TAX UPDATE **PREPARED BY: JOHAN KOTZE**

FOR PERIOD: 1 JULY 2012 – 30 SEPTEMBER 2012

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1. INTRODUCTION

The purpose of this update is to summarise the tax developments that occurred during the third quarter of 2012 (i.e. 1 July 2012 to 30 September 2012), in relation to Income Tax and Value-Added Tax (VAT). Johan Kotze, Bowman Gilfillan's Head of Tax Dispute Resolution, has compiled this summary.

The aim of this summary is for clients, colleagues and friends alike to be exposed to the latest developments and to consider areas that may be applicable to their circumstances. The reader is invited to contact any of the members of Bowman's tax team to discuss their specific concerns and, for that matter, any other tax concerns.

An aspect of interest covered in this update is the Oceanic Trust Co case, which the taxpayer has lost, applying for declarotors, but certainly not the end of the dispute. This matter will certainly become part of South Africa's tax landscape.

The update is dominated by the Tax Administration Act, and the Short Guide on this Act, which SARS published. This Act commenced on 1 October 2012 and will from now on have to be read and considered when taxpayers interact with SARS, together with the specific tax act.

Enjoy reading on!

2. MEDIA STATEMENTS

2.1 Proclamation No. 51 of 2012: Tax Administration Act, 2011, commencement

The Tax Administration Act, 2011, shall commence on 1 October 2012, except for:

- section 187(2),(3)(a) to (e) and (4)
- section 188(2) and (3)
- section 189(2) and (5)

and

- Schedule 1 of TAA that amends or repeals a provision of a tax Act relating to interest under that tax Act, to the extent of that amendment or repeal.

2.2 Proposed additional to 2012 Tax Laws Amendment Bills to close tax avoidance schemes related to dividend tax

I. Background

When significant tax avoidance schemes are identified, the Minister of Finance reserves the right to make an extraordinary announcement and take urgent steps to close-down such loopholes to protect the fiscus. This option is today exercised in relation to tax avoidance schemes related to the Dividends Tax and will take effect on the date of announcement.

The Dividends Tax came into effect on 1 April 2012 at a rate of 15% and is designed to replace the former Secondary Tax on Companies. The Secondary Tax on Companies applied at the company level, leaving the combined company rate above 30% (a

rate above the international norm). The Dividends Tax accordingly applies to dividends at the shareholder level so as to avoid this concern. This shift to the shareholder level is in sync with modern international trends.

One consequence of the change is the differing rates applicable depending on the shareholder involved. As a result, dividends paid to pension funds are now exempt. Dividends paid to domestic companies are also generally exempt on the basis that they will be taxed once the profits are eventually paid via further dividends paid to other types of shareholders (e.g. natural persons). Dividends paid to certain foreign shareholders may now be eligible for tax treaty relief.

II. Concerns

A. Dividend schemes involving foreign shareholders

A growing number of advisors are advocating a tax scheme for the benefit of foreign shareholders that arguably reduces the Dividends Tax rate to zero (without any reliance on a tax treaty). These schemes essentially seek to convert the taxable payment of dividends into exempt compensation, gains or income upon disposal. This conversion is arguably accomplished in a number of ways on the alleged basis that the scheme allows for the conversion of Rand denominated dividends into amounts denominated in a foreign currency (even though this conversion could occur through other means). These conversion schemes come in a variety of forms, the most notable of which are described below.

Example 1.

Facts: Listed Company declares dividends to its shareholders. After declaration, but before payment, Foreign Shareholder expects to receive R100 000 of dividends from Listed Company. Foreign Shareholder sells the right to these dividends to Independent South African Company in exchange for a foreign currency equivalent (less a fee). The stated purpose of the transaction is to convert the

Rand dividend amount to foreign currency, but the real purpose of the transaction is to eliminate Dividends Tax.

Alleged result: If form fully governs, the sale of dividend rights by Foreign Shareholder is viewed as foreign source income (outside South African taxing jurisdiction). The acquisition of dividends by way of cession is included in the income of Independent South African Company, but the repayment of the equivalent amount (as a manufactured dividend) allegedly qualifies for an offsetting deduction.

Example 2.

Facts: Listed Company declares dividends to its shareholders. After declaration, but before payment, Foreign shareholder expects to receive R800 000 in dividends from Listed Company. Foreign Shareholder sells the shares cum dividend to Independent South African Company for $1 million. Foreign Shareholder then repurchases the same shares for $900 000 (after the dividend is paid to Independent South African Company and after subtracting the fee). The stated purpose of the transaction is to convert the Rand dividend amount to foreign currency, but the real purpose of the transaction is to eliminate Dividends Tax.

Alleged result: The sale of the shares by Foreign Shareholder is viewed as foreign source income (outside South African taxing jurisdiction). The receipt of dividends by South African Company after the sale is allegedly viewed as an exempt company-to-company dividend.

Example 3:

Facts: Listed Company declares dividends to its shareholders. After declaration, but before payment, Foreign shareholder expects to receive R800 000 in dividends from Listed Company. Foreign Shareholder lends the shares (including the implicit dividend expectation) to Independent South African Company. During the lending period, Independent South African Company receives R800

000 of dividends on the borrowed shares but must repay the corresponding foreign currency equivalent to Foreign Shareholder (less a fee). This repayment is in the form of manufactured dividends. The stated purpose of the transaction is to convert the Rand dividend amount to foreign currency, but the real purpose of the transaction is to eliminate Dividends Tax.

Alleged result: The share loan by Foreign Shareholder is either viewed as a non-taxable loan or as a foreign source disposition (outside South African taxing jurisdiction). The receipt of dividends by South African Company is included in the income of South African Company but the repayment of the amount (as a manufactured dividend) allegedly qualifies for an offsetting deduction.

Example 4

Facts: Foreign Person is seeking to acquire Listed Company shares without being subject to the Dividends Tax in respect of those shares. In order to achieve this result, Independent South African Company issues a derivative (e.g. a stock future or a contract for difference) that provides Foreign Person with the same yield as Listed Company Shares. Independent South African Company acquires an equivalent number of Listed Company shares as a hedge in relation to the derivative. Listed Company subsequently declares and pays a dividend amounting to R100 000 in respects of the shares held by Independent South African Company.

Result: The gain or loss by Foreign Person in respect of the derivative is viewed as foreign source income (outside South African taxing jurisdiction); including any amount determined with reference to the R100 000 dividends. Independent South African Company will be exempt upon the initial receipt of the R100 000 dividends and arguably qualifies for a deduction in respect of payments to Foreign Person pursuant to the derivative obligation.

B. STC credit schemes

As a transitional measure, taxpayers with STC credits under the pre-existing Secondary Tax on Companies can carry these credits into the new Dividends Tax for a three year period. STC credits are premised on the notion that profits in the form of dividends were once subject to the STC. As stated in the explanatory memorandum associated with the legislation, STC credits are designed so that the same profits are not subject to tax again if passed along via further dividends. That said, National Treasury has expressed longstanding concerns that the mixing of old and new systems could give rise to unintended losses to the fiscus but proceeded with a limited transition rule at the strong insistence of the private sector.

Unfortunately, a small group of aggressive taxpayers have sought to exploit alleged defects in the transitional rules with the purpose of generating STC credits even though no STC was ever paid on the underlying profits. The basic essence of the scheme was to pay exempt dividends between group members during the last dividend cycle before the 1 April effective date of the new Dividends Tax so as to generate STC credits. This creation of STC credits in respect of profits never previously subject to the Secondary Tax on Companies is in clear violation of basic tax principles and in clear violation of the stated intention of the proposed relief. Most tax advisors accordingly advised against entering into schemes of this nature with the exception of an aggressive few.

III. Proposal

A. Closure of dividend schemes involving foreign shareholders

Given the above, schemes involving the conversion of dividends into other forms of non-taxed income will be closed with immediate effect (i.e. from the date that this media statement is released). More specifically, the anti-avoidance rules will apply to eliminate the benefit of the dividend conversion schemes outlined above.

In essence, if a domestic company receives a dividend by way of

cession after declaration, the domestic company will be viewed as making a dividend in specie in respect of the consideration issued therefore. If a domestic company acquires the share by way of loan and pays a manufactured dividend in respect of dividends arising from that share loan, the manufactured dividend will be treated as a dividend in specie. If a domestic company acquires a share after a dividend declaration and resells that share to the seller (or a connected person thereto), the domestic company will be treated as having made a dividend in specie to the extent that the purchase price represents compensation for the dividend declared. Lastly, any amount paid by a domestic company pursuant to a share derivative (e.g. a share future and contract-for-difference) will be treated as a dividend in specie to the extent the amount is determined with reference to a dividend declared.

As a result, the domestic company paying these amounts will be subject to the Dividends Tax in respect of these compensating amounts. The exact wording of this anti-avoidance legislation is attached for comment (see Annexure A).

Example 1:

Facts: Listed Company declares dividends to its shareholders. After declaration, but before payment, Foreign shareholder expects to receive R100 000 of dividends from Listed Company. Foreign Shareholder sells the right to these dividends by way of cession to Independent South African Company in exchange for a foreign currency equivalent.

Proposed result: Independent South African Company remains exempt from the Dividends Tax in respect of the actual dividends (as an exempt company-to-company dividend). For purposes of the normal tax, the dividends received are included in income but the payment of the foreign currency equivalent is potentially deductible. However, the payment of the foreign currency equivalent will now be viewed as a dividend in specie for purposes of the Dividends Tax. Independent South African Company is accordingly subject to the

Dividends Tax (with possible relief should the scope of a tax treaty cover the payment).

Example 2:

Facts: Foreign Person enters into a contract-for-difference with Independent South African Company with the value of that contract based solely on the value of a share of Listed Company including dividends arising in respect of those shares. Independent South African Company acquires Listed Company shares in order to fully hedge the contract-for-difference.

Proposed result: Any payment by Independent South African Company in respect of the contract-for-difference will be treated as a dividend in specie for purposes of the Dividends Tax. Independent South African Company to the extent the payment is determined with direct or indirect reference to a dividend. This payment is accordingly subject to the Dividends Tax (with possible relief should the scope of a tax treaty cover the transaction).

B. STC credit schemes

When the STC credit was proposed, the stated intention was to provide taxpayers with a starting STC credit as of 1 April 2012 equal to the STC credit equivalent that would have existed on 1 April 2012 had the Secondary Tax on Companies remained in effect. This starting STC credit was designed to equal: (i) the dividends accrued during the last dividend cycle before that 1 April 2012 date, plus (ii) excess accrued dividends from prior cycles, less (iii) dividends declared. These rules were intended to work in tandem with the pre-existing STC credit system, which essentially operated on the same basis. Under that system, 'no regard' was to be had for dividends accrued in respect of dividends not subject to the Secondary Tax on Companies (see the definitions of 'dividend cycle' in sections 64B(1) and 64D read in context with section 64B(3A)).

It has accordingly been proposed that the STC transitional rules be more closely linked to the old system to make absolutely clear that

STC credits cannot arise from dividends never previously subject to the Secondary Tax on Companies. The revised language in this regard has already been included in the draft bill released as of 5 July 2012. In addition, the draft legislation will be revised so that the company paying a dividend with overstated STC credits becomes liable for any tax shortfall. As a practical matter, this liability must fall on the paying company because only the company paying the dividend has control over these calculations. Regulated intermediaries and the ultimate shareholders should not be subject to any Dividends Tax liability because these parties merely relied on STC credit relief as alleged by the company payor. All of these changes take effect as of 1 April 2012 (like all other technical corrections proposed in relation to the Dividends Tax).

3. TAX CASES

3.1 Oceanic Trust Co. Ltd No v C:SARS

Oceanic Trust Company was a company registered and incorporated under the company laws of Mauritius with its principal place of business in Port Louis, Mauritius, and it was the sole trustee of a trust, Specialised Insurance Solutions (Mauritius) ('SISM') which was established and registered on 23 November 2000 in Mauritius.

SISM was established by a Deed of Settlement and the agreement provided that Oceanic Trust Company was the original trustee of SISM and that the proper law of the deed of settlement was that of Mauritius, that the laws of Mauritius governed the validity of the settlement, its construction, effects and administration and that the trustees shall maintain their principal place of business at, and shall conduct their affairs from premises in Mauritius.

SISM was registered as an offshore trust in accordance with section 29 of the Mauritius Offshore Business Activities Act 1992 and was licensed in Mauritius to conduct business as a provider of long-term insurance. It was

also registered as a trust under the South African Trust Property Control Act.

SISM's main activity was to carry out captive re-insurance business and it derived all its business from mCubed Life Limited, a South African registered company and it was set up to conduct business as a captive reinsurer of mCubed Life Limited. The premiums of the policies of reinsurance by mCubed Life with SISM were transferred to SISM and constituted assets invested by SISM in South Africa and elsewhere in a variety of investments. SISM utilised an asset manager in South Africa to manage the assets invested there. When any policy came to an end, SISM was obliged in terms of the agreement with mCubed Life, to return the assets to mCubed Life, together with any growth thereon, less the fees to which it was entitled and all expenses incurred by it in terms of the policy.

SISM, during the period of its business operations, had prepared financial accounts and rendered income tax returns to the revenue authorities in Mauritius as it had considered throughout that it only had tax obligations in Mauritius and that it did not have any tax obligations in South Africa.

SARS had in 2008 issued a notice of audit in terms of section 74A of the Income Tax Act informing SISM that SARS intended conducting an audit/inspection of SISM and requesting certain information from SISM.

Oceanic Trust Company, as the sole trustee of SISM, responded and correspondence ensued pursuant where to SISM, without conceding that SARS was entitled thereto, provided certain information to SARS who thereupon issued a letter stating that it believed that it had a tax claim against SISM and asked for reasons why SISM should not be taxed.

SARS, after some further delay, then issued an assessment letter (the letter of assessment) wherein it raised an assessment of income tax, additional tax and interest for the tax years 2000 to 2007 for R1 506 900 973 and one of the bases for the assessment was that SISM was a 'resident' in South Africa because it had its 'place of effective management in South Africa' and that it derived income from a South African source which was not exempt from tax. A further, alternative basis for the assessment was that

SISM derived income from a South African source and that it carried on business through a permanent establishment in South Africa, within the meaning of section 10(1)(*h*) of the Income Tax Act.

SISM, in response to the assessment, had filed a detailed objection on 28 August 2009.

SARS, soon after the date of the aforesaid assessment, had appointed Standard Bank of South Africa Ltd (Standard Bank), the South African bankers of SISM, as SISM's agent in terms of section 99 of the Act and had required Standard Bank to remit the R1.5 billion to SARS.

Pursuant to the aforementioned appointment and request, Standard Bank paid an amount of R20 655 150 out of SISM's account to SARS in July 2009, leaving a balance in the account.

SARS thereafter gave written notice to SISM that it was proceeding with legal action against it which included its liquidation to recover the tax debt, criminal and/or civil summons for an outstanding return and for the outstanding income tax of R1.5 billion.

Oceanic Trust Company, in its capacity as the trustee of SISM, then launched this application as a matter of urgency which was brought in two part:

- in Part A an urgent interim order was sought pending the determination of the relief sought in Part B, restraining SARS from taking any of the steps mentioned in its notice to enforce payment of any amount of income tax under the assessment to which SISM had objected and
- in Part B Oceanic Trust Company sought declaratory orders declaring that it was not a 'resident' of South Africa as defined in section 1 of the Act; that it had not carried on business through a permanent establishment as defined in section 1 of the Act, in South Africa as contemplated in section 10(1)(*h*) of the Act; and that SARS was liable to repay the amount of R20 million removed from SISM's Standard Bank account.

The relief sought under Part A of the notice of motion had been disposed of by agreement between the parties.

SARS, in raising the assessment, had relied on the facts set out in the letter of assessment and on the provisions of the Act, the Double Tax Agreement (the DTA) between South Africa and Mauritius and the Organisation for Economic Co-operation and Development (OECD) guidelines.

SARS contended that SISM was a resident of South Africa by virtue of it having its place of effective management (POEM) in South Africa and that, consequently, its worldwide receipts or accruals constituted gross income for purposes of the Act, and was taxable in South Africa.

SARS maintained that all SISM's investments were made in South Africa and during the period under review it had generated its entire income from business activities actually conducted in South Africa. It had also held its bank account with Standard Bank in South Africa and did not transfer money to Mauritius from its bank account here.

Moreover, SISM did not provide to SARS, as requested, minutes of trustees meetings of SISM in Mauritius or any documentation to substantiate the claim that SISM's business was run in Mauritius by its trustees, the Oceanic Trust.

SARS concluded that SISM was effectively managed in South Africa and not in Mauritius where the Oceanic Trust Company had been situated and therefore it was a resident of South Africa.

SARS contended further that the determination of the question whether SISM's 'place of effective management' was located in South Africa was a mixed question of fact and law.

SARS also relied upon the financial statements of SISM, drawn in Rands, which disclosed that SISM was deriving investment income from the actual investment of the trust assets in interest bearing instruments in South Africa and fee income from the re-insurance services it provided to mCubed Life in South Africa and that many decisions appear to have been taken in South Africa.

Oceanic Trust Company contended that it was not a resident in South Africa, that its income was not of a South African source and that it did not carry on its business through a permanent establishment in South Africa as no person had and habitually exercised a general authority to conclude contracts in the name of SISM in South Africa.

Oceanic Trust Company also contended that the place of effective management was a question of fact and must be evaluated by taking account of the relevant facts and circumstances and that it did not have its place of effective management in South Africa.

It was contended that SISM had always been a Mauritian company and all the management decisions regarding SISM would have been taken by its sole trustee and those decisions could consequently only have been made in Mauritius and there was no one in South Africa who could be said to have been orchestrating the management of SISM. Moreover, the fact that SISM carried on its business and conducted certain activities in South Africa pursuant to an agreement between itself and mCubed Life said nothing about the effective management of SISM which had always taken place in Mauritius.

Oceanic Trust Company relied on the English case of *Commissioner for Her Majesty's Revenue and Customs* v *Smallwood and Another* [2010] EWCA Civ 778 where the principle enunciated was that the place of effective management of a trust was the place where the trustees exercised control.

SARS' first point of opposition to the declaratory relief sought by Oceanic Trust Company was raised *in limine* and it contended that although the High Court, as opposed to the Tax Court, did have the power to issue declaratory relief, this court, i.e. the Western Cape High Court, nevertheless did not have jurisdiction to hear this matter.

The court had to determine whether the declaratory relief sought by Oceanic Trust Company in this court should be granted.

Judge Louw held the following:

Whether declaratory relief should be granted

(i) That it was clear that the issues raised in regard to the question whether SISM was a resident in South Africa were, at least in part, factual in nature and it was clear that the issues raised by the assessment and the objection by SISM in regard to the location of the source of SISM's income, is at least in part a factual issue which will eventually have to be determined by the Tax Court.

(ii) That the Tax Court was established by section 83 of the Income Tax Act as a specialist court with its own rules to hear appeals against assessments raised by the SARS and in terms of section 169(*b*) of the Constitution of the Republic of South Africa Act the High Court may, in addition to certain constitutional matters regulated by section 169(*a*), decide . . . any other matter not assigned to another court by an Act of Parliament and it was settled law that the High Court has jurisdiction to hear and decide income tax cases turning on legal issues only.

(iii) That it was common cause at the hearing that the High Court had jurisdiction to hear this matter only if the issues to be decided were questions of law and did not require this court to make any finding of fact.

(iv) That what the cases cited by Oceanic Trust Company established was first that when all the material facts are 'fully found' and are 'sufficiently clear' the question whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, was one of law.

Where the trust's place of effective management was situated

(v) That in the English case of *Commissioner for Her Majesty's Revenue and Customs v Smallwood and Another* [2010] EWCA Civ 778, relied upon by Oceanic Trust Company, the key features relating to the place of effective management (POEM) of an entity relevant to this case were, *inter alia*, that the POEM was the place where key management and commercial decisions that are necessary for the

conduct of the entity's business are in substance made and the POEM will ordinarily be the place where the most senior group of persons (*e.g.* a board of directors) makes its decisions, where the actions to be taken by the entity as a whole are determined but no definite rule can be given and all relevant facts and circumstances must be examined to determine the POEM of an entity.

(vi) That the decision in *Smallwood*'s case, *supra*, was based not only on the general test for POEM but also on the specific section of the UK legislation which provided that the trustees be treated as a single and continuing body of persons who shall be treated as resident in the UK unless the general administration of the trusts is ordinarily carried on outside the United Kingdom and the trustees or the majority of them for the time being are not resident or not ordinarily resident in the UK.

(vii) That, further, in the *Smallwood* case the court undertook a painstaking analysis of the facts and the way that the scheme was set up and was implemented in order to come to the conclusion on where the POEM of the trust in that case was.

(viii) That Oceanic Trust Company, on the test in the *Smallwood* case, had not made out a case for declaratory relief in this court on two grounds:

- That, firstly, for this court to declare that SISM was not a resident of South Africa, will require this court to enquire into the facts and to make factual findings, *inter alia*, on the question where, in South Africa or in Mauritius, SISM's key management and commercial decisions that are necessary for the conduct of SISM's business were in substance made during the years in question and all the material facts relating to the management of SISM have not been 'fully found' and are not 'sufficiently clear' in order to simply pose the question whether the facts are such as to bring this case within the definition of 'resident' properly construed. Moreover, the question whether SISM was a resident of South Africa was not at this stage simply a question of law and this court was not entitled to enquire into and make the required findings of fact as the making of such decisions has

been entrusted to the Tax Court.

- That, secondly, even if the facts were sufficiently clear to make a decision, the place where key management and commercial decisions that were necessary for the conduct of SISM's business, were in substance made, has not been established to be outside South Africa and that at least some key management decisions and at the very least commercial decisions necessary for the conduct of SISM's business, were in substance made in South Africa.

(xi) That, therefore, applying the *Smallwood* test, the facts to the extent that they have been established, does not establish that the POEM of SISM was in Mauritius, and not in South Africa.

<u>Whether the trust carried on business in South Africa through a permanent establishment</u>

(xii) That although the definition of 'permanent establishment' requires some place with an address in South Africa through which the business of an entity is wholly or partly carried on, the defining provision read as a whole does not require the establishment to be that of the entity whose business was being carried on through the establishment in question and the establishment may be a fixed place of business, a place of management of, a branch or an office of another entity.

(xiii) That the business, which it was common cause was being carried on by SISM in South Africa, was being conducted, at least partly, through mCubed Life and mCubed Holdings, who were at the very least, making business decisions regarding SISM's business and from whom SISM and its agent regularly received instructions regarding SISM's investments in South Africa and there was no suggestion that mCubed Life or mCubed Holdings, as opposed to CMM, SISM's asset manager and investment advisor, were acting as 'a broker, general commission agent or any other agent of an independent status' on behalf of SISM.

(xiv) That the Oceanic Trust Company had not made out the case for the *declarator* it sought, namely that the business SISM conducted in South Africa was not wholly or partly carried on through a fixed place of business in South Africa and, to the contrary, on the facts upon which the court was asked to determine the application, such business was carried on at the very least partly, through a fixed place of business in South Africa.

(xv) That, alternatively, all the material facts regarding the question whether SISM carried on business through a permanent establishment in South Africa, have not been 'fully found' and are not 'sufficiently clear'; moreover, this court is not allowed to make factual findings as the legislator has entrusted the making of such decisions to the Tax Court and it followed that the court also did not have jurisdiction to make the second declaratory order sought by Oceanic Trust Company in Part B of the notice of motion.

(xvi) That it was not appropriate for this court, restricted as it was to dealing with the facts in the manner prescribed for deciding factual disputes in an application before the High Court, to issue a *declarator* on issues which the Tax Court will be called upon to decide after a full ventilation of the relevant facts before that court and justice and convenience do not demand that the declaratory orders sought by the Oceanic Trust Company be issued and, accordingly, the court declined to exercise the discretion vested in it to issue the first two declaratory orders sought by Oceanic Trust Company.

<u>Whether trust entitled to declaratory order for repayment of money taken from its account</u>

(xvii) That SARS may make an agency appointment in terms of section 99 of the Act if 'he thinks (it) necessary' and the agent may be required by SARS to make payment of tax, interest or penalty 'due' from any monies which the agent may hold for the taxpayer and section 99 envisages two discretionary decisions by the Commissioner, namely, the appointment of the agent and requiring the agent to make payment of any tax or other monies due.

(xviii) That the issue to be decided was whether an income tax assessment dated 20 July 2009 which required SISM to pay the amount of the assessment by no later than 1 September 2009, could lawfully justify the removal of funds from SISM's bank account on 23 July 2009, on the basis that the assessed tax was due as contemplated in section 99 of the Act.

(xix) That the question to be determined was whether Oceanic Trust Company was entitled to the declaratory order it sought which was that SARS was liable to repay to SISM the amount of R20 656 150 which was removed at the behest of SARS from SISM's bank account held at the Standard Bank of South Africa Ltd.

(xx) That the aforesaid *declarator* should not be issued for two reasons – firstly, there had been no extension of the date for payment of the interest component of some R470 million which was therefore payable at the latest once the assessment was issued and the R20 million recovered through section 99 was therefore in respect of the R470 million which was then already due and payable and, secondly, that in any event the court would exercise the discretion afforded by section 19(1)(*a*)(iii) of the Supreme Court Act against making a *declarator*.

(xxi) That in this case it would serve no purpose to issue the declaratory order sought by Oceanic Trust Company as even if it be ordered that SISM was entitled to the repayment of the R20 million, SARS will it seems be entitled to raise set off or, if the order is given effect to, to immediately require the Standard Bank, as SISM's agent, to return the R20 million to SARS under the provisions of section 99 of the Act.

Application for the orders sought in Part B of the Notice of Motion was dismissed with costs, such costs to include the costs of two counsel.

3.2 ITC 1858

The taxpayer, at all relevant times, was a member of a public sector pension fund (the fund) which was a fund as contemplated in par. (*a*)(ii) of the definition of 'pension fund' in section 1 of the Income Tax Act and was governed by the rules contained in its Statutes and annexures thereto.

A total amount of R521 484 had accrued to the taxpayer during the year of assessment ending on 29 February 2008 and of that amount R259 375,72 had been paid to the taxpayer by the fund in accordance with its rules and constituted a pre-retirement withdrawal from the fund pertaining to his service in the public sector.

The taxpayer had remained in the employ of the same employer, being the public sector, throughout the 2008 year of assessment and had been in the employ of the public sector service for a total period of seven years, of which two years preceded 1 March 1998 and had been a member of the fund during that period.

SARS had issued the taxpayer an income tax assessment in respect of the 2008 year of assessment in which two-thirds of the amount of R259 375,72, namely R172 917,15, had been included in the taxpayer's gross income in terms of sub-par. (iii) of par. (*e*A) of the definition of 'gross income' in section 1 of the Act and the amount of R172 917,15 had been calculated without allowing for any exclusion pertaining to membership of the fund prior to 1 March 1998, alternatively 29 June 1998.

Par. (*e*A) only pertained to rights to benefits relating to the period after 1 March 1998 and, accordingly, two sevenths of the amount of R259 375,72, being R74 107,35 related to the period pre-1 March 1998.

The taxpayer objected to the inclusion of the total amount of R172 917,15 in his gross income on the basis that no adjustment or exclusion had been made pertaining to his employment prior to 1 March 1998 or 29 June 1998.

SARS thereafter disallowed the taxpayer's objection whereupon he appealed to the Pretoria Tax Court.

The taxpayer contended that the amount of R74 107,35 should have been

excluded from the amount of R259 375,72 and that of the balance of R185 268,37 one-third should have been exempted from tax in terms of par. (*e*A), leaving a balance of R123 512,25, which should have been the amount included in the taxpayer's gross income in terms of the aforesaid paragraph.

The issue in dispute before the court, as agreed between the parties, was whether, in arriving at the two-thirds of the amount to be included in the taxpayer's gross income pertaining to the 2008 year of assessment, in terms of sub-par. (iii) of par. (*e*A), that part of the amount of R259 375,72 which related to the taxpayer's employment prior to 1 March 1998, alternatively prior to 29 June 1998, should have been excluded.

The taxpayer contended that there was no rational basis upon which to exclude pre-1 March 1998 membership benefits from lump sum benefits received upon retirement or withdrawal from a fund, but not to exclude such membership benefits from the two-thirds to be taxed in terms of sub-par. (iii) of par. (*e*A), upon amounts becoming payable out of the public sector fund or being utilised to redeem debts to the member.

The taxpayer further contended that, having regard to sub-par. (iii) of par. (*e*A) and having regard to the purpose of par. (*e*A) and par. (*e*), namely to treat payments from public sector funds on the same basis as payments from private sector funds, but only with effect from 1 March 1998, membership benefits relating to membership prior to that date, should also be excluded from sub-par. (iii) of par. (*e*A).

SARS contended, *inter alia*, that the fact that the taxpayer was in the employ of the public sector service for a period of seven years, of which two years preceded 1 March 1998, was of no concern in the interpretation of par. (*e*A), which was very clearly worded, and did not concern itself with a period of employment, or whether a part thereof related to a period prior to 1 March 1998 or not. Moreover, the paragraph concerned itself, in the context of the definition of 'gross income' with two-thirds of the amount payable, irrespective of considerations relating to periods of employment and it also did not concern itself with any exemption.

SARS contended further that the plain wording of any words used by the legislature was central to the interpretation of all statutes and this applied to tax legislation as well.

