Synopsis

Tax today

January 2020

A monthly journal, published by PwC South Africa, that gives informed commentary on current developments in the tax arena, both locally and internationally.

Through analysis of and comment on new laws and judicial decisions of interest, Synopsis helps executives to identify developments and trends in tax law and revenue practice that may affect their business.

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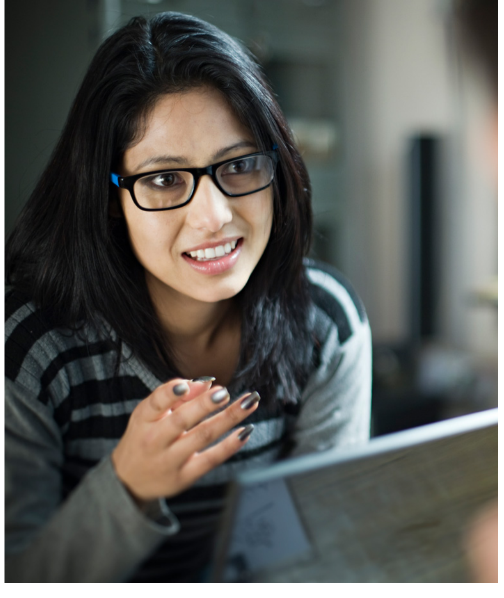
SARS Watch: Linda Mathatho

Understatement penalty – the taxpayer's right to reasons

When an assessment is issued, the taxpayer has a right to request reasons for the assessment from SARS before noting an objection. If the objection is disallowed and the matter proceeds to the tax court on appeal, the rules for the conduct of the appeal require SARS to provide reasons for the assessment.



In Tax Case No. 24643 (judgment delivered 3 May 2019), the Gauteng Tax Court was asked to adjudicate the adequacy of the reasons for a penalty assessment levied by SARS following an audit which resulted in the issuing of an additional assessment.

In this instance the taxpayer had noted an appeal against the additional assessment including the penalty assessment. SARS asserted that the taxpayer had been grossly negligent in the preparation of his return of income and had imposed a penalty at a level consistent with such behaviour.

SARS delivered a notice of grounds of assessment and opposing the appeal, which it is required to deliver in terms of Rule 31 ('the Rule 31 statement'). At paragraph 22, SARS stated:

> '22.1 The appellant neglected to provide complete and accurate information together with the submission of his annual income tax returns for the tax year in dispute;
>
> 22.2 The facts uncovered during the audit fell in the sole knowledge of the appellant, these facts the appellant failed to disclose to SARS;
>
> 22.3 It is SARS' contention that there was no bona fide inadvertent error on the part of the appellant when he completed and submitted his tax returns;
>
> 22.4 SARS deems the conduct of the appellant as stipulated above to fall under the category of gross negligence in completing a return as listed in the understatement penalty percentage table of section 22(3)(1) of the Tax Administration Act.'

The taxpayer contested this statement, arguing that it did not disclose the reasons for the imposition of a penalty based on gross negligence.

In the case of a penalty assessment, the burden of proof rests on SARS, and it must establish, on a balance of probability, that the taxpayer's actions were such as to justify the penalty assessed. Where an assessment of a penalty is contested on appeal, the Rule 31 statement must comply with the requirements of Rule 31(2), which states:

> (2) The statement of the grounds of opposing the appeal must set out a clear and concise statement of—
>
> (a) the consolidated grounds of the disputed assessment;
>
> (b) which of the facts or the legal grounds in the notice of appeal under rule 10 are admitted and which of those facts or legal grounds are opposed; and
>
> (c) the material facts and legal grounds upon which SARS relies in opposing the appeal.

The judgment

Unterhalter J described the purpose of the Rule 31 statement and the responding statement that a taxpayer is required to submit thereafter at paragraphs [11] and [12]):

> '[11] The real question however that I must determine is whether the averments that are contained in paragraph 22 of the Rule 31 statement suffice for the purposes of Rule 31. It seems clear to me that the Rule 31 statement must set out a clear and concise statement of the material facts and legal grounds upon which SARS relies in opposing the appeal (see in particular Rule 31(2)(c)). That provision in the Rule is of course wholly consistent with the purpose of the Rule 31 statement and the Rule 32 statement because as Rule 34 explains, and as I have indicated these two statements set out the issues that go on appeal to the Tax Court.
>
> [12] The Rule 32 statement has a similar requirement, which is that in the Rule 32(2) the statement must set out clearly and concisely, amongst other things, which of the facts or the legal grounds in the statement under Rule 31 are admitted and which of those facts and legal grounds are opposed. The very exercise that is therefore contemplated in the Rule 31 and Rule 32 statements is that there are facts and legal grounds that are sufficiently clearly and concisely specified so as to know what issues proceed to an appeal.'

