



Guide to the  
Small Business Tax Amnesty

June 2007

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# The Small Business Tax Amnesty

*The terms of the Small Business Tax Amnesty are set out in the Small Business Tax Amnesty and Amendment of Taxation Laws Act 9 of 2006. In what follows, this Act will for brevity be referred to as the Tax Amnesty Act. This Act must be read in conjunction with the regulations issued by the Minister of Finance<sup>1</sup> which provide limited further relief associated with the amnesty.*

*The Second Small Business Tax Amnesty and Amendment of Taxation Laws Act 10 of 2006 provides for the administration of the small business tax amnesty.*

*A distinction needs to be drawn between, on the one hand, the amnesty available under the Tax Amnesty Act and, on the other hand, the relief, in the form of a waiver of additional tax, interest and penalties, provided for in aforementioned ministerial regulations, promulgated in terms of the Tax Amnesty Act.*

*The small business tax amnesty, if applied for and granted, results in an amnesty, for stipulated periods preceding the 2006 year of assessment, in respect of income tax, and a wide range of other taxes.*

*The waiver, in terms of the ministerial regulations, if applied for and granted, results in a waiver, not of the principal amount of tax, but only of additional tax, interest and penalties.*

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<sup>1</sup> Government Notice R361 issued on 20 April 2007

## Background

Government recognises the importance of small businesses to the national economy, for “without small businesses many of our people would be without jobs and an honest way to make a living”.<sup>2</sup>

The small business tax amnesty is intended to give small businesses the chance to regularise their tax affairs without punishing them for failing to do so in the past.

By availing themselves of the amnesty and becoming registered taxpayers, small businesses will be able to qualify for banking and financial services, tender for government contracts, and access the small business initiatives offered by government.

The other objectives of the small business tax amnesty are to broaden the tax base, increase and improve the tax compliance culture, and facilitate participation in the taxi recapitalisation programme.

## Overview: key points of the small business tax amnesty

- An applicant is entitled to apply for amnesty without employing the services of an attorney, accountant, financial adviser, etc, although it is advisable to get professional assistance. The process for applying for amnesty, as set out in the Act and as outlined below, is very straightforward – but the application form must be completed carefully and fully, and the applicant must take care to make full and accurate disclosure of all the required information.
- SARS has tried to make the application process and the application form itself as simple as possible. However, we suggest that, if possible, an applicant does, at least, take the application form to a tax professional for checking before delivering it to SARS. The most



likely risk in failing to take professional advice is not that a lay person may apply for amnesty where he or she does not qualify (in which event, amnesty will simply be refused) but rather that a person may inadvertently not apply for the full range of amnesty relief to which they would be entitled.

- If the applicant is one of the categories of person who is entitled to apply for amnesty, and if the applicant’s taxable income for the 2006 tax year did not exceed the stipulated threshold, and if

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<sup>2</sup> SARS memorandum accompanying form SBA 0001

the applicant applies for amnesty in the proper way and within the prescribed time limits, SARS must grant amnesty. SARS has no discretion to withhold amnesty from a person who is entitled to it and has properly applied for it.

- No matter how grave the applicant's tax transgressions have been in the past – and irrespective of whether he or she has failed to register as a taxpayer, or has failed to lodge tax returns, or has told untruths or half-truths or made mistakes in tax returns – the applicant must be granted amnesty if they qualify for it and apply for it in the proper way.
- For the small price of the amnesty levy (see below), the slate for a successful applicant will be wiped clean in respect of stipulated periods preceding the 2006 tax year of all taxes for which amnesty was granted. The amnesty, if granted, is also applicable in relation to any criminal offence that has been committed in terms of the tax legislation in respect of which amnesty was applied for.
- The secrecy provisions of the Income Tax Act apply to SARS officials who implement the small business tax amnesty.

