substituted by s. 56 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*b*) be set-off against any refund due to the taxpayer.

(5) A senior SARS official may, in the case of a taxpayer which is not a natural person and cannot provide the security required under subsection (1), require of any or all of the members, shareholders or trustees who control or are involved in the management of the taxpayer to enter into a contract of suretyship in respect of the taxpayer's liability for tax which may arise from time to time.

Part B
Payment of Tax

162. Determination of time and manner of payment of tax.—(1) Tax must be paid by the day and at the place notified by SARS, the Commissioner by public notice or as specified in a tax Act, and must be paid as a single amount or in terms of an instalment payment agreement under section 167.

[Sub-s. (1) substituted by s. 49 of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

(2) The Commissioner may by public notice prescribe the method of payment of tax, including electronically.

[Sub-s. (2) substituted by s. 49 of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

(3) Despite sections 96 (1) (*f*) and 167, a senior SARS official may, if there are reasonable grounds to believe that—

(*a*) a taxpayer will not pay the full amount of tax;

(*b*) a taxpayer will dissipate the taxpayer's assets; or

(*c*) that recovery may become difficult in the future,

require the taxpayer to—

(i) pay the full amount immediately upon receipt of the notice of assessment or a notice described in section 167 (6) or within the period as the official deems appropriate under the circumstances; or

(ii) provide such security as the official deems necessary.

163. Preservation order.—(1) A senior SARS official may, in order to prevent any realisable assets from being disposed of or removed which may frustrate the collection of the full amount of tax that is due or payable or the official on reasonable grounds is satisfied may be due or payable, authorise an *ex parte* application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person, subject to the conditions and exceptions as may be specified in the preservation order, from dealing in any manner with the assets to which the order relates.

[Sub-s. (1) substituted by s. 57 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(2) (*a*) SARS may, in anticipation of the application under subsection (1) seize the assets pending the outcome of an application for a preservation order, which application must

commence within 24 hours from the time of seizure of the assets or the further period that SARS and the taxpayer or other person may agree on.

[Para. (*a*) substituted by s. 57 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*b*) Until a preservation order is made in respect of the seized assets, SARS must take reasonable steps to preserve and safeguard the assets including appointing a *curator bonis* in whom the assets vest.

[Para. (*b*) substituted by s. 57 (*c*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(3) A preservation order may be made if required to secure the collection of the tax referred to in subsection (1) and in respect of—

(*a*) realisable assets seized by SARS under subsection (2);

(*b*) the realisable assets as may be specified in the order and which are held by the person against whom the preservation order is being made;

(*c*) all realisable assets held by the person, whether it is specified in the order or not; or

(*d*) all assets which, if transferred to the person after the making of the preservation order, would be realisable assets.

[Sub-s. (3) amended by s. 57 (*d*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(4) The court to which an application for a preservation order is made may—

(*a*) make a provisional preservation order having immediate effect;

(*b*) simultaneously grant a rule *nisi* calling upon the taxpayer or other person upon a business day mentioned in the rule to appear and to show cause why the preservation order should not be made final;

[Para. (*b*) amended by s. 57 (*e*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*c*) upon application by the taxpayer or other person, anticipate the return day for the purpose of discharging the provisional preservation order if 24 hours' notice of the application has been given to SARS; and

[Para. (*c*) amended by s. 57 (*f*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*d*) upon application by SARS, confirm the appointment of the *curator bonis* under subsection (2) (*a*) or appoint a *curator bonis* in whom the seized assets vest.

[Para. (*d*) added by s. 57 (*g*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(5) A preservation order must provide for notice to be given to the taxpayer and a person from whom the assets are seized.

(6) For purposes of the notice or rule required under subsection (4) (*b*) or (5), if the taxpayer or other person has been absent for a period of 21 business days from his or her usual place of residence or business within the Republic, the court may direct that it will be sufficient service of that notice or rule if a copy thereof is affixed to or near the outer door of the building where the court sits and published in the *Gazette*, unless the court directs some other mode of service.

(7) The court, in granting a preservation order, may make any ancillary orders regarding how the assets must be dealt with, including—

(*a*) authorising the seizure of all movable assets;

(*b*) if not appointed under subsection (4) (*d*), appointing a *curator bonis* in whom the assets vest;

[Para. (*b*) substituted by s. 57 (*h*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*c*) realising the assets in satisfaction of the tax debt;

(*d*) making provision as the court may think fit for the reasonable living expenses of a person against whom the preservation order is being made and his or her legal dependants, if the court is satisfied that the person has disclosed under oath all direct or indirect interests in assets subject to the order and that the person cannot meet the expenses concerned out of his or her unrestrained assets; or

(*e*) any other order that the court considers appropriate for the proper, fair and effective execution of the order.

(8) The court making a preservation order may also make such further order in respect of the discovery of any facts including facts relating to any asset over which the taxpayer or other person may have effective control and the location of the assets as the court may consider necessary or expedient with a view to achieving the objects of the preservation order.

(9) The court which made a preservation order may on application by a person affected by that order vary or rescind the order or an order authorising the seizure of the assets concerned or other ancillary order if it is satisfied that—

(*a*) the operation of the order concerned will cause the applicant undue hardship; and

(*b*) the hardship that the applicant will suffer as a result of the order outweighs the risk that the assets concerned may be destroyed, lost, damaged, concealed or transferred.

(10) A preservation order remains in force—

(*a*) pending the setting aside thereof on appeal, if any, against the preservation order; or

(*b*) until the assets subject to the preservation order are no longer required for purposes of the satisfaction of the tax debt.

(11) In order to prevent any realisable assets that were not seized under subsection (2) from being disposed of or removed contrary to a preservation order under this section, a senior SARS official may seize the assets if the official has reasonable grounds to believe that the assets will be so disposed of or removed.

(12) Assets seized under this section must be dealt with in accordance with the directions of the High Court which made the relevant preservation order.

164. Payment of tax pending objection or appeal.—(1) Unless a senior SARS official otherwise directs in terms of subsection (3)—

(*a*) the obligation to pay tax; and

(*b*) the right of SARS to receive and recover tax,

will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.

(2) A taxpayer may request a senior SARS official to suspend the payment of tax or a portion thereof due under an assessment if the taxpayer intends to dispute or disputes the liability to pay that tax under Chapter 9.

(3) A senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to relevant factors, including—

(*a*) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;

(*b*) the compliance history of the taxpayer with SARS;

(*c*) whether fraud is *prima facie* involved in the origin of the dispute;

(*d*) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the *fiscus* if the disputed tax is not paid or recovered; or

(*e*) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the *fiscus*.

[Sub-s. (3) amended by s. 58 (*a*) of Act No. 39 of 2013 and substituted by s. 50 (1) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015.]

(4) If payment of tax was suspended under subsection (3) and subsequently—

(*a*) no objection is lodged;

(*b*) an objection is disallowed and no appeal is lodged; or

(*c*) an appeal to the tax board or court is unsuccessful and no further appeal is noted,

the suspension is revoked with immediate effect from the date of the expiry of the relevant prescribed time period or any extension of the relevant time period under this Act.

[Sub-s. (4) amended by s. 58 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(5) A senior SARS official may deny a request in terms of subsection (2) or revoke a decision to suspend payment in terms of subsection (3) with immediate effect if satisfied that—

(*a*) after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious;

(*b*) the taxpayer is employing dilatory tactics in conducting the objection or appeal;

(*c*) on further consideration of the factors referred to in subsection (3), the suspension should not have been given; or

(*d*) there is a material change in any of the factors referred to in subsection (3), upon which the decision to suspend payment of the amount involved was based.

[Sub-s. (5) amended by s. 58 (*c*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012. Para. (*d*) substituted by s. 64 of Act No. 21 of 2012 (English Only).]

(6) During the period commencing on the day that—

(*a*) SARS receives a request for suspension under subsection (2); or

(*b*) a suspension is revoked under subsection (5),

and ending 10 business days after notice of SARS' decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.

(7) If an assessment or a decision referred to in section 104 (2) is altered in accordance with—

(*a*) an objection or appeal;

(*b*) a decision of a court of law pursuant to an appeal under section 133; or

(*c*) a decision by SARS to concede the appeal to the tax board or the tax court or other court of law,

a due adjustment must be made, amounts paid in excess refunded with interest at the prescribed rate, the interest being calculated from the date that excess was received by SARS to the date the refunded tax is paid, and amounts short-paid are recoverable with interest calculated as provided in section 187 (1).

(8) The provisions of section 191 apply with the necessary changes in respect of an amount refundable and interest payable by SARS under this section.

Part C
Taxpayer Account and Allocation of Payments

165. Taxpayer account.—(1) SARS must maintain one or more taxpayer accounts for each taxpayer.

(2) The taxpayer account must reflect the tax liability in respect of each tax type included in the account.

[Sub-s. (2) substituted by s. 59 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(3) The taxpayer account must record details for all tax periods of—

(*a*) the tax liability;

[Para. (*a*) substituted by s. 59 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*b*) any penalty imposed;

(*c*) the interest payable on outstanding tax debts;

[Para. (*c*) substituted by s. 59 (*c*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*d*) the tax liability for any other tax type;

[Para. (*d*) substituted by s. 59 (*c*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*e*) tax payments made by or on behalf of the taxpayer; and

(*f*) any credit for amounts paid that the taxpayer is entitled to have set-off against the taxpayer's tax liability.

(4) From time to time, or when requested by the taxpayer, SARS must send to the taxpayer a statement of account, reflecting the amounts currently due and the details that SARS considers appropriate.

166. Allocation of payments.—(1) Despite anything to the contrary contained in a tax Act, SARS may allocate payment made in terms of a tax Act against an amount of penalty or interest or the oldest amount of an outstanding tax debt at the time of the payment, other than amounts—

(*a*) for which payment has been suspended under this Act; or

(*b*) that are payable in terms of an instalment payment agreement under section 167.

[Sub-s. (1) amended by s. 65 of Act No. 21 of 2012 and by s. 60 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(2) SARS may apply the first-in-first-out principle described in subsection (1) in respect of a specific tax type or a group of tax types in the manner that may be prescribed by the Commissioner by public notice.

(3) In the event that a payment in subsection (1) is insufficient to extinguish all tax debts of the same age, the amount of the payment may be allocated among these tax debts in the manner prescribed by the Commissioner by public notice.

(4) The age of a tax debt for purposes of subsection (1) is determined according to the duration from the date the debt became payable in terms of the applicable Act.

Part D
Deferral of Payment

167. Instalment payment agreement.—(1) A senior SARS official may enter into an agreement with a taxpayer in the prescribed form under which the taxpayer is allowed to pay a tax debt in one sum or in instalments, within the agreed period if satisfied that—

(*a*) criteria or risks that may be prescribed by the Commissioner by public notice have been duly taken into consideration; and

(*b*) the agreement facilitates the collection of the debt.

(2) The agreement may contain such conditions as SARS deems necessary to secure collection of tax.

(3) Except as provided in subsections (4) and (5), the agreement remains in effect for the term of the agreement.

(4) SARS may terminate an instalment payment agreement if the taxpayer fails to pay an instalment or to otherwise comply with its terms and a payment prior to the termination of the agreement must be regarded as part payment of the tax debt.

(5) A senior SARS official may modify or terminate an instalment payment agreement if satisfied that—

(*a*) the collection of tax is in jeopardy;

(*b*) the taxpayer has furnished materially incorrect information in applying for the agreement; or

(*c*) the financial condition of the taxpayer has materially changed.

(6) A termination or modification—

(*a*) referred to in subsection (4) or (5) (*a*) takes effect as at the date stated in the notice of termination or modification sent to the taxpayer; and

(*b*) referred to in subsection (5) (*b*) or (*c*) takes effect 21 business days after notice of the termination or modification is sent to the taxpayer.

168. Criteria for instalment payment agreement.—A senior SARS official may enter into an instalment payment agreement only if—

(*a*) the taxpayer suffers from a deficiency of assets or liquidity which is reasonably certain to be remedied in the future;

(*b*) the taxpayer anticipates income or other receipts which can be used to satisfy the tax debt;

(*c*) prospects of immediate collection activity are poor or uneconomical but are likely to improve in the future;

(*d*) collection activity would be harsh in the particular case and the deferral or instalment agreement is unlikely to prejudice tax collection; or

(*e*) the taxpayer provides the security as may be required by the official.

CHAPTER 11
RECOVERY OF TAX

Part A
General

169. Debt due to SARS.—(1) An amount of tax due or payable in terms of a tax Act is a tax debt due to SARS for the benefit of the National Revenue Fund.

(2) A tax debt is recoverable by SARS under this Chapter, and is recoverable from—

(*a*) in the case of a representative taxpayer who is not personally liable under section 155, any assets belonging to the person represented which are in the representative taxpayer's possession or under his or her management or control; or

(*b*) in any other case, any assets of the taxpayer.

[Sub-s. (2) amended by s. 61 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(3) SARS is regarded as the creditor for the purposes of any recovery proceedings related to a tax debt.

[Sub-s. (3) substituted by s. 61 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(4) SARS need not recover a tax debt under this Chapter if the amount thereof is less than R100 or any other amount that the Commissioner may determine by public notice, but the amount must be carried forward in the relevant taxpayer account.

[Sub-s. (4) substituted by s. 61 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

170. Evidence as to assessment.—The production of a document issued by SARS purporting to be a copy of or an extract from an assessment is conclusive evidence—

(*a*) of the making of the assessment; and

(*b*) except in the case of proceedings on appeal instituted under Chapter 9 against the assessment, that all the particulars of the assessment are correct.

[Para. (*b*) substituted by s. 20 of Act No. 22 of 2018.]

171. Period of limitation on collection of tax.—Proceedings for recovery of a tax debt may not be initiated after the expiration of 15 years from the date the assessment of tax, or a decision referred to in section 104 (2) giving rise to a tax liability, becomes final.

Part B

Judgment Procedure

172. Application for civil judgment for recovery of tax.—(1) If a person has an outstanding tax debt, SARS may, after giving the person at least 10 business days' notice, file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified by SARS as correct.

[Sub-s. (1) substituted by s. 62 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(2) SARS may file the statement irrespective of whether or not the tax debt is subject to an objection or appeal under Chapter 9, unless the period referred to in section 164 (6) has not expired or the obligation to pay the tax debt has been suspended under section 164.

[Sub-s. (2) substituted by s. 62 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(3) SARS is not required to give the taxpayer prior notice under subsection (1) if SARS is satisfied that giving notice would prejudice the collection of the tax.

173. Jurisdiction of Magistrates' Court in judgment procedure.—Despite anything to the contrary in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), the certified statement referred to in section 172 may be filed with the clerk of the Magistrate's Court that has jurisdiction over the taxpayer named in the statement.

174. Effect of statement filed with clerk or registrar.—A certified statement filed under section 172 must be treated as a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement.

175. Amendment of statement filed with clerk or registrar.—(1) SARS may amend the amount of the tax debt specified in the statement filed under section 172 if, in the opinion of SARS, the amount in the statement is incorrect.

[Sub-s. (1) substituted by s. 63 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(2) The amendment of the statement is not effective until it is initialled by the clerk or the registrar of the court concerned.

176. Withdrawal of statement and reinstitution of proceedings.—(1) SARS may withdraw a certified statement filed under section 172 by sending a notice of withdrawal to the relevant clerk or registrar upon which the statement ceases to have effect.

(2) SARS may file a new statement under section 172 setting out an amount of the tax debt included in a withdrawn statement.

[Sub-s. (2) substituted by s. 64 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(3) If SARS is satisfied that a person has paid the full amount of the tax debt set out in a certified statement filed under section 172 and has no other outstanding tax debts, SARS must withdraw the statement if requested by the person in the prescribed form and manner.

[Sub-s. (3) added by s. 64 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

Part C

Sequestration, Liquidation and Winding-up Proceedings

177. Institution of sequestration, liquidation or winding-up proceedings.—(1) A senior SARS official may authorise the institution of proceedings for the sequestration, liquidation or winding-up of a person for an outstanding tax debt.

[Sub-s. (1) substituted by s. 65 of Act No. 39 of 2013 and by s. 56 of Act No. 23 of 2015.]

(2) SARS may institute the proceedings whether or not the person—

(*a*) is present in the Republic; or

(*b*) has assets in the Republic.

(3) If the tax debt is subject to an objection or appeal under Chapter 9 or a further appeal against a decision by the tax court under section 129, the proceedings may only be instituted with leave of the court before which the proceedings are brought.