The crisp issue was whether sufficient information had been provided concerning the behaviour of the taxpayer to justify the conclusion that he was grossly negligent. In this regard the following dicta from the judgment in *Transnet Limited t/a Portnet v Owners of the N B Stella Tingas and Another* 2003(2) SA 473 SCA at paragraph [7]:

> 'It follows I think that to qualify as gross negligent the conduct in question, although falling short of *dolus eventualis* must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme. It must demonstrate where this is found to be conscious risk-taking, a complete obtuseness of mind or where there is no conscious risk taking a total failure to take care. If something less were required the distinction between ordinary and gross negligence would lose its validity.'

Noting that the extent of the penalty is set out in a table in section 223 of the Tax Administration Act, Unterhalter J explained the table at paragraph [15] and [16]:

> '[15] … Thus reading the table, the understatement penalty percentages differentiate substantial understatement from reasonable care not being taken in completing a return and gross negligence.
>
> [16] The penalty percentages increase with the differentiation in the behaviour; and gross negligence in the standard case is visited with a penalty percentage of 100% and it is precisely that percentage that SARS alleges in the Rule 31 statement and that the taxpayer here has committed gross negligence.'

The issue was whether sufficient information was provided to the taxpayer to enable the taxpayer to prepare a case. SARS had argued that the facts would emerge from evidence in the trial and that all it needed to do was aver that there had been culpable behaviour. At paragraphs [23] and [24], Unterhalter J examined the necessity for disclosure:

> '[23] It is of the essence of the behaviour that is tabulated in section 223 that there are differentiated forms of culpability and in order to differentiate the behaviour it is necessary to understand by reference to some facts why the deviation that SARS has uncovered is so great from the standard of reasonable care that it amounts to gross negligence, rather than ordinary negligence or indeed simply a substantial understatement.
>
> [24] That it seems to me is not purely a matter of evidence but is something where certain facts would have to be proved to show that gross negligence is present and that gross negligence must have something to do with what facts were not disclosed and why SARS believe that failure to disclose those facts is constitutive of gross negligence rather than mere negligence or indeed innocent understatement.'

Unterhalter J found that the averments in paragraph 22 of SARS' Rule 31 statement did not disclose behaviour which would justify a finding of gross negligence, as opposed to ordinary negligence or substantial understatement. The exception taken by the taxpayer was upheld, at paragraphs [26] and [27]:

> '[26] Absent the essential facts that SARS relies upon as to why there is gross negligence, the pleadings will simply be a bare denial of gross negligence and that will not be helpful for the purposes of explaining the true dispute that must be resolved on appeal.
>
> [27] I accordingly find that the **exception is well taken** and it is a true exception in the sense that the Rule 31 statement lacks averments necessary to sustain a finding of gross negligence and the imposition of an understatement penalty at the rate of 100%.'

SARS was ordered to remedy the defect in the Rule 31 statement within 15 days.

The takeaway

Although the taxpayer won the battle in this instance, he might not have won the war, as SARS now had the opportunity to amend its Rule 31 statement and specify the behaviour on which it placed reliance, which hopefully then provides a basis for a genuine dispute. From the viewpoint of dealing with SARS, the imposition of a penalty is an instance in which the burden of proof falls on SARS to establish that it has acted reasonably. Taxpayers should exercise their right to test the assertions. If SARS asserts that the taxpayer's behaviour reflects a certain level of culpability, then the taxpayer would be advised to obtain reasons for the level of penalty imposed and be prepared to contest the assertions.

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'Tax as a strategic asset' series

At the start of this new century it is with excitement that we launch this new series focused on the tax function as a value-added business partner. In each topic we hope to enable organisations understand the golden thread of tax through the entire organisation and the requirement for insight, strategic repositioning, improved business performance, tax optimisation and tax integration.

Topic 1: It's not about whether to, or whether not to, it's about how companies adopt tax transparency for their stakeholders

Sustainable Value Creation

In January 2020 during the Davos meeting the World Economic Forum in collaboration with the Big 4 consulting firms set out a proposal for Common Metrics and Consistent Reporting of Sustainable Value Creation that could be used to align an organisation's public reporting. As stated in the Davos Manifesto, 'A company is more than an economic unit generating wealth. It fulfils human and societal aspirations as part of the broader social system. Performance must be measured not only on the return to shareholders, but also on how it achieves its environmental, social and good governance objectives.'
By reporting on non-financial information relevant to sustainable value creation in mainstream reports on a consistent basis a company demonstrates to its shareholders and other stakeholders that it diligently weighs all pertinent risks and opportunities in running its business, conducting its governance processes and contributing to broader economic and social progress, including achievement of the World Bank Sustainability Development Goals.[1]

'Society is demanding more information on the tax position and behaviour of powerful organisations, tax administrations and wealthy individuals. People want to know if everybody is equally contributing to the public welfare. The benefit of providing more information about tax to the public is that you can show that your "tax policy" is not just "boilerplate language". Investors will be more favourable towards transparent companies, since an increasing number of pension funds, private equity and sovereign wealth funds expect a sustainable tax policy. Transparency also leads to "accountability" of tax administrations. Key drivers for voluntary tax transparency include investor requirements and public pressure.'

