

Tax Law Review

November 2012

Tax Administration Act 28 of 2011

The Tax Administration Act (No. 28 of 2011)

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In this document:

- “**TAA**” means the Tax Administration Act (No. 28 of 2011); and
- “**TAAG**” means the “Short Guide to the Tax Administration Act” issued by SARS on 10 August 2012

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1 Introduction and definitions

1 Introduction and definitions

1.1 Objects & Purpose

The introduction of the TAA (Tax Administration Act) is primarily intended to incorporate into one piece of legislation certain generic administrative provisions which are currently duplicated in various Tax Acts. Whilst this is a meaningful result in itself, it also advances National Treasury's project to re-write the entire Income Tax Act.

The "Objects" memorandum that accompanies the TAA also uses concepts like "modern administration", "consolidation" and "alignment of disparate requirements".

Note, however, that even though the majority of the TAA provisions can be described as "alignment" and "consolidation", there are also some significant new concepts, powers and obligations being introduced. In this respect, the Objects Memorandum also claims that "the TAA seeks to achieve a balance between the powers and duties of SARS, on the one hand, and the rights and obligations of taxpayers, on the other".

*Many commentators—including PwC—claim that this "balance" has **not** been achieved. Rather, the TAA remains skewed in favour of SARS and compliant taxpayers do not (in some cases) have sufficient protection against potential abuses of power by individual SARS officials.*

The specific Tax Acts that are affected are the:

- Transfer Duty Act (No. 40 of 1949);
- Estate Duty Act (No. 45 of 1955);
- Income Tax Act (No. 58 of 1962);
- Value-added Tax Act (No. 89 of 1991);
- Skills Development Levies Act (No. 9 of 1999);
- Unemployment Insurance Contributions Act (No. 4 of 2002);
- Diamond Export Levy (Administration) Act (No. 14 of 2007);
- Securities Transfer Tax Administration Act (No. 26 of 2007); and the
- Mineral and Petroleum Resources Royalty (Administration) Act (No. 29 of 2008).

Accordingly, many of the administration provisions in these individual Tax Acts will be deleted simultaneously with the coming-into-operation of the TAA.

Note, however, that there are several administrative provisions that remain to be housed within the specific Tax Acts. Furthermore, a notable exception—i.e. that is *not* covered by the TAA—is the Customs and Excise Act (No. 91 of 1964). The matter of potential conflicts between the TAA and other Tax Acts is addressed in s4 TAA (see "*Application of Act*" discussed below in 2.1).

The TAAG also comments that not only are various provisions still housed in the old Acts but that some represent additional requirements. At section “A” in the TAAG VAT is given as an example where the standard document retention provisions will be in the TAA but that the VAT Act will have supplementary provisions that have to be complied with in addition.

1.2 Effective dates

According to **s272(1)** of the TAA, it will come into effect on a date to be proclaimed by the President. Note that **s272(2)** does envisage the possibility that different parts of the TAA could take effect on different dates.

*PwC Comment: The President has by proclamation set the date of commencement of the TAA at **1 October 2012** with only the provisions relating to interest being deferred to a date yet to be effected by notice.*

Despite the general rule above, certain specific matters (albeit minor consequential amendments) have predetermined effective dates.¹

The TAAG (at “A”) only states that the TAA has no force and effect until the commencement date has been promulgated which is stated as being approximately three (3) months after 4 July 2012, thus during Oct 2012.

1.3 Definitions

The majority of definitions are contained in **s1** of the TAA.

However, certain chapter-or-part-specific definitions are housed within the relevant chapters or parts of the TAA. In this document, the definitions are not listed separately but rather referred to within the appropriate context. However, it is useful to note that the definitions used in the TAA can probably be categorised as either:

- Entirely new definitions —i.e. not already contained anywhere else in existing Tax Acts; or
- Amended definitions —i.e. existing concepts imported from existing Tax Acts, but which have significant amendments; or
- Replicated definitions —i.e. existing concepts that have been replicated verbatim, or with only minor or inconsequential amendments, from other Tax Acts.

¹ These are:

1-Apr-12: Amendments to s66(13) ITA in respect of the period covered by the income tax return in the year when a SA-resident taxpayer becomes non-resident [s272(3)];

1-Jan-11: Insertion of a deduction into the PAYE rules (a new para (cA) into the para 2(4) of the 4th Sch. ITA), to take into account insurance premiums that are deemed to have been incurred by an employee [s272(4)]; and

1-Mar-10: A minor textual amendment to s4(1)(b) of the Mineral and Petroleum Resources Royalty Administration Act.

| New definitions | | |
|---------------------------------------|-------------------------------|------------------------|
| additional assessment | original assessment | serious tax offence |
| administration of a tax act | practice generally prevailing | shareholder |
| administrative non-compliance penalty | premises | tax board |
| biometric information | presiding officer | tax court |
| effective date | public notice | tax debt |
| fair market value | public officer | tax offence |
| income tax | relevant material | tax ombud |
| international tax agreement | responsible third party | tax period |
| jeopardy assessment | return | taxpayer information |
| judge | SARS confidential information | tax reference number |
| magistrate | SARS official | thing |
| official publication | self-assessment | understatement penalty |
| | Senior SARS official | withholding agent |

| Amended definitions | Replicated definitions |
|----------------------------|-------------------------------|
| assessment | Commissioner |
| business day | company |
| date of assessment | connected person |
| document | date of sequestration |
| information | prescribed rate |
| reduced assessment | SARS |
| reportable arrangement | |
| representative taxpayer | |
| taxpayer | |

PwC comment: The use and interpretation of definitions is confused by the use of specific quotation marks (‘ ’) in some cases –to indicate that a term is being used in its defined sense².

Specifically, where terms are defined in s1, they appear to be used without specific quotation marks when they appear elsewhere in the TAA. Thus they must be interpreted to take on the defined meaning in all cases, unless the context clearly indicated otherwise.

On the other hand, where a term is only defined in a specific chapter or part, that term appears to be used only with quotation marks within that chapter or part. Presumably, this is intended to mean that those terms have the defined meaning only within the context of that chapter or part, but must take on the general or ordinary meaning when they appear in other parts of the TAA. However, there are some cases where the quotation marks have been omitted when it seems to us that the quotation marks were intended to be used. Technically, this means that the ordinary meaning prevails –but in practice we submit that confusion exists.

² For example, s76 TAA says: “The purpose of the ‘advance ruling’ system is to ...”, with the words ‘advance ruling’ in quotation marks to indicate that it is a specifically defined term in that part of the TAA.

New subsections (2)³ have been added into the sections 14 of the TDA, the EDA, the ITA, the VATA, the SDLA, the UICA, the DELAA, the STTAA, and the MPRRA, to provide that TAA definitions also apply in those Tax acts (unless the context indicates otherwise).⁵

The opening words to s1 TAA also confirm that terms that are defined in other tax Acts, will also have those defined meanings in the TAA —unless the context otherwise indicates.

PwC comment: The interaction of definitions across Acts, and within different parts of the TAA itself, is likely to cause potential conflicts and absurdities. It remains to be seen how this will be dealt with. For example:

- *The TAA uses the word “person” regularly, but the TAA itself has no definition of “person”. Against that, for example, “person” is expressly —but differently— defined in the ITA (which excludes “foreign partnerships”, but includes estates and trusts) and in the VATA (which specifically includes a public authority, municipality and “foreign donor funded project”).*
 - *The definition of BGR (“general binding ruling”) is contained in s75 TAA, not in s1 TAA —which means that the definition is relevant only for Chapter 7 TAA (and that term is in fact used in quotation marks in Chapter 7). However, this could also mean that where the term BGR is used elsewhere in the TAA, then it remains undefined? (For example, the s1 definition of “generally prevailing practice” also includes any BGR.)*
-

³ S1(3) in the case of the MPRRA

⁴ A minor technicality is that all the existing definitions in these sections 1 have not been moved into a newly created subsection (1)

⁵ See paras 1(d), 12(d), 23(o), 108(h), 148(d), 157(d), 167(d), 172(c), Sch. 1, TAA

1 General Administration Provisions

2 General Administration Provisions

2.1 In general (Part A)

Purpose of the Act (s2)

A new purpose statement has been added which is not currently in either the ITA or VATA and sets out four purposes for the TAA, namely:

- (a) aligning the administration of all the Tax Acts;
- (b) prescribing the rights and obligations of taxpayers (and others);
- (c) prescribing the powers and duties of the administrators (essentially SARS); and
- (d) giving effect to the “*objects and purposes of tax administration*”.

PwC comment: In relation to item (d) above, we note that:

The phrase “tax administration” is not defined and it is unclear what the scope of this term is and if it is different to the term “administration of a tax act” which is defined in s3 –see later.

In trying to understand what the “objects and purposes” of tax administration could be, it might be useful to review what SARS considers to be tax administration best practice, as mentioned in its “Objects Memorandum” (section 2.1):

“In drafting the TAA, due regard was given to the following principles of international best practice in tax administration:

Equity and fairness to ensure that the tax system is fair and also perceived to be fair, which should in turn enhance compliance.

Certainty and simplicity so that tax administration is not seen as arbitrary but transparent, clear and as simple as the complexity of the system allows.

Efficiency, where compliance and administration costs are kept to a minimum and payment of tax is as easy as possible.

Effectiveness, so that the right amount of tax is collected, active or passive non-compliance is kept to a minimum, and the system remains flexible and dynamic to keep pace with technological and commercial development.”

Administration of Tax Acts (s3)

This provision incorporates s2 ITA and s4 VATA—which essentially make the Commissioner responsible for the administration— as well as s74 ITA which attempts to define the term “*administration of a tax act*”. In the ITA a new s2(2) is added, and in the VATA a new s4(2) is added to specify that administrative matters not regulated in the ITA/VATA are regulated in the TAA.⁶ S74 ITA and s57 VATA is repealed in its entirety.⁷

⁶ See paras 24 and 109, Sch. 1, TAA

⁷ See paras 64 and 141, Sch. 1, TAA

The main part is **s3(2)** which explains what “*administration of a tax Act*” means. It lists items like: obtain information, ascertain if returns have been filed, establish identities, determine tax liability, collect tax and make refunds, investigate offences, give effect to international agreements, etc.

Note that the TAA (**s3(1)**) technically makes “SARS” —as an entity— responsible for the administration, and refers to SARS as being “*under the control or direction*” of the Commissioner. Under previous law, the administration responsibility vested unequivocally with the Commissioner (as a person).

Although, in the main the concepts are the same, different, substantially broader and all-encompassing language is used in the new TAA provisions. Consider for example, the issue of “*obtaining full information*”:

| | |
|---|---|
| <p>Para (a) of the previous definition of “<i>administration of this act</i>”, in s74(1) ITA refers to the obtaining of “<i>full information</i>” in relation to any:</p> <ul style="list-style-type: none"> (i) amount received or accrued by a person; (ii) property disposed of for no consideration; and (iii) payment made or liability incurred by any person; | <p>On the other hand, s3(2)(a) TAA refers to the obtaining of “<i>full information</i>” in relation to :</p> <ul style="list-style-type: none"> (i) anything that may affect the liability of a person for tax in respect of a previous, current or future tax period; (ii) a taxable event; or (iii) the obligation of a person (personally or on behalf of another) to comply with a tax Act; |
|---|---|

Another example is that SARS’s rights and duties under an “*international tax agreement*”⁸ were not expressly covered before, but are now (in **s3(2)(i)**).

PwC comment: It is noted that the interpretation of the definition of “administration of a [tax] act” (per s74 ITA) has for a long time been subject to debate and dispute, so it is of concern that the new text in the TAA seems to extend and broaden the definition even further. For example, the reference to “future” tax periods (see the s3(2)(a) comparison above) makes it clear that forecasts and budgets may be requested —which was sometimes in dispute under the previous law— but it now also opens up a new area of debate around what other forward-looking information might be required. There are several other examples and uncertainties.

S3(3) also adds a new deeming provision in relation to foreign tax administration assistance, in terms of which the actions undertaken by SARS in response to requests from a foreign state, and in some cases the actual documents of the foreign state (to be served by SARS), are deemed to be done under the provisions of the TAA.

The TAAG (at C 2.3) expresses SARS’ interpretation and application of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) in relation to administration of a tax act. It confirms that PAJA overrides the TAA and that deviations of the fairness provisions in PAJA are done so in accordance with the exclusions of s 3(4) & (5) PAJA. It should however be noted that the onus will

⁸ Defined in s1 to mean agreements with other Governments, and presumably includes double tax treaties, exchange of information agreements, etc.

remain on SARS (as administrator) to prove that it meets the “reasonable and justifiable” criteria set in s 3(4)(b) PAJA. The TAAG also notes that not all actions of SARS are reviewable under PAJA as it expressly requires such action to adversely affect the rights of any person and to have a direct legal effect. Some of SARS’ examples of excluded actions in the TAAG such as taking civil judgements without notice may in future still be tested in future in the courts against the principles of PAJA, especially where such judgements go against other human rights matters such as primary residence disposals and attachment all income without allowance of living expenses.

Application of Act (s4)

This is a new provision determining the persons generally to whom the TAA applies, namely “every person who is liable to comply with a provision of a tax Act”.

It also contains conflict clauses by providing that if the TAA is silent or inconsistent in respect of the administration of a Tax Act, then the provisions of the relevant “tax Act” supersede the TAA.

This provision potentially results in duplication for taxpayers and tax practitioners, as they now will have to not only look at two different acts, but also determine whether the Tax Act has provisions which deal with a matter that the TAA either does or does not have.

Note also the PwC comment under 1.3 above, regarding the potential confusion around the meaning of the term “person”.

Practice generally prevailing (s5)

The specific description of “practice generally prevailing” is a new concept. **S5(1)** provides that is only a practice that is set out in an “official publication” regarding the “application or interpretation” of a tax Act.

“Official publication” is a defined term in **s1** TAA, and means a binding general ruling, interpretation note, practice note or public notice issued by the Commissioner or a Senior SARS official. A “public notice” (also defined in s1) and is limited to notices published in the government *Gazette*.

The circumstances in which such publication will cease to be prevailing practice are set out in **s5(2)**, e.g. if the relevant publication is withdrawn, or where the practice is *materially* affected by a change in statute or a court decision, etc.

PwC Comment: The concept of “official publication” is not extended to SARS’ Guides, which is problematic as many taxpayers rely on the SARS’ guides in adopting tax positions. PwC has submitted representations in this respect.

2.2 Powers, Duties & Authority (Parts B – E)

Powers & Duties, Delegation and SSO’s (Senior SARS officials)

The powers and duties of the Commissioner and SARS officials are governed by **s6** TAA, which is in many respects similar to 3 ITA and s5 VATA.

Background: This deals with matters like the authority of the Commissioner and other SARS officials to exercise certain powers and duties, as well as delegated roles.

The new concept of a “senior SARS official” (“SSO”) is also introduced in **s6(3)**, meaning either:

- (a) the Commissioner;
- (b) a SARS official specifically authorised as a senior SARS official —i.e. having “*specific written authority from the Commissioner*” to exercise a power required by the TAA to be exercised by a SSO; and
- (c) a SARS official occupying a post specifically designated for the purpose of exercising a power required by the TAA to be exercised by a SSO.

PwC Comment: It appears that (except for the Commissioner) the question of whether a SARS official is a “senior” SARS official is not determined with reference to the individual’s designation, ranking or grade per se within the SARS organisation, but rather with reference to his/her role, function or duty.