### Categories of persons who qualify to apply for amnesty

The Act<sup>3</sup> provides that the following categories of persons are entitled to apply for amnesty, namely –

- a taxpayer who –
  - is a natural person, including the deceased or insolvent estate of a natural person;
  - was an unlisted company for all years of assessment preceding the 2006 year and all the shares or members' interests in the company were held directly by natural persons (including the deceased or insolvent estate of a natural person);
  - is a trust and all the beneficiaries of that trust, throughout the 2006 year of assessment were natural persons (including the deceased or insolvent estate of a natural person)<sup>4</sup>;

and if –

- the total gross income of that person for the 2006 year of assessment from carrying on business did not exceed R10 million. If that person's financial year was not 12 months, the amount of R10 million is reduced proportionally.

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<sup>3</sup> Section 2

<sup>4</sup> The meaning of this provision is to be clarified by the addition of section 2A, which will be backdated to 1 August 2006



## Commentary

Where income tax is concerned, the small business tax amnesty is available only in respect of income or capital received or accrued to the applicant “from the carrying on of any business”.<sup>5</sup>

An employee does not, for purposes of tax law, “carry on a business” and the amnesty is therefore not available to the salary or wages of such persons. If, in addition to earning a salary or wage, an employee also carries on business for his or her own account, then the small business tax amnesty will apply to the income from that business.



Amnesty is available only if the total gross income of the applicant for the 2006 year of assessment from carrying on business did not exceed R10 million (or a pro rata amount if that year of assessment was less than 12 months).

If an applicant carried on several businesses in the 2006 year of assessment, the total gross income for all those businesses must be aggregated to determine whether the R10 million ceiling has been exceeded.

It should be noted that the ceiling of R10 million refers to “gross income”, in other words to the total amount received or accrued, before taking into account any expenditure.

The R10 million ceiling is determined with reference to the applicant’s gross business income in the 2006 year of assessment. It is irrelevant if the gross income in previous years was higher than this.

## Period for applying for amnesty

The period within which a person can apply for amnesty is 1 August 2006 to 30 June 2007. Application must be made in the “manner and form prescribed by the Commissioner”.<sup>6</sup>

In practical terms, an applicant must access the SARS website ([www.sars.gov.za](http://www.sars.gov.za)) and then –

- download form SBA 001, and fill it in;
- annex to that form a statement of assets and liabilities, within and outside the Republic in respect of the applicant and his or her minor children (if the applicant is an individual), or details of their assets and liabilities on the last day of the year of assessment (if they are carrying on business for their own account or as partners or as farmers);

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<sup>5</sup> Section 6(2)

<sup>6</sup> Section 3

- furnish an income tax return for the 2006 year of assessment together with the application for amnesty plus a statement of assets (at cost) and liabilities as at the end of that year, and submit these supporting documents together with the application for amnesty or within such further period as SARS may allow.
- lodge the application form SBA 001 together with the supporting documents at any SARS office on or before 30 June 2007.

If it is “not possible” for the applicant, in the amnesty application, to provide full particulars of actual amounts or in any tax return or statement accompanying the application, the applicant is allowed to provide reasonable estimates, but must disclose which of the amounts are estimates.<sup>7</sup>

### *Commentary*

If an applicant gives estimates of his or her income or tax-deductible expenditure in the 2006 year of assessment, then he or she must disclose in the amnesty application that the amounts given are estimates. Estimates are acceptable only if it is “not possible” to give the exact amounts.

## Information and disclosure required in the application

An applicant for amnesty must disclose the taxable income derived by that applicant from carrying on business during the 2006 year of assessment. Form SBA 001 (see above) has space, under heading 6, for this disclosure.

Heading 6 also asks “Are you aware of any audit, investigation or other enforcement action against you?”

### *Commentary*

The significance of this question is that an application for amnesty cannot be granted if, before the application is submitted, SARS gives the applicant notice of an audit, investigation or other enforcement action.<sup>8</sup> However, the Tax Amnesty Act does not say that an applicant, whose affairs are under investigation, cannot submit an application for amnesty.

Persons who wish to apply for amnesty should therefore not be deterred from doing so, simply because their tax affairs are already under investigation by SARS. If the investigation is withdrawn, the application for amnesty must (arguably) then be considered on its merits.