Judge Fabricius held the following:

(i) That legislation must have its language respected and legislation did not mean whatever we might wish it to mean, be it 'ordinary' legislation or even the Constitution itself. Moreover, one cannot subvert the words chosen by Parliament either in favour of the spirit of the law, or by referring to background policy considerations that were not reflected in the language of the particular statute itself and interpretation concerns the meaning of words used by the legislature and it is therefore useful to approach the task by referring to the words used, and to leave extraneous considerations for later.

(ii) That it was also abundantly clear that although it has been said that our law is an enthusiastic supporter of 'purposive construction', the purpose of a statutory provision can provide a reliable pointer to the intention of the legislature but only, where there is an ambiguity.

(iii) That the rule as stated by Boruchowitz J in *ITC 1804*, i.e. that any contextual and business-like interpretation of a statute or part thereof had to yield to the plain and unambiguous language employed, had been consistently applied over the years and for almost a century as noticed.

(iv) That the Constitutional Court did not intend to say that background material such as, in the present case, parliamentary memoranda, may be considered when legislation is interpreted where the language is clear, and where there is no ambiguity, and where the interpretation leads to no absurdity, or any result that could not possibly have been intended by the legislature even in the context of the words that it chose to use.

(v) That in the present context the wording of the definition of 'gross income' was clear, as was the provisions of par. (*e*A) of the definition of 'gross income' in section 1 of the Act, and there was simply no

scope of 'reading in' as it were, the *explanatory memoranda* to the relevant legislation as suggested by the taxpayer in the light of the clear language used and, as a result, the court without hesitation declined the kind invitation to have regard to the mentioned parliamentary memorandum and to 'interpret' the relevant legislative provisions as a result, and to read-in what was not contained therein.

(vi) That there was in the present context no ambiguity in the relevant paragraphs of the Act and, as a result, the court preferred to follow the 'old-fashioned' approach that concerned itself with the meaning of the words used in the absence of any ambiguity or absurdity; however, by saying that, the court was not suggesting that the 'modern' approach was rejected but it was saying that the 'modern' approach had almost in all cases been misapplied and its source had been misinterpreted and taken out of context.

(vii) That, accordingly, the taxpayer's appeal was dismissed and the assessment was confirmed in terms of section 83(13)(*a*)(i) of the Act.

4. INTERPRETATION NOTES

4.1 Income Tax – Amalgamation of Amateur and Professional Sporting Bodies – No. 47 (Issue 4)

This Note provides information and guidance on the amalgamation of amateur and professional sporting bodies carried out under section 125 of RLAA, 2007, as substituted by section 76(1) of the TLAA, 2008.

Before its deletion, section 10(1)(*c*D) provided an exemption from income tax for:

'the receipts and accruals of any amateur sporting association'.

The above provision was deleted with effect from 15 July 2001 with the introduction of a new tax dispensation for exempt organisations. Under the new dispensation, a concept of a PBO conducting an approved PBA was introduced. Both these terms are defined in section 30. The PBAs approved

by the Minister of Finance are set out in Part I of the Ninth Schedule to the Act. A PBA under the heading 'Sport' is described in paragraph 9 as follows:

> 'The administration, development, co-ordination or promotion of sport or recreation in which the participants take part on a non-professional basis as a pastime.'

Provided an amateur sporting organisation complied with the requirements and conditions of section 30 and conducted the approved PBA, the organisation could be approved as a PBO and was fully exempt from income tax on its receipts and accruals. One of the requirements contained in section 30 was that an approved PBO was not permitted to engage in any trading or business activities.

As a result of the professional sport conducted by some national or provincial sporting organisations, they no longer qualified as amateur sporting associations and thus failed to comply with the requirements for approval as PBOs. This was because they did not conduct the approved PBA described above and consequently their income was regarded as being derived from trading activities or a business undertaking. Certain sporting bodies therefore separated their professional and amateur activities in order for the amateur body to qualify as a PBO.

The professional arm of any sporting body is always seen as the 'income provider' or 'promoter' of the amateur sporting activities. The total income of the professional arm derived from sponsorships, media rights and the like is fully taxable, while money expended by the professional arm in supporting amateur sport is not deductible under section 11(*a*) as it is not in the production of income.

In 2006 the provisions of the Act relating to PBOs were amended to provide a partial-taxation system for approved PBOs conducting trading or business activities. This meant that PBOs were permitted to retain their trading activities while being taxed on their trading income without losing their tax-exempt status. T

he separation of a sporting body into two separate entities proved to be to

the disadvantage of certain sporting bodies and consequently the 2007 Budget Review proposed measures to be introduced to assist in the re-integration of the separate sporting entities, so that expenditure incurred by the professional body to develop amateur sport could be deducted by the unified body, a taxable entity.

The new legislation provides relief in the event of the amalgamation of the professional and amateur arms of a sport. Provided certain requirements are met, the one body may dispose of its assets to the other body on a tax-neutral basis and the transferor will cease to exist. The unified entity will be a taxable entity. The PBO will lose its approval under section 30 and consequently will no longer qualify for exemption of certain of its receipts and accruals under section 10(1)(*c*N). Section 11E provides for a special deduction in the unified entity, provided certain requirements are met. This means it may deduct from its income any expenditure (not of a capital nature) directly incurred or paid to another entity contemplated in the section in the development and promotion of qualifying amateur sport falling under the same code of sport as the professional sport it carries on.

Note: The relief measures relating to the amalgamation only apply for a five-year window period starting on 1 January 2008 and ending on 31 December 2012.

This Note discusses only the broad principles in interpreting the current legislation. As the facts and circumstances pertaining to each sporting association may differ, each case must be considered on its own merits.

5. BINDING PRIVATE RULINGS

5.1 BPR119 – Transfer of amount contributed to a foreign pension fund to a South African retirement annuity fund

This ruling deals with the tax consequences arising from a transfer of a pension fund interest from a source outside the Republic to a South African retirement annuity fund.

In this ruling references to sections and paragraphs are to sections of the Income Tax Act and paragraphs of the Second Schedule to the Act, applicable as at 15 February 2012 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Act.

This ruling has been requested under the provisions of:

- section 1, definition of 'gross income', more specifically paragraphs (*a*) and (*e*) thereof;
- section 9(1)(*g*);
- section 10(1)(*g*C);
- sections 11(*k*) and (*n*); and
- paragraphs 2(1)(*a*) and 5 of the Second Schedule.

<u>Parties to the proposed transaction</u>

The Applicant: A natural person as referred to in paragraph (*a*) of the definition of 'resident' in section 1

The foreign retirement fund: A pension fund registered and resident in the United Kingdom (the UK fund)

The South African retirement fund: A retirement annuity fund registered and resident in South Africa (the SA fund)

Description of the proposed transaction

The Applicant is a resident of South Africa but was previously resident and employed in the United Kingdom (UK) for a period in excess of twenty years. Whilst living and working in the UK the Applicant contributed towards the UK fund which is a fund similar to a South African retirement annuity fund and it was not linked to his employer or employment.

The Applicant intends transferring his pension interest in the UK fund to the SA fund by means of Her Majesty's Revenue and Customs (HMRC) Qualifying Recognised Overseas Pension Scheme (QROPS) transfer system as this can have significant taxation and investment advantages to individuals with UK pension rights who have or will become non-resident in the UK for tax purposes.

Under the QROPS transfer system a person may transfer their UK pension interest free from UK tax to an overseas fund that has been approved by the HMRC as a QROPS. The rules of the approved Scheme to which pension funds will be transferred should correspond to the rules governing an authorised UK pension scheme.

To further qualify for a pension transfer into an approved Scheme the following QROPS rules will apply with regard to the transferee who must either:

- be a current member of a personal or occupational pension fund;
- have been or expect to become a non-UK resident for a minimum of 5 years; or
- have not yet purchased an annuity.

The SA fund is an approved fund for purposes of the HMRC QROPS transfer system.**3**

Conditions and assumptions

This ruling is made subject to the conditions and assumptions that:

- the contributions to the UK fund were not in respect of services rendered to an employer; and

- the SA fund will issue a retirement annuity contribution certificate to the Applicant in respect of the amount transferred to it from the UK fund.

Ruling

The ruling made in connection with the proposed transaction is as follows:

- On transfer of the Applicant's pension interest from the UK fund to the SA Fund:
    - There will be no amount to be included in the Applicant's gross income in terms of the general definition of 'gross income' in section 1 as the accrual will be of a capital nature. There will also be no inclusion in terms of paragraph (*e*) of the definition of 'gross income' because the UK fund does not qualify as a 'pension fund' as defined in section 1.
    - The amount transferred to the SA fund will qualify for deduction under section 11(*n*)(i) to the extent provided for by subparagraph (i)(*aa*) read with paragraph (*cc*) of the proviso.
- At retirement:
    - The benefits to be received by the Applicant from the SA fund will be from a South African source, consequently, section 9(1)(*g*) will not be applicable.
    - The annuity that will be received by the Applicant will be included in his gross income under paragraph (*a*) of the definition of 'gross income' and will not be exempt under section 10(1)(*g*C).
    - The lump sum benefit will be taxable under paragraph 2(1)(*a*) read with paragraph 5(1)(*a*) of the Second Schedule. The amount so determined will be included in the gross income of the Applicant under paragraph (*e*) of the definition of 'gross income'.

5.2 BPR120 – The interaction between section 45 and 24J in the transfer of interest-bearing receivables under the corporate rules

This ruling deals with the treatment of interest-bearing receivables to be transferred in terms of the corporate rules contained under section 45 of the Act as read with section 24J of the Act.

In this ruling references to sections and paragraphs are to sections of the Income Tax Act and paragraphs of the Eighth Schedule to the Act applicable as at 1 June 2012 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Act.

This ruling has been requested on the interpretation and application of the provisions of:

- section 1, definition of ‘group of companies’;
- section 22;
- section 24J(1), definitions of ‘accrual amount’, ‘adjusted initial amount’, ‘adjusted gain on transfer or redemption of an instrument’, ‘adjusted loss on transfer or redemption of an instrument’, ‘holder’, ‘income instrument’, ‘initial amount’, ‘instrument", ‘interest’, ‘transfer’ and ‘transfer price’ and ‘yield to maturity’;
- section 24J(3);
- section 24J(4);
- section 41(1), definitions of ‘allowance asset’, ‘base cost’ and ‘capital asset’;
- section 41(2);
- section 45(1);
- section 45(2)(*a*);
- section 45(2)(*b*);
- paragraph 1 of the Eighth Schedule, definitions of ‘asset’ and ‘base

cost'; and

- paragraph 20(1)(*a*) of the Eighth Schedule.

Parties to the proposed transaction

The Applicant: A company incorporated in and a resident of South Africa

The Co-Applicant: A company incorporated in and a resident of South Africa that holds 100% of the shares in the Applicant

Description of the proposed transaction

The Applicant intends to dispose of its interest-bearing receivables to the Co-Applicant under the corporate rules as contained in section 45. A summary of the proposed transaction is set out below:

- The Applicant intends to dispose of its interest-bearing receivables to the Co-Applicant for a cash consideration equal to the market value thereof.
- It is anticipated that the market value of the interest-bearing receivables will be lower than the face value thereof.
- The Co-Applicant will continue to hold the interest-bearing receivables so acquired on the same basis (that is, capital asset or trading stock) as the Applicant.

Conditions and assumptions

This ruling is made subject to the conditions and assumptions that:

- the interest-bearing receivables are not to be disposed of by the Applicant to the Co-Applicant in terms of a liquidation distribution referred to in section 47, regardless of whether or not an election has been made for the provisions of that section to apply and regardless of whether or not the Co-Applicant acquires that asset as a capital asset or as trading stock;
- the Applicant and the Co-Applicant will not agree in writing that the provisions of section 45 will not apply to the disposal of the interest-bearing receivables; and

- the total amount of interest recognised in respect of each interest-bearing receivable will be the same irrespective of whether or not the proposed transaction takes place.

Ruling

The ruling made in connection with the proposed transaction is as follows:

- Section 45 will apply to the proposed sale of the interest-bearing receivables of the Applicant to the Co-Applicant with the result that:
    - for the Applicant, the proceeds upon the disposal of the receivables will be deemed to be equal to the base cost (see section 45(2)(*a*)(i)) of or the expenditure incurred (see section 45(2)(*b*)(i)) in respect of such receivables as at the date of the disposal;
    - the Co-Applicant will be deemed to have acquired the interest-bearing receivables from the Applicant at the base cost/expenditure thereof which will thus be the Co-Applicant's base cost/expenditure in respect of the interest-bearing receivables subsequent to the acquisition thereof; and
    - such base cost/expenditure will be equal to the adjusted initial amount at the beginning of the accrual period in which the transfer takes place (that is, initial amount plus accrual amounts of all previous periods plus other payments made by the holder during previous accrual periods less any payments received by the holder during all previous accrual periods) plus accrual amounts for the current accrual period ending on the date of transfer and other payments made by the holder during such period less any payments received by the holder during such period.
- The provisions contained in section 45 will have the following impact on the application of section 24J to the Applicant and the Co Applicant:
    - the ‘transfer price’, for purposes of the treatment of the

transfer of the interest-bearing receivables in the hands of the Applicant under section 24J, will be deemed to be equal to the base cost/expenditure of the interest-bearing receivables (as calculated in terms of the principles set out above); and

- the 'transfer price', for purposes of the treatment of the interest-bearing receivables in the hands of the Co-Applicant under section 24J subsequent to the proposed transaction will be deemed to be equal to the base cost/expenditure of the interest-bearing receivables (as calculated in terms of the principles set out above).

5.3 BPR121 – Secondary Tax on Companies or Dividend Tax

This ruling deals with the question as to whether a dividend to be paid to shareholders will be subject to secondary tax on companies or dividends tax.

In this ruling references to sections are to sections of the Income Tax Act applicable as at 16 April 2012 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Act.

This ruling has been requested on the interpretation and application of the provisions of:

- section 64B(1), the definition of 'declared'; and
- section 64E(1) read with section 64D.

Parties to the proposed transaction

The Applicant: A public listed company incorporated in and a resident of South Africa, listed on the Johannesburg Stock Exchange (JSE)

The Co-Applicant: A public listed company incorporated in and a resident of the United Kingdom, with its primary listing on the London Stock Exchange (LSE) and its secondary listing on the JSE.

Description of the proposed transaction

The Applicant and the Co-Applicant operate as dual listed companies of a broader group.

The ordinary shares of the Co-Applicant have the same rights as the ordinary shares of the Applicant, and vice versa. This means, for example, that any dividend paid in respect of each ordinary share of the Co-Applicant will be matched by an equivalent dividend in respect of each ordinary share of the Applicant.

Prior to 1 April 2012, in the disclosure of the group's full year results for the 2011 financial year end, the board of directors of both the Applicant and the Co-Applicant recommended a final dividend of €xx cents per share payable to shareholders post 1 April 2012. The final dividend will be subject to the approval of the shareholders of the Applicant and the Co-Applicant at the respective annual general meetings scheduled post 1 April 2012.

Condition and assumption

This ruling is made subject to the condition and assumption that the final dividend to be declared is a 'dividend', as defined in section 1.

Ruling

The ruling made in connection with the proposed transaction is as follows:

- The final dividend will not constitute a dividend declared by the Applicant and the Co-Applicant before 1 April 2012, as contemplated in the definition of 'declared' in section 64B(1).
- The final dividend declared and paid by the Applicant and the Co-Applicant on or after 1 April 2012, will be subject to dividends tax, as set out in Part VIII of the Act.
- The final dividend will be subject to DT under section 64E(1), subject to any applicable exemptions or double tax treaty reductions that may apply, and in the case of the Co-Applicant only to the extent that such dividend is declared and paid in respect of its JSE 'listed shares'.

6. BINDING GENERAL RULINGS

6.1 BGR 10 – VAT apportionment methology to be applied by category B municipalities

The purpose of this binding general ruling is to prescribe the apportionment method, as contemplated in section 17(1), which Category B municipalities must use to calculate the amount of value-added tax (VAT) to be allowed as input tax in respect of the acquisition of goods or services for a mixed purpose.

(A 'Category B Municipality' is a 'local municipality' that shares municipal executive and legislative authority, i.e. the authority to administer and make rules, in its area with a Category C Municipality, being a 'district municipality', within whose area it falls.

For purposes of this document the acquisition of goods or services partly for the purpose of consumption, use or supply in the course of making taxable supplies and partly for another intended use will be referred to as a 'mixed purpose'.)

Background

A municipality must levy VAT at the standard rate, under section 7(1)(*a*), on all supplies made in the course or furtherance of carrying on an enterprise which are not specifically subject to VAT at the rate of zero percent under section 11 (for example, grants, municipal property rates etc.), exempt from VAT under section 12 (for example, the transportation of passengers in a bus, the rental of dwellings etc.), or fall outside the scope of VAT (for example, dividends, statutory fines and penalties).

In this regard the *VAT 419: Guide for Municipalities* sets out the application of the VAT Act in respect of, amongst others, supplies made by and to municipalities.

The law and its application

The statutory framework [i.e. the definition of 'input tax' in section 1] requires the principle of 'direct attribution' to be applied, in that VAT must be attributed in the first instance according to whether it is wholly related to the making of taxable supplies or wholly to the making of exempt or out of scope supplies. VAT that cannot be attributed must be allocated to a mixed purpose.

A municipality, being a vendor, may deduct the full amount of the VAT incurred on the acquisition of goods or services, as input tax, where the acquisition is wholly for the purpose of consumption, use or supply in the course of making taxable supplies and may not deduct the VAT incurred on the acquisition of goods or services, as input tax, where the acquisition is for the purpose of consumption, use or supply in the course of making wholly exempt or wholly out of scope supplies[3]. The VAT incurred on the acquisition of goods or services where the acquisition is for a mixed purpose may also be deducted as input tax to the extent determined in accordance with an approved apportionment method as contemplated in section 17(1).

(An out of scope supply refers to a supply that is made by a municipality that is neither in the course or furtherance of that municipality's enterprise nor is it an exempt supply. This term is also synonymous with the term 'non-supply', for example dividends and statutory fines.)

Ruling

- Category B municipalities must use the turnover-based method of apportionment to determine the amount of VAT to be deducted as input tax in respect of the acquisition of goods or services for a mixed purpose.
- The apportionment formula (the Formula) to be applied to determine the amount of input tax contemplated in paragraph **4.1** is as follows:

  $y = a/(a + b + c) \times 100$

  Where:

  'y' = the apportionment percentage;

‘a’ = the value of all taxable supplies (including deemed taxable supplies) made during the period;

‘b’ = the value of all exempt supplies made during the period; and

‘c’ = the sum of any other amounts not included in ‘a’ or ‘b’ in the formula, which were received or which accrued during the period (whether in respect of a supply or not, for example, income received in respect of out of scope supplies).

Notes:

1. The term ‘value’ excludes any VAT component.
2. In the Formula, ‘c’ will typically include, but is not limited to, items such as dividends and statutory fines (if any).
3. Exclude from the calculation the value of any capital goods or services supplied, unless supplied under a rental agreement/operating lease (that is, not a financial lease[4] or instalment sale agreement).
4. Exclude from the calculation the value of any goods or services supplied where input tax on those goods or services was specifically denied in terms of section 17(2).
5. The apportionment percentage should be rounded off to 2 decimal places.
6. Where the Formula yields a result equal to 95% or more, the full amount of VAT incurred for a mixed purpose may be deducted (the *de minimis* rule).

- Category B municipalities, for purposes of determining the amounts to be included in the Formula, are required to comply with the following arrangements:
    - A grant that is received for purposes of making mixed supplies must be attributed accordingly. For example, if

30% of a grant is for subsidising the municipality's public transport business, which is an exempt supply, and 70% is for subsidising the supply of water and electricity to customers, which is a taxable supply, the grant must be attributed in terms of section 10(22). Therefore, 30% of the grant will be applied for exempt supplies and will therefore be included in 'b' in the Formula, and the remaining 70% will be subject to VAT at the zero rate and will therefore be included in 'a' in the Formula.

- Category B municipalities are required to recalculate the apportionment percentage based on the actual attribution of all grants, within three months after their financial year end, which may result in an increase or decrease to input tax. A Category B municipality that is unable to perform the recalculation within the stipulated timeframe must approach the South African Revenue Service (SARS) to request an extension.
- The assignment of functions by national or provincial government falls within the ambit of the 'enterprise' activities carried on by that municipality, provided that the activity does not fall within the ambit of section 12. Any consideration charged, must be included in 'a' in the Formula. Any payment received as a result of the national or provincial government providing financial assistance to enable the Category B municipality to carry out the assigned activity, which is a taxable supply, is regarded as a 'grant' as defined in section 1 and must be included in 'a' in the Formula.
- The activities in respect of which Category B municipalities are appointed as agent by provincial government do not fall within the ambit of the enterprise carried on by Category B municipalities. Only the amount charged in respect of the taxable supply of such agency service to

provincial government must be included in ‘a’ in the Formula.

- Interest earned on, for example, investing surplus funds or overdue accounts, must be included in ‘b’ in the Formula.

- The VAT incurred and paid for directly on the supply of goods or services associated with provincial government mandates, referred to as ‘unfunded mandates’, is regarded as being incurred in the course or furtherance of that municipality’s enterprise, provided that the provincial government mandate activity is not exempt in terms of section 12. The VAT may be deducted in full where incurred wholly for purposes of use, consumption or supply in the course of making taxable supplies or deducted in accordance with the Formula if incurred for mixed purposes, subject to sections 16(2), 16(3), 17 and 20.
- Category B municipalities are required to exclude the value of the supply of capital goods or services (unless supplied under a rental agreement/operating lease) and the value of the supply of goods or services where input tax was specifically denied for the apportionment calculation The value of all other taxable supplies, exempt supplies and non-supplies must be included in the Formula.
- The Commissioner may, on written application, consider excluding extraordinary income which may create a distortion in the Formula. The written application for a VAT ruling in terms of section 41B, must be submitted to the SARS Branch Office where the municipality is registered.

6.2 BGR 11 – VAT use of exchange rate (draft)

This BGR prescribes the foreign exchange rate that must be used when issuing tax invoices as well as for determining the output tax due where the consideration for the standard rated supply is in a foreign currency.

Background

Vendors in some instances conclude contracts or issue tax invoices in respect of the taxable supply of goods and services, which is taxable at the standard rate. In addition, such contracts or tax invoices, as the case may be, reflect the consideration in a foreign currency.

Issue

The issue under consideration is the exchange rate that should be applied to determine the consideration in Rands for purposes of complying with section 20(4) and (5) as well as for determining the vendor's output tax liability.

The law and its application

For purposes of the Act, a supply of goods or services is deemed in terms of section 9, to take place when the time of supply occurs. A vendor is liable in terms of section 16(4) to account for output tax in respect of a supply in the tax period in which the supply is made. The value to be placed on the supply of goods or services is determined in accordance with the provisions of section 10.

Section 20(1) places an obligation on a supplier to issue a tax invoice within 21 days from the date of making a taxable supply. Section 20(4) and (5) requires a tax invoice to be in the currency of the Republic, unless the supply is zero-rated in terms of section 11.

Ruling

A vendor is required to issue a tax invoice that complies with section 20(4) or (5), in the currency of South Africa within 21 days of the date of the supply. In addition to the requirements as set out in section 20(4) or (5) as the case may be, the vendor must also reflect the consideration for the supply in a foreign currency as well as the relevant exchange rate on the tax invoice. In this regard, it will be acceptable to SARS if vendors use the applicable daily exchange rate[1] as published on the South African Reserve Bank website[2], at the time of supply, to determine the Rand equivalent of the consideration for the supply.

(The exchange rate is the weighted average of the banks' daily rates at approximately 10:30 am.)

(http://www.resbank.co.za/Research/Rates/Pages/SelectedHistoricalExchangeAndInterestRates.aspx)

It is effective from 1 September 2012 and will apply for an indefinite period.

7. BINDING CLASS RULINGS

7.1 BCR31 – Income distributed by a discretionary trust and benefit units allocated to beneficiaries by virtue of employment

This ruling deals with the question as to whether:

- dividends received and distributed by a trust will retain its nature as dividends in the hands of the beneficiaries of the trust; and
- beneficial units allocated to beneficiaries will constitute equity instruments in their hands.

In this ruling legislative references to sections are to sections of the Income Tax Act applicable as at 1 January 2011 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Act.

This ruling has been requested under the provisions of:

- section 1, definition of 'gross income';
- section 8C; and
- section 10(1)(*k)*(i).

Class

The class members to whom this ruling will apply will be the employees as described in point 4 below.

Parties to the proposed transaction

The Applicant: A holding company together with its subsidiaries, which form a group of companies (the Group)

The Trust: A discretionary trust established by the Group

The Employees: A specific group of permanent employees of the Group (also to be known as the beneficiaries of the Trust)

Description of the proposed transaction

The Trust has been established to enable the Employees to participate in a broad-based black economic empowerment initiative of the Applicant.

One of the objectives of the Trust is to acquire ordinary shares (the shares) in two companies within the Group. Both these two companies are public companies duly incorporated under the Companies Act, No. 61 of 1973. These shares will vest in the Trust and will at all times remain under the control of the trustees save for those circumstances when the shares will be used as security. These shares will not vest in the Employees.

A further object of the Trust is to hold and administer the 'trust funds'. The trust funds comprise all assets administered by the trustees of the Trust, except for the shares acquired in the two companies. The trust funds comprise the following:

- a donation;
- any other donation as may from time to time be made to the Trust;
- other assets, shareholdings or investments – movable or immovable, corporeal or incorporeal – which the trustees may acquire on behalf of the Trust, but not limited to shares; and
- interest, dividends or accruals to the Trust of whatever nature.

The trustees are empowered to apply and allocate the trust funds in the discretion of the trustees for the benefit of the Employees to achieve the following objectives of the Trust:

- the broad-based black economic empowerment of the Employees;
- the improvement of the lives and standard of living of the Employees;
- the educational needs of the Employees and their immediate families or other dependents, as identified by the trustees from time to time;

- the initiation and development of projects to promote the employment, health, recreation, mental- and spiritual welfare and general well-being of the Employees;
- the provision of urgent relief and/or medical care to Employees in times of unforeseen hardship; and
- such further purposes which the trustees in their sole and unfettered discretion may deem ancillary and supplementary to the objects detailed.

The trustees may exercise their discretion to vest in the Employees the dividends – ordinary or special – declared by the two companies, which accrue to the Trust, being the owner of the shares. The Trust Deed enables the trustees to deal with these dividends as follows:

- 20% of the cash dividends may be utilized by the trustees in their absolute discretion in order to satisfy the objectives of the Trust as listed above;
- the remaining 80% of the cash dividends may be used exclusively for repayment of the loans incurred to acquire the shares in the two companies;
- once the loans have been settled in full, the remaining 80% of all the cash dividends declared by the two companies and accruing to the Trust may be utilised by the trustees in their absolute discretion in order to satisfy the objectives of the Trust as set out above; and
- any non-cash dividends declared by the two companies and accruing to the Trust may be utilised by the trustees in their absolute discretion in order to satisfy the objectives of the Trust as set out above.

The Employees will also participate in the Trust by way of Beneficial Units which will be determined and allocated to them as the Beneficiaries in the Trust within 6 months of the year-end of the Trust. The allocation method will result in a floating variable pool of the Employees eligible for Beneficial Units on an annual basis. They will share equally in the number of Beneficial Units to be allocated annually. The Beneficial Units will be determined in

accordance with the formula:

A = B/C

in which:

A means an amount of Beneficial Units to be allocated to each Employee;

B means an amount equal to the total portion of cash dividends received by the Trust that will be utilised for repayment by the Trust of the loans incurred to purchase the shares in each financial year; and

C means the number of Employees on the first day of the Trust's financial year to which the debt repayments in B above relate.

The Trust Deed provides that the Beneficial Units can only be valued as follows:

- the trustees will determine the price at which the Beneficial Units will be re-purchased in their sole and absolute discretion, taking into account the trust funds available for the re-purchase of the Beneficial Units on the relevant re-purchase date;
- the trustees are entitled to use such method of calculating the value of the Beneficial Units to be re-purchased at such date as they may deem fit and reasonable in their sole and absolute
- discretion at the time of the re-purchase of the Beneficial Units; and
- the trustees are entitled to put such measures in place relating to the payment of the re-purchase price of the Beneficial Units as they may deem fit and reasonable in their sole and absolute discretion.

The number of Beneficial Units will be the same as the value of the dividend amounts that will be used to repay the loans. If an Employee resigns or retires from a company within the Group he or she will be paid an amount based on the discretion of the trustees (re-purchase of the Beneficial Units). Whilst the number of Beneficial Units is equal to the dividends which could be vested in the Employees, the amount paid to Employees does not represent an amount equal to dividends which could not be vested. The re-

purchase price is based on the trust funds available for the re-purchase of Beneficial Units. The value of the Beneficial Units is taxable in the hands of the Employees in the year in which the re-purchase value accrues to them.

Conditions and assumptions

This ruling is made subject to the conditions and assumptions that:

- the trustees' discretion in terms of Trust Deed is in no way linked to the performance of the Employees and cannot result in the payment of any form of remuneration or bonus to the said Employees;
- the vesting of the dividends in the Employees and the distribution thereof will not result in the settlement of an obligation of the Group in respect of the employment or services rendered by the Employees; and
- the re-purchase price of the Beneficial Units will in no way be linked to the value of the shares.

