

SARS

SHORT GUIDE TO THE TAX ADMINISTRATION ACT, 2011 (ACT NO. 28 of 2011)

This publication is provided to assist taxpayers to understand their obligations and entitlements under the Tax Administration Act, 2011 (Act No. 28 of 2011), which commenced on 1 October 2012. It is not a binding general ruling, interpretation note, practice note or other official publication as referred to in the Act and should therefore not be used as a legal reference.

Should you require additional information concerning any aspect of the Tax Administration Act, 2011, you may—

- visit the SARS website at www.sars.gov.za
- visit the SARS Tax Administration webpage at <http://www.sars.gov.za/Legal/TaxAdmin/Pages/History.aspx>
- visit your nearest SARS branch
- contact your own tax advisor/tax practitioner
- if calling locally, contact the SARS Contact Centre on 0800 00 7277
- e-mail your enquiry to TAInfo@sars.gov.za

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A. INTRODUCTION

The drafting of a Tax Administration Act 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, 2011 (Act No. 28 of 2011) (the Act), was promulgated on 4 July 2012.

The Act came into operation on 1 October 2012 by Proclamation No. 51 of 2012, published in *Government Gazette* 35687 on 14 September 2012.

In terms of the law that has created SARS, the South African Revenue Service Act, 1997 (the SARS Act), SARS's objectives include the efficient and effective collection of revenue. Tax legislation, such as the Act, seeks to achieve this objective. Tax legislation typically comprises two aspects:

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

The Act 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; and
- harmonise the provisions as far as possible.

Note: 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 this Act and a tax Act prescribe administrative procedures and a taxpayer must comply with both. For example, the record keeping requirements in this Act for value-added tax are supplemented by additional record keeping requirements in the Value-Added Tax Act, 1991 (the VAT Act), which are unique to value-added tax. Mainly the following administrative provisions remain in tax Acts:

- When the obligation to register for a tax type arises;
- When the obligation to submit a return arises;
- Records retention specific to a tax type;
- When the payment obligation arises;
- When percentage based administrative non-compliance penalties may be imposed and the percentage;
- Certain tax type specific criminal offences.

The Act 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.

The Act 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.

The Act 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 taxpayers submit income tax returns. SARS then determines the tax liability and assesses the taxpayers – the Act builds a platform for a full self-assessment regime where taxpayers determine their own tax liability and pay 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.

The Act seeks in numerous ways to enhance tax compliance to ensure that every person pays his or her fair share. The Act 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 the Act should ensure better service and a lower compliance cost. Tax evaders, however, will face stricter enforcement, assessment and collection powers.

B. STRUCTURE OF THE ACT

Tax administrative procedures inevitably follow a time sequence, commonly referred to as a “step-by-step” approach. The Act 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.

Chapter 1	Definitions	Chapter 11	Recovery
Chapter 2	General Administration	Chapter 12	Interest
Chapter 3	Registration	Chapter 13	Refunds
Chapter 4	Returns and Records	Chapter 14	Write off or Compromise of Tax Debts
Chapter 5	Information Gathering	Chapter 15	Administrative Non-Compliance Penalties
Chapter 6	Confidentiality	Chapter 16	Understatement Penalties
Chapter 7	Advance Tax Rulings	Chapter 17	Criminal Offences
Chapter 8	Assessments	Chapter 18	Reporting of unprofessional conduct
Chapter 9	Dispute Resolution	Chapter 19	General provisions
Chapter 10	Tax Liability & Payment	Chapter 20	Transitional provisions

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.

C. CHAPTERS OF THE ACT

1. CHAPTER 1 - INTERPRETATION

1.1. General interpretation

Essentially, there are three important interpretive rules.

Firstly, in the context of interpreting the provisions of the Act, a term that is defined in another tax Act will have that meaning where used in the Act. This is unless the context where the term is used in the Act indicates otherwise. For example, the term 'director' is defined in the Income Tax Act, 1962, (Income Tax Act) and not in the Act. Where this term is used in the Act and the Act's provision is applied in respect of income tax, 'director' will bear the Income Tax Act's defined meaning. Where the term 'director' is used in the Act in the context of referring to the Director of Public Prosecutions, the context will indicate that the Income Tax Act's defined meaning of 'director' does not apply. Also, if the Act's provision is applied in respect of value-added tax, the term will not have the defined meaning of the Income Tax Act.

Secondly, in the context of interpreting the provisions of a tax Act, a term that is defined in the Act 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 the Act and not in the Income Tax Act. Where this term is used in the Income Tax Act in the context of an administrative requirement, such as the obligation to submit a return of income, 'return' will bear the Act's defined meaning. Where the term 'return' is used in the Income Tax Act in the context of, for example, a return of capital, the context will indicate that the Act's defined meaning of 'return' does not apply.

Thirdly, if there is an inconsistency between the Act and another tax Act, then the other tax Act will prevail.

The Act's definitions are either global definitions, which are contained in §1, or Chapter only definitions of words or phrases that are relevant to only the Chapter in which they are defined. Chapter definitions appear in that Chapter in single quotation marks, for example the term 'advance ruling' in Chapter 7.

1.2. New definitions introduced by the Tax Administration Act

The Act introduced 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.

1.2.1. Assessment

In the Act, 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 in turn, is defined to mean a determination of the amount of tax payable under a tax Act by a taxpayer and the act of—

- 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 this amount 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 to 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.

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.

1.2.2. 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, the days from 16 December of each year to 15 January of the following year are excluded.

The Act 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.

1.2.3. Customs and excise legislation

This means the Customs and Excise Act, 1964, the Customs Duty Act, 2014, or the Customs Control Act, 2014. The provisions of the Act apply to customs and excise legislation only where specified.

1.2.4. International tax agreement and international tax standard

International tax agreement means—

- an agreement entered into with the government of another country in accordance with a tax Act, such as a Double Taxation Agreement (DTA), or
- other international tax agreements between the competent authority of the Republic and the competent authority of another country relating to the automatic exchange of information under an agreement entered into with the government of another country in accordance with a tax Act.

An international tax standard means—

- the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters;
- the Country-by-Country Reporting Standard for Multinational Enterprises specified by the Minister; or
- any other international standard for the exchange of tax-related information between countries specified by the Minister,

subject to such changes as specified by the Minister in a regulation issued under §257.

1.2.5. 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 and taxpayers from those that are not, for example SARS guides. It is also particularly relevant for purposes of what constitutes a practice generally prevailing, referred to in §5.

1.2.6. Public notice

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

1.2.7. Return

A return means a form, declaration, document or other manner of submitting information to SARS that incorporates a self-assessment, is a basis on which an assessment is to be made by SARS or incorporates relevant material required under §25, §26 or §27 or a provision under a tax Act requiring the submission of a return.

1.2.8. Tax

This is a very important definition in the context of the Act, 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 the Act to include all the amounts to which the Act applies, and does not mean that for any other purpose the term “tax” or “taxes” includes, for example fees.

1.2.9. Relevant material

The information gathering powers of SARS may only be used to obtain relevant material. Relevant material is information, documents, or things that, in the opinion of SARS are foreseeably relevant for the administration of a tax Act as referred to in §3 of the Act.

1.2.10. 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.

1.2.11. SARS official

SARS official is a defined term in the Act and means—

- the Commissioner,
- an employee of SARS; or
- a person contracted or engaged by SARS, other than an external legal representative, 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.

1.2.12. 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 of the Act; or any other offence involving fraud on SARS or on a SARS official relating to the administration of a tax Act; or theft of moneys due or paid to SARS for the benefit of the National Revenue Fund.

1.2.13. Tax Acts

The Act 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 but excludes customs and excise legislation, which is defined as the Customs and Excise Act, 1964, the Customs Duty Act, 2014 or the Customs Control Act, 2014.

1.2.14. 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
- determine the meaning of administration of a tax Act in the context of obtaining full information in relation to a taxable event.

1.2.15. Taxpayer

Taxpayer is defined to mean—

- a person who is or may be chargeable to tax or with a tax offence;
- a representative taxpayer;
- a withholding agent;
- a responsible third party; or
- a person who is the subject of a request to provide assistance under an international tax agreement.

1.2.16. 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.

1.2.17. 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 of the Act.

2. CHAPTER 2 - GENERAL ADMINISTRATION OF THE TAX ACTS

2.1. Purpose of Chapter

Chapter 2 provides that SARS is responsible for the administration of the 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 the Tax Administration Act, 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; and
- The establishment of the office of the Tax Ombud.

It further provides that if the Act is silent with regard to an aspect of the administration of a tax Act and it is specifically provided for in the relevant tax Act, the provisions of that tax Act apply. If any inconsistencies between the Act and a tax Act should arise, it provides that in the event of any inconsistency between the Act and another tax Act, the tax Act prevails.

2.2. Administration of the tax Acts

The meaning of administration of the tax Acts is critical to the application of the Act 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—
 - o anything that may affect the liability of a person for tax in respect of a previous, current or future tax period;
 - o a taxable event; or
 - o 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 debts and refunding any tax overpaid;
- Investigating whether a tax offence has been committed and, if so—
 - o to lay criminal charges; and
 - o to provide the assistance that is reasonably required for the investigation and prosecution of the tax offence;
- Enforcing SARS's 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;
- Giving effect to the obligation of the Republic to provide assistance under an international tax agreement; and
- Giving effect to an international tax standard.

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

2.3. Tax administration and PAJA

The right to administrative justice under the Constitution is given effect to in the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (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; and
- 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 include—

- Where such departure is reasonable and justifiable in the circumstances of a specific matter; and
- 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 Tax Administration Bill, 2011, 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 the Act 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 the Act 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 the Act 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—
 - o the need for a jeopardy assessment;
 - o an assessment based on an estimation, and
 - o an assessment that is not fully based on a return i.e. that is contrary to the tax position taken by a taxpayer; and
- Regarding recovery, a final demand notice that recovery steps will be initiated must be given by SARS at least 10 business days before such steps are taken to afford a tax debtor a final opportunity to pay the outstanding tax debt or seek debt relief.

It is important to bear in mind that the fact that the Act prescribes administrative fairness requirements in respect of certain decisions does not mean that such requirements do not apply to other decisions under the Act 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, the Act 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 the Act limits administrative fairness in respect of certain actions does not mean that SARS may not in respect of other administrative actions under the Act depart from administrative fairness

requirements where such departure is reasonable and justifiable in the circumstances of a specific matter, as contemplated in PAJA.

2.4. The tax Acts

The Act 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.
- Employment Tax Incentive Act, 2013
- Merchant Shipping (International Oil Pollution Compensation Fund) Administration Act, 2013
- Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act, 2013

It does not apply to the customs and excise legislation, unless the Act expressly provides that a provision applies in respect of customs or excise matters, such as in the context of secrecy (§69(2) and set off (§191(1)).

2.5. 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 a defined term in the Act. The only sources of SARS's 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.

The concept of a practice generally prevailing is used in the Act in the context of both defining and limiting SARS's 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. The Act 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.

2.6. Decision-making levels

The Act introduced a new framework for decision-making that ensures that powers and duties that have far-reaching impact are only delegated to suitably 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:

2.6.1. 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 assigned to the Commissioner personally.

- Authority to determine the tax environment includes 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 those powers and duties in the manner provided for in the Act.