178. Jurisdiction of court in sequestration, liquidation or winding-up proceedings.—Despite any law to the contrary, a proceeding referred to in section 177 may be instituted in any competent court and that court may grant an order that SARS requests, whether or not the taxpayer is registered, resident or domiciled, or has a place of effective management or a place of business, in the Republic.

Part D

Collection of Tax Debt from Third Parties

179. Liability of third party appointed to satisfy tax debts.—(1) A senior SARS official may authorise the issue of a notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt.

[Sub-s. (1) substituted by s. 66 of Act No. 39 of 2013 and by s. 57 (*a*) of Act No. 23 of 2015.]

(2) A person that is unable to comply with a requirement of the notice, must advise the senior SARS official of the reasons for the inability to comply within the period specified in the notice and the official may withdraw or amend the notice as is appropriate under the circumstances.

(3) A person receiving the notice must pay the money in accordance with the notice and, if the person parts with the money contrary to the notice, the person is personally liable for the money.

(4) SARS may, on request by a person affected by the notice, amend the notice to extend the period over which the amount must be paid to SARS, to allow the taxpayer to pay the basic living expenses of the taxpayer and his or her dependants.

(5) SARS may only issue the notice referred to in subsection (1) after delivery to the tax debtor of a final demand for payment which must be delivered at the latest 10 business days before the issue of the notice, which demand must set out the recovery steps that SARS may take if the tax debt is not paid and the available debt relief mechanisms under this Act, including, in respect of recovery steps that may be taken under this section—

(*a*) if the tax debtor is a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on the basic living expenses of the tax debtor and his or her dependants; and

(*b*) if the tax debtor is not a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on serious financial hardship.

[Sub-s. (5) added by s. 57 (*b*) of Act No. 23 of 2015.]

(6) SARS need not issue a final demand under subsection (5) if a senior SARS official is satisfied that to do so would prejudice the collection of the tax debt.

[Sub-s. (6) added by s. 57 (*b*) of Act No. 23 of 2015.]

180. Liability of financial management for tax debts.—A person is personally liable for any outstanding tax debt of the taxpayer to the extent that the person's negligence or fraud resulted in the failure to pay the tax debt if—

(*a*) the person controls or is regularly involved in the management of the overall financial affairs of a taxpayer; and

(*b*) a senior SARS official is satisfied that the person is or was negligent or fraudulent in respect of the payment of the tax debts of the taxpayer.

[S. 180 amended by s. 67 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

181. Liability of shareholders for tax debts.—(1) This section applies where a company is wound up other than by means of an involuntary liquidation without having satisfied its outstanding tax debt, including its liability as a responsible third party, withholding agent, or a representative taxpayer, employer or vendor.

[Sub-s. (1) substituted by s. 68 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(2) The persons who are shareholders of the company within one year prior to its winding up are jointly and severally liable to pay the tax debt to the extent that—

(*a*) they receive assets of the company in their capacity as shareholders within one year prior to its windingup; and

(*b*) the tax debt existed at the time of the receipt of the assets or would have existed had the company complied with its obligations under a tax Act.

[Sub-s. (2) amended by s. 68 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(3) The liability of the shareholders is secondary to the liability of the company.

(4) Persons who are liable for the tax debt of a company under this section may avail themselves of any rights against SARS as would have been available to the company.

[Sub-s. (4) substituted by s. 68 (*c*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(5) This section does not apply—

(*a*) in respect of a "listed company" within the meaning of the Income Tax Act; or

(*b*) in respect of a shareholder of a company referred to in paragraph (*a*).

182. Liability of transferee for tax debts.—(1) A person (referred to as a transferee) who receives an asset from a taxpayer who is a connected person in relation to the transferee without consideration or for consideration below the fair market value of the asset is liable for the outstanding tax debt of the taxpayer.

[Sub-s. (1) substituted by s. 69 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(2) The liability is limited to the lesser of—

(*a*) the tax debt that existed at the time of the receipt of the asset or would have existed had the transferor complied with the transferor's obligations under a tax Act; and

(*b*) the fair market value of the asset at the time of the transfer, reduced by the fair market value of any consideration paid, at the time of payment.

(3) Subsection (1) applies only to an asset received by the transferee within one year before SARS notifies the transferee of liability under this section.

183. Liability of person assisting in dissipation of assets.—If a person knowingly assists in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt of the taxpayer, the person is jointly and severally liable with the taxpayer for the tax debt to the extent that the person's assistance reduces the assets available to pay the taxpayer's tax debt.

184. Recovery of tax debts from other persons.—(1) SARS has the same powers of recovery against the assets of a person who is personally liable under section 155, 157 or this Part as SARS has against the assets of the taxpayer and the person has the same rights and remedies as the taxpayer has against such powers of recovery.

(2) SARS must provide a person referred to in subsection (1) with an opportunity to make representations—

(*a*) before the person is held liable for the tax debt of the taxpayer in terms of section 155, 157, 179, 180, 181, 182 or 183, if this will not place the collection of tax in jeopardy; or

(*b*) as soon as practical after the person is held liable for the tax debt of the taxpayer in terms of section 155, 157, 179, 180, 181, 182 or 183.

[S. 184 substituted by s. 51 (1) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015.]

Part E
Assisting Foreign Governments

185. Tax recovery on behalf of foreign governments.—(1) If SARS has, in accordance with an international tax agreement, received—

(*a*) a request for conservancy of an amount alleged to be due by a person under the tax laws of the other country where there is a risk of dissipation or concealment of assets by the person, a senior SARS official may authorise an application for a preservation order under section 163 as if the amount were a tax payable by the person under a tax Act; or

[Para. (*a*) substituted by s. 58 (1) of Act No. 23 of 2015 deemed to have come into operation on 1 October, 2012.]

(*b*) a request for the collection from a person of an amount alleged to be due by the person under the tax laws of the other country, a senior SARS official may, by notice, call upon the person to state, within a period specified in the notice, whether or not the person admits liability for the amount or for a lesser amount.

(2) A request described in subsection (1) must be in the prescribed form and must include a formal certificate issued by the competent authority of the other country stating—

(*a*) the amount of the tax due;

(*b*) whether the liability for the amount is disputed in terms of the laws of the other country;

(*c*) if the liability for the amount is so disputed, whether such dispute has been entered into solely to delay or frustrate collection of the amount alleged to be due; and

(*d*) whether there is a risk of dissipation or concealment of assets by the person.

(3) In any proceedings, a certificate referred to in subsection (2) is—

(*a*) conclusive proof of the existence of the liability alleged; and

(*b*) *prima facie* proof of the other statements contained therein.

(4) If, in response to the notice issued under subsection (1) (*b*), the person—

(*a*) admits liability;

(*b*) fails to respond to the notice; or

(*c*) denies liability but a senior SARS official, based on the statements in the certificate described in subsection (2) or, if necessary, after consultation with the competent authority of the other country, is satisfied that—

(i) the liability for the amount is not disputed in terms of the laws of the other country;

(ii) although the liability for the amount is disputed in terms of the laws of the other country, such dispute has been entered into solely to delay or frustrate collection of the amount alleged to be due; or

(iii) there is a risk of dissipation or concealment of assets by the person,

the official may, by notice, require the person to pay the amount for which the person has admitted liability or the amount specified, on a date specified, for transmission to the competent authority in the other country.

(5) If the person fails to comply with the notice under subsection (4), SARS may recover the amount in the certificate for transmission to the foreign authority as if it were a tax payable by the person under a tax Act.

(6) No steps taken in assistance in collection by any other country under an international tax agreement for the collection of an amount alleged to be due by a person under a tax Act, including a judgment given against a person in the other country for the amount in pursuance of the agreement, may affect the person's right to have the liability for the amount determined in the Republic in accordance with the relevant law.

Part F

Remedies with Respect to Foreign Assets

186. Compulsory repatriation of foreign assets of taxpayer.—(1) To collect an outstanding tax debt, a senior SARS official may apply for an order referred to in subsection (2), if—

(*a*) the taxpayer concerned does not have sufficient assets located in the Republic to satisfy the tax debt in full; and

(*b*) the senior SARS official believes that the taxpayer—

(i) has assets outside the Republic; or

(ii) has transferred assets outside the Republic for no consideration or for consideration less than the fair market value,

which may fully or partly satisfy the tax debt.

[Sub-s. (1) amended by s. 70 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(2) A senior SARS official may apply to the High Court for an order compelling the taxpayer to repatriate assets located outside the Republic within a period prescribed by the court in order to satisfy the tax debt.

(3) In addition to issuing the order described in subsection (2), the court may—

(*a*) limit the taxpayer's right to travel outside the Republic and require the taxpayer to surrender his or her passport to SARS;

(*b*) withdraw a taxpayer's authorisation to conduct business in the Republic, if applicable;

(*c*) require the taxpayer to cease trading; or

(*d*) issue any other order it deems fit.

(4) An order made under subsection (2) applies until the tax debt has been satisfied or the assets have been repatriated and utilised in satisfaction of the tax debt.

CHAPTER 12
INTEREST

187. General interest rules.—(1) If a tax debt or refund payable by SARS is not paid in full by the effective date, interest accrues, and is payable, on the amount of the outstanding balance of the tax debt or refund—

(*a*) at the rate provided under section 189; and

(*b*) for the period provided under section 188.

[Sub-s. (1) amended by s. 59 (1) (*a*) of Act No. 23 of 2015 deemed to have come into operation on 1 October, 2012.]

(2) Interest payable under a tax Act is calculated on the daily balance owing and compounded monthly, and the Commissioner may prescribe by public notice from which date this method of determining interest will apply to a tax type.

(Date of commencement of sub-s. (2) to be proclaimed.)

(2) Interest payable under a tax Act is calculated on—

(*a*) the daily balance owing; or

(*b*) the daily balance owing and compounded monthly, which method of determining interest will apply to a tax type from the date the Commissioner prescribes it by public notice.

(Pending amendment: Sub-s. (2) to be substituted by s. 52 (1) of Act No. 44 of 2014 with effect from the date on which s. 187 (2) of this Act comes into operation – date not yet determined
(Editorial Note: effective date in s. 52 (2) of Act No. 44 of 2014 as substituted by s. 137 (1) of Act No. 23 of 2015.)

(Date of commencement to be proclaimed.)

(3) The effective date for purposes of the calculation of interest in relation to—

(*a*) tax other than income tax or estate duty for any tax period, is the date by which tax for the tax period is due and payable under a tax Act;

(Date of commencement of para. (*a*) to be proclaimed.)

(*b*) income tax for any year of assessment, is the date falling seven months after the last day of that year in the case of a taxpayer that has a year of assessment ending on the last day of February, and six months in any other case;

(Date of commencement of para. (*b*) to be proclaimed.)

(*c*) estate duty for any period, is the earlier of the date of assessment or 12 months after the date of death;

(Date of commencement of para. (*c*) to be proclaimed.)

(*d*) a fixed amount penalty referred to in section 210, is the date of assessment of the penalty, and in relation to an increment of the penalty under section 211 (2), the date of the increment.

[Para. (*d*) substituted by s. 66 of Act No. 21 of 2012.]

(Date of commencement of para. (*d*) to be proclaimed.)

(*e*) a percentage based penalty referred to in section 214, is the date by which tax for the tax period should have been paid;

[Para. (*e*) amended by s. 59 (1) (*b*) of Act No. 23 of 2015.]

(Date of commencement of para. (*e*) to be proclaimed.)

(*f*) an understatement penalty, is the effective date for the tax understated; and

[Para. (*f*) amended by s. 59 (1) (*b*) of Act No. 23 of 2015.]

(*g*) an outstanding tax debt referred to in section 190 (5), is the date of payment of a refund which is not properly payable under a tax Act.

[Para. (*g*) added by s. 59 (1) (*b*) of Act No. 23 of 2015.]

(4) The effective date in relation to an additional assessment or reduced assessment is the effective date in relation to the tax payable under the original assessment.

(Date of commencement of sub-s. (4) to be proclaimed.)

(5) The effective date in relation to a jeopardy assessment is the date for payment specified in the jeopardy assessment.

(6) If a senior SARS official is satisfied that interest payable by a taxpayer under subsection (1) is payable as a result of circumstances beyond the taxpayer's control, the official may, unless prohibited by a tax Act, direct that so much of the interest as is attributable to the circumstances is not payable by the taxpayer.

(7) The circumstances referred to in subsection (6) are limited to—

(*a*) a natural or human-made disaster;

(*b*) a civil disturbance or disruption in services; or

(*c*) a serious illness or accident.

(8) SARS may not make a direction that interest is not payable under subsection (6) after the expiry of three years, in the case of an assessment by SARS, or five years, in the case of self-assessment, from the date of assessment of the tax in respect of which the interest accrued.

[Sub-s. (8) added by s. 59 (1) (*c*) of Act No. 23 of 2015.]

188. Period over which interest accrues.—(1) Unless otherwise provided in a tax Act, interest payable under section 187 is imposed for the period from the effective date of the tax to the date the tax is paid.

(2) Interest payable in respect of the—

(*a*) first payment of provisional tax, is imposed from the effective date for the first payment of provisional tax until the earlier of the date on which the payment is made or the effective date for the second payment of provisional tax; and

(*b*) second payment of provisional tax, is imposed from the effective date for the second payment of provisional tax until the earlier of the date on which the payment is made or the effective date for income tax for the relevant year of assessment.

(Date of commencement of sub-s. (2) to be proclaimed.)

(3) Unless otherwise provided under a tax Act—

(*a*) interest on an amount refundable under section 190 is calculated from the later of the effective date or the date that the excess was received by SARS to the date the refunded tax is paid; and

(*b*) for this purpose, if a refund is offset against a liability of the taxpayer under section 191, the date on which the offset is effected is considered to be the date of payment of the refund.

(Date of commencement of sub-s. (3) to be proclaimed.)

189. Rate at which interest is charged.—(1) The rate at which interest is payable under section 187 is the prescribed rate.

(2) In the case of interest payable with respect to refunds on assessment of provisional tax and employees' tax paid for the relevant year of assessment, the rate payable by SARS is four percentage points below the prescribed rate.

(Date of commencement of sub-s. (2) to be proclaimed.)

(3) The prescribed rate is the interest rate that the Minister may from time to time fix by notice in the *Gazette* under section 80 (1) (*b*) of the Public Finance Management Act, 1999 (Act No. 1 of 1999).

(4) If the Minister fixes a different interest rate referred to in subsection (3) the new rate comes into operation on the first day of the second month following the month in which the new rate becomes effective for purposes of the Public Finance Management Act, 1999.

(5) If interest is payable under this Chapter and the rate at which the interest is payable has with effect from any date been altered, and the interest is payable in respect of any period or portion thereof which commenced before the said date, the interest to be determined in respect of—

(*a*) the period or portion thereof which ended immediately before the said date; or

(*b*) the portion of the period which was completed before the said date, must be calculated as if the rate had not been altered.

[Sub-s. (5) substituted by s. 67 of Act No. 21 of 2012.]

(Date of commencement of sub-s. (5) to be proclaimed.)

CHAPTER 13
REFUNDS

190. Refunds of excess payments.—(1) SARS must pay a refund if a person is entitled to a refund, including interest thereon under section 188 (3) (*a*), of—

(*a*) an amount properly refundable under a tax Act and if so reflected in an assessment; or

(*b*) the amount erroneously paid in respect of an assessment in excess of the amount payable in terms of the assessment.

[Sub-s. (1) amended by s. 60 (1) (*a*) of Act No. 23 of 2015 deemed to have come into operation on 1 October, 2012.]

(2) SARS need not authorise a refund as referred to in subsection (1) until such time that a verification, inspection or audit of the refund in accordance with Chapter 5 has been finalised.

(3) SARS must authorise the payment of a refund before the finalisation of the verification, inspection or audit if security in a form acceptable to a senior SARS official is provided by the taxpayer.

(4) An amount under subsection (1) (*b*) is regarded as a payment to the National Revenue Fund unless a refund is made in the case of—

(*a*) an assessment by SARS, within three years from the later of the date of the assessment or the erroneous payment;

[Para. (*a*) amended by s. 21 (*a*) of Act No. 22 of 2018.]

(*b*) self-assessment, within five years from the later of the date the return had to be submitted or, if no return is required, payment had to be made in terms of the relevant tax Act or the erroneous payment was made; or

[Para. (*b*) amended by s. 21 (*b*) of Act No. 22 of 2018.]

(*c*) an erroneous payment claimed by a taxpayer within the period referred to in paragraph (*a*) or (*b*), but not paid by SARS within the period.

[Sub-s. (4) substituted by s. 53 of Act No. 44 of 2014 and by s. 60 (1) (*b*) of Act No. 23 of 2015. Para. (*c*) added by s. 21 (*c*) of Act No. 22 of 2018.]

