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THE PEOPLE & PROCESSES IN DISPUTE RESOLUTION

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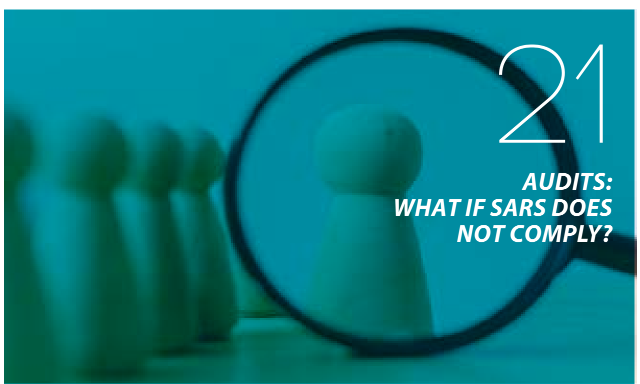

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MEET THE ADVOCATES IN TAX

Four members of the select group of tax advocates called Senior Counsel agreed to answer some of our questions about the tax litigation environment in South Africa and how they experience their important work. We also provide a directory of Senior Counsel active in tax litigation.

ALASDAIR SHOLTO-DOUGLAS SC

Date of Silk: 18 December 2004
Qualifications: BA LLB

What trends have you seen in the cases over the last few years? Has the nature of SARS' litigation strategy changed? Has the judiciary taken a different approach?

I do not have insight into SARS' litigation strategy. However, judging from what I have seen, in recent times there has been a more focused and considered approach to deciding what matters proceed to litigation. Whatever changes have been made within SARS, they seem to me to have resulted in a more reasonable approach to alternatives to litigation, particularly settlement, in deserving cases. This has been my sense from both a SARS and taxpayer perspective, although not my consistent experience. The trend is, however, encouraging.

I am not aware of any different approach having been taken by the judiciary. It is unlikely, however, that the judiciary is not influenced, however imperceptibly, by the rise and fall in the levels of tax morality. The fairer the system, the less the courts have to intervene to level the playing field. By the same token, however, the fairer the system, the fewer the disputes.

What was the most notable case you were involved in over the last few years? Any lessons to be learned?

The related cases of *Commissioner, South African Revenue Service v Capstone 556 (Pty) Ltd* 2016 (4) SA 341 (SCA) and *Commissioner, South African Revenue Service v Kluh Investments (Pty) Ltd* 2016 (4) SA 580 (SCA).

These were cases in which the appeal courts differed from the factual findings of the tax court on the basis of an acceptance of the evidence adduced at the trials in the tax court. Subsequent events tended to support the approach adopted by the tax court.

Facts are perceived differently by different people in different circumstances. It has often been said that reasonable people can reasonably arrive at different conclusions. A trial court comes to hear of the facts during the course of oral evidence; an appeal court is restricted to reading the facts in a typed transcript. The distinction is one worth bearing in mind whenever an argument premised on facts is considered by an appeal court.

Does the tax system properly balance taxpayer rights versus SARS' need to collect under the current Tax Administration Act?

The one area in which, in my view, the tax system has not properly balanced rights is the application of the "pay now, argue later" principle. In my view, the right to claim payment of a disputed tax debt prior to judgment should be limited to those cases where there is a reasonable prospect – shown by the evidence – that SARS will be in a worse collection position should it obtain judgment than it is at the time it seeks to recover the disputed debt.

What part of the litigation process do you enjoy the most?

Working with colleagues and specialists in preparing a matter and, ultimately, the court appearance itself.

What part of the litigation process do you enjoy the least?

Nothing.

MICHAEL JANISCH SC

Date of Silk: 22 October 2015
Qualifications: BA LLB, LLM, HDip Tax

What trends have you seen in the cases over the last few years? Has the nature of SARS' litigation strategy changed? Has the judiciary taken a different approach?

Given the wide range of taxation provisions which can give rise to litigation, and the fact-specific nature of tax cases, it is difficult to discern trends in how such cases are being decided. There does however appear to be a high frequency of matters being taken on appeal from the Tax Court. Both SARS and taxpayers seem to prefer appeals directly to the Supreme Court of Appeal rather than to the full bench.

Although SARS issues many assessments invoking the "new" (2006) general anti-avoidance rules in the Income Tax Act, it seems that very few cases, if any, get to court. Settlement seems the preferred option from both SARS' and taxpayers' sides. As a result, there is still frustratingly little judicial authority on the interpretation and application of the current GAAR.

What was the most notable case you were involved in over the last few years? Any lessons to be learned?

Pienaar Brothers (Pty) Ltd v SARS 2017 (6) SA 435 (GP), which broadly endorsed the power of the legislature to make tax laws with retroactive effect, demonstrating the importance of taking heed of announcements of legislative intent in the national budget process.

I might also mention *SARS v KWJ Investments* (2019) 81 SATC 1 (SCA), which shows that it pays in the long run to pursue available alternative grounds of appeal. Here the SCA disagreed with the Tax Court, which had found for the taxpayer on the merits, but still went on to uphold the taxpayer's case on an alternative procedural ground that the Tax Court had not found it necessary to decide.

Does the tax system properly balance taxpayer rights versus SARS' need to collect under the current Tax Administration Act?

The balance in relation to "pay now, argue later" disputes is generally sound in theory, but in my view section 164(3) of the Tax Administration Act should say expressly that the merits of a case (i.e., the taxpayer's and SARS' prospects of success) are a relevant factor in deciding whether to suspend payment.

What part of the litigation process do you enjoy the most?

Putting it all together in argument, once all the potential uncertainties (e.g., what facts will emerge during the appeal, and how the witnesses will perform) have been removed.

What part of the litigation process do you enjoy the least?

Being asked the impossible question: what percentage would you assign to the prospects of success? Litigation, unfortunately, is inherently unpredictable.

What trends have you seen in the cases over the last few years? Has the nature of SARS' litigation strategy changed? Has the judiciary taken a different approach?

I cannot say that the trends in the cases over the last few years have changed.

The approach by SARS to disputes in recent years has been more aggressive, showing a tendency among certain SARS employees to attempt to collect as much revenue as possible rather than simply ensuring that all tax which is legally due is collected.

I cannot say that the judiciary has taken a different approach to what its approach was in the past.

What was the most notable case you were involved in over the last few years? Any lessons to be learned?

The case of *Sasol Ltd v CSARS* in the tax court and then the supreme court of appeal. No particular lessons were learned.

Does the tax system properly balance taxpayer rights versus SARS' need to collect under the current Tax Administration Act?

No. The tax system is biased in favour of the fiscus.

What part of the litigation process do you enjoy the most?

The analysis and determination of the law.

What part of the litigation process do you enjoy the least?

The resolution of factual disputes.

PETER SOLOMON SC

Date of Silk: 22 October 1989
Qualifications: BA (Law), LLB and HDip Tax

NAZREEN BAWA SC

Date of Silk: 22 October 2015
Qualifications: B.BusSc, LLB

What trends have you seen in the cases over the last few years? Has the nature of SARS' litigation strategy changed? Has the judiciary taken a different approach?

From reported cases there does not appear to be one defined litigation strategy that can be attributed to SARS. There are nominally more (and different) legal counsel being briefed to represent SARS in matters than was the case even five years ago but there has not been great inroads made to meet transformative goals or to diversify geographically as far as briefing patterns are concerned. Repeatedly, one hears that to do tax work requires special skills, and hence the pool of advocates used by SARS is very small. This needs to change as this is not so. Practitioners skilled particularly in the interpretation of statutes and public law have the requisite expertise to litigate in tax matters and in this regard perceptions as to what is required to do work for SARS should change.

What was the most notable case you were involved in over the last few years? Any lessons to be learned?

The matter of *Commissioner for the South African Revenue Service v Executors of Estate Late Sidney Ellerine 2019* (1) SA 111 (SCA). Given the processes involved it took a considerable number of years to complete this process. The matter was one of interpretation, which is not uncommon in tax matters, and the question to be determined was whether the rights that attached to preference shares and which entitled the holder thereof to convert them should be taken into account in the determination of the market value and turned on the meaning attributed to words in the Articles of Association. Whilst ex facie it may not seem like a matter of import, it was of significance to SARS for purposes of determining estate duty in the matter as well as setting a precedent where there are similar companies over which structures have been set up but ultimate control rests in particular individuals.

Does the tax system properly balance taxpayer rights versus SARS' need to collect under the current Tax Administration Act?

There is no inherent inequity within the parameters of the Act. The difficulty is the ability of taxpayers to have the wherewithal to exercise rights that they do have, rather than the Act itself.

What part of the litigation process do you enjoy the most?

Probably the preparation of argument when one decides on the course of argument and can see an argument take shape and the robust debate that ensues with the presiding bench.

What part of the litigation process do you enjoy the least?

The formalities and making sure that procedures for litigation are followed. Sometimes we place too much emphasis on form over substance and the real issues get lost in the process.

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In the highly competitive tax landscape of South Africa, taking steps to ensure you stay on top of the game is no longer an additional measure, it has become an essential part of preparing for what is to come. Holding a professional designation from the South African Institute of Tax Professionals (SAIT) can assist in future-proofing your career. The Tax Faculty offers three programmes to achieve a SAIT designation.

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- Full journey: 24 months
- Recognition of prior learning (RPL) journey: 12 months (Assessed via diagnostic)*

QUALIFICATION: TAX PROFESSIONAL

- Full journey: 36 months
- Recognition of prior learning (RPL) journey: 18 months (Assessed via diagnostic)*

*We recognise that learning is achieved through past experience and therefore to qualify for the recognition of prior learning (RPL), the learning journey will begin with a diagnostic from which tailored learning journeys are implemented, giving you the qualification without having to start from scratch.

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The professional certificate is designed to empower course participants with applied working and practical knowledge of the fundamentals of taxation that will secure the course participant the license to practice as a registered tax practitioner with SARS and professional membership with SAIT. The course covers the entire field of taxation (including value-added tax) and will enable the course participant to calculate the tax of individuals including farmers, partnerships, sole traders as well as the taxation of companies, close corporations and trusts. This course will benefit beginners as well as practitioners who need to update their knowledge on the fundamentals of taxation.

Course duration	12 months.
Entry-level requirement	Senior certificate and four years appropriate experience in tax.
Achievement upon completion	120 credits of NQF 6 Qualification Tax Technician (see below).
SAIT membership level upon completion	Tax Technician level (TT SA).

QUALIFICATION: TAX TECHNICIAN

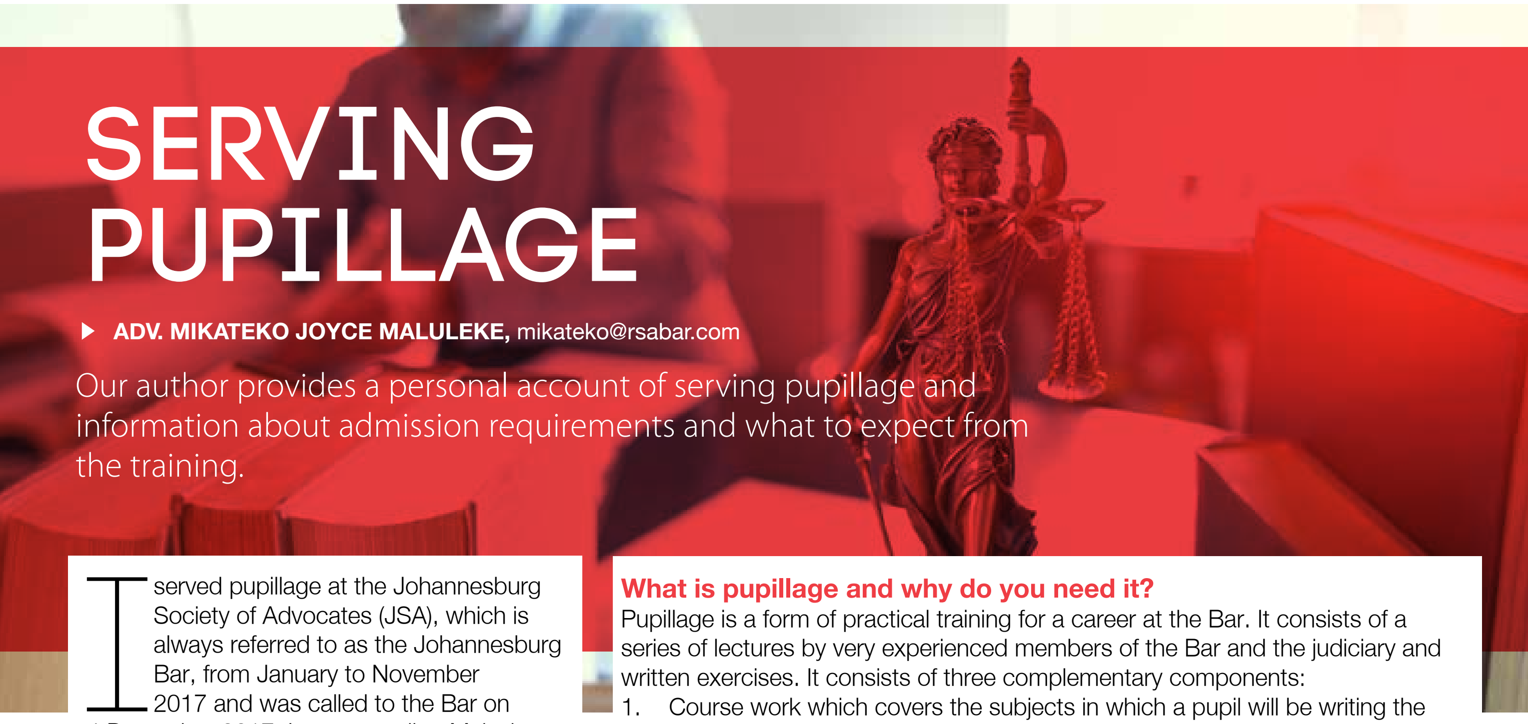
The knowledge and practical skills gained in this qualification will provide course participants with the foundational knowledge and practical skills to perform SARS tax compliance functions and services, including the preparation and submission of tax returns. Completion of this course provides entry into the final external integrated summative assessment (EISA), administered by SAIT.

Course duration	**Full journey:** 24 months. **RPL:** 12 months.
Entry-level requirement	**Full journey:** A senior certificate or equivalent NQF 4 qualification. At least one-year experience in completing tax returns. **RPL:** NQF 4 and at least three years of structured working experience and recently completed Annual Tax CPD programme updates with SAIT or similar such as SARS internal training.
Achievement upon completion	Occupational Qualification: Tax Technician (NQF 6).
SAIT membership level upon completion	Tax Technician level (TT SA).

QUALIFICATION: TAX PROFESSIONAL

The skills gained in this occupational qualification will provide participants with the advanced skill to practice as a tax consultant and advisor. Completion of this course provides entry into the final external integrated summative assessment (EISA), administered by SAIT resulting in the prestigious Tax Advisor designation.

Course duration	**Full journey:** 36 months. **RPL:** 18 months.
Entry-level requirement	**Full journey:** NQF 6 such as a National Diploma in the fields of commerce, accountancy or law (or equivalent). At least one-year experience in completing tax returns. **RPL:** NQF 7 such as BCom in the fields of commerce, accountancy or law (or equivalent). Three years tax experience or signed learnership.
Achievement upon completion	Occupational Qualification: Tax Professional (NQF 8).
SAIT membership level upon completion	Advisor level (TA SA).



SERVING PUPILLAGE

▶ **ADV. MIKATEKO JOYCE MALULEKE,** mikateko@rsabar.com

Our author provides a personal account of serving pupillage and information about admission requirements and what to expect from the training.

I served pupillage at the Johannesburg Society of Advocates (JSA), which is always referred to as the Johannesburg Bar, from January to November 2017 and was called to the Bar on 4 December 2017. I was a pupil at Maisels Chambers 3 and was fortunate to have two mentors and to serve at a chamber where every door of a senior member is open to pupils to go in to ask for assistance, borrow a book or request to join them in court to observe them in action.

Before coming to the bar, I thought I had sufficient legal knowledge to practise as an advocate. For example, I have a BA and LLB from the Witwatersrand University and LLM (Tax) from the University of Pretoria. I served articles at Wits Law Clinic in 1997, attended the School of Legal Practice and passed the Attorneys Board Examination in 1998. I was admitted as advocate on 18 February 2003. I worked in government for a cumulative period of over 18 years. I served as a commissioner for the Commission of Employment Equity and have conducted legal research in different institutions. However, serving pupillage made me realise that procedural knowledge is just as important as substantive knowledge, if not more so because it has the potential of having your case thrown out of court on a technicality before you can even display your substantive knowledge.

Serving pupillage was invaluable for me. It enabled me to acquire the skills, tactics and values of the profession.

What is pupillage and why do you need it?

Pupillage is a form of practical training for a career at the Bar. It consists of a series of lectures by very experienced members of the Bar and the judiciary and written exercises. It consists of three complementary components:

1. Course work which covers the subjects in which a pupil will be writing the examinations set by the National Bar Board Examinations.
2. A set of prescribed practical training tasks a pupil has to perform under the supervision of a mentor.
3. General learning, by working with your mentor in chambers, in preparation for and in court; to familiarise the pupil with the types of advocacy work and to inculcate habits of diligence, analysis and integrity (personal and intellectual) which are the hallmarks of good advocacy. It prepares a pupil for practice.

A pupil needs pupillage not only to write and pass the National Bar Examination Board Examinations (Examinations) for admission as a member of the Bar, but to acquire skills, knowledge and values required to practise and survive in the profession. The values inculcated during pupillage enable the pupil to avoid unethical or illegal conduct and are critical.

For me, the practical experience was the best preparation for both the Examinations and practice. It is important for pupils to read and then go to court to observe, for example, going to the criminal, motion and civil courts to observe how counsel argue, how witnesses are examined and listening to issues raised by the judge. This enables you to not repeat the same mistakes when you appear.

Where do I apply for a pupillage?

The General Council of the Bar (GCB) is a federal body representing the organised advocates' profession in South Africa, and has ten constituent societies of practising advocates called Bars. There is a Bar at the seat of every provincial and local division of the High Court of South Africa. All the Bars call for applications for pupillage through an advert on their websites. The closing date for submission of applications differs from Bar to Bar, for example, the Pretoria Society of Advocates' closing date is August while for the Johannesburg Society of Advocates it is September.

> *"Serving pupillage made me realise that procedural knowledge is just as important as substantive knowledge, if not more so."*

What are the admission requirements?

I served pupillage under the Admission of Advocates Act 74 of 1964 before the Legal Practice Act 28 of 2014 took effect. Under the Admission of Advocates Act, the requirement was to have a Bachelor of Laws degree (LLB) obtained at a South African university. The next step would be to apply to the High Court to be included on the "roll" of advocates. Although enrolment as an advocate was not a requirement for admission as a pupil, it was a requirement for writing the National Bar Examination Board Examinations.

Those who aspire to serve pupillage must familiarise themselves with the requirements of the Legal Practice Act, section 24 "Admission and enrolment as an advocate" and section 26 "Minimum qualifications and practical vocational training". Under the Legal Practice Act, completion of pupillage at a Bar does not automatically entitle one to enrolment as an advocate. It treats different categories of pupils differently. There are at least four categories of pupils:

1. **Pupils already admitted under the Admission of Advocates Act**
   These applicants are deemed to be admitted as legal practitioners and enrolled as advocates in terms of section 114 of the Legal Practice Act. Once they complete all the requirements of pupillage, they will be admitted to the Johannesburg Society of Advocates.

2. **Pupils who qualified, in principle, to be admitted in terms of the Admission of Advocates Act as at 31 October 2018**
   These applicants are entitled to be admitted as advocates in terms of sections 24 and 115 of the Legal Practice Act, read with section 3 of the Admission of Advocates Act. As a general rule, if, on 31 October 2018, you met all of the requirements to become an advocate set out in section 3 of the Admission of Advocates Act, then you can apply to the High Court to be admitted and enrolled as an advocate as if the Admission of Advocates Act were still in force.

3. **Applicants who were attorneys on 31 October 2018 do not qualify to be admitted as advocates in terms of the transitional provisions of the Legal Practice Act.**
   Attorneys must, instead, apply to the Legal Practice Council to convert their enrolment to that of an advocate in terms of section 32 of the Legal Practice Act, read with Rule 30 of the South African Legal Practice Council Rules. The requirements for such an application are set out in Rule 30 of the Legal Practice Council Rules.

4. **Pupils who did not meet the requirements of section 3 of the Admission of Advocates Act on 31 October 2018, and who are not attorneys**
   Pupils will have to comply with all of the operative requirements of sections 24, 26 and 29 of the Legal Practice Act. They will have to sign and lodge a practical vocational training contract with the Legal Practice Council. Unlike us who could apply to be enrolled as an advocate before serving pupillage, they will only be able to apply for admission and enrolment as an advocate at the end of pupillage and after having met all the other requirements set out in the Legal Practice Act.

The Legal Practice Act requires pupils to do community service, which was not a requirement when I served pupillage. The content of the community service is not yet regulated, but the Johannesburg Society of Advocates will require its pupils to do some form of community service during pupillage before they can be admitted as full members.

What can you expect during pupillage?

Pupils are expected to attend lectures administered by senior members and members of the judiciary. The lecturers impart their valuable knowledge, understanding and skills that are critical to being a successful advocate. The training builds upon the theoretical knowledge acquired at university and intends to ensure that the pupil acquires the necessary knowledge, skills and competence in litigation in the fields of Legal Writing; Ethics; Criminal procedure and evidence; Motion Court Practice; and Preparation for and Conduct of Civil Trials. The lecturers underscore the importance of academic ability; written and oral communication skills; interpersonal skills among others.

All courses are important but the most important were legal drafting and ethics. Without the drafting skill, no one can succeed in this profession. The profession has potential risks when lots of briefs are received. The ethics class will teach you what conduct is proper and which is improper. For example, in the matter of the *Johannesburg Society of Advocates v Tiry [2018]* ZAGPJHC 512, the respondent was found guilty of double briefing and over reaching, and was suspended for three years, two years of which were suspended with a condition. The respondent was also ordered to pay R500 000.

What can you expect after completion?

Once admitted as an advocate, and having completed pupillage and passed the Board exam, it is customary to join one of the Bars to benefit from the strong collective spirit and experience of the fraternity. Membership of a Bar is limited to advocates in private practice. Members of the Bar are obliged to occupy chambers and are bound by the rules of ethics of individual Bars.

Note that parts of the text are from experience but some are from the pupillage notes and/or the Johannesburg Society of Advocates website.

SARS: FROM VERIFICATION TO TAX COURT IN 8 STEPS

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What you need to know about the process when you become involved in a dispute with SARS.

The lifecycle of disputes with SARS is represented in this article by a process flow published in the *SARS Guide on Alternative Dispute Resolution 2014*. In fact it looks a little more like a maze of possible ways to get it wrong with SARS. This article is meant to serve as a step-by-step guide to assist taxpayers to not only react correctly but also be aware of the possible remedies to resolve matters with SARS as efficiently and swiftly as possible.

So where does it start?