Ruling

The ruling made in connection with the proposed transaction is as follows:

- Any distribution made by the trustees of the Trust to the Beneficiaries (Employees) will, if the distribution is made within the same year of assessment in which the dividend was received by or accrued to the Trust, retain the character of a dividend in the hands of the Beneficiaries (Employees).
- Such distributions will be exempt in the hands of the Beneficiaries (Employees) under section 10(1)(*k*)(i).
- The Beneficial Units will not constitute equity instruments as defined in section 8C in the hands of the Beneficiaries (Employees).

8. SHORT GUIDE TO THE TAX ADMINISTRATION ACT

This guide is provided by SARS to assist taxpayers to understand their obligations and entitlements under the Tax Administration Act (the TAAct). It is not a binding general ruling, interpretation note, practice note or other official publication as referred to in the Tax Administration Act and should therefore not be used as a legal reference.

Here follows extracts from the guide:

8.1 Introduction

The drafting of TAAct was announced by the Minister of Finance in the 2005 Budget Review. The first draft of the Tax Administration Bill was published in 2009, which was followed by an extensive public consultation process and the Tax Administration Act was promulgated on 4 July 2012. SARS has announced that it anticipates that the Act will commence within three months of that that date.

In terms of the law that has created SARS, the SARS Act, SARS' objectives include the efficient and effective collection of revenue. Tax legislation, such as TAAct, seeks to achieve this objective. Tax legislation typically comprises two aspects:

- Tax liability provisions or 'tax charging' provisions; and
- Tax administration provisions.

TAAct only deals with tax administration, and seeks to:

- Incorporate into one piece of legislation administrative provisions that are generic to all tax Acts and currently duplicated in the different tax Acts;
- Remove redundant administrative provisions;
- Harmonise the provisions as far as possible.

Some administrative provisions that only apply and are unique to the administration of a specific tax type remain in the tax Act that imposes that tax. In certain instances, therefore, both TAAct and a tax Act prescribe administrative procedures and a taxpayer must comply with both. For example, the record keeping requirements in TAAct for value-added tax are supplemented by additional record keeping requirements in the VAT Act which are unique to value-added tax.

TAAct seeks to simplify administrative provisions. It is an established principle that simplified law enhances clarity. It is easier for a taxpayer to fully comply with law he or she understands, than with law that is too technical and therefore difficult to understand and comply with.

TAAct seeks to promote a better balance between the powers and duties of SARS and the rights and obligations of taxpayers and to make this relationship more transparent. This balance will greatly contribute to the equity and fairness of tax administration. International experience has demonstrated that if taxpayers perceive and experience the tax system as fair and equitable, they will be more inclined to fully and voluntarily comply with it.

TAAct also seeks to provide a foundation for further and future modernisation and development of tax administration, such as single registration, self-assessment and accounting transformation. Single registration means that taxpayers will only need to register once with SARS and the basic registration information will then apply for all tax types. A self-assessment system seeks to reduce administration. For example, currently a taxpayer submits an income tax return. SARS then determines the tax liability and assesses the taxpayer - TAAct builds a platform for a full self-assessment regime where a taxpayer determines his own tax liability and pays the tax. Accounting transformation involves for example:

- A move to accrual accounting from the current cash basis;
- A single account for a taxpayer with a rolling balance, including payment allocation rules across taxes;
- The alignment of interest across tax types & and its calculation on a

compounded basis.

TAAct seeks in numerous ways to enhance tax compliance to ensure that every person pays his or her fair share. TAAct gives recognition to the fact that:

- The majority of taxpayers are compliant and want a more modern and responsive revenue administration;
- There is a minority who seek to evade tax or defraud the government.

Most taxpayers are compliant and for them TAAct should ensure better service and a lower compliance cost. Tax evaders, however, will face stricter enforcement, assessment and collection powers.

8.2 Structure of the TAAct

Tax administrative procedures inevitably follow a time sequence, commonly referred to as a 'step by step' approach. TAAct introduces a step-by-step methodology that helps to align the structure of tax administration to the administrative life cycle of taxpayers, which is illustrated by the Chapter headings.

Not every taxpayer would be involved in each possible step in tax administration. Both taxpayers and SARS would know when to advance over intervening possibilities until the next relevant issue is reached. For example, once a taxpayer submits a return regulated by Chapter 4, but SARS does not audit the return, both the taxpayer and SARS would know to advance to the assessment chapter, Chapter 8 to determine what procedures will follow.

8.3 Chapter 1: Interpretation

Essentially, there are three important interpretive rules:

- Firstly, in the context of interpreting the provisions of TAAct, a term that is defined in another tax Act will have that meaning where used in

TAAct. This is unless the context where the term is used in TAAct indicates otherwise. For example, the term ‘director’ is defined in the ITA and not in TAAct. Where this term is used in TAAct and TAAct provision is applied in respect of income tax, ‘director’ will bear the ITA defined meaning. Where the term ‘director’ is used in TAAct in the context of referring to the Director of Public Prosecutions, the context will indicate that the ITA defined meaning of ‘director’ does not apply. Also, if TAAct provision is applied in respect of value-added tax, the term will not have the ITA defined meaning.

- Secondly, in the context of interpreting the provisions of a tax Act, a term that is defined in TAAct will have that meaning in the tax Act. This is unless the context where the term is used in the tax Act indicates otherwise. For example, the term ‘return’ is defined in TAAct and not in the ITA. Where this term is used in the ITA in the context of an administrative requirement, such as the obligation to submit a return of income, ‘return’ will bear the ITA defined. Where the term ‘return’ is used in the ITA in the context of, for example, a return of capital, the context will indicate that TAAct defined meaning of ‘return’ does not apply.
- Thirdly, if there is an inconsistency between TAAct and another tax Act, then the tax Act will prevail.

<u>New definitions introduced by TAAct</u>

TAAct introduces some new definitions and some of them that have a more general application are briefly discussed below, while others are dealt with in the relevant chapters.

- Business day

  This means a day which is not a Saturday, Sunday or public holiday. Furthermore, for purposes of determining the days or a period allowed for complying with the dispute resolution provisions of Chapter 9 only, it excludes the days from 16 December of each year to 15 January of the following year.

  TAAct uses generally uses business days in the context of time

periods for registration, submission of returns or requested relevant material and calendar days in the context of time periods for payment of tax or calculation of interest.

- International tax agreement

  This means an agreement entered into with the government of another country in accordance with a tax Act, such as a DTA, or other international tax agreements with a view to:

  - Avoid double taxation; or
  - The rendering of reciprocal assistance in the administration of and the collection of taxes under the laws of South Africa and of the other country.

- Official publication

  This means a binding general ruling, interpretation note, practice note or public notice issued by a senior SARS official or the Commissioner. This is to distinguish SARS publications that are binding on SARS from those that are not, for example SARS guides. It is also particularly relevant for purposes of what constitutes a practice generally prevailing.

- Public notice

  This means a notice issued by the Commissioner and published in the Government *Gazette*. Provisions which are currently contained in the tax Acts, such as third party return obligations in ITA section 69 and non-compliance that will trigger an administrative penalty, will be listed in a public notice. TAAct includes the regulations and public notices issued thereunder, which will have the status of subordinate legislation.

- Self-assessment and original assessments

  In TAAct, assessment means the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS.

- Self-assessment

  Self-assessment means a determination of the amount of tax payable under a tax Act by a taxpayer and:

  - submitting a return which incorporates the determination of the tax; or
  - if no return is required, making a payment of the tax.

  With a self-assessment tax, the taxpayer calculates the amount of tax that must be paid, or refunded, and these amounts must be contained in that return. The return filed, therefore, is the original assessment which is effectively made by the taxpayer. For example, when a vendor files a VAT return the original assessment is the return that is filed. The same principle applies for employees' tax. If no return is needed but a taxpayer has to calculate what amount to pay, then the act of making payment is the original assessment.

- Assessment by SARS

  In contrast, if a tax Act requires a taxpayer to submit a return which does not incorporate a determination of the amount of a tax liability, SARS must make an assessment based on the return. The first assessment for a given tax period is an original assessment issued by SARS.

- Tax

  This is a very important definition in the context of TAAct, and, for purposes of administration under the Tax Administration Act only, includes a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act. This term is used as a collective term in TAAct to include all the amounts to which TAAct applies, and does not mean that for any other purpose the term 'tax' or 'taxes' includes, for example Relevant material

  The information gathering powers of SARS may only be used to obtain relevant material. Relevant material is information, documents,

or things that are forseeably relevant for tax risk assessment, assessing and collecting tax, or for determining compliance with a tax obligation.

- Responsible third party

  A responsible third party means a person who becomes personally liable for the tax liability of another person, other than as a representative taxpayer or as a withholding agent, whether in a personal or representative capacity.

- SARS official

  SARS official is a defined term in TAAct and means:

  - the Commissioner,
  - an employee of SARS; or
  - a person contracted 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.

- Serious tax offence

  This means a tax offence for which a person may be liable on conviction to a fine or to imprisonment for a period exceeding two years. A tax offence is also defined and means an offence in terms of a tax Act, including the offences listed in Chapter 17, or any other offence involving fraud on SARS or on a SARS official relating to the administration of a tax Act.

- Tax Acts

  TAAct applies to the administration of the tax Acts. A tax Act means the Tax Administration Act or an Act, or portion of an Act, referred to in the SARS Act, excluding the Customs and Excise Act.

- Taxable event

  This means an occurrence which affects or may affect the liability of a person to tax, and is important to:

- determine the tax period for purposes of transaction based taxes, such as value-added tax; and
- the meaning of administration of a tax Act in the context of obtaining full information in relation to a taxable event.

- Tax period

  This period determines the period for which returns and payments are required. This differs from tax type to tax type and is determined by the relevant tax Act.

- Taxpayer reference number

  This is the number that SARS may allocate in respect of one or more taxes to each person registered under a tax Act or Chapter 3.

8.4 Chapter 2: General Administration of the tax Acts

Chapter 2 provides that SARS is responsible for the administration of this Act under the control or direction of the Commissioner, and regulates the following:

- The ambit of administration of the tax Acts;
- The delegation of functions and duties to different levels in SARS;
- The limitation of administrative powers;
- The powers of the Minister;
- The application of TAAct i.e. to every person who is liable to comply with a provision of a tax Act (whether personally or on behalf of another person);
- What is a practice generally prevailing and when does it apply;
- The establishment of the office of the Tax Ombud.

It further provides that if TAAct is silent with regard to the administration of a tax Act and it is specifically provided for in the relevant tax Act, the

provisions of that tax Act apply. It deals with the resolution of any inconsistencies between TAAct and a tax Act, if any should arise, by providing that in the event of any inconsistency between TAAct and another tax Act, the tax Act prevails.

Administration of the tax Acts

The meaning of administration of the tax Acts is critical to the application of TAAct, as the exercise of any power or duty under a tax Act by a SARS official must be related to and within the ambit of the meaning of 'administration of the tax Acts'.

Administration of a tax Act includes the following:

- Obtaining full information in relation to:
    - anything that may affect the liability of a person for tax in respect of a previous, current or future tax period;
    - a taxable event; or
    - the obligation of a person (whether personally or on behalf of another person) to comply with a tax Act
- Ascertaining whether a person has filed or submitted correct returns, information or documents in compliance with the provisions of a tax Act
- Establishing the identity of a person for purposes of determining liability for tax
- Determining the liability of a person for tax
- Collecting tax and refund any tax overpaid
- Investigating whether a tax offence has been committed, and, if so:
    - to lay criminal charges; and
    - to provide the assistance that is reasonably required for the investigation and prosecution of tax offences or related common law offences
- Enforcing SARS' powers and duties under a tax Act to ensure that an

obligation imposed by or under a tax Act is complied with

- Performing any other administrative function necessary to carry out the provisions of a tax Act and
- Giving effect to the obligation of the Republic to provide assistance under an international tax agreement.

The administration of the tax Acts includes administrative assistance to foreign governments under an international tax agreement, which may include sharing of information, assistance with collection and the service of documents.

Tax administration and PAJA

The right to administrative justice under the Constitution is given effect to in the Promotion of Administrative Justice Act (PAJA). PAJA essentially mandates in the context of tax administration that tax administrative actions that materially and adversely affect taxpayer rights must, in the absence of exceptions provided for in PAJA, adhere to fairness requirements such as:

- Prior notice of the intended decision;
- A prior hearing before the decision is taken;
- Clear grounds for the decision;
- Adequate notice of the right to request reasons for the decision.

Exceptions under which SARS may depart from the requirements such as prior notice and prior hearing provided for in PAJA includes:

- Where such departure is reasonable and justifiable in the circumstances of a specific matter;
- Where SARS is empowered by empowering provisions to follow procedures that are fair, but different from the listed fairness requirements.

During the commentary period on the TAB, various comments were made that specific sections should contain administrative fairness provisions that require SARS officials to act reasonably or otherwise protect a taxpayer from the abuse of power. The concerns that SARS officials will act

unreasonably, unless TAAct requires them to act reasonably, however, are incorrect as PAJA applies in any event. The Constitutional Court has held that all statutes that authorise administrative action must now be read together with PAJA unless the provisions of the statutes in question are inconsistent with PAJA.

It is, therefore, not necessary for TAAct itself to spell out all the relevant aspects of administrative justice. This is implicit given the overriding application of PAJA, under which the unreasonable exercise of a power or performance of a function is a ground for review.

However, in certain impactful provisions of TAAct, administrative fairness provisions have been codified, for example:

- SARS may only conduct a field audit or investigation with prior notice;
- At the conclusion of the audit process SARS is obliged to give prior notice and prior opportunity to respond to the audit findings before the *assessment* is issued;
- Regarding assessments, SARS must give grounds for:
    - the need for a jeopardy assessment;
    - an assessment based on an estimation, and
    - an assessment that is not fully based on a return i.e. that is adverse to the tax position taken by a taxpayer.

It is important to bear in mind that the fact that TAAct prescribes administrative fairness requirements in respect of certain decisions does not mean that such requirements do not apply to other decisions under TAAct that constitute administrative action under PAJA. In the latter regard, it must be noted that not all decisions taken by SARS constitute administrative action under PAJA as they do not adversely affect rights nor have a direct, external effect.

In certain provisions, TAAct limits administrative fairness rights, as permitted under PAJA, for example:

- An inspection of a business premises may be conducted without prior

notice; and

- SARS is not required to give the taxpayer prior notice of an application for a civil judgment for the recovery of tax if SARS is satisfied that giving notice would prejudice the collection of the tax.

Once again, the fact that TAAct limits administrative fairness in respect of certain actions, does not mean that SARS may not in respect of other administrative actions under TAAct depart from administrative fairness requirements where such departure is reasonable and justifiable in the circumstances of a specific matters, as contemplated in PAJA.

The tax Acts

TAAct will essentially apply to the following statutes ('the tax Acts'):

- Transfer Duty Act, 1949
- Estate Duty Act, 1955
- Income Tax Act, 1962
- Value-Added Tax Act, 1991
- Skills Development Levies Act, 1998
- Unemployment Insurance Contributions Act, 2002
- Diamond Export Levy Act, 2007
- Diamond Export Levy (Administration) Act, 2007
- Securities Transfer Tax Act, 2007
- Securities Transfer Tax Administration Act, 2007
- Mineral and Petroleum Resources Royalty Act, 2008
- Mineral and Petroleum Resources Royalty (Administration) Act, 2008
- Voluntary Disclosure Programme and Taxation Laws Second Amendment Act, 2010.

It does not apply to the Customs and Excise Act, 1964.

Practice generally prevailing

If SARS has a practice that is a practice generally prevailing, a taxpayer has an expectation that SARS will follow that practice in respect of such taxpayer. The meaning of the term has been dealt with in numerous, but sometimes conflicting, cases. Taxpayers are often unsure of the existence of a practice generally prevailing as a result of reliance on certain non-SARS publications, media releases or published articles, operational practices or procedures and guides. None of these necessarily reflect the application or interpretation of a tax Act that is binding on and generally applied by the whole of SARS.

In order to give certainty to what this term means, it is now a defined term in TAAct. The only sources of SARS' binding practices will be official publications i.e. a binding general ruling, an interpretation note, a practice note or public notice issued by a senior SARS official or the Commissioner.

This concept is used in TAAct in the context of both defining and limiting SARS' power to issue an additional or reduced assessment and placing limitations upon taxpayers in claiming refunds. Where the grounds of objection are based on a change in the practice generally prevailing which applied on the date of the disputed assessment, the period for objection may not be extended. TAAct also deals with the situation where a practice generally prevailing ceases to be one, for example, as a result of legislative amendments or judgments that are handed down to an extent material to the practice.

Decision-making levels

TAAct introduces a new framework for decision-making that ensures that powers and duties that have far-reaching impact are only delegated to suitable qualified and experienced senior SARS officials and are exercised directly by the senior SARS official or under that official's direct supervision. The administration of the Act is divided into three tiers:

Tier 1: The Commissioner

The powers assigned to the Commissioner personally can be separated into those that allow the Commissioner to determine the

macro environment within which SARS functions, and specific operational powers that are the Commissioner's reserve.

- Authority to determine the tax environment include the authority to:
    - Issue public notices, for instance which specify in what form a taxpayer must retain records; when an auditor must inform a taxpayer of the stage of an audit, and when compounded interest will apply to a tax type; and
    - Prescribe tax forms.
- The exclusive operational powers of the Commissioner include the authority to:
    - Publish details of taxpayers convicted of an offence;
    - Publish facts concerning a taxpayer to counter inaccurate reporting in the media;
    - Permit a jeopardy assessment; and
    - Settle a tax dispute.

Powers and duties which are assigned to the Commissioner must be exercised by the Commissioner personally but he or she may delegate such powers and duties in the manner provided for in TAAct.

Tier 2: Senior SARS officials

Only a senior SARS official who is authorised to do so by the Commissioner may perform one or more of the more serious powers or functions, examples of which are reflected in table 1 below.

A SARS official acting under a delegation must be so authorised in writing with the mandate or authority specified.

Powers or functions reserved for senior SARS officials Power or Function delegated to senior SARS official	**TAAct**
Issuing an official publication (definition of *official publication*)	1
Withdraw or amend a decision by a SARS official	9
Laying a criminal charge relating to a *tax offence*	11(3)
Power or Function delegated to senior SARS official	TAAct
Appearing in the Tax Court and higher courts	12
Authorising a SARS official to conduct an audit or criminal investigation	41(1)
Requiring a person to attend an interview and to produce relevant material	47
Applying to a judge for authorisation to conduct an enquiry	50
Applying to a judge for a search and seizure warrant	59
Authorise a search and seizure without a warrant	63
Extend the period within which an objection must be filed	104(4)
Designate a tax dispute as a test case	106(6)
Extend the period within which an appeal must be lodged	107(2)
Approve the hearing of a matter by the Tax Board	109(1)
Appear before the Tax Board in support of the assessment or ‘decision’	113(5)
Appear before the Tax Court in support of the assessment or ‘decision’	125(1)
Approve and sign a settlement agreement	147(4)

Authorise an application to the High Court for a preservation order and authorise the seizure of assets subject to the order	163(1) & (11)
Suspend the payment of disputed tax pending the outcome of an objection or appeal or the decision of a court of law and withdraw or revoke such suspension	164
Appointing a third party to pay to SARS money held or owed to a taxpayer	179
Determine if a third party involved in the financial management of a tax debtor is personally liable for the tax debt	180
Take conservancy /collection steps requested under international tax agreement	185
Apply for a court order for repatriation of foreign assets to satisfy local tax debts	186
Temporarily write off a tax debt and withdraw this decision if the debt is no longer uneconomical to pursue	195
Permanently write off a tax debt that is irrecoverable at law or compromised	197
Authorise and sign a compromise agreement in terms of which a portion of the tax debt will be written off if the taxpayer pays the remainder	200 & 204
Approve a VDP application	230
Lay a complaint with SAPS or the NPA regarding tax evasion offences	235(3)
Lodge a complaint against a 'registered tax practitioner' with the relevant 'controlling body' and disclose the relevant information	241 & 242

Approve the issue of a tax clearance certificate	256(3)

Tier 3: SARS officials

The majority of functions and powers under the tax Acts will be performed and executed by SARS officials. A reference to officer in a tax Act where used in the context of a person who is engaged by the Commissioner in carrying out the provisions of the relevant tax Act, also means a SARS official as defined in TAAct.

Conflict of Interest

A SARS official cannot become involved in a matter if in the previous three years, the official has or had a personal, family, social, business, employment or financial relationship with the relevant person.

Identity cards

A SARS official involved in the administration of a tax Act must be issued with an identity card which he or she must produce when required by a member of the public. This card is used to, when requested, to demonstrate the authority of a SARS official to perform functions or duties. This ensures that SARS officials are not impersonated and that the public is satisfied that they are dealing with a SARS official and know the identity of that official.

Withdrawal or amendment of a decision

If all the material facts were known to the SARS official at the time the decision was made, a decision or notice may not be withdrawn or amended with retrospective effect, after three years from the later of the:

- date of the written notice of that decision; or
- date of assessment of the notice of assessment giving effect to the decision (if applicable).

A person can ask an official who made a decision, or that official's manager, or a senior SARS official to withdraw or amend any decision except a decision that underlies an assessment. If an assessment is disputed, a taxpayer must pursue the process of objection and appeal.

Powers and duties of the Minister

Under TAAct, the Minister has the power to issue regulations, appoint the Tax Ombud and bring forward the date for submission of returns and payment of tax generally.

The powers conferred and the duties imposed upon the Minister by or under the provisions of a tax Act may:

- be exercised or performed by the Minister personally; and
- except for the appointment of the Tax Ombud and the issue of regulations under TAAct, be delegated by the Minister to the Deputy Minister or Director-General of the National Treasury. These powers may be delegated to the

The Tax Ombud

Why a Tax Ombud?

The Tax Ombud will provide taxpayers with a cost-effective mechanism to address administrative difficulties, which will operate in addition to the existing mechanisms to do so. It is important to note that the creation of a Tax Ombud is not the only balancing factor to SARS' powers under TAAct. Taxpayer protection and remedies are specifically afforded in TAAct sections or parts dealing with SARS' powers, in addition to overarching remedies such as the right to request SARS to internally review a decision and the internal complaints resolution mechanisms.

Who is the Tax Ombud?

The Tax Ombud is appointed by the Minister to ensure the Tax Ombud's independence from SARS. The Minister determines the Tax Ombud's terms and conditions of service. The Tax Ombud may only be removed by the Minister in the case of misconduct, incapacity or incompetence.

How is the Tax Ombud's office established?

The Tax Ombud's office must be established within one year after commencement of TAAct. TAAct does not create the Tax Ombud's office as a separate entity. A close connection with SARS allows for the use of SARS facilities and structures to the maximum extent possible, so reducing the costs of establishing and running the office. The secondment of SARS employees to the Tax Ombud's office is a practical matter, which will ensure staff are knowledgeable about tax and SARS' internal processes and will simplify the administration of secrecy around taxpayers' affairs.

What is the mandate of the Tax Ombud?

Essentially, there are two kinds of disputes with SARS:

- Disagreements on the interpretation of law: In such disputes, the normal dispute resolution steps are followed namely objection and appeal, alternative dispute resolution, appeal to the tax board and/or the tax court, and further appeals to the Higher Courts; and
- Disagreements on procedural administration of law: Complaints in this regard may be reported to the Tax Ombud.

The Tax Ombud must review and address a complaint laid by a taxpayer and resolve a dispute using informal, fair and cost effective measures. This method of resolution is intended to be a simple and affordable remedy to taxpayers who have legitimate complaints that relate to administrative matters, poor service or the failure by SARS to observe taxpayer rights.

In discharging his or her mandate, the Tax Ombud must:

- review a complaint and, if necessary, resolve it through mediation or conciliation;
- act independently in resolving a complaint;
- follow informal, fair and cost-effective procedures in resolving a complaint;

- provide information to a taxpayer about the mandate and the procedures to pursue a complaint;
- facilitate access by taxpayers to complaint resolution mechanisms within SARS to address complaints; and
- identify and review systemic and emerging issues related to service matters or the application of the provisions of this Act or procedural or administrative provisions of a tax Act that impact negatively on taxpayers.

The Tax Ombud may not review matters outside the mandate above namely:

- Legislation or tax policy;
- SARS policy or practice generally prevailing, other than to the extent that it relates to a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS;
- A matter subject to objection and appeal under a tax Act, except for an administrative matter relating to such objection and appeal; or
- A decision of, proceeding in or matter before the tax court.

<u>To whom does the Tax Ombud report?</u>

Tax Ombud reports directly to the Minister and the Ombud's annual report must be tabled by the Minister in the National Assembly of Parliament. The reporting powers of the Tax Ombud include:

- Reporting any matter at any time to the Minister;
- Submitting quarterly reports to the Commissioner, and
- In the annual report in particular, identifying and reviewing systemic and emerging issues related to service matters or the application of the provisions of TAAct that impact negatively or adversely on taxpayers.

How can a complaint be reported to the Tax Ombud

Before an administrative complaint can be sent to Tax Ombud, the taxpayer must first try to resolve the complaint through SARS' internal complaints resolution procedures unless there are compelling circumstances justifying direct access to the Tax Ombud, for example where the complaint is very serious.

The Tax Ombud's office will have a dedicated website which will, for example, include information about the Tax Ombud, contacts details and prescribed forms. Information on when and how to contact the Tax Ombud will also be communicated by SARS.

8.5 Chapter 3: Registration

The purpose of Chapter 3 is to regulate the identification and registration of taxpayers. The management of taxpayer registration involves three basic functions: creation or registering taxpayers, updating taxpayer details and deletion of taxpayers from SARS' records. To encourage compliance with registration obligations, TAAct seeks to provide clear and comprehensive description of registration requirements. SARS further seeks to make the procedural requirements for registration as easy as possible, including investigating the feasibility of online registration in the future.

SARS also needs to take measures to ensure the completeness of taxpayer registration, i.e. to ensure that taxpayers who fail to register or provide adequate information are detected. TAAct supports the following measures:

- A system of access to third party information whereby SARS is notified of external events with tax implications for example the setting-up of companies and one-man business and vehicle transactions records;
- Physical inspections of business premises;
- On-the-spot checks at markets and other trade locations;

- Searching sources of information on economic activities such as newspapers and the Internet.

In practice, a taxpayer will only be deleted from the taxpayer register:

- in the case of a natural person and provided there is no outstanding tax liability, upon death or if the taxpayer becomes non-resident with no assets in South Africa; or
- in any other case (e.g. a company, trust etc.) and provided there is no outstanding tax liability, upon finalisation of liquidation, deregistration or if the taxpayer becomes non-resident with no assets in South Africa.

Single registration

TAAct provides for a single tax account, and it allows SARS to implement a single registration process for all tax types over time. Ultimately this will ease the administrative burden on taxpayers as they will need to submit only one form to register for any of the taxes. Taxpayers will have one account that reflects their entire tax liability. The ultimate objective is to create a single view of a taxpayer.

Registration period

TAAct aligns the periods within which a person must apply to register as a taxpayer in as far as this is feasible.

Discretion to register

Whether a person is obliged to apply or may voluntarily apply for registration under a tax Act, it should be borne in mind that it is an application to register. If SARS determines that a person is not required or permitted to register under the relevant tax Act, for example as a vendor for value-added tax, the person will not be registered.

A taxpayer must submit the registration information required under TAAct and a tax Act, where applicable, for purposes of an application to register or requested in the prescribed registration form. SARS may request additional documentation to be produced by an applicant and a person is required to produce all relevant material that is requested.

Where a taxpayer that is obliged to register with SARS under a tax Act fails to do so, SARS may register the taxpayer for one or more tax types as is appropriate under the circumstances. For example in the case of a micro business, SARS may register the person for the simpler turnover tax.

Every application for registration must be made using the prescribed form. If a person does not use the prescribed form, the person is considered not to have applied for registration. The prescribed form may require additional information depending on the tax type.

Biometric information

Biometric information includes fingerprints, facial recognition, vocal recognition and iris or retina recognition. Since biometric information is almost impossible to duplicate, unlike a signature for instance, it is an effective prevention against identity theft and fraud. SARS can require a person to provide biometric information when a person applies to register or to confirm a person's current registration.

A person registered **or** applying for registration under a tax Act, may be required to submit biometric information in the prescribed form and manner if the information is required to ensure:

- proper identification of the person; or
- counteracting identity theft or fraud.

Furthermore, in view of the highly private nature of biometric information, additional protection in the context of the disclosure thereof is afforded in the confidentiality of information chapter, Chapter 6, to the extent that not even a High Court may order the disclosure thereof. It may, however, be disclosed for purposes of criminal prosecution for tax offences to the extent that it relates or constitutes material information for the proving of, a tax offence.

Changes in registered particulars

Taxpayers must inform SARS of changes in their registered particulars to ensure that SARS has the most accurate and current information. Taxpayers must communicate to SARS any change of postal, physical or

electronic addresses, representative taxpayer and banking particulars.

Generally, in practice, a specific form will be provided by SARS for such communications which form may also indicate the manner of communication, i.e. postal, electronic or in person at a SARS office. In respect of some changes, for example banking details, stricter requirements will apply to counteract fraud and to ensure, in the context of refunds paid by SARS into a bank accounts, that SARS correctly discharges its obligation to pay the refund to the correct taxpayer. Other details required to be updated may be prescribed by the Commissioner through the issue of a public notice and additional specific notifications may still be required in a tax Act.

Taxpayer reference number (TRN)

The TRN is the linking element of the information that is included in SARS' various databases with reference to each taxpayer and is an essential instrument for identification of taxpayers and facilitating exchange of information between SARS and taxpayers.

