TAX UPDATE **PREPARED BY: JOHAN KOTZE**

FOR PERIOD: 1 JULY 2013 – 30 SEPTEMBER 2013

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1. INTRODUCTION

The purpose of this update is to summarise the developments that occurred during the third quarter of 2013 (i.e. 1 July 2013 to 30 September 2013) specifically in relation to Income Tax and VAT. Johan Kotze, Bowman Gilfillan's Head of Tax Dispute Resolution, has compiled this summary.

The aim of this summary is for clients, colleagues and friends alike to be exposed to the latest developments and to consider areas that may be applicable to their situation. The reader is invited to contact any of the members of Bowman's tax team to discuss their specific concerns and, for that matter, any other tax concerns.

Taxpayers and tax advisors are waiting for enactments of the Draft Taxation Laws Amendment Bill and Tax Administration Laws Amendment Bill, which makes consideration of the media release detailing material amendments worth-whlile.

The South African Tax Review Committee, which was initiated in the 2013 Budget, has its terms of reference published in this quarter and will nodoubt change the tax landscape. Readers should take note hereof.

From a personal perspective the Master Currency VAT case is of relevance, as it deals with the zero-rating practice in duty free areas.

Interpretation notes, rulings and guides are all important aspects of the developments that took place, as they give taxpayers an insight into SARS' application of a specific provision. It is however important to note that these publications are not law, but may bind SARS. Taxpayers should nonetheless consider these publications carefully to determine whether, and how, they are actually applicable to their own circumstances.

The Dispute Rules are about to be replaced by a new set, and the amended set of rules is reproduced in this Tax Update. This is an important area of taxation, dealing with tax disputed technicalities, because many tax disputes are either won or lost due to the application or misapplication of these rules.

Enjoy reading on!

2. MEDIA STATEMENT – DRAFT TAXATION LAWS AMENDMENT BILL AND TAX ADMINISTRATION LAWS AMENDMENT BILL, 2013

Draft Taxation Laws Amendment Bill and Tax Administration Laws Amendment Bill, 2013

National Treasury today publishes the 2013 draft Taxation Laws Amendment Bill and the Tax Administration Laws Amendment Bill for public comment. The draft legislation gives effect to most of the tax proposals announced in the 2013 Budget Review.

The Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2013 was published on the National Treasury website on 18 June 2013.

Certain tax proposals requiring more consultation (amongst others, trust reforms, pre-retirement preservation proposals and the taxation of long-term insurers) will be dealt with later this year or as part of next year's process.

Tax proposals that require specific legislation (e.g. employment tax incentive, gambling tax, waste discharge incentive charges bill) will be published later this year, whilst others (e.g. carbon tax) will be published for comment next year.

The Merchant Shipping (International Oil Pollution Fund) Contribution & Administration Bills have already been published for comment.

The TLAB deals with some of the following issues:

- A beneficial tax regime for companies that locate in Special Economic Zones approved by the Minister of Finance will be eligible for.
- Proposals to revitalise the maritime sector in South Africa through implementation of an attractive tax regime.
- Tax base erosion in the form of profit-shifting through excessive interest deduction and the use of artificial debt will now be contained through an objective set of rules and limitation rules.
- Taxation of dividends received for services rendered under normal income tax rules (e.g. no Dividends Tax).

- The company paying the dividend will, subject to certain conditions, be entitled to an income tax deduction.
- As from 1 March 2015, most individuals will be able to qualify for a higher deduction in respect contributions made to South African retirement funds. The new regime will be fair and excess contributions will not be deductible.
- The vested rights of current provident fund members will be protected in the proposals in respect of the annuitisation of provident funds. The annuitisation will only affect new contributions for persons under the age of 55 as at 1 March 2015.
- Employers will in future be able to assist their low-income employees to acquire houses at below market value without tax being payable by the employee.
- Foreign e-commerce suppliers will have to register for VAT, ensuring that they compete on equal footing with local e-commerce suppliers.

More detail on some of the material amendments are provided below.

Disability (and income protection) policies

Premiums in respect of income protection insurance policies have been allowed as a tax deduction for individuals as those policies were intended to cover the individual against an actual loss of income. However, as a policy matter, premiums in respect of life cover and temporary or permanent disability are non-deductible, with the pay-outs being tax-free. It is proposed that these principles (non-deductibility of premiums and tax-free pay-outs) be extended to income protection policies to ensure that there is uniformity in the treatment of polices that relate to personal cover for individuals.

Removal of dividend character overlap and the employee share scheme dividends

The amendment seeks to address tax avoidance through the re-characterisation of income. This occurs when dividends are paid in respect of services rendered. Under this revised approach, the party receiving the dividend will be taxed on the dividend as ordinary income if the dividend is received or accrued by virtue of services rendered. The company paying

the dividend will, subject to certain conditions, be entitled to an income tax deduction. This amendment addresses some of the concerns around employee share trusts.

Retirement reforms

The proposed reforms introduced in the Bill are based on some of the proposals made in various retirement reform papers published in 2012 and with the 2013 Budget. They encompass the tax treatment of contributions to retirement funds for the employer and the individual, as well as the alignment of provident funds to pension and retirement annuity funds. To ensure greater transparency and better data, employer contributions to any retirement fund will be taxed as a fringe benefit in the hands of the individual. The sum of the contributions from employer and individual will be deductible in the hands of the individual taxpayer up to 27.5 per cent of the greater of taxable income or remuneration, or up to a monetary cap of R350 000, whichever is the lowest. Employer contributions towards a defined benefit fund will be valued through the application of a formula.

Although a few taxpayers might be negatively affected (those contributing in excess of the caps), the net after tax position of the majority of taxpayers will remain unchanged and some will be marginally better off, given the higher 27.5 per cent deductions. The effect of the introduction of annuitisation to provident funds will be gradual through the protection of vested rights. The vested rights of current provident fund members will be protected in the proposals in respect of the annuitisation of provident funds. The annuitisation will only affect new contributions for persons under the age of 55 as at 1 March 2015. Consultations will continue to take place with interested parties, including trade unions, businesses, public servants, to discuss the proposed reforms, including a reasonable to effect the above proposals.

Employer provided accommodation - low-cost housing

Housing programmes initiated by employers for the benefit of their employees are hindered by the fringe benefit tax that an employee will pay on the difference between the market value of the property and the amount

paid by the employee. In order to eliminate this obstacle, there will be no tax payable if an employee earning a total salary of not more than R200 000 acquires a property with a cost to the employer of not more than R350 000. The incentive is not limited to a certain sector; it should stimulate the provision of affordable housing in South Africa and help address some of the challenges in the mining sector in particular.

Restricting debt to prevent base erosion

Tax base erosion in the form of profit shifting through excessive interest deductions, with income being shifted to low-tax (or zero-tax) jurisdictions, or the conversion of interest income into a different type of income in another jurisdiction has been of global concern. It is proposed that permanent measures to address the concerns of tax base erosion be introduced. In respect of hybrid debt instruments, the proposals focus on two elements: (1) the debt instrument itself and (2) the yield. The proposal dealing with the instrument denies the interest deduction for the payor and treats the interest payments on the instruments as dividends if the debt satisfies one or more of the following characteristics: (i) it is unlikely to be redeemed within 30 years, (ii) it can be converted into shares, or (ii) payments in respect of the instrument are subject to the solvency of the issuer. The proposal dealing with the yield also denies the deduction and treats the interest as dividends if the interest payment is not determined with reference to a specified interest rate or the time value of money, or the payment obligation is conditional upon the solvency of the debtor.

The proposal dealing with connected person debt limits the interest deduction to 40 per cent of the debtor's taxable income (with certain adjustments) if the creditor (together with related parties) holds more than 70 per cent of the equity shares or voting rights in the creditor company. The proposal dealing with the limit for acquisition debt (taxable acquisitions) will be based on 40 per cent of the adjusted taxable income of the acquired company, while the limit for debt used in re-organisation transactions (tax-free acquisitions) will be based on 40 per cent of the adjusted taxable income of the acquiring company.

Collective investment schemes:

Currently, hedge funds are operating in an unregulated arena. These funds will be regulated by housing them in the collective investment scheme framework. The proposed regulation is set for implementation in 2014.

Existing rules on the taxation of collective investment schemes (other than collective investment schemes in property) need to be adjusted to ensure a complete exemption from tax (income tax and capital gains tax) at a collective investment scheme level. Distributions by a collective investment scheme to unit holders will however be treated as normal income in the hands of the unit holder (investor), except where:

- the collective investment scheme makes the distribution as consideration for the buyback of units from the unit holder, or distributes units to the unit holder, upon which the distribution received by the unit holder will be treated as a capital receipt; and
- dividends are distributed within 12 months after receipt or accrual thereof by the collective investment scheme, in which case the dividend will be subject to dividends tax in the hands of the unit holder.

When the investor sells the units in a collective investment scheme in securities or in a retail hedge fund, the amount received will be deemed to be of a capital nature if the units were sold after a three year holding period. In the case of a restricted hedge fund, the amount received will always be deemed to be of an ordinary nature.

Tax Incentives for Special Economic Zones

The Department of Trade and Industry (DTI) has identified a lack of targeted tax incentives as one of the hindering factors to the success of Industrial Development Zones. In support of the DTI‘s broader initiative to improve governance, streamline procedures and provide more focused support for industry, it is proposed that companies operating within .Special Economic Zones (SEZs) (and approved by the Minister of Finance after consultation with the Minister of Trade and Industry) will be eligible for a favourable tax dispensation. All businesses operating within approved

SEZs will be eligible for accelerated depreciation allowances on capital structures and an employment incentive. Certain companies (carrying on qualifying activities within an approved SEZ) will be subject to a reduced corporate tax rate (i.e. 15 per cent instead of 28 per cent). All SEZs will qualify for VAT and customs relief similar to that for the current IDZs.

Public benefit organisations

Donations to certain public benefit activities are deductible for income tax purposes up to a maximum of 10 per cent of taxable income. Where a taxpayer makes a donation in excess of 10 per cent of taxable income in any one tax year, the tax benefit of such excess donation is lost. The revised proposal will allow the tax deductibility of such excess donations to roll over to the next tax year so that the tax benefit is not foregone. This reform will also be beneficial to the biodiversity stewardship programme (BSP) of the Department of Environmental Affairs. A BSP is a partnership with private land owners to preserve biodiversity and is implemented through the creation and expansion of protected areas by means of bilateral agreements whereby private landowners voluntarily restrict and maintain the land on the government's behalf. Where land has been owned for many years, the original cost of the land is generally much lower than its current market value. Presently, the incentive is calculated using the lower of cost or market value of the protected area for 99-year contracts. In addition to the above roll-over provision, the draft legislation provides that the value for the purpose of this incentive should be the lower of the municipal or market value. Capital gains will be triggered, but the taxable proportion of these gains will be set off against the deduction allowed over a period.

Streamlining the research and development (R&D) tax incentive

In moving from the previous to the current tax dispensation (whereby companies are required to obtain pre-approval for an additional deduction of 50 per cent of R&D related expenditure), some unintended anomalies have become apparent. The language in the current provision has led to uncertainties in the interpretation of the legislation and blockages have arisen in the adjudication process. The proposed amendments will streamline and accelerate the adjudication process, particularly for projects

in the pharmaceutical (generic medicines and clinical trials) and information and communication technology (ICT) related sectors.

Uniform cross-border withholding to prevent base erosion

Fees payable to foreign persons in respect of technical, management or consultancy services rendered in South Africa that fall outside the normal tax are not subject to any withholding tax. Certain fees, like interest and royalties, generate local deductions that often lead to tax planning opportunities. Therefore, some form of protection in the form of withholding is needed to protect the tax base. It is proposed that cross-border consultancy, management and technical fees received by foreign residents be subject to withholding tax. This new withholding tax will be a final withholding tax that will be used to identify and collect revenue from non-resident taxpayers who provide certain services within a South African source that falls outside the normal tax. This withholding tax will be levied at the rate of 15 per cent of the gross amount of fees paid to a foreign resident.

Exemption for international shipping transport entities

It is proposed that a new tax regime for the shipping companies be introduced. In the main, the new shipping tax regime exempts qualifying shipping companies from income tax, capital gains tax, dividends tax, and withholding tax on interest. This tax relief would form part of the integral policy alignment by the Department of Transport to revive the maritime sector in South Africa. These complete exemptions are more favourable than the initially proposed tonnage tax for South Africa.

Gateway Subsidiary

The proposed domestic treasury management company regime encourages the establishment of group treasury management functions in South Africa. This is part of the ongoing strategy of leveraging South Africa's advantage as a gateway to Africa. In the main, any company listed on the Johannesburg Stock Exchange may establish an exchange control-free subsidiary in South Africa to manage its group treasury functions without adverse currency tax implications.

VAT registration of E-commerce suppliers

Under current VAT law, foreign suppliers of e-commerce services to South African customers are not compelled to register as VAT vendors, owing to the fact that these foreign suppliers transact wholly over the internet and have no physical place of business in South Africa. Introducing a place of supply rule into the VAT Act will ensure that foreign suppliers of e-commerce services register for VAT in South Africa and will protect the VAT base. The local e-commerce service industry will benefit as the foreign suppliers will now be on equal footing with their local counterparts (i.e. VAT is levied on local sales of e-commerce services and will now be levied on e-commerce services electronically delivered by foreign suppliers to South African customers). E-commerce suppliers will be allowed to register for VAT on the payments basis in order to ease administration.

Streamlining VAT registration

The current provisions in the VAT Act regarding compulsory and voluntary registration are being streamlined. In the compulsory space, businesses that make taxable supplies in excess of R1 million over a continuous period of 12 months and businesses that will surpass this threshold in a future period of 12 months (owing to a contractual commitment in writing to make those supplies e.g. government tender work, etc.), will be obliged to register for VAT. The predictive element for compulsory VAT registration is eliminated and it is hoped that most of the disputes surrounding VAT registration in this area will be eliminated.

In the voluntary space, VAT registration is simplified with the ultimate objective of speeding up VAT registration for small and medium businesses, as well as large businesses that undertake huge capital investments (e.g. mining, forestry, warehousing, etc.). It is proposed that voluntary registration follows a two-pronged approach: (i) traditional VAT registration, and (ii) fast-tracked VAT registration:

- Under the traditional approach, municipalities, welfare organisations, foreign donor-funded projects, etc. will be allowed to register – with no threshold test being applicable for supplies made, or to be made, by

these entities. Further, other entities seeking registration under this traditional approach (e.g. mining, forestry, warehousing, etc.) must incur a minimum of R5 million in expenditures. Vendors registered under this approach can claim refunds for expenses incurred in respect of supplies received.

- Under the fast-tracked approach, persons/entities seeking registration will be registered – again with no threshold test being applicable for supplies made, or to be made, by these entities. A safeguard will be added to ensure that refunds are blocked until that person/entity makes R100 000 of taxable supplies in a continuous period of 12 months before becoming entitled to the refund.

Refinements to the mineral royalty regime

The proposed amendments to the Mineral and Petroleum Resources Royalty Act is to remove any anomalies that have arisen, and to refine and strengthen the current legislation. There are three main refinements:

- The current reporting requirements place an unnecessary compliance burden on taxpayers in that they must report to both SARS and National Treasury. In order to reduce this burden and streamline the data collection process, the proposed amendments will require the Commissioner for SARS to provide the Minister of Finance with detailed data on royalty calculations and payment information per taxpayer.
- The proposed amendments will alleviate the compliance burden on small business corporations (SBCs) – SBCs will no longer be required to register if their gross sales is below R10 million.
- The schedules have been reviewed due to some companies incorrectly interpreting the legislation or the legislation not being sufficiently clear. This appears to be prevalent in the case of coal. The value of total coal sales constitutes a larger share than all other minerals in 2011 (second biggest in 2010), while royalty contributions from coal mining companies for 2011/12 are only 5.3 per cent (7.3 per cent in 2010/11) in relation to other minerals.

Search and Seizure provisions in terms of the Customs and Excise Act, 1964

Pursuant to the judgment by the Western Cape High Court in the Patric Lorenz Martin Gaertner vs The South African Revenue Service (12632/12) case and the finding that the search and seizure provisions in section 4 of the Customs and Excise Act, 1964, are unconstitutional, an amendment to section 4 is proposed in the draft Bill.

Currently the legislation affords very wide powers to officers to search any premises at any time, without the requirement of a warrant. The Court suspended the effect of the order to afford Parliament an opportunity to amend section 4 to correct the Constitutional defect. The proposed amendment aims to achieve this by establishing the broad principle that an officer may enter premises only on authority of a warrant. A warrantless search and seizure may occur in prescribed narrow circumstances. Certain categories of premises are excluded from the general rule and access to these premises is unrestricted and no warrant is required (e.g. premises managed or operated by the State or a public entity as part of a port, airport, railway station or land border post where customs activities are carried out).

Extension of prescription period in the event of delays by taxpayers

In complex matters, such as transfer pricing and GAAR audits, taxpayers often employ dilatory tactics in providing information to force a matter closer to the three year prescription period. The proposed amendment provides for an extension of prescription for the periods that taxpayers, without just cause, do not provide information or employ dilatory tactics.