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<sup>7</sup> Section 4(3)

<sup>8</sup> See section 5(2)

## Evaluation and approval of an application for amnesty

Subject to what is said below, SARS must approve an application for amnesty if the applicant is a person who qualifies for amnesty, if the applicant's total gross income from carrying on business in the 2006 year of assessment was below the specified threshold (see above), if the applicant submits the application in time and in the proper form, and if the applicant discloses his taxable income (or reasonable estimate) from the carrying on of business for the 2006 year of assessment and furnishes an income tax return for that period together with a statement of assets and liabilities as at the end of that year.<sup>9</sup>

However, as was noted above, the Act states that an application for amnesty cannot be approved if, at any time before the submission of the application, SARS has delivered a notice to the applicant or the latter's representative advising of an audit, investigation or other enforcement action<sup>10</sup> relating to any failure by the applicant to comply with any tax legislation in respect of which application for amnesty is made,<sup>11</sup> unless SARS delivers a letter, before the submission of the application for amnesty, notifying the applicant that the notice of investigation, audit, etc has been withdrawn, or that the investigation, audit etc has been concluded.<sup>12</sup>



SARS must deliver to the applicant a notice of the decision to approve or deny the application for amnesty; if it is denied, reasons must be given<sup>13</sup> If SARS denies the application for amnesty, the applicant has a right of objection and appeal.<sup>14</sup>

## The amnesty levy

An applicant whose application for amnesty has been approved is liable for an amnesty levy which is on a sliding scale, starting at zero.

The amount of the levy is calculated by applying the specified rate to the taxable income of the applicant for the 2006 year of assessment to the extent that is attributable to any amount derived by the applicant from carrying on business.

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<sup>9</sup> Section 5(1)

<sup>10</sup> Namely, an enforcement action of a type which may be prescribed by the Commissioner by notice in the Government Gazette; section 5(3)

<sup>11</sup> Section 5(2)

<sup>12</sup> Section 5(4)

<sup>13</sup> Section 5(5)

<sup>14</sup> Second Small Business Tax Amnesty and Amendment of Taxation Laws Act 10 of 2006, section 6(1)



The rates applicable in so determining the amnesty levy are –

0%	on so much of the taxable income as does not exceed R35 000
2%	on so much of the taxable income as exceeds R35 000 but does not exceed R100 000
3%	on so much of the taxable income as exceeds R100 000 but does not exceed R250 000
4%	on so much of the taxable income as exceeds R250 000 but does not exceed R500 000
5%	of the taxable income exceeding R500 000

### Commentary

It should be noted that –

- An applicant for amnesty must lodge a tax return for 2006 together with the amnesty application if this has not already been done.<sup>15</sup>
- The amnesty levy is calculated on the 2006 taxable income, not on gross income, in other words, after subtracting tax-deductible expenditure.
- The amnesty levy is calculated on the applicant's true taxable income for the 2006 tax year – even if some of this income was, in fact, fully disclosed in the applicant's original tax return. In other words, the amnesty levy is not calculated only on the undisclosed income for 2006.
- If the taxpayer's true taxable income for 2006 did not exceed R35 000, the amnesty levy is nil.

### Time for payment of the amnesty levy

The amnesty levy must be paid within 12 months from the date on which notice of approval of the application was delivered to the applicant. SARS can, however, extend this period.<sup>16</sup>

### Commentary

Failure to pay the amnesty levy in full within the prescribed period (or such extended period as SARS may allow) will retrospectively invalidate any approval granted by SARS in respect of the application for amnesty.<sup>17</sup>

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<sup>15</sup> Section 4(2)

<sup>16</sup> Section 7

<sup>17</sup> Section 12(a)

## Extent of the tax relief granted to a successful applicant for amnesty

A person who applies for and is granted amnesty is not liable for the payment of <sup>18</sup>–

- income tax in respect of any amount received by or accrued to the applicant during any year of assessment preceding the 2006 year from the carrying on of any business;
- employees' tax in terms of the fourth schedule to the Income Tax Act in respect of any remuneration paid to employees during any tax period which ends on or before 28 February 2006;
- any VAT in terms of the Value-Added Tax Act in respect of any goods or services supplied or imported during any tax period which ends on or before 28 February 2006;
- any withholding tax on royalties in terms of the Income Tax Act in respect of any amount paid during the period ending on or before 28 February 2006 to any non-resident;
- secondary tax on companies in terms of the Income Tax Act, in respect of any dividend declared or deemed to be declared during any dividend cycle which ends in any year of assessment preceding the 2006 year;
- contributions payable in terms of the Unemployment Insurance Contributions Act in respect of any remuneration paid during any tax period or month which ends on or before 28 February 2006;
- levies payable in terms of the Skills Development Levies Act in respect of any leviable amounts during any tax period which ends on or before 28 February 2006.