A reference number is allocated to a taxpayer once the registration application has been processed. In order to maintain efficiency a taxpayer must include this tax reference number when filing a return or document with SARS. If the reference number is not used SARS may regard the return or document as invalid and must, if practical, inform the taxpayer.

8.6 Chapter 4: Returns & records

Returns

What is a return and where can a return form be obtained?

TAAct defines a return as a form, declaration, document or other manner of submitting information to SARS that incorporates a self-assessment or is the basis on which an assessment is to be made by SARS.

A return will generally be a prescribed form, for example Form ITR12

for income tax, which can be obtained at a SARS office or on the SARS website. Non-receipt by a person of a return form does not affect the obligation to submit a return.

Return forms can be obtained as follows:

- Manual returns: A return may be obtained by submitting a request at a SARS office, by post or telephonically. Returns for manual filing cannot be obtained electronically, for example from the SARS website, but are posted by SARS if requested by a taxpayer.
- eFiling: A return is available once an eFiler accesses the system by using a username and password.

When must a taxpayer submit a return?

If the obligation to submit a return is imposed under a tax Act, the taxpayer must submit the return in accordance with the requirements of relevant tax Act and TAAct. A taxpayer, who is generally not obliged to submit a return, may still be specifically required by SARS to do so.

Specific returns required under current law, for example income tax returns by companies, will now be regulated under the general return requirements of TAAct and the specific information required will be set out in the prescribed form.

Form and manner of submitting a return

A taxpayer who is required to submit a return must do so:

- In the prescribed form, including completing all the information prescribed by a tax Act or the Commissioner in the form;
- In the prescribed manner, this includes submitting the return at the prescribed place. In the case of eFilers, this will be on the eFiling system and in case of manual filers, at the place and in the manner (for example postal delivery) indicated in the return form; and

- By the date specified.
- Additionally, a return must be:
- A full and true return; and
- Be signed by the taxpayer or an authorised representative and the person who signs a return is regarded for all purposes to be cognisant of the statements made in the return.

Due date for submitting returns

A taxpayer who is required to submit a return must do so:

- By the date specified in the tax Act;
- By the date specified by the Commissioner in a public notice;
- If an individual extension has been given to the taxpayer by SARS, by that extended date;
- If a general extension has been given by the Commissioner, by that extended date; or
- The date for submission of returns determined by the Minister, if he or she exercises the power to do so.

The date prescribed by a tax Act when a return must be submitted differs between the tax types.

What if a mistake is made in the return?

Before an original assessment is issued, SARS may request or allow a person to submit an amended return to correct an undisputed error in the return. This will typically apply in the eFiling environment as a way to correct honest errors made in the return which may result in an incorrect assessment being issued. If a taxpayer, who was requested to submit an amended return, accesses the eFiling system, a new return populated with the information in the erroneous return will be accessible and the taxpayer must fix the error and file this return.

However, once an original assessment has been issued the only way to rectify it is through an additional or reduced assessment, or the

withdrawal thereof.

Example: If an incorrect VAT return is filed through self-assessment, the filing of the return is considered to be an original assessment. An error made in the return can only be remedied by:

- The taxpayer by requesting a reduced assessment which SARS may issue in the case of an undisputed error;
- SARS by issuing an additional assessment or reduced assessment to correct the error; or
- Withdrawal of the assessment by SARS if issued to the incorrect taxpayer, tax period or issued as a result of an incorrect payment allocation.

Third party returns

Third party reporting enables income tax returns to be pre-populated and helps SARS to verify accuracy of taxpayers' disclosures. This contributes to the development of an appropriate risk assessment environment. Currently a return is pre-populated with remuneration received from employers. As SARS' systems evolve, the pre-populated returns may include interest, medical aid related information and other third party information. This is intended to simplify the filing process.

The Commissioner may in a public notice require specific third party information to be provided. Every person who meets the criteria set out in this public notice has a duty to submit the information in the form and manner and by the date prescribed in the notice. The notice calling on third party returns to be filed must:

- Set out who must file a third party return;
- Stipulate by when the third party return must be filed (a third party return may be required at any time and not necessarily once a year); and
- Prescribe what information is to be included.

The Commissioner determines the prescribed form that must be completed, and, therefore, will determine what information an affected third party must report on. The notice may require returns from, for example:

- Employers that employ people;
- Institutions that receive amounts for another person or pay money to person; or
- Institutions that control the assets of another person.

Other returns required

Under TAAct, SARS may call on any person, whether a taxpayer or third party, to file a further or more detailed return for any tax. An interim income tax return can also be requested under the ITA, which is normally required before a taxpayer emigrates, becomes non-resident or ceases to exist before the end of the relevant tax period. A special return for VAT purposes must still be rendered when a deemed supply is made.

Statement concerning accounts by preparer

If any return furnished by a person under a tax Act is supported by any balance sheet, statement of assets and liabilities or account prepared by any other person, the taxpayer may be requested to submit a certificate or statement recording:

- the extent of the examination by the preparer of the books of account and of the documents from which the books of account were written up; and
- in so far as may be ascertained by the examination, whether or not the entries in those books and documents disclose the true nature of any transaction, receipt, accrual, payment or debit.

The preparer must, at the request of the taxpayer, submit to that taxpayer a copy of the certificate or statement. The submission of false certificate or statement constitutes a criminal offence and may trigger an administrative non-compliance penalty under Chapter 15.

Record retention

The duty to keep records

TAAct imposes a duty on a person to retain the records, books of account or documents needed to comply with a tax Act. It is important to note that certain taxpayers, for example employers and vendors, are required to keep additional specific records in terms of the relevant tax Acts.

Under TAAct, a person must keep the records, books of account or documents that:

- enable the person to observe the requirements of a tax Act;
- are specifically required under a tax Act; and
- enable SARS to be satisfied that the person has observed these requirements.

The duty to retain records does not rest only on taxpayers who are registered and who have filed a return, but is extended to include those who ought to but have not filed a return and those people who would have been obliged to file a return if not for an exemption or threshold. Failure or neglect to retain records as required under TAAct is a criminal offence. It may also trigger an administrative non-compliance penalty under Chapter 15.

Who must keep records?

The requirement to keep records for a tax period apply to a person who:

- has submitted a return for the tax period;
- is required to submit a return for the tax period and has not submitted a return for the tax period; or
- is not required to submit a return but has, during the tax period, received income, has a capital gain or loss, or engaged in any other activity that is subject to tax or would be subject to tax but for the application of a threshold or exemption.

In what form must records be kept

Regarding the manner of keeping records, a new requirement is added. This is to ensure the orderly and safe retention of the records and efficient access thereto by SARS, for purposes of an inspection or audit, during the prescribed retention period. To ensure that records are kept in the correct form, provision is made that SARS may inspect the records for this purpose, in addition to an examination, audit or investigation under TAAct. A person obliged to keep records must:

- keep the records in:
    - their original form;
    - the form generally prescribed by the Commissioner by public notice; or
    - the form authorised by a senior SARS official upon request by a specific taxpayer for the retention of information contained in records or documents by that taxpayer in a different but acceptable form.
- in an orderly fashion,
- in a safe place; and
- keep records open for inspection, audit or investigation by SARS.

SARS can do an unannounced inspection to ensure that the records that have to be retained are actually retained and a taxpayer has the duty to keep the necessary records open for inspection by SARS in South Africa.

For what period must records be retained for?

The periods for which persons are required to keep records are set out in the Table below.

Record retention periods Person	Period
A person who has submitted a return	From date of the submission of the return until last day of 5 years
A person who is required to submit a return for the tax period and has not submitted a return	Indefinite, until a return is submitted, when the above period applies
A person who is not required to submit a return but has, during the tax period, received income, has a capital gain or loss or engaged in any other activity that is subject to tax or would be subject to tax but for the application of a threshold or exemption	Until the audit is concluded or the applicable period above, whichever is the latest
A person who has been notified or is aware that the records are subject to an audit or investigation	Required to submit return: Date of submitting return Not required to submit return but received income: End of tax period Failed to submit return: End of tax period
A person who has lodged an objection or appeal against an assessment or decision under TAAct	Until the disputed assessment or decision becomes final or the applicable period above, whichever is the latest

Reportable arrangements

TAAct effects the following significant changes to the reportable arrangement scheme under current law:

- All listed arrangements likely to lead to an undue tax benefit are to be identified by the Commissioner by public notice, and the Commissioner may determine an arrangement to be an excluded

arrangement by public notice;

- Failure to report a reportable arrangement will not constitute a criminal offence, but is subject to an administrative non-compliance penalty under Chapter 15 discussed below.

Further changes include:

- A new definition of financial reporting standards, i.e. this term means:
    - in the case of a company required to submit financial statements in terms of the Companies Act, financial reporting standards prescribed by that Act; or
    - in any other case, the Generally Accepted Accounting Practice or appropriate financial reporting standards that provide a fair presentation of the financial results and position of the taxpayer.
- A reportable arrangement now includes an arrangement that is a listed arrangement and gives rise to an amount that is or will be disclosed by a participant in any year of assessment or over the term of the arrangement as:
    - a deduction for purposes of the ITA, but not as an expense for purposes of financial reporting standards; or
    - revenue for purposes of financial reporting standards but not as gross income for purposes of the Income Tax Act;
- The ITA provision regulating requests by SARS for information regarding reportable arrangements is deleted as information gathering is dealt with under Chapter 5;
- The ITA provision which imposes a flat R1 million administrative penalty for failure to report a reportable arrangement is repealed and replaced by a more proportionate administrative non-compliance penalty under Chapter 15.

8.7 Chapter 5: Information gathering

New Information Gathering Powers and Procedure

SARS' information gathering powers are supplemented or extended by TAAct. This is essentially to address the problem that too many requests for information by SARS result in protracted debates as to SARS' entitlement to certain information. However, taxpayer's rights are amplified and made more explicit to counterbalance SARS' new information gathering powers.

TAAct increases SARS' information gathering powers, and SARS may now:

- Conduct unannounced but limited inspections at business premises to verify that a person has complied with the formal obligations such as registering and maintaining records;
- Request information that concerns previous, current and future tax periods or taxable events – this is known as real time audit;
- Request information in respect of an objectively identifiable taxpayer (for example where SARS is aware of the existence of a transaction that is a taxable event, but not the name of a party to the agreement);
- Request information concerning an objectively identifiable class of taxpayers;
- Conduct audits on a random or risk assessment basis;
- Obtain information for purposes of revenue estimation;
- Ask a taxpayer to attend an interview at a SARS office to clarify issues of concern with a view to rendering further auditing unnecessary;
- The authority to conduct a search and seizure is retained, but extended to allow SARS officials to search a premise that is not identified in a warrant, and conduct a search and seizure without a warrant in limited circumstances.

Relevant material may be required by SARS to administer a tax Act. The more common reasons for requesting information include:

- Verifying whether a return, declaration or document is correct;
- Auditing a person's tax affairs;
- Establishing a person's correct liability, or refund;
- Collecting a tax debt; and
- Investigating and collecting evidence whether a person has committed a tax offence.

TAAct allows SARS officials to collect relevant information using six methods, namely:

- Request for information;
- Production of relevant material in person during an interview at a SARS office;
- A field audit or criminal investigation at the premises of a person;
- Formal inquiry before a presiding officer;
- Search and seizure.

The failure to provide information or answer questions is both administratively and criminally sanctionable, unless a taxpayer has just cause for such failure.

General rules for inspection, verification, audit and criminal investigation

Selection basis for inspection, verification or audit

The basis upon which a person may be selected for an inspection, verification (for example through a 'desk audit') or audit is now prescribed as either on a random or risk assessment basis. This is not the basis for criminal investigations, which are triggered by indications of the commission of an offence under the tax Acts.

Random selection is essentially a spot check, based on random factors, for example every 10th taxpayer on the register from a random starting point. Random audit selection is premised on the reality that it is impossible to verify all returns, and that not all risks are known to

SARS or are readily apparent from the face of a return. A spot check or a system of random monitoring is thus essential to the integrity of the tax system.

Risk based audit selection is, however, more common in modern revenue authorities as it ensures that a revenue authority allocates its audit resources to taxpayers that demonstrate risks. It involves assessing the risk profile of taxpayers ('risk assessment') and then allocating resources in accordance with the risk profiles ('resource to risk allocation'). There are clear benefits to risk based audit selection such as:

- More targeted audits and efficient use of SARS' and taxpayers' resources;
- SARS will be able to address emerging tax risks in real-time & provide tax certainty to taxpayers sooner;
- Reduced need for protracted audits (typically some years after targeted transactions occurred);
- Limit disputes; and
- Reduces the incidence of tax underpayments, administrative penalties and interest.

Obtaining real-time information from taxpayers and about taxpayers from third parties are key to effective risk management.

Authority to conduct an audit or investigation

A SARS official must demonstrate his or her authority to conduct audits or criminal investigations, as these powers may only be exercised by duly authorised officials and not all SARS officials. If a SARS official fails to demonstrate this authority, which must be in writing, a taxpayer may lawfully refuse to allow the audit or investigation until such official shows that this authority exists.

A SARS official authorised to conduct audits or criminal investigations do not need a specific authorisation for each matter audited or investigation, but the authority letter that affords the SARS official with

a general authority to conduct audits or criminal investigations will have a validity period. This authority is in addition the SARS identity card.

Keeping a taxpayer informed of the audit

TAAct prescribes the procedure that SARS have to follow both during and after an audit.

- *Stage of audit:* A taxpayer is entitled to be informed of the stage the audit is at, at intervals specified by the Commissioner in a Public Notice.
- *Letter of audit findings:* Within 21 days of the audit being finished the taxpayer must be given a letter of findings.
    - If the audit was inconclusive, SARS must inform the taxpayer of this fact.
    - If the audit concluded that a material adjustment should be made, then the grounds of the proposed adjustment must be set out. The taxpayer may respond to the findings and the proposed adjustment within 21 business days after receiving SARS' findings. In complex cases, both SARS and the taxpayer may deviate from these time periods.
- *Exception:* SARS is exempted from following the reporting and findings requirements if the taxpayer waives these rights or if it may impede or prejudice the purpose, progress or outcome of the audit. However, if SARS issues an assessment without a prior audit findings letter and opportunity to respond, SARS is then required to provide the grounds of the assessment within 21 business days of the assessment or the further period that may be required based on the complexities of the audit. This does not affect the right of the taxpayer to request reasons or to object to the assessment.

The scheme of TAAct clearly distinguishes between inspection, verification, audit and criminal investigations. The above obligations of

SARS to keep the taxpayer informed only arise as a result of a so-called in depth audit or criminal investigation.

Protection of a person's rights in the course of a criminal investigation

If a taxpayer is being audited and it appears that a serious tax offence has been committed, then the SARS auditor must refer the matter to a senior SARS official responsible for criminal investigations. Although the audit may continue, any information gathered from the taxpayer under Chapter 5 audit after referral must be kept separate from a criminal investigation and is not admissible in criminal proceedings. Material obtained before this referral can be used in a criminal investigation and material obtained in the course of an investigation can be used in civil and in criminal proceedings.

When a SARS official conducts a criminal investigation he or she is required to recognise the constitutional rights that a suspect has in a criminal investigation. The Constitution protects the following rights of a suspect:

- To remain silent;
- To be informed promptly of the right to remain silent and the consequences of not remaining silent; and
- Not to be compelled to make any confession or admission that could be used in evidence against him or her during a criminal trial.
- Aligned to this, the Constitution protects the rights of a suspect to choose and be represented by a legal practitioner at his own expense, at least until arrest, and to be informed of this right promptly.

The rights of a person who is a suspect are further protected in TAAct in the following ways:

- An admission of an offence by a taxpayer made in the course of information gathering by SARS is not admissible in criminal proceedings, unless a court orders that it is;

- An inspection and an interview under TAAct section 47 cannot be used when conducting a criminal investigation.

Inspection, request for relevant material, audit and criminal investigation

Inspections

SARS may, without prior notice, arrive at and inspect a premise. These inspections will typically be used for tax base broadening purposes or verification, for example, of the existence of an enterprise for purposes of VAT registration.

The following apply to inspections:

- The inspection may only be conducted for purposes of the administration of a tax Act;
- SARS may arrive without prior notice;
- Before entering, the SARS official must have a reasonable belief that a trade or enterprise is being carried on (e.g. signs at the entrance; clients coming & going; third party information etc.);
- The inspection may only be done to determine:
- the identity of the person occupying the premises;
- whether the person occupying the premises is registered for tax; and
- whether the person is keeping records in the required format;
- A SARS official may not enter a dwelling-house or domestic premises, except any part thereof that is used for trade, without the consent of the occupant.

Request for relevant material

SARS may direct a request for information to a taxpayer or another person, typically a third party that has information about the taxpayer, to provide information to SARS. The request is normally done by way

of a written notice and the taxpayer or person will be asked to furnish the requested information or provide a written explanation. A request for relevant material is not limited to a formal audit or investigation, but may be utilised for any purpose related to the administration of a tax Act, including a simple verification of registration and other details, compliance with any obligation imposed under a tax Act such as reporting or reportable arrangements or a so-called 'desk audit'.

A senior SARS official can also ask a person to provide information under oath or solemn declaration.

The limitations on a request for relevant material by SARS, in summary, are:

- A request for information must be related to and within the ambit of the administration of the tax Acts, for example in the case of a request for income tax information the request must be related to the ITA;
- The request for information may only be used to obtain relevant material;
- The request for information is limited to the records maintained or that should reasonably be maintained by a person. The person is accordingly not obliged to obtain or gather information outside such records in order to comply with an information request;
- Relevant material required by SARS in the request for information, must be referred to in the request with reasonable specificity; and
- Relevant material requested by SARS for revenue estimation purposes are limited to the information in this regard that a taxpayer has available.

The obligations and rights of a taxpayer of person from whom information is requested under TAAct are:

- To submit the relevant material to SARS in as a complete

manner as possible and in the manner requested, for example under oath or solemn declaration;

- To submit the specified relevant material to SARS at the place and within the time specified in the request;
- If unable to provide the information within the time provided, to request SARS on reasonable grounds to extend the period within which the relevant material must be submitted.

It is a criminal offence under TAAct if a person without just cause refuses or neglects to—

- furnish, produce or make available any information, document or thing, excluding information for purpose of revenue estimation;
- reply to or answer truly and fully any questions put to the person by a SARS official; or
- take an oath or make a solemn declaration.

Non-compliance with a request for information may also trigger an administrative non-compliance penalty under Chapter 15.

<u>Production of relevant material in person</u>

SARS may have some concerns arising from returns or from other sources, for example third party information, which it may wish to clarify during an interview with the person concerned in the hope of rendering further verification or audit unnecessary. From the perspective of the person being interviewed, this is a mechanism to possibly avoid more intrusive and potentially protracted verification and audit.

SARS may do the following:

- Require by notice a person, whether or not chargeable to tax, to attend an interview at the time and place indicated in the notice with reasonable prior notice;
- The person required to attend may be chargeable to tax or not,

in other words the purpose of the interview may be to determine whether a person is chargeable to tax;

- Question the person during the interview;
- Require in the notice that the person produce information at the interview.

The limitations of requiring a person to attend an interview and produce relevant material are as follows:

- A senior SARS official must authorise and issue the notice, although the interview itself may be executed by a SARS official under the control of the senior SARS official;
- The interview is limited to the tax affairs of the person required to attend, i.e. a third party may not be interviewed regarding the tax affairs of another person;
- The purpose of the interview, in addition to be limited to the administration to a tax Act, is further limited in that it may only be used for purposes of:
    - Clarifying issues of concern to SARS to render further verification or audit unnecessary; and
    - May not be used for purposes of a criminal investigation;
- The interview or questioning may not be done under oath or solemn declaration unless the person consents thereto;
- The information requested to be produced must be relevant material referred to in the notice with reasonable specificity;
- The person required to attend the interview may decline to attend an interview, if the distance between the place designated in the notice and the usual place of business or residence of the person exceeds the distance prescribed by the Commissioner by public notice.

Field audit or criminal investigation

Purpose

During a field audit or investigation, SARS may do the following:

- Arrive, with prior notice, at the premises of a person;
- Request relevant material to be made available by the person at the premises, including asking questions from persons at the premises and examine systems and downloading relevant material;
- Conduct an audit or criminal investigation in relation to the person at the premises or another person, for example the premises of the external payroll administrator of the person being audited or investigated.

Limitations

The limitations on the conduct of a field audit or criminal investigation are as follows:

- The notice of the field audit or criminal investigation must:
    - Be issued by a SARS official duly authorised to conduct an audit or investigation;
    - Be given at least 10 business days before the intended date of the audit or investigation;
    - State the place where and date and time (which must be during business hours) when the audit or investigation is due to start;
    - Indicate the initial basis and scope of the audit or investigation. Note: The reason that only the initial basis and scope can be indicated is premised on the reality that such initial basis and scope, for example an income tax audit, often expand as evidence of non-compliance or tax offences in respect of another tax type is discovered such as value-added tax.

Exceptions:

- SARS is not required to give the notice if the person waives the right to receive the notice. For example where a person contacts SARS with a request to conduct the field audit or investigation within a shorter period to fit in with other commitments, and the person is prepared to make the arrangements with SARS without requiring the notice;
- If the person at least 5 business days before the date listed in the notice advances reasonable grounds for varying the notice, SARS may vary the notice accordingly, subject to conditions SARS may impose with regard to preparatory measures for the audit or investigation.

- The audit or investigation must be in connection with the administration of a tax Act and only relevant material may be required;
- Only a SARS official duly authorised to conduct an audit or investigation may conduct the field audit or criminal investigation and may be required by the person at the premises to demonstrate this authority;
- A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for the purposes of trade, without the consent of the occupant.

Reasonable assistance

An obligation is imposed on the person on whose premises the audit or criminal investigation is carried out to provide such reasonable assistance as may be required by SARS to conduct the audit or investigation, including:

- Making available appropriate facilities, to the extent that such facilities are available, for example photocopying facilities;
- Answering questions relating to the audit or investigation;

- Submitting relevant material as required.

If SARS uses photocopying facilities at a person's premises, the person may recover from SARS after completion of the audit (or, at the person's request, on a monthly basis) the costs for the use of photocopying facilities in accordance with the fees prescribed in PAIA. The obligation to provide the reasonable assistance as is required by SARS is reinforced by TAAct provisions under which no person at the premises may without just cause:

- obstruct a SARS official from carrying out the audit or investigation; or
- refuse to give the access or assistance as may be required.

Such obstruction or refusal is also criminalised under TAAct, and may trigger an administrative non-compliance penalty under Chapter 15.

Inquiries

Purpose of inquiry

An inquiry under Part C of Chapter 5 is a much more formal process with witnesses subpoenaed and evidence being led and cross-examined under oath or solemn declaration, but it remains an information gathering mechanism.

Before an inquiry into the tax affairs of a person may be held, SARS must apply *ex parte* to a judge of the High Court each time an inquiry is sought. The judge essentially issues an order in terms of which a specific person is designated to act as presiding officer at the inquiry and has certain powers to regulate the inquiry proceedings. The purpose of the inquiry is to obtain information and, subject to the right against self-incrimination, SARS may use evidence given by a person under oath or solemn declaration at an inquiry in a subsequent proceeding involving the person or another person.

Limitations on inquiry

The following limitations apply:

- A senior SARS official must authorise the application to the judge and authorise a person to conduct an inquiry on behalf of SARS for the purposes of the administration of a tax Act;
- The application must be supported by information supplied under oath or solemn declaration by SARS, establishing the facts on which the application is based;
- The judge must be satisfied from such information under oath or solemn declaration that:
    - A person failed to comply with an obligation imposed under a tax Act; or
    - A person has committed a tax offence; and
    - Relevant material is likely to be revealed during the inquiry which may provide proof of the failure to comply or of the commission of the tax offence; and
- The order must:
    - Designate a presiding officer before whom the inquiry is to be held;
    - Identify the person alleged to have failed to comply with an obligation or committed a tax offence;
    - Refer to the alleged non-compliance or tax offence to be inquired into;
    - Be reasonably specific as to the ambit of the inquiry; and
    - Be provided to the appointed presiding officer.
- The presiding officer appointed by the judge to conduct the inquiry must be a member of the panel of advocates and attorneys appointed as chairpersons of the Tax Board.

Obligations and powers of presiding officer during inquiry

The presiding officer of the inquiry has the following obligations and powers:

- Determine the conduct of the inquiry as the presiding officer thinks fit;
- Ensure that the inquiry proceedings are recorded at a standard that would meet the standard required for the proceedings and evidence to be used in a court of law;
- Subpoena any person, whether or not chargeable to tax and whether or not he or she is the person whose tax affairs are being investigated, to appear at the inquiry to be examined under oath by the person authorised to conduct the inquiry on behalf of SARS and to produce relevant material;
- Issue a warrant of arrest should that person fail to appear or fail to stay in attendance at the inquiry until excused, and convict the person of a criminal offence for such failure;
- Hold a person in contempt;
- Direct that a person receive witness fees to attend in accordance with the tariffs prescribed in terms of the Magistrates' Courts Act;
- Ensure that the inquiry is private and confidential and on request, exclude a person from the inquiry if the person's attendance is prejudicial to the inquiry.

Rights or person subpoenaed to an inquiry

The rights of a person who is subpoenaed to an inquiry include:

- To advance just cause why he or she cannot attend or testify;
- To have a representative present when he or she appears as a witness;
- Although the person may not refuse to answer a question during

an inquiry on the grounds that it may incriminate the person, incriminating evidence obtained during the inquiry is not admissible in criminal proceedings against the person giving the evidence, unless the proceedings relate to:

- the administering or taking of an oath or the administering or making of a solemn declaration;
- the giving of false evidence or the making of a false statement; or
- the failure to answer questions lawfully put to the person, fully and satisfactorily.

Unless a High Court orders otherwise, an inquiry must proceed despite the fact that a civil or criminal proceeding is pending or contemplated against or involves:

- the person alleged to have failed to comply with an obligation under a tax Act or committed a tax offence;
- a witness or potential witness in the inquiry; or
- another person whose affairs may be investigated in the course of the inquiry.

Information disclosed during an inquiry constitutes taxpayer information is subject to the confidentiality provisions of TAAct, which regulate the disclosure of taxpayer information and apply with the necessary changes to persons present at inquiry, including the person being questioned.

Search and seizure under a warrant

Purpose of search and seizure warrant

For purposes of information gathering, SARS may unannounced enter a premises where relevant material is being kept, conduct a search of a person's premises and seize relevant material under a search and seizure warrant issued by a judge or magistrate. SARS may apply *ex parte* to a judge of the High Court or a magistrate for a warrant.

Limitations on issue of the warrant

The following limitations apply to the application for the warrant and the content of the warrant:

- A senior SARS official must authorise the application to the judge or magistrate for a warrant for search and seizure for the purposes of the administration of a tax Act;
- SARS may only apply to a magistrate for a warrant if the matter relates to an audit or investigation where the estimated tax in dispute does not exceed the amount determined under TAAct;
- The application must be supported by information under oath or solemn declaration by SARS, establishing the facts on which the application is based;
- The judge must be satisfied from such information under oath or solemn declaration that:
    - A person failed to comply with an obligation imposed under a tax Act; or committed a tax offence; and
    - Relevant material likely to be found on the premises specified in the application may provide evidence of the failure to comply or commission of the offence;
- A warrant issued by the judge or magistrate must contain the following:
    - the alleged failure to comply or offence that is the basis for the application;
    - the person alleged to have failed to comply or to have committed the offence;
    - the premises to be searched; and
    - the fact that relevant material is likely to be found on the premises.

Powers under the warrant

Under the warrant, a SARS official may do the following:

- Open or cause to be opened or removed in conducting a search, anything which the official suspects 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 it is necessary to copy the material required;
- Make extracts from or copies of relevant material, for example where the removal of original documents or computers may prejudice the continuance of a taxpayer's business;
- Require from a person an explanation of relevant material found at the premises;
- Search anyone who is on the premises;
- Require a person on the premises to assist SARS provided that the assistance is reasonable, for example asking a person where certain information is kept;
- If the premises listed in the warrant is a vessel, aircraft or vehicle, stop and board the vessel, aircraft or vehicle, search the vessel, aircraft or vehicle or a person found in the vessel, aircraft or vehicle, and question the person with respect to a matter dealt with in a tax Act;
- If material is kept at premises not identified in a warrant, SARS officials may also search those premises if a senior SARS official authorises it on the basis that there is reasonable grounds to believe that:
    - the relevant material referred to in the warrant application and included in a warrant is at premises not identified in the warrant and may be removed or destroyed;

- a warrant cannot be obtained in time to prevent the removal or destruction of the relevant material; and
- the delay in obtaining a warrant would defeat the object of the search and seizure.

Note: Despite the existence of the above reasonable belief, a SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, without the consent of the occupant.

Limitations on the carrying out of the warrant

The following limitations apply to the carrying out of the warrant:

- The warrant must be exercised within 45 business days or such further period as a judge or magistrate deems appropriate on good cause shown by SARS - on good cause shown essentially means a person must provide grounds why it would be just and equitable to both parties involved that this period be extended;
- When the SARS officials arrive at the premises it must produce the warrant to the person in charge of the premises. A failure to produce a warrant entitles a person to refuse access to the officials;
- The search must be carried out with due regard to decency and order;
- SARS may only search a person if the official is of the same gender as the person being searched;
- SARS must make an inventory of the relevant material seized and provide a copy thereof to the person. The inventory must be in the form, manner and at the time that is reasonable under the circumstances. For example, if a large number of documents are seized, it may only be possible to provide the inventory at a later stage;
- If the SARS official seizes relevant material, the official must ensure that the relevant material seized is preserved and

retained until it is no longer required for:

- the investigation into the non-compliance or tax offence on which the warrant was based; or
- the any legal proceedings under a tax Act or criminal proceedings in which the material is required to be used.