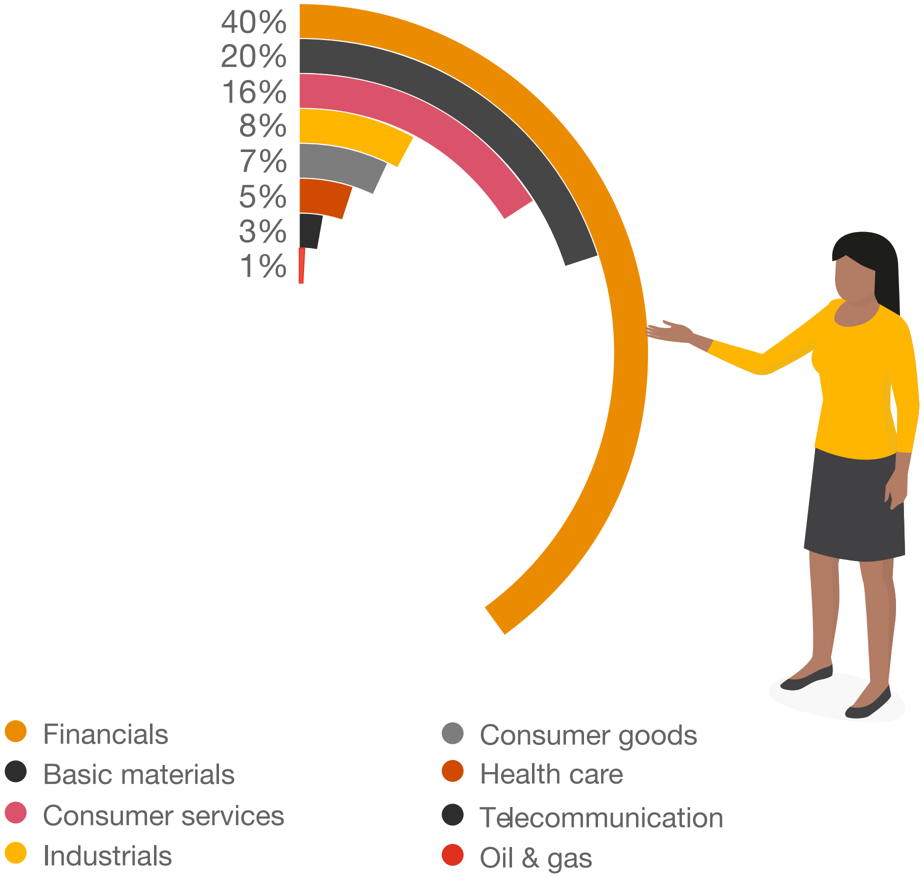
Eelco van der Enden
Partner Tax Administration Consulting, PwC Netherlands
Member of the Board of Directors, GRI

1 World Economic Forum, Toward Common Metrics and Consistent Reporting of Sustainable Value Creation, January 2020

Trends in tax transparency in South Africa

We recently released our latest 'Building pubic trust through tax transparency' publication providing insights into voluntary tax reporting for the financial year ending 31 December 2018 of the top 100 companies listed by market capitalisation on the Johannesburg Stock Exchange.

Sector representation (JSE top 100 companies)



Base: 100
Source: PwC Building Public Trust Study

In terms of market capitalisation, the greatest representation is from the financial sector (40%), basic materials (20%) and consumer services (16%) sectors.

We summarise trends that are shaping the tax transparency landscape and provide examples of how companies are responding by using voluntary tax disclosures to tell their story, thereby demonstrating corporate citizenship as responsible taxpayers.

The PwC Tax Transparency Framework (the Framework) is intended to guide companies in developing a transparency strategy that is fit for purpose. The Framework does not necessarily lead to more disclosure on tax matters, but is intended to help companies make an informed decision on 'transparency to whom and for what purpose'.
The Framework includes 57 broadly defined tax transparency criteria that we consider to be the basis of good practice in voluntary tax reporting. These criteria are grouped under the following categories:

Context	Tax strategy and risk management	Tax numbers and performance	Context
• Effective transparency – easy to find and well communicated • Value reporting	• Tax strategy • Tax as a business risk • Tax risk management, tax governance, tax reporting and oversight • Relationship with tax authorities • Tax controversy • Stakeholder engagement	• Key financial indicators • Effective tax rate v cash tax rate • Tax incentives • Clear and understandable tax rate reconciliation	• Jurisdictions, entities & primary activities • Total economic contributions per tax type, jurisdiction, year • Other economic contributions to government • Tax & wider value creation • Tax and SDG's/ corporate citizenship