2.6.2. Tier 2: Senior SARS officials

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

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

Table 1: Powers or functions reserved for senior SARS officials

Power or function delegated to senior SARS official	Section of TAA
Issuing an official publication (definition of <i>official publication</i>)	1
Withdrawing or amending a decision by a SARS official	9
Appearing in the Tax Court and higher courts	12
Requiring a person to submit further or more detailed returns	27
Authorising an alternative form of record keeping	30
Requiring a person to furnish a translation of information in an official language	33
Authorising a SARS official to conduct a field audit or criminal investigation	41(1)
Authorising a decision not to provide an audit progress report or a pre-assessment letter of findings	42(5)
Authorising a criminal investigation when the commission of tax offences appears during an audit	43(1)
Requiring relevant material from a class of taxpayers or from an offshore connected person	46(2)
Directing that relevant material be provided under oath or solemn declaration and if necessary in accordance with the Criminal Procedure Act, 1977	46(7)
Requesting relevant material for purposes of revenue estimation	46(8)
Requiring a person to attend an interview and to produce relevant material	47
Authorising an ex parte application to a judge for authorisation to conduct an inquiry and authorise the person to conduct the inquiry	50
Authorising an ex parte application to a judge for a search and seizure warrant	59
Authorising the entering and searching of premises not identified in a search and seizure warrant	62
Authorising a search and seizure without a warrant	63
Determining the supervision of the examination and copying of seized material	65(2)
Disclosing taxpayer information to specified entities	70
Disclosing or applying for the disclosure of information in criminal, public safety or environmental matters if so ordered by a judge	71
Issuing a binding general ruling, binding private ruling or binding class ruling	75 & 78
Extending the period within which a return required under §91(5)(b) must be submitted	91(6)
Making a reduced assessment if satisfied that a preceding assessment was made as a result of third party failures or fraud or a SARS processing error	93(1)(e)
Authorising an agreed assessment if no accurate return can be submitted by a taxpayer	95(3) & 98(2)
Extending the period within which an objection must be filed	104(4)
Designating a tax dispute as a test case	106(6)
Extending the period within which an appeal must be lodged	107(2)
Agreeing to the hearing of a matter by the Tax Board	109(1)
Appearing before the Tax Board in support of the assessment or 'decision'	113(5)
Appearing before the Tax Court in support of the assessment or 'decision'	125(1)
Approving and signing a settlement agreement	147(4)
Authorising an application to the High Court for a preservation order and authorising the seizure of assets subject to the order	163(1) & (11)
Suspending the payment of disputed tax pending the outcome of an objection or appeal or the decision of a court of law and withdrawing or revoking such suspension	164(3) and (5)
Authorising the institution of proceedings for the sequestration, liquidation or winding-up of a person for outstanding tax debt	177
Appointing a third party to pay to SARS money held for or owed to a taxpayer	179
Determining if a third party involved in the financial management of a tax debtor is personally liable for the tax debt	180
Taking conservancy /collection steps requested under international tax agreement	185
Applying for a court order for repatriation of foreign assets to satisfy local tax debts	186
Temporarily writing off a tax debt and withdrawing this decision if the debt is no longer uneconomical to pursue	195
Permanently writing off a tax debt that is irrecoverable at law or compromised	197
Authorising and signing a compromise agreement in terms of which a portion of the tax debt will be	200 & 204

Power or function delegated to senior SARS official	Section of TAA
written off if the taxpayer pays the remainder	
Approving a VDP application	230
Laying a complaint with SAPS or the NPA regarding tax evasion offences	235(3)
Lodging a complaint against a 'registered tax practitioner' with the relevant 'controlling body' and disclosing relevant information	241 & 242
Approving the issuing of a tax clearance certificate	256(3)

2.6.3. 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 the Act.

Which SARS officials may exercise which power or duty is determined by the term used in the Act, as illustrated in Table 2.

Table 2: Which SARS official may exercise which power or duty?

Term used in the Tax Administration Act:	Means:
"the Commissioner"	- the Commissioner personally; or - a person to whom the Commissioner delegated the power or duty in accordance with the Act (§10)
"a senior SARS official"	- the Commissioner; - a SARS official who has specific written authority from the Commissioner to do so; or - a SARS official occupying a post designated by the Commissioner in writing for this purpose
"a SARS official"	- the Commissioner; - an employee of SARS; or - a person contracted or engaged by SARS, other than an external legal representative, 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
"SARS"	the South African Revenue Service established under the SARS Act, including, by necessary implication, any SARS official

2.7. Conflict of interest

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

2.8. Identity cards

A SARS official involved in the administration of a tax Act may 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, demonstrate the authority of a SARS official to perform functions or duties. If the official does not produce the identity card, a member of the public is entitled to assume that the person is not a SARS official. 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.

2.9. 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 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 objection and appeal process.

2.10. Powers and duties of the Minister

Under this Act, 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 the Act, be delegated by the Minister to the Deputy Minister or Director-General of the National Treasury.

2.11. The Tax Ombud

2.11.1. Why a Tax Ombud?

The Tax Ombud provides taxpayers with a cost-effective mechanism to address administrative difficulties, which operates in addition to other 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's powers under the Act. Taxpayer protection and remedies are specifically afforded in the Act sections or parts dealing with SARS's powers, in addition to overarching remedies such as the right to request SARS to internally review a decision and the internal complaints resolution mechanisms.

2.11.2. 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.

2.11.3. How is the Tax Ombud's office established?

The Act does not create the Tax Ombud's office as a separate entity. The expenditure connected with the functions of the office of the Tax Ombud is paid in accordance with budget approved by the Minister for the office. The Tax Ombud must appoint the staff of the office of the Tax Ombud who must be employed in terms of the SARS Act.

2.11.4. 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 regarding a service matter, procedural matter or administrative matter arising from the application of the provisions of a tax Act by SARS. The Tax Ombud must 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.

The Tax Ombud must also review, at the request of the Minister or at the Ombud's own initiative with the approval of the Minister, any systemic and emerging issue related to a service matter or the application of the provisions of the Act or procedural or administrative provisions of a tax Act.

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's 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, proceedings in or a matter before, the tax court.

2.11.5. To whom does the Tax Ombud report?

The 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 the Act that impact negatively or adversely on taxpayers.

2.11.6. How can a complaint be reported to the Tax Ombud?

Before an administrative complaint can be sent to the Tax Ombud, the taxpayer must first try to resolve the complaint through SARS's internal complaints resolution procedures (<http://www.sars.gov.za/Contact/How-Do-I/Pages/default.aspx>), 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 has a dedicated website which, for example, includes information about the Tax Ombud, contact details and prescribed forms.

2.11.7 Recommendations by the Tax Ombud

The Tax Ombud's recommendations are not binding on taxpayers or SARS but if not accepted by a taxpayer or SARS, reasons for such decision must be provided to the Tax Ombud within 30 days of notification of the recommendations and may be included by the Tax Ombud in the report to the Minister or the Commissioner.

3. CHAPTER 3 – REGISTRATION

3.1. Purpose

The purpose of Chapter 3 is to regulate the identification and registration of taxpayers. The management of taxpayer registration involves three basic functions: registering taxpayers, updating taxpayer details and deletion of taxpayers from SARS's records. To encourage compliance with registration obligations, the Act seeks to provide a 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. The Act 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 businesses and vehicle transaction records;
- Physical inspections of business premises;
- On-the-spot checks at markets and other trade locations; and
- 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 when the taxpayer becomes a non-resident with no assets in the RSA; or
- in any other case (e.g. a company, trust, etc.) and provided there is no outstanding tax liability, upon finalisation of liquidation or deregistration or when the taxpayer becomes non-resident with no assets in the RSA.

3.2. Single registration

The Act provides for a single tax account and 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.

3.3. Registration period

The Act aligns the periods within which a person must apply to register as a taxpayer in as far as this is achievable.

3.4. 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 person must submit the registration information required under the Act 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 person that is obliged to register with SARS under a tax Act fails to do so, SARS may register the person 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.

3.5. 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
- counteract 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 Chapter 6, the chapter dealing with confidentiality of information, 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 to or constitutes material information for the proving of a tax offence.

3.6. 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 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.

3.7. Taxpayer reference number (TRN)

The TRN is the linking element of the information that is included in SARS's 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.

4. CHAPTER 4 - RETURNS AND RECORDS

4.1. Returns

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

The Act defines a return as a form, declaration, document or other manner of submitting information to SARS that incorporates a self-assessment, is the basis on which an assessment is to be made by SARS or incorporates relevant material required under section 25, 26 or 27 or a provision under a tax Act requiring the submission of a return.

A return will generally be in 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 form may be obtained by submitting a request at a SARS office, by post or telephonically. Return forms 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 form is available once an eFiler accesses the system by using a username and password.

4.1.2. 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 the relevant tax Act and the Act. 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 law, for example income tax returns by companies, are regulated under the general return requirements of the Act and the specific information required is set out in the prescribed form.

4.1.3. 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 return form;
- in the prescribed manner, which includes submitting the return at the prescribed place. In the case of eFilers, this will be on the eFiling system and in the 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
- signed by the taxpayer or a duly authorised representative and the person who signs a return is regarded for all purposes to be cognisant of the statements made in the return.

4.1.4. Due date for submitting returns

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

- by the date specified in a 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
- by the date for submission of returns determined by the Minister, if he or she exercises the power to do so.

The dates for submission of returns for the different tax types are prescribed in the various tax Acts.

4.1.5. What if a mistake is made in a 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 new 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 where SARS is satisfied that there is a readily apparent undisputed error in the assessment by either SARS or the taxpayer;
- 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, in respect of the incorrect tax period or issued as a result of an incorrect payment allocation.

4.1.6. 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, e.g., remuneration received from employers, medical aid related information and interest. As SARS's systems evolve, the pre-populated returns may include 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.

In order to provide the required information, a return must comply with the due diligence requirements as may be prescribed in a tax Act, an international tax agreement, an international tax standard or by the Commissioner in a public notice consistent with an international tax agreement or international tax standard. The Commissioner may also, by public notice, require a person to apply to register as a person required to submit a return under this specific section in the Act, an international tax agreement or an international tax standard.

The Commissioner determines the prescribed form that must be completed, and, therefore, determines 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 another person; or
- institutions that control the assets of another person.

4.1.7. Other returns required

Under this Act, 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 Income Tax Act, 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 be rendered when a deemed supply is made.

4.1.8. 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 by the preparer, 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 a false certificate or statement constitutes a criminal offence **and** may trigger an administrative non-compliance penalty under Chapter 15.

4.2. Record retention

4.2.1. The duty to keep records

This Act 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 the Act, 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, or by the Commissioner by public notice; 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 the Act is a criminal offence. It may also trigger an administrative non-compliance penalty under Chapter 15.

4.2.2. Who must keep records?

The requirement to keep records for a tax period applies 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, had 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.

4.2.3. In what form must records be kept?

Regarding the manner of keeping records, a new requirement was added in terms of the Act. 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 the Act.

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;
- an orderly fashion; and
- a safe place.

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.

4.2.4. For what period must records be retained?

The periods for which persons are required to keep records are set out in Table 3.

Table 3: Record retention periods

Person	Period
A person who has submitted a return	From the date of the submission of the return until the last day of a period of five years
A person who is required to submit a return for the tax period and has not submitted a return	Indefinite. When a return is submitted, from the date of the submission of the return until the last day of a period of five years
A person who is not required to submit a return but has, during the tax period, received income, had 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	From the beginning of the tax period until five years after it has ended
A person who has been notified or is aware that the records are subject to an audit or investigation	Until the audit or investigation is concluded or the applicable five year period ends, whichever is the latest
A person who has lodged an objection or appeal against an assessment or decision under this Act	Until the disputed assessment or decision becomes final or the applicable five year period ends, whichever is the latest

4.3. Reportable arrangements

The Act made significant changes to the following areas of the old reportable arrangement scheme that was regulated under the Income Tax Act:

- A reportable arrangement is an arrangement (defined as any transaction, operation, scheme, agreement or understanding (whether enforceable or not) referred to in §35(1) or listed in a public notice under §35(2) that is not an excluded arrangement referred to in §36 of the Act;
- Failure to report a reportable arrangement will not constitute a criminal offence and is no longer subject to a flat R1 million penalty, but is subject to a more proportionate administrative non-compliance penalty under Chapter 15.

Further changes included—

- A new definition of **participant**, i.e. this term in relation to an arrangement, means—
 - o a promotor (which means, in relation to an arrangement, a person who is principally responsible for organising, designing, selling, financing or managing the arrangement);
 - o a person who directly or indirectly will derive or assumes that the person will derive a tax benefit or financial benefit by virtue of an arrangement; or
 - o any other person who is party to an arrangement listed in a public notice referred to in §35(2) of the Act.
- A new definition of **financial reporting standards**, i.e. this term means—
 - o in the case of a company required to submit financial statements in terms of the Companies Act, 2008 (Act No. 71 of 2008), financial reporting standards prescribed by that Act; or
 - o in any other case, the International Financial Reporting Standards or appropriate financial reporting standards that provide a fair presentation of the financial results and position of the taxpayer.
- A new definition of tax benefit i.e. this term means the avoidance, postponement, reduction or evasion of a liability for tax.

5. CHAPTER 5 - INFORMATION GATHERING

5.1. New information gathering powers and procedure

SARS's information gathering powers were supplemented or extended by the Act. However, taxpayer's rights were amplified and made more explicit to counterbalance SARS's new information gathering powers.

The Act essentially 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 enquiry before a presiding officer;
- Search and seizure.

The Act increased SARS's information gathering powers, and SARS may:

- Conduct unannounced but limited inspections at business premises to verify that a person has complied with the formal obligations such as registering for tax 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
- Request information held or kept by a connected person in relation to the taxpayer, located outside the Republic
- Request that relevant material be provided under oath or solemn declaration or, in the case of a criminal investigation, in accordance with the requirements of certain sections of the Criminal Procedure Act
- Select a person for inspections, verifications or audits on a random or risk assessment basis
- Obtain information for purposes of revenue estimation
- Ask a taxpayer or its employees or office holders (e.g. director) to attend an interview and submit information at a SARS office to clarify issues of concern with a view to rendering further investigation or audit unnecessary or to expedite a current verification or audit
- The authority to conduct a search and seizure under a warrant is retained, but extended to allow SARS officials to search premises that are not identified in a warrant, and to conduct a search and seizure without a warrant in limited circumstances
- Conduct a warrantless search and seizure under very narrow circumstances

Relevant material means any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of 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.

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

The additional protection of taxpayer's rights provided when SARS exercises its information gathering powers is set out below.