1 The SARS letters – verification, letter of audit finds and assessments

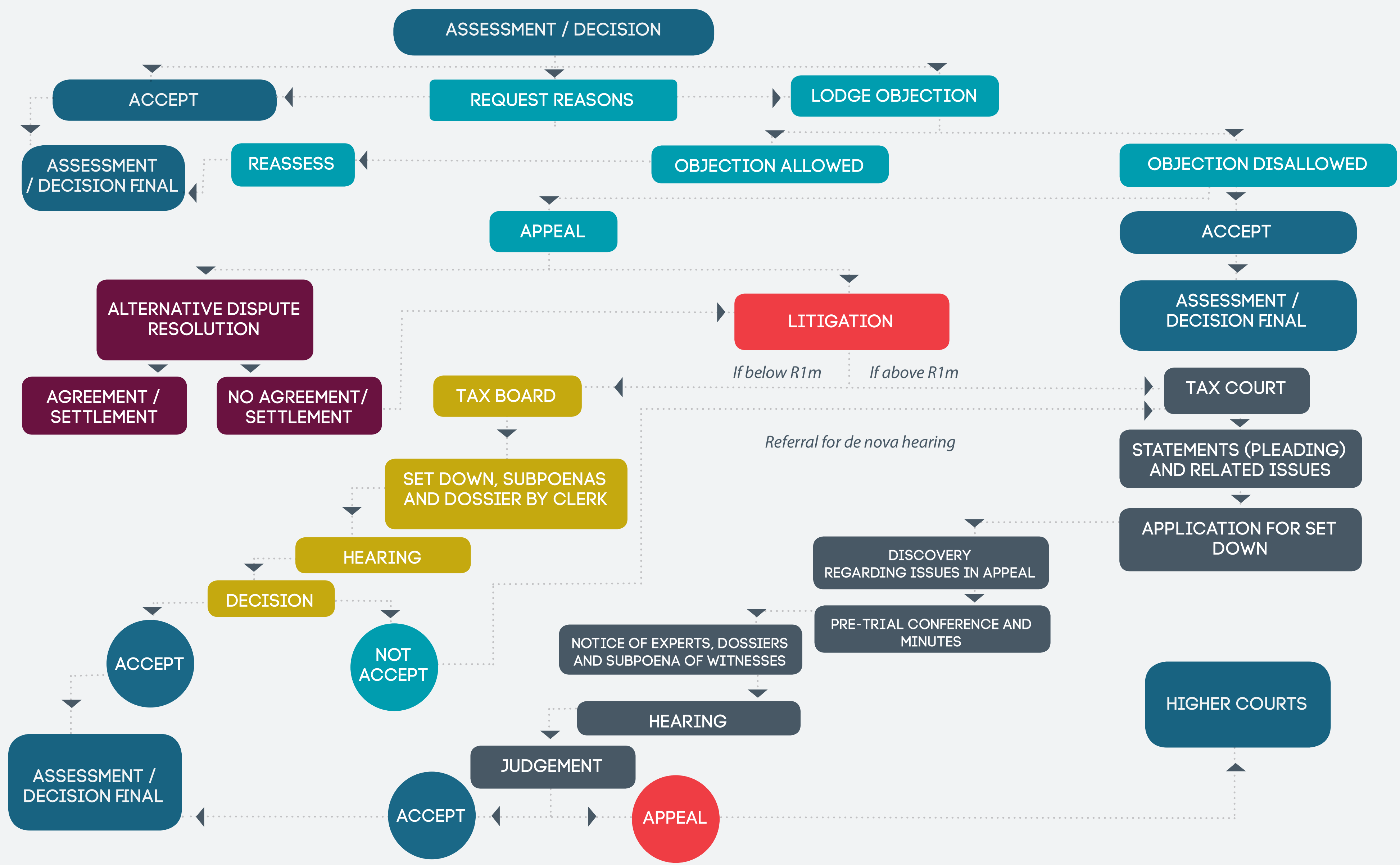
Section 46 of the Tax Administration Act provides the basis on which SARS may make a request. Under these provisions, SARS may request a taxpayer or another person to submit "relevant material" in relation to a taxpayer. Such request must be limited to material maintained or kept or that should reasonably be maintained or kept by the taxpayer or the other person in respect of the taxpayer. This is usually also the first step towards a SARS verification and can also evolve into an audit, across all tax types including lifestyle audits.

In terms of section 42(1) of the Tax Administration Act, SARS also has an obligation to keep taxpayers informed (every 90 days) of the progress of the audit.

So what is the turnaround time on audits with SARS? In the PwC Taxing Times 2019 (PwC survey) report, it was noted that only 10% of respondents reported that investigative audits were completed within a period of three months. Further, in respect of transfer pricing audits, it was concerning to see that 52.2% of respondents said that the audit took longer than 12 months to finalise.

In principle, the remainder should have received progress reports. However, approximately 33% of respondents in 2019 (2018 – 38%) indicated that they never received progress reports. This suggests that SARS should improve on striving to fulfil its obligations under the Tax Administration Act, as is equally expected from the taxpayer.

"A taxpayer aggrieved by an assessment should be aware of the right to dispute the assessment."



Source: SARS Guide on Dispute Resolution 2014

2 Request for reasons and the letter of objection

An assessment issued at the completion of an audit is usually accompanied by a letter explaining the adjustments made by SARS. The purpose of the letter is to inform the taxpayer why an amount has been assessed or why a penalty has been imposed. In the 2019 PwC survey only 25% of respondents indicated that they were able to understand the reasons for the adjustments most of the time, which is concerning.

Taxpayers should take note of their right, in terms of Rule 6 of the Dispute Resolution Rules promulgated in terms of section 103 of the Tax Administration Act, to request SARS to provide detailed reasons for the assessments raised. This is in the event that the taxpayer is of the view that SARS did not provide sufficient reasons to enable the taxpayer to formulate a full and complete objection.

SARS may, however, also require the taxpayer to produce additional documents to support the objection and must notify the taxpayer within 30 business days if this is the case.

3 Managing taxpayer timelines

Responses to SARS' queries should be provided within the deadlines as provided for by the Tax Administration Act, alternatively as prescribed by SARS. If additional time is required to obtain some of the requested documents or information, this should be discussed with SARS at the earliest possible time and not once the deadline has passed. Information that is, however, available should be provided within the initial set deadline.

4 Ensuring SARS meets its timelines

The time periods for SARS to respond to matters are generally unsatisfactory. Per the PwC survey results they also rarely comply with the timelines as per the legislation and their own SARS Service Charter. Most taxpayers are unaware that SARS has specific turnaround times for matters to be resolved.

In terms of the Rules in respect of objections SARS is required to inform the taxpayer of the decision on the objection within 60 business days, with a further extension of 45 business days if the matter is complex, subject to certain criteria.

There are specific timelines for all aspects of the dispute resolution process which SARS needs to adhere to.

5 Suspension of payment

The basic premise is that once a taxpayer has been assessed by SARS, the amount of tax becomes due even though the taxpayer disagrees with the amount of tax. Your obligation to pay the tax, and SARS' right to recover the tax, is not suspended by any objections or appeals against the assessment or pending court proceedings, i.e. pay the tax and then dispute it. Therefore, the 'pay now, argue later' rule can only be suspended by a senior SARS official if there is a dispute or at least an intent to dispute the assessment as well as an adherence to the criteria contained in section 164 of the Tax Administration Act.

In considering the request, in terms of section 164(3) of the Tax Administration Act, the SARS official should consider relevant factors. These include but are not limited to whether the recovery of the disputed tax will be in jeopardy or if there will be a risk of dissipation of assets, the compliance history of the taxpayer with SARS and 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.

Taxpayers should not look to abuse the suspension system, as SARS is well within its rights to revoke a decision to suspend payment with immediate effect. This may happen if SARS is satisfied that a taxpayer merely entered into the dispute process on a frivolous or vexatious basis, is employing dilatory tactics, or if there is a material change in the circumstances from when the request was granted.

Furthermore, if a request has been successfully granted, but the taxpayer does not object to the assessment, does not appeal after a disallowed objection or proceeds to court, the suspension will be revoked with immediate effect.

SARS will not suspend payment of an amount of tax of its own accord once the dispute process has commenced. Taxpayers will need to actively take steps to initiate the suspension. A request for suspension of payment is a vital part of the dispute resolution process and should be submitted as soon as possible if a taxpayer intends to dispute an assessment.

6 Appeal

If a taxpayer is not in agreement with a decision made by SARS on an objection, the taxpayer has the right to appeal such a decision in terms of section 107 of the Tax Administration Act. The taxpayer has to lodge the appeal within 30 business days after SARS delivered the notice of disallowance or partial allowance of the objection.

The period of 30 business days may be extended by 21 days and a further 45 business days depending on the circumstances and subject to the provisions of the Tax Administration Act. However, taxpayers should take heed that the Tax Administration Act does not make provision for condonation for late filing. As such, it will be extremely difficult to enter an appeal once the time period has lapsed.

It should also be noted that a taxpayer may not use the appeal procedure to raise new objections that were not raised in the original notice of objection. Any new objections must be lodged in terms of a new process and only if the time period to object is still open. It is possible to add a new ground or reason for the objection and appeal, provided the item under appeal is one that was raised in the original notice of objection.

No appeal can or will be allowed to be submitted more than three years after the date of the decision to disallow the objection.

7 Alternative dispute resolution

The dispute process makes provision for a taxpayer to rather select the dispute to be directed for alternative dispute resolution (ADR) proceedings, thereby avoiding having the dispute escalated to litigation (Tax Board or Tax Court). In most instances litigation turns out to be an exceptionally expensive and drawn-out exercise.

So why rather ADR as opposed to litigation? ADR proceedings give a taxpayer the opportunity to present its case, with the assistance of advisers if need be, at an informal forum and without prejudice. ADR proceedings will constitute a round-table discussion and will be attended by the taxpayer and its representatives, the SARS auditor as well as an official from SARS' legal division. Such proceedings will be overseen by an independent facilitator.

8 Tax court / tax board and beyond

A tax dispute can ultimately end up in one of two places, based on the quantum of the dispute. In the event of a dispute which is below the R1 million threshold, it will be adjudicated by the Tax Board. Disputes that exceed the threshold will fall within the jurisdiction of the Tax Court, which is in essence a High Court of South Africa.

Commencing with litigation against SARS is, as mentioned above, a costly exercise in that lawyers and advocates are usually involved and the process consists of various steps. This is time consuming and onerous to the taxpayer.

The takeaway

The Tax Administration Act provides for mechanisms by which SARS may obtain information, raise assessments and recover tax debts. SARS' powers are balanced by mechanisms granting certain rights to the taxpayer in order to engage with SARS in the event of a dispute. A taxpayer who chooses not to engage in dispute with SARS or make use of the applicable administrative processes as outlined in the Tax Administration Act does so at its peril.

A taxpayer aggrieved by an assessment should be aware of the right to dispute the assessment and the process by which to engage the dispute mechanisms.

In the present day and age, inactivity until the last moment is simply not an option. Obtaining professional advice and assistance to ensure that all tax matters are dealt with in a procedurally correct manner is advisable.

VERIFICATIONS OR AUDITS: WHAT IF SARS DOES NOT COMPLY?

15 minutes CPD

▶ **NICO THERON,** ntheron@unicustax.co.za **AND WIKUS SWART,** wswart@unicustax.co.za

Being selected for a verification or audit by SARS can cause stress or strike fear into even compliant taxpayers. Although set out clearly in the Tax Administration Act, the administration process in the case of a tax dispute is a complicated one – and most people do not read legislation if they can avoid it. This article raises the importance of following correct procedures from the start: for tax practitioners and their client taxpayers and also for SARS.

In the majority of cases, tax disputes are preceded by a verification or audit by SARS. This is in turn followed by an "adjustment letter" or "letter of audit findings". Then follows an audit finalisation letter (in the case where a letter of audit findings has been issued) and, subsequently, SARS' notice of assessment. When the notice of assessment is issued and an objection is contemplated by the taxpayer, then generally the taxpayer would tend to focus their efforts on the merits of the assessment raised by SARS. In other words, the taxpayer would tend to focus on the issue of whether the underlying adjustments made by SARS are, in substance, correct or not and whether there is any defence for the taxpayer based on the merits. Few taxpayers seem to consider not only the substantive fairness, or merits, of such an assessment but also whether the assessment was lawfully issued in a procedurally fair manner in the first place.

The Tax Administration Act and other tax Acts place a number of obligations on SARS in terms of procedural compliance. Two recent judgments out of Port Elizabeth (*Mr A v CSARS (IT13726)* and *Nondabula v CSARS and Another*) suggest that failure by SARS to comply with these obligations renders their assessments unlawful. The importance of this in a tax dispute should not be underestimated. If an assessment is unlawful due to SARS' failure to abide by the prescripts of the Tax Administration Act, this could be raised by the taxpayer as a ground for objection in addition to (although irrespective of) the merits of the case. Whilst it may be debateable whether the Tax Court would have jurisdiction to hear arguments along these lines, it stands to reason that this would, indeed, be the case.

Procedural obligations

Noncompliance by SARS with the following procedural obligations are possible defences for the taxpayer in a tax dispute:

Notice of commencement of audit

Section 42 of the Tax Administration Act requires SARS to issue a notice of commencement of an audit. In practice, SARS tends to issue these notices, but occasionally the taxpayer is not timeously informed of the commencement of an audit.

Further still, in practice, SARS tends to extend the scope of the audit to further years of assessment if they have identified proposed adjustments in the year or years of assessment under audit. It could be argued that if SARS extends the scope of the audit to further years of assessment that a further notice of commencement of an audit is required to be issued.

Issuing progress reports

Section 42 of the Tax Administration Act read with Notice 788 in *Government Gazette* 35733 requires SARS to issue progress reports. The progress reports must indicate, among other things, the scope of the audit, the current stage of completion as well as any relevant material outstanding from the taxpayer. Also, the notice is required to be issued every 90 days from the date of commencement of the audit. In our experience, these notices are often not only issued outside the timeframes prescribed but also often omit prescribed detail and are therefore deficient due to procedural noncompliance.

Outcome of audit
In terms of section 42 of the Tax Administration Act, SARS must issue a document containing the outcome of the audit. Of importance in this regard is the requirement that SARS must provide the proposed grounds for the assessment and must allow the taxpayer the opportunity (within 21 business days) to respond to the grounds before an assessment is raised.

In our experience, however, there seems to be a tendency by SARS to "comply" with this obligation by issuing a letter of audit findings when an audit has been conducted, but without specifying the grounds for the proposed assessment or at least all the grounds for the proposed assessments. Further still, we have often found that when a verification (as opposed to an audit) is conducted, SARS seems to conflate the issue of a request for relevant material in terms of section 46 of the Tax Administration Act and the requirement under section 42 – to issue a letter of audit findings before an assessment is raised. In the case of a verification, the adjustment letter is often issued on the same date as the additional assessment (especially following an IT14SD process).

Grounds for assessment
It is a requirement under section 96 of the Tax Administration Act to include in the actual notice of assessment (typically the ITA34, VAT217 or EMP217) the grounds for assessment, in the case of an estimated assessment or an assessment not fully based on a return submitted by a taxpayer.

Any additional assessment raised by SARS following an audit or verification is arguably an assessment that is not fully based on a return submitted by a taxpayer. As such, it is our view that the grounds for the assessment must be included in the notice of assessment. In our experience, the manner in which SARS purportedly complies with this provision (at least where an additional income tax assessment is being raised), is by merely including a sentence under grounds for assessment on the ITA34 which states "refer to letter". It is debateable whether this would be sufficient to comply with this requirement under section 96. Sometimes, the grounds for assessment are simply not included on the notice of assessment.

The importance of including specific grounds for assessment in the notice of assessment cannot be overstated. After all, it is the notice of assessment that brings about the existence of the tax liability (*Singh v CSARS* and *Top Watch (Pty) Ltd v CSARS*), and not the letter of audit findings (although such a letter could be construed as an assessment – see *CSARS v South African Custodial Services (Pty) Ltd*).

Lifting the veil of prescription
There is a requirement under section 99 read with section 92 of the Tax Administration Act that SARS must be satisfied that the correct amount of tax was not assessed due to fraud, misrepresentation or non-disclosure of material fact before they can lift the veil of prescription.

In the recent judgment of *Wingate-Pearse v CSARS*, the court held that SARS must subjectively believe (although this subjective belief must be formed based on objective factors), that the correct amount of tax was not assessed due to fraud, misrepresentation or non-disclosure of material facts before they can lift the veil of prescription. It seems, with respect, strange that the test for raising the assessment is merely subjective but when a taxpayer raises prescription as defence, SARS needs to prove they can lift the veil of prescription on a balance of probabilities.

Prepare for litigation
Having said all this, it is our experience that these types of grounds for objection will only be seriously considered once the taxpayer goes on appeal and opts for litigation. Taxpayers would therefore be well advised to ensure they are sufficiently prepared to proceed to litigation against SARS if their defence is based on the assessment being unlawful due to procedural non-compliance.

Careful consideration should also be given to the need and timing of launching review applications in the High Court under the Promotion of Administrative Justice Act. Following the recent judgments in *Gold Kid Trading CC v CSARS* and *Rampersadh and Another v CSARS and Others*, it is arguable though that launching a review application in the High Court under the Promotion of Administrative Justice Act before the Tax Court has heard and adjudicated the appeal might be premature.

Assuming that the assessment is eventually ruled by a court or if it is conceded by SARS to have been issued unlawfully (based on SARS' noncompliance with the Tax Administration Act), then the question remains as to whether SARS would, subsequently, be within its rights to engage the taxpayer on the same matter once again (but this time in due compliance with the prescripts of the Tax Administration Act), and then to raise the same assessment as was previously declared unlawful.

Section 99(1)(e) of the Tax Administration Act states that an assessment may not be made "in respect of a dispute that has been resolved under Chapter 9." Arguably then, if SARS issues a reduced assessment (which they will have to do in terms of section 93(1)(a)) after the additional assessment was ruled or conceded to have been issued unlawfully, that reduced assessment arguably prescribes on the date it is issued by SARS. It is submitted therefore that it would not be possible for SARS to engage the taxpayer again in an attempt to issue a lawful assessment.

SARS noncompliance as a defence

Correctly identifying and applying SARS' noncompliance with the Tax Administration Act as a defence in a tax dispute requires careful consideration of case law as well as the Tax Administration Act and other tax Acts. It should not be raised without proper analysis. Defences based on these grounds are also not without risk.

"The importance of including specific grounds for assessment in the notice of assessment cannot be overstated."

The fact of the matter nevertheless is that it could be raised (as in the case of IT13726) and can be a very powerful defence. After all, as the High Court held in the *Nondabula* case, "The least that is expected of the first respondent [SARS] is to comply with its own legislation and most importantly promote the values of our Constitution in the exercise of its public power." [My insertion.]

REQUEST FOR REASONS & THE LETTER OF OBJECTION

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45 minutes CPD

Our authors take you through the dispute process immediately after an assessment has been issued: requesting reasons for the assessment and formulating an objection based on those, while emphasising the importance of keeping within the stipulated timeframes.

Once SARS has issued an assessment in terms of Chapter 8 of the Tax Administration Act, the affected taxpayer may dispute the assessment in accordance with Part B of the Rules promulgated under section 103 of the Tax Administration Act.

Reasons for assessment

SARS must provide the taxpayer with a statement of grounds for the assessment, setting out the reasons for the assessment in sufficient detail to enable the taxpayer to formulate an objection to SARS' assessment.

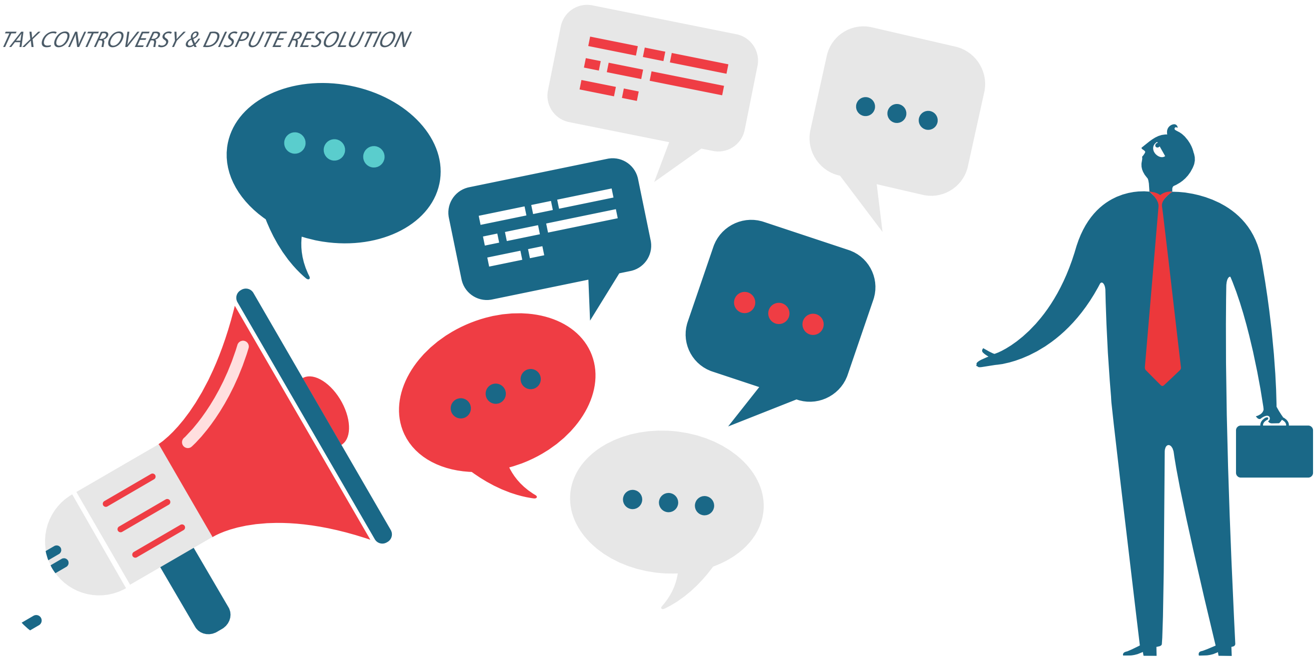
In determining the extent of the reasons which must be provided by SARS to the taxpayer, the Supreme Court of Appeal in *CSARS v Spriggs Investment (Pty) Ltd* held that the decision-maker (in this case being SARS) must provide a clear explanation which will allow the recipient to understand the decision, even if they should disagree with that decision. The explanation should also place the recipient in a position to decide whether the decision involves an unwarranted finding of fact or an error of law which calls for challenge. The court held that in order for the reasons for the decision to be adequate, the decision-maker must set out their understanding of the relevant law, any findings of fact on which the decision depends (especially if those facts have been in dispute), and the reasoning process which led them to those conclusions. In addition, the court held that the decision-maker must provide the reasons for the decision in clear and unambiguous language and not in vague generalities or the formal language of the legislation.

SARS is therefore obligated to provide the taxpayer with reasons for the assessment in sufficient detail to allow the taxpayer to understand the basis of the assessment, in order to place the taxpayer in a position to decide whether to dispute the assessment. It is therefore not satisfactory for SARS to issue an assessment without providing comprehensive reasons for the decision, or to simply quote the legislation upon which it bases its decision.

Where SARS does not provide sufficient reasons for the assessment the taxpayer may, in terms of Rule 6, within 30 business days from the assessment date (or 45 business days if extension is granted by SARS) request SARS to provide reasons for the assessment to enable the taxpayer to formulate an objection against the assessment. SARS is obliged to respond either within 30 business days if they are of the opinion that the reasons required were provided; or within 45 business days with adequate reasons.

