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TAXTALK

South Africa's Leading Tax Journal

Issue 68 January/February 2018

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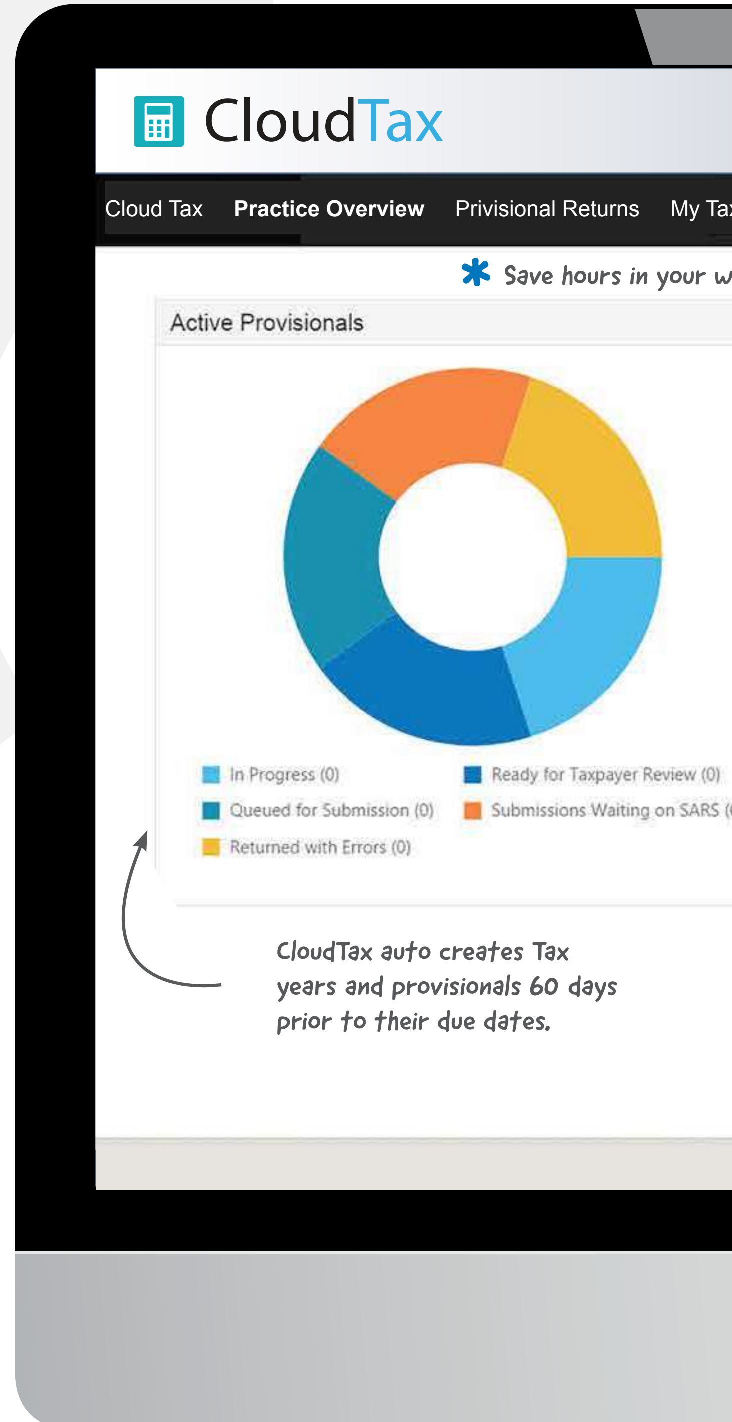

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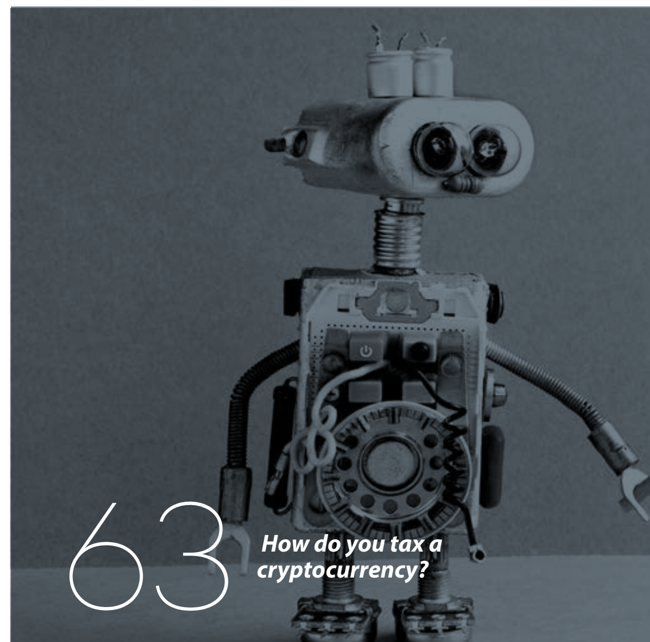

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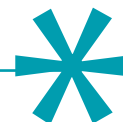

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Enter our sudoku competition to stand a chance to win 2 tax pocket books.

Message From the CEO

Welcome back to work as we enter 2018. We trust you had some rest over the holidays.

SAIT has made a number of successful changes to the *TaxTalk* magazine in 2017 and will keep moving forward so that our new features and format will make this magazine ever-more relevant to your practice and interests. The magazine has already become a leading feature in the South African publishing landscape.

In this issue, we are featuring the tax legislative process. As most of our readers know, tax law changes at least annually. While we regularly provide seminars, describing the various updates at the year-end and after the February budget (through our affiliate, the Tax Faculty), we also think it is important to inform our readers of the tax legislative process itself as opposed to simply the particular amendments.

We further note that SAIT is actively engaged in the tax legislative process throughout the year. Our Head of Tax Policy, Erika de Villiers, is devoted to this task as well as to engaging with SARS in terms of binding tax interpretations. As CEO, I am also involved with this process and select members of staff and we consequently have several active working groups which provide regular support so that SAIT can obtain practical input on issues of genuine practitioner concern.

The shape of the tax law is vital to the process of ensuring consensus. Consensus buy-in is important for achieving some level of willingness to comply in terms of tax morality. Taxpayers are often more willing to pay their fair share if they believe in the system. Government should also remember that democracy requires community participation, not unilateral imposition of laws. Tax morality is not a concern for SARS in terms of enforcement (which has been the recent focus of the press).

National Treasury has historically been more willing to engage than many departments, but this level of engagement varies depending on the tax officials involved. At this stage, we are witnessing some level of willingness to engage, and Parliament has been increasingly supportive in this regard.

We would also like to thank the various contributors to our magazine who consistently provide regular content on matters of ongoing interest. The array of contributors has increased over the years as the magazine has grown in usage.

In short, we hope you enjoy this issue and become more informed of your tax landscape.

Keith Engel

CEO of SAIT

Message From the Editor

Welcome to the new year! It is time to swap out your calendars and gird up your loins for the coming year.

Last year was somewhat of a metamorphic journey for *TaxTalk* to pinpoint our desired place in the South African tax space. We sought to fine-tune the magazine's content and reach according to industry requirements and so, for 2018, we have devised further improvements….

In a world where most media is now consumed digitally, we had to consider the need to produce content electronically. Our print journey is by no means over as the hardcopy publication continues to be our flagship. But, as we look ahead, our content will be reaching more readers than ever before through our growing website and popular weekly newsletters.

You may also notice that we have made a few amendments to the design and layout of the magazine; the result of our 2017 reader survey results.

This year we have lined up pertinent tax themes to keep you in the loop. For this first issue of 2018, we bring you the latest in tax law amendments. This notable theme inspired our allegorical front cover and the idea for our main feature article. Following this section, we delve into the dispute resolution process and look at mechanisms available to taxpayers.

TaxTalk prides itself on being the premier publication in tax. The Editorial Team, with the assistance of our contributing readership, is determined to enhance the status of the publication and we look forward to providing you with valuable content in 2018 and beyond.

Tania Wolson

Editor

Tell us what you think. Questions and suggestions can be sent to editor@thesait.org.za

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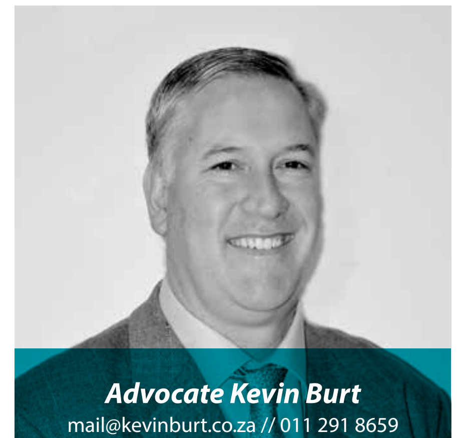
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THE 4 SEASONS of Tax Law

KEITH ENGEL, SAIT

The cyclic tax law process, much like the seasons, is ever changing, but how exactly it changes can seem mysterious. SAIT's CEO and former National Treasury insider explains the overall legislative process.

Besides being complex, tax law is ever changing. Experienced tax professionals have come to expect that South African tax legislation will change at least once per year. But, what is often not understood is how tax legislative changes are enacted. The purpose of this article is to outline the overall legislative cycle so that tax professionals have a stronger voice in the legislative process.

Before going into detail, one should first note that the legislative cycle can be broken down into the following four "seasons" (which will be outlined in detail in this article):

1. Budget
2. Initial draft release
3. Comment and finalisation
4. Completion and proposal renewal

1. Budget

The annual budget process lies at the heart of National Treasury's functions. Although the national budget may only be in the forefront of the public's attention twice a year, the budget process is actually a year-round process that picks up steam toward the second half of every year and reaches a crescendo every January and February after Government officials return from their Christmas holidays.

This budget process reaches culmination with the release of National Treasury's annual budget review, followed by a speech presented by the Minister of Finance before Parliament and the nation. Both the annual budget review and the speech are fully available on National Treasury's website. Both the Minister's speech and the budget review are typically released on Wednesday afternoon during the third week of February.

The core aspects of the budget process fall into the following three parts:

1. Expenditure allocation
2. Tax revenue
3. Borrowing

Like many treasuries, South Africa's National Treasury's budget is led by expenditure needs. Tax revenue must be sufficient to ensure that the Government's borrowing capacity remains within reasonable bounds.

To achieve these aims, tax discussions within National Treasury fall into two general parts: Macro and micro considerations. Macro considerations focus on rates and large tax proposals that can be readily quantified in the budget process. Micro considerations typically include narrower proposals that have a smaller monetary effect, such as the closure of tax avoidance schemes, providing isolated incentives and remedying various anomalies. Tax proposals can be internally generated, but often include concerns raised by SARS and the private sector. In recent years, SARS has had a stronger influence regarding these proposals.

Annual tax proposals are typically found in Chapter 4 and Annexure C of the *Budget Review*. Chapter 4 mainly contains macro changes, such as changes in rates and numerical thresholds as well as populous items (e.g., changes impacting individual tax returns of salaried individuals). Annexure C mostly contains the micro items listed above.

In addition, National Treasury releases a Rates and Monetary Amounts and Revenue Laws Amendment Bill. This bill contains tax rate changes and changes to monetary amount thresholds, including medical credits and the primary rebates. The purpose of this immediate release is to ensure that rate and monetary changes can be placed into effect as soon as possible (e.g., 1 March or 1 April). Parliament regularly adopts this bill without any meaningful changes.

2. Initial draft release

Many officials within National Treasury become involved in a short media campaign immediately after the budget release. The core players, including certain officials within the tax team, often become part of the various post-budget events and press engagements. This post-budget period typically extends into the first and second week of March.

One key post-budget event during this period (besides the SAIT events, of course!) involves the Parliamentary process. The Standing Committee on Finance of the National Assembly holds a short series of post-budget committee hearings. These hearings include a session focused on tax that is open for public comment. The policy team of SAIT and other active private stakeholders attend these sessions.

The tax teams within National Treasury then begin the hard work of converting the budget announcements found in Chapter 4 and Annexure C of the budget into a draft bill. Most of the work during this phase has become internalised within National Treasury's tax teams and key SARS tax personnel who regularly engage in the tax policy process.

National Treasury tends to reach out to certain key stakeholders within the private sector when the proposals seek to eliminate anomalies that adversely impact taxpayers and where the proposals provide tax incentives or general tax facilitation. But, National Treasury tends to avoid outside stakeholder engagement when imposing anti-avoidance rules and other proposals that are contrary to taxpayer interests. Overall, private sector stakeholder engagement during this period has become somewhat limited.

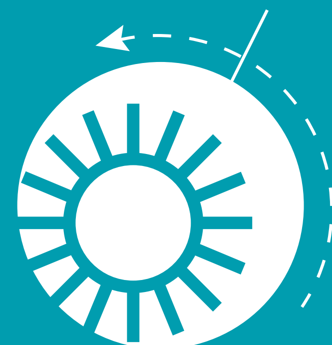
The draft tax bill preparation process reaches its peak in June and early July. National Treasury's tax teams, in conjunction with SARS, prepare a draft bill and an accompanying explanatory memorandum. These documents come along with an internal National Treasury submission that is transmitted through three levels:

1. The Deputy-Director General of Tax and Financial Sector Policy
2. The Director-General of National Treasury
3. The Minister of Finance

Once the submission is signed by the Minister, the draft tax bill and accompanying explanatory memorandum are released on National Treasury's website for public consultation. This release previously occurred in mid-June, but has recently shifted to early July.

One should note that the draft release technically involves two taxation laws amendment bills. The first is a draft taxation laws amendment bill which covers substantive changes to the tax acts. This draft bill is a money bill with National Treasury driving the process. The second is a draft taxation laws amendment bill which deals with tax administration (known as a tax administration laws amendment bill). This second bill is typically driven by SARS.

"The annual budget process lies at the heart of National Treasury's functions."



"Tax practitioners and private sector professionals become most active in the tax process once the draft tax bills are released."

3. Comment and finalisation

Tax practitioners and private sector professionals become most active in the tax process once the draft tax bills are released. Detailed words on a page tend to have a galvanising effect for the tax community. Draft legislation typically falls into a dual track: One for National Treasury and one for Parliament.

In terms of the first track, National Treasury formally seeks direct comment from the public via a two-day workshop. Taxpayers usually have a three- to four-week period to provide their written comments. National Treasury, with SARS attendant, also engages separately with specific industry bodies in terms of key sectors directly impacted by the draft bill. SARS may have a workshop of its own in respect of the draft bill dealing with tax administration.

In terms of the second track, the process begins with an initial briefing or presentation by National Treasury and SARS, before the Standing Committee on Finance of the National Assembly. National Treasury and SARS use this briefing to fully present the public case for their proposals. Taxpayers may attend this briefing, but their practical ability to comment is very limited.

Taxpayers have an opportunity to directly engage with the National Assembly via the Standing Committee on Finance. Taxpayers must provide a separate set of submissions to the committee to be involved in the public hearings. The first round of public hearings typically occurs in late August with key National Treasury and SARS officials in attendance. Besides SAIT, private stakeholders mainly include private firms, professional bodies and trade associations.

Upon completion of the above consultations, National Treasury and SARS return to the Standing Committee on Finance to report back on the draft tax bills. This report-back typically occurs in early September during which National Treasury and SARS provide a response document in which they describe the plan to revise the tax bills in light of public comment. This response must be approved by the Minister before release. Taxpayer comments are listed in-depth with Government's response given under a heading which either says "Accepted", "Not accepted", "Partially accepted", "Comment misplaced" or "Noted," followed by a short explanation. The Chair of the Standing Committee on Finance has recently opened these proceedings so taxpayers have a limited opportunity to further respond.

The activities occurring within the period following the report-back is of an ad hoc nature. National Treasury and SARS largely work behind the scenes to revise the draft bills. These revisions are aimed at adjusting the draft bills in line with their statements in the report-back session and polishing the draft bills further for enhanced accuracy. National Treasury and SARS may also enter into one or two select engagements with taxpayers on isolated issues.

National Treasury and SARS complete the process by submitting their finalised versions of the draft bills to the State Law Advisors. Once the bills are in the hands of the State Law Advisors, the bills are mainly checked for constitutionality (especially around issues such as effective dates). The draft bills are also briefly reviewed by the Parliamentary legal team. Few substantive changes are made once the bills are before the State Law Advisors and the Parliamentary legal team.

HOW NEW TAXES ARE LEGISLATED

South Africa has introduced a few new tax instruments over the years, such as the Mineral and Petroleum Resources Royalty Act and the pending Carbon Tax. These new tax instruments follow a slightly different process than the taxation laws amendment bills.

National Treasury typically brings new taxes to the fore via discussion papers, followed by informal draft bills. Controversial taxes tend to be revised a few times by National Treasury on a unilateral basis upon initial entry into the public domain. These new tax instruments are sent to Cabinet for approval once or a few times, depending on the number of changes made during the initial stages; whereas Cabinet has little involvement in the annual taxation laws amendment process.

National Treasury begins the Parliamentary process once it believes that the newly proposed tax is sufficiently viable, after having undertaken the above consultative process. The newly proposed tax is first brought to Parliament as an informal draft (much like the taxation laws amendment bills) and then formally introduced in a similar fashion. New taxes typically come before Parliament as a separate set of engagements from the annual taxation laws amendment bills.

4. Completion and proposal renewal

As the draft bills finds their way through the State Law Advisors and Parliamentary legal team, National Treasury and SARS tax teams transmit a final internal submission through the system which contains the final version of the substantive features. This submission must once again find its way through to the Commissioner's office as well as the Deputy Director-General (Tax and Financial Sector Policy), the Director-General and the Minister of Finance.

Once finalised, the Minister of Finance formally introduces the first formal version of the annual tax bills to the National Assembly as a whole. This formal introduction typically falls on the same day on which the Minister presents his Medium-Term Budget Policy Statement in preparation of the full budget process for the following February. The Minister typically comes before the National Assembly with these items towards the end of October.

Legislative completion

The formalised tax bills are then referred back to the Standing Committee on Finance for official committee approval. National Treasury and SARS make one final presentation to the Standing Committee on Finance, followed by committee approval. Little, if any, private sector comment is heard during this period. Once approved, the Minister of Finance comes back to the National Assembly as a whole for a political debate, followed by formal adoption.

The tax bills are then referred to the National Council of Provinces. At this point, National Treasury and SARS are called upon once again to present the tax bills; this time to the Select Committee on Finance under the auspices of the National Council of Provinces. The National Council of Provinces subsequently approves the tax bills on its side.

It is rare for tax bills to be changed at this stage because changes require a formal Parliamentary process. However, some recent exceptions have occurred in respect of venture capital companies and retirement funds.

National Treasury and SARS also prepare the Afrikaans version of the tax bills at this time, given that Government is required to have a non-English version of all laws. We also note that National Treasury will release an explanatory memorandum during this period which previously had to be released upon National Assembly's formal introduction in late October, but may now come as late as January.

The final leg of the legislative journey pertains to Presidential signature. The President must ultimately sign the bills for these bills to become law. Presidential signature previously occurred in December, but now more frequently occurs in late January. Once signed, the tax laws become formalised by way of Government Gazette a few days later. We do not know of any instances in which the President failed to sign a tax bill in the exact same form presented to him.

