



# Errors and SARS

*YOUR KEY TO THE TAX COMMUNITY*

# Constitutional rights

S33

- Everyone has the right to administrative action that is lawful, reasonable and procedurally fair
- Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons
- National legislation must be enacted to give effect to these rights and:
  - Provide for the review of administrative action by a court
  - Impose a duty on the state to give effect to these rights
  - Promote an efficient administration

National legislation  
enacted to give  
effect to right of  
administrative  
action

- The promotion of Administrative Justice Act (PAJA)

# Scenario

- A common problem – a landlord owns a building and doesn't realise that they are entitled to claim allowances. In this case the allowances were claimable in 2007 to 2012 and the oversight was discovered in 2014.
  - How do you fix this?

# Tax returns?

- ***IT14434/2019***
- The core argument by the taxpayer was that s 13quin(3) allowed them to make the lump sum claim in the 2014 year. SARS made the argument that the allowance is an annual event, in the applicable year of assessment and the purpose of s 13quin(3) is merely to help calculate the recoupment.
- *Editors Note:* From a practical point of view, the taxpayer could not go and reopen certain of these assessments to claim the allowance in the applicable year of assessment as these would have prescribed already.
- The Court held that SARS's view is correct. Allowances must be claimed in the year the taxpayer becomes eligible for it, not as some future date at the convenience of the taxpayer. Please make sure your clients are aware of the allowances they can claim!

# Key take away?

- IFRS does not equal tax rules, cumulative catch is not an option under tax unless there is a specific, stated dispensation for it.
- A similar consideration would apply for gross income concerns.

- ***IT 24614***

- Although this principle has been decided a few times already, it is still worth repeating: a label in the AFS does not override the true nature or purpose of the item/transaction.
- In this case a debt that had originated from the sale of trading stock between two entities was ultimately written off due to the insolvency of the purchaser. This amount of trade debtors had been reflected in the books of the seller as “Loan/receivable”. SARS made the argument that the amount was capital in nature and therefore was not deductible. The Courts held that this was related to a trade debt and therefore was permitted as a deduction.

# Realistically?

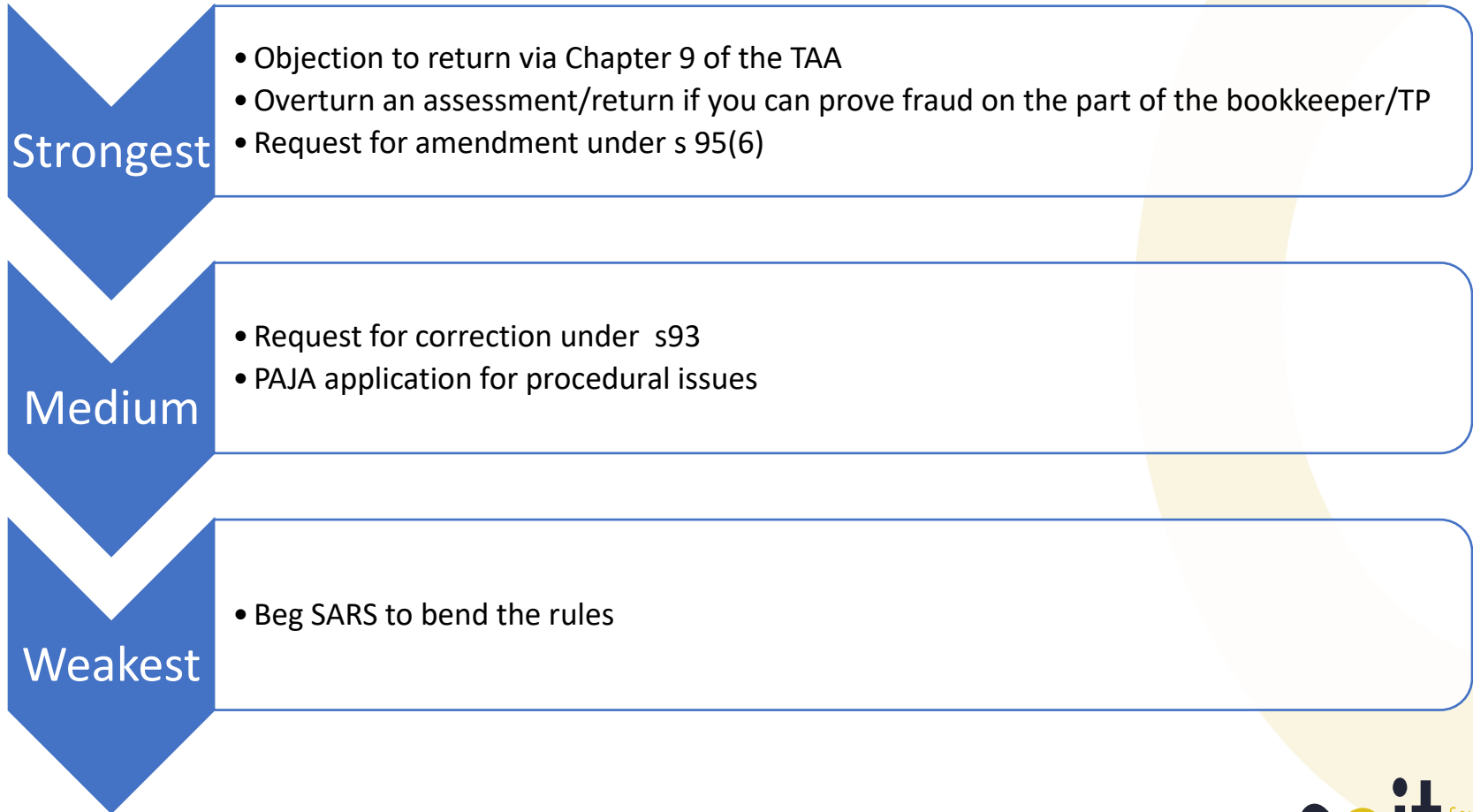
- For expenses understated/gross income over reported:
  - Re open each year of assessment
  - Remember prescription
- For income under reported/expenses overstated:
  - VDP



- **Lifman and Another v CSARS and Others (22820/2016) [2019] ZAWCHC 67 (11 June 2019)**
- A cautionary tale in making sure that if you want to object, that you do so in terms of the processes outlined in the law, not according to what is convenient to you. In addition, judges can and will come down on you heavily if they believe you are abusing the court processes to delay payment of taxes due.

- ***CSARS v Danwet (399/2017) [2018] ZASCA 38 (28 March 2018)***
- This is another case dealing with condonations of late objections. In short, if SARS refuses to hear/grant your condonation, you can't take it to the Tax Court.

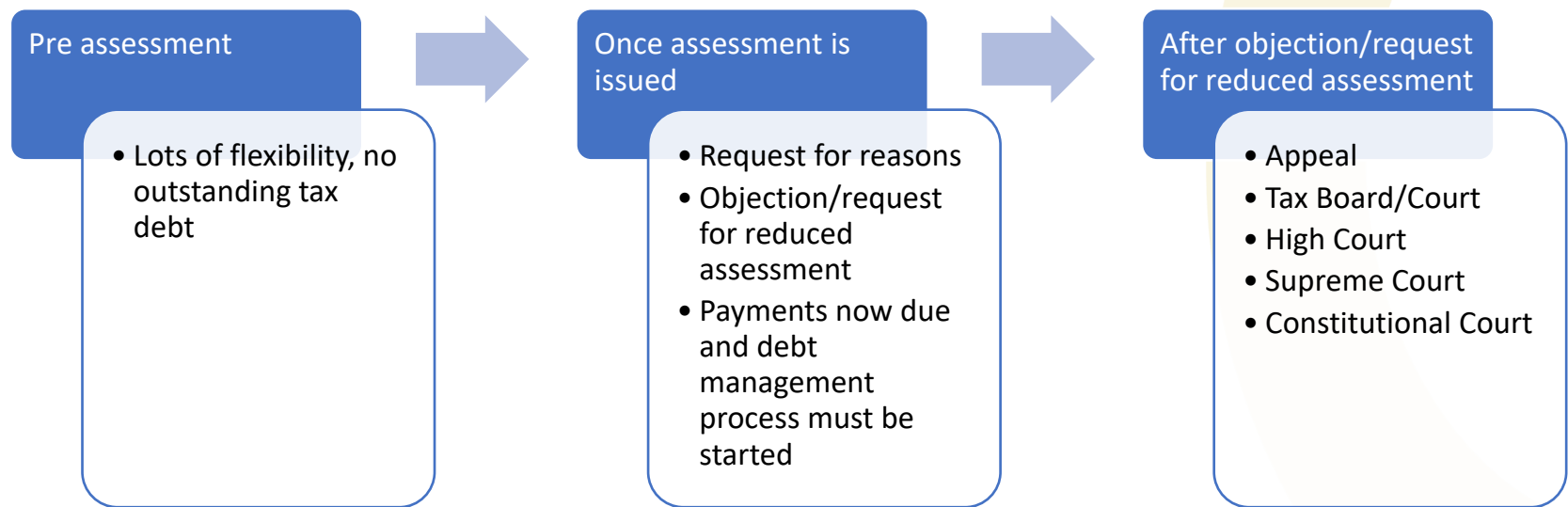
# Process therefore in terms of strongest legal argument