Objecting against an assessment

Section 104 of the Tax Administration Act, read with Rule 7, provides for an aggrieved taxpayer to object against an assessment. On receiving the assessment, and determining that SARS has provided adequate reasons for the assessment, a taxpayer may lodge a notice of objection setting out the grounds on which the taxpayer objects to the assessment. In this regard, Rule 7(2)(b) provides that the taxpayer's notice of objection must set out the detail regarding the part or specific amount of the assessment objected to and the grounds of assessment which are disputed, and must provide to SARS the documents required to substantiate the grounds of objection which have not been previously provided to SARS.



Period for lodging a notice of objection

The taxpayer must submit their notice of objection within 30 business days after the date of assessment or after receiving a response to a request for reasons. Where the taxpayer is not in a position to lodge their objection within the prescribed 30-day period, the taxpayer must apply to SARS for an extension of the period. This extension may be granted where a senior SARS official is satisfied that reasonable grounds exist for the delay in lodging the objection.

The Tax Administration Act does not provide for the factors which must be taken into account by the senior SARS official in determining whether reasonable grounds exist for the delay. Interpretation Note 15 dated 21 December 2018 states that the factors which will be relevant to the SARS official's discretion (in considering a request to extend the period in which to lodge an objection timeously) include the reasons for the taxpayer's failure to lodge the objection within the prescribed time limit, the length of the delay, and the prospects of the objection being successful.

Interpretation Note 15 specifically states that the following reasons for failing to submit an objection within the prescribed time limits will not be taken into account by SARS: the taxpayer's ignorance of the law with regard to the time limits for the lodging of an objection and failure by the taxpayer's tax practitioner to lodge the objection timeously. The taxpayer is therefore held responsible for their tax affairs and cannot rely on ignorance of the law or a failure by a tax adviser to submit an objection as a basis for extension of the period within which to lodge an objection.

Taxpayers should therefore be mindful, upon receiving adverse assessments which they intend to dispute, to submit an objection timeously. If not, they may be subjected to SARS exercising its discretion regarding whether the reason for failing to submit an objection timeously is reasonable.

The grounds of objection

Taxpayers often make the error of underestimating the importance of the notice of objection, and particularly the grounds of objection set out therein. This is a grave error which may prejudice the taxpayer in conducting the dispute with SARS and putting up a strong defence to any adverse assessments issued by SARS.

In the event that the taxpayer's objection is disallowed by SARS and the dispute proceeds to the Tax Court, Rule 32 governs the taxpayer's statement of grounds of appeal, which sets out the grounds on which the taxpayer appeals the adverse assessment. The rule provides that the taxpayer may not include in their statement of grounds of appeal any grounds which did not form part of their objection. Therefore, the adoption of a *laissez-faire* attitude when preparing the objection could be to the taxpayer's detriment: the taxpayer is restricted to the grounds of objection set out in their notice of objection in conducting their defence against an adverse assessment.

In addition, the Rules do not specifically provide for amendment of a taxpayer's objection once it has been lodged. Rule 35 makes specific provision for the amendment of pleadings lodged in terms of Rules 31, 32 and 33 (i.e., pleadings in the Tax Court). Therefore the taxpayer may, in terms of the Rules, amend their statement of grounds of appeal but not necessarily the objection which in essence forms the basis for the grounds of appeal.

Preparation of a comprehensive objection to an adverse assessment is of vital importance, and taxpayers are strongly encouraged to seek professional tax advice in order to ensure that all of the relevant grounds of objection are properly canvassed. Obtaining professional advice following the lodging of the objection is extremely ill-advised, as the professional tax adviser would be restricted to the grounds of objection raised in the objection. The adviser would effectively be hamstrung in advising the client on the manner in which to best conduct their defence where the dispute proceeds to the Tax Court.

Understatement penalties

An understatement penalty can only be imposed by SARS in terms of Chapter 16 of the Tax Administration Act. In this regard, the quantum of the understatement penalty levied is determined in accordance with the understatement penalty percentage table set out in section 223 of the Tax Administration Act. This section provides for the penalty to be determined based on the taxpayer's behaviour, which may be classified as a "substantial understatement", lack of reasonable care taken in completing the return, no reasonable grounds for the taxpayer's tax position, impermissible avoidance arrangements, gross negligence or intentional tax evasion.

In terms of section 102(2) of the Tax Administration Act, SARS bears the burden of proving the basis upon which understatement penalties are imposed on a taxpayer. SARS therefore must classify the taxpayer's behaviour in terms of the understatement penalty percentage table and prove why the taxpayer's behaviour falls within that classification.

Typically, in SARS' letters of audit findings issued to taxpayers prior to the finalisation of an audit, SARS informs taxpayers that the "relevant" penalties will be imposed on the taxpayer, without providing the quantum of the penalties or advising the taxpayer of the classification of their behaviour in terms of the understatement penalty table. It is then left to the taxpayer, in their response to the letter of audit findings, to motivate why penalties should not be imposed by SARS. This appears to place the responsibility on the taxpayer to motivate to SARS why understatement penalties should not be imposed, going against the grain of the legislative onus on SARS in this regard.

Only following the consideration of this motivation by the taxpayer does SARS inform the taxpayer of the basis for the imposition of understatement penalties in the finalisation of audit letter. As a result, SARS in essence pre-supposes an "understatement" which the taxpayer is obligated to disprove, at a stage of the audit where the taxpayer's only obligation should be to make submissions to SARS responding to any findings of fact or law, in contravention of section 102(2) of the Tax Administration Act.

In terms of section 223(3) of the Tax Administration Act, a penalty imposed in respect of a "substantial understatement" must be remitted by SARS if SARS is satisfied that:

- The taxpayer made full disclosure of the arrangement that gave rise to the prejudice to SARS by the date on which the return was due;
- The taxpayer obtained an opinion by an independent registered tax practitioner which is based on a full disclosure of the facts and circumstances of the arrangement; and
- The tax practitioner confirmed that the taxpayer's position is more likely than not to be upheld if the matter proceeds to court.

Peculiarly, the provisions for remittance of an understatement penalty are only applicable to a penalty imposed in respect of a "substantial understatement" but are silent in respect of the other behaviours listed in the understatement penalty percentage table.

Having regard to the fact that a "substantial understatement" is, in essence, the least undesirable category of behaviour in which a taxpayer's behaviour may be classified in terms of the understatement penalty percentage table, it stands to reason that the balance of the behavioural categories listed in the understatement penalty percentage table would not be applicable where the taxpayer obtained an opinion from an independent tax practitioner in accordance with section 223 of the Tax Administration Act. It would be illogical, surely, to classify the behaviour of a taxpayer who has gone to the trouble of obtaining an opinion in respect of their tax position from a tax practitioner as being not reasonable or grossly negligent, or constituting an impermissible avoidance arrangement or intentional tax evasion. The logical result of a taxpayer obtaining an opinion in accordance with section 223 of the Tax Administration Act should therefore be that understatement penalties should be remitted by SARS in all cases.

Taxpayers should therefore be prudent when formulating their tax position, and obtain advice in the form of an opinion from a registered tax practitioner in order to effectively insulate themselves from the levying of understatement penalties by SARS.

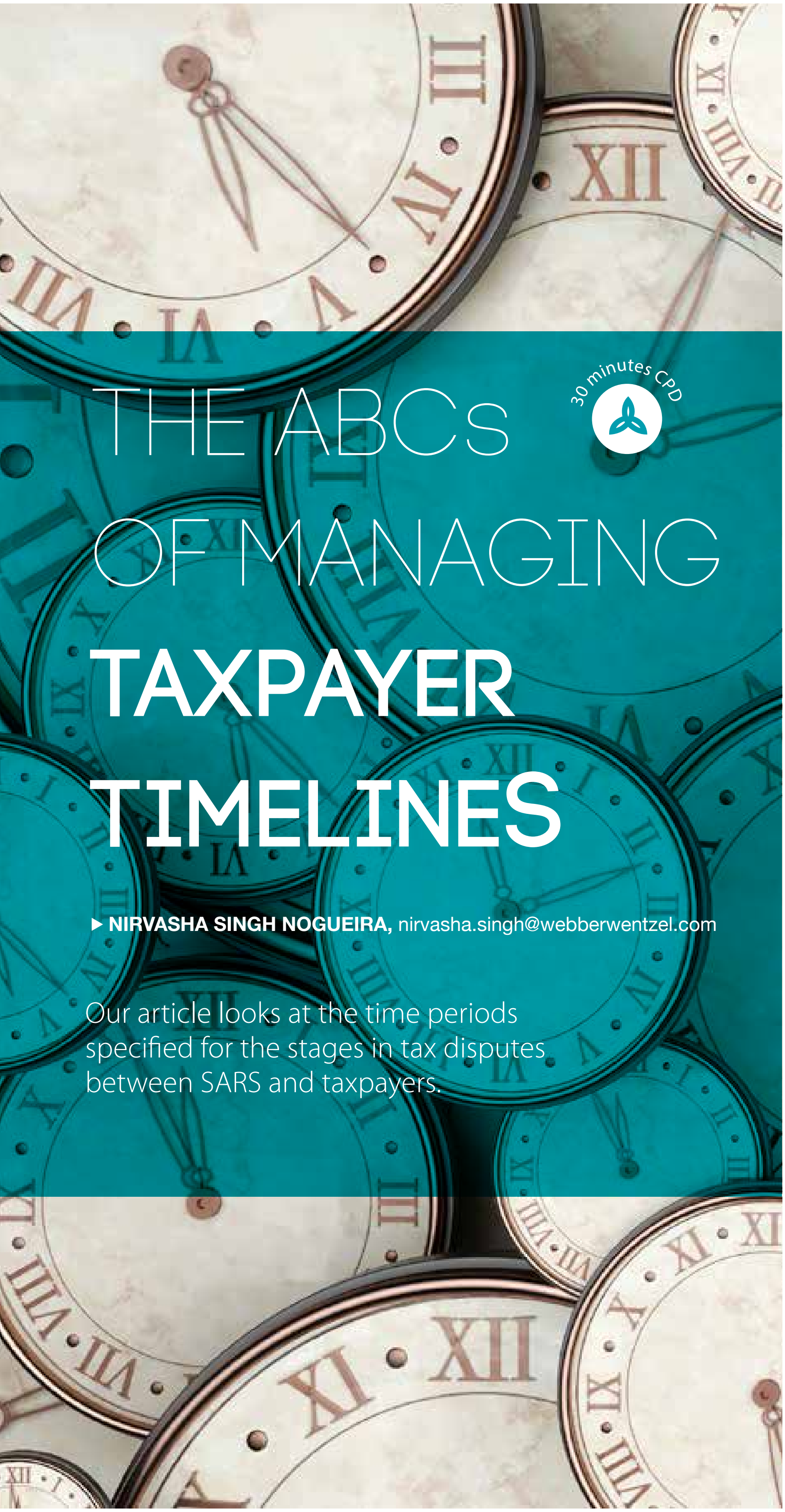
When the dispute relates to a taxpayer's financial year end that is prior to 1 October 2012, the commencement date of the Tax Administration Act, it requires more consideration. Prior to the commencement date of the Tax Administration Act, there was no understatement penalty regime although the Tax Administration Act does contain certain transitional provisions.

Interest

Interest is levied on underpaid tax in terms of section 89quat of the Income Tax Act. This section sets out how the interest is determined. We point out that SARS has a discretion to direct that interest not be paid in whole or in part by the taxpayer where SARS is satisfied that the interest payable is a result of circumstances beyond the taxpayer's control. These circumstances are limited in terms of section 187(7) of the Tax Administration Act to a natural or human-made disaster, a civil disturbance or disruption in services, or a serious illness or accident. The Tax Administration Act contains interest provisions set out in Chapter 12 but the date of commencement of most of these provisions is yet to be proclaimed.

Tread carefully when entering this stage

Taxpayers should tread carefully when they are facing an adverse assessment in order to effectively build their case substantively and with regard to penalties.



30 minutes CPD

THE ABCs OF MANAGING TAXPAYER TIMELINES

▶ **NIRVASHA SINGH NOGUEIRA,** nirvasha.singh@webberwentzel.com

Our article looks at the time periods specified for the stages in tax disputes between SARS and taxpayers.

Taxpayers are offered various legal processes to challenge the legality of actions and decisions within SARS. The right to object, appeal and review any decision by SARS is a fundamental requirement for a due process or a fair hearing in the South African tax system. It is therefore fundamental that a tax review or appeal should be heard within a reasonable time, as there may be potential dangers that the revenue authority or the taxpayer may unnecessarily delay the proceedings to prevent a hearing.

In order to curtail the possibility of time being unnecessarily wasted, SARS and taxpayers have to adhere to strict rules within Chapter 9 of the Tax Administration Act and the rules issued under section 103 of the Tax Administration Act, to comply with the procedural time periods for a tax dispute. The rules essentially govern the procedures and set out the prescribed time periods to lodge an objection and appeal against an assessment or decision, the alternative dispute resolutions and the hearing of an appeal before a tax board or tax court.

Suspension of payment

When a taxpayer is aggrieved by an assessment or a decision that is subject to an objection or an appeal in terms of section 104 of the Tax Administration Act, they have a right to dispute it. In terms of the "pay now, argue later" principle, a taxpayer is required to pay a tax debt before a dispute is finalised or resolved. Therefore, the obligation to pay tax, which arises when SARS issues an assessment, is not automatically suspended by an objection or appeal. The taxpayer's obligation would only be suspended by SARS upon the taxpayer filing a formal request for suspension. The 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.

"If a taxpayer wishes to have their matter finalised within a reasonable period, both the taxpayer and SARS must endeavour to comply with all the stipulated timeframes."

Where a SARS official grants the suspension for payment of tax, and the taxpayer does not lodge an objection, or an objection is disallowed and no appeal is lodged, or the appeal to the tax board or court is unsuccessful, the suspension is automatically revoked and the taxpayer must pay the tax due under the assessment. If the SARS official denies the request for suspension and issues a notice of the decision to the taxpayer, SARS is prohibited from proceeding with collection steps before the expiration of 10 business days from the date the taxpayer receives SARS' decision (section 164(6) of the Tax Administration Act). Should a taxpayer feel aggrieved by SARS' decision, the taxpayer may take SARS' decision on review to the High Court within 180 days from the date the taxpayer received the rejection of the suspension of debt. The High Court, before the application is heard, will order SARS to suspend the recovery of tax debt until the review application is finalised.

A request for reasons

If a taxpayer believes that they have not been provided with a comprehensive basis for the assessment that has been raised, the taxpayer must lodge, within 30 days from the date of the assessment, a request for reasons from SARS (rule 6(2)(c)). The reasons will enable the taxpayer to formulate their objection against the assessment. If the taxpayer is unable to lodge the request within the 30-day period, the taxpayer must submit a request to extend the 30-day period within which the reasons may be requested. If SARS is satisfied that reasonable grounds exist for extending the period, the 30-day period may be extended with a maximum of another 45-day period (rule 6(3)).

If SARS 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 (rule 6(4)). Where reasons have not been provided by SARS for the taxpayer to formulate the objection, SARS must respond within 45 days after delivery of the request.

Lodging an objection

If the taxpayer is aggrieved by an assessment, whether there are reasons or not, the taxpayer may lodge their objection within 30 days from the date of the assessment (rule 7(1)). Where a taxpayer requested reasons, within 30 days after delivery by SARS of the notice stating that SARS is satisfied that the reasons were sufficient, the taxpayer may object to the assessment. Where no reasons are requested; the taxpayer must lodge an objection within 30 days of the assessment. This 30-day period may be extended by a period of 30 days by SARS where a senior SARS official is satisfied that reasonable grounds exist for the delay in lodging the objection (section 104(4) of the Tax Administration Act).

SARS, upon receipt of the objection, may inform the taxpayer by notice that the objection is invalid within 30 days (rule 7(4)). The taxpayer, upon receiving the notice of invalidity, may, within 20 days of delivery of the notice, submit a new objection (rule 7(5)). Upon receipt of a valid objection, SARS may request, within 30 days after receipt of the objection, for the taxpayer to substantiate their grounds of objection with further documents for purposes of the disputed assessment (rule 8(1)). The taxpayer must deliver the requested documentation within 30 days after the date of the above notice or request an extension of not more than 20 days (rule 8(2)). SARS, upon receipt of the substantiating documents, must deliver its decision on the objection within 45 days (rule 9(1)(b)).

Appealing against a decision

Where there is no request from SARS to substantiate the objection, SARS must notify the taxpayer of its decision in writing within 60 days after the taxpayer's objection (rule 9(1)). If SARS allows the taxpayer's objection, then SARS must provide reasons to the taxpayer and the assessment will be altered. Where SARS disallows the objection, the taxpayer must deliver its appeal within 30 days after the delivery of the disallowance (rule 10(1)(a)). This period may be extended by a senior SARS official by 21 days if reasonable grounds exist or up to 45 days if exceptional circumstances exist (section 107(2)).

Alternative dispute resolution

Once the appeal has been lodged, the appeal may be referred by SARS for a process known as alternative dispute resolution. The alternative dispute resolution proceedings end at the date the dispute is resolved or when the proceedings are terminated. The alternative dispute resolution process must be concluded within a 90-day period after the date of commencement of alternative dispute resolution (rule 15(3)).

The tax board

Where SARS and the taxpayer fail to reach a settlement agreement and the alternative dispute resolution is terminated, the taxpayer must, by notice, place the appeal before the tax board within 20 days. The clerk of the tax board will, within at least 30 days before the hearing of the appeal, inform SARS and the taxpayer of the date, time and place of the hearing (rule 26(1)).

The decision by the tax board must be provided within 60 days after hearing of the matter. The clerk of the tax board must, within 10 days of receipt of the decision, furnish the decision to SARS and the taxpayer (rule 29). Where there is no referral of the appeal to the tax court, SARS must issue an assessment to the taxpayer, within 45 days of receipt of the decision, to give effect to the decision.

Referral to the tax court

Where SARS or the taxpayer intends to appeal to the tax court, it must notify the clerk of the tax board within 21 business days of receiving the decision from the tax board, but before the expiry of the 60-day period for the tax board to deliver its decision. The clerk of the tax court must, within 10 days of receipt of a request, deliver the request to the relevant chairperson. The chairperson must make a decision within 15 days of receipt of the request and inform the clerk who must thereafter notify the parties within 10 days. The matter will then be heard at the tax court to settle the dispute.

There are five pre-hearing stages before a matter is heard at the tax court. These stages are set out in rules 31 to 43. The pleading stage which is common to civil proceedings is where the parties formulate their cases in order to crystallise the issues that the court must deal with. In terms of rule 31, SARS must deliver to the appellant (the taxpayer) a statement of the grounds of assessment and the opposing appeal within 45 days. The appellant must deliver to SARS, in terms of rule 32, their statement of grounds of appeal within 45 days after the delivery of SARS' statement. The taxpayer may also, within 10 days after the delivery of SARS' statement, deliver a notice of discovery to SARS requesting SARS to discover any documentary material the appellant may require to formulate its grounds of appeal under rule 32. SARS may also deliver within 10 days after the delivery of the taxpayer statement a notice of discovery. Once the taxpayer delivers their statement of ground of appeal, SARS may deliver a reply to the statement within 15 days after the taxpayer has discovered the required documents in term of the notice of discovery or 20 days after the delivery of the taxpayer's statement under rule 32.

SARS and the taxpayer would enter into various stages of legal proceedings such as the discovery stage, application to set down the appeal before the tax court, the pre-trial conference and finally where witnesses may be subpoenaed and documentary evidence is prepared for the tax court hearing.

Once the pre-hearing stages have been completed and the hearing is concluded, the tax court will then make a decision to either confirm the assessment or decision, order the assessment or decision to be altered or refer the assessment back to SARS. The registrar of the tax court must by notice deliver the written judgment of the tax court to the parties within 21 days of receipt of the judgment.

Further appeals

A party who feels aggrieved by the judgment can appeal to a full bench of the High Court or to the Supreme Court of Appeal against the judgment.

Compliance with timeframes

If a taxpayer wishes to have their matter finalised within a reasonable period, both the taxpayer and SARS must endeavour to comply with all the stipulated timeframes for the various stages in the dispute process.

SARS' DEADLINES:

15 minutes CPD

CONSIDERATIONS BY A TAX ATTORNEY

▸ **NATASHA WILKINSON,** natasha@taxconsulting.co.za

A short overview of the deadlines that apply to SARS, and the implications when these are not met.

Following the promulgation of the South African Revenue Service Act (the SARS Act), SARS was established. Under this Act, SARS is required to perform its functions in the most cost-effective and efficient manner and in accordance with the values and principles mentioned in section 195 of the Constitution. Section 195(1) of the Constitution requires that SARS must ensure, amongst others, that the efficient, economic and effective use of resources is promoted and further that people's needs are responded to.

With the above in mind, it may be argued that the statutory obligations imposed on SARS by the SARS Act as well as the Constitution have not been satisfied where SARS misses its deadlines in a particular matter. This is so because it would be difficult for SARS to argue that it is performing its functions efficiently where such deadlines are missed.

What deadlines are imposed on SARS?

From a dispute resolution perspective, a number of deadlines are imposed on SARS by the Rules governing alternative dispute resolution, including:

- Following the delivery by a taxpayer of a request for reasons under Rule 6(1):
  - 30 business days for SARS to provide the taxpayer with a notice that reasons were previously provided to that taxpayer; or
  - 45 business days for SARS to provide the taxpayer with reasons for its decision where no reasons have previously been provided by SARS.
- Following the delivery of an objection by a taxpayer under Rule 7(1):

"Section 42 of the Tax Administration Act sets out a clear duty on SARS to keep the taxpayer informed of the status of an audit being undertaken by SARS."

» 30 business days for SARS to provide the taxpayer with a notice of invalid objection;
» 30 business days for SARS to provide the taxpayer with a request for substantiating documents; or
» 60 business days for SARS to provide the taxpayer with a notice of allowance or disallowance of the objection (where no notice of invalid objection or request for substantiating documents was previously delivered by SARS).

- Following the delivery of an appeal by a taxpayer in terms of Rule 10(1):
  » 30 business days for SARS to provide the taxpayer with a notice that the matter is appropriate for alternative dispute resolution (ADR) proceedings to be held (where a taxpayer has opted to make use of the ADR process); or
  » 45 business days for SARS to provide the taxpayer with its statement of grounds of assessment and opposing appeal, where the taxpayer has opted not to make use of ADR proceedings and the matter falls within the monetary jurisdiction of the Tax Court (which currently deals with matters where the tax in dispute exceeds R1 million).

Aside from the above, other timelines are also imposed on SARS. Section 42 of the Tax Administration Act sets out a clear duty on SARS to keep the taxpayer informed of the status of an audit being undertaken by SARS. In this regard, the public notice issued under section 42(1) confirms that a progress report must be provided to the taxpayer in every 90 calendar-day interval. Furthermore, section 42(2) of the Tax Administration Act requires that SARS must, upon completion of an audit, notify the taxpayer, within 21 business days, either: (a) that the audit was inconclusive or (b) of the outcome of the audit.

For ease of reference, section 42(1) and (2) of the Tax Administration Act as well as an extract from the public notice referred to in section 42(1) are included below:

42. Keeping taxpayer informed

1. *A SARS official involved in or responsible for an audit under this Chapter <u>must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a report indicating the stage of completion of the audit.</u>*
2. *<u>Upon conclusion of the audit</u> or a criminal investigation, and where—*
   a. *the audit or investigation was <u>inconclusive, SARS must inform the taxpayer accordingly within 21 business days;</u> 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 <u>document containing the outcome of the audit,</u> including the grounds for the proposed assessment or decision referred to in section 104 (2).* (Emphasis added.)

