TAX & EXCHANGE CONTROL
ALERT

22 SEPTEMBER 2022

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

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System update: SARS no longer utilising IT14SD forms for corporate income tax verifications

The South African Revenue Service's (SARS) core function is the efficient and effective administration of tax Acts.

This necessarily includes the collection of the proper amount of tax from various taxpayers. Part of the means at SARS' disposal to ensure this is achieved, is requiring taxpayers to submit relevant information, augmented by data collected from third-party entities. A further mechanism at SARS' disposal to ensure the information received is full and correct, are the investigatory powers granted to SARS under Chapter 5 of the Tax Administration Act 28 of 2011 (TAA).

A familiar part of the tax administration process for corporate taxpayers is the preparation and submission of a corporate income tax supplementary declaration form titled IT14SD (IT14SD). In this form, companies selected for verification by SARS are required to reconcile income tax, Value-Added Tax (VAT), Pay-As-You-Earn (PAYE) and Customs declarations after the submission of their corporate income tax returns.

With effect from 16 September 2022, SARS will no longer be issuing or accepting IT14SD forms. This includes IT14SD forms outstanding at that date, in which case the verification process will proceed under the new regime.

WHAT IS VERIFICATION?

SARS' verification procedure entails a face value assessment of what has been declared by the taxpayer in their tax returns, against other sources of information such as the supporting documents submitted by the taxpayer and third-party information collected by SARS. The overall intention being to ensure that the return accurately reflects the tax position, as evidenced by such supporting documents or third-party information.

SARS' authority to conduct verifications of income tax returns is rooted in section 40 of the TAA, which empowers SARS to "*select any person for inspection, verification or audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis*".

EFFECT OF THE CHANGE

Previously, SARS would initiate the verification procedure by issuing a notice of verification of income tax return (Verification Notice) identifying the return which is subject to verification. This letter would set out the information sought for verification and the timeframes envisaged for the verification process.

A taxpayer that received a Verification Notice could opt to submit a revised income tax return for the relevant period (provided the specific requirements for such a resubmission were met) or to submit an IT14SD, along with any relevant supporting material requested.

The IT14SD would require the taxpayer to complete the schedules relating to the various tax types, indicating the various tax information required. For example with corporate income tax, taxpayers would be required to indicate the net profit/loss and calculated profit/loss for the year of assessment, as well as the applicable debit and credit

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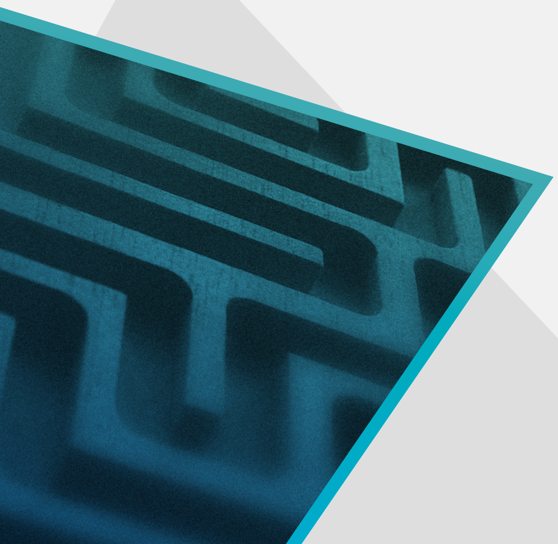

adjustments, and thereafter where the reconciling differences exceed 1% of taxable profit/loss or R1,000, to provide details explaining the basis for such differences.

If the taxpayer fails to co-operate with the verification process, SARS could potentially issue a revised assessment based on the information at its disposal, which could in some instances result in the imposition of penalties.

The result following the completion of the verification process would depend on the outcomes of the process. Where no risks were identified then a notice of finalisation of verification would be issued. If grounds for a revised assessment were uncovered during the verification, SARS could potentially issue a revised assessment. Alternatively, if additional risks were identified SARS could then pursue an audit process.

The verification process now that SARS will no longer utilise the IT14SD, remains largely unchanged in the other respects. SARS will continue to issue a Verification Notice setting out the timelines. The taxpayer retains the ability to submit a request for correction, allowing the submission of a revised tax return. Similarly, the failure to comply with the process and potential outcomes of the verification remain the same.

The principal difference under the new verification regime is that in the Verification Notice SARS will now request specific supporting documents targeted at addressing the particular risks which were the underlying reason for taxpayer being selected for verification.

