2016 Dispute Resolution

Presented by

Nico Theron

MTP(SA), BCom Law (cum laude), BCom Honours Taxation, MCom Taxation

Nico, previously from PKF/Grant Thornton, holds the degrees, BCom Law (cum laude), BCom Honours Taxation and MCom Taxation (SA and International Tax) and is also a registered Master Tax Practitioner with SAIT. Nico specialises in corporate income tax, value added tax and employees’ taxes, more specifically in the context of tax dispute resolution and ruling applications.
Programme:

08:15 – 08:55  Registration
09:00 – 10:30  2016 Dispute Resolution
10:30 – 10:50  Tea Break (20 mins)
10:50 – 13:00  2016 Dispute Resolution
13:00          Conclusion
Welcome

2016 Dispute Resolution

*Presented by Nico Theron*

Upcoming CPD Events
Upcoming CPD Events
Refer to our website for all upcoming events

August
• 2016 Mazars: Taxation of International Transactions

September
• 2016 Accounting and Reconciliation for Tax Practitioners
• Tax Indaba

2016 Dispute Resolution Seminar
OVERVIEW

• Current dispute-resolution landscape;

• What is subject to objection and appeal and what is not, including how and where PAJA fits into tax-related disputes;

• Assessments and prescription;

• Asking for reasons for an assessment:
  – The importance of reasons;
  – Procedure to follow when requesting reasons;
  – Dealing with the quality of reasons received; and
  – Reasons under PAJA vs reasons under TAA.

OVERVIEW

• Requesting suspension of payment under section 164 of PAJA:
  – Importance of requesting suspension of payment; and
  – Procedure to follow when requesting suspension of payment.

• The objection:
  – Procedure:
    • Submission channels and deadlines; and
    • Power of attorney.
  – Importance of the grounds of objection;
  – Drafting the grounds (including practical examples); and
  – Onus of proof.
OVERVIEW

• Feedback on objection:
  – How to deal with the “invalid objection”;
  – Requests from SARS for further information.

• Appeal:
  – Drafting the Grounds of Appeal;
  – ADR:
    • Procedure and rules.
  – Tax Board:
    • Procedure and rules (condensed).
  – Tax Court:
    • Procedure and rules (condensed).

Current Tax Dispute Resolution Landscape

Outcome of Reported Judgments: 012014 - 032016

- In favour of SARS: 6%
- In favour of the taxpayer/appellant: 56%
- Partly upheld (partly in favour of the taxpayer): 38%
Current Tax Dispute Resolution Landscape

- Current economic climate forces SARS to collect more and taxpayers to try save where they can.

- Tax disputes are, therefore, now more prevalent than ever and it is increasingly difficult for taxpayers to be successful in tax disputes.

- This is due to SARS taking more rigid approach to the interpretation of legislation but often also due to difficulties experienced in the dispute-resolution process.

- Evident from responses received from SARS of late, is that SARS must be receiving countless objections and queries.

Current Tax Dispute Resolution Landscape

- **Practical Issues:**

  - Dispute resolution procedures are still problematic in practice
    - Processes not followed – invalid objections
    - Onus of proof being used to disallow expenses
      - Reminder – balance of probabilities and not beyond all reasonable doubt (medical aid certificates).

  - ADR Hearings – disputes resolved?

  - Objection allowed, no reduced assessment.

  - When filing a NOO or NOA form on e-filing, only able to object against 5 items.
Current Tax Dispute Resolution Landscape

Practical Issues (Contd.):

• When submitting a Notice of Objection/Appeal to SARS via e-filing, the “Grounds of Dispute” should be completed in full indicating the reason for the objection/appeal as well as the section reference – non-compliance may result in NOO/NOA being declared as invalid.

• The “dispute amount” on the NOO/NOA does not pull through correctly from the Assessment and NOO/NOA is declared invalid based thereon.

• Verification issues with lodging disputes pushing taxpayers over 30 days.

Application submitted to Tax Court to declare objection valid – subsequent to correspondence with SARS litigation team, further correspondence received indicating that exceptional circumstances should be provided re why objection late.

• Objection already previously declared invalid by SARS – later received further letter- lack of communication at SARS.
What is Subject to Objection and Appeal?

- Section 104 of the Tax Administration Act, No. 28 of 2011 (“the TAA”):

“(1) a taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment.

(2) the following decisions may be objected to and appealed against in the same manner as an assessment:
(a) A decision under subsection (4) not to extend the period for lodging an objection;
(b) A decision under section 107(2) not to extend the period for lodging an appeal; and
(c) Any other decision that may be objected to or appealed against under a tax Act.” (emphasis added)
What is Subject to Objection and Appeal?

- **What is an assessment?**

  - In the context of income tax, the SCA considered the meaning of "assessment" in:

    - **Commissioner, South African Revenue Services v South African Custodial Services (Pty) Ltd (131/11) [2011] ZASCA 233 ("SA Custodial Services Case"); and

    - **First South African Holdings v CSARS (372/10) [2011] ZASCA 67 (First South African Holdings Case).**

What is Subject to Objection and Appeal?

- **What is an assessment?**

  - In the SA Custodial Services Case:

    - The SCA referred to the definition of "assessment" in s1 of the IT Act, namely as meaning 'the determination by the Commissioner, by way of a notice of assessment (including a notice of assessment in electronic form) served in a manner contemplated in section 106(2) . . . of an amount upon which any tax leviable under this Act is chargeable"
What is Subject to Objection and Appeal?

• What is an assessment?

  – In the SA Custodial Services Case (contd.):

    • Court referred to ITC 17406, where Galgut DJP held that in order to fall within this definition, ‘what is required is at least a purposeful act, one whereby the document embodying the mental act is intended to be an assessment’.

What is Subject to Objection and Appeal?

• What is an assessment?

  – In the SA Custodial Services Case (contd.):

    • *Ito facts in casu*: a letter which “calls itself a revised assessment; it responded to the issues raised by the taxpayer when it requested a reduced assessment in terms of s 79A; it spoke, in the body of the document, of the ‘revised assessment below’, in explaining the decisions encapsulated in it; and it purported to make an adjustment under a heading ‘Revised assessment’. *It is apparent from these features that the letter records a determination.*”
What is Subject to Objection and Appeal?

• What is an assessment?

  – In the SA Custodial Services Case (contd.):

    • Ito facts in casu, court indicated that the only indication that runs counter to the indications listed above is the sentence that reads: “Tax assessment will be issued to you in due course.”

What is Subject to Objection and Appeal?

• What is an assessment?

  – In the SA Custodial Services Case (contd.):

    • Held by court is that the overwhelming impression created by the letter is that it is an assessment: it determines, in a reasoned manner, the request made by the taxpayer for a reduced assessment in terms of s 79A. The last sentence, when viewed in the context of the letter as a whole, must therefore be taken to mean no more than an expression of intent on the part of the Commissioner to despatch in due course the IT34 form to formally record the decision that had already been taken.
What is Subject to Objection and Appeal?

What is an assessment?

– In the SA Custodial Services Case (contd.):

Example


What is Subject to Objection and Appeal?

What is an assessment?

– In First South African Holdings Case:

"If ‘assessment’ in s 79A were to be a reference to the notice of assessment, the latter date would presumably be the applicable one. But that is not what an assessment is. It is a ‘determination by the Commissioner of one or more matters’ (compare ITC 1077 28 SATC 33 at 38 per Corbett J). This appears from the definition of the word in s 1 of the Income Tax Act: "‘assessment’ means the determination by the Commissioner ..."
What is Subject to Objection and Appeal?

• What is an assessment?
  – In First South African Holdings Case (Contd.):
    • Each line constitutes a separate assessment.
    • Example: HR Computek Case

What is Subject to Objection and Appeal?

• What is an assessment?
  – It is not only, for example, an IT34/ VAT217/ EMP217.
  – Can also be a letter which sets out a determination by SARS.
What is Subject to Objection and Appeal?

• Decisions

  – Decision not to extend period within which to lodge an objection or an appeal.

  – If an objection is late, then declared invalid - 20 days to resubmit - often deadlock – object.

  – S104(4) of the TAA:
    
    "(4) A senior SARS official may extend the period prescribed in the ‘rules’ within which objections must be made if satisfied that reasonable grounds exist for the delay in lodging the objection."

Objection against Assessment – Extension of Time Period

• Ito Rule 7(3):
  
  “the taxpayer may apply to SARS under section 104(4) for an extension of the period for objection.”

• Factors considered by SARS official in granting an extension, as per Interpretation Note 15:

  – Reason for delay;
  – Length of delay;
  – Prospects of success on the merits; and
  – Any other relevant factor (for example, SARS’ interest in determination of final tax liability in view of broader public interest relating to budgeting and fiscal planning).
Objection against Assessment – Extension of Time Period

• Factor 1: Reasons for Delay

  – Detailed information of reason for delay must be provided to SARS official;

  – If reason is due to circumstances beyond taxpayer’s control, generally the requirement of reasonable grounds is met then;

  – Taxpayer must still prove that objection was still lodged as soon as possible, despite these circumstances.

• Factor 1: Reasons for Delay (Contd.)

  – Examples which are not regarded as sufficient:

    • Ignorance of the law with regard to time periods

    • Failure, without good cause, by taxpayer’s practitioner to lodge the objection on time. This is confirmed by Section 153(3) of the TAA:

      "A taxpayer is not relieved from any liability, responsibility or duty imposed under a tax Act by reason of the fact that the taxpayer’s representative—

      (a) failed to perform such responsibilities or duties; or

      (b) is liable for the tax payable by the taxpayer."
Objection against Assessment – Extension of Time Period

• Factor 2: Length of Delay
  – Taxpayer must justify the period of delay;
  – Extension of period for lodging an objection is not a right. SARS has a discretion under section 104(4) of the TAA to grant the extension.