(5) If SARS pays to a person by way of a refund any amount which is not properly payable to the person under a tax Act, the amount, including interest thereon under section 187 (1), is regarded as an outstanding tax debt from the date on which it is paid to the person.

[Sub-s. (5) substituted by s. 71 of Act No. 39 of 2013 and by s. 60 (1) (*c*) of Act No. 23 of 2015 deemed to have come into operation on 1 October, 2012.]

(5A) If a person who carries on the 'business of a bank' as defined in the Banks Act, 1990 (Act No. 94 of 1990), holds an account on behalf of a client into which an amount referred to in subsection (5) is deposited, reasonably suspects that the payment of the amount is related to a tax offence, the person must immediately report the suspicion to SARS in the prescribed form and manner and not proceed with the carrying out of any transaction in respect of the amount for a period not exceeding two business days unless—

(*a*) SARS or a High Court directs otherwise; or

(*b*) SARS issues a notice under section 179.

[Sub-s. (5A) inserted by s. 60 (1) (*d*) of Act No. 23 of 2015 and substituted by s. 28 of Act No. 13 of 2017.]

(6) A decision not to authorise a refund under subsection (1) (*b*) is subject to objection and appeal.

[Sub-s. (6) substituted by s. 60 (1) (*e*) of Act No. 23 of 2015.]

191. Refunds subject to set-off and deferral.—(1) An amount refundable under section 190, including interest thereon under section 188 (3) (*a*), must be treated as a payment by the taxpayer that is recorded in the taxpayer's account under section 165, of an outstanding tax debt, if any, and any remaining amount must be set off against any outstanding debt under customs and excise legislation.

[Sub-s. (1) substituted by s. 61 of Act No. 23 of 2015 and by s. 39 of Act No. 33 of 2019.]

(2) Subsection (1) does not apply to a tax debt—

(*a*) for which the period referred to in section 164 (6) has not expired or suspension of payment under section 164 exists; or

[Para. (*a*) substituted by s. 72 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*b*) in respect of which an instalment payment agreement under section 167 or a compromise agreement under section 204 applies.

(3) An amount is not refundable if the amount is less than R100 or any other amount that the Commissioner may determine by public notice, but the amount must be carried forward in the taxpayer account.

CHAPTER 14
WRITE OFF OR COMPROMISE OF TAX DEBTS

[Ch. 14 amended by s. 69 of Act No. 21 of 2012.]

Part A
General Provisions

192. Definitions.—In this Chapter, unless the context indicates otherwise, the following terms, if in single quotation marks, have the following meanings—

'asset' . . . . . .

[Definition of 'asset' deleted by s. 68 of Act No. 21 of 2012.]

'Companies Act' means the Companies Act, 2008 (Act No. 71 of 2008);

'compromise' means an agreement entered into between SARS and a 'debtor' in respect of a tax debt in terms of which—

(*a*) the 'debtor' undertakes to pay an amount which is less than the full amount of the tax debt due by that 'debtor' in full satisfaction of the tax debt; and

(*b*) SARS undertakes to permanently 'write off' the remaining portion of the tax debt on the condition that the 'debtor' complies with the undertaking referred to in paragraph (*a*) and any further conditions as may be imposed by SARS;

[Definition of 'compromise' amended by s. 73 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

'debtor' means a taxpayer with a tax debt; and

[Definition of 'debtor' substituted by s. 73 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

'write off' means to reverse an outstanding tax debt either in whole or in part.

[Definition of 'write off' substituted by s. 73 (*c*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

193. Purpose of Chapter.—(1) As a general rule, it is the duty of SARS to assess and collect all tax debts according to a tax Act and not to forgo any tax debts.

(2) SARS may, when required by circumstances, deviate from the strictness and rigidity of the general rule referred to in subsection (1) if it would be to the best advantage of the State.

(3) The purpose of this Chapter is to prescribe the circumstances under which SARS may deviate from the general rule and take a decision to 'write off' a tax debt or not to pursue its collection.

194. Application of Chapter.— Parts C and D of this Chapter apply only in respect of a tax debt owed by a 'debtor' if the liability to pay the tax debt is not disputed under Chapter 9 by the 'debtor'.

[S. 194 substituted by s. 54 of Act No. 44 of 2014 and by s. 60 of Act No. 16 of 2016 deemed to have come into operation on 1 October, 2012.]

Part B
Temporary Write Off of Tax Debt

195. Temporary write off of tax debt.—(1) A senior SARS official may decide to temporarily 'write off' an amount of tax debt—

(*a*) if satisfied that the tax debt is uneconomical to pursue as described in section 196 at that time; or

(*b*) for the duration of the period that the 'debtor' is subject to business rescue proceedings under Chapter 6 of the 'Companies Act', as referred to in section 132 of that Act.

[Sub-s. (1) substituted by s. 55 of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

(2) A decision by the senior SARS official to temporarily 'write off' an amount of tax debt does not absolve the 'debtor' from the liability for that tax debt.

(3) A senior SARS official may at any time withdraw the decision to temporarily 'write off' a tax debt if satisfied that the tax debt is no longer uneconomical to pursue as referred to in section 196 and that the decision to temporarily 'write off' would jeopardise the general tax collection effort.

196. Tax debt uneconomical to pursue.—(1) A tax debt is uneconomical to pursue if a senior SARS official is satisfied that the total cost of recovery of that tax debt will in all likelihood exceed the anticipated amount to be recovered in respect of the outstanding tax debt.

(2) In determining whether the cost of recovery is likely to exceed the anticipated amount to be recovered as referred to in subsection (1), a senior SARS official must have regard to—

(*a*) the amount of the tax debt;

(*b*) the length of time that the tax debt has been outstanding;

(*c*) the steps taken to date to recover the tax debt and the costs involved in those steps, including steps taken to locate or trace the 'debtor';

(*d*) the likely costs of continuing action to recover the tax debt and the anticipated return from that action, including the likely recovery of costs that may be awarded to SARS;

(*e*) the financial position of the 'debtor', including that 'debtor's' assets and liabilities, cash flow, and possible future income streams; and

(*f*) any other information available with regard to the recoverability of the tax debt.

Part C
Permanent Write Off of Tax Debt

197. Permanent write off of tax debt.—(1) A senior SARS official may authorise the permanent 'write off' of an amount of tax debt—

(*a*) to the extent satisfied that the tax debt is irrecoverable at law as referred to in section 198; or

(*b*) if the debt is 'compromised' in terms of Part D.

(2) SARS must notify the 'debtor' in writing of the amount of tax debt 'written off'.

198. Tax debt irrecoverable at law.—(1) A tax debt is irrecoverable at law if—

(*a*) it cannot be recovered by action and judgment of a court; or

(*b*) it is owed by a 'debtor' that is in liquidation or sequestration and it represents the balance outstanding after notice is given by the liquidator or trustee that no further dividend is to be paid or a final dividend has been paid to the creditors of the estate; or

(*c*) it is owed by a 'debtor' that is subject to a business rescue plan referred to in Part D of Chapter 6 of the 'Companies Act', to the extent that it is not enforceable in terms of section 154 of that Act.

(2) A tax debt is not irrecoverable at law if SARS has not first explored action against or recovery from the assets of the persons who may be liable for the debt under Part D of Chapter 11.

199. Procedure for writing off tax debt.—(1) Before deciding to 'write off' a tax debt, a senior SARS official must—

(*a*) determine whether there are any other tax debts owing to SARS by the 'debtor';

(*b*) reconcile amounts owed by and to the 'debtor', including penalties, interest and costs;

(*c*) obtain a breakdown of the tax debt and the periods to which the outstanding amounts relate; and

(*d*) document the history of the recovery process and the reasons for deciding to 'write off' the tax debt.

(2) In deciding whether to support a business rescue plan referred to in Part D of Chapter 6 of the 'Companies Act' or 'compromise' made to creditors under section 155 of the 'Companies Act' a senior SARS official must, in addition to considering the information as referred to in section 150 or 155 of that Act, take into account the information and aspects covered in the provisions of sections 200, 201 (1), 202 and 203 with the necessary changes.

Part D
Compromise of Tax Debt

200. Compromise of tax debt.—A senior SARS official may authorise the 'compromise' of a portion of a tax debt upon request by a 'debtor', which complies with the requirements of section 201, if—

(*a*) the purpose of the 'compromise' is to secure the highest net return from the recovery of the tax debt; and

(*b*) the 'compromise' is consistent with considerations of good management of the tax system and administrative efficiency.

201. Request by debtor for compromise of tax debt.—(1) A request by a 'debtor' for a tax debt to be 'compromised' must be signed by the 'debtor' and be supported by a detailed statement setting out—

(*a*) the assets and liabilities of the 'debtor' reflecting their current fair market value;

(*b*) the amounts received by or accrued to, and expenditure incurred by, the 'debtor' during the 12 months immediately preceding the request;

(*c*) the assets which have been disposed of in the preceding three years, or such longer period as a senior SARS official deems appropriate, together with their value, the consideration received or accrued, the identity of the person who acquired the assets and the relationship between the 'debtor' and the person who acquired the assets, if any;

(*d*) the 'debtor's' future interests in any assets, whether certain or contingent or subject to the exercise of a discretionary power by another person;

(*e*) the assets over which the 'debtor', either alone or with other persons, has a direct or indirect power of appointment or disposal, whether as trustee or otherwise;

(*f*) details of any connected person in relation to that 'debtor';

(*g*) the 'debtor's' present sources and level of income and the anticipated sources and level of income for the next three years, with an outline of the 'debtor's' financial plans for the future; and

(*h*) the 'debtor's' reasons for seeking a 'compromise'.

(2) The request must be accompanied by the evidence supporting the 'debtor's' claims for not being able to make payment of the full amount of the tax debt.

(3) The 'debtor' must warrant that the information provided in the application is accurate and complete.

(4) A senior SARS official may require that the application be supplemented by such further information as may be required.

202. Consideration of request to compromise tax debt.—(1) In considering a request for a 'compromise', a senior SARS official must have regard to the extent that the 'compromise' may result in—

(*a*) savings in the costs of collection;

(*b*) collection at an earlier date than would otherwise be the case without the 'compromise';

(*c*) collection of a greater amount than would otherwise have been recovered; or

(*d*) the abandonment by the 'debtor' of some claim or right, which has a monetary value, arising under a tax Act, including existing or future tax benefits, such as carryovers of losses, deductions, credits and rebates.

(2) In determining the position without the 'compromise', a senior SARS official must have regard to—

(*a*) the value of the 'debtor's' present assets;

(*b*) future prospects of the 'debtor', including arrangements which have been implemented or are proposed which may have the effect of diverting income or assets that may otherwise accrue to or be acquired by the 'debtor' or a connected person in relation to the 'debtor';

(*c*) past transactions of the 'debtor'; and

(*d*) the position of any connected person in relation to the 'debtor'.

203. Circumstances where not appropriate to compromise tax debt.—A senior SARS official may not 'compromise' any amount of a tax debt under section 200 if—

(*a*) the 'debtor' was a party to an agreement with SARS to 'compromise' an amount of tax debt within the period of three years immediately before the request for the 'compromise';

(*b*) the tax affairs of the 'debtor' (other than the outstanding tax debt) are not up to date;

(*c*) another creditor has communicated its intention to initiate or has initiated liquidation or sequestration proceedings;

(*d*) the 'compromise' will prejudice other creditors (unless the affected creditors consent to the 'compromise') or if other creditors will be placed in a position of advantage relative to SARS;

(*e*) it may adversely affect broader taxpayer compliance; or

(*f*) the 'debtor' is a company or a trust and SARS has not first explored action against or recovery from the personal assets of the persons who may be liable for the debt under Part D of Chapter 11.

204. Procedure for compromise of tax debt.—(1) To 'compromise' a tax debt, a senior SARS official and the 'debtor' must sign an agreement setting out—

(*a*) the amount payable by the 'debtor' in full satisfaction of the debt;

(*b*) the undertaking by SARS not to pursue recovery of the balance of the tax debt; and

(*c*) the conditions subject to which the tax debt is 'compromised' by SARS.

(2) The conditions referred to in subsection (1) (*c*) may include a requirement that the 'debtor' must—

(*a*) comply with subsequent obligations imposed in terms of a tax Act;

(*b*) pay the tax debt in the manner prescribed by SARS; or

(*c*) give up specified existing or future tax benefits, such as carryovers of losses, deductions, credits and rebates.

205. SARS not bound by compromise of tax debt.—SARS is not bound by a 'compromise' if—

(*a*) the 'debtor' fails to disclose a material fact to which the 'compromise' relates;

(*b*) the 'debtor' supplies materially incorrect information to which the 'compromise' relates;

(*c*) the 'debtor' fails to comply with a provision or condition contained in the agreement referred to in section 204; or

(*d*) the 'debtor' is liquidated or the 'debtor's' estate is sequestrated before the 'debtor' has fully complied with the conditions contained in the agreement referred to in section 204.

Part E
Records and Reporting

206. Register of tax debts written off or compromised.—(1) SARS must maintain a register of the tax debts 'written off' or 'compromised' in terms of this Chapter.

(2) The register referred to in subsection (1) must contain—

(*a*) the details of the 'debtor', including name, address and taxpayer reference number;

(*b*) the amount of the tax debt 'written off' or 'compromised' and the periods to which the tax debt relates; and

(*c*) the reason for 'writing off' or 'compromising' the tax debt.

207. Reporting by Commissioner of tax debts written off or compromised.—(1) The amount of tax debts 'written off' or 'compromised' during a financial year must be disclosed in the annual financial statements of SARS relating to administered revenue for that year.

(2) The Commissioner must on an annual basis provide to the Auditor-General and to the Minister a summary of the tax debts which were 'written off' or 'compromised' in whole or in part during the period covered by the summary, which must—

(*a*) be in a format which, subject to section 70 (5), does not disclose the identity of the 'debtor' concerned;

(*b*) be submitted within 60 business days following the end of the fiscal year; and

[Para. (*b*) substituted by s. 56 of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

(*c*) contain details of the number of tax debts 'written off' or 'compromised' and the amount of revenue forgone, which must be reflected in respect of main classes of taxpayers or sections of the public.

[Para. (*c*) substituted by s. 56 of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

CHAPTER 15
ADMINISTRATIVE NON-COMPLIANCE PENALTIES

Part A
General

208. Definitions.—In this Chapter, unless the context indicates otherwise, the following terms, if in single quotation marks, have the following meanings—

'administrative non-compliance penalty' or **'penalty'** means a "penalty" imposed by SARS in accordance with this Chapter or a tax Act other than this Act, and excludes an understatement penalty referred to in Chapter 16;

[Definition of 'administrative non-compliance penalty' or 'penalty' substituted by s. 57 of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

'first incidence' means an incidence of non-compliance by a person if no 'penalty assessment' under this Chapter was issued during the preceding 36 months, whether involving an incidence of non-compliance of the same or a different kind, and for purposes of this definition a 'penalty assessment' that was fully remitted under section 218 must be disregarded;

'penalty assessment' means an assessment in respect of—

(*a*) a 'penalty' only; or

(*b*) tax and a 'penalty' which are assessed at the same time;

'preceding year' means the year of assessment immediately prior to the year of assessment during which a 'penalty' is assessed;

'remittance request' means a request for remittance of a 'penalty' submitted in accordance with section 215.

209. Purpose of Chapter.—The purpose of this Chapter is to ensure—

(*a*) the widest possible compliance with the provisions of a tax Act and the effective administration of tax Acts; and

(*b*) that an 'administrative non-compliance penalty' is imposed impartially, consistently, and proportionately to the seriousness and duration of the non-compliance.

Part B
Fixed Amount Penalties

210. Non-compliance subject to penalty.—(1) If SARS is satisfied that non-compliance by a person referred to in subsection (2) exists, SARS must impose the appropriate 'penalty' in accordance with the Table in section 211.

(2) Non-compliance is failure to comply with an obligation that is imposed by or under a tax Act and is listed in a public notice issued by the Commissioner, other than—

(*a*) the failure to pay tax subject to a percentage based penalty under Part C;

(*b*) non-compliance in respect of which an understatement penalty under Chapter 16 has been imposed; or

(*c*) the failure to disclose information subject to a reportable arrangement or mandatory disclosure penalty under section 212.

[S. 210 substituted by s. 70 of Act No. 21 of 2012. Para. (*c*) substituted by s. 40 of Act No. 33 of 2019.]