5.2. General rules for inspection, verification, audit and criminal investigation

5.2.1. 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 prescribed as either on a random or a risk assessment basis. This is not the basis for criminal investigations, which are triggered by indications of the commission of an offence under a tax Act or related common law offences.

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's 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);
- Limiting of disputes; and
- The incidence of tax underpayments, administrative penalties and interest is reduced.

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

5.2.2. 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 does 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 to the SARS identity card.

5.2.3. Keeping a taxpayer informed of the audit

The Act prescribes the procedure that SARS has to follow both during and after an audit.

- *Stage of audit:* A taxpayer is entitled to be informed of the stage of completion of an audit in the form and manner as specified by the Commissioner in a public notice.
- *Letter of audit findings:* The taxpayer must be given a letter of findings within 21 business days of the audit being finished and if the audit—
 - o was inconclusive, SARS must inform the taxpayer of this fact; and
 - o indicates 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's findings. In complex cases, both SARS and the taxpayer may deviate from these time periods.
- *Exception:* SARS is exempt 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 this Act 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.

5.2.4 Procedure where legal professional privilege is asserted

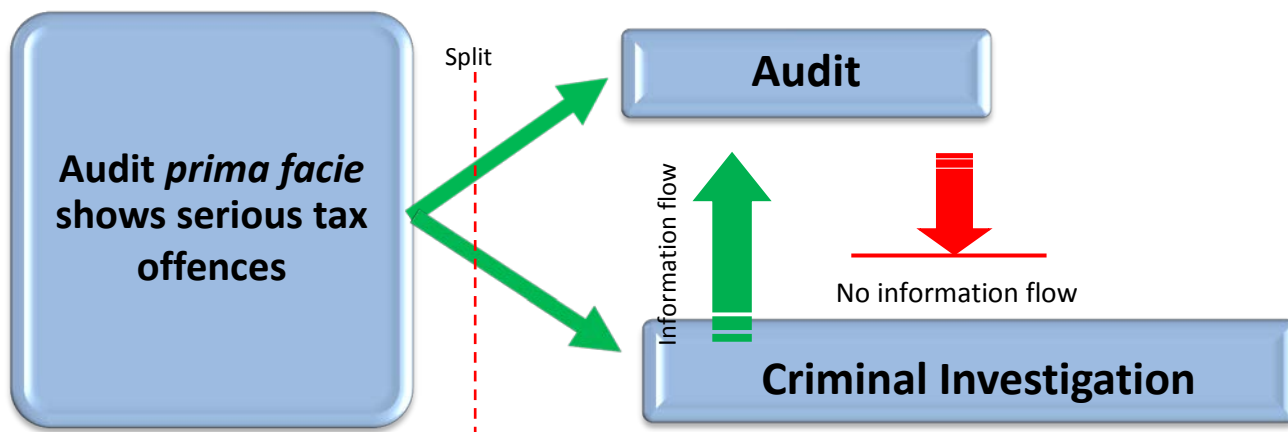
In the context of information requests, interviews and field audits, legal professional privilege is often asserted in respect of information required by SARS. The Tax Administration Laws Amendment Act, 2015, inserted a new section 42A to specifically deal with cases where legal professional privilege is asserted. This section seeks to clarify the requirements that must be met for such assertion and provides for a procedure where SARS does not accept the assertion of legal professional privilege. The first objective of section 42A is to resolve the matter between SARS and the taxpayer, as opposed to starting with an adjudicative and generally more protracted process. This approach is followed elsewhere in the Act, for example section 66 which provides that a taxpayer subjected to a search and seizure and who intends to bring an application for the return of the seized relevant material or costs of damages must first request this from SARS and only if SARS refuses, bring a High Court application. Applying this approach to assertions of legal professional privilege regarding relevant material required by SARS means there will be a process to handle the volumes of such matters.

The section ensures that SARS will have a basic set of information to enable it to determine whether a document is subject to legal professional privilege. In the absence of this information SARS has no basis for determining whether it agrees or not with the taxpayer's assertion of privilege or a decision in this regard by an independent legal practitioner or court. The courts have warned against overreliance on a "judicial peek" to decide matters of confidentiality in decisions of the High Court in the case of privilege in a tax matter and the Constitutional Court in the case of promotion of access to information. If SARS and the taxpayer agree that the material is privileged, alternative methods such as redaction of the privileged part and providing SARS with the remainder can be pursued. This will substantially reduce the number of cases that require adjudication by an independent legal practitioner or the High Court.

5.2.5 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 a 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.

This can be illustrated as follows:



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**:

- The right to remain silent;
- The right to be informed promptly of the right to remain silent and the consequences of not remaining silent;
- The right not to be compelled to make any confession or admission that could be used in evidence against him or her during a criminal trial; and
- Aligned to this, the Constitution protects the right of a **suspect** to choose and be represented by a legal practitioner at his or her 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 the Act 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; and
- An inspection and an interview under §47 cannot be used when conducting a criminal investigation.

5.3. Inspection, request for relevant material, audit and criminal investigation

5.3.1. Inspections

SARS may, without prior notice, arrive at and inspect premises. 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 or if a business is registered for the required tax types.

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 and going; third party information etc.);
- The inspection may **only** be done to determine:
 - o the identity of the person occupying the premises;
 - o whether the person occupying the premises is registered for tax;
 - o 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.

5.3.2. 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'. SARS may extend the period within which the relevant material must be submitted if reasonable grounds for an extension are submitted by the person or taxpayer. "Reasonable circumstances" will depend on the facts and circumstances of the specific matter, such as the extent and availability of the relevant material required.

A senior SARS official may require relevant material in respect of taxpayers in an objectively identifiable class of taxpayers, for example require a bank to provide relevant material in respect of "all account holders who made offshore transfers in excess of R1 million.". A senior SARS official may also require relevant material held or kept by a connected person (as referred to in paragraph (d)(i) of the definition of 'connected person' in the Income Tax Act) in relation to the taxpayer located outside the Republic. The relevant material kept or held by such a connected person must be submitted by the taxpayer within 90 days from the date of the request unless an extension is granted by SARS. If the taxpayer fails to provide the relevant material, it may not be produced by the taxpayer in any subsequent proceedings, unless a competent court directs otherwise on the basis of circumstances outside the control of the taxpayer and any connected person in relation to the taxpayer.

A senior SARS official can also ask a person to provide information under oath or a solemn declaration or if required for purposes of a criminal investigation, under oath or solemn declaration in accordance with the requirements of section 212 or 236 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

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 as defined;
- The request for information from a person who is a third party in relation to the taxpayer is limited to the records maintained or kept or that should reasonably be maintained or kept by the person in the normal course of the person's business. 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 is limited to the information in this regard that a taxpayer has available.

The **obligations and rights** of a taxpayer or a person from whom information is requested under the Act are—

- to submit the relevant material to SARS as complete as possible in the manner requested, for example, under oath or in a 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 Chapter 17 if a person without just cause refuses or neglects to—

- furnish, produce or make available any information, document or thing, excluding information for purposes 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 of the Act, which is an escalating penalty until the non-compliance is remedied, if a public notice to this effect is issued by the Commissioner.

5.3.3. Production of relevant material in person

SARS may have some concerns arising from returns or from other sources, for example third party information, which SARS may wish to clarify during an interview with the person concerned in the hope of rendering further verification or audit unnecessary or to expedite a current verification or audit. 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 (such as a legal entity, trust, partnership, individual etc.), an employee of the person or a person who holds an office in the person 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);
- Require in the notice that the person produce relevant material under the person's control at the interview;
- Question the person during 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 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—
 - o clarifying issues of concern to SARS to render further verification or audit unnecessary or to expedite a current verification or audit; and
 - o may not be used for purposes of a criminal investigation;
- The interview or questioning may not be done under oath or in a 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.

5.3.4. 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 of persons at the premises, examine systems and download relevant material;
- Conduct an audit or criminal investigation in relation to the person at the premises of 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—
 - o be issued by a SARS official duly authorised to conduct an audit or investigation;
 - o be given at least 10 business days before the intended date of the audit or investigation;
 - o state the place where and date and time (which must be during business hours) when the audit or investigation is due to start;
 - o 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, such as value-added tax, is discovered.

Exceptions:

- o 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;
- o If the person at least five 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, for example photocopying facilities, to the extent that such facilities are available;
- answering questions relating to the audit or investigation, including if so required, under oath or solemn declaration;
- 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 the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (PAIA).

The obligation to provide the reasonable assistance as is required by SARS is reinforced by this Act's provisions under which no person at the premises may without just cause—

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

Such obstruction or refusal is also criminalised under the Act, and may trigger an administrative non-compliance penalty under Chapter 15 of the Act if a public notice to this effect is issued by the Commissioner.

5.4. Inquiries

5.4.1. 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 relevant material 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 subsequent proceedings involving the person or another person.

5.4.2. 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 in a solemn declaration that—
 - o a person failed to comply with an obligation imposed under a tax Act;
 - o a person has committed a tax offence; or
 - o a person disposed of, removed or concealed assets which may fully or partly satisfy an outstanding tax debt; and
 - o relevant material (as defined in the Act) 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 or of the disposal, removal or concealment of the assets; and
- The order must—
 - o designate a presiding officer before whom the inquiry is to be held;
 - o identify the person alleged to have failed to comply with an obligation, committed a tax offence or disposed of, removed or concealed assets;
 - o refer to the alleged non-compliance, commission of the offence or the disposal, removal or concealment of assets to be inquired into;
 - o be reasonably specific as to the ambit of the inquiry;
 - o 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.

5.4.3. 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 and evidence 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, 1944 (Act No. 32 of 1944); and
- 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.

5.4.4. Rights of 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—

- o the administering or taking of an oath or the administering or making of a solemn declaration;
- o the giving of false evidence or the making of a false statement;

- o 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 civil or criminal proceedings are pending or contemplated against or involve—

- 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;
- another person whose affairs may be investigated in the course of the inquiry.

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

5.5. Search and seizure under a warrant

5.5.1. 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.

5.5.2. 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 the Act (currently R1m);
- 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 that—
 - o a person failed to comply with an obligation imposed under a tax Act; or committed a tax offence; and
 - o 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; and
- A warrant issued by the judge or magistrate must contain the following:
 - o The alleged failure to comply or offence that is the basis for the application;
 - o The person alleged to have failed to comply or to have committed the offence;
 - o The premises to be searched; and
 - o The fact that relevant material is likely to be found on the premises.

5.5.3. 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 are 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; and
- If material is kept at premises not identified in a warrant, SARS officials may also search those premises if a senior SARS official authorises the search on the basis that there are reasonable grounds to believe that—
 - o 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;
 - o a warrant cannot be obtained in time to prevent the removal or destruction of the relevant material; and
 - o 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.

5.5.4. 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 they 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 made 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—
 - o the investigation into the non-compliance or tax offence on which the warrant was based; or
 - o 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:
 - o If SARS anticipates that a person will allege 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; and
 - as soon as is reasonably possible, hand over the material to the attorney;
 - o 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
 - o The attorney must retain the relevant material pending final resolution of the dispute by the parties or an order of court.

5.5.5. Rights of affected person

A person whose premises are 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—
 - o at the person's cost in accordance with the fees prescribed in accordance with PAIA;
 - o during normal business hours; and
 - o under the supervision determined by a senior SARS official; and

- 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—
 - o on good cause shown, make the order as it deems fit;
 - o 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 this Act, SARS administrative complaints resolution procedures and the Tax Ombud, as well as under PAJA.

5.6. Search and seizure without a warrant

5.6.1. 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.

5.6.2. 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—
 - o what the legislative basis is of the search and seizure i.e. that the search is being conducted under an empowering provision under the Act; and
 - o 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.

5.6.3. Rights of affected person

A person affected by the warrantless search and seizure would have the same rights and remedies as discussed under paragraph 5.5 (**Search and seizure under a warrant**).

A warrantless search will be justiciable 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.

6. CHAPTER 6 - CONFIDENTIALITY OF INFORMATION

6.1. Taxpayer information and SARS confidential information

The Act 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.

6.2. 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's records by PAIA (§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 the Act.

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*.

6.3. Taxpayer Information

6.3.1. 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.

6.3.2. SARS's 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 to not 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 the Act, 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 the Act.

6.3.3. 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
- of 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.

6.3.4. 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, 1998
- the Financial Intelligence Centre Act, 2001
- the Drugs and Drug Trafficking Act, 1992.

6.3.5. 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 previous law provided that a competent Court may order disclosure of taxpayer information. This included a Magistrate's Court, Maintenance Court and a §205 enquiry by a magistrate under the Criminal Procedure Act. 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; and
- The information does not constitute biometric information.

6.3.6. 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.

6.3.7. 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 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 pension funds, pension preservation funds, provident funds, provident preservation funds and retirement annuity funds as well as 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.

6.3.8. 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.

6.3.9. Disclosure to other entities

A senior SARS official may disclose certain information that is required for the performance of their respective legislative functions to organs of state, institutions and employers. 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 the 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, the Act 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, the Act 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; and

- Other non-financial information as the organ of state or institution may require for purposes of verifying the above.