Objection against Assessment – Extension of Time Period

• Factor 3: Prospects of Success
  – This is not a decisive factor. Taxpayer is still required to provide adequate reasons for the delay in lodging the objection within the prescribed time periods.
  – ITC 1777:
    "... for condonation of a party’s failure to comply with a rule of court in time, our law requires the party concerned to show 'good cause' for his failure to take the necessary step timeously. To show good cause he must not only explain the reason for his failure. He must also show that he has a reasonable prospect of success on the merits of the litigation at issue; he must have what is called a prima facie case ... the stronger the party’s case is on his prospects of success, the more lenient the court will be in regard to the excuses for his default; ... the weaker his explanation for his default, the stronger his prospects of success on the merits ... must be." (emphasis added)
What is Subject to Objection and Appeal?

- **Decisions**
  - S104(5) of the TAA *(Amendment, 2016 TALAB – 30 days)*:

  
  "(5) The period for objection must not be so extended—
  
  (a) for a period exceeding 21 business days, unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection;
  
  (b) if more than three years have lapsed from the date of assessment or the 'decision'; or
  
  (c) if the grounds for objection are based wholly or mainly on a change in a practice generally prevailing which applied on the date of assessment or the 'decision'."  

Objection against Assessment – Extension of Time Period

- **S218 of the TAA**:

  "218. Remittance of penalty in exceptional circumstances.—(1) SARS must, upon receipt of a 'remittance request', remit the 'penalty' or if applicable a portion thereof, if SARS is satisfied that one or more of the circumstances referred to in subsection (2) rendered the person on whom the 'penalty' was imposed incapable of complying with the relevant obligation under the relevant tax Act."
Objection against Assessment – Extension of Time Period

• S218 of the TAA (Cont.):

(2) The circumstances referred to in subsection (1) are limited to—

(a) a natural or human-made disaster;
(b) a civil disturbance or disruption in services;
(c) a serious illness or accident;
(d) serious emotional or mental distress;
(e) any of the following acts by SARS—
   (i) a capturing error;
   (ii) a processing delay;
   (iii) provision of incorrect information in an official publication or media release issued by the Commissioner;
   (iv) delay in providing information to any person;

(f) serious financial hardship, such as—
   (i) in the case of an individual, lack of basic living requirements; or
   (ii) in the case of a business, an immediate danger that the continuity of business operations and the continued employment of its employees are jeopardised; or

(g) any other circumstance of analogous seriousness.”
Objection against Assessment – Extension of Time Period

• In IT0038/2015 (4 March 2016):

Issue:

• Court was approached to evaluate whether the taxpayer could discharge the onus of proving “exceptional circumstances” (s104 of the TAA).

Facts:

• Assessments were raised against the taxpayer during December 2014 iro UIF, SDL, employees tax, secondary tax on companies and VAT.

• Taxpayer filed an objection on 5 June 2015 – objection out of time by 65 business days.

• Objection was disallowed by SARS.
Objection against Assessment – Extension of Time Period

Arguments:
- Submissions regarding exceptional circumstances were made and responded to as follows:
  - 65 days is not such a long time compared to the 3-year prescription period.
  - Assessment and objections involved complex issues of law – no complexity demonstrated by taxpayer’s counsel.
  - Dies non – this would have no impact on taxpayer’s opportunity to timeously lodge objection.
  - Negotiations were held with SARS when objection became due – counsel conceded that “series of meetings” were in reality only one meeting with SARS.

Judgment:
- Court acknowledged its obligation to consider the taxpayer’s prospects of success in deciding whether or not to allow the extension:
  - Counsel for the taxpayer did not submit any evidence in this regard, but only an advice from themselves to the taxpayer – could not accept prospects of success on the mere “say-so” of counsel.
Objection against Assessment – Extension of Time Period

• In IT0038/2015 (4 March 2016)- Contd.:

Judgment:

• There was no satisfactory explanation for the delay between December 2014 – June 2015, let alone a discharge of the onus of proving “exceptional circumstances”.

• Causal connection between exceptional circumstances and delay is important.

• Appeal was dismissed with costs.

Objection against Assessment – Extension of Time Period

• Avnit v First Rand Bank Ltd (20233/14) [2014] ZASCA 132 (23 September 2014)

– “Later cases have likewise declined any invitation to define ‘exceptional circumstances’ for the sound reason that the enquiry is a factual one. A helpful summary of the approach to the question in any given case was provided by Thring J in MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and another 2002 (6) SA 150 (C) where he said:

‘1. What is ordinarily contemplated by the words ‘exceptional circumstances’ is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; ‘besonder’, ‘seldsaam’, ‘uitsonderlik’, or ‘in hoë mate ongewoon’.”
Objection against Assessment – Extension of Time Period

- Avnit v First Rand Bank Ltd (20233/14) [2014] ZASCA 132 (23 September 2014)

"2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.

4. Depending on the context in which it is used, the word ‘exceptional’ has two shades of meaning: the primary meaning is unusual or different: the secondary meaning is markedly unusual or specially different.

5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.”
Objection against Assessment – Extension of Time Period

- Decision under 107(2) of the TAA

  "(2) A senior SARS official may extend the period within which an appeal must be lodged for—
  (a) 21 business days, if satisfied that reasonable grounds exist for the delay; or
  (b) up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days." (our emphasis)

What is Subject to Objection and Appeal?

- Section 104 of the Tax Administration Act, No. 28 of 2011 ("the TAA"):

  "(1) a taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment.

  (2) the following decisions may be objected to and appealed against in the same manner as an assessment-
  (a) A decision under subsection (4) not to extend the period for lodging an objection;
  (b) A decision under section 107(2) not to extend the period for lodging an appeal; and
  (c) Any other decision that may be objected to or appealed against under a tax Act."
What is Subject to Objection and Appeal?

- Refer to PDF table.

Practical Examples: “Any other decision”

- Example 1: S220 of TAA:

  "220. Objection and Appeal against Decision not to Remit Penalty.- A decision by SARS not to remit a 'penalty' in whole or in part is subject to objection and appeal under Chapter 9."

  - First required to ask for remittance, if the VAT return is late. Thereafter object against the penalty.
**What is Subject to Objection and Appeal?**

- Decision not to remit percentage-based penalty, not the actual imposition of the penalty
  
  - Therefore, first ask for remission:
    - Letter: when?
    - RFR01: when?
  
  - Then object (unless the penalty included an assessment).

**What is Subject to Objection and Appeal?**

- Request for Remittance and against that decision must object.

- Issues with forms and e-filing.

- Asking for remittance of a percentage-based penalty: see S217 of the TAA.

- Underestimation penalty – S217 + par 20 of the Fourth Schedule to the IT Act.
What is Subject to Objection and Appeal?

- Practical Examples: “Any other decision”

  - Example 2: Par 20(2) of 4th Schedule, IT Act:

    "(2) where the Commissioner is satisfied that the amount of any estimate referred to in subparagraph (1) was seriously calculated with due regard to the factors having a bearing thereon and was not deliberately or negligently understated, or if the Commissioner is partly so satisfied, the Commissioner may in his or her discretion remit the penalty or a part thereof."

  - Objected to an assessment and, therefore, need not ask for remittance. Object directly.

What is Subject to Objection and Appeal?

- Many sections where discretion is afforded and where not subject to objection and appeal.

  - Example: proviso (iii) to section 23(1) of the VAT Act:

    "(1) Every person who, on or after the commencement date, carries on any enterprise and is not registered, becomes liable to be registered –
    (a) ...;
    (b) ...:"


What is Subject to Objection and Appeal?

- Many sections where discretion is afforded and where not subject to objection and appeal (contd.).

- Example: **proviso** (iii) to section 23(1) of the VAT Act:
  "Provided that the total value of the taxable supplies of the vendor within the period of 12 months referred to in paragraph (a) or the period of 12 months referred to in paragraph (b) shall not be deemed to have exceeded or be likely to exceed the amount contemplated in paragraph (a), **where the Commissioner is satisfied** that the said total value will exceed or is likely to exceed such amount solely as a consequence of-
  (i)...;
  (ii)...;
  (iii) Abnormal circumstances of a temporary nature."

What is Subject to Objection and Appeal?

- Example: S164(2) of the TAA suspension of payment request, refused by SARS, not subject to objection and appeal.

- Example: S98 of the TAA, withdrawal of assessment, decision not to withdraw not subject to objection and appeal.
PAJA

• Review application under provisions of PAJA.

• Keep in mind S7(2)(a) of the PAJA which provides that:

  "... no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted."

• Also keep in mind interlocutory applications brought into the Rules.

• Remedies under review- decision referred back to SARS or in exceptional cases, substituting SARS’ decision with that of the court’s.

PAJA

• PAJA allows for the High Court to review administrative action of SARS.

• Most actions of SARS constitute administrative action and hence most actions of SARS may be reviewed under PAJA.

• This is what was done in:
  – Ackermans V C:SARS (441/09) [2010] ZASCA;
  – Chittenden N.O. and others v C:SARS [2014] ZAGPPHC 51;
  – MTN v C:SARS [2013] 75 SATC 171; and
  – Medox Ltd v CSARS (49017/11) [2014] ZAGPPHC 98.
PAJA

• Ackermans V C: SARS (441/09) [2010] ZASCA:

Facts:

– SARS started and investigation in October 2003;

– SARS requested information which was supplied in around 2005;

– SARS raised additional assessments in 2011.

Arguments for the taxpayer:

– The lengthy period of delay between 2005 and 2011 constitutes unreasonable administrative action.

PAJA

• Ackermans V C: SARS (441/09) [2010] ZASCA (Contd.):

Held:

– Whether or not the period of delay is unreasonable depends on whether or not the assessment in question had prescribed or not. I.e. whether there was non-disclosure of material facts, fraud or misrepresentation.