2. Due dates for reports

A SARS official involved in or responsible for an audit … must provide the taxpayer concerned with a <u>report indicating the stage of completion of the audit—</u>

…

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

What remedies are available to taxpayers?

There may be a variety of remedies available to taxpayers, depending on the particular facts of the matter. In the case of SARS failing to comply with the obligatory deadlines imposed under the dispute resolution rules (for example, in relation to a request for reasons, objection and appeal outlined above), the dispute resolution rules provide taxpayers with an opportunity to force SARS into complying with these deadlines. This is done by delivering a formal legal notice to SARS, in terms of which SARS is alerted to the fact that they are in default of their obligations and requesting that SARS remedy this default within a period of 15 business days. Where SARS nevertheless fails to correct this, the Tax Court is then asked to intervene by way of a formal Tax Court application.

In respect of SARS' failure to adhere to the deadlines in section 42(1) and (2) of the Tax Administration Act in relation to audits, for example, the court in *ITC 13726* has held that SARS' non-compliance with these provisions "clearly offends both the Constitution and the principle of legality" resulting in SARS' decision to conduct an audit without proper notice being subject to being set aside and furthermore that any resultant assessment may be found to be invalid.

Seeking appropriate advice

The discussion above is in no way meant to constitute legal advice that applies to every case. This is so because the particular facts of a matter may influence what would be the best-suited course of action. It is always recommended that comprehensive advice be sought from a tax attorney who is familiar with what the law prescribes.

15 minutes CPD

SUSPENSION OF PAYMENT: A DELICATE BALANCING ACT

▸ **ANTON LOCKEM,** lockem@wylie.co.za & **CHRICHAN DE LA REY,** chrichan.delarey@wylie.co.za

What happens when SARS is convinced a taxpayer has a liability and the taxpayer is convinced the amount is not due? Can payment be avoided? What about SARS' obligation to collect revenue? Our article describes the balancing act between competing rights and obligations.

As with all things in life, too much of something is bad. This applies to too much freedom given to a taxpayer or SARS, too many rights afforded to either of the aforementioned parties or even simply consuming too much food over the upcoming festive period. Balance is a necessity. The Tax Administration Act is literature setting out the line between rights and obligations and balancing both SARS' right to collect revenue and taxpayers' rights to administrative action that is lawful, reasonable and procedurally fair. The entire dispute resolution process is set out and prescribed within the Tax Administration Act, including a process that runs parallel to the taxpayer's dispute: suspension of payment.

Section 164 of the Tax Administration Act provides that a taxpayer should request a senior SARS official to suspend the payment of tax or a portion of the tax due under an assessment if such taxpayer intends to dispute or disputes his tax liability. The Tax Administration Act affords the senior SARS official the discretion whether to allow the request, having regard to a list of criteria provided. The SARS official may also deny the taxpayer's request to suspend liability, if the official is satisfied that the dispute process was merely entered into on a frivolous or vexatious basis or as a dilatory tactic. The request may also be denied should there be material changes in the circumstances from when the request was granted.

Pay now, argue later

The difficulty most tax practitioners have is explaining to taxpayers that, unlike normal disputes where the right to collect the outstanding funds are deferred until resolution or a court order is made, SARS is entitled to collect the revenue upon raising the assessment. SARS is also armed with the exceptional power to appoint third parties to collect tax on their behalf. This can be banks removing the funds directly from taxpayers' bank accounts. Hence the "pay now, argue later" principle applies automatically, and taxpayers need to request for a suspension of payment to avoid the unpleasant surprise of having funds being removed without notification. It is unfortunate that SARS is provided with these powers in an economic climate where many taxpayers cannot afford to pay over the tax liability whilst the dispute is ongoing. It is conceded that the Tax Administration Act is not unreasonable in that SARS is obliged to repay the funds, including interest, should the taxpayer win the dispute. However, paying a substantial tax liability will most likely be crippling to any middle-class individual and companies could be forced to close shop.

Communication lines

Furthermore, another difficulty arising within this parallel process is that the request for suspension of payment is dealt with in a different department from the department dealing with the causally connected dispute. Whilst the audit department handles ▸

- the objection or appeal procedures, the debt management department presents the taxpayer's request for suspension of payment to a committee that makes the final decision. It is likely, due to lack of communication within the large SARS entity, that the debt management department responsible for the collection proceedings is not aware of the suspension of payment request or the ongoing dispute. It is also likely that the audit department is not aware of the third-party appointment already in place for the tax liability being disputed. A concern raised by various tax practitioners at the 2019 Tax Indaba is that due to the delay in allocating the request for suspension of payment to the correct official within SARS' internal system, the request is only received after the collection proceedings have commenced. SARS is aware of the prejudice suffered due to the "right hand not knowing what the left hand is doing" and a positive change is expected.

Taxpayers' rights

SARS acknowledged at the 2019 Tax Indaba that the organ of state hears the taxpayers' pleas and understands the difficulty taxpayers have in "paying now and arguing later". It is here where the Tax Administration Act attempts to balance the rights of SARS and taxpayers. In considering the request for a suspension of payment, the senior SARS official should consider, amongst other factors, 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. Tax practitioners must ensure that this submission is made in the request and an evidentiary framework must be included. Should the senior SARS official abuse this power and act unreasonably when applying their discretion, the decision to disallow the request is an action capable of being reviewed as it infringes on the taxpayer's right to reasonable administrative action.

The provisions included in section 164 form the perfect balance between SARS' and taxpayers' rights, and balance is a necessity."

The public interest

As with any piece of legislation, its purpose must be considered. The case of *Capstone and Kluh Investments v CSARS (2011)* encapsulates the purpose of the "pay now, argue later" principle in that it "include(s) the public interest in obtaining full and speedy settlement of tax debts and the need to limit the ability of recalcitrant taxpayers to use objection and appeal procedures strategically to defer payment of their taxes".

Practically, tax disputes are time consuming and protracted. The suspension of payment relief provided to bona fide taxpayers takes cognisance of this within the "pay now, argue later" framework and requests are generally allowed. Incidences may arise where taxpayers are required to provide security for the tax liability amount.

A balancing act

Should SARS be given too much freedom or too many rights, all taxpayers would have to "pay now and argue later", whether irreparable hardship would be caused or not. Had taxpayers been given too much freedom or too many rights, SARS (whose purpose is to collect revenue) would not be able to fulfil their objectives and the fiscus would be harmed as requests for suspension of payment would be made as pure dilatory tactics.

The provisions included in section 164 form the perfect balance between SARS' and taxpayers' rights, and balance is a necessity.

TAX APPEALS

30 minutes CPD

▶ **AAKIFAH LOUW,** msclouw@gmail.com

If SARS disallows or partially disallows a taxpayer's objection, the taxpayer can appeal against this decision by SARS. Our article follows the steps in the appeals procedure.

It is a mistake to believe that an appeal against SARS' decision on a taxpayer's objection is made to SARS. Although an appeal is lodged on SARS eFiling, an appeal is in fact made either to the tax board or the tax court.

The tax board has jurisdiction over tax appeals of R1 million or less and has a simpler procedure. The tax court considers all other disputes, and sometimes even the R1 million disputes, given the nature of the dispute or the legal principles involved.

This discussion focuses on the nature of a tax appeal and the basic tax court appeal procedure, covering the hearing of, and the orders in, an appeal in the tax court.

Nature of an appeal

The legislative provisions relating to appeals are in section 107 of the Tax Administration Act, read together with rules 10 and 11 of the Rules Promulgated Under Section 103 of the [Tax Administration] 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.

A taxpayer who has objected to an assessment or decision must be notified by SARS in writing of its decision to either disallow or partially allow the objection. The notification must also set out the basis for the decision and a summary of procedures to appeal the decision.

A taxpayer is then entitled to appeal against SARS' decision in respect of the objection. If they decide to do so the taxpayer is referred to as the "appellant" and the Commissioner of SARS as the "respondent".

A taxpayer is also entitled to appeal against an assessment or decision which has been altered subsequent to SARS considering the objection – the taxpayer appeals against the altered assessment or decision.

To initiate an appeal, the appellant delivers a notice of appeal which sets out:

- which grounds of objection are being appealed against;
- the grounds for disputing the disallowance of objection;
- any new ground of appeal which is not a new objection; and
- an indication of whether the taxpayer elects alternative dispute resolution. ▶

- Where the notice of appeal raises a new ground of appeal not relied on in the objection, SARS may request documents supporting this new ground to be provided to SARS within 15 days, which period can be extended for a further 20 days on a taxpayer's request.

Tax court procedure

The notice of appeal must be filed within 30 days of SARS' decision in respect of the objection. A senior SARS official may extend the time period for either 21 days on reasonable grounds shown, or up to 45 days where exceptional circumstances exist that justify a further extension.

Once a notice of appeal is filed on eFiling, the appellant and respondent may attempt to settle the dispute through alternative dispute resolution. Proceedings on the appeal, along with relevant time periods, are suspended during the alternative dispute resolution procedure and will only commence in the event that the parties fail to settle the matter through alternative dispute resolution. In such an instance, the tax court procedure as provided for in Part E of the Rules applies.

The tax court is not a court as referred to in section 166 of the Constitution of the Republic of South Africa. It is an administrative tribunal created in terms of Part D of Chapter 9 of the Tax Administration Act. The tax court has the same function and role as that of the erstwhile special court, as a court of revision *(ITC 1906 80 SATC 256)*.

Rule 31 statement

Subsequent to the notice of appeal, the respondent must deliver a statement of grounds of assessment and opposing appeal, colloquially referred to as the 'rule 31 statement'. This is delivered within 45 days of either:

- the conclusion of the alternative dispute resolution process if one was followed;
- referral to the tax court of a matter decided by the tax board;
- provision by the taxpayer of additional information in support of a ground not relied upon in the objection; or
- delivery of the appellant's notice of appeal.

The rule 31 statement must set out:

- a clear and concise statement of the consolidated grounds of assessment;
- facts or legal grounds in the notice of appeal admitted and opposed; and
- the material facts and legal grounds upon which the respondent relies in opposing the appeal.

Of import is that the rule 31 statement must not contain a ground that novates the whole of the factual or legal basis of the disputed assessment, or which requires the issuing of a revised assessment.

Rule 32 statement

The appellant then delivers a statement of grounds of appeal, colloquially referred to as 'the rule 32 statement', within 45 days. The rule 32 statement must contain:

- the grounds on which the appellant appeals;
- the facts or legal grounds in the rule 31 statement admitted and opposed; and
- the material facts and legal grounds relied upon to oppose the rule 31 statement.

The rule 32 statement must not have a 'new ground of objection not disputed to'.
The common law on a similar provision in the dispute resolution rules in terms of section 107A of the Income Tax Act was that a taxpayer who failed to raise an objection to an assessment was precluded from doing so at the appeal stage (*HR Computek (Pty) Ltd v CSARS* [2012].

"The tax board has jurisdiction over tax appeals of R1 million or less and has a simpler procedure. The tax court considers all other disputes."

In terms of the Rules, the tax court held that a taxpayer is not precluded from raising a new ground of objection in its rule 32 statement where, in substance, it is the same issue that is before the court of appeal (*ITC 1912 80 SATC 417; CSARS v Massmart Holdings Limited IT14294*).

Regardless of which wording of the provision is applied, it is imperative that an objection be comprehensive.

Rule 33 statement

The respondent may then deliver a reply to the rule 32 statement, colloquially referred to as 'the rule 33 statement'. The rule 33 statement is delivered within 20 days of delivery of the rule 32 statement.

Issues in the appeal

These pleadings exchanged between the parties contain the issues in the appeal, per rule 34 of the Rules.

Hearing of tax appeal

The appellant must apply to the registrar of the tax court for a date for the hearing of the appeal within 30 days of delivery of either its rule 32 statement or the respondent's rule 33 statement. In the event that the appellant fails to do so, the respondent must apply for a date of hearing within 30 days of the expiry of the period afforded the appellant to do so.

The registrar provides the parties written notice of the date of the hearing at least 80 days before such hearing.

Burden of proof

Section 129(2) read with section 102(1) of the Tax Administration Act provides that in an appeal, the appellant bears the burden to prove that it has carried out the correct tax treatment in its tax returns, or that the respondent's decision in respect of the objection is incorrect.

The exception to this rule is where the appeal is against an understatement penalty in terms of section 222(1) of the Tax Administration Act. The onus is therefore reversed and the respondent bears the burden to prove its case in respect of the imposition of the understatement penalty.

Duty to commence proceedings

The appellant has the duty to commence with its case at the hearing in terms of rule 44(1) of the Rules.

There are two exceptions to this general rule, both of which place the duty to commence on the respondent. The first is where the only issue in dispute is either the reasonability of an estimated assessment by the respondent, or the facts upon which an understatement penalty is imposed. The second is where the respondent raises a point *in limine* (i.e., the hearing of a specific legal point which takes place before the main dispute is heard).

The tax court may also determine which party has to commence proceedings as a point *in limine* where the parties so request.

Awards by the tax court

The tax court's awards are limited. For an appeal against an assessment or decision, the tax court may confirm the assessment, order the assessment or decision be altered, or refer the assessment back to SARS for reconsideration. In respect of an appeal against an understatement penalty, the tax court may confirm, reduce or increase the understatement penalty.

On application by either party, the tax court may order the payment of costs where the case of the opposing party is unreasonable, a postponement is requested by the opposing party or the appeal is withdrawn or conceded after allocation of a hearing date.

ALTERNATIVE DISPUTE RESOLUTION
IMPROVING OUTCOMES

15 minutes CPD

KEVIN BURT, mail@kevinburt.co.za

How can alternative dispute resolution procedures deliver better outcomes for taxpayers and SARS? Our article provides three concrete proposals.

Part C of the dispute resolution rules provides the legislative framework for the resolution of a tax dispute by a process other than litigation. This process is known as alternative dispute resolution (ADR). ADR is a facilitative style of mediation, the aim of which is to assist the parties in reaching a mutually agreeable resolution of the dispute. In my experience, many tax disputes could be resolved by ADR much sooner than they could be by litigating them. In my view, participation in ADR could even begin at an earlier stage than is currently contemplated in Part C. By the time a notice of appeal is lodged, the parties often have become entrenched in their respective positions.

A taxpayer, whose objection to an assessment has been disallowed by SARS and who wants to appeal against the assessment, may indicate in the notice of appeal that he is willing to participate in ADR proceedings. Should SARS be satisfied that the dispute is appropriate for ADR, it will notify the taxpayer of its decision. If the parties agree to a facilitator, the usual practice is for SARS to appoint a SARS official as facilitator. This practice is to suit SARS, not the taxpayer. Dispute resolution rule 16 obliges SARS to establish a list of facilitators and states that a person included on the list "may be a SARS official". (My emphasis.) In other words, he or she need not be an employee of SARS. Because in my view most tax disputes could be resolved by ADR more readily than by litigation, the usual practice is a concern, irrespective that it might be expedient. There is a perception among taxpayers that a facilitator who is an employee of SARS has a conflict of interest. This situation may needlessly cause taxpayers to doubt the legitimacy of the ADR process. Dispute resolution rule 18(1) declares that a facilitator will not, as a consequence of his or her employment by SARS, be regarded as having a conflict of interest. A declaration that there does not exist a conflict of interest does nothing to dispel a perception regarding the legitimacy of the ADR process, which taxpayers may perceive as biased because facilitators are SARS employees.

"There is a perception among taxpayers that a facilitator who is an employee of SARS has a conflict of interest."

There are three further aspects of the ADR process which are often overlooked by taxpayers and tax practitioners. Each of them will be discussed below, as they may improve outcomes at the ADR stage.

Duration of ADR proceedings

Once the appointment of a facilitator has been made, SARS determines the place, date and time of the meeting at which the ADR proceedings are to be convened. In practice it is very often the expectation of the taxpayer and the tax practitioner representing him or her that the ADR process will be confined to the solitary meeting as notified to the taxpayer by SARS. SARS rarely does or says anything that will alter this belief. There is, however, no reason for taxpayers and tax practitioners to think this. Dispute resolution rule 15(3) provides the parties with 90 business days within which to attempt to resolve the dispute. The meeting is seldom scheduled by SARS for more than an hour or two. It is quite unrealistic to expect to narrow a wide-ranging, high-value dispute, in which more than a single tax year or period may be concerned, by attempting to resolve as many issues in dispute as possible in such a solitary meeting. Dispute resolution rule 20(5)(b) specifically provides that, if it is agreed, the meeting at which the ADR proceedings were initially convened may be resumed at the same place or another place at a date and time suitable to the parties and the facilitator. ADR is a process, not a procedure, the whole aim of which is to attempt to resolve the dispute.

Resolving the dispute by agreement

The second aspect, mentioned above, is most important. Too many tax practitioners, in practice, approach ADR with the attitude that their duty to their clients is to seek to settle the dispute with SARS. This is a wrong approach and is also contrary to dispute resolution rule 24(1). The rule provides that the parties may attempt to settle the dispute, i.e. by compromising the disputed tax liability (or liabilities), only once they have attempted by "all reasonable efforts" to resolve it by agreement. The approach in ADR proceedings is for the taxpayer's representative to seek to persuade SARS to accept the taxpayer's version of the facts or the legal principles applicable to those facts and, in some disputes, both. Equally, the taxpayer's representative needs to be willing to accept that SARS may be right and he or she may be wrong on the facts or the law, or both. It should, therefore, be clear that approaching ADR in this way requires not only a change of outlook by tax practitioners and taxpayers, but a completely different mode of preparation for the ADR proceedings. It is also true, though, that SARS has been known to approach ADR proceedings with a view to seeking a settlement with the taxpayer at all costs, rather than being put to the effort of having to persuade the taxpayer of the correctness of the disputed assessment(s). This state of affairs is equally unacceptable as it does not conduce to principled resolution of disputes.

Recommendation by a facilitator

The right of a taxpayer to request that a facilitator make a written recommendation at the conclusion of the ADR proceedings, is the third and final aspect of the ADR process discussed in this article. Such a request must be made at the commencement of the ADR proceedings and SARS and the facilitator must agree to it.

A written recommendation is not to be confused with the report which a facilitator is obliged to provide to the parties within 10 days of the conclusion of the ADR proceedings. They are quite distinct.

Given that the facilitator is duty bound, in terms of dispute resolution rule 17(c), to "promote … and give effect to the … efficacy of the alternative dispute resolution process", it may be argued on this wording that reconsideration of the issues to pursue on appeal after a facilitator has made a recommendation is to "promote" and "give effect" to the "efficacy" of the ADR process. Therefore, a flat refusal by a facilitator not to make a recommendation, should no agreement or settlement be reached, may well be to act contrary to dispute resolution rule 17(c).

Litigation is as much about the facts and the law as it is about the cost of litigation and the prospects of success in court. All these factors have to be considered before the next step in the litigation process is taken. To my mind, the possibility that the tax court may take the facilitator's recommendation into consideration in deciding whether to make a costs order or not is not a good justification for not requesting a facilitator to make a recommendation. A party not agreeing to a facilitator making a recommendation possibly says more about the prospects of the party's case, considering that a recommendation by the facilitator will not be admissible during any subsequent proceedings.

DISPUTE RESOLUTION: TAX BOARD / TAX COURT AND BEYOND

15 minutes CPD

THOMAS LOBBAN, thomas@taxconsulting.co.za

What happens if the alternative dispute resolution process does not resolve the issues between a taxpayer and SARS? Some aspects of the procedure for litigation are outlined below.

Once a dispute with SARS gets to a certain point, it becomes clear that the matter will require judicial intervention. Where alternative dispute resolution (ADR) is not successful or is otherwise not suitable, the next stage is for the taxpayer to take the matter on appeal to either the tax board, or the Tax Court. Therefore, what follows below is a basic overview of the salient points of procedure in this respect, to enable tax practitioners to successfully navigate the parlous landscape of tax litigation.

The tax board

The tax board is a creature of statute, established in terms of section 108 of the Tax Administration Act and chaired by an admitted attorney or advocate. It may also be co-chaired by either an accountant or commercial representative.

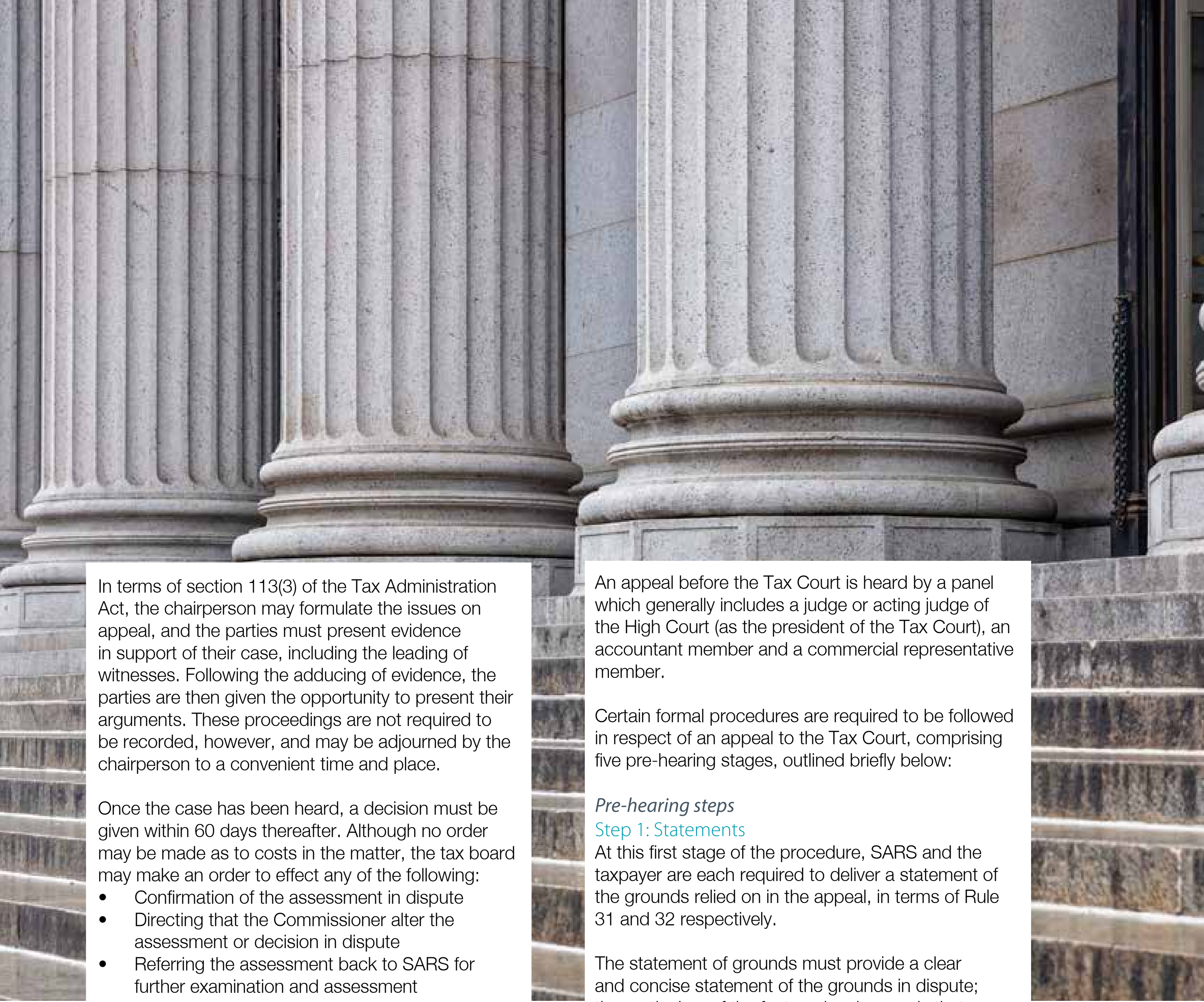
The tax board has jurisdiction over tax disputes that do not exceed R1 million, unless otherwise agreed to between SARS and the taxpayer (for example, where the matter is complex). Further, although the places where hearings are held before the tax board are designated by SARS, an appeal must be held at the place closest to the residence or place of business of the taxpayer, unless otherwise agreed.