Extension of prescription period for reduced assessment

The proposed amendment will enable SARS to issue a reduced assessment to address an error made by the taxpayer. However, a reduced assessment will only be issued if SARS was notified of the error in time, the error is not disputed, and SARS did not issue the reduced assessment before the expiry of the prescription period. Currently, SARS cannot accommodate the taxpayer.

Understatement penalty system

The proposed amendments to the Act seek to clarify that an understatement as a result of a bona fide inadvertent error will not result in a penalty. .The applicable percentages of the penalty are also reduced in the case of substantial understatements, if reasonable care was not taken, or if no reasonable grounds exist for the tax position taken.

Regulation of tax practitioners

Under the current wording, employees who are under the direct supervision of a person who is a registered tax practitioner need not register as tax practitioners. Industry has made representations that this results in 'intermediate managers' (between trainees or article clerks, for example) and a partner or director also having to register as tax practitioners. An amendment to replace direct supervision with the concept of acceptance of accountability is proposed.

3. REGULATIONS / NOTICES

3.1 Advance Tax Ruling system

The Advance Tax Ruling (ATR) system is intended to promote clarity, consistency and certainty in respect of the interpretation and application of the tax laws to which it applies.

Clarity and certainty on SARS' interpretation and application of the tax laws relating to proposed transactions can be obtained through a Binding Private Ruling (BPR) or a Binding Class Ruling (BCR).

Applications for VAT BCRs and VAT BPRs as envisaged in section 41B of the VAT Act, 1991, must be submitted to SARS by email to VATRulings@sars.gov.za or by facsimile on +27 86 540 9390. The application should be marked with either 'Application for a VAT Class Ruling' or 'Application for a VAT Ruling'.

Note that applications for VAT rulings are not submitted via eFiling and that there are no costs involved

Provided full and accurate disclosure of facts in connection with any proposed transaction has been made and that the transaction is actually carried out as described in the application, a ruling will be binding on SARS.

The ATR unit may be contacted per email addressed to Atrinfo@sars.gov.za

Application fees	
Applicant Category	**Application Fee**
Small, medium and micro enterprises (SMMEs)	R2 500
Any other taxpayer	R14 000

Cost recovery fees

Category	**Estimated free range**	**Estimation deposit** (20% of higher amount)	**Hourly rate**
Standard	R10 000 to R35 000	R7 000	R650
Involved	R35 000 to R70 000	R14 000	R650
Complex	R70 000 to R105 000	R21 000	R650
Extraordinary	Case-by-case	Case-by-case	R650
Urgent applications	Case-by-case	Case-by case	R1 000

In addition to the above, any direct costs incurred in connection with an application will be recovered. These will, however, be subject to prior written approval being obtained from the applicant.

4. SOUTH AFRICAN TAX REVIEW COMMITTEE – TERMS OF REFERENCE

The Minister of Finance announced in the 2013 Budget that-

'A tax review will be initiated this year to assess our tax policy framework and its role in supporting the objectives of inclusive growth, employment, development and fiscal sustainability…'

In providing further details, this Terms of Reference draws from announcements already made in the 2013 Budget Review (BR).

1. Composition Committee

Judge Dennis Davis will chair the committee. The other members are:

- Prof. Annet Wanyana Oguttu,
- Prof Matthew Lester,
- Prof Ingrid Woolard,
- Ms. Nara Monkam,
- Ms. Tania Ajam,
- Prof N Padia
- Mr Vuyo Jack.
- Two officials, one from the National Treasury, Mr. Cecil Morden, and one from the South African Revenue Service, Mr. Kosie Louw, will serve as ex-officio members in a technical, supportive and advisory capacity.

In addition the National Treasury and SARS will provide secretarial support to the Committee and SARS will provide office accommodation and logistical support to the Committee.

2. Terms of Reference

The terms of reference for the Tax Review Committee are to inquire into the role of the tax system in the promotion of inclusive economic growth, employment creation, development and fiscal sustainability. The committee will take into account recent domestic and international developments and, particularly, the long term objectives of the National Development Plan.

The Committee is advisory in nature, and will make recommendations to the Minister of Finance. The Minister will take into account the report and recommendations and will make any appropriate announcements as part of the normal budget and legislative processes. As with all tax policy proposals, these will be subject to the normal consultative processes and Parliamentary oversight once announced by the Minister.

The committee should evaluate the South African tax system against internationally accepted tax trends, principles and practices, as well as recent international initiatives to improve tax compliance and deal with problems of base erosion.

The following aspects should receive specific attention from the committee:

1 An examination of the overall tax base and tax burden including the appropriate tax mix between: direct taxes, indirect taxes, provincial and local taxes. An analysis of the sustainability in the long-run of the overall tax-to-GDP ratio, and the tax-to-GDP ratio for each of the three major tax instruments, personal income tax (PIT), corporate income tax (CIT) and VAT should be undertaken. This in essence requires an evaluation of the economic and social impact of the tax system and an assessment of whether the current tax structure is able to generate sufficient and sustainable revenues to fund government's current and future expenditure priorities.

2 The impact of the tax system in the promotion of small and medium size businesses. An analysis of tax compliance costs, the possible further streamlining of tax administration and simplification of tax legislation.

3 A review of the corporate tax system with special reference to:

a. the efficiency of the corporate income tax structure;

b. tax avoidance (e.g. base erosion, income splitting and profit shifting, including the tax bias in favour of debt financing);

c. tax incentives to promote developmental objectives and;

d. average (and marginal) effective corporate income tax rates in the various sectors of the economy.

4 As noted in the 2013 Budget Review, the committee will consider:

a. Whether the current mining tax regime is appropriate, taking account of:

i the agreement between Government, Labour and Business to ensure that the mining sector contributes to growth and job creation, remains a competitive investment proposition, and all role players contribute to better working and living conditions;

ii the challenges facing the mining sector, including low commodity prices, rising costs, falling outputs and declining margins, as well as to its current contribution to tax revenues.

b. Various elements of taxation within the financial sector, namely the taxation regime of long term insurers, the taxation of hedge funds, the taxation of various innovative financial instruments, and the VAT treatment of financial services and VAT apportionment within the financial sector.

5 Value added tax with specific reference to efficiency and equity. In this examination, the advisability and effectiveness of dual rates, zero rating and exemptions must be considered.

6 The impact of e-commerce (especially the use of digital delivery of goods and services) upon the integrity of the tax base, in particular upon value added tax and corporate income tax revenues.

7 The progressivity of the tax system and the role and continued relevance of estate duty to support a more equitable and progressive

tax system. In this inquiry, the interaction between capital gains tax and the estate duty should be considered.

8 An evaluation of proposals to fund, for example, the proposed National Health Insurance (NHI) and long term infrastructure projects to boost the growth potential of this economy.

9 An evaluation of the legislative process with a view to both enhancing simplicity and ensuring the protection of the tax base and to recommend how to improve the current process.

The Committee is mandated to study any further tax issues which, in the Committee's view, should be addressed in order to promote inclusive economic growth, employment creation, development and fiscal sustainability. The Committee is required to submit interim reports and a final report which will be published on dates to be determined after consultation between the Committee and the Minister of Finance.

3. Objectives of South African tax system

The committee should take into account the following broad tax policy objectives:

a. Revenue-raising to fund government expenditure is the primary objective of taxation

b. Social objectives, building a cohesive and inclusive society can be met partially through a progressive tax system and by raising revenue in order to redistribute resources.

c. Market failures can be corrected by applying a tax on production and/or consumption to internalise negative externalities, e.g. pollution or consumption of harmful products.

d. The tax system can influence behavioural changes by encouraging certain actions (e.g. savings) and discouraging others (e.g. smoking).

e. Taxes and tax incentives are sometimes used in targeted ways to encourage higher levels of investment to help facilitate economic growth.

f. International competitiveness is important, although the tax system is not the main driver of international competiveness. Innovation and productivity improvements are far more important. We should guard against the 'race to the bottom' in our efforts to strive for a 'competitive tax system'.

4. Background to the Review

Following the last tax commission (The Katz Commission), South Africa's tax system and tax administration have undergone significant changes. An independent tax administration, the broadening of the tax base and the lowering of marginal tax rates have all contributed towards a relatively robust and competitive tax system. Today South Africa's tax policy and tax administration compares favourably with that in many developed and emerging economies.

Given the pace of globalisation, the relatively modest economic growth following the 2008/09 economic recession and significant social challenges such as persistent unemployment, poverty and inequality, there is a need to review the contribution of the tax system (as part of an coherent and effective fiscal policy framework) in order to address these challenges in the future. There is also a need to address concerns about base erosion and profit shifting, especially in the context of corporate income tax, as identified by the OECD and G20.

5. TAX CASES

5.1 MTN International (Mauritius) Ltd v C:SARS

MTN International (Mauritius) Ltd (MTN) was a company registered in Mauritius and a subsidiary of a South African company, MTN Group Ltd, listed on the Johannesburg Securities Exchange. It is the intermediate holding company of cellular telephone operating subsidiaries outside South Africa and was registered as a taxpayer with the Respondent, being the

Commissioner for SARS.

MTN had acquired operating groups in Nigeria and the Middle East through loans made from its holding company, MTN Holdings Ltd and the interest expenditure on these loans was claimed as a deduction in terms of the Income Tax Act.

It was common cause that MTN's original assessment for the 2006 year of assessment had been issued on 1 April 2008 and as a result of MTN's overpayment of provisional tax issues arose regarding the percentage it allocated as deductible on its interest expenditure and the Commissioner for SARS conducted a refund audit as MTN had claimed a substantial amount in tax refunds and the Commissioner's view was that the interest expenditure was 'unproductive interest' and did not qualify for deduction under the Act.

SARS issued a letter of findings to MTN on 24 February 2011 in which he gave MTN thirty days to respond thereto and MTN replied on 25 March 2011.

SARS, on 31 March 2011, raised an additional assessment and emailed the said assessment on the same day to the MTN who was of the view that SARS had dismissed and had not properly considered all the matters raised in its reply and preceding correspondence and contended further that SARS' conduct was unlawful and reviewable for the following reasons:

- SARS had issued the revised assessment (IT40) on 31 March 2011 and contrary to its powers and in the 'absence of jurisdictional facts entitling it to do so' had back-dated the 'due date' by one day to 30 March 2011 and SARS had thereby 'manipulated the commencement date of prescription in terms of the Act by pushing it back by a day. (The power of SARS to raise an additional assessment would have prescribed in terms of section 79 of the Income Tax Act on 31 March 2011.)
- SARS had refrained from applying the practice that it had consistently applied by setting the 'second date' 30 days later (*ie* by indicating the second date as being 31 March 2011 and not 30 days later it had

omitted the period for payment entirely); by raising extraneous and irrelevant factors SARS had 'arbitrarily and capriciously' brought forward the 'second date' to 31 March 2011.

- The decision taken by SARS was not rationally connected to the reason contained in SARS' aforementioned letter of findings.
- MTN contended accordingly that SARS' conduct had been defective and invalid and, furthermore, it was also inconsistent with the Constitution and the rule of law.

MTN also contended that SARS had failed to comply with what had become common practice that followed after concluding audits as it failed to provide a meaningful reply to the information and extensive annexures attached to its response to the Letter of Findings and it seemed as if nothing so presented would change the decision already taken to issue an additional assessment. In other words, a legitimate expectation had been created by the former Commissioner for SARS, Mr Pravin Gordhan, in the Transvaal Provincial Division case *4594/02* when he stated that:

'even if upon conclusion of the audit, the view is held that there is additional income not declared by the MTN for which it should be assessed, the MTN will be informed of the basis of such conclusions. The MTN will be given an opportunity to respond to such views prior to the issue of the assessment.'

MTN had brought an application in the North Gauteng High Court in terms of section 6 of the Promotion of Administrative Justice Act (PAJA) for the review of the procedural defects and actions of SARS in the determination of the additional assessment raised on 31 March 2011 in terms of s 79 of the Act in respect of MTN's 2006 year of assessment.

In terms of MTN's notice of motion an order was sought to set aside the additional tax assessments in issue in respect of MTN's 2006 year of assessment and to credit or reverse any set-off that it had applied against the refund owed by SARS to the MTN.

MTN submitted that SARS could not raise an assessment that omitted entirely the 'period for payment' or set the 'due date' to be before issue of the assessment because section 89 of the Act contemplated a period for

payment and interest payable if the amount was not paid within that period and by predating the 'due date' the taxpayer was deprived of the 30 days from 'due date' within which to object or to request reasons or time within which to pay the assessed amount.

SARS denied that he had been influenced by ulterior motives in raising the additional assessment and stated that he was duty bound in terms of section 79 of the Act to raise the 2006 additional assessment which could not be set aside on the basis of the legitimate expectation relied upon by the MTN.

SARS averred that the official concerned had manually fixed the 'due date' and the 'second date' as 30 March 2011 and 31 March 2011 respectively because he was under the impression that the two dates could not be on the same date 'and that he was afraid that if he fixed later dates, then it could be said that the assessment had prescribed.' SARS admitted that the official had been wrong because the relevant date of assessment was the date upon which the assessment had been raised.

SARS further averred that in order to give effect to the 2006 additional assessment raised on 31 March 2011, the assessment still had to be entered into SARS' 'NITS' system 'which automatically generated and issued an IT 34 assessment which fixed a new 'due date' and 'second date' as 1 May 2011 and 31 May 2011 respectively.

SARS, relying on the decision in *Metcash Trading Ltd* v *C: SARS* 63 SATC 13, submitted that the High Court had jurisdiction to determine 'income tax cases turning on legal issues (only) and that where a specialist court, such as the Tax Court, had been assigned to hear appeals against tax assessments, the High Court did not have jurisdiction to adjudicate over the merits relating to such assessment.

Judge Tlhapi held the following:

(i) That the issues here were:

- firstly, whether the additional assessment was issued without due process being followed;

- secondly, whether SARS had infringed the MTN's legitimate expectation as set out above and,
- thirdly, whether the additional assessment was defective and invalid based on the Constitution and the rule of law and had deprived MTN of just administrative action that was 'lawful, reasonable and procedurally fair'.

(ii) That disputes of fact did arise in the present matter because of the serious allegations levelled against SARS which revolved around the reasons for raising the assessment and for fixing the 'due date' and 'second date' and the court has to establish whether on the papers the MTN has made out a case to support the conduct alleged and the order that it seeks and it was correctly submitted that if the dispute of fact was material to the relief sought, the MTN could not succeed in the absence of an application to go to oral evidence and the matter had to be resolved in terms of the rule in *Plascon-Evans Paints Ltd* v *Van Riebeeck Paints Ltd* 1984 (3) SA 623 (A) at 634E–635C.

(iii) That what was not in dispute was that in terms of section 79 of the Act SARS was, if so satisfied, entitled to raise an additional assessment in respect of any amount which should have been taxed under the Act and was not assessed to tax, notwithstanding that an assessment may have been raised in respect of that year or years of assessment and, notwithstanding the provisions of sections 81 and 83(18) of the Act provided that such additional assessment shall not be raised after the expiration of three years from the date of assessment.

(iv) That the question had to be asked whether, in as far as this matter was concerned, the erroneous date had impacted upon the MTN's rights, where the MTN had availed itself of the right to ask for reasons in terms of Rule 3 of the Tax Court Rules.

(iv) That while the manipulation of the dates was wrong and that it could be seen to affect rights afforded to the taxpayer by the Constitution, SARS also conceded that its official's conduct was wrong. Whether his explanation would be accepted or not depended also on the

determination of the merits which was before the Tax Court and the submission for the MTN entirely ignored the fact that the additional assessment in both the IT40 and IT34 was raised within the three year period and was communicated to the MTN on the same day, after both parties had deliberated over the issue, albeit not to the satisfaction of the MTN and therefore the submission of SARS was correct because it gave effect to the meaning and application of section 79 of the Act, that is, an entitlement by SARS to raise additional tax within the period prescribed.

(vi) That the argument based solely on the issue of the unfairness to the taxpayer because of the manipulation of the dates or if the two dates fell on the same date was flawed and it could not have been intended in the relevant provisions that, despite the presence of sections 79 and 94 of the Act, the Commissioner would not be entitled to raise an additional assessment on any day which bordered on the last day of the three year period (in this case 31 March 2011) because the issue thereof had the potential of disentitling the taxpayer of the 30-day period for payment or period to object and should effect be given to the 30-day period, that in any event, the additional assessment shall have prescribed.

(vii) That the question to be asked was whether the alleged manipulation of the 'due date' and 'second date' had been *mala fide* and had therefore invalidated the additional assessment raised and that in order for the MTN to succeed, the court would have to reject the explanation for the manipulation and the reason for raising the assessment as 'far fetched and untenable' and find that the conduct was irregular, had vitiated the proceedings and was prejudicial to the MTN. It was not possible in these proceedings to properly decide on the alleged *mala fides* of SARS or that he had been motivated by ulterior motives without first examining whether SARS had satisfied itself that it was in the circumstances proper to raise the additional assessment and this was an issue that had to be decided by the Tax Court.