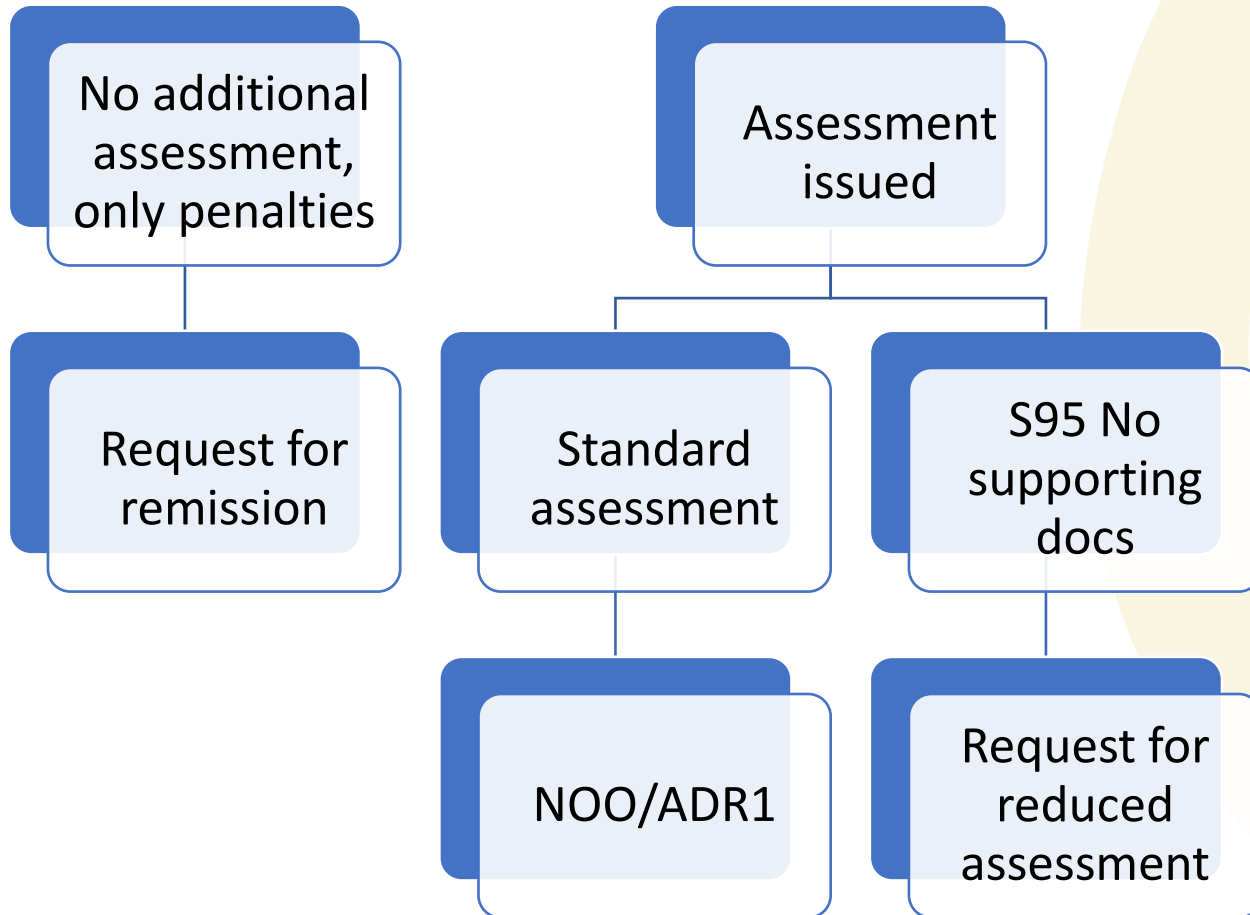
# Technically SARS can withdraw assessments

- But only if
  - Issued to incorrect taxpayer
  - Issued in regard to the incorrect tax period; or
  - Issued as a result of an incorrect payment allocation

# Always figure out where you are in the process



# Cheat sheet



# Why?

- Because the law gives us a lot of clout, until we make errors...

- ***United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service (Case no 1231/2021) [2023] ZASCA 29 (24 March 2023)***
- Essentially – you can't run straight to the High Court for tax related matters if you have not followed the objection and appeals process as required by the TAA. Extract from para 11:
- ' Section 105 is an innovation introduced by the TAA from 1 October 2011. It has moreover been narrowed down by an amendment made in 2015. Its purpose is to make clear that the default rule is that a taxpayer may only dispute an assessment by the objection and appeal procedure under the TAA and may not resort to the high court unless permitted to do so by order of that court. The high court will only permit such a deviation in exceptional circumstances. This much is clear from the language, context, history and purpose of the section. Thus, a taxpayer may only dispute an assessment by the objection and appeal procedure under the TAA, unless a high court directs otherwise.

- **I-Cat International Consulting (Pty) Ltd v CSARS (41667/2021)**
- Good news for the taxpayer. I-Cat was successful in forcing SARS to reconsider their request for a reduced assessment – in fact, the Courts even awarded them cost of two counsel. This was however, in part, only possible because the taxpayer had kept meticulous records and had followed due process.

# Alternative Dispute Resolution

A guide

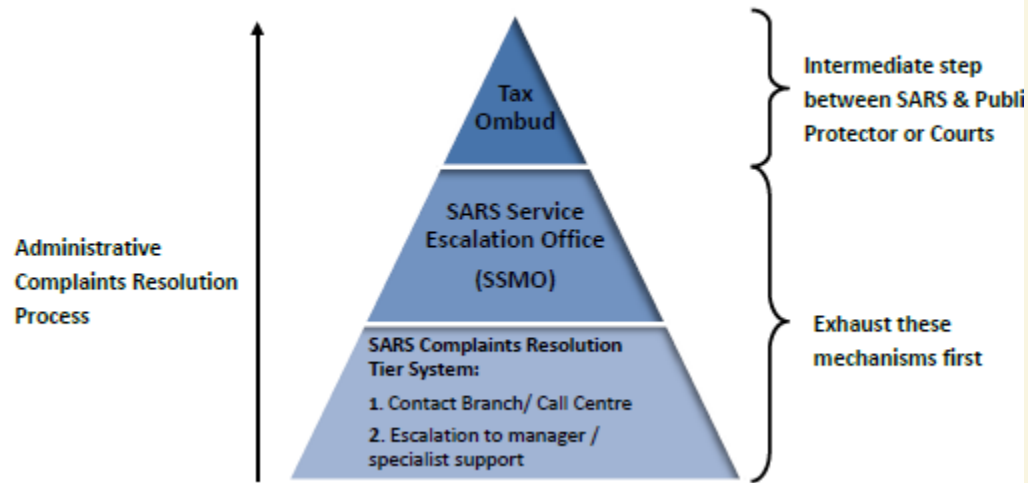
# Where to look for additional information

- <https://www.sars.gov.za/individuals/what-if-i-do-not-agree/>
- <https://www.sars.gov.za/legal-counsel/dispute-resolution-judgments/dispute-resolution-process/>
- <http://www.taxombud.gov.za/Complaints/Pages/Guide.aspx>
- In particular look for the **“SOUTH AFRICAN REVENUE SERVICE DISPUTE RESOLUTION GUIDE:GUIDE ON THE RULES PROMULGATED IN TERMS OF SECTION 103 OF THE TAX ADMINISTRATION ACT, 2011”**

149 pages of explanatory goodness, with extracts of the TAA, the full rules as well as any other relevant legislation.

# Tax Ombudsman

- Section 16(1) of the Tax Administration Act, Act No. 28 of 2011 “The mandate of the Tax Ombud is to review and address any complaint by a taxpayer **regarding a service matter, or a procedural or administrative matter** arising from the application of the provisions of a tax Act by SARS.”
- [complaints@taxombud.gov.za](mailto:complaints@taxombud.gov.za)
- [www.taxombud.gov.za](http://www.taxombud.gov.za)



# Some pointers and guidelines

- Electronic Communication Rules
  - Annexure Q of SARS ADR Guide has full details
  - Highlights:
    - If not correctly submitted on eFiling, then doesn't qualify as submitted.
    - SARS must send you a proof of receipt/submission unless specifically stated otherwise.
    - Your UserID/password qualifies as an electronic signature unless otherwise specifically stated
- Items always out of scope of ADR process
  - S89 bis interest
  - s89 interest on assessed income tax
  - Interest on STC payments

# Pay now argue later

- TAA s 164 gives SARS the right, been deemed Constitutional imperative
  - If you pay and later win, you get interest on your money from date deposited to date matter resolved
  - Request for suspension can only happen if taxpayer requests
  - If request suspension, and then don't object, suspension immediately revoked
  - Taxpayer may take suspension request to High Court if refused by SARS
  - SARS has right to revoke suspension, so subject to periodic review
  - If no suspension, SARS may begin recovering the cash. Process must be halted from day request received ending 10 days after SARS decision