In addition, any relief granted to a successful applicant for amnesty will be treated as exempt income for income tax purposes, and any capital gain or loss will be disregarded for capital gains tax purposes.<sup>19</sup>

### Commentary

Although the Tax Amnesty Act says that where an application for amnesty is approved, the applicant “is not liable for the payment of any income tax”, etc, in respect of the period prior to the 2006 year of assessment, this does not mean that any income tax already paid in respect of that period will be refunded. This is because the Tax Amnesty Act specifically provides that the tax amnesty relief does not apply to any tax that has already been paid.<sup>20</sup>

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<sup>18</sup> See section 8.

<sup>19</sup> Proposed section 9A

<sup>20</sup> Section 10(a)

## Amnesty in respect of additional tax, interest and penalties

A person whose application for amnesty has been approved is also freed from liability for payment of any additional tax, interest and penalties in respect of any amount for which amnesty has been granted.<sup>21</sup>

SARS is permitted to extend the due date for the submission of any tax returns which the applicant for amnesty is required to furnish and can waive the penalty for late submission.<sup>22</sup>

SARS can also waive any additional tax, interest and penalties in respect of amounts relating to returns which are due after the end of 2006 year of assessment.<sup>23</sup>

## Circumstances in which amnesty relief is not available

No amnesty is available in respect of any tax, contribution, interest, penalty or additional tax if <sup>24</sup>—

- prior to the submission of the application for amnesty, it has already been paid;
- it is payable or becomes payable in respect of any information furnished to SARS by the applicant or the latter's representative in any return, declaration, or otherwise before the submission of the application for amnesty;
- it is payable by the applicant for amnesty in terms of an assessment issued by SARS before the submission of the application for amnesty;
- it relates to value-added tax not paid as a result of a false declaration of the acquisition, import or export of goods or services that did not actually occur.

### Commentary

No amnesty is available in respect of any tax that has already been paid. Hence, the granting of amnesty will not result in the refunding of any tax already paid.

It is also significant that no amnesty can be granted in respect of tax liability in terms of an assessment that was issued by SARS before the applicant submitted the application for amnesty.

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<sup>21</sup> Section 9(1)

<sup>22</sup> Section 9(2)

<sup>23</sup> Section 9(3)

<sup>24</sup> See section 10

## Disallowance of deductions, allowances and losses

A person whose application for amnesty has been approved may not <sup>25</sup>–

- utilise any assessed loss or capital loss arising during a year of assessment prior to the 2006 year for the purpose of determining the applicant's liability for income tax after that period;
- for the purpose of calculating the applicant's liability for secondary tax on companies, set off any excess of dividends which accrued to the applicant during any dividend cycle ending during a year of assessment prior to the 2006 year against any dividends declared by the applicant during any dividend cycle ending after that period;
- claim the deduction of any output tax under the VAT Act or any other deduction under that Act<sup>26</sup> which relates to the supply to the applicant during any tax period ending during a year of assessment preceding the 2006 year for purposes of calculating the applicants liability for VAT after that period.

## Circumstances where approval of an amnesty application is void

Any approval granted by SARS to an application for amnesty is void if <sup>27</sup>–

- the applicant fails to pay the amnesty levy in full within the prescribed period;
- the applicant fails to make full disclosure of any required information, including the true taxable income received or accrued during the 2006 year of assessment or in the income tax return for the 2006 year of assessment or in the statement of assets and liabilities which must accompany that return;
- any estimate made by the applicant, in his application for amnesty or in any tax return relating to the application, of any amount is materially incorrect.