Renewal

During the final leg of the legislative tax journey, National Treasury's tax teams and SARS prepare themselves for the tax proposal process that leads into the next cycle. The economic tax team within National Treasury, along with the tax statistical teams of SARS, provide the interim tax revenue numbers that become part of the Medium-Term Budget Policy Statement. This Medium-Term Budget Policy Statement sets the economic scene and forecasts future total revenue needs required when the Minister of Finance presents the formal budget numbers for the following February.

As the tax laws amendment bills wind their way through National Assembly and the National Council of Provinces, the tax teams within National Treasury and SARS make their initial preparations for the next year's cycle of tax proposals. National Treasury and SARS spearhead their own agendas while simultaneously providing taxpayer access for public comment. This process is informally referred to as the Annexure C process, whereby taxpayers are given a three- to four-week period to make submissions. National Treasury and SARS then provide a two-day workshop for discussion that involves the tax community as a whole. Smaller Government-private sector meetings may also be selectively held during this period.

Conclusion

As one can see from the above, South Africa has a sophisticated legislative process that includes a series of formal and informal procedures. Interested taxpayers must understand this process to be effectively engaged. We at SAIT have dedicated personnel who regularly engage with the various Government stakeholders to ensure that the tax system is better aimed at representing the tax community as a whole.

THE ROLES OF PARLIAMENT, SARS AND TREASURY IN TAX LEGISLATION

Parliament: Ratification of the executive

National Treasury (with the assistance of SARS) engages and introduces all tax bills for Parliamentary approval. The National Assembly effectively serves as the main body in tax matter discussions and debates and the National Council of Provinces serves as the secondary body. Both must formally approve legislation if the legislation is to be sent for Presidential signature. The key committee for the National Assembly is the Standing Committee on Finance, while the key committee for the National Council of Provinces is the Select Committee on Finance.

Parliament largely plays an oversight role in terms of legislation. We are unaware of any tax bills proposed by Treasury that have been rejected. The key committees tend to act more in a consultative capacity with Treasury adjusting proposals based on committee input. The Parliamentary Budget Office supports the committees in this role, by conducting research and analysis on their behalf.

SARS: Tax administrator

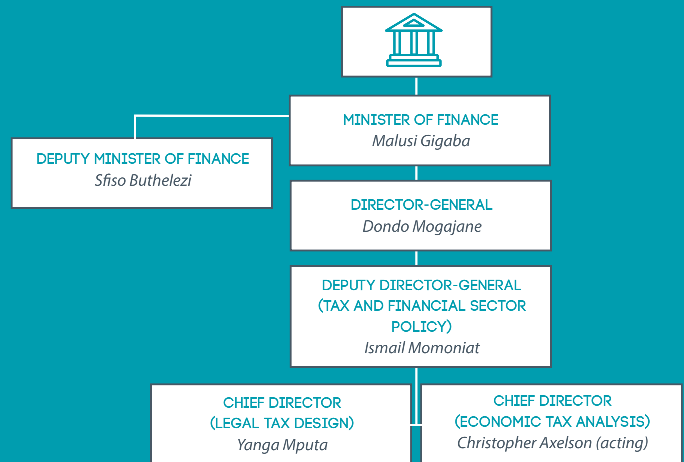
SARS plays a key role in the tax legislative process as the administrator and enforcer of tax laws. National Treasury regularly engages with SARS in all tax policy matters throughout the tax legislative process. SARS drives (and even drafts) legislation which deals with tax administration (e.g., the Tax Administration Act) and sometimes drafts portions of the anti-avoidance provisions.

The function within SARS dealing with tax policy and legislation is the team for Legal Policy and Research, headed by a Group Executive. The Group Executive operates under the Exco group.

National Treasury: Maker of tax policy

National Treasury is the department that drives national tax policy, and only the Minister of Finance may introduce tax legislation (and other money bills). National Treasury drives this tax process as part of its overall budget authority.

The tax function sits under the division of Tax and Financial Sector Policy, headed by a Deputy Director-General (whose office is filled with a political appointee). The tax portion of the division is headed by two teams: The Economic Tax Analysis team and the Legal Tax Design team. The Economic Tax Analysis team consists of economists and statisticians who are headed by a Chief Director. The Legal Tax Design team consists of lawyers and accountants who are headed by another Chief Director. Both teams are staffed and headed by technocrats.



** Please note that all names and dates in this article were correct at time of collation.*

Flip over for a visual representation of the tax law process.

SAVE THE DATE

POST BUDGET REVIEW

FEBRUARY 2018

CAPE TOWN

WEDNESDAY, 21 FEBRUARY 2018

2pm - 4pm: Live Stream Budget Speech
4pm - 6pm: Live Budget Breakdown (Panel Discussion)

DURBAN

THURSDAY, 22 FEBRUARY 2018

8am - 10am
Budget Breakfast / Live Discussion

JOHANNESBURG

FRIDAY, 23 FEBRUARY 2018

8am - 10am
Budget Breakfast / Live Panel Discussion

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THE 4 SEASONS OF TAX LAW CREATION

1. BUDGET

JANUARY

Potentially the month when the President signs last year's tax bills and they are gazetted.

FEBRUARY

Budget Speech and Budget Review, including major tax proposals.

4. COMPLETION AND RENEWAL

OCTOBER

The final versions of the bills are introduced in Parliament, usually at the MTBS.

NOVEMBER

Parliament finalises bills.

Writing of the new Budget Review gathers steam.

DECEMBER

Public invited to submit Annexure C proposals.

Potentially the month when the President signs the bills and they are gazetted.

*Dates are not definitive for any of the events mentioned.

2. INITIAL DRAFT RELEASE

MARCH

Officals engage in a media campaign.

SCOF is briefed on budget.

Private stakeholders address SCOF.

Drafting of legislation begins.

APRIL

Drafting of legislation continues. Some engagement with key stakeholders.

MAY

Drafting of legislation continues.

JUNE

Drafting of legislation reaches its peak.

3. COMMENT AND FINALISATION

JULY

Draft legislation is published in two bills with explanatory memo.

Taxpayers usually have four weeks to comment to Treasury.

Treasury and SARS present bills to SCOF.

AUGUST

Public hearings and workshops with the public continue.

SEPTEMBER

Treasury delivers a response document to SCOF on public comments.

Officials work to revise the bills accordingly. State Law Advisors take control.

REVISED DEBT RESTRUCTURING RULES: WAS THIS INTENDED?

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Changing the terms and conditions of debts may have tax implications in future. Taxpayers who find themselves in a position of financial distress should be aware of this and make sure that they consider this when restructuring debts.

The pressures of the current economic climate in South Africa may cause borrowers to find themselves in a position where they are unable to meet their debt obligations or restructure their affairs to prevent finding themselves in this position. Significant changes to the tax regime that applies to debt restructuring transactions take effect for years of assessment commencing on or after 1 January 2018. The aim of this article is to provide an analysis of one of these changes, namely debt restructuring by way of changes or waiver of terms and conditions relating to a debt.

Basic principles

The tax rules relating to debt restructuring mainly apply where a taxpayer used debt to fund expenditure that was deductible for tax purposes or that reflects in the base cost of an asset. If this debt is restructured in a manner that it is no longer owing, this means that the taxpayer will not be required to actually pay the expenditure funded by the debt. The basic principle that applies from a tax perspective is that, in such circumstances, a recoupment must arise to reverse the effect of the deductible expenditure funded by the debt or the base cost of the asset funded needs to be reduced to accurately reflect the amount that the taxpayer has or will really pay. For the purpose of explanation in this article, this recoupment or adjustment to the base cost of an asset, as the case may be, is conveniently referred to as the tax consequences of a debt restructuring.

Effect of changes of the terms or conditions in respect of a debt

Previously, the trigger event for the above tax implications used to be a debt reduction. Even though this concept was not explicitly defined in the legislation, its meaning could be deduced from the definition of the term "reduction amount" to refer to a situation where the amount of debt (i.e., face value) is reduced by more than the consideration applied by the person to affect that reduction in the face value of the debt.

For years of assessment commencing on or after 1 January 2018, the trigger event changes to a concession or compromise in respect of a debt. If such a concession or compromise occurs, the revised rules define a debt benefit amount to which the above tax consequences will apply. The definition of concession or compromise consists of two components, namely:

1. Changes or waivers of terms or conditions in respect of the debt and, related to this, the substitution of the obligation in terms of which the debt is owed (paragraph (a)); and
2. A settlement of the debt by conversion or exchange for shares or by applying the proceeds from share issues (paragraph (b)).

The focus of this article is only on the introduction of paragraph (a), specifically changes to any term or condition in respect of a debt, as a trigger for the tax rules to apply. Where such a change (or waiver) in the terms or conditions of a debt occurs, the debt benefit to which the tax rules apply is calculated as the difference between the face value of the debt, prior to the arrangement that results in the change in terms or conditions, and the market value of the claim in respect of the debt. It is submitted that the claim in respect of the debt is held by the lender, which means that the claim needs to be valued from its perspective.

The remainder of this article will first consider the principles applicable to the valuation of the debt claim and thereafter discuss its impact on the tax consequences that arise under the revised rules when the terms and conditions of a debt are changed.

Relevant valuation principles

It is submitted that the market value of a debt claim is calculated as the present value of the future contractual cash flows expected to be received in respect of the debt. This present value is determined by discounting such cash flows at a rate that reflects the market's view of the debt. In particular, the discount rate will reflect a market participant's current assessment of the risk that the borrower would not be able to make repayments when required to do so (i.e., the credit risk associated with the counterparty to the claim (borrower)).

This valuation method can be illustrated by an example with a few simple scenarios

Example: Valuation of a debt claim

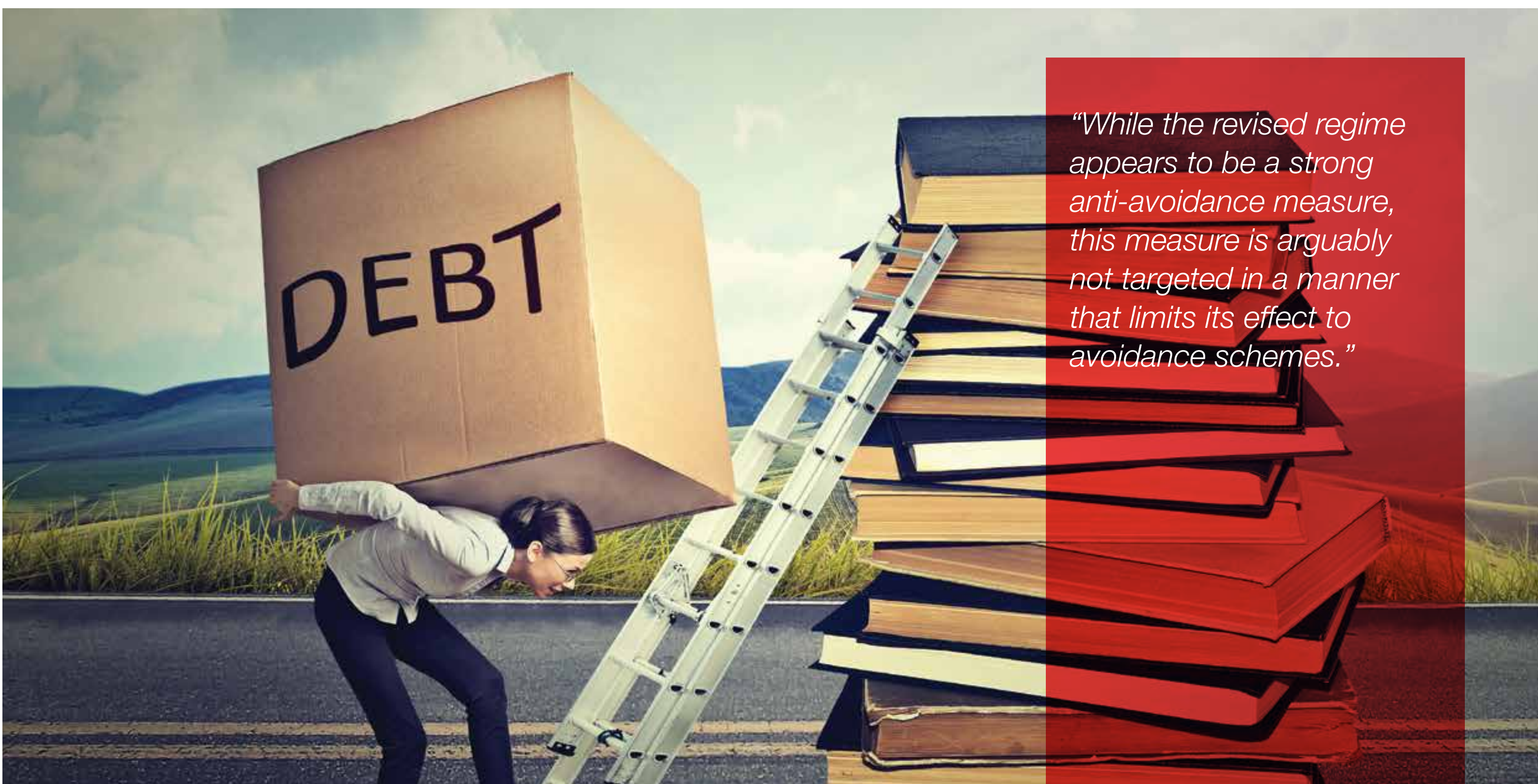
A bank advances a loan of R100 to a borrower on market-related terms, including interest at a rate of 10% per annum. The borrower is required to repay the loan in two equal instalments of R50; one at the end of Year 1 and another at the end of Year 2. Assuming that interest is payable in arrears at the end of each year, this would mean that interest of R10 (R100 x 10%) is payable at the end of Year 1 and R5 ((R100-R50) x 10%)) at the end of Year 2. When the debt is advanced to the borrower, its market value can be determined as follows:

	Remaining Cash Flows	*Present Value of the Debt*	*Face Value of the Debt (excluding interest that will still accrue in future)*
End of Year 1	60	$60 / [(1+0.1)^1] = 54.55$	
End of Year 2	55	$55 / [(1+0.1)^2] = 45.45$	
Value of the debt claim at inception		**100**	**100**

Assuming that there is no change in the credit risk of the borrower, the market value of the debt, after the first repayment at the end of Year 1, will be as follows:

	Remaining Cash Flows	*Present Value of the Debt*	*Face Value of the Debt (excluding interest that will still accrue in future)*
End of Year 2	55	$55 / [(1+0.1)^1] = 50$	
Value of the debt claim at end of Year 1		**50**	**50**

The above calculation illustrates that if the credit risk of the borrower remains unchanged since the inception of the loan, the market value and face value of the debt should be approximately equal.



"While the revised regime appears to be a strong anti-avoidance measure, this measure is arguably not targeted in a manner that limits its effect to avoidance schemes."

- However, the credit risk of the borrower may have changed since the inception of the loan. This could, for example, be due to difficult business conditions that the borrower is experiencing. This would increase the risk that the borrower would not be able to service its debt obligations in a timely manner. If a lender had to advance the loan to the borrower at this point in time, the lender would have required a higher return to compensate it for the higher credit risk taken on the borrower. If one assumes, for the purpose of the example, that the lender would have required a return of 15% had the loan been advanced at the end of Year 1, the calculation would look as follows:

	Remaining Cash Flows	*Present Value of the Debt*	*Face Value of the Debt (excluding interest that will still accrue in future)*
End of Year 2	55	55 / [(1+0.15)^{1}] = 47.8	
Value of the debt claim at end of Year 1		**47.8**	**50**

The reduction in the market value of the debt claim is solely as a result of the deterioration of the credit position of the borrower. This decrease occurs, despite the fact that the terms and conditions of the loan remained unchanged. It is furthermore important in this context to note that despite a change in the present value of the debt, the borrower will still be required to pay an amount of R55, consisting of the R50 repayment of the outstanding capital and the R5 interest in respect of the loan, at the end of Year 2.

The application of these valuation principles can be illustrated in the context of the following two scenarios:

Scenario 1

At the end of Year 1, the terms of the debt are changed so that it only becomes repayable in 100 years, without any further interest accrual. It is submitted that this change in the terms would effectively result in the debt being extinguished from a commercial perspective, while remaining outstanding from a legal perspective. This reality will be reflected in the market value of the debt claim.

If the same calculation as above is performed at the end of Year 1 (assuming no change in the credit risk of the borrower since inception), the outcome is as follows:

	Remaining Cash Flows	*Present Value of the Debt*	*Face Value of the Debt (excluding interest that will still accrue in future)*
End of Year 101	50	50 / [(1+0.10)^{100}] = 0.00362	
Value of the debt claim at end of Year 1		**0.00362**	**50**

Scenario 2

At the end of Year 1, the borrower finds itself in financial distress and is unable to service its obligations at the end of Year 1. The bank restructures the loan to take additional collateral and allows the borrower to repay the debt over a five-year period in equal instalments of R20, with the first repayment at the end of Year 2, while only increasing the interest rate to 12% per annum based on affordability to the borrower. It can furthermore be assumed, for the purpose of this scenario, that given the history of default, if the bank had to advance the loan at the end of Year 1, as opposed to being in a position where it had to salvage a debt to collect what it can, the market-related interest rate in respect of such a new loan would have been 25% per annum.

In this case, the market value of the bank's debt claim will be as follows:

	Remaining Cash Flows	*Present Value of the Debt*	*Face Value of the Debt (excluding interest that will still accrue in future)*
End of Year 2	20 + (100 x 12%) = 32	32 / [(1+0.25)^{1}] = 25.6	
End of Year 3	20 + (80 x 12%) = 29.6	29.6 / [(1+0.25)^{2}] = 18.94	
End of Year 4	20 + (60 x 12%) = 27.2	27.2 / [(1+0.25)^{3}] = 13.93	
End of Year 5	20 + (40 x 12%) = 24.8	24.8 / [(1+0.25)^{4}] = 10.158	
End of Year 6	20 + (20 x 12%) = 22.4	22.4 / [(1+0.25)^{5}] = 7.34	
Value of the debt claim at end of Year 1		**75.968**	**100**

"The examples used in this article illustrate a possible abusive change in terms or conditions of a loan, but also a commercially sensible change in terms or conditions of a loan."

As indicated earlier, this decrease in the value of the debt claim is partly attributable to the change in the terms of the loan, but largely attributable to the deterioration of the credit risk of the borrower reflected in the increased discount rate of 25%.

Application of the revised tax rules to the scenarios

If one assumes that the borrower used the debt to fund deductible expenditure, the tax implications of the debt in the two scenarios described in the above example, under the revised rules, are as follows:

Scenario 1

The change in the terms or conditions of the debt will be a compromise or concession. The debt benefit arising from this event will be approximately R100 (being R100 - R0.00362). This debt benefit will be taxed as a recoupment of the expenditure funded with the debt that was previously deducted. This outcome would arguably be appropriate as the change in the terms and conditions is such that the loan is effectively extinguished from a commercial perspective as the taxpayer will not be paying the R100 within the next 100 years.