- In respect of relevant material that may be alleged to be subject to legal professional privilege, the following applies:
  - If a SARS anticipates that a person will or a person alleges the existence of legal professional privilege in respect of relevant material that SARS wants to seize SARS must:
    - seal the material if an independent attorney is not present;
    - make arrangements with such an attorney to take receipt of the material;
    - as soon as is reasonably possible, hand over the material to the attorney;
  - The attorney must within 21 business days make a determination of whether the privilege applies and any party dissatisfied with the determination may apply to a court for relief; and
  - The attorney must retain the relevant material pending final resolution of the dispute by the parties or an order of court.

<u>Rights of affected person</u>

A person whose premises is subject to a search and seizure or to whose affairs seized relevant material relates, has the following specific rights:

- The right to examine and copy the seized material:
  - at the person's cost in accordance with the fees

prescribed in accordance with PAIA;

- during normal business hours; and
- under the supervision determined by a senior SARS official,

- The right to request SARS to return some or all of the seized material and compensation for physical damage caused during the conduct of the search and seizure and, if SARS refuses the request, the right to apply to a High Court for an order to this effect.
- The court may:
  - on good cause shown, make the order as it deems fit;
  - if the court sets aside the warrant or orders the return of the seized material, authorise SARS to retain the original or a copy of any relevant material in the interests of justice.

Any abuse of this power by SARS may be addressed by using the general remedies of taxpayers in TAAct, SARS administrative complaints resolution procedures and the Tax Ombud, as well as under PAJA.

Search and seizure without a warrant

Purpose

The power to conduct a warrantless search and seizure is a narrow exception to the requirement that searches and seizures occur pursuant to a warrant. However, such narrow exceptions occur frequently in South African law, and our courts, including the Constitutional Court, have emphasised that such narrow exceptions to the warrant requirement are appropriate. Several other tax jurisdictions also have warrantless search and seizure powers.

This power should, for example, assist in tax base broadening and addressing the reality that tax evaders who, upon approach by SARS,

waste no time in destroying all records and evidence of their fraudulent activities and details of income derived.

Limitations

A warrantless search is only permitted in the following circumstances:

Firstly, if the owner or person in control of the premises so consents in writing; or

Secondly, if no consent is given, if a senior SARS official on reasonable grounds is satisfied that:

- There may be an imminent removal or destruction of relevant material likely to be found on the premises;
- If SARS applies for a search warrant under its statutory power to do so, a search warrant will be issued; and
- The delay in obtaining a warrant would defeat the object of the search and seizure.

Furthermore, among other safeguards:

- A SARS official must before carrying out the search, inform the owner or person in control of the premises:
    - what the legislative basis if of the search and seizure i.e. that the search is being conducted under an empowering provision under TAAct; and
    - of the alleged failure to comply with an obligation imposed under a tax Act or tax offence that is the basis for the search.
- The search may only be carried out in the same manner and subject to the same statutory limitations as a search in terms of a warrant; and
- A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, without the consent of the occupant.

Rights of affected person

A person affected by the warrantless search and seizure would have the same rights and remedies as discussed above under Search and seizure under a warrant.

A warrantless search will be justifiable by the Court, which can inquire into the grounds and decide whether they are reasonable. A court could also be approached on an urgent basis for interlocutory relief regarding the custody or sealing of the documents pending an application to set aside the search and seizure.

8.8 Chapter 6: Confidentiality of information

Taxpayer information and SARS confidential information

TAAct distinguishes between:

- Taxpayer information; and
- SARS confidential information.

SARS confidential information is information that is relevant to the administration of a tax Act that is, for example, confidential information such as internal policies, legal opinions and memorandums. The concept is narrowly defined and only information relevant to tax administration is included.

The reason for this distinction is to clearly differentiate between taxpayer information, in respect of which the right to privacy applies and stricter disclosure rules apply, and SARS information that is confidential but in respect of which less strict disclosure rules apply.

Purpose of secrecy provisions

Taxpayers have a right to expect that any information provided by them or about them under the tax Acts is treated in confidence, will not be disclosed to third parties and is used for tax purposes only. The public policy in South Africa behind the secrecy provisions is to encourage taxpayers to register and make full and proper disclosure of their income.

Regarding access by third parties to taxpayer information, the protection of such information is reinforced by the mandatory protection of SARS' records by PAIA section 35, which Act gives effect to the constitutional right of access to information. This protection is further underpinned by case law wherein strict requirements are laid down before a court will order disclosure of tax information to third parties, which requirements have now mostly been codified in TAAct.

Disclosure provisions may, however, be justified where the public benefit derived from the lawful disclosure of relevant information outweighs concerns about individuals' privacy. It is, therefore, accepted, in South Africa and internationally, that exceptions to the obligation to protect taxpayer information are necessary because information collected by a revenue authority can be vital to other arms of government in performing their functions properly. Specifically, it is recognised that in the context of law enforcement:

- where certain taxpayer information is likely to be of value to a criminal investigation, it is in the public interest that the information is available to law enforcement agencies within certain limits; and
- such limited disclosure will ensure that there is a potential for information flow in two directions, i.e. between a revenue authority and law enforcement agencies and vice versa.

Taxpayer Information

What is 'taxpayer information'?

This includes all material provided by a taxpayer or obtained by SARS in respect of a taxpayer, and specifically includes biometric information. It may safely be said that most information that relates to a taxpayer and a taxpayer's affairs is taxpayer information.

SARS' duty to preserve the secrecy of taxpayer information

There is a general duty on current and former SARS employees, and on every person contracted by SARS, to preserve the secrecy of taxpayer information and not to disclose taxpayer information to a

person who is not a SARS official. All SARS officials, including persons contracted by SARS, are obliged to take an oath of secrecy. Failure to take the oath before commencing duties is a statutory offence.

Even non-SARS employees who unlawfully receive taxpayer information are required to abide by the secrecy provisions. These recipients are prohibited, under criminal sanction, from distributing the information any further. A person, who lawfully receives taxpayer information under TAAct, must preserve the secrecy of the information and may only disclose the information to another person if the disclosure is necessary to perform the functions specified in the relevant section.

The consequences of contravening the secrecy provisions are severe, as any disclosure contrary to the secrecy provisions would be unlawful, and the person concerned could be liable for criminal prosecution.

Apart from the necessary authority to disclose taxpayer information when performing a duty there are exceptions to the general confidentiality provisions in TAAct.

Disclosure in the performance of duties

The duty to preserve secrecy of taxpayer information does not prohibit a SARS official from disclosing taxpayer information in the performance of duties under a tax Act, which includes disclosure:

- to the SAPS or the NPA of information relating to tax offences for purposes of the prosecution thereof;
- as a witness in any civil or criminal proceedings under a tax Act; or
- the taxpayer information necessary to enable a person to provide such information as may be required by SARS from that person.

Biometric information of a taxpayer may not be disclosed by SARS

except to the SAPS or the NPA to the extent that it is information relating to tax offences for purposes of the prosecution thereof.

Disclosure under any other Act

The duty to preserve secrecy of taxpayer information does not prohibit a SARS official from disclosing taxpayer information under any other Act which expressly provides for the disclosure of taxpayer information despite the confidentiality or secrecy provisions of the tax Acts, for example:

- The Prevention of Organised Crime Act, 2000
- The Financial Intelligence Centre Act, 2001
- The Drugs and Drug Trafficking Act, 2001.

Disclosure by order of a High Court

The duty to preserve secrecy of taxpayer information does not prohibit a person who is a current or former SARS official from disclosing taxpayer information by order of a High Court. The current law provides that a competent Court may order disclosure of taxpayer information. This includes a Magistrate's Court, Maintenance Court and a section 205 enquiry by a magistrate under the CPA. This power is now limited to the High Court to ensure better protection of taxpayer information.

An application by any person to the High Court for a disclosure order requires prior notice to SARS of at least 15 business days unless the court, based on urgency, allows a shorter period. SARS may oppose the application on the basis that the disclosure may seriously prejudice the taxpayer concerned or impair a civil or criminal tax investigation by SARS.

The court may not grant the order unless satisfied that the following circumstances apply:

- The information cannot be obtained elsewhere;
- The primary mechanisms for procuring evidence under an Act

or rule of court will yield or yielded no or disappointing results;

- The information is central to the case;
- The information does not constitute biometric information.

Disclosure of taxpayer information that is public information

The duty to preserve secrecy of taxpayer information does not prohibit a person who is a current or former SARS official from disclosing taxpayer information if it is public information.

General publication for administration purposes

The Commissioner may publish the name and tax reference number of any registered taxpayer. The purpose of making this limited information available is to publicise persons registered for tax for purposes of, for example in the case of value-added tax, to assist enterprises in conducting a trade. In respect of registered income taxpayers, the publication should enhance general compliance.

The Commissioner may also publish a list of Public Benefit Organisations. In the case of income tax, a list of duly registered Public Benefit Organisations may assist the community when donating funds to Public Benefit Organisations.

Disclosure to rebut false allegations in the media

If false allegations or information is disclosed publicly by a taxpayer in the media, then the Commissioner may counter or rebut this false information. The purpose is to protect the integrity and reputation of SARS as an organisation. The checks and balances for the exercise of this power are:

- Only the Commissioner personally may approve such disclosure;
- The disclosure must be for the protection of the integrity and reputation of SARS as an organisation;
- The disclosure must be limited to taxpayer information that is necessary to rebut the false allegations;

- The false allegations must have been made by the taxpayer personally or someone authorised to do so by the taxpayer; and
- Prior notice of at least 24 hours before publication should be given to the taxpayer.

Disclosure to other entities

A senior SARS official may disclose certain information to organs of state, institutions and employers that is required for the performance of their respective legislative functions. In respect of some of these entities, the information may only be disclosed by SARS or the relevant person or entities to the extent that it is:

- necessary for the purpose of exercising a power or performing a regulatory function or duty under legislation; and
- relevant and proportionate to what the disclosure is intended to achieve as determined under legislation.

Purpose of disclosure to financial regulatory agencies

Several regulatory and enforcement agencies are subject to secrecy provisions that limit the ability to share information, hampering enforcement and the protection of public against financial exploitation through schemes such as pyramid, ponzi and investment schemes. Following the proposal in the 2010 Budget Review, that the secrecy provisions of regulatory agencies should be reviewed, TAAct authorises the disclosure of taxpayer information to the FSB, SARB, FIC and NCR. Amendments to the regulatory frameworks of these entities also allow them to share information with SARS for this purpose.

Purpose of disclosure for purposes of verification of basic information

The accuracy of identifying information and other basic information relating to a taxpayer is essential to SARS, organs of state and other entities. Therefore, TAAct in this section provides for the disclosure of information for purposes of the verification of the correctness thereof to an organ of state or institution listed in a regulation issued by the

Minister. An institution may include a private institution.

The organ of state or entity must otherwise be lawfully entitled to the information and only the following particulars of a taxpayer may be disclosed:

- Name and taxpayer reference number;
- Any identifying number;
- Physical and postal address and other contact details;
- Employer's name, address and contact details;
- Other non-financial information as the organ of state or institution may require for purposes of verifying the above.

Disclosure in criminal, public safety or environmental matters

An application for a court order for the disclosure of information regarding specified types of serious offences may be brought by means of an *ex parte* court application by:

- A senior SARS official;
- The SAPS; or
- The NPA.

Under current law only SARS may initiate such proceedings, but this does not adequately cater for circumstances where the SAPS or the NPA has reason to believe that such information is in the possession of SARS and wishes to apply for the disclosure thereof. As the application is *ex parte* no notice to the taxpayer concerned is required, but an application procedure as between SARS and SAPS or the NPA or is prescribed which requires at least 10 business days' notice to SARS by SAPS or the NPA when initiating the application. SARS may oppose an application by the SAPS or NPA if the disclosure of the information would seriously impair or prejudice a civil or criminal tax investigation or other enforcement of a tax Act by SARS.

Disclosure to taxpayer of own records

There are three rules which govern a taxpayer's right of access to information concerning that taxpayer:

- *Assessment or other decisions*: A taxpayer is entitled to a certified copy of an assessment or other decision against which a taxpayer may object to;
- *Information provided by the taxpayer*: If the taxpayer provided SARS with the information, for example returns and supporting documents, then SARS must provide the taxpayer copies of that information;
- *Information obtained by SARS*: If a taxpayer requests information that SARS collected in respect of the taxpayer, then the taxpayer must request the information through the provisions of the PAIA. The significance is that in terms of PAIA a request may be refused on a number of grounds including that disclosure is premature and prejudicial to the outcome of an investigation or may reveal the identity of an informant. Requests for information must be made to SARS' appointed PAIA information officer, and SARS is authorised to levy a charge as prescribed by the PAIA.

Publication of names of tax offenders

The default of a minority of taxpayers shifts the tax burden to compliant taxpayers. Accordingly, the broad base of compliant taxpayers has a vested interest in knowing what action has been taken against those who have not been compliant. Certain details of taxpayers who have been convicted of a tax offence may be published by the Commissioner. The details that may be published include the person's name and residential area, as well as details of the offence and the sentence imposed.

SARS confidential information

SARS confidential information that is relevant to the administration of a tax Act is protected from disclosure. This includes, for example:

- Personal information of SARS officials;
- Information subject to legal professional privilege vested in SARS;
- Information provided by a third party in confidence to SARS if disclosure thereof would prejudice similar information being disclosed in the future;
- Information supplied in confidence by or on behalf of another state or an international organisation.

The disclosure of SARS confidential information to a person who is not a SARS official is prohibited, as well disclosure to a SARS official who is not authorised to have access to the information is also prohibited, also referred to as the 'need to know' principle.

SARS confidential information may be disclosed by a SARS official or former official if:

- The information is public information;
- Authorised by the Commissioner;
- The disclosure is authorised under any other Act which expressly provides for the disclosure of the information despite the provisions in Chapter 6;
- Access has been granted for the disclosure of the information in terms of PAIA;
- Required by order of a High Court.

Self-incriminating information

Although this issue is dealt with in Chapter 6, the principle applies to TAAct as a whole and, in particular, the submission of returns by taxpayers and information gathering by SARS.

Self-incrimination and the submission of returns

TAAct section 72(1) provides that:

- a taxpayer may not refuse to comply with his or her obligations under a tax Act to complete and submit a return or an application on the grounds that to do so might incriminate him or her; and
- an admission by the taxpayer contained in a return, application, or other document submitted to SARS by a taxpayer is admissible in criminal proceedings against the taxpayer for a tax offence, unless a competent court directs otherwise.

TAAct section 72(1) is intended to deal with taxpayers arguing that they need not complete returns and similar documents and respond to audit enquiries since their responses would be self-incriminating and they thus enjoy constitutional protection from responding. Some go so far as to insist on immunity from prosecution in return for their cooperation. This provision makes it clear that all taxpayers are obliged to complete tax returns and that the danger of self-incrimination does not absolve them from this duty. It preserves some residual power for the Court to depart from the default position and direct that, in a specific case, admissions in a tax return may not be used.

Regarding the constitutionality of TAAct section 72(1), SARS is of the view that the section does not limit any constitutional right, and in particular the right against self-incrimination. It applies to all taxpayers when they submit standard returns or applications. It is, therefore, not applicable to either persons arrested or accused as referred to in the Constitution section 35 or even merely suspected of committing offences.

The duty to file a full and complete return applies regardless of whether the income indicated therein is lawful or not, and regardless of whether the information contained therein is incriminating or not.

Self-incrimination and the use of information obtained by SARS

TAAct section 72(1) provides that an admission by the taxpayer of the commission of an offence under a tax Act obtained from a taxpayer under Chapter 5 is not admissible in criminal proceedings against the taxpayer, unless a competent court directs otherwise.

The purpose of TAAct section 72(2) is to protect the right against self-incrimination of taxpayers compelled to provide information to SARS under Chapter 5 under threat of criminal sanction. Interventions by SARS under its information gathering powers for purposes of, for example an audit or investigation, are specific to identified taxpayers – rather than the general body of taxpayers – and are closer to cases where the Constitutional Court had struck down legislation that provided for the use of evidence obtained under compulsion in criminal proceedings. TAAct section 72(2) preserves some residual power for the Court to depart from the default position and direct that, in a specific case, admissions gathered using SARS' information gathering powers may be used

In the context of a verification, inspection or audit under Chapter 5 a taxpayer is not a suspect. However, if it appears during such verification, inspection or audit that a serious tax offence has been committed and the matter is referred for criminal investigation under TAAct, the taxpayer can then be regarded as a suspect and SARS is then obliged to conduct the investigation with due recognition of the taxpayer's constitutional rights as a suspect in a criminal investigation. Only once SARS has laid a criminal charge, will the taxpayer become an arrested, detained and accused person invoking the full protection afforded by the fair trial rights under the Constitution.

8.9 Chapter 7: Advance rulings

Purpose of advance rulings

The purpose of the advance ruling system is to promote clarity, consistency and certainty regarding the interpretation and application of a tax Act by creating a framework for the issuance of advance rulings. A binding ruling will provide a taxpayer with clarity and certainty on how SARS will interpret and apply the various tax laws to a proposed transaction. The ruling will be binding upon SARS when a taxpayer is assessed in connection with that proposed transaction, unless the taxpayer has not disclosed all the facts in connection with the proposed transaction or has not concluded the transaction as described in the taxpayer's application.

The advance ruling system currently regulated in the Income Tax Act and the Value-Added Tax Act is incorporated in TAAct, and advance rulings may be now issued in respect of all tax types and tax Acts.

New definitions

The following definitions applicable to advance rulings are included in TAAct:

- 'binding effect' means the requirement that SARS interpret or apply the applicable tax Act in accordance with an advance ruling under TAAct;
- 'class' means-
    - shareholders, members, beneficiaries or the like in respect of a company, association, pension fund, trust, or the like; or
    - a group of persons, which may be unrelated but are similarly affected by the application of a tax Act to a proposed transaction and agree to be represented by an applicant.
- 'proposed transaction' means a transaction that an applicant proposes to undertake, but has not agreed to undertake, other than by way of an agreement that is subject to a suspensive condition or is otherwise not binding.

Procedure for applying for an advance ruling

The application procedures for advance rulings are quite structured. The advance rulings process is not designed to provide answers to taxpayers general tax queries regarding their current tax affairs or general questions about tax laws such as administrative or procedural matters (for example, where, when or how to file returns). In addition to the provisions of Chapter 7, the Commissioner may issue procedures and guidelines, in the form of binding general rulings, for implementation and operation of the advance ruling system.

The provisions of Chapter 7 establish the framework for the advance ruling system and set out basic rules regarding the:

- application process and fees;
- grounds for exclusions and refusals of applications for advance rulings;
- binding effect and applicability of advance rulings;
- when are advance rulings rendered void *ab initio*;
- impact on advance rulings of subsequent amendments to the underlying tax Act or by court decisions;
- withdrawal or modification of advance rulings;
- publication by SARS of advance rulings;
- effect of non-binding private opinions; and
- the issue general rulings by SARS.

A new basis for the rejection of an application for an advance ruling under TAAct is if the application:

- requests or requires the rendering of an opinion, conclusion, or determination regarding a matter which can be resolved by SARS issuing a directive under the Fourth Schedule to the ITA; or
- requests SARS to rule on the substance of a 'transaction' and disregard its form.

In the context of fees, TAAct provides that if there is more than one applicant for a ruling in respect of a proposed transaction SARS may, upon request by the applicants; impose a single prescribed fee in respect of the application. Also, a withdrawal does not affect the liability to pay fees under TAAct.

In the context of applications, TAAct provides in addition to current law that:

- An application for a binding private ruling may be made by one person who is a party to a proposed transaction, or by two or more parties to a proposed transaction as co-applicants, and if there is more than one applicant, each applicant must join in designating one applicant as the lead applicant to represent the others;
- An application for a binding class ruling may be made by a person on behalf of a class;
- An applicant may withdraw an application for a ruling at any time;
- A co-applicant to a private ruling or a person referred to in TAAct section 78(2) may withdraw from an application at any time.

A binding general ruling is issued by a senior SARS official and is not based on an application for a ruling by an applicant.

More information on the advance ruling system can be found in the following sources:

- LAPD Quick Guide to Advance Tax Rulings at:
    - http://www.sars.gov.za/Tools/Documents/DocumentDownload.asp?FileID=66769
- LAPD Comprehensive Guide to Advance Tax Rulings at:
    - http://www.sars.gov.za/Tools/Documents/DocumentDownload.asp?FileID=66768
- SARS Advance Tax Rulings website at:
    - http://www.sars.gov.za/home.asp?pid=4109.

These guides will be aligned with the Tax Administration Act, once

commenced.

When is an advance ruling rendered void?

A binding private ruling or binding class ruling is void *ab initio* if:

- the proposed transaction described in the ruling is materially different from the transaction actually carried out;
- there is fraud, misrepresentation or non-disclosure of a material fact; or
- an assumption made or condition imposed by SARS is not satisfied or carried out.

A fact will be considered material if it would have resulted in a different ruling had SARS been aware of it when the original ruling was made.

When does an advance ruling seize to be effective?

An advance ruling ceases to be effective if:

- a provision of the tax Act that was the subject of the advance ruling is repealed or amended in a manner that materially affects the advance ruling in which case the advance ruling will cease to be effective from the date that the repeal or amendment is effective; or
- a court overturns or modifies an interpretation of the tax Act on which the advance ruling is based in which case the advance ruling will cease to be effective from the date of judgment unless:
    - the decision is under appeal;
    - the decision is fact-specific and the general interpretation upon which the advance ruling was based is unaffected; or
    - the reference to the interpretation upon which the advance ruling was based was *obiter dicta*.

Withdrawal or modification of advance rulings

SARS may withdraw or modify an advance ruling provided certain procedures are followed.

8.10 Chapter 8: Assessments

Purpose of assessments

Issuing a tax assessment is the process of determining tax due by a taxpayer or a refund due to a taxpayer, and a distinction is made between self-assessment and administrative assessment. An assessment is defined in TAAct as the determination of the amount of a tax liability or refund either through a taxpayer's self-assessment or an assessment by SARS ('administrative assessment').

TAAct introduces more generic terms to accommodate the modernisation initiative towards a full self-assessment system. Throughout TAAct, provision is made for the transition to a full self-assessment system, which system can be described as follows:

- Self-assessment is a mechanism applied as part of a tax collection system;
- Under self-assessment, the taxpayer is required to report the basis of assessment (for example taxable income), to submit a calculation of the tax due and, usually, to simultaneously pay any outstanding tax due as calculated by the taxpayer. The onus is on the taxpayer to calculate the correct amount of tax payable;
- The role of SARS in this system is to verify the correctness of the assessment by the taxpayer by means of a combination of risk based and random verifications and audits;
- It contrasts with the role of SARS in an administrative assessment system where the taxpayer is called upon to submit the information to SARS. The onus on the taxpayer is to submit a true and complete return of the information required. SARS is responsible for establishing the tax due, normally by means of an assessment, the assessment specifies the period within which the tax must be paid.

Chapter 8 contains all the provisions relating to assessments and deals with the types of assessments, what must be contained in an assessment and when these assessments may be issued.

Types of assessments

The term assessment does not include any decision which in terms of a tax Act is subject to objection and appeal (as is currently the case in the ITA). These decisions are now separated from the concept of an assessment for purposes of TAAct, and are dealt with separately in TAAct.

TAAct provides for only four types of assessments, i.e.:

- Original assessment;
- Additional assessment;
- Reduced assessment;
- Jeopardy assessment.

Original assessment

The concept of an original assessment, i.e. the first assessment in respect of a tax period, is now a defined term that relates to a specific type of assessment, in the same way as additional assessment and reduced assessment are individually defined.

TAAct provides that an original assessment exists in four instances:

- First, if a return must be submitted that incorporates a self-assessment, which involves the taxpayer's calculation of tax payable or refundable, the original assessment comes into existence when the return is submitted to SARS. Examples are VAT and employees' tax returns filed with SARS;
- Second, if no return is required, but an amount of tax must be paid, then an original assessment comes into existence when the payment is made;
- Third, if a return is required that does not incorporate a determination of a tax liability SARS must make an original assessment of the amount due or refundable. The annual income tax return is the clearest example;
- Fourth, if a taxpayer is obliged but fails to submit a return and SARS assesses the taxpayer. Note: SARS can base this

original assessment on an estimation under TAAct section 95.

Additional assessment

TAAct provides for simplified grounds on which additional assessments may be issued to achieve alignment across taxes. A new simplified concept prejudice to SARS or the fiscus will be used as a basis for the issue of additional assessments. For example an understatement of income prejudices SARS or the fiscus in that the correct amount of tax was not assessed. This general concept is used essentially to cater for all circumstances in the tax Acts which may give rise to an additional assessment.

SARS must, therefore, issue an additional assessment if any assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus. An additional assessment is a notification to a taxpayer to pay a tax liability which exceeds the tax liability in another assessment, or in the case of an income tax assessed loss reduces the assessed loss, and will always be issued subsequent to an original assessment.

Reduced assessment

A reduced assessment can only be issued in two instances:

- The first is where there is a disputed assessment and a reduced assessment must be issued to give effect to the conclusion of the dispute. This could be where an objection is allowed, or where a dispute is settled, or if there is a judgment against which there is no right of further appeal;
- The second category is if there is an error in the assessment which is undisputed. The error can be the fault of either SARS or the taxpayer, and no objection or appeal is needed to issue a reduced assessment.

Jeopardy assessment

Jeopardy assessments are in addition to other powers in TAAct that may be applied if the collection of tax is in jeopardy. Jeopardy

assessments, also known as protective assessments, may be issued in advance of the date on which the return is normally due in order to secure the early collection of tax that would otherwise be in jeopardy or where there is some danger of tax being lost by delay. A jeopardy assessment may be issued where the taxpayer, for example, tries to place assets beyond the reach of SARS' collection powers when an investigation into the taxpayer's tax affairs is initiated or where a tax debtor is about to leave South Africa without satisfying tax debts.

Since the purpose of a jeopardy assessment is to raise a liability urgently, the assessment may be an estimation based on information readily available to SARS. Although a jeopardy assessment can be issued without following the ordinary audit route, the basis on which it is believed that the collection of tax is in jeopardy will be stated on the notice of assessment. The issue of a jeopardy assessment is a narrow exception to the ordinary assessment procedure and is subject to the following limitations and rights of the affected taxpayer:

- The SARS official intending to issue a jeopardy assessment must satisfy the Commissioner that a jeopardy assessment is necessary;
- An affected taxpayer may apply to the High Court for a review of the assessment on the basis that:
    - the amount is excessive, or
    - the circumstances on which SARS relied to justify the making of the jeopardy assessment do not exist;
- If the taxpayer challenges a jeopardy assessment in a High Court, then SARS has the burden of showing that the making of the jeopardy assessment was reasonable in the circumstances;
- The normal objection and appeal procedure is still available to the taxpayer.

Estimation of assessments

The term estimated assessment previously used in tax Acts, is

replaced by the concept of an original, reduced, additional or jeopardy assessment based on an estimation.

Circumstances when an assessment based on an estimate may be raised

If a taxpayer does not comply with certain duties SARS is authorised to estimate the amount of an assessment which can be based on information readily available to SARS.

The authority to raise an assessment based on an estimate applies in the following circumstances:

- If a taxpayer fails to submit a return when required;
- If a taxpayer submits an inadequate or incorrect return;
- If a taxpayer does not provide information when requested;
- If SARS requests information and a taxpayer provides inadequate or incorrect information;
- If a taxpayer cannot submit an accurate return;
- If the basis exists to raise a jeopardy assessment.

An assessment based on an estimation as a result of the fact that no return was submitted, is final if no return referred to in TAAct section 91(5)(b) is submitted. This means that a taxpayer cannot object and appeal against such assessment until such return is submitted.

What happens if a taxpayer cannot submit an accurate return?

A senior SARS official may agree with a taxpayer to make an assessment based on an estimate where a taxpayer cannot submit an accurate return. This agreement has to be in writing, and a taxpayer must forego the right to object or appeal against the agreed assessment, as such assessment is regarded as final.

What remedies does a taxpayer have?

If a return is not submitted

If an assessment based on an estimate is raised because the

taxpayer has either not filed a return or filed an incorrect or inadequate return - a taxpayer may submit a complete and correct return. This complete and correct return has to be submitted within the period allowed for filing an objection. If a complete and correct return is submitted, then SARS' assessment is not considered to be final.

If incomplete information in return

If a defective return has been submitted, and SARS raises an assessment because of a person's default in filing a correct return, a taxpayer must dispute the additional assessment through the objection and appeal procedure.

If taxpayer unable to submit an accurate return

The taxpayer has to agree in writing to an assessment based on an estimate and does not have the option of objecting or appealing against the agreed assessment, unless the assessment does not correctly reflect the agreement, in which case the taxpayer *may* object and appeal if the problem cannot be otherwise resolved.

Assessments based on an estimate and understatement penalties

Whenever an assessment based on an estimate is raised SARS must levy the appropriate understatement penalty, if applicable. An understatement penalty is chargeable in any instance when an assessment based on an estimate is raised.

Notice of assessment and recording of an assessment

A liability is always contained in an assessment, whether the tax is a self-assessment or a SARS administered assessment. When SARS issues an assessment it is by way of a notice of assessment. The notice must contain specific information, including:

- The date of assessment (which is the date the notice is issued);
- The tax period subject to the assessment;
- The amount of tax of the assessment;

- The date by when the amount must be paid.