Technically, it appears that if the Commissioner specifically authorises any SARS official to do something that can only be done by an SSO, like (say) represent SARS in the Tax Court (s12(1)), then that person is automatically promoted to the level of SSO —not by virtue of the fact that the person receives the specific promotion to or designation as “senior SARS official”, but rather by virtue of the fact that he/she was instructed to do something that can only be done by a SSO. Thereafter (it seems) that the SSO is entitled to do anything else that is reserved for SSOs like (for example) withdraw a SARS notice (s9(1)(b)) or carry out a warrantless search order (s63(1)).

It is unclear how taxpayers will verify that a power has been delegated to a specific official or post, since an ordinary “SARS official” can, by definition, also include a contractor —and taxpayers are not likely to be privy to post designations within SARS.

Under **s6(6)** the Commissioner may restrict a general power of ordinary SARS officials, by specifying (by public notice) that certain powers or duties in *other* Tax Acts may only be exercised by the Commissioner personally or by an SSO. (However, the Commissioner does not have a similar authority in respect of the TAA —i.e. if the TAA says that something can be carried out by an *ordinary* SARS official then the Commissioner cannot reserve that function for only SSOs.)

PwC Comment: The power to restrict a general power contained in a Tax Act (other than the TAA) is a new extension of the Commissioner’s powers, and it is questionable whether it is welcome —as it in effect provides the Commissioner with the power to legislate by “public notice” and amend provisions related to powers and duties currently contained in a Tax Act without Parliamentary scrutiny.

The requirements for a valid delegation of the Commissioner’s s6 powers are contained in **s10** (a new provision), which regulates the manner of delegation in that it must conform to certain requirements i.e.:

- (a) must be in writing;
- (b) is only effective from the date when signed by the person *receiving* the delegation; and
- (c) remains subject to any limitations/conditions imposed by the Commissioner.

S10(2) also provides that the *Commissioner* retains responsibility for the exercising of the delegated power or the performance of the delegated duty.

As regards delegation by a SSO, **s6(4)** permits “ancillary” tasks to be executed by an official under the SSO’s or Commissioner’s control or by “the incumbent of a post under the SSO’s control”—which presumably also means that non-ancillary tasks cannot be delegated.

PwC Comment: No obligation is placed on the Commissioner or the delegated person to present the written delegation of power or to inform an affected taxpayer if such power has been amended or repealed with the taxpayer having to relying on an assumption of the deeming provisions in s9. For example if settlement procedures are undertaken in terms of s149 TAA (equivalent to the previous s88D ITA) between SARS and a taxpayer, and SARS is represented by a SARS official with delegated powers by the Commissioner, the taxpayer will not ordinarily be aware of the actual extent of the powers delegated to the SARS official, nor of any subsequent amendments to the mandate of the SARS official?

The TAAG (at C 2.6.2) dealing with the powers of SSO’s confirms that a SARS official acting under delegation must be authorised in writing with the mandate, but does not deal with SSO position appointments. The TAAG thus does not address the concerns raised above other than possibly providing taxpayers the opportunity to request the written authority and determine the mandate given to the SARS official under the Promotion of Access to Information Act.

The power to delegate the approval of a pension or provident fund to the executive officer of the Financial Services Board, in s3(5) ITA has been retained in the ITA (together with right to object and appeal certain decisions), i.e. is not part of the TAA.

Conflict of interest (s7)

This is a new provision to prevent the Commissioner or a SARS official from exercising powers in circumstances where bias will exist.

PwC Comment: No consequences are prescribed where a SARS official or the Commissioner exercises a power in contravention of this section. Thus no remedy is available to the taxpayer other than to obtain relief from a court or to approach the Public Protector, or perhaps the Tax Ombud.

Identity Cards (s8)

This is a new provision and requires SARS officials, when personally exercising powers under the TAA, to—upon request by a member of the public— produce an identity card. Members of the public are “*entitled to assume*” that the person is *not* a SARS official if he/she fails to produce an ID card upon request.

PwC Comment: It is not clear what the content of the identity card will be as no minimum information is prescribed. It is also unclear whether it is expected to indicate whether the official is a SSO. A further concern is that no verification procedure (or requirement for such procedure) is prescribed so that taxpayers can confirm the authenticity of the identity card.

Decision or notice by SARS (s9)

In the main, s9 is similar to the previous s3(2) & (3) ITA and s5(2) VATA which are deleted⁹.

Background: These provisions create a presumption that SARS officials effecting decisions and notices do have the requisite authority. It also authorises the withdrawal of such notices/decisions. For certain notices/decisions, they may not be withdrawn with retrospective effect after 3 years, provided all relevant facts were known at the time of issue.

Whereas the previous ITA/VATA rules cover decisions, notices *and communications*, the new TAA rule does not cover “communications” (i.e. only decisions and notices are contemplated) in **s9**. Furthermore, **s9(1)** considers that:

- a “decision” is made by “a SARS official” —i.e. a natural person; whilst
- a “notice” is issued by “SARS” —i.e. as an entity.

Assessments appear to be excluded. Specifically, s9(1) excludes “a decision given effect to in an assessment” or a “notice of assessment”.

PwC Comment: Presumably, this exclusion is to ensure that assessments remain subject to their own separate rules on validity and prescription.

Presumably (also) it seeks to circumvent the argument that certain discretionary decisions can be deemed to have been made purely as a result of an assessment being issued. For example, if a taxpayer applies (in a tax return) a wear and tear rate that is not in accordance with IN 47, it might be have been arguable that that SARS’s discretionary power was exercised by virtue of the issuing the assessment —and thus the effect of the exclusion in s9(1) is to prevent the presumption and validity rules in s9 from applying automatically.

However, given that the effect of the majority of “decisions” by SARS officials will ultimately be reflected in assessments, it is not clear what kinds of decisions will remain to be covered by s9.

Previously, the presumption as to the SARS official having the proper mandate did not appear to be subject to scrutiny/challenge. Against that, **s9(1)(a)** now asserts the presumption only “until proven to the contrary” —which seems to allow either the taxpayer or SARS to challenge the authorisation.

PwC Comment: It is submitted that this is more likely to be to the detriment of taxpayers, since taxpayers are less likely to be able to establish whether the proper mandate existed in the first instance.

S9(1)(b) now also provides that a taxpayer can request that the decision or notice be withdrawn.

As regards the three-year protection against retrospective withdrawal of certain decisions/notices:

- Whereas the previous law reckoned the date from date of the notice/decision, the TAA rule (**s9(2)**) determines the 3-year period from the *later* of either (i) the date of the notice or (ii) the date of the *assessment* that gives effect to the decision.

⁹ See paras 25 and 110, Sch. 1, TAA

PwC Comment: Presumably the reference in item (ii) to “assessment” means the first assessment that gives effect to the decision. Otherwise, the decision could effectively be remain liable to retrospective withdrawal in perpetuity. (For example, if an approval (decision) is given for a specific s11(e) rate during a year of assessment and the first return is assessed only two years later, then it is expected that SARS is not prohibited from amending/withdrawing the decision within the first 5 years (instead of 3 years) of making the original decision —but no withdrawal with retrospective effect may take place after the expiration of that period.)

More critically, however, it is not clear how such a validity period would be applied when the very concept of a decision that is “given effect to in an assessment”, is excluded under s9(1).

- Whereas the 3-year protection previously only applied to decisions exercised under *discretionary* powers, the new **s9(2)** effectively applies to all decisions or notices (subject to the general exclusions mentioned above).

Legal Proceedings on behalf of the Commissioner

Previously, s83(12) and s83A(8) ITA¹⁰ dealt with which officials are authorised to participate in legal actions on behalf of SARS.

In the TAA, **s11** determines that civil proceedings may only be instituted or defended by the Commissioner him/herself or a SARS official specifically authorised by the Commissioner.

SSOs may :

- lay criminal charges relating to a tax offence (**s11(3)**);
- appear *ex parte* in a judge’s chambers in the Tax Court or High Court (e.g. warrant applications) – **s12(1)**; and
- appear in the Tax Court or High Court, but only if that SSO is an advocate or an attorney (**s12(2)**)

PwC Comment: As regards appearances in civil proceedings, s11(2) creates the presumption that any SARS official who does in fact appear must be regarded as duly authorised —“until proven to the contrary”. It is noted that the taxpayer is at a disadvantage (compared to SARS) in trying to prove that the SARS official does not have the requisite authority. No formal mechanism exists for such an enquiry.

Since attorneys generally do not have an automatic right of appearance in the High Court (and have to apply for such right in terms of the Right of Appearance in Courts Act, 62 of 1995), it is unclear what s12(2)(b) seeks to achieve by authorising attorneys (who are also senior SSOs) to appear in the High Court. Either:

- *it supersedes the right-of-appearance law, i.e. effectively authorising such attorneys to appear in the High Court —and it is not clear why the TAA would seek to do this; or*
 - *it is simply confirming that such attorneys may appear on behalf of SARS, but subject to the right-of-appearance rules —but then it is not clear why the advocates (in s12(2)(a)) are not authorised to appear on SARS’s behalf in the Supreme Court or in the Constitutional Court.*
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¹⁰ Deleted now, by para 66, Sch. 1, TAA

Powers and duties of the Minister

s13 TAA is similar to the existing s4A ITA and provides for the delegation of powers and duties by the Minister to either the Deputy Minister (who does not appear to be authorised by the TAA to on-delegate such powers / duties) or to the Director-General who in turn may delegate to any other person under his supervision and control.

However a limitation is added in **s13(1)(b)**, whereby the powers under s14 (Appointment of Ombud) and s257 (Regulations for the TAA, and Regulations for the Ombud) must be exercised by the Minister personally. The current s4A ITA is also amended¹¹ to exclude delegation powers for notices and regulations (i.e. the Minister must exercise these powers personally).

In **s14(1)**, the Minister is obliged to (“*must*”) appoint the “*Tax Ombud*” (to a renewable 3-year term). The Minister is also authorised to determine the Tax Ombud’s remuneration and allowances (**s14(1)(b)**), and to remove the Tax Ombud in the case of “*misconduct, incapacity or incompetence*” (**s14(2)**). The Tax Ombud is discussed further in section 2.3 below.

PwC Comment: The compromise –or perceived compromise– of the Tax Ombud’s independence is of is of great concern for various reasons (discussed later). This concern is further highlighted by the Minister having the power to (i) renew the term of the Tax Ombud and (ii) determine his/her remuneration. The former criterion was held in Justice Alliance of South Africa v President of Republic of South Africa and Others [2011] ZACC 23, where the Constitutional Court clearly states that the non-renewability of a judge’s term is a factor that guarantees independence of the judiciary from the executive. A similar reason exists for the Judges’ Remuneration and Conditions of Employment Act which ensures that the executive does not affect the independence of the judiciary by determining remuneration and benefits. Both these independence criteria have been ignored in the case of the Tax Ombud.

2.3 Tax Ombud (Part F)

Appointment & Staff

As indicated above (**s14**), the authority to appoint the Tax Ombud vests with the Minister of Finance. According to **s14(5)**, the Tax Ombud:

- (a) is accountable to the Minister;
- (b) must have a “*good background in customer service as well as tax law*”; and
- (c) must *not* at any time in the preceding 5 years have been convicted of theft, fraud, forgery, etc., or any offence involving dishonesty, for which the sentence was either imprisonment exceeding 2 years (without the option of a fine) or a fine exceeding certain prescribed amounts.

The Ombud’s staff must be employed in terms of the SARS Act, and seconded to the Ombud’s office (after consultation with the SARS Commissioner) – **s15(1)**. The actual expenditure of the Ombud’s office is to be funded by SARS.

¹¹ By para 27, Sch. 1, TAA

PwC Comment: The Ombud’s independence (actual and perceived) from SARS remains an issue of concern. It is considered undesirable that: (i) there are restrictions on the Ombud’s ability to freely select his/her own staff (i.e. the staff must be those seconded by the Commissioner, and be employed under the SARS Act), and (ii) the funding of the Ombud’s office (including budgets, etc.) is effectively in the hands of National Treasury and the Minister of Finance.

If the Ombud is temporarily absent or unable to perform his/her functions, he/she may appoint an acting Tax Ombud from amongst his/her staff, but only for up to 90 days at a time (**s15(2) & (3)**). If the actual Ombud position itself is vacant, the *Minister* may appoint an acting Tax Ombud (from amongst the staff of the Ombud’s office), but only for up to 90 days at a time (**s14(3) & (4)**).

Mandate & Authority

The job of the Tax Ombud is essentially to review complaints about bad service. In **s16(1)** the Tax Ombud is mandated to:

- “review and address any complaint” by a taxpayer
- regarding a “service matter or a procedural or administrative matter”
- arising from SARS’s application of a tax Act.

S20(2) confirms that the Ombud’s recommendations are *not* binding on SARS nor on taxpayers.

More specifically, **s16(2)** requires the Ombud to:

- (a) resolve complaints through “*mediation or conciliation*”;
- (b) act independently;
- (c) follow informal, fair, and cost-effective procedures;
- (d) inform taxpayers of the Ombud’s mandate, and of complaint procedures;
- (e) facilitate taxpayers’ access to SARS’s internal complaints resolution ; and
- (f) identify and review service related systemic and emerging issues that negatively impact taxpayers.

Importantly, complaints may only be considered by the Ombud if the complainant (taxpayer) has already exhausted all SARS’s internal “*available complaints resolution mechanisms*” (**s18(4)**). However, if there are “*compelling circumstances*” for not first exhausting all the SARS mechanisms, the Ombud may review the complaint. In **s18(5)**, factors to be considered in deciding whether there are such “*compelling circumstances*” include systemic problems, potential hardship for the taxpayer, and timing.

PwC Comments: It is not clear what how the term “exhausted” must be interpreted and applied. For example, if SARS is tardy in responding to an objection, and the taxpayer raises the matter with the SSMO¹², the question then arises as to how much time should the SSMO be allowed to resolve the matter (24 hours, 48 hours, etc.) before it may be referred to the Tax Ombud.

The TAAG does not provide any guidance on what internal complaints mechanisms are, nor when these mechanisms can be considered to have been exhausted, nor on what would be compelling circumstances to exclude these mechanisms.

¹² SARS Service Monitoring Office

The matters which the Ombud may *not* review are listed in **s17**. Legislation, tax policy, and matters decided by (or currently proceeding in) the Tax Court, cannot be considered by the Ombud at all (**s17(a) & (d)**). SARS policy and prevailing practice can only be reviewed to the extent that it relates to a service, procedural, or administrative matter. Objections and appeals may not be reviewed, although the administrative matters relating objections and appeals may be reviewed.

Although the mandate provisions in **s16** indicate that the Ombud “*must*” review complaints, the review rule in **s18(1)** provides that the Ombud “*may*” review any issue (upon request from a taxpayer). The Ombud is authorised to determine the *manner* of the review (**s18(2)(a)**), and also to determine whether a review should be terminated before completion (**s18(2)(a)**). The factors to be taken into account in considering the early termination of a review include the age of the review-request, the seriousness of the matter, whether the review-request was made in good faith, and so forth (**s18(3)**).

PwC Comments: The Tax Ombud does not have any determinative powers. The dominant view (concern) amongst commentators is that the Ombud is simply a statutory version of the SSMO (SARS Service Monitoring Office), which makes findings and recommendations –but still without any power to compel SARS to undertake (or refrain from undertaking) any action.

Reports & Confidentiality

The Ombud is required to inform the requester (taxpayer) of the results of the review or action taken (**s18(6)**), although the time and manner of such communication is at the Ombud’s discretion.