Scenario 2

Similarly to Scenario 1, the change in the terms or conditions of the debt will be a compromise or concession. The debt benefit arising from this event will be approximately R24 (being R100 – R75.97). As the debt funded deductible expenditure, the debt benefit of R24 will be taxed as a recoupment.

The rationale for this recoupment is much more difficult to explain from either a mechanical calculation or a policy perspective. Starting at the mechanical calculation, the concern arising in this instance is that the taxpayer will still, within the next five years, repay the full R100 in respect of which it was allowed a deduction. As no portion of the R100 will not be repaid, it is submitted that it is not correct from a conceptual perspective to require a recoupment of R24 (approximately a quarter of the expenditure funded with the debt). An analysis, based on the calculation of the market value of the debt claim, reveals that the R24 debt benefit arises primarily as a result of the deterioration of the borrower's credit risk to the lender, rather than as a result of the change in the collateral, repayment terms or interest rate.

From a policy perspective, the concern with this outcome is that the borrower (i.e., a taxpayer with a business that is likely to contribute to economic activity and, in most instances, employment in South Africa) now finds itself in a position where it is required to pay tax due to the fact that its business is struggling and was accommodated by a lender. Depending on the extent of the borrower's financial woes at the time that the terms of the debt were renegotiated, it may or may not have an assessed loss to absorb the effect of the recoupment.

The South African economy is in need of activities that contribute to economic growth. Businesses are, however, under pressure. It is submitted that a tax policy that requires viable (even though possibly struggling) businesses to utilise available funds to pay tax due to the fact that their own credit risk has deteriorated rather than being able to plough these funds back into reviving and growing the business is hard to understand.

Concluding thoughts

It is submitted that the two examples used in this article illustrate a possible abusive change in terms or conditions of a loan (Scenario 1), but also a commercially sensible change in terms or conditions of a loan (Scenario 2). If one were to only consider Scenario 1, it may appear as if the amendment to the debt restructuring tax rule discussed in this article is appropriate and arguably even necessary to ensure that the playing field is level for all taxpayers who extinguish debts. However, Scenario 2, which will arguably occur much more frequently than Scenario 1, shows that the amendment could have an absurd outcome, if argued from both a mechanical calculation and a policy perspective. In light of the analysis provided, it is questionable whether the outcome of Scenario 2 could be what the National Treasury could have intended with the amendment as this would arguably be counterproductive to other initiatives to achieve a revival of the economic conditions in the country.

The conclusion that can be drawn from the analysis in this article is that, while the revised regime appears to be a strong anti-avoidance measure, this anti-avoidance measure is arguably not targeted in a manner that limits its effect to avoidance schemes. Scenario 2 illustrates that the revised regime will have significantly adverse implications for transactions that are critical to the South African economy, which are negotiated with commercial objectives of reviving businesses in mind rather than achieving any tax benefits. Such legislation will have a damaging economic impact in the long run. In light of this, the author is of the opinion that the amendments would require urgent and significant revision to prevent this outcome.

FOREIGN INCOME EXEMPTION QUESTIONS ANSWERED

JACO VAN ZYL, jaco.vanzyl@maitlandgroup.com

The tax proposal which caught the public's eye last year was the removal of the foreign income tax exemption. Keeping this in mind, we look at five questions regarding the proposal that Jane Public may likely ask you in the coming year.

In terms of section 10(1)(o)(ii) of the Income Tax Act, South African residents are entitled to an exemption for remuneration received or accrued with respect to services rendered outside South Africa, provided the South African resident was outside South Africa for more than 183 days during any 12-month period and 60 of these 183 days were consecutive. National Treasury has proposed to limit this exemption to the first R1 million of eligible South Africans' foreign remuneration with effect from 1 March 2020.

Although the change has caused some consternation and confusion, the truth of the matter is that it is unlikely to affect most South Africans living outside South Africa. Only a handful of South African citizens rely on the tax exemption. The worst affected will be those temporarily working in low- or zero-tax jurisdictions (which commonly do not have treaties with South Africa) and earning more than R1 million per annum. For them, this change will be a bitter pill to swallow, but nothing is stopping them from emigrating, which is clearly going to be a possible consequence of limiting the exemption.

Here is how to answer five common questions your clients may ask you about the income exemption.

1. When can SARS tax my offshore income?

South Africa taxes its residents on a worldwide basis, while non-residents are subject to tax in South Africa on South African source income and only certain capital gains from a South African source. Importantly, remuneration from employment outside South Africa is not seen as being from a South African source for non-residents.

SARS can, therefore, only tax you on a worldwide basis (which includes your foreign earned salary) if you are a South African tax resident.

Thus, the starting point for your South African tax liability would be your tax residence status.

A natural person is regarded as tax resident in South Africa if he or she is:

- "Ordinarily resident" in South Africa; or
- Not ordinarily resident, but spends a certain amount of time (determined in terms of the physical presence test) in South Africa, provided that he or she is not a treaty resident in another country which is party to a double tax agreement (treaty) with South Africa. If he or she is a treaty resident, the treaty residence would override South African residence rules.

2. What constitutes a South African tax residence?

Ordinary residence means the place where a person eats, sleeps and works with some degree of continuity and permanence. Your ordinary residence is the country to which you would naturally and as a matter of course return. Note that ordinary residence is a question of fact and is not solely determined by the amount of days spent in a jurisdiction (as is the case with the physical presence test), but rather where a person's deepest roots are held.

If you are not ordinarily resident in South Africa, you could still qualify as being a South African tax resident in terms of the physical presence test, if you:

- Are physically present in South Africa for more than 91 days in aggregate during the relevant tax year;
- Were physically present in South Africa for an aggregate period exceeding 915 days during the preceding five tax years; and
- Were physically present in South Africa for more than 91 days in aggregate for each of those five years.

If you permanently work in a country other than South Africa, the physical presence test would most likely not be applicable. So, effectively, only the ordinarily resident test would be applicable to ascertain if you could still be regarded as a South African tax resident and thus subject to tax on your worldwide income to SARS.

If you are regarded as a tax resident in both South Africa and another country with which South Africa has a treaty (i.e., the country you work in), your tax residence status will depend on which country the tie-breaker clause in the treaty breaks. If it breaks in favour of South Africa, you would be regarded as a tax resident only in South Africa and if it breaks in favour of the other country (i.e., where you work), your South African tax residency will cease.

Usually, the tie-breaker clause provides that a dual resident is deemed a resident of the country where he or she has a permanent home available to him or her. If he or she has a permanent home available in both countries, the person will be deemed a resident of the country where his or her personal and economic interests are closer (i.e., the person's centre of vital interests). If the centre of vital interests cannot be determined,

"There will most likely be an increased desire to emigrate for tax reasons and that may well be an achievable result with little downside."

then the country where he or she has a habitual abode will be the deciding factor. If all the above are equal in both jurisdictions, the country of which he or she is considered to be a national will generally be his or her country of residence for the purpose of the treaty.

3. How does my tax situation work?

Even if you are still somehow considered to be ordinarily resident in South Africa, but you live in a country such as the UK which has a double tax treaty with South Africa, you will most likely be a treaty resident in the UK if that is where you live, work and reside with your family. In such a case, South Africa will have no taxing rights whatsoever on your non-South African source income or gains.

For those working in countries that do not have treaties with South Africa, there will be no tie-breaker to rely on and South Africa will, unfortunately, continue to have taxing rights, unless you actually cease to be a South African tax resident.

In short, the change to the exemption contained in section 10(1)(o)(ii) of the Income Tax Act will have "no effect" on you, if:

- You have ceased to be a tax resident in South Africa; or
- You are ordinarily resident in South Africa as well as resident in a treaty country where you work, but the treaty tie-breaker breaks in favour of the treaty country.

4. Should I emigrate?

Apart from a potential deemed capital gains tax exit charge (see below), emigration could suit many South African residents who already do not spend more than 183 days in South Africa. If, with careful planning of days (and remembering that part of a day is counted in full), you ensure that you are not in South Africa for more than 90 days in the tax year after you cease your South African tax residence, you can spend up to 183 days in South Africa for the following five tax years without being resident under the physical presence test. You will then just have to ensure that you do not "revive" your ordinary residence and/or remain a treaty resident outside South Africa.

There is a catch to emigration, however, in the form of a deemed capital gains tax exit charge which is triggered under section 9H of the Income Tax Act upon ceasing to be a South African tax resident. Or, if you hold assets as trading stock, which is quite uncommon, the section 9H charge can also be an income tax charge.

This means that you would be deemed to dispose of all your assets for their market value on the date immediately before the day on which you cease to be a South African tax resident and to have reacquired those assets immediately after the date of disposal at the same market value. This will result in a capital gains tax charge of up to a maximum effective tax rate of 18%. It is, however, important to note that the capital gains tax exit charge will not apply to cash, immovable property in South Africa, assets of a South African permanent establishment and certain equity instruments granted by reason of employment.

Please be aware that exchange control residence is a separate concept to tax residence and has its own formal procedures to comply with upon a financial emigration via the SARB. This topic is not covered in this article.

5. What are the consequences for a South African resident working abroad?

If you still qualify as ordinarily resident in South Africa, while employed abroad, the change to section 10(1)(o)(ii) will only affect you if you work in a jurisdiction with a lower tax rate than South Africa and earn more than R1 million per annum.

You will, however, be able to get a credit for the tax, if any, paid in that lower tax jurisdiction, but will have to pay tax in South Africa on the balance (i.e., up to the tax you would have had to pay if the services were rendered in South Africa). Also, be aware of exchange rate differences.

We appreciate that South African tax residents working in low tax jurisdictions could be left high and dry, as they will now be required to pay up to the South African income tax rates on the portion of their foreign salaries in excess of R1 million and will essentially not be able to receive any form of credit for their high living costs in the low tax jurisdiction. Therefore, there will most likely be an increased desire to emigrate for tax reasons and, as pointed out above, that may well be an achievable result with little downside.

If, however, you are a South African tax resident working abroad in a higher tax jurisdiction (e.g., the UK), the change to the section 10(1)(o)(ii) exemption will not really have a financial impact on you, apart from a potential administrative burden. The reason being that you will be able to claim a credit for the tax paid in the country where you are employed, which will often be more or equal to the tax that you would have paid in South Africa.

Finally, if you live and work in one of the 78 countries with which South Africa has a tax treaty and are deemed resident in that country, the change to the section 10(1)(o)(ii) exemption may not affect you at all.

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TRAVEL REIMBURSEMENTS:

A simplified method, not so simple…

SHOHANA MOHAN, smohan@bdo.co.za

We take a look at the effect of recent law changes to travel reimbursements intended to simplify the tax situation.

One of the recent tax law changes, which will affect employers and employees from 1 March 2018, is the introduction of a simplified method intended to calculate the taxable portion of the travel reimbursement by removing reference to the actual distance travelled (i.e., the 12 000 km parameter) when conducting the relevant calculations.

It is proposed that the excess between the rate at which the employee is reimbursed by the employer and the fixed rate stated in the Gazette be calculated on a monthly basis and that any excess be included as "remuneration" to calculate the amount of employees' tax to be withheld, notwithstanding the distance travelled. The 12 000 km parameter will be taken into consideration upon assessment.

To understand and analyse this change, this article will first look at the status quo and then at the effect of the proposed change.

The law prior to the 2017 proposed amendment

A travel allowance, according to section 8(1)(b)(i) of the Income Tax Act, is an allowance paid or an advance given to an employee in respect of travelling for business purposes.

Such an allowance or advance is deemed not to have been actually spent on travelling for business if the allowance or advance has been spent on private travelling. This includes travel between the employee's place of residence and his or her place of employment or travel done for private or domestic purposes.

An employee may be provided with a travel allowance to finance transport, i.e., a fixed amount per pay period and/or reimbursement based on actual business travel. Depending on the nature of the duties and the category of employment, only 20% or 80% of the fixed travel allowance is subject to employees' tax withholding on a monthly basis.

A reimbursed travel allowance or advance is based on the actual distance travelled for business purposes, excluding private travel. The amount spent on business is deemed to be the actual distance travelled, not exceeding 12 000 km per annum, multiplied by the prescribed rate per kilometre, fixed by the Minister of Finance (see section 8(1)(b)(iii) of the Act). The gazetted rate per kilometre is R3.55, with effect from 1 March 2017.

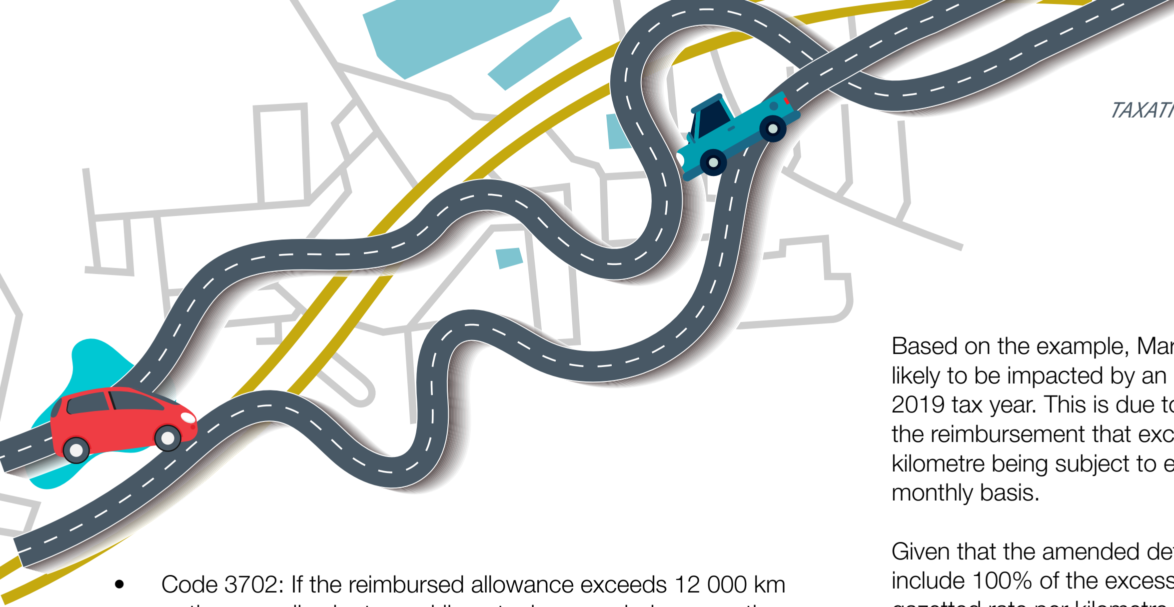
The employees' tax withholding of travel reimbursements prior to the proposals

Prior to the proposed amendment, an allowance or advance based on the actual distance travelled for business purposes is excluded from the definition of "remuneration" in the Fourth Schedule to the Act and is not subject to employees' tax withholding.

The employer could, therefore, reimburse the employee for business travel undertaken at varying rates per kilometre. If the rate per kilometre exceeded the gazetted rate, the liability for normal tax is discharged by the employee on assessment.

The full amount of the reimbursement must, however, be reflected on the employee's tax certificate (IRP5) under one of the following:

- Code 3703: If the reimbursed allowance does not exceed 12 000 km and the prescribed rate per kilometre is not exceeded and no other compensation (such as a travel allowance) is paid to the employee.



- Code 3702: If the reimbursed allowance exceeds 12 000 km or the prescribed rate per kilometre is exceeded or any other compensation (such as a travel allowance) is paid to the employee.

The implication is that, to the extent that an allowance is paid by an employer for business travel undertaken by an employee at a rate exceeding the simplified method rate, the excess will be regarded as remuneration in determining the employees' tax withholding. The result is that, if the rate of reimbursement per kilometre exceeds the rate per kilometre indicated in the Gazette (i.e., R3.55 per kilometre), the excess will be regarded as "remuneration" as defined and subject to employees' tax as well as SDL and UIF contributions.

The impact of the proposed amendment on employees and employers

Employees

By way of example: Joe Soap, a sales person, receives a fixed travel allowance of R10 000 per month. Only 20% of such an allowance is subject to employees' tax withholding on a monthly basis. Mary Jane is reimbursed for business travel at a rate of R4.25 per kilometre by her employer. Mary Jane does not receive a travel allowance and travelled 12 100 km and 13 750 km in the 2018 and 2019 tax years, respectively.

The impact on the net take-home pay for Joe Soap and Mary Jane is illustrated below.

	Joe Soap	Mary Jane				
	ANNUAL	ANNUAL				
	2019	2018	2019			
Fixed travel allowance	120 000.00	-	-			
Reimbursed travel	-	51 425.00	58 437.50	A	«	*[13 750 km x 4.25]*
(Per gazetted rate per kilometre)			-48 812.50	B	«	*[13 750 km x 3.55]*
Inclusion rate	0.20	0.00	100.00			
Amount subject to employees' tax	24 000.00					
Subject to employees' tax	10 800.00	0.00	9 625.00		«	*Result of [A-B]*
Net pay (reduced by)	**-10 800.00**	**0.00**	**-4 331.25**			

[Assumes a marginal tax rate of 45%.]

Based on the example, Mary Jane's take-home pay is likely to be impacted by an amount of R4 331.25 in the 2019 tax year. This is due to 100% of the amount of the reimbursement that exceeds the gazetted rate per kilometre being subject to employees' tax withholding on a monthly basis.

Given that the amended definition of "remuneration" will include 100% of the excess between the reimbursed and gazetted rate per kilometre, this will result in an increase in contributions toward retirement funds and an increase in the corresponding deductions. If the employee contributes at the maximum allowable limit of R350 000, any excess contributions will not be allowed as a deduction. Contributions that cannot be deducted in the current tax year will be carried forward to the following tax year.

Employees will need to comply with strict payroll calendars and timelines for the submission of their reimbursement claims prior to payroll specific cut-off dates. Line managers will also be required to approve these claims within agreed timelines.

Employers

Employers should revisit their Business Travel and Reimbursement Policies to determine whether employees who are required, in terms of their conditions of employment, to travel for business purposes would want to opt for an increase in their fixed travel allowances. This will defray the costs to be associated with the actual distance or business mileage to be undertaken, using a private motor vehicle.

If employers do not have a Business Travel and Reimbursement Policy, it is imperative that they introduce one to provide input for payroll configuration and mapping processes. This will also provide a standard operating process related to reimbursed travel expenses to align with the various disciplines, such as the finance, human resources and payroll departments.

Given the increase in administration to collate information and accurately process and record payroll information to determine the taxable portion of reimbursements per category of employee and the applicable rates (in certain instances), it is important that employers ensure that their payroll systems are configured to comply with the legislation (once promulgated). The configuration should also take into account the potential impact of the different rates per kilometre at which employees may be reimbursed due to certain reasons, such as promotions or changes in job profiles.

ALARMING ISSUES BROUGHT TO LIGHT IN THE 2017 TAX OMBUD REPORT

PATRICIA WILLIAMS, patricia.williams@bowmanslaw.com

We take a look at the concerning points that emerged from the Tax Ombud's recent report.

The Office of the Tax Ombud released its annual report for the 2016/17 year on 17 October 2017 and some alarming trends came to light.