In terms of Rule 10 of the Dispute Resolution Rules under section 103 of the Tax Administration Act (the Rules), a taxpayer who wishes to lodge an appeal is required to submit a notice of appeal to the tax board within 30 days of the delivery from SARS of a notice of disallowance of the objection, or 15 days following the termination of ADR proceedings.

The taxpayer is also required to request, within 35 days after delivery of the notice of appeal, that the clerk of the tax board set the matter down for hearing. The clerk is then required to set the matter down for hearing within 30 days of the taxpayer's request for set down. The clerk is also required to provide notice to the taxpayer of the date, time and place of the hearing, no less than 20 days beforehand.

Prior to the hearing the parties may, at the discretion of the tax board, issue subpoenas requiring that evidence be furnished to the tax board. However, the person or documents concerned must be relevant to the matter so as not to constitute an abuse of process.

The tax board does not generally conform to strict procedures, which are determined by the chairperson to the extent not provided for under the Rules. As is the case in any other judicial forum, each party must have the opportunity to put their version forward, in the interest of the *audi alteram partem* principle.



In terms of section 113(3) of the Tax Administration Act, the chairperson may formulate the issues on appeal, and the parties must present evidence in support of their case, including the leading of witnesses. Following the adducing of evidence, the parties are then given the opportunity to present their arguments. These proceedings are not required to be recorded, however, and may be adjourned by the chairperson to a convenient time and place.

Once the case has been heard, a decision must be given within 60 days thereafter. Although no order may be made as to costs in the matter, the tax board may make an order to effect any of the following:

- Confirmation of the assessment in dispute
- Directing that the Commissioner alter the assessment or decision in dispute
- Referring the assessment back to SARS for further examination and assessment

The Tax Court

A tax court is established by proclamation of the President of South Africa, in terms of section 116 of the Tax Administration Act.

An appeal may be lodged with the Tax Court where ADR is not pursued or the taxpayer is aggrieved by the decision of the tax board. However, the Tax Court will hear every case in which the tax amount concerned exceeds R1 million. In particular, the Tax Court may hear matters relating to the following:

- An appeal lodged under section 107 of the Tax Administration Act
- An interlocutory application which is related to the appeal
- An application in a procedural matter relating to Chapter 9 of the Tax Administration Act read with Part F of the Rules

An appeal before the Tax Court is heard by a panel which generally includes a judge or acting judge of the High Court (as the president of the Tax Court), an accountant member and a commercial representative member.

Certain formal procedures are required to be followed in respect of an appeal to the Tax Court, comprising five pre-hearing stages, outlined briefly below:

Pre-hearing steps

Step 1: Statements

At this first stage of the procedure, SARS and the taxpayer are each required to deliver a statement of the grounds relied on in the appeal, in terms of Rule 31 and 32 respectively.

The statement of grounds must provide a clear and concise statement of the grounds in dispute; the particulars of the facts or legal grounds that are admitted or opposed, respectively; and the material facts and legal grounds which inform SARS' opposition of the appeal.

Both parties are permitted at this juncture to add new grounds for the appeal in the statement, but may not include a ground which reframes the entire factual or legal basis of the disputed assessment or which will require the issuance of a revised assessment. Following this, SARS may also deliver a further reply to the taxpayer's statement.

Step 2: Discovery

Discovery entails the procuring and disclosure of the evidence relied on by the parties, and ensures that the trial that follows is fair to each party. In terms of Rule 36, discovery may take place where a new ground is relied on by either SARS or the taxpayer in their respective statements under Rule 31 or 32, or

"Discovery entails the procuring and disclosure of the evidence relied on by the parties, and ensures that the trial that follows is fair to each party."

in respect of the issues in appeal generally. The production or inspection of documents in discovery must take place at a venue and in a manner agreed to between the parties, or may be delivered in a specified manner as reasonably required.

Step 3: Set down

The taxpayer is required to apply to the Registrar of the Tax Court for a date on which the appeal can be heard, within 30 days of the delivery of its statement of grounds of appeal under Rule 32 or SARS' reply under Rule 33, and deliver notice hereof to SARS. An appeal in the Tax Court must be heard in the area nearest to the residence or place of business of the taxpayer.

Step 4: Pre-trial conference

A pre-trial conference, or meeting, is intended to crystallise the issues in dispute and may also be used as an opportunity to settle the matter before trial. This is compulsory under Rule 38, which prescribes that the meeting must be held no later than 60 days before the hearing date.

Step 5: Subpoena and document preparation

Either SARS, the taxpayer or the president of the Tax Court may issue a subpoena on a witness, in terms of Rule 43, requiring the attendance of a person at the hearing to give evidence or to produce documentation in their possession or control.

At this point in the process, the parties may call upon expert witnesses to give evidence under Rule 37, SARS must provide a dossier including the documents required under Rule 40, and all relevant documents delivered in terms of the Rules must be divided, in chronological order and paginated, with the paragraphs contained therein to be consecutively numbered.

The procedure for the trial itself is governed, amongst others, by Rule 44. Generally, the taxpayer is given the opportunity to present its case first, followed by SARS. In giving its decision, the Tax Court may do one of the following:

- Confirm the assessment or decision
- Order the assessment or decision to be altered
- Refer the assessment or decision back to SARS for further examination and assessment

Further appeal

Where either party is not satisfied with the decision of the Tax Court, they may appeal to a full bench of the High Court or to the Supreme Court of Appeal (SCA), under Part E in Chapter 9 of the Tax Administration Act. The party lodging a notice of intention to appeal must indicate whether the appeal is directly to the SCA or to the relevant division of the High Court. This notice must also set out whether the appeal is against the whole or a part of the judgment of the Tax Court.

As these latter stages of a dispute are generally very expensive, time consuming and onerous, it is not advisable that an appeal to the High Court or SCA be lightly considered. In an effort to ensure that the matter is also resolved sooner rather than later, it is always advisable that the entirety of the process (namely, from the objection stage) be undertaken with the assistance of an experienced tax attorney.

The Tax Faculty

sait South African Institute of Tax Professionals

2019 YEAR-END TAX UPDATE
NOVEMBER 2019

The year-end update is one of the most important updates for tax practitioners and taxpayers.

SEMINAR

4 HOURS

OVERVIEW

In this year's update, Nico Theron from Unicus Tax Specialists SA will cover a selection of important court judgments, rulings (in particular, Binding General Rulings) issued by SARS during the year, regulations and notices issued, as well as some of the important proposed amendments to tax legislation in this year's round of amendments.

PRESENTERS

Nico Theron
Unicus Tax Specialists SA

REGIONS

11 Nov	Port Elizabeth
12 Nov	Durban
13 Nov	Cape Town
18 Nov	Kempton Park
20 Nov	Johannesburg
21 Nov	Pretoria
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WE DO E-LEARNING SO YOU CAN DO LIFE

CORPORATE TAXPAYERS' EXPERIENCE WITH SARS

We present a summary of key findings from a survey conducted by PwC which outlines corporate taxpayers' experience with SARS in the dispute resolution process.

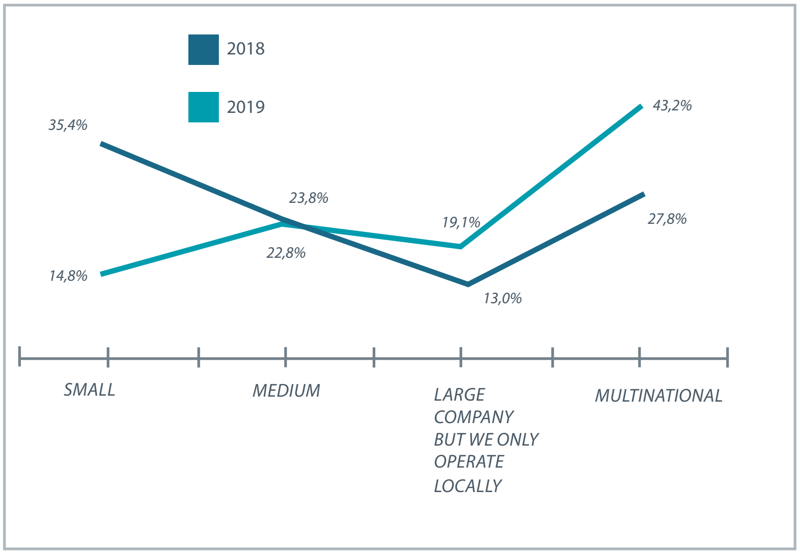
Survey questions were sent to nearly 2000 PwC clients in charge of tax functions across all industries. The aim of the survey is to gauge corporate clients' experience when dealing with SARS and to use their feedback to support constructive engagement with SARS about how it can improve efficiency, trust and credibility.

Much has happened in the area of tax since the first survey was released in October 2018, not least of which has been significant developments with regards to SARS.

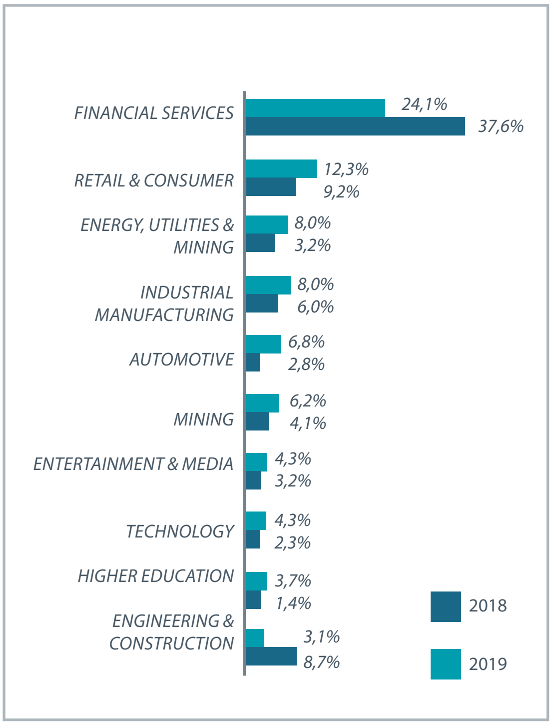
The 2019 results suggest that companies are seeing a slight improvement in verification audits and the pay out of refunds, but are experiencing a significant increase in tax audits, prolonged audits and delays in dealing with settlements as well as voluntary disclosures.

RESPONDENT PROFILE

WHAT IS THE SIZE OF YOUR COMPANY?



WHICH INDUSTRY IS YOUR COMPANY IN?

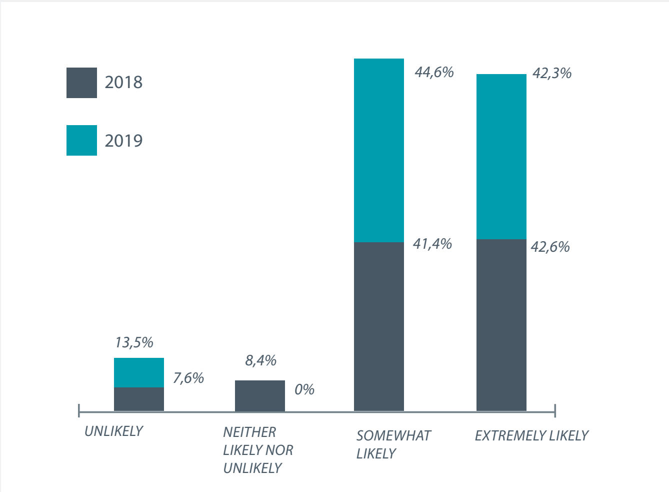


AUDIT PROCESS RESULTS

Corporate income tax

The usual procedure on filing of a return is that an assessment is issued based on the information submitted. Thereafter, SARS may require the taxpayer to verify information provided in the return.

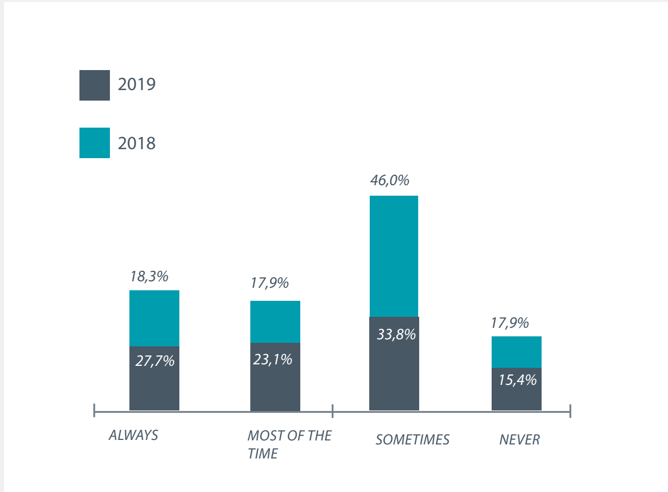
HOW LIKELY IS SARS TO VERIFY/AUDIT YOUR COMPANY POST SUBMISSION OF THE ITR14 RETURN ON AN ANNUAL BASIS?



Pay-as-you-earn

Respondents were generally of the view that PAYE administration has not improved and the perception is that companies are encountering even greater difficulty than before in dealing with SARS in relation to PAYE accounts.

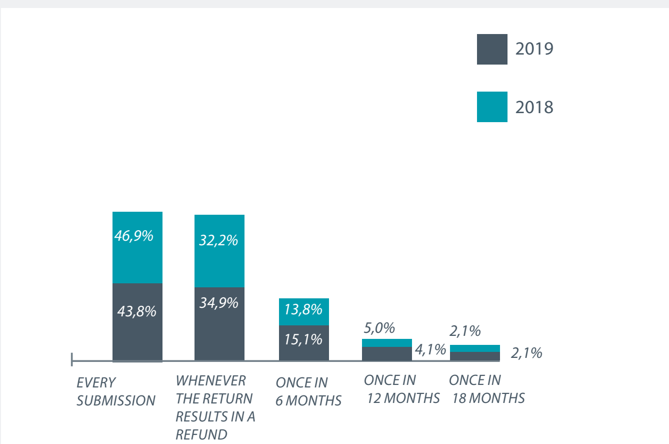
ARE YOU EXPERIENCING ISSUES IN RELATION TO PAYE ACCOUNT/S WITH REGARD TO MULTIPLE JOURNAL ENTRIES OR DIFFICULTY IN UNPACKING THE ACCOUNT?



Value-added Tax

VAT refunds are a potential drain on SARS' revenues if they are subject to dishonest practices and the verification process is a vital first step in combating fraud. That said, it should become apparent over time whether the information submitted by a vendor is reliable.

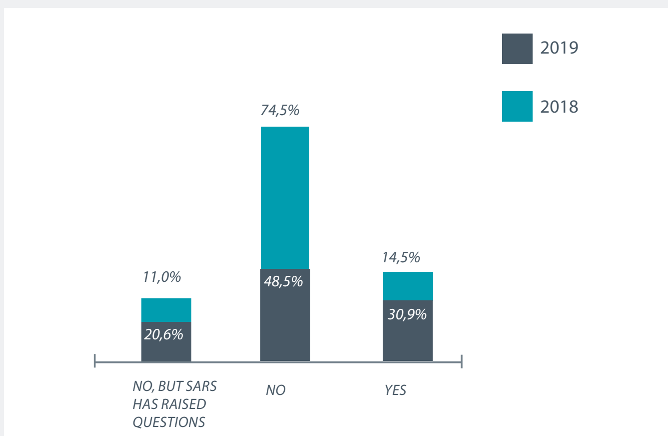
HOW OFTEN DOES YOUR VAT201 GET SELECTED FOR VERIFICATION?



Transfer pricing

SARS has stepped up transfer pricing risk reviews (and ensuing audits) since October 2017 and we expect this trend to continue. In the context of base erosion and profit shifting (BEPS), multinationals should review their transfer pricing policies, document appropriately and expect to be audited. Therefore, for those taxpayers doing cross border transactions, the need to have documentary evidence ready for a transfer pricing audit is a necessity.

HAVE YOU BEEN SUBJECT TO A SARS AUDIT RELATING TO TRANSFER PRICING?

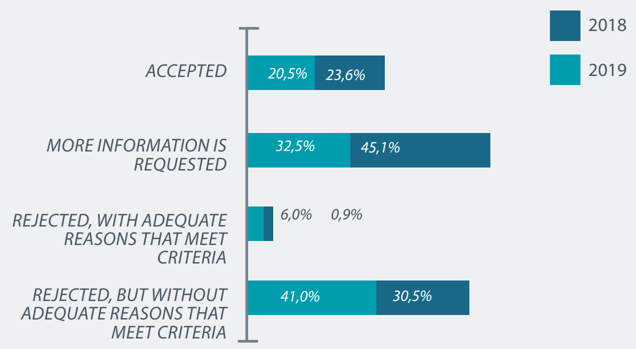


DEBT MANAGEMENT PROCESS RESULTS

Debt management process

The "pay now, argue later" rule can only be suspended by a Senior SARS official if there is an intent to dispute the assessment as well as an adherence to the criteria of section 164 of the Tax Administration Act.

WHEN YOU SUBMIT A SECTION 164 SUSPENSION OF PAYMENT REQUEST TO DEBT MANAGEMENT, WHAT RESPONSE DO YOU GET FROM SARS? THE SUSPENSION OF PAYMENT IS...



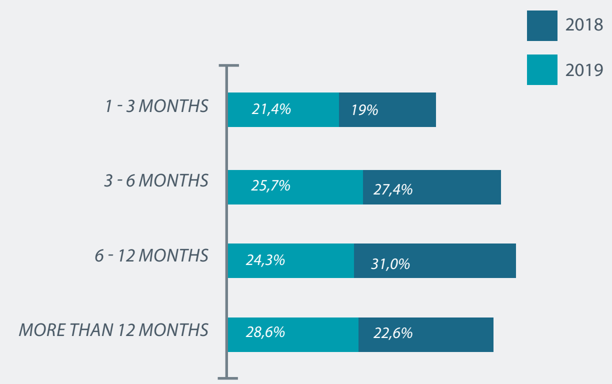
VOLUNTARY DISCLOSURE PROGRAMME RESULTS

VDP applications

The voluntary disclosure programme (VDP) is a valuable means of revenue collection for SARS. Where taxpayers voluntarily disclose prior defaults or understatements and make full disclosure, this relieves SARS from engaging in time-consuming audits.

For taxpayers, VDP provides the opportunity to correct compliance defaults without incurring potentially significant penalties. Forty-two percent of respondents said they had made use of the VDP process. Almost half of those reported that the application was finalised within six months and there appears to have been no significant improvement in this process since 2018.

WHAT IS THE CURRENT TURNAROUND TIME FOR A VDP APPLICATION TO BE FINALISED?

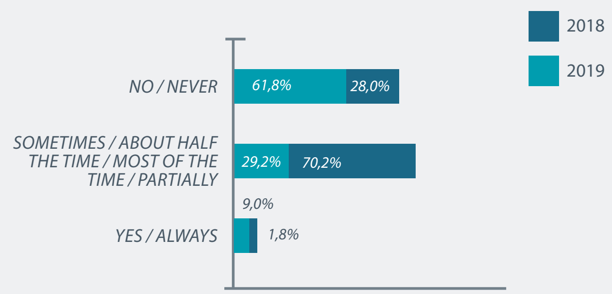


SARS SERVICE CHARTER RESULTS

Quality of service

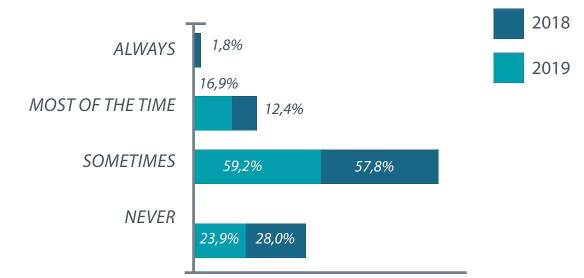
Respondents' sentiments about the SARS Service Charter are not encouraging. Whereas 28% in 2018 believed the Charter would not make a difference to the quality of SARS' service delivery, 61.8% held this view in 2019.

DO YOU THINK THE SARS SERVICE CHARTER MAKES A DIFFERENCE TO THE QUALITY OF SERVICE DELIVERY TO TAXPAYERS?



SARS' compliance with time periods
SARS' compliance with published response time periods was generally unsatisfactory and not one respondent reported that SARS always complied with the time frames published in the SARS Service Charter.

DOES SARS COMPLY WITH THE TIME PERIODS PROVIDED IN GENERAL (INCLUDING LODGING COMPLAINTS WITH THE CMO)?



TAXPAYER BEHAVIOUR RESULTS

Better understanding of the behaviours of taxpayers and their attitudes towards taxation can improve both voluntary compliance and the efficiency of tax administration. Evidence suggests that at least five factors drive tax compliance:

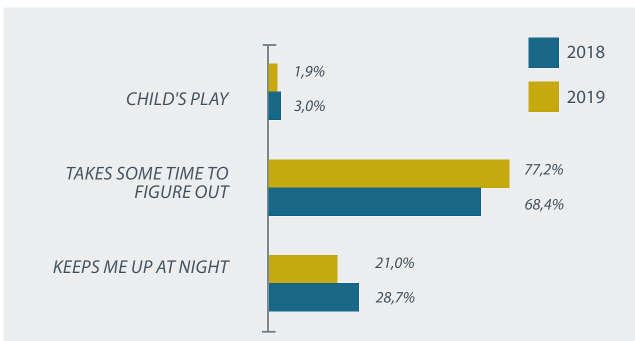
1. Deterrence: The likelihood of getting caught for non-compliance and the threat of punishment.
2. Social norms: The degree to which tax evasion is widespread and socially acceptable.
3. Fairness and trust: The perception of the tax system and how taxes are collected as being fair.
4. Complexity of the tax system: The taxpayer's level of understanding and the complexity of the process and system.
5. Broader economic and external social factors: Difficult economic conditions may affect compliance. Social factors such as responsible government spending and level of perceived corruption within the government also affect tax compliance. These factors are referred to as external, since they are beyond the control of the tax administration.

Complexity of the tax system
Tax is a complex matter for many people and evidence suggests this complexity contributes to non-compliance. Tax complexity is generally quantified in terms of number of payments made and time (hours) needed to comply with the tax system.

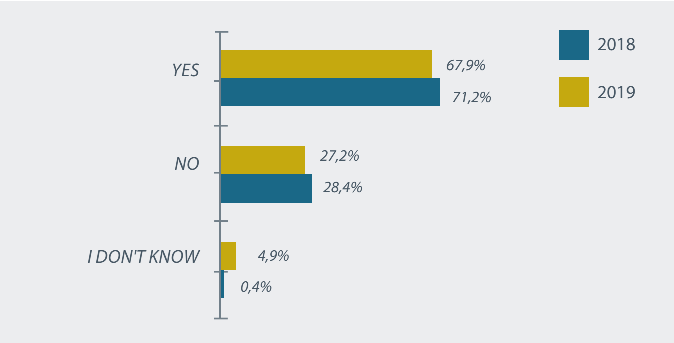
While South Africa ranks in the top 50 countries globally in PwC's Paying Taxes 2019 report with regard to its overall 'paying taxes' score, the time needed to comply is approximately 210 hours, which ranks us 103rd out of 189 countries.