6.3.10. 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 South African Police Service (SAPS); or
- the National Prosecuting Authority (NPA).

Under old law only SARS could initiate such proceedings, but this did not adequately cater for circumstances where the SAPS or the NPA had reason to believe that such information was in the possession of SARS and wished 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 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.

6.3.11. 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 to which a taxpayer may object;
- *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 with copies of that information; and
- *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's appointed PAIA information officer, and SARS is authorised to levy a charge as prescribed by the PAIA.

6.3.12. 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.

6.4. SARS confidential information and disclosure

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; and
- 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 as disclosure to a SARS official who is not authorised to have access to the information, 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; and
- required by order of a High Court.

6.5. Self-incriminating information

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

6.5.1. Self-incrimination and the submission of returns

The Act provides in §72(1) 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.

The Act 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 (§72(1)). 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 §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 (§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.

6.5.2. Self-incrimination and the use of information obtained by SARS

The Act provides in §72(1) 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 §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. Section 72(2) preserves some residual power for the Court to depart from the default position and direct that, in a specific case, admissions obtained by using SARS's information gathering powers may be used.

In the context of 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 the Act, 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 that may invoke the full protection afforded by the fair trial rights under the Constitution.

7. CHAPTER 7 - ADVANCE RULINGS

7.1. 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. Because these rulings are binding, they 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 previously regulated in the Income Tax Act and the Value-Added Tax Act was incorporated in the Act, and advance rulings are now issued in respect of all tax types and tax Acts.

7.2. New definitions

The following definitions applicable to advance rulings are included in this Act:

- **“binding effect”** means the requirement that SARS interpret or apply the applicable tax Act in accordance with an advance ruling under this Act;
- **“class”** means—
 - o shareholders, members, beneficiaries or the like in respect of a company, association, pension fund, trust, or the like; or
 - o a group of persons, that 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.

7.3. Types of advance rulings and binding effect

Chapter 7 provides for specific rules in respect of the four primary types of rulings or opinions, as set out in table 4 below.

Table 4: Types of advance rulings and effect

Ruling	Meaning	Binding effect
‘Binding class ruling’	A written statement issued by SARS regarding the application of a tax Act to a specific ‘class’ of persons in respect of a ‘proposed transaction’	On SARS for ‘class’
‘Binding general ruling’	A written statement issued by a senior SARS official under §89 regarding the interpretation of a tax Act or the application of a tax Act to the stated facts and circumstances	On SARS for all qualifying taxpayers
‘Binding private ruling’	A written statement issued by SARS regarding the application of a tax Act to one or more parties to a ‘proposed transaction’, in respect of the ‘transaction’	On SARS for applicant
‘Non-binding private opinion’	Informal guidance issued by SARS in respect of the tax treatment of a particular set of facts and circumstances or ‘transaction’, but which does not have a ‘binding effect’ within the meaning of §88	None, but may be cited in proceedings involving the person to whom the opinion was issued

7.4. 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 taxpayers with answers to 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;
- rendering of advance rulings void *ab initio*;
- impact on advance rulings of subsequent amendments to the underlying tax Act or of court decisions;
- withdrawal or modification of advance rulings;
- publication by SARS of advance rulings;
- effect of non-binding private opinions; and
- the issuing of general rulings by SARS.

Two additional grounds for the rejection of an application for an advance ruling were added to the previous grounds under old law, namely 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 or the Seventh Schedule to the Income Tax Act; or
- requests SARS to rule on the substance of a 'transaction' and disregard its form.

In the context of fees, the Act 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 the Act.

In the context of applications, the Act provides, in addition to old 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 §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 that are available on the SARS website under Legal and Policy's Publications:

- LAPD Comprehensive Guide to Advance Tax Rulings
 - o <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TAdm-G02%20-%20Comprehensive%20Guide%20to%20Advance%20Tax%20Rulings%20-%20External%20Guide.pdf>
- SARS Advance Tax Rulings website
 - o <http://www.sars.gov.za/Legal/Interpretation-Rulings/Pages/Advance-Tax-Rulings-ATR.aspx>

7.5. 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.

7.6. When does an advance ruling cease to be effective?

An advance ruling ceases to be effective when—

- 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—
 - o the decision is under appeal;
 - o the decision is fact-specific and the general interpretation upon which the advance ruling was based is unaffected; or
 - o the reference to the interpretation upon which the advance ruling was based was *obiter dicta*.

7.7. Withdrawal or modification of advance rulings

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

8. CHAPTER 8 - ASSESSMENTS

8.1. 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 this Act 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").

The Act introduced more generic terms to accommodate the modernisation initiative towards a full self-assessment system. Throughout the Act, 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 is on the taxpayer 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, which assessment specifies the period within which the tax must be paid.

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

8.2. Types of assessments

The Act provides for four types of assessments:

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

The term assessment does not include any decision which is subject to objection and appeal in terms of a tax Act (as was the case in the Income Tax Act). These decisions are dealt with elsewhere in the Act.

8.2.1. Original assessment

The concept of an original assessment, i.e. the first assessment in respect of a tax period, relates to a specific type of assessment.

The Act 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; and
- Fourth, if a taxpayer is obliged but fails to submit a return or make a payment, then SARS assesses the taxpayer.

Note: SARS can base this original assessment on an estimation under §95.

8.2.2. Additional assessment

The Act provides for simplified grounds on which additional assessments may be issued to achieve alignment across taxes. A simplified concept **prejudice to SARS or the fiscus** is 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 and will always be issued subsequent to an original assessment. In the case of an assessed loss under the income tax, an additional assessment may reduce the assessed loss reflected in an original assessment.

8.2.3. Reduced assessment

A reduced assessment can only be issued in these 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 SARS is satisfied that there is a readily apparent 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; and
- The third category is where a senior SARS official is satisfied that an assessment was based on—
 - o the failure to submit a return or submission of an incorrect return by a third party under section 26 or by an employer under a tax Act;
 - o a processing error by SARS; or
 - o a return fraudulently submitted by a person not authorised by the taxpayer.

8.2.4. Jeopardy assessment

Jeopardy assessments are in addition to other powers in the Act 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's collection powers when an investigation into the taxpayer's tax affairs is initiated or where a tax debtor is about to leave the RSA without satisfying tax debts.

Since the purpose of a jeopardy assessment is to raise a liability urgently, the assessment may be based on an estimation based on information readily available to SARS. The basis on which it is believed that the collection of tax is in jeopardy must be stated in the notice of assessment. The issuing 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—
 - o the amount is excessive; or
 - o 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; and
- The normal objection and appeal procedure is still available to the taxpayer.

8.3. Assessments based on estimates

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.

8.3.1. Circumstances when an assessment based on an estimate may be raised

If a taxpayer does not comply with certain duties, SARS is authorised to make an assessment based on an estimate, which estimate must 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; or
- 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 the Act (§91(5)(b)) is submitted. This means that a taxpayer cannot object and appeal against such assessment until such return is submitted.

8.3.2. 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.

8.3.3. 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's assessment is not considered to be final.

If incomplete information in return

If a defective return has been submitted, and SARS raises an additional assessment because of a person's default in filing a correct return, a taxpayer may 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.

8.3.4. 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 when there is prejudice to SARS or the *fiscus*.

8.4. 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; and
- 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 of how the estimate and the assessment were arrived at.

8.5. Withdrawal of assessments

Provision is made for the withdrawal of an incorrect assessment issued, i.e. if it—

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

A withdrawn assessment is considered not to have been issued.

8.6. Periods of limitation for issuance of an assessment

In order to provide certainty the Act prescribes periods after which SARS cannot raise an assessment.

8.6.1. SARS administered tax and self-assessment tax

The period that applies depends on whether the underlying liability arose from an assessment by SARS or through a self-assessment by the taxpayer.

Table 5: Periods of limitation for issue of assessments

Incident	Example	Period
Original assessment is issued by SARS	Income tax	Three years from date of the original assessment
Self-assessment by a taxpayer	VAT, PAYE	Five years from date of submission of the return
Original assessment is issued by SARS because a self-assessment return is not filed	VAT, PAYE & no return filed	Five years from date of the original assessment.
No return is required but payment required		Five years from the date of the last payment made

8.6.2. Periods if action is 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.

8.6.3. When a dispute is finally resolved

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

8.6.4. 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.

To give effect to the resolution of a dispute

The prescription rules will not apply where the assessment is required to give effect to the resolution of a dispute under Chapter 9.

Requests for reduced assessments

The prescription periods will not apply where SARS issues a reduced assessment if SARS is satisfied that—

- there is a readily apparent undisputed error, and SARS became aware of the error before expiry of the period for the assessment; or
- the assessment was based on the failure to submit a return or submission of an incorrect return by a third party or by an employer under a tax Act, a processing error by SARS or a return fraudulently submitted by a person not authorised by the taxpayer.

Failure to provide relevant material or information entitlement disputes

SARS may by prior notice of at least 30 days extend prescription before expiry thereof, by a period approximate to a delay arising from:

- failure by a taxpayer to provide all the relevant material requested in terms of the Act; or
- resolving an information entitlement dispute, including legal proceeding.

Audit or investigations relating to certain complex tax matters

SARS may by prior notice of at least 60 days extend prescription, before expiry thereof, by three years in the case of an assessment by SARS and two years in the case of self-assessment, where an audit or investigation relates to:

- the application of the doctrine of substance over form;
- the application of anti-avoidance provisions;
- the taxation of hybrid entities or hybrid instruments; or
- transfer pricing matters.

8.7. Finality of assessment

8.7.1. 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; and
- an appeal is concluded.

There are specific rules contained in §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.

8.7.2. 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, or ask that a mistake be remedied.

8.8. Mistake made on returns, and incorrect assessments by SARS

The Act 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 where SARS is satisfied that it was a readily apparent undisputed error by the taxpayer.

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 return or an 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 where SARS is satisfied that it was a readily apparent undisputed error by the taxpayer.

It is important to note that this Act requires that the error has to be a readily apparent 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 the error is disputed, then the taxpayer must follow the objection and appeal route.

9. CHAPTER 9 - DISPUTE RESOLUTION

9.1. 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 §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 §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.

The rules under §103 of the Act were issued by the Minister after consultation with the Minister of Justice and Constitutional Development, by public notice on 11 July 2014 in *Government Gazette* No. 37819. As the dispute resolution process is procedurally intensive, a Guide on Tax Dispute Resolution, aligned with the Act is available on the SARS website. This Guide deals more comprehensively with this part of tax administration and is available at the following link: <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TAdm-G05%20-%20Dispute%20Resolution%20Guide%20-%20External%20Guide.pdf>.

9.2. Transitional provisions related to disputes

Disputes that were not finalised at the commencement date of the new rules will be dealt with under the new rules issued under the Act. For example, if a taxpayer objected under the "old rules" and the objection had 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. The expression "as if taken or instituted under these rules" means, for example, that 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 in the Act, but calculated from the date of commencement of the new rules.

9.3. 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 that taxpayer.

However, 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.

9.4. Objection against assessment or decision

9.4.1. What assessments and decisions may be objected against?

A taxpayer may object against—

- any assessment where the taxpayer is aggrieved by the assessment;
- a decision by SARS to not 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 to not authorise a refund;
- a decision to not remit an administrative non-compliance penalty; and

- a decision to not remit an understatement penalty.

The Act 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, the Act effects amendments to, for example, §3 in the Income Tax Act to include most of the 'decisions' under the Income Tax Act that are subject to objection and appeal. In the VAT Act these 'decisions' are mostly to be found in §32.

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

- be lodged within 21 business days after the date of assessment;
- be 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;
- be signed by the taxpayer or duly authorised representative;
- be 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's 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.

9.4.2. SARS's decision on objection

The Act provides that SARS must consider a valid objection in the manner and within the period prescribed under the Act and the rules. The Act provides that—

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

9.4.3. 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—
 - o reasonable grounds exist for the delay and the application is submitted within 30 business days of the deadline; or
 - o the delay is due to an exceptional circumstance referred to in §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—
 - o for an extension of the objection period for a period of less than 30 business days, reasonable grounds exist for the delay; or
 - o for an extension of the objection period for a period of more than 30 business days, exceptional circumstances exist for the delay;
- the objection period may not be extended by SARS in the following circumstances:

- o 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
- o 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 the Act 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. Examples of what would constitute exceptional circumstances for purposes of the remittal of penalties are included in §218(2).

9.5. Appeal against assessment or decision

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

9.5.1. Requirements for a valid appeal

The process to be followed to lodge a valid appeal is set out in the rules, which essentially prescribe that an appeal—

- must be in the prescribed form;
- must be delivered to SARS within 30 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;
- must indicate whether or not the taxpayer wishes to make use of the ADR procedures to resolve the dispute, should these procedures be available; and
- must contain a request for a representative, when the 'appellant' wants to be represented at the hearing by another person.

A notice of appeal 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.