There is an urgent need for an increased budget

The 2016/17 report notes that the Office of the Tax Ombud did not receive an increased budget or an increase in personnel compared to the 2015/16 year. This was despite a reported 62% increase in complaints received and a 224% increase in the number of "queries". In addition, the Ombud performed its first investigation into systemic and emerging issues (specifically the alleged delayed refunds issue), which gave rise to the 81-page report dated 28 August 2017.

In such circumstances, it is clear that the Ombud urgently requires a significant increase in budget to properly staff itself to address taxpayers' needs. One thus wonders if the inadequate budget could simply be an oversight or if this is indeed by design. While the Ombud has performed extremely well given the limited funding, the situation cannot continue unabated.

92% of taxpayers approaching the Ombud cannot receive help – where are things going wrong?

The 2016/17 report describes "queries" as:

> *"[E]nquiries in an effort to understand the [Ombud] mandate and formulate [taxpayers'] complaints accordingly. These queries included requests for complaint forms and complaints guides, as well as the email, postal and physical addresses of the Office."*

In the 2015/16 financial year, 3 771 queries and 2 133 formal complaints were received, which reflects a conversion ratio of 57%. In other words, of the original queries raised with the Ombud where taxpayers needed

"The Ombud urgently requires a significant increase in budget to properly staff itself to address taxpayers' needs."

information to lodge their complaints with the Ombud, 57% of the issues were subsequently submitted as complaints.

In 2016/17, the number of queries received increased to 12 204 and only 3 454 complaints were lodged in comparison. This shows a drastic drop in the conversion ratio to 28%. If this reflects taxpayers who wanted help with a SARS issue and who were then discouraged from lodging their complaints, it means that up to 72% of the taxpayers who approached the Ombud believed, after this contact, that their issues could not be resolved by the Ombud and did not even bother to submit a complaint.

This ratio decreases even more when one factors in the complaints rejected. Rejected complaints increased from 938 (44% rejections) in 2015/16 to 1 722 (58% rejections) in 2016/17. In other words, both as an absolute number of complaints rejected and a relative percentage of the total complaints rejected, more complaints were rejected in 2016/17. The 1 270 accepted complaints in 2016/17 furthermore represent only about 8% of the total original "contacts" received by the Ombud. In other words, about 92% of the taxpayers who contacted the Ombud, thinking it might be able to help them, were unable to get help.

This ratio gives a clear indication that the scope and mandate of the Ombud's authority is inadequate to address the real issues identified by taxpayers.

Public call for change

Basic values and principles governing public administration are set out in section 195 of the Constitution. This includes that "[p]eople's needs must be responded to, and the public must be encouraged to participate in policy-making."

This article is an open call for change with regard to the Ombud. The public should be consulted and the issues gleaned from the contacts with the Ombud's office should be reviewed, making it possible to identify how the scope and mandate of the Ombud should be extended to address the real concerns of taxpayers.

PAYE ATTENTION TO YOUR RIGHTS DURING AN AUDIT

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Undergoing an audit can be a harrowing experience for any taxpayer. However, knowing as much as possible about the laws governing the process should help to alleviate some of the fear.

There is no need to hyperventilate when you receive a call from a SARS official, informing you of a looming PAYE audit. Adequate notice of the nature and purpose of the proposed audit must be provided to you. And, it is imperative that you understand and exercise your rights during this audit and not be bulldozed by the powers of SARS.

From the beginning of this process, it is therefore vital that you ensure that all correspondence regarding an audit is in writing. Also, note that you have the right to request the SARS official's written authorisation to conduct an audit and request proof of identity.

Included are a few questions that may occur to you or your client, should a client become subject to an audit.

Why my company?

Section 40 of the Tax Administration Act empowers SARS to select a taxpayer for an audit. An audit can be initiated randomly or based on a risk assessment. SARS also chooses specific issues or themes that it believes are particular high-risk issues, e.g., the correct tax treatment of employee share schemes. You have the right to request the reasons why your company has been selected for an audit.

What is the scope of the audit?

SARS must clearly identify the scope of the audit, including the following:

- Does SARS want to verify that all the earnings and allowances are taxed correctly according to the requirements of the relevant sections and schedules of the Income Tax Act?
- Does SARS want to verify that the value of the fringe benefits is calculated correctly in terms of the Seventh Schedule to the Income Tax Act?
- Does SARS want to verify that all the earnings are correctly reported on the IRP5 under the correct code as set out in the Business Requirements Specifications?

You will benefit from understanding what information SARS needs, what area of the taxpayer's taxes are under review and whether the information is relevant to the scope of the audit.

What information must I provide?

Section 46 gives SARS the power to request relevant material needed for the purpose of an audit. The words "may request" indicate that SARS has discretion to request this information and this discretion allows the taxpayer the right to request reasons why the specific material is relevant to the audit. It is important to note that, in accordance with section 3(2) of the Tax Administration Act, this information must be requested for the purpose of the administration of a tax Act. SARS must provide detailed reasons that are adequate. The information requested must also be clearly specified and SARS must provide a reasonable period in which to provide the material.

The factors that must be taken into account when a reasonable period is determined include:

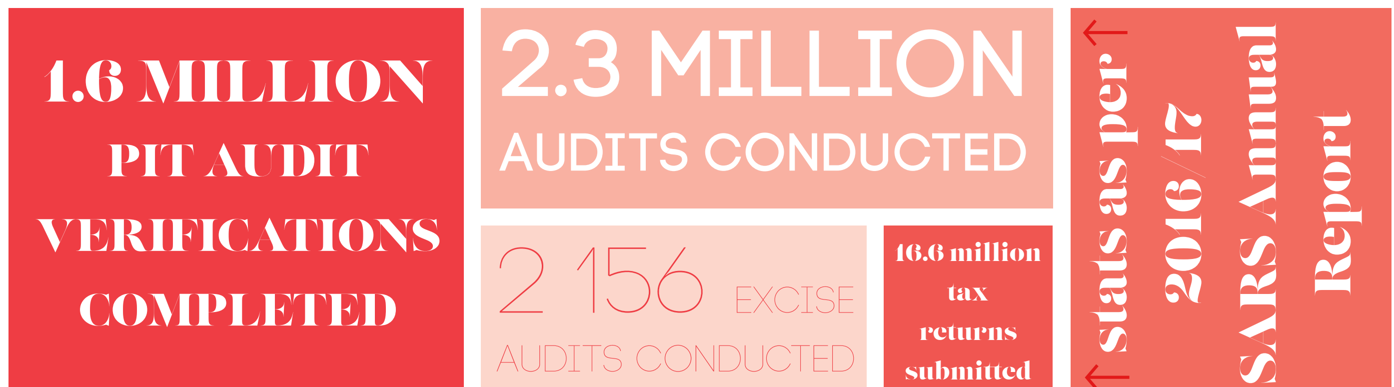
- The type of information needed;
- Whether the information is readily available;
- Where the information is stored;
- The volume of information needed; and
- The period covered by the audit.

A taxpayer has the right to request an extension of the time in which the information must be submitted and SARS must provide reasons why the extension is not approved, if that is the case.

Here are more rights related to the information that must be provided:

- The definition of "relevant material" is exceptionally wide as it also includes material that is deemed "foreseeably relevant" by SARS. Yet, a taxpayer has the right to request reasons why SARS believes the information is relevant to the scope of the audit or why it will be foreseeably relevant in the future.
- SARS cannot request material that is already in its possession. Yet, it is common for SARS to request information that is easier to obtain from the taxpayer than searching for it on its systems.
- SARS cannot go on a fishing expedition and issue a payroll questionnaire that consists of more than 70 questions which are not all relevant to a specific employer.
- SARS must request very specific material that relates to the scope of the audit.

"A taxpayer can object to an assessment within 21 days after the assessment has been raised."



SARS receives IRP5s from employers that specify all the remuneration earned, including allowances, fringe benefits and deductions made under a specific identifiable code. Therefore, the following types of questions can be referred back to the submitted IRP5s:

- Do you pay travel allowances and reimburse travel claims? Please provide a list of all employees that receive an allowance or have received payments as a result of a claim.
- Does the company provide fringe benefits to its employees or the relatives of its employees?
- Does the company offer a medical aid, pension or provident fund? Provide a list of all the contributions made by each member of the fund.

This information is readily available to SARS as the IRP5 certificates submitted to SARS have specific codes that will identify travel allowances, travel reimbursements, medical aid contributions and any other fringe benefit or allowance.

SARS can only request material that is reasonably maintained and kept by the taxpayer in the original format required. Due to the complexities of employee share schemes, SARS often requests a taxpayer to draw a flow diagram to explain the transactions and rules of the share scheme. A taxpayer has no obligation to maintain or keep such a document and, therefore, you should not create such a document for the purpose of this audit. Rather refer SARS back to the rules of the scheme.

Can SARS interview my employees?

SARS may request an employee to attend an interview to acquire more information. But, it is imperative that an employee does not answer a question unless he or she truly understands the question and has complete knowledge regarding the policy or process in question. In all other cases, the employee should let the interviewer know that he or she does not know the details of the policy as the answers provided can be used as evidence to support SARS' interpretation of the legislation in the letter of findings and the assessment.

SARS should interview the specialists in the company who understand the policies or remuneration structures, such as the head of human resources or the remuneration specialist.

How will I know what the status of the audit is?

Section 42 of the Tax Administration Act compels SARS to provide regular updates to the taxpayer while they are under audit. In terms of this section, the Commissioner has issued a public notice which requires SARS to submit a status report after 90 days from the commencement of the audit and every 90 days thereafter.

The report must contain:

- A description of the current scope of the audit;
- The stage of completion of the audit; and
- The relevant material that is still outstanding.

How will I be informed of the audit findings?

Within 21 days after the audit has been concluded, the taxpayer must receive a letter of findings. The taxpayer then has the opportunity to respond in writing and raise anomalies regarding the facts and conclusions within 21 business days. The taxpayer can also request an extension of the period in which they are expected to respond based on the complexity of the matter.

A taxpayer can waive its right to receive the letter of findings, but this is not advised.

Will an assessment be raised after SARS receives my response?

SARS can issue an additional assessment, if SARS is satisfied that the taxpayer has not paid the correct amount of employees' tax, SDL and UIF levies or has declared the incorrect amounts on the IRP5s.

SARS must provide reasons why the assessment has been raised. Where no reasons or insufficient reasons have been provided by SARS, you can exercise your right to request adequate reasons. Where SARS does not comply, the case may be referred to the Office of the Tax Ombud to ensure that SARS adheres to the administrative procedures set out in the Tax Administration Act.

Where there is no audit finding, SARS should inform the taxpayer. This will provide certainty that the audit has been completed. Should future audits occur, this letter can be used to argue that a legitimate expectation exists because SARS has previously audited the area of concern and indicated that it is correctly reported and treated correctly for tax purposes. This will make it impossible to challenge the tax treatment retrospectively in subsequent years, unless facts have been omitted or the legislation has been amended.

Should I pay the amount due despite disagreeing with the assessment?

As mentioned above, a taxpayer can object to an assessment within 21 days after the assessment has been raised. The taxpayer can request an extension of the period for lodging the objection, if the taxpayer provides reasonable grounds. The taxpayer may object against the SARS decision not to extend the objection period and SARS will have to provide reasons why it disallowed the extension request.

SARS must consider a valid objection in the manner and within the period prescribed. SARS can disallow the objection, or a part thereof, with reasons. The taxpayer can request reasons for the disallowance of the objection and can appeal against the objection to a tax board or tax court.

Once on appeal, the taxpayer and SARS can try and resolve the dispute in an alternative dispute resolution hearing, although this does not seem to be a successful channel since the presiding officer is not always independent. Proceedings of the appeal are suspended while the alternative dispute resolution process is running. Should the dispute not be resolved, it will be heard by the tax board or Tax Court and the judgments made by these courts can be appealed to the Tax Court or a higher court, respectively.

The "pay now, argue later" rule still applies

Despite the objection or appeal process being underway, the taxpayer is still liable to pay the tax debt, unless a senior SARS official directs otherwise. In the case of *Metcash Trading v CSARS and another (2001 (1) SA 1109 (CC))*, the Constitutional Court stated that the "pay now, argue later" rule comprises the following:

- The obligation to pay in light of an assessment is not suspended by an appeal.
- The Commissioner may enforce payment of the unpaid tax.

The judge has indicated in the *obiter dicta* that it is important to note that the Commissioner:

- Cannot instantly dismiss the taxpayer's request to suspend the payment of tax until the appeal has been heard;
- Must suitably exercise its discretion in terms of the relevant legislation; and
- Must take into account the facts of the specific case.

In a subsequent media release, SARS stated that it will consider the following when they receive a request to suspend the obligation to pay tax and the right of SARS to receive or recover tax (which should be read with section 164(3) of the Tax Administration Act):

- Whether the payment of the amount will result in serious hardship which will not be reversed if the taxpayer will succeed in the appeal;
- Whether the circumstances of the case give rise to reasonable doubt; and
- Certainty whether the amount will be paid when the appeal fails.

Despite the provisions of the Tax Administration Act, a taxpayer has the right to expect fair, reasonable and lawful conduct from SARS in terms of section 33 of the Constitution and the provisions of the Promotion of Administrative Justice Act.

The more informed a taxpayer is about his or her rights and obligations during an audit, the less daunting the audit and post-audit period should be for the taxpayer.

"The more informed a taxpayer is about his or her rights during an audit, the less daunting the audit and post-audit period should be."

WHAT IS REQUIRED IS PROOF, NOT SIMPLY ARGUMENT

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An analysis of a recent court case which illustrates the finer points around disputing tax liability.

Often, a proper consideration of that which must be proved for the taxpayer to succeed against SARS in a tax dispute is entirely disregarded by tax practitioners. This is, perhaps, a surprising observation to make, since most tax practitioners conduct the dispute on behalf of their clients and know full well that their clients are burdened with the onus of proving that an assessment by SARS is incorrect.

In this article, our aim is to remind tax practitioners of a few essential points in regard to disputing a tax liability, which are quite often overlooked. We refer to the judgment of the Tax Court in *ITC No. 13695* in the course of our discussion of these points. This case can be accessed from the Tax Court Judgments section of the SARS website (http://www.sars.gov.za/Legal/DR-Judgments/Tax-Court/Pages/2019-2017.aspx).

"What the taxpayer and the accountant seem to have overlooked is that proof of a fact involves a process of evaluation."

What constitutes evidence and why it is important

Even before a tax dispute has arisen, tax practitioners would do well by their clients if they always keep in view that, in their dealings with SARS, a successful outcome will very often depend on them being able to produce evidence in support of their client's case. For example, if SARS' findings after the finalisation of a field audit were met not by argument alone, but by the production of compelling evidence as well, then the bounds of any future dispute between the taxpayer and SARS would be much narrower than it otherwise might be. The benefits of this to the taxpayer are obvious. If a tax dispute does arise, the dispute can hopefully be resolved without the need for approaching the Tax Court or tax board to adjudicate upon it.

But the prospect of that happening depends on consideration being given much earlier in the tax dispute process than most tax practitioners would have their clients believe to the question of exactly what must be proved by the taxpayer to succeed. The objection and appeal stages are important stages in this process. In our view, they are much more important than many tax practitioners would credit them.

While argument is often foreshadowed in the grounds of objection and of appeal, in our opinion, insufficient regard is had to the invaluable guidance it can already provide at the objection and appeal stages with regard

"The Tax Court will make findings based on the credibility of a witness, his or her reliability and the general probabilities."

to the quantum and quality of the evidence that will be required to persuade the Tax Court that the taxpayer should, on a balance of probabilities, be entitled to succeed. Being aware of the quantum and quality of the evidence that would be required to persuade the Tax Court is a significant advantage, as evidence can be subject to great variety. Besides the advantage to the taxpayer of giving proper attention to the evidence early in the process, it will also be advantageous for the fiscus. It will result in SARS not becoming embroiled in disputes that run for longer than they should, which is a waste of SARS' human, financial and other resources.

In a Tax Court hearing, the taxpayer must present all the evidence on which his or her case depends. Such evidence consists of oral statements made by witnesses under oath or affirmation, but it also consists of documents. Evidence is therefore the means of furnishing proof.

The general practice in civil cases that evidence must be given orally by witnesses in the presence of the parties applies likewise in tax cases. The rationale is that SARS and the taxpayer must have an opportunity to confront a witness who testifies against them, and should be able to challenge the evidence by questioning the witness so that the parties and the Tax Court can observe the candour and demeanour of the witness for the purpose of assessing his or her credibility.

Evidence of a fact which is in dispute is not yet proof of that fact. The Tax Court still has to decide whether the fact has been proved upon a balance of probability. If what is presented can in law properly be put before the Tax Court, it is admissible. It is only once it has been admitted that its persuasiveness has to be considered. Only after the evidence has been presented, including any presented by SARS, and the arguments have been delivered will the Court be in a position to evaluate the evidence in chief of the taxpayer and to decide what weight to give it.

Thus, the mere fact that the taxpayer has placed evidence before the Court and that this evidence has not been contradicted by any evidence led by SARS or through cross-examination of the taxpayer's witnesses does not necessarily mean that the evidence concerned should be accepted as proving the taxpayer's case. This is well illustrated by *ITC No. 13695*, where the Tax Court found that the evidence of the taxpayer's accountant, regarding the origin of certain bank deposits, to be so improbable that it could not be relied upon to prove that the deposits should be treated as anything other than gross income.

The approach to proving facts

The onus of proof is the duty which is imposed on the taxpayer by section 102(1) of the Tax Administration Act, in order to be successful, of presenting evidence that is sufficient to persuade the Tax Court that he or she is, on a balance of probabilities, entitled to succeed. In our view, had the taxpayer in *ITC No. 13695* been mindful of the risk of non-persuasion, which is what the onus of proof is sometimes called, she might have reconsidered her decision to call only her accountant to testify on her behalf. She had disputed that she was liable to pay tax on certain bank deposits. Merely by having her accountant give evidence on facts that she needed to prove did not mean that she succeeded in proving

them. What was required of the taxpayer to discharge the onus was affirmative evidence of the facts upon which she relied to prove her case.

It is implicit in the judgment of the Tax Court that the taxpayer's sole reliance on the evidence of the accountant to discharge the onus on her was not plausible, since she would have had personal knowledge of the facts concerning amounts deposited in her own bank account. The taxpayer possessed financial and business acumen, as she was the founder and chief executive officer of a multi-million rand property group and was therefore clearly in a position to testify about the flow of funds into and out of her bank account.

What the taxpayer and the accountant seem to have overlooked is that proof of a fact involves a process of evaluation. The Tax Court had to accept that such facts, as the accountant had testified to the existence of, had indeed been proved. In this case, the Tax Court found that those facts had not been proved by her in that, on a preponderance, it was not probable that the particular situation that the accountant had testified about had existed at all. This finding was not surprising since the Tax Court viewed the accountant's evidence as, *inter alia*, "improbable" (in paragraph 14 and 82), "vague and confusing" (in paragraph 20) and a "reconstruction of the facts" (in paragraphs 37 and 49).