– Deciding on this point requires an enquiry into the merits of the case;

– As this is a review application, the court cannot entertain the merits of the dispute; and

• Application dismissed.
PAJA

• Chittenden N.O. and others v C:SARS [2014] ZAGPPHC 51:

Facts:

– SARS refused to issue a tax clearance certificate to the taxpayer.

Arguments for the taxpayer

– SARS’ refusal creates harm to the taxpayer;
– The court is requested to order issuance of the tax clearance certificate under PAJA.

(Contd.):

Held:

– The court accepts that issuance of a TCC constitutes administrative Action under PAJA;
– The court however cannot give an order for the issuance of a tax clearance certificate;
– Doing so would “set a precedent that would negatively impact on the first respondent’s tax administration. Henceforth every taxpayer whose application for a clearance certificate had been refused would simply be entitled to approach the court and without having to address the merits of the refusal obtain an order compelling the first respondent to issue him/her with the certificate”. (Emphasis added)
PAJA

• MTN v C:SARS [2013] 75 SATC 171:

Facts:
- SARS disallowed certain expenses claimed by MTN.
- In raising the assessment, SARS manually set the due date to the day before the original assessment would prescribe.

Arguments for the taxpayer:
- SARS acted in bad faith by manually fixing the due date to the day before the original assessment would prescribe.
- Court asked to set aside the additional assessment.

Held:
- There is a dispute of fact and accordingly, the court cannot entertain the application under PAJA. Disputes should be resolved in the tax court.
PAJA
• Medox Ltd v CSARS (49017/11) [2014] ZAGPPHC 98:

Facts:
– Taxpayer had an assessed loss in its 1996 tax year of R46 622 063.
– Taxpayer did not file a return for 1997;
– Taxpayer filed returns for 1998 – 2010;
– SARS did not into account the 1996 loss in the 1998 – 2010 assessments;
– Taxpayer did not object to 1998 – 2010 assessments and they had prescribed.

PAJA
• Medox Ltd v CSARS (49017/11) [2014] ZAGPPHC 98
(Contd.):

Arguments for the taxpayer:
– SARS acted *ultra vires* by not taking the assessed loss into account. Taxpayer wants to the assessments set aside.
PAJA

• Medox Ltd v CSARS (49017/11) [2014] ZAGPPHC 98 (Contd.):

Held

– The taxpayer should have objected to the assessments. It didn’t.

PAJA

• Observation

Use your own discretion after considering case law.
Remedies Available iro Decisions Not Subject to Objection and Appeal?

– Withdrawal/ amendment of decision ⇒ request under S9 of TAA to SARS official/ manager/ senior SARS official (excl: decision given effect to in an assessment).

• S9 of the TAA:

"9. Decision or notice by SARS.—(1) A decision made by a SARS official and a notice to a specific person issued by SARS, excluding a decision given effect to in an assessment or a notice of assessment—
(a) is regarded as made by a SARS official, authorised to do so or duly issued by SARS, until proven to the contrary; and

(b) may in the discretion of a SARS official described in subparagraphs (i) to (iii) or at the request of the relevant person, be withdrawn or amended by—
(i) the SARS official;
(ii) a SARS official to whom the SARS official reports; or
(iii) a senior SARS official.
Remedies Available iro Decisions Not Subject to Objection and Appeal?

- S9 of the TAA:

  (2) If all the material facts were known to the SARS official at the time the decision was made, a decision or notice referred to in subsection (1) may not be withdrawn or amended with retrospective effect, after three years from the later of the—
  (a) date of the written notice of that decision; or
  (b) date of assessment of the notice of assessment giving effect to the decision (if applicable).”

Remedies Available iro Decisions Not Subject to Objection and Appeal?

- Service escalation → internal complaints procedure within SARS and then CMO (Complaints Management Office).

- Tax Ombud → after exhausting internal complaints procedure at SARS (unless compelling circumstances as to why Tax Ombud is approached directly).

**Note:** CMO and Tax Ombud cannot deal with substance/merits of an objection → only investigate manner in which objection is being dealt with.

- [2016 TALAB proposes changes to Tax Ombud’s powers (reviews at Minister’s request). Also indicates that reasons for not accepting Tax Ombud’s decision need to be provided to the Ombud in order to then be included in the report to the Minister/ SARS under S19 of TAA.]
Assessments and Prescription

- Assessment not possible, under S99(1), if:

  - 3 years have lapsed since date of assessment of original assessment by SARS;

  - Iro self-assessment for which a return is required, 5 years after the date of assessment of an original assessment by way of self-assessment by the taxpayer or if no return is received, by SARS; and

  - Iro self-assessment for which no return is required, after the expiry of 5 years from date of last payment of tax for tax period/ effective date, if no payment was made by the taxpayer for tax period.

Assessments and Prescription – Contd.

- Assessment not possible, under S99(1), if:

  - If preceding assessment was made in accordance with practice generally prevailing at time of that assessment;

  - Iro dispute that has been resolved under Chapter 9.

- Prescription is not applicable if, fraud, misrepresentation or non-disclosure of material fact (and if these resulted in SARS not assessing the taxpayer correctly).
Assessments and Prescription – Contd.

• SARS may (by 30 days prior notice) extend the period in S99(1) before the expiry thereof, if the delay is due to failure by taxpayer to provide all relevant information/ due to resolving information entitlement dispute, including legal proceedings (S99(3) added by S51(c) of the TALA, 2015).

Assessments and Prescription – Contd.

• Example:
  – Taxpayer was non-resident → taxed on non-source income;
  – Documents were submitted to SARS and the objection was allowed (reduced assessment was issued);
  – Later, SARS raised a new assessment to include the non-source income again;
Assessments and Prescription – Contd.

• Example (Contd.):
  
  – Ito S99(1)(e) of TAA: “An assessment may not be made in terms of this Chapter-

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

Who Bears Onus of Proof?

• Iro the existence of fraud, misrepresentation or non-disclosure in terms of section 99 of the TAA?

• A comparable provision in the Income Tax Act was section 79.

• Trite law under section 79 that SARS bears the onus.

• For example, in C:SARS v Brummeria Renaissance (Pty) Ltd & other (2007) 69 SATC 205.
Who Bears Onus of Proof?

• When must SARS raise it?

  – In *ABC (Pty) Ltd v SARS IT1291 & VAT2855*:

    "*It is clear that the respondent had not made such a determination before the raising of the additional assessment and, as such, the statutory immunity ought not to be disturbed.* The belated reference in the correspondence to a material non-disclosure was, in my view, *clearly an afterthought*, made only after the appellant had raised the issue."

Importance of Asking for Reasons

1. To formulate the objection to address the basis on which the assessment was raised;

2. Limiting SARS later in the dispute;
Importance of Asking for Reasons

- In DS v C:SARS (13238 & 13164/2008), 8 December 2014:
  - The court then draws a distinction between disputes on fact and law and disputes involving the exercise by SARS of a discretion based on being satisfied of particular matters.
  - In the case of a dispute on fact and law, the court comments that both SARS and the taxpayer should be allowed to change their grounds at any stage before trial, “subject to fair play and the other party being sufficiently forewarned before trial”.
  - Where the commissioner is required to be satisfied of certain matters however it is a different story:
Importance of Asking for Reasons
In DS v C:SARS (13238 & 13164/2008), 8 December 2014 (Contd.):

“One is not dealing with a situation where the law prescribes that certain expenses shall be disallowed or certain income shall be taxed if a certain state of affairs objectively exists. One is dealing, rather, with a situation where a particular fiscal result follows only if the Commissioner himself is satisfied of certain matters.”

In this regard, the court held that SARS cannot “support [its] existing assessment on the basis of matters on which [it] was not satisfied when [it] issued that first assessment.”[our insertions].

* This case is, however, in terms of the old rules.

Importance of Asking for Reasons
1. Rule 31:

“(3) SARS may not include in the statement a ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment.” (emphasis added)

Therefore, how would you know if there is novation if reasons are not requested from SARS?
Importance of Asking for Reasons

• **What is “novation”?**
  
  – Not defined in the rules.
  
  – According to the Shorter Oxford English Dictionary, ‘novate’ in a legal context means “the *substitution* of a new debtor, creditor, contract ... *in place of* the old one”.

---

Importance of Asking for Reasons

• **What is novation? – Contd.**

  – The SARS Guide on Dispute Resolution indicates that:

    "**Applied in the context of assessment, novate would mean that the new ground requires the substitution or replacement of the assessment with a new one. The high court on occasion held that novation takes place as the result of an agreement between parties substituting a new obligation for an existing one, thus cancelling the existing one.**"
**Procedure: Reasons for Assessment**

- Rules promulgated under section 103 of the TAA (“the rules”).

- Rule 6:

  **6. Reasons for assessment**
  (1) A taxpayer who is aggrieved by an assessment may, prior to lodging an objection, request SARS to provide the reasons for the assessment required to enable the taxpayer to formulate an objection in the form and manner referred to in rule 7.

- Rule 6 (Contd.):

  (2) The request must-
  (a) be made in the prescribed form and manner;
  (b) specify an address at which the taxpayer will accept delivery of the reasons; and
  (c) be delivered to SARS within 30 days from the date of assessment.

  (3) The period within which the reasons must be requested by the taxpayer may be extended by SARS for a period not exceeding 45 days if a SARS official is satisfied that reasonable grounds exist for the delay in complying with that period.
Reasons for Assessment

• Rule 6 (Contd.):

(4) Where a SARS official is satisfied that the reasons required to enable the taxpayer to formulate an objection have been provided, SARS must, within 30 days after delivery of the request, notify the taxpayer accordingly which notice must refer to the documents wherein the reasons were provided.

(5) Where in the opinion of a SARS official the reasons required to enable the taxpayer to formulate an objection have not been provided, SARS must provide the reasons within 45 days after delivery of the request for reasons.