- ***IT 34975/2019***

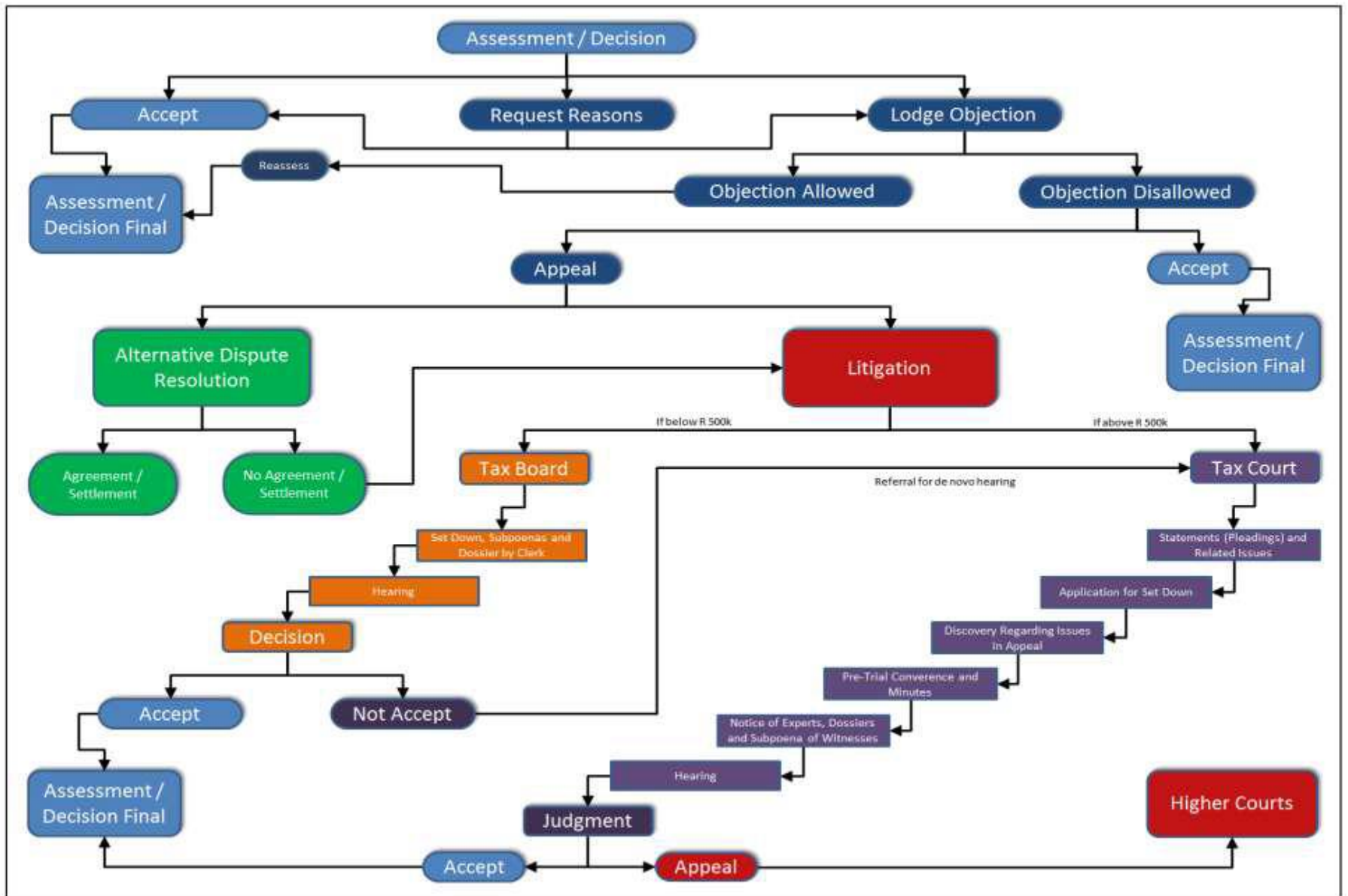
- Lack of notice is sufficient to postpone a 3<sup>rd</sup> party recovery request sent by SARS. Please note that the Courts made no findings to state that SARS had no right to get the payment, just that they had given insufficient notice. This case also highlights that SARS is willing to use the provisions of s 183 and s 184 to recover funds from persons other than the taxpayer. Please tread lightly.

# General Process should be:

- Taxpayer unhappy with Assessment
- Requests initial ADR meeting
- If still unhappy gets sent to the next level for further review (ADR 2)
- If still unhappy, then formal litigation:
  - Tax Court
  - High Court
  - Then normal legislative process and out of the hands of the TAA

# However!!

- If the assessment was issued under s95 because the taxpayer didn't submit supporting docs, then can't object and must request a reduced assessment per s95(6) – within 40 days!!



# What is an assessment?

- The determination of liability for tax, penalties & interest, or the determination of a refund
- For ADR purposes, this includes:
  - A decision not to extend the period for lodging an objection
  - A decision not to extend the period for lodging an appeal
  - Any other decision that may be objected to

- ***Commissioner for the South African Revenue Service v Langholm Farms (Pty) Ltd (1354/2018) [2019] ZASCA 163 (29 November 2019)***
- There are two key take aways from this case. Firstly, you can go straight to Court for a declaratory order after SARS has issued you with a Letter of Findings stating that there is a dispute of law. This right has been upheld.

# Must I always object?

- No
  - If factual (objective error), then follow “Request for Correction” process. This is for errors of both the taxpayer and SARS!
  - A “reduced assessment” will then be issued
  - Can’t issue the reduced assessment if:
    - More than 3 years after assessment
    - More than 5 years after self assessment
    - Return was lodged in accordance with practice generally prevailing at the time.

NB: If SARS disputes the nature of the error, you may have missed your objection window period.

NB: Assessments can be withdrawn in very limited circumstances, eg: error picked up in return more than 3 years old.

- ***Ntanyiya V SARS***
- First key point: Your objections and affidavits must tell a story. They must be “lucid, logical and intelligible” if you hope to have the Courts sympathy.
- Second Key Point: Follow due process when instituting legal process. Notification periods and notice address are not just in the TAA for our entertainment.
- Third Key Point: If you’re going to argue that a calculation is wrong, you must do so clearly, precisely and with detailed outlines. A simple statement of “it’s incorrect” cannot be sufficient.

- ***Lifman and Another vs CSARS, (22820/2016) [2019] ZAWCHC 67 (11 June 2019)***
- This case is another poster child of the importance of following the objections and appeals process in the Taxation Administration Act. In short, this particular taxpayer has been on a merry go round with SARS relating to audits and revised assessments. For each company and year of assessment in question, SARS issued the taxpayer with a Letter of Findings and revised assessments. At no point did the taxpayer ever object to these assessments. The only items the taxpayer did object to was when SARS the obtained a judicial order to recover the amounts owing (in excess of R350 million).
- There are two main take aways from this case. The first is that you cannot rely on “internal review processes” or any procedure outside of the Act to provide you with relief. The second is that in reviewing your case, the courts will look at your behaviour and relief that you did try to claim.

# Understanding of the assessment

- SARS is obliged to provide reasons for the assessment
- Rule 6 states that where a request for additional information has been submitted, the timer stops for the objection.
- SARS has to respond within 30 days if they believe the original grounds were clear enough, 45 if they have to be drafted. Extensions can be granted for:
  - Exceptional circumstances
  - Complexities
  - Principle or amount involved

# Requesting reasons for assessment

“As best as can be discerned, [SARS’s] approach was that if [it] did not understand something [it] was free to raise an additional assessment and leave it to the taxpayer to prove in due course at the hearing before the Tax Court that she was wrong. [This] approach was fallacious.

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

This erroneous approach led to an inability on [SARS’s] part to explain the basis for some of the additional assessments and an inability in some instances to produce the source of some of the figures [it] had used in making the assessments.”

- SARS vs Pretoria East Motors

# Promotion of Administrative Justice Act

- Works hand in hand with TAA
- Forces SARS to explain their reasoning, not just provide facts. Does not override timers in TAA
- Must choose ARD Rule 6 or PAJA, unless can prove that the one avenue was fruitless

# What about understatement penalties?

- Always object – unlike everything else where the onus of proof is on the taxpayer, it's on SARS here.
- No need to add much, but here are some nice case law quotes.

- ***CSARS v The Thistle Trust (516/2021) [2022] ZASCA 153 (7 November 2022)***
- This is one for the memory banks and worth a read in full: <http://www.saflii.org/za/cases/ZASCA/2022/153.html> . Summary of facts:
- The Thistle Trust is a beneficiary of various trusts that comprised the Zenprop Group. The trusts, referred to as Tier 1 Trusts comprised a group of ten vesting trusts that conduct the business of the Zenprop Group, a group of property owners and developers. In the 2014, 2015 and 2016 tax periods, the Tier 1 Trusts disposed of certain capital assets. The capital gains so realised were distributed, inter alia, to the Thistle Trust in the same tax period. The Thistle Trust, in turn, in the same tax periods, distributed the amounts it received to its beneficiaries. It treated the proceeds received as taxable in the hands of its beneficiaries.

- A second core point from this case was that the understatement penalty was reversed and considered a *bona fide* inadvertent error as the Thistle Trust had obtained a legal opinion and genuinely believed that the treatment they had applied was correct. No penalty was levied.

- ***Commissioner for the South African Revenue Service v Coronation Investment Management SA (Pty) Ltd (1269/2021) [2023] ZASCA 10 (07 February 2023)***
- Wow – what a judgement. It's not often that one court case makes a company lose over R1 billion in market cap overnight. There were two primary issues decided in the case – the impact of outsourcing on the definition of foreign business establishment in s 9D of the Income Tax Act, and the imposition of penalties.
- Let's start with the easy one – penalties. The good news for taxpayers is that this is another case which came to the conclusion that disagreeing with SARS on a matter of law is not enough to trigger the understatement penalties. The judgement even referenced the very recent judgement in *Commissioner for the South African Revenue Service v The Thistle Trust* [2022] ZASCA 153 (SCA) para 29 that this is a bona fide inadvertent error.

- ***Lance Dickson Construction CC v Commissioner for the South African Revenue Service (A211/2021) [2023] ZAWCHC 12 (31 January 2023)***
- One to keep on the records for arguing penalties with SARS. The essence of this case is that the taxpayer objected to the 25% penalty that had been raised by SARS. The gist of SARS' argument was that they had agreed to be "lenient" to the taxpayer and not charge 50%. The argument of the taxpayer was that the penalties are legally prescribed categories, and if SARS's chooses to not apply the 50%, then they can't just automatically apply the 25%. Particularly in this case, the taxpayer contends that SARS cannot simply apply 25% where SARS disagrees with the tax position taken by the taxpayer. Reasonable care was taken – therefore 25% cannot apply, SARS should have been arguing for 50% if they truly believed that the taxpayer had not carefully interpreted tax law.
- The court agreed.
- 47. Once SARS had failed in its bid to discharge the onus of proving the item (ii) penalty for which it had contended and which buttressed the case the taxpayer came to meet, that was the end the case. SARS was not entitled to ask for "the money and the box", as it were.