The Ombud must also report to the Minister as well as to the SARS Commissioner (**s19(1)**). The reports are expected to focus on the 10 most serious complaints (including actions taken, resolution (or not), etc.), and also recommendations for administrative actions (**s19(2)**). The Minister is also required to table the Ombud’s annual report in parliament. (**s19(3)**)

For the sake of attempting to resolve issues at the right level, the Ombud is expected to communicate with any SARS officials identified by SARS. (**s20(1)**)

PwC Comment: There are also concerns that compelling the Ombud to remain in communication with “SARS officials identified by SARS” in order to resolve complaints, may conflict with the Ombud’s discretionary mandate to resolve a matter efficiently and effectively.

SARS is required to allow the Ombud to access SARS information (as appropriate in relation to the complaint-review), but the confidentiality rules contained in Chapter 6 of the TAA remain in point (**s21(1)&(2)**). The Ombud (and staff) may not disclose its own information to SARS (**s21(3)**), except to the extent of the performance of the Ombud’s functions.

PwC Comment: It is unclear what the legal status is of information acquired by SARS via the Ombud, and whether it can be used in proceedings against the taxpayer. This provision also does not provide a mechanism for information to be supplied by the taxpayer to make his/her case, and to prevent the Ombud from making such information available to SARS. Furthermore by referencing Chapter 6 (confidentiality) in its entirety the Ombud may also be compelled to make certain disclosure under those provisions to the specific state entities and may also be compelled to disclose to protect the “integrity of SARS”.

3 Registration

3 Registration

S22 TAA deals with the registration of taxpayers across all tax types, and supplements, by way of amendment to the relevant provisions, the registration sections (e.g. s67 ITA, s23 VATA)¹³ and various other provisions dealing with registration, such as provisional tax, UIF etc.

The timeframe for registration will remain in accordance with the relevant Tax Acts, but where no time frame is stipulated, a person must apply for registration within 21 business days of becoming obliged to register, or within a further period approved by SARS (**s22(2)**).

The TAAG notes that taxpayers will in practice only be deleted as registered taxpayers if there is no outstanding tax liability and taxpayer is dead/liquidated/has no assets in SA. The general requirement for no outstanding tax liability seems in stark contrast to the new Chapter 14 of the TAA dealing exclusively with tax debt waivers and SARS' attempts to remove historical irrecoverable tax debts from their records/budgets.

A person may be required to submit biometric information upon registration (**s22(3)**) for the purposes of ensuring proper identification and counteracting identity theft and fraud. “Biometric information” is defined in **s1** TAA to mean:

“biological data used to authenticate the identity of a natural person by means of—

- (a) facial recognition;*
- (b) fingerprint recognition;*
- (c) voice recognition;*
- (d) iris or retina recognition; and*
- (e) other, less intrusive biological data, as may be prescribed by the Minister in a regulation ...”*

PwC Comment: It is unclear whether biometric information will be stored by SARS and who remains accountable for access to it and who may access it? Furthermore security concerns regarding this information have been raised (as with e-Filing) where the private sector is used as contractor to store taxpayer information. The application of other legislation governing this use of Biometric Information is also unclear, especially in relation to minors who may also be taxpayers as s22(3) limits the application of the biometric information solely to identity verification and identity fraud prevention.

A further concern exists around the secrecy rules contained in Chapter 6. On the one hand, s69(7) provides biometric information can disclosed only to SAPS or the NPA (if related to a potential tax offence) but, on the other hand, it is not clear whether the restriction in s69(7) applies to the entirety of Chapter 6 (including s70) or whether it covers only s69.

The TAAG (at C3.1) states that SARS is investigating the feasibility of future online registrations; however it is unclear how this would impact on the simultaneous drive for biometric verification.

¹³ In s67(1) ITA and s23 VATA, registration is required to comply with the TAA Chapter 3

Failure to submit required particulars and documents upon registration “*may be regarded*” (by SARS) as a non-application —i.e. the taxpayer could be deemed *not* to have applied for registration (**s22(4)**).

The TAAG (at C 3.4) states that an applicant that does not use the right form will be considered not to have applied for registration.

The TAAG (at C 3.4) makes it clear that the registration obligation upon the taxpayer is simply the obligation to apply, but that SARS retains the discretion to register the taxpayer. However, this might leave the taxpayer in a precarious position because if SARS incorrectly does not register the taxpayer (notwithstanding his or her application), nothing seems to prevent SARS from doing so retrospectively at a future date to the detriment of the taxpayer (who may have to rely on PAJA to contest any negative consequences).

Where a taxpayer is obliged to register for any tax—but fails to do so—SARS may nevertheless register the taxpayer as appropriate (**s22(5)**).

In terms of **s23**, a registered person must inform SARS of any change-of-particulars within 21 business days of that change. S23 also lists the information in question, e.g. addresses, banking details, etc. This provision replaces and expands the previous s67(1A)¹⁴ ITA.

The new concept of a single “*taxpayer reference number*” (“TRN”) is introduced in **s24**. This refers to the *possibility* (i.e. SARS “*may*”) of allocating a single reference number in respect of one or more taxes, e.g. a single number for Income Tax and VAT registrations. SARS may allocate a TRN to a person who is not registered (**s24(2)**).

Once a taxpayer has a TRN, **s24(3)** requires that taxpayer to quote their TRN in all communications with SARS —and according to **s24(4)** a document or return may be considered to be invalid if it does not contain the TRN.

¹⁴ Deleted by para para 61(b), Sch 1, TAA

4 Returns & Records

4 Returns & Records

4.1 General (Part A)

The majority of the existing rules on the filing of returns and furnishing of records/information have been replicated into the TAA, although there are several additions and extensions.

As regards the duty to submit returns, **s25** TAA will essentially replace ss65¹⁵ & 69 – 71¹⁶ ITA, and s23(2)-(9) VATA. The return must contain the information prescribed by a tax Act (or by the Commissioner) (**25(2)**), and be signed by the taxpayer or duly authorised representative (**25(3)**).

The TAA (at C 4.1.3) confirms that a return must be signed by the taxpayer or his representative and then the taxpayer will be deemed to be cognisant of the content of the return¹⁷. However it is unclear for the purposes of electronic communications, including eFiling, what serves as a signature. Should the Electronic Communications & Transactions Act (No. 25 of 2002) be applied, a signature cannot be implied (i.e. signature data must be expressly attached as a signature). However the TAA¹⁸ seems to contradict this as it deems the return to have been made and signed by the taxpayer as long as the return “purports” to be made or signed on behalf of the taxpayer - and the taxpayer then has the onus of proving otherwise. Thus the mere “making” of a return seems automatically fulfil the requirements for signature. This also seems to be confirmed in SARS’ FAQ on eFiling, which states that taxpayers do not have to sign eFiled documents. Arguably, it may bring into question the validity of unsigned filed returns.

S25(5) allows SARS –prior to the issue of an original assessment– to request the submission of an amended return to correct an undisputed error on the return.

SARS may also extend the period for filing a return in a particular case, in accordance with procedures and criteria to be published by the Commissioner (**25(6)**), or may extend the period generally or for specific classes by way of public notice (**25(7)**) –but this extension does not affect the deadline for paying tax (**25(8)**).

In terms of **s26**, the Commissioner may (by way of public notice) oblige a person to submit a return in on behalf of another person. This essentially broadens the circumstances identified previously in s69 ITA, and **s26** TAA specifically addresses situation where one person:

- employs;
- pays amounts to;
- receives amounts on behalf of;
- or otherwise transacts with; or
- has control over assets of;

¹⁵ Deleted by para 59, Sch. 1, TAA

¹⁶ Deleted by para 62, Sch. 1, TAA

¹⁷ Section 25(3), TAA

¹⁸ Section 250(2), TAA

the other person.

Under **s27**, the Commissioner may require persons to submit more detailed return, in addition to any return prescribed by a tax Act, concerning any matter.

The TAAG (at 4.1.7) states that these further returns could include interim returns required before a taxpayer emigrates/ceases to be resident before the end of the tax year.

Where financial statements are submitted, SARS may also require a certificate/statement from the taxpayer's book-keeper/accountant. (**s28(1)**) The certificate/statement must set out the extent of work done and whether or not the entries "*disclose the true nature*" of the transactions, etc. **S28(2)** compels the accountant/bookkeeper to submit the requisite statement/certificate, if requested by the taxpayer.

On the question of the duty to keep records, **s29** TAA is essentially a replacement for the old s73A¹⁹ ITA. The period for the retention of records remains at 5 years.

- The default rule is that the 5 year-period is reckoned from the submission of a return.
- Where no return is required, the information must be retained for a period of 5 years from the end of the relevant tax period.

But there does not appear to be a limitation on the retention period in cases where a return is required but not submitted.

The TAAG (at C 4.2.4) confirms the above indefinite period of retention until such time as a return is submitted, whereupon the 5 year period starts to run.

The 5-year rule is superseded by **s32**, which provides that records that are relevant to an audit, investigation, objection or appeal, must be retained until the conclusion of the audit is concluded or the assessment is finalised.

The rules governing the *form* in which the records "*must*" be kept (in **s30** TAA) essentially expands on the previous s73A(3) ITA. The default position is that the records must be kept in the original form unless prescribed otherwise by the Commissioner by way of public notice. Slightly expanded requirements are added (like "*in an orderly fashion and in a safe place*" in **s30(1)(a)**). A SSO may authorise the retention of records in a form acceptable to that official (**s30(2)**).

PwC Comment: A draft regulation has now been issued allowing the retention of documents in electronic format subject to the conditions stipulated.

S31 requires that all records (retained in terms of s29) must be available for inspection (by SARS) in SA. (This is essentially a replica of the principles in s74B ITA.) The stated purposes of the inspection are to either: (a) determine compliance with the record-keeping rules in ss29 & 30 above; or (b) an inspection, audit or investigation under Chapter 5.

¹⁹ Deleted by para 64, Sch. 1, TAA

PwC Comment: A draft regulation has now been issued allowing the retention of documents in electronic format outside SA subject to the conditions stipulated, including various requirements for access to such electronic documents.

4.2 Reportable Arrangements (Part B)

For the most part, **ss34 – 39** TAA are replicas of the existing ss80M – 80T ITA²⁰.

PwC Comment – Background: The overall object of these rules is to compel taxpayers to report certain “arrangements” to SARS, where those arrangements result in a “tax benefit”. We presume that the intended purpose is to put SARS in a position to investigate these transactions as and when they happen (as opposed to waiting for the filing of the tax return or stumbling upon them in audits).

The following are the more significant changes from the existing law:

What is an “arrangement”?

In s34 TAA, the definition of “arrangement” is extended to also include the concepts of “agreement or understanding (whether enforceable or not)” – in addition to the existing concepts of “transaction, operation or scheme”.

PwC Comment: Several commentators consider that this extension of “arrangement” concept is too broad and vague.

Accounting-Tax Mismatches

The TAA attempts to clarify – but it also extends – the confusing concept that existed in s80M(1)(c) ITA. The old ITA provision referred to arrangements that are disclosed as “giving rise to” a “financial liability” for GAAP purposes, but not for Income Tax. The main point of confusion is that the concept of “financial liability” does not exist in Income Tax, so a comparison is impossible. (There are also other criticisms.) In the new **s35(1)(c)** TAA, the targeted arrangement is clarified (and extended) to mean, either:

- an Income Tax *deduction* which is not an *expense* for the purposes of “*financial reporting standards*”; or
- an item of *revenue* under financial reporting, but which is not “*gross income*” for Income Tax purposes.
- Also, a definition of “*financial reporting standards*” is inserted into **s34**, to mean either:
- the “*financial reporting standards*” definition contained in s1 of the new Companies Act (71 of 2008) – where the participant is required by the Companies Act to submit financial statements ;
- the GAAP or other appropriate standards, in other cases.

Hybrid instruments

The previous inclusion of hybrid debt or equity instruments (in s80M(2)(a) & (b)) ITA is *not* replicated in the TAA. The old rule was that arrangements involving hybrid instruments referred to in s8E or s8F ITA

²⁰ Deleted by para 66, Sch. 1, TAA

—but replacing the specified 3-year instrument-terms with 10 years instead— would be potentially reportable.

PwC Comment: It is not clear why this item has been removed from the list of specific targets.

Listed arrangements & Exclusions – Authority with SARS

Whereas the old s80M(2)(c) and s80N(4) ITA authorised the Minister to either specify additional targeted arrangements, or to exclude (i.e. exempt) certain arrangements, the new s35(2) and s36(4) TAA vests these authorities in the Commissioner.

Reporting periods

The new **s37(4)** TAA contains two changes when compared to the old s80O(4). First, a minor consequential change is that the current reference to “60 days” is replaced with “45 business days” – which in either case approximates 9 weeks (so no real change). A similar amendment exists in **s37(5)** in relation to extensions. Secondly (and potentially more importantly), the deadline date is to be reckoned with reference to when an amount is “*first*” received or paid (or accrued or incurred).

PwC Comment: Presumably, this new insertion of the word “first” clarifies that old arrangements (initiated before the Reportable Arrangements rules existed) cannot be caught even if cash flows are still continuing.

Other consequential matters

The previous rules authorising SARS to request additional information (s80R ITA), and also the rules on penalties (s80S), are not replicated in this part of the TAA —but are included in other parts.

5 Information Gathering

5 Information Gathering

5.1 General (Part A)

General

As regards the basis upon which SARS may select a person for inspection, verification or audit, **s40** now grants SARS very broad powers by referring to “*any relevant consideration*”. The selection basis could include “*a random or a risk assessment basis*”.

PwC Comment: The use of the word “may” suggests that there are no circumstances where SARS is compelled by law to conduct an investigation. So, for example, where a person has been reported to SARS for tax evasion (perhaps through SARS’ own whistle-blower hotline), there is nothing that compels SARS to investigate the claim.

The TAAG (at C5.2.1) appears to limit the “prescribed” selection methods to only random and risk assessment based. On the one hand the, TAAG does not discuss the possibility of selection powers wider than these two methods. On the other hand however, there is no restriction on how wide “risk assessment” can be interpreted. For example, the TAAG notes that “obtaining real time information” not only “from taxpayers”, but also “about taxpayers from third parties” are both “key to effective risk management”.

The rules on the authorisation for audits (**s41 TAA**) are largely the same as the old provisions contained in ss74 and 74B(4) ITA²¹, namely that written authorisation is required and that the SARS official undertaking the action must present the authorisation letter. **S41(1)** refers specifically to “*field audit*” or a “*criminal investigation*” and, furthermore, requires the authorisation letter to be granted by a SSO. If the letter is not produced, members of the public are entitled to assume that the person is not a duly authorised SARS official.

The TAAG (C5.2.2) clarifies that the authorisation to conduct such activities is not granted on a case-by-case basis, but rather that a general authority (to undertake audits and investigations) will be granted to general SARS officials – and that this authority will have a specified validity period.

SARS’s duty to keep the taxpayer informed is a new concept, introduced in **s42**. Under **s42(1)** SARS is required to keep the taxpayer up to date on the stage-of-completion of the audit. At the end of an audit or a criminal investigation SARS, must (per **s42(2)**) –within 21 business days after the completion of the audit / investigation– either:

- (a) inform the taxpayer that it was inconclusive (**s42(2)(a)**); or
- (b) provide the taxpayer with a document containing the outcome of the audit (if “*potential adjustments of a material nature*” were identified), although in this case, the 21-business-day period may be extended depending on the “*complexities of the audit*” (**s42(2)(b)**). The taxpayer may, under

²¹ Deleted by para 64, Sch. 1, TAA

s42(4), waive the right to receive this document, in which case (presumably) SARS can probably proceed immediately to the assessment/decision stage.