(6) The period for providing the reasons may be extended by SARS if a SARS official is satisfied that more time is required by SARS to provide reasons due to exceptional circumstances, the complexity of the matter or the principle or the amount involved.

(7) An extension may not exceed 45 days and SARS must deliver a notice of the extension to the taxpayer before expiry of the 45 day period referred to in subrule (5).”
Reasons for Assessment

• Rule 6: request for reasons for an assessment must be delivered to SARS within 30 days from date of assessment.

  – “Assessment“, ito Rule 1 = includes a decision referred to in S104(2) of TAA.

  – “Deliver”, in case of “to SARS”, = handing to SARS, sending it to SARS by registered post, sending it to SARS by email/fax, or by SARS electronic filing service.

  – “Day” = “business day” as defined in S1 of TAA → days that is not Saturday, Sunday or public holiday and for purposes of Chapter 9 (Dispute Resolution) excl days between 16 December and 15 January, both days inclusive.
Reasons for Assessment

- Where to Submit Request for Reasons?
  - Rule 6(2)(c) requires that request is “delivered to SARS”.
  - Notice of Addresses at Which a Document, Notice or Request is to be Delivered or Made for Purposes of Rule 2(c)(ii) and Rule 3(1) Read Together with Rule 2(c)(iii) of the Rules Promulgated in terms of Section 103 of the TAA (“the Notice”).

<table>
<thead>
<tr>
<th>Region</th>
<th>Email</th>
<th>Fax number</th>
</tr>
</thead>
<tbody>
<tr>
<td>North South Africa:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gauteng North (includes</td>
<td><a href="mailto:Contact.north@sars.gov.za">Contact.north@sars.gov.za</a></td>
<td>(+27) 12 670 6880</td>
</tr>
<tr>
<td>Tshwane and Centurion),</td>
<td></td>
<td></td>
</tr>
<tr>
<td>North West, Mpumalanga</td>
<td></td>
<td></td>
</tr>
<tr>
<td>and Limpopo</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Reasons for Assessment

- Ito the Notice:

  1. Any document, notice or request (excluding a notice of objection under Rule 7, notice of appeal under Rule 10, any document where a SARS electronic filing service is available for delivery, any document relating to the dispute process after delivery of a notice of appeal under Rule 10 and any document or application in terms of Part F of the Rules):
Reasons for Assessment

**Where to Submit Request for Reasons?**

- **Central South Africa:**
  - Including Midrand, the Greater Johannesburg area, Kempton Park, Boksburg, Vereeniging and Springs, Free State and Northern Cape
  - Contact: central@sars.gov.za
  - (+27) 10 208 5005

- **Eastern South Africa:**
  - Taxpayers residing in KZN and the northern parts of the Eastern Cape (up to and including East London)
  - Contact: east@sars.gov.za
  - (+27) 31 328 6018

- **Southern South Africa:**
  - Taxpayers residing in the Eastern Cape south of East London and in the Western Cape
  - Contact: south@sars.gov.za
  - (+27) 21 413 8905

Dealing with Reasons

- “Reasons” = reasons required for taxpayer to formulate an objection (as per wording of Rule 6(1) and Rule 6(4)).

- In CSARS v Sprigg Investment 117 CC t/a Global Investment [2011] 3 All SA 18 (SCA) → SCA held that all that is required is that SARS must give the “actual reasons” for an assessment to enable a taxpayer to formulate an objection.

  - “actual reasons” therefore = SARS’ findings of fact and law applicable thereto (does not require SARS’ reasoning as the rationality test is not applicable, as per Sprigg case)

  - Rationality test only required to determine if reasons for decision were “adequate” for purposes of S5 PAJA.
Dealing with Reasons

“The intention of rule 6 is not to limit or replace a taxpayer’s right to adequate reasons in terms of PAJA. A taxpayer may, instead of or in addition to a request in terms of rule 6, pursue a PAJA request. For purposes of a PAJA review, the person needs to understand the reasoning process to determine if the decision can be challenged by review under PAJA on the bases of error in law, fact or irrationality.” (SARS Guide on Dispute Resolution).

Dealing with Reasons

- SARS v Pretoria East Motors (Pty) Ltd (291/12) [2014] ZASCA 91:

  “the raising of an additional assessment must be based on proper grounds for believing that, in the case of VAT, there has been an under declaration of supplies and hence of output tax, or an unjustified deduction of input tax. In the case of income tax, it must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified. ...

  It is also the only basis upon which it can, as it must, provide grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the assessment was wrong”.
Dealing with Reasons

• Remedy available if taxpayer unable to formulate objection based on reasons given by SARS:
  – Apply to Tax Court for an order for reasons required to enable taxpayer to object – Rule 52(2)(a); or
  – Apply to Tax Court for Default Judgment (final order/order to compel) – Rule 56.

• If apply to Tax Court, Rule 57(2) provides that an application must be brought within 20 days after the date of the action including the delivery of the notice, document, decision or judgment by a party, the clerk, the registrar, a tax board, a tax court or a failure to do so, giving rise to the application.
  – If application is brought, then an application brought under Part F, interrupts the periods prescribed under Part A and E (as per Rule 50(4)).

Requesting Reasons under PAJA vs Requesting Reasons under Rules

• Section 5 PAJA (reasons) – does not suspend objection period but can expect adequate reasons.

• Rule 6 of the Rules – period suspended but can only expect actual reasons.
Suspension of Payment

• S164(1) of TAA: unless senior SARS official otherwise directs, obligation to pay tax/right of SARS to receive and recover tax is not suspended by an objection/appeal.

• Taxpayer can request senior SARS official to suspend payment of tax/portion thereof due to assessment, if taxpayer disputes liability to pay tax.

• May therefore be done even if taxpayer only intends to lodge objection.

Suspension of Payment

• S164(3) of TAA:

"(3) A senior SARS official may suspend payment of the disputed tax having regard to—

(a) the compliance history of the taxpayer;
(b) the amount of tax involved;
(c) the risk of dissipation of assets by the taxpayer concerned during the period of suspension;
(d) whether the taxpayer is able to provide adequate security for the payment of the amount involved;"
Suspension of Payment

• S164(3) of TAA (Contd.):

  (e) whether payment of the amount involved would result in irreparable financial hardship to the taxpayer;
  (f) whether sequestration or liquidation proceedings are imminent;
  (g) whether fraud is involved in the origin of the dispute; or
  (h) whether the taxpayer has failed to furnish information requested under this Act for purposes of a decision under this section."

Suspension of Payment

• No form and manner prescribed for requesting a suspension of payment.
  – Therefore, the request is submitted in a letter and by attaching whatever supporting documents are needed.

• Where? Branch where taxpayer is registered.
Suspension of Payment

• S164(6) of TAA:

"(6) During the period commencing on the day that—

(a) SARS receives a request for suspension under subsection (2); or

(b) a suspension is revoked under subsection (5), and

ending 10 business days after notice of SARS’ decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned."

Suspension of Payment

• The immediate suspension

  – Example

• Suspension granted/ not granted

  – If suspension not granted – review application to High Court (if have grounds).

  – If suspension granted

    • May be revoked under certain circumstances. For example, if no objection is actually lodged.
Suspension of Payment

- Suspension granted/ not granted (Contd.)
  - Application will be denied if (S164(5) of the TAA):
    - Objection/ appeal is frivolous or vexatious; and
    - Taxpayer is employing dilatory tactics.

Procedure: Objection against Assessment

- Rule 7(1):
  "(1) A taxpayer who may object to an assessment under section 104 of the Act, must deliver a notice of objection within 30 days after-
  (a) delivery of a notice under rule 6(4) or the reasons requested under rule 6; or
  (b) where the taxpayer has not requested reasons, the date of assessment”

(Extension expected soon based on 2016 EM to TALAB – draft Rules not yet published)
Objection against Assessment

• Rule 7(1): “deliver”

  – “deliver” is defined in Rule 1 as:

  "deliver means to issue, give, send or serve a document to the address specified for this purpose under these rules, in the following manner:
  (a) by SARS, the clerk or the registrar, in the manner referred to in section 251 or 252 of the Act, except the use of ordinary post;
  (b) by SARS, if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment, by posting it on the electronic filing page of the taxpayer or appellant; or
  (c) by the taxpayer or appellant, by-
  (i) handing it to SARS, the clerk or the registrar;
  (ii) sending it to SARS, the clerk or the registrar by registered post;
  (iii) sending it to SARS, the clerk or the registrar by electronic means to an e-mail address or telefax number; or
  (iv) if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment, submitting it through the SARS electronic filing service."
Objection against Assessment

• Rule 7(1): “deliver”

  – SARS Guide on Dispute Resolution indicates further that the Objection must be delivered at:

    • Address specified in the assessment; or

    • Where no address is specified, the address that the Commissioner under Rule 2 has specified by public notice as the address at which documents under these rules must be delivered to SARS.