211. Fixed amount penalty table.—(1) For the non-compliance referred to in section 210, SARS must impose a 'penalty' in accordance with the following Table—

Table: Amount of Administrative Non-Compliance Penalty

1 Item	2 Assessed loss or taxable income for 'preceding year'	3 'Penalty'
(i)	Assessed loss	R250
(ii)	R0 – R250 000	R250
(iii)	R250 001 – R500 000	R500
(iv)	R500 001 – R1 000 000	R1 000
(v)	R1 000 001 – R5 000 000	R2 000
(vi)	R5 000 001 – R10 000 000	R4 000
(vii)	R10 000 001 – R50 000 000	R8 000
(viii)	Above R50 000 000	R16 000

(2) The amount of the 'penalty' in column 3 will increase automatically by the same amount for each month, or part thereof, that the person fails to remedy the non-compliance within one month after—

(*a*) the date of assessment of the penalty, if SARS is in possession of the current address of the person and is able to deliver the assessment, but is limited to 35 months from the date of the assessment; or

[Para. (*a*) substituted by s. 71 of Act No. 21 of 2012.]

(*b*) the date of the non-compliance if SARS is not in possession of the current address of the person and is unable to deliver the 'penalty assessment', but limited to 47 months after the date of non-compliance.

(3) The following persons, except those falling under item (viii) of the Table or those that did not trade during the year of assessment, are treated as falling under item (vii) of the Table—

(*a*) a company listed on a recognised stock exchange as referred to in paragraph 1 of the Eighth Schedule to the Income Tax Act;

(*b*) a company whose gross receipts or accruals for the 'preceding year' exceed R500 million;

(*c*) a company that forms part of a "group of companies" as defined in section 1 of the Income Tax Act, which group includes a company described in item (*a*) or (*b*); or

(*d*) a person or entity, exempt from income tax under the Income Tax Act but liable to tax under another tax Act, whose gross receipts or accruals exceed R30 million.

(4) SARS may, except in the case of persons referred to in subsections (3) (*a*) to (*c*), if the taxable income of the relevant person for the 'preceding year' is unknown or that person was not a taxpayer in that year—

(*a*) impose a 'penalty' in accordance with item (ii) of column 1 of the Table; or

(*b*) estimate the amount of taxable income of the relevant person for the 'preceding year' based on available relevant material and impose a 'penalty' in accordance with the applicable item in column 1 of the Table.

(5) Where, upon determining the actual taxable income or assessed loss of the person in respect of whom a 'penalty' was imposed under subsection (4), it appears that the person falls within another item in column 1 of the Table, the 'penalty' must be adjusted in accordance with the applicable item in that column with effect from the date of the imposition of the 'penalty' issued under subsection (4).

212. Reportable arrangement and mandatory disclosure penalty.—(1) A person referred to in—

(*a*) paragraph (*a*) or (*b*) of the definition of 'participant' in section 34, who fails to disclose the information in respect of a 'reportable arrangement', as required by section 37; or

(*b*) the definition of intermediary in the regulations, issued in respect of paragraph (*a*) of the definition of "international tax standard", who fails to disclose the information required to be disclosed under the regulations,

is liable to a 'penalty', for each month that the failure continues (up to 12 months), in the amount of—

(i) R50 000, in the case of a 'participant' or intermediary, as the case may be, other than the 'promoter'; or

(ii) R100 000, in the case of the 'promoter'.

(2) The amount of 'penalty' determined under subsection (1) is doubled if the amount of anticipated 'tax benefit', as defined in section 34, for the 'participant' by reason of the arrangement (within the meaning of section 35) exceeds R5 000 000, and is tripled if the benefit exceeds R10 000 000.

(3) A person referred to in paragraph (*c*) of the definition of 'participant' in section 34, who fails to disclose the information in respect of a 'reportable arrangement' as required by section 37 is liable to a 'penalty' in the amount of R50 000.

[S. 212 amended by s. 62 (*a*) and (*b*) of Act No. 23 of 2015 and substituted by s. 41 of Act No. 33 of 2019.]

Part C
Percentage Based Penalty

213. Imposition of percentage based penalty.—(1) If SARS is satisfied that an amount of tax was not paid as and when required under a tax Act, SARS must, in addition to

any other 'penalty' or interest for which a person may be liable, impose a 'penalty' equal to the percentage of the amount of unpaid tax as prescribed in the tax Act.

[Sub-s. (1) substituted by s. 63 (1) of Act No. 23 of 2015 deemed to have come into operation on 1 October, 2012.]

(2) In the event of a change to the amount of tax in respect of which a 'penalty' was imposed under subsection (1), the 'penalty' must be adjusted accordingly with effect from the date of the imposition of the 'penalty'.

Part D
Procedure

214. Procedures for imposing penalty.—(1) A 'penalty' imposed under Part B or C is imposed by way of a 'penalty assessment', and if a 'penalty assessment' is made, SARS must give notice of the assessment in the format as SARS may decide to the person, including the following—

(*a*) the non-compliance in respect of which the 'penalty' is assessed and its duration;

(*b*) the amount of the 'penalty' imposed;

(*c*) the date for paying the 'penalty';

(*d*) the automatic increase of the 'penalty'; and

(*e*) a summary of procedures for requesting remittance of the 'penalty'.

(2) A 'penalty' is due upon assessment and must be paid—

(*a*) on or before the date for payment stated in the notice of the 'penalty assessment'; or

(*b*) where the 'penalty assessment' is made together with an assessment of tax, on or before the deadline for payment stated in the notice of the assessment for tax.

(3) SARS must give the taxpayer notice of an adjustment to the 'penalty' in accordance with section 211 (2) or 213 (2).

215. Procedure to request remittance of penalty.—(1) A person who is aggrieved by a 'penalty assessment' notice may, on or before the date for payment in the 'penalty assessment', in the prescribed form and manner, request SARS to remit the 'penalty' in accordance with Part E.

(2) The 'remittance request' must include—

(*a*) a description of the circumstances which prevented the person from complying with the relevant obligation under a tax Act in respect of which the 'penalty' has been imposed; and

(*b*) the supporting documents and information as may be required by SARS in the prescribed form.

(3) During the period commencing on the day that SARS receives the 'remittance request', and ending 21 business days after notice has been given of SARS' decision, no collection steps relating to the 'penalty' amount may be taken unless SARS has a reasonable belief that there is—

(*a*) a risk of dissipation of assets by the person concerned; or

(*b*) fraud involved in the origin of the non-compliance or the grounds for remittance.

(4) SARS may extend the period referred to in subsection (1) if SARS is satisfied that—

(*a*) the non-compliance in issue is an incidence of non-compliance referred to in section 216 or 217, and that reasonable grounds exist for the late receipt of the 'remittance request'; or

(*b*) a circumstance referred to in section 218 (2) rendered the person incapable of submitting a timely request.

(5) If a tax Act other than this Act provides for remittance grounds for a 'penalty', SARS may despite the provisions of section 216, 217 or 218 remit the 'penalty' or a portion thereof under such grounds.

[Sub-s. (5) added by s. 58 of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

Part E
Remedies

216. Remittance of penalty for failure to register.—If a 'penalty' is imposed on a person for a failure to register as and when required under this Act, SARS may remit the 'penalty' in whole or in part if—

(*a*) the failure to register was discovered because the person approached SARS voluntarily; and

(*b*) the person has filed all returns required under a tax Act.

217. Remittance of penalty for nominal or first incidence of non-compliance.—(1) If a 'penalty' has been imposed in respect of—

(*a*) a 'first incidence' of non-compliance; or

[Para. (*a*) substituted by s. 72 (*a*) of Act No. 21 of 2012.]

(*b*) an incidence of non-compliance described in section 210 if the duration of the non-compliance is less than five business days,

SARS may, in respect of a 'penalty' imposed under section 210 or 212, remit the 'penalty', or a portion thereof if appropriate, up to an amount of R2 000 if SARS is satisfied that—

(i) reasonable grounds for the non-compliance exist; and

(ii) the non-compliance in issue has been remedied.

(2) In the case of a 'penalty' imposed under section 212, the R2 000 limit referred to in subsection (1) is changed to R100 000.

(3) If a 'penalty' has been imposed under section 213, SARS may remit the 'penalty' or a portion thereof, if SARS is satisfied that—

(*a*) the 'penalty' has been imposed in respect of a 'first incidence' of non-compliance, or involved an amount of less than R2 000;

(*b*) reasonable grounds for the non-compliance exist; and

(*c*) the non-compliance in issue has been remedied.

[Sub-s. (3) substituted by s. 72 (*b*) of Act No. 21 of 2012.]

218. Remittance of penalty in exceptional circumstances.—(1) SARS must, upon receipt of a 'remittance request', remit the 'penalty' or if applicable a portion thereof, if SARS is satisfied that one or more of the circumstances referred to in subsection (2) rendered the person on whom the 'penalty' was imposed incapable of complying with the relevant obligation under the relevant tax Act.

(2) The circumstances referred to in subsection (1) are limited to—

(*a*) a natural or human-made disaster;

(*b*) a civil disturbance or disruption in services;

(*c*) a serious illness or accident;

(*d*) serious emotional or mental distress;

(*e*) any of the following acts by SARS—

(i) a capturing error;

(ii) a processing delay;

(iii) provision of incorrect information in an official publication or media release issued by the Commissioner;

(iv) delay in providing information to any person; or

(v) failure by SARS to provide sufficient time for an adequate response to a request for information by SARS;

(*f*) serious financial hardship, such as—

(i) in the case of an individual, lack of basic living requirements; or

(ii) in the case of a business, an immediate danger that the continuity of business operations and the continued employment of its employees are jeopardised; or

(*g*) any other circumstance of analogous seriousness.

219. Penalty incorrectly assessed.—If SARS is satisfied that a 'penalty' was not assessed in accordance with this Chapter, SARS may, within three years of the 'penalty assessment', issue an altered assessment accordingly.

220. Objection and appeal against decision not to remit penalty.—A decision by SARS not to remit a 'penalty' in whole or in part is subject to objection and appeal under Chapter 9.

CHAPTER 16
UNDERSTATEMENT PENALTY

Part A
Imposition of Understatement Penalty

221. Definitions.—In this Chapter, unless the context indicates otherwise, the following terms, if in single quotation marks, have the following meanings—

'impermissible avoidance arrangement' means an arrangement in respect of which Part IIA of Chapter III of the Income Tax Act is applied and includes, for purposes of this Chapter, any transaction, operation, scheme or agreement in respect of which section 73 of the Value-Added Tax Act or any other general anti-avoidance provision under a tax Act is applied;

[Definition of 'impermissible avoidance arrangement' inserted by s. 61 (*a*) of Act No. 16 of 2016.]

'repeat case' means a second or further case of any of the behaviours listed under items (i) to (vi) of the understatement penalty percentage table reflected in section 223 within five years of the previous case;

[Definition of 'repeat case' substituted by s. 61 (*b*) of Act No. 16 of 2016.]

'substantial understatement' means a case where the prejudice to SARS or the *fiscus* exceeds the greater of five per cent of the amount of 'tax' properly chargeable or refundable under a tax Act for the relevant tax period, or R1 000 000;

'tax' means tax as defined in section 1, excluding a penalty and interest;

'tax position' means an assumption underlying one or more aspects of a tax return, including whether or not—

(*a*) an amount, transaction, event or item is taxable;

(*b*) an amount or item is deductible or may be set-off;

(*c*) a lower rate of tax than the maximum applicable to that class of taxpayer, transaction, event or item applies; or

(*d*) an amount qualifies as a reduction of tax payable; and

'understatement' means any prejudice to SARS or the *fiscus* as a result of—

(*a*) failure to submit a return required under a tax Act or by the Commissioner;

[Para. (*a*) substituted by s. 22 of Act No. 22 of 2018.]

(*b*) an omission from a return;

(*c*) an incorrect statement in a return;

(*d*) if no return is required, the failure to pay the correct amount of 'tax'; or

(*e*) an 'impermissible avoidance arrangement'.

[Definition of 'understatement' amended by s. 74 of Act No. 39 of 2013 and substituted by s. 61 (*c*) of Act No. 16 of 2016.]

222. Understatement penalty.—(1) In the event of an 'understatement' by a taxpayer, the taxpayer must pay, in addition to the 'tax' payable for the relevant tax period, the understatement penalty determined under subsection (2) unless the 'understatement' results from a *bona fide* inadvertent error.

[Sub-s. (1) substituted by s. 75 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(2) The understatement penalty is the amount resulting from applying the highest applicable understatement penalty percentage in accordance with the table in section 223 to each shortfall determined under subsections (3) and (4) in relation to each 'understatement'.

[Sub-s. (2) substituted by s. 75 (*a*) of Act No. 39 of 2013 and by s. 23 (*a*) of Act No. 22 of 2018.]

(3) The shortfall is the sum of—

(*a*) the difference between the amount of 'tax' properly chargeable for the tax period and the amount of 'tax' that would have been chargeable for the tax period if the 'understatement' were accepted;

[Para. (*a*) substituted by s. 75 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*b*) the difference between the amount properly refundable for the tax period and the amount that would have been refundable if the 'understatement' were accepted; and

(*c*) the difference between the amount of an assessed loss or any other benefit to the taxpayer properly carried forward from the tax period to a succeeding tax period and the amount that would have been carried forward if the 'understatement' were accepted, multiplied by the tax rate determined under subsection (5).

(4) (*a*) If there is a difference under both paragraphs (*a*) and (*b*) of subsection (3), the shortfall must be reduced by the amount of any duplication between the paragraphs.

(*b*) Where the 'understatement' is the failure to submit a return, the 'tax' that resulted from the 'understatement', had the 'understatement' been accepted, for purposes of subsection (3), must be regarded as nil.

[Sub-s. (4) substituted by s. 75 (*c*) of Act No. 39 of 2013 and by s. 23 (*b*) of Act No. 22 of 2018.]

(5) The tax rate applicable to the shortfall determined under subsections (3) and (4) is the maximum tax rate applicable to the taxpayer, ignoring an assessed loss or any other benefit brought forward from a preceding tax period to the tax period.

[Sub-s. (5) substituted by s. 75 (*c*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

223. Understatement penalty percentage table.—(1) The understatement penalty percentage table is as follows:

1	2	3	4	5	6
Item	*Behaviour*	*Standard case*	*If obstructive, or if it is a 'repeat case'*	*Voluntary disclosure after notification of audit or criminal investigation*	*Voluntary disclosure before notification of audit or criminal investigation*
(i)	'Substantial understatement'	10%	20%	5%	0%
(ii)	Reasonable care not taken in completing return	25%	50%	15%	0%
(iii)	No reasonable grounds for 'tax position' taken	50%	75%	25%	0%
(iv)	'Impermissible avoidance arrangement'	75%	100%	35%	0%
(v)	Gross negligence	100%	125%	50%	5%
(vi)	Intentional tax evasion	150%	200%	75%	10%

[Sub-s. (1) substituted by s. 76 (1) (*a*) of Act No. 39 of 2013 and by s. 62 of Act No. 16 of 2016.]

(2) An understatement penalty for which provision is made under this Chapter is also chargeable in cases where—

(*a*) an assessment based on an estimation under section 95 is made; or

(*b*) an assessment agreed upon with the taxpayer under section 95 (3) is issued.

(3) SARS must remit a 'penalty' imposed for a 'substantial understatement' if SARS is satisfied that the taxpayer—

(*a*) made full disclosure to SARS of the arrangement, as defined in section 34, that gave rise to the prejudice to SARS or the *fiscus* by no later than the date that the relevant return was due; and

[Para. (*a*) substituted by s. 42 of Act No. 33 of 2019.]

(*b*) was in possession of an opinion by an independent registered tax practitioner that—

(i) was issued by no later than the date that the relevant return was due;

(ii) was based upon full disclosure of the specific facts and circumstances of the arrangement and, in the case of any opinion regarding the applicability of the substance over form doctrine or the anti-avoidance provisions of a tax Act, this requirement cannot be met unless the taxpayer is able to demonstrate that all of the steps in or parts of the arrangement were fully disclosed to the tax practitioner, whether or not the taxpayer was a direct party to the steps or parts in question; and

(iii) confirmed that the taxpayer's position is more likely than not to be upheld if the matter proceeds to court.

[Para. (*b*) substituted by s. 73 of Act No. 21 of 2012 and amended by s. 76 (1) (*b*) of Act No. 39 of 2013 with effect from the date of promulgation of that Act.]

224. Objection and appeal against imposition of understatement penalty.—The imposition of an understatement penalty under section 222 or a decision by SARS not to remit an understatement penalty under section 223 (3), is subject to objection and appeal under Chapter 9.