Difficulty complying with tax requirements
Complexity can overwhelm taxpayers, making it more difficult for them to pay their taxes. More than three-quarters of survey respondents indicated that it takes them some time to figure out the Tax Administration Act and SARS' processes. This suggests there might be too much complexity in the tax system and insufficient knowledge among taxpayers.

HOW DO YOU FEEL ABOUT THE TAA AND SARS' PROCESSES?



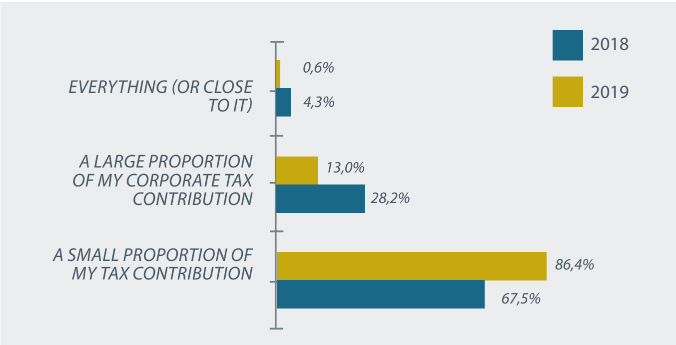
DO YOU USE THE SERVICES OF TAX CONSULTANT/ADVISOR TO ASSIST YOUR COMPANY IN NAVIGATING THE TAX ADMINISTRATION PROCESS WITH SARS?



Broader external economic and social factors

Higher tax rates have been linked to higher levels of tax evasion if they incentivise taxpayers to move into the shadow economy. Research by the IMF suggests the shadow economy made up 22% of the total economy in 2015.

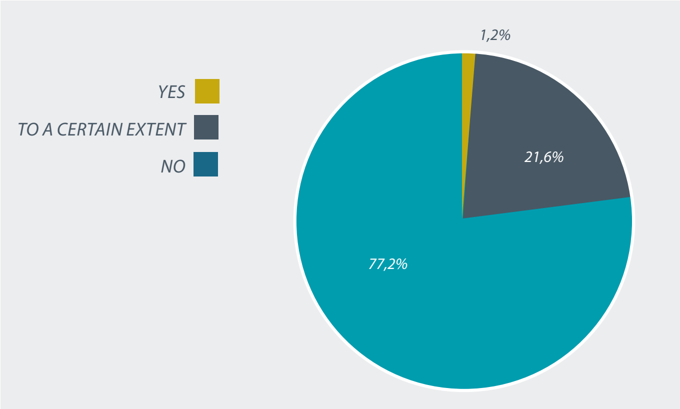
WHAT PORTION OF YOUR CORPORATE TAX CONTRIBUTION DO YOU THINK IS EFFECTIVELY DEPLOYED TO VARIOUS SPENDING PRIORITIES?



Satisfaction with public infrastructure and services

Most respondents (77%) are also not satisfied with public infrastructure and services. Although these factors are beyond the tax administration's authority, these drivers will need to be addressed by the responsible parties to avoid deterioration in tax compliance.

ARE YOU SATISFIED WITH PUBLIC INFRASTRUCTURE AND SERVICES (SUCH AS HEALTH, EDUCATION, ROADS, WATER AND SANITATION)?



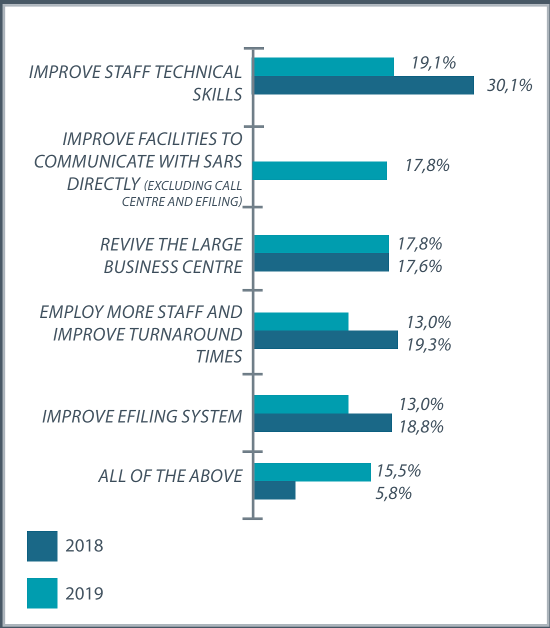
THE WAY FORWARD

We asked respondents to share their views on SARS and what they think SARS should do to improve its service to taxpayers. There have been a number of changes in the organisation in the last year, including the reviving of the Large Business Centre and the appointment of a new Commissioner. There is still much to be done, but there are signs that these changes are beginning to have a positive impact on client experience.

Respondents identified three key areas in which SARS can improve its services:

1. Improving people by employing more staff and providing strong technical training
2. Improving facilities to communicate with SARS
3. Reviving the Large Business Centre

WHAT CAN SARS DO TO IMPROVE ITS SERVICE OFFERING TO CLIENTS?



Survey results were taken directly from PwC's report *Taxing Times 2019: A survey of corporate taxpayers' experiences with SARS.*

Expat Taxes: What's New And What's Coming

30 minutes CPD

▶ **RUAAN VAN EEDEN,** Ruaan.vanEeden@investec.co.za

In order to look forward to 2020, our article goes back to changes in the interpretation and practical application of the foreign service income exemption under section 10 of the Income Tax Act.

Just another article on the foreign income exemption? Let's attempt a different historical and future-looking angle on this topic, given everything that taxpayers and tax practitioners have been exposed to over the last couple of years.

It is not often that a tax amendment makes headlines and raises controversial debate as it has done in relation to the imminent changes to the way foreign employment income of South African tax residents will be taxed, with effect from 1 March 2020. Potentially affected South African tax residents will find a plethora of views in the media, some correct and others somewhat misguided and naïve as to the correct application of the law. However, with time running out, it is crucial that correct decisions are made, based on each person's particular facts and circumstances.

What has changed since 2016?

To understand the changes with effect from 1 March 2020, it is important to recap existing legislation and the various iterations relating to the interpretation of the legislation, which eventually morphed into what is coming. Under current tax law, which will be applicable up to 28 February 2020, South African tax residents working abroad are entitled to a tax exemption for remuneration earned abroad, provided they are physically outside of South Africa for 183 days in aggregate during any 12-month period and, during the 183-day period outside South Africa, at least 60 days must be continuously spent outside South Africa. Those are the basics - where both the abovementioned requirements are met, South African tax residents will be able to claim a tax exemption for the income that relates to the employment services rendered outside South Africa.

But let us backtrack a few years, with specific focus on the various iterations of SARS's interpretation of the tax exemption for foreign services and whether it provides any clues to potential future amendments. During 2016, SARS issued Draft Interpretation Note 16 (Issue 2) for public comment. At the time of publication, when compared to the historical version of Interpretation Note 16 (IN 16), Issue 2 of IN 16 indicated a marked shift, on certain aspects, in SARS's interpretation of the tax exemption that applies to foreign employment income. Why the shift? SARS stated in Issue 2 of IN 16 that a "… common misconception is that all remuneration received or accrued during the qualifying period of 12 months is exempt …". All good and well stating there was a misconception, but being faced with a counter argument of 'practice prevailing', given the longevity and specific wording of IN 16 which applied from 27 March 2003, a fresh interpretation was required by SARS relating to the foreign income exemption.

Enter Issue 2 of IN 16, SARS's first step towards what we have today as impending legislation. In respect of calculating the 183/60 day periods, as required under s10(1)(o)(ii) of the Income Tax Act, Issue 2 of IN 16 essentially continued SARS's previous practice under IN 16, whereby weekends, public holidays, annual leave days, sick leave days and rest periods spent outside South Africa are taken into account in determining any potential exemption. IN 16 historically contained examples indicating the practical application of the "183/60 day approach" and it could reasonably be accepted, based on that practice, that the determination of an amount qualifying for exemption is relatively straightforward. That straightforward approach was set for a rethink under Issue 2 of IN 16.

Issue 2 of IN 16 went further to state that only "… the remuneration received or accrued in respect of services rendered outside the Republic during the qualifying period of 12 months is exempt …". Essentially, Issue 2 of IN 16 brought in an apportionment calculation, which seems to have acted as a "second step" in determining the actual remuneration exempt from normal tax, once the 183/60 day tests have been complied with. Stated differently, in any given situation, the first test would be to apply the normal 183/60 day rules, which take into account weekends, public holidays, annual leave days, sick leave days and rest periods spent outside South Africa, and, as a second test, apply SARS's apportionment methodology which excludes any day not regarded as a work day. A "work day", as contemplated in Issue 2 of IN 16 does not include weekends, public holidays or leave days. The effect is that remuneration received for work days in South Africa would be subject to normal tax, whereas jetting in and out of South Africa could have slipped into the exemption potentially under the old IN 16, where apportionment was not always practically enforced by SARS.

The result of the aforementioned was the initial tightening of the ability to claim an exemption in relation to foreign income, based on SARS's revised interpretation of the legislation, as encompassed in Interpretation Note 16 (Issue 2), which applies from 2 February 2017.

Fast forward to 19 July 2017, being the date of publication of the Draft Taxation Laws Amendment Bill 2017 and its accompanying explanatory memorandum. This spawned the birth of a sub-industry within the tax profession in constant disagreement on the application of the legislation, with National Treasury and SARS sitting on the sidelines as interested spectators. We all know the effect of the proposed amendment, which will be discussed later in this article, but let us focus on the reasons for the change. Reading the reasons for the proposed change in legislation, as set out in the explanatory memorandum, often prompts rolling of the eyes. Any experienced tax practitioner will look through the text and merely see this as a tax revenue generator, similar to carbon tax and sugar tax, where behavioural changes are supposedly intended, but which are merely disguised tax revenue generators, albeit on a much larger scale than the topic under discussion.

National Treasury stated in the explanatory memorandum that the purpose of introducing the exemption was to prevent double taxation of an individual's income between South Africa and the country where the services are rendered, which instead created opportunities for double non-taxation. National Treasury went on to state that this is contrary to the policy intent expressed when the foreign employment income tax exemption was introduced and that it was always intended that the relief measure be monitored for abuse.

Monitored for close to 17 years? One can see why the "practice prevailing" argument could have potentially been to SARS' detriment in disputes relating to the foreign income exemption, based on its historical approach to this topic.

Where do we stand now?

Given the culmination of events that transpired, essentially from 2016 through the publication of Issue 2 of IN 16, we now have a new era on foreign income taxation upon us, with some frantic scrambling for position by affected taxpayers still happening. With effect from 1 March 2020, only the first R1 million earned in respect of foreign service income from foreign services rendered in an employment context will be exempt from tax in South Africa, provided that more than 183 days are spent outside South Africa in any 12-month period and, during the 183-day period, 60 days are continuously spent outside South Africa.

Practically, this means that any foreign service remuneration above the first R1 million will be taxed in South Africa at the relevant tax resident's marginal tax rate. Apportionment comes into play and potentially more scrutiny, given the complexity of the tax return disclosure process. Although the debate rages on, the only practical way to avoid being impacted by the impending changes is to cease tax residency from a South African perspective and to deal with the associated capital gains tax consequences. Although financial emigration involves an element of tax compliance by way of obtaining a relevant clearance certificate, it is not a deciding factor as to whether a person has ceased tax residency and would not alleviate the impending tax burden on foreign earned income, post 1 March 2020.

Do we need more legislation?

As stated above, there has been minimal intervention from National Treasury and SARS since publication of the draft law changes on 19 July 2017, despite numerous subsequent interactions with tax practitioners and other interested parties representing the expat community. The message that affected taxpayers had enough time to restructure their affairs came through strongly in the legislators' approach, after the promulgation of the changes.

It appears that a "wait and see" approach is now being adopted, meaning that changes, if any, will only be considered in the 2021 / 22 legislative cycle, once the practical impact of the changes are analysed. More legislation is not necessary, at least at this stage.

What does the future hold?

It is unlikely, given National Treasury's current stance, that the legislation will be amended so as to allow for a full exemption from taxation of foreign service income.

Instead, one would hope that the arbitrary R1 million threshold will be subject to a more scientific approach, based on accurate data, to at least provide for indexation from an inflationary perspective or an adjustment in relation to the cost of living in a foreign jurisdiction.

Affected taxpayers will need to constantly monitor their tax positions so as not to fall foul of the new legislation and the need for professional advice becomes paramount, especially from a tax compliance perspective. This topic is certainly far from being settled.

"Practically, this means that any foreign service remuneration above the first R1 million will be taxed in South Africa at the relevant tax resident's marginal tax rate."

GAINING AND BREAKING TAX RESIDENCY FOR INDIVIDUALS

15 minutes CPD

GRAEME SAGGERS, graemes@nolandstax.co.za

If you want to find out what tax residency is, how to acquire or break it and what the consequences could be, then read this article.

The term "resident" is very broad and can refer to several different concepts. In South Africa the Department of Home Affairs, the South African Reserve Bank and SARS all use the term "resident" when individuals satisfy their specific regulatory requirements. There may be some overlap between the different residence concepts and being one type of resident, e.g., a citizen, may be persuasive when assessing whether you are also another type of resident, e.g., tax resident. Yet the concepts need to be understood separately.

Types of residency

It is important to distinguish between the different types of residency.

Immigration status

You are considered a resident by the Department of Home Affairs if you are either a citizen or permanent resident. In these instances, you are eligible for a South African identity number. If you are a South Africa citizen, the third last number in your ID will be a 0 whilst if you are a permanent resident, the third last number in your ID will be a 1. There are many ways that immigrants may be eligible for permanent residence in South Africa. A general guideline is that persons living in the Republic on a temporary visa can apply for permanent residence after five years.

Exchange control

The Reserve Bank classifies individuals as residents if they have taken up permanent residence or domicile in South Africa. Citizens and permanent residents are therefore automatically considered residents by the Reserve Bank.

Income tax

The Income Tax Act defines a resident based on two tests: the ordinary residence test and the physical presence test. The overriding requirement is that the person is not a resident if they are considered exclusively resident of another country with which South Africa has a double taxation agreement (DTA).

These concepts are complex and therefore persons planning to move between countries, whether permanently or temporarily, should analyse their personal circumstances carefully so as to prevent any undue consequences. This is important not only when South Africans are seeking to move abroad but also when South Africans living abroad move between different countries.

Breaking tax residency

If a person either no longer satisfies the tax residency tests of a specific jurisdiction or if they trigger tax residency in another jurisdiction, they will likely cease to be considered tax resident. All countries have different domestic tests for tax residency. Many countries operate on a simple test of being present in the country for more than 183 days in a tax year. This would usually result in the taxpayer being taxed for that year on their worldwide earnings. This means that a person can move in and out of the tax nets of certain countries from year to year relatively easily. Countries will, however, usually have different tax consequences for tax residents that are legally domiciled in that country. In the United Kingdom, for example, the tax implications for a domiciled tax resident are different to those for a non-domiciled tax resident. South Africa does not have a legally defined distinction of "domicile" in the Income Tax Act. However the features of tax residency contain elements of the concept of domicile.

Ordinary residence

The ordinary residence test is similar in many ways to the tests for domicile in other countries. As "ordinarily resident" is not defined in the Income Tax Act, this is a common law test and depends entirely on a person's individual facts and circumstances and related principles that have been developed through case law. When analysing whether a person is ordinarily resident in South Africa, one needs to understand various personal aspects of their personal life: where their habitual abode is, where their family lives, their social and leisurely activities, the location of their personal belongings. This is the colloquially called "pipe and slippers" test and works off the assumption that every person has a place they call "home" and their tax residency should be consistent with the facts that support this assumption. A break in tax residency based on ceasing to be ordinarily resident therefore requires a significant change in personal circumstances to substantiate the change.

It stands to reason, therefore, that this test is harder to break for South African citizens than foreigners.

A person's residency, as determined by the Department of Home Affairs, and their exchange control residency will be factors that should be considered as part of this analysis. This is not to say that if a person is an emigrant from an exchange control perspective they will automatically cease to be ordinarily resident. However, it is a factor to be brought into account. There is a common misconception that going through an emigration with the Reserve Bank will trigger a break in tax residency. As part of a Reserve Bank emigration, the individual is required to apply to SARS for a tax clearance certificate and sign a declaration stating that they intend to live permanently abroad. Whilst this is an excellent piece of evidence to support a person's intention at the time of emigration, the facts need to support this intention. A person may intend to live abroad permanently. However, various other factors may indicate that they have not carried out steps indicative of such intention, in which case they will not break tax residency.

Physical presence

The physical presence test will trigger a person entering the South African tax net in their sixth year if they have been in the country for more than 91 days in each of the six years under analysis and a total of at least 915 days in the preceding five years (thus an average of 183 days). This test is designed more to bring foreigners into the South African tax net than to retain South Africans who have moved abroad. As this is an annual test, it is possible for a person to meet the criteria in one year but not in a subsequent year, thereby triggering a break in tax residency provided they are not ordinarily resident.

Tax residency under a double taxation agreement

When moving to another country, a person will likely satisfy the domestic tax residency tests of the country they move to. If South Africa has a DTA with that country, it is possible that the person will trigger a break in tax residency by application of the DTA's tiebreaker clauses. DTAs have certain tiebreaker clauses that are designed to prevent persons from being tax resident in more than one country at a time.

South Africa's DTAs are modelled on the OECD model tax treaty and therefore generally have the following sequence:

- Permanent home: Interestingly, if the person owns a property in a country that is under long-term rental, it will not always be considered a permanent home available to them. Also, a home does not necessarily mean a fixed structure. It can refer to, for example, a caravan or a boat.
- Centre of vital interests: This depends on personal factors such as the location of employment, lifestyle and personal relationships.
- Habitual abode: This would be the place where the person spends the majority of their time.
- Nationality: This refers to their immigration status.
- Mutual agreement: Between the competent authorities of both countries.

"Persons planning to move between countries, whether permanently or temporarily, should analyse their personal circumstances carefully so as to prevent any undue consequences."

The application of a DTA should be considered very carefully. It may, in many circumstances, result in a person triggering a break in tax residency when they do not intend to. A person may, for example, satisfy both the ordinary residence and the physical presence test but if they move to another country and no longer have a permanent home available to them in South Africa, they will likely trigger a break in tax residency. Conversely, a DTA may protect a person who does not wish to be considered tax resident in South Africa whilst they are in a foreign country that has a DTA in force, such as the UAE. If the person moves temporarily to another country that does not have a DTA with South Africa, such as Bermuda, this may potentially trigger them re-entering the South African tax net.

What are the implications of breaking tax residency?

A person who becomes tax resident in South Africa is deemed to acquire all their assets at market value on the date of residency. Thus, the market value at entry date is the base cost of the assets for capital gains tax purposes. When a person ceases to be tax resident in South Africa, they will be deemed to have disposed of all their worldwide assets (excluding South African property and retirement savings assets) at market value. This will trigger a capital gains tax consequence.

From an estate planning perspective, a person's tax residency is exceptionally important. If a person is no longer ordinarily resident in South Africa as at the time of their death, they will be subject to estate duty only on their South African based assets and not their worldwide assets. Thus, even if a person is tax resident by virtue of the physical presence test, but is not ordinarily resident in South Africa, they will only be subject to estate duty on their South African *situs* assets.

APPLICATION OF THE AMENDED section 10(1)(o)(ii) to individuals

15 minutes CPD

BARENDINE DUVENHAGE, barendine@duvenhage.me

Our article looks at the changed tax environment for South Africans who are employed abroad but remain tax resident in South Africa.

The expression "may you live in interesting times" initially sounds like a blessing but it is commonly accepted to be an ancient Chinese curse. Considering the challenges that will be introduced by the amendment of section 10(1)(o)(ii) of the Income Tax Act, it immediately makes one lean towards seeing "interesting times", and the uncertainty that follows, more like a curse than a blessing.

Residence vs source

When South Africa converted from a source-based to a residence-based tax system, everyone rendering services abroad was concerned that they would now have to pay tax in South Africa on foreign-sourced income. The source-based tax system assigns the right to tax to the country where the income is sourced. In the case of employment income this is accepted to be the country where the services are rendered, regardless of where payment is made or received, and foreign-earned employment income is excluded from the domestic tax net.

Under the expanded residence-based tax net, South African tax residents would be liable to tax in South Africa on their worldwide income, including foreign-sourced employment income. Section 10(1)(o)(ii) of the Income Tax Act was introduced to govern this.

The foreign earned employment income exemption

After the initial uproar quietened down a bit, South African resident taxpayers employed abroad were delighted to discover that the foreign-earned employment income exemption set out in section 10(1)(o)(ii) of the Income Tax Act stated, in very broad strokes, that foreign-earned employment income would remain exempt from tax in South Africa, provided certain criteria were met.

At present, section 10(1)(o)(ii) states that remuneration (as defined) earned in respect of services rendered outside South Africa will be exempt from tax in South Africa if the employee rendering such services was outside South Africa:
"…(aa) for a period or periods exceeding 183 full days in aggregate during any period of 12 months; and
(bb) for a continuous period exceeding 60 full days during that period of 12 months,
and those services were rendered during that period or periods…".

As long as the above criteria were met, the change to a residence-based tax system therefore had very little impact on foreign-earned employment income.

What exactly will be changing?

As with the change from source-based to residence-based tax systems, the uncertainty about what will be changing and how it will impact taxpayers is causing widespread alarm and general confusion.

The situation is not aided by the lack of guidance from SARS on how the changes will be implemented, even if the change in legislation is clear.

Effective 1 March 2020, the foreign employment exemption will be limited to the first R1 million of foreign employment income. Any income in excess of R1 million will be taxed at progressive tax rates in South Africa. A foreign tax credit will be allowed for tax paid in other countries.

R1 million is a decent salary – surely most people will not be affected?

Bear in mind that section 10(1)(o)(ii) exempts "any form of remuneration received by or accrued to any employee by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument or allowance …".

Remuneration (which includes amounts in paragraph (i) of the definition of "gross income" and sections 8, 8B and 8C) includes any taxable benefit (as defined in the Seventh Schedule), which brings in items such as accommodation, school fees, medical aid or insurance and home leave flights. Where the employer pays tax on behalf of the employee (tax equalisation), this is regarded as settling a debt on behalf of an employee, which is also regarded as a taxable fringe benefit.

Considering the cost of certain of these benefits (in other countries), the R1 million exemption no longer appears so generous. Apart from benefits in kind being included in remuneration, thereby "limiting" the exemption, there are a number of other factors that may impact taxpayers, some of which are addressed below.

Limitation of foreign tax credits

As mentioned above, foreign tax credits will be allowed against the South African tax liability. However, the amount allowed as a foreign tax credit is limited to the lower of the amount of tax that would have been payable on that income in South Africa or the actual amount of tax paid in the other country or countries.

When referencing tax rates in other countries, one should distinguish between the different types of tax. Social security or similar contributions are often included when referring to tax rates, but these are different from income tax and will probably not qualify for foreign tax credits. Once these contributions are stripped out of the "tax rate", the actual income tax rate in South Africa is actually amongst the highest in the world.