Objection against Assessment

• Rule 7(1): “deliver”

  – According to the public notice, the delivery of a notice of objection under Rule 7:

    • In the case of personal and corporate income tax, delivery must be made:

      – By means of the taxpayer’s electronic filing page, if applicable;

      – By post to any of the addresses mentioned in “paragraph 1.2. above”; or

      By handing it to SARS at any SARS branch office.
Objection against Assessment
“By post” and “paragraph 1.2. above”:

<table>
<thead>
<tr>
<th>Office</th>
<th>Postal Address</th>
<th>Physical address</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberton</td>
<td>Private Bag X15</td>
<td>St Austell Street</td>
</tr>
<tr>
<td></td>
<td>Alberton 1450</td>
<td>Mackinnon Crescent</td>
</tr>
<tr>
<td></td>
<td></td>
<td>New Redruth</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Alberton 1449</td>
</tr>
<tr>
<td>Belville</td>
<td>Private Bag X11</td>
<td>Corner of Teddington &amp; De Lange Road</td>
</tr>
<tr>
<td></td>
<td>Belville 7530</td>
<td>Belville</td>
</tr>
<tr>
<td>Doringkloof</td>
<td>P O Box 436</td>
<td>7 Protea Street</td>
</tr>
<tr>
<td></td>
<td>Pretoria 0001</td>
<td>Centurion</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Pretoria 0157</td>
</tr>
<tr>
<td>Durban</td>
<td>P O Box 921</td>
<td>201 Dr Pixley KaSeme Street</td>
</tr>
<tr>
<td></td>
<td>Durban 4000</td>
<td>Durban</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4001</td>
</tr>
</tbody>
</table>

Objection against Assessment

• Rule 7(1): “deliver”

  – According to the public notice, the delivery of a notice of objection under Rule 7:

    • In the case of VAT, employees tax (PAYE) or any other tax, delivery must be made:

      – To any of the addresses mentioned in paragraph 1.1. or 1.2. above or

      – By handing it to SARS at any SARS branch office.
Objection against Assessment

“To any of the addresses” and “paragraph 1.1. or 1.2. above”:

<table>
<thead>
<tr>
<th>Region</th>
<th>Contact Details</th>
<th>Phone Number</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>North South Africa:</strong></td>
<td><a href="mailto:Contact.north@sars.gov.za">Contact.north@sars.gov.za</a></td>
<td>(+27) 12 670 6880</td>
</tr>
<tr>
<td>Gauteng North (includes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tshwane and Centurion),</td>
<td></td>
<td></td>
</tr>
<tr>
<td>North West, Mpumalanga</td>
<td></td>
<td></td>
</tr>
<tr>
<td>and Limpopo</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Central South Africa:</strong></td>
<td><a href="mailto:Contact.central@sars.gov.za">Contact.central@sars.gov.za</a></td>
<td>(+27) 10 208 5005</td>
</tr>
<tr>
<td>(including Midrand, the</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Greater Johannesburg area,</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kempton Park, Boksburg,</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vereeniging and Springs),</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Free State and Northern</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cape</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Eastern South Africa:</strong></td>
<td><a href="mailto:Contact.east@sars.gov.za">Contact.east@sars.gov.za</a></td>
<td>(+27) 31 026 6018</td>
</tr>
<tr>
<td>Taxpayers residing in KZN</td>
<td></td>
<td></td>
</tr>
<tr>
<td>and the northern parts of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>the Eastern Cape (up to and</td>
<td></td>
<td></td>
</tr>
<tr>
<td>including East London)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Southern South Africa:</strong></td>
<td><a href="mailto:Contact.south@sars.gov.za">Contact.south@sars.gov.za</a></td>
<td>(+27) 31 413 8805</td>
</tr>
<tr>
<td>Taxpayers residing in the</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Eastern Cape south of East</td>
<td></td>
<td></td>
</tr>
<tr>
<td>London and in the Western</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cape</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Objection against Assessment

“To any of the addresses” and “paragraph 1.1. or 1.2. above” (Contd.):

<table>
<thead>
<tr>
<th>Location</th>
<th>Address</th>
<th>Contact Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberton</td>
<td>Private Bag X15, Alberton</td>
<td>St Austell Street</td>
</tr>
<tr>
<td></td>
<td>1450</td>
<td>Mackinnon Crescent</td>
</tr>
<tr>
<td></td>
<td></td>
<td>New Redruth</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Alberton</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1449</td>
</tr>
<tr>
<td>Bellville</td>
<td>Private Bag X11, Bellville</td>
<td>Corner of Teclington &amp;</td>
</tr>
<tr>
<td></td>
<td>7530</td>
<td>De Lange Road</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Bellville</td>
</tr>
<tr>
<td></td>
<td></td>
<td>7530</td>
</tr>
<tr>
<td>Doringkloof</td>
<td>P O Box 436, Pretoria</td>
<td>7 Protea Street</td>
</tr>
<tr>
<td></td>
<td>0001</td>
<td>Centurion</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Pretoria</td>
</tr>
<tr>
<td></td>
<td></td>
<td>0157</td>
</tr>
<tr>
<td>Durban</td>
<td>P O Box 921, Durban</td>
<td>201 Dr Pixley KaSeme</td>
</tr>
<tr>
<td></td>
<td>4000</td>
<td>Street</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Durban</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4001</td>
</tr>
</tbody>
</table>
Objection against Assessment

• Rule 7(2):

“(2) A taxpayer who lodges an objection to an assessment must-

(a) complete the prescribed form in full;
(b) specify the grounds of the objection in detail including-
   (i) the part or specific amount of the disputed assessment
       objected to;
   (ii) which of the grounds of assessment are disputed; and
   (iii) the documents required to substantiate the grounds of
       objection that the taxpayer has not previously delivered
       to SARS for purposes of the disputed assessment;
(c) if a SARS electronic filing service is not used, specify an
   address at which the taxpayer will accept delivery of SARS's
   decision in respect of the objection as well as all other
   documents that may be delivered under these rules;

(d) sign the prescribed form or ensure that the prescribed form
    is signed by the taxpayer's duly authorised representative; and
(e) deliver, within the 30 day period, the completed form at the
    address specified in the assessment or, where no address is
    specified, the address specified under rule 2.”
Objection against Assessment

- Prescribed Form for an Objection (SARS website)

<table>
<thead>
<tr>
<th>Type of Tax</th>
<th>Request for Remission</th>
<th>Notice of Objection (NOD)</th>
<th>Notice of Appeal (NOA)</th>
<th>ADR1</th>
<th>ADR2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal Income Tax (Administrative Penalties)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Personal Income Tax (Assessed Tax including additional/understatement tax, interest and penalties, etc.)</td>
<td>×</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Corporate Income Tax (Assessed Tax including additional/understatement tax, interest and penalties, etc.)</td>
<td>×</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trust</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Value-Added Tax (VAT)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Payroll Taxes (Assessment, Penalties and Interest, etc.)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>All other taxes not listed above (e.g. STC before 1 April 2011, Donations Tax, Dividends Tax, etc.)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Objection against Assessment

- Requirements for a valid objection?

  - All requirements of Rule 7(2) need to be complied with in full.

Example: If the objection is not signed by the taxpayer or the taxpayer’s duly authorised representative, then Rule 7(2)(d) has not been complied with and this would be a basis, in terms of the Rules, to regard the objection as an invalid one.

Example: if e-filing is not used and the taxpayer does not specify an address at which the taxpayer will accept delivery of SARS’ decision in respect of the objection as well as all other documents that may be delivered under these rules, then Rule (2)(c) would not be complied with. This would have the same consequence as the example above.

Example: objection needs to be submitted within 30 days. If not, Rule 7(2)(e) has not been complied with.
Objection against Assessment – Late Objection

• Objection is to be delivered within 30 days

• What remedies does a taxpayer have if an objection is late?
  
  – Ask for an extension (Interpretation Note 15).
  
  – If an extension is not requested, objection may be regarded as being invalid.

Importance of Objecting
Drafting the Grounds

- Practical examples:
  - VAT objection; and
  - Underestimation of penalty.

Burden of Proof

- S102 of TAA:
  "(1) A taxpayer bears the burden of proving-
  a) That an amount, transaction, event or item is exempt or not taxable;
  b) That an amount or item is deductible/ may be set off;
  c) The rate of tax applicable to transaction, event, item or class of taxpayer;
  d) That an amount qualifies for reduction in tax payable;
  e) That a valuation is correct; or
  f) Whether ‘decision’ that is subject to objection and appeal under a tax Act, is incorrect.

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

- S129 of TAA:

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

(2) ...

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

Burden of Proof

- “On a balance of probabilities”

  and not

- “Beyond reasonable doubt”

- Example (medical aid)
Burden of Proof
- IT 12951 and VAT 855:

"The respondent argued that Mr X could not provide documentary evidence, for example in the form of cheques; casual labourers details etc, showing that payments were made to casual labourers but simply relied on his ipse dixit to the effect that such expenses would have been incurred in the nature of the appellant’s business. It accordingly contends that the appellant has failed to substantiate that it incurred expenditure related to salaries and wages and that such expenditure was incurred for purposes of trade. In the final analysis the respondent therefore contends that the appellant has failed to prove that the deduction in respect of salaries and wages and which the respondent added back and thereafter subjected to income tax was a permissible deduction in terms of the IT Act. The appellant has given evidence that these amounts were actually incurred in respect

Burden of Proof
- IT 12951 and VAT 855 (Contd.):

of the offloading of containers of stock during the year of assessment. The nature of the taxpayer’s business supports these contentions on a balance of probabilities. In my view, given the nature of the appellant’s operations, as testified to by Mr X, the general human and business probabilities sustain the claim. I have already found Mr X to be a credible witness and have no reason to reject his ipse dixit on this score.”