Although only a streamlined set of documentation will now be requested from the taxpayer, it is worth noting that the verification process will require the submission of a signed set of annual financial statements, and a detailed tax computation, accompanied by the underlying supporting documentation/schedules.

Taxpayers are able to submit the documents requested in the same manner which the IT14SD and any required supporting documents would have been submitted, being at a SARS branch, through the taxpayer SARS eFiling profile, or through the online query portal on the SARS website.

COMMENT

SARS has indicated in its strategic plan for the 2023 tax year that a continuing part of its strategic vision as a revenue authority is to make tax compliance easy and streamlined. The jettisoning of the IT14SD as part of the verification process is in line with these objectives.

Taxpayers will now have to deal with a risk based and targeted verification process, where they will be required to submit specified documentation. This means that taxpayers will not have to bear the administrative burden of completing the IT14SD form, which could require information regarding all the tax types for which a corporate taxpayer was registered. This reduction in the tax compliance burden should be a welcome development for corporate taxpayers.

TSANGA MUKUMBA

SOUTH AFRICA

Standing on solid ground(s) when objecting to an assessment

On appeal from a full bench of the High Court, the Supreme Court of Appeal (SCA) dispensed with a taxpayer's request for default judgment against the South African Revenue Service (SARS) in the recent case of *Commissioner, SARS v Candice-Jean van der Merwe* [2022] ZASCA 106.

Although the facts surrounding the SCA's decision were unique to that case, it does beg a broader question regarding a taxpayer's right to be provided with grounds for an assessment issued under section 95 of the Tax Administration Act 28 of 2011 (TAA).

FACTS

The taxpayer in this case received a large sum of money from an overseas benefactor which she declared as a donation when filing her tax return for the 2014 tax year. SARS disagreed with this and included the amount received in the taxpayer's gross income, thus subjecting her to normal tax. The dispute between SARS and the taxpayer was resolved by agreement, and SARS issued an assessment under section 95(3) of the TAA (an assessment by agreement). This assessment by agreement is not subject to objection or appeal by the taxpayer.

Nevertheless, the taxpayer subsequently lodged an objection against this assessment. SARS refused to entertain this objection on the basis that it was issued by agreement in terms of section 95(3) of the TAA, and thus not subject to objection. Undeterred, the taxpayer proceeded to lodge an appeal with the Tax Court.

Additionally, in the Tax Court the taxpayer delivered a further notice requesting default judgment be granted against SARS. This was on the basis that SARS had failed to deliver its grounds for the assessment in dispute.

DECISION

The SCA upheld the Tax Court's decision against the taxpayer after the High Court found in favour of the taxpayer. In short, the SCA agreed with SARS that it (SARS) is bound only to consider a valid objection, and that an appeal to the Tax Court can only follow a valid objection. Finding that the assessment raised by SARS by agreement with the taxpayer was not subject to objection, the SCA found the taxpayer did not have a basis to object or appeal.

The SCA's decision also dispensed with the taxpayer's request for default judgment. Although the case deals specifically with a process initiated by the taxpayer, which was seemingly flawed from the beginning, and does not centre on the taxpayer's request for default judgment, this request does raise questions regarding SARS' obligation to provide grounds for assessments it issues.

A TAXPAYER'S RIGHT TO REASONS

As discussed in a previous alert with reference to *ABSA Bank Limited v Commissioner, SARS* 2021 (3) SA 513 (GP), SARS arguably takes administrative action, as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), when it issues an assessment. It follows, therefore, that taxpayers enjoy a right to reasons, as contemplated in section 5 of PAJA, for SARS' decisions.

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Standing on solid ground(s) when objecting to an assessment

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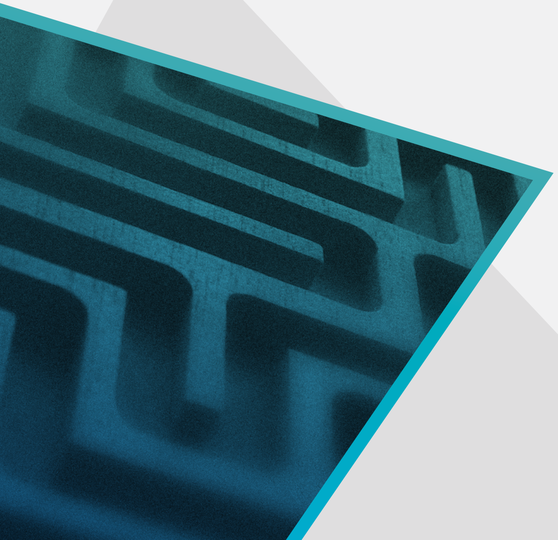
The TAA reflects this in section 96(2) where SARS is obligated to provide a taxpayer with the grounds on which it has raised an estimation assessment in terms of section 95 of the TAA. Further, rule 6 of the rules promulgated under section 103 of the TAA (Dispute Resolution Rules), allows a taxpayer who is aggrieved by an assessment to make a request to SARS for the reasons for the assessment.