9.5.2. Condonation of late appeal

If the notice of 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 business days if satisfied that there were reasonable grounds for the delay. If there is a delay of more than 21 business days and less than 45 business 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.

9.6. 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.

The Act contains a 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 is regulated by the rules, which *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 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.

9.7. Alternative Dispute Resolution (ADR)

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 ADR process applies only if there is mutual agreement between SARS and the taxpayer. No-one can be compelled to enter into the ADR 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 board or the tax court.

9.8. Appeals to the tax board

9.8.1. Establishment, jurisdiction and constitution of tax board

Tax boards are established by the Minister to hear appeals in the manner provided in the Act. They are established in areas that the Minister thinks fit, but SARS must designate the places where tax boards hear appeals. A 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 R1 000 000); **and**
- 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. 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 five years but the person's appointment may be terminated by the Minister where warranted. If the Chairperson, after considering any representations by a senior SARS official or the taxpayer considers it necessary, an accountant and a representative of the commercial community may co-chair the tax board. The persons so appointed must be of good standing and have appropriate experience.

9.8.2. 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 as 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.

9.8.3. Clerk of tax board

The Act 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 from the jurisdiction in which the tax board is convened is available to adjudicate on a dispute.

9.8.4. Procedure before the tax board

The procedure before the tax board is determined by both the Act **and** the rules for dispute resolution issued under §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.

9.8.5. Decisions of tax board

A time limitation of 60 business days is imposed for the delivery of a tax board decision. The tax board's decision period 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 the appeal be heard afresh by the tax court. The request must be in writing and must be filed with the clerk of the tax board within 21 business days, but the chairperson may condone a late filing of an appeal to the tax court if there is good cause shown. The condonation request must be delivered to the clerk of the tax board to arrange a hearing.

9.9. Appeal to tax court

9.9.1. Establishment, jurisdiction and constitution of tax court

The President of the Republic 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; and
- a registrar of the tax court appointed by the Commissioner.

If the appeal involves—

- a complex matter that requires extensive experience and the president of the tax court so directs after considering any representations by a senior SARS official or the appellant, the representative of the commercial community may be a person with the necessary experience in that field of expertise;
- the valuation of assets and the president of the tax court, a senior SARS official or the appellant so requests, the representative of the commercial community must be a sworn appraiser; or
- 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; and
- 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.

9.9.2. Tax court procedures

The procedure before, during and after the hearing of an appeal by the tax court is regulated by both the Act **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 in the Act 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.

9.9.3. 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.

9.9.4. Publication of tax court judgments

The Act 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.

9.10. Appeals to higher courts

Part E of Chapter 9 sets out the procedure a party must follow when appealing against a decision of the tax court to the full bench of the Provincial Division which has jurisdiction over the area in which the tax court was sitting, 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 as 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.

9.11. Settlement of disputes

The settlement provisions previously contained in the Income Tax Act were largely carried over into the Act and apply across taxes. The Act clarifies that a ‘settlement’ can only be concluded after an assessment has been issued, as a result of operational uncertainty as to whether ‘settlements’ may be concluded 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; or
- a compromise agreement.

Part F of Chapter 9 includes provisions that cater for the implications for SARS and rights of SARS where the taxpayer defaults after conclusion of a ‘settlement’. This 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.

10. CHAPTER 10 - TAX LIABILITY AND PAYMENT

10.1. Introduction

The provisions concerning the payment of tax and SARS's powers of recovery are contained in 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 the Act, all the provisions may be used to recover all tax types.

Chapter 10 also includes 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; and
- a person who is the subject of a request to provide assistance under an international tax agreement.

Measures are introduced to combat instances where the collections process is frustrated. These measures extend SARS's authority to recover tax debts beyond the actual taxpayer — the person originally chargeable to tax. Interventions by SARS are 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 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 authorised to compromise a tax debt that is not disputed, and SARS may also write off tax temporarily or permanently.

10.2. Taxpayers and categories of persons liable to tax

10.2.1. 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.

10.2.2. 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 management of or control over;
- Transactions concluded by the representative taxpayer; and
- Anything else done by the representative taxpayer in his or her capacity as a representative taxpayer.

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.

10.2.3. Duties and liabilities of withholding agents

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

Under the Act tax liability and payment obligations apply to withholding agents irrespective of the type of withholding tax.

- A withholding agent is a person who must withhold tax under a tax Act and pay it to SARS;
- A withholding agent is personally liable for failure to withhold tax or pay tax withheld;
- A withholding agent has a right to recovery from the person who is primarily liable for the tax of the amount of withholding tax that was paid to SARS by the withholding agent;
- SARS may require security from a withholding agent for payment of tax under certain circumstances, e.g. if the withholding agent previously failed to pay tax due;
- The obligation to pay withholding tax is imposed by the relevant tax Act, e.g. §35A in the Income Tax Act, but the Act may prescribe the manner of payment, e.g. electronically;
- SARS may seize assets of a defaulting withholding agent in anticipation of a preservation order by the High Court;
- The obligation to pay tax is not suspended by an appeal against a decision of a tax court ("Pay-now-argue-later") but payment of the amount for which the withholding agent is personally liable may be suspended by a senior SARS official pending outcome of a dispute under Chapter 9;
- Allocation of payments: the Commissioner may apply the first-in-first-out principle in respect of a specific tax type or a group of taxes, e.g. withholding taxes; and
- A withholding agent unable to pay the tax in one sum may request deferment by means of an instalment payment agreement.

10.2.4. Responsible third parties

The Act extends personal liability for tax debts to the following responsible 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 previous 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 to dissipate assets in order to obstruct the collection of tax debts is jointly and severally liable with the taxpayer.

10.2.5. Personal liability 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 prescribed.

Table 6: Requirements for personal liability

Category	Requirements for personal liability
Representative taxpayers	A representative taxpayer becomes liable in terms of §155 if the tax could have been paid to SARS but was not; or the amount in respect of which the tax was chargeable was disposed of.
Withholding agents	Liability arises in terms of §157 if tax is withheld but not paid to SARS, or if the tax should have been withheld but was not.
Responsible third parties	Under §159 a responsible third party is personally liable to the extent described in Part D of Chapter 11.
Person in control of financial management	Section 180 provides that a person who controls or is regularly involved in the management of the overall financial affairs of a taxpayer is personally liable if the person was negligent or fraudulent in the payment of the tax debts of the taxpayer.
Shareholders of a company in liquidation	• Section 181 provides that when a company is wound up while having a tax debt, a shareholder who received a company asset within one year is personally liable. • The section does not apply to listed companies. • It is important to note that the tax debt also includes tax that would have existed had the company complied with its tax obligations; and the shareholder has the same rights against SARS as the company had. • The section applies to a company that is a principal taxpayer, a representative taxpayer, a withholding agent, and any category of responsible third party.
A transferee of assets	• Section 182 provides that if a connected party to the taxpayer receives a taxpayer's asset for free or below market value, the person becomes personally liable to pay a tax debt that existed at the time the asset was transferred. • The liability is the lesser of the tax debt at the time of receipt and the difference between the fair market value and the consideration paid. • The tax debt is the actual tax debt at the time or what the tax debt should have been had the taxpayer complied with tax obligations. • Liability is triggered in respect of assets received less than a year before SARS notifies the transferee of personal liability.
Person assisting to dissipate assets	• Section 183 provides that a person who obstructs collection by assisting in dissipating a taxpayer's assets is jointly liable with the original taxpayer. • This person is liable to the extent that their assistance reduces the taxpayer's assets.
Liability of person appointed to satisfy a tax debt	If SARS appoints a person to pay tax from money held for the taxpayer, and the person ignores the appointment, then in terms of §179 the person becomes personally liable for the money.

10.2.6. Right to recovery

A representative taxpayer, withholding agent or 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 but is entitled to recover the amount of an unlawful or erroneous payment from SARS.

10.3. 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—
 - o has been convicted of a tax offence;
 - o has frequently failed to pay tax when due;
 - o has frequently failed to comply with tax obligations thereby attracting administrative non-compliance penalties;
 - o 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
 - has frequently failed to comply with tax obligations attracting an administrative non-compliance penalty.
- In the case of a taxpayer that 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 the Act 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 by 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 in Chapter 11.

10.4. When must tax be paid?

The Act provides that tax is payable either on a date specified in a tax Act **or** on a date specified by SARS. 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.

10.4.1. General rule

With regard to the self-assessment taxes, such as VAT and employees' tax, 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.

10.4.2. 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. However 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.

10.4.3. 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.

10.4.4. 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.

10.4.5. 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.

10.4.6. 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 be issued. A jeopardy assessment is then issued and the normal due date is brought forward; and
- 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.

10.5. 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.

10.6. 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.

10.6.1. 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.

10.6.2. Factors used to make a decision

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

- whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;
- the compliance history of the taxpayer;
- whether the taxpayer is able to provide adequate security for the payment of the disputed tax and accepting it would be in the interest of SARS and the *fiscus*;
- whether payment of the amount involved would result in irreparable financial hardship to the taxpayer; and
- whether fraud is involved in the origin of the dispute.

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.

10.6.3. 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 the Act.

10.6.4. 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, the Act provides that SARS may review and withdraw the suspension. Therefore, an 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.

10.6.5. 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's 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.

10.6.6. 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's 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.

10.7. Taxpayer account and allocation of payments

The Act provides the legislative platform for SARS to maintain one tax account for a taxpayer across tax types. 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 is charged on a daily balance and accrued monthly. One set of rules for the remittance of interest applies.

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 is contrary to an instalment payment arrangement entered into with SARS.

10.8. 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.

11. CHAPTER 11 - RECOVERY OF TAX

11.1. 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 the Act were carried forward, with amendments, from existing tax Acts. The Act introduced further powers 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 tax laws by ensuring correct and timely payment of tax.

The powers contained in one or more of the tax Acts and incorporated with improvements in the Act are—

- the civil judgment procedure;
- the authority to institute sequestration or liquidation proceedings;
- the appointment of a third party who holds or owes money for or to a tax debtor to pay the tax debt;
- the personal liability of persons involved in the financial management of a taxpayer - 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; and
- the personal liability of withholding agents.

The Act introduced the following recovery provisions not previously contained in a tax Act:

- The personal liability of shareholders for tax debts of a company 'stripped' of assets;
- The personal liability of transferees who receive 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; and
- Compulsory repatriation of foreign assets of a taxpayer to satisfy domestic debts.

11.2. 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's 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 business days – beyond the due date for payment. Concerning the payment of a tax debt, taxpayers are urged to engage with SARS's debt management staff to discuss payment options.

The majority of taxpayers pay their taxes on time, but in instances of genuine financial distress, the Act 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
- 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.

11.3. Recovery procedures and processes

11.3.1. Judgment procedure

When a person does not pay an amount of tax, 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 business 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 the Act.
- 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.

11.3.2. 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 the RSA or has assets in the RSA;
- 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 the RSA.

11.3.3. Appointment of a third party to satisfy tax debt

Under the Act any third party who holds or owes or will hold or owe money for or 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 the Act. A person who holds or owes or will hold or owe money for or to a debtor can be compelled to pay a debtor's tax to SARS. Money includes pensions, wages, salaries, and other remuneration.

New The following procedures apply:

- A senior SARS official must authorise the issue of the notice;
- SARS may only issue the notice after delivery to the tax debtor of a final demand for payment which must be delivered at the latest 10 business days before the issue of the notice;
- If the tax debtor is a natural person, the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS based on the basic living expenses of the tax debtor and his or her dependants.
- If the tax debtor is not a natural person, the tax debtor may within five business days of receiving the demand apply to SARS for a reduction in the amount to be paid to SARS based on serious hardship.
- 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; and
- SARS need not issue a final demand if satisfied that to do so would prejudice the collection of the tax debt.

11.4. 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.

11.5. Tax recovery on behalf of foreign governments

The Act empowers the Commissioner to assist in the collection of taxes due to a country with which the RSA has entered into an international tax agreement, for example a Double Taxation 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, i.e. –

- a request for conservancy in respect of assets of that person located in the RSA, in which case—
 - o a senior SARS official may, if satisfied there is a risk of dissipation or concealment of the assets, authorise an application for a preservation order in respect of the assets; and
 - o 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; and
- a request for the collection of the amount under prescribed procedures.

These two requests may also be combined, i.e. the requesting country may request assistance with collection of the amount and, 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; and
- Whether there is a risk of dissipation or concealment of assets by the person.

11.6. 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 the RSA 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 the RSA; or
- the taxpayer has transferred assets outside the RSA 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—
 - o the taxpayer cease trading;
 - o the taxpayer surrender their passport; and
 - o the taxpayer's authorisation 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.

12. CHAPTER 12 - INTEREST

12.1. Introduction

Chapter 12 creates a framework to support the modernisation of SARS's 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. The periods when SARS is entitled to charge interest are aligned with the periods when SARS is obliged to pay interest. The general rule is that interest on tax outstanding accrues and is payable 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 set off against an existing tax debt of the taxpayer, the date on which the set-off is effected 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 specific circumstances beyond the taxpayer's control.