(emphasis added)
Burden of Proof

- *SARS v Pretoria East Motors (Pty) Ltd (291/12) [2014]*
  ZASCA 91 – the SARS Guide on Dispute Resolution provides the following summary:

  - "In this matter, SARS insisted that the evidence of the witnesses was insufficient and that the taxpayer was obliged to provide documentary evidence to discharge the onus. However, even before the matter came before the tax court, SARS [Ms Jacqueline Victor] insisted that the taxpayer had provided insufficient proof. The taxpayer had provided SARS with relevant records and even put all of its ledger accounts in a van and had them delivered to SARS's offices. However, SARS refused to inspect the documents. On several further occasions the taxpayer tendered the documents to SARS;"

---

Burden of Proof

- *SARS v Pretoria East Motors (Pty) Ltd (291/12) [2014]*
  ZASCA 91 – the SARS Guide on Dispute Resolution provides the following summary (Contd.):

  - The fact that the taxpayer carries the burden of proof does not suggest that SARS was free to simply adopt a supine attitude. It was bound before the appeal to set out the grounds for the disputed assessments and the taxpayer was obliged to respond with the grounds of appeal and these delineate the disputes between the parties;"
Burden of Proof

- *SARS v Pretoria East Motors (Pty) Ltd (291/12) [2014]*
  
  ZASCA 91 – the SARS Guide on Dispute Resolution provides the following summary (Contd.):
  
  - A taxpayer, to discharge the onus, may call witnesses. The taxpayer's evidence under oath and that of its witnesses could not be disregarded simply as being self-serving and therefore unreliable - it should be given full consideration along with all other evidence, and the credibility of the witnesses must be tested just as it is in any other matter before a court;

- In the tax court, counsel for SARS questioned the taxpayer's witnesses and asked them to provide source documents proving that SARS was wrong, without indicating which specific documents it required. Such an approach was untenable, for it left the taxpayer none the wiser as to what was truly in issue and what needed to be produced in order for it to discharge the burden of proof that rested upon it;
Burden of Proof

- *SARS v Pretoria East Motors (Pty) Ltd (291/12) [2014]*
  - ZASCA 91 – the SARS Guide on Dispute Resolution
  - provides the following summary (Contd.):
    - The taxpayer thus adopted the general approach that, as SARS had misunderstood the accounts and ignored the provisions in particular of the VAT Act, it sufficed for the taxpayer to demonstrate that through the evidence of witnesses. That was a perfectly proper approach;
    - The taxpayer was not alerted to any other issue and was certainly not called upon to produce every underlying voucher or invoice or to reconstruct its accounts from scratch for the tax court. In these circumstances the submissions that the original vouchers had not been produced or that the witness’s explanations were to be ignored because they were based on hearsay, cannot be sustained;

- Where, for example, the SARS auditor has based an assessment upon the taxpayer’s accounts and records, but has misconstrued them, then it is sufficient for the taxpayer to explain the nature of the misconception, point out the flaws in the analysis and explain how those records and accounts should be properly understood. That can be done by a witness;
  - If there are underlying facts in support of that explanation that SARS wishes to place in dispute, then it should indicate clearly what those facts are so that the taxpayer is alerted to the need to call direct evidence on those matters. Any other approach would make litigation in the tax court unmanageable, as the taxpayer would be left in the dark as to the level of detail required of it in the presentation of its case;
Burden of Proof

- **SARS v Pretoria East Motors (Pty) Ltd (291/12) [2014] ZASCA 91** – the SARS Guide on Dispute Resolution provides the following summary (Contd.):

  - The SCA stressed that SARS is under an obligation throughout the assessment process leading up to the appeal and the appeal itself to indicate clearly what matters and which documents are in dispute so that the taxpayer knows what is needed to present its case.”

---

Ms Victor’s approach was that if she did not understand something she was free to raise an additional assessment and leave it to the taxpayer to prove in due course at the hearing before the Tax Court that she was wrong. Her approach was fallacious.”
Responses from SARS

- Invalid Objection; or
- Request Documents; or
- Disallowance or allowance of objection.

Responses from SARS: Invalid Objections

- Rule 7(4) sets out circumstances as to when an objection is invalid:

“(4) Where a taxpayer delivers an objection that does not comply with the requirements of subrule (2), SARS may regard the objection as invalid and must notify the taxpayer accordingly and state the ground for invalidity in the notice within 30 days of delivery of the invalid objection ...”
Responses from SARS: Invalid Objections (Contd.)

• 2 Requirements in terms of Rule 7(4):

- Non-compliance with Rule 7(2)
- Notice to taxpayer within 30 days

Responses from SARS: Invalid Objections (Contd.)

• Requirement 1: Rule 7(2)

"(2) A taxpayer who lodges an objection to an assessment must-
(a) complete the prescribed form in full;
(b) specify the grounds of the objection in detail including-
   (i) the part or specific amount of the disputed assessment objected to;
   (ii) which of the grounds of assessment are disputed; and
   (iii) the documents required to substantiate the grounds of objection that the taxpayer has not previously delivered to SARS for purposes of the disputed assessment;"
Responses from SARS: Invalid Objections (Contd.)

• **Requirement 1: Rule 7(2) (Contd.)**

  (c) if a SARS electronic filing service is not used, specify an address at which the taxpayer will accept delivery of SARS’s decision in respect of the objection as well as all other documents that may be delivered under these rules;

  (d) **sign the prescribed form or ensure that the prescribed form is signed by the taxpayer’s duly authorised representative; and**

  (e) **deliver, within the 30 day period, the completed form at the address specified in the assessment or, where no address is specified, the address specified under rule 2.**

Responses from SARS: Invalid Objections (Contd.)

• **Rule 7(4) grants SARS a discretion to declare an objection invalid.**

• If an objection is declared invalid, Rule 7(5) indicates that a taxpayer may:

  “… may within 20 days of delivery of the notice submit a new objection without having to apply to SARS for an extension under section 104(4).”

• **According to Rule 7(6), if a taxpayer fails to submit a new objection within the 20-day time period, the taxpayer will only be able to submit a new objection with an application to SARS for an extension of the period for objection under section 104(4) of the TAA.**
Responses from SARS: Request for Substantiating Documents

• What happens if all substantiating documents necessary to decide the objection are not provided by a taxpayer?

  – SARS may request such documents under Rule 8:

  "8. Request for substantiating documents after objection lodged
  (1) Within 30 days after delivery of an objection, SARS may require a taxpayer to produce the additional substantiating documents necessary to decide the objection.
  (2) The taxpayer must deliver the documents within 30 days after delivery of the notice by SARS.

Responses from SARS: Request for Substantiating Documents (Contd.)

• Rule 8 (Contd.):

  (3) If reasonable grounds for an extension are submitted by the taxpayer, SARS may extend the period for delivery of the requested document for a further period not exceeding 20 days."
• One of the requirements for a valid objection is that the objection must include the documents required to substantiate the grounds of objection that the taxpayer has not previously delivered to SARS for purposes of the disputed assessment.

• As Rule 7(4) provides SARS with a discretion to regard an objection as valid despite this, and instead request substantiating documents under Rule 8.

• Therefore, if documents are requested by SARS under Rule 8, it has exercised its discretion to rather treat the objection as valid.

Responses from SARS: Request for Substantiating Documents (Contd.)

• Extension of time period to submit documents

  – Taxpayer may request that the 30-day period within which to submit the substantiating documents be extended.

  – If SARS believes reasonable grounds submitted, the extension will be granted.

  – The extension cannot be for more than 20 days.

If SARS refuses to extend the period, the taxpayer may apply to the tax court under Rule 52(2)(d) for an order granting the extension where the taxpayer is able to demonstrate good cause shown why the extension should be granted.
Responses from SARS: Decision on Objection

- After receiving an objection or the substantiating documents requested, SARS must consider the information and either disallow the objection or allow the objection in whole or in part.

- Once a decision is made by SARS, Rule 9 sets out the requirements for conveying the decision to the taxpayer.

Response from SARS: Decision on Objection

- Rule 9:

  "9. Decision on objection"

  (1) SARS must notify the taxpayer of the allowance or disallowance of the objection and the basis thereof under section 106(2) of the Act within-

  (a) 60 days after delivery of the taxpayer’s objection; or

  (b) where SARS requested supporting documents under rule 8, 45 days after-

  (i) delivery of the requested documents; or

  (ii) if the documents were not delivered, the expiry of the period within which the documents must be delivered.
Decision on Objection

- Rule 9 (Contd.):

  (2) SARS may extend the 60 day period for a further period not exceeding 45 days if, in the opinion of a senior SARS official, more time is required to take a decision on the objection due to exceptional circumstances, the complexity of the matter or the principle or the amount involved.

  (3) If a period is extended the official must, before expiry of the 60 day period, inform the taxpayer that the official will decide on the objection within a longer period not exceeding 45 days.”

Can SARS Declare an Objection Invalid after Requesting Documents?

- The answer lies in Rule 9(1)(b):

  "(1) SARS must notify the taxpayer of the allowance or disallowance of the objection and the basis thereof under section 106(2) of the Act within-

  (a) ...; or

  (b) where SARS requested supporting documents under rule 8, 45 days after-

  (i) delivery of the requested documents; or

  (ii) if the documents were not delivered, the expiry of the period within which the documents must be delivered.”

- Therefore, according to the Rules, an objection cannot be regarded as invalid after documents are requested by SARS.
Remedy: If an Objection is Declared Invalid Incorrectly?

- An application can be made to the Tax Court under Rule 52(2)(b).
- Rule 52(2)(b):

  "(2) A taxpayer or appellant may apply to a tax court under this Part-
  (a) ...
  (b) if an objection is treated as invalid under rule 7, for an order that the objection is valid"

Responses from SARS: Basis for Decision

- In the notice of containing the decision on the objection, SARS is required to indicate the basis for the decision taken.
- According to Section 106(5) of the TAA:

  "(5) The notice must state the basis for the decision and a summary of the procedures for appeal"
Appeal – Rule 10 Notice

- Where to send the Notice of Appeal?

  - Rule 10(1) requires that the notice of appeal be delivered by the taxpayer.