[S. 224 substituted by s. 74 of Act No. 21 of 2012 and by s. 77 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

Part B

Voluntary Disclosure Programme

225. Definitions.—In this Part, unless the context indicates otherwise, the following term, if in single quotation marks, has the following meaning—

'default' means the submission of inaccurate or incomplete information to SARS, or the failure to submit information or the adoption of a 'tax position', where such submission, non-submission, or adoption resulted in an understatement.

[Definition of 'default' substituted by s. 64 of Act No. 23 of 2015.]

226. Qualification of person subject to audit or investigation for voluntary disclosure.—(1) A person may apply, whether in a personal, representative, withholding or other capacity, for voluntary disclosure relief.

(2) If the person seeking relief has been given notice of the commencement of an audit or criminal investigation into the affairs of the person, which has not been concluded and is related to the disclosed 'default', the disclosure of the 'default' is regarded as not being voluntary for purposes of section 227, unless a senior SARS official is of the view, having regard to the circumstances and ambit of the audit or investigation, that—

(*a*) . . . . .

(*b*) the 'default' in respect of which the person has sought relief would not otherwise have been detected during the audit or investigation; and

(*c*) the application would be in the interest of good management of the tax system and the best use of SARS' resources.

(3) A person is deemed to have been notified of an audit or criminal investigation, if—

(*a*) a representative of the person;

(*b*) an officer, shareholder or member of the person, if the person is a company;

(*c*) a partner in partnership with the person;

(*d*) a trustee or beneficiary of the person, if the person is a trust; or

(*e*) a person acting for or on behalf of or as an agent or fiduciary of the person,

has been given notice of the audit or investigation.

[S. 226 amended by s. 65 of Act No. 23 of 2015 and substituted by s. 63 of Act No. 16 of 2016.]

227. Requirements for valid voluntary disclosure.—The requirements for a valid voluntary disclosure are that the disclosure must—

(*a*) be voluntary;

(*b*) involve a 'default' which has not occurred within five years of the disclosure of a similar 'default' by the applicant or a person referred to in section 226 (3);

[Para. (*b*) substituted by s. 66 of Act No. 23 of 2015.]

(*c*) be full and complete in all material respects;

(*d*) involve a behaviour referred to in column 2 of the understatement penalty percentage table in section 223;

[Para. (*d*) substituted by s. 66 of Act No. 23 of 2015.]

(*e*) not result in a refund due by SARS; and

(*f*) be made in the prescribed form and manner.

228. No-name voluntary disclosure.—A senior SARS official may issue a non-binding private opinion, as defined in section 75, as to a person's eligibility for relief under this Part, if the person provides sufficient information to do so, which information need not include the identity of any party to the 'default'.

229. Voluntary disclosure relief.—Despite the provisions of a tax Act, SARS must, pursuant to the making of a valid voluntary disclosure by the applicant and the conclusion of the voluntary disclosure agreement under section 230—

(*a*) not pursue criminal prosecution for a tax offence arising from the 'default';

[Para. (*a*) substituted by s. 75 of Act No. 21 of 2012.]

(*b*) grant the relief in respect of any understatement penalty to the extent referred to in column 5 or 6 of the understatement penalty percentage table in section 223; and

(*c*) grant 100 per cent relief in respect of an administrative non-compliance penalty that was or may be imposed under Chapter 15 or a penalty imposed under a tax Act, excluding a penalty imposed under that Chapter or in terms of a tax Act for the late submission of a return.

[S. 229 amended by s. 67 (*a*) of Act No. 23 of 2015. Para. (*c*) substituted by s. 67 (*b*) of Act No. 23 of 2015.]

230. Voluntary disclosure agreement.—The approval by a senior SARS official of a voluntary disclosure application and relief granted under section 229, must be evidenced by a written agreement between SARS and the qualifying person who is liable for the outstanding tax debt in the prescribed format and must include details on—

(*a*) the material facts of the 'default' on which the voluntary disclosure relief is based;

(*b*) the amount payable by the person, which amount must separately reflect the understatement penalty payable;

(*c*) the arrangements and dates for payment; and

(*d*) relevant undertakings by the parties.

[S. 230 amended by s. 78 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

231. Withdrawal of voluntary disclosure relief.—(1) In the event that, subsequent to the conclusion of a voluntary disclosure agreement under section 230, it is established that the applicant failed to disclose a matter that was material for purposes of making a valid voluntary disclosure under section 227, a senior SARS official may—

(*a*) withdraw any relief granted under section 229;

(*b*) regard an amount paid in terms of the voluntary disclosure agreement to constitute part payment of any further outstanding tax debt in respect of the relevant 'default'; and

[Para. (*b*) substituted by s. 79 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*c*) pursue criminal prosecution for a tax offence.

[Para. (*c*) substituted by s. 76 of Act No. 21 of 2012.]

(2) Any decision by the senior SARS official under subsection (1) is subject to objection and appeal.

232. Assessment or determination to give effect to agreement.—(1) If a voluntary disclosure agreement has been concluded under section 230, SARS may, despite anything to the contrary contained in a tax Act, issue an assessment or make a determination for purposes of giving effect to the agreement.

(2) An assessment issued or determination made to give effect to an agreement under section 230 is not subject to objection and appeal.

233. Reporting of voluntary disclosure agreements.—(1) The Commissioner must annually provide to the Auditor-General and to the Minister a summary of all voluntary disclosure agreements concluded in respect of applications received during the period.

(2) The summary must—

(*a*) subject to section 70 (5), not disclose the identity of the applicant, and must be submitted at such time as may be agreed between the Commissioner and the Auditor-General or Minister, as the case may be; and

(*b*) contain details of the number of voluntary disclosure agreements and the amount of tax assessed, which must be reflected in respect of main classes of taxpayers or sections of the public.

CHAPTER 17
CRIMINAL OFFENCES

234. Criminal offences relating to non-compliance with tax Acts.—A person who wilfully and without just cause—

(*a*) fails or neglects to register or notify SARS of a change in registered particulars as required in Chapter 3;

(*b*) fails or neglects to appoint a representative taxpayer or notify SARS of the appointment or change of a representative taxpayer as required under section 153 or 249;

(*c*) fails or neglects to register as a tax practitioner as required under section 240;

(*d*) fails or neglects to submit a return or document to SARS or issue a document to a person as required under a tax Act;

(*e*) fails or neglects to retain records as required under this Act;

(*f*) submits a false certificate or statement under Chapter 4;

(*g*) issues an erroneous, incomplete or false document required to be issued under a tax Act to SARS or to another person;

[Para. (*g*) substituted by s. 77 (*a*) of Act No. 21 of 2012 and by s. 43 of Act No. 33 of 2019.]

(*h*) refuses or neglects to—

(i) furnish, produce or make available any information, document or thing, excluding information requested under section 46 (8);

(ii) reply to or answer truly and fully any questions put to the person by a SARS official;

(iii) take an oath or make a solemn declaration; or

(iv) attend and give evidence,

as and when required in terms of this Act;

(*i*) fails to comply with a directive or instruction issued by SARS to the person under a tax Act;

(*j*) fails or neglects to disclose to SARS any material facts which should have been disclosed under this Act or to notify SARS of anything which the person is required to so notify SARS under a tax Act;

(*k*) obstructs or hinders a SARS official in the discharge of the official's duties;

(*l*) refuses to give assistance required under section 49 (1);

(*m*) holds himself or herself out as a SARS official engaged in carrying out the provisions of this Act;

(*n*) fails or neglects to comply with the provisions of sections 179 to 182, if that person was given notice by SARS to transfer the assets or pay the amounts to SARS as referred to in those sections; or

(*o*) dissipates that person's assets or assists another person to dissipate that other person's assets in order to impede the collection of any taxes, penalties or interest;

(*p*) fails or neglects to withhold and pay to SARS an amount of tax as and when required under a tax Act;

[Para. (*p*) added by s. 77 (*b*) of Act No. 21 of 2012.]

is guilty of an offence and, upon conviction, is subject to a fine or to imprisonment for a period not exceeding two years.

235. Evasion of tax and obtaining undue refunds by fraud or theft.—(1) A person who with intent to evade or to assist another person to evade tax or to obtain an undue refund under a tax Act—

(*a*) makes or causes or allows to be made any false statement or entry in a return or other document, or signs a statement, return or other document so submitted without reasonable grounds for believing the same to be true;

(*b*) gives a false answer, whether orally or in writing, to a request for information made under this Act;

(*c*) prepares, maintains or authorises the preparation or maintenance of false books of account or other records or falsifies or authorises the falsification of books of account or other records;

(*d*) makes use of, or authorises the use of, fraud or contrivance; or

(*e*) makes any false statement for the purposes of obtaining any refund of or exemption from tax,

is guilty of an offence and, upon conviction, is subject to a fine or to imprisonment for a period not exceeding five years.

(2) Any person who makes a statement in the manner referred to in subsection (1) may, unless the person proves that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part, be regarded as being aware of the falsity of the statement.

[Sub-s. (2) substituted by s. 68 of Act No. 23 of 2015.]

(3) Only a senior SARS official may lay a complaint with the South African Police Service or the National Prosecuting Authority regarding an offence under this section.

[S. 235 amended by s. 59 of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012. Sub-s. (3) substituted by s. 78 of Act No. 21 of 2012 and by s. 80 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

236. Criminal offences relating to secrecy provisions.—A person who contravenes the provisions of section 67 (2), (3) or (4), 68 (2), 69 (1) or (6) or 70 (5) is guilty of an offence and, upon conviction, is subject to a fine or to imprisonment for a period not exceeding two years.

[S. 236 substituted by s. 69 of Act No. 23 of 2015.]

237. Criminal offences relating to filing return without authority.—A person who—

(*a*) submits a return or other document to SARS under a forged signature;

(*b*) uses an electronic or digital signature of another person in an electronic communication to SARS without the person's consent and authority; or

(*c*) otherwise submits to SARS a communication on behalf of another person without the person's consent and authority,

is guilty of an offence and, upon conviction, is subject to a fine or to imprisonment for a period not exceeding two years.

[S. 237 substituted by s. 79 of Act No. 21 of 2012.]

238. Jurisdiction of courts in criminal matters.—A person charged with a tax offence may be tried in respect of that offence by a court having jurisdiction within any area in which that person resides or carries on business, in addition to jurisdiction conferred upon a court by any other law.

CHAPTER 18
REGISTRATION OF TAX PRACTITIONERS AND REPORTING OF UNPROFESSIONAL CONDUCT

[Heading of Ch. 18 substituted by s. 80 (1) of Act No. 21 of 2012 with effect from the date of promulgation of that Act: 20 December 2012.]

239. Definitions.—In this Chapter, unless the context otherwise indicates, the following terms, if in single quotation marks, have the following meanings—

'controlling body' means a body established, whether voluntarily or under a law, with power to take disciplinary action against a person who, in carrying on a profession, contravenes the applicable rules or code of conduct for the profession; and

'recognised controlling body' means a 'controlling body' recognised by the Commissioner under section 240A.

[Definition of 'recognised controlling body' inserted by s. 81 (1) (*a*) of Act No. 21 of 2012 with effect from the date of promulgation of that Act: 20 December 2012.]

'registered tax practitioner' . . . . . .

[Definition of 'registered tax practitioner' deleted by s. 81 (1) (*b*) of Act No. 21 of 2012 with effect from the date of promulgation of that Act: 20 December 2012]

240. Registration of tax practitioners.—(1) Every natural person who—

(*a*) provides advice to another person with respect to the application of a tax Act; or

(*b*) completes or assists in completing a return by another person,

[Para. (*b*) substituted by s. 82 (1) (*a*) of Act No. 21 of 2012 with effect from the date of promulgation of that Act: 20 December 2012.]

must—

(i) register with or fall under the jurisdiction of a 'recognised controlling body' by the later of 1 July 2013 or 21 business days after the date on which that person for the first time provides the advice or completes or assists in completing the return; and

(ii) register with SARS as a tax practitioner in the prescribed form and manner, within 21 business days after the date on which that person for the first time provides the advice or completes or assists in completing the return.

[Words following para. (*b*) substituted by s. 82 (1) (*b*) of Act No. 21 of 2012 with effect from the date of promulgation of that Act: 20 December 2012.]

(2) The provisions of this section do not apply in respect of a person who only—

(*a*) provides the advice or completes or assists in completing a return for no consideration to that person or his or her employer or a connected person in relation to that employer or that person;

(*b*) provides the advice in anticipation of or in the course of any litigation to which the Commissioner is a party or where the Commissioner is a complainant;

(*c*) provides the advice as an incidental or subordinate part of providing goods or other services to another person; or

(*d*) provides the advice or completes or assists in completing a return—

(i) to or in respect of the employer by whom that person is employed on a full-time basis or to or in respect of the employer and connected persons in relation to the employer; or

(ii) under the supervision of a registered tax practitioner who has assigned or approved the assignment of those functions to the person.

[Sub-s. (2) amended by s. 82 (1) (*c*) and (*d*) of Act No. 21 of 2012 and substituted by s. 81 (1) (*a*) of Act No. 39 of 2013 deemed to have come into operation on 20 December, 2012.]

(2A) A tax practitioner who has assigned or approved the assignment of functions to a person under subsection (2) (*d*) (ii) is regarded as accountable for the actions of that person in performing those functions for the purposes of a complaint to a recognised controlling body under section 241 (2).

[Sub-s. (2A) inserted by s. 81 (1) (*b*) of Act No. 39 of 2013 deemed to have come into operation on 20 December, 2012.]

(3) A person may not register as a tax practitioner under subsection (1) or SARS may deregister a registered tax practitioner if the person or the registered tax practitioner, as the case may be—

(*a*) during the preceding five years has been removed from a related profession by a 'controlling body' for serious misconduct;

[Para. (*a*) substituted by s. 82 (1) (*e*) of Act No. 21 of 2012 and amended by s. 60 (*b*) of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

(*b*) during the preceding five years has been convicted (whether in the Republic or elsewhere) of—

(i) theft, fraud, forgery or uttering a forged document, perjury or an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004); or

(ii) any offence involving dishonesty,

for which the person has been sentenced to a period of imprisonment exceeding two years without the option of a fine or to a fine exceeding the amount prescribed in the Adjustment of Fines Act, 1991 (Act No. 101 of 1991);

[Para. (*b*) amended by s. 60 (*b*) of Act No. 44 of 2014 and by s. 24 (*a*) of Act No. 22 of 2018.]

(*c*) during the preceding five years has been convicted of a serious tax offence; or

[Para. (*c*) added by s. 60 (*b*) of Act No. 44 of 2014 and amended by s. 24 (*b*) of Act No. 22 of 2018.]

(*d*) during the preceding 12 months has for an aggregate period of at least six months not been tax compliant to the extent referred to in section 256 (3) and has failed to—

(i) demonstrate that he or she has been compliant for that period; or

(ii) remedy the non-compliance,

within the period specified in a notice by SARS.

[Sub-s. (3) amended by s. 60 (*a*) of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012. Para. (*d*) added by s. 24 (*c*) of Act No. 22 of 2018.]

(4) If prosecution for a serious tax offence has been instituted but not finalised against a person or registered tax practitioner and if the person or registered tax practitioner continues with the commission of a serious tax offence after the criminal proceedings have been instituted, a senior SARS official may—

(*a*) not register the person as a registered tax practitioner; or

(*b*) suspend the registration of the registered tax practitioner,

for the duration of the criminal proceedings commencing on the date that prosecution is instituted and ending on the date that the person or registered tax practitioner is finally acquitted.

[Sub-s. (4) added by s. 60 (*c*) of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

240A. Recognition of controlling bodies.—(1) The Commissioner must recognise as a 'recognised controlling body'—

(*a*) the Independent Regulatory Board for Auditors established in terms of section 3 of the Auditing Professions Act, 2005 (Act No. 26 of 2005);

(*b*) the Legal Practice Council established under the Legal Practice Act, 2014 (Act No. 28 of 2014);

[Para. (*b*) substituted by s. 44 (*a*) of Act No. 33 of 2019.]

(*c*) . . . . . .

[Para. (*c*) deleted by s. 44 (*b*) of Act No. 33 of 2019.]

(*d*) a statutory body that the Minister is satisfied is similar to the statutory bodies in this subsection and the details of which are published in the *Gazette*.

(2) The Commissioner may recognise a 'controlling body', for natural persons who provide advice with respect to the application of a tax Act or complete returns, as a 'recognised controlling body' if the body—

(*a*) in respect of such persons, maintains relevant and effective—

(i) minimum qualification and experience requirements;

(ii) continuing professional education requirements;

(iii) codes of ethics and conduct; and

(iv) disciplinary codes and procedures;

[Para. (*a*) amended by s. 82 (1) (*a*) of Act No. 39 of 2013 deemed to have come into operation on 20 December, 2012.]