PwC Comment: A draft regulation has now been issued stating the stage of completion period as firstly 90 days from commencement of the regulation or the commencement of the audit and every 90 days thereafter.

The TAAG (at C5.2.3) emphasises that the obligations to keep taxpayers informed are limited to “so-called in depth audits or criminal investigations”. The TAA does not expressly contain the concept of “in depth audits” so there may be some debate around what this refers to. (It is possible that it might mean “field audits” in contradistinction to “verification”- the latter sometimes colloquially referred to by tax practioners as “desk audits”) .

Upon receipt of the audit-outcome document, the taxpayer has 21 business days to respond to SARS in respect of the document’s “*facts and conclusions*” (**s42(3)**). The taxpayer may request an extension of the response period, and SARS may allow the extension depending on the “*complexities of the audit*”.

PwC Comment: It is unclear in principle that if SARS has exceeded the 21 days period whether this will result in the matter automatically being seen as complex and thus enabling the taxpayer to rely on same argument to request extension of time for submission of a response.

However, if a SSO has a “*reasonable belief*” that the purpose, progress or outcome of the audit will be “*impeded or prejudiced*” by keeping the taxpayer informed of the progress and/or by providing an audit-outcome document, then SARS is not obliged to fulfil those reporting requirements (**s42(5)**). That is, SARS would be permitted to go straight to the assessment/decision stage, without first informing the taxpayer that the audit was complete and/or what the outcome was (**s41(6)**). In this case, **s41(6)** also requires SARS to subsequently provide the taxpayer with the grounds-of-assessment, either within 21 business days of the assessment/decision or within an extended period that may be necessitated by the “*complexities of the audit*”.

PwC Comment: The wide discretion to dispense with the obligation to keep the taxpayer informed, is considered objectionable. It appears to serve no purpose other than to permit an urgent additional assessment where SARS becomes concerned that an original assessment will prescribe before they’ve completed their investigations. Furthermore, even if the urgent assessment is considered potentially reasonable, the subsequent 21-business-days grace period (more than 4 weeks) before the taxpayer receives the grounds-of-assessment letter, is considered unnecessarily long —given that the assumption must be that (ostensibly) the grounds would already have been formulated at the time of the assessment. And note also that that there appears to be NO adverse implications if SARS simply delays or ignores the deadline period for providing the grounds to the taxpayer.

Criminal investigation

When SARS conducts a criminal investigation, **s44(1)** obliges SARS to recognise the taxpayer’s constitutional rights as a suspect in a criminal investigation.

Where an audit reveals that a “*serious tax offence*” might have been committed, the investigation must be referred to a separate SSO responsible for criminal investigations (**s43(1)**). A “*serious tax offence*” is defined in **s1** TAA as a tax offence which carries the liability either of imprisonment for more than 2 years

without the option of a fine, or a fine exceeding the equivalent amount of a fine per the Adjustments of Fines Act²².

After the referral, the audit must be kept separate from the criminal investigation —and the “*relevant material*” subsequently gathered in the audit cannot be used in the criminal proceedings (**s43(2)**). However, the relevant material obtained in the audit *before* the referral remains available to be used in the criminal investigation (**s44(2)**).

If the outcome of a criminal investigation is either that:

- (a) the investigation is not pursued; or
- (b) the investigation is terminated; or
- (c) the case is not prosecuted;

then the material gathered in the criminal investigation must be given to the SARS official responsible for the audit (**s43(3)**). But in any event, **s44(3)** provides that relevant information obtained during a criminal investigation may —irrespective of the outcome of that investigation— be used for the purposes of audit, or even for any other subsequent civil or criminal proceedings.

PwC Comment: The requirement for the separation of information has been criticised as being too subjective, as no written referral is required, and nor is there a requirement for a listing/catalogue of the information gathered up to such date. It thus creates significant scope for dispute over when the referral was done and which information was gathered after the referral. However the TAA²³ clearly provides a timeline when the matter must be referred namely “when it appears that the taxpayer may have committed a serious tax offence”. This still leaves the taxpayer with the hurdle that such timeline would only be determinable on cross examination of the relevant SARS Officials as to when they first thought that such offence may have been committed.

5.2 Inspections, Requests, Audits, Criminal Investigation (Part B)

Inspections

The concept of an “*inspection*” —meaning the physical inspection of premises by a SARS official— now to be governed by **s45** TAA is amended substantially from the rules previously contained in s74B ITA.

On the one hand, the ambit/purpose of an inspection is restricted in that the old rules simply had the vague/broad reference to “*for the purposes of the administration of this Act*”, whereas **s45(1)** will restrict the purpose of the inspection to “*only*” three (3) possible objectives, namely to determine:

- (a) the identity of the occupant;
- (b) whether the occupant is registered for tax; or
- (c) whether the occupant is complying with his/her duty to maintain records.

²² No 101 of 1991.

²³ Section 43(1), TAA

On the other hand however, the SARS's powers under the new rules are extended *substantially* in that:

- There is no longer a requirement for “*reasonable prior notice*” as contemplated in the old s74B(1) ITA —i.e. **s45(1)** TAA permits SARS officials to arrive completely unannounced (“*without prior notice*”).
- There is also no restriction to “*business hours*”—i.e. so the inspection can happen at any time.
- Critically, it does not appear that any authorisation letter is required. The rules on authorisation in **s41** appear to relate only to “*field audits*” and “*criminal investigations*”, and there is no mention in **s45** of authorisation or an authorisation letter (as was the case under s74B(1)&(4) ITA).

PwC Comment: This provision is criticised as opening the scope for abuse by SARS officials. One of the listed outcomes of the inspection is to confirm whether documents have been retained as required by s29 TAA (and in the required form required in s30) —see item (c) above. In this respect, it must be recognised that this inspection can only be practically exercised through SARS's canvassing of the documents on the premises, which at the very least may be an “audit” as this term is not defined. It could also be argued that this is in itself a disguised search without a warrant and thus in contravention of the TAA itself.

Only trade premises that may be inspected —i.e. a SARS official “*has a reasonable belief that a trade or enterprise is being carried on*” (**s45(1)**). Dwellings and domestic premises may not be inspected (except for parts used for trade), unless the occupant consents (**s45(2)**).

Relevant material

The concept of “relevant material” is defined in **s1** TAA as being: “any information, document or thing that is foreseeably relevant for tax risk assessment, assessing tax, collecting tax, showing non-compliance with an obligation under a tax Act or showing that a tax offence was committed”.

The new rules (in **ss46 & 47** TAA) governing SARS's “request for relevant information” is also an extension of the old s74B ITA rules. Some of the important changes include:

- The target population that may be approached to furnish the information is broadened substantially. Not only is it the taxpayer, but it could also be “*another person*” —meaning obtaining information about a taxpayer from some other person (**s46(1)**). Furthermore, the respondent need not be identified specifically by name, as long as the person is “*otherwise objectively identifiable*” (e.g. “the owner”, or the “manager”?).
- Information could be requested (by a SSO) in respect of an objectively identifiable “*class*” of taxpayers (**s46(2)**). For example, could a jeweller be asked for information about his/her clients?
- Information could be required orally, i.e. an interview (**s46(1)**). Furthermore, a SSO may request that the information be provided under oath or solemn declaration (**s46(7)**).

PwC comment: A draft regulation has been issued stating that the interview may be declined if the place of the interview is more than 200km from the person's usual place of residence or business. This however does not apply to listed companies, companies with a turnover in excess of R500m and any group company if any one of the company's in the group is a listed company or exceeds the turnover threshold.

- Information may be requested purely for SARS's internal revenue estimation purposes (**s46(8)**).

- A person may be required to attend an interview at a time and place designated by SARS (**s47**). The stated intention is that such an interview should aim to avert or obviate the need for further verification or audit (and should not relate to a criminal investigation). The interviewed person may also be required to present actual relevant material at the interview. **S47(4)** permits a person to decline the interview if the venue specified by SARS is too far from the person’s home or business. (The Commissioner is to prescribe acceptable distance.)
- The only safeguard that is provided for taxpayers is that the relevant material required by SARS must be referred to in the request “*with reasonable specificity*” (**s46(6)** & **s47(3)**). In other words, a targeted person may reject vague or generic (non-specific) requests.

PwC Comment: The “relevant material” definition is very subjective and substantially increases the scope of this provision.

Furthermore the compulsion to provide information for statistical purposes is to be lamented as this provides a further inconvenience and cost to taxpayers e.g. SARS requesting the taxpayer to provide detailed forecasts shortly before SARS’s own year end.

As regards presenting oneself for an interview, no provision is made for cost-reimbursement, nor that (at the very least) the interview should be at the closest SARS office –especially where it is about another person’s tax affairs. It also does not provide for ancillary matters such as where witnesses are involved where employers are compelled to provide leave for such a person to appear, thus arguably forcing the employee to take unpaid leave. No provision is made for the person to receive minutes of what was said at the interview or that it should be recorded.

Field audits and Criminal investigations

The provisions in **s48** TAA are also based on the previous rules in s74B ITA, although there are now several extensions and new concepts. These include:

- The concept of “*criminal investigation*” is now specifically mentioned, and clarified (in **ss43 & 44**) to be separate from a “*field audit*”. However, for both types of investigations, the *conduct* of SARS officials is regulated by the same rules in **s48**.
- As opposed to the undefined “*reasonable prior notice*” (in the old s74B ITA), **s48(1)** will now set a minimum notice period (before the audit/investigation commences) at “*at least 10 business days*”.
- If the taxpayer wants the notice to be varied, the taxpayer must—at least 5 business days before the listed commencement date— advance reasonable grounds for a variation, in which case SARS “*may*” vary the notice (subject to conditions).

PwC Comment: Concern is expressed over the lack of clarity around how the 10 days is calculated in relation to the issue-date of the notice and the proposed commencement of the audit/investigation. For example, in an exclusively (and efficient) e-filing environment, the dates might be easier to manage but whilst there is still reliance on the traditional postal system the actual determination of the lead time needs to be more clearly described. Given that a person might have a window of just 5 business days to request extension (or other variation), there needs to be certainty that this window will not be further reduced as a result of ill-defined dates. It is also unclear how the “request for relevant material” in s46 which is subject to a “reasonable time” is to be applied in relation to s48 which technically is not just a field audit notification but instead a request to the taxpayer to make available “relevant material” at his own premises, just now within the 10 day time period which may or may not be reasonable.

The TAA will now also expressly require taxpayers to be cooperative with the SARS investigators. **S49(1)** requires the person to provide “reasonable assistance” (and also lists examples like making available “appropriate facilities”) and **s49(2)** prevents any person from obstructing the investigation/audit or from refusing to cooperate. Where the SARS officials make copies using the taxpayer’s facilities, photocopying costs may also be recovered from SARS (**s49(3)**).

PwC Comment: The person who is compelled to provide assistance is the person on whose premises the audit is carried out. S49(1)(b) also places the obligation to answer questions on this person. It is unclear who exactly this person is e.g. does it require ownership or right of use by a person to be “the person on whose premises” or is similar to s63 namely the owner or person in control of the premises? The prohibition against “no person” may refuse to assist must in our opinion be interpreted as referring to the person in s49 and should not be interpreted to extend the general authorisation that SARS may question any person, for example any staff member or person on the premises in terms of this provision. The “self incrimination” rights in s57 and s72 will also have to be read into the obligation in terms of s49 to “assist SARS” by not refusing to answer questions.

The TAAG (at C5.3.4) seems to hold a different view by stating that this power extends to any person on the premises without stating what that person’s relationship must be to the taxpayer other than being physically on site e.g. does it include the taxpayer’s auditors, attorneys, suppliers or clients?

5.3 Inquiries (Part C)

The rules on “inquiries” in **ss50 – 58** TAA are largely similar to the old s74C²⁴ ITA.

Background: Where there is the suspicion of non-compliance or a tax offence, these provisions authorise the appointment (by a judge’s order) of a “presiding officer” to conduct an inquiry. The inquiry essentially involves the questioning of witnesses (who may be compelled to give evidence under oath), the review of relevant material, and whatever the presiding officer deems appropriate. The provisions deal with matters like the powers of the presiding officer, obligations of witnesses, confidentiality, and so forth.

One of the minor changes contained in the new (TAA) rules are that, apart from the judge being satisfied that there is a suspicion (i.e. “reasonable grounds to believe”) of non-compliance or a tax offence, the judge must now also be satisfied that the inquiry is likely to reveal helpful relevant material (**s51(1)(b)**).

PwC Comment: The self incrimination provisions in s57(2) are the subject of much debate (see comments on s72). Unlike s 72, s 57(2) has “perjury” exclusions²⁵ similar to the Insolvency Act²⁶, but also has in addition a “completeness” exclusion²⁷ both which all still remains untested for constitutionality.

²⁴ Deleted by para 64, Sch. 1, TAA

²⁵ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1*

²⁶ Section 64(2A)(b), Insolvency Act 24 of 1936

²⁷ Section 57(2)(c), TAA

5.4 Search & Seizure (Part D)

The rules contained in **ss59 – 66** TAA are largely modelled on the old s74D²⁸ ITA, subject to several additions and amendments.

Warrants

Whereas the current rules require the warrant to be issued by a judge, the TAA opens up the possibility for the warrant application can be presented to, and for the warrant itself may be issued by, a *magistrate*—but only if the estimated tax in dispute is less than the threshold for Tax Board cases (**s59(3)**).

Whereas the old s74D(1) ITA specifically notes that the officer *named* in the warrant may execute the warrant, no such limitation is contained in the current ss59 – 66 TAA.

PwC Comment: The minimum content of lawful warrants has been determined by the Constitutional Court²⁹ and it is noted that those requirements are wider than the minimum set in the TAA. Warrants issued under the TAA might therefore have to meet the extended criteria set by the court to be valid.

Carrying out a Search

The rules governing the actual search are elaborated in substantially more detail in the new TAA provisions (compared to the existing law). For example:

- It is expressly clarified that if the SARS official does not produce the warrant, the person/occupant may refuse access to the SARS official (**s61(2)**). However, there is an exception in the search-without-warrant rules in **s63**—see below.
- **S61(3)** lists the types of actions that the SARS official could undertake, like opening things, retaining computers, stopping and boarding vessels, etc. The same-gender search of a person is permitted by **s61(5)**.
- An inventory of seized material must be provided to the person from whom the items were seized (**s61(4)**). SARS must also ensure that seized items are retained and preserved until no longer required (**s61(9)**)—although there are no rules on ensuring that the seized items are satisfactorily returned to their owners.

The rules around extending the search to beyond only the premises specified in the warrant are contained in **s62**, which is essentially a replica of the old rules in s74D(5) ITA.

The person (to whose affairs the search and seizure relates), is entitled to make copies of the seized material (**s65**). There appears to be no automatic mechanism for the return of seized material, but rather the taxpayer may request a return of the material (**s66(1)(a)**). If SARS caused physical damage, they may also be requested to cover the relevant costs (**s66(1)(b)**).

²⁸ Deleted by para 64, Sch. 1, TAA

²⁹ *Minister for Safety & Security v Van der Merwe & others* [2011] JOL 27344 (CC)

If a court sets aside a warrant (and order SARS to return seized material) the court might still authorise SARS to retain copies (or originals) of the seized material “*in the interests of justice*” (**s66(4)**).