This should not have been unforeseen as the accountant did not have personal knowledge of all the facts. No wonder then that he had to reconstruct some of them. The Tax Court had no compunction making an adverse credibility finding against him. The finding was largely informed by the impression the Tax Court gained from the accountant's candour in the witness box, his latent bias towards the taxpayer, the contradictory explanations he proffered and the improbability of particular aspects of his version. The Tax Court's finding as to the accountant's unreliability also largely depended on the same factors.

It must be remembered that, when evaluating oral evidence, the Tax Court will make findings based on the credibility of a witness, his or her reliability and the general probabilities. Evidence must be evaluated in its totality, which means oral evidence must be evaluated with documentary evidence and other probative material as a whole. When weighed with the bank statements that had been produced and received in the Tax Court and with the inferences to be drawn from the representations of fact contained in them and the general probabilities, the probative value of the evidence of the taxpayer's accountant was so greatly devalued that it really counted for nothing.

"Before judgment is given by the Tax Court, the taxpayer has a right to be heard in argument."

The mere fact that the taxpayer had placed evidence before the Tax Court did not necessarily mean that the evidence should be accepted as such. As it happened, it was not accepted. The Tax Court therefore found as a fact that the taxpayer had received various deposits over and above the salaries received by her and was liable to be taxed on them.

Formulation of the argument

The argument that would be delivered on the taxpayer's behalf in the Tax Court, regardless of whether the tax dispute will ever end up being heard by the Tax Court, should always be kept in view, even at the objection and appeal stages. This is because the formulation of the argument at the early stages of the tax-dispute process can greatly assist, as it points out both what must be proved and what degree of persuasion is needed. To be able to argue successfully in the end depends on there being affirmative evidence to establish the probability of the facts upon which the taxpayer's case depends. Therefore, the quantum and quality of the evidence available to verify the taxpayer's averments must already be considered at the objection stage. How often does that happen?

Before judgment is given by the Tax Court, the taxpayer has a right to be heard in argument (as does SARS). The delivery of argument is the opportunity for the parties to address the Tax Court on the persuasiveness or otherwise of the evidence received during the hearing. This argument does not amount to evidence and is not presented through evidence. It is a particular form of reasoning. This distinction between argument and evidence is commonly lost on taxpayers and tax practitioners alike.

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HOW TO BATTLE THE FRANKENSTEIN JUGGERNAUT

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Understanding the mysterious and powerful creature that is the "SARS official" is key in any tax dispute situation. The author delves into the depths of literary and tax law references to unveil this term.

I am reliably informed that, on the night of 1 October 2012 and as the final and twelfth gong of the clock tower bell rang ominously over the sleeping taxpayers in the hamlet below, the drafters could be heard deliriously screaming from the top of the steeple at Castle Megawatt Park, "Look! It's moving. It's alive... IT'S ALIVE!" Or words to that effect. And, so it came to pass on that fateful night; a decree ordered the birth of the Tax Administration Act and, with it, the state juggernaut known as "the SARS official". Victor Frankenstein would have been very proud.

The "senior SARS official" may be dull and unimaginative in title, yet sinistrously, if not divinely, omnipresent and omnipotent throughout all of the Tax Administration Act. This official is SARS' secret weapon: A sapient creature of statute cloaked in immense power, tasked with the effective and efficient collection of tax, lord and custodian of all tax Acts and undoubtedly the most powerful person in all of tax litigation in South Africa.

You see, all decisions in the tax Acts, in particular the Tax Administration Act, start and end with the senior SARS official. The official can decide, *inter alia*, to:

- Inspect, investigate, verify or audit a taxpayer's affairs;
- Obtain an order for a tax enquiry or a warrant to raid a taxpayer's premises or appoint a *curator bonis* to preserve the taxpayer's assets;
- Accept or decline a request for instalment payment agreements;
- Appoint a third party to satisfy the tax debts of a taxpayer; and
- Consider a proposal to write off or compromise a taxpayer's tax debt.

So, who exactly is this colossal creature of statute?

Section 1 of the Tax Administration Act defines a SARS official (sans senior) as follows:

> *"(a) the Commissioner, (b) an employee of SARS; or (c) a person contracted or engaged by SARS... for purposes of the administration of a tax Act and who carries out the provisions of a tax Act under the control, direction or supervision of the Commissioner".*

Section 1 of the Tax Administration Act further defines a "senior SARS official" to mean the official in section 6(3) which, in turn, means:

> *"Powers and duties required by this Act to be exercised by a senior SARS official must be exercised by (a) the Commissioner; (b) a SARS official who has specific written authority from the Commissioner to do so; or (c) a SARS official occupying a post designated by the Commissioner in writing for this purpose."*

Thus, and mostly due to a lack of in-house expertise, a SARS official is not only a SARS employee, but can also include any third-party person or entity contracted by SARS, such as forensic investigators, attorneys, advocates, auditors and accountants.

Then the question becomes: What is the big deal? Well, for starters, all decisions in the Tax Administration Act are initiated at the behest of a senior SARS official. If a taxpayer decides to dispute such a decision, the fight is essentially, and almost always, against a decision or finding made by the senior SARS official.

Therein lies the rub: The wily drafters of the Tax Administration Act shielded their precious sapient creature with that pesky provision found in section 102 of the Act: The taxpayer's onus. (See similar provisions in the now repealed section 82 of the Income Tax Act and section 37 of the VAT Act.)

Accordingly, the taxpayer must battle on two fronts: On the one hand, the taxpayer must discharge a heavy evidentiary burden

based on an objective measure of his or her conduct and, on the other, the taxpayer must dispute the subjective mindset of the senior SARS official. It is like Donald Trump built a great, big, beautiful wall around the senior SARS officials and got the taxpayer to pay for it.

How then do you challenge a colossal state juggernaut with seemingly unlimited resources and power? The answer lies essentially in reasonableness: You must first conquer the wall by demonstrating the reasonableness in the taxpayer's conduct, then you must attack the unreasonableness of the SARS official's decision or finding. The more unreasonable the SARS official's decision or finding is (in particular insofar as it relates to its subjective suspicion on the facts), the lower the wall would be to climb. And, the more reasonable the taxpayer's conduct is (in particular insofar as it relates to disclosure, transparency and cooperation), the longer the ladder would be. Naturally, an evasive and belligerent taxpayer will have the opposite effect.

Let us unpack the onus further.

Firstly, the taxpayer's conduct is measured objectively. In *Commissioner for the South African Revenue Services v Pretoria East Motors (Pty) Ltd ([2014] 3 All SA 266 (SCA))*, the Court stated at [8]:

"It is so that the taxpayer's ipse dixit *will not lightly be regarded as decisive. But it must be considered together with all of the other evidence in the case. And, given the unfavourable position of having the onus resting upon it – a 'formidable and difficult' one to discharge.… the interests of justice require that the taxpayer's evidence and questions of its credibility be considered with great care. Indeed, the taxpayer's evidence under oath and that of its witnesses must necessarily be given full consideration by the court, and the credibility of the witnesses must be assessed as in any other case that comes before the Court.… It thus remains the function of the court to make a determination of the issues that arise for decision on an objective review of all of the relevant facts and circumstances. Not the least important of the facts, according to* Miller J (ITC 1185 (1972) 35 SATC 122 (N) at 124)*, 'will be the course of conduct of the taxpayer in relation to the transactions in issue, the nature of his business or occupation and the frequency or otherwise of his past involvement or participation in similar transactions. The facts in regard to those matters will form an important part of the material from which the court will draw its own inferences against the background of the general human and business probabilities'."*

The taxpayer's onus was explained in *Commissioner for Inland Revenue v Goodrick (12 SATC 279 at 296)* as follows:

- *"What is required from the taxpayer to discharge this onus is affirmative evidence which satisfies the Court on a preponderance of probability that the amount received was not income".*

The weighing of probabilities was described in *Bitcon v Rosenberg ((1936) AD 380 at 396)* as:

> *"The trial judge is not concerned with what is or is not probable when dealing with abstract business men or normal men, but he is concerned with what is probable and what is not probable as regards the particular individuals situated in the particular circumstances in which they were."*

Secondly, and insofar as the senior SARS officials' conduct is concerned, it is a subjective test. The Supreme Court of Appeal has repeatedly endorsed and adopted Lord Devlin's statement that:

> *"suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of* prima facie *proof is the end."* (See *Duncan v Minister of Law and Order 1986 (2) SA 805 (A) 819I.*)

In *Powell NO v Van der Merwe (NO 2005 (5) SA 62 (SCA) at 36)*, Cameron J adopted Lord Devlin's distinction between suspicion and *prima facie* proof:

> "Prima facie *proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all… Suspicion can take into account also matters which, although admissible, could not form part of a* prima facie *case."*

The individual pieces of evidence must not be judged in isolation. "It is the total picture that is relevant" which is "an impression formed on the basis of diverse factors, including facts and pieces of information falling short of fact such as allegations and rumours." (*Powell NO* at 35).

Therefore, context is everything: The senior SARS official's grounds of belief is, more often than not, nothing more than a suspicion. Suspicion itself is not evidence. The test is whether the suspicion is reasonable as the suspicion forms the basis of the senior SARS official's decisions. That, in turn, would depend on the facts and information in the official's possession at the

"The senior SARS official's grounds of belief is, more often than not, nothing more than a suspicion."

time, either as obtained independently through SARS' own sources or as provided to SARS by the taxpayer (or both). So, it is critical that the taxpayer uses all the remedies available in the Tax Administration Act to ascertain where and how the senior SARS official obtained its information to attack the reasonableness of its decisions. Those remedies are lost further down the dispute resolution process.

Finally, the senior SARS official, no matter how powerful, remains a creature of statute. Any decision or findings by a senior SARS official is a discretion which must be exercised judicially and must, by operation of law, flow naturally from a correct appreciation of the facts. In reaching its decision, the senior SARS official must adhere to the rule of law, including the prescribed processes in the Tax Administration Act as all its decisions are administrative actions subject to constitutional scrutiny and the provisions of, *inter alia*, the Promotion of Administrative Justice Act. The senior SARS official must interpret and use its powers in the tax acts within the spirit and purport of the Constitution.

Fortunately, the taxpayer is not unarmed and defenceless in its battle against the senior SARS official. Quite the contrary. The Tax Administration Act recognises South Africa's new constitutional dispensation, including the taxpayer's rights.

> *"One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck."* (See *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (3) SA 580 (CC)* at para 1.)

In summary, inside every state juggernaut there lies a creature of statute looking for affection and attention. The taxpayer must shower the senior SARS officials with lots of love in the form of information and credible explanations and answers to SARS' suspicions regarding the taxpayers' affairs, whether arising from a SARS investigation and audit or any request for consideration. There is simply no side-stepping the taxpayers' disclosure requirements.

For the rest, trust in your legal team's understanding of the information gathering process (Chapter 5 of the Tax Administration Act), the assessment process (Chapter 8 of the Tax Administration Act) and the dispute resolution process (Chapter 9 of the Tax Administration Act) and the remedies in between to ensure our juggernaut stays loyal and true to its fiscal mandate, otherwise face the "sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck," in the words of Chief Justice Mogoeng Mogoeng.

DOTH THOU PROTEST IN THE RIGHT WAY?

▶ **JERRY BOTHA,** jerry@taxconsulting.co.za **& NATASHA WILKINSON,** natasha@taxconsulting.co.za

We take a look at the dispute resolution mechanisms available to taxpayers aside from lodging objections.

Disgruntled taxpayers are usually well aware of the option to lodge an objection to an unfavourable assessment which incorrectly reflects their tax position. While such an objection may be the only or best remedy in a given scenario, in others, pursuing or continuing with the matter solely in an objection format may be incorrect and may not yield the best results.

The key is to ascertain wherein exactly the dispute with SARS lies before deciding on the appropriate remedy, and whether the matter should indeed be pursued by solely lodging an objection. In this article, we set out several options available to disgruntled taxpayers to ensure that an optimal result is achieved.

Approaching the SARS Complaints Management Office

The SARS Complaints Management Office (CMO) is an internal complaints department set up by SARS to consider administrative and procedural issues experienced by taxpayers. When a taxpayer has lodged an objection, the CMO may also be approached to consider, for example, the manner in which the objection is being dealt with by SARS.

Advantages

The CMO may assist taxpayers without an objection being first withdrawn. It is solely tasked with investigating administrative complaints. A taxpayer may therefore approach the CMO for assistance should the procedures pertaining to the objection not be adhered to correctly. This route may thus be a more cost-effective mechanism when compared to approaching the Tax Court for relief.

Following this course of action ensures that a different SARS official considers the matter. The SARS official concerned is afforded a set period of time within which to consider the complaint and revert to the taxpayer with an outcome.

Disadvantages

Before a taxpayer can approach the CMO, the taxpayer must first contact SARS' call centre or a SARS branch for details of the issue to be conveyed to SARS and for the issue to be resolved. If the issue is not resolved, the taxpayer would then use the reference number obtained from the call centre or SARS branch to approach the CMO for further assistance.
The CMO is, however, unable to consider the merits of an objection, such as those related to a disagreement on the facts, the law or both. Therefore, the CMO is unable to make a decision regarding the merits of the objection.

Lodging a complaint with the Tax Ombud

The Tax Ombud's mandate states that the office may review any complaint pertaining to a "service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS".

Advantages

As with the CMO, when a taxpayer believes that an objection or appeal is being dealt with in an unsatisfactory manner by SARS, such a taxpayer may approach the Tax Ombud. This will ensure that an independent third party considers and provides a recommendation on the matter.

Disadvantages

Before a taxpayer can approach the Tax Ombud for assistance, the taxpayer must first exhaust all internal remedies set up by SARS, such as first approaching the CMO. However, a taxpayer may approach and Tax Ombud directly if there are compelling circumstances for the taxpayer doing so. What constitutes "compelling circumstances" is set out in section 18(5) of the Tax Administration Act and includes, for example, if the taxpayer were to first follow SARS' internal remedies, and this would unlikely produce a result within a period of time that the Tax Ombud considers reasonable.

The Tax Ombud does not, however, have the authority to make a decision on an objection and appeal unless there is a related administrative issue. For example, if SARS did not deal with an objection within the prescribed time periods.

Furthermore, the Tax Ombud may only make a recommendation to SARS as to how the dispute should be resolved. As such, the Tax Ombud's decision is not binding on either SARS or the taxpayer.

Section 9 requests

If a decision is not subject to an objection and appeal, an effective remedy available to taxpayers is to request that SARS either withdraw or amend its prior decision in terms of section 9 of the Tax Administration Act.

Advantages

Where a taxpayer is not afforded the opportunity to object under a tax Act, the remedy afforded by section 9 of the Tax Administration Act may be available. Should a taxpayer then be granted relief under section 9, a dispute can be avoided in its entirety as SARS' decision may be withdrawn or amended in line with the taxpayer's section 9 request.

Disadvantages

Section 9 applies to a very limited number of instances; decisions given effect to in an assessment and a notice of assessment expressly fall outside the ambit of this provision.

Where the SARS official was aware of all material facts at the time the decision was made, the taxpayer is only afforded three years from the date of the decision within which to lodge a section 9 request.

Applications for judicial review of SARS' (administrative) decision under section 6 of the Promotion to Administrative Justice Act

A taxpayer may, in specific instances, file an application with the High Court asking the Court to review an administrative decision made by SARS. If the taxpayer is seeking clarity on a question of the law, the taxpayer may approach the High Court immediately without first pursuing an objection. Where relief is not granted or only partially granted by the High Court, the taxpayer may then lodge an objection.

Advantages

After hearing the Promotion to Administrative Justice Act application, the High Court may rule that the administrative decision made by SARS is set aside in its entirety or may refer it back to the particular SARS official for reconsideration.

Disadvantages

In the context of a dispute with SARS, section 7(2)(a) of the Promotion to Administrative Justice Act requires that a taxpayer, who wishes to approach the High Court to review SARS' decision, be required to first exhaust the internal remedies available to the taxpayer.

Notably, in the recent judgment of *United Manganese of Kalahari (Proprietary) Limited v Commissioner for SARS (74158/2016) [2017] ZAGPPHC 628*, the Court did not rule on whether a taxpayer is first required to exhaust internal remedies in the context of a review. The Court did, however, indicate that, in certain instances, it may be approached directly to grant declaratory relief in a dispute involving questions of law or if the order sought from the Court is interlocutory in nature.

The Promotion to Administrative Justice Act, however, sets out strict time periods within which a court may be approached to review an administrative decision by SARS. For example, the application for judicial review must be made within 180 days from the date on which all internal remedies were exhausted by the taxpayer. As such, the taxpayer needs to ensure that he or she acts quickly while also not prematurely.

Importantly, a Promotion to Administrative Justice Act application will not automatically extend the time periods within which a taxpayer may lodge an objection, absent a court order to this effect.

As a Promotion to Administrative Justice Act application requires the taxpayer to approach the High Court, the costs involved may be relatively high.

Requests for correction

Where an assessment contains an undisputed error, the taxpayer may lodge a request for correction as an alternative to lodging an objection.

Advantages
Provided that the error is undisputed, the taxpayer will not be required to lodge an objection and experience the associated administrative and cost burden associated therewith.

Disadvantages
SARS has confirmed that, if it has raised an additional assessment which includes the error therein, the taxpayer will be required to lodge an objection. As such, a request for correction is unavailable where an additional assessment is present.

Reduced assessment request under section 93(1)(d) of the Tax Administration Act

Section 93(1)(d) of the Tax Administration Act enables SARS to alter an assessment to correct processing errors by SARS or return-completion errors by taxpayers. The section 93 request is therefore another alternative to lodging an objection.

Advantages
Errors in returns can be rectified by SARS, following a section 93 request, even in situations where a taxpayer has not previously lodged an objection or an appeal.

Where SARS receives a section 93 request, the prescription periods set out in section 99(1) of the Tax Administration Act do not apply, provided that the section 93 request is received prior to the assessment having been prescribed.

Disadvantages
Section 93(1)(d) of the Tax Administration Act places a heavy evidentiary burden on the taxpayer to demonstrate, to the satisfaction of SARS, that there is a "readily apparent undisputed error in the assessment".

Request for withdrawal of assessment under section 98 of the Tax Administration Act

SARS can be asked to withdraw an assessment in its entirety, despite no objection being lodged, where an assessment was issued to an incorrect taxpayer, for an incorrect tax period or as a result of an incorrect payment allocation.

Advantages
SARS may withdraw the assessment despite the fact that no objection was lodged. This is therefore a cost-effective remedy which ensures that the issue is resolved in an expeditious manner.

Disadvantages
There are limited instances to which this provision and its accompanying relief apply, being restricted to the scenarios listed above.

While numerous options exist to ensure that disputes are resolved with SARS, pursuing the incorrect course of action can have dire consequences for taxpayers. To ensure that a dispute is not protracted and unnecessary costs are not incurred, taxpayers are always encouraged to seek expert advice and assistance.