To place this in context: assume South Africa taxes all income at 45% and the other country taxes all income at 35%. Even if the entire 35% paid in the other country is allowed as a foreign tax credit against the South African tax liability, this would still result in a residual liability of 10% (45% - 35% = 10%). Effectively this immediately reduces taxpayers' take-home pay by 10%.

Considering the above, most South African resident taxpayers working abroad will have a residual tax liability in South Africa.

Cost of living differences

Remuneration packages in other countries may appear much higher than the South African equivalent. However, when one considers the difference in cost of living, a higher package paid in another country may afford a taxpayer the same standard of living a lower package would have afforded them in South Africa.

Losing part of one's take-home pay to a residual tax liability will therefore have a direct, negative impact on one's standard of living.

Different tax regimes

Each country has its own tax legislation determining what is taxable. Some countries do not tax benefits in kind while other countries require the employer to pay the tax on these benefits.

For instance, the provision of accommodation may not be considered a taxable fringe benefit in the country where the taxpayer is working, or the taxable value of accommodation may be determined based on different criteria than in South Africa. If the benefit is not taxable in the other country or the taxable value is lower than it would have been in South Africa, there would either be no, or less, foreign tax credit to offset against the South African tax liability. This would again result in a residual liability.

"Effective 1 March 2020, the foreign employment exemption will be limited to the first R1 million of foreign employment income."

It is not yet clear whether fringe benefit tax paid by an employer will be regarded as a foreign tax credit against a taxpayer's South African income tax liability. It is likely that it will not be allowed, meaning the taxpayer will have to pay tax on the benefit in South Africa.

Social security contributions

As mentioned above, social security contributions are not classified as income tax and will accordingly not be allowed as a deduction against income tax in South Africa. Many employers absorb the social security contributions on behalf of employees, i.e., the employer pays the employee portion of the contribution as well as the employer contribution. This is likely to be regarded as settling debt on behalf of an employee, which as mentioned before attracts tax in South Africa.

It is further conceivable that the employer contribution is regarded as a taxable fringe benefit in South Africa.

How will the residual tax liability be collected?

Although SARS has issued some guidance in this regard, many questions unanswered.

For taxpayers being paid by foreign employers abroad, tax will be collected through the provisional tax system, meaning all tax residents working abroad and who are being paid by a foreign employer should register as provisional taxpayers and file provisional tax returns.

Where the taxpayer is paid by a South African employer, the timing of tax collection and the practicality of accounting for foreign tax through a South African payroll remains muddled.

As with any new legislation, there are sure to be some teething problems and it is expected that we will learn through trial and error.

Will the change apply to all South Africans working abroad?

As has always been the case, the exemption, whether limited or not, applies only to individuals earning remuneration, i.e., employees. Independent contractors do not qualify for the exemption.

What if I am no longer tax resident?

Without discussing how tax residence is established or broken, it should be noted that non-residents are not liable to tax in South Africa on their worldwide income. This means South Africans working abroad and who decide to break tax residence will not be affected by the change: their foreign-earned employment income simply will not be liable to tax in South Africa.

It is worth mentioning, albeit very briefly, that taxpayers working abroad should confirm their tax residence status in the country where they are working and determine whether there is a double tax agreement between South Africa and that country, as they may have broken South African tax residence without realising it.

Interesting times indeed…

15 minutes CPD

CHANGES TO SECTION 10(1)(O)(ii) & THE IMPACT ON CORPORATE EMPLOYERS

CAROLYN CHAMBERS, carolyn.chambers@kpmg.co.za

The change in tax treatment of remuneration earned by South Africans employed abroad has implications for the individuals concerned. But what about the employers? Our article looks at the factors to be taken into consideration to avoid or mitigate negative outcomes for corporates that send SA individuals on work missions abroad.

Effective from 1 March 2020, changes will be made to the foreign remuneration exemption, which are likely to impact many South Africans working temporarily abroad and will have consequences for their employer companies, in many cases.

Currently, the foreign remuneration exemption contained in section 10(1)(o)(ii) of the Income Tax Act states that foreign employment remuneration income earned by a South African resident employee will not be subject to tax in South Africa if the taxpayer meets certain requirements. Put simply, an employee must spend more than 183 days rendering services physically outside of South Africa in a rolling 12-month period, of which more than 60 days need to be consecutive.

The change to the legislation, effective 1 March 2020, has the result that that remuneration income earned in respect of foreign services, which qualifies for the exemption, will no longer be entirely exempt from South African income tax. From the 2021 tax year, only the first R1 million of remuneration relating to foreign services will be exempt from South African tax.

This raises concerns for both individual taxpayers and their South African employers, as there will be both the potential for double taxation between two countries, and the likely cash-flow impact of having to pay tax in two countries and claim foreign tax credits (FTCs) on either side. As many employees working overseas are subject to a tax equalisation policy, the ultimate cost will often lie with the employer and not the individual taxpayer. The increased complexity also raises some concerns.

Employees' tax implications for employers

South African employers who continue to pay employees via a local South African payroll while they work outside of South Africa have historically been entitled to stop withholding South African employees' tax in relation to qualifying foreign remuneration. Where the employee failed to meet the requirements of section 10(1)(o)(ii), however, the employer was liable for the withholding of employees' tax due to SARS, as well as the resultant penalties and interest. This will continue to be the case for employees who earn less than R1 million per tax year (including the cost of foreign benefits provided to them). However, this is likely to be a small percentage of the cases, given the cost of benefits in foreign currencies.

There is a potential solution available to employers to enable the offset of FTCs through the payroll. However it involves obtaining all the required information and applying to SARS for a directive, under Paragraph 10 of the Fourth Schedule to the Income Tax Act, to apply a different rate of tax against the taxable income, as a result of the offset of the FTCs. These will still need to be claimed and proved on filing the individual's annual tax return (form ITR12), however.

Foreign tax credits – Complexities

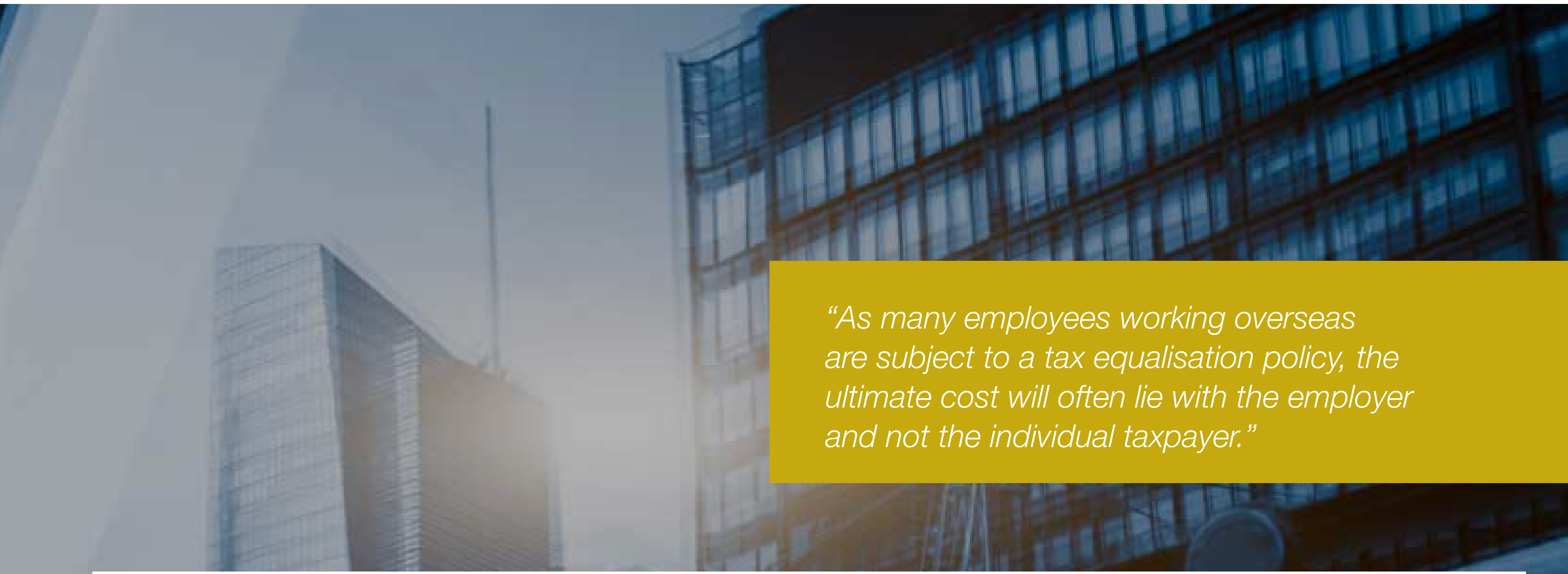
Section 6quat of the Income Tax Act provides that FTCs may be claimed to the extent that the foreign taxes are "paid or proved to be payable".

Globally, individual taxes are paid in different ways and through differing mechanisms. Some countries have self-assessment tax return systems, where no assessments are issued. Others have monthly taxes payable by employers on behalf of their employees, and others have payroll withholding, which is not a final tax, and does not have assessments that reflect the taxes paid or payable. So proving the payment of foreign taxes is difficult for employees, and even more difficult on a "real time" monthly basis, to enable offset through the SA payroll.

Although this problem in relation to the claiming of FTCs already exists for those employees who do not qualify for the exemption, and who are taxable in a foreign country, it is on a much smaller scale, and has not created a large amount of concern as a result. Given the likely impact of the change to the legislation, it is essential that the question around what would constitute sufficient proof for the offset of FTCs is answered before the amended legislation becomes effective.

SARS guidance

A guidance document was issued by SARS on 7 October 2019, entitled *Frequently Asked Questions – The Foreign Employment Income Exemption.* This guide is aimed at assisting taxpayers and corporates with the application of the new legislation. It addresses some of the various issues that have arisen, but is silent on



"As many employees working overseas are subject to a tax equalisation policy, the ultimate cost will often lie with the employer and not the individual taxpayer."

some of the bigger challenges, such as how the FTC offset will be calculated and how the payroll directive application should be submitted. It indicates that a dedicated channel will be made available to the public, for the submission of directive applications. However, it is not as yet clear what form this will take.

Calculation of South African tax due

As the R1 million is subject to an exemption, the taxable income over and above R1 million would be taxed at normal tax rates applicable to the amount. For example, if the total income was R1.5 million, R500 000 would remain as taxable income and be taxed using the tax rates applicable. The following example appears in the SARS guide:

An individual (below 65 years of age) earns foreign employment income of R1.5 million. Based on the tax rates applicable to the 2020 year of assessment, the normal tax liability is calculated below.

R1 000 000 will be exempt

R500 000 is subject to normal tax and calculated as follows

= R100 263 + [(R500 000 - R423 300) x 36%]
= R100 263 + R27 612
= R127 875
= less the primary rebate of R14 220

= R113 655

What is unfortunately not covered in this example in the guide is how an FTC would be applied in these circumstances. The question remains as to whether the full amount of foreign taxes on the R1.5 million can be used to offset the tax due, or whether a strict interpretation of section 6quat will be used to limit the FTC to only the tax paid in respect of R500 000 of the income earned. So to expand this example, if tax was paid in the foreign country at a flat rate of 30%, it would not matter, as there would be sufficient FTCs to offset the full liability irrespective of which method is used.

If the taxpayer were to work in a country with lower tax rates (e.g., Mauritius with a top tax rate of 15%), or graduated rates similar to South Africa, e.g., the UK, the method of calculation will have an impact. In the same example, for the 2020 tax year in the UK, the tax due would be approximately R55 000, which would leave a balance of R68 655 payable in South Africa, using the FTC available against the taxable portion only. If we apply the full FTC, the tax due in the UK would be approximately R375 000, leaving no taxable income in South Africa.

In workshops held with SARS over the past year, it has been indicated that the latter method will be used, however no confirmation of this has been provided as yet.

Conclusion

Given that the implementation date for the change in legislation is less than six months away, employers are advised to assess the impact for them, where they have employees on their payroll who work outside of South Africa and are likely to qualify for the exemption. There are actions that can be taken to minimise the impact for employers, such as breaking tax residence, or moving the payroll outside of South Africa. However these are not always practical. The FTC offset may mitigate the additional costs completely, depending on the foreign country in which the employee works, but action should be taken sooner, rather than later, to prepare to apply for directives.

Tax resident individuals employed abroad should critically evaluate their South African tax residence position to determine whether they remain tax resident in South Africa or not, and ensure that they fully evaluate their global tax position, understand what will be required of them from 1 March 2020 and what the likely cost implications will be if they remain South African tax residents. Each individual's circumstances need to be addressed on a case-by-case basis. Some assignments may prove too costly for employers, but others will not.

Advice should be sought well before March 2020 to ensure advance planning and careful consideration of all of the possible consequences.

TAX INDABA 2019: REBUILDING TRUST, MOVING FORWARD TOGETHER

Our Supporting Editor Jeanne Viljoen attended Tax Indaba 2019. Below are a few of her impressions of some of the keynote speeches and discussions.

Keith Engel, CEO of SAIT, opened the 2019 Tax Indaba by saying that the overall objective of the Indaba is to have a time for tax people to get together and exchange ideas about tax. This year the focus was on rebuilding trust in the tax environment.

The Commissioner and the future of SARS

The new Commissioner of SARS, Edward Kieswetter, expressed some old-school ideas about tax morality, compliance, integrity and cooperation between taxpayers, SARS, tax practitioners and registered controlling bodies.

He also made the point that tax revenue can make a big difference to the lives of individuals and that privilege should not desensitise us to this developmental aspect of government.

Efficient operation of SARS will lower the cost to society. SARS is working towards a tax system based on voluntary compliance.

What went wrong?

Before embarking on a new path, the new Commissioner said SARS has to face up to the damage done to the institution in the last few years: from an organisation committed to modernisation and transformation, acting according to good international practice, it became a victim of the state capture project.

A breakdown in governance and integrity in the organisation and a slowdown in the modernisation process led to a drop in taxpayer compliance. Lower revenue collection was caused by decadence, lawlessness, rent seeking, corruption, waste and inefficient spending. Staff members and taxpayers were treated unfairly and there was collusion between SARS officials and taxpayers.

The current environment

Today we find ourselves in a tough global environment where liberal democracy is under threat, Brexit causes political and economic uncertainty, developments in IT bring disruption and threats. Moral and ethical capability has not kept up with the reality of big data, artificial intelligence and the fourth industrial revolution, where dematerialised goods pose a challenge to conventional tax and customs policies.

The way forward: healing the wounds

In order to heal the trauma and rebuild capacity a strategy of renewal and engagement with stakeholders (firstly staff members) is required. Leadership must not only provide strategic direction, it must lead in values and behaviours.




Rebuilding
In order to rebuild, SARS cannot only be restored to where it was in 2014, it must move forward. Issues to be addressed are:

- Building audit capacity
- Expediting tax refunds
- Establishing fair transfer-pricing methods
- Tackling illicit flows and money laundering
- Addressing the tax gap
- Regularising the giving and receiving of donations
- Rooting out witting and unwitting complicity

A vision for the future
SARS should be characterised by the use of modern technology and for staff it should be the employer of choice. Efficient revenue collection will enable a capable government. The Commissioner outlined some of the Vision 2024 objectives that SARS is aiming for:

- Clarity and certainty of the rules to make things easy for compliant taxpayers and hard for noncompliant taxpayers.
- High-performance systems, streamlined IT and highly performing staff to provide efficiency.
- Engagement with all stakeholders to rebuild trust in the organisation.

Integrity and the RCBs
The Commissioner called on registered controlling bodies to serve a higher purpose in the general public interest, to form a society where the rule of law and fiscal compliance go hand in hand.

As co-stewards of society's resources, RCBs should work with SARS towards integrity in the system.

The Deputy Minister and the right to tax
Deputy Minister of Finance, Dr David Masondo, took us back in history in search of the philosophical grounding of the right to tax in a social contract. In fact the American Revolution of the 1800s was fuelled by the slogan “no taxation without representation”.

In the libertarian view, tax is theft and serves as a disincentive to economic growth. In a more liberal and democratic view, tax is necessary to provide public goods that enable sustainable economic growth. The election of public representatives leads to legitimacy of government and the consent to tax.

Weak economic growth currently creates a situation where servicing of government debt crowds out the provision of services to citizens.

The role of tax policy
Can tax policy foster economic growth? At a time when African and Asian countries had a tax-to-GDP ratio of roughly 15%, African countries experienced negative growth and Asian countries had 5% growth. This indicates that other policy instruments besides fiscal policy are required.

While South Africa's income tax is seen as very progressive and measures such as the change to a medical credit are aimed at greater equity, inequality has not been positively impacted.

KEY SPEAKERS

EDWARD KIESWETTER
Commissioner, SARS

DR DAVID MASONDO
Deputy Finance Minister, National Treasury

ADVOCATE CAROL STEINBERG
Thumela Chambers (Nugent Commission)

ISMAIL MOMONIAT
Deputy Director General, National Treasury

MARK KINGON
Group Executive, SARS

Positive steps would be to improve skills, also through tax incentives leading to greater growth and investment. A competent and ethical bureaucracy would restore tax morale and compliance, reversing the trend towards under collection of tax revenue. Good tax administration equals good tax policy and the Department of Finance supports the Commissioner in his efforts.

However, policy is not sufficient. A coalition of active citizens, political parties and trade unions is needed for developmental growth.

The international context
Environmental sustainability is a major concern and the carbon tax was introduced to mitigate the threat of climate change and in accordance with the Paris Agreement. Adaptation from a coal-based energy situation is prized.

Illegal flows of money between jurisdictions pose a major threat to emerging economies. Efforts by the G20 countries and the BEPS initiative of the OECD are aimed at closing loopholes and South Africa complies with the minimum standard set. The digital economy poses unique challenges as it is not ring fenced to a specific jurisdiction.

Rebuilding trust
In order to rebuild trust, sound tax policy is required, as well as a competent revenue service and ethical accounting and consulting professionals.

POINTS RAISED DURING DISCUSSIONS

- *Government expenditure:* Can South Africa sustain the level of debt servicing needed to recapitalise state-owned entities?
- *Tax morality:* The need to see prosecutions and money being paid back. Plea bargaining must be subject to full disclosure and return of ill-gotten gains. Well-functioning law enforcement agencies are required to take matters forward.
- *A corrupt tender process:* Apart from the active participants, there had been complicity of inaction by others.
- *Tax fraud:* A syndicate involved in VAT fraud has come forward and been arrested.
- *Lifestyle audits:* SARS assesses returns and not taxpayers but legislation is in the pipeline to enable lifestyle audits on high-net-worth individuals, whether government officials or from the corporate environment.
- *In good standing:* A new company almost always has a good compliance record and has an edge in tender processes.
- *Block chain:* Technology will come to our rescue with transparent records.
- *Tax professionals:* People make use of tax professional advice for the sake of assurance and to find ways of legally minimising their taxes. If the main reason for a transaction is to reduce tax it falls foul of a correctly applied general anti-avoidance rule (GAAR).

National Treasury: The economy and tax

Will the economy grow sufficiently to satisfy National Treasury's Budget projections? Chris Axelson from the National Treasury stated that after 2008, government spent its way out of the downturn. But now the billions are not there. Reforms are needed that do not cost government a lot but do streamline and foster growth.

A contrary view voiced was that we should not be looking at how to slice the cake in smaller pieces, we should see how to bake more cakes.

Factors seen as placing a drag on economic growth:

- Regulations and uncertainty (BEE trusts)
- Policy incoherence – carbon tax instituted but biggest emitter (Eskom) is exempt
- Lack of jobs, worsened by a deficit of skills
- Possibility of ratings downgrade, leading to barriers to investment (e.g. for pension fund investors) and fall in rand value
- Negative perceptions around NHI, load shedding, potholes in roads and dysfunctional municipalities.

Suggested ways to unlock economic growth

- Freeze policy changes to create more certainty
- Get rid of legislation that prohibits growth
- Encourage manufacturing as a major skills-absorbing industry
- Rationalise visa requirements
- Unlock spectrum to generate revenue
- Encourage public-private initiative energy production to create jobs
- Fix Eskom before embarking on NHI
- Fix medical services
- Establish a national consensus to get the plane to fly higher

The effects of corruption

Billions have been lost over the last number of years due to corruption. What now? Some of the views expressed were:

- The evidence of corruption is now clear and frustration is building. Rogues belong behind bars. The rule of law needs to work and to be seen to work.
- Active citizens and NGOs are needed to take the process forward. Civil society is laying charges and causing pain.
- Lack of transparency led to businesses milking SOEs. Finance houses should not have financed SOEs like Eskom and Sanral because they cannot sell their assets.
- The media and the judiciary have been shining light on corruption, and IT systems are being put in place to bring light to government procurement procedures.
- The capture of SARS has implications for the country's economic structure. If the tax base is compromised, government services have to be cut. Unchecked illicit trade in alcohol caused billions in excise to be lost.
- How effective are current tender processes to address transformation? The system of tenderpreneurs came about as a result of laudable objectives, like black economic empowerment, but now BEE partners get paid a percentage to do nothing.

Views on what is needed to rebuild trust in SARS

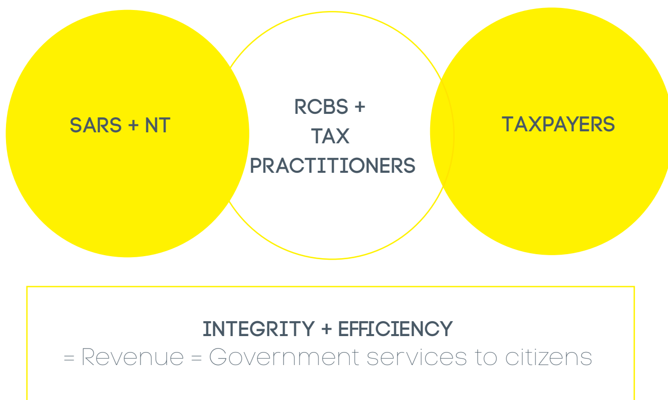
- To rebuild respect for fiscal rights, revenue must be used effectively, not corruptly.
- There must be transparency and accountability at SARS, the IT system must be improved and demoralisation of personnel addressed.
- Lifestyle audits must be conducted.
- SARS must apply penalties, also in the case of personal liabilities arising from companies that have gone under. Tax evasion is difficult to prosecute but other tax offences are not.
- SARS should be unshackled from secrecy provisions.
- Communication by SARS should improve: taxpayers have the right to know.
- The ratio between SARS admin costs and revenue collection should be made public.

Closing remarks by the Commissioner

- SARS is in a process of dealing with criminal offences in SARS and outside.
- Lifestyle audits will become more efficient.
- Legislation around secrecy provisions should change.
- Fraud in the VAT system is being tackled.
- Taking more matters to court, even if SARS loses a case, helps to set precedents and provide clarity of interpretation.
- SARS should be less reactive and more responsive to the economic environment.
- There have been great improvements in the IT space: 1.649 million tax returns have been submitted via eFiling and the SARS MobiApp. Of these, 84 000 were assessed within minutes.
- Nonetheless, thousands of people still wait in long lines at branches because they insist on filing at a branch. Why?

The Commissioner addressed a special word to tax practitioners: own up to ethical problems and work with RCBs to improve efficiency.

WORKING TOGETHER



Tax Indaba 2020 will be taking place from 7-11 September at the Sandton Convention Centre. Be sure to diarise the event.

Q&A

The Tax Helpline service is available exclusively to SAIT members. Log your tax-related technical queries via www.thesait.org.za

Q

SAIT

Questions and answers about the technical details around independent contractors, interest and employees' benefits.