### Commentary

These provisions must be taken seriously by an applicant, since non-compliance will invalidate the application for amnesty.

In particular, an applicant should be meticulous about correctly stating his or her true taxable income for the 2006 year of assessment. The Tax Amnesty Act provides that if it is “not possible” for the applicant to provide full particulars of the actual amounts, then a “reasonable estimate” can be given.

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<sup>25</sup> See section 11

<sup>26</sup> As contemplated in section 16(3) of the Value-Added Tax Act

<sup>27</sup> See s 12

# Waiver of additional tax, interest and penalties in terms of the ministerial regulations

## Background

In any tax amnesty, there are bound to be “hard cases”, in which some people by a quirk of timing or some other technical reason, do not qualify to apply for amnesty.

The ministerial regulations are intended to go some way toward providing relief for some such hard cases. However, in contrast to the amnesty, the relief does not result in a waiver of the principal amount of tax owing by the applicant, but only additional tax, interest or penalties.

## Persons who qualify for the relief

The Tax Amnesty Act provides<sup>28</sup> that the Minister of Finance can, by regulation, prescribe the circumstances in which SARS can waive, in whole or in part, any additional tax, interest or penalty payable in respect of any year of assessment, dividend cycle, tax period or month ending during any year of assessment preceding the 2006 year by a person who satisfies the requirements set out in section 2 of the Act, but to whom the amnesty relief will not apply because –

- the tax in question was payable as a result of information furnished to SARS by the applicant for amnesty or the latter’s representative in any tax return, declaration or otherwise before the submission of the application; or
- the tax was payable by the applicant in terms of an assessment issued by SARS before the submission of the application.

In other words, only persons who would have qualified for the amnesty, but for the circumstances summarised in these two bulleted points, are entitled to apply for a waiver of additional tax, interest and penalties under the ministerial regulations.

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<sup>28</sup> See section 13



On 20 April 2007, the Minister duly issued the envisaged regulations,<sup>29</sup> prescribing the circumstances in which SARS could make the aforesaid waiver and laying down the procedures to be followed.

### *Commentary*

The ministerial regulations provide for less generous relief than the small business tax amnesty provided for in the Tax Amnesty Act.

A person who applies for and is granted amnesty under the Tax Amnesty Act gets an amnesty for the tax itself, and for additional tax interest and penalties in respect of that tax.<sup>30</sup>

By contrast, a person who applies for and is granted the waiver envisaged in the ministerial regulations, only gets a waiver in respect of additional tax, interest and penalties, and gets no relief in respect of the principal amount of tax.

However, the additional tax, interest and penalties can amount to a considerable sum, and a person who does not qualify for amnesty, but does qualify for the waiver should make sure that they apply for the waiver.

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<sup>29</sup> Government Notice R361 dated 20 April 2007

<sup>30</sup> See section 8



## Scope of the relief granted

As with the Tax Amnesty Act, The ministerial regulations provide for a waiver in respect of –

- income tax;
- employees' tax;
- value-added tax;
- withholding tax on royalties;
- secondary tax on companies
- contributions payable in terms of the Unemployment Insurance Contributions Act;
- levies payable in terms of the Skills Development Levies Act.

However, unlike the Tax Amnesty Act, the waiver is in respect, not of the principal amount of tax, but only in respect of any additional tax, interest or penalty in respect of these taxes.<sup>31</sup> The regulations refer to such additional tax, interest or penalty as a “business tax debt”.<sup>32</sup>

The maximum amount that can be waived under the ministerial regulations in respect of any applicant is R1 million.<sup>33</sup>

### Commentary

Where a person who is granted amnesty, such amnesty will also cover additional tax, interest and penalties in respect of the amount for which amnesty was granted.<sup>34</sup>

## The amount that may be waived

If application is properly made for a waiver under the ministerial regulations, and the application is granted, the waiver will apply to any additional tax, interest or penalties outstanding at the close of business on 31 December 2006.<sup>35</sup>

In determining the amount so to be waived, any credits or refunds due to the applicant as at 31 December 2006 must first be off-set.<sup>36</sup>