(*b*) is approved in terms of section 30B of the Income Tax Act for purposes of section 10 (1) (*d*) (iv) of the Act; and

(*c*) has at least 1 000 members when applying for recognition or reasonable prospects of having 1 000 members within a year of applying.

(3) A body must within the prescribed time period and in the prescribed form and manner, if recognised under—

(*a*) subsection (1), submit a list of its members to whom the provisions under section 240 (1) apply; and

(*b*) subsection (2), submit a report on its members and compliance with this Chapter.

[Sub-s. (3) substituted by s. 82 (1) (*b*) of Act No. 39 of 2013 and by s. 61 (1) of Act No. 44 of 2014 deemed to have come into operation on 20 December, 2012.]

(4) The Minister may appoint a panel of retired judges or persons of similar stature and competence one or more of whom may decide, on behalf of a body recognised under subsection (2), complaints lodged under section 241—

(*a*) at the request of the body; or

(*b*) if the Minister is satisfied that the body's disciplinary process is ineffective.

(5) The costs of the panel in deciding complaints will be borne equally by such a body and SARS.

(6) If a body recognised under subsection (2) no longer meets the listed requirements, the Commissioner must notify it that if it does not take corrective steps within the period specified in the notice, its recognition will be withdrawn at the end of the period.

[S. 240A inserted by s. 83 (1) of Act No. 21 of 2012 with effect from the date of promulgation of that Act: 20 December 2012.]

241. Complaint to controlling body.—(1) A senior SARS official may lodge a complaint with a 'controlling body' if a person who carries on a profession governed by the 'controlling body', did or omitted to do anything with respect to the affairs of a taxpayer, including that person's affairs, that in the opinion of the official—

(*a*) was intended to assist the taxpayer to avoid or unduly postpone the performance of an obligation imposed on the taxpayer under a tax Act;

(*b*) by reason of negligence on the part of the person resulted in the avoidance or undue postponement of the performance of an obligation imposed on the taxpayer under a tax Act;

(*c*) constitutes a contravention of a rule or code of conduct for the profession which may result in disciplinary action being taken against the person by the body; or

(*d*) constitutes conduct under subsection (2) by a registered tax practitioner.

(2) A senior SARS official may lodge a complaint with a 'recognised controlling body' if a registered tax practitioner has, in the opinion of the official—

(*a*) without exercising due diligence prepared or assisted in the preparation, approval or submission of any return, affidavit or other document relating to matters affecting the application of a tax Act;

(*b*) unreasonably delayed the finalisation of any matter before SARS;

(*c*) given an opinion contrary to clear law, recklessly or through gross incompetence, with regard to any matter relating to a tax Act;

(*d*) been grossly negligent with regard to any work performed as a registered tax practitioner;

(*e*) knowingly given false or misleading information in connection with matters affecting the application of a tax Act or participated in such activity; or

(*f*) directly or indirectly attempted to influence a SARS official with regard to any matter relating to a tax Act by the use of threats, false accusations, duress, or

coercion, or by offering gratification as defined in the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).

[S. 241 substituted by s. 84 (1) of Act No. 21 of 2012 with effect from the date of promulgation of that Act: 20 December 2012.]

242. Disclosure of information regarding complaint and remedies of taxpayer.—(1) Despite section 69, the senior SARS official lodging a complaint under section 241 may disclose the taxpayer information as in the opinion of the official is necessary to lay before the 'controlling body' to which the complaint is made.

[Sub-s. (1) substituted by s. 83 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(2) Before a complaint is lodged or information is disclosed, SARS must deliver to the taxpayer concerned and the person against whom the complaint is to be made notification of the intended complaint and information to be disclosed.

[Sub-s. (2) substituted by s. 83 of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(3) The taxpayer or that person may, within 21 business days after the date of the notification, lodge with SARS an objection to the lodging of the complaint or disclosure of the information.

(4) If on the expiry of that period of 21 business days no objection has been lodged or, if an objection has been lodged and SARS is not satisfied that the objection should be sustained, a senior SARS official may thereupon lodge the complaint as referred to in section 241.

243. Complaint considered by controlling body.—(1) The complaint is to be considered by the 'controlling body' according to its rules.

(2) A hearing of the matter where details of a person's tax affairs will be disclosed, may be attended only by persons whose attendance, in the opinion of the 'controlling body', is necessary for the proper consideration of the complaint.

(3) The 'controlling body' and its members must preserve secrecy in regard to the information as to the affairs of a person as may be conveyed to them by SARS or as may otherwise come to their notice in the investigation of the complaint and must not communicate the information to a person other than the person concerned or the person against whom the complaint is lodged, unless the disclosure of the information is ordered by a competent court of law.

CHAPTER 19
GENERAL PROVISIONS

244. Deadlines.—(1) If—

(*a*) a day notified by SARS or specified in a tax Act for payment, submission or other action; or

(*b*) the last day of a period within which payment, submission or other action under a tax Act must be made,

falls on a Saturday, Sunday or public holiday, the action must be done not later than the last business day before the Saturday, Sunday or public holiday.

(2) The Commissioner may prescribe the time of day by which a payment, submission or other action must be done, and if it is done after that time on the day it is regarded as done on the first business day following the specified day.

(3) If SARS is authorised to extend a deadline, the application for extension must be submitted to SARS in the prescribed form before the deadline expires unless—

(*a*) reasonable grounds exist for the delay and the application is submitted within 21 business days of the deadline; or

[Para. (*a*) substituted by s. 85 of Act No. 21 of 2012.]

(*b*) the delay is due to a circumstance referred to in section 218 (2) (*a*) to (*e*) or any other circumstance of analogous seriousness and the application is submitted within three years of the deadline.

245. Power of Minister to determine date for submission of returns and payment of tax.—(1) Despite any other provision of a tax Act, if the date for the submission of a return or the payment of tax is the last day of the financial year of the Government, the Minister may by public notice prescribe any other date for submission of the return and payment of the tax, which date must not fall on a day more than two business days prior to the last day of that year.

(2) The notice contemplated in subsection (1) must be published at least 21 business days prior to the date so prescribed by the Minister.

246. Public officers of companies.—(1) Every company carrying on business or having an office in the Republic must at all times be represented by an individual residing in the Republic.

(2) The individual representative under subsection (1) must be—

(*a*) approved by SARS and—

(i) must be a person who is a senior official of the company; or

(ii) if no senior official resides in the Republic, may be another suitable person;

[Para. (*a*) substituted by s. 84 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(*b*) appointed by the company or by an agent or legal practitioner who has authority to appoint such a representative for the purposes of a tax Act;

[Para. (*b*) substituted by s. 45 of Act No. 33 of 2019.]

(*c*) called the public officer of the company; and

(*d*) appointed within one month after the company begins to carry on business or acquires an office in the Republic.

(3) If a public officer is not appointed as required under this section, the public officer is the director, company secretary or other officer of the company that SARS designates for that purpose.

[Sub-s. (3) substituted by s. 84 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(4) A company that has not appointed a public officer is subject to a tax Act as if a tax Act did not require the public officer to be appointed.

[Sub-s. (4) substituted by s. 86 of Act No. 21 of 2012.]

(5) A public officer is responsible for all acts, matters, or things that the public officer's company must do under a tax Act, and in case of default, the public officer is subject to penalties for the company's defaults.

(6) A public officer's company is regarded as having done everything done by the public officer in the officer's representative capacity.

(7) If SARS is of the opinion that a person is no longer suitable to represent the company as public officer SARS may withdraw its approval under subsection (2) (*a*).

247. Company address for notices and documents.—(1) A company referred to in section 246 (1) must, within the period referred to in section 246 (2) (*d*), appoint a place within the Republic approved by SARS at which SARS may serve, deliver or send the company a notice or other document provided for under a tax Act.

(2) Every notice, process, or proceeding which under a tax Act may be given to, served upon or taken against a company referred to in section 246 (1), may be given to, served upon, or taken against its public officer, or if at any time there is no public officer, any officer or person acting or appearing to act in the management of the business or affairs of the company or as agent for the company.

248. Public officer in event of liquidation, winding-up or business rescue.—(1) In the event of a company referred to in section 246 (1) being placed in voluntary or compulsory liquidation, the liquidator or liquidators duly appointed are required to exercise in respect of the company all the functions and assume all the responsibilities of a public officer under a tax Act during the continuance of the liquidation.

(2) In the event of a company referred to in section 246 (1) being subject to a business rescue plan referred to in Part D of Chapter 6 of the "Companies Act", the business rescue practitioner as defined in that Chapter is required to exercise, in respect of the company, all the functions and assume all the responsibilities of a public officer under a tax Act for the period that the company is subject to the business rescue plan.

[S. 248 amended by s. 62 (1) (*a*) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January, 2015. Sub-s. (2) added by s. 62 (1) (*b*) of Act No. 44 of 2014 with effect from the date of promulgation of that Act, 20 January 2015.]

(Editorial Note: Subsection (1), previously section 248, has been re-numbered due to the addition of subsection (2) by s. 62 (1) (*b*) of Act No. 44 of 2014.)

249. Default in appointing public officer or address for notices or documents.—(1) No appointment is deemed to have been made under section 246 (2) until notice thereof specifying the name of the public officer and an address for service or delivery of notices and documents has been given to SARS.

(2) A company must—

(*a*) keep the office of public officer constantly filled and must at all times maintain a place for the service or delivery of notices in accordance with section 247 (1); and

(*b*) notify SARS of every change of public officer or the place for the service or delivery of notices within 21 business days of the change taking effect.

250. Authentication of documents.—(1) A form, notice, demand or other document issued or given by or on behalf of SARS or a SARS official under a tax Act is sufficiently authenticated if the name of SARS or the name or official designation of the SARS official is stamped or printed on it.

(2) A return made or purporting to be made or signed by or on behalf of a person is regarded as duly made and signed by the person affected unless the person proves that the return was not made or signed by the person or on the person's behalf.

(3) Subsection (2) applies to other documents submitted to SARS by or on behalf of a person.

251. Delivery of documents to persons other than companies.—If a tax Act requires or authorises SARS to issue, give, send, or serve a notice, document or other communication to a person (other than a company), SARS is regarded as having issued, given, sent or served the communication to the person if—

(*a*) handed to the person;

(*b*) left with another person over 16 years of age apparently residing or employed at the person's last known residence, office or place of business;

(*c*) sent to the person by post to the person's last known address, which includes—

(i) a residence, office or place of business referred to in paragraph (*b*); or

(ii) the person's last known post office box number or that of the person's employer; or

(*d*) sent to the person's last known electronic address, which includes—

(i) the person's last known email address;

(ii) the person's last known telefax number; or

(iii) the person's electronic address as defined in the rules issued under section 255 (1).

[Para. (*d*) substituted by s. 70 (1) of Act No. 23 of 2015 deemed to have come into operation on 25 August, 2014.]

252. Delivery of documents to companies.—If a tax Act requires or authorises SARS to issue, give, send or serve a notice, document or other communication to a company, SARS is regarded as having issued, given, sent or served the communication to the company if—

(*a*) handed to the public officer of the company;

[Para. (*a*) substituted by s. 87 of Act No. 21 of 2012.]

(*b*) left with a person older than 16 years apparently residing or employed at—

(i) the place appointed by the company under section 247; or

(ii) where no such place has been appointed by the company, the last known office or place of business of the company;

(*c*) sent by post addressed to the company or its public officer at the company or public officer's last known address, which includes—

(i) an office or place referred to in paragraph (*b*); or

(ii) the company or public officer's last known post office box number or that of the public officer's employer; or

(*d*) sent to the company or its public officer's last known electronic address, which includes the—

(i) last known email address;

(ii) last known telefax number; or

(iii) electronic address as defined in the rules issued under section 255 (1).

[Para. (*d*) substituted by s. 71 (1) of Act No. 23 of 2015 deemed to have come into operation on 25 August, 2014.]

253. Documents delivered deemed to have been received.—(1) A notice, document or other communication issued, given, sent or served in the manner referred to in section 251 or 252, is regarded as received by the person to whom it was delivered or left, or if posted it is regarded as having been received by the person to whom it was addressed at the time when it would, in the ordinary course of post, have arrived at the addressed place.

(2) Subsection (1) does not apply if—

(*a*) SARS is satisfied that the notice, document or other communication was not received or was received at some other time; or

(*b*) a court decides that the notice, document or other communication was not received or was received at some other time.

(3) If SARS is satisfied that—

(*a*) a notice, document or other communication (other than a notice of assessment) issued, given, sent or served in a manner referred to in section 251 or 252 (excluding paragraphs (*a*) and (*b*) thereof)—

(i) has not been received by the addressee; or

(ii) has been received by that person considerably later than it should have been received; and

(*b*) the person has in consequence been placed at a material disadvantage,

the notice, document or other communication must be withdrawn and be issued, given, sent or served anew.

254. Defect does not affect validity.—(1) A notice of assessment or other notice or document issued to a person under a tax Act is not to be considered invalid or ineffective by reason of a failure to comply with the requirements of section 251 or 252 if the person had effective knowledge of the fact of the notice or document and of its content.

(2) A notice of assessment or other notice or document issued under a tax Act is not to be considered invalid or ineffective by reason of defects if it is, in substance and effect, in conformity with this Act, and the person assessed or affected by the notice or document is designated in it according to common understanding.

255. Rules for electronic communication.—(1) The Commissioner may by public notice make rules prescribing—

(*a*) the procedures for submitting a return in electronic format, electronic record retention and other electronic communications between SARS and other persons;

(*b*) requirements for an electronic or digital signature of a return or communication; and

(*c*) the procedures for electronic record retention by SARS.

[Sub-s. (1) substituted by s. 88 of Act No. 21 of 2012.]

(2) SARS may, in the case of a return or other document submitted in electronic format, accept an electronic or digital signature of a person as a valid signature for purposes of a tax Act if a signature is required.

[Sub-s. (2) substituted by s. 63 of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

(3) If in any proceedings under a tax Act, the question arises whether an electronic or digital signature of a person referred to in subsection (2) was used with the authority of the person, it must be assumed, in the absence of proof to the contrary, that the signature was so used.

256. Tax compliance status.—(1) A taxpayer may apply, in the prescribed form and manner, to SARS for third party access to the taxpayer's tax compliance status.

(2) SARS must provide or decline to provide third party access to the taxpayer's tax compliance status within 21 business days from the date the application is submitted or such longer period as may reasonably be required to confirm the correctness of the taxpayer's tax compliance status.

(3) The taxpayer's tax compliance status may only be indicated as compliant if the taxpayer—

(*a*) is registered for tax as required in terms of a tax Act;

(*b*) does not have any outstanding tax debt, excluding a tax debt—

(i) contemplated in section 167 or 204; or

(ii) that has been suspended under section 164; or

(iii) that may not be recovered for the period specified in section 164 (6); or

(iv) that does not exceed the amount referred to in section 169 (4) or any higher amount that the Commissioner may determine by public notice; and

(*c*) does not have any outstanding return, unless an arrangement with SARS has been made for the submission of the return.

(4) An indication of the tax compliance status of a taxpayer must include at least—

(*a*) the date of the tax compliance status of the taxpayer;

(*b*) the name and taxpayer reference number of the taxpayer; and

(*c*) the taxpayer's tax compliance status as at the date referred to in paragraph (*a*).

(5) Despite the provisions of Chapter 6, SARS may indicate the taxpayer's tax compliance status as at a current date, or a previous date as prescribed by the Minister in a regulation under section 257 (2A), to—

(*a*) an organ of state; or

(*b*) a person to whom the taxpayer has provided third party access to the taxpayer's tax compliance status.

(6) SARS may revoke third party access to the taxpayer's tax compliance status if the access—

(*a*) was issued in error; or

(*b*) was provided on the basis of fraud, misrepresentation or non-disclosure of material facts,

and SARS has given the taxpayer prior notice and an opportunity to respond to the allegations of at least 10 business days prior to the revocation.

(7) A taxpayer's tax compliance status will be indicated as non-compliant by SARS for the period commencing on the date that the taxpayer no longer complies with a requirement under subsection (3), or such later date as the Commissioner may prescribe, and ending on the date that the taxpayer remedies the non-compliance.

[S. 256 substituted by s. 89 (1) of Act No. 21 of 2012, amended by s. 85 of Act No. 39 of 2013, substituted by s. 64 (1) of Act No. 44 of 2014, amended by s. 72 of Act No. 23 of 2015 and substituted by s. 46 of Act No. 33 of 2019.]

