

TAX & EXCHANGE CONTROL ALERT

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MAPPING OUT MAP PROCEDURES

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NATIONAL TREASURY RESPONDS TO PUBLIC COMMENTS ON THE 2018 DRAFT RATES BILL

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MAPPING OUT MAP PROCEDURES

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Finding the MAP

MAP is a procedure provided for in a double tax agreement (DTA) or "tax treaties" between the governments of two jurisdictions. DTAs or tax treaties encapsulate international agreements between foreign jurisdictions. The aim of these agreements is to eliminate the occurrence of double taxation with respect to taxes on income and on capital, without creating tax evasion or avoidance in the form of non-taxation and reduced taxation.

The tax treaties and DTAs between South Africa and other jurisdictions generally mimic Article 25 of the Organisation for Economic Cooperation and Development's (OECD) Model Tax Convention on Income and on Capital (Convention), where the OECD has provided a basis for MAP.

Article 25 emphasises that jurisdictions shall endeavour, by mutual agreement, to resolve the situation of taxpayers subjected to taxation that is not in accordance with the Convention. Moreover, Article 25 invites and authorises the parties to the DTA or tax treaty to resolve, by mutual agreement, any problems relating to the interpretation or application of the Convention and to consult together regarding the elimination of double taxation in instances not provided for in the Convention.

The MAP to SARS

The Guide describes that MAP is essentially a special procedure that complements domestic dispute resolution procedures. Taxpayers may refer to the MAP when tax has been charged, or is going to be charged, in spite of the provisions of the relevant DTA or tax treaty in place.



CHAMBERS GLOBAL 2018 ranked our Tax & Exchange Control practice in Band 1: Tax.

Gerhard Badenhorst ranked by CHAMBERS GLOBAL 2014 - 2018 in Band 1: Tax: Indirect Tax.

Emil Brincker ranked by CHAMBERS GLOBAL 2003 - 2018 in Band 1: Tax.

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Ludwig Smith ranked by CHAMBERS GLOBAL 2017 - 2018 in Band 3: Tax.

MAPPING OUT MAP PROCEDURES

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The competent authority will seek to guarantee that taxation in both jurisdictions is consistent with the terms of the DTA or tax treaty in place.



Regardless of any remedies in the domestic law of the jurisdictions who are party to the DTA or tax treaties, MAP is available for the taxpayer to present its case to the competent authority (that is, the position, person or body within a contracting jurisdiction to whom issues can be addressed to) of the jurisdiction of residence, or both jurisdictions. As such, South African taxpayers may find that the MAP will allow for preliminary assessment by the Commissioner for SARS, in its capacity as the competent authority to which the case would be presented, in order to determine whether the case is justified and to ensure that any taxpayer entitled to the benefits of a DTA or tax treaty is not subject to taxation that is not in accordance with the terms of said DTA or tax treaty. At all times, the competent authority will seek to guarantee that taxation in both jurisdictions is consistent with the terms of the DTA or tax treaty in place.

The role of the Commissioner for SARS for purposes of MAP, according to the Guide, therefore includes the exchange of information, providing assistance in the collection of taxes and interacting with counterparts in order to correctly interpret or apply the provisions of DTAs and tax treaties in order to resolve international tax disputes.

Within SARS, this role has been delegated to designated representatives in the Legislative Research and Development subdivision within Legal Counsel, who have the authority to endeavour to resolve

MAP cases and to timeously implement agreements reached based on an objective and consistent application of DTA/treaty provisions applicable to the taxpayer's specific facts and circumstances.

MAP of South African Law

South African law makes provision for the use of MAP to resolve international tax disputes in s108(1) of the Income Tax Act, No 58 of 1962 (Act). Section 108(1) states that South Africa may enter into an agreement with the government of any other jurisdiction with the view to preventing, mitigating or discontinuance of the levying, under the laws of South Africa and the other jurisdiction of tax in respect of the same income, profits or gains, or donation. Section 108(2) of the Act mentions that, after the approval of Parliament and with regard to any constitutional limitations, the DTA or tax treaty and the articles contained therein will become part of South African domestic law.