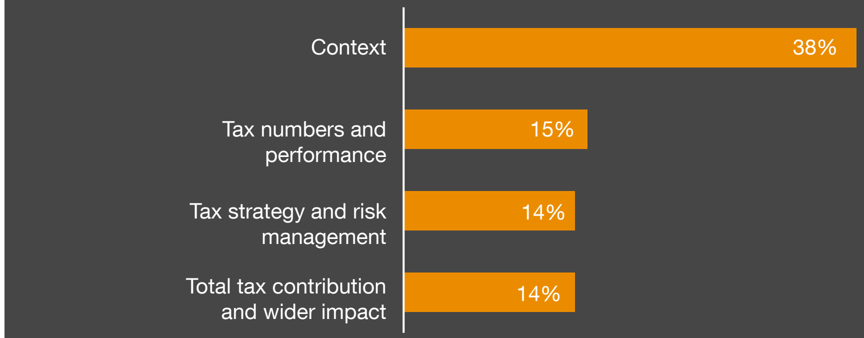
Our aim is to guide companies from the potential complexity of tax transparency to practical execution. With this in mind, we closely monitor developments regarding voluntary transparent tax reporting. In this context, we reconsider the criteria included in the Framework frequently to ensure that they align with global frameworks.

'Tax transparency is not an issue where one size fits all. We would encourage companies to assess their own position, based on their economic profile, their sector, geographic profile and profitability. In this context a company can decide whether there is merit in disclosing more about its tax position. It may want to consider the questions stakeholders may ask, what information is appropriate and how it can be most helpfully disclosed. Companies that provide more voluntary information about their taxes can reduce the risk of hostile scrutiny from the public as a result of misunderstandings or inaccurate media reporting. In the long term, the ability of a company to demonstrate its contribution to the society in which it operates supports its licence to operate and its ability to trade and grow in each market.'

Andrew Packman
Total Tax Contribution and Tax Transparency Leader, PwC United Kingdom

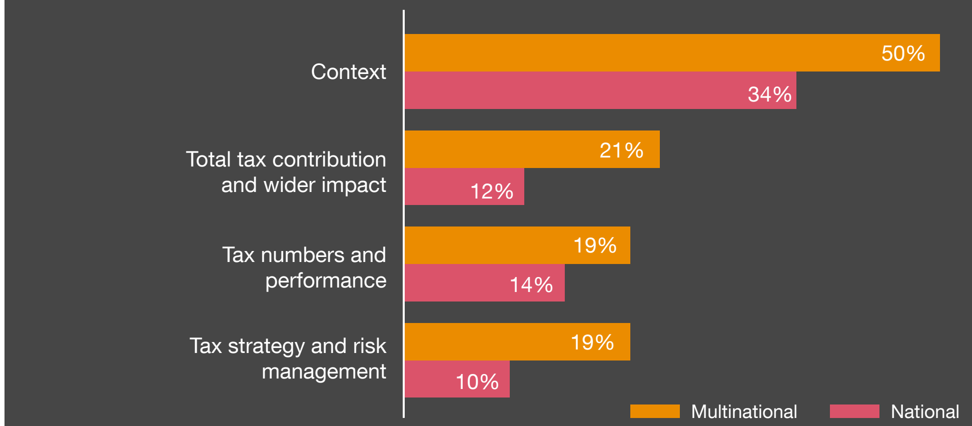
The practices of the companies featured in this analysis show that some are taking a proactive approach to certain aspects of voluntary tax transparency, as they start to deal with an increasing amount of tax reporting/transparency guidance. However, the statistics indicate that the majority of companies elect to focus only on mandatory tax reporting.

Distribution of average transparency per category (JSE top 100 companies)



Base: 100
Source: PwC analysis

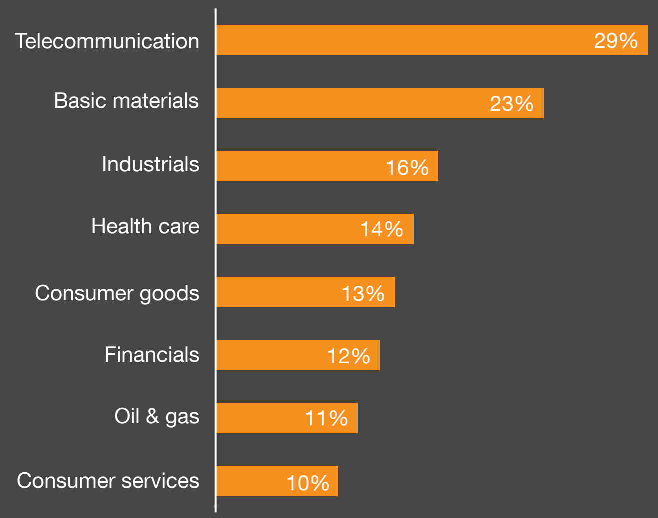
Distribution of average transparency per category (primary-listed national/ multinational companies)



Base: Primary listed, 78; Secondary listed, 22
Source: PwC analysis

Companies that have a primary listing in South Africa with a multinational presence[2] outperformed primary listed companies that have a predominantly national presence.[3] This is most probably due to the exposure of multinational companies to the development of international initiatives that aim to improve tax transparency reporting.