257. Regulations by Minister.—(1) The Minister may make regulations regarding—

(*a*) any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act; and

(*b*) any matter which under this Act is required or permitted to be prescribed.

(2) The Minister may, after consultation with the Tax Ombud, make regulations regarding—

(*a*) the proceedings of the Tax Ombud; and

(*b*) the limitations on the mandate of the Tax Ombud, having regard to—

(i) the factual or legal complexity of any complaint dealt with by the Tax Ombud;

(ii) the nature of the taxpayer whose complaint is dealt with by the Tax Ombud; and

(iii) the maximum amount involved in the dispute between the taxpayer and SARS.

[Para. (*b*) amended by s. 90 (*a*) of Act No. 21 of 2012.]

(2A) For purposes of a confirmation of tax compliance status of a taxpayer under section 256, the Minister may make regulations regarding—

(*a*) the circumstances when a confirmation or an update of or a change in the tax compliance status of a taxpayer may be required from a person or SARS;

(*b*) the period of validity of a confirmation of tax compliance status of a taxpayer; or

(*c*) any procedure to further regulate the issue or withdrawal of a confirmation of tax compliance status of a taxpayer.

[Sub-s. (2A) inserted by s. 90 (*b*) of Act No. 21 of 2012 and substitued by s. 73 of Act No. 23 of 2015.]

(3) For purposes of the regulations referred to in paragraph (*e*) of the definition of "biometric information" in section 1, the Minister must publish the draft regulations in the *Gazette* for public comment and submit the draft regulations to Parliament for parliamentary scrutiny at least 30 days before the draft regulations are published.

CHAPTER 20
TRANSITIONAL PROVISIONS

258. New taxpayer reference number.—If a person has been allocated a taxpayer, tax or other reference number for purposes of a tax Act before the promulgation of this Act, the number remains in force until the time that SARS allocates a taxpayer reference number to the person under section 24 for purposes of the relevant tax type.

259. Appointment of Tax Ombud.—(1) The Minister must appoint a person as Tax Ombud under section 14 within one year of the commencement date of this Act.

(2) The first Tax Ombud appointed under this Act may not review a matter that arose more than one year before the day on which the Tax Ombud is appointed, unless the Minister requests the Tax Ombud to do so.

260. Provisions relating to secrecy.—A person who took and subscribed to an oath or solemn declaration of secrecy under a tax Act before the commencement date of this Act is regarded as having taken and subscribed to the oath or solemn declaration under section 67 (2).

261. Public officer previously appointed.—A public officer appointed or regarded as appointed under a tax Act and holding office immediately before the commencement date of this Act, is regarded as a public officer appointed under this Act.

262. Appointment of chairpersons of tax board.—A legal practitioner appointed to the panel of persons who may serve as chairpersons of the tax board under a tax Act, who is on that panel immediately before the commencement date of this Act, is regarded as appointed under the provisions of section 111 until the earlier of—

(*a*) the expiry of the legal practitioner's appointment under the provisions previously in force; or

(*b*) termination of the legal practitioner's appointment under section 111 (3).

[S. 262 substituted by s. 47 of Act No. 33 of 2019.]

263. Appointment of members of tax court.—A member of the tax court appointed under a tax Act who is a member immediately before the commencement date of this Act is regarded as appointed under the provisions of section 120 (1) until the expiry of his or her term of office in terms of the provisions previously in force, or until his or her appointment in terms of section 120 (4) is terminated or lapses.

264. Continuation of tax board, tax court and court rules.—(1) A tax board or tax court that was established under a tax Act and exists immediately before the commencement date of this Act, is regarded as established under section 108 or 116, respectively, of this Act.

(2) Rules of court issued by the Minister under a tax Act that are in force immediately before the commencement date of this Act continue in force as if they were issued under section 103.

265. Continuation of appointment to a post or office or delegation by Commissioner.—(1) A person appointed to a post or office or delegated by the Commissioner under the SARS Act or a tax Act, which appointment or delegation is in force immediately before the commencement date of this Act, is regarded as appointed or delegated under this Act.

(2) Subsection (1) applies until the person is so appointed or delegated under this Act or the appointment or delegation is withdrawn.

266. Continuation of authority to audit.—If a SARS official was issued a letter authorising the official to audit under a tax Act, and the letter is in force immediately before the commencement date of this Act, the letter is regarded as issued to the official under section 41.

267. Conduct of inquiries and execution of search and seizure warrants.—(1) If the Commissioner authorised an inquiry under a tax Act and a judge granted an order designating a person to act as presiding officer in the inquiry before the commencement date of this Act, the inquiry is regarded as authorised under sections 50 and 51.

(2) If a judge issued a search and seizure warrant under a tax Act that has not been executed before the commencement date of this Act, the warrant is regarded as issued under section 60.

268. Application of Chapter 15.—Chapter 15 applies to non-compliance resulting from a continuous failure by a person to comply with an obligation that exists on the date a notice referred to in section 210 (2) comes into effect, in which case the date on which the non-compliance occurred will be regarded as the date that notice came into effect.

269. Continuation of authority, rights and obligations.—(1) Rules, notices and regulations issued under the provisions of a tax Act repealed by this Act that are in force immediately before the commencement date of this Act, remain in force as if they were issued under the equivalent provisions of this Act, to the extent consistent with this Act, until new rules, notices and regulations are issued under such provisions.

[Sub-s. (1) substituted by s. 91 of Act No. 21 of 2012.]

(2) Forms prescribed under the authority of a tax Act before the commencement date of this Act, and in use immediately before the date of commencement of this Act, are considered to have been prescribed under the authority of this Act, to the extent consistent with this Act.

(3) Rulings and opinions issued under the provisions of a tax Act repealed by this Act and in force immediately before the commencement date of this Act, which have not been revoked, are regarded as having been issued under the authority of this Act to the extent relevant to and consistent with this Act.

(4) An order of a court under the authority of a tax Act and in force immediately before the commencement date of this Act, continues to have the same force and effect as if the provisions had not been repealed or amended, subject to any further order of the court.

(5) A right or entitlement enjoyed by, or obligation imposed on, a person under the repealed or amended provisions of a tax Act, that had not been exercised or complied with before the commencement date of this Act, is a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act.

(6) The commission of an offence before the commencement date of this Act which is a statutory offence under the provisions of a tax Act repealed by this Act, may be investigated by SARS, in the manner referred to in Chapter 5, and prosecuted as if the statutory offence remained in force.

270. Application of Act to prior or continuing action.—(1) Subject to this Chapter, this Act applies to an act, omission or proceeding taken, occurring or instituted before the commencement date of this Act, but without prejudice to the action taken or proceedings conducted before the commencement date of the comparable provisions of this Act.

(2) The following actions or proceedings taken or instituted under the provisions of a tax Act repealed by this Act but not completed by the commencement date of the comparable provisions of this Act, must be continued and concluded under the provisions of this Act as if taken or instituted under this Act—

(*a*) a decision by a SARS official in terms of a statutory power to do so;

(*b*) a request by a person for the withdrawal or amendment of a decision or notice by SARS, registration for tax, form of record keeping, information, taxpayer record, advance ruling, refund, reduced assessment, suspension of a disputed tax debt, deferral, write off, compromise or waiver of a tax debt and the remittance of interest or a penalty;

(*c*) an inspection, verification, request for information, audit, criminal investigation, inquiry or search and seizure;

(*d*) an objection, appeal to the tax board, tax court or higher court, alternative dispute resolution, settlement discussions or other related High Court application;

(*e*) suspension of a disputed tax debt;

(*f*) a deferment, write off or compromise of a tax debt; or

(*g*) recovery of a tax debt, including the appointment of an agent to satisfy a tax debt, execution of a civil judgment or sequestration, liquidation or winding-up instituted by SARS or any other related court application.

(3) A form, notice, demand or other document issued, given or received by a person or SARS under the provisions of a tax Act repealed by this Act, must be regarded as issued, given or received in terms of any comparable provision of this Act, as from the date that the form, notice, demand or other document was issued, given or received under the repealed provisions.

(4) A record kept or retained by a person as required under the provisions of a tax Act repealed by this Act, must be regarded as kept or retained as required under the comparable provisions of this Act from the date that record was kept or retained under the repealed provisions of the tax Act.

(5) If the period for an application, objection, appeal or prosecution had expired before the commencement date of this Act, nothing in this Act may be construed as enabling the

application, objection, appeal or prosecution to be made under this Act by reason only of the fact that a longer period is specified in this Act.

(6) Additional tax, penalty or interest may be imposed or levied as if the repeal of the legislation in Schedule 1 had not been effected and may be assessed and recovered under this Act, if—

(*a*) additional tax, penalty or interest which but for the repeal would have been capable of being imposed, levied, assessed or recovered by the commencement date of this Act, has not been imposed, levied, assessed or recovered by the commencement date of this Act; or

(*b*) an understatement penalty, administrative non-compliance penalty or interest under this Act cannot be imposed, levied, assessed or recovered in respect of an understatement as defined in section 221, non-compliance or failure to pay that occurred before the commencement date of this Act.

[Sub-s. (6) substituted by s. 86 (*a*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(6A) For the purposes of subsection (6), 'capable of being imposed' means that the verification, audit or investigation necessary to determine the additional tax, penalty or interest had been completed before the commencement date of this Act.

[Sub-s. (6A) inserted by s. 86 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(6B) If a return was due by the commencement date of this Act, the requirement under section 223 (3) (*b*) (i) is regarded as having been met for the purposes of remittance of a substantial understatement penalty.

[Sub-s. (6B) inserted by s. 86 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(6C) A person who made a valid voluntary disclosure before the commencement date of this Act, qualifies for the relief referred to in section 229 (*b*) if the audit or investigation of the person's affairs has commenced before but only concluded after commencement date of this Act and the requirements of Part B of Chapter 16 have been met.

[Sub-s. (6C) inserted by s. 86 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(6D) If an understatement penalty is imposed as a result of an understatement, as defined in section 221, made in a return submitted before the commencement date of this Act, a taxpayer may object against the penalty under Chapter 9 (whether or not the taxpayer has previously objected against the assessment imposing the penalty) and if the return was required under—

(*a*) the Income Tax Act, excluding returns required under the Fourth Schedule to that Act, a senior SARS official must, in considering the objection, reduce the penalty in whole or in part if satisfied that there were extenuating circumstances; or

[Para. (*a*) substituted by s. 65 (*a*) of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

(*b*) the Value-Added Tax Act or the Fourth Schedule to the Income Tax Act, a senior SARS official must reduce the penalty in whole if the penalty was imposed under circumstances other than the circumstances referred to in item (vi) of the understatement penalty table in section 223 (1).

[Sub-s. (6D) inserted by s. 86 (*b*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012. Para. (*b*) substituted by s. 65 (*a*) of Act No. 44 of 2014 and by s. 64 of Act No. 16 of 2016.]

(6E) Until the date on which the whole of Chapter 12 and of Schedule 1 to this Act come into operation in respect of a tax type—

(*a*) the accrual and payment of interest on an understatement penalty imposed under section 222 must be calculated in the manner that interest upon an additional tax penalty imposed under a tax Act, prior to the repeal of the penalty by this Act, was calculated in terms of the interest provisions of the relevant tax Act; and

(*b*) the effective date referred to in section 187 (3) (*f*) for tax understated before 1 October 2012 must be regarded as the commencement date of this Act.

[Sub-s. (6E) inserted by s. 74 (1) of Act No. 23 of 2015 and substituted by s. 29 of Act No. 13 of 2017.]

(6F) From the date on which the whole of Chapter 12 and of Schedule 1 to this Act come into operation, the accrual and payment of interest on an understatement penalty imposed under section 222 must be calculated in the manner prescribed by Chapter 12 in respect of an understatement penalty imposed after such date.

[Sub-s. (6F) inserted by s. 74 (1) of Act No. 23 of 2015 deemed to have come into operation on 1 October, 2012.]

(7) Interest arising before the commencement date of this Act must be—

(*a*) calculated in accordance with the relevant tax Act until the commencement date; and

(*b*) regarded as interest payable under this Act from the commencement date of the comparable provisions of this Act.

[Para. (*b*) substituted by s. 86 (*c*) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012.]

(8) . . . . . .

[Sub-s. (8) amended by s. 86 (*d*) of Act No. 39 of 2013 and deleted by s. 65 (*b*) of Act No. 44 of 2014 deemed to have come into operation on 1 October, 2012.]

271. Amendment of legislation.—The Acts listed in Schedule 1 are amended to the extent set out in that Schedule.

272. Short title and commencement.—(1) This Act is called the Tax Administration Act, 2011, and comes into operation on a date to be determined by the President by proclamation in the *Gazette*.

(2) The President may determine different dates for different provisions of this Act to come into operation and for the purposes of Chapter 12 and the provisions relating to interest in Schedule 1, the Minister may determine by public notice the date on which they come into operation in respect of a tax type.

[Sub-s. (2) substituted by s. 30 of Act No. 13 of 2017.]

(3) Subparagraphs (*g*), (*h*), (*i*) and (*j*) of paragraph 60 of Schedule 1 come into operation on the date on which Part VIII of Chapter II of the Income Tax Act, 1962, comes into operation.

(4) Paragraph 78 of Schedule 1 is deemed to have come into operation on 1 January 2011 and applies in respect of premiums incurred on or after that date.

(5) Paragraph 184 of Schedule 1 is deemed to have come into operation on 1 March 2010 and applies in respect of a mineral resource transferred on or after that date.

COMMENCEMENT OF THIS ACT

Date of commencement	*The whole Act/ Sections*	*Proclamation No.*	*Government Gazette*	*Date of Government Gazette*
1 October, 2012	The whole Act except ss. 187(2), (3) (*a*)-(*e*) and (4), 188 (2) and (3) and 189 (2) and (5); and any provision of Schedule 1 to the Act that amends or repeals a provision of a tax Act relating to interest under that tax Act, to the extent of that amendment or repeal.	51	35687	14 September, 2012
This Act was published in *Government Gazette* 35491 dated 4 July, 2012.				

SCHEDULE 1

SECTION 271

(Date of commencement of Sch. 1: 1 October, 2012, except any provision that amends or repeals a provision of a tax Act relating to interest under that tax Act, to the extent of that amendment or repeal – to be proclaimed with effect from a date to be determined by the President by proclamation in the *Gazette*.)