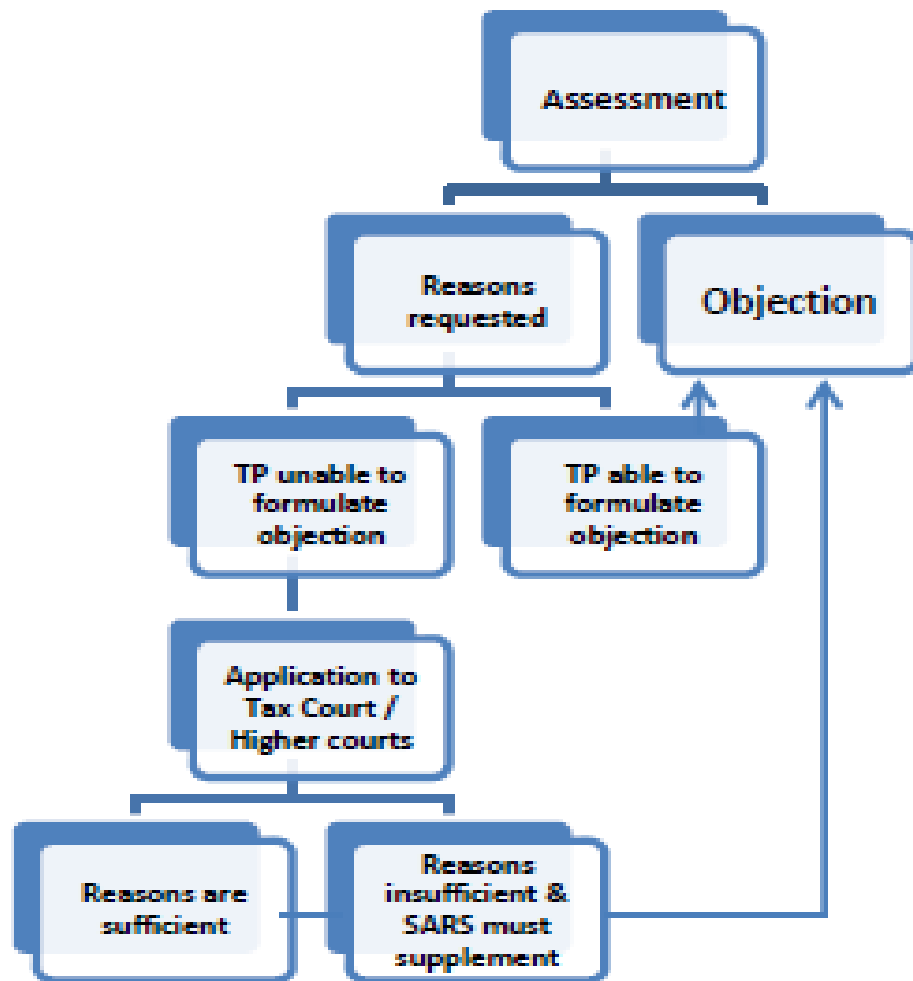
- ***LDC Taxpayer v Commissioner for the South African Revenue Service (IT 24888) [2021] ZATC 6 (18 June 2021)***
- Taxpayers beware – for two reasons. This case serves to underscore two core principles in tax law which most taxpayers find unfair.
- 
- Firstly – capital gains tax is payable when the contract is concluded NOT when the payments are due. The only delay can occur is if there are suspensive conditions in a contract. A property sale agreement is concluded when the contract is legally binding, not when transfer occurs or when the payment is received.
- 
- Secondly – the fact that all taxes are eventually paid is no argument against understatement penalties. The statement in law is “any loss to the fiscus” which includes not just the tax, but also the utilisation in resources to find the contravention. You are not safe just because you ultimately paid the tax.

- ***ITC 14055***

- This is a great discussion on what actually entails Corporate Social Expenditure and the documentation required to prove it. This is worth reading even if it is only to shake your head at the taxpayers ever changing story of what this mysterious R2 million was actually paid for. This case also contains a very thorough review of what must be considered when applying the understatement tables. In short – this got dropped to 50% as, to paraphrase, the taxpayer was too ignorant to have intentionally evaded taxes.

- ***IT 24623***
- If you're going to go to Court, make sure your documents submitted are detailed and appropriate. The taxpayer in this case was able to argue that the Rule 31 documents submitted by SARS were not sufficient to support their claim of a 100% understatement penalty. The Courts upheld this motion, indicating that the Rule 31 submission must be sufficient to provide a summarised and concise report of the key facts and arguments that are being submitted. Unfortunately this just gave SARS 15 days to amend their submission, it did not result in a waiver of the penalty.

- **14184 (Income Tax) 14186 (PAYE) 1544 (VAT)**
- A worthwhile read for everyone who has that one company that is not tax compliant. This case primarily revolves around understatement penalties, which were eventually reduced, but it goes to show that a history or track record of trying to do the right thing helps.



# Most up to date information on which form to use for objections?

- Available here:  
<https://www.sars.gov.za/individuals/what-if-i-do-not-agree/>

# Objection to be made

- 80 days after the assessment (Rule 7)
- May request extension from senior SARS official (SSO) (IN 15)
  - Not more than 30 business days unless exceptional circumstances
  - No extension if more than 3 years from date of assessment
  - Objection is based on change to practice generally prevailing
- Must be in required format (refer table at beginning)
  - Specify the grounds and amounts objected to
  - Any documents not previously submitted to support the objection
  - Power of Attorney no longer required to sign the objection

# Invalid objections (Rule 7)

- SARS has 30 days from receipt to inform you that the objection is invalid.
- Have 30 days from issue of notice to resubmit the objection
- If this 30 day period is missed, must then first object/request an extension for submission. Once granted, resubmit the objection.
- Rule 8 allows SARS to request additional information rather than rendering the whole return invalid. 30 days after receipt of objection.
- Generally 30 days for all parts of process.

- ***CSARS v Executor of Estate Late Ndlovu (A395/2016) [2020] ZAGPPHC (12 October 2020)***
- Please make sure you object to everything you want to object to in your first document. The taxpayer was denied their interest objection as this was only raised at the appeals stage.

# Now that SARS has your objection...

- Make a decision allowing the whole or part of your objection
  - 60 days from receipt of objection
  - 45 days after substantiating documents, where requested
  - SARS may ONLY extend this by 45 days after informing the taxpayer for extenuating, principle, amount or complexity.
- If SARS is late
  - Follow internal complaints process/Tax Ombudsman
  - Apply for a default judgement under Rule 56
    - Essentially a Tax Court order that compels SARS to issue a ruling, or if no good cause can be found, award in favour of the taxpayer.
    - Costs may be awarded against SARS too

# Then what?

- SARS must issue grounds for allowance/disallowance
  - This is not a rehash of the assessment, this is an explanation of why SARS didn't agree with your objection
- Appeal must then be lodged 30 days after delivery of objection outcome
  - Same extension rules apply as for objection except limit is 21 days
  - Must specify why you disagree with SARS disallowance of your objection
  - Mention whether you would like ADR process

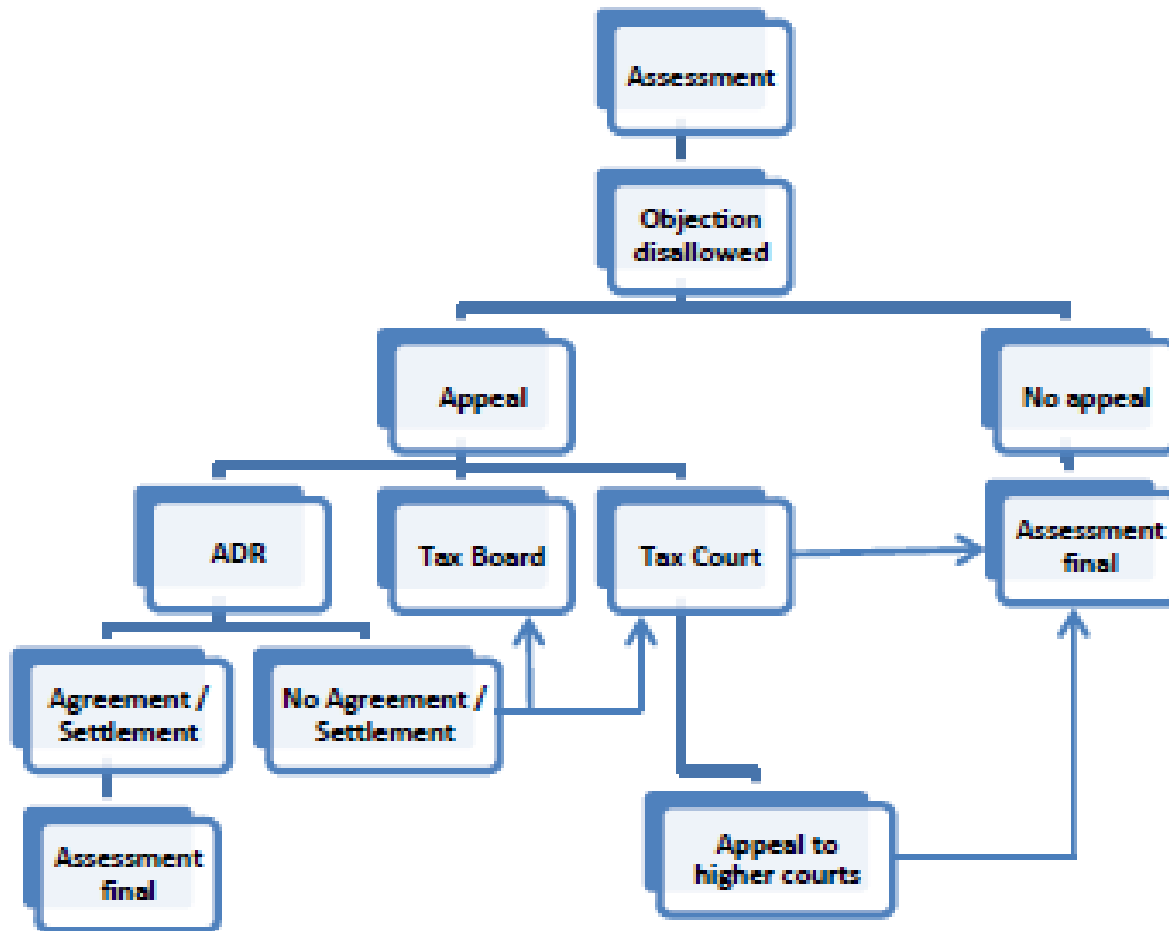
# Is your appeal bound by your objection?