(viii) That whether the MTN could rely on a legitimate expectation related to an aspect that was not settled in our law and the court examined two cases, *Meyer* v *Iscor Pension Fund* 2003 (2) SA 715 (SCA) at 733C–D and *South African Veterinary Council* v *Szymanski* 2003 (4) SA 42 (SCA) at 49E–H where the court warned against importing into our law the English doctrine of substantive legitimate expectation and stating that before transplanting a legal concept from one system of law to another it was imperative first to examine the context in which that concept originated and developed its system of origin. However, having regard to the above and without pronouncing on the doctrine, the court could endorse such legitimate expectation if the issue had first been raised with SARS and if the court, dealing with the merits of the additional assessment, had found that it was justifiable for the MTN to rely on such expectation and therefore the Tax Court would be the appropriate forum to address this issue.

Application dismissed with costs which includes the costs of two counsels.

5.2 Master Currrency (Pty) Ltd v C:SARS

Master Currency (Pty) Ltd (Master Currency) had been awarded the tender to operate two bureaux de change in the duty free area of then Johannesburg International Airport. There were numerous ‘duty free shops’ in this area where departing passengers were able to purchase goods free of

taxes and duties and there was also a VAT refund administrator stationed in the area where departing non-residents could collect cheques for the VAT that they claimed back on purchases they had made in South Africa.

Master Currency had been established in 1995 with the assistance of Rennies Foreign Exchange and it was licensed in 1997 by the Reserve Bank as a foreign exchange dealer with limited authority to deal in foreign exchange for travelling purposes with non-residents visiting and residents leaving South Africa.

The services rendered by Master Currency at the two bureaux were mostly cash transactions concluded with departing non-resident passengers in possession of a boarding pass and a passport. These passengers would present South African rand to Master Currency either in cash, travellers' cheques or cheques received from the VAT refund administrator and Master Currency would then convert the rand into foreign currency, calculate the exchange rate margin and the commission and transaction fee and present the departing passengers with an invoice. The latter would then pay over a rand amount to Master Currency in exchange for the equivalent in foreign currency less commission and a fee.

The two bureaux dealt with non-residents only in accordance with an instruction by the Reserve Bank that residents were not allowed to purchase foreign currency as part of their travel allowance once they had passed through passport control and emigration.

Master Currency made a margin on the foreign exchange based on the difference between the rate at which it bought and at which it sold and it also charged a commission on the transaction as a percentage of its value, and levied a fee per transaction. The services rendered by Master Currency were 'financial services' as defined in section 2(1) of the VAT Act.

Master Currency had branches throughout South Africa and until 2003 had used Rennies' point of sale computer system at all its branches. Rennies did not conduct foreign exchange business in duty-free areas and its software automatically calculated VAT at the standard rate on fees charged for foreign exchange services.

Master Currency, in October 2003, implemented its own point of sale system which included a functionality that allowed a branch to charge or not charge VAT and Master Currency assumed that no VAT had to be charged in the duty free areas and in 2003 turned off the VAT functionality in branches in those areas and the basis for that assumption was the perception that no VAT was chargeable in a duty free area.

The result of this was that between 1999, when Master Currency commenced operations at the two bureaux de change, and 2003, VAT was

charged on its fees and commissions at the standard rate, but this was not done after October 2003 when Master Currency's own point of sale system was introduced.

KPMG, during their 2004 audit, noticed that the two bureaux de change were not charging VAT and the matter was referred to the South African Revenue Service for clarification resulting in the ruling and eventual assessment.

Master Currency contended that the services rendered by it in the duty free area of the airport were not subject to VAT at the standard rate in terms of section 7(1)(*a*) of the VAT Act but that, on a proper construction of section 11(2)(*l*) of the Act, they should have been zero-rated.

The court *a quo*, being the Johannesburg Tax Court, (see *ITC 1857* (2011) 74 SATC 115 *per* Victor J) had dismissed Master Currency's appeal against the revised VAT assessments in respect of the October 2003 to January 2005 tax period on the basis that 'the commission and transaction fees received by the two branches operating in the duty free area of then Johannesburg International Airport should be standard rated in terms of section 7(1)(*a*) of the VAT Act . . .'

Master Currency submitted that judicial notice could be taken of the 'clear and well-established fact' that there were duty free areas at many airports where commercial transactions by passengers boarding international flights were free from government duties.

Master Currency also submitted that, although the long title of the Act was intended to be of general application throughout the Republic, there was no indication of an intention to levy VAT in duty free areas and the Act was understood and applied by the revenue and other authorities in this manner.

Master Currency further submitted that the rendering of its services were zero-rated in terms of s 11(2)(*l*)(ii)(*aa*) because they were supplied in connection with movable property that was being 'exported'. This, it was submitted, was sufficient to secure a zero-rating and s 11(2)(*l*)(iii) could not be applied independently to disqualify the zero-rating under

s 11(2)(*l*)(ii)because sub-paras (i) to (iii) must be read disjunctively.

SARS however contended that s 11(2)(*l*)(iii) was dispositive of the matter and if the services were rendered to persons who were present in the Republic at the time the services were rendered that is the end of the matter and no zero-rating under s 11(2)(*l*)(ii) was possible.

Judge Malan held the following:

(i) That for Master Currency to escape liability for VAT it must bring itself within one of the 'exemptions, exceptions, deductions and adjustments' provided for in the VAT Act and the Act as it read during the period of assessment contained no reference to a 'duty free area' or a 'tax free area' and did not use a similar expression.

(ii) That Master Currency did not bring itself within the confines of the Act but instead suggested that a court could take judicial notice of a so-called 'well-established fact' that there are duty free areas at airports.

(iii) That courts will generally take judicial notice of facts which are either so notorious as not to be the subject of reasonable dispute or which are capable of immediate and accurate demonstration and the suggestion that judicial notice may be taken of the fact that many airports have areas where commercial transactions can be concluded free from government duties can obviously not be accepted. It is an excessively broad proposition, full of uncertainty as to the nature of the 'duties' and 'transactions'. Moreover, no reliable evidence was presented to support this proposition, particularly in so far as services are concerned and the documentation supplied by Master Currency formed no basis for a proper comparative law inquiry into the issue involved, nor did it provide any useful approach to the construction of s 12(2)(*l*) of the Act.

(iv) That Master Currency could not rely on the maxims *contemporanea exposito* and *subsecuta observatio* to support its contention that VAT was not payable in the duty free areas and was in fact not paid because it could not identify the provisions of the VAT Act which were understood by the authorities in the way suggested. Failing that, there

was no room for the application of the two canons of construction and for a reliance on circumstances surrounding the legislation. The canons are canons of construction applicable to the language that must be construed and, absent a text, they had no function.

(v) That SARS' section 72 ruling does not support the argument that services rendered by 'duty free shops' are free of VAT. The ruling concerns 'goods' only and is not an understanding of the application of the Act but the exercise of a power in terms of section 72 which allows SARS to make arrangements or give directions to overcome 'difficulties, anomalies or incongruities' in the application of the Act.

(vi) That the purpose of the aforementioned ruling was to deal with the situation where suppliers in duty free shops sell goods to departing passengers and charge VAT on these purchases, only for the customers to immediately go to the VAT refund administrator to claim a refund under the export incentive scheme. It therefore alleviates the administrative burden of vendors in cases where VAT is going to be refunded and it is thus not correct to suggest that SARS regarded duty free shops as not being subject to VAT. On the contrary, it did. However, because the VAT payable is bound to be refunded, the ruling was made to 'overcome such difficulties, anomalies or incongruities.' Since the VAT was both chargeable (s 7(1)(*a*)) and refundable (section 44(9)) the ruling did not have the effect of substantially reducing or increasing the ultimate liability for VAT under the Act and there was therefore no question of an official remitting any portion of a tax or of absolving someone from the payment of tax.

(vii) That this appeal was essentially concerned with the construction of s 11(2)(*l*) of the Act and Master Currency contended that it was entitled to a zero-rating by virtue of s 11(2)(*l*)(ii)(*aa*) but this was not correct. Section 11(2)(*l*) defines services to non-residents which are zero-rated. Subparagraphs (i) to (iii) are exceptions to the zero-rated services, and are in effect services that are standard rated. Subparagraph (i) deals with services to non-residents in connection with land situated in the Republic. Subparagraph (ii) deals with

services in connection with movable property situated inside the Republic; they are zero-rated but not where the services fall under subparas (*aa*) or (*bb*). It is not so that a status is conferred on the services referred to in subparas (*aa*) or (*bb*). These subparagraphs help to define the services referred to in the main body of par. (ii). This means that the fact that a service may fall under sub par. (ii)(*aa*) does not mean that it cannot be covered by subpar. (iii). This follows from the reference in subpar. (iii) to subpar. (ii)(*bb*): if the Master Currency were correct the words in subpar. (iii) 'other than in circumstances contemplated in subpar. (ii)(*bb*)' would have been unnecessary because the 'secured' zero-rating under subpar. (*bb*) would not be 'lost' by virtue of subpar. (iii).

(viii) That subpar. (ii)(*aa*) does not require the recipient to be in the Republic when the services are rendered and this reflects the principle that services consumed in the Republic attract VAT at the standard rate. The historical amendments to s 11(2)(*l*) demonstrate this principle. Originally, s 11(2)(*l*) provided that services were zero-rated if supplied 'for and to a person who is not a resident . . . and who is outside the Republic . . . at the time the services are rendered . . .' The amendments brought about by section 89 of the Taxation Laws Amendment Act 30 of 1998 deleted the italicised words in s 11(2) and introduced par. (*l*)(iii) as a self-standing exception.

(ix) That it was assumed that the definition of 'exported' had no application to the facts of this case. The Master Currency argued that 'export' meant both the carrying out of something out of a country as well as the sending of goods out of a country. In s 11(2)(*l*)(ii)(*aa*) the phrase used is 'exported to the said person'. The most common meaning of 'export' is the sending of goods out of the country. To call the non-resident recipient the 'exporter' in the circumstances of this case unduly strains the meaning of the word. The property is rather 'exported' by the supplier 'to the person' to whom the services are supplied. The use of the words 'exported to the said person' leaves no doubt that the 'said person', the non-resident, is not the exporter but

that the property is exported to him. When the wording of subpar. (*aa*) was introduced the opening words of s 11(2) required that the recipient had to be outside the Republic and this made it clear that the type of export then envisaged by subpar. (*aa*) was direct.

(x) That Master Currency finally submitted that its services should be zero-rated by virtue of the provisions of s 11(2)(*g*) of the Act but the argument was rather ingenious but also clearly wrong. Master Currency produced no evidence as to the nature of the bank notes exchanged at its bureaux de change. Assuming again that notice of the nature of foreign banknotes can be taken, the argument ignores entirely the history of money and central banking. It followed that banknotes, with or without a promise to pay its face value on demand, cannot be regarded as documents that embody incorporeal rights that are situated, in the case of foreign notes, elsewhere.

Appeal dismissed with costs.

5.3 ITC 1863

The taxpayer, being a prospecting and mining enterprise, lodged an appeal against SARS, tax assessment in respect of the 2003-2006 years of assessment for a tax liability in the amount of R12 889 189.

The appeal related to the following principal issues:

<u>2003 Tax Year: Capital Gains Tax in respect of the alleged disposal of the C Mining Dump.</u>

The taxpayer contended that it did not dispose of the C Mining Dump, nor the rights thereto, within the meaning of the word ‘disposal’ as envisaged in par. 11 of the Eighth Schedule to the Income Tax Act.

It contended that it did not own the C Mining Dump but had only acquired the rights to certain platinum bearing materials thereon and which rights were to be exploited in conjunction with another company in a joint venture and, consequently, the provisions of the

Eighth Schedule to the Act were inapplicable to the transaction concerned as were the penalties imposed in terms of the provisions of section 76 of the Act.

SARS contended that the disposal of its 50% ownership of the chrome tailing rights to D Company by the taxpayer as contemplated in par. 11(1) of the Eighth Schedule to the Act for a consideration in the sum of R3.5 million paid by D Company to the taxpayer fell within the purview of par. 11(1) of the Eighth Schedule to the Act.

2004 Tax Year: Fair Value adjustment

The taxpayer asserted that the amount in question constituted an allowable deduction in terms of section 11(*a*) of the Income Tax Act and was made up of office expenditure and salaries incurred by the taxpayer when it took over the staff and premises of E Mining (Pty) Ltd for its own purposes to raise capital from the public during a reverse take-over bid aimed at rescuing the latter in order to secure its listing on the Johannesburg Stock Exchange.

The taxpayer contended further that the assessment was factually incorrect in that E Mining (Pty) Ltd never issued shares to the taxpayer in lieu of any loans that it advanced to it.

While the taxpayer contended that the deduction of fair value adjustment was fully justified, it noted that it had been mistakenly claimed by way of an adjustment and/or a write-off of a loan converted into shares and stated that the reason for the mistake was fully set out in correspondence with SARS.

SARS contended that the amount in issue was not deductible in terms of section 11(*a*) of the Act because the taxpayer had proffered two different versions to SARS regarding the circumstances which led to the accrual of expenditure/loan advance as the ‘Fair Value Adjustment’.

2005 Tax Year: Capital Gains Tax- Alleged 'disposal' of Chrome Tailings Right

The taxpayer contended that the assessment in question was based on the incorrect assumption that it had acquired certain mineral rights from F Company and G Company for no consideration and thereafter had disposed of these rights between itself, the L Consortium, D Company and NO company for a deemed consideration of R8 million.

The taxpayer contended that the aforesaid assumption was factually incorrect as no disposal of mineral rights per se had occurred within the meaning of par. 11 of the Eighth Schedule to the Act.

SARS contended that the mineral rights acquired from G Company and F Company by the taxpayer had been acquired for no consideration as there had been no capital outlay made by the taxpayer when the mineral rights were acquired.

SARS contended further that the taxpayer, by divesting itself of an asset in favour of the L Consortium, in circumstances where the latter uses the asset and contributes it for commercial purposes, had been involved in the transfer of an asset (mineral rights and intellectual property) from the taxpayer to the L Consortium and thus 'there was a disposal of a right . . .'

2005 Tax Year: Capital Gains Tax and Donations Tax – Disposal of an income share

The taxpayer contended that SARS' application of par. 38 of the Eighth Schedule to the Act to the transaction concerned, as being a disposal of an asset to a connected person in relation to itself for a consideration which did not reflect an arms' length price, was factually and legally incorrect.

The taxpayer stated that on the conclusion of the transaction in issue the parties were totally unrelated and the transaction was primarily aimed at severing their relationship with the least cost implications to each other, with each party retaining all existing

rights and benefits.

Moreover, the transaction constituted a bona fide agreement concluded between parties acting at arms' length and consequently the provisions of par. 38 of the Eighth Schedule were inapplicable.

SARS contended that capital gains tax was levied in terms of par. 38 of the Eighth Schedule on the 'disposal' of an 'asset' and where such disposal was for no consideration par. 38 required the proceeds to be determined at the 'market value' of such asset.

Moreover, in terms of section 58 of the Income Tax Act, SARS may deem a 'disposal' of 'property' as a donation when it has been disposed of for an 'inadequate consideration' and, consequently, the taxpayer was liable for Donations Tax in terms of section 54 of the Act in respect of the said transaction as there had been a disposal of the taxpayer's 38% participation shares to L Co for no consideration.

SARS contended that the taxpayer's 38% participation right in the L Consortium was an unconditional personal right which constituted an incorporeal asset, part of which was disposed of for no consideration, thus bringing the transaction within the scope of par. 38 as being an 'asset disposed of for' 'a consideration not measurable in money'.

Donations Tax – Deemed donation

The taxpayer contended that SARS' application of section 58 of the Income Tax Act to the transaction was flawed in that no gratuitous 'disposal' of 'property' had taken place within the meaning of section 58 of the Act.

2006 Tax Year: Accrual of management fees

The taxpayer, in terms of the L Consortium Agreement, became entitled to a management fee of 3.5% of the consortium's net operating profit before tax and such fee could only be determined once payment had been received by the L Consortium in respect of

the sale of the 'consortium concentrate' in terms of certain off-take agreements which provided for payment on the tenth day of the fourth month following the delivery of the concentrate.

The taxpayer contended that it was quite evident that the accrual of the management fees had only occurred once the L Consortium's net income had been determined and on which such fees could be calculated. Moreover, the management fees income had been duly disclosed in the taxpayer's financial statements for the 2007 financial year and could not be taxed twice.

The taxpayer contended that SARS' inclusion of the said amounts in the 2006 year of assessment was contrary to the 'accrual' principle because the taxpayer had not acquired an unconditional legal right to claim payment of a determinable amount.

SARS contended that as the taxpayer became unconditionally entitled to the fees in issue in the 2006 tax year, the whole amount ought to have been included in the taxpayer's gross income in the 2006 tax year on an accrual basis and not in the 2007 tax year.

2003–6 Tax Years: Deduction of overseas travel expenses

The taxpayer contended that the overseas travel expenses in issue were deductible in terms of section 11(*a*) of the Income Tax Act as they were incurred in order to raise working capital for the company's operations, inter alia, through loans from private investors and from public funds through a possible listing on the London Stock Exchange.