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Make the future count

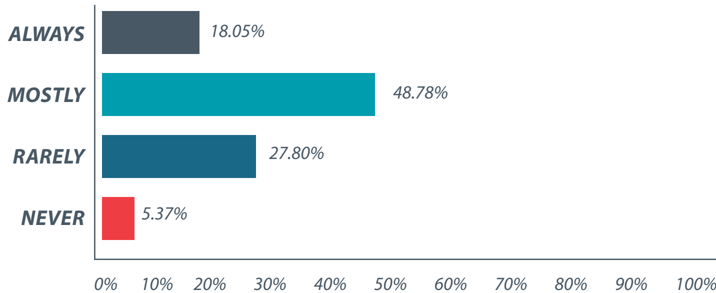
TAX DISPUTE SURVEY

8 Interesting Findings

DARREN BRITZ, darren@taxconsulting.co.za

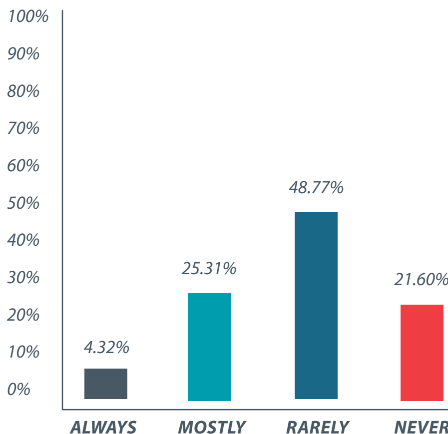
Disputes with SARS are bound to happen and need not be a cause for concern as the law prescribes appropriate steps to resolve disputes amicably and efficiently. What is concerning is when the dispute resolution process does not work timeously and efficiently. In order to gauge the health of the dispute resolution process, SAIT and Tax Consulting conducted a dispute resolution survey.

HOW OFTEN DOES SARS DECLARE AN OBJECTION INVALID?



It is of significant concern that more than two thirds of participants regularly have their objections declared invalid. SARS is permitted to declare an objection invalid under Rule 7(4), however, only where the objection does not meet the prescribed requirements provided in Rule 7(2). In our experience, a declaration of invalidity is often raised on grounds not permitted by Rule 7(4) and, in such an event, the decision may be challenged in the Tax Court.

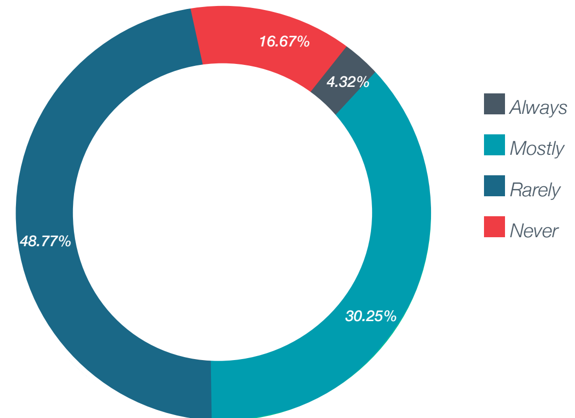
DOES SARS PROVIDE FEEDBACK TO AN OBJECTION ON TIME?



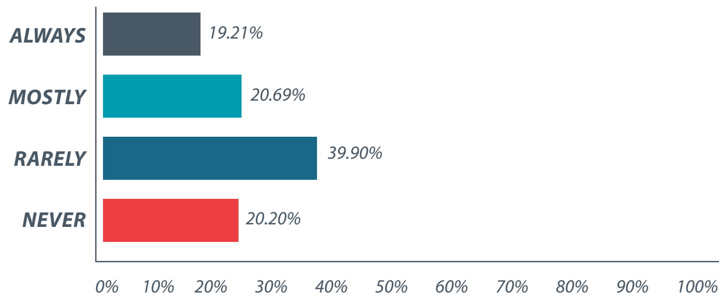
It speaks for itself that about 70% of participants do not receive a timeous response from SARS to their objections. The rules permit SARS 30 business days to consider and declare an objection invalid, and 60 business days (roughly three calendar months) to either allow or disallow an objection. In our experience, the time delay is often dependent on the region in which the taxpayer is registered. Certain regions have been known to ignore an objection until receipt of a Rule 56 notice compelling feedback.

WHEN SARS PROVIDES A DECISION ON AN OBJECTION, IS THE ACCOMPANYING NOTICE WRITTEN IN A WAY THAT MAKES IT CLEAR WHY SARS ARRIVED AT A DECISION?

It is fundamental that SARS determine an objection in a rational manner and communicate the underlying reasons for its decision with sufficient clarity. Two-thirds of participants found that they typically cannot extract these underlying reasons. This makes assessing the merits of SARS' decision exceptionally difficult as well as thereafter determining the correct procedure to follow: either remedying the issue raised by SARS or challenging the decision at the Tax Court.

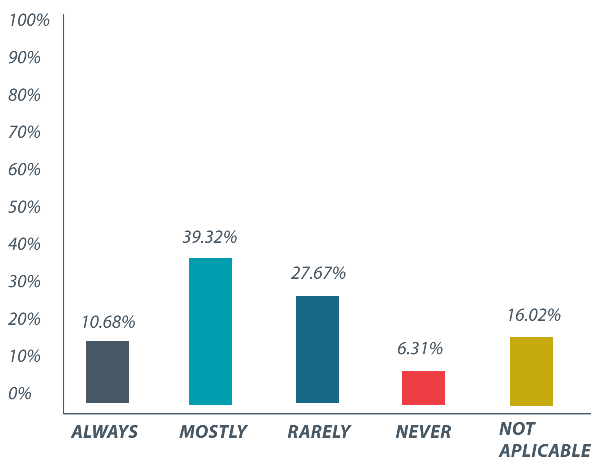


FOLLOWING A DISALLOWED OBJECTION, DO YOU PROCEED AS PER ALTERNATIVE DISPUTE RESOLUTION RULES?



Alternative dispute resolution (ADR) is a fundamental part of the appeal process and yet it is apparent that ADR is not at all a favoured approach amongst participants. The alternative to ADR is to either proceed on appeal directly to the Tax Board/Tax Court or to withdraw the appeal. Therefore, ADR should be pursued as an interim step to obtain a cost-effective resolution to the matter. However, as about 60% of participants indicated that they do not proceed to ADR, this begs the question as to whether there is a perception that ADR is, in fact, a waste of time.

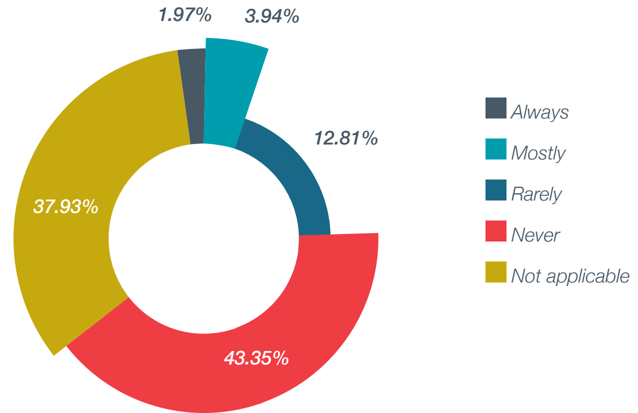
HOW OFTEN DOES ALTERNATIVE DISPUTE RESOLUTION SUCCESSFULLY RESULT IN A DECISION THAT BENEFITS TAXPAYERS?



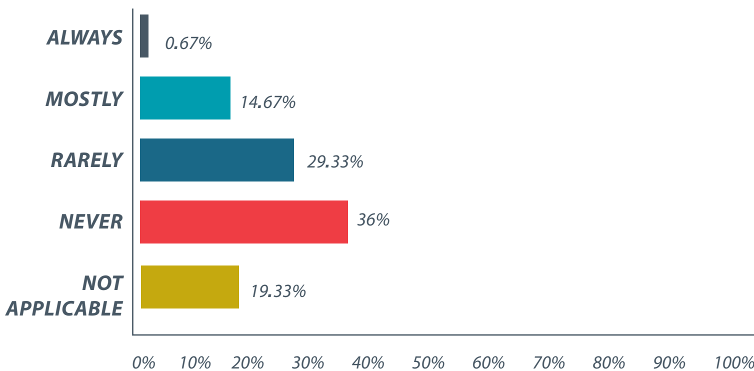
We found this to be the most interesting statistic of the survey as it is apparent that participants have varying experiences with ADR. This may again raise the question of whether the value of an ADR is region specific. In our experience, ADR is approached in good faith to demonstrate to SARS that the taxpayer is willing to engage in mediation to resolve the matter. In this regard, SARS is likely to pursue a matter to the Tax Board/Tax Court as a last resort and only where the taxpayer's merits are weak.

FOLLOWING AN UNSUCCESSFUL ALTERNATIVE DISPUTE RESOLUTION PROCESS, DO YOU TAKE THE MATTER TO THE TAX COURT?

Of those participants who did not mark the question inapplicable, the vast majority answered that they do not pursue an appeal to the Tax Court. The time and cost to pursue a matter at the Tax Court is a factor which weighs heavily against doing so. However, it must be borne in mind that these facts apply equally to SARS. Where the merits are strong, there may be value in serving court papers on SARS to endeavour to precipitate a concession.



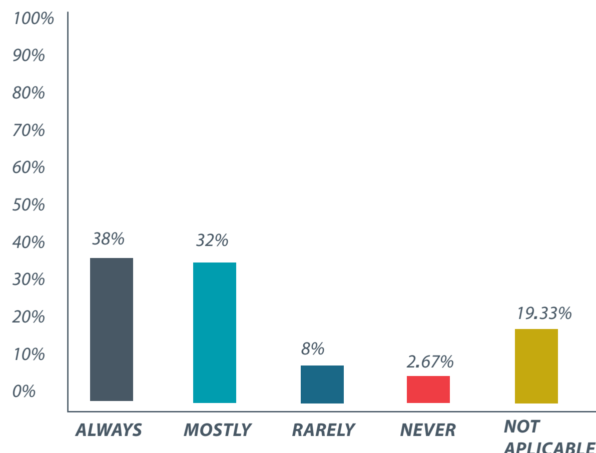
DOES SARS RESPOND TO REQUESTS TO DELAY OUTSTANDING PAYMENT?



When pursuing an objection, it is a fundamental step that the tax practitioner simultaneously requests suspension of payment of the debt. In our experience, we agree with the majority of participants that SARS very rarely communicates feedback relating to lodging the request. Fortunately, SARS is obliged, in terms of the Tax Administration Act, to deliver a notice providing the taxpayer with an additional 10 days to pay the debt before it is permitted to take steps to collect on the debt.

DOES SARS STILL COLLECT OUSTANDING PAYMENTS DESPITE NOT RESPONDING TO A REQUEST FOR SUSPENSION OF PAYMENT?

Perhaps the most significant risk facing a taxpayer is that during the objection process SARS nevertheless pursues collection of the outstanding debt. The vast majority of participants indicate in their experience that SARS has ignored a request for suspension of payment and, nevertheless, commenced with collection procedures. This conduct should be reported to the Office of the Tax Ombud, who should be tasked with monitoring unfair collection procedures.



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TAX COMMUNITY NEWS

Annual Africa Transfer Pricing Summit

▶ **IMAGES BY ADELE KLOPPERS, adelekloppers.co.za**

The 6th Annual Africa Transfer Pricing Summit, hosted by SAIT, took place from 15 to 17 November 2017. This year, the event was held in Cape Town at the African Pride, 15 on Orange Hotel located in the City Centre. Over 120 delegates and speakers from all over Africa gathered to discuss and deliberate pertinent issues affecting the continent, such as regional customs trends, thin capitalisation and an analysis of debt funding, and the practical challenges of transfer pricing documentation. In addition to local specialists, international delegates in attendance included representatives from the Chartered Institute of Taxation of Nigeria, the Ghana Revenue Authority and the Tanzania Revenue Authority.

All transfer pricing specialists should be sure to look out for next year's event where they will, yet again, be afforded the opportunity to share ideas and update themselves on the latest transfer pricing trends.

Look out for SAIT's next must-attend event on the tax calendar! The Budget Breakfast, our real-time budget review, will take place in late February.

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THE TAX CONSEQUENCES OF THE GARDEN ROUTE FIRES PART 2

▶ **GILES BUTLIN,** gbutlin@gbw.co.za

This second article in a series analysing the tax consequences of natural disasters looks at the tax considerations of rebuilding versus rebuying and how the taxes differ.

Many residents in the Garden Route area are piecing together their lives after losing their homes in the destructive fires that swept through the area in June 2017. Some of the residents were insured and were able to claim their losses against their insurance policies; others were uninsured and were in the unfortunate position of having to shoulder their losses themselves, sometimes with financially devastating consequences. In the aftermath, everyone is doing what they need to do to get their lives back on track. But, how many people have properly considered the tax consequences that they are faced with?

This series of articles aims to explain some of the more common issues facing those who have lost their properties when it comes to dealing with their income tax affairs.

Part 1 of the article series explained how the destruction of one's property gives rise to a capital gain or loss and discussed the election available to taxpayers to defer the capital gain arising from their insurance claims. It also drew attention to the potential disadvantage of making such an election, specifically in relation to the primary residence exclusion. (Refer to the Nov/Dec 2017 issue of *TaxTalk.*)

In this part, the tax consequences that arise where a house is rebuilt as opposed to being replaced are explained and compared. Most of those who were affected by the fires held their properties in their own hands; this is the situation dealt with in this article.

The uninsured owner

Let us first discuss the position of the unfortunate property owner who was uninsured. Such a person would not have received any insurance claim and, provided no other compensation was received, a capital loss will arise in respect of the building that was destroyed. As no proceeds were received, the capital loss will be equivalent to the base cost relating to the building and, where the property was a primary residence, this loss will be reduced by the primary residence exclusion.

This will have the effect of reducing the capital loss by a maximum of R2 million and the remaining loss will be set off against any other capital gains arising in the hands of the unfortunate person who has lost his or her home.

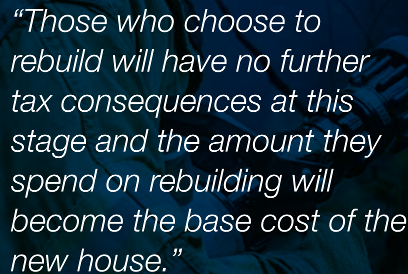
The position relating to the plot of land on which the building stood will be discussed later in this article.

The insured owner

Next, let us turn to the insured property owner who received an insurance claim or compensation relating to the building from some other source.

The insurance claim or other compensation will be regarded as the proceeds from the "disposal" of the building. This will result in either a capital gain or loss, depending on the amount of the base cost relating to the building.

Where a capital loss arises, it will be treated in the same way as the loss discussed above, where no insurance claim or other compensation was received. However, where the insurance claim or other compensation exceeds the base cost of the



building, a capital gain will arise. Where the property was a primary residence, the primary residence exclusion will apply which will reduce that capital gain by a maximum of R2 million. The resultant taxable capital gain will then be used to calculate the liability for capital gains tax.

The plot of land

And now for the interesting part. How is the plot of land, upon which the burnt down building stood, dealt with and are there any implications on the capital gains or losses discussed above in relation to the building?

Those whose properties were destroyed have to choose whether to rebuild the house or whether to sell the plot, either now or later, and possibly purchase a replacement property.

Those who choose to rebuild will have no further tax consequences at this stage and the amount they spend on rebuilding will become the base cost of the new house. This, together with the base cost relating to the plot, will then make up the base cost of the entire replacement property. When that entire property is disposed of, the normal capital gains tax consequences will follow and the primary residence exclusion will apply, provided the property was used as a primary residence.

Those who choose to sell the plot will realise a capital gain or loss, depending on the amount of its base cost and the proceeds from the disposal. Note that no primary residence exclusion applies to the gain or loss from the disposal of the plot. The primary residence exclusion (of a maximum of R2 million) only applies to the disposal of the plot when it is sold along with the house to the same purchaser.

Apportioning the base cost

From the discussion above, you will note that the relative base costs of the building and the plot become significant and need to be established separately. Where a vacant plot was originally purchased and the owner built the house, the situation is straightforward: The original purchase price of the plot will determine its base cost, and the building cost will determine the base cost of the house. However, where the plot and the house were purchased together, as would be the case in most instances, the purchase price will need to be apportioned between the plot and the house to determine their relative base costs.

This relative apportionment of the base cost becomes particularly significant when taking the following factors into account:

- The plot might only be disposed of in a future tax year. For example, if the relative base costs result in a capital gain arising from the "disposal" of the house in the 2018 tax year, but a capital loss arising from the disposal of the plot in a future year, one will not be able to set the capital loss relating to the plot off against the capital gain arising in respect of the house. As a result, a capital gains tax liability will arise in the 2018 tax year and the capital loss on the plot will only be set off against possible future capital gains.
- The primary residence exclusion only applying to the "disposal" of the house and not the plot means that the base cost apportioned to the house will determine the capital gain or loss arising on its "disposal" to which the primary residence exclusion applies. If the relative apportionment between the house and the plot were to result in a situation where the primary residence exclusion is not fully used, but, subsequently, a capital gain were to arise on the sale of the plot, the capital gain tax liability would increase as a result of the relative apportionment.

"Where the land or built property was acquired before 1 October 2001, there are special rules to determine the base costs."

Properties acquired before 1 October 2001

The discussion above relating to the determination of the base cost and its relative apportionment between the plot and the house has focused on situations where the properties concerned, being either the plot or the built property, were acquired after the implementation of capital gain tax on 1 October 2001. Thus, where the land or built property was acquired before 1 October 2001, there are special rules to determine the base costs. The principle of the apportionment of the base costs between the plot and the house, however, remains the same.

By way of explanation, where the acquisition took place before 1 October 2001, the base cost will, at the option of the taxpayer, be any one of the following:

- The market value as at 1 October 2001, determined by way of a valuation carried out by 30 September 2004;
- The so-called time apportioned base cost which effectively apportions the growth in value from the date of acquisition to 1 October 2001 and adds that apportioned growth to the original acquisition cost; or
- 20% of the proceeds from the "disposal" of the property.

Clearly, one will opt for whichever of the above options results in the highest base cost.

What to expect in Part 3

In the final article in the series, the situation where properties were held in trusts, companies or other structures will be dealt with.

While this article is intended to make readers aware of the issues discussed, it is advised that those who have lost their properties discuss their circumstances with professional tax advisers.

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Q&A

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A collection of scenarios representing queries received by the SAIT Technical Department.

Q A client who is older than 55 years sold his farms with the houses and everything on it. We deducted the tax according to the small business tax brackets. However, SARS does not recognise the taxpayer as a small business and there is thus a dispute with SARS over the small business deduction. What remedies are at our disposal in this regard?

Under section 42(2) of the Tax Administration Act, SARS must provide the "grounds for the proposed assessment". The taxpayer is entitled to request the reason under rule 6 of the rules governing the procedures to lodge an objection. This requires an additional assessment (IT34) to have been issued. In any event, we agree with you that the grounds provided are incorrect.

The following is relevant to the response to the letter of audit findings, the section 42(3) letter:

At issue is not whether the individual is a "small business corporation", which the individual cannot be, but whether the individual disposed of "an active asset of a small business owned by the individual". See paragraph 57(2)(a) of the Eighth Schedule to the Income Tax Act: "…an active business asset of a small business owned by that natural person as a sole proprietor".

We agree that paragraph 57 does not provide for a "deduction" or base cost, but it does allow for the amount (the R1.8 million) to be disregarded.