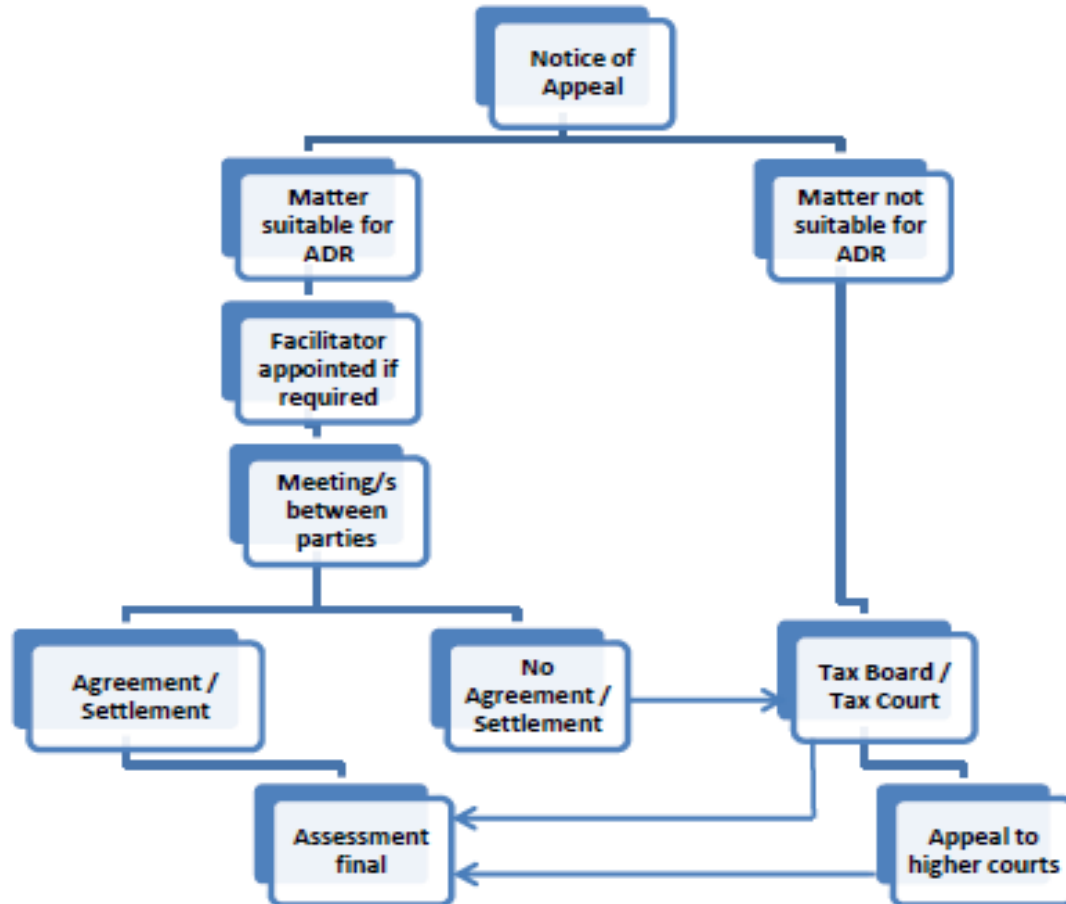
- Notice of appeal is allowed to include new grounds (Rule 10(c)(iii))
  - Can't create a new objection (eg: Previously didn't object to understatement penalty, now do)
  - If new documents are submitted as part of the appeal, SARS has a right to request documents which must be submitted 15 days after receipt of request.
  - However this gives SARS the same rights. SARS may bring completely new arguments (eg: not in production of income vs capital in nature).
  - Rule 31(3) however states that the new argument may not result in an a cancellation of the existing assessment and reissuing of a new one.

# Is your appeal bound by your objection?

- If SARS raises new grounds, taxpayer may deliver notice of discovery to force SARS to provide the documentation that supports their new grounds.
- Taxpayers grounds of appeal need only be delivered after such discovery is complete.
- See page 40 of the Guide for more detail

- ***The Commissioner for The South African Revenue Service v Free State Development Corporation (1222/2021) [2023] ZASCA 84 (31 May 2023)***
- This judgement just reiterates that where a matter is “foreshadowed” in an objection, even if a particular argument or section is not raised, then it must be allowed on appeal. In paragraph 43, the judge states:
- If an issue has been foreshadowed in the objection but was not expressly stated, there would be no real prejudice to the other party and the amendment should be granted. The taxpayer’s explanation was that it was advised by its erstwhile attorneys that the transactions between it and the DTI, were zero-rated for VAT purposes. The taxpayer thus completed the VAT 201 assessments in that manner and on that advice. The taxpayer’s objection and pleadings were also drafted in accordance with the advice received. This changed when the second legal opinion was received.
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- [44] Applications for amendments seeking to retract incorrectly admitted legal consequences are normally granted by our courts (even on appeal), for ‘the law would be prejudiced if cases were to be decided on what parties might, in ignorance, have agreed the law to be’.





# ADR process

- Aim is mediation rather than litigation
- Facilitator is available on request
- Initiated by:
  - Taxpayer in notice of appeal
  - SARS may approach the taxpayer
  - 30 day notice period for acceptance
- Not all situations apply (TAA s 145)
  - Unlikely that SARS and taxpayer will reach agreement
  - Any settlement would be contrary to law or practice generally prevailing
  - Public interest to have judicial clearance “test case”

# ADR Process

- Period starts by SARS/taxpayer acceptance of ADR process
- Must conclude within 90 days either as resolved or terminated
- Interrupts the Tax Board/Tax Court proceedings timelines.
- Facilitators must have good technical knowledge, may be SARS officials, must attempt to bring dispute to expeditious conclusion.
- Facilitators can be removed under certain circumstances, if desired

# ADR process

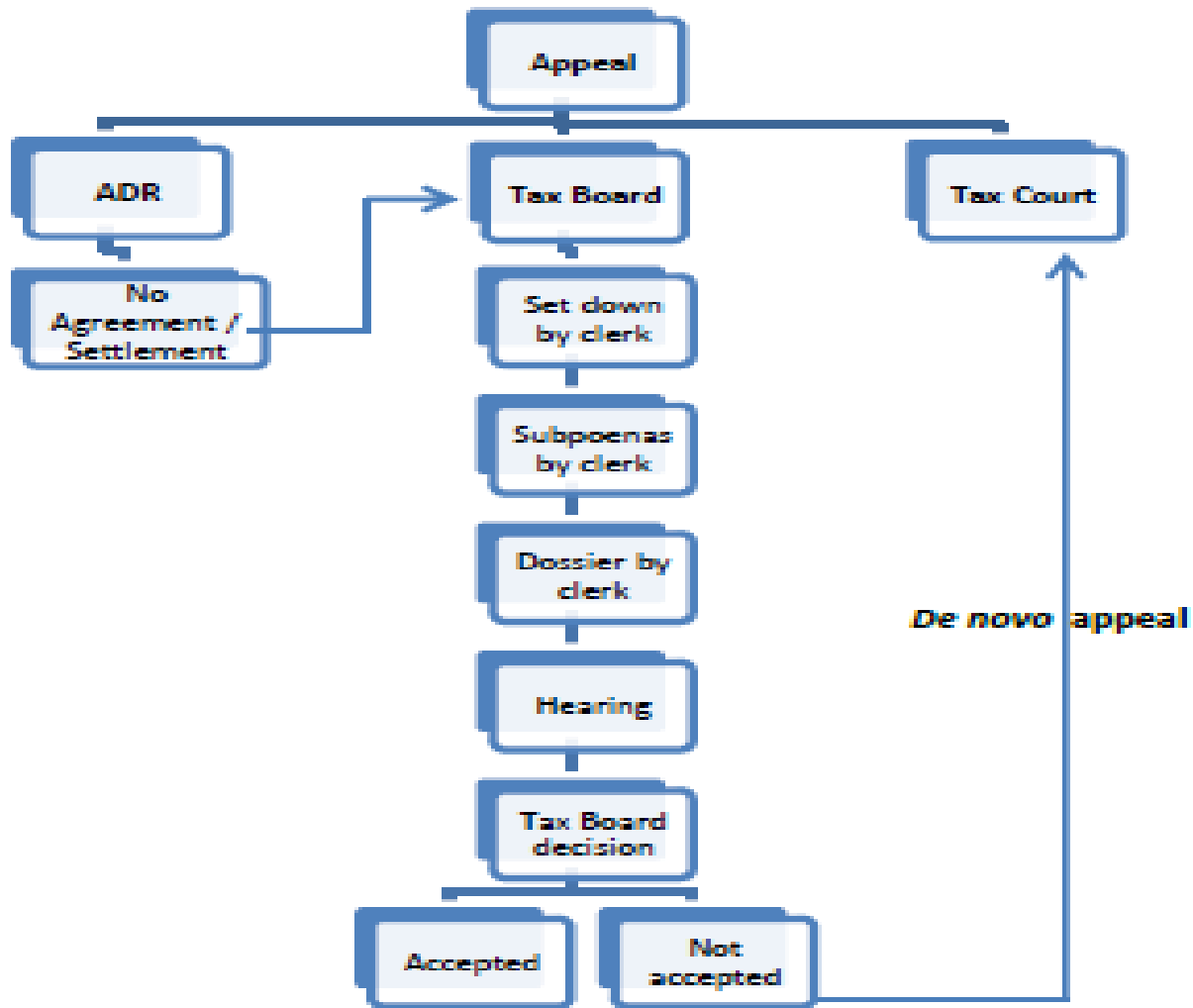
- Facilitator must arrange meeting within 20 days, if no facilitator – 30 days from start of proceedings
- Taxpayer must be physically present
- Facilitator may cancel process if parties fail to submit information or where they believe resolution will not be reached.
- Facilitator must make a formal report at the end of proceedings detailing:
  - Resolved issues
  - Issues that couldn't be resolved
  - Any other information considered necessary