While the reasons requested in the context of review proceedings in the High Court, such as those in Absa Bank Limited, must be distinguished from a rule 6 request, the reasons are necessary to enable an aggrieved taxpayer to formulate an objection against the assessment as provided for in section 104 of the TAA. Indeed, therefore, the TAA can be seen as an empowering provision envisaged in section 5(5) of PAJA which provides a fair procedure for requesting reasons from SARS.

In practice, however, it has become more common for SARS to issue estimation assessments without providing the grounds for them, as required by section 96(2) of the TAA. In terms of recent amendments to the TAA, where an estimated assessment is issued, such assessment is only subject to objection or appeal if the taxpayer submits the relevant material (or outstanding return) required and SARS decides not to issue a reduced or additional assessment. The submission of the outstanding return or relevant material must occur within 40 business days from the date of the estimated assessment, unless SARS grants reasonable grounds for the extension. It is unclear whether a taxpayer is permitted to request reasons for such an estimated assessment or whether it should object to the assessment on the basis that it is invalid due to proper grounds of assessment not being provided.

In its Dispute Resolution Guide (Issue 2), SARS draws a distinction between grounds for an assessment under section 96(2) of the TAA and the reasons for an assessment which may be requested under rule 6 of the Dispute Resolution Rules: *"The grounds for an adverse assessment by SARS should generally enable the taxpayer to understand the basis for the assessment and to object. However, if this is not the case, the taxpayer may request from SARS the reasons required to enable it to formulate its objection."*

This seems to suggest that where a taxpayer is provided with the grounds for an assessment, but is still unable to formulate an objection, it may potentially request the reasons for the assessment from SARS under rule 6 of the Dispute Resolution Rules.



SOUTH AFRICA

Standing on solid ground(s) when objecting to an assessment

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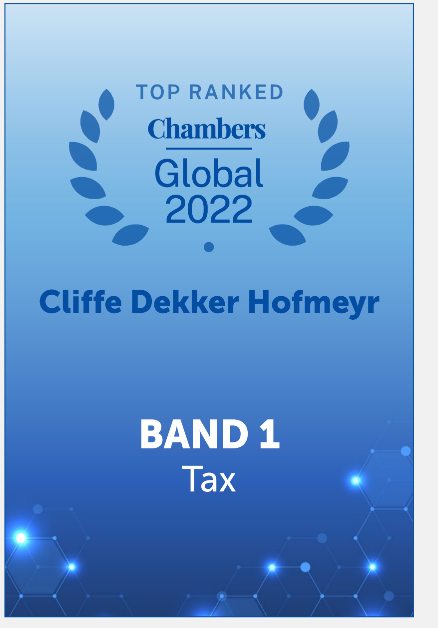
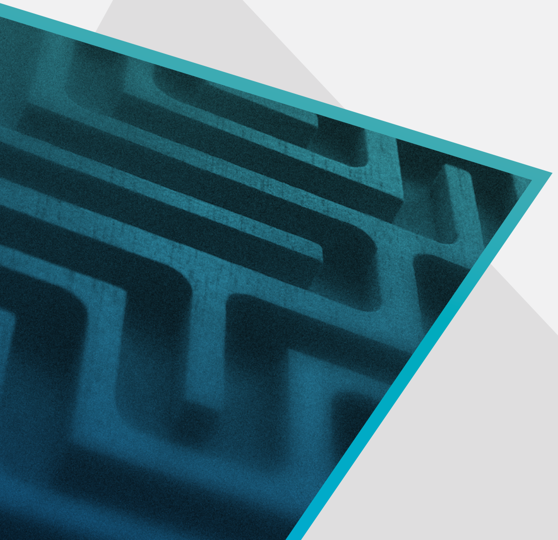
OUR APPROACH

Both the grounds and reasons for an assessment are there to enable an aggrieved taxpayer to formulate an objection against SARS' assessment. However, the distinction between the two, and the possible procedural benefits of being provided with both, should not be ignored.