  - The Public Notice indicates that a notice of appeal under Rule 10 must be delivered:
    - By means of the taxpayer’s electronic filing page, if applicable;
    - To any of the addresses mentioned in paragraph 1.1 or 1.2. above; or
    - By handing it to SARS at any SARS branch office.
**Appeal**

- Where to send the Notice of Appeal?
  - “To any of the addresses” and “paragraph 1.1 or 1.2. above”:

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<tr>
<th>Area</th>
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<th>Contact Number</th>
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<tr>
<td><strong>North South Africa:</strong></td>
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<td></td>
</tr>
<tr>
<td>Gauteng North (includes Tshwane and Centurion), North West, Mpumalanga and Limpopo</td>
<td><a href="mailto:Contact.north@sars.gov.za">Contact.north@sars.gov.za</a></td>
<td>(+27) 12 670 6860</td>
</tr>
<tr>
<td><strong>Central South Africa:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(including Midrand, the Greater Johannesburg area, Kempton Park, Boksburg, Vereeniging and Springs, Free State and Northern Cape)</td>
<td><a href="mailto:Contact.central@sars.gov.za">Contact.central@sars.gov.za</a></td>
<td>(+27) 10 208 5005</td>
</tr>
<tr>
<td><strong>Eastern South Africa:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Taxpayers residing in KZN and the northern parts of the Eastern Cape (up to and including East London)</td>
<td><a href="mailto:Contact.east@sars.gov.za">Contact.east@sars.gov.za</a></td>
<td>(+27) 31 328 6018</td>
</tr>
<tr>
<td><strong>Southern South Africa:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Taxpayers residing in the Eastern Cape south of East London and in the Western Cape</td>
<td><a href="mailto:Contact.south@sars.gov.za">Contact.south@sars.gov.za</a></td>
<td>(+27) 21 413 8905</td>
</tr>
<tr>
<td><strong>Alberton</strong></td>
<td>Private Bag X15 Alberton 1450</td>
<td>St Austell Street</td>
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<td><strong>Belville</strong></td>
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<td>Corner of Teddington</td>
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<td>&amp; De Lange Road</td>
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<tr>
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<td></td>
<td>Belville 7530</td>
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<tr>
<td><strong>Doringkloof</strong></td>
<td>P O Box 436 Pretoria 0001</td>
<td>7 Protea Street</td>
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<tr>
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<td>P O Box 921 Durban 4000</td>
<td>201 Dr Pixley KaSome</td>
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<td>Street Durban 4001</td>
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(contd.)
Appeal

- Notice of Appeal must be delivered **within 30 days** of a **notice of disallowance** under Rule 9 or within an extended period if the taxpayer successfully applied for condonation for late filing under s107(2) of the TAA.

- S107(2) of the TAA:

  "(2) A senior SARS official may extend the period within which an appeal must be lodged for—
  (a) 21 business days, if satisfied that reasonable grounds exist for the delay; or
  (b) up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days."

Appeal

- What relief is available to a taxpayer if SARS refuses to extend the time period within which an appeal can lodged?

  - A taxpayer can approach the tax court on motion under Rule 52(2)(e) for an order extending the period within which an appeal must be lodged.
Appeal

Rule 10(2)(b):

- If e-filing is not used, specify an address.

• Rule 10(2)(c): Specify in detail:

  - *Grounds of the objection referred to in rule 7 the taxpayer is appealing*;
  - *Grounds for disputing the basis of the decision to disallow the objection referred to in section 106(5);* and
  - *Any new ground on which the taxpayer is appealing.*
Appeal

• Rule 10(2)(c)(iii): “Any new ground”

  – “Any new ground” is qualified by Rule 10(3) which indicates that a taxpayer may not appeal on a ground that constitutes a new objection against a part or amount of the disputed assessment not objected to under Rule 7.

  – If a taxpayer relies on a ground not raised in the objection under Rule 7, SARS may require the taxpayer to produce the substantiating documents necessary to decide on the further progress of the appeal. SARS’s request for documents must be made within 15 days in terms of Rule 10(4).

  – Purpose of adding new grounds is to address the interpretive problems arising from the SCA judgment in *HR Computek (Pty) Ltd v CSARS [2012] ZASCA* (Computeck Case)
**Appeal**

- Rule 10(2): “Any new ground”

  - In the Computek Case:
    - The taxpayer initially only objected to additional tax and not the capital amount of the disputed assessment.
    - The taxpayer only sought to dispute the capital amount when filing its statement under the old rule 11 (new Rule 32).

  - SCA findings in the Computek Case are interpreted by many to mean that a taxpayer is now limited throughout the further conduct of a dispute to its original grounds of objection, whereas SARS’ statement for reasons for assessment under the old rule 10 (new Rule 33) is not limited to earlier grounds or reasons for the assessment.

**Appeal**

- New grounds in statements filed under Rule 31 and 32

  - Under Rule 31, SARS may include new factual or legal grounds in its statement of grounds of assessment and opposing appeal.

  - This is because Rule 31 is drafted in the present tense and indicates, for example at Rule 31(2)(c), that SARS must set out the material facts and legal grounds upon which it “relies” and not only those it previously “relied” on.
Appeal

- New grounds in statements filed under Rule 31 and 32 (Contd.)

  - Rule 31(3) qualifies the above by providing:

    "(3) SARS may not include in the statement a ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment."
ADR

- ADR covered in Part C of the Rules and allows for resolution of tax disputes outside of litigation.

- Advantages: less formal and expensive than court procedures and disputes would be resolved sooner.

- ADR requires mutual agreement between taxpayer and SARS. This is confirmed by S 107(5) of the TAA:

  "(5) By mutual agreement, SARS and the taxpayer making the appeal may attempt to resolve the dispute through alternative dispute resolution under procedures specified in the ‘rules’."
ADR

• If an appellant requests or agrees to ADR, they are regarded as having accepted the terms of ADR set out in the rules – this is according to Rule 13(3).

• The ADR proceedings are without prejudice (not on record). Any representation or documents tendered may not be tendered in subsequent proceedings as evidence by the other party, unless:

  – It is done with knowledge and consent of the party;
  – If such representation or document already in possession of the other party;
  – If such representation or document is obtained by the other party otherwise than ito ADR proceedings;
  – If a senior SARS official is satisfied that the representation or document is fraudulent.

ADR

• Period of ADR:

  – Commences on delivery of notice by SARS/ taxpayer to participate in ADR under rule 13 and ends on date that the dispute is resolved under rule 23 (agreement) or 24 (settlement), or when the proceedings are terminated under rule 25.

  – Interrupts the time periods for appeals to the tax court and tax board as well as in respect of bringing of any applications under part F of the rules.

  – ADR must be finalised within 90 days after the commencement date (ie from notice by SARS or the taxpayer under rule 13).
ADR

• Appointment of a Facilitator:

  – Rule 16(2) indicates that a facilitator is only required to facilitate the proceedings if the parties so agree.

  – SARS Guide on Dispute Resolution indicates that a facilitator may facilitate discussions between the two parties, if requested.

  – Senior SARS official must appoint a person from the list of facilitators within:
    • 15 days after the commencement date of ADR; or
    • 5 days of the removal or withdrawal of a facilitator.

ADR

• Removal of a Facilitator:

  – A senior SARS official cannot remove a facilitator once the facilitator has commenced with proceedings, unless:

    • This is done at the request of the facilitator; or

    • The parties so agree; or

    • At the request of a party and if satisfied that there has been misconduct, incapacity, incompetence or non-compliance with the duties under rule 17 by the facilitator; or

    • If there is conflict of interest as envisaged under rule 18.
**ADR**

- **Duties of a Facilitator under Rule 17:**
  - Act within the prescripts of the ADR proceedings under the rules and the law;
  - Seek a fair, equitable and legal resolution of the dispute between the appellant and SARS;
  - Promote, protect and give effect to the integrity, fairness and efficacy of the ADR process;
  - Act independently and impartially;
  - Conduct himself or herself with honesty, integrity and with courtesy to all parties;
  - Act in good faith;
  - Decline an appointment or obtain technical assistance when a case is outside the field of competence of the facilitator; and
  - Attempt to bring the dispute to an expeditious conclusion.

- **Request for Withdrawal of Facilitator:**
  - If there is an indication of bias or conflict of interest on the part of the facilitator, either party may request the senior SARS official who appointed the facilitator in question to withdraw the facilitator.
  - If the parties agree, a new facilitator can be appointed to continue with the proceedings.
  - Such a request to the senior SARS official would be made under rule 18(3).
**ADR**

- **ADR meeting:**
  - If a facilitator is appointed:
    - Within 20 days of such appointment, the facilitator must determine a date, time and place for an ADR meeting to be held and notify the parties of same in writing.
  - If no facilitator is appointed:
    - The parties must, within 30 days, determine a date, place and time for an ADR meeting to be held.

---

**ADR**

- **When a Facilitator can Terminate ADR Proceedings Without Prior Notice in Rule 19(3):**

  - If a party fails to attend the ADR meeting; or
  - If a party fails to notify the other party in writing which written submissions or any other document should be furnished and exchanged and when the submissions and documents are required, in terms of rule 19(1)(b); or
  - If the facilitator is of the opinion that the dispute cannot be resolved through such proceedings; or
  - For any other appropriate reason.
ADR

- **ADR Proceedings:**

  - The proceedings may not be electronically recorded;
  
  - Facilitator and the parties are not required to record the proceedings;
  
  - Appellant (if a natural person or representative taxpayer), must be personally present or participate via telephone or video conferencing;
  
  - If SARS agrees, an appellant may be represented by a representative of the appellant’s choice;

- **ADR Proceedings:**

  - If a facilitator was appointed, the facilitator may, in exceptional circumstances, allow the appellant to be represented in the appellant’s absence by a representative of the appellant’s choice;

  - ADR meeting may be concluded at the instance of the facilitator/ if the parties so agree AND if the facilitator and parties agree that the meeting be resumed on another date.
**ADR**

- **ADR Proceedings:**
  
  - If a facilitator is appointed, at the conclusion of the meeting, the facilitator must provide a report which sets out:
    
    - The issues that were resolved;
    
    - Issues where settlement or agreement could not be reached; and
    
    - Any other point that the facilitator considers necessary.
  
  - This report must be delivered to SARS and the taxpayer within 10 days of the cessation of the proceedings.