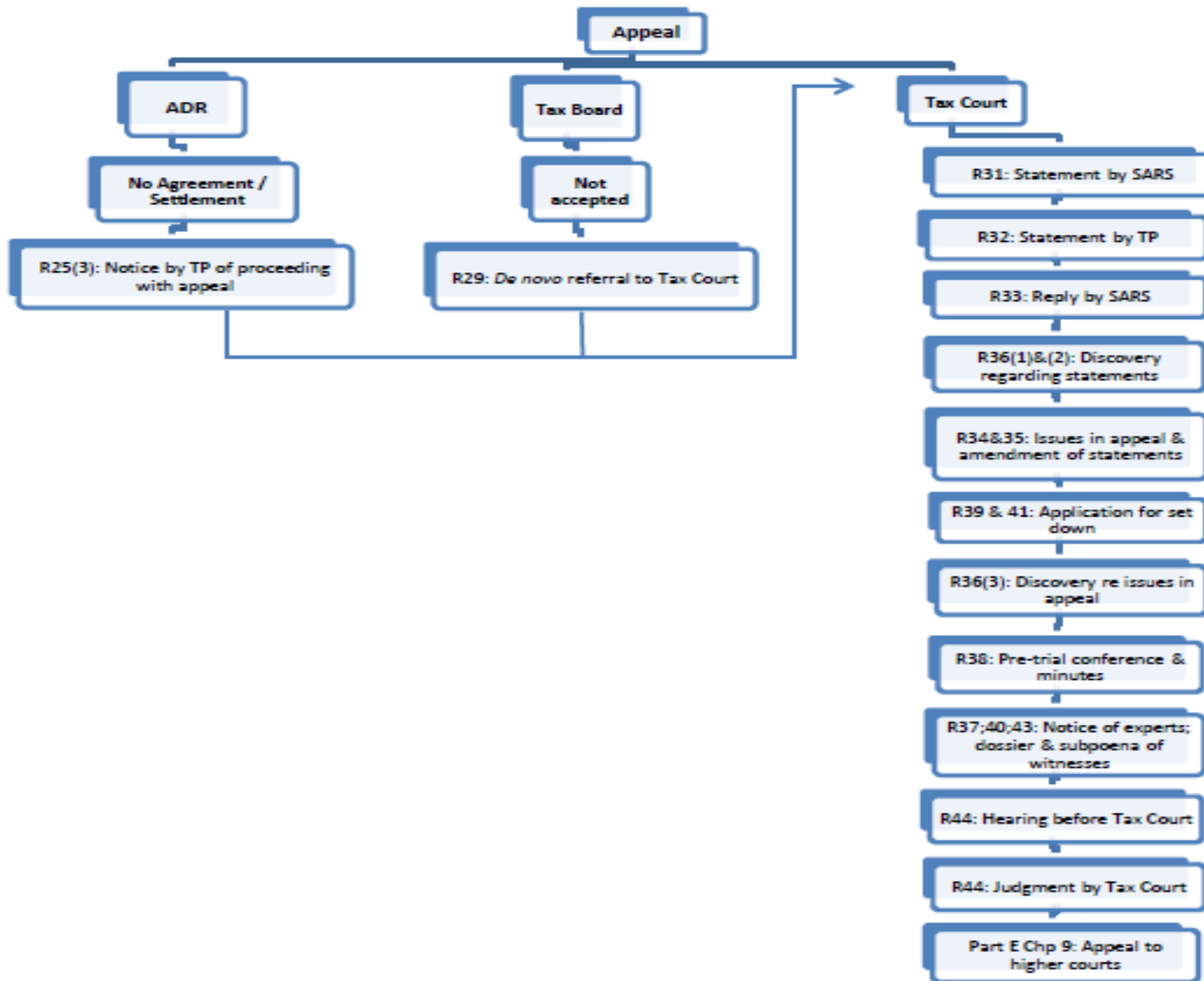
# ADR process

- As not a formal legal process, information and statements not legally binding.
- May only be made available if information was already received outside of this process or by agreement
- SARS must act on the settlement agreement/resolutions by issuing a revised assessment within 45 days of the settlement agreement being signed.
- Tax Court can convert the settlement agreement to a court order

# Settlements

- Law makes it clear that SARS must collect all taxes due as first prize
- Some situations make settlement worthwhile:
  - Overall fairness/use of resources
  - Cost of litigation
  - Complex factual issues/evidence issues which could cloud outcomes
  - Cost effective way of ensuring compliance
- Never appropriate
  - Tax evasion/fraud
  - Contrary to law/practice generally prevailing
  - Test cases, etc





# I missed a deadline – now what?

- Deadlines may be extended by agreement with SARS,
- DOES NOT APPLY TO SITUATIONS WHERE THE TAA DICTATES TIMELINES!
- Refer to Rule 3 and 4 (Page 131 of the SARS Guide)

- ***ITC Case number: 0038/2015***

- Taxpayer had missed his objections deadline. Section 104 of the TAA permits a taxpayer to object to an assessment within the period prescribed in the rules, viz. 30 days, which period may be extended but not for a period exceeding 21 business days “unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection.”
- Taxpayer tried to argue “exceptional circumstances” none of which was substantiated.
- Tried to argue that there had been a time delay as they had appointed counsel from Florida, America. Judge queried why this was necessary for a purely south African company and deemed it irrelevant.
- Key take away: Exceptional MUST be backed up by documentary proof and have substance. Your inability to engage experts does not constitute “exceptional circumstances”.

- ***S Company v Commissioner for the South African Revenue Service (IT0122/2017) [2017] ZATC 2 (17 October 2017)***
- This matter involves two applications. The first is that of the taxpayer's for default judgment in terms of rule 56 of the Tax Court Rules ('the rules'). The second is SARS' application for condonation for late filing of its answering affidavit in opposition to the default judgment application. Luckily for us, this is a case where SARS also drew the short straw of not following legal process deadlines. The end finding was as follows:
- The following order is made:
  - 1. The respondent's application for condonation for the late filing of its answering affidavit is dismissed.
  - 2. A final order is granted under section 129(2)(b) of the Tax Administration Act 28 of 2011 altering the assessments issued by SARS on 2 November 2015 in respect of the tax periods 2005 to 2010, and on 3 November 2015 in respect of the tax periods 2011 and 2012, in the manner contemplated in the applicant's notice of appeal dated 31 January 2017.
  - 3. The respondent shall pay the applicant's costs in respect of both applications, including the costs of 2 (two) counsel where employed.
- Moral of the story? Where SARS doesn't stick to the deadlines, don't be afraid to use Rule 56...

# Rules: Part A – General provisions

- Rule 1 – definitions
- Rule 2 – Prescribed form and manner and date of delivery
- Rule 3 Office of clerk of tax board and registrar of tax court
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- Rule 5 Index and pagination of documents

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- 59 Set down for hearing where no intention to oppose
- 60 Notice of intention to oppose and answering affidavit
- 61 Replying affidavit
- 62 Set down for hearing where no answering affidavit
- 63 Application for set down by respondent
- 64 Judgment by tax court

# Part G: Transitional provisions

- 65 Definitions
- 66 Application of rules to prior or continuing action
- 67 Applications of new procedures
- 68 Completion of time periods

# Some other interesting case law

- ***ITC 13720***
- You can't use denying SARS information as an argument against understatement penalties. At the core, this case is about a taxpayer being stubborn and refusing to work with SARS and a SARS auditor who presumed the worst based on that attitude. There were years worth of differing opinions with 125% penalties levied by SARS as a result. The Court upheld the 125% penalties, but also agreed to revise the assessments downward based on new information made available by the taxpayer. The taxpayer lost their argument against the penalties as they refused to make information available which changed the minds of tax experts about the conclusions drawn by SARS.
- Please don't be this taxpayer – yes, you have a right to argue. Don't argue/withhold to the point that the courts find you obstructive!

Tax Administration Act,  
No 28 of 2011

# Statement concerning accounts

- SARS may request
  - From the person who preps the financials or accounts prepared by another person in support of the submitted return
  - To submit a certificate or statement by the other person setting out the details of
    - The extent of examination of the books of accounts and source documents
    - Whether or not the entries in the books disclose the true nature of the transactions, receipts, accruals, payments or debits in so far as may be ascertained from the that examination
- Have to give copy of certificate to taxpayer in question upon request
- Companies Act....