SARS contended that the overseas travel expenditure sought to be deducted was capital in nature in that such expenditure was more attached to the cost of establishing, enhancing or adding to its income earning structure as opposed to being attached to the cost of performing its income earning operations and the reasons given for travelling overseas were invariably given among others of establishing a new office in London or investigating the possibility of a listing.

Consequently, insofar as such expenditure related to the raising of working capital, it formed part of the cost of performing its income-earning operations and therefore constituted an allowable deduction in terms of section 11(*a*) of the Act.

2003–6 Tax Years: Penalties in terms of section 76 of the Income Tax Act

The taxpayer contended that SARS' imposition of penalties had been based on the alleged non-disclosure of income or incorrect statements on the relevant tax returns which allegedly resulted in the avoidance of tax but in the present case no such non-disclosure or incorrect statements had been made and no tax had been raised in addition to what had been properly declared in the relevant tax returns.

The taxpayer further contended that the penalties in question were not applicable as it was not guilty of transgressing section 76 of the Act.

Moreover, SARS' decision to apply the provisions of section 58 of the Act in regard to a so-called 'deemed donation' did not entitle it to raise penalties for failure to submit a Donation's Tax Return in circumstances where the taxpayer, on reasonable grounds, disagreed with the opinion of SARS as to whether or not a donation had taken place pursuant to the provisions of section 58 of the Act.

SARS contended that section 76(1) of the Act applied equally to all issues that constituted the basis of the present tax appeal as there had been either a default or omission or the making of incorrect statements. If any of the above elements were present the taxpayer was obliged to pay additional tax, being an amount equal to twice the difference between the tax calculated in respect of the taxable income returned by it and the tax which would have been properly chargeable.

SARS further contended that the fact that any omission, default or the making of incorrect statements had been due to the taxpayer's accountants was no defence as the taxpayer as the taxpayer

remained ultimately responsible for its own tax affairs.

Interest under section 89(2) of the Income Tax Act

Section 89(2) of the Act imposes interest if tax is not paid in full within the period specified in the assessment notice or within the period prescribed by the Act.

The taxpayer contended that SARS in raising interest retrospectively created an anomalous situation in that it became entitled to interest in respect of taxes not legally due at the time of the transaction concerned nor payable during the period prior to its Notice of Assessment

2006 Tax Year: Capital expenditure.

The taxpayer contended that the L Consortium incurred expenditure in the amount of R24 489 741 in respect of the construction of its processing plant and the taxpayer's 25% share of such expenditure amounted to R6 122 435, which amount qualified for deduction in terms of section 36 of the Income Tax Act.

Judge Mokgoatlheng held the following:

(i) That in the evaluation of facts and issues in dispute the court was guided by section 82 of the Income Tax Act dealing with the burden of proof as to exemptions, deductions and abatements.

As to the 2005 Tax Year: Capital Gains Tax and Donations Tax

(ii) That par. 38 of the Eighth Schedule to the Act was not applicable due to the fact, *inter alia*, the transaction was in the form of a multi-party agreement between two groups of shareholders and their companies, which entailed the exchange of assets of equal value and was thus unproductive of any capital gain; the parties were not 'connected parties' after completion of the share swap exercise, which was specifically designed for such parties to become fully disassociated and was completely at arms' length and for an equitable consideration; there was no disposal of any 'asset' as the undertaking by the taxpayer to pay part of its after-tax income, from the L

Consortium, upon the happening of an uncertain future event, merely constituted a promise to pay, which did not constitute an 'asset' and in the hands of the recipient it merely constituted a '*spes*', namely, a hope, or expectation to receive something in future; the undertaking to pay an undisclosed amount in future, contingent upon the happening of an event, did not have an ascertainable market value, nor could it be treated as having been received or accrued.

(iii) That even if the transaction could be regarded as a Capital Gains Tax event, which it clearly was not, SARS' determination of market value, in any event, had no scientific basis and was not supported by any relevant information or expert opinion.

(iv) That for the taxpayer's disposal of 38% of its participation in the L Consortium joint venture to have been a donation under section 54 of the Act, the disposal must have been for an inadequate consideration, or for no consideration at all, the latter being the contention of SARS but there was in fact a consideration, in that the taxpayer acquired a 62% interest in the second joint venture as a *quid pro quo*, something SARS seems to have lost sight of.

(iv) That SARS' contention that there was no consideration at all was clearly incorrect and consequently the court's finding was that SARS had failed to show that there was a donation as envisaged in terms of section 54 of the Act and consequently the taxpayer's appeal was upheld regarding this issue.

<u>As to the 2005 Tax Year: Capital Gains Tax – Alleged disposal of Chrome Tailings Rights</u>

(vi) That while SARS had contended that the taxpayer had disposed of the chrome tailings rights to the L Consortium for a consideration of R8 million, the taxpayer had contended that the rights in question were acquired by it on behalf of the consortium and consequently no disposal had occurred.

(vii) That in the court's view there was no contemporaneous evidence that the relevant rights acquired by the taxpayer were acquired on behalf

of the L Consortium and the inescapable conclusion was that, while the taxpayer (and possibly the other parties) might have envisaged that these rights would, if agreement could be reached, be exploited in the L Consortium, the taxpayer took the sole risk in acquiring these rights, and never had any claim on the other parties prior to the conclusion of the Notarial Consortium Agreement and, in short, the taxpayer had acquired these rights solely on its own account and for its own account and it appeared that the taxpayer had not been required to incur any cost in respect thereof.

<u>As to the 2003 Tax Year: Capital gains tax in respect of the alleged disposal of the C Mining Dump</u>

(viii) That the court's view was that a sale of rights did indeed take place and that a sale of 50% of the C Mining Dump mineral rights for R3.5 million did in fact take place in 2003 in one or other form, either as an outright sale, or as portion of the taxpayer's contribution to the joint venture.

(ix) That, accordingly, the taxpayer had not discharged the *onus* set out in section 82 of the Income Tax Act required to show that the amount in issue was not liable to tax, or was to be disregarded or excluded in terms of the Eighth Schedule to the Act and, in regard to the imposed penalty of 50%, such penalty was justified in the circumstances, given the difficulties the taxpayer's inconsistent disclosures posed to SARS' efforts to establish the facts.

(x) That the evidence revealed that the amount in issue had been received in part by the taxpayer itself and, as such, this was a beneficial receipt by the taxpayer and was subject to tax as a capital gain or possibly even as a revenue gain, the latter being more onerous than the former and consequently the taxpayer's appeal regarding this issue is dismissed.

<u>As to the 2004 Tax Year: Fair Value Adjustment</u>

(xi) That SARS had contended that the adjustment of R2 638 070 related to the write-off of the value of a loan made by the taxpayer on capital

account and the resultant loss was therefore of a capital nature. However, the taxpayer contended that the adjustment related to its own operating costs in relation to staff and operations taken over from E Mining (Pty) Ltd and was deductible in terms of s 11(*a*) of the Income Tax Act.

(xii) That it was clear that the amount of R2 638 070 was incurred by the taxpayer on behalf of E Mining (Pty) Ltd in the form of transactions on loan account, resulting in a loan to the latter that was intended to be converted into E Mining (Pty) Ltd's equity in the event of a successful rescue of that entity, so achieving a listing for the taxpayer through a so-called reverse takeover.

(xiii) That expenditure relating to the purchase of equity was generally of a capital nature, as was expenditure relating to the obtaining of a listing and consequently the taxpayer did not discharge the *onus* of showing why this expenditure should not be so regarded and hence the taxpayer's appeal on this issue was dismissed.

(xiv) That the taxpayer had benefited from an accrual of a capital asset with a probable value of R6 million in exchange for the relevant rights and consequently the appeal regarding the issue had to be dismissed.

As to the 2006 Tax Year: Accrual of Management Fees

(xv) That the dispute between the parties related to certain Management Fees not received at year-end, and, in addition, the taxpayer had contended that these fees had not accrued for gross income purposes; moreover, the Management Fees in dispute were stated by the taxpayer to be based on the 'net operating profits' as determined once the sale proceeds could be ascertained under the IRS and J Holdings contracts and, accordingly, it followed that these Management Fees could not themselves accrue until the accrual under the BA Holdings Services Limited Agreement and the NN Platinum Mining Agreement contracts took place.

(xvi) That the issue before the court was accrual of Management Fees to the taxpayer and not accrual of proceeds from the sale of the

consortium concentrate and hence, for the taxpayer's argument to succeed, it needed first to show that the Management Fees accrued to it at the same time that the proceeds from the sale of the concentrate accrued to the L Consortium.

(xvii) That the question to be answered was whether the taxpayer had an unconditional entitlement to the Management Fees and this question was not answered but the taxpayer contended that the Management Fees were calculated as a percentage of sales of the consortium concentrate but it had not shown the connection between the accrual of the Management Fees and the accrual of proceeds from the sale of the consortium concentrate.

(xviii) That consequent upon the contingencies described in the evidence, it was the court's view that the earliest point at which accrual of Management Fees took place would be the time at which the proceeds accrued under the IRS and J Holdings contracts, a minimum of four months after delivery of the concentrate to IRS and J Holdings and consequently SARS was directed to recalculate the accruals of these Management Fees in accordance with the court's finding.

As to the 2003–6 Tax Years: Deduction of overseas travel expenses

(xix) That it was the taxpayer's responsibility to discharge the *onus* of showing why an amount was deductible and it was not the court's duty to make extrapolations from contentions where these were unsupported by corroborative evidence, consequently, the court was unable to make a specific finding as to the exact *quantum* of expenditure that was not of a capital nature, and thus could not set aside SARS' approach of disallowing 50% of the expenditure not already conceded by the taxpayer, as being capital in nature, consequently the taxpayer's appeal regarding the issue was dismissed.

As to the 2006 Tax Year: Mining Capital Expenditure

(xx) That it was unclear why, if the plant in issue cost R24 489 741, the

taxpayer's share as a consortium member was a full 25% rather than only 25% of the excess over R24 million as it had already been established that pursuant to the Notarial Consortium Agreement the two other partners to the L Consortium had agreed to spend up to R24 million in aggregate on the required plant without the taxpayer being required to incur any cost.

(xxi) That this aspect is referred back to the parties to determine if, in fact, the holder(s) of the 25% Participation Share did in fact incur a charge of R6 122 433 being 25% of expenditure of R24 489 741 incurred by the L Consortium on its new processing plant, having regard to clauses 8.2.1 and 8.2.3 of the Notarial Consortium Agreement.

(xxii) That, thereafter, whatever amount was in fact legally so incurred should be treated as a deduction of mining capital expenditure in terms of section 36 of the Income Tax Act, split between the taxpayer (62%) and LK SA (38%) in accordance with their respective interests in the Participation Share.

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(xxiii) That the processes adopted by SARS in regard to section 76 of the Act did in fact take place and the final determination of the level of these additional taxes was not inappropriate in the circumstances and hence the taxpayer's appeal regarding this issue is dismissed.

6. INTERPRETATION NOTES

6.1 Income Tax – Allowances, advances & reimbursements – No. 14 (Issue 3)

This Note provides clarity on the tax treatment of allowances, advances and reimbursements granted to employees and office holders and gives guidance on the record-keeping requirements relating to motor vehicles.

The Note updates and replaces Issue 2 which was published on 8 January 2008 and incorporates relevant legislation changes up to and including the

Taxation Laws Amendment Act No. 22 of 2012.

In line with the 2002 Budget Review proposal to simplify the system of employment income taxation, the provisions relating to allowances, advances and reimbursements were previously consolidated in section 8(1). Section 23(*m*) was also previously enacted to limit the deductions available to employees and office holders.

Since Issue 2 of this Note, substantial amendments have been made to the travel allowance system. These include the removal of the 'deemed kilometre' method of calculating the allowable deduction as well as amendments to the employees' tax withholding requirements on allowances and advances.

The update to this Note includes these amendments and clarifies what constitutes business travel and private travel.

6.2 Income Tax – Tax implications of rental income from tank containers – No. 73

This Note provides guidance on the income tax implications of the letting of tank containers.

Tank containers are used for bulk transportation of various cargoes such as liquids, chemicals, gas, foodstuff and bitumen to all parts of the world. The most frequent users of tank containers are local and international shipping, leasing and operating companies.

Investment in tank containers is common, not only for companies, but also for individuals. Tank containers are often bought by investors in rand and let, mostly, to international clients for a US dollar return.

A taxpayer may acquire tank containers for letting purposes through direct acquisition or by hire, typically from a financial institution.

In a typical tank container leasing arrangement the investor purchases a tank container and appoints a South African investment management company as the investor's agent for a period of 10 years. The investment

management company in turn has agreements with various offshore lease managers who manage the container on a day-to-day basis and conclude lease agreements with lessees on behalf of the investment management company and hence the investor. The tank is generally placed in a pool and the investor derives a share of the net pool rental income which is determined after deducting various operating costs such as insurance and the fees paid to the leasing agents and investment manager.

This Note discusses how the rental income from the letting of tank containers as well as related deductions and assessed losses will be treated.

6.3 Income Tax – Insolvent estates of natural persons - No. 8 (Issue 3)

This Note provides guidance on the tax treatment of insolvent estates including the application of section 25C of the Act. Issue 2 of this Note, issued on 22 March 2006, is hereby replaced.

A person is said to be insolvent when their liabilities exceed their assets. Depending on the circumstances, a debtor (that is, the insolvent) or a creditor may apply to the court for sequestration of the debtor's estate. The effect of sequestration is, amongst others, to 'divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him.'

Before 4 July 1997 it was SARS' practice to regard insolvent estates as taxable entities and to treat the trustees of these estates as representative taxpayers.

However, in the case of *Thorne & Molenaar NNO v Receiver of Revenue Cape Town* the Supreme Court held that this practice was incorrect. The court had to decide whether a trustee of an insolvent estate was liable to pay income tax on income accruing to an insolvent estate in the capacity of a representative taxpayer or any other capacity.

The court found that:

- the income derived by the trustees could not be said to be income of a person under a legal disability;
- merely because a person fell under the definition of a ‘trustee’ as defined in section 1 of the Act did not necessarily mean the person was a representative taxpayer;
- the defined term ‘trustee’ could not be regarded as correlative to the term ‘trust’ and, for a trustee to be a representative taxpayer, he had to be a trustee of the income that was the subject of a trust; and
- as a result, the trustee of the insolvent estate was not liable for tax on any income accruing to the insolvent estate in his personal capacity or in his capacity as a representative taxpayer.

A number of amendments were subsequently enacted to ensure that income received by or accrued to an insolvent estate on or after 4 July 1997 is subject to tax.

For income tax purposes, a new taxable entity comes into existence when a person’s estate is sequestrated. In addition, the natural person receives a new taxpayer identity from the date of sequestration. Three separate taxpayers will, therefore, be liable for tax, namely:

- The insolvent person for the period before insolvency (that is, up to the date preceding the date of sequestration);
- The insolvent estate (a new entity from the date of sequestration); and
- The insolvent person for the period on and after the date of sequestration.

A separate tax return must be submitted for each of the periods identified above.

The estate of the person before sequestration and the person’s insolvent estate are, however, deemed to be one and the same person for certain purposes, for example, the determination of the deductions and allowances the insolvent estate may be entitled to and the determination of a taxable capital gain or assessed capital loss in the insolvent estate. It also means there is no disposal for capital gains tax purposes when the assets pass

from the insolvent to the insolvent estate.

Paragraph 83(1) and 83(2) of the Eighth Schedule provide that:

- the disposal of an asset by an insolvent estate is treated in the same manner as if the natural person whose estate has been sequestrated had disposed of that asset, and
- no person whose estate has been voluntarily or compulsorily sequestrated may carry forward any assessed capital loss incurred before the date of sequestration. In other words it may not be carried forward by the insolvent after the date of sequestration but it may be carried forward to the insolvent estate.

Similarly, an assessed loss prior to the date of insolvency may be carried forward to the insolvent estate.

The trustee or administrator of the insolvent estate is the representative taxpayer of an insolvent estate and, in that capacity, is subject to the duties, responsibilities and liabilities of the insolvent estate. In this capacity the trustee or administrator may, depending on the specific facts, elect that the normal tax chargeable on the taxable income from farming of the estate be determined in accordance with the rating formula specified in section 5(10).

The trustee or administrator may be held personally liable for the underlying taxes.

In circumstances where an order of sequestration is set aside SARS must withdraw any assessment issued to the insolvent estate and must also withdraw the assessment which was issued to the insolvent person in the year the sequestration order was granted by the court (that is, from the beginning of that year to the date preceding the date of sequestration). SARS must simultaneously issue assessments to the person who has been released from sequestration as if the sequestration never took place.

Taxes and levies imposed on income accrued or business conducted from the date of sequestration qualify as a cost of administration under section 97(2)(*c*) of the Insolvency Act No. 24 of 1936.