12.2. Imposition of interest: General rules

12.2.1. Accrued daily and compounded monthly

Under the Act interest due or payable will be calculated on the daily balance owing and be compounded monthly. This introduces a 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 (time value of money). However, the Act 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 type of tax to which this method of interest will apply, which will be announced in a public notice. Until then, the current method under each of the relevant tax Acts applies.

12.2.2. Effective date

This is the date that determines from when interest on tax or a refund is payable under Chapter 12, and it is different for different tax types and assessment types. The general rule is 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.

Table 7: Effective date for purposes of interest calculation

Tax / Type of assessment	Effective Date
Tax other than income tax or estate duty (e.g. value-added tax, transfer duty, donations tax, employees' tax, skills development levy, unemployment insurance fund contributions, etc.)	The date by which tax for a tax period is due and payable under a tax Act
Income tax (excluding provisional tax)	The date falling seven months after the last day of that year in the case of a taxpayer that has a year of assessment ending on the last day of February, and six months in any other case. If the assessment is issued before the effective date, no interest accrues.
Estate duty	The earlier of the date of assessment or 12 months after the date of death
Fixed amount administrative non-compliance penalty	The date of assessment of the penalty or the date of increment
Percentage based administrative non-compliance penalty	The date by which tax for the tax period should have been paid
Jeopardy assessment	The date for payment specified in the assessment
Understatement penalty	The effective date for the tax understated
Refund erroneously paid by SARS	The date of payment of the refund which is not properly payable under a tax Act
Additional assessment or reduced assessment	The effective date in relation to the tax payable under the original assessment

12.2.3. Period over which interest runs

Interest is charged from the effective date to the date of payment. Unless the effective date is contained in §188 or §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. The Act 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.

12.3. 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.

12.3.1. Normal Tax

Income tax is normal tax, i.e. for purposes of the Act it excludes employees’ tax and provisional tax. The due date for payment of normal tax does not trigger the date when interest on the assessed tax commences. The effective date for interest on income tax depends on the taxpayer’s financial year end. If the taxpayer’s financial year end is the last day of February, then interest is calculated seven months after the last day of the financial year. For every other taxpayer, who has another financial year-end, interest is calculated six months after that taxpayer’s financial 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.

12.3.2. Provisional tax

The effective date for the first and second provisional tax payments are as follows:

- *First payment:* The first payment must be made within the first six months of the year of assessment. Interest is calculated from the effective date for payment until the earlier of—
 - o the date of payment; or
 - o 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 the second payment until the earlier of—
 - o the date the second payment is actually paid; or
 - o 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. As mentioned above, the Act consolidates the interest on the third provisional payment and assessed tax.

12.3.3. Value-Added Tax (VAT)

Although interest on a refund will generally accumulate over the period that SARS audits the refund, the VAT system is an exception as it is based purely on invoices and 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 was made to §28 of the VAT Act that allows eFilers this extra time to pay, but stipulates that 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 for eFilers, 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 payment is deemed to have been made on the 25th 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 §45 of the VAT Act, no interest on the refund will accrue for the period—

- from the date that 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 to that account until the date the vendor submits the bank account particulars.

12.3.4. Transfer Duty

Under the Transfer Duty Act, 1949, transfer duty is payable within six months of the date of acquisition of immovable property. Where this duty is not paid in respect of a transaction entered into prior to 1 March 2005, a **penalty** of 10% per annum is payable. In the case of unpaid duty concerning transactions entered into after 1 March 2005 **interest** is calculated at the rate of 10% per annum, calculated in relation to each completed month after the month during which the transfer took place. When Chapter 12 of the Act is in operation, interest on unpaid transfer duty will be payable at the prescribed rate on the daily balance owing, from the first day after the six-month payment period until the duty is fully paid.

12.3.5. Amounts erroneously paid by SARS

If SARS pays a refund amount to a person that is not properly entitled to the refund, 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.

12.4. Remittal of interest

In order to remit payment 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; or
- A serious illness or accident.

SARS may not decide to remit interest after the expiry of three years, in the case of an assessment by SARS, or five years, in the case of self-assessment, from the date of assessment of the tax in respect of which interest accrued.

12.5. Interest on amounts due by SARS

Interest on a refundable amount is calculated from the **later** of the effective date or the date that the excess was received by SARS until the date the refundable 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. in the VAT Act, where interest on refunds is only payable after 21 business days of a claim, and the running of interest may be suspended if a vendor does not provide material facts.

13. CHAPTER 13 - REFUNDS

13.1. 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.

13.2. Entitlement to a refund

A taxpayer is entitled to a refund in two instances—

- when the refund is correctly stated in an assessment; and
- if a taxpayer made a mistake and paid an amount greater than what is contained in an assessment.

Example: 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.

13.3. 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 - see table 8.

Table 8: When may refunds be withheld?

Tax / Type of assessment	When refund may be withheld
Income tax (including provisional tax and employees' tax)	A refund of income tax, provisional tax or employees' tax may be withheld until every income tax, provisional tax and employees' tax return required to be filed, has actually been filed - ITA §102(1A)
VAT	A refund of VAT may be withheld until- - o details of the vendor's banking account have been provided - VAT Act §44(3)(d) - o a vendor has filed all outstanding VAT returns - §44(7) - o SARS is satisfied that a refund claimed will be refunded to another party by the vendor where the claimant vendor's output tax is borne by that other party - §44(3)(c)

If a taxpayer provides acceptable security SARS must release a refund before verification, inspection or audit is finalised. A decision not to authorise a refund is subject to objection and appeal.

13.4. Time period in which to claim a refund

If an amount is erroneously paid in excess of the amount payable in terms of an assessment, the amount will only be refunded—

- in the case of self-assessment tax, within five years from the later of the date the return had to be submitted, payment had to be made or the excess payment was made; and
- in the case of a SARS assessment, within three years from the later of the date of assessment by SARS or of the excess payment.

13.5. Refunds erroneously paid by SARS

If SARS pays an amount in error, the amount, together with interest thereon 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 an outstanding tax debt.

This means that SARS's 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.

If a person who carries on the business of a bank as defined in the Banks Act, 1990, reasonably suspects that the payment of an amount into an account held on behalf of a client is related to a tax offence, the person must immediately report the suspicion to SARS in the prescribed form and manner and not proceed with the carrying out of any transaction in respect of the amount for a period not exceeding two business days unless—

- SARS or a High Court otherwise directs; or
- SARS appoints the person as a third party in terms of section 179.

13.6. 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 customs and excise legislation, 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 an instalment payment agreement.

14. CHAPTER 14 – WRITE OFF OR COMPROMISE OF TAX DEBTS

14.1. 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, preferably 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 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.

In the Act no major changes were made to existing 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.

14.2. 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 of 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 the debt may still be recoverable during the prescription period. This period, under the Act, will be 15 years from the date a tax debt comes into existence. This is the date of assessment of tax or the date on which a decision that is subject to objection and appeal becomes final and gives rise to a tax liability by a taxpayer. However, a permanent write off under Part C of 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.

14.2.1. Temporary write off

A temporary write off is an internal decision that has no 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.

14.2.2. 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 by law. Part C 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.

14.3. Compromise of tax debts

14.3.1. 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 forgo 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 if—

- the purpose of the compromise is to secure the highest net return from the recovery of the tax debt; and
- 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.

14.3.2. Broad criteria

SARS does not have unfettered power to settle or compromise and is obliged to take into consideration various factors in the procedure for compromises. The debtors' current, past and future circumstances must support a compromise and SARS must be satisfied that no other creditor will be advantaged or disadvantaged. A creditor may, however, consent to being disadvantaged.

A compromise may not be concluded if—

- a debtor's other tax affairs are not up to date;
- a debtor has entered into a compromise in the three years preceding the request for compromise;
- if other creditors intend taking insolvency proceedings against the debtor;
- a compromise will adversely affect broad taxpayer compliance.

14.3.3. 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 by agreement.

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 debtor's present 'assets';
- future prospects and transactions;
- the monetary value of any future right a debtor will forgo; 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.

15. CHAPTER 15 - ADMINISTRATIVE NON-COMPLIANCE PENALTIES

15.1. 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:

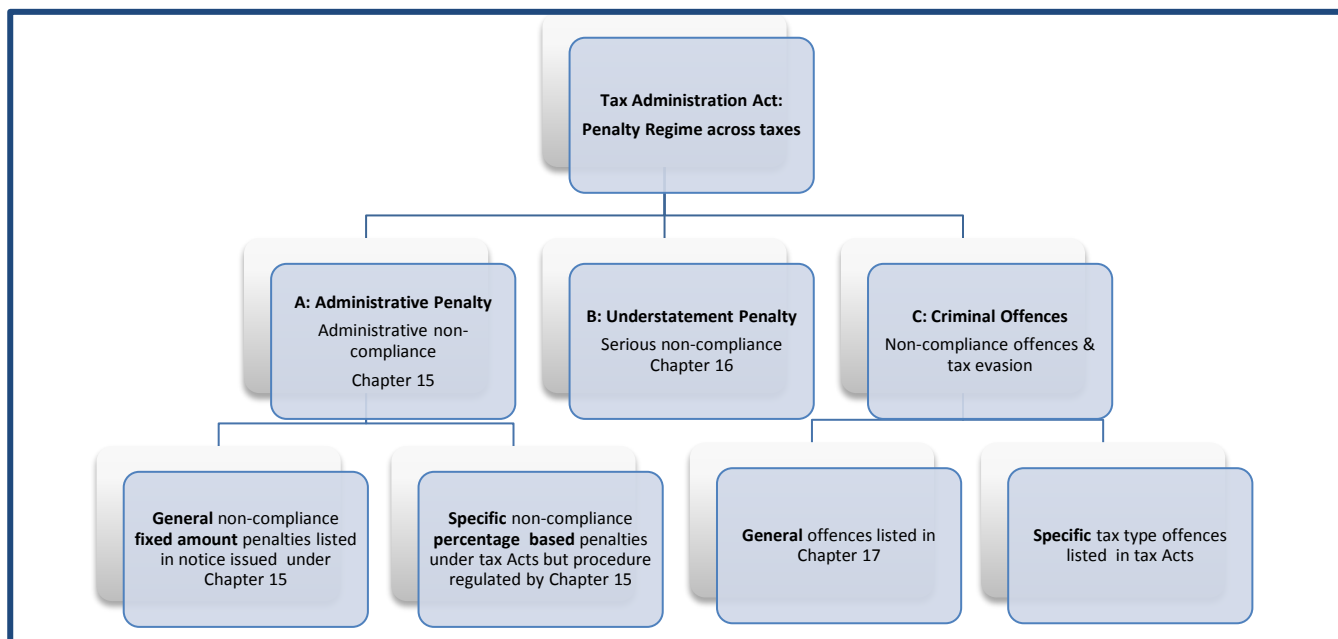
- Sanctions must be **easily understood** by taxpayers and must be easily applied, determined and certain in their outcome;
- **Certainty**, the perceived probability of being penalised or caught, must exist in the mind of the taxpayer; and
- A **discretionary judgment** (within prescribed consistent 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 §75B of the Income Tax Act were included in the Act 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. The Act sets out that the purpose of the administrative non-compliance penalties is to ensure the widest possible compliance with the tax Acts in a way that is impartial and which is proportional to the seriousness and duration of the incidence of non-compliance.

15.2. Penalty regime under the Act

The penalty regime under the Act and the tax Acts can be illustrated as follows:



15.3. 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.

15.4. Fixed amount penalties

15.4.1. 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 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 continues which may be communicated in any form, including by short messaging service (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 public notices by the Commissioner, and not **any** non-compliance with an obligation under a tax Act. The purpose of these notices is to only target impactful or more serious non-compliance and only when SARS's systems are in place to do so effectively.

15.4.2. How much is the fixed amount penalty?

The Act 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's liability to ensure an impactful penalty.

Table 9: Fixed amount penalty table

1 Item	2 Assessed loss or taxable income for 'preceding year'	3 '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 the Act, 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 §211(1), the date of the increment.

15.4.3. Examples of duties

Table 10 below reflects examples of what could attract a fixed amount administrative non-compliance penalty.

Table 10: Non-compliance that may attract administrative penalty

Duty	Penalties could be imposed for:
Registration requirements	• not registering when required to
	• registering outside of the time prescribed to register
	• not completing a registration form in full or correctly
	• not submitting the supporting documentation
If there is a change to registration details	• not informing SARS when there is a change— ◦ of a postal, physical or electronic address; ◦ to the representative taxpayer; or ◦ to banking details.
Returns	• not filing a return at all
	• not filing a return on time
	• not using the prescribed form
	• not signing the return as required
Retaining records	• Not retaining records in their original form or in an authorised manner
	• Not retaining records for the prescribed period
	• Not keeping the records open for inspection by SARS
Information gathering	• Not attending an interview when requested
	• Not providing material available when requested on time or at all
	• Not co-operating during a field audit or investigation
Debt management	• Not giving full and accurate information when requesting a deferred or instalment payment arrangement

15.5. Reportable arrangements

A penalty will be imposed on a participant in a reportable arrangement who fails to report the reportable arrangement to SARS.