# Duty to keep records (S29)

- A person must keep records, books of account or document that
  - Enable a person to observe the requirements of the Act
  - Are specifically required by Act or Commissioner
  - Enable SARS to be satisfied that the person has observed these requirements
- The requirements to keep record for the tax period apply to a person who
  - Has submitted a return for that period
  - Is required to submit, and has as yet not submitted
  - Is not required to submit but has been exposed to a transaction that creates a tax event

- At the request of a SARS official, produce a translation of records (S33)
- S29(3) Records need to only be retained for 5 years from the **submission** of the return or the end of the relevant tax period (if no return required)
- Need to keep records until the end of a SARS audit or investigation (Chapter 5), if applicable
- Or if the taxpayer lodges an objection or an appeal to an assessment, until matter is satisfied, concluded and decision is final.

# Interesting note

- S 29(3) only tells you that you're exempt if:
  - You've submitted a return; or
  - If you were not legally required to submit a return.

Takeaway? If you had to submit and didn't the 5 year exemption doesn't apply

- **Brits v CSARS and Another (70549-2015) [2019] ZAGPPHC 987 (18 November 2019)**
- Keep all your documents! This case revolved around a VAT debt that was raised in 2000 and brought to the fore when the taxpayer reactivated their VAT number in 2014. There was much back and forth between the accountant, taxpayer, attorneys and SARS. The end result is that the taxpayer was held to be on the hook as SARS could provide enough evidence to demonstrate that the assessment had been sent and therefore prescription didn't apply. In addition, this case is another poster child for taking significant care of which provisions you use to argue your case. The PAJA application was thrown out as not all internal remedies in the TAA had been exercised.

- ***CSARS v Char-Trade (776/2017) ZASCA 89 (31 May 2018)***
- Considering all our arguments about prescription – in short, SARS had the right to raise STC on a 2007 assessment as prescription had *not started running yet* as the taxpayer had not submitted a return as required by the TAA. This is contrary to the Tax Court ruling on the matter. Non submission is no defence!

# Forms of records kept or retained (S30)

- Must be kept or retained in
  - Their original form in an orderly fashion, and
  - In a safe place
  - In electronic format
  - As prescribed by Com in a public notice
  - In a form specifically authorised by a senior SARS official
    - acceptable to that official

# Inspection of records (S31)

- Must at all reasonable times during the required periods
- Be open for inspection by a SARS official in RSA
- For the purpose of
  - determining compliance with the requirement above
  - An inspection, audit or investigation

# Some important reminders

- An audit/verification does not stop the prescription timer.
- Until the revised assessment is issued, timings are all pretty much by agreement between the taxpayer and SARS.
- Once the assessment is issued, then the timings become legislated and rigid.
- The assessment also creates a tax debt.

Information  
gathering....

# Selection for inspection, verification or audit (S40)

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

# A few thoughts

- New HNW unit...
  - Great AI/IT infrastructure
  - More international information sharing
  - Social media?
- 
- Last not but not least: No, SARS selecting you for audit does not infringe your constitutional rights.

- ***COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES and JULIAN BROWN (561/2016)***
- In summary, a taxpayer must respond to a Lifestyle Questionnaire when requested by SARS. It is only where the taxpayer can show that the request is completely irrational that it may be reconsidered. A request for information is not classed as an audit.

- ***Carte Blanche Marketing CC and Others v CSARS (26 May 2017)***
- The essence of this case is to discuss whether the applicants had the right to compel SARS to produce documents. SARS had issued a notice of audit against the respondents on the basis of discrepancies between the bank statements and the financial statements. The respondents requested copies of the bank statements. SARS gave them a portion of the documents, but not all. SARS's key argument was that they were not compelled to release the information, and in any circumstance, the grounds on which they chose someone for audit is within their ambit to decide. The High Court held that the taxpayer was still entitled to request the documents and that High Court oversight would only be applied if the issue at hand was clear cut and would have no bearing on the underlying dispute. This was not clear in this case and as such they would not interfere. SARS was ordered to hand over the documents and pay the respondents costs.

***Cart Blanche Marketing CC and two others v Commissioner for SARS (Case No: 26244/2015)***

The following is an extract of the SARS Media release on the case

The South African Revenue Service (SARS) warmly welcomes the court's decision of 31 August 2020, which ruled in its favour in the matter involving Cart Blanche Marketing CC and two others v Commissioner for SARS (Case No: 26244/2015). SARS has over the years witnessed an increase in the number of administrative challenges to its actions. Such a legal challenge on an administrative matter delays the progress of an audit, sometimes for years, which is often the purpose of such an administrative or collateral challenge.

The case of Cart Blanche is an embodiment of such a determined effort to thwart SARS from carrying out its work lawfully. The important principle in this case was whether a decision to audit was an administrative action. If a decision to audit is an administrative act, then that decision is reviewable in terms of the Promotion of Administrative Justice Act or principle of legality. If that were the case, SARS would have had to demonstrate that the decision to audit is rational and justifiable. This would have to take place before the actual audit engagement.

At the heart of the dispute, is the taxpayers' non-compliance with the Customs and Excise Act. This led SARS to expand its scope of investigation to include a risk assessment on the taxpayer's compliance with Value Added Tax (VAT) and Income Tax. This process established that there were discrepancies in the turnovers declared by the taxpayers and their customs declarations. This led to the taxpayers being selected for audit. The taxpayers elected not to participate in the audit nor provide any of the requested information as they contended their tax affairs were in order and that the decision to audit them was unlawful. SARS continued with an audit and brought its findings to the taxpayers.

Subsequently, the taxpayers launched a review application in the High Court in April 2015. The taxpayers requested the court to review and set aside the Commissioner's decision to audit the taxpayers, arguing that the decision was unlawful for being arbitrary and irrational and done for ulterior motives and in bad faith. SARS opposed the application on the basis that a decision to audit the taxpayer is not subject to review as it is not a reviewable administration action under the principle of legality.

The High Court Gauteng concurred with SARS in its judgment, which was delivered on 31 August 2020. The court found that to select a taxpayer for an audit, does not adversely affect a taxpayer's rights. An audit by SARS is merely the start of an investigation and the initiation thereof is not subject to review, as the decision is incomplete.

This landmark decision, following a similar judgment in the Eastern Cape High Court in 2016, represents a major victory for SARS. It communicates a clear and unequivocal message that SARS will not be deterred in taking lawful actions that are derived from and are consistent with the relevant legislation.

Furthermore, it conveys an unambiguous message that SARS has the capacity to detect and make it costly for non-compliant taxpayers who opt to use our courts to frustrate and delay legitimate and lawful action. Despite years of determined efforts to denude the organisation of its capacity to combat illicit and unlawful activities, SARS is committed to leave no stone unturned in seeking and punishing those that wilfully transgress the law and engage in criminal malfeasance to deprive the fiscus of legitimate resources.

SARS aims to provide the necessary clarity and certainty to compliant and honest taxpayers, and to make it easy and seamless for them to comply with their legal obligations. In the same vein, SARS will make it hard and costly to non-compliant taxpayers who are intentionally committing a crime. The same message should go to tax preparers who cross the line by aiding and abetting tax evasion. The crime of tax evasion ranks in the same category as that of those who engage in PPE corruption, and must be dealt with sternly and decisively. SARS will do its part to stop any descent into lawlessness.

# Keeping taxpayers informed (S42)

- A SARS official
  - involved in or responsible for the audit
  - In the form or manner prescribed (Com in public notice)
  - Provide the taxpayer with a report indicating the stage of completion of the audit
  - Every 3 months...
- Upon conclusion of the audit or a criminal investigation, and
  - where the outcome was inconclusive
  - SARS must inform the taxpayer within 21 business days

- **[IT13726](#) *Whether the Respondent procedurally conducted a valid audit and whether the Appellant was entitled to farming expenses and a retrenchment benefit as a deduction***
- This is a great case to keep as a reference. In short, the taxpayer got an additional assessment kicked out as SARS did not follow due process with an audit. A lot of this case centered around procedural failings on SARS's part about keeping the taxpayer informed. Bookmark this one!

- Upon conclusion of an audit or a criminal investigation, and where
  - The audit identified potential adjustments of a material nature
  - SARS must within 21 days provide the taxpayer with
    - A document containing the outcome of the audit
    - Including the grounds for the proposed assessment or decision referred to in S104(2)
- The taxpayer must respond in writing within 21 days upon receipt of the above, to the facts and conclusions detailed in the document
  - Can request a further period

- Taxpayer has the right to waiver the right to receive the “outcome of audit doc”
- If a Senior SARS official has reasonable belief that providing this document would
  - Impede or prejudice the purpose, progress or outcome of the audit
  - S42(5) allows them not to provide the following reports
    - Stage of completion
    - Outcomes of the audit
  - Only to be used in exceptional circumstances
    - Still subjective....

- If a senior SARS official triggered their right not to furnish the above reports
  - SARS may issue an assessment or make a decision based on the audit
  - And the grounds of the assessment must be furnished within 21 days of assessment or decision
  - May request additional time based on the complexity of the matter

- ***IT 2017/44380***

- During the course of an audit, SARS had effectively seized all of the original documents of the taxpayer. SARS then proceeded to issue a letter of audit findings. The taxpayer requested that SARS provide them with documentation to back up the findings, seeing that they had no proof of their own. SARS, for the most part, refused to release the documents. The core argument of the taxpayer was that s 42 of the Taxation Administration Act gave them the right to request the documents and SARS should comply. In this matter the Court agreed. The Court also did not agree with SARS's argument that the taxpayer could simply object once the assessment had been issued. The core difference being that once an assessment issued, SARS has the right to collect on the amount.