Average overall score for total tax transparency by sector



Base: 100
Source: PwC analysis

The telecommunications sector received the highest overall voluntary tax transparency rating, followed by the basic materials sector. These findings are potentially due to the telecommunications sector experiencing a highly regulated and taxed environment in Africa. There is also an expectation that extractive companies (which form part of the basic materials industry classification) will be more proactive in tax transparency disclosures due to their exposure to international initiatives that aim to improve the voluntary transparency of their industry's tax disclosures.

Taking into consideration the clear requirements on tax set out in King IV™, tax strategy, governance and good corporate citizenship, JSE Listing Requirements as well as the guidance provided by other frameworks, companies may want to reconsider their strategic response to transparency, asking the question: 'Transparency to whom and for what purpose?', providing additional disclosures where they add value. Some value-added disclosure criteria, as noted here, can be considered.

Frameworks for tax transparency

Locally and globally we have seen various guidance issued on voluntary tax disclosure that stakeholders would find helpful in order to understand a company's tax affairs. In South Africa, the King IV™ Report on Corporate Governance™ (King IV™) has brought substance to the requirements of being a responsible taxpayer.

In other parts of the world lawmakers are actively participating in the design of transparency standards. For instance, the UK requires the public disclosure of tax strategies, Australia has introduced its quasi-mandatory Tax Transparency Code (TTC), and the EU has put forward a proposal for mandatory public country-by-country tax disclosures. In the US, the Financial Accounting Standards Board (FASB) re-issued an exposure draft on the income taxes disclosure framework. The aim is to improve the effectiveness of the disclosures in the notes to financial statements by facilitating clear communication of the information required under the generally accepted accounting principles (GAAP) that is most important to users of each entity's financial statements. Frameworks such as the UN-supported Principles for Responsible Investment and the Global Reporting Initiative (GRI) include tax transparency within their scope.

In 2018, The B Team, a global group for responsible business, released its report outlining responsible tax principles to raise the bar on how businesses approach tax and transparency. The Principles for Responsible Investment (PRI) guidance on evaluating and engaging on corporate tax transparency serves as an investor tool for engagements on tax, drawing on key trends and gaps observed in the current status of corporate income tax disclosure practices.

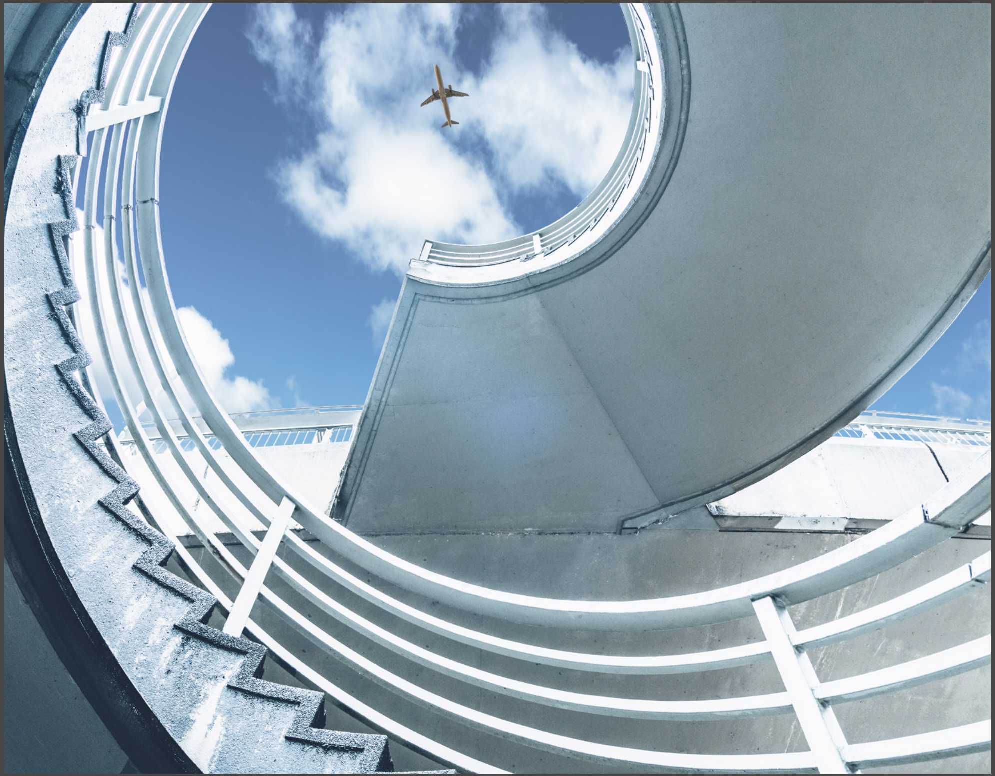
The topic is also being pushed by investor action and industry not-for-profit groups such as VBDO's Tax Transparency Benchmark, Norges Bank Investment Management's Tax and Transparency expectations towards companies document and the Extractive Industries Transparency Initiative (EITI).