Q Can you please tell me which directive to apply for independent contractors? Is it the fixed percentage and are you aware of any changes to the requirements for independent contractors?

Interpretation Note 17 (Issue 4), that deals with the potential employees' tax implications of amounts paid or payable to a person carrying on a trade independently, was last amended on 14 March 2018. The amendments did not make fundamental changes to the practice generally prevailing.

SARS' practice of rejecting applications for confirmation as an independent contractor under subparagraph (ii) of the definition of "remuneration" has been codified into the law – see section 80(1)(a)(vii) of the Tax Administration Act. One can therefore, since 1 October 2012, not apply for an advance ruling relating to whether the person is an independent contractor.

In essence there are no changes to the requirements for independent contractors.

The practice generally prevailing states that "it is the employer's duty to determine whether a person is an independent contractor or an employee and whether employees' tax should therefore be deducted or not". This is because the "employer is in the best position to interpret the facts of each case."

We accept that the individual that you refer to here, the "independent contractor", is someone who is not *"deemed to carry on a trade independently"*. See the proviso to paragraph (ii) of the definition of "remuneration" in paragraph 1 of the Fourth Schedule to the Income Tax Act. In other words, the amounts paid or payable to such an individual form remuneration and the employer must withhold employees' tax for the amounts.

The guide for employers in respect of employees' tax, issued by SARS in respect of the 2020 year of assessment, states that the employees' tax for an independent contractor must be calculated according to the deduction tables or a tax directive. The practice generally prevailing confirms that the amounts paid to the independent contractor must be coded 3616 on the IRP5 certificate.

In terms of paragraph 11 of the Fourth Schedule to the Act, SARS *"may, having regard to the circumstances of the case, issue a directive to an employer authorising that employer … to deduct or withhold by way of employees' tax from any remuneration in terms of paragraph 2, a specified amount or an amount to be determined in accordance with a specified rate or scale."* SARS can however only issue a directive:

- In order to alleviate hardship to that employee due to circumstances outside the control of the employee
- To correct any error in regard to the calculation of employees' tax
- In the case of remuneration constituting commission or where the remuneration is paid or payable to a personal service provider and that directive must be complied with

Q **Please can you confirm that all interest reflected on an IT3(b) will fall under code 4201, whether reflected as such on the certificate, or not? For example, interest on medical savings, interest earned on an investment and as reflected under 4201, interest for late payment of retirement income.**

I believe all interest should be declared whether received in cash or not.

You are correct. The total amount received (or accrued) in respect of interest with a source in the RSA must be inserted next to source code 4201. Any interest received from SARS must be declared separately in the field provided.

In terms of section 24J(3) of the Income Tax Act, there is deemed to have accrued to a person and must be included in the gross income of that person during that year of assessment, an amount of interest which is equal to the sum of all accrual amounts in relation to all accrual periods falling, whether in part or in whole, within such year of assessment in respect of such income instrument. The person is the holder in relation to an income instrument and the amount is included in gross income whether or not that amount constitutes a receipt or accrual of a capital nature. This of course only applies if the holder of the instrument did not have, during the year of assessment in question, a right to require redemption of the instrument and the instrument does not provide for the payment of deferred interest.

You referred to "interest for late payment of retirement income" and it is accepted that it arose from a late payment of a lump sum benefit. In terms of binding general ruling 31 (Issue 2), "interest that arises as a result of late payment of the benefit and therefore in addition to the benefit liability must be reflected separately and an IT3(b) certificate must be issued and submitted to SARS as per the prescribed processes."

The time of accrual of interest payable by SARS is specifically dealt with in section 7E of the Income Tax Act. It provides that "any amount of interest to which a person becomes entitled that is payable by SARS in terms of a tax Act is deemed to accrue to that person on the date on which that amount is paid to that person." This is the reason why this interest is not added to the other interest. Section 7F allows for "any amount of interest paid by SARS to that person under a tax Act and deemed to have accrued to that person in terms of section 7E that has to be repaid by that person to SARS", to be deducted from that person's taxable income in the year of assessment during which that amount is repaid to SARS. The ITR12 allows for this deduction to be made.

Q We are a construction company. My question is about two different employees:

- **Employee A moved to Johannesburg from Cape Town and the company is renting (paying for) accommodation in Johannesburg for the employee.**
- **Employee B moved to Johannesburg from Korea and the company is also renting (paying for) accommodation in Johannesburg for this employee.**

The company provided the two employees with a car that is owned by the company. So far, the car is used by them to travel from the rented accommodation to work and the company pays for the fuel.

The law relevant to hiring residential accommodation in a hotel or elsewhere is found in section 10(1)(nB)(ii) of the Income Tax Act. The provision exempts from normal tax "*… any benefit or advantage accruing to any employee (as defined in paragraph 1 of the Seventh Schedule) by reason of the fact that his employer (as defined in the said paragraph), has, 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, borne the expense—*

i. *…;*

ii. *…; or*

iii. *of hiring residential accommodation in an hotel or elsewhere for the employee or members of his household during the period ending 183 days after his transfer took effect or after he took up his appointment, as the case may be, if such residential accommodation was occupied temporarily pending the obtaining of permanent residential accommodation;"*

Paragraph 9(7A) of the Seventh Schedule is relevant to the foreign resident – we assume the individual is not a resident of the RSA. It reads as follows: *"Subject to subparagraph (7B) no rental value shall be placed under this paragraph on any accommodation provided by an employer to an employee away from such employee's usual place of residence outside the Republic—*

a. *for a period not exceeding 2 years from the date of arrival of that employee in the Republic, for the purposes of performing the duties of his or her employment; or*

b. *if that accommodation is provided to that employee during the year of assessment and that employee is physically present in the Republic for a period of less than 90 days in that year."*

The current practice generally prevailing explains the benefit of the use of a vehicle by more than one employee as follows: The grant of a right to use a motor vehicle is the fringe benefit that is subject to taxation. An employer who allows more than one employee to use the same motor vehicle for private or domestic purposes is granting each of the employees a right to use the vehicle. Each employee must therefore be taxed on the full value of the benefit.

BINDING RULINGS

▶ **JEAN-LOUIS NEL,** jean-louis@taxconsulting.co.za

We discuss three recent rulings, dealing with the tax consequences of a company group restructuring, consecutive asset-for-share transactions and dividend distributions received by trust beneficiaries when terminating their employment.

BINDING PRIVATE RULING 327
Tax implications of a group restructuring

Issue
This ruling determines the tax consequences of a group restructuring which includes liquidation distributions, in terms of the Income Tax Act.

Facts
The applicant is a resident company that is majority shareholder in the co-applicant, also being a resident company. The co-applicant is the sole shareholder in companies A, B and D. The co-applicant and company B are shareholders in company C. Company C is a minority shareholder in the co-applicant. Company D has a portfolio of investments in operating companies known as companies X, Y and Z, respectively.

The co-applicant and company B also hold an economic interest in these latter operating companies. Any dividends declared by these companies in favour of Company D will be distributed to the co-applicant and company A.

The applicant and its subsidiaries intend to restructure the group in order to eliminate the subsidiaries within the group. The applicant intends to take the following steps to restructure the group:

- The co-applicant will acquire company B's shareholding in company C at market value. The co-applicant will also acquire the shareholding held by company B in the co-applicant at market value. Both these acquisitions are in terms of a "liquidation distribution" as defined in section 47(1) of the Income Tax Act. The portfolio of shares in companies X, Y and Z, which are held by company D, will be purchased by the applicant at market value in terms of an "intragroup transaction" as defined in section 45(1) of the Income Tax Act. The consideration payable by the applicant will be left outstanding on a loan (Loan Obligation 1) that will constitute a loan claim (Loan Claim 1). This loan will bear no interest and is repayable on demand. The co-applicant and company A will acquire all the assets of company D, including the Loan Claim 1 in terms of a liquidation distribution. Loan Claim 1 will be distributed to the co-applicant and company A, based on their underlying investments, taking into account the relevant interests in companies X, Y and Z. As a result, a portion of Loan Claim 1 against the applicant is distributed to company A, and the balance of Loan Claim 1 is distributed to the co-applicant along with other assets attributable to the ordinary shares in company D. After acquiring the pro rata portion of Loan Claim 1 from company D, company A will distribute all its assets to the co-applicant, which is the sole shareholder of company A, also in terms of a liquidation distribution. Consequently, the co-applicant will be the sole holder of the total Loan Claim 1. A dividend will be declared by the co-applicant, equal to the amount of Loan Claim 1 to the applicant. This dividend will, however, be held outstanding as a loan (Loan Obligation 2) and as a result a loan claim (Loan Claim 2) will be created in favour of the applicant.
- Loan Obligation 2 will be set off against Loan Obligation 1 in favour of the co-applicant.

Ruling
This ruling was not subject to any additional conditions or assumptions and is valid for a period of three years from 7 November 2018.

The dividend, declared by the co-applicant to the applicant company and settled via the creation of Loan Claim 2 in favour of the applicant company in the proposed transaction, will for tax purposes be:

- exempt from income tax under section 10(1)(k)(i) due to the classification of the receipts as dividends; and
- exempt from dividends tax under section 64F(1)(a) read with section 64G(2)(b).

For the purposes of paragraph 20(1)(a) of the Eighth Schedule to the Income Tax Act, Loan Claim 2's base cost will be equal to the amount of the dividend declared by the co-applicant.

Section 45(3A)(c) of the Income Tax Act will be applicable to the settlement of Loan Claim 1 in the last proposed transactional step, whereby the loan claims and obligations are set off against each other. No capital gain will be realised by the co-applicant under this last transactional step.

BINDING PRIVATE RULING 328
Consecutive asset-for-share transactions

Issue
The applicant, a resident company that is a BEE participant, approached SARS for a ruling to determine the tax consequences of consecutive asset-for-share transactions within a period of 18 months, in terms of section 42 of the Income Tax Act.

Facts
Company A is a resident company that will introduce a new BEE participant, by implementing the following transactional steps:

- The first asset-for-share transaction, in terms of which company A will allot and issue shares to the BEE participant. The BEE participant will acquire single-digit equity interest at market value that exceeds the base cost of the interest in company A. In return for acquiring the shares in company A, the BEE participant will discharge the consideration by way of a loan account in favour of company A. The original shareholders of company A (the original shareholders) will retain the majority of the shareholding in company A. It is noted that the shares have a market value which exceeds their base cost.
- The second asset-for-share transaction in terms of which, after acquiring the equity interest in company A, the BEE participant will transfer at market value the shares in company A to a resident company known as InvestCo. In return, the BEE participant will acquire 100% of the shares in InvestCo. These shares also have a market value which exceeds their base cost.

The second asset-for-share transaction will be effected within an 18-month period after the first, and may thus trigger the anti-avoidance provisions of section 42(5) of the Income Tax Act.

As a result of the two asset-for-share transactions, the original shareholders will dispose of 18,69% interest in company A to the BEE participant and the BEE participant will transfer this acquired interest to InvestCo. The original shareholders will receive shares in the applicant and 100% of the economic interest in the BEE participant, but will only have 49% of the voting rights therein.

Ruling
The ruling issued by SARS is not subject to any additional conditions and assumptions and is as follows:

- The shares in company A will be regarded as having been acquired and held by the applicant on capital account, even though these shares will be disposed of to InvestCo shortly after acquisition. The facts and circumstances of this matter, taking into account the proposed steps before and after the acquisition of the shares in company A by InvestCo, are very specific and, in the context of the corporate rules, indicate that the applicant and the group as a whole will not treat the shares in Company A as trading stock.
- Section 42(7) will apply to the proposed transaction, but will have no tax implications.
- The base cost of the shares in company A, on the date of their disposal to the Applicant and InvestCo, will remain the same as the base cost of those shares for the original shareholders.

BINDING PRIVATE RULING 330
Distributions of dividends and other amounts from a trust to beneficiaries on termination of their employment

Issue
This ruling determines the tax consequences in terms of the Income Tax Act of dividend distributions and other amounts received by trust beneficiaries on termination of their employment.

Facts
The applicant is a resident trust that has been established to invest funds from time to time for the benefit of black permanent employees of company A, who are also the beneficiaries of the trust. The objective of the applicant is to invest funds from time to time and to use the fruits of these investments to the benefit of the beneficiaries.

The trust assets comprise the following:

- A donation of R100.00
- Donations made to the applicant from time to time
- Other assets, shareholding or investments, moveable or immoveable, corporeal or incorporeal that are acquired by the trustees, but not limited to shares

- Net revenue, that may be capitalised by the trustees in their unfettered discretion
- Interest, dividends or accruals in favour of the applicant of any nature

The trustees of the applicant are empowered to apply and allocate the above trust assets in their sole discretion to the benefit of the beneficiaries in order to achieve the objects of the applicant. The objectives of the applicant include the following:

- The economic empowerment of the beneficiaries
- The improvement of their lives and standard of living
- Their educational needs
- The initiation and development of projects to promote their welfare
- The provision of urgent relief and medical care
- Such further purpose as may be determined by the trustees of the applicant.

Due to the nature of the object of the applicant, the trustees are offered the discretion to manage and control the business affairs of the applicant. However, the trustees are required to hold trust funds in trust and allocate the net revenue.

The allocation of the net revenue or the portion of the monies held by the applicant is determined by the sole discretion of the trustees.

The trust deed provides for the allocation of beneficial units and the manner of the disposal of such beneficial units to the applicant. The beneficiary that holds the beneficial unit is not entitled to dispose of or trade in it in any other way before the date of vesting of the applicant.

Upon termination of the beneficiary's employment with company A, the trust deed provides that the beneficial unit must be promptly repurchased by the applicant after the last day of the applicant's financial year in which the beneficiary ceases to be an employee.

The purchase prices of the beneficial units are determined by the trustees' sole discretion, taking into account the net revenue available to repurchase the beneficial units on the relevant repurchase date.

The proposed transaction is that the applicant will, on termination of a beneficiary's employment, repurchase the beneficial unit held by the beneficiary on the date that the beneficiary ceases his or her employment with company A. The purchase price will be funded by the existing funds held by the applicant and not by a specific dividend received.

In the course of the relationship between the applicant and its beneficiaries, the trustees will periodically exercise their discretion to vest certain dividends in the employees. The distributions will be funded directly by dividends received from company A. The dividends received by the applicant will, in future, be distributed almost immediately, but not later than 30 days after their receipt.

Conditions and assumptions

The ruling is subject to the following: The amounts to be distributed to the employees from dividends receipts will be distributed to the employees within the year of assessment in which they were paid.

Ruling

The ruling issued by SARS is as follows:

- The amount to be received by a beneficiary of the applicant, by reason of the termination of his or her employment with company A, will be included in his or her gross income in terms of paragraph (d) of the definition of "gross income" and be subject to employees' tax as provided for by the Fourth Schedule to the Income Tax Act.
- All the amounts to be distributed to the beneficiaries of the applicant will constitute remuneration as defined and will be subject to employees' tax.

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Case Law
Wrap-up

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The article wraps up cases dealing with the application of a rebate in terms of the Customs and Excise Act and whether tax consulting fees paid by an employer constitute a taxable fringe benefit to its employees.

ACTI-CHEM SA (PTY) LTD V C:SARS
(8540/2017) [2019] ZAKZPHC 58 (15 August 2019)

Issue
The issue in this matter relates to whether the rebate claimed by the appellant (the taxpayer) was applicable to the goods it imported.

Facts
The taxpayer is a manufacturer and distributor of biocides, flame retardants, personal care ingredients and other speciality chemicals. The taxpayer is also a rebate registrant in respect of goods used in the manufacture of other goods more fully described in item 306.07 of Schedule No. 3 to the Customs and Excise Act and listed under the industry, "Polishes and Creams" (the industry).

The taxpayer imports ethylene-acrylic acid copolymer and oxidised polyethylene homopolymer (the imported goods), which it uses to manufacture Quecolin ESP and Quecolin HWI (Quecolin). Although Quecolin is neither a polish nor a cream, it can be used in the manufacture of polishes or creams. Although the taxpayer does not itself use Quecolin to manufacture polishes or creams, most of the taxpayer's customers to whom the Quecolin is sold do use it for this purpose. However, none of the customers are rebate registrants for rebate item 306.07.

The Commissioner made a determination that the imported goods had been used "otherwise than in accordance with the item under which entry was intended for" and made a demand for the taxpayer to pay duty on the goods together with VAT, penalties and interest.

In turn, the taxpayer brought an application in terms of section 47(9)(e) of the Customs and Excise Act, framed as an appeal to set aside the determination by the Commissioner and for a declaration to be made to the effect that the rebate imposed on item 306.07 is applicable to the imported goods.

Taxpayer's case
The taxpayer relied on the contention that the manufacture of Quecolin, regardless of the use for which it was applied, was enough to justify the rebate. The taxpayer further relied on the definition of "goods", "material" and "product" respectively, as contemplated in the First Schedule to the Act.

In terms of the taxpayer's argument, it followed that the imported goods were "materials" used by the taxpayer as ingredients to manufacture Quecolin. Quecolin is thus a "product" as defined, notwithstanding it being intended for later use in another process of manufacture. Given that the definition of "goods" includes products, Quecolin falls within the definition. Specifically, Quecolin is a good manufactured from the imported goods and, as it is capable of being used to manufacture polishes and creams, the criterion is satisfied.

The taxpayer further submitted that the rebate was merited, since the principal use of Quecolin is for the manufacture of polishes or creams. The taxpayer thus holds that the requirement is that the imported goods be used "for use in connection with" the manufacture of goods in the polishes and creams industry.

SARS' case
SARS' case was that the use requirement was crucial, insofar as the provision states that "[t]he imported goods … shall … be admitted for use in connection with the production or manufacture of goods in the [industry]".

It could not be said that the mere manufacture of Quecolin meant that the imported goods have been used "in connection with the production or manufacture of goods in the industry", solely because they are capable of such use. It is the final product which determines whether the imported goods have been so used. That final product must be a polish or a cream, of which Quecolin is neither.

SARS noted that the taxpayer may manufacture a product from the imported goods which is eventually used to manufacture polishes and creams. If Quecolin is used by others to manufacture polishes and creams, the taxpayer's use is one "in connection with" the manufacture of polishes or creams.

Outcome

The manufacture of Quecolin alone does not qualify the taxpayer for the relevant rebate. It must ultimately be used to manufacture polishes and creams in order to do so. The taxpayer does not manufacture polishes and creams and the entities to which the taxpayer sells Quecolin are not rebate registrants, thus the rebate claimed by the taxpayer does not apply. The application was dismissed.

Core reasoning

The issue is whether the words "in connection with" mean that the imported goods need not ultimately be used to manufacture polishes or creams. The connection requires polishes or creams to ultimately be manufactured from the imported goods.

The court held that the phrase "in connection with" simply means that the initial importer need not itself manufacture polishes or creams from the imported goods. This can be done by a subsequent entity. However, the manufacture of polishes or creams from the imported goods is required before it can be said that they have been used "in connection with" the production or manufacture of goods in the industry.

Thus, unless the Quecolin is actually used for this purpose, it cannot be said that there has been a use of the imported goods "in connection with the production or manufacture of goods", in the industry. The connection is not established if this does not take place. Further, the polishes and creams must be manufactured by a rebate registrant.

Take away

Quecolin must specifically be used for the manufacturing of polishes and creams by a rebate registrant in order for the rebate applied on item 306.07 of Schedule No. 3 to be applicable.

Regard must be had to the use for which the goods are applied, as SARS will not generally allow a rebate in respect of goods that do not fall within the language and provisions of the Customs and Excise Act.

BMW SOUTH AFRICA (PTY) LTD V SARS

Case No: 1156/2018

Issue

The appeal turned on whether payments made by BMW (Pty) Ltd (the taxpayer) to tax consulting firms KPMG, Price Waterhouse Coopers and Raffray Tax Consultants CC (the consultants), in relation to services rendered to expatriate employees in respect of their domestic tax obligations, constitute a taxable benefit in terms of paragraph (i) of the definition of "gross income", read with paragraphs 2(e) or (h) of the Seventh Schedule to the Income Tax Act.

The facts

As part of BMW Group's international business policy, employees are assigned to perform services in countries where the Group has a presence for certain fixed periods. As these assignments are not permanent, the employees continue to submit their tax returns in their home country.

To facilitate tax compliance of their expatriate employees in South Africa, the taxpayer procured the services of the consultants. The consultants would assist the expatriates with their domestic tax obligations, specifically to assist with their tax returns and to deal with queries and objections.

SARS queried the payments made to the consultants, in particular why they were not treated as a taxable fringe benefit. The taxpayer responded, denying that the payments constituted a benefit, but SARS was unmoved and issued additional assessments in respect of the 2004–2009 years of assessment.

In its notice of objection, the taxpayer contended that the services were for the benefit of the taxpayer and not its employees, as they have no choice in the matter. The basis for this argument was that the services were procured to protect the taxpayer to ensure that South African taxes are not overstated or understated. In fact, it was put forth that the largest component of the fee is directed towards providing assurance to the taxpayer regarding its responsibilities in relation to the tax due.

SARS disagreed with this assertion and the matter ended up before the Tax Court.

Tax Court

The primary question in the Tax Court was whether any benefit accrued to the employees as a result of the payment to the tax consultants. Ruling in favour of SARS, the court concluded as follows: *Applying the principle to the present case, the question of whether tax consultancy services are for private use must be determined objectively. They are manifestly for the private use of locals. Consequently, and objectively, they remain so in respect of expatriate employees as well.*

High Court

The taxpayer appealed the Tax Court's decision to the full bench of the High Court, which confirmed the test is objective. The taxpayer relied on an academic source to contend that *the use [of the benefit] must be wholly private or domestic – if used partially for the business or affairs of the employer, it falls outside this provision.*

The taxpayer then argued that the services were not wholly for the private benefit of the employees and thus fell outside the provision in question. In this regard, the court found: *… the services rendered by the consultancy firm were rendered wholly for private use not partially. Reiterating there is no evidence that the tax services that were rendered were partially for BMW group and partially for the expatriate employees.*

On this basis the court agreed with the Tax Court's conclusions and dismissed the matter with costs. The taxpayer took the matter on appeal to the Supreme Court of Appeal (SCA).

Outcome

In the SCA, the taxpayer again relied on the argument that the use of the services must be wholly private or domestic. It was contended that the services were, at least in part, for the benefit of the taxpayer which utilised such services to ensure it paid the correct amounts of income tax, and deducted the correct amounts of employees' tax …

The SCA, however, upheld the decisions in the Tax Court and the High Court and the taxpayer's appeal was dismissed with costs.

Core reasoning

The SCA in this instance did not challenge the possibility that the taxpayer may have benefited from the services as well, but it dismissed the contention that the use must be wholly private or domestic for it to constitute a taxable benefit. Having regard to the engagement letter between the BMW Group and the consultants, the SCA held as follows:

That there might have been some peripheral advantage to BMWSA in that the tax returns of the expatriate employers and the results of the other services rendered to them could be utilised in checking the accuracy of their own calculation and otherwise utilising the data is irrelevant. The statement by Davis et al referred to in para 20 above on which BMWSA relied, is too strongly worded. There will be instances in which benefits or advantages contemplated within s 1(i) read with the Seventh Schedule have some residual or marginal advantage for an employer.

The SCA confirmed that the primary question is whether an advantage or benefit was granted by an employer to an employee and whether it was for the employee's private or domestic purposes. If this is answered in the positive, such benefit would be taxable and the fact that there may have been a peripheral advantage to the employer is irrelevant.

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