PwC Comment: Some commentators are questioning the constitutional validity of s66(4), after the SCA judgement in Ivanov vs North West Gambling Board [2012] ZASCA 92 (31 May 2012) where the court held that where a search warrant is set aside the search and seizure becomes unlawful from when it was executed. Thus it seems that s66(4) might be attempting to authorise the court to permit the unlawful seizure and retention of the material. The common law principle (ex turpi causa non oritur action) that a court cannot sanction an illegal act is confirmed as part of the Constitution in S v Jordan and others 2002 (6) SA 642 (CC).

Search without a warrant (s63)

This is an entirely new provision, which permits a SSO to conduct a search and seizure *without a warrant*. This will apply where either:

- (a) a person consents thereto, in writing; or
- (b) the SSO (on reasonable grounds) is satisfied that:
 - (i) there may be imminent removal/destruction of relevant material;
 - (ii) if a search warrant was applied for, it would be issued; and
 - (iii) the delay in obtaining the warrant would defeat the object of the search.

The owner (or person in control) of the premises must be informed —before the search— of the alleged compliance-failure or tax offence that is the basis for the search. Residential premises may not be searched without the occupant’s permission, except for parts used for trade.

PwC Comment: Perhaps the most objectionable aspect of this provision is that it contains no in-built review mechanism. That is, if this power is abused by any senior SARS official, there is nothing in the TAA itself that would sanction the SSO or protect the taxpayer. The only remedy is likely to be a PAJA review in the High Court, which is usually too expensive for most taxpayers.

Legal professional privilege (s64)

This is another *new* provision. It seeks to statutorily regulate the procedure to protect the common law right of professional privilege for lawyers. It however introduces a protracted procedure involving an independent attorney (appointed by the Minister). If the person being searched claims that privilege applies:

- SARS must arrange for the a attorney to be present at the search (**s64(1)**);
- The attorney must take personal responsibility for the allegedly privileged material (**s64(4)**) and must, within 21 business days, make a determination as to whether privilege does indeed apply (**s64(5)**).

6 Confidentiality

6 Confidentiality

The “*general prohibition of disclosure*” rules contained in **s67** and **s69** TAA are similar to those in s4³⁰ ITA, which requires SARS officials to preserve the confidentiality of information. The confidentiality rules apply not only to “*taxpayer information*” but also to “*SARS confidential information*”.

Background: The secrecy rules also contain broad exceptions for when taxpayer information may be disclosed, e.g. court orders, or information provided to the police for the purposes of proving a tax offence, etc.

The new concept of “*SARS confidential information*” is introduced in **s68** TAA. This refers essentially to internal SARS matters like information:

- on SARS officials;
- related to internal operations;
- about research projects;
- security of SARS buildings;
- and so forth. (**S68(1)** lists 10 categories of SARS confidential information.)

As a general rule, this kind of information may only be shared with SARS officials who are properly authorised to access the specific information in question (**s68(2)**). However, **s68(3)** specifies the circumstances when SARS confidential information may be shared with others —like if authorised by the Commissioner or a court order, or if the disclosure is expressly authorised by another Act, etc.

Where a taxpayer makes false allegations or discloses false information (which is published “*in the media or in any other way*”), the Commissioner personally may in terms of **s67(5)** disclose taxpayer information “*to the extent necessary to counter or rebut*” the false allegations/disclosure —for the purposes of “*protecting the integrity and reputation of SARS as an organisation*”.

PwC Comment: The highly discretionary nature of this provision is cause for concern. It requires the adoption of potentially disputable positions on many issues, such as whether the SARS reputation/integrity was in fact harmed (i.e. and needs protecting), whether the disclosure was indeed made by the taxpayer or someone on his/her instruction, the extent of taxpayer information that should necessarily be disclosed to rebut the allegations, etc.

The other entities to which a senior SARS official may disclose taxpayer information is set out in **s70**, which is similar to the old s4(1A) and s4(1)(c)) ITA. Typical entities would be the Statistician General, or the SA Reserve Bank, etc. New entities that have also been added now are Commissions of Inquiry established by the SA President and also the National Credit Regulator. Disclosure in criminal, public safety or environmental matters is regulated in **s71**, which largely mirrors the old s4(1B) ITA..

³⁰ Repealed by para 26, Sch. 1, TAA

The matter of “self-incrimination” is dealt with in **s72**. Not only may a taxpayer may *not* refuse to submit a return or application on the grounds that it might incriminate him/her, it is also made explicit that admissions in such a “return, application or other document” can indeed be used against the taxpayer in criminal proceedings (unless a court directs otherwise) – **s72(1)**. However, an admission of an offence obtained under Chapter 5 (information gathering —e.g. inspection, audit, etc.) is *not* admissible in criminal proceedings (unless a court directs otherwise) – **s72(2)**.

PwC Comment: The right against self incrimination extends to the examinee, whether as a result of fidelity to the rights of accused persons³¹ or even possibly the right to freedom³². The self incrimination provisions affect both the “direct use” immunity principle³³ of evidence for criminal proceedings as well as the criminal offence provisions in the TAA³⁴. The “self incrimination” provisions are dealt with in both s 57 (Inquiry proceedings) and s 72 (which covers the whole of Chapter 5). It is unclear whether s 57 is subordinate to s 72 as the former is the more specific legislation. The protection afforded by these provisions extends to the criminal offences which require “without reason” for non-compliance and self incrimination rights qualify as such. The protection against self incrimination may extend to derivative information should a court find it in the interest of a fair trial (would not have possibly been discoverable without the primary evidence).

The TAAG (at 6.5.1.) states SARS’ view that s72 as pertains self incrimination is not unconstitutional on the basis that s35 protects only accused or arrested persons. It however does not deal with the rights of the examinee (which would be every taxpayer submitting a return who is not an accused or detained person) and the constitutionality of this matter seems to be a matter of some debate.

S73 entitles the taxpayer to request copies of his/her own information submitted to SARS or information about his/her own tax affairs. However, the request must be made under PAIA (the Promotion of Access to Information Act) if the information was obtained by SARS in respect of the taxpayer.

PwC Comment: The request-for-information process has three tiers and three “costs”.

- Assessments or decisions on objections or other decisions by SARS: Copies must be given by SARS seemingly without cost.

- Information submitted by taxpayer: Must be provided by SARS on request but PAIA costs apply

- Information obtained by SARS: Request must be in terms of PAIA and PAIA costs apply.

PAIA is an extremely cumbersome process —simply for the taxpayer to get documents pertaining to his/her tax affairs. It also seems in terms of SARS’ own PAIA manual (Nov 2010) which states that taxpayers own records are under clause 9 “documents automatically available” that taxpayers own records exclude the records obtained by SARS but not from the taxpayer or SARS generated.

³¹ *Bernstein and Others v Bester NO and Others (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751*

³² *Minority judgement in Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1*

³³ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995)*

³⁴ *Section 234, TAA*

The TAA (at C6.3.11) confirms the three tiers of “taxpayers own records” and the relevant processes to be followed to obtain copies thereof. However the inclusion of “information obtained by SARS” as taxpayers own records does raise the question whether these documents do not form part of “documents automatically available” as per SARS’ PAIA manual, the latter Act which would supersede the TAA.

Section 74 – Publication of names of offenders

Although the **s74** rule that permits the Commissioner to publish the names of offenders is essentially the same as the old s75A ITA, the list of offenders will now include any “*tax offence*” —whereas s75A ITA specified a narrower list of offenders.

7 Advance Rulings

7 Advance Rulings

For the most part, ss75 – 90 TAA are replicas of the existing ss76B – 76S ITA³⁵.

Background: The overall object of these rules is to allow SARS to issue rulings as to the tax treatments of specified transactions or fact-sets. Individual taxpayers or “classes” of taxpayers may apply for rulings that are specific to them only (“binding private rulings” (“BPRs”) or “binding class rulings” (“BCRs”)), or SARS may unilaterally issue “binding general rulings” (“BGRs”) that are applicable generally to specified facts or circumstances.

The following are the more significant changes from the existing law:

7.1 Who may issue a binding ruling?

According to s78(5) and s89(1), binding rulings are to be issued by a SSO. (Against that, the previous law, e.g. in the ITA, referred simply to “the Commissioner”).

7.2 Who is in the same “class”?

For the purposes of BCRs a definition of “class” is introduced in s75 TAA, to mean either:

- (a) Shareholders (of a company), or members (of an association or of a pension fund), or beneficiaries (of a trust), or “the like”: or
- (b) Any group of persons (even unrelated) that:
 - are similarly affected by the tax implications of a proposed transaction; and
 - agree to be represented by the “applicant” for the purposes of obtaining a ruling.

PwC Comment: The provisions do not appear to cater for scenarios where individual members wish to voluntarily elect in or out of the “class”. For example, under item (b) above, if a taxpayer technically qualifies under (b)(i), but is not aware of the ruling application and thus does not expressly agree to be included in the “class”, it is not clear whether that taxpayer can subsequently rely on the ruling.

7.3 Fees for joint applications

Where there is more than one “applicant” in respect of the same transaction, s81(4) permits the applicants to request a single fee for the ruling application.

7.4 Rejected applications

Two further items are added to the list of ruling applications that SARS will *not* consider, namely:

³⁵ Deleted by para 64, Sch. 1, TAA

- matters that can be resolved through a directive under the ITA's 4th Schedule (typically PAYE withholding matters) – **s80(1)(a)(vi)**; and
- applications that request SARS to disregard the *form* of a transaction and to rule instead on its *substance* (**s80(1)(f)**).

7.5 General compliance requirement

Previously, if (for example) an applicant sought a ruling on, say, the STC implications of a proposed transaction, SARS would only consider the application if there was confirmation that the applicant was up to date as regards compliance obligations in respect of Income Tax, PAYE, VAT, etc. are concerned. This pre-requisite that applicants must be compliant in all other aspects of their tax affairs (which was contained in ss76E(2)(n)&(o) and s76G(1)(e)&(f)), appears to be omitted from the TAA.

7.6 Withdrawal of applications

It will now be expressly clarified, in **s79(8)-(10)**, that an applicant (or any co-applicant, if there are more than one), may withdraw from the ruling application at any time. However, the obligation to pay the relevant fees will remain.

8 Assessments

8 Assessments

The rules regarding assessments are to be contained in the **ss91 – 100**. These import many of the rules previously contained in ss77 – 80 ITA³⁶, but also introduce several new concepts.

In **s1 TAA**, a new definition of “assessment” is introduced, namely, “*the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS*”.

The term “*self-assessment*” means either (also per **s1**) either:

- (a) the combination of determining an amount of tax payable and submitting a return that incorporates that tax determination —presumably withholding taxes (e.g. dividends, royalties, etc.) are good examples;
- (b) where no return is required, the combination of determining an amount of tax payable and making payment of that tax —presumably indirect taxes like Transfer Duty would be in point.

8.1 Original assessment

In terms of **s91(1)**, where the taxpayer submits a return that does not incorporate the tax computation, SARS must issue an original assessment based on the return (or other information in respect of the taxpayer). But where the return does incorporate a determination of the tax liability amount, the return constitutes an original self-assessment (**s91(2)**).

If a tax Act requires a taxpayer to make a determination of the amount of a tax liability, and no return is required, the *payment* of the amount of tax due is an original assessment (**s91(3)**).

If no return or payment is made, SARS may (under **s91(4)**) issue an assessment based on an estimate (see **s95** later). If a return is required, SARS estimation does not relieve the taxpayer from the obligation to file the return. If the taxpayer does thereafter submit the return (within the prescribed period), SARS may issue an additional or reduced assessment.

8.2 Additional assessments (s92)

The section allows SARS to issue an additional assessment at any time if an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus.

8.3 Reduced assessments (s93)

SARS may make reduced assessments as a result of a successful dispute of an assessment, a “*settlement*” agreement, or a judgment in respect of an “*appeal*”. A reduced assessment may also be made if SARS is satisfied that there is an error in an assessment as a result of an undisputed error (by SARS or by the taxpayer in a return).

³⁶ Deleted by para 64, Sch. 1, TAA

8.4 Jeopardy (protective) assessments (s94)

A “jeopardy assessment” is explained in **s94(1)** an assessment that is made even before the date that the return is normally due. This requires the Commissioner to be satisfied that the collection of tax would be in jeopardy unless the jeopardy assessment is issued to secure the tax.

A taxpayer may request the High Court to review the jeopardy assessment on the grounds that either the amount is excessive, or the circumstances that justify a jeopardy assessment do not exist (**s94(2)**). In this case, the burden of proof is upon SARS.

8.5 Estimated assessments (s95)

In terms of **s95**, SARS may make an assessment based on an estimate if the taxpayer fails to submit a return as required or where the return or information is inadequate. A SSO may agree the tax chargeable with a taxpayer in writing if the taxpayer is unable to submit an accurate tax return (s95(3)), but then the assessment is not subject to objection and appeal.

The TAAG (at C8.3) notes that the separate concept of an “estimated assessment” is now replaced by SARS having the power to estimate an original, reduced, additional or jeopardy assessment. Thus no specific procedures apply to estimates by SARS and taxpayers would have to address the estimate based on whether it was an original, reduced, additional or jeopardy assessment.

8.6 Notice of assessments (s96)

S96 requires SARS to issue (to the taxpayer) a notice of the assessment, and also lists the information to be included in the assessment.

8.7 Recording (s97)

The particulars of an assessment and the amount of tax payable thereon must be recorded and kept by SARS. The notice issued by SARS is regarded as made by a SARS official authorised to do so or duly issued by SARS, until proven to the contrary. The record of an assessment is not open to public inspection and may be destroyed by SARS after five years from the date of assessment or the expiration of a further period that may be required by the Auditor-General.

The TAAG (at 8.4) states that in addition to the standard content required, when an assessment is based on either an estimate or not fully on the information submitted by the taxpayer, then the notice of assessment should be accompanied by an explanation as to how the assessment was made and the basis of any estimation. (Also note that the onus of defending the estimation falls upon SARS.)

8.8 Withdrawal of assessments (s98)

In terms of **s98**, SARS can withdraw an assessment issued to the incorrect taxpayer or in respect of the incorrect tax period or issued as a result of in incorrect payment allocation.

8.9 Period of limitations (prescription) for issuance of assessments (s99)

| | |
|---------------------------------------|---|
| Assessment by SARS | 3 years from date of original assessment (s99(1)(a)) |
| Self assessment – return required | 5 years from date of original assessment (i.e. return) by taxpayer, or by SARS if no return was received ((1)(b)) |
| Self- assessment – no return required | 5 years from either : the date of last payment ((1)(c)(i)); or if no payment, the “effective date” ((1)(c)(ii)) |

PwC Comment: The reference to “effective date” is confusing, because this term is defined (in s1 TAA) as being determined in s187(3), (4) & (5)—but those provisions do not deal expressly with the effective date in relation to a self-assessment. Presumably, it could mean the original “due and payable” date, which is the “effective date” for the purposes of interest calculation, as contemplated in s187(3). In any event, however, this prescription rule is at odds with the “no prescription” rules in s99(2) —see below.

Apart from the time-based limitations above, SARS may also not issue an additional or reduced assessment if previous assessment was based on practice generally prevailing at the date of assessment (**s99(1)(d)**). SARS may not issue an assessment in terms of Chapter 8 in respect of a dispute resolved in Chapter 9 (**s99(1)(e)**).