In addition to the standard content, whenever an assessment is based on an estimate, or is not fully based on the return submitted by a taxpayer, the notice of assessment should be accompanied by an explanation how the assessment was estimated.

Withdrawal of assessments

Provision is made for the withdrawal of an assessment issued but with errors i.e. if it—

- was issued to the incorrect taxpayer;
- was issued in respect of an incorrect tax period; or
- reflects an incorrect payment allocation.

A withdrawn assessment is considered not to have been issued.

Periods of limitation for issuance of an assessment

To provide certainty to taxpayers TAAct prescribes periods after which SARS cannot raise an assessment.

Periods if action taken in line with a practice generally prevailing

A practice generally prevailing is intended to provide certainty on how a provision will be applied. In line with this principle additional assessments and reduced assessments cannot be issued if the preceding assessment was made in line with a practice generally prevailing at the time. The same rule applies if no return is required and a payment is made in line with a practice generally prevailing at the time of payment.

When a dispute is finally resolved

If a dispute has been resolved in terms of the Dispute Resolution Chapter, Chapter 9, no further assessment may be issued, unless it is to give effect to a settlement or a final judgment.

Non-application of the prescription rules

Fraud, misrepresentation and non-disclosure

Generally the prescription period that prohibits SARS from issuing an assessment does not apply if the reason why the full amount of tax was not charged was due to fraud, misrepresentation, or non-disclosure of material facts. When the tax is a self-assessment tax, such as VAT and PAYE, the basis on which the period of limitation does not apply differs in that it refers to fraud, as well as intentional and negligent misrepresentation or non-disclosure.

Failure to submit a return

SARS is not barred from making an assessment if a person has not submitted a return for a self-assessment tax.

Agreement between SARS and taxpayer

SARS and the taxpayer may agree that the prescription periods do not apply provided that this agreement is concluded prior to the expiry of the periods.

Finality of assessment

When is an assessment final?

An assessment or decision is final if:

- SARS has made an assessment based on an estimate because a taxpayer has not submitted a return and the taxpayer has not thereafter submitted a complete and correct return to rectify the assessment based on an estimate;
- A taxpayer cannot submit an accurate return and an assessment based on an estimate is raised by agreement;
- No objection is submitted or an objection is withdrawn;
- An objection is disallowed and no appeal is submitted;
- An appeal is concluded.

There are specific rules contained in TAAct section 100(2) that determine when an assessment is final because an appeal is finalised. Finality is not reached if there is fraud, intentional or negligent misrepresentation or non-disclosure of material facts in the

appeal process. However, if an appeal has been decided by a High Court and there is no right of further appeal, then that assessment is final and no other assessment may be made by SARS.

Implication of the finality of an assessment

Even though an assessment is final this does not prevent SARS from issuing an additional assessment in respect of the same period if the specified criteria are met. If an assessment is final and no condonation of a late objection is possible, then the taxpayer cannot challenge the assessment through the objection and appeal process, nor ask that a mistake be remedied.

Mistake made on returns, and incorrect assessments by SARS

TAAct makes it easier to fix mistakes made by taxpayers in a return without having to follow the formal objection and appeal process:

- If no original assessment has been made, then SARS may request and allow a taxpayer to submit an amended return to correct an undisputed error;
- If an incorrect original assessment has already been made because of a mistake made by the taxpayer in a return then SARS is entitled to issue a reduced assessment to correct the error.

Example: If a taxpayer has submitted an income tax return but has made an error, such as when amounts are captured, SARS may draw this to the taxpayer's attention before issuing an original assessment. The taxpayer may then elect to submit an amended return, and SARS will then issue an original assessment. On the other hand, if an original assessment has been made, for instance when a VAT or employees' tax return is submitted, and the taxpayer has made an error in the return, then the taxpayer can request SARS to issue a reduced assessment without having to lodge an objection.

It is important to note that TAAct provides that the error has to be an undisputed error. Before a taxpayer takes this quick route of correcting an assessment, SARS must be satisfied that the mistake is a genuine error. If there the error is disputed then the taxpayer must follow the objection and

appeal route.

8.11 Chapter 9: Dispute resolution

Purpose of Chapter

When taxpayers are aggrieved by an assessment, they have a right to dispute it. Chapter 9 provides the legal framework for these disputes across all tax types found in the tax Acts.

Chapter 9 must be read in addition to the rules issued under TAAct section 103 governing the following:

- The procedures to lodge an objection and appeal against an assessment or 'decision' that is subject to objection and appeal under TAAct section 104(2);
- Alternative dispute resolution (ADR) procedures under which SARS and the person aggrieved by an assessment or 'decision' may resolve a dispute;
- The conduct and hearing of an appeal before a tax board or tax court.

Currently these rules are issued under the ITA. New rules will, however, be issued under TAAct section 103 by the Minister after consultation with the Minister of Justice and Constitutional Development, by public notice. As the dispute resolution process is procedurally intensive, the Guide on Tax Dispute Resolution will be aligned with TAAct and published. This Guide will deal with this part of tax administration more comprehensively.

Transitional provisions related to disputes

Essentially, until new rules are issued under TAAct, the current rules will apply. Once new rules are issued under TAAct, disputes not finalised at the commencement date of the new rules will be dealt with under the new rules issued under TAAct. For example, if a taxpayer has objected under the 'old rules' and the objection has not been dealt with by SARS upon commencement of the 'new rules', the dispute must continue and be dealt with by SARS under the new rules. 'As if taken or instituted under TAAct'

means, for example, that the time period within which an objection lodged under the 'old rules' or repealed provisions, lodged before commencement of the 'new rules', must be dealt with by SARS within the time period prescribed under TAAct but calculated from the date of the commencement of the new rules.

Burden of proof

The burden of proof generally lies with a taxpayer in view of the fact that the assessment is essentially based on facts within the particular knowledge of the taxpayer.

However, TAAct now provides that the burden of proof is on SARS to prove—

- that an assessment based on an estimate is reasonable; and
- the basis for imposing an understatement penalty.

It must also be noted that when the Commissioner authorises a jeopardy assessment a taxpayer has the right to approach a High Court for review on the basis that the assessment is excessive or that there is no justification for the jeopardy assessment. In such a review application SARS bears the burden of proving that the making of the assessment was reasonable in the circumstances. This, however, is not a burden of proof in the context of objections and appeals.

Objection against assessment or decision

What assessments and decisions may be objected to?

A taxpayer may object to:

- Any assessment where the taxpayer is aggrieved by the assessment;
- A decision by SARS not to extend the period for objection or appeal where the taxpayer requested such extension;
- Any decision that may be objected to or appealed against under a tax Act;
- A decision not to authorise a refund;

- A decision not to remit an administrative non-compliance penalty;
- A decision not to remit an understatement penalty.

TAAct distinguishes between an assessment and a 'decision' subject to objection and appeal. Regarding 'decisions' that may be objected to or appealed against under a tax Act, TAAct effects amendments to, for example, ITA section 3 to include in that section most of the 'decisions' under the ITA that are subject to objection and appeal. In the VAT Act these 'decisions' are mostly to be found in VAT Act section 32.

The requirements for a valid objection are regulated by the rules, which rules will essentially prescribe that an objection must be:

- Lodged within 30 business days after the date of assessment;
- Lodged in the prescribed form;
- Specify the grounds of objection in full;
- Specify an address at which the taxpayer will accept notice and delivery of documents for purposes of the dispute;
- Signed by the taxpayer or duly authorised representative;
- Delivered at the SARS address specified for this purpose in the assessment.

An objection that does not comply with any of the above requirements will be regarded as invalid and of no effect, unless the taxpayer remedies the invalidity within a prescribed period after delivery of SARS' notice of invalidity to the taxpayer. A taxpayer may not always be required to file an objection against an assessment or a 'decision' made by SARS to correct an assessment. If there is an undisputed error in an assessment the taxpayer can request SARS to correct the mistake by issuing a reduced assessment and the taxpayer need not file an objection unless SARS does not agree that it is an undisputed error.

SARS' decision on objection

TAAct provides that SARS must consider a valid objection in the manner and within the period prescribed under TAAct and the rules. TAAct provides that:

- SARS may disallow the objection or allow it either in whole or in part and alter the assessment accordingly;
- SARS must inform a taxpayer by notice of the disallowance or partial allowance of an objection, which notice must:
    - state the basis for the decision; and
    - contain a summary of the procedures for appeal.

Condonation of late objection

SARS is authorised to extend the deadline of the period within which an objection must be filed, but the procedure and grounds for such extension are prescribed.

The requirements for and limitations of the condonation of a late objection are:

- An application for the extension of the period within which an objection must be filed must be submitted to SARS in the prescribed form before the deadline expires unless—
    - reasonable grounds exist for the delay and the application is submitted within 21 days of the deadline; or
    - the delay is due to an exceptional circumstance referred to in TAAct section 218 or any other circumstance of analogous seriousness and the application is submitted within three years of the deadline;
- To qualify for an extension for a late objection, the taxpayer has to prove that—
    - for an extension of the objection period for a period of less than 21 business days, reasonable grounds exist for the delay; or

- for an extension of the objection period for a period of more than 21 business days, exceptional circumstances exist for the delay;

- The objection period may not be extended by SARS in the following circumstances:
- if more than three years have lapsed from the date of assessment or 'decision' that is subject to objection. In other words, SARS may not condone a late objection that is lodged more than three years after the date of assessment; or
  - if the grounds of the objection is based on a change in a practice generally prevailing which applied on the date of assessment or the 'decision'.

The ordinary dictionary meaning of 'reasonable' is 'having sound judgment; moderate; ready to listen to reason; not absurd; within the limits of reason; not greatly less or more than might be expected; tolerable; fair'. Essentially, for a decision to be reasonable the Commissioner is required to consider all relevant matters. The Constitutional Court has held that there is no absolute standard of reasonableness – what is 'reasonable' would depend on the particular circumstances of each case.

The concept 'exceptional circumstances' is not defined in TAAct in this context, but it is accepted law that when an Act refers to 'exceptional circumstances' it contemplates something out of the ordinary and of an unusual nature. The Constitutional Court has held that the lawgiver cannot be expected to prescribe that which is inherently incapable of delineation – if something can be imagined and outlined in advance, it is probably because it is not exceptional. Each case must, therefore, be considered according to its own merits in order to determine whether the reason for requesting an extension of time beyond the prescribed period after the date of assessment, is exceptional and, therefore, justifies the requested extension. In TAAct section 218(2) examples of what would constitute exceptional

circumstances for purposes of the remittal of penalties are included.

Appeal against assessment or decision

After a taxpayer is notified of SARS' decision on the objection, the taxpayer has the right to appeal against the assessment or the 'decision' in the prescribed form and manner.

Requirements for a valid appeal

The rules set out the process to be followed to lodge an appeal, which rules will essentially prescribe that an appeal:

- Must be in the prescribed form;
- Must be delivered to SARS within 21 business days after the date of the notice of the disallowance or partial allowance of an objection at the address prescribed in the notice;
- Must be signed by the taxpayer or duly authorised representative;
- Must indicate in respect of which grounds specified in the objection the taxpayer is appealing;
- May indicate whether or not the taxpayer wishes to make use of the ADR procedures to resolve the dispute, should these procedures be available;
- If the 'appellant' wants to be represented by another person at the hearing, the request must be contained in the notice of appeal.

A notice of assessment that does not satisfy the requirements of the rules is not valid. If the assessment that was objected against is altered after an objection, the appeal is made against that altered assessment.

Condonation of late appeal

If the appeal is delivered after the prescribed 21 business days, a request must be made to condone the delay. A senior SARS official can condone a delay of up to 21 days if satisfied that there were

reasonable grounds for the delay. If there is a delay of more than 21 days and less than 45 days the official must be satisfied that exceptional circumstances exist for the delay.

If the senior SARS official does not extend the time within which an appeal must be lodged, a taxpayer may object to this 'decision' in the same way as an objection may be made against an assessment.

Test cases

At times there may be several disputes that involve substantially similar issues, and it is more efficient to use one dispute as a test case that will inform how the remaining disputes are to be dealt with.

TAAct inserts a new test case provision, under which a senior SARS official may designate an objection or appeal as a test case if the official considers that the determination of the objection or appeal, whether on-

- a question of law only, or
- both a question of fact and a question of law,

is likely to be determinative of all or a substantial number of the issues involved in one or more other objections.

The official may then stay the other objections or appeals by reason of the taking of a test case on a similar objection or appeal before the tax court. The test case procedure will be regulated by the rules, which will *inter alia* provide for notice by taxpayers who do not wish their objections or appeals to be stayed or subjected to the outcome of a test case, as a result of which SARS may apply to the Tax Court for an order that the relevant objection or appeal be stayed pending the determination of the test case or the further order of the Tax Court. The rules will also provide for the duration of the suspension of an objection or appeal, the consequence of staying proceedings and the costs in a designated test case.

Alternative Dispute Resolution

Provisions are made in the rules to resolve a dispute outside of the tax board or tax court in line with principles of mediation. The alternative dispute process applies only if there is mutual agreement between SARS

and the taxpayer. No-one can be compelled to enter into the alternative dispute resolution process, and proceedings in the appeal are suspended while the ADR procedure is ongoing. ADR proceedings are with full reservation of rights of both SARS and the taxpayer and if ADR is unsuccessful, the taxpayer can pursue the appeal to the tax court

Appeals to the tax board

Establishment, jurisdiction and constitution of tax board

Tax boards are established by the Minister to hear appeals in the manner provided in TAAct. They are established in areas that the Minister thinks fit, but SARS must designate the places where the tax board hears appeals. The tax board may only hear appeals if:

- The amount of tax in dispute does not exceed the amount the Minister determines by public notice (currently R500 000); or
- A senior SARS official and the 'appellant' so agree.

In other words, if a dispute exceeds this threshold, a dispute can still be heard by a tax board if the taxpayer and SARS agree. If a taxpayer requests that an appeal that exceeds the threshold be heard before a tax board, a senior SARS official must make this decision and has to consider whether the dispute should rather be heard by a tax court. Even if a dispute does fall in the monetary jurisdiction of the tax board it can be referred to the tax court by the chairperson if the chairperson believes that the dispute should rather be heard in a tax court.

The Tax Board consists of an advocate or attorney as chairperson. Such advocate or attorney is appointed to a panel of suitable advocates or attorneys by the Minister in consultation with the Judge-President of the relevant Division of the High Court. The appointment of such advocates and attorneys are for a term of 5 years but the person's appointment may be terminated by the Minister where warranted. If the Chairperson, the Commissioner or the taxpayer considers it necessary, an accountant or a representative of the commercial community may co-chair the Tax Board.

Conflict of interest

A chairperson will not solely on account of his or her liability to tax be regarded as having a personal interest or a conflict of interest in any matter upon which he or she may be called upon to adjudicate. A chairperson of the tax board is obliged to withdraw where there is a conflict of interest which may give rise to bias, whether on own volition or upon application by either of the parties. Such application may also be made in the event of other indications of bias, and must be made under the procedure in the rules.

The members of the tax board are subject to the same conflict of interest provisions than the members of the tax court, in terms of which a member of the tax board is obliged to withdraw where there is a conflict of interest which may give rise to bias, whether on own volition or upon application by either of the parties. Such application may also be made in the event of other indications of bias, and must be made under the procedure in the rules.

Clerk of tax board

TAAct now includes the obligation that the Commissioner must appoint a clerk of the tax board who acts as the convenor of the board. Provision is made that the clerk can convene a tax board with a chairperson from another jurisdiction if no chairperson is available to adjudicate on a dispute.

Procedure before the tax board

The procedure before the tax board is determined by both TAAct and the rules for dispute resolution issued under TAAct section 103. The tax board is less formal than the tax court as the chairperson determines, as he or she sees fit, how the proceedings should be conducted, provided that both parties have an opportunity to be heard and provided that any other rules prescribed are followed.

Decisions of tax board

A new 60 business day time limitation is imposed for the delivery of a

tax board decision. The tax board's decision period of 60 business days is prescribed to promote the quick resolution of matters before the tax board. The clerk of the tax board must deliver the decision to the 'appellant' and SARS. If the chairperson fails to deliver the decision within the 60-day period, the appeal must be referred to the tax court to be considered *de novo*.

After delivery of the decision of the tax board, both SARS and the 'appellant' may request that appeal be heard by the tax court afresh. The request must be in writing and must be filed with the clerk within 21 business days, but the chairperson may condone a late filing of an appeal to the tax court if there is good cause. The condonation request must be delivered to the clerk of the tax board to arrange a hearing.

Appeal to tax court

Establishment, jurisdiction and constitution of tax court

The President of South Africa may by proclamation in the *Gazette* establish a tax court or additional tax courts for areas that the President thinks fit and may abolish an existing tax court as circumstances may require. The place where an appeal is heard by a tax court is determined by the rules. The tax court is a court of record, and has jurisdiction over tax appeals lodged under Chapter 9. It may hear interlocutory applications relating to an objection or appeal and may decide on a procedural matter as provided for in the rules.

The tax court comprises:

- A president, who is a judge or acting judge of the High Court nominated and seconded by the Judge-President of the Division of the High Court with jurisdiction in the area for which a tax court has been constituted;
- Members, which must include an accountant and a representative of the commercial community, but if the president of the tax court, a senior SARS official or the 'appellant' so requests, the representative of the commercial community must:

- if the appeal relates to the business of mining, be a registered mining engineer;
- if the appeal involves the valuation of assets, be a sworn appraiser;

- A registrar of the tax court appointed by the Commissioner.

If an appeal to the tax court involves a matter of law only or is an application for condonation or an interlocutory application, the president of the court alone must decide the appeal, and the president of the court alone decides whether a matter for decision involves a matter of fact or a matter of law.

The Judge-President of the Division of the High Court with jurisdiction in the area for which a tax court has been constituted may direct that a 'full bench' tax court, comprising three judges, be established if:

- The amount in dispute exceeds R50 million;
- SARS and the 'appellant' jointly apply to the Judge-President.

Conflict of interest provisions apply to both the judges of the tax court and the members.

Tax court procedures

The procedure before, during and after the hearing of an appeal by the tax court is regulated by both TAAct and the rules.

While tax court hearings are normally held in camera, the court may direct on application by any person, including a person who is not a party to the appeal, and under exceptional circumstances, that a sitting be held in public. This was inserted as a result of the concern that a constitutional difficulty may arise if only the taxpayer concerned may request that a sitting be held in public, as this may conflict with the open justice principle.

Cost orders by tax court

Normally, in genuine disputes a costs order is not made, however, in certain circumstances a tax court may order that costs are awarded.

Costs may essentially be awarded if the basis of the position taken by SARS or the 'appellant' is unreasonable.

Publication of tax court judgments

Currently SARS is in possession of all judgments delivered by the tax court, whereas taxpayers are only aware of those decisions which are marked reportable by the judges. TAAct now provides that all judgments delivered by tax courts must be published whether marked reportable or not. The judgments must be published in a form that does not reveal the taxpayer's identity.

Appeals to higher courts

Part E of Chapter 9 sets out the procedure a party must follow when appealing from a decision of the tax court to the full bench of the Provincial Division which has jurisdiction over the tax court, and to the Supreme Court of Appeal. The process requires that notice must be given to the registrar of the tax court and to the other party. This notice must be given within 21 business days after the registrar has given notice of the tax court's decision, or such longer period that the president of the tax court grants.

If no notice of intention to appeal is given then the person is considered to have abandoned the right to appeal or to cross appeal. If a notice of intention to appeal is given but is then withdrawn the person is deemed to have abandoned the right to appeal.

Settlement of disputes

The existing settlement provisions of the ITA are largely carried over into the TAAct and apply across taxes. However, TAAct now clarifies that a 'settlement' can only be concluded after the issue of an assessment, as a result of operational uncertainty as to whether 'settlements' may be concluded prior to assessments, for example during an audit.

A 'settlement' under Part F of Chapter 9 is not a debt relief mechanism. It should only be concluded in respect of valid 'disputes'. Debt relief in respect of an undisputed or undisputable tax liability can be sought through:

- An instalment payment agreement;

- Write off;
- A compromise agreement.

Part F of Chapter 9 also now includes provisions that cater more clearly for the implications for SARS and rights of SARS where the taxpayer defaults after conclusion of a 'settlement' as is the case under current law. The change essentially enables SARS, if the taxpayer fails to pay or fully pay the 'settlement' amount, to choose between:

- Regarding the 'settlement' agreement as breached as a result of which the full 'disputed' amount remains due (and the dispute must continue); or
- Enforcing specific performance of the amount of the 'settlement' in which event the 'dispute' is regarded as finalised.

8.12 Chapter 10: Tax liability and payment

Introduction

The provisions concerning the payment of tax and SARS' powers of recovery are contained in TAAct Chapters 10 and 11. Chapter 10 sets out the primary rules for tax payment including the power to suspend payment if an objection or appeal is filed, requesting security and obtaining a preservation order. Chapter 11 contains the enforcement powers, which tie in closely with the provisions of Chapter 10. Since the recovery mechanisms are contained in TAAct, all the provisions may be used to recover all tax types.

Chapter 10 also includes new categories of persons liable to tax in order to simplify and clarify the tax liability of different persons, and the capacity in which they may be liable for tax debts. The circumstances when a tax liability in respect of each category of person will arise both in representative capacities and personal capacities are then described. The categories are:

- Persons chargeable to tax (primary liability);

- Representative taxpayers;
- Withholding agents;
- Responsible third parties;
- A person who is the subject of a request to provide assistance under an international tax arrangement.

Measures are introduced to combat instances where the collections process is frustrated which extend SARS' authority to recover tax debts beyond the actual taxpayer - the person originally chargeable to tax. Interventions by SARS are now also available when taxpayers divest themselves of assets, conduct business with no regard for the tax consequences, or retain assets off-shore to avoid paying what is due.

Debt relief is also provided to taxpayers, for example:

- Under certain circumstances the payment of tax may be suspended if a taxpayer intends to pursue a valid objection;
- In order to recognise legitimate circumstances where a taxpayer suffers a temporary liquidity problem, SARS may extend the date for paying a tax debt or enter into an instalment payment arrangement with the taxpayer;
- SARS is also authorised to compromise a tax debt that is not disputed, and SARS may also write tax off temporarily or permanently.

Taxpayers and categories of persons liable to tax

Categories

A clear distinction is made between the person originally chargeable to tax and the person's representative, a withholding agent, and a responsible third party. A responsible third party becomes liable to pay tax in a personal capacity if certain circumstances are met.

Duties, entitlements and liabilities of representative taxpayers

A representative taxpayer is in such capacity:

- subject to the duties, responsibilities and liabilities of the taxpayer represented;
- entitled to any abatement, deduction, exemption, right to set off a loss and other items that could be claimed by the person represented; and
- liable for the amount of tax specified by a tax Act.

The above duties, responsibilities, entitlements and liabilities of a representative taxpayer are, however, limited to the following:

- The income to which the representative taxpayer is entitled;
- Moneys to which the representative taxpayer is entitled or has the management or control;
- Transactions concluded by the representative taxpayer;
- Anything else done by the representative taxpayer in such capacity.

A representative taxpayer may be assessed in respect of any tax but such assessment is regarded as made upon the representative taxpayer in such capacity only.

Duties and liabilities of withholding agents

The administration of withholding taxes is regulated both by TAAct and the relevant tax Acts, which impose specific duties on withholding agents.

Under TAAct the following tax liability and payment obligations apply to withholding agents irrespective of type of withholding tax:

- A withholding agent i.e. a person who must withhold tax under a tax Act and pay it to SARS;
- When is a withholding agent personally liable for failure to withhold tax or pay tax withheld;
- When does a withholding agent have a right to recovery of the amount of withholding tax from the person who is primarily liable

for the tax;

- SARS may require security from withholding agent for payment of withholding tax under certain circumstances e.g. if the withholding agent previously failed to pay withholding tax;
- The obligation to pay withholding tax is imposed by the relevant tax Act, e.g. ITA section 35, but TAAct may prescribe the manner of payment e.g. electronically;
- SARS may seize assets of defaulting withholding agent in anticipation of preservation order by High Court;
- 'Pay now argue later' and suspension of the amount for which the withholding agent is personally liable pending outcome of dispute under Chapter 9;
- Account of withholding agent and allocation of payments – the Commissioner may apply the first-in-first-out principle in respect of a group of taxes e.g. withholding taxes;
- A withholding agent unable to pay may request deferment by means of an instalment payment agreement.

Responsible third parties

TAAct extends personal liability for tax debts to the following third parties:

- *A third party holding or owing money and appointed to satisfy tax debts:* A person who holds or owes or will hold or owe any money for or to a taxpayer and who is required by SARS to pay the money to SARS, but fails to do so (known under current law as an agent appointment);
- *A third party involved in financial management:* A person who controls or is regularly involved in the management of the overall financial affairs of a taxpayer and who was negligent or fraudulent in respect of the payment of the tax debts of the taxpayer;

- *Shareholders acquiring assets of a wound-up company:* A shareholder who acquired assets within one year prior to the winding-up of a company without having satisfied its tax debts. This generally happens in a scenario known as asset stripping or dividend stripping of a company by shareholders;
- *A transferee receiving assets below market value:* Any person who is a connected person in relation to a taxpayer and received assets from that taxpayer without consideration or for consideration below fair market value; and
- *A third party who assists with obstruction of tax collection:* A person who knowingly assists a taxpayer in order to obstruct the collection of tax debts, is jointly and severally liable with the taxpayer.

Right to recovery

A representative taxpayer, withholding agent and responsible third party who pays a tax in that capacity is entitled to recover the amount so paid from the taxpayer on whose behalf it is paid, or to retain an equivalent amount out of money or assets of the taxpayer in that person's possession.

A taxpayer, on whose behalf an amount was withheld and paid by a withholding agent under the agent's statutory obligation to do so, may not recover the amount from the withholding agent.

Security by certain taxpayers

In prescribed circumstances, a taxpayer may be required to provide security for purposes of safeguarding the collection of tax.

Security may be required from the following taxpayers or persons:

- A representative taxpayer, withholding agent or responsible third party held liable in a personal capacity under Chapter 10;
- A taxpayer who-
    - has been convicted of a tax offence;

- frequently failed to pay tax when due;
- frequently failed to comply with tax obligations that attracts an administrative non-compliance penalty;
- is under the management or control of a person-
  - who has been held liable, in a personal capacity, under Part A of Chapter 10;
  - has been convicted of a tax offence;
  - has frequently failed to pay tax when it is due; or
  - who frequently failed to comply with tax obligation that attracts an administrative non-compliance penalty;

- In the case of a taxpayer which is not a natural person and cannot provide the required security, any or all of the members, shareholders or trustees who control or are involved in the management of the taxpayer may be required to enter into a contract of suretyship in respect of the taxpayer's liability for tax which may arise from time to time.

As security provided by a taxpayer under this provision of TAAct is aimed at securing the recovery of tax that may, in future, be in jeopardy a decision to require security is not subject to objection and appeal. It is otherwise reviewable by, for example, requesting SARS to review the decision internally or by pursuing external remedies. Security in the form of a cash deposit may be recovered under the recovery provisions.

When must tax be paid

TAAct provides that tax is payable either on a date specified in a tax Act or on a date that SARS specifies. The date when an amount must be paid will be determined as set out below. Provision is also made for an expedited due date for payment or the provision of security where there is a risk of dissipation of assets to evade or frustrate the collection of tax.

General rule

With regard to the self-assessment taxes, such as VAT and PAYE,

the payment dates are contained in the tax Acts, while in the case of SARS administered taxes (such as income tax) a notice of assessment will stipulate by when the liability must be paid.

VAT eFilers

As SARS promotes the use of eFiling a vendor registered for eFiling is entitled to pay by the end of the month rather than by the 25th. An amendment was made to VAT Act section 28 so that if an eFiler does not pay by the end of the month, then interest is charged from the 25th day of the month as if the vendor was obliged to pay by the 25th.

After an audit or verification

A taxpayer's liability for any tax may be determined after verification or an audit. In these circumstances SARS will notify the taxpayer in an assessment how much is due and when the amount must be paid.

Deferment of tax debt

After the date for paying an amount of tax has passed, the tax becomes a tax debt that may be collected. SARS may grant a taxpayer a deferred or instalment payment arrangement. The date when an amount must be paid will be set by SARS in an agreement which records the concession. SARS may, however, terminate or modify the agreement under certain circumstances which will affect the date of payment.

Suspension of payment of disputed tax liability

Payment may be suspended if a person disputes an assessment and applies for the payment to be suspended. This is dealt with in more detail below.

If the collection of tax is in jeopardy

There are two instances when SARS can bring forward a due date for payment:

- First, if the date for paying a tax has not yet arrived, but the collection of tax is in jeopardy as a result of the actions of the

tax debtor, the Commissioner may authorise that a jeopardy assessment should be issued. A jeopardy assessment is then issued and the normal due date is brought forward;

- The second instance is when a senior SARS official demands immediate payment despite an existing future due date. This will only happen if the future collection of the tax is at risk.

Preservation order

If there is a reasonable suspicion that the collection of tax is frustrated because assets are, or will be, removed or dissipated then a senior SARS official can apply on an *ex parte* basis to the High Court for a preservation order. A court may order the seizure of movable property and place the custody of the assets of a taxpayer, or another person liable for tax, in a *curator bonis* i.e. a caretaker of property. However, where there is urgency, SARS may seize and remove realisable assets up to 24 hours prior to an application for a preservation order.