If there is a business case, companies should consider increasing their voluntary or public tax transparency and developing innovative disclosures containing relevant and understandable data to inform and influence these standards.

2 A company would fall into this category if the foreign sales are more than 50% of the total sales
3 A company would fall into this category if foreign sales are less than 50% of total sales

The new GRI 207 standard on tax

The GRI Standards issued by the Global Sustainability Standards Board are designed to be used by organisations to report about their impacts on the economy, the environment, and society. Any organisation that claims its report has been prepared in accordance with the GRI Standards is required to report on its management approach for every material topic. The newly developed GRI 207: Tax 2019 ('GRI207') is the first public global standard for comprehensive tax disclosures. GRI 207 now forms an integral part of the consolidated set of GRI Standards, the most widely adopted standards for sustainability reporting in the world. If an organisation has identified tax as a material topic, it is required to report on the topic using GRI 103: Management Approach 2016 and GRI 207. Taxes are important sources of government revenue and are central to the fiscal policy and macroeconomic stability of countries. They are acknowledged by the United Nations to play a vital role in achieving the Sustainable Development Goals. They are also a key mechanism by which organisations contribute to the economies of the countries in which they operate. The GRI states that public reporting on tax increases transparency and promotes trust and credibility in the tax practices of organisations and in the tax systems. It enables stakeholders to make informed judgments about an organisation's tax positions. Tax transparency also informs public debate and supports the development of socially desirable tax policy. The disclosures in GRI 207 are designed to help an organisation understand and communicate its management approach with regard to the following.



Approach to tax:

An organisation's approach to tax defines how the organisation balances tax compliance with business activities and ethical, societal, and sustainable development-related expectations. It can include the organisation's tax principles, its attitude to tax planning, the degree of risk it is willing to accept, and its approach to engaging with tax authorities.

Tax governance, control, and risk management:

Having robust governance, control, and risk management systems in place for tax can be an indication that the reported approach to tax and tax strategy are well embedded in an organisation and that the organisation is effectively monitoring its compliance obligations. Reporting this information reassures stakeholders that training and guidance has been provided to relevant employees on the link between tax strategy, business strategy, and sustainable development

Stakeholder engagement and management of concerns related to tax:

The approach an organisation takes to engaging with stakeholders has the potential to influence its reputation and position of trust. This includes how the organisation engages with tax authorities in the development of tax systems, legislation, and administration. Stakeholder engagement can enable the organisation to understand evolving expectations related to tax. It can give the organisation insight into potential future regulatory changes and enable it to better manage its risks and impacts.

In addition, GRI 207 provides guidance on topic-specific disclosures, including country-by-country reporting on financial, economic, and tax-related information for each jurisdiction in which the organisation operates.

When is GRI 207 ready to use?

GRI 207 will be effective for reports published from 1 January 2021. This means that if the reporting organisation has identified Tax as a material topic, it will be required to report on GRI 207 from 1 January 2021 onwards. Earlier adoption of GRI 207 is encouraged, even if a reporting organisation cannot yet meet all the requirements.

The proposed ‘Common Metrics and Consistent Reporting of Sustainable Value Creation’ presented at the World Economic Forum in Davos mentioned above includes metrics for tax in line with new GRI 207 Tax Standard. This will be a big push for tax transparency reporting in 2020 annual reports.

Please click here for the latest detailed ‘Building public trust through tax transparency’ publication

As this report has discussed, it is recommended for the board to identify where the company is on the spectrum of tax transparency-related communications and tax stakeholder engagement. If you are interested in understanding how your current and proposed disclosure compares to those of your peers, contact our Tax Reporting and Strategy team.