The above limitations do not apply:

- In the case of a SARS assessment, if tax was under-assessed as a result of fraud, misrepresentation or non-disclosure of a material fact (**s99(2)(a)**);
- In the case of a self-assessment, if tax was under-assesses as a result of:
- fraud, or “intentional or negligent” misrepresentation or non-disclosure (**s99(2)(b)(i)-(iii)**); or
 - failure to submit a return where one is required (**s99(2)(b)(iv)**); or
 - failure to make a payment where no return is required (**s99(2)(b)(iv)**).

PwC Comment: As regards self-assessment based on payment (i.e. where no return is required) s99(1)(c)(ii) and s99(2)(b)(iv) appear to be contradictory. The former expressly says that “if no payment was made” then the prescription date is 5 years from the “effective date”, but the latter also expressly says that “failure to make payment” means that the prescription rules do not apply.

The taxpayer and SARS may also agree to waive the limitations in s99(1) by agreement prior to the expiry of the limitation periods (**s99(2)(c)**). The limitation would also not apply if required to give effect to the resolution of a dispute in Chapter 9 (**s99(2)(d)**).

8.10 Finality of assessments (s100)

An assessment (or decision that is subject to objection and appeal) is final —from the perspective of the taxpayer only— if:

- An estimated assessment was issued as a result of the non-filing of a return (or the filing of an incorrect or inadequate return), and no actual return (or no complete and correct return) is filed within the objection period after the estimated assessment;
- An estimated assessment was issued as a result of an agreement between the taxpayer and an SSO;
- No objection is lodged (or the objection is withdrawn); or
- No appeal is lodged against a disallowed objection.

However, SARS would still be able to raise additional assessments in these cases.

An assessment would be final for both the taxpayer *as well as SARS*, in the case of assessments giving effect to :

- “*settlement*” of disputes (i.e. per Part F of Chapter 9);
- Tax Board decisions that have not been referred to the Tax Court; and
- Tax Court decisions, which have no further right of appeal

However, SARS would still be able to raise additional assessment in these cases, if there was fraud, misrepresentation, material non-disclosure, etc.

In the case of assessments giving effect to High Court or SCA judgments (in respect of which there is no right of further appeal), the assessment is final for SARS and the taxpayer—and SARS may not make an additional assessment.

9 Dispute Resolution

9 Dispute Resolution

9.1 General (Part A)

Some definitions specifically relevant to dispute resolution are set out in **s101** TAA, i.e. “*appellant*”, “*decision*”, “*registrar*”, and “*rules*”.

In **s102** TAA, the “*burden of proof*” provision incorporates the old s82³⁷ ITA onus burden. In addition, however, it also extends the taxpayer’s onus to proving that:

- a specific tax rate should be applied;
- an amount qualifies as a reduction of tax (e.g. rebates);
- a valuation is correct; and
- a decision subject to objection and appeal is incorrect.

PwC Comment: The extension of an already burdensome onus is worrying, especially in relation to decisions (taken by SARS) where SARS previously had to justify the decision first before the onus shifted to the taxpayer. Furthermore, all matters under this chapter that have not been finalised by the effective date will be dealt with under the new provisions. This may create practical problems as the new provisions have in certain instances materially different requirements to the current procedures.

The TAAG (at C9.2) as a transitional arrangement states that when the new rules are issued for dispute resolution then any outstanding matters will be dealt with under the new rules. This created some apprehension since it is not clear whether the rules will be the same and how SARS will apply the new rules where they are to the detriment of the taxpayer.

The onus is placed upon SARS in (**s103(2)**) for:

- in the case of estimated assessments (**s95**), proving that the estimate was “*reasonable*”; and
- for proving the facts that form the basis for an understatement penalty (**s222**) imposed by SARS.

The TAAG (at C9.3) seems to indicate that in the case of jeopardy assessments, where a taxpayer requests a review at the High Court, the onus to prove that the assessment is not excessive or that there is a basis for such assessment rests on SARS. However, where the taxpayer relies on the normal objection and appeal procedure within the TAA, no such onus is placed on SARS.

As regards the “*rules for dispute resolution*” —which governs procedures for objection, appeal, Tax Board hearings and Tax Court proceedings— the new **s103** TAA retains the position of s107A³⁸ ITA. That is that the rules do not form part of the legislation but remain to be made separately by the Minister.

³⁷ Deleted by para 66, Sch. 1, TAA

³⁸ Deleted by para 73, Sch. 1, TAA

PwC Comment: It is not clear why this opportunity was not used to incorporate the rules (governing objection and appeal and ADR) into the main text of the TAA. Thus these rules (and amendments thereto) remain outside of parliamentary scrutiny.

9.2 Objection & Appeal (Part B)

Background: Where the taxpayer disagrees with an assessment issued, or a decision taken, by SARS, an “objection” is the first stage of formal dispute proceedings.

The basic “objection” rules in **s104** are essentially the same as the old rules in s81³⁹ ITA. **S104(2)** specifically lists the decisions that may be objected to (and appealed against), the most notable one being any matter that is listed in any tax Act as being subject to objection and appeal. A welcome addition is **s104(2)(c)**, namely a decision to withhold a refund.

In **s105**, taxpayers are compelled to follow only the dispute resolution proceedings set out in the TAA (Chapter 9), or through review applications to the High Court. SARS’s obligation to consider, and decide on, an objection is contained on **s106**, which largely follows the pre-existing law.

Under **s106(6)** SARS may designate an objection or appeal to be a “test case”, if a SSO considers that the resolution of that objection/appeal is likely to be determinative of issues in other objections/appeals. In that case, the other objections/appeals may be stayed, pending the determination of the test case.

PwC Comment: On the one hand, this is a sensible provision in that it seeks to obviate multiple litigation of the same issue. On the other hand however, for the other taxpayers, it prevents/delays access to the courts (and immediate relief), merely on the opinion of a SSO. Furthermore it does not indicate the basis for determining which should be the “test case” such as, e.g. the first case disputed. The question of the extent to which seemingly similar cases may or may not be distinguished on the facts remains with the SSO. There will be concerns that SARS could cherry-pick as a test case the one SARS is most likely to win (whether regard is had to the facts, or submissions made, or to a taxpayer’s resources to challenge SARS). Furthermore, it is arguable that a SCA case can be stayed in anticipation of a Tax Court “test case” –as it does not require the other cases to be before the Tax Court.

The TAAG (at C9.6) notes that the test case procedures will be regulated by the “new rules” and will include that taxpayers may by notice exclude themselves for the test case (whereupon SARS may apply to court to compel the suspension of those cases), the duration of suspension, the consequences for staying procedures and the costs in a designated test case. This is an important part of the TAA which again seems to escape Parliamentary scrutiny by being in the rules rather than the body of the TAA.

Where SARS rejects an objection and the taxpayer wishes to appeal, the appeal requirements are set out in **s107** TAA. This provision is similar to the old s83(1)-(1C) ITA⁴⁰ —which refers back to the “rules” made by the Minister under **s103**. However, the discretion to condone late appeals indefinitely (in the old s83(1A) ITA) will now be restricted (in **s107(2)**) to a maximum of 45 business days.

³⁹ Deleted by para 66, Sch. 1, TAA

⁴⁰ Deleted by para 66, Sch. 1, TAA

9.3 Tax Board (Part C)

Background: Following the rejection of an objection, the taxpayer may appeal to the Tax Board (although in some cases the taxpayer may prefer to, or be obliged to, bypass the Tax Board and appeal directly to the Tax Court).

The majority of the Tax Board provisions now to be contained in **ss108 – 115** TAA are replicated from the rules in s83A⁴¹ ITA.

Some of the changes from the existing law are:

- Many of the powers currently ascribed may (under the new TAA rules) be exercised by a SSO.
- On the basis of conflict-of-interest or bias (etc.) the chairperson of the Tax Board may withdraw (in accordance with **s111(6) or (7)**), either on the basis of his/her own assessment of the potential for conflict/bias or at the request of either of the parties (based on their perception of the potential for conflict/bias).
- As regards representation at the Tax Board, **s113(7)** permits the person who prepared the tax return to represent the taxpayer.
- Whereas there is currently no formal deadline for when the Tax Board must reach its decision, **s114(2)** will set a deadline of 60 business days after the conclusion of the hearing. If the deadline is not met, either party can appeal to the Tax Court for the case to be re-heard there (**s115(1)**).

9.4 Tax Court (Part D)

Background: Following the rejection of an objection, the taxpayer may appeal directly to the Tax Court. Or alternatively, if the taxpayer has appealed to the Tax Board (following the rejection of an objection), the loser at the Tax Board may apply for the matter to be heard at the Tax Court.

The majority of the Tax Court provisions now to be contained in **ss116 – 132** TAA are replicated from s83⁴² ITA, although certain matters currently contained in the “rules” are now also written into the main text of the TAA.

Some of the changes from the existing law are:

- On the basis of conflict-of-interest or bias (etc.) any member of the Tax Court may withdraw (in accordance with **s122(1) or (2)**), either on the basis of his/her own assessment of the potential for conflict/bias or at the request of either of the parties (based on their perception of the potential for conflict/bias).
- Whilst the rule that the Tax Court sittings are “not public” is retained, there is a slight change in the position in relation to observers. On the one hand, the old rule was (in s83(11) ITA) that the Tax Court

⁴¹ Deleted by para 66, Sch. 1, TAA

⁴² Deleted by para 66, Sch. 1, TAA

President can—at the behest of SARS or the taxpayer— exclude or withdraw any person who is “*not necessary*”. This appears to imply that observers do not need permission to attend, but can be asked to leave. On the other hand, the new **s124(2)** TAA appears to automatically exclude all observers as a default, and then to give the President the authority to permit their attendance only if they specifically request it, and only “*in exceptional circumstances*”—and still subject to the President’s consideration of any representations from SARS or the taxpayer.

- As regards the decisions of the Tax Court, **s129(3)** will now specifically recognise that, in the case of an understatement penalty, the burden of proof is upon SARS.
- As regards the awarding of costs, the old s83(17) appeared to penalise the taxpayer if the appeal was “*frivolous*”, whereas the new s130(1)(b) will penalise the taxpayer for “*unreasonable*” grounds of appeal.
- A new notification-deadline rule is added (in **s131**), requiring the registrar to inform the parties of the decision within 21 business days of the written decision being delivered.
- The rule regarding the publication of Tax Court judgments (previously in s83(19) ITA) is amended in two respects (in the new **s132** TAA):
 - Whereas the current rule gives the Tax Court President the discretion to indicate which judgments should be published, the new rule simply requires that all judgments must be published; and
 - Whereas the judgment must (under current law) be sanitised to not reveal the identity of the taxpayer, the new rule recognises that sanitisation is not required if the sitting was in any event public (by virtue of observers being permitted to attend—see **s124(2)** above).

PwC Comment: It is unclear why the legislature has not clarified the jurisdiction of the Tax Court in s117 to include interlocutory proceedings which relates to a powers exercised under a Tax Act but is not an objection/ appeal matter or governed in the “rules”. (Historically there has always been a debate as to whether the Tax Court has such rights.) For example injunctive relief for the setting aside of a search warrant exercised in terms of Tax Act.

9.5 Other Courts (Appeal against Tax Court) (Part E)

Background: Whoever loses in the Tax Court (whether it is the taxpayer or SARS), is entitled to appeal to the High Court or, in some cases, directly to the Supreme Court of Appeal.

The rules governing the appeal against the decision will be contained in **ss133 – 141** TAA, which are largely the same as the current rules contained in s86A ITA. Some of the matters that are found in the dispute resolution “*rules*” referred to earlier are now also written into the main text of the TAA.

Some of the changes from the previous law are:

- Although it is the general position that an appeal directly from the Tax Court to the Supreme Court of Appeal must be granted by the Tax Court President, **s135(3)** expressly recognises the appellant’s right to appeal to the Chief Justice of the SCA.

- Notice of an appeal to the SCA need only be lodged at the SCA registrar and follow the rules of that court (**s138(1)**) —as opposed to the old provisions that required the notice to also be lodged with the registrar of the Tax Court and with the attorney of the opposite party.

9.6 Settlement (Part F)

Background: The “settlement” rules form part of the Alternative Dispute Resolution regime, and allows SARS and the taxpayer to enter into negotiations for the payment of a settlement amount as a resolution to the dispute. The dispute is therefore not resolved through a finding or judgment on who wins and who loses, but rather on the basis that the matter in dispute will not be pursued —just “settled”.

The rules governing settlements will be contained in **ss142 – 149** TAA, which are largely the same as the old ss88A – 88H ITA⁴³. Some of the matters that are found in the dispute resolution “rules” referred to earlier.

Some of the changes from the previous law are:

- The definition of “dispute” in **s142** will confirm that a “dispute” can only arise “pursuant to” (i.e. after, and as a result of) the issuing of an assessment.

PwC Comment: This seeks to ensure that settlement negotiations cannot be initiated before an assessment has been issued. SARS are opposed to the practice that has developed over the last few years of settlement negotiations being initiated at a too-early stage. Note that this precise amendment had already (in 2009) been promulgated to become part of the s88A rules, but never came into effect because the requisite Ministerial notice was never published. However the definition of “settle” now defers this process to after an appeal has been lodged. Furthermore the dispute must be settled by “compromise” which is a defined process and as a requirement requires the taxpayer to accept the tax liability which is contradictory to the settlement procedure where no party by its nature accepts tax liability as contended by the other. It is also unclear to what extent taxpayers can rely on s270(1) which provides of sorts for a “may not be worse off” measure on the transition between the old and new provisions.

- It will be confirmed that either party (i.e. SARS or the taxpayer) may seek to initiate settlement discussions, but also that the other party is not obliged to engage in the settlement procedure (**s144**).
- The actual signature of a senior SSO is now expressly a formal part of the settlement procedure (**s147(4)**).
- Where a settlement agreement is reached, but the taxpayer still fails to pay the agreed upon (settlement) amount, **s148** will now clarify that SARS will have the option of either:
 - enforcing the collection of the settlement amount; or
 - regarding the settlement agreement as void and thus proceed with the dispute in respect of the original dispute amount.

⁴³ Deleted by para 66, Sch. 1, TAA

Against this, the old s88F(8) ITA simply entitled SARS to “*recover any outstanding amounts involved in the settlement in full*” —and it was not always clear what this meant.

10 Tax Liability & Payment

10 Tax Liability & Payment

10.1 Taxpayers (Part A)

Whereas the current “*taxpayer*” definition (in s1 ITA) refers essentially to “*any person chargeable with any tax*”, the definition in **s151 TAA** is extended to also specifically include (in addition):

- 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 arrangement made with a foreign government.

Most of these concepts are also separately described. For example, **s152** determines that a person is “*chargeable to tax*” if the liability for tax (under any tax Act) is imposed upon that person, and that person is personally liable to pay that tax. (See below for some of the other descriptions.)

A “*representative taxpayer*” (**s153(1)**) is responsible to pay the tax liability of another person (other than as withholding agent). A representative taxpayer is assessed on tax and is liable for the tax payable in such capacity (**s154(1)**). This does not relieve the actual taxpayer from liability (**s153(3)**). The representative taxpayer may recover the amount of tax paid from the taxpayer or retain it out of assets of the taxpayer in the representative taxpayer’s possession (**s160(1)**). A representative taxpayer can be held personally liable for the tax if he/she alienates, charges or disposes of funds or moneys from which the taxes could legally have been paid (**s155**). The representative taxpayer must notify the Commissioner within 21 business days of any changes in his/her status (**s153(2)**).