However, SARS is not permitted to waive –

- a “business tax debt”, as defined, to the extent that it exceeds R1 million;

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<sup>31</sup> Regulation 1

<sup>32</sup> *Ibid*

<sup>33</sup> Regulation 9

<sup>34</sup> Section 9(1)

<sup>35</sup> Regulation 8(1)

<sup>36</sup> Regulation 8(2)

- an amount paid after the close of business on 31 December 2006 in respect of a business tax debt or other tax debt outstanding on that date, to the extent that it exceeds the amount of any other tax debt outstanding on that date.<sup>37</sup>

### Commentary

Where an applicant qualifies for and is granted amnesty under the Tax Amnesty Act, there is no ceiling to the amount of tax for which amnesty is granted. By contrast, when a waiver is granted in terms of the ministerial regulations, the maximum amount that can be waived is R1 million.

## Procedure for applying for relief

A person who applies for the waiver of a “business tax debt” – which, as was noted above, is defined<sup>38</sup> as additional tax, interest or penalties, imposed in respect of the stipulated taxes – must submit an application to SARS by no later than 30 June 2007 in the prescribed form.

### Commentary

In practical terms, a person who wishes to apply for the waiver envisaged in the ministerial regulations must download from the SARS website ([www.sars.gov.za](http://www.sars.gov.za)) form SBA 001R, complete this form and submit it at any SARS office, together with (in the case of an applicant who is an individual) a statement of assets and liabilities, and (in the case of an applicant who is a trust, close corporation or unlisted company) the financial statements or balance sheet of the entity as at the end of the 2006 year of assessment.

The applicant must, together with the application, submit all returns outstanding as on 31 December 2006 that have not previously been furnished.<sup>39</sup>

## SARS must notify the decision

SARS is obliged (if the applicant complies with the requirements laid down in the regulations) to approve an application for waiver (up to R1 million) in respect of additional tax, interest and penalties if the application has been timeously submitted in the proper form.

SARS must, in due course, deliver to the applicant a notice of the decision to approve or deny the application. If the application is denied, SARS must give reasons for such denial.<sup>40</sup>

If the application for waiver is refused, the applicant has a right of objection and appeal.<sup>41</sup>

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<sup>37</sup> Regulation 9

<sup>38</sup> Regulation 1 *sv* “business debt”

<sup>39</sup> Regulation 5(2)(b)

<sup>40</sup> Regulation 6(1)

<sup>41</sup> *Second Small Business Tax Amnesty and Amendment of Taxation Laws Act 10 of 2006, section 6(1)*

## Circumstances in which the application for waiver will not be granted

SARS is not permitted to make the waiver provided for in the regulations if, before the application has been submitted to SARS –

- the sheriff of the High Court has attached the assets of the applicant under a writ of execution obtained by SARS in respect of the additional tax, interest or penalties in question;
- sequestration or liquidation proceedings have been instituted against the applicant; or
- SARS has delivered a notice to the applicant or the latter's representative advising of an audit or investigation relating to the applicant's failure to comply with tax legislation, unless SARS has, before the applicant submits the application, has given notice that the audit or investigation has been withdrawn or concluded.<sup>42</sup>

## Agreement between SARS and the applicant

If an application for waiver in terms of the ministerial regulations is approved, SARS and the applicant must enter into and sign an agreement which provides that the balance of the tax debt (if any) plus any interest, must be paid by the applicant within six months from date of signature, so such longer period as SARS allows, and any other conditions that SARS may impose.<sup>43</sup>

## Circumstances in which SARS is not bound to the agreed waiver

If an application for waiver is approved by SARS, and an agreement is entered into and signed by SARS in this regard, such waiver will be void *ab initio* if the applicant –

- failed to make full disclosure in the application of the information required in the application or in any outstanding returns submitted with the application for waiver or within such further period as SARS permits;
- supplied any materially incorrect information to which the waiver relates; or
- fails to comply with any condition contained in the waiver agreement entered into with SARS.<sup>44</sup>

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<sup>42</sup> Regulation 7

<sup>43</sup> Regulation 10

<sup>44</sup> Regulation 11

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