An administrative non-compliance penalty failure to report a reportable arrangement has been included in this Chapter. 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 the various parties listed in the definition of participant in §34.

15.6. Percentage based penalties

Percentage based penalties are imposed under the Act 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 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 the Act, but the circumstances that trigger the imposition of the penalty remain in the tax Act.

Table 11 shows some examples when the percentage based 'penalty' will be imposed:

Table 11: Examples when the percentage based penalty will be imposed

Tax	Incident
Income tax [ITA]	When a SA resident buys immovable property from a non-resident seller and does not withhold and pay the fixed percentage to SARS, a penalty of 10% is imposed. [§35A]
Turnover tax [ITA]	A late payment penalty will be imposed if VAT is not paid by a micro-business that is deregistered and becomes a VAT vendor. [§78A] A penalty of 20% is imposed for underpayment of turnover tax as a result of underestimation. [par 11(6) of Sixth Schedule]
Provisional tax [ITA]	A 10% penalty is imposed on the late or non-payment of provisional tax. [par 27] A 20% penalty is imposed if the taxpayer understates a provisional tax estimate by a particular percentage of the taxable income. [par 20 of Fourth Schedule]
Employers & employees' tax [ITA] [Unemployment Insurance Contribution Act]	If an employer fails to file a return (reconciliation) SARS can impose a percentage based penalty for each month that the employer fails to submit a complete return, which in total may not exceed 10 per cent of the total amount of employees' tax. [par 14(6) of Fourth Schedule] If employees' tax is not paid the employer must pay a 10% penalty. [par 6 of Fourth Schedule] A 10% penalty is imposed if UIF contributions are not paid. Failure to indicate taxable fringe benefits in employees' tax certificates triggers a penalty equal to 10% of the cash equivalent of the taxable benefit. [par 17(6) of Seventh Schedule]
Value-Added Tax [VAT Act]	Failing to pay by the 25 th attracts a 10% penalty but note the changes to eFilers discussed above under Chapter 10 and 12. [§39]

15.7. How is a penalty imposed?

The fixed amount and percentage based penalties are contained in a penalty assessment. The 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 as for the tax assessed.

15.8. Remitting administrative non-compliance penalties

A taxpayer may apply to SARS to remit an administrative non-compliance penalty. The application must be done in 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. Payment or collecting of the penalty is automatically suspended if a remittance request is made.

15.8.1. 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; and
- If the penalty was incorrectly imposed; i.e. there was no reason to impose the penalty.

If the tax Act which triggered the imposition of a percentage based penalty contains specific grounds for remittance of the penalty, then those grounds are to be used to consider remitting the penalty. If the tax Act does not contain a specific basis for remitting the penalty, then the basis contained in the Act must be used to consider remitting the penalty.

15.8.2. 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
- 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 R2 000.

15.8.3. 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:*
 - o For an individual, if compliance would lead to depriving the person of basic living requirements; or
 - o 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 would be jeopardised.
- *an act by SARS:* If the reason for non-compliance is connected to SARS's fault or error, involving one of the following:
 - o SARS made a capturing error;
 - o there was a processing delay;
 - o incorrect information was contained in an official publication or media release issued by the office of the Commissioner;
 - o SARS delayed providing information; or
 - o SARS did not provide sufficient time for an adequate response to be made to a request for information.
- *Any other circumstance of analogous seriousness.*

15.9. Objection and appeal against decision not to remit

If SARS's 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.

16. CHAPTER 16 - UNDERSTATEMENT PENALTY

16.1. Introduction

The previous open-ended discretion to impose “additional tax” of up to 200% under the Income Tax Act was replaced with the more equitable and consistent understatement penalty framework in Part A of Chapter 16. The understatement penalty framework 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 as understatement penalties are only imposed on understated tax and not on penalties and interest.

16.2. Overview of understatement penalty

The main purpose of the understatement penalty regime is to deter unwanted behaviour that causes non-compliant reporting. To reflect this purpose, all the actions or inactions that can trigger understatements are ones that negatively affect the submission or content of a return – a default in rendering, an omission from, or an incorrect statement in a return; the failure to pay the correct amount of tax when a return is not required; or an impermissible avoidance arrangement. In any given tax period there can be one or more of these actions or inactions and for each one that causes prejudice to SARS or the *fiscus*, the resultant prejudice will be an understatement. It follows that a person who fails to submit a return as required or submits a return or information that is incorrect or inadequate will incur an understatement penalty when SARS makes an assessment based on an estimate.

The prejudice that the action or inaction causes need not be actual financial loss. If this were so, an understatement would not occur if it was discovered before the tax or refund was payable. The main emphasis of the understatement penalty regime is the deterrence of non-compliance reporting. It addresses the negative effect of reporting actions or inactions on the true amount of tax payable i.e. not only the actual but also the potential financial prejudice caused. For each such action or inaction, the prejudice is consequently quantified by a shortfall to determine the existence of an understatement.

16.3. How is the shortfall calculated?

The shortfall is essentially the difference between the correct amount of tax and the tax that was reported in a tax period (by either the submission or non-submission of a return), i.e. the negative effect of the action or inaction expressed in monetary terms. For each understatement it is calculated as the sum of—

- the difference between the tax properly chargeable and the tax that was reported as chargeable (§222(3)(a));
- the difference between the amount properly refundable and the amount that was reported as refundable (§222(3)(b)); and
- the result of the maximum tax rate applied to the difference between the assessed loss or other benefit to the taxpayer properly carried forward from one tax period to the next and the assessed loss or benefit that was reported as carried forward (§222(3)(c)). The tax rate is the maximum one applicable to the taxpayer, ignoring any assessed loss or other benefit to the taxpayer carried forward from one tax period to the next. For illustrative purposes, a standard tax rate of 28% is used.

Example: A taxpayer declares R1 000 taxable income in their return. They have therefore reported R280 tax chargeable. It transpires that the taxable income is actually R1 500 and the tax chargeable R420.

Tax properly chargeable	R	420
Tax reported as chargeable	- R	280
Paragraph (a) shortfall	R	140

Example: A vendor submits a VAT return that reflects a refund of R1 200. However, the calculation excludes output VAT of R700 and the VAT properly refundable is actually R500.

VAT reported as refundable	R	1 200
VAT properly refundable	-	<u>R 500</u>
Paragraph (b) shortfall	R	700

Example: A taxpayer declares a loss of R1 000 in their return but because the calculation excludes income of R700, the actual assessed loss is R300.

Assessed loss reported	R	1 000
Actual assessed loss	-	<u>R 300</u>
Difference	R	700
Tax rate	x	<u>28 %</u>
Paragraph (c) shortfall	R	196

In short, an understatement is the prejudice, quantified as a shortfall, to SARS or the *fiscus* caused by a non-compliant or dishonest reporting action or inaction. In such an event, the taxpayer must pay a penalty unless the understatement results from a bona fide inadvertent error.

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 relevant tax period. 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.

16.4. Applying the Understatement Penalty Table

In the case of tax being underpaid because of an understatement made by a taxpayer, the Act provides for different rates of an understatement penalty based on the type of behaviour or the degree of culpability involved.

Table 12: Understatement Penalty Table

1 Item	2 Behaviour	3 <u>Standard</u> case	4 If <u>obstructive</u> , or if it is a 'repeat case'	5 Voluntary disclosure <u>after</u> notification of audit or investigation	6 Voluntary disclosure <u>before</u> notification of audit or investigation
(i)	Substantial understatement	10%	20%	5%	0%
(ii)	Reasonable care not taken in completing return	25%	50%	15%	0%
(iii)	No reasonable grounds for tax position taken	50%	75%	25%	0%
(iv)	Impermissible avoidance arrangement	75%	100%	35%	0%
(v)	Gross negligence	100%	125%	50%	5%
(vi)	Intentional tax evasion	150%	200%	75%	10%

The amount of understatement penalty is determined by the amount resulting from applying the highest applicable percentage in accordance with the understatement penalty percentage 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 (v) in the table), item (v) will apply.

16.5. The "behaviours" understood

16.5.1. 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 or investigation;
- 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.

The following is a brief description of what the listed "behaviours" mean:

16.5.2. Substantial understatement

Substantial understatement is not an understatement, and neither is it behaviour although it is listed with and treated as such. It is a case; in point of fact, a factual circumstance of a case the presence of which, along with the other listed behaviours, contributes to determining the appropriate penalty percentage to apply to individual understatements. 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.

Substantial understatement highlights the fact that the standard of care expected from the reasonable person is raised exponentially in circumstances where large amounts of money are involved. This is evident from the fact that a taxpayer can incur a penalty for substantial understatement even if they have met the required standard of reasonableness expected from all taxpayers.

A specific rule is provided in the Act 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—

- o was issued by no later than the date that the relevant return was due;
- o took account of the specific facts and circumstances of the arrangement; and
- o confirmed that the taxpayer's position is more likely than not to be upheld if the matter proceeds to court.

The circumstances of remittance both illustrate the level of care expected and acknowledge when it has been attained. The purpose of the remission is to recognise the scenario where a taxpayer took particular care before preparing a return.

16.5.3. 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 fulfil 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.

16.5.4. 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.

16.5.5. Impermissible avoidance arrangement

An impermissible avoidance arrangement is defined to mean an arrangement in respect of which Part IIA of Chapter III of the Income Tax Act is applied and includes any transaction, operation, scheme or agreement in respect of which section 73 of the Value-Added Tax Act or any other general anti-avoidance provision (GAAR) under a tax Act is applied. Case law under the additional tax penalty regime, the predecessor to the understatement penalty regime, supports the imposition of understatement penalties in GAAR matters. The imposition of such penalties is in line with international law. A separate behavioural category is inserted in the understatement penalty table to provide clarity as to what would be the appropriate penalty in GAAR matters.

16.5.6. 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.

16.5.7. 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 that is 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 illustrated by a wilful act, 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. Intentional tax evasion 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 could lead to a genuine misunderstanding of the practical application of a taxing provision and this would not necessarily 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. 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.

16.6. Remittance & disputes

SARS may remit a penalty imposed for a substantial understatement in the circumstances set out in §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—
 - o was issued by no later than the date that the relevant return was due;
 - o took account of the specific facts and circumstances of the arrangement; and
 - o 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 as for an assessment apply to the understatement penalty.

16.7. Voluntary Disclosure Programme (VDP)

16.7.1. 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 the Act. 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’s resources. It seeks to encourage taxpayers to come forward and avoid the future imposition of understatement penalties, other administrative penalties and interest.

16.7.2. 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 make a disclosure; and
- prescribe when, where and how to apply for the VDP relief.

A defaulting taxpayer will be granted relief under the programme, provided—

- the disclosure is voluntary;
- the disclosure is full and complete in all material respects;
- the disclosure involves a 'default' which has not occurred within five years of the disclosure of a similar 'default';
- SARS was not aware of the default; and
- the disclosure involves a behaviour referred to in column 2 of the understatement penalty percentage table in section 223.

16.7.3. Extent of relief

The VDP will not provide interest or exchange control relief, but will on a permanent basis provide the following benefits to qualifying applicants:

- 100% relief in respect of an administrative non-compliance penalty will be granted. The relief excludes penalties imposed for the late submission of returns;
- Relief in respect of any understatement penalty as determined in the applicable column in the understatement penalty table; and
- 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.

16.7.4. Application for relief

After notification of an audit or investigation

Any person may apply, whether in a personal, representative, withholding or other capacity, for voluntary disclosure relief. If the person seeking the relief has been given notice of the commencement of an audit or criminal investigation into the affairs of the person, which has not been concluded and is related to the disclosed default, the disclosure of the default is regarded as not being voluntary, unless a senior SARS official is of the view, having regard to the circumstances and ambit of the audit or investigation that—

- the default in respect of which the person has sought relief would not otherwise have been detected during the audit or investigation; and
- the application would be in the best interest of good management of the tax system and the best use of SARS's resources.

A person is deemed to have been notified of an audit or criminal investigation if someone connected to the person – such as a partner, representative, officer, or shareholder – has been given notice of the 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's 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 audit or criminal investigation.

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 an understatement. The cause of this prejudice must involve submitting incomplete or inaccurate information, failing to submit information to SARS, or adopting a tax position. A default that has been previously disclosed by the applicant may not form the basis for a subsequent disclosure.

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.

16.7.5. 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 disclose 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.

17. CHAPTER 17 - CRIMINAL OFFENCES

17.1. Introduction

Although general statutory offences are included in the Act, tax type specific offences remain in the tax Acts. The Act 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; and
- 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.

17.2. Criminal non-compliance

A person that does not comply with an obligation imposed under a tax Act commits a criminal offence, and the Act contains a comprehensive list of these obligations. These offences are committed if the person performs or fails to perform an act wilfully 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 or make a solemn declaration;
- The failure to retain records, or to retain them in the form required;
- Not complying with a request by SARS 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; and
- Impeding the collection of tax by assisting a taxpayer to dissipate assets.