# Referral for criminal investigation (S43)

- If at any time before or during the course of an audit
  - It appears that a taxpayer has committed a serious tax offence
  - The investigation of the offence MUST be referred to a Senior SARS official responsible for criminal investigations
  - For a decision as to whether a criminal investigation should be pursued
- Serious tax offence =
  - Person may be liable on conviction to more than 2 yrs imprisonment without the option of a fine, or
  - A fine exceeding the equivalent amount of a fine under the Adjustment of Fines Act, 1991

- Relevant material = any information, document or thing
  - that is foreseeably relevant for
  - tax risk assessment,
  - assessing tax,
  - collecting tax,
  - showing non compliance with an obligation under a tax Act, or
  - showing that a tax offence was committed

- Relevant material obtained under Chapt 5 from the taxpayer
  - after the referral
  - Must be kept separate from the criminal investigation
- If an investigation is referred
  - The relevant material and files relating to the case must be returned to the SARS official responsible for the audit if:
    - No criminal investigation is pursued
    - The investigation is terminated
    - Referral to prosecution results in a decision not to prosecute

# Conduct of a criminal investigation (S44)

- During a criminal investigation
  - SARS must apply the info gathering powers in terms of Chap 5
  - With due recognition of the taxpayers constitutional rights as a suspect in a criminal investigation
- In the event that a decision is taken to pursue the criminal investigation of a serious tax offence
  - SARS may make use of relevant material obtained prior to the referral
- Relevant info obtained during a criminal investigation may be used for purposes
  - Of audit
  - subsequent civil and criminal proceedings

# Inspection (S45)

- When can SARS arrive at premises to conduct an inspection?
  - For the purpose of the administration of the tax Act
  - And without prior notice
- A SARS official may arrive at a premises
  - if he has a reasonable belief
  - that a trade or enterprise is being carried on
  - And conduct an inspection to determine only
    - The identity of the person occupying the premises
    - Whether the person occupying the premises is registered for tax
    - Whether that person keeps the records, books of account and documents required

- A SARS official may NOT enter a dwelling-house or domestic premises for purposes of an inspections
  - Without the consent of the occupant
  - Except if any part thereof is used for the purpose of trade
- Trying to expand the tax net....

# Request for relevant information (S46)

- SARS may,
  - for the purposes of administration of a tax Act in relation to a taxpayer,
  - whether identified by name or otherwise objectively identifiable,
  - require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires
- Relevant material required by SARS
  - Must be referred to in the request with reasonable specificity

- A request by SARS for relevant material from
  - A **person other than the taxpayer**
  - Is limited to relevant info related to the records maintained or that should reasonably be maintained by the person in relation to the taxpayer
- The person receiving such a request must submit the info to SARS at the place and within the time specified by SARS
  - Period may be extended by SARS if good cause shown
- SSO may require an oath or solemn declaration
- SSO may require info wrt taxpayers in an objectively identified class of taxpayers

- ***COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES and JULIAN BROWN (561/2016)***
- In summary, a taxpayer must respond to a Lifestyle Questionnaire when requested by SARS. It is only where the taxpayer can show that the request is completely irrational that it may be reconsidered. A request for information is not classed as an audit.

# The really bad side of s46

- 9 – If the taxpayer fails to provide information held by a non resident connected person, this cannot later be produced in Court. Court may include this material if they accept that the “non production” was due to circumstances beyond their control.

# Production of relevant material in person (S47)

- Is an interview
- A SSO may, by notice,
  - require a person, whether or not chargeable to tax,
  - to attend in person at the time and place designated in the notice
  - for the purpose of being interviewed by a SARS official concerning the tax affairs of that person
- If the interview
  - Is intended to clarify issues of concern to SARS to render further verification or audit unnecessary
  - Is not for the purpose of a criminal investigation
- A person may decline
  - Place of interview and taxpayers residence/place of business exceeds 200km (return)

# Field audit (S48)

- A SARS official may require a person
  - With 10 days prior notice
  - Make available at the person's premises
  - specified in the notice relevant material
- The notice must
  - State place, date and time that the audit/investigation is due to start
    - Must be during normal business hours
  - Indicate the initial basis and scope of the audit/investigation
    - Notice may be varied if the person gives reasonable grounds
    - At least 5 bus days before date listed in the notice
- Person may waiver right to notice
- Same rules apply to entering a dwelling/domestic premises.

# Assistance during field audit/criminal investigation

- Must provided reasonable assistance as is required by SARS to conduct audit/investigation
- This includes
  - Appropriate facilities, if available
  - Answer related questions
  - Submit relevant material
- No one (without just cause) can
  - Obstruct a SARS official from doing their work
  - Refuse to give access or assistance as required
- Can recover photocopy costs (per PAIA) at completion of audit/investigation or on a monthly basis

# Inquiries

- S50 – Authorisation for inquiry
- Judge may (on application by SSO)
  - grant an order for a person (per S51(3))
  - to be designated as a presiding officer in an inquiry
  - Application must be supported by info obtained under oath/solemn declaration that support the facts
  - Inquiry can be for the administration of this Act
- S51 presiding officer must be per S111 (Appointment of chairpersons)

- Inquiry order
- Judge must be satisfied that there are reasonable grounds that
  - a person has
    - failed to comply with an obligation per a tax Act
    - Has committed a serious tax offence, and
  - Relevant material is likely to be revealed in the inquiry that provides proof of the above
- The order referral must
  - Designate the presiding officer
  - Identify the person
  - Refer to the offence/ failure to comply
  - Reasonably specific to ambit of inquiry
  - Be provided to presiding officer

- Notice to appear
  - Presiding officer may request
- S52 Inquiry proceedings
  - Presiding officer
    - Runs the proceedings as he sees fit
    - Must record proceedings & evidence in the same manner as a court of law
    - Has the same powers as a President of a tax court (S54)
    - Can exclude a person if PO deems prejudicial
  - Can have a representative if called as a witness
  - Proceedings are private & confidential (S56)

- SARS can use evidence from an inquiry in a subsequent proceeding
  - But not a criminal matter (S56 incriminating evidence)
- Person can not refuse to answer on grounds that may incriminate (S57)
- Info can only be used in a criminal matter if it relates to
  - The oath
  - False statements
  - Failure to answer question lawfully, fully and to the satisfaction of the person questioning
- S58 Inquiry not suspended by criminal or civil proceedings

# Search & Seizure

- (S59) A SSO may if necessary authorise the application for a warrant under which
  - SARS may enter a premises
  - where relevant material is kept
  - To search the premises and any person present
  - And seize relevant material
- (S60) SARS must apply ex parte to a judge for the warrant
- Unless estimated amount under dispute is part of an audit/investigation and under a certain value (per notice)
  - Then apply to a magistrate

- Judge/magistrate need to be satisfied as with an inquiry
- Warrant must be exercised within 45 business days and a further period deemed appropriate by the Courts.
- SARS official needs to produce the warrant when carrying out a search
  - Owner not present – affix warrant in a prominent and visible place
- No warrant = no search
  - Unless it is a “search without a warrant”

# Carrying out a search (S61)

- The SARS official may
  - Open/caused to be open/remove anything that is suspected to contain relevant material
  - Seize any relevant material
  - **Seize and retain a computer or storage device** in which relevant material is stored for as long as necessary to copy the required
  - Make extracts from or copies of relevant material, and require from a person any explanations
  - If the premises listed is a vessel, aircraft, vehicle
    - Stop and board, search and question

- SARS official
  - Make an inventory of everything in the form, manner and time that is reasonable and provide a copy
  - Must conduct the search with a strict regard for decency & order.
    - Same gender must search same gender
  - May request assistance from police
    - Who must provide it.
- SARS official must ensure material is preserved and retained until no longer required for proceedings

- (S62) Search a premises not identified in warrant
- SSO needs reasonable grounds to believe
  - Relevant material at this location may be removed or destroyed
  - A warrant can not be obtained in time before the above happens
  - Any delay in obtaining the warrant would defeat the purpose of the search & seizure
- SARS official may go ahead as if premises was included in warrant

- (S63) Search without warrant (S61(4)-(8) applies)
- SSO may exercise powers as per S61(3) if
  - Owner consents
  - SSO has reason to believe there may be imminent removal and destruction of relevant material likely to be found
  - If SARS had to apply for a warrant it would have been issued
  - Any delay in getting the warrant would have defeated the purpose of it
- SARS official must inform the owner
  - that the search is being conducted per this section
  - The reason – failure to comply or the tax offence
- Still can't enter a domestic property (unless used for trade) without owners consent

- (S64) Legal professional privilege
- If relevant material subject to the above,
  - SARS must arrange for an attorney from a panel appointed by S111 to be present during the search & seizure
  - Can substitute appointed attorney if they are not available
  - If attorney not present when material having legal professional privilege is detected
    - SARS must seal the documents
    - Make arrangements for the appropriate attorney to take receipt
    - Hand over material as soon as reasonably possible

- (S65) Persons right to make copies
  - Person whose affairs relate to relevant material that has been seized may examine and copy it
  - Copies made at the persons own cost (PAIA)
  - During normal business hours
  - Under supervision of SSO
- (S66) Application to have relevant material returned or costs for damages
  - Person may apply
  - If SARS refuse, can go to the High Court
  - Decision at Courts discretion

# Disclaimer

This seminar is presented for information purposes only and does not constitute tax advice. Please contact your tax practitioner for advice tailored to your specific circumstance.