Once the DTAs or tax treaties have been put into effect as per s108 of the Act, taxpayers and tax practitioners are invited to utilise, for example, OECD transfer pricing guidelines, the United Nations (UN) Model Tax Convention and Commentary and the UN Practice Manual on Transfer Pricing in order to aid any interpretative issues that arise from said DTAs or tax treaties. Useful reference points recommended by SARS also include the Manual on Effective Mutual Agreement Procedures (MEMAP) and Base Erosion and Profit Shifting (BEPS) Action 14 Report.

MAPPING OUT MAP PROCEDURES

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Time limits for lodging a MAP request are generally stipulated in DTAs or tax treaties (except in the case of DTAs with the United Kingdom) as being three years from “first notification”.



Using the MAP

The Guide sets out that a MAP will apply, for example, in instances where dual residency is at issue or where there are difficulties or doubts as to the interpretation or application of the OECD Convention. MAP can also be utilised where withholding taxes are not withheld in accordance with the relevant DTA or tax treaty, or in matters regarding attribution or transfer pricing cases.

Where a taxpayer resident in one of the contracting states to a DTA or tax treaty has experienced taxation that is contrary to the provisions of said DTA or tax treaty, the taxpayer may submit to the competent authority in the prescribed manner the minimum information requirements to lodge a MAP, which include, among others, the taxpayer particulars, the facts of the case, the basis for the request and an interpretation of the issues requested to be resolved by MAP.


Time limits for lodging a MAP request are generally stipulated in DTAs or tax treaties (except in the case of DTAs with the United Kingdom) as being three years from “first notification”. “First notification” is the finalisation of the enquiry or audit

that resulted in the assessment that gave rise to the double taxation or taxation not in accordance with the DTA or tax treaty. If the period in the relevant DTA or tax treaty is longer than that imposed by domestic law, the longer period will apply and the DTA will effectively override domestic law.

Considering the MAP

The competent authority will, upon lodging of the MAP request, consider if the DTA or tax treaty applies to the transaction at hand, whether the actions of one jurisdiction or both result or will result in taxation not in accordance with the DTA or tax treaty, and whether the MAP request has been timeously lodged. The competent authority will take into account the full scope of a taxpayer’s submission and the information provided in a two-stage approach.

The first stage - the unilateral stage - must examine whether the taxation complained of is due wholly or partly to a measure taken in that jurisdiction. The issue in this instance can be resolved without moving beyond the first stage, as adjustments are made or relief is allowed in a manner that appears to the competent authority to be justified.



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Ultimately, SARS has conveyed its interest in furthering MAP usage in South Africa and has therefore provided the taxpayer with another route on the map to international tax dispute resolution.



The second stage - the bilateral stage - will involve instances where the taxation complained of is due wholly or partly to a measure taken in another jurisdiction, in which case the issue is submitted to the competent authority of the other jurisdiction.

At all stages, the competent authorities will use their best endeavours to reach agreement.

MAP for the taxpayer

As set out in SARS's Guide, MAP procedure provides an avenue for the taxpayer that is in addition to the domestic law objection and appeal procedures. The taxpayer can therefore pursue MAP and domestic legal remedies simultaneously.

It must be noted that the MAP will not override a domestic judicial decision and MAP will therefore not withstand a court's judgment on a matter. SARS therefore makes recommendation that the taxpayer suspends domestic law remedies after a South African tax appeal has been lodged or Rule 31 and 32 statements have been filed, until MAP is concluded.

Ultimately, SARS has conveyed its interest in furthering MAP usage in South Africa and has therefore provided the taxpayer with another route on the map to international tax dispute resolution.

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Emil Brincker has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory and Who's Who Legal: Corporate Tax – Controversy for 2017.

Mark Linington has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory for 2017.



NATIONAL TREASURY RESPONDS TO PUBLIC COMMENTS ON THE 2018 DRAFT RATES BILL

The Response Document notes that National Treasury received 11 submissions related to the Draft Rates Bill.

National Treasury indicated that the R3,5 million estate duty abatement and R2 million primary residence capital gains tax exclusion, where a primary residence is disposed of, including a deemed disposal at death, should mitigate the impact of estate duty for lower income households.



On 13 September 2018, National Treasury released a draft response document (Response Document), in response to comments received regarding the 2018 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill (Draft Rates Bill). The Draft Rates Bill was first released for public comment along with the 2018 Draft Regulations Prescribing Electronic Services and the Budget on 21 February 2018. The Response Document notes that National Treasury received 11 submissions related to the Draft Rates Bill. In this article, we will set out some of the comments received in relation to the Draft Rates Bill and National Treasury's response to those comments.