- **Recommendation by Facilitator:**
  
  - At the commencement of the ADR proceedings, SARS, the appellant and the facilitator may agree that, if no settlement or agreement is reached, the facilitator may make a written recommendation at the end of the proceedings.
  
  - Such a recommendation must be delivered within 30 days of the termination of the proceedings under rule 25, unless the parties agree to an extension.
  
  - Recommendation by the facilitator is inadmissible during any subsequent proceedings, unless it is required by the tax court for purposes of deciding costs under s130 of the TAA.
ADR

- ADR attempts to resolve dispute through agreement under Rule 23 or through settlement under Rule 24.

- If no agreement or settlement reached, matter then referred to Tax Board or Tax Court, as are applicable.

- Agreement occurs when either SARS/ taxpayer accepts the other party’s interpretation of the facts or law or both.

- Settlement occurs when a part of the disputed liability is compromised under the agreement. This is based on definition of “settle” in S142.

ADR

- If SARS fails to issue an assessment to give effect to an agreement or settlement within the period prescribed under rule 23(3) or 24(3), a taxpayer may apply to the tax court on motion under rule 52(5)(b) for an order that SARS must issue such an assessment.
**ADR**

- **Termination of ADR Proceedings:**

  - ADR proceedings are terminated on the expiry of the 90-day period, unless the parties agree to an extension;

  - Before the expiry of the 90-day period or any extension thereof and also if no settlement or agreement is reached, the ADR proceedings are terminated on the date that:
    - The facilitator terminates the proceedings under rule 19;
    - The parties so agree;
    - A party delivers a notice of termination to the other party.

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**ADR**

- **Termination of ADR Proceedings:**

  - If the ADR proceedings are terminated, the appellant must within **20 days** of the termination:

    - Request clerk of Tax Board to set the matter down;

    - Give notice to SARS that taxpayer proceeding with appeal to Tax Court.

**Note:** if taxpayer fails to notify clerk, for example, SARS may apply for Default Judgment to obtain final judgment.
Jurisdiction: Tax Court or Tax Board?

- According to Government Gazette Notice No. 39490, dated 17 December 2015:
  - Ito appeals noted on or after 1 January 2016;
  - Notice of fixing the amount of the threshold for the amount of tax in dispute for purposes of an appeal to the Tax Board to R1 million, in terms of section 109(1)(a) of TAA.

- When is an appeal dealt with by the Tax Board?
  - If taxpayer opts out of ADR / following unsuccessful ADR; and
  - Set out in S109 of TAA
Jurisdiction: Tax Court or Tax Board?

- When is an appeal dealt with by the Tax Board?
  - Set out in S109 of TAA:
    - Senior SARS official and taxpayer so agree (Official required to consider if the grounds of appeal/legal principles require that the appeal should rather be heard by Tax Court);
    - Unless the Chairperson of Tax Board directs otherwise (if chairperson believes matter should be heard by Tax Court → can order matter be referred to Tax Court and heard de novo).

Tax Board

- When you appeal to the Tax Board (directly), must deliver Rule 10 Notice of Appeal to the same address as above. But also to the Clerk of the Tax Board.
- If you select “ADR” but possibly go to the Tax Board if ADR not successful, deliver your Rule 10 Notice to the Clerk of the Tax Board as well (safest).
- Example- Rule 10 Notice for delivery of Tax Board.
**Tax Board**

- **Which Tax Board?**

  - Section 109(3) of the TAA:

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

- How is this dealt with in practice?

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<th>Contact</th>
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</thead>
<tbody>
<tr>
<td>Limpopo, NW &amp; Mpumalanga</td>
<td>40 Landdros Maree Street, Polokwane</td>
<td>F: 086 575 2630</td>
</tr>
<tr>
<td></td>
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<td><a href="mailto:Board.LimpNWandMP@sars.gov.za">Board.LimpNWandMP@sars.gov.za</a></td>
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<tr>
<td>Gauteng North</td>
<td>Riverwalk Office Park, Matroosberg Road, Pretoria</td>
<td>F: 010 208 3067</td>
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<tr>
<td>Gauteng South</td>
<td>Alberton Campus, Saint Austell Road, New Redruth, Alberton</td>
<td>F: 086 612 1643</td>
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<td><a href="mailto:TaxBoard.GautengSouth@sars.gov.za">TaxBoard.GautengSouth@sars.gov.za</a></td>
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<tr>
<td>Gauteng Central</td>
<td>Megawatt Park, LBC Office, Maxwell Drive, Sunninghill</td>
<td>F: 086 513 1758</td>
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<tr>
<td>Western Cape</td>
<td>18th Floor, Sanlam Building, Project 166, 22 Hans Strydom Avenue, Cape Town</td>
<td>F: 010 208 1961</td>
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<tr>
<td>KwaZulu Natal</td>
<td>7th Floor, Albany House, 61 Margaret Mncadi Ave, Durban</td>
<td>F: 086 617 7595</td>
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<tr>
<td>Free State</td>
<td>Fedsure Building, 49 Charlotte Maxeke Street, Bloemfontein</td>
<td>F: 501 3201</td>
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<tr>
<td>Eastern Cape</td>
<td>Revenue Building, Cnr St Mary’s Terace and Whyte’s Road Central, Port Elizabeth</td>
<td>F: 010 208 3053</td>
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**Tax Board**

- Taxpayer is first required to apply for set down (Rule 11 if no ADR, or if ADR terminated, Rule 25 need to request the clerk to set down) (example)

- Clerk of the Tax Board must set matter down before Tax Board within 30 days of notice to Rule 11/Rule 25

- Clerk must also give written notice to both parties of the date, time and place of the hearing of the appeal at least 20 days before the hearing.

- Dosier- prepared by the clerk of the tax board and to be delivered at least 10 days before the hearing of the appeal or as otherwise agreed to between the parties.

**Tax Board**

- Subpoenas to be issued (Magistrates’ Court Rules apply to issuing of subpoenas in the tax board)

- Proceedings are then held

- Clerk is then required to deliver a copy of the tax board’s decision to both parties within 10 days of receipt of the decision

- If no referral of the appeal is made to the tax court, SARS must, if required, issue the assessment to give effect to the decision of the tax board within 45 days after delivery of a copy of the tax board’s decision.
Tax Court

- When is a matter dealt with by the Tax Court?
  - When ADR not pursued/ unsuccessful/ taxpayer not satisfied with decision of Tax Board;
  - Deals with appeals, interlocutory applications and applications in procedural matter relating to dispute provided for in rules;
  - Deals with all cases where tax in dispute exceeds R1 million.
  - Also deals with cases where important tax principles are involved, even if these do not exceed R1 million.

Tax Court

- The Public Notice indicates that a notice of appeal under Rule 10 must be delivered:
  - By means of the taxpayer's electronic filing page, if applicable;
  - To any of the addresses mentioned in paragraph 1.1 or 1.2. above; or
  - By handing it to SARS at any SARS branch office.
**Tax Court**

- **Where to Send Documents for the Tax Court?**

  - Delivery of any document, notice or making a request relating to a dispute process after delivery of a notice of appeal or an application into Part F of the Rules:
    
    | Physical Address                  | Khanyisa Building, 1st Floor, 271 Bronkhorst Street, Nieuw Muckleneuk |
    |----------------------------------|-----------------------------------------------------------------------|
    | Email Address                    | taxcourtlitigation@sars.gov.za                                        |
    | Fax Number                       | 012 422 5012                                                          |

  - Any document or notice required to be delivered to tax court under rules:
    - Same physical address and fax number as per above
    - Email: RegistrarTaxCourt@sars.gov.za

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**Tax Court Applications**

- **Tax Court – Summary of Application Procedure**

  - An application must be brought on Notice of Motion which must, according to Rule 57:
    - Set out the order sought;
    - Be signed by the applicant or the applicant’s representative; and
    - Must be supported by an affidavit that contains the facts upon which the applicant relies for relief.
**Tax Court Applications**

- **Tax Court – Summary of Application Procedure**
  - The application must be brought within 20 days of the date of the action or inaction giving rise to the application;
  - Copies of the application must be delivered to the respondent and to the registrar of the tax court.
  - Example of a motion application includes an application for an order for an objection to be regarded as a valid objection.

**Appeal Procedure: Overview**

1. Tax Court
2. Statement by SARS
3. Statement by taxpayer
4. Reply by SARS
5. Discovery re statements
6. Set down
7. Discovery re issues in appeal
8. Pre-trial conference
9. Dossier and subpoenas
10. Hearing
11. Judgment
12. Appeal to higher courts
Costs

- Ito ADR, Rule 23(2)(b): an agreement must also include an agreement as to costs.

- Costs order may be granted by Tax Court under S130(1) iro Appeal if:
  - SARS'/ appellant’s grounds are held to be unreasonable
  - Tax Board’s decision is substantially confirmed;
  - Hearing of appeal is postponed at request of other party; or
  - Appeal is withdrawn/ conceded by other party after registrar allocates hearing date.

- S 130(3) of TAA: Tax Court may make an order as to costs in:
  - A test case under S106(5);
  - An interlocutory application.

- Rule 52(9): if a notice of withdrawal/ concession is delivered under Rule 46 after appeal/application has been set down for hearing without a consent to pay the other party’s costs, the aggrieved party may apply to Tax Court under Part F of Rules for an order as to costs under S130(1)(e).
**Costs**

- Costs must be determined in accordance with fees prescribed by rules of High Court (registrar may perform functions of taxing master/ appoint someone to perform such functions).

**Referral of Appeal?**

- S115 of the TAA, the appellant or SARS can send out a notice requiring that the appeal be referred to the TC for hearing.

- Also, S133 indicates that SARS or the appellant can appeal against a decision of the TC to a full bench of the High Court or to the SCA.
Questions?

nico@taxconsulting.co.za

076 396 4375

www.taxconsulting.co.za