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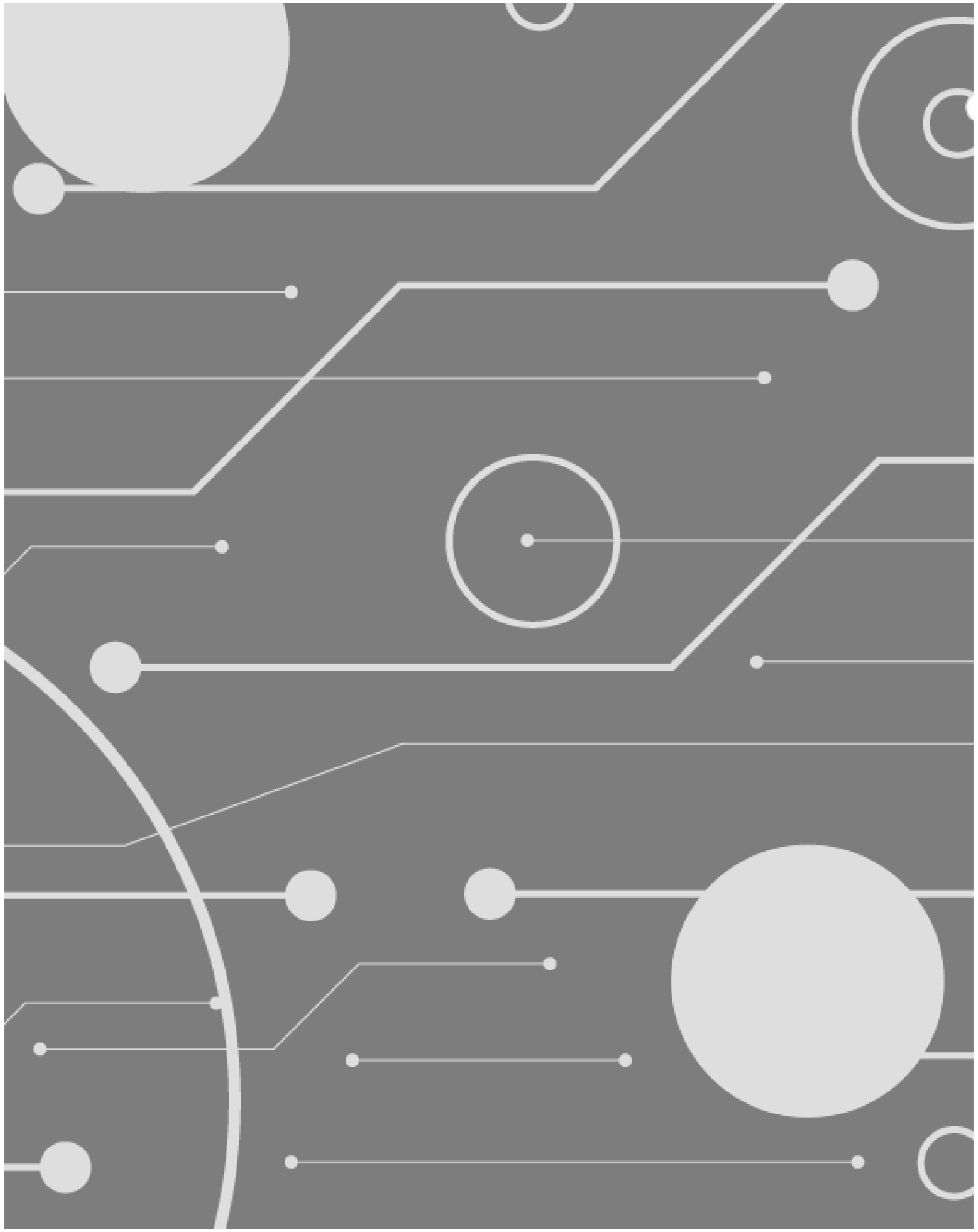