Therefore, where a taxpayer is aggrieved by an estimated assessment issued by SARS, and the grounds for this assessment have not been provided, the taxpayer should first consider whether it needs to submit any relevant material or an outstanding return. If this has been submitted and SARS refuses to issue a reduced or additional assessment, one can then object against the estimated assessment. The potential invalidity of an assessment, due to the absence of proper grounds of assessment, can be raised as a ground of objection. Such objection must be submitted in the prescribed form and manner set out in the TAA and Dispute Resolution Rules.

LANCE COLLOP AND
NICHOLAS CARROLL





KENYA

The new administration should have a tax policy to tackle taxpayers' woes

Following the recent elections, Kenya has a new administration. Many Kenyans are eager for this new administration to roll up its sleeves and fulfil its promises to the people.

The new administration established by the Kenya Kwanza team has taken over at a time when tax revenue targets are falling behind. The Statement of Actual Revenues and Net Exchequer Issues as at 31 August 2022 indicates that against the annual tax revenue target of KES 2.071 trillion for the financial year from July 2022 to June 2023, the Kenya Revenue Authority (KRA) collected KES 280 billion in two months. Even though tax collection is not expected to be the same every month, the KRA fell short of the KES 345 billion expected by the end of the second month of this financial year if we assume a monthly tax revenue of KES 172.5 billion. This indicates a deficit of KES 65 billion. Against this backdrop, the new administration has cut down fuel subsidies and introduced subsidies for fertilizers.

Knee-jerk reactions to tax policies and measures are not sustainable. Businesses require certain, predictable and simple tax systems. A tax policy can help, and the new administration should proactively collaborate with stakeholders to produce one.

National Treasury has collected views on the draft national tax policy, but this was not advanced by Kenya Kwanza in its manifesto. The manifesto acknowledged that the tax revenue base must be expanded, but did not indicate how the new regime would go about that. In a 30-page manifesto, Kenya Kwanza indicated that it was keen on doing this through taxing the informal sector, that is, the boda boda operators, beauticians, hawkers etc. but this is missing in its more detailed 68-page manifesto. In the detailed manifesto, Kenya Kwanza speaks more to incentives such as reducing the cost of importing agricultural inputs, providing tax incentives to encourage manufacturers in the pharmaceutical sector (dealt with by the Finance Act of 2022), automating value-added tax systems, reducing the cost of calls and data to encourage the creatives sector, tax incentives to convert public service vehicles to electric vehicles, tax incentives for corporates who sponsor sports, and import duty exemption for assistive devices used by persons with disabilities, among other things.

The new regime will need to finance its plans for the country even though it is coming after the country has already prepared its 2022/23 budget. Actualizing some of the promises such as the KES 50 billion hustler fund will need to be financed, presumably through taxes.

KENYA

The new administration should have a tax policy to tackle taxpayers' woes

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A cursory look at Kenya Kwanza's manifesto indicates what the new regime will focus on in the short-, middle- and long-term. A tax policy should prominently feature in the mind of the new regime in all these plans. Promises and budgets come at a cost to the ordinary businessperson in Kenya.

Consequently, the new administration should aim for more than just subsidies and the promise of a friendlier tax authority. It should collaborate with stakeholders to reduce tax burdens, structure tax incentives and monitor their impact, guide future tax law amendments, facilitate faster review and payment of tax refunds, and simplify tax compliance. These, among other initiatives, are detailed in the draft national tax policy and support from the new regime can help move this forward.

At the end of the day, good tax revenue depends on facilitating income-generating businesses, assisting them to comply with their tax obligations through simple procedures, providing a stable and predictable tax environment, and putting the tax revenue to effective use. The new regime's tax policy can provide direction in this regard.

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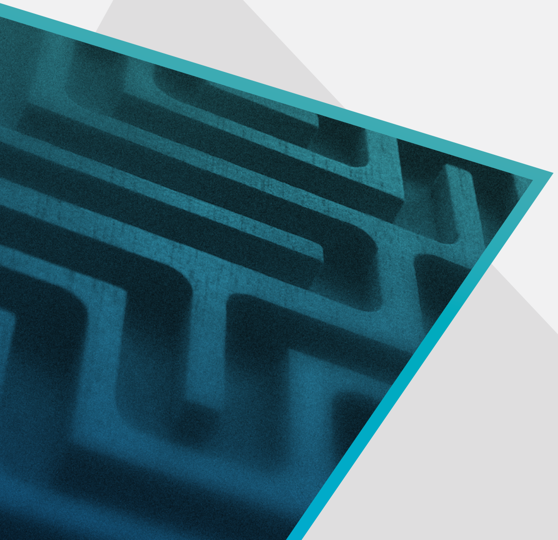

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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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