For purposes of VAT, employees' tax, skills development levies and

unemployment insurance fund contributions, the insolvent estate and the person whose estate is sequestrated are regarded to be one and the same person. The trustee or administrator of the insolvent estate takes over the duties and responsibilities regarding these taxes, levies or contributions.

6.4 Income Tax – Deduction & recoupment of expenditure incurred on repairs – No. 74

This Note provides guidance on the interpretation and application of section 11(*d*) which allows a deduction for expenditure incurred on repairs for the purposes of trade.

Expenditure on repairs to an asset not comprising trading stock is likely to be of a capital nature, particularly when it is not incurred at regular intervals. This is because the expenditure relates to the protection of a capital asset.

Expenditure of a capital nature does not qualify as a general deduction under section 11(*a*). Nevertheless, section 11(*d*) makes provision for the deduction of expenditure incurred on repairs for the purposes of trade provided its requirements are met.

For purposes of section 11(*d*) it is important to distinguish between a 'repair' and an 'improvement' since only expenditure incurred on repairs is deductible under section 11(*d*). No hard and fast rules can be provided for this distinction. Each case must be decided on its own facts.

In order for an asset to be repaired, there must be damage or deterioration to a part of the original asset or structure and the intention of the taxpayer must be to restore the asset or structure to its original condition. Because there are no set criteria as to what constitutes a repair and only principles derived from case law, each case will have to be determined on its merits.

The cost of repairs may be recovered or recouped under section 8(4)(*a*) provided that there is a causal link between the cost of the repairs and the amount received or accrued.

6.5 Income Tax – Exercise of discretion in case of late objection or appeal - No.15 (Issue 3)

This Note provides guidance on the factors that a senior SARS official will take into account when deciding whether to extend the period for lodging an objection under section 104(4) or an appeal under section 107(2). It also serves to highlight that the period during which an objection or appeal may be lodged is limited.

A taxpayer who is aggrieved:

- by an assessment made on the taxpayer; or
- by certain decisions made under the TA Act or tax Acts,

may object to and appeal against those assessments or decisions under the TA Act.

An objection against an assessment or decision must be lodged in the manner, under the terms, and within the period prescribed in the rules.

A person whose objection has been disallowed may appeal to the tax board or tax court against that outcome and in such event the appeal must be lodged in the manner, under the terms, and within the periods prescribed in the TA Act and the rules.

A senior SARS official may, within prescribed limits, extend the period prescribed in the rules within which an objection or appeal must be lodged.

The TA Act came into operation on 1 October 2012 and incorporates into one piece of legislation certain administrative provisions that are generic to all tax Acts and administrative provisions previously duplicated in different tax Acts. The objection and appeal procedures as contained in the TA Act and the rules will therefore apply to any dispute under, amongst others, the following tax Acts administered by the Commissioner:

- Diamond Export Levy Act
- Diamond Export Levy (Administration) Act
- Estate Duty Act

- Income Tax Act
- Mineral and Petroleum Resources Royalty Act
- Mineral and Petroleum Resources Royalty (Administration) Act
- Securities Transfer Tax Act
- Securities Transfer Tax Administration Act
- Skills Development Levies Act
- Tax Administration Act
- Transfer Duty Act
- Unemployment Insurance Contributions Act
- VAT Act

The Customs and Excise Act contains its own provisions relating to dispute resolution.

An objection against an assessment or decision must be lodged within 30 business days of the date of assessment or decision. Similarly, an appeal against the disallowance of an objection must be lodged within 30 business days of the date of disallowance of the objection.

A senior SARS official may extend the date for lodging an objection by:

- 21 business days if satisfied that reasonable grounds exist for the delay in lodging the objection; and
- between 22 business days and three years if satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection.

No extension can be granted for:

- a delay of more than three years from the date of assessment or decision; or
- an objection that relates to a change in the practice generally prevailing at the date of assessment or decision.

A senior SARS official may extend the date for lodging an appeal by:

- 21 business days, if satisfied that reasonable grounds exist for the delay; or
- up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days.

7. BINDING PRIVATE RULINGS

7.1 BPR 149 – Disposal of an asset that constitutes an equity share in a foreign company

This ruling deals with the tax consequences arising from a disposal of an equity share held in a foreign company to another foreign company in exchange for an equity share in that other foreign company.

In this ruling references to sections and paragraphs are to sections of the Act and paragraphs of the Eighth Schedule to the Act applicable as at 20 March 2012 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of the provisions of:

- section 1(1),definition of ‘contributed tax capital’;
- section 42, definition of ‘asset-for-share transaction’; and
- paragraph 64B of the Eighth Schedule.

<u>Parties to the proposed transaction</u>

The Applicant: A company that is incorporated in and a resident of South Africa that holds 100% of the equity shares in Company X

Company X: A company that is incorporated in and a resident of the Netherlands that holds the foreign investments (in various foreign countries) of the Applicant

The Co-operative: A Dutch Co-operative to be established in terms of the laws of the Netherlands and a resident of that country

Description of the proposed transaction

The Co-operative will be established by the Applicant and interposed between the Applicant and Company X with the purpose of acting as the holding vehicle for the foreign investments currently held by Company X.

The Applicant intends to dispose of its equity shares in Company X to the Co-operative at market value in return for the issue of 99,99 per cent of the member's interest in the Co-operative. The amount representing the market value will be recorded by the Co-operative as contributed tax capital by the Applicant.

The Applicant will hold 99,99 per cent of the interest in the Co-operative whereas the Co-operative will hold 100 per cent of the equity shares in Company X. The remaining 0,01 per cent interest in the Co-operative will be held by another group company.

Conditions and assumptions

This ruling is subject to the conditions and assumptions that:

- no opinion, conclusion or determination is made in this ruling in relation to the application or interpretation of the laws of the Netherlands;
- the ruling is issued on the condition that the profit distributed by the Co-operative will be treated by the Dutch Tax Authority as a dividend or similar payment for purposes of the laws relating to tax on income in the Netherlands;
- in the context of paragraph 64B(5) of the Eighth Schedule, Company X is not a 'foreign financial instrument holding company' as defined in section 41; and
- the participating members of the Co-operative will have an unlimited right to distributions when declared, and return of capital on the winding-up of the company.

Ruling

The ruling made in connection with the proposed transaction is as follows:

- The disposal by the Applicant of its interest in Company X to the Co-operative will be governed by section 42.
- Under section 42(2)(*a*):
    - the Applicant will be deemed to have disposed of the equity shares held in Company X for an amount equal to its base cost and to have acquired the interest in the Co-operative for an amount equal to such base cost; and
    - the base cost of the Applicant's interest in Company X, to be acquired by the Co-operative, will be equal to the original base cost of the equity shares when held by the Applicant.
- The definition of 'contributed tax capital' will not apply to the Co-operative whilst the Co-operative remains a 'foreign company' as defined in section 1(1). The provisions contained in the Act relating to a 'foreign dividend' and 'foreign return of capital', as defined in section 1(1), will be applied without reference to the definition of and rules governing 'contributed tax capital'.

7.2 BPR 150 – Income tax and VAT – Tax treatment relating to a credit linked deposit

This ruling deals with the income tax consequences arising from a credit linked deposit agreement entered into with a Bank in order to raise funding.

In this ruling references to sections are to sections of the relevant Act applicable as at 23 June 2013 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in that Act.

This is a ruling on the interpretation and application of the provisions of:

- section 1(1) of the definition of 'gross income' of the Act;
- section 11(a) read with section 23(*g*) of the Act;
- section 24J of the Act; and

- section 7(1) of the VAT Act

Parties to the proposed transaction

The Applicant: A company incorporated in and a resident of South Africa

The Bank: A public company registered as a bank in terms of the Banks Act No. 94 of 1990

Description of the proposed transaction

Part of the Applicant's business operations is to sell its products to its clients on credit. As a result, the Applicant enters into instalment sale agreements from time to time in terms of which its clients have to pay amounts to the Applicant over a certain period. These transactions are capital intensive and have a substantial impact upon the cash flow exposure of the Applicant. The Applicant intends to enter into a Credit Linked Deposit Agreement (CLD Agreement) with the Bank, on the basis that:

- the Bank will make a deposit with the Applicant;
- the Applicant will agree to repay such deposit amount together with interest thereon only from payments it receives from its clients in respect of their so-called obligations. The concept of these obligations is defined in the CLD Agreement as the amount owing by each client to the Applicant in terms of the relevant instalment sale agreement;
- the outstanding deposit amount will bear interest at a fixed deposit rate. This rate will be calculated as the internal rate of return or fixed rate based on the difference between the discounted amount (the deposit amount) and the amount of future expected cash flows to be paid by the Applicant to the Bank. Cash received from the Applicant will first be applied in settlement of the interest amount due, and thereafter, to repayment of the deposit amount;
- all monies that the Applicant receives from its clients in respect of their obligations, will be deposited into a collection account, the proceeds of which will be paid by the Applicant to the Bank on a monthly basis;

- the sole source of the repayment of the deposit amount and the payment of interest thereon will be the amounts received by the Applicant in respect of its clients' obligations. Should the Applicant receive insufficient payments in respect of these obligations, the Applicant will have no further repayment or payment obligations to the Bank in respect of the outstanding deposit amount and/or any accrued but unpaid interest;
- in terms of the proposed CLD Agreement the Applicant is to discharge its remaining obligations to the Bank only on the termination date, by ceding its rights in relation to any debt unpaid as at the termination date against the instalment sale debtors in favour of the Bank on an out-and-out basis. The cession will result in the Applicant being deemed to have paid the outstanding deposit amount and any interest payable thereon and the Applicant will have no further obligations in terms of the deposit towards the Bank. The initial deposit amount will thus be repaid through means of either cash received from the instalment sale debtors prior to the termination date, or on the termination date by cession of the remaining rights against the instalment sale debtors. It is thus agreed upfront that the deposit amount will be repaid through the cession of the remaining instalment sale debtors, whether or not they have defaulted. The Bank thus effectively takes the risk on the repayment by the instalment sale debtors of these amounts.

In the same agreement, the Applicant and the Bank will agree (a Service Undertaking) that the Applicant undertakes to pursue its remedies under the instalment sale agreements entered into with its clients and to collect any and all amounts owing by or on behalf of the clients to the Applicant. The Applicant will be paid an annual fee (Undertaking Fee). in respect of the Service Undertaking.

Ruling

The ruling made in connection with the proposed transaction is as follows:

- The CLD Agreeement will be an 'instrument' for purposes of section

24J of the Act;

- The interest will be incurred by the Applicant on a 'yield to maturity' basis in terms of section 24J of the Act;
- Any gain or loss realised at the end of the CLD Agreement which is not treated under section 24J will be a gain or loss on revenue account;
- Any Undertaking Fee payable in terms of the CDL Agreement will, however, be subject to VAT in terms of section 7(1)(*a*) of the VAT Act.

7.3 BPR 151 – Income tax – Renunciation of inheritance

This ruling deals with the donations tax, capital gains tax and estate duty consequences of the renunciation by a testator's descendants of their rights to benefit under a will under which the testator's surviving spouse also benefits.

In this ruling references to sections and paragraphs are to sections of the relevant Act and paragraphs of the Eighth Schedule to the Act applicable as at 30 April 2013 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the relevant Act.

This is a ruling on the interpretation and application of the provisions of:

- section 55(1) of the Act, definition of 'donation';
- paragraphs 11 and 67(2) of the Eighth Schedule; and
- section 4(*q*) of the Estate Duty Act.

<u>Parties to the proposed transaction</u>

The Applicant: The executor of a deceased estate

The Co-Applicants: The surviving spouse and the two descendants of the testator

<u>Description of the proposed transaction</u>

The descendants of the testator are the designated residuary heirs under the will of the deceased. The will also bequeaths certain legacies to the surviving spouse of the deceased. The Applicant anticipates that estate duty will become leviable on the net value of the estate. The descendants propose to renounce their inheritances.

Conditions and assumptions

This ruling is subject to the following additional conditions and assumptions:

- The ruling will apply only if the Master of the High Court accepts as valid the proposed renunciations of their inheritances by the descendants.
- The Applicant must, pursuant to section 2C of the Wills Act No. 7 of 1953, allocate those inheritances to the surviving spouse in the liquidation and distribution account in the course of the administration of the deceased estate.

Ruling

The ruling made in connection with the proposed transaction is as follows:

- The renunciations will not result in the levying of any donations tax.
- The renunciations will not be ‘disposals’ for purposes of paragraph 11 of the Eighth Schedule.
- Section 4(*q*) of the Estate Duty Act will apply to the inheritances that will accrue by operation of law to the surviving spouse by virtue of the proposed renunciations.
- Paragraph 67(2)(*a*) of the Eighth Schedule will apply to the inheritances that will accrue by operation of law to the surviving spouse by virtue of the proposed renunciations.

7.4 BPR 152 – Captial gains tax: Cancellation and extinguisment of a right to interest

This ruling deals with the question as to whether the cancellation and extinguishment of a right to claim interest on a shareholder loan will trigger a capital gains tax liability in terms of the provisions of the Eighth Schedule to the Act.

In this ruling references to paragraphs are to paragraphs of the Eighth Schedule to the Act applicable as at 30 April 2013 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of:

- paragraph 3;
- paragraph 11(1)(*b*);
- paragraph 35(1); and
- paragraph 38 of the Eighth Schedule.

Parties to the proposed transaction

The Applicant: A public company incorporated in and a resident of South Africa;

The Co-Applicant: A private company incorporated in and a resident of South Africa.

Description of the proposed transaction

A listed public company sold its majority shareholding of 74% in the Co-Applicant to the Appllicant. The Co-Applicant and the Applicant were not connected parties prior to the equity acquisition in the Co-Applicant by the Applicant.

As part of the acquisition of 74% of shares in the Co-Applicant, the Applicant acquired a total loan claim to the value of R4,161 billion owed by the Co-Applicant to a financing company. The Applicant paid R1,1 billion for the loan claim. The Co-Applicant, however, continues to owe the Applicant

the total R4,161 billion amount. Interest is charged at JIBAR plus 4.9% per annum. The Co-Applicant is not in a position to service all the interest on the loan claim due to the Applicant.

The Applicant proposes splitting the loan claim into two parts. Interest will continue being charged on the R1,1 billion amount. Interest on R3,061 billion, reflecting the discounted portion of the loan claim, will be cancelled. The R3,061 billion amount will subsequently become an 'interest free portion';

In addition, the loan claim will be subordinated in order to restore the solvency of the Co-Applicant and to allow the Co-Applicant to be in a position to negotiate better credit terms with other financial institutions.

Ruling

The ruling made in connection with the proposed transaction is as follows:

- As the Co-Applicant and the Applicant were not connected parties prior to the equity acquisition in the Co-Applicant by the Applicant, the R1,1 billion amount for the loan claim will represent an arm's length price.
- The cancellation and extinguishment of the Applicant's right to interest based on the interest free portion of the loan claim will not trigger any capital gains tax liability for the Applicant under the provisions of the Eighth Schedule.

7.5 BPR 153 – Residence status of a non-resident who applies for a temporary residence permit

This ruling deals with the residency status of a non-resident natural person who intends applying for a temporary residence permit in the Republic of South Africa (South Africa) and whether the application for such a permit will result in the person becoming ordinarily resident for South African tax purposes.

In this ruling references to sections are to sections of the Act applicable as

at 18 December 2012 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of the provisions of section 1, definition of 'resident'.

Parties to the proposed transaction

The Applicant: An individual who is a national of a foreign country (Country X)

Description of the proposed transaction

The Applicant is currently resident in Country X and a registered taxpayer with Country X's tax authorities.

The Applicant retired recently and has been spending time in South Africa on extended visits. The Applicant is contemplating retiring to South Africa and intends applying to the Department of Home Affairs for temporary residence in the form of a retired person's permit.

Conditions and assumptions

This binding private ruling is made subject to the additional condition and assumption that the Applicant is not a 'resident' as defined in section 1.

Ruling

The ruling made in connection with the proposed transaction is as follows:

- An application for a retired person's permit will not, in itself, be sufficient for the Applicant to become ordinarily resident in South Africa provided the Applicant does not indicate to the Department of Home Affairs on the relevant application form(s) that the intention is to settle in South Africa on a permanent basis.

7.6 BPR 154 – Income Tax – Corporate rules: Acquisition of a debtors book

This ruling deals with the tax consequences arising from the acquisition of a debtors book under section 45 of the Act.

In this ruling references to sections are to sections of the Act applicable as at 5 June 2012 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of the provisions of:

- section 11(*j*), and
- section 45.

Parties to the proposed transaction

The Applicant: A company incorporated in and a resident of South Africa

GroupCo: A company incorporated in and a resident of South Africa

Description of the proposed transaction

The Applicant and GroupCo form part of the same 'group of companies' as defined in section 1(1).

GroupCo intends to dispose of one of its business units, inclusive of the book debt relating to the unit, to the Applicant. The Applicant will finance the acquisition of the business unit by way of an interest bearing loan account.

The sale and cession of GroupCo's existing debtors book will be at their current tax value.

Conditions and assumptions

This ruling is subject to the following additional conditions and assumptions:

- The proposed transaction will constitute an 'intra-group transaction', as defined in section 45, which complies with the requirements under this section.