Estate duty

In terms of the Draft Rates Bill, the Estate Duty Act, No 45 of 1955 would be amended so that where the dutiable amount of the estate exceeds R30 million, the amount above R30 million would be subject to estate duty at the rate of 25%. This amendment would be deemed to come into effect on 1 March 2018. In terms of the Draft Rates Bill, this would also apply to donations above R30 million, during the immediately preceding 12-month period.

One of the comments received noted that the high cost of living, land and accommodation make it difficult for ordinary South Africans to save for retirement and that estate duty should be reduced to allow ordinary citizens to acquire property without the burden of estate duties. It added that no estate duty should be payable where 50% or more goes to a spouse or other natural person. In response, National Treasury indicated that the R3,5 million estate duty abatement and R2 million primary residence capital gains tax exclusion, where a primary residence is disposed of, including a deemed disposal at death, should mitigate the impact of estate duty for lower income households. Furthermore, it noted that

transfers to a spouse upon death are not currently subject to estate duty, but that the Davis Tax Committee suggested that this should be reviewed.

Another comment received indicated that the higher estate duty rate of 25% would incentivise capital flight from South Africa, would be difficult to enforce and could lead to avoidance, and that consideration should rather be given to a wealth tax, which would be a simpler way to contribute to the fiscus. In response, National Treasury noted that the higher rate of estate duty should not impact administration and that a number of measures had been introduced in recent years to reduce avoidance. It added that in its opinion, it is unlikely that a wealth tax would be a simpler way to contribute to the fiscus.

Personal income taxes

In the Draft Rates Bill, the primary, secondary and tertiary rebates were partially adjusted for inflation, and below inflation adjustments to the bottom three income brackets were proposed. Although none of the tax rates for any of the income brackets were increased, a comment was received noting that the tax burden on individuals is very high in South Africa.

NATIONAL TREASURY RESPONDS TO PUBLIC COMMENTS ON THE 2018 DRAFT RATES BILL

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The Response Document states that National Treasury and the Department of Environmental Affairs has agreed on a full alignment between the carbon tax and carbon budget, which will require amendments.



Ordinary workers who earn R305,000 and above face abnormally high tax levels, especially after including fuel levies and indirect taxes. It was therefore proposed that a standard tax rate of 30% be imposed on personal income for all persons who earn up to R1 million and that an additional 25% be imposed on incomes above R1 million.

In response, National Treasury explained that South Africa's personal income tax system is highly progressive, with over 25% of personal income taxes being collected from around 110,000 individuals who earn over R1,5 million. In contrast, around 10,8 million individuals earn less than R250,000 and contribute 8,6% of personal income tax revenue. Moving to a flat rate of 30% as proposed, would lessen progressivity and unless there is a high tax-free threshold, this would most likely result in lower tax revenues.

Carbon tax

The Response Document notes that the Draft Response Document on the 2017 Draft Carbon Tax Bill was presented at the public hearings held by the Joint Standing Committee on Finance and the Portfolio Committee on Environmental Affairs on 7 June 2018. Furthermore, the Response Document states that the draft bill has been revised to take into account stakeholder comments, including written comments submitted and comments made during the public hearings and bilateral consultations. National Treasury has indicated that the bill is ready to be tabled, but that the implementation date may need to be moved. The Response

Document states that National Treasury and the Department of Environmental Affairs has agreed on a full alignment between the carbon tax and carbon budget, which will require amendments. Pursuant to comments received on the draft bill and to alleviate further concerns, adjustments will be made to:

- the deduction of petrol and diesel related emissions;
- taxation of domestic aviation and revision of allowances; and
- waste related emissions.

Bills to be tabled

The Response Document notes that the following bills will be tabled at or before the Medium Term Budget Policy Statement (MTBPS):

- the Rates and Monetary Amounts and Amendment of Revenue Laws Bill;
- the Taxation Laws Amendment Bill (TLAB);
- the Tax Administration Laws Amendment Bill (TALAB); and
- the Carbon Tax Bill.

National Treasury recently hosted workshops where the public had an opportunity to provide input on the draft TLAB and draft TALAB released earlier this year, after numerous written submissions had been received by National Treasury. We anticipate that National Treasury will soon release a document containing its responses to the comments received.

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