No. and Year	**Short Title**	**Extent of amendment or repeal**
Act No. 40 of 1949	**Transfer Duty Act, 1949**	**1. Amends section 1.**
		2. Amends section 3.
		3. Amendment of section 4.—Section 4 of the Transfer Duty Act, 1949, is hereby amended— (*a*) by the substitution for the heading of the following heading: "**Penalty on late payment of duty**"; **(*b*) Substitutes subsection (1);** (*c*) by the deletion of subsection (1A). (Date of commencement of s. 3 (*a*) and (*c*) to be proclaimed.)

continued

No. and Year	Short Title	Extent of amendment or repeal
		4. Amends section 10.
		5. Amends section 11.
		6. Repeals sections 11A, 11B, 11C, 11D and 11E.
		7. Amends section 13.
		8. Repeals sections 13A, 13B and 13C.
		9. Amends section 14.
		10. Amends section 15.
		11. Repeals sections 17, 17A, 17B, 18, 20, 20A, 20C and 20D.
Act No. 45 of 1955	**Estate Duty Act, 1955**	**12. Amends section 1.**
		13. Amends section 6.
		14. Amends section 7.
		15. Repeals sections 8, 8A, 8B, 8C, 8D and 8E.
		16. Amends section 9.
		17. Repeals sections 9A and 9B.
		18. Amendment of section 10.—Section 10 of the Estate Duty Act, 1955, is hereby amended by the substitution for subsection (1) of the following subsection: "(1) If the assessment of duty is delayed beyond a period of twelve months from the date of death, interest at the prescribed rate shall be payable as from a date twelve months after the date of death on the difference (if any) between the duty assessed and any deposit (if any) made on account of the duty payable within the said period of twelve months.". (Date of commencement of s. 18 to be proclaimed.)
		19. Substitutes section 12.
		20. Repeals sections 12A, 12B, 23, 23*bis*, 24, 25, 25A and 27.
		21. Amends section 28.
		22. Repeals sections 28A and 30.

continued

No. and Year	Short Title	Extent of amendment or repeal
Act No. 58 of 1962	**Income Tax Act, 1962**	**23 (*a*)-(*e*); (*g*)-(*o*). Amends section 1;** (*f*) by the substitution for the definition of "prescribed rate" of the following definition: " **'prescribed rate'** means the rate contemplated in section 189 (3) of the Tax Administration Act;"; (Date of commencement of para. (*f*) to be proclaimed.)
		24. Amends section 2.
		25. Amends section 3.
		26. Repeals section 4.
		27. Amends section 4A.
		28. Amends section 5.
		29. Amends section 6*quat*.
		30. Amends section 8.
		31. Amends section 10.
		32. Amends section 10A.
		33. Amends section 11.
		34. Amends section 11D.
		35. Amends section 12G.
		36. Amends section 12I.
		37. Amends section 12J.
		38. Amends section 23.
		39. Amends section 23H.
		40. Amends section 24J.
		41. Amends section 25A.
		42. Amends section 35.
		43 (*a*)-(*b*); (*d*)-(*e*). Amends section 35A (6), (7), (10) and (13) respectively; (*c*) by the substitution for subsection (9) of the following subsection: "(9) If a purchaser fails to pay any amount contemplated in subsection (1) to the Commissioner within the period allowed for payment in terms of subsection (4), that purchaser must pay a penalty equal to ten per cent of the amount, in addition to any other penalty or charge for which he or she may be liable under this Act."; (Date of commencement of para. (*c*) to be proclaimed.)

continued

No. and Year	Short Title	Extent of amendment or repeal
		44. Amends section 37H.
		45. Repeals section 40.
		46. Amends section 47C.
		47. Amends section 47F.
		48. Amends section 47G.
		49. Repeals sections 47H and 47I.
		50. Amends section 60.
		51. Amends section 61.
		52. Amends section 62.
		53. Repeals section 63.
		54. Amends section 64B.
		55. Amends section 64K.
		56. Amends section 64L.
		57. Amends section 64M.
		58. Amends section 64R. (Editorial Note: Please note that s. 64R of Act No. 58 of 1962 has previously been repealed by s. 85 (1) of Act No. 24 of 2011 with effect from 1 April, 2012.)
		59. Repeals section 65.
		60. Amends section 66.
		61. Amends section 67.
		62. Repeals sections 67A, 69, 70, 70A, 70B and 71.
		63. Amends section 72A.
		64. Repeals sections 73, 73A, 73B, 73C, 74, 74A, 74B, 74C, 74D, 75, 75A, 75B, 76, 76B, 76C, 76D, 76E, 76F, 76G, 76H, 76I, 76J, 76K, 76L, 76M, 76N, 76O, 76P, 76Q, 76R, 76S, 77, 78, 79, 79A, 79B and 80.
		65. Amends section 80B.
		66. Repeal of sections 80K and 80M to 89*sept*.—Sections 80K, 80M, 80N, 80O, 80P, 80Q, 80R, 80S, 80T, 81, 82, 83, 83A, 84, 85, 86A, 87, 88, 88A, 88B, 88C, 88D, 88E, 88F, 88G, 88H, 89, 89*bis*, 89*ter*, 89*quat*, 89*quin*, 89*sex* and 89*sept* of the Income Tax Act, 1962, are hereby repealed. (Date of commencement of s. 66 insofar as it repeals: (*a*) ss. 80M-80T, 81-83, 83A, 84-85, 86A, 87-88, 88A-88H, 89 (1), 89*ter*, 89*sex* and 89*sept*: 1 October, 2012; and

continued

No. and Year	Short Title	Extent of amendment or repeal
		(*b*) ss. 80K, 89 (2), 89*bis*, 89*quat* and 89*quin*: to be proclaimed.)
		67. Amends section 90.
		(Editorial Note: Please note that s. 90 (1) referred to in *Government Gazette* 35491 does not exist. We suggest that s. 90 was in fact meant.)
		68 (*a*). Amends section 91 (1) and (2); (*b*) by the substitution for subsection (5) of the following subsection: "(5) So much of any interest payable in terms of Chapter 12 of the Tax Administration Act as relates to such portion of any tax as is in terms of subsection (4) recoverable from the assets referred to in that subsection may also be recovered from such assets.". (Date of commencement of para. (*b*) to be proclaimed.)
		69. Repeals sections 91A, 92, 93, 94, 95, 96, 97, 98, 99, 100 and 101.
		70. Amends section 102.
		71. Repeals section 102A.
		72. Amends section 103.
		73. Repeals sections 104, 105, 105A, 106, 107A and 110.
		74. Amends paragraph 13 of First Schedule.
		75. Amends paragraph 19 of First Schedule.
		76. Amends paragraph 20 of First Schedule.
		77. Amends paragraph 1 of Fourth Schedule.
		78. . . . . . [Para. 78 deleted by s. 92 of Act No. 21 of 2012.]
		79. Amends paragraph 5 of Fourth Schedule.
		80. Amends paragraph 6 of Fourth Schedule.
		81. Repeals paragraph 8 of Fourth Schedule.
		82. Amends paragraph 11B of Fourth Schedule.
		83. Amends of paragraph 11C of Fourth Schedule.
		84. Repeals paragraph 12 of Fourth Schedule.

continued

No. and Year	Short Title	Extent of amendment or repeal
		85. Amends paragraph 14 of Fourth Schedule.
		86. Amends paragraph 15 of Fourth Schedule.
		87. Repeals paragraph 16 of Fourth Schedule.
		88. Amends paragraph 17 of Fourth Schedule.
		89. Amends paragraph 18 of Fourth Schedule.
		90. Amends paragraph 19 of Fourth Schedule.
		91. Amends paragraph 20 of Fourth Schedule.
		92. Amends paragraph 20A of Fourth Schedule.
		93. Amendment of paragraph 23A of Fourth Schedule.—Paragraph 23A of the Fourth Schedule to the Income Tax Act, 1962, is hereby amended— (*a*) by the substitution for subparagraph (1) of the following subparagraph: "(1) Any provisional taxpayer may for the purpose of avoiding or reducing his or her liability for any interest which may become payable by him or her in respect of any year of assessment under Chapter 12 of the Tax Administration Act, elect to make an additional payment of provisional tax in respect of such year."; and (*b*) by the deletion of subparagraph (2). (Date of commencement of s. 93 to be proclaimed.)
		94. Amends paragraph 25 of Fourth Schedule.
		95. Amends paragraph 27 of Fourth Schedule.
		96. Inserts paragraph 28A of Fourth Schedule.
		97. Amends paragraph 30 of Fourth Schedule.
		98. Repeals of paragraphs 31 and 32 of Fourth Schedule.
		99 (*b*)-(*c*). Amends paragraph 11 (6) and (8) of Sixth Schedule respectively; (*a*) by the deletion of subparagraph (3). (Date of commencement of para. (*a*) to be proclaimed.)
		100. Repeals paragraph 12 of Sixth Schedule.
		101. Amends paragraph 14 of Sixth Schedule.
		102. Repeals paragraph 15 of Sixth Schedule.

continued

No. and Year	Short Title	Extent of amendment or repeal
		103. Amends paragraph 12A of Seventh Schedule.
		104. Amends paragraph 17 of Seventh Schedule.
		105. Amends paragraph 18 of Seventh Schedule.
		106. Repeals paragraph 19 of Seventh Schedule.
Act No. 89 of 1991	**Value-Added Tax Act, 1991**	**107. Substitutes certain terms of Act No. 89 of 1991.**
		108 (*a*)-(*b*); (*d*)-(*h*). Amends section 1; (*c*) by the substitution for the definition of **"prescribed rate"** of the following definition: " **'prescribed rate'** means the rate contemplated in section 189 (3) of the Tax Administration Act;". (Date of commencement of para. (*c*) to be proclaimed.)
		109. Substitutes section 4.
		110. Amends section 5.
		111. Repeals section 6.
		112. Amends section 13.
		113. Amends section 14.
		114. Amends section 15.
		115 (*a*)-(*b*). Amends section 16. (Date of commencement of para. (*b*): 1 October 2012 except to the extent related to interest under section 39 in respect of which the wording prior to the amendment applies: Proclamation 51 in *Government Gazette* 35687.)
		116. Amends section 17.
		117. Amends section 23.
		118. Amends section 25.
		119. Substitutes section 26.
		120. Amends section 27.
		121. Amends section 28.
		122. Amends section 29.
		123. Repeals section 30.

continued

No. and Year	Short Title	Extent of amendment or repeal
		124. Amends section 31.
		125. Repeals sections 31A and 31B.
		126. Amends section 32.
		127. Repeals sections 33, 33A, 34, 35, 36 and 37.
		128 (*a*)-(*f*). Amends section 39. (Date of commencement of s. 128: (*a*) paras. (*a*) to (*e*): 1 October, 2012, except to the extent related to interest in respect of which the wording prior to the amendment applies: Proclamation 51 in *Government Gazette* 35687; and (*b*) para. (*f*) insofar as it relates to the deletion of: (i) sub-ss. (6), (6A): 1 October, 2012: Proclamation 51 in *Government Gazette* 35687; (ii) sub-s. (7): 1 October, 2012, except to the extent related to interest in respect of which the wording prior to the amendment applies: Proclamation 51 in *Government Gazette* 35687; and (iii) sub-s. (8): to be proclaimed.)
		129. Repeals section 40.
		130. Repeals section 41A.
		131. Amends section 41B.
		132. Repeals sections 42 and 43.
		133 (*a*)-(*g*). Amends section 44. (Date of commencement of s. 133 (*a*) insofar as it relates to the deletion of s. 44 (1): 1 October, 2012, except to the extent related to interest in respect of which the wording prior to the amendment applies: Proclamation 51 in *Government Gazette* 35687.)
		134. Substitution of section 45.—The Value-Added Tax Act, 1991, is hereby amended by the substitution for section 45 of the following section: "**Interest on delayed refunds** **45.** (1) Where the Commissioner does not within the period of 21 business days after the date on which the vendor's return in respect of a tax period is received by a SARS office refund any amount refundable under the Tax Administration Act, interest will be paid on such amount in accordance with Chapter 12 of that Act.

continued

No. and Year	Short Title	Extent of amendment or repeal
		(2) Despite the provisions of Chapter 12 of the Tax Administration Act, if a person fails to— (*a*) without just cause submit relevant material, requested by SARS for purposes of verification, inspection or audit of a refund in accordance with Chapter 5 of the Tax Administration Act; or (*b*) furnish SARS in writing with particulars of the account required in terms of section 44 (3) (*d*) to enable SARS to transfer a refund to that Account, no interest accrues on the amount refundable for the period from the date that— (i) in respect of subparagraph (*a*), the relevant material was required to be submitted; or (ii) in respect of subparagraph (*b*), the refund is authorised, until the date that the person submits the relevant material or bank account particulars.". (Date of commencement of s. 134 to be proclaimed.)
		135. Repeal of section 45A.—Section 45A of the Value-Added Tax Act, 1991, is hereby repealed. (Date of commencement of s. 135 to be proclaimed.)
		136. Amends section 46.
		137. Repeals sections 47, 48 and 49.
		138. Amends section 50.
		139. Amends section 50A.
		140. Amends section 55.
		141. Repeals sections 57, 57A, 57B, 57C and 57D.
		142. Amends section 58.
		143. Repeals sections 59 and 60.
		144. Amends section 61.
		145. Repeals sections 62, 63, 70 and 71.
		146. Amends section 72.
Act No. 34 of 1997	**South African Revenue Service Act, 1997**	**147. Amends section 1.**

continued

No. and Year	Short Title	Extent of amendment or repeal
Act No. 9 of 1999	**Skills Development Levies Act, 1999**	**148. Amends section 1.**
		149. Amends section 2.
		150. Amends section 6.
		151. Repeals section 7A.
		152. Amendment of section 11.—Section 11 of the Skills Development Levies Act, 1999, is hereby amended— (*a*) by the substitution for subsection (1) of the following subsection: "(1) If an employer fails to pay a levy or any portion thereof on the last day for payment thereof, as contemplated in section 6 (2) or 7 (4), interest is payable on the outstanding amount in accordance with the provisions of Chapter 12 of the Tax Administration Act."; and (*b*) by the deletion of subsection (2). (Date of commencement of s. 152 to be proclaimed.)
		153. Amends section 12.
		154. Repeals section 13.
		155. Amends section 15.
		156. Repeals sections 16, 17, 20, 20A and 21.
Act No. 4 of 2002	**Unemployment Insurance Contributions Act, 2002**	**157. Amends section 1.**
		158. Amends section 3.
		159. Amends section 8.
		160. Amends section 9A.
		161. Amends section 10.
		162. Repeal of section 12.—Section 12 of the Unemployment Insurance Contributions Act, 2002, is hereby repealed. (Date of commencement of s. 162 to be proclaimed.)
		163. Amends section 13.
		164. Repeals section 14.

continued

No. and Year	Short Title	Extent of amendment or repeal
		165. Amends section 15.
		166. Repeals section 17.
Act No. 14 of 2007	**Diamond Export Levy (Administration) Act, 2007**	**167. Amends section 1.** [Para. 167 amended by s. 93 (*a*) and (*b*) of Act No. 21 of 2012.]
		168. Amends section 7.
		169. Repeal of sections 10 to 15.—Sections 10, 11, 12, 13, 14 and 15 of the Diamond Export Levy (Administration) Act, 2007, are hereby repealed. (Date of commencement of s. 66 insofar as it repeals: (*a*) ss. 10, 11, 12, 13 and 14: 1 October, 2012; and (*b*) s. 15: to be proclaimed.)
		170. Amends section 16.
		171. Repeals section 17.
Act No. 26 of 2007	**Securities Transfer Tax Administration Act, 2007**	**172. Amends section 1.**
		173. Amends section 3.
		174. Amends section 4.
		175. Repeal of sections 5, 6 and 7.—Sections 5, 6 and 7 of the Securities Transfer Tax Administration Act, 2007, are hereby repealed. (Date of commencement of s. 66 insofar as it repeals: (*a*) sections 6 and 7: 1 October, 2012; and (*b*) section 5: to be proclaimed.)
		176. Amends section 8. (Date of commencement of s. 176: 1 October, 2012, except to the extent related to interest in respect of which the wording prior to the amendment applies: Proclamation 51 in *Government Gazette* 35687.)
		177. Repeals sections 9, 10, 11, 12, 14, 15, 16, 17, 18 and 19.
		178. Substitutes section 20.
		179. Repeals section 21.

continued

No. and Year	Short Title	Extent of amendment or repeal
Act No. 36 of 2007	**Revenue Laws Second Amendment Act, 2007**	**180. Repeals sections 33 and 36.**
Act No. 4 of 2008	**Taxation Laws Second Amendment Act, 2008**	**181. Repeals sections 16 and 18.**
		182. Amends section 23.
Act No. 29 of 2008	**Mineral and Petroleum Resources Royalty (Administration) Act, 2008**	**183. Amends section 1.**
		184. Amends section 4.
		185. Amends section 5.
		186. Repeals section 7.
		187. Amends section 8.
		188. Amends section 9.
		189. Repeals sections 10, 11, 12 and 13. [Para. 189 substituted by s. 65 of Act No. 16 of 2016.]
		190. Amends section 17.
		191. Repeals section 18.
		192. Amends section 18A.
Act No. 61 of 2008	**Revenue Laws Second Amendment Act, 2008**	**193. Repeals sections 3, 13 and 14.**
		194. Amends section 16.
		195. Repeals section 20.
Act No. 18 of 2009	**Taxation Laws Second Amendment Act, 2009**	**196. Repeals sections 12, 13, 14, 33, 34 and 38.**

No. and Year	Short Title	Extent of amendment or repeal
Act No. 36 of 2007	Revenue Laws Second Amendment Act, 2007	180. Repeals sections 33 and 36.
Act No. 4 of 2008	Taxation Laws Second Amendment Act, 2008	181. Repeals sections 16 and 18.
		182. Amends section 23.
Act No. 29 of 2008	Mineral and Petroleum Resources Royalty (Administration) Act, 2008	183. Amends section 1.
		184. Amends section 4.
		185. Amends section 5.
		186. Repeals section 7.
		187. Amends section 8.
		188. Amends section 9.
		189. Repeals sections 10, 11, 12 and 13. [Para. 189 substituted by s. 65 of Act No. 16 of 2016.]
		190. Amends section 17.
		191. Repeals section 18.
		192. Amends section 18A.
Act No. 61 of 2008	Revenue Laws Second Amendment Act, 2008	193. Repeals sections 3, 13 and 14.
		194. Amends section 16.
		195. Repeals section 20.
Act No. 18 of 2009	Taxation Laws Second Amendment Act, 2009	196. Repeals sections 12, 13, 14, 33, 34 and 38.

Table of cases