17.3. 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 are distinguished from “non-compliance” offences in 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” has been removed and replaced with a practical evidentiary rule. In a prosecution under the evasion provisions, the person who made a statement that is the basis of the evasion is considered to have committed an offence unless able to prove that there is a reasonable possibility that he or she did not know that the statement was false and that their 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 the statement made. If discharged the onus would remain on the state to prove beyond reasonable doubt the person’s 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.

17.4. Tax offences under the tax Acts

As stated above, certain tax specific offences remain in the tax Acts, for example an offence under paragraph 30 of the Fourth Schedule to the Income Tax Act 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 §58 of the VAT Act which are unique to value-added tax, remain.

17.5. Other offences under the Act

Other offences provided for in Chapter 17 are criminal offences relating to secrecy provisions and criminal offences relating to filing a return without authority.

17.6. 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.

17.7. Jurisdiction of courts in criminal matters

A person charged with an offence under the Act, 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.

18. CHAPTER 18 - REPORTING OF UNPROFESSIONAL CONDUCT

18.1. Introduction

Initially, the Act incorporated the Income Tax Act provisions under which a tax professional or a tax practitioner may be reported to a controlling body. No major changes were effected at the time, except that a condition was 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 or her application for registration has been removed from a related profession or professional body for dishonesty, or convicted of a crime involving dishonesty, may not be so registered. The registration of tax practitioners was contained in §241 of the Act.

However, a new regime for the registration of tax practitioners was inserted into the Act by the Taxation Laws Amendment Act, 2012. The regulation of tax practitioners is now divided into two phases. The first phase being the compulsory registration of tax practitioners with a recognised controlling body, is discussed in more detail below. The second phase will be the establishment of an independent regulatory board for tax practitioners.

The recognised controlling body model is a middle way between a lack of regulation and a statutory regulator, which will leverage existing bodies. It is intended to provide a framework to ensure that tax practitioners are appropriately qualified and that a mechanism is available, both to taxpayers and SARS, to ensure that misconduct is addressed.

Registration of tax practitioners hinges on two requirements:

- The first is the initial requirement that tax practitioners register with SARS, which was brought into force in 2005. The Act modified this requirement to provide that a tax practitioner may not be registered if he or she has been removed from a professional body or convicted of a crime involving dishonesty in the preceding five years.
- The second is a requirement for all tax practitioners to belong to a recognised tax practitioners' association or to fall under the authority of a directly relevant statutory regulator, such as the Independent Regulatory Board for Auditors (IRBA).

SARS would review the minimum qualifications and experience requirements, continuing professional education requirements, codes of ethics and conduct and disciplinary procedures of a professional association seeking recognition. It would ensure that members are required to have knowledge of tax that is kept up to date, are subject to codes of ethics and conduct that are relevant to the tax field and require members to act ethically and professionally and that an effective disciplinary mechanism exists to deal with members who contravene the codes of ethics and conduct.

To ensure sustainability and credibility, associations should have a minimum of 1 000 members upon either application or within a year to cater for new associations. To cater for associations that lack the capacity or willingness to deal with SARS's complaints of members' misconduct adequately, the Minister is empowered to appoint a panel of retired judges or persons of similar stature and competence to hear these complaints on an association's behalf. The costs of the appointment will be borne equally by the association and SARS.

A process for revoking an association's recognition if it does not follow through on its commitments also forms part of the new regime.

In order to recognise the status of statutory regulators, recognition of the relevant bodies is automatic.

Finally, the range of misconduct that may be reported by SARS to a professional association or statutory regulator in terms of §241, the successor to §105A of the Income Tax Act, was expanded to cover additional tax specific misconduct.

18.2. 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 performance of an obligation contained in a tax Act, SARS may report that registered tax practitioner to a recognised controlling body. In addition, if a person carrying on a profession governed by a controlling body

conducts himself or herself 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.

18.3. What is the procedure?

The Act 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's intention to lodge the complaint, and an opportunity to object to SARS's proposed report. An objection must be considered before SARS continues with reporting the registered tax practitioner. The report to the recognised controlling body may include taxpayer information. However, the recognised 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.

19. CHAPTER 19 - GENERAL PROVISIONS

19.1. Deadlines

Chapter 19 deals, amongst other things, with matters related to time periods imposed under the tax Acts. 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 that Saturday, Sunday or public holiday. The Commissioner may also 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.

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 business days before the date set by the Minister.

19.2. 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.

The Act deals with the duty of companies to appoint a public officer, to keep the office occupied and to notify SARS of any change, as well as with SARS's power to approve the appointment of a public officer.

The public officer must reside in South Africa, whether as a resident as defined in the Income Tax Act 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.

19.3. Authentication of documents

19.3.1. SARS documents

A SARS document is considered to be authentic if:

- A SARS official's name or official designation is contained thereon; or
- SARS's official stamp is printed or stamped on the document.

19.3.2. Taxpayer 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.

19.4. 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 §247;
- posted by registered post or ordinary post to the person's, or the person's 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 email address, fax or electronic address as defined in terms of the Electronic Communication Rules issued under §255 of the Act.

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 that fairness requirements are met;
- If delivery was made in one of the above ways a notice 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 the person has, because of this, 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. These rules were published on 25 August 2014 in *Government Gazette* No. 37940.

19.5. Confirmation of tax compliance status

SARS's practice of issuing a tax clearance certificate (TCC) in compliance with regulations promulgated under the PFMA has now been codified in the Act, which prescribes the requirements of a confirmation of tax compliance status. The confirmation of tax compliance status regime caters for the modernisation of the previous tax clearance certificate procedure, which will essentially enable both taxpayers and third parties to verify the tax compliance status of a taxpayer online.

19.5.1. When may SARS issue a confirmation of tax compliance status?

Taxpayers must apply for a confirmation of tax compliance status in the prescribed form and manner, and SARS must issue or decline to issue the confirmation of taxpayer's tax compliance status within 21 business days. The Act enables SARS to extend the 21 business day period within which a certificate must be issued where more time is required to ensure that the taxpayer is compliant, for example where it appears that the taxpayer intends to make offshore transfers of large amounts. A confirmation of tax compliance status may be issued if the taxpayer is tax compliant, and SARS may decline to issue a confirmation of tax compliance status if—

- the taxpayer has a debt outstanding. The confirmation of tax compliance status 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 confirmation of tax compliance status may, however, still be granted if suitable arrangements are in place to file an outstanding return.

19.5.2. SARS's authority to alter a taxpayer's tax compliance status to non-compliant

SARS is entitled to alter a taxpayer's tax compliance status from compliant to non-compliant if the confirmation was issued in error, or was obtained through a misrepresentation, fraud or the non-disclosure of material facts. A taxpayer's tax compliance status will be indicated as non-compliant by SARS from the date that the taxpayer became non-compliant until such time that the taxpayer remedies the non-compliance.

19.5.3. Confirming the validity of a confirmation of tax compliance status

Despite the provisions of Chapter 6 of the Act, SARS may confirm the taxpayer's tax compliance status as at the date of a request, or a previous date as prescribed by the Minister in a regulation under §257(2A), by an organ of state, or a person to whom the taxpayer has presented the tax compliance status confirmation. The Minister may furthermore determine by regulation the circumstances when a confirmation of tax compliance may be required from a person for governmental purposes, for example when tendering for procurement contracts with an organ of state, or from SARS, and prescribe additional procedural requirements for the issue and withdrawal of confirmations of tax compliance status.

20. CHAPTER 20 - TRANSITIONAL PROVISIONS

20.1. Introduction

The transitional provisions were intended to ensure a smooth transition to administration under the Act. The transitional rules are that—

- provisions deleted under the Act apply until the Act's commencement date;
- thereafter the Act 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—
 - o 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;
 - o tax appeal proceedings before a court, where proceedings commenced before the Act came into operation the proceedings will continue and be disposed of by the court as if the Act had not come into operation.

20.2. 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 business days from the commencement of the Act, which date is 1 October 2012;
- 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 this Act;
- forms prescribed under a tax Act and in use immediately before the commencement of this Act; and
- rules, interpretation notes, practice notes and other publications issued under a tax Act.

20.3. Court proceedings

If a tax appeal or criminal prosecution commenced before the Act came into operation, it will continue, and be disposed of, as if the Act had not come into operation.

20.4. No extension if periods have expired

If any period for an application, appeal, or prosecution expired before the Act commenced, and the Act provides for longer periods, advantage cannot be taken of the longer periods.

20.5. Tax debts

A tax debt that arose before the Act commenced may be recovered in terms of the recovery provisions in the Act.

20.6. Administrative non-compliance penalties

If an obligation that is contained in a public notice published by the Commissioner under §210(2) is not complied with, the non-compliance will attract an administrative non-compliance penalty from the date on which the public notice came into effect. However, if continuous non-compliance existed on the date the public notice was published, the notice is deemed to have been published on the date from which the non-compliance occurred. This means that in such a case an administrative non-compliance penalty will be imposed from the date on which

the non-compliance with the obligation occurred, regardless of whether this was before or after the date on which the public notice containing the obligation was published [§268].

21. SCHEDULE 1 TO THE ACT

In the Schedule of amendments to the other tax Acts, the following approach was followed:

- Most administrative provisions were removed from the various tax Acts and are now housed in the Act;
- A general catch-all provision was included in most of the tax Acts which provides that administrative requirements and procedures required for purposes of the performance of any duty, power or obligation or the exercise of any right in terms of the various tax Acts are, to the extent not regulated by the particular tax Act, regulated by the Act;
- Provisions that are unavoidably tax type specific **remain** in the various tax Acts and in some cases specific tax Act requirements apply in addition to the requirements of the Act;
- Definitions in the tax Acts are aligned with the definitions in the Act or deleted if they are already defined in the Act, although a few 'mirror definitions' are retained e.g. "Commissioner";
- Most of the interest provisions in the tax Acts were moved into a single interest dispensation in the Act;
- Most administrative non-compliance penalties and understatement penalties (previously known as additional tax) were moved to the Act; and
- Specific understatement penalties (understatement of taxable income) and other penalties (underestimation of or failure to submit estimates of provisional tax timeously) are retained in the Fourth Schedule to the Income Tax Act.

GLOSSARY

Glossary of terms used for purposes of this guide:

Term	Meaning
ADR	Alternative Dispute Resolution
ATR	Advance tax ruling
Companies Act	Act 71 of 2008
competent authority	This is normally the person who is designated for the execution of DTAs and other tax treaties. In South Africa it is the Commissioner, which power he may delegate to authorised representatives.
conservancy	Conservancy is measures taken to seize or freeze assets before final adjudication of a tax liability in order to guarantee that a taxpayer will have sufficient assets to meet his or her liability once it is finalised.
Constitution	The Constitution of the Republic of South Africa, 1996
CPA	Criminal Procedure Act, 51 of 1977
DEL(A) Act	Diamond Export Levy (Administration) Act, 14 of 2007
de novo	A matter starts afresh; anew
DTA	Double Tax Agreement
EDA	Estate Duty Act, 45 of 1955
ex parte	An <i>ex parte</i> application means an application brought by one party only i.e. without notice to or the appearance of the other party or person affected by the order sought
FIC	Financial Intelligence Service
FSB	Financial Services Board
ITA	Income Tax Act, 58 of 1962
Minister	The Minister of Finance
M&PRD Act	Mineral and Petroleum Resources Development Act, 28 of 2002
M&PRR(A) Act	Mineral and Petroleum Resources Royalty (Administration) Act, 29 of 2008
M&PRR Act	Mineral and Petroleum Resources Royalty Act, 28 of 2008
NCR	National Credit Regulator
NPA	National Prosecuting Authority
Obiter dictum	A remark made in passing by judge that was unnecessary for the decision of the case and hence not binding in subsequent court cases
PAIA	Promotion of Access to Information Act, 2 of 2000 (PAIA)
PAJA	Promotion of Administrative Justice Act, 3 of 2000 (PAJA)
PFMA	Public Finance Management Act, 1 of 1999
prima facie	Means <i>at first sight; on the face of it; at first blush</i>
RSA	Republic of South Africa
SAPS	South African Police Service
SARB	South African Reserve Bank
SARS Act	South African Revenue Service Act, 34 of 1997
SDL Act	Skills Development Levy Act, 9 of 1999
STT Act	Securities Transfer Tax Act, 25 of 2007
STTA Act	Securities Transfer Tax Administration Act, 26 of 2007

Term	Meaning
This Act	Tax Administration Act, 28 of 2011
TAB	Tax Administration Bill, 11B of 2011
TCS	Tax compliance status
TDA	Transfer Duty Act, 40 of 1949
TRN	Taxpayer reference number
UIC Act	Unemployment Insurance Contributions Act, 4 of 2002
VDP	Voluntary disclosure programme
VAT Act	Value-Added Tax Act, 89 of 1991