SARS Watch

SARS Watch 23 December 2019 – 26 January 2020

Legislation		
24 Jan 2020	Note 8 to Schedule No. 5, to provide for the granting of a refund or drawback of duty as contemplated in section 75(1)(c), 54D or 54J of the Act in circumstances where the customs procedure code is not inserted on the bill of entry or other export declaration, or has been inserted incorrectly	Notice R45 published in Government Gazette No. 42968 with an implementation date of 24 January 2020.
22 Jan 2020	Memorandum on the objects of TALAB B19 of 2019	Explanation to the Final TALAB which was promulgated on 15 January 2020 to Tax Administration Laws Amendment Act 33 of 2019.
22 Jan 2020	Explanatory Memorandum on the TLAB of 2019	Explanation to the Final TLAB which was promulgated on 15 January 2020 to Taxation Laws Amendment Act 34 of 2019.
17 Jan 2020	Amendment to Part 1 of Schedule No. 1, by the substitution of tariff subheadings 1001.91 and 1001.99 as well as 1101.00.10, 1101.00.20, 1101.00.30 and 1101.00.90 to reduce the rate of customs duty on wheat and wheaten flour from 100.86c/kg and 151.29c/kg to 77.62c/kg and 116.44c/kg respectively, in terms of the existing variable tariff formula – Minute M10/2019	Notice R36 published in Government Gazette No. 42959 with an implementation date of 17 January 2020.
17 Jan 2020	The draft notice relating to the carbon tax environmental levy account (DA 180), which is prescribed under rule 54FD.04, has been published for another round of public comments	Comments must be submitted to SARS by Friday, 7 February 2020.
15 Jan 2020	Rates and Monetary Amounts Amendment Act 32 of 2019	Act No. 32 of 2019 published in Government Gazette No. 42951 promulgated on Wednesday, 15 January 2020.
15 Jan 2020	Tax Administration Laws Amendment Act 33 of 2019	Act No.33 of 2019 published in Government Gazette No. 42951 promulgated on Wednesday, 15 January 2020.
15 Jan 2020	*Taxation Laws Amendment Act 34 of 2019*	Act No. 34 of 2019 published in Government Gazette No. 42951 promulgated on Wednesday, 15 January 2020.
23 Dec 2019	Amendment to rules published in Government Notice R.1874 of 8 December 1995, relating to the environmental levy in respect of carbon tax, and substitution of forms	Notice R. 1700 published in Government Gazette No. 42926, the Insertion of rules 54FD, and substitution of related forms (DA 185 and DA 185.4B2).
Case law		
In accordance with date of judgment		
31 May 2019	Peter v CSARS (3158/2018) ZAGPJHC	This is an application for the review and setting aside of a decision taken by SARS's 'Tier Three Debt Committee' on 20 September 2017, to decline the request by the applicant brought in terms of section 164(2) of the Tax Administration Act 28 of 2011 ('TAA'), to suspend the payment of his tax liability in respect of additional assessments pending the finalisation of his appeal which is currently pending before the Tax Court.
3 May 2019	TAdm 24643	Whether the statement of grounds lacked sufficient averments necessary to sustain a finding of gross negligence.
19 June 2019	VAT 1610	Whether the appellant was entitled to input tax and output tax claims relating to reorganising loans and substituting foreign loans.
31 May 2019	Charles v CSARS (3158/2018) ZAGPJHC	The applicant is objecting to additional assessments and requesting suspension of payment.
29 August 2019	Agricultural Industrial Mechanisation (Pty) Ltd v CSARS (21164/2017) ZAGPJHC	The taxpayer was placed in voluntary business rescue and is requesting SARS to compromise and permanently write off an amount it owed to SARS under the TAA.

19 July 2018	Gold Kid Trading CC v CSARS (2016/31842) [2018] ZAGPJHC 710	Whether applicant is entitled to leave to appeal to the high court in respect of a matter pending before the tax court.
24 October 2019	Glencore Operations SA (Pty) Limited v CSARS (11696/18) [2019] ZAGPPHC 545	Customs and Excise appeal against the decision by SARS to refuse an internal appeal lodged by the applicant against a determination by the Commissioner not to allow certain rebates in respect of distillate diesel fuel purchased and used in mining operations conducted by the appellant.
17 September 2019	IT 13798, IT 13931 and TAdm 14294	Capital gains tax and capital losses: employee share incentive scheme and trust, meaning of 'asset' as defined in the Eighth Schedule and whether that definition includes a personal right.
27 November 2019	Dragon Freight (Pty) Limited and Others v Commissioner for the SA Revenue Service (82686/19) [2019] ZAGPPHC 626	Whether SARS was entitled to seize containers of clothing because of alleged understatement of declared transaction value.
15 November 2019	IT 24614	Whether the appellant was entitled to a deduction for what SARS regarded as a loan.
7 November 2019	IT 14157	Whether the appellant was an independent contractor that was not obliged to deduct SDL and PAYE.
Rulings		
17 Jan 2020	BPR 338 – Donations of money made to a public benefit organisation at a fundraising event	This ruling determines the tax treatment of payments made to the applicant, a public benefit organisation approved under section 30, at a fundraising event.
9 Jan 2020	BPR 337 – Amalgamation transactions involving the assumption of liabilities only	This ruling determines the income tax effect of an amalgamation transaction for consideration involving the assumption of liabilities only.
Guides and forms		
14 Jan 2020	Draft guide to building allowances (Issue 2)	Comments must be submitted to SARS by Friday, 28 February 2020.
National Treasury		
21 Jan 2020	Final Response Document on the 2019 Draft Tax Bills	The Final Response Document updates the Draft Response Document previously published, taking into account submissions and decisions made following further inputs by stakeholders, the Standing Committee on Finance and the Select Committee on Finance during public hearings on the 2019 Draft Rates Bill, 2019 Draft Income Tax Amendment Bill, 2019 Draft TLAB and 2019 Draft TALAB.
Other publications		
14 Jan 2020	Tax Alert: Carbon Tax: Licensing commenced on 2 January 2020	The alert discusses the Rules to the Customs and Excise Act, 1964, which were amended by the insertion of rules 54FD. The new rules relate to the environmental levy in respect of carbon tax imposed in terms of the Carbon Tax Act, 2019.
23 Dec 2019	OECD releases further guidance for tax administrations and MNE Groups on Country-by-Country reporting	The Inclusive Framework on BEPS has released additional interpretative guidance to give greater certainty to tax administrations and MNE Groups on the implementation and operation of Country-by-Country (CbC) Reporting (BEPS Action 13).

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