Assets seized under this section must be dealt with in accordance with the directions of the High Court which made the preservation order. This power is also available as a conservancy measure for purposes of mutual assistance in the recovery of tax on behalf of foreign governments.

Suspension of payment if there is a dispute

Also known as the 'pay now argue later' rule, the obligation to pay tax, which arises upon the issue of an assessment, is not automatically suspended by an objection or appeal. The obligation can only be suspended by SARS upon request by the taxpayer.

A taxpayer who pays disputed tax and whose objection or appeal is upheld, is entitled to interest from the date of payment of the disputed amount to the date on which such amount is refunded. This rule applies across all taxes.

Application to suspend payment

The suspension of payment of disputed tax is not an automatic right and a taxpayer must apply for the suspension in the form and manner prescribed by SARS.

In view of the fact that the due date for the payment of tax under an assessment is normally before the due date for lodging an objection and to cater for pre-objection requests for reasons, a suspension request may be made before an objection is lodged.

Factors used to make a decision

The exercise of a discretion by a senior SARS official to suspend payment is based on criteria specified in TAAct to enable a taxpayer to understand what criteria will be considered in reviewing a request for suspension. The eight factors that must be taken into account by the senior SARS official are:

- The compliance history of the taxpayer;
- The amount of tax involved;
- The risk of dissipation of assets by the taxpayer concerned during the period of suspension;
- Whether the taxpayer is able to provide adequate security for the payment of the amount involved;
- Whether payment of the amount involved would result in irreparable financial hardship to the taxpayer;
- Whether sequestration or liquidation proceedings are imminent;
- Whether fraud is involved in the origin of the dispute;
- Whether the taxpayer has failed to furnish information requested under TAAct for purposes of a decision under this section.

A senior SARS official may deny a request to suspend payment if satisfied that:

- after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious;
- the taxpayer is employing dilatory tactics in conducting the objection or appeal;
- on further consideration of the factors on which the suspension

was based, the suspension should not have been given; or

- there is a material change in any of the factors on which the suspension was based.

Automatic revocation of suspension

If the payment of tax which the taxpayer intended to dispute was suspended before the lodging of an objection and subsequently—

- no objection is lodged;
- an objection is disallowed and no appeal is lodged; or
- an appeal to the tax board or court is unsuccessful and no further appeal is noted,

the suspension is revoked with immediate effect from the date of the expiry of the relevant prescribed time period or any extension of the relevant time period under TAAct.

Denial or revocation of suspension by a senior SARS official

Since there is an inherent risk that the provision could be misused to delay payment, TAAct provides that SARS may review and withdraw the suspension. Therefore, a new obligation is placed on the senior SARS official to periodically review the suspension (essentially on a risk basis) during the dispute process, and to revoke the suspension in the case of dissipation of asset risks or delaying tactics employed by the taxpayer.

A senior SARS official may deny a request or revoke a decision to suspend payment with immediate effect if satisfied that—

- after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious;
- the taxpayer is employing dilatory tactics in conducting the objection or appeal;
- on further consideration of the factors on which the suspension was based, the suspension should not have been given; or

- there is a material change in any of the factors on which the suspension was based.

Automatic suspension of collection steps

During the period commencing on the day that SARS receives a request for suspension or a suspension is revoked and ending 10 business days after notice of SARS' decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken by SARS. This is to enable a taxpayer to consider its rights, for example whether to bring a review application against the decision not to suspend or to revoke.

Where, however, SARS has a reasonable belief that there is a risk of the taxpayer dissipating assets, this period of automatic suspension of collection does not apply. If a taxpayer's application is successful then the obligation to pay is suspended although interest will continue to accrue on the unpaid amount

Suspension of paying an administrative penalty

When a taxpayer requests the remittance (in practice sometime referred to as remission or remittal) of an administrative non-compliance penalty there is an automatic suspension of the duty to pay and SARS' right to collect which will run from the day the application is submitted until 21 business days after a decision is taken not to remit the administrative non-compliance penalty. As with an application for the suspension of a disputed liability the automatic suspension does not apply if there is a risk of a taxpayer not paying or if fraud was a factor in the underlying non-compliance.

Taxpayer account and allocation of payments

TAAct provides the legislative platform to maintain one tax account. In line with this SARS may apply the first-in-first-out method of allocating payments, and the Commissioner may determine the methodology of allocating payments amongst the different tax types, interest, penalties and

interest. Interest will be charged on a daily balance and will be accrued monthly. One set of rules for the remittance of interest will apply.

The Commissioner may, by public notice, determine the payment allocation rules that set out:

- How the first-in-first-out principle applies to a tax or group of taxes;
- How payments are to be allocated amongst taxes that are of the same age if the full amount is not paid.

No payment can be allocated to a tax debt if the obligation to pay has been suspended or contrary to an instalment payment arrangement entered into with SARS.

Deferral of payment

Where a taxpayer is unable to pay a tax debt in a single amount within the prescribed payment period, provision is made for a formal instalment payment arrangement in accordance with prescribed criteria and procedures. A tax debt may be paid at a later date or in instalments through an agreement referred to as a deferral. This is different to a settlement or a compromise in that it does not involve the discharge of a tax debt by the payment of a lesser amount.

This is essentially a debt relief mechanism but is only applicable if the criteria to qualify for such an arrangement are met. The overriding intention of a deferral is to provide temporary relief when the taxpayer's financial position does not make immediate payment possible. It is, therefore, an option only when the taxpayer's financial position is anticipated to improve. A taxpayer must satisfy a senior SARS official that a deferral should be granted, and must submit all information and documentation requested.

A senior SARS official may enter into such an agreement with a taxpayer, under which the taxpayer may be allowed to pay a tax debt in a single amount after a prescribed period or in instalments. The agreement must set out all the terms and conditions, including the dates when instalments are to be paid. Compliance with the terms will then be monitored by SARS.

SARS may terminate or modify the agreement if:

- the taxpayer fails to pay an instalment or fails to otherwise comply with its terms;
- materially incorrect information was supplied by a taxpayer when applying for an arrangement;
- the financial condition of the taxpayer changes materially; or
- the collection of tax is in jeopardy.

Upon termination of an agreement payments made prior to the termination will be retained by SARS as part payment of the tax debt.

8.13 Chapter 11: Recovery of tax

Introduction

Chapter 11 contains the unique powers SARS has to recover a tax debt, as well as certain provisions that determine the procedural aspects of tax recovery. All the special recovery powers can be used to recover an amount due by any category of person liable.

Some powers of recovery contained in TAAct are carried forward, with amendments, from the existing tax Acts. TAAct introduces further powers that are intended to facilitate the recovery of a tax debt, such as the strengthening of powers to collect tax from responsible third parties. In addition, the potential personal liability of parties involved in the management of the financial affairs of a company should serve as encouragement to comply with the tax laws by ensuring correct and timely payment of tax.

The powers that are contained in one or more of the existing tax Acts, and are incorporated with improvements in TAAct are:

- The civil judgment procedure;
- The authority to institute sequestration or liquidation proceedings;
- The appointment of a third party who holds or owes money to a tax debtor to pay the tax debt;

- The personal liability of persons involved in the financial management of a taxpayer - which is an extension of some provisions in the tax Acts that provide for the liability of a shareholder, member or director of a taxpayer;
- The incidence of a representative taxpayer's personal liability;
- The personal liability of withholding agents.

TAAct introduces the following new recovery provisions:

- The personal liability of shareholders for tax debts of company 'stripped' of assets;
- The personal liability of transferees who receives assets below market value from a tax debtor;
- The personal liability of persons who assist tax debtors to dissipate assets to frustrate the collection of tax;
- Authority to apply for a preservation order where a tax debtor dissipates assets;
- Compulsory repatriation of foreign assets of a taxpayer to satisfy domestic debts.

Recognition of financial distress or hardship

When a taxpayer refuses to pay a tax debt, or is recalcitrant, evasive, or deceptive, SARS will use the recovery processes. SARS' practice involves first giving notice to a taxpayer of a tax debt that is due and payable, and demanding payment within a specified period – which is normally 10 days – beyond the due date for payment. In engagement with SARS concerning the payment of a tax debt, taxpayers are urged to engage with SARS' debt management staff to discuss repayment options.

The majority of taxpayers pay their taxes on time, but in instances of genuine financial distress, TAAct provides that under prescribed circumstances:

- SARS may agree with a taxpayer that a tax debt can be paid in instalments over a fixed period of time in terms of an instalment

payment agreement; and

- SARS may compromise a tax debt, or permanently write-off the whole of a tax debt.

In instances where a taxpayer disputes an assessment that underlies a tax debt, the obligation to pay the tax debt may be suspended by SARS if particular criteria are satisfied.

Recovery procedures and processes

Judgment procedure

When a person does not pay an amount SARS may file a statement with the clerk of the Magistrate's Court or the registrar of the High Court. This has the effect of a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement. After the court official has entered a judgment against the debtor, the debtor's assets can be attached by the sheriff through a writ of execution.

The following procedures apply:

- SARS must give the tax debtor 10 days' notice before this statement is filed with a court, unless SARS is satisfied that giving notice would prejudice the collection of the tax.
- To ensure alignment with the ''pay now argue later'' rule under which SARS may recover a disputed amount of tax, SARS may file a statement irrespective of whether or not the amount of tax is disputed under Chapter 9, unless the obligation to pay the amount has been suspended under TAAct.
- SARS may amend the statement if, in the opinion of SARS, the amount in the statement is incorrect, and the clerk or registrar must initial the amendment.
- SARS may withdraw a statement by sending a notice of withdrawal to the relevant clerk or registrar upon which the statement ceases to have effect, whereafter SARS may file a new statement setting out tax included in a withdrawn

statement.

Liquidation and sequestration

SARS can bring sequestration or liquidation proceedings against a taxpayer even if the debt is disputed. SARS may institute these proceedings:

- whether or not the tax debtor is present in South Africa or has assets in South Africa;
- if the tax debt is under dispute under Chapter 9, only with leave of the court before which the proceedings are brought; and
- in any competent court and that court may grant an order that SARS requests, whether or not the taxpayer is registered, resident or domiciled, or has a place of effective management or a place of business, in South Africa.

Appointment of a third party to satisfy tax debt

Under current law, this is an ‘‘agent appointment’’ effected under, for example, the ITA and VAT Act. The use of the term ‘‘agent’’ was considered unnecessarily confusing. Under TAAct any third party who holds or owes or will hold or owe money to the taxpayer, may by notice by a senior SARS official be required to pay the amounts to SARS and will pursuant to such appointment be a responsible third party for purposes of liability and recovery under TAAct. A person who does or will hold or owe a debtor’s money can be compelled to pay a debtor’s tax to SARS. Money includes pensions, wages, salaries, and other remuneration.

The following procedures apply:

- A senior SARS official must issue the notice;
- The appointed responsible third party may advance reasons why the notice cannot be complied with and SARS may withdraw or amend the notice as is appropriate under the circumstances;

- A person affected by the notice can request SARS that the notice be amended to allow the taxpayer or dependants to afford basic living expenses.

Collection of tax debt from third parties

SARS has the same powers of recovery against the assets of a responsible third party as SARS has against the assets of the taxpayer, and the third party has the same rights and remedies as the taxpayer has against such powers of recovery. Before taking any collection steps against a responsible third party, SARS must provide the third party with an opportunity to make representations—

- before the responsible third party is held liable for the tax debt of the taxpayer, if this will not place the collection of tax in jeopardy; or
- as soon as practical after the responsible third party is held liable for the tax debt of the taxpayer.

Tax recovery on behalf of foreign governments

TAAct empowers the Commissioner to assist in the collection of taxes due to a country with which South Africa has entered into an international tax agreement, for example a Double Tax Agreement (DTA), providing for reciprocal assistance in the collection of taxes.

Under an international tax agreement, SARS may receive two types of requests for recovery assistance of an amount alleged to be due by a person, referred to as 'the debtor', under the tax laws of the requesting country:

- A request for conservancy in respect of assets of that person located in South Africa, in which case:
    - A senior SARS official, if satisfied there is a risk of dissipation or concealment of the assets, may apply for a preservation order in respect of the assets; and
    - For purposes of a preservation order application, the amount due to the requesting country is regarded as a tax payable by the debtor under a tax Act;

- A request for the collection of the amount under prescribed procedures.

The above two requests may also be combined, i.e. the requesting country may request assistance with collection of the amount, but in view of dissipation or concealment concerns, also request the application of conservancy measures.

A request for conservancy or collection must be in the prescribed form and include a formal certificate stating the following:

- The amount of the tax due;
- Whether the liability for the amount is disputed in terms of the laws of the requesting country;
- If the liability for the amount is disputed, whether the dispute has been entered into solely to delay or frustrate collection of the amount alleged to be due;
- Whether there is a risk of dissipation or concealment of assets by the person.

Compulsory repatriation of foreign assets of taxpayer

Where a taxpayer has offshore assets which could be utilised to satisfy tax debts, provision is made that SARS may apply to the High Court for an order to compel the repatriation of these assets. This is not an *ex parte* application, and accordingly notice of the application must be given to the taxpayer concerned.

This application may only be made if the tax debtor does not have sufficient assets located in South Africa to satisfy the tax debt in full, and a senior SARS official may apply for the order if there is a reasonable belief that:

- The taxpayer has assets outside South Africa; or
- The taxpayer has transferred assets outside South Africa for no consideration or for consideration less than the fair market value; and
- The assets may fully or partly satisfy the tax debt.

The Court may impose certain sanctions where the taxpayer fails to comply

with its order, for example:

- Imprisonment based on contempt of court;
- The imposition of other limitations until the taxpayer has complied with the court order, for example order that:
    - the taxpayer cease trading
    - the taxpayer surrenders a passport
    - the taxpayer's authority to conduct business in SA is withdrawn.

A repatriation order may remain in force until the tax debt is paid or the assets have been repatriated and utilised in satisfaction of the tax debt.

8.14 Chapter 12: Interest

Introduction

Chapter 12 creates a framework to support the modernisation of SARS' accounting system regarding interest. Within this framework, interest provisions may be aligned across taxes and interest due or payable be calculated on the daily balance owing and compounded monthly. It also seeks to align the periods when SARS is entitled to interest with the periods SARS is obliged to pay interest. The general rule is that that interest accrues from the effective date to the date of payment at the prescribed rate. Interest on an amount refundable is calculated from the later of the effective date, or the date that the excess was received by SARS to the date the refunded tax is paid by SARS. In other words, if the overpayment only occurred after the effective date, interest will be calculated from such ''out of pocket'' date and not the earlier effective date.

If a refund is offset against an existing tax debt of the taxpayer, the date on which the offset is affected is considered to be the date of payment of the refund. Exceptions to this rule may remain in some tax Acts. The effective date in relation to an additional assessment or reduced assessment is the effective date in relation to the tax payable under the original assessment. Separate provision is made for interest payable in respect of the first and

second payment of provisional tax. The discretion to remit interest is retained, but limited to specified circumstances beyond the taxpayer's control.

Imposition of interest: general rules

Accrued daily and compounded monthly

Under TAAct interest due or payable will be calculated on the daily balance owing and be compounded monthly. This introduces the commercially acceptable method of calculating interest across all tax types and gives effect to the principle that interest is compensation for the loss of the use of money. However, TAAct provides that the new interest rule will only apply as and when the Commissioner announces that the new interest calculation method applies to a tax. The Commissioner may determine the date and tax to which this method of interest will apply which will be announced in a public notice. Until then, the current method under the relevant tax Act will apply.

Effective date

This is the date that determines from when interest on tax or a refund is payable under Chapter 12, and differs between tax types and assessment types. The general rule is that that interest accrues from the effective date to the date of payment. The effective date would generally be the date that the tax is payable under a tax Act and—

- if tax is not paid by that date, interest will accrue from that date until the tax is paid; or
- if a refund is due, interest on the amount refundable is calculated from the later of the effective date or the date that the excess was received by SARS, to the date the refunded tax is paid.

Period over which interest runs

Interest is charged from the effective date to the date of payment. Unless the effective date is contained in TAAct section 188 or section

187, the effective date is the date by when the tax must be paid under a tax Act. For income tax purposes, the date of assessment or 'due date' for payment of tax no longer triggers interest. TAAct provides a new effective date that depends on the taxpayer's year-end. The effective date differs between tax types, but generally means the date by which tax for a tax period is due and payable under a tax Act.

Exceptions to general interest rule

Unless otherwise provided in a tax Act, interest payable under Chapter 12 is imposed for the period from the effective date of the tax to the date the tax is paid. Exceptions to this rule are set out below.

Normal Tax

Income tax is normal tax, i.e. excludes for purposes of TAAct employees' tax and provisional tax. The due date for payment of normal tax no longer triggers the date when interest on the assessed tax commences. The effective date for interest on income tax depends on the taxpayer's year end. If the taxpayer's year end is the last day of February then interest is calculated seven months after the last day of the year. For every other taxpayer, who has another year-end, interest is calculated six months after that taxpayer's year-end. Essentially then, interest on late third provisional payments and assessed tax have been combined.

If an additional assessment is raised for income tax then the effective date from when interest accrues remains the effective date of the original assessment.

Provisional tax

A new effective date applies for the first and second provisional tax payments.

- *First payment:* The first payment must be made within six months of the year of assessment. Interest is calculated from the effective date for payment until the earlier of:
    - the date of payment; or

- the effective date for payment of the second payment.

- *Second payment*: The second payment must be made by the last working day of the year of assessment. Interest is imposed from the effective date for payment until the earlier of-
  - the date the second payment is actually paid; or
  - seven or six months after the last day of the tax year.
- *Third payment*: A provisional taxpayer has the option of making a third top-up payment after the end of the year of assessment. Under current law the date by when this payment must be made is prescribed and provision is made for interest to be charged on late payment of the top-up. As mentioned above the TAA consolidates the interest on the third provisional payment and assessed tax.

VAT

Although interest on a refund will generally accumulate over the period that SARS audits the refund claimed, the VAT system is an exception as it is based purely on invoices, it is particularly susceptible to fraud.

VAT must be paid by the 25th day of a month following the end of a vendor's VAT period. eFilers may pay by the end of the month. An amendment is made to VAT Act section 28 that still allows eFilers this extra time to pay, but if payment is not made by month-end this will result in a deemed non-payment on the 25th day of the month. If VAT is not paid, by the 25th or by month-end, then interest is charged from the 26th day. If a vendor makes payment in full via a debit order the debit order is effected on the last business day of the month, and the period within which payment is to be made is deemed to be that last business day. If full payment is not made through the debit order, then the deeming provision is not applicable, and interest will be charged from the 26th day of the month.

In the context of delayed VAT refunds and pursuant to amendments

to the VAT Act section 45, no interest on the refund will accrue for the period—

- from the date that the information was required to be submitted until the date that the information is submitted; or
- from the date that a vendor fails to provide banking particulars to SARS to enable SARS to transfer the refund, after conclusion of the verification or audit thereof, to that account until the date the vendor submits the bank account particulars.

Transfer Duty

Before TAAct the interest calculation depended on the date of the transaction. For instance transaction prior to 1 March 2005 attracted a penalty of 10% per month, while interest on unpaid duty concerning transactions entered into after 1 March 2005 was calculated at the rate of 10% per annum calculated in relation to each completed month after the month during the transfer took place. Under the TDA transfer duty is payable within six months of the date of acquisition of immovable property, and interest will, therefore, be charged from the day after the sixth month if the duty is not paid.

Amounts erroneously paid by SARS

If SARS pays a refund amount to a person by mistake, the amount is regarded as a 'tax payable' from the date that the amount was paid to the person, and interest is calculated on the amount overpaid from the date the amount was paid to the person until the date the money is paid to or recovered by SARS.

Remission of interest

A senior SARS official must be satisfied that the interest payable by a taxpayer was caused by circumstances beyond the taxpayer's control, and only the following circumstances may be considered beyond the taxpayer's control:

- A natural or human-made disaster;
- A civil disturbance or disruption in services;

- A serious illness or accident.

Interest on amounts due by SARS

Interest on an amount refundable is calculated from the later of the effective date, or date that the excess was received by SARS to the date the refunded tax is paid.

The taxpayer is, therefore, normally entitled to refund interest from the same date that SARS would have been entitled to interest on unpaid tax. Exceptions to this rule remain in some tax Acts, e.g. VAT where interest on refunds is only payable after 21 days of claim, and the running of interest may be suspended if a vendor does not provide material.

8.15 Chapter 13: Refunds

Introduction

The payment of a refund is unfortunately a significant risk area because a small number of people submit incorrect or even completely false refund claims. Therefore, even though a taxpayer is entitled to be refunded, SARS has the right to establish the legitimacy of a claim.

Entitlement to a refund

A taxpayer is entitled to a refund in two instances:

- When the refund is correctly stated in an assessment;
- If a taxpayer made a mistake and paid an amount greater than what is contained in an assessment.

Example: It will be recalled that a self-assessment return, such as a VAT return, is an original assessment. If the return correctly represents a refund, then the vendor is entitled to the refund. On the other hand if a VAT vendor files a return that shows an amount of R10 500 is to be paid, and by mistake the vendor pays R105 000 the vendor is entitled to be refunded the amount overpaid.

When may SARS withhold paying a refund?

Even though a taxpayer is entitled to a refund, SARS may withhold payment of a refund:

- to determine the correctness of the refund; and
- if a taxpayer has not submitted income tax, provisional tax, employees' tax or VAT returns If a taxpayer provides acceptable security SARS must release a refund before a verification, inspection or audit is finalised. A decision not to authorise a refund is subject to objection and appeal.

Time period in which to claim a refund

If a refund relates to a self-assessment tax, then the refund must be claimed within five years from the date of the assessment. In the case of a SARS assessment the person must claim the refund within three years of the date of assessment by SARS.

Refunds erroneously paid by SARS

If SARS pays an amount in error, the amount is regarded as tax and the recipient is obliged to repay the amount on demand. If the person doesn't repay SARS, SARS may recover the amount as if the amount were a tax debt.

This means that SARS' expedited powers of recovery may be used to recover any amount of money that was paid out in error. For example, by appointing the bank where the refund was erroneously paid as a third party liable to pay the amount to SARS. If the amount has been withdrawn, transferred or spent, SARS may obtain judgment against the recipient's assets. Sequestration or liquidation proceedings may also be instituted. Interest is levied on these amounts from the date the amount was paid erroneously.

Refunds and set-off

A refund and interest on the refund must be set off against a taxpayer's tax debt under a tax Act and a debt outstanding under the Customs and Excise Act, unless the tax debt is disputed under Chapter 9 and suspended by

SARS. Similarly, a refund cannot be set off against a tax debt if there is a deferred payment arrangement.

8.16 Chapter 14: Write-off or compromise of tax debts

Introduction

Tax debtors are expected to take responsibility for their tax obligations and to organise their affairs in such a way as to be able to discharge those responsibilities when required. They should give at least the same priority to tax obligations as their other responsibilities. If tax debtors cannot, or anticipate they will not be in a position to, meet their tax obligations they should contact SARS at the earliest opportunity to discuss the matter and make appropriate alternative arrangements. Such contact should preferably be made before the due date for payment.

When deciding the most appropriate manner in which to deal with outstanding tax obligations, SARS will give considerable weight to the tax debtors' individual circumstances and its compliance history. For example, the history in lodging correct returns and documents and paying taxes on time. It may, however, occur that taxpayers cannot pay a tax debt or that it would be uneconomical to pursue a tax debt, hence the need for provisions dealing with the write-off or compromise of a tax debt.

No major changes were made to current law, except that the circumstances where it is appropriate to compromise a tax debt were made less restrictive, by removing some of the factors that disqualify the tax debtor from a compromise agreement.

Write off or waiver of tax debts

Tax may be written off temporarily or permanently when a debt is irrecoverable and the effort and cost pursuing it will prove ineffective or pursuing it is a legal impossibility. A temporary write off is generally merely a suspension of the recovery of a debt, and may still be recoverable during the prescribed prescription period. This period, under TAAct, will be 15

years from the date a tax debt comes into existence i.e. from the date of assessment of tax or the date of a decision that is subject to objection and appeal giving rise to a tax liability, becomes final i.e. when a taxpayer fails to pay tax by the due date. However, a permanent write off under Chapter 14 will be final.

Only a senior SARS official may approve a write off, and absent this approval and a notice by SARS to the tax debtor that an amount of a tax debt is written off, no amount tendered or paid by a tax debtor can constitute a full and final settlement of a tax debt.

Temporary write off

A temporary write off is an internal decision that has no external effect on a taxpayer - as the taxpayer is not absolved from liability. A temporary write off is authorised if it is uneconomical to pursue collections, for example if more time, effort and money will be spent than what the debt is worth.

Permanent write off

A permanent write off is made by a senior SARS official when it is an integral part of a compromise or if the tax debt is irrecoverable at law. Chapter 14 sets out all the factors that must be taken in consideration by SARS as well as the procedure that must be followed to write off a tax debt permanently.

Compromise of tax debts

Broad principle

The broad principle is that SARS is obliged to enforce the provisions of a Tax Act to the fullest extent, to collect what is due and not forego taxes. However, the provisions relating to settlements and compromises recognise and give effect to special circumstances which might arise during disputes and in the collection environment. A senior SARS official may authorise a compromise request by a taxpayer generally if:

- The purpose of the compromise is to secure the highest net

return from the recovery of the tax debt;

- The compromise is consistent with considerations of good management of the tax system and administrative efficiency.

If there is no dispute of the liability but the taxpayer is unable to pay, SARS may agree to compromise and write off a portion of the tax debt. Only a senior SARS official may approve a compromise agreement, and absent this approval and a notice by SARS to a tax debtor that the compromise is approved, no amount tendered or paid by a tax debtor can constitute a full and final settlement of a tax debt.

Broad criteria

SARS does not have unfettered power to settle or compromise and is obliged to take into consideration various factors. The debtors' current, past and future circumstances must support a compromise and SARS must be satisfied if no other creditor will be advantaged or disadvantaged. A creditor may, however, consent to being disadvantaged.

A compromise may not be concluded if:

- A debtors' other tax affairs are not up to date;
- A debtor has entered into a compromise in the past three years;
- If other creditors intend taking insolvency proceedings against the debtor;
- A compromise will adversely affect broad taxpayer compliance.

Procedure for compromises

When entering into discussions concerning a compromise, a taxpayer is required to be open, honest and frank. SARS does not have to adhere to a compromise if material facts were not disclosed during the settlement, if facts were misrepresented, or if there was fraud. The negotiated terms are confidential, unless disclosure is authorised.

A compromise must be initiated by a taxpayer who must submit a completed application that comprises a detailed statement containing

prescribed information. SARS will need a thorough disclosure of:

- the value of a debtors' present 'assets';
- future prospects and transactions;
- the monetary value of any future right a debtor will forego; and
- details of people connected to the debtor.

Before a compromise is concluded with a company or a trust SARS has to carefully consider whether another person may be personally liable.

A senior SARS official and the debtor must sign a compromise agreement setting out:

- the amount payable by the debtor in full satisfaction of the debt;
- the undertaking by SARS not to pursue recovery of the balance of the tax debt; and
- the conditions subject to which the tax debt is compromised by SARS.
- The above conditions may include a requirement that the debtor must—
- comply with subsequent obligations imposed in terms of a tax Act;
- pay the tax debt in the manner prescribed by SARS; or
- give up specified existing or future tax benefits, such as carryovers of losses, deductions, credits and rebates.

8.17 Chapter 15: Administrative non-compliance penalties

Introduction and purpose

The principal goal of sanctions is based on a simple premise – the threat of

punishment (imposition and effective collection of monetary administrative sanctions) deters unwanted behaviour (non-compliance and tax evasion). If the likely punishment is sufficient to outweigh the prospect of gain, a rational person will not undertake the activity that will result in that likely punishment. For sanctions in the form of administrative penalties to be effective, the following according to international best practice is fundamental:

- Sanctions must be easily understood by taxpayers and must be easily applied, determined and certain in their outcome;
- Certainty, the perceived probability of being penalised or caught, must exist in the mind of the taxpayer;
- A discretionary judgment (within prescribed consistent limits) in imposing sanctions must only be required where non-compliance is based on negligence or intent.

The non-compliance penalties in respect of non-compliance introduced under ITA section 75B are included in TAAct so as to apply across taxes, but are referred to as administrative non-compliance penalties to distinguish them from understatement penalties imposed under Chapter 16. Administrative non-compliance penalties relate to failures to comply with administrative requirements of the tax Acts. Non-compliance that results in an understatement of tax due is addressed under the understatement penalty regime in Chapter 16.

Financial sanctions consist of the administrative non-compliance penalty and the understatement penalty regime which, together with criminal sanctions, provide a comprehensive framework to deter non-compliance. TAAct sets out that the purpose of the administrative non-compliance penalties is to ensure the widest possible compliance of the tax Acts in a way that is impartial and which is proportional to the seriousness and duration of the incidence of non-compliance.

What are administrative non-compliance penalties?

An administrative non-compliance penalty means a penalty imposed by SARS in accordance with Chapter 15, and excludes an understatement

penalty referred to in Chapter 16. It comprises fixed amount-based and percentage-based penalties. A fixed amount-based penalty is charged when an administrative obligation is not complied with, and the percentage-based penalty is generally imposed when certain amounts of tax are not paid.

Fixed-amount penalties

When will a fixed-amount penalty be imposed?