Ruling

The ruling made in connection with the proposed transaction is as follows:

- Section 45 will apply to the disposal of the business unit by GroupCo to the Applicant.
- The Applicant and GroupCo will be deemed to be one and the same person under section 45(3)(*a*)(ii) for purposes of determining the amount of doubtful debts allowance to which the Applicant will be entitled to under section 11(*j*). The Applicant will be entitled to utilise GroupCo's historical financial information when calculating such allowance in respect of the debtors so acquired.

7.7 BPR 155 – Income Tax – Incentive for oil and gas production

This ruling deals with the income tax consequences for an oil and gas company, in relation to expenditure to be incurred in the development of two oil and gas fields, including the refurbishment of a floating production unit (FPU), to produce oil and gas (the FPU Utilisation Project).

In this ruling references to paragraphs are to paragraphs of the Tenth Schedule to the Act applicable as at 12 April 2013 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of the provisions of:

- paragraph 1, definition of 'production', 'oil and gas right' and 'oil and gas income'; and
- paragraph 5(2)(*b*) of the Tenth Schedule.

<u>Parties to the proposed transaction</u>

The Applicant: Oil and Gas Company

<u>Description of the proposed transaction</u>

In terms of the FPU Utilisation Project, the Applicant will undertake the development of two oil and gas fields situated offshore from South Africa, and the refurbishment of a FPU, in order to produce oil and gas.

Expenditure will be incurred by the Applicant in relation to:

- subsea and topside facilities (such as modifications and upgrades to the FPU to add capability to handle the gas processing);
- developmental wells and completions (including dual tubing to mitigate water loading); and
- subsurface work (such as pipeline network and tie-backs).

The expenditure to be incurred is typical of expenditure that will follow the field appraisal stage as referred to in the definition of 'exploration' in paragraph 1. In accordance with the life stages of an oil and gas field the proposed expenditure is preliminary to the activities defined as 'production' also in paragraph 1. The expenditure thus falls within the ambit of the development stage of the life cycle of an oil and gas field.

Typical expenditure that may be necessary after production has commenced would relate to either or both of the following:

- Improvements at the topside facilities, or to the subsea infrastructure, to implement new technology during shutdowns (every 3 years). Such improvements may be the replacement of a single component with more advanced equipment.
- Well work-overs, which will be undertaken to enhance the recovery from existing producing wells. This may take the form of side tracks (horizontal drilling) or fracking of existing wells.

In terms of the estimates prepared by the Applicant, expenditure incurred during the development stage will constitute 92.4% of total capital expenditure to be incurred during the combined development and production stages, whilst expenditure during the production stage will equate to 7.6%. The bulk of the post-exploration expenditure will, therefore, be in relation to the development stage.

The Mineral and Petroleum Resources Development Act No. 28 of 2002, as amended (the MPRDA) makes provision for the issue of two types of oil and gas rights, namely an exploration right and a production right. It has been assumed for purposes of this ruling that development activities may

be conducted by a company that holds either an exploration right or a production right issued in terms of the MPRDA.

Conditions and assumptions

This ruling is subject to the following additional conditions and assumptions:

- the expenditure in relation to which the deduction is sought is –
- incurred in the year in respect of which the additional deduction is claimed;
- of a capital nature; and
- does not relate to the acquisition of an 'oil and gas right', as defined in paragraph 1; and
- development activities may be conducted under an exploration right or a production right in terms of the MPRDA.

Ruling

The ruling made in connection with the proposed transaction is as follows:

- The proposed expenditure incurred in consequence of the FPU Utilisation Project will be 'in respect of production' and 'in terms of an oil and gas right', as contemplated in paragraph 5(2) read with the appropriate definitions in paragraph 1 of the Tenth Schedule; and will, therefore, qualify for the additional deduction in terms of paragraph 5(2)(*b*) of this Schedule.

8. BINDING CLASS RULING

8.1 BCR 41 – Dividends distributed by a foreign company

This ruling deals with the question whether dividends distributed by a foreign company will be foreign dividends as defined in section 1(1) of the Act.

In this ruling references to sections are to sections of the Act applicable as

at 8 May 2013 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of the definition of a 'foreign dividend' in section 1(1).

Class

The class members to whom this ruling will apply are described in point 4 below.

Parties to the proposed transaction

- The Applicant: A corporate partnership limited by shares, registered in a foreign country (Country X) as a securitisation company
- The Class Members The beneficial owners of foreign dividends associated from time to time with the Applicant's shares

Description of the proposed transaction

The Applicant's shares are listed in Country X and its depository receipts are listed on the JSE.

Currently the Applicant's major asset is shares listed on the London Stock Exchange, which are held via a subsidiary of the Applicant. A dividend attributable to that asset was the material source of the Applicant's income in its previous financial year.

The Applicant's income is subject to tax in Country X. In calculating its taxable net income based on its unconsolidated financial statements, the Applicant is able to deduct from its net income the dividends paid or undertaken to be paid pursuant to resolutions of its shareholders at an annual general meeting and, in the case of interim dividends, by the general partner.

The Applicant's shareholders who are resident in Country X are taxed on that dividend income on the basis that it is treated as interest.

A distribution by the Applicant is not subject to dividends withholding tax or interest withholding tax in Country X.

The Applicant has not declared any dividends since its establishment.

Conditions and assumptions

This ruling is subject to the following additional conditions and assumptions:

- The Applicant is a 'foreign company' as defined in section 1(1).
- The shares of the Applicant in respect of which dividends are to be declared are not 'hybrid equity instruments' as defined in section 8E(1).
- The amount paid by way of a dividend:
  (a) is a dividend for purposes of the Convention between the Government of the Republic of South Africa and the Government of Country X for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, as well as for purposes of company law, securitisation law and accounting;
  (b) does not constitute the redemption of a participatory interest in an arrangement or scheme contemplated in paragraph (*e*)(ii) of the definition of a 'company' in section 1(1); and
  (c) does not constitute a 'share' in the Applicant as defined in section 1(1).

Ruling

The ruling made in connection with the proposed transaction is as follows:

- Any dividend declared by the Applicant to any of the Class Members will constitute a foreign dividend.

9. NEW DISPUTE RESOLUTION RULES – DRAFT 2

Explanatory note:

1. This draft notice proposes the promulgation of the rules in terms of section 103 of the Tax Administration Act, 2011, prescribing the procedures to be followed in lodging an objection and appeal against an assessment or a decision subject to objection and appeal referred to in section 104(2),

procedures for alternative dispute resolution, the conduct and hearing of appeals before a Tax Board or Tax Court and transitional rules.

2. This draft is published for a second round of public comment and incorporates changes to the first draft for public

3. The changes are mostly reflected as insertions for ease of reading. Minor or technical changes are not reflected.

4. It was determined that some of the new rules would require amendments to certain provisions of the Tax Administration Act, 2011. These amendments will be proposed in the Tax Administration Laws Amendment Bill, 2013, which has been published for public comment.

RULES PROMULGATED UNDER SECTION 103 OF THE TAX ADMINISTRATION ACT, 2011 (ACT NO. 28 OF 2011), PRESCRIBING THE PROCEDURES TO BE FOLLOWED IN LODGING AN OBJECTION AND APPEAL AGAINST AN ASSESSMENT OR A DECISION SUBJECT TO OBJECTION AND APPEAL REFERRED TO IN SECTION 104(2) OF THAT ACT, PROCEDURES FOR ALTERNATIVE DISPUTE RESOLUTION, THE CONDUCT AND HEARING OF APPEALS, APPLICATION ON NOTICE BEFORE A TAX COURT AND TRANSITIONAL RULES

In terms of section 103 of the Tax Administration Act, 2011, I, Pravin Jamnadas Gordhan, the Minister of Finance, after consultation with the Minister of Justice and Constitutional Development, hereby prescribe in the Schedule hereto, the rules governing the procedures to lodge an objection and appeal against an assessment or decision under Chapter 9 of the Act, the procedures for alternative dispute resolution and the conduct and hearing of appeals before a Tax Board or Tax Court.

PJ GORDHAN

MINISTER OF FINANCE

Part A

General provisions

1. Definitions

In these rules, unless the context indicates otherwise, a term which is assigned a meaning in the Act, has the meaning so assigned, and the following terms have the following meaning:

'appellant' means a taxpayer who has noted an appeal under section 107 of the Act against an assessment as defined in these rules;

'assessment' includes, for purposes of these rules, a decision referred to in section 104(2) of the Act;

'clerk' means the clerk of the tax board appointed under section 112 of the Act;

'day' means a 'business day' as defined in section 1 of the Act ;

'deliver' means to issue, give, send or serve a document under these rules, to the address specified for this purpose under these rules, in the following manner:

(a) by SARS, the clerk or the registrar, in the manner referred to in section 251 or 252 of the Act, except the use of ordinary post;

(b) by SARS, if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment, by posting it on the electronic filing page of the taxpayer or appellant; or

(c) by the taxpayer or appellant, by—

(i) handing it to SARS, the clerk or the registrar;

(ii) sending it to SARS, the clerk or the registrar by registered post;

(iii) sending it to SARS, the clerk or the registrar by electronic means to an email address or telefax number; or

(iv) if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment, submitting it through SARS electronic filing service.

'document' means a document as defined in the Act, and includes—

(a) an agreement between the parties under these rules, whether in draft or

otherwise;

(b) a request or application under these rules; and

(c) a notice required under these rules;

'electronic filing page' has the meaning assigned in the rules for electronic communications issued under section 255 of the Act;

'grounds of assessment', for purposes of these rules, include any

(a) grounds for a proposed assessment referred to in section 42(2)(a) of the Act;

(b) grounds of assessment referred to in section 42(6) of the Act;

(c) grounds of assessment referred to in section 96(2) of the Act;

(d) grounds for a decision by SARS not to remit an administrative non-compliance penalty under Part E of Chapter 15 of the Act;

(e) grounds for a decision by SARS not to remit a substantial understatement penalty under section 223(3) of the Act;

(f) grounds for a decision referred to in section 104(2) of the Act;

(g) reasons for assessment provided by SARS under rule 6(5); and

(h) related correspondence;

'party' means—

(a) for purposes of an objection, the taxpayer or SARS;

(b) for purposes of an appeal to the tax board or tax court, the appellant or SARS; and

(c) for purposes of an application under Part F, the applicant or the respondent;

'parties' means—

(a) for purposes of an objection, the taxpayer and SARS;

(b) for purposes of an appeal to the tax board or tax court, the appellant and SARS; and

(c) for purposes of an application under Part F, the applicant and the respondent;

'registrar' means the registrar of the tax court appointed under section 121 of the Act;

'SARS electronic filing service' has the meaning assigned in the rules for electronic communications issued under section 255 of the Act;

'sign' or **'signature'** has the meaning assigned in the rules for electronic communication issued under section 255 of the Act where a party—

(a) uses electronic means to deliver a document at an electronic address provided by the other party, the clerk or the registrar for this purpose; or

(b) uses a SARS electronic filing service to lodge an objection or note an appeal under these rules;

'Supreme Court Act' means the Supreme Court Act, 1959 (Act No. 59 of 1959);

'the Act' means the Tax Administration Act, 2011 (Act No. 28 of 2011); and

'these rules' means the rules reflected in this Schedule made under section 103 of the Act.

2. Prescribed form and manner and date of delivery

(1) A document or notice required to be delivered or given under these rules must be—

(a) in the form as may be prescribed by the Commissioner under section 103 of the Act;

(b) in writing and be signed by the relevant party, the party's duly authorised representative, the clerk or the registrar, as the case may be; and

(c) delivered to the address that—

(i) the taxpayer or appellant must use or has selected under these rules;

(ii) SARS has specified under these rules or, in any other case, the Commissioner has specified by public notice as the address at which the documents must be delivered to SARS; or

(iii) is determined under rule 3 as the address of the clerk or the registrar.

(2) For purposes of these rules, the date of delivery of a document—

(a) in the case of delivery by SARS, the clerk or the registrar, is regarded as the date of delivery of the document in the manner referred to in the definition of 'deliver' in rule 1, but subject to section 253 of the Act; and

(b) in the case of delivery by the taxpayer, appellant or applicant (other than SARS), is regarded as the date of the receipt of the document by SARS, the clerk or the registrar.

3. Office of clerk of tax board and registrar of tax court

(1) The location of the office of the clerk of the tax board and the registrar of the tax court will be determined by a senior SARS official from time to time by public notice.

(2) The office of the clerk and the registrar will be open every Monday to Friday, excluding public holidays, from 08h00 to 16h00.

4. Extension of time periods

(1) Except where the extension of a period prescribed under the Act or these rules is otherwise regulated in the Act or these rules, a period may be extended by agreement between—

(a) the parties;

(b) a party or the parties and the clerk; or

(c) a party or the parties and the registrar.

(2) A request for an extension must be delivered to the other party before expiry of the period prescribed under these rules unless the parties agree that the request may be delivered after expiry of the period.

(3) A party who requires an extension of a period may, if the other party or the clerk or the registrar does not agree to a request for an extension of a period, apply to the tax court under Part F for an order under rule 52 which application must be brought within 20 days after delivery of the notice by the other party of not agreeing to a request for an extension or, in any other case, before the expiry of the prescribed period.

(4) If SARS is afforded a discretion under these rules to extend a time period applicable to SARS, SARS must in the notice of the extension state the grounds of the extension.

(5) If a period is extended under this rule by an agreement under subrule (1) or a final order under subrule (3), the period within which a further step of the proceedings under these rules must be taken commences on the day that the extended period ends.

5. Index and pagination of documents

(1) In all proceedings before the tax board and tax court, all documents filed under these rules must be—

(a) if drafted under these rules, divided into paragraphs numbered consecutively;

(b) paginated by the party who seeks to put them before the tax board or tax court; and

(c) as far as practical, arranged in chronological order.

(2) All documents must be accompanied by an index that corresponds with the sequence of the paginated documents and the index must contain sufficient information to enable the tax board or tax court to identify every document without having to refer to the document itself.

(3) If additional documents are filed after the index has been completed, the party who files additional documents must paginate them following the method of original pagination, and compile a supplementary index describing the additional documents.

(4) Unless the parties agree otherwise, the party who produces the paginated documents and index must make the number of copies specified by the clerk or the registrar of the original and any supplementary documents, as well as the related index, and deliver a copy to the clerk or registrar and to the other party.

Part B

Reasons for assessment, objection, appeal and test cases

6. Reasons for assessment

(1) A taxpayer who is aggrieved by an assessment may, prior to lodging an objection, request SARS to provide the reasons for the assessment required to enable the taxpayer to formulate an objection in the form and manner referred to in rule 7.

(2) The request must –

(a) be made in the prescribed form;

(b) specify an address at which the taxpayer will accept delivery of the reasons; and

(c) be delivered to SARS within 30 days from the date of assessment.

(3) The period within which the reasons must be requested by the taxpayer may be extended by SARS for a period not exceeding 45 days if a SARS official is satisfied that reasonable grounds exist for the delay in complying with that period.

(4) Where in the opinion of a SARS official the reasons required to enable the taxpayer to formulate an objection have been provided, SARS must, within 30 days after delivery of the request, notify the taxpayer accordingly which notice must refer to the documents wherein the reasons were provided.

(5) Where in the opinion of a SARS official the reasons required to enable the taxpayer to formulate an objection have not been provided, SARS must provide the reasons within 45 days after delivery of the request for reasons.

(6) The period for providing the reasons may be extended by SARS if a SARS official is satisfied that more time is required by SARS to provide reasons due to exceptional circumstances, the complexity of the matter or the principle or the amount involved.

(7) An extension under subrule (6) may not be extended for a period exceeding 45 days and SARS must deliver a notice of the extension to the taxpayer before expiry of the 45 day period referred to in subrule (5).

(8) If subsequent to delivery of a notice under subrule (4) or the provision of

reasons by SARS under this rule the taxpayer is not able to formulate the objection, the taxpayer may apply to the tax court under Part F for an order under rule 52 which application must be brought within 20 days after delivery of a notice under subrule (4) or delivery of reasons under this rule.

7. Objection against assessment

(1) A taxpayer who may object to an assessment under section 104 of the Act, must deliver a notice of objection within 30 days after –

(a) delivery of a notice under rule 6(4) or the reasons requested under rule 6; or

(b) where the taxpayer has not requested reasons, the date of assessment.

(2) A taxpayer who lodges an objection to an assessment must

(a) complete the prescribed form in full;

(b) specify the grounds of the objection in detail including —

(i) the part or specific amount of the disputed assessment objected to; and

(ii) which of the grounds of assessment are disputed;

(c) if a SARS electronic filing service is not used, specify an address at which the taxpayer will accept delivery of SARS' decision in respect of the objection as well as all other documents that may be delivered under these rules;

(d) sign the prescribed form or ensure that the prescribed form is signed by the taxpayer's duly authorised representative; and

(e) deliver, within the 30 day period referred to in subrule (1), the completed form at the address specified in the assessment or, where no address is specified, the address specified under rule 2.