We further agree that the grounds provided by SARS (in the letter of audit findings) is insufficient for the taxpayer to respond. SARS also did not refer to paragraph 57, but it is obvious that it is in issue. The taxpayer may want to obtain further information from SARS, but the taxpayer may also, in the response letter, set out why the assets disposed of actually are active assets of the small business owned by the taxpayer. The taxpayer would be well advised to start the letter by pointing out to SARS that the proposed grounds were not provided in a way that enables the taxpayer to respond properly.

Q For an employee who is permanently out of South Africa and employed by a South African Country, is UIF & SDL payable by the employee?

The Unemployment Insurance Contributions Act applies to all employers and employees (refer to section 4). We accept that none of the exclusions in section 4 applies in your case. Section 5 of the Act refers to every employer and employee (see also section 8). The notice issued by the Minister (the determination of the limit on an amount of remuneration for the purpose of the determination of the contribution) also refers to "an employer to an "employee".

An employee is a defined term (in the UIF Act) and must be read with "remuneration" in the Act (see below). Those definitions read as follows:

- “Employee” means any natural person who receives any remuneration or to whom any remuneration accrues in respect of services rendered or to be rendered by that person, but excludes an independent contractor.
- “Remuneration” means remuneration as defined in paragraph 1 of the Fourth Schedule to the Income Tax Act, but does not include any amount paid or payable to an employee:
  - By way of any pension, superannuation allowance or retiring allowance;
  - Which constitutes an amount contemplated in paragraphs (a), (cA), (d), (e) or (eA) of the definition of “gross income” in section 1 of the Income Tax Act; or
  - By way of commission.
- The Skills Development Levies Act states that an “employer” includes an employer as defined in the Fourth Schedule to the Income Tax Act and similarly makes no reference to the resident status of the of the employer or its representative employer. Section 7 implies that the levy must be paid by employers who fall within the jurisdiction of any SETA specified in a notice published in a Gazette.

In both instances, if and to the extent that it does, the remuneration is exempt from normal tax, it would not be income and consequently would not be remuneration. But note that it is not based on taxable income as you indicated.

Q Can you lodge a Notice of Appeal after the expiry date given by SARS but within the three-year period?

We start with the relevant law and practice prevailing with respect to objections not filed within the period prescribed in the rules.

The current practice generally prevailing is that a senior SARS official may extend the date for lodging an appeal by:

- 21 business days, if satisfied that reasonable grounds exist for the delay; or
- Up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days.

In such a request, the taxpayer will have to provide grounds for the delay.

Based on the facts you provided, “exceptional circumstances” will have to be proved. The term “exceptional circumstances” is not defined for the purposes of section 104. Consideration must therefore be given to its ordinary grammatical meaning, taking into account the context in which it appears and the purpose to which it is directed.

The current practice generally prevailing is that “the circumstances referred to must thus be of such a nature that they would be considered as being something out of the ordinary and of an unusual nature”.

For the purpose of considering an extension to the period for lodging an objection, the senior SARS official is required to consider all the relevant matters. These would include:

- The reasons for the delay;
- The length of the delay;
- The prospects of success on the merits; and
- Any other relevant factor, for example, SARS’ interest in the determination of the final tax liability in view of the broader public interest relating to budgeting and fiscal planning.

Despite these factors being relevant to the exercise of a discretion, they are neither all-embracing nor individually decisive and each case must be considered on its own merits.

The Tax Administration Act does not prescribe the manner in which the discretion to extend the period for lodging an objection under section 104(4) should be exercised. The senior SARS official’s decision must comply with the requirements for administrative justice which are contained in section 33 of the Constitution of the Republic of South Africa, read with the Promotion of Administrative Justice Act. In particular, the senior SARS official’s decision must be reasonable. Essentially, for a decision to be reasonable, the senior SARS official is required to consider all the relevant matters.

The following comment made by Judge Satchwell in a recent Tax Court case gives some idea of what is required: “The lapse of time from mid-December 2014 to June 2015 is not satisfactorily explained let alone sufficiently to discharge the onus of proving ‘exceptional circumstances’.”

We do not know what the date of the assessment was. You refer to objections lodged on 7 October 2016, 5 December 2016 and 17 September 2017. Following from this, the taxpayer had to lodge an appeal or an objection to SARS’ decision not to condone the late filing of the objection.

You also mention that SARS requested “substantiating proof”; we accept that this was a request under rule 8. These documents should then have been provided to SARS within 30 days. If it was requested as part of the review process, it should in any event have been provided in the objection.

As it appears that the correct process was not followed, SARS will not entertain a new objection or condone late filing.

Case Law
Wrap-up

▶ **JEAN DU TOIT, JONTY LEON & ALICEA VAN DER RYST,** Tax Consulting South Africa

A summary and analysis of three recent cases involving disputes with SARS.

ABC (PTY) LTD v CSARS
Court: Tax Court
Case Number: 0018/2016

Issue

This matter addresses the question of whether the appellant was entitled to condonation for the late filing of the appellant's appeal in terms of section 107(2) of the Tax Administration Act.

Facts

On 7 October 2013, the taxpayer filed an objection against an assessment raised by SARS. SARS notified the taxpayer on 8 November 2013 that the objection had been partially allowed. Accordingly, the taxpayer's accountant lodged a notice of appeal on behalf of the taxpayer on 9 December 2013, which was within the allotted time period set out in the Rules. In doing so, the accountant retained a hard copy to keep on file and noted on that copy of the notice of appeal form that his ADSL line was faulty.

The accountant waited until 30 June 2014 before enquiring about the status of the appeal, after which he was informed that SARS had no record thereof. As such, the objection and appeals compliance officer at SARS advised that a further notice of appeal, together with a request for condonation, must be filed. The accountant heeded the advice and cited the faulty ADSL line as the basis for his request for condonation.

On 10 February 2015, SARS refused the request for condonation. The accountant, however, noted that the notification did not come to his or the taxpayer's attention until 20 June 2015, as the notification had been sent to the taxpayer's previous tax practitioner, as opposed to the address noted in the appeal (as is required in the Rules).

At the instance of SARS, the accountant lodged a further notice of appeal on 23 June 2015. On 13 July 2015, a SARS legal advisor informed the accountant that the appeal had been invalidated, as it was filed more than 75 days after the date of the notice of disallowance.

It was submitted on behalf of the taxpayer that section 107(2) of the Act ought to

be interpreted to mean that the periods prescribed by it must be calculated from the date of the request for condonation, otherwise the discretion provided for by the section would be meaningless.

SARS' interpretation of section 107(2) provides for a discretion to extend the time period (beyond the initial 30-day period provided for by the Rules) within which an appeal must be lodged within either 21 days, if reasonable grounds exist for the delay, or 45 days, if exceptional circumstances are shown to exist. The extension period of either 21 days or 45 days, as the case may be, is calculated from the date on which the initial 30-day period lapses. In other words, SARS has no discretion to condone the filing of an appeal after 75 days from the date on which the taxpayer was notified of the outcome of the objection.

Outcome

The taxpayer was granted leave to file its notice of appeal against the disallowance of the objection. SARS was ordered to pay the costs.

Core reasoning

SARS failed to take into account that there may be cases where taxpayers are unaware of the disallowance of the objection or that its notice of appeal was not filed in the manner required by SARS. If the taxpayer is unaware of his or her failure or if administrative action is taken against him or her, it would be illogical to expect a taxpayer to avail himself or herself to the remedies afforded by the Act.

Section 107(2) does not specify from when a SARS official may extend the time periods. The timeframe in which an appeal is to be lodged may be extended for either 21 days or 45 days, as the case may be, from the date of the request for condonation.

The argument put forward by SARS that it has no discretion to grant condonation beyond 75 days from the date of notice of disallowance was, therefore, dismissed.

Takeaway

This decision changes the position that late appeals cannot be condoned beyond the 75-day period, which was how section 107(2) was previously interpreted and brings comfort to taxpayers as it confirms that taxpayers are not left without remedy in cases where the 75-day period has lapsed.

The question arises as to where this leaves taxpayers who abandoned their appeal on the strength of advice to the contrary.

ABC (PTY) LTD v CSARS

Court: Tax Court
Case Number: IT 14247

Issue

At issue in this appeal is whether SARS is entitled to levy understatement penalties against the taxpayer in accordance with the provisions of section 222(1) of the Tax Administration Act for the 2011, 2012, 2013 and 2014 years of assessment.

The taxpayer did not deliver VAT returns, which it does not dispute. Its only contention was that the non-delivery of the VAT returns did not result in any "prejudice to SARS or the fiscus" as envisaged in section 221 of the Act.

Facts

The taxpayer is an investment company which also renders financial advisory services to BEE entities in respect of which services it receives remuneration.

The taxpayer submitted its income tax return in respect of the 2011 year of assessment on 19 April 2012, and those in respect of the 2012 to 2014 years of assessment on 29 January 2015, which all stated that the taxpayer neither received any income nor incurred any expenditure during these tax periods. In other words, the taxpayer rendered so-called "nil returns".

At the time of the above rendition of the "nil returns" by the taxpayer, it already paid provisional tax in respect of the 2011 to 2014 years of assessment in the total amount of R13 777 347.74.

The rendering of the "nil returns" resulted in a credit balance in the taxpayer's tax account that entitled the taxpayer to a tax refund.

With regard to the taxpayer's VAT obligations, the taxpayer neither registered for VAT nor rendered any VAT returns for the 2011 to 2014 years of assessment. This was despite the taxpayer actively trading and, in the course thereof, charging VAT.

The taxpayer, on 5 January 2011, entered into a consultancy agreement. In terms of the

agreement, the taxpayer would be paid a total fee of R12 500 000, inclusive of VAT, in cash. On 1 November 2012, the taxpayer concluded yet another consultancy agreement.

SARS had initially levied a 100% penalty on both the income tax and the VAT understatements. The taxpayer objected to these assessments and SARS consequently reduced the penalty to 25% in respect of the income tax understatement and to 50% in respect of the VAT understatement.

The taxpayer appealed the imposition of penalties in their entirety.

SARS led the evidence of Ms T, the Operational Specialist within SARS' Audit Department. According to Ms T, SARS suffered prejudice as a result of the taxpayer's non-delivery of VAT returns and the misstatements in its income tax returns. This was based on the opportunity cost from the failure of the taxpayer to properly fulfil its tax obligations as well as the resource allocation in respect of the audit process. In terms thereof, SARS prayed for a 100% penalty to be levied as is the sanction in cases where the understatement was brought about by the gross negligence of the taxpayer and the case is a standard one.

Outcome

SARS suffered prejudice in the form of the opportunity cost occasioned by its delayed recovery of the income tax and VAT amounts due to it.

Although SARS had the funds in its possession, it was not entitled to the use thereof as the funds were reflected as a credit in the account of the taxpayer (for which the taxpayer sought a refund).

The interest that accrued to the funds during the time that SARS had the funds in its possession was for the taxpayer's account.

The reduced understatement penalties were set aside and the 100% penalties were imposed.

Each party was to pay their own costs.

Takeaway

This decision provides some clarity as to the Court's view on prejudice caused by the submission of "nil returns" to SARS and whether such prejudice is of such a serious nature that penalties may be levied against the taxpayer.

It is clear that SARS and the Court consider such submissions, or non-action, as very serious and will not hesitate to levy penalties against the taxpayer in such situations.

Thus, taxpayers must take note and be vigilant with regard to deadlines imposed by the Tax Administration Act as delays and negligence in that regard will undoubtedly lead to penalties being imposed.

ABC Company (Pty) Ltd and DEF (Pty) Ltd v Commissioner of SARS

Court: Tax Court

Case numbers: 0032/2016 and 0033/2016

Kindly note that the above two case numbers were not consolidated. The two cases were set down for a hearing simultaneously due to the same key legal issues apparent in both.

Issue

The question of "what constitutes sufficient reasons" in terms of Rule 6 of the Rules promulgated under section 103 of the Tax Administration Act was finally put to bed when two taxpayers decided to approach the Tax Court in terms of Rule 52(2)(a) of the Income Tax Court Rules. The basis for the said approach was nestled in the argument that SARS did not *in casu* provide "sufficient reasons".

Facts

SARS issued a section 80J(1) notice to the applicants, setting out the audit findings and the basis upon which the Commissioner believed that the General Anti-Avoidance Rule (GAAR) provisions in the Income Tax Act found application.

The applicant's response to the notice addressed, in detail, why the GAAR provisions were not applicable to the given facts and indicated that the applicant was not aware

of, nor a party to, the transactions and/or agreements as set out in the notice.

The applicant did not state that the notice was unclear and, in assessing the applicant's response to the notice, it appears the applicant understood the notice in its entirety.

Upon SARS' request that the applicant provide additional information, the applicant took great care in providing the requested information and knew exactly what SARS required.

After receiving the additional information, SARS issued an additional assessment to the applicant in terms of sections 80A to 80L of the GAAR in the Income Tax Act. This caused the applicant to feel aggrieved.

The applicant approached the Tax Court for an order in terms of Rule 52(2)(a) of the Rules.

The applicant argued that SARS did not give reasons as contemplated in Rule 6 and therefore created an obstacle for the taxpayer to formulate an objection under Rule 7.

Outcome

The applicant was unsuccessful in proving that the respondent did not meet the benchmark in terms of Rule 6 of the Rules.

The Tax Court found that the reasons provided by SARS complied with Rule 6 of the Rules and that the taxpayer was in fact able to formulate an objection in terms of Rule 7 of the Rules.

Core reasoning

The Court emphasised the two principles established in *Minister of Environmental Affairs and Tourism v Phambili Fisheries* (2003 (6) SA 407 (SCA)):

- Firstly, the party against whom the decision has been made should be given adequate reasons that will make the party understand why the decision went against it, even if it does not agree with the decision.
- Secondly, the decision-maker is required to set out the following:
    - His or her understanding of the relevant law;
    - The findings of fact on which his or her conclusions depend; and
    - The reasoning process which led him or her to the above conclusions.

In essence, the reasons given must be properly informative and explain why the decision was made.

The Tax Court held that it was apparent in the correspondence between the applicant and respondent that the applicant clearly understood the arrangements and transactions referred to in the tax benefit leg. The applicant had no struggle in responding to each averment made in the notice.

The Court stated that to have "pedantic questions" does not constitute an argument under Rule 6 of the Rules and could be regarded as a "delaying tactic" at best.

Takeaway

The rationale for Rule 52(2)(a) of the Rules is to afford an aggrieved taxpayer the opportunity to apply to the Tax Court for an order that SARS must provide the taxpayer with reasons within a specified period of time. This remedy is available to the taxpayer if SARS fails to provide the reasons under Rule 6 and by doing so creates an obstacle for the taxpayer to formulate a proper objection under Rule 7.

Should the reasons provided by SARS not meet the Phambili case threshold, a taxpayer should immediately address this in the initial correspondence to SARS by requesting reasons which adhere to Rule 6 of the Rules.

BINDING RULINGS

▶ **DARREN BRITZ, JONTY LEON & ALICEA VAN DER RYST,** Tax Consulting South Africa

Potatoes, electricity and sports clubs: A summary of three recent binding rulings.

BINDING GENERAL RULING 45
Supply of Potatoes

Issue
When determining whether a supply of potatoes may be zero-rated under the VAT Act, what factors will be considered by SARS in determining whether potatoes are being supplied as seed potatoes to be used for agricultural, pastoral or other farming purposes or as vegetables, i.e., a supply consisting of foodstuffs?

Facts
For the purpose of levying a zero-rate to the supply of potatoes, potatoes could be supplied as:

- Seed potatoes for cultivation under Item 6 of paragraph 1 of Part A of the Second Schedule to the VAT Act, which supply may be zero-rated under section 11(1)(g), subject to the provisions of paragraph 2; or
- Foodstuffs (that is, vegetables) under Item 12 of paragraph 1 of Part B of the Second Schedule to the VAT Act, which supply may be zero-rated under section 11(1)(j).

The Ruling describes “seed potatoes” to mean “potatoes which have been certified as seed potatoes under the South African Seed Potato Certification Scheme”, defined in Government Notice R. 664 in Government Gazette 11245 of 15 May 1998 under the Plant Improvement Act.

Ruling
To distinguish between potatoes supplied as seeds and potatoes supplied as foodstuffs, the intention of the vendor supplying the potatoes must be determined at the time of supply. In determining the stated intention of the vendor, the Commissioner of SARS may consider, among others, the following objective factors:

- The description of the potatoes as contained in the tax invoice issued by the vendor;
- The tax status of the recipient of the potatoes, for example whether the recipient is a VAT-registered and duly authorised vendor carrying on agricultural, pastoral or other farming operations;
- The consideration paid for the potatoes as, for example, the price to be paid for seed potatoes may be significantly higher than potatoes supplied as foodstuffs; and
- The labelling or packaging in which the potatoes are supplied, for example the South African Seed Potatoes Certification Scheme requires that seed potatoes be supplied in containers which are labelled in a specific manner.

In addition to satisfying the Commissioner as to the type of supply, the vendor must, under section 11(3) of the VAT Act, obtain and retain documentary proof substantiating the vendor's entitlement to apply the zero-rate under either section 11(1)(g) or (j).

BINDING PRIVATE RULING 282

Income tax consequences in respect of obligations imposed by an electricity generation agreement

Issue

Are the contributions made by the applicant to a trust to undertake projects or provide funding to public benefit organisations in terms of an electricity generation agreement deductible by the applicant in terms of the general deduction formula set out in the Income Tax Act?

Facts

The applicant is a company that owns and operates a wind farm that generates electricity. The company entered into an agreement with Government, whereby it would supply electricity to the national grid. According to the agreement, the company must commit a specific percentage of its annual revenue to socio-economic and enterprise development.

Should the company fail to incur such expenditure, it will result in the company earning termination points towards the agreement with Government. However, the amount of termination points that may be earned from not incurring the adequate expenditure will not be enough to result in the termination of the agreement.

The applicant, in order to meet its expenditure commitments, established a trust that will specifically undertake the projects or otherwise provide funding to other organisations registered as public benefit organisations as contemplated in section 30(3) which will undertake such projects. The applicant proposed to contribute amounts to the trust on a quarterly basis based on the specified percentage of its revenue earned in the previous year of assessment.

The applicant wanted its payments to the trust to be considered as deductible expenditure, and required SARS to make a ruling on this.

Ruling

SARS confirmed, in its ruling, that the contributions made by the applicant to the trust in respect of socio-economic and economic development commitments were deductible under section 11(a) read with section 23(g) of the Income Tax Act.

Furthermore, SARS confirmed that such payments will not be considered a donation or a deemed donation in terms of section 55(1) or section 58, respectively.

The ruling is valid for a period of five years from 17 August 2017.

BINDING PRIVATE RULING 281

Disposal of a portion of land owned by a recreational club

Issue

What is the exact interpretation and application of paragraph 65B of the Eighth Schedule to the Income Tax Act?

Facts

SARS had to determine whether roll-over relief, under paragraph 65B of the Income Tax Act, is available to a recreational club in special circumstances where the recreational club did not only subdivide and dispose of part of its land, but also utilised the proceeds to effect improvements to the remaining portion of the land.