There are a number of obligations that a taxpayer is legally required to comply with, and a fixed amount penalty is imposed when a taxpayer does not comply with an obligation.

The amount of the penalty imposed in a penalty assessment will increase automatically for each month, or part thereof, that the person fails to remedy the non-compliance within one month after:

- the date of the delivery of the penalty assessment, if SARS is in possession of the current address of the person and is able to deliver the assessment, but limited to 35 months after the date of delivery. Note: An amendment to TAAct is proposed in the Tax Administration Amendment Bill, 2012, that this date should ne date of assessment of the penalty; or
- the date of the non-compliance if SARS is not in possession of the current address of the person and is unable to deliver the penalty assessment, but limited to 47 months after the date of non-compliance.

A penalty assessment must be duly delivered in one of the prescribed manners to constitute a valid assessment. SARS may, however, issue a reminder of the automatic increase every month that the default continuous which may be communicated in any form, including sms, as this is not a new imposition or penalty assessment. Fixed amount administrative non-compliance penalties may only be imposed in respect of non-compliance listed in a public notice by the Commissioner, and not any non-compliance with an obligation under a tax Act. The purpose of the notice is to only target impactful or more

serious non-compliance and only when SARS' systems are in place to do so effectively.

How much is the fixed-amount penalty?

TAAct contains a table that specifies precisely what amount is imposed for non-compliance. As can be seen from the penalty table, the amount depends on the amount of the taxpayer's taxable income or assessed loss for the preceding year of assessment. This is essentially to ensure that the penalty is proportionate to the size of the taxpayer to ensure an impactful penalty.

Item	Assessed loss or taxable income for 'preceding year'	'Penalty'
(i)	Assessed loss	R250
(ii)	R0 - R250 000	R250
(iii)	R250 001 - R500 000	R500
(iv)	R500 001 - R1 000 000	R1 000
(v)	R1 000 001 - R5 000 000	R2 000
(vi)	R5 000 001 - R10 000 000	R4 000
(vii)	R10 000 001 - R50 000 000	R8 000
(viii)	Above R50 000 000	R16 000

Special rules apply for large companies and their groups, as well as large exempt institutions

A penalty is regarded as tax as defined in TAAct, and is interest bearing from the effective date which—

- in relation to the original penalty amount, is the date for payment specified in the penalty assessment; and
- in relation to any increment under TAAct section 211(1), the date of the increment.

Reportable arrangements

A penalty will be imposed on a participant of a reportable arrangement who fails to report the reportable arrangement to SARS.

The current administrative non-compliance penalty of R1 million or more for failure to report a reportable arrangement has been included in this Chapter and changed to ensure that the amount of the penalty is imposed on a more proportionate basis. The basis, amount and procedure for the imposition and remittance of this penalty are, therefore, regulated by Chapter 15. Specific rules apply to the amount of the 'penalty' imposed on a participant and a promoter.

Percentage based penalties

Percentage based penalties are imposed under TAAct if SARS is satisfied that an amount of tax was not paid as and when required under a tax Act. SARS may impose a penalty equal to the percentage, as prescribed in the relevant tax Act, of the amount of unpaid tax. The procedures for the imposition and remittance of a percentage based penalty are regulated by TAAct, but the circumstances that trigger the imposition of the penalty remain in the tax Act.

How is a penalty imposed?

The fixed-amount and percentage-based penalties are contained in a penalty assessment. This penalty assessment notice is in a prescribed format and contains the date when the penalty must be paid. If the penalty is raised simultaneously with an assessment for another tax then the date of payment is the same date of payment for the tax assessed.

Remitting administrative non-compliance penalties

A taxpayer may apply to SARS to remit an administrative non-compliance penalty. The application must be done on the prescribed form and be

delivered to SARS before the date the penalty must be paid. If a person has not filed the remittance request before the due date SARS may grant a condonation. There is an automatic suspension of paying or collecting the penalty if a remittance request is made.

When can a fixed-amount penalty be remitted?

There are four categories to remit an administrative non-compliance penalty:

- If the penalty was imposed for a failure to register;
- If the failure is a nominal or a first incidence;
- If exceptional circumstances exist;
- If the penalty was incorrectly imposed - i.e. there was no reason to impose the penalty.

Regarding percentage based penalties, if the tax Act which triggered the imposition of the penalty contains specific grounds for remittance of the penalty, then those grounds are to be used to consider remitting the percentage based penalty. If the tax Act does not contain a specific basis for remitting the penalty, then the basis contained in TAAct must be used to remit the penalty.

Remittance of first incidence or 'nominal' non-compliance

A first incidence means that a penalty has not been imposed for the past 36 months – whether for the same default or any other type of default. A nominal incidence of non-compliance—

- triggering a fixed amount penalty is where the duration of the non-compliance, for example failure to submit a return by the due date for filing, is less than five business days; or
- triggering a percentage based penalty is where the amount of the non-compliance, for example failure to pay an amount of tax on time, involves an amount of less than R2000.

Remittance for exceptional circumstances

An administrative non-compliance penalty may be remitted if

exceptional circumstances exist. The exceptional circumstances, in this case, are limited to listed circumstances and one, or more, of the circumstances must have rendered the person incapable of complying with the obligation. The listed circumstances are:

- *External factors* - if there was a natural or human-made disaster, or a civil disturbance, or a disruption in services.
- *Factors personal to the taxpayer* - if the non-compliance was due to a serious illness or accident; or to serious emotional or mental distress.
- *Serious financial hardship*-
    - For an individual, if the reason for non-compliance was connected to depriving the person of basic living requirements.
    - In the case of a business, if there was an immediate danger that the continuity of business operations and the continued employment of its employees were jeopardised.
- *SARS' fault* - if the reason for non-compliance is connected to SARS' fault or error, involving one of the following:
    - SARS made a capturing error;
    - there was a processing delay;
    - incorrect information was contained in an official publication or media release issued by the office of the Commissioner;
    - SARS delayed providing information; or
    - SARS did not provide sufficient time for an adequate response to be made to a request for information.
- *Any other circumstance of analogous seriousness*.

Objection and appeal against decision not to remit

If SARS' decision is to not remit or reduce the administrative non-

compliance penalty, the taxpayer may object to this decision under Chapter 9. This is a qualification of the right to object and appeal under Chapter 9, in that the objection and appeal lies against the decision not to remit the penalty and not against the penalty assessment.

8.18 Chapter 16: Understatement penalty

The current open-ended discretion to impose 'additional tax' of up to 200% is replaced with the understatement penalty framework that is aimed at ensuring consistent treatment of taxpayers in comparable circumstances. The penalty will be determined by locating each case within a table that assigns a percentage to objective criteria. SARS must now prove that the grounds exist for imposing an understatement penalty. The term 'tax' for purposes of Chapter 16 excludes an understatement penalty.

Overview of understatement penalty

An understatement penalty will be included in an assessment issued by SARS and must be paid by the date specified in the notice of assessment. An understatement penalty may only be imposed if the fiscus is prejudiced by the taxpayer's conduct in reporting. The fiscus will be prejudiced if there is a shortfall. In simple terms, the shortfall is the difference between the correct amount of tax that should have been reported and the amount that was reported by the taxpayer. If there is prejudice, this must have been caused because a taxpayer:

- did not file a return;
- filed a return but omitted an item from that return; or
- filed a return in which an incorrect statement was made.

Example: If a taxpayer did not file a return but traded and should have filed VAT returns and paid VAT of R90 000, the shortfall is the difference between R90 000 and zero – which is the tax position that the taxpayer reported The shortfall is, therefore, an expression of the prejudice to the fiscus. The table is then used to identify the highest applicable percentage that best describes the facts of the case and the taxpayer's behaviour.

How is the shortfall calculated?

The shortfall on which the applicable percentage is applied, is the sum of the difference between

(a) the tax properly chargeable and what would have been charged if the taxpayer's reporting had been accepted;

(b) the amount properly refundable and what was refundable according to what the taxpayer reported; and

(c) the notional amount of tax applied to the loss or other benefit properly carried forward, and what the loss or benefit was according to what the taxpayer reported.

If an understatement results in a difference under both paragraphs *(a)* and *(b)*, the shortfall must be reduced by the amount of any duplication between the paragraphs. The tax rate is the maximum tax rate applicable to the taxpayer, ignoring an assessed loss or any other benefit brought forward from a preceding tax period to the tax period.

Applying the Understatement Penalty Table

In the case of tax being underpaid because of an understatement made by a taxpayer, TAAct provides for different rates of an understatement penalty based on the type of behaviour or the degree of culpability involved.

The amount of understatement penalty is determined by is the amount resulting from applying the highest applicable understatement penalty percentage in accordance with the understatement penalty table to the shortfall. In other words, if a taxpayer's behaviour involves both that no reasonable grounds exist for a tax position taken (item (iii) in the table) and gross negligence (item (iv) in the table), item (iv) will apply.

The 'behaviours' understood

Introduction

Once an applicable 'behaviour' is identified, SARS must determine whether:

- The taxpayer made a voluntary disclosure before or after being

notified of an audit,

- The taxpayer was obstructive when engaging with SARS officials,
- It is a repeat case; or
- The case is not defined by any of the above and is thus a standard case.
- What follows is a brief description of what the following 'behaviours' mean:
- Substantial understatement;
- Reasonable care not taken in completing return;
- No reasonable grounds for 'tax position' taken;
- Gross negligence;
- Intentional tax evasion.

Substantial understatement

If no other behaviour defines the facts of a case, then an understatement penalty will be triggered if there is a substantial understatement. A substantial understatement means that the prejudice to SARS must exceed the greater of 5% of the tax properly chargeable or refundable, or R1 million.

A specific rule is provided in TAAct that allows the remittance of a substantial understatement, under which SARS must remit a penalty imposed for a substantial understatement if SARS is satisfied that the taxpayer—

- made full disclosure of the arrangement that gave rise to the prejudice to SARS or the fiscus by no later than the date that the relevant return was due; and
- was in possession of an opinion by a registered tax practitioner that—
    - was issued by no later than the date that the relevant

return was due;

- took account of the specific facts and circumstances of the arrangement; and
- confirmed that the taxpayer's position is more likely than not to be upheld if the matter proceeds to court.

The purpose of the remission is to recognise the scenario where a taxpayer took particular care before preparing a return.

Reasonable care not taken

Reasonable care is not defined, so the ordinary meaning must apply. Taxpayers are legally responsible for their tax affairs. A taxpayer must take reasonable care in keeping records and in providing complete and accurate information to SARS.

Reasonable care means that a taxpayer is required to take the degree of care that a reasonable, ordinary person in the circumstances of the taxpayer would take to fulfill his or her tax obligations. It means, for example, a taxpayer must try his or her best to lodge a correct tax return. Although a taxpayer is liable for the actions of their employees, the question of whether the taxpayer has taken reasonable care must still be considered. The reasonable care standard does not mean perfection, but refers to the effort required commensurate with the reasonable person in the taxpayer's circumstances.

If the taxpayer uses an adviser to complete a return and the practitioner does not exercise reasonable care, the taxpayer is liable to pay an understatement penalty.

No reasonable grounds for the tax position

Where an underpayment of tax occurs due to a taxpayer's interpretation of the application of a tax Act, an understatement penalty is payable if the taxpayer does not have a reasonably arguable position. A taxpayer's interpretation of the application of the law is reasonably arguable if, having regard to the relevant authorities, for example an income tax law, a court decision or a

general ruling, it would be concluded that what is being argued by the taxpayer is at least as likely as not, correct.

Tax position is defined to mean an assumption underlying one or more aspects of a tax return, including whether or not—

- an amount, transaction, event or item is taxable;
- an amount or item is deductible or may be set-off;
- a lower rate of tax than the maximum applicable to that class of taxpayer, transaction, event or item applies; or
- an amount qualifies as a reduction of tax payable.

If a shortfall arises because of a substantive disagreement concerning the application of a taxation provision, this understatement penalty will be imposed if the taxpayer's position is not based on reasonable grounds. The purpose is not to levy a penalty when SARS disagrees with a position adopted by a taxpayer but to attach a penalty where a taxpayer assumes a position unreasonably. As there is an inherent risk in assuming a tax position, taxpayers are expected to adopt a sensible approach in the process of adopting a tax position and to also have considered the integrity of the tax position taken.

Gross negligence

Where a taxpayer is grossly negligent, the result may be that too little tax is paid or payable or a tax refund is overstated. Gross negligence essentially means doing or not doing something in a way that, in all the circumstances, suggests or implies complete or a high level of disregard for the consequences. The test for gross negligence is objective and is based on what a reasonable person would foresee as being conduct which creates a high risk of a tax shortfall occurring. Gross negligence involves recklessness but, unlike evasion, does not require an element of *mens rea*, meaning wrongful intent or 'guilty mind', or intent to breach a tax obligation.

Intentional tax evasion

The most severe penalty is preserved for cases where a taxpayer has acted with the intention to evade tax. To evade tax includes actions that are intended to reduce or extinguish the amount that should be paid, or which inflate the amount of a refund that is correctly refundable to the taxpayer.

Intentional tax evasion can exist where a taxpayer makes a false statement in a return, and even where a person does not file a return. The most important factor is that the taxpayer must have acted with intent to evade tax. Intention is a willful act, that exists when a person's conduct is meant to disobey or wholly disregard a known legal obligation, and knowledge of illegality is crucial. Whether SARS acts on or accepts a false declaration is irrelevant. If SARS does not accept the declaration, but audits the taxpayer and determines the correct tax position the original intent to evade tax is not excused. Intention may, at times, be difficult to distinguish from an act that is grossly negligent.

Since the application of tax law to a particular taxpayer may be complex, it may be that a genuine misunderstanding of the practical application of a taxing provision does not indicate intentional tax evasion. If the taxing provision is uncertain, for instance if there are conflicting judgments on the issue, and the taxpayer applies a reasonable interpretation, it is doubtful that intent to evade could be established and that the more appropriate behavioural category would be whether the taxpayer had taken a tax position on unreasonable grounds or, at worse, that the taxpayer has been grossly negligent. This is an area that is also influenced by the nature of the actions that underlie an understatement and the circumstances of the taxpayer.

Remittance & disputes

SARS may remit a penalty imposed for a substantial understatement in the circumstances set out in TAAct section 223(3), i.e. if SARS is satisfied that the taxpayer—

- made full disclosure of the arrangement that gave rise to the prejudice to SARS or the fiscus by no later than the date that the relevant return was due; and
- was in possession of an opinion by a registered tax practitioner that—
    - was issued by no later than the date that the relevant return was due;
    - took account of the specific` facts and circumstances of the arrangement; and
    - confirmed that the taxpayer's position is more likely than not to be upheld if the matter proceeds to court.

A decision by SARS not to remit an understatement penalty is subject to objection and appeal under Chapter 9. The same procedures concerning objection, appeal, and alternative dispute resolution apply to the understatement penalty.

Voluntary Disclosure Programme (VDP)

Introduction

An interim voluntary disclosure programme expired in October 2011, but a permanent legislative framework for voluntary disclosure that applies to all tax types is included in TAAct. The main purpose of such a framework is to enhance voluntary compliance in the interest of the good management of the tax system and the best use of SARS' resources. It seeks to encourage taxpayers to come forward and avoid the future imposition of understatement penalties, other administrative penalties and interest.

Overview of the voluntary relief programme

The proposed provisions to give effect to the VDP:

- introduce the concept of voluntary disclosure;
- prescribe the relief that may be provided under the VDP;
- state who qualifies to may make a disclosure; and

- prescribe when, where and how to apply for the VDP.

A defaulting taxpayer will be granted relief under the programme, provided:

- the disclosure is complete;
- SARS was not aware of the default; and
- an administrative non-compliance penalty or understatement penalty would have been imposed had SARS discovered the default in the normal course of business.

Extent of relief

The VDP will not provide interest or exchange control relief, but will on a permanent basis provides the following benefits to qualifying applicants:

- If the taxpayer has remedied all non-compliance, 100% relief in respect of an administrative non-compliance penalty will be granted. The relief excludes penalties imposed for the late submission of returns or for the late payment of tax;
- Relief in respect of any understatement penalty as determined in the applicable column in the understatement penalty table;
- SARS will not pursue criminal prosecution.

A person cannot qualify for VDP relief if this will result in a refund being payable to the person.

Application for relief

- After notification of an audit or investigation

  A person who is aware of a pending audit or investigation or who is being audited or investigated may not qualify for the relief offered by the VDP, unless a senior SARS official decides otherwise. A person is considered to be aware of a pending or existing tax audit or investigation if certain people connected to the person – such as a partner, representative, officer, or shareholder - has become aware of the pending or existing

audit or investigation. The purpose of extending the scope of knowledge is to prevent taxpayers from making disclosure and benefiting from the relief offered when there is effective knowledge of SARS' audit or investigation.

The prospective applicant will be informed whether formal application may be filed once a senior SARS official has assessed whether the underlying default would have been identified during the pending or current audit or investigation. If satisfied that SARS would not have unearthed the default, the person may be allowed to apply provided that this is in the interest of the good management of the tax system and amounts to the best use of SARS' resources.

- No-name applications

  There is a mechanism available to apply for relief on an anonymous basis, which involves SARS providing a non-binding private opinion on the applicant's eligibility. The application must clearly contain sufficient information to enable an opinion to be formed.

- Underlying default

  To qualify there must be an underlying default that resulted in a person not being assessed for, or not paying, the correct amount of tax or receiving an incorrect refund. The cause of this prejudice must involve submitting incomplete or inaccurate information, failing to submit information to SARS, or adopting a tax position. The default may not have been previously disclosed by the applicant.

- What happens if a taxpayer qualifies?

  If a person qualifies for relief, an agreement will be concluded between the qualifying person and the senior SARS official. The contents of this agreement must include details of the default, the amount of tax and understatement penalty payable, how payment will be made, and the undertakings adopted by the

parties. Upon conclusion of the agreement an assessment, or other determination, will be issued which will reflect the contents of the agreement. No right of objection or appeal lies against such an assessment.

Withdrawal of relief

Relief may be withdrawn, a criminal prosecution may be pursued, and payments already made may be treated as part payment of further outstanding tax, if the applicant did not disclosure a material factor. This provision exists to ensure that an application for relief will be full, complete and honest. A qualifying person may object and appeal against a decision to withdraw relief.

8.19 Chapter 17: Criminal offences

Although general statutory offences are included in TAAct, tax type specific offences remain in the tax Acts. TAAct contains the following categories of offences:

- General offences concerning non-compliance;
- Serious tax offences relating to tax evasion;
- Filing a return without authority or using a signature without authority;
- Contravening the secrecy provisions.

The existence of these statutory offences does not preclude a prosecution of a person for an offence committed under the common law. Criminal prosecution may be pursued by SARS in addition to imposing an administrative non-compliance penalty or understatement penalty, but 'administrative double jeopardy' is avoided in that an administrative non-compliance penalty may not be imposed where an understatement penalty has been imposed.

Criminal non-compliance

A criminal offence may be committed if a person does not comply with an obligation imposed under a tax Act, and TAAct contains a comprehensive

list of these obligations. These offences are committed if the person performs or fails to perform an act willfully and without just cause. If found guilty the taxpayer is subject to a fine or to imprisonment for a period not exceeding two years.

The following constitute offences:

- The failure to register and notify SARS of a change to registered particulars;
- The failure to appoint a representative taxpayer;
- Refusing or neglecting to take an oath of secrecy or solemn declaration;
- The failure to retain records, or to retain them in the form required;
- Not complying with a request issued under the information gathering powers;
- Not disclosing relevant material facts to SARS when required;
- The failure to comply with a directive or instruction issued by SARS to the person under a tax Act;
- The refusal to give assistance during a field audit or criminal investigation as required;
- Impeding the collection of tax by assisting a taxpayer to dissipate assets.

These offences are committed if the person performs or fails to perform the relevant obligation willfully and without just cause.

Serious tax offences relating to tax evasion

Offences may be separated into tax offences and serious tax offences. Serious tax offences relate to intentional tax evasion, and one distinction to a 'non-compliance' offence is that the period of imprisonment for a serious tax offence is a sentence of up to five years. The investigation of a serious tax offence will be carried out with regard to the rights that a suspect has by suitably qualified and experienced SARS officials. An investigator must have authority from a senior SARS official to investigate, and only a senior

SARS official may lay a complaint with the police concerning an offence related to tax evasion.

The ‘reverse onus’ under the current law has been removed and replaced with a practical evidentiary rule. In a prosecution under the evasion provisions, the person who makes a statement that is the basis of the evasion is considered to have committed the offence unless able to prove that there is a reasonable possibility that he or she was ignorant of the falsity of the statement was false and that that ignorance was not due to negligence. This does not result in a so-called ‘reverse onus’, but only places on the accused an evidentiary burden in relation to statement made by him. If discharged the onus would remain on the state to prove beyond reasonable doubt knowledge of, or negligence in relation to, the falsity of the statement. While it may limit the fundamental right to silence, it does so only in relation to facts which are peculiarly within the knowledge of the accused and in respect of which it would not be unreasonable to require the accused to discharge an evidentiary burden.

Tax offences under the tax Acts

As stated above, certain tax specific offences remain in the tax Acts, for example an offence under the ITA Fourth Schedule paragraph 30 by an employer who uses or applies employees' tax deducted for purposes other than the payment of such amount to the Commissioner. Several offences under the VAT Act section 58 which are unique to value-added tax, remain.

Other offences under TAAct

Other offences provided for in Chapter 17 are criminal offences relating to secrecy provisions and criminal offences relating to filing a return without authority.

Publication of names of offenders

The Commissioner is empowered to make public the name, area of residence, offence, and sentence of people convicted of a tax offence, once all appeal remedies have been exhausted by the accused. This form of social ostracism is aimed at making criminal sanctions a more effective deterrent against non-compliance and tax evasion.

Jurisdiction of courts in criminal matters

A person charged with an offence under TAAct, may be tried in respect of that offence by a criminal court having jurisdiction within any area in which that person resides or carries on business, in addition to jurisdiction conferred upon a court by any other law.

8.20 Chapter 18: Reporting of unprofessional conduct

TAAct now incorporates the ITA provisions under which a professional or a tax practitioner may be reported to a controlling body. No major changes were effected, except that a condition has been added to the existing requirement that a person who gives tax advice must register as a tax practitioner with SARS. A person who during the five years before his application for registration has been removed from a related profession or professional body for dishonesty, or convicted for a crime involving dishonesty, may not be so registered. The registration of tax practitioners is now contained in TAAct section 241.

When may SARS report a professional?

If an intentional or negligent act of a registered tax practitioner resulted in a taxpayer avoiding or unduly postponing performing an obligation contained in a tax Act, SARS may report that registered tax practitioner to a controlling body. In addition, if a registered tax practitioner conducts himself in a manner that exposes the professional to disciplinary action being taken by the controlling body, SARS may report that professional to the controlling body.

What is the procedure?

TAAct provides a procedure for reporting, which begins when a decision to report the registered tax practitioner is taken by a senior SARS official. The registered tax practitioner and the taxpayer concerned will be given prior notice of SARS' intention to lodge the complaint, and an opportunity to object to SARS' proposed report. An objection must be considered before

SARS continues with reporting the registered tax practitioner. The report to the controlling body may include taxpayer information, however, the controlling body is obliged to maintain the confidentiality of taxpayer information at all times, including during the course of a disciplinary hearing, unless a competent court orders otherwise.

Note: A new regime for the regulation of tax practitioners is proposed in the Tax Administration Amendment Bill, 2012. Essentially, this regime will require a tax practitioner to register with a recognised controlling body.

8.21 Chapter 19: General provisions

Deadlines

Chapter 19 regulates matters related to time periods imposed under the tax Acts. Under current law, if a date specified in a tax Act falls on a Saturday, Sunday or public holiday the taxpayer must perform the act on the last business day before the holiday. The Commissioner may now stipulate a time by which a person must act, and if the person performs the act after that time it is considered that the act was performed the following day.

TAAct provides that whenever SARS is authorised to extend a deadline, a person may request an extension of that deadline but must file the request before the deadline expires. SARS may accept the late submission of a request for an extension if specified exceptional circumstances or circumstances of analogous seriousness exist.

If a date for submitting a return or making a payment falls on the last day of the government's financial year, the Minister may bring forward that date by no more than two business days. The Minister’s decision must be published in the *Gazette* at least 21 days before the date set by the Minister.

Companies: Public Officers and address for delivery

Every company that carries on business, or has an office, in South Africa must be represented by a natural person and that person is called the public officer. The public officer must be a senior official of the company because the company performs its tax duties, and accepts delivery of

notices, through the public officer.

TAAct deals with the duty of companies to appoint a public officer, to keep the office occupied and notify SARS of any change, as well as SARS power to approve an appointment of the public officer. A public officer already appointed will continue as the company's public officer upon commencement of TAAct.

The public officer person must reside in South Africa, whether as a resident as defined in the ITA or not. If SARS is of the opinion that a person is no longer suitable to represent the company as public officer SARS may withdraw its approval.

Authentication of documents

SARS' documents

A SARS document is considered to be authentic if:

- A SARS official's name or official designation is contained thereon; or
- SARS' official stamp is printed or stamped on the document.

Taxpayers' documents

There is a presumption that a return or other document is made or signed by the person whose return or document it is, unless that person proves that the return or document was not made or signed by him or her.

Delivery of documents

A SARS notice, document or communication is regarded as having been delivered if:

- handed to the person;
- handed to the public officer of a company;
- left with a person over 16 years at the person's last known residence, office, or place of business or, if a company- at the company's registered address elected in terms of TAAct section 248;

- posted by registered post or ordinary post to the person's, or the person's or the employer's last known post office box number;
- posted by registered post or ordinary post to the last known address or post box number of the company, public officer or the public officer's employer; or
- sent electronically to the person's or company's last known fax or e-mail address.

The following provisions are important to note:

- If a person has effectively received the communication then a formal defect in delivery does not affect the communication's validity, as minor procedural defects should not invalidate proceedings provided fairness requirements are met;
- Delivery made in one of the above ways is regarded as having been received; and if posted it is regarded to have been received in the time that normal post would ordinarily take. SARS may, despite this rule, accept that a notice was not received or was received at some later time;
- If a person can show that a notice was not received, and because of this has been placed at a material disadvantage, then SARS may withdraw the notice and re-issue a fresh one;
- Provision is made for the Commissioner to issue rules governing electronic communication.

Tax Clearance Certificates

SARS' practice of issuing a TCC in compliance with regulations promulgated under the PFMA has now been codified in TAAct, which prescribes the requirements of a TCC.

Note: Amendments to the TCC scheme in TAAct are proposed in the Tax Administration Amendment Bill, 2012.

When may SARS issue a TCC?

Taxpayers must apply for a TCC upon the prescribed form, and SARS

must provide or decline the TCC within 21 business days. A TCC may be issued if the taxpayer is tax compliant, and SARS may decline a TCC if:

- the taxpayer has a debt outstanding. The TCC may, however, still be granted if SARS has deferred the payment, compromised that debt, or suspended payment pending an objection or appeal; or
- the taxpayer has not filed a return. The TCC may, however, still be granted if suitable arrangements are in place to file an outstanding return.

SARS' authority to withdraw a TCC

SARS is entitled to withdraw a TCC if it was issued in error, or was obtained through a misrepresentation, fraud or the non-disclosure of material facts.

Confirming the validity of a TCC

SARS is also able to verify the validity of a TCC that has been issued when confirmation is requested by any sphere of government or a parastatal.

8.22 Chapter 20: Transitional provisions

The transitional provisions are intended to ensure a smooth transition from current law to TAAct. The transitional rules applied are:

- Provisions deleted under TAAct apply until TAAct commencement date;
- Thereafter TAAct applies (i.e. including ongoing audits, investigations, disputes & debt recovery), as the idea is to avoid 'two systems' going forward;
- The exceptions to this rule are:
    - criminal prosecutions i.e. where prosecution for a tax offence

has been instituted the prosecution will proceed based on the original wording of the relevant tax offence;

- tax appeal proceedings before a court which commenced before TAAct came into operation will continue, and be disposed of, by the court as if TAAct had not come into operation.

General matters

The transitional provisions provide for the continuation of:

- a taxpayer's reference number;
- an oath of secrecy taken by a SARS official under another tax Act;
- the appointment of a company's public officer;
- the appointment of existing chairpersons of a tax board;
- the existing appointed members of the tax court;
- tax court rules;
- delegations by the Commissioner - for a period of 90 days from the commencement of TAAct;
- letters of authority issued to SARS officials;
- authority to conduct an inquiry;
- rules for dispute resolution;
- regulations that are in place immediately prior to the commencement of TAAct;
- forms prescribed under a tax Act and in use immediately before the commencement of TAAct; and
- rules, interpretation notes, practice notes and other publications issued under a tax Act.

Court proceedings

If a tax appeal or criminal prosecution commenced before TAAct came into operation, it will continue, and be disposed of, as if TAAct had not come into operation.

No extension if periods have expired

If any period for an application, appeal, or prosecution has expired before TAAct commences, and TAAct provides for longer periods, advantage cannot be taken of the longer periods.

Tax debts

A tax debt that arose before TAAct commences may be recovered in terms of the recovery provisions in TAAct.

Administrative non-compliance penalties

If an obligation that is contained in a public notice published by the Commissioner under TAAct section 210(2), is not complied with, it will attract an administrative non-compliance penalty from the date that the public notice is published.

9. INDEMNITY

Whilst every care has been taken in the production of this update we cannot accept responsibility for the consequences of any inaccuracies contained herein or for any action undertaken or refrained from taken as a consequence of this update.