A “*withholding agent*” (**s156**) is a person who has a responsibility under a tax Act to withhold tax and pay it to SARS. The agent is *personally* liable for: (a) tax withheld but not paid to SARS, or (b) tax not withheld but which should have been withheld (**s157(1)**). Any amount paid by a withholding agent in such capacity is paid in respect of the tax liability of the taxpayer (**s157(2)**). A taxpayer is not entitled to recover an amount so withheld from the withholding agent (**s160(2)**).

A “*responsible third party*” (**s158**) is any person (other than a representative taxpayer or withholding agent) who becomes liable for the tax liability of another person —and may also be held personally liable under the tax recovery rules contained in Chapter 11.

A SSO may request “*security*” from a taxpayer to cover a tax liability if any of the conditions listed **s161(1)** are present—e.g. a representative taxpayer who was previously convicted of a tax offence, or who has a history of non payment. If the requested security is a cash deposit but the taxpayer fails to make the deposit, SARS may recover the security as if it was a tax due, or set it off against refunds due (**s161(4)**). If the taxpayer is not a natural person, a SSO may require members, shareholders or trustees to provide surety for the debts of the taxpayer, if the taxpayer cannot provide the security (**s161(5)**).

10.2 Payments (Part B)

Tax must be paid at the time and place notified by SARS, or as specified in the relevant tax Act (**s162(1)**). SARS can also specify the method of payment (**s162(2)**). The tax must be paid in a full amount or in terms of an instalment payment agreement.

SARS may request immediate payment or security, if a SSO has reasonable grounds to believe that a taxpayer will not pay the full amount or will dissipate assets, or that recovery may become difficult later (**s162(3)**).

Under **s163(1)**, a SSO may apply to the High Court for an order for the preservation of a taxpayer's assets (or of any other person) —to prohibit any person from dealing with those assets. In anticipation of applying for the preservation order, SARS may immediately seize the assets to prevent those assets from being disposed of or removed (**s163(2)**) —but the application for the preservation order must commence within 24 hours of seizing the assets. S163 also contains substantial detail on matters like procedures to be followed, how the assets may be dealt with, and so forth.

The so-called pay-now-argue-later principle —i.e. “*payment of tax pending objection and appeal*” — is contained in **s164** and, in almost all respects, replicates s88 ITA⁴⁴. Some of the changes are:

- If SARS grants a suspension-of-payment, but the taxpayer does not actually object or appeal, the suspension is immediately revoked (**s164(4)**).
- No recovery proceeds may take place in the first 10 days after a suspension request (from the taxpayer) or a revocation notice (from SARS), unless there is a risk of dissipation of assets (**s164(6)**).

10.3 Accounts & Allocation (Part C)

SARS must maintain taxpayer accounts for each taxpayer (**s165(1)**), with details of all taxes, penalties, interest, other amounts owing, payments and other credits. SARS must —from time to time, or upon request from the taxpayer— provide taxpayers with a statements of account (**s165(4)**).

SARS may allocate a payment against the oldest outstanding tax amount first in respect of each specific tax type or a group of tax types (**s166(1)&(2)**). The age of the debt is determined from the date it became payable in terms of the tax Act.

10.4 Deferral (Part D)

In terms of **s167**, a SSO may enter into an agreement with a taxpayer to pay a tax debt in one sum after a prescribed period, or in instalments if the criteria in **s168** are met. If the taxpayer misses a payment (or otherwise fails to comply), SARS may terminate the instalment agreement (**s167(4)**). According to **s168**, an instalment agreement can *only* be considered if:

⁴⁴ Deleted by para 66, Sch. 1, TAA

- (a) the taxpayer has temporary liquidity or asset-sufficiency problems (i.e. to be remedied in the future);
- (b) the taxpayer anticipates income/other receipts;
- (c) there are poor prospects of immediate collection (likely to improve); and
- (d) collection activity would be harsh, and deferral will not prejudice collection; or
- (e) the taxpayer provides security.

11 Recovery of Tax

11 Recovery of Tax

11.1 Tax Debts & Judgments (Parts A – C)

In terms of **s169**, a “*tax debt*” due to SARS is recoverable from any assets of the taxpayer, or any assets belonging to the taxpayer but which are in the possession or under the control of a representative taxpayer. **S171** now sets the prescription period for tax debts at 15 years.

SARS may, after giving a defaulting taxpayer at least 10 business days advance notice, file for a civil judgment (**s172(1)**). The 10 days notice is not required if SARS decides that the giving-of-notice will prejudice the collection (**s172(3)**). The judgment may be sought irrespective of whether the tax is subject to an objection or appeal (**172(2)**) —unless “*suspension*” has been granted. Other procedural and related matters in respect of the judgment are covered in **ss173–176**.

S177 permits SARS to institute sequestration/liquidation proceedings in order recover a tax debt. The proceeding may be initiated irrespective of whether the taxpayer or the taxpayer’s assets are present in SA (**s177(2)**), and irrespective of where the taxpayer is registered, resident, domiciled, effectively managed or has a place of business (**s178**). However, if the tax debt subject to an objection or appeal, the proceedings must first be sanctioned by the Court (**s177(3)**).

11.2 Collection from third parties (Part D)

Third parties holding taxpayers’ funds

The old “agent” provisions in s99 ITA⁴⁵ are substantially expanded in **s179** TAA. This effectively authorises SARS to appoint a third party who “*holds or owes*” any money for/to a taxpayer, to pay such moneys over to SARS in satisfaction of the taxpayers tax debt. **S179(1)** specifically includes “*pension, salary, wage, or other remuneration*”, but other kinds of funds like bank balances or debts payable, would also appear to be covered. If the person receiving the notice is unable to comply (i.e. unable to make the payment to SARS in accordance with the notice), they should inform SARS —in which case the notice may be withdrawn or amended (**s179(3)**).

The affected taxpayer may request an amendment to the notice (i.e. an extended payment period) in order to cover basic living expenses (**s179(4)**).

PwC Comment: There is nothing to compel SARS to first or simultaneously inform that taxpayer of the notice —which means that the funds may be remitted to SARS before the taxpayer is aware— so the concession to allow the taxpayer to apply for an extended payment period becomes meaningless. Furthermore, although the constitutionality of this provision has been tested in the High Court (in the

⁴⁵ Deleted by para 69, Sch. 1, TAA

*Hindry case*⁴⁶) to the benefit of SARS, subsequent pronouncements by Constitutional Court may cast doubt into the debate⁴⁷.

The TAAG (at C11.3.3) states that the procedure to be followed includes that the taxpayer can after receiving the s 179 notice request SARS to amend the notice to allow for “basic living expenses”. However the notice is not compulsory before the fact and no time periods for this process is stated. Therefore the relief may well only be granted after the damage has already been done. Furthermore no guidance is provided in either the TAA or the TAAG as to what SARS would have to consider in determining the taxpayers “basic living expenses”.

s184 gives SARS the same rights of recovery against the assets of “responsible third parties” as SARS has against the assets of the taxpayer. However, SARS must give such a third party an opportunity to make representations (**s184(2)**), either before, or “as soon as practical [sic] after” the third party is held liable for the tax debt.

Financial managers

A person may become personally liable for the tax debts of another taxpayer (**s180**), if that person controls or is regularly involved in the taxpayer’s financial affairs, and that person was negligent/fraudulent in respect of paying the taxpayer’s tax debt.

Shareholders

Where a company is voluntarily wound up without having settled its tax debts, all shareholders who received assets (essentially distributions) from the company in the last year before its winding up, may be liable for the company’s tax debts (**s181(1)**). However, this only applies to the extent that the tax debt was already in existence at the time when the assets were distributed. (**s181(2)**).

Connected Transferees

Where a connected person (i.e. connected to the taxpayer), receives an asset from that taxpayer either for free or below market value, that connected person is liable for the tax debt of the taxpayer (**s182(1)**). However, the connected person’s liability is limited (**s182(2)**) to the lesser of the taxpayer’s tax debt that existed at the time of the asset-transfer or the connected person’s under-payment for the asset (i.e. MV minus actual payment). Furthermore, this rule can only be applied to assets that were transferred in the last year before SARS invokes this provision (**s182(3)**).

Dissipaters

According to **s183**, if a person knowingly assists in dissipating a taxpayer’s assets in order to obstruct the collection of a tax debt of the taxpayer, that person is jointly and severally liable with the taxpayer for the tax debt to the extent that the person’s assistance reduces the assets available to pay the taxpayer’s tax debt.

⁴⁶ *Hindry v Nedcor Bank Ltd and Another 1999 (2) SA 757 (W)*

⁴⁷ *Lesapo v North West Agricultural Bank and Another 1999 (12) BCLR 1420 (CC); Metcash Trading Limited v Commissioner for the South African Revenue Service and Another 2001 (1) BCLR 1 (CC) where the court specifically notes that the judge in the Hindry case did not have the guidance of the pronouncements in the Lesapo case.*

11.3 Foreign Governments and Foreign Assets (Parts E & F)

SARS may assist a foreign state, by applying some of the collection measures (e.g. preservation orders) to the SA assets/funds of a person who owes foreign taxes (**s185(1)**). **S185** also sets out certain other procedural matters in relation to collection actions undertaken.

On the other hand (in terms of **s186**), SARS may compel a taxpayer (with a SA tax debt) to repatriate foreign funds. A High Court order could be obtained not only to compel the repatriation of foreign assets, but also surrendering of the taxpayer's passport, cessation of trading, etc. (**s186(3)**).

12 Interest

12 Interest

12.1 General interest rules (s187)

This provision sets out the general rules for calculating interest on outstanding tax debts due by taxpayers or refunds payable by SARS. Interest accrues from the effective date at prescribed rate over the period as provided. The general rule, replicated from s89quin(2) ITA⁴⁸, is that interest is calculated on a daily balance owing and compounded monthly—but the Commissioner may publish by way of public notice when this method will apply to a tax type and which date.

Effective date for the purpose of calculating interest is specifically dealt with in S187(3) and (4) TAA and replaces the definition in s89quat ITA⁴⁹. The effective date for interest payable in specific scenarios:

| | |
|--|--|
| Income Tax | Remains the same, i.e. 6 months after year-end, or 7 months for taxpayers with February years. |
| Estate Duty | Earlier of date of assessment or 12 months from date of death |
| Other taxes | Date that tax is due and payable in terms of the Tax Act |
| Fixed amount penalty | Date specified in the notice or the date of any increment |
| Percentage based penalty | Date by which the tax should have been paid. |
| An additional assessment or reduced assessment | The effective date in relation to the tax payable under the original assessment |
| Jeopardy assessment | The payment date specified in the jeopardy assessment |

12.2 Waiver of interest

In **s187(5)**, a SSO may waive the interest payable, unless prohibited by a tax Act, where the interest arose due to circumstances beyond the control of the taxpayer. These circumstances identified in **s187(6)** are limited to a natural or human-made disaster, a civil disturbance or disruption in services or a serious illness or accident.

⁴⁸ Deleted by para 66, Sch. 1, TAA

⁴⁹ Deleted by para 66, Sch. 1, TAA

12.3 Period over which interest accrues (s188)

This provides a general rule that interest runs from the effective date of the tax (as set out under **s187**) to the date the tax is paid.

For provisional tax (**s188(2)**), interest on the first provisional tax payment is from the effective date to the earlier of either the payment of the tax or the effective date for the second provisional tax payment; and for the second provisional tax payment, interest runs from the effective date until the earlier of the date of payment or the effective date set out in section **s187(3)(b)**.

Interest on a refund payable by SARS is calculated (**s188(3)**) from the *later* of the effective date or the date the excess was paid to SARS, to the date the refunded tax is paid. Where an offset of a refund occurs against a tax liability the date of the offset is deemed to be the date of payment of the refund.

PwC Comment: The interest accrual periods will remain in the underlying tax acts where such sections have not been repealed.

The TAAG (at C12.3.3) confirms that in future the current deferral of interest for VAT refunds will be retained until the requested documents or information is submitted.

12.4 Rate at which interest is charged (s189)

The interest rate applicable under **s187** is the “*prescribed rate*” determined by Minister and announced by notice in *Gazette* under s8(1)(b) of the Public Finance Management Act (“PFMA”) 1999.

Interest on refunds of provisional tax on assessment and employee’s tax paid within six months after the last date of that year of assessment, the rate is four percentage points below the prescribed rate. This is essentially a replica of the definition of prescribed rate in s1 ITA.

The change in rate timing remains the same, i.e. the first day of the second month following the month the new rate becomes effective for the purposes of the PFMA.

The TAAG (at C12.1) notes that in future SARS system will be able to automatically offset refunds against tax liabilities and treat them as payments for the calculation of interest. This would largely be beneficial to taxpayers as the current system retains the debits and credits separately and accrues interest at a differential rate to the benefit of SARS.

PwC Comment: The TAA provisions relating to interest have not been made effective on 1 October 2012 (with the other provisions) and remain ineffective. Thus interest is still dealt with by the other Tax Acts.

13 Refunds

13 Refunds

13.1 Refunds of excess payments (s190)

Refunds are payable in respect of an amount properly refundable under a tax Act in terms of an assessment (**s190(1)(a)**) or an amount that was erroneously paid in excess of the amount payable in terms of the assessment (**s190(1)(b)**).

SARS need not grant the refund until such time as a verification, inspection or audit of the refund in accordance with chapter 5 has been finalized. Refunds may be paid by SARS before the chapter 5 procedures if security acceptable to a senior SARS official is provided.

Refunds claimed are limited to three years in the case of an assessment by SARS, or five years in the case of a self assessment (**s190(4)**). The previous limitation in S102(2) ITA⁵⁰ was three years. Excess refunds paid by SARS must be paid and is recoverable by SARS under TAA as if it were a tax (**s190(5)**).

PwC Comment: Excess refunds which have been done erroneously by SARS' own negligence, should in principle, not have been subjected to the same harsh collection procedures or subjected to the same interest provisions as done under the current law⁵¹. Special reasonableness provisions should have been added for this purpose and brings into question whether SARS really intended balancing powers and bringing reasonableness to tax administration.

13.2 Refunds subject to set-off and deferral (S191)

Refunds, including interest thereon under **s188(3)(a)**, must be treated as a payment and set off against a tax debt and recorded in the taxpayer's account under **s165** and then against an outstanding debt under the Customs and Excise Act. This set off is not applicable in respect certain listed circumstances.

⁵⁰ Deleted by para 70(c), Sch. 1, TAA

⁵¹ Davis v CSARS 14551/2009 KZN

14 Write-off or Compromise of Tax Debts

14 Write-off or Compromise of Tax Debts

The rules previously contained in s91A ITA⁵², read together with the 2007 Regulations issued in terms of s91A, have largely been replicated mostly un-amended into Chapter 14 (i.e. **ss192 – 207**) of the TAA.

Background: In relation to tax debts, these rules contemplate the possibility of :

- *Temporary write-off –where the debt is “uneconomical to pursue” (e.g. recovery costs are not justified by the amount of the tax debt). These debts may subsequently still be collected’*
 - *Permanent write-off –where the debt is either (a) irrecoverable at law; or (b) “compromised”. There are substantial rules around the procedures for negotiating a “compromise” between SARS and the taxpayer, including guidelines (specified in the Regulations) on when it may or may not be “appropriate” to compromise.*
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⁵² Deleted by para 69, Sch. 1, TAA

15 Non-compliance penalties

15 Non-compliance penalties

15.1 Fixed Amount Penalties, incl. Reportable Arrangements (Parts A&B)

For the most part, **ss208 – 211** TAA replicate certain provisions of the old s75B ITA and some parts of the Regulations that are issued in terms of s75B. S212, dealing with penalties for failing to report “reportable arrangements”, replaces the old s80S ITA, but is amended significantly.

