

28 JANUARY 2021

TAX & EXCHANGE CONTROL ALERT

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Call for Comment: SARS' Advance Tax Ruling System

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CLIFFE DEKKER HOFMEYR

Call for Comment: SARS' Advance Tax Ruling System

One of the objectives in SARS' Strategic plan 2020/21 – 2024/25 is proactively improving certainty for taxpayers. Part of achieving this is reviewing and improving the ATR system. SARS has issued a call for public comments seeking input on ways to increase the efficiency and efficacy of the ATR system. Comments must be sent to policycomments@sars.gov.za by 12 February 2021.

Certainty about how tax rules will apply should a business choose a particular path or undertake a transaction is a crucial part of a good tax system. Where taxpayers can confidently predict the tax consequences of a particular decision, they are able to engage in economic activity confident of the scope of that cost relative to their investment. This predictability also benefits revenue authorities by increasing the ease of compliance and collection.

The Advance Tax Ruling (ATR) system was introduced by SARS in 2006 with a view to providing taxpayers a means to access SARS' view of how South African tax law will apply to a proposed course of action. Currently taxpayers may apply for: Binding Private Rulings, Binding General Rulings, and Binding Class Rulings on a wide range of tax rules, including income tax rules. Similar rulings are also available under the Value Added Tax Act 89 of 1991.

One of the objectives in SARS' Strategic plan 2020/21 – 2024/25 is proactively improving certainty for taxpayers. Part of achieving this is reviewing and improving the ATR system. SARS has issued a call for public comments seeking input on ways to increase the efficiency and efficacy of the ATR system, especially regarding:

- The overall application process – Is the process efficient, effective and user friendly?
- The eFiling interface – Is the interface user-friendly and effective?
- Turnaround times.
- Cost recovery and payment system.
- The specific exclusions and no-rulings list.

- Publication of sanitised rulings, secrecy, and anonymity.
- ATR service levels, professionalism, transparency, and accessibility.
- General effectiveness of the ATR process.
- Impact of negative rulings, rights, and legal remedies.
- Reasons that would prevent a taxpayer from applying for a ruling.

Comments must be sent to policycomments@sars.gov.za by 12 February 2021.

Current Process and Rules

The current ATR regime is contained in sections 75 to 90 of the Tax Administration Act 28 of 2011 (TAA). These sections prescribe the rules for matters including the application process, binding effect of an ATR, grounds for withdrawal or voiding of rulings and requirement of ATR publication.

The process for an advance ruling is started on eFiling with the completion of the pre-screening checklist, filing of application forms along with supporting documents, and payment of the applicable fee. The contents of the application are stipulated by section 79 of the TAA and taxpayers must fully disclose, *inter alia*, the nature and steps of the proposed transaction, the parties involved and importantly the impact of the proposed transaction. The impact to be disclosed includes a description of the tax consequences of the transaction for all parties and anticipated tax effect of the ruling.

Call for Comment: SARS' Advance Tax Ruling System...*continued*

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The type of ruling being applied for will dictate the parties which have standing to apply for the ruling, and have the ruling apply to them. SARS is the only party bound to apply a ruling that has not been withdrawn. A taxpayer is free to apply their own interpretation of the tax rules and thereafter follow the assessment and objection process. To demonstrate: a binding class ruling may be applied for by a person on behalf of the class of persons to whom the ruling will be applicable, while a binding private ruling can only be applied for by a party to the transaction and who will therefore have SARS apply the ruling to that party.

Under section 80 of the TAA, SARS may reject applications dealing with certain subject matter. This is aimed at preventing taxpayers from seeking revenue authority guidance in circumstances where it would not fit with the policy rationale underlying the ATR system. SARS may reject applications seeking rulings on matters including: the market valuation

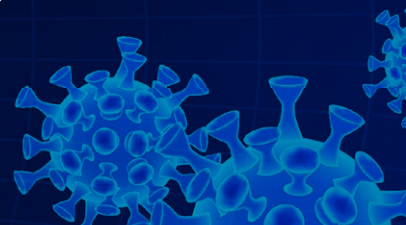
of assets, matters which are the subject of audit or investigation by SARS, and transactions which are only contemplated hypothetically or for academic purposes.

As noted above, SARS is the only party bound by an ATR. However, section 86 empowers SARS to withdraw or modify a ruling at any time. This power is limited to the date on which a ruling was delivered to an applicant or binding general ruling published. Retrospective withdrawal or modification is also possible, where the ruling was made erroneously and either the transaction has not commenced, a person besides an applicant would suffer greater prejudice, or the effect of the ruling would materially erode the tax base.

Following the ATR process, under section 87 the applicants are bound to consent to the publication of the ruling in a form which removes information and detail which could lead to identification of the parties or transaction. This similarly applies to any modification or withdrawal of an ATR.

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Call for Comment: SARS' Advance Tax Ruling System...*continued*

Taxpayers and their advisors should not miss this opportunity to engage with SARS towards creating an ATR system which is innovative, reliable and provides confidence where rulemaking may have been unclear or overly restrictive.

Comparative and way forward

ATR systems exist throughout the world. Some systems are technically sophisticated reaching all aspects of the tax system and may provide broad powers to revenue authorities, which may be exercised confidentially and even allowing the adjustment of tax liabilities. The potential impact of revenue authority advance rulings has been demonstrated in recent high value international tax litigation regarding advance transfer pricing rulings by the Irish Tax and Customs leading to the litigation with Apple in the General Court of the European Union and by the United States of America's Internal Revenue Service in *The Coca-Cola Co. v. Commissioner, T.C.*, No. 31183-15, 11/18/20.

SARS is potentially showing an interest in reinforcing its rulings capacity with the current call for public comment and discussion paper on Advance Pricing Agreements published in late 2020. With this push to improve and broaden access comes the potential not only for greater tax certainty through an improved ATR system, but the possibility for a broadened scope for ATRs. This could enable SARS to dictate the tax effects of a given set of facts and even incentivise selected taxpayers or industries. Taxpayers and their advisors should not miss this opportunity to engage with SARS towards creating an ATR system which is innovative, reliable and provides confidence where rulemaking may have been unclear or overly restrictive.

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Ludwig Smith ranked by CHAMBERS GLOBAL 2017 - 2020 in Band 3: Tax.

Stephan Spamer ranked by CHAMBERS GLOBAL 2019-2020 in Band 3: Tax.



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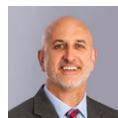
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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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