(3) The taxpayer may apply to SARS under section 104(4) of the Act for an extension of the period for objection before expiry of the 30 day period referred to in subrule (1) above.

(4) Where a taxpayer delivers an objection that does not comply with the requirements of subrule (2)*(a), (b), (d)* or *(e)*, SARS may regard the objection as invalid and must, if SARS is in possession of the current address of the taxpayer,

notify the taxpayer accordingly and state the ground for invalidity in the notice within 20 days of delivery of the invalid objection.

(5) A taxpayer who receives a notice of invalidity under subrule (4) may within 20 days of delivery of the notice submit a new objection.

(6) If the taxpayer fails to submit a new objection within the 20 day period under subrule (5), the taxpayer may thereafter only submit a new objection together with an application to SARS for an extension of the period for objection under section 104(4) of the Act.

8. Request for supporting documents after objection lodged

(1) Within 30 days after delivery of an objection, SARS may require a taxpayer to produce the supporting documents necessary to decide the objection.

(2) The taxpayer must deliver the documents within 30 days after delivery of the notice under subrule (1).

(3) If reasonable grounds for an extension are submitted by the taxpayer, SARS may extend the period under subrule (2) for a period not exceeding 20 days.

9. Decision on objection

(1) SARS must notify the taxpayer of the allowance or disallowance of the objection under section 106(2) of the Act within—

(a) 60 days after delivery of the taxpayer's objection; or

(b) where SARS requested supporting documents under rule 8, 45 days after —

(i) delivery of the requested documents; or

(ii) if the documents were not delivered, the expiry of the period within which the documents must be delivered.

(2) SARS may extend a period referred to in subrule (1) for a further period not exceeding 45 days if, in the opinion of a senior SARS official, more time is required to take a decision on the objection due to exceptional circumstances, the complexity of the matter or the principle or the amount involved.

(3) If a period is extended under subrule (2), the official must, before expiry of the period referred to in subrule (1), inform the taxpayer that the official will decide on the objection within a longer period.

10. Appeal against assessment

(1) A taxpayer who wishes to appeal against the assessment to the tax board or tax court under section 107 of the Act must deliver a notice of appeal in the prescribed form and manner within 30 days after delivery of the notice of disallowance of the objection under rule 9 or the extended period under section 107(2) of the Act.

(2) A notice of appeal must—

(a) be made in the prescribed form;

(b) if a SARS electronic filing service is used, specify an address at which the appellant will accept delivery of documents when SARS electronic filing service is no longer available for the further progress of the appeal;

(c) specify in detail—

(i) in respect of which grounds of the objection referred to in rule 7 the taxpayer is appealing;

(ii) the grounds for disputing the basis of the decision to disallow the objection under section 106(5) of the Act; and

(iii) any new ground on which the taxpayer is appealing;

(d) be signed by the taxpayer or the taxpayer's duly authorised representative; and

(e) indicate whether or not the taxpayer wishes to make use of the alternative dispute resolution procedures referred to in Part C, should these procedures be available.

(3) The taxpayer may not appeal on a ground that constitutes a new objection against a part or amount of the disputed assessment not objected to under rule 7.

(4) If the taxpayer in the notice of appeal relies on a ground not raised in the

objection under rule 7, the taxpayer must produce any related document requested by SARS in order to decide on the further progress of the appeal.

11. Appeal to tax board or court

(1) Where –

(a) the provisions of section 109(1) of the Act apply, the appeal must be dealt with by the tax board under Part D; and

(b) the chairperson of the tax board directs an appeal to the tax court under section 109(5) or the provisions of section 117 of the Act apply, the appeal must be dealt with by the tax court under Part E.

(2) If no alternative dispute resolution procedures under Part C are pursued, the appellant must—

(a) if the appeal is to be dealt with by the tax board, within 35 days of delivery of the notice of appeal request the clerk to set the matter down before the tax board under rule 26; or

(b) if the appeal is to be dealt with by the tax court, deliver the statement under rule 31.

12. Test cases

(1) A senior SARS official must upon designating an objection or appeal as a test case or staying a similar objection or appeal by reason of a designation under section 106(6) of the Act, inform the taxpayers or appellants accordingly by notice before—

(a) the objection is decided under rule 9;

(b) if the appeal is to be dealt with by the tax board, a decision by the chairperson of the tax board is given under section 114 of the Act; or

(c) if the appeal is to be dealt with by the tax court, the appeal is heard by the tax court.

(2) The notice must set out—

(a) the number of and common issues involved in the objections or appeals that the test case is likely to be determinative of;

(b) the question of law or fact or both law and fact that, subject to the augmentation thereof under rule 34, constitute the issues to be determined by the test case; and

(c) the importance of the test case to the administration of the relevant tax Act.

(3) The taxpayers or appellants may within 30 days of delivery of the notice, deliver a notice—

(a) opposing the decision that an objection or appeal is designated as a test case;

(b) opposing the decision that an objection or appeal is stayed pending the final determination of a test case on a similar objection or appeal before the tax court; or

(c) if the objection or appeal is to be stayed, requesting a right of participation in the test case, which notice must set out the grounds of opposition or for participation, as the case may be.

(4) If no notice under subrule (3) is received by SARS, the designation of the test case or suspension of the objection or appeal by reason of the designation is regarded as final.

(5) Within 30 days after receipt of the notice under subrule (3) a senior SARS official may—

(a) withdraw the decision to select the objection or appeal as test case or to stay the objection or appeal pending the outcome of a test case;

(b) agree that a taxpayer or appellant requesting participation may do so; or

(c) apply to the tax court under Part F for an order under rule 52—

(i) that the objection or appeal be selected as test case;

(ii) that the objection or appeal be stayed pending the determination of the test case;

(iii) if in dispute, what are the issues that will be determined in the test case; or

(iv) that the taxpayer or appellant requesting participation should not be allowed to do so.

(6) The stay of an objection or appeal terminates on the date of the—

(a) expiry of the 30 day period prescribed under subrule (5), if a taxpayer or appellant has delivered a notice under subrule (3) and the senior SARS official has not within the 30 day period withdrawn the decision under subrule (5)*(a)* or made an application under subrule (5)*(c)*;

(b) delivery of the notice by the official that the decision has been withdrawn under subrule (5)*(a)*;

(c) agreement between the taxpayer or appellant and the official that the stay of the objection or appeal is terminated; or

(d) dismissal by the tax court, or higher court dealing with an appeal against the judgment of the tax court, of an application by the official under subsection (5)*(c)*.

(7) For the period during which an objection or appeal is stayed under section 106(6)*(b)* of the Act—

(a) a period prescribed under these rules (other than under this rule) in relation to the objection or appeal, does not apply; and

(b) if the staying of an objection or appeal terminates, a period prescribed under these rules is treated as if the period was extended by the same period that the suspension of the objection or appeal was in effect.

(8) Proceedings in an objection or appeal under these rules which have been instituted but not determined by the tax board, tax court or any other court of law are stayed with effect from delivery of the notice under subrule (1) until the stay of an objection or appeal is terminated under subrule (6).

(9) A test case designated under section 106(6) of the Act must be heard by the tax court.

(10) For purposes of a cost order by the tax court, or higher court dealing with an appeal against the judgment of the tax court, in a test case designated under section 106(6) of the Act, the appellants in the test case include:

(a) the appellant whose appeal was selected as the test case; and

(b) a taxpayer or appellant who participated in the test case.

(11) In the event that a tax court under section 130 of the Act, or a higher court dealing with an appeal against the judgment of the tax court in the test case, awards costs and—

(a) SARS is substantially successful in a test case, the appellants in the test case will be responsible for the legal costs of the appellant whose appeal was selected as the test case on the proportionate basis as may be determined by the tax court; or

(b) the appellants are substantially successful in a test case, SARS will be liable for the legal costs of the appellants.

Part C

Alternative dispute resolution

13. Notice of alternative dispute resolution

(1) If the appellant has in a notice of appeal indicated a willingness to participate in alternative dispute resolution proceedings under this Part in an attempt to resolve the dispute, SARS must inform the appellant by notice within 30 days of receipt of the notice of appeal whether or not the matter is appropriate for alternative dispute resolution.

(2) If the appellant has not indicated in the notice of appeal that the appellant wishes to make use of alternative dispute resolution under this Part, but SARS is satisfied that the matter is appropriate for alternative dispute resolution and may be resolved by way of the procedures referred to in this Part—

(a) SARS must inform the appellant accordingly by notice within 30 days of receipt of the notice of appeal; and

(b) the appellant must within 30 days of delivery of the notice by SARS deliver a notice stating whether or not the appellant agrees thereto.

(3) An appellant who requests alternative dispute resolution under subrule (1) or agrees thereto under subrule (2), is regarded as having accepted the terms of

alternative dispute resolution set out in this Part.

14. Reservation of rights

(1) The parties participate in alternative dispute resolution proceedings under this Part with full reservation of their respective rights in terms of the procedures referred to in the other Parts of these rules.

(2) Subject to rule 22(3)*(c)*, any representations made or documents submitted in the course of the alternative dispute resolution proceedings will be without prejudice.

15. Period of alternative dispute resolution

(1) The period within which the alternative dispute resolution proceedings under this rule is conducted commences on the date of delivery of the notice by SARS under rule 13(1) or the notice by the appellant under rule 13(2)*(b)*, and ends on the date the proceedings are resolved under rule 23 or 24 or terminated under rule 25.

(2) The period referred to in subrule (1) interrupts the periods prescribed for purposes of proceedings under rule 12 and Parts D, E and F of these rules.

(3) The parties must finalise the alternative dispute resolution proceedings within 90 days after the commencement date referred to in subrule (1).

16. Appointment of facilitator

(1) Unless the parties otherwise agree, a senior SARS official may appoint any person, including a person employed by SARS, to facilitate the alternative dispute resolution proceedings under this Part within 15 days after the commencement date of the proceedings under rule 15(1) and give notice thereof to the appellant and SARS official involved in the proceedings.

(2) A person appointed as a facilitator must be a person of good standing who has appropriate experience and must comply with the duties under rule 17.

(3) A senior SARS official may at the request of a party, remove a facilitator

from the list of facilitators at any time for misconduct, incapacity, incompetence or non-compliance with the duties under rule 17.

(4) A senior SARS official may not remove a facilitator once the facilitator has commenced with the proceedings, save at the request of the facilitator or by agreement between the parties.

(5) A senior SARS official may request a party to submit evaluations of the facilitation process, including an assessment of the facilitator, which evaluations are regarded as SARS confidential information.

17. Conduct of facilitator

A person appointed to facilitate the proceedings under this Part has a duty to—

(a) act within the prescripts of the proceedings under this Part and the law;

(b) seek a fair, equitable and legal resolution of the dispute between the appellant and SARS;

(c) build the integrity, fairness and efficacy of the alternative dispute resolution process;

(d) be independent and impartial;

(e) conduct himself or herself with honesty, integrity and with courtesy to all parties;

(f) act in good faith;

(g) decline an appointment or obtain technical assistance when a case is outside the field of competence of the facilitator; and

(h) attempt to bring the dispute to an expeditious conclusion.

18. Conflict of interest of facilitator

(1) A facilitator will not solely on account of his or her liability to tax and, if applicable, employment by SARS be regarded as having a personal interest or a conflict of interest in proceedings in which he or she is appointed to facilitate.

(2) A facilitator must withdraw from the proceedings as soon as the facilitator becomes aware of a conflict of interest which may give rise to bias which the facilitator may experience with the matter concerned or other circumstances that may affect the facilitator's ability to remain objective for the duration of the proceedings.

(3) Either party may ask for withdrawal of the facilitator on the basis of conflict of interest or other indications of bias.

19. Determination and termination of proceedings by facilitator

(1) The facilitator must, after consulting the appellant and SARS official involved in the alternative dispute resolution proceedings—

(a) within 20 days of the facilitator's appointment, determine a place, date and time at which the parties must convene the alternative dispute resolution meeting and notify the parties accordingly in writing; and

(b) if required, notify each party in writing which written submissions or any other document should be furnished or exchanged and when the submissions or documents are required.

(2) The facilitator may summarily terminate the proceedings without prior notice—

(a) if a party fails to attend the meeting;

(b) if a party fails to carry out a request under subrule (1)*(b)*;

(c) if of the opinion that the dispute cannot be resolved through such proceedings; or

(d) for any other appropriate reason.

20. Proceedings before facilitator

(1) The alternative dispute resolution proceedings before the facilitator must be conducted in accordance with the procedures set out in this Part.

(2) A facilitator is not required to record the proceedings and the proceedings

may not be electronically recorded.

~~(3) During the proceedings the facilitator may request or allow a party to present evidence, including leading witnesses, and such proceedings must comply with the rules of evidence.~~

(3) During the proceedings the appellant, if a natural person or if a representative taxpayer within the meaning of section 153 of the Act, must be personally present and may be accompanied by a representative of the appellant's choice.

(4) The facilitator, in exceptional circumstances, may allow the appellant to be represented in the appellant's absence by a representative of the appellant's choice.

(5) The meeting before the facilitator may be—

(a) concluded at the instance of the facilitator or if the parties so agree; and

(b) if both parties and the facilitator agree, resumed at the place, date or time determined by the facilitator.

(6) At the conclusion of the meeting the facilitator must record in writing—

(a) the issues which were resolved;

(b) the issues upon which agreement or settlement could not be reached; and

(c) any other point which the facilitator considers necessary.

(7) The facilitator must deliver the report under subrule (6) to the taxpayer and SARS within 10 days of the cessation of the proceedings.

21. Recommendation by facilitator

(1) SARS, the appellant and the facilitator may agree at the commencement of the proceedings that, if no agreement or settlement is ultimately reached between the parties, the facilitator may make a written recommendation at the conclusion of the proceedings.

(2) The facilitator must deliver the recommendation to the parties with 30 days after the termination of the proceedings under rule 25 unless the parties

agree to an extension of this period.

(3) A recommendation by a facilitator will not be admissible during any subsequent proceedings including court proceedings unless it is required by the tax court for purposes of deciding costs under section 130 of the Act.

22. Confidentiality of proceedings

(1) Representations made or documents tendered to the facilitator in confidence by a party during the course of the facilitation should be kept by the facilitator in confidence and not be disclosed to the other party except with the consent of the party that disclosed the information.

(2) A facilitator who is not a SARS official will be regarded as such for purposes of Chapter 6 of the Act.

(3) The proceedings under this rule will not be one of record, and any representation made or document tendered in the course of the proceedings

(a) is subject to the confidentiality provisions of Chapter 6 of the Act;

(b) is made or tendered without prejudice; and

(c) may not be tendered in any subsequent proceedings as evidence by a party, except—

(i) with the knowledge and consent of the party who made the representation or tendered the document;

(ii) if such representation or document is already known to, or in the possession of, that party;

(iii) if such representation or document is obtained by the party otherwise than under the proceedings in terms of this rule; or

(iv) if a senior SARS official is satisfied that the representation or document is fraudulent.

(4) No person may—

(a) subject to the circumstances listed in subrule (3)*(c)*, subpoena a person involved in the alternative dispute resolution proceedings in whatever

capacity to compel disclosure of any representation made or document tendered in the course of the proceedings;

(b) subpoena the facilitator to compel disclosure of any representation made or document tendered in the course of the proceedings in any other proceedings; or

(c) subpoena the facilitator during or after termination of the proceedings under rule 25 to explain or defend a recommendation made under rule 21.

23. Resolution of dispute by agreement

(1) A dispute which is subject to the procedures under this rule, may be resolved by agreement whereby a party accepts, either in whole or in part, the other party's interpretation of the facts or the law applicable to those facts or both.

(2) An agreement under this rule—

(a) must be recorded in writing and signed by the appellant and SARS official duly authorised to do so;

(b) must relate to the appeal as a whole, including costs;

(c) if not all issues in dispute were resolved, stipulate those areas in dispute—

(i) that are resolved; and

(ii) that could not be resolved and on which the appellant may continue the appeal to the tax board or tax court;

(d) may be made an order of court either with the consent of both parties, or on application to the tax court by a party under Part F; and

(e) must be reported internally in SARS in the manner as may be required by the Commissioner.

(3) Where an agreement is concluded, SARS must issue an assessment to give effect to the agreement within a period of 45 days after the date of the last signing of the agreement.

(4) If the appellant wishes to pursue the appeal on the unresolved issues to the tax board or tax court, the appellant must deliver a notice to this effect to the

clerk or registrar, as the case may be, within 15 days of the date of the agreement.

24. Resolution of dispute by settlement

(1) Where the parties are, despite all reasonable efforts, unable to resolve the dispute under rule 23, the parties may attempt to settle the matter in accordance with Part F of Chapter 9 of the Act.

(2) A settlement under Part F of Chapter 9 of the Act pursuant to proceedings under this Part—

(a) must be recorded in writing and signed by the appellant and SARS official duly authorised to do so;

(b) must relate to the appeal as a whole, including costs;

(c) if not all issues in dispute were settled, stipulate those areas in dispute—

(i) that are resolved; and

(ii) that could not be resolved and on which the appellant may continue the appeal to the tax board or tax court;

(d) may be made an order of court either with the consent of both parties, or on application to the tax court by a party under Part F; and

(e) must be reported in the manner referred to in section 149 of the Act.