PwC Comment – Background: The overall object of these rules is to allow SARS to impose penalties for non-compliance (such as failure to submit tax returns).

The following are the more significant changes from the existing law:

The role of the Regulations

Certain of the provisions currently contained in the Regulations will now be contained in the main text of the TAA, but the provisions themselves remain largely unchanged. Note, however, that the matters not expressly covered in the TAA (e.g. the list of punishable non-compliances currently contained in para 4 of the Regulations), will be dealt with in a “*public notice*” to be issued by the *Commissioner* —whereas the current position is that the Regulations are issued by the *Minister*.

Notably, the Penalty Table and related application provisions (currently contained in para 5 of the Regulations) is replicated un-amended into **s211** TAA.

PwC comment: A notice has been issued that limits the application of this penalty schedule, for the time being, only to failure of submission of income tax returns by natural persons.

Reportable arrangements

In **s212**, the penalty rules for “*a ‘participant’ who fails to disclose the information in respect of a reportable arrangement ...*” replaces the rules currently contained in s80S ITA. (See in section 4.2 above that the ‘participant’ has approximately 9 weeks to report.)

However, there are some important changes in the penalty amount. Instead of the fixed R1m penalty previously specified in s80S(1) ITA, the new **s212(1)** TAA imposes a monthly cumulative penalty as follows:

- R100,000 per month, in the case of the ‘promoter’; or
- R50,000 per month, for other ‘participants’;
- Up to a maximum of 12 months, so the maxima are R1.2m or R600,000, respectively.

Furthermore, **s212(2)** doubles or triples the monthly penalty amount if the “*amount of the anticipated tax benefit*” exceeds either R5m (double penalty) or R10m (triple penalty). Thus, the maximum possible penalty is where, more than 12 months after the reporting deadline, a ‘promoter’ has still not reported, in respect of a reportable arrangement that produced a tax benefit in excess of R10m —in which case the total penalty will amount to R3.6m (i.e. R300,000 x 12 months).

PwC Comment: In the light of the complexities and disputes around whether certain arrangements are indeed reportable, it is quite common for arrangements to go unreported for more than 12 months, i.e. if the parties involved do not report within the first 9 weeks, it usually means that they've adopted an opinion that they do not have to report at all. It has therefore been submitted that the once-off fixed penalty of R1m should be re-instated.

The possibility of a reduction or waiver of the penalty (previously in s80S(2) ITA) is discussed further in section 15.3 below.

15.2 Percentage based Penalty (Part C)

S213 imposes an obligation upon SARS to impose a percentage based penalty on an amount of tax that was not paid. However, the TAA itself does not prescribe a penalty percentage, but rather reverts to the actual percentages prescribed in the individual Tax Acts.

15.3 Procedures and Remedies (Parts D & E)

Procedures

S214 requires SARS to issue a “*penalty assessment*” in order to impose a penalty. Note that **s208** defines a “*penalty assessment*” as either a stand-alone assessment charging only the penalty, or a composite assessment containing a tax liability as well as the penalty.

In order to request a remission of the penalty, **s215** sets out the procedures to be followed by the taxpayer—including the description of a “*remittance request*” (*sic*).

Remedies

The penalty for failing to register when required under the TAA may be remitted partially or fully if the taxpayer approached SARS voluntarily, and all returns due by the taxpayer have been filed. (**s216**)

The fixed non-compliance penalties may be remitted:

- In full: Only either in terms of the VDP (Voluntary Disclosure Programme) —discussed later— or in “*exceptional circumstances*”. **S218** lists examples of “*exceptional circumstances*” such as disasters, civil disturbances, certain SARS errors, serious financial hardship (e.g. affecting business continuity), and others.
- Up to an amount of R2,000 in cases of either:
 - nominal non-compliance (i.e. tax amount under R2,000); or
 - “*first incidence*” non-compliance,

as long as there were reasonable circumstances for the non-compliance and the non-compliance has been remedied. In the case of the Reportable Arrangement penalty, the maximum remittance limit is increased to R100,000 (instead of R2,000).

In the case of percentage-based penalties, s217(3) permits the remission of all or a portion of the penalty in cases of either:

- nominal non-compliance (i.e. tax amount under R2,000); or
- “*first incidence*” non-compliance,

as long as there were reasonable circumstances for the non-compliance and the non-compliance has been remedied.

*16 Underestimate Penalty
and the VDP*

16 Underestimate Penalty and the VDP

16.1 Underestimate Penalty (Part A)

In terms of s221, an “understatement” means any prejudice to SARS or the *fiscus* as a result of:

- A default in rendering a return; or
- An omission from a return; or
- An incorrect statement in a return; or
- Failure to pay the correct tax (if no return was required).

S222 imposes a percentage-based penalty, determined with reference to the unpaid tax amount, and applying the table set out in **s223**.

| 1 Item | 2 Behaviour | 3 Standard Case | 4 Obstructiv e or Repeat case | 5 Voluntary disclosure , after audit notice | 6 Voluntary disclosure , before audit notice |
|-----------|--|-----------------------|---|--|---|
| (i) | Substantial understatement | 25% | 50% | 5% | 0% |
| (ii) | Reasonable care not taken in return | 50% | 75% | 25% | 0% |
| (iii) | No reasonable grounds for tax position | 75% | 100% | 35% | 0% |
| (iv) | Gross negligence | 100% | 125% | 50% | 5% |
| (v) | Intentional evasion | 150% | 200% | 75% | 10% |

S222(2) requires that the penalty must be determined by applying the “highest applicable understatement penalty percentage in accordance with the table”.

In relation to the penalties stated above, note also that:

- A “repeat case” means a repeat incident within 5 years (defined in s221).
- A “substantial understatement” means “prejudice to” SARS or the *fiscus* in excess of the greater of R1m or 5% of the correct tax liability/refund (defined in s221). In this case, the penalty or a portion may be waived (according to s223(3)) if the taxpayer made timeous full disclosure to SARS and was in possession of an appropriately supportive (i.e. “more likely than not”) tax opinion issued by a registered tax practitioner no later than the date that the return was due.

PwC Comment: Although the defence of having a “more likely than not” tax opinion is presented in s223(3) with specific reference to “substantial understatements”, it would appear that this defence is also available for understatements that are not “substantial”. That is, in order for the penalty table to apply it appears that there must be both : (a) an “understatement”; as well as (b) any one of the 5 items listed in Column 1 of the table. Thus it follows that if the only reason for the understatement is that the taxpayer adopted a “tax position” (i.e. Items (ii), (iv) or (v) are not applicable), then the only way the Table could levy a penalty is if the taxpayer had “no reasonable grounds” (i.e. Item (iii)). Although the phrase “reasonable grounds” is not specifically explained anywhere, it is submitted that the “more likely than not” tax opinion referred to in s223(3) should be in point.

16.2 Voluntary Disclosure Programme (Part B)

The VDP offered in TAA mirrors the original programme (which expired 31 October 2011), insofar as requirements and procedures are concerned. However, as regards the relief offered, we should note the following:

- No waiver of interest is offered;
- For understatement penalties (see 16.1 above), the relief offered is the lower percentages reflected in Columns 5 & 6 of the table (as opposed to the 100% or 50% relief previously offered); and
- The possibility of remitting 100% of non-compliance penalties is retained (see Chapter 15).

17 Criminal Offences

17 Criminal Offences

Background: Several actions or omissions (etc.) are specifically listed as offences, and, in some cases, specific penalties are prescribed.

The list of non-compliance offences previously contained in s75 ITA⁵³ are replaced with an updated list in the new **s234** TAA. Many of the provisions are identical, although there are some changes. For example, issuing an erroneous, incomplete or false document to be issued to another person is added as an offence (**s234(g)**). This would conceivably include employees' tax certificates.

PwC Comment: This additional offence is quite harsh as it catches both erroneous and incomplete documents and not just intentionally false documents. It will thus now criminalise pure negligence as well.

The list of tax evasion offences from s104 ITA⁵⁴ are replicated into **s235** TAA. An additional offence is added (**s235(1)(e)**), being the making of a false statement for the purposes of obtaining a refund of, or exemption from, tax. S235(3) also recognises that a SSO may lay a complaint with the SA Police Service or with the National Prosecuting Authority.

The new **s237** criminalises the filing of returns, documents, or other communications on behalf of another, without consent of the other person.

PwC Comment: Note that, technically, this does not apply solely to providing false information, but could apply to any information. The main issue is whether the permission of the other person has been obtained. For example, even if one person considers they are fulfilling a duty, or assumes that they are doing another person a favour, by submitting information to SARS, it may be a criminal offence. Tax practitioners should therefore ensure that they have specific consent and authority to file a specific return from the client. It is however unclear whether a specific or general mandate is required and whether it must be in writing. As to the latter, it is noted that no onus rules exist.

An alleged offender may be tried at a court having jurisdiction in the area where that person resides or carries on business (**s238**).

⁵³ Deleted by para 64, Sch. 1, TAA

⁵⁴ Deleted by para 73, Sch. 1, TAA

18 Unprofessional Conduct

18 Unprofessional Conduct

SS239 – 243 essentially retain the rules contained in s105A ITA, as well as the rules on the regulation of tax practitioners in s67A ITA.

PwC Comment: Amendments are proposed in the Taxation Laws Amendment Bill 2012 that tax practitioners should now register with both SARS and an approved professional body. Minimum requirements for disciplinary action will be set and it even makes provision that SARS may appoint a disciplinary panel of judges where it is not satisfied with the disciplinary procedures of the professional body. Further regulation of the profession will take place through the Draft Regulation of Tax Practitioners Bill 2008 once it is finalised and enacted.

19 Other General Provisions

19 *Other General Provisions*

Chapter 19 is in reality the last Chapter of TAA (Chapter 20 deals with transitional measures). It deals with miscellaneous provisions that affect several other parts of the TAA.

The majority of Chapter 19 is a restatement of existing law. For example, **s244** TAA mirrors the old s89sex ITA on the point of deadlines —i.e. that deadlines that fall on a weekend or public holiday must be treated as being on the last business day just before that weekend or public holiday. Other matters include rules regarding company public officers, document delivery, tax clearance certificates, etc.

The main new points are as follows:

- **S254** deems certain defective communications to still be valid. Under **s254(1)** if a document is intended to be delivered to a person, but the delivery requirements of **s251 or s252** are not fulfilled, then the document will still be valid if the person had “*effective knowledge*” of the document and its content. Similarly, under **s254(2)** if a defective document is “*in substance and effect*” in conformity with the TAA and is intended recipient is designated in the document “*according to common understanding*”, then the document is considered to be valid and effective.
- **S255** authorises the Commissioner to make rules regarding electronic communications, and also considers the validity of electronic or digital signatures
- **S256** deals with TCCs (Tax Clearance Certificates). SARS is given 21 days to issue or decline the TCC. Matters like the form of the request, the matters to be considered by the senior SARS official considering the application, the form of the TCC, and so forth are also covered in **s256**.

20 Transitional Provisions

20 *Transitional Provisions*

The provisions in Chapter 20 are aimed at ensuring a smooth transition from current law to the TAA.

Perhaps the most important provision in this chapter is **s271**, which incorporates Schedule 1 of the TAA. This contains all of the amendments to existing legislation (e.g. in the ITA, VATA, etc.) to take effect simultaneously with the enactment of the TAA. The majority of these are consequential (e.g. deletion of sections in the ITA, or cross-reference in the ITA to the TAA, etc.) although there are certain substantive changes –which are discussed elsewhere.

The other sections are as follows:

- **s258. New taxpayer reference number:** Existing references numbers issued under current tax Acts remain in force until such time as SARS issues the taxpayer with a new number under s24 TAA.
- **s259. Appointment of Tax Ombud:** The Minister must appoint the Ombud under s14 TAA within 1 year of the commencement of the Act. The Tax Ombud may not review a matter that arose more than 1 year before he or she is appointed, unless requested by the Minister.
- **s260. Provisions relating to secrecy:** Persons subject to secrecy and oath provisions under existing tax Acts are deemed to have subscribed to the oath or solemn declaration under s67(2) TAA.
- **s261. Public officer previously appointed:** Public officers holding office immediately before commencement of TAA are considered appointed under TAA.
- **s262. Appointment of chairperson of tax board:** Persons appointed to the panel who may serve as chairperson of the board, who is on that panel immediately before commencement of TAA, are regarded as appointed under TAA, until the earlier of the expiry of the attorney or advocate's appointment under the previous Act, or the appointment under s 111(3) TAA.
- **s263. Appointment of members of the tax court:** Persons appointed under a tax Act are deemed to have been appointed under TAA, until the expiry of the term of office in terms of the tax Act, or until the appointment in terms of s120(4) TAA lapses.
- **s264. Continuation of tax board, tax court and court rules:** Tax boards and courts established under a tax Act are deemed to be established under s108 or 116 TAA respectively. The rules of court issued by the Minister remain in force, as if issued under s103 TAA.
- **s265. Continuation of appointment to a post or office or delegation by Commissioner:** Persons appointed under previous Acts remain appointed, until such time as the appointment is withdrawn or are re-appointed under TAA.
- **s266. Continuation of authority to audit:** The authority to conduct an audit issued before the commencement of TAA remains in force.
- **s267. Conduct of inquiries and execution of search and seizure warrants:** Inquiries authorised and warrants issued before commencement remain in force.
- **s268. Application of Chapter 15:** Chapter 15 is extended to non-compliance resulting from continuous failure by a person to comply with an obligation that exists on the date the notice under

s210(2) comes into effect. The date of the non-compliance is deemed to be the date the notice came into effect.

- **269. Continuation of authority, rights and obligations:** Rules, regulations, forms, rulings, opinions, Court orders, rights or entitlements under existing Acts are considered to be have been in place under TAA, to the extent they are consistent with TAA. Statutory offences that occur before the commencement of TAA may be prosecuted under the relevant statute.
- **s270. Application of Act to prior or continuing action:** The TAA applies to several actions taken before the commencement of TAA, without prejudice to the action taken before the commencement date of the comparable provisions of TAA. All forms, notices, demand or other documents received or issued by persons or records retained under previous Acts must be regarded as issued or kept under the provisions of the previous Acts. Nothing in TAA may be construed as extending the time period for existing applications, objections, appeal or prosecution. Additional tax and penalties that would have been imposed but for the repeal of the relevant provision may be imposed and assessed under TAA. Interest arising under an existing Act must be calculated under that Act until the commencement date, be regarded as interest due under the provisions of this Act.

PwC Comment: Many of the transitional arrangements allow for the continuation of old regulations, procedures or processes on the basis that “it is consistent with the TAA”. It is unclear what the scope of this “caveat” is and to what prejudice needs to be suffered to be regarded as inconsistent with the TAA provision rather than simply being different. For example, is the old settlement procedure which does not require an assessment to have been issued inconsistent with the provisions of the TAA which does not have this requirement?

PwC Comment: Conflicting transitional provisions seem to exist for penalties and interest. S268 TAA states that where non compliance in respect of a fixed amount penalty continues till after the effective date (1 October 2012) then it will deem the non-compliance to have occurred on that date, thus making it subject to the TAA penalty. In contrast s270(6) TAA states that any penalty, additional tax or interest that “would have been capable of being imposed” by the commencement date, may be imposed under the old provision but recovered under the TAA provisions.

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