As was the case with Club B, the applicant was a recreational club established in, and a resident of, South Africa. An agreement was concluded between the applicant and Club B in terms of which Club B disposed of a sports club enterprise to the applicant.

The sports club enterprise included three adjoining, separately registered portions of land (i.e., the property) which the applicant became the registered owner of.

The consideration due to Club B was payable by way of annual instalments and the applicant was not permitted to sell any portion of the property without written consent from Club B until the consideration was settled. In the event of any portion being sold, the proceeds from the sale were to be apportioned between the applicant and Club B.

- Due to financial difficulties, the applicant raised funding for the balance of the amount owed to Club B by issuing debentures. The terms afforded to the holders of the debentures were that each holder of a debenture will be repaid on the earlier of either the disposal of any portion of the property or within five years from their issue date.

It was decided that, to settle the debentures and consideration due, the applicant would enter into three separate sale agreements to sell three separate portions of the land to three unrelated persons (i.e., the first, second and third disposals).

Due to the disposal of the portions, the sports facilities had to be redesigned and a new irrigation system had to be installed. A new clubhouse also had to be built due to the current clubhouse occupying a disposable portion.

The budgeted expenses in respect of the redesign, irrigation system and club facilities would be equal to or exceed the expected proceeds available to the applicant from the third disposal.

Outcome

The ruling made for the proposed transaction is as follows:

- There is no accrual in favour of the applicant of the portion of the proceeds payable to Club B.
- There is an accrual in favour of the applicant of that portion of the proceeds payable to debenture holders.
- The first and second disposals will result in capital gains.
- Paragraph 65B will apply to the third disposal only.

Core Reasoning

The first disposal will be applied to settle the amounts owing to the debenture holders and therefore no proceeds will go to Club B.

The second disposal will also be utilised to settle the remaining balance owed to the debenture holders, which therefore will also not be used to settle the consideration owed to Club B.

Finally, with the third disposal, the proceeds will be used to cover the costs for the redesign of the sports facilities, the installation of a new irrigation system and the construction of new recreational facilities.

The following additional conditions and assumptions are also present:

- The contracts for the acquisition of the replacement assets have been or will be concluded within 12 months after the date of the disposal of the relevant portions of the property.
- The replacement assets will be brought into use within three years of the disposal of the relevant portions of the property.
- The actual costs to acquire the replacement assets will be equal to or exceed the proceeds, excluding the portion payable to Club B, in respect of the third disposal and the proceeds received by the applicant will be used to replace facilities lost by the applicant as a result of the third disposal.

Takeaway

Roll-over relief is still available upon a disposal made by a recreational club. However, when portions of immovable property and the repayment of debentures are elements of the disposal, a clear distinction must be made as to which part of the diverse disposals fall within the ambit of paragraph 65B, and the paragraph should be applied accordingly.

TaxTalk would like to extend a special thanks to Tax Consulting South Africa for compiling this issue's Binding Rulings and Case Law sections. Tax Consulting South Africa's niche expertise is tax consulting, advice and compliance in South Africa. You can contact them at 011 467 0810.

Taxing Bitcoin: It's a Bit Cryptic

ASHEER JAYWANT RAM, asheer.ram@wits.ac.za

As Bitcoin becomes ever more mainstream, tax authorities are struggling to keep up. In this article, we look at the intricacies of the technology and the tax implications thereof.

Bitcoin: Is it a currency or another type of asset? The answer to this question has significant implications for how Bitcoin owners and traders are taxed. As at the time of writing, one Bitcoin was trading at around R124 850, having been trading at R13 837 on 1 January 2017. Bitcoin raises a number of interesting questions, such as what drives the volatile swings in price and is Bitcoin really the way of the future?

There is no escaping the rise in popularity of Bitcoin. The International Monetary Fund and the European Central Bank, among many others, have authored reports noting that serious consideration should be given to Bitcoin and blockchain technology because of its growing international appeal. The wide reach of Bitcoin is assisted by the fact that it is entirely digital and has no physical form.

Bitcoins are accepted as a means of payment across the world by many reputable entities, such as Microsoft, Overstock and TakeaLot. Pick n Pay recently successfully piloted the acceptance of payments in Bitcoins.

However, there have also been instances of illegal activity using Bitcoins. For example, a website on the so-called Dark Web, known as Silk Road and Silk Road 2.0, accepted Bitcoins as payments for, inter alia, purchasing drugs and commissioning hits on individuals.

Control

One of the key features of Bitcoin is that it is not controlled by a single entity, such as a central bank. This lack of central control allows Bitcoin to circumvent exchange control regulations. So, transfers can be made internationally without going through a central bank or a remittance company.

It also appears as though traditional macroeconomic variables, such as inflation and interest rates, do not have a direct impact on Bitcoin.

Additionally, Bitcoin is limited to a total supply of 21 million, thereby avoiding issues that could be caused by a central bank manipulating the money supply (e.g., through quantitative easing).

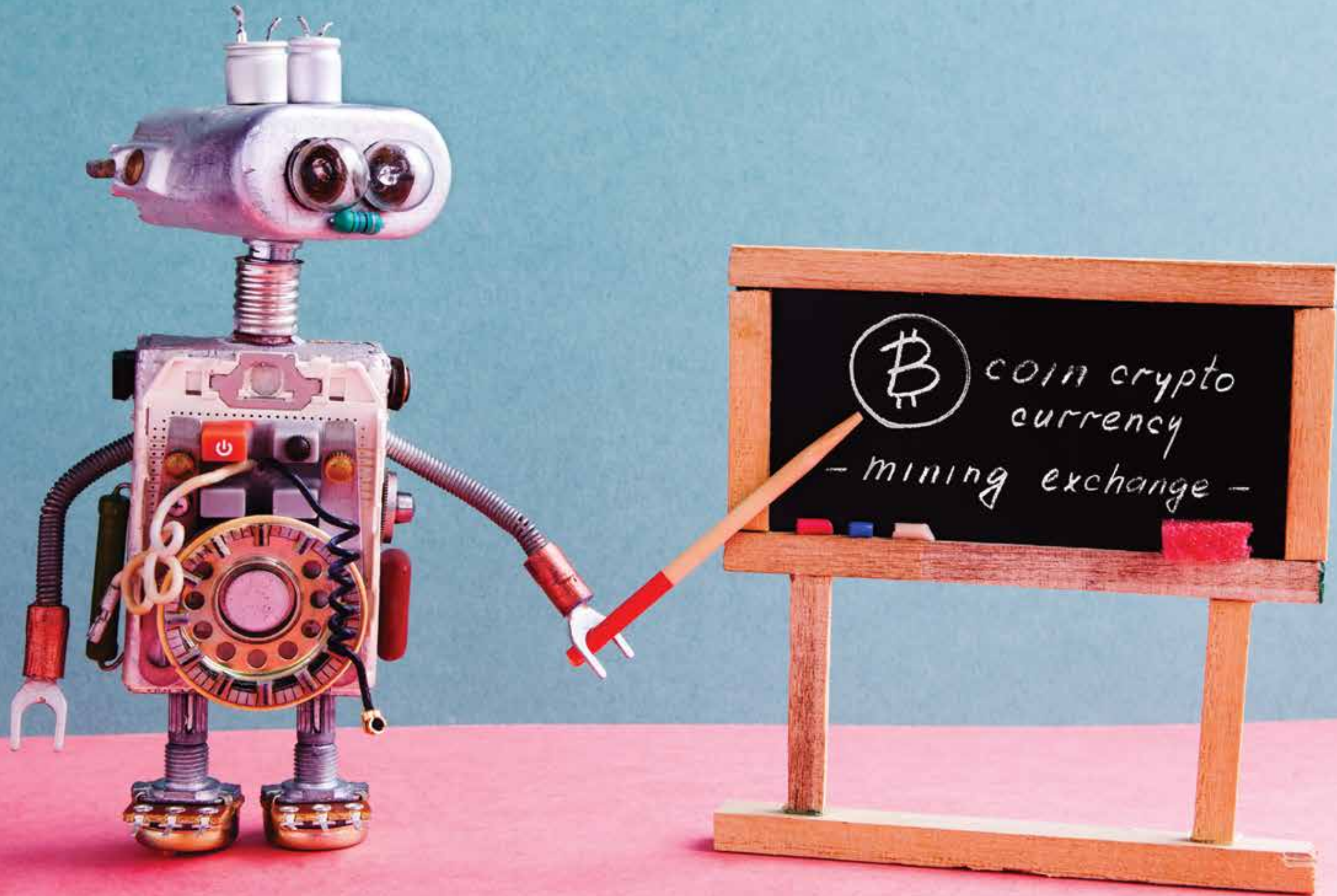
Public ledger

The absence of a single authority to regulate the use of Bitcoin would have led to fraud issues (most commonly double-spending) around the use of Bitcoin. But, this problem was solved quite elegantly by Bitcoin's unknown designer(s) who used the alias Satoshi Nakamoto in the White Paper entitled *Bitcoin: A Peer-to-Peer Electronic Cash System.*

All transactions on Bitcoin are, thus, simultaneously stored on a distributed public ledger that cannot be altered. This ledger is known as the blockchain and has found application beyond Bitcoin itself. As all transactions are publicly recorded, if a person were to try and process a fraudulent transaction, the network would reject it as it would not reconcile.

Anonymity and security

Yet, what is stored on the network is merely addresses and Bitcoin values, not personal information. When you have Bitcoins, you will have a wallet address and this is what is recorded. This is akin to a bank account. What is also key here is that this may indicate that Bitcoin is an anonymous vehicle for transacting. This is, however, not the case. Studies by forensic IT specialists have shown that a user can be determined with significant investigation; hence, Bitcoin is pseudonymous. This aspect of Bitcoin has led to concerns around Bitcoin being used for money laundering and the financing of terrorism.



- Bitcoin itself and the addresses it uses, mentioned above, are governed and secured by a branch of mathematics known as cryptography. Cryptography is the process and art of converting legible information into a code which can only be read legibly by the trusted party to the transaction. This has led to the term “cryptocurrency”, of which Bitcoin is one of many. Other examples include Ethereum (currently the largest cryptocurrency by market capitalisation after Bitcoin), Litecoin, Peercoin and the tongue-in-cheek Dogecoin. Note that this is not an exhaustive list and the world of cryptocurrency is exceptionally vast.

Acquisition

Bitcoins can be acquired in various ways: Through peer-to-peer purchases, by being purchased on an exchange or through mining.

In the first instance, individuals can transact with others to purchase Bitcoins or trade them for goods and services. Exchanges can be used in the second instance. An exchange works, as other exchanges, where conventional currency is used to purchase cryptocurrency. South African exchanges include Luno and Ice3X. It is worth noting that across exchanges globally, Bitcoin trades at different prices, indicating a lack of price parity.

The last method of acquisition involves using computing power to solve cryptographic hash functions, thereby generating a reward of 12.5 Bitcoins, which halves with every 210 000 blocks generated, and is known as “mining”. This method uses tremendous amounts of electricity and has been commercialised globally, effectively excluding small players who have limited computing power.

The regulatory environment and tax

The aforementioned characteristics and uses collectively present interesting challenges to regulators and governments alike. At the moment, in South Africa, there is no regulatory framework. This is what the deputy CEO of Pick n Pay mentioned as the obstacle to a full-store rollout of Bitcoin acceptance. Even globally, the regulatory situation is still uncertain with very few countries providing a comprehensive regulatory framework.
There are also challenges within the financial reporting space, as there is no definitive policy for accounting for Bitcoin. However, initial research by the author in this regard does exist.

Our focus here is on how tax regulators should be taxing Bitcoin, if at all. South Africa currently does not have any guidance on how Bitcoin should be taxed. The SARB has stated, in their *Position Paper on Virtual Currencies*, that they do not “oversee, supervise or regulate” virtual currencies, including Bitcoin.

"Bitcoins can be acquired in various ways: Through peer-to-peer purchases, by being purchased on an exchange or through mining."

BITCOIN PERSPECTIVES FROM VARIOUS COUNTRIES

Country	Tax Treatment
USA	The Internal Revenue Service has no single treatment for Bitcoin taxable gains and losses. What is crucial is the character of the gain or loss. Where Bitcoins are held as a capital asset, the gain or loss is capital in nature. But, if Bitcoins are not held as a capital asset (i.e., income in nature), the gain or loss will be an ordinary gain or loss.
UK	Her Majesty's Revenue and Customs requires that Bitcoin be taxed based on whether the receipt or expenditure is revenue or capital in nature as well as on the type of taxpayer to determine whether income tax, capital gains tax or corporation tax is applicable.
Australia	Australia treats Bitcoin transactions as akin to barter arrangements, and Bitcoin is treated as an asset for capital gains tax purposes.
Japan	Japan has taken steps to characterise Bitcoin as legal tender which could lead to Bitcoin being taxed as a currency.

In contrast to the South African position, some guidance has been issued by other countries. The table above provides a brief summary of these positions. (Note that this is not an exhaustive list.)

Given these differing views, it is clear that there is no consensus on how Bitcoin should be taxed. This presents challenges for practitioners with regard to declaring Bitcoin gains and for determining the tax implications thereof.

As the regulatory environment moves to keep pace with the development and adoption of Bitcoin and other cryptocurrencies, it is prudent to highlight that exchanges are slowly becoming the nexus of regulation. As a result, information around Bitcoin transactions could then be accessed by SARS, placing emphasis on ethics and the principle of self-reporting in this regard.

In South Africa, Bitcoin will not be money as defined in section 1 of the VAT Act. Consequently, it may be subject to VAT if supplied as a good. In addition, Bitcoin may be treated as an asset and whether it is taxed under capital gains tax or not is based on the intention of the acquirer.

Additional dimensions that need to be explored include the following:

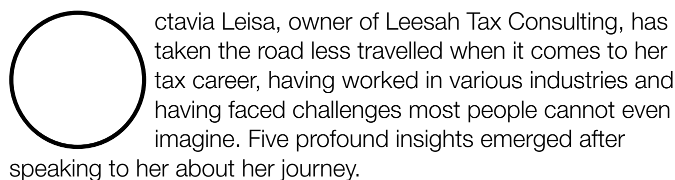
- How Bitcoins that are mined should be treated.
- Whether fair value gains in Bitcoin should be taxed.
- The translation rules that apply if Bitcoin is valued in a foreign currency.
- The tax treatment of foreign exchange gains or losses on Bitcoin.

It is clear that, for the moment at least, the evolution of cryptocurrencies is outpacing regulations. As a result, practitioners should be prudent when accounting for the tax effects of cryptocurrencies.

The Positive Outlook of Octavia Leisa

LEIGH SCHALLER, Assistant Editor

A look at five ways in which Octavia Leisa has used her life experiences to grow both professionally and personally.



Octavia Leisa, owner of Leesah Tax Consulting, has taken the road less travelled when it comes to her tax career, having worked in various industries and having faced challenges most people cannot even imagine. Five profound insights emerged after speaking to her about her journey.

1. People skills are essential to any profession

People who believe that the lives of tax practitioners revolve around numbers and legislation may be surprised by how much joy Octavia gets from the social aspect of her job. "I get to interact with different people across different income levels and backgrounds, offering them a service that makes their daily hassles easier and makes me happy."

"I took a gap year after school and worked in the retail industry. I enjoyed interacting with customers. This had a great influence on other careers that I later ventured into. It also taught me one of the greatest lessons: How to work with different customers' personalities and how to remain professional in serving their needs. This requires emotional intelligence in recognising that, if a customer is in a bad mood, it is not because of you; it could be the result of other external factors that culminated to that one particular moment. You need to understand the customers and give them the most value-added and memorable experience for that day."

2. Focus your abilities

Following her stint in retail, Octavia's second job was that of a personal assistant to the director of a non-governmental organisation (NGO) that assists the blind.

"My duties ranged from organising events to end-to-end salary administration (payroll duties). This sparked my passion for obtaining more knowledge in tax and, as a result, I resigned from my job. I took time to investigate this new desire or field that had endless possibilities."

Gaining new knowledge and experience later served Octavia well. After working at the NGO, she joined SARS where she spent 16 years in various departments that ultimately led her to start her own business.

"I enjoy doing logbooks for my clients as I see them as a challenge. After getting all the relevant information from my clients, my task then becomes making sure that the numbers are accurate. Trying to achieve this can take several hours because balancing those numbers is not easy, but there is some sort of satisfaction I receive after tackling a client's logbook and seeing the accuracy."

3. Loving, finding peace and embracing the "new Octavia"

"In 2012 my life changed. I had complications from blood clots in my left leg that eventually resulted in the amputation of my limb. I faced this challenge with a positive outlook that has deepened my spiritual growth and commitment to God."

Octavia has been able to focus on all the positive changes in her life, focusing on things that she can do and building her tax practice.

"I could not feel sorry for myself by worrying about the restrictions that might come my way. So, I conditioned my mind to be the best I could be and devised survival skills in order to cope.

"Embarking on this new journey, I had to learn a new path: How to walk with a stick, practise new ways of exercising and cope with pain that is triggered by the blood flow of my limb. It has been a difficult journey of self-discovery, respect, belief and awareness; coming to a point where I can say that it was all worth it as I yield positive addictions of self-mastery in many aspects of the 'new me'."

"There is some sort of satisfaction I receive after tackling a client's logbook and seeing the accuracy."

4. Set future aspirations

Of her future aspirations, Octavia wants to empower people on how to deal with health challenges that lead to disability and teach them how to release fear and be at peace in the now; to enjoy life and continue to love; and to connect with herself and the community at large.

5. Value family support

"I am grateful with all my being for my mother, daughter and siblings for all their love, care, support and patience that they offered me and continue to give me. Your prayers make me strong and give me daily hope to cope in life. I don't have the words to thank you enough. I know that when I fall, you will be there to pick me up.

"Lastly, I thank my priests, church members, friends and clients who continue to support me with all their prayers. They keep me strong in my faith.

"I humbly thank you all."

SUDOKU CHALLENGE

You know the drill! Ensure that each row, column and 3x3 block contains all the digits from 1-9 (without repeating a digit). Good luck!

LEVEL OF DIFFICULTY: HARD

	6						5	1
				7				9
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1. Two lucky winners will each receive two pocket books: *Financial Intelligence Centre Act & Regulations* and *Tax Administration Act & Rules and Related Material.*

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12 March 2018	Cape Town, D'Aria Venue
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19 March 2018	Pretoria, CSIR Convention Centre
20 March 2018	Johannesburg North, FNB Conference Centre
22 March 2018	Johannesburg West, Ruimsig Golf Club
23 March 2018	Johannesburg East, Birchwood Hotel & OR Tambo Conference Centre
26 March 2018	Port Elizabeth, Radisson Blu Port Elizabeth

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- Unemployment Insurance Fund – What's in, what's out, and by when? The impact on your payroll management processes and the impact on those individuals who will need to claim benefits in 2018.
- The new National Minimum Wage – The visible and more importantly, the invisible implications.
- Paternity Leave changes – How this will impact leave management from a payroll perspective.
- Envisaged changes to the taxation of Foreign Employment income and payments to Foreign Pension schemes – The impact on individuals working abroad.
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