(3) Where a settlement is concluded, SARS must issue the assessment referred to in section 150 of the Act to give effect to the settlement within a period of 45 days after the date of the last signature of the settlement.

(4) If the appellant wishes to pursue the appeal on the unresolved issues to the tax board or tax court, the appellant must deliver a notice to this effect to the clerk or registrar, as the case may be, within 15 days of the date of the settlement.

25. Termination of proceedings

(1) The alternative dispute resolution proceedings are terminated on the day after the expiry of the 90 day period under rule 15, unless the parties agreed that this period may be extended.

(2) Before expiry of the 90 day period under rule 15 or any extension thereof, if no agreement under rule 23 or settlement under rule 24 is concluded, the alternative dispute resolution proceedings are terminated on the date that—

(a) the facilitator terminates the proceedings under rule 19;

(b) the parties so agree; or

(c) a party delivers a notice of termination to the other party.

(3) If alternative dispute resolution proceedings are terminated under this rule, the appellant must—

(a) if the appeal is to be dealt with by the tax board, within 20 days of delivery of the notice of appeal request the clerk to set the matter down before the tax board under rule 26; or

(b) if the appeal is to be dealt with by the tax court, deliver the statement under rule 31.

Part D

Procedures of tax board

26. Set down of appeal before tax board

(1) The clerk must set an appeal down before the tax board within 30 days after receipt of—

(a) a notice by the appellant under rule 11(2)*(a)*, 23(4), 24(4) or 25(3);

(b) a decision by the chairperson to condone non-appearance before the tax board under rule 30; or

(c) an order by the tax court to condone non-appearance before the tax board under rule 53.

(2) The clerk in his or her sole discretion may allocate a date for the hearing.

(3) The clerk must give the parties written notice of the date, time and place for the hearing of the appeal at least 20 days before the hearing.

27. Subpoenas and dossier to tax board

(1) At the request of either party, or if a tax board directs, a subpoena may be issued by the clerk requiring a person to

(a) attend the hearing of the appeal for the purpose of giving evidence in connection with an appeal; and

(b) produce any specified document which may be in that person's possession or under that person's control and which is relevant to the issues in appeal.

(2) The rules of the Magistrate's Courts Act, 1944 (Act No. 32 of 1944), governing the service of subpoenas in civil matters in that court will apply in respect of subpoenas issued under this rule.

(3) A witness or document subpoenaed must be relevant to the issues in appeal evident from the grounds of assessment, notice of objection, notice of disallowance of objection and notice of appeal, and if the clerk is satisfied that a request for a subpoena by a party constitutes an abuse of process, the clerk must inform the party to apply to the tax board for the issue of the subpoena.

(4) At least 10 days before the hearing of the appeal or as otherwise agreed between the parties, the clerk must prepare and deliver a dossier to the chairperson and the parties containing copies of-

(a) all returns by the appellant relevant to the tax period in issue;

(b) all assessments relevant to the appeal;

(c) all documents relevant to a request for reasons for the assessment under rule 6;

(d) the notice of objection under rule 7 and documents, if any, provided under rule 8;

(e) the notice of disallowance of the objection under rule 9;

(f) the notice of appeal under rule 10; and

(g) any order by the tax court under Part F relating to the appeal.

(5) The dossier must be prepared in accordance with the requirements of rule 5.

28. Procedures in tax board

(1) Sections 122, 123, 124, 126, 127, 128 and 129 of the Act apply, with the necessary changes, to the tax board and the chairperson.

(2) A party must present all evidence, including leading witnesses, on which the party's case is based and must adhere to the rules of evidence.

(3) At the conclusion of the evidence, the parties may be heard in argument.

(4) The clerk must as required under section 114(3) of the Act deliver of a copy of the tax board's decision to both parties within 10 days of receipt of the decision.

(5) If no referral of the appeal to the tax court is requested under rule 29, SARS must, if required, issue the assessment to give effect to the decision of the tax board within a period of 45 days after delivery of a copy of the tax board's decision by the clerk.

29. Referral of appeal from tax board to tax court

(1) A party requiring an appeal to be referred to the tax court for a *de novo* hearing under section 115 of the Act must deliver a notice to the clerk requesting the referral and deliver a copy thereof to the other party.

(2) The referral notice must be delivered within the 21 day period prescribed under that section or the period extended under this rule—

(a) after delivery by the clerk of the tax board's decision under rule 28(4) or decision to extend the period under subrule (5);

(b) after delivery by the registrar of the tax court's decision to extend the period under rule 53; or

(c) the expiry of the 60 day period within which the chairperson must deliver the decision under section 114(2) of the Act.

(3) If the party seeking the referral is unable to deliver the notice within the prescribed period, the party may within the 21 day period prescribed under section 115 deliver a request for an extension by the chairperson under section 115(1) of

the Act, to the clerk setting out the grounds for the extension or delay.

(4) The clerk must within 10 days of receipt of the request, deliver the request to the relevant chairperson and a copy thereof to the other party.

(5) The chairperson must determine whether good cause exists for the extension and must make a decision within 15 days of receipt of the request and inform the clerk accordingly, and the clerk must notify the parties within 10 days of delivery of the decision of the chairperson.

(6) If a party is dissatisfied with the decision of the chairperson, that party may, within 15 days of delivery of the chairperson's decision, apply to the tax court under Part F for an order under rule 53.

30. Reasons for non-appearance at tax board hearing

(1) If the chairperson confirms an assessment under section 113(9) of the Act or allows an appeal under section 113(11), a party who failed to appear at the hearing of the board may provide reasons for the non-appearance and request that the chairperson withdraws the tax board's decision.

(2) The request must set out the reasons for the non-appearance and must be delivered to the clerk within 10 days after—

(a) if the tax board decided the matter on the day of the hearing when the party failed to appear, the date of the hearing;

(b) if the tax board decided the matter after the day of the hearing, the date of delivery of a copy of the tax board's decision; or

(c) in any other case, the date that the party becomes aware of the tax board's decision.

(3) The clerk must, within 10 days of receipt of the request deliver the application to the chairperson and a copy thereof to the other party.

(4) The chairperson must determine whether the party's non-appearance is due to sound reasons and must make a decision within 15 days of receipt of the request and inform the clerk accordingly.

(5) The clerk must deliver the chairperson's decision to the parties within 10

days of receipt of the decision.

(6) If a party is dissatisfied with the decision of the chairperson, that party may, within 15 days of delivery of the chairperson's decision, apply to the tax court under Part F for an order under rule 53.

Part E

Procedures of tax court

31. Statement of grounds of appeal

(1) The appellant must deliver a statement of the grounds of appeal to SARS within 45 days after—

(a) the date of an agreement under rule 23 or settlement under rule 24 in terms of which the parties agreed on the unresolved issues that the appellant may continue on appeal to the tax court;

(b) the date of termination of alternative dispute resolution proceedings under rule 25;

(c) if the matter was decided by the tax board, delivery of the notice by a party of the *de novo* referral of the appeal to the tax court under rule 29; or

(d) in any other case, the date of delivery of the notice of appeal by the appellant under rule 10.

(2) The statement must set out —

(a) a clear and concise statement of the grounds upon which the appellant appeals; and

(b) the material facts and the applicable law upon which the appellant relies for the appeal.

(3) The appellant may not include in the statement a ground of appeal that constitutes a new objection against a part or amount of the disputed assessment not objected to under rule 7.

32. Statement of grounds of opposing appeal

(1) SARS must after delivery of the statement of the grounds of appeal under rule 31, deliver to the appellant a statement of the grounds of opposing the appeal within—

(a) where the appellant was requested to make discovery under rule 35(1), 35 days after the appellant has discovered the required documents; or

(b) where the appellant was not requested to make discovery under rule 35(1), 45 days after delivery of the statement under rule 31.

(2) The statement of the grounds of opposing the appeal must set out—

(a) a clear and concise statement of the grounds upon which the appellant's appeal is opposed;

(b) the material facts and the applicable law upon which SARS relies; and

(c) which of the facts or the applicable law set out in the statement of the grounds of appeal under rule 31 are admitted and which of those facts or applicable law are denied.

(3) SARS may not include in the statement a ground that constitutes a novation of the factual or legal basis of the disputed assessment.

33. Reply to statement of grounds of opposing appeal

(1) The appellant may after delivery of the statement of grounds of opposing the appeal under rule 32 deliver a reply to the statement within—

(a) where SARS was requested to make discovery under rule 35(2), 15 days after the appellant has discovered the required documents; or

(b) where SARS was not requested to make discovery under rule 35(2), 20 days after delivery of the statement under rule 31(2).

(2) The reply to the statement of grounds of opposing the appeal must set out a clear and concise reply to any new grounds, material facts or applicable law set out in the statement of the grounds of opposing the appeal.

34. Issues in appeal

The issues in an appeal to the tax court will be those contained in the statement of the grounds of appeal read with the statement of the grounds of opposing the appeal and, if any, the reply to the grounds of opposing the appeal.

35. Amendments of statements

(1) The parties may agree that a statement under rule 31, 32 or 33 be amended.

(2) If the other party does not agree to the amendment, the party who requires an amendment may apply to the tax court under Part F for an order under rule 52.

36. Discovery of documents

(1) SARS may, within 10 days after delivery of the statement under rule 31, deliver a notice of discovery to the appellant requesting the appellant to make discovery on oath of any document material to a ground of appeal not set out in the notice of objection under rule 7 or the notice of appeal under rule 10, to the extent that such document is required by SARS to formulate its grounds of opposing the appeal under rule 32.

(2) The appellant may, within 10 days after delivery of the statement under rule 32 deliver a notice of discovery to SARS requesting SARS to make discovery on oath of any document material to a ground of opposing the appeal not set out in the reasons for the assessment or the basis of the disallowance of the objection under rule 9, to the extent such document is required by the appellant to formulate its grounds of reply under rule 33.

(3) A party may, within 15 days after delivery of the statement under rule 32 or 33, as the case may be, deliver a notice of discovery to the other party requesting that party to—

(a) make discovery on oath of all documents relating to the issues in appeal as referred to in rule 34; and

(b) if required and reasonable, produce specified documents in a specified manner, including electronically.

(4) A party to whom a notice of discovery has been delivered, must make discovery on oath of all documents relating to the new ground of appeal, the new ground of opposing the appeal or the issues in appeal, as the case may be, within 20 days after delivery of the discovery notice, specifying separately -

(a) the documents in or under the party's possession or control, or in or under the control of that party's agent;

(b) the documents which were previously in the party's possession or control, or under the control of the party's agent, but which are no longer in the party's possession or control or that of the party's agent; and

(c) the documents in respect of which the party has a valid objection to produce.

(5) After delivery of the documents under subrule (4), the production or inspection of the documents must take place at a venue and in a manner that the parties agree on.

(6) If either party believes that, in addition to the documents disclosed, there are other documents in possession of the other party that may be relevant to the new ground of appeal, the new ground of opposing the appeal or the issues in appeal, as the case may be, that have not been discovered, then that party may give notice of further discovery within 10 days of the discovery under subrule (4), or of the inspection of the documents under subrule (5), to that other party requiring the other party to within 10 days—

(a) make the further documents available for inspection; or

(b) state under oath that the documents requested are not in that party's possession, in which event the party must state their whereabouts, if known.

(7) A document not disclosed pursuant to a notice of discovery under subrule (4) or (6) may not, unless the tax court in the interest of justice otherwise directs, be used for any purpose at the appeal by the party who failed to make disclosure, but the other party may use such document.

(8) A document referred to in subrule (7) does not include a document specifically prepared to assist the court in understanding the case of the relevant

party and which is not presented as evidence in the appeal.

37. Notice of expert witness

Neither party may, save with the leave of the tax court or if the parties so agree, call a person as a witness to give evidence as an expert, unless that party has -

(a) not less than 30 days before the hearing of the appeal delivered a notice to the other party and the registrar of the party's intention to do so; and

(b) not less than 20 days before the hearing of the appeal delivered to the other party and the registrar a summary of the expert's opinions and the relevance thereof to the issues in appeal under rule 34.

38. Pre-trial conference

(1) SARS must arrange for a pre-trial conference to be held by not later than 60 days before the hearing of the appeal.

(2) During the pre-trial conference the parties must attempt to reach consensus of -

(a) what facts are common cause and what facts are in dispute;

(b) the resolution of preliminary points that either party intends to take;

(c) the sufficiency of the discovery process;

(d) the preparation of a paginated bundle of documents;

(e) the manner in which evidence is to be dealt with, including an agreement on the status of a document and if a document or a part thereof, will serve as evidence of what it purports to be;

(f) whether evidence on affidavit will be admitted and the waiver of the right of a party to cross-examine the deponent;

(g) expert witnesses and the evidence to be given in an expert capacity;

(h) the necessity of an inspection *in loco*;

(i) an estimate of the time required for the hearing and any means by which the proceedings may be shortened; and

(j) if the dispute could be resolved or settled in whole or in part.

(3) This conference may take place at a venue agreed between the parties.

(4) SARS must within 10 days of the conclusion of the pre-trial conference prepare and deliver to the appellant a minute setting out the parties' discussion and an agreement reached in respect of each matter referred to subrule (2).

(5) Where the appellant does not agree with the content of the minute, the appellant must, within 10 days of delivery of the minute by SARS, deliver a differentiating minute to SARS setting out with which statements in the minute by SARS the appellant does not agree and why.

39. Set down of appeal for hearing before tax court

(1) The appellant must apply to the registrar to allocate a date for the hearing of the appeal within 30 days after delivery of SARS' statement of grounds of appeal under rule 32 or the appellant's reply under rule 33, as the case may be, and give notice thereof to SARS.

(2) If the appellant fails to apply for the date within the period prescribed under subrule (1), SARS must apply for a date for the hearing within 30 days after the expiry of the period prescribed under subrule (1).

(3) The registrar in his or her sole discretion may allocate a date for the hearing.

(4) The registrar must deliver to the parties a written notice of the time and place appointed for the hearing of the appeal at least 80 days before the hearing of the appeal.

40. Dossier to tax court

(1) At least 30 days before the hearing of the appeal, or as otherwise agreed between the parties, SARS must deliver to the appellant and the registrar a dossier containing copies, where applicable, of -

(a) all returns by the appellant relevant to the year of assessment in issue;

(b) all assessments and grounds of assessment by SARS relevant to the issues in appeal;

(c) the appellant's notice of objection against the assessment;

(d) SARS' notice of disallowance of the objection;

(e) the appellant's notice of appeal;

(f) the appellant's statement of grounds of appeal;

(g) SARS' statement of grounds of opposing the appeal;

(h) the appellant's reply to SARS' statement of grounds of opposing the appeal, if any;

(i) SARS' minute of the pre-trial conference and, if any, the appellant's differentiating minute;

(j) any request for a referral from a tax board decision to the tax court under rule 29; and

(k) any order by the tax court under Part F or a higher court in an interlocutory application or application on a procedural matter relating to the objection or the appeal.

(2) The dossier must be prepared in accordance with the requirements of rule 5.

(3) The registrar must deliver copies of the dossier to the tax court at least 20 days before the hearing of the appeal.

41. Places at which tax court sits

(1) The Judge-President of the Division of the High Court with jurisdiction in the area where a tax court has been established under section 116 of the Act, must—

(a) determine the place and the times of the sittings of the tax court in that area by arrangement with the registrar under section 117(2) of the Act; and

(b) allocate a judge or an acting judge of the High Court as the president of the

tax court for each sitting.

(2) The tax court established in the area which is nearest to the residence or principal place of business of the appellant must hear and determine an appeal or application under Part F by the appellant, unless -

(a) the parties agree that the appeal or application be heard by a tax court sitting in another area; or

(b) the tax court, on application by a party under Part F, orders that the appeal or application be heard and disposed of in that tax court if—

(i) there are reasonable grounds to determine the matter in that tax court; and

(ii) approved by the Judge-President of the Division of the High Court with jurisdiction in the area where that tax court sits.

42. Procedures not covered by Act and rules

(1) If these rules do not provide for a procedure in the tax court, then the most appropriate rule contained in the uniform rules of the High Court issued under section 43 of the Supreme Court Act and the extent consistent with the Act and these rules, may be utilised by a party or the tax court.

(2) A dispute that arises during an appeal or application under Part F concerning the use of a rule under subrule (1) must be dealt with by the president of the tax court as a matter of law under section 118(3) of the Act.

43. Subpoena of witnesses to tax court

(1) At the request of either party, or if a tax court directs, a subpoena may be issued by the registrar requiring a person to attend the hearing of the appeal for the purpose of giving evidence in connection with an appeal.

(2) The subpoena may require the person subpoenaed to produce any specified document which may be in that person's possession or under that person's control and which is relevant to the issues in appeal.

(3) A witness or document subpoenaed must be relevant to the issues in

appeal under rule 34, and if the registrar is satisfied that a request for a subpoena by a party constitutes an abuse of process, the registrar must inform the party to apply to the tax court for the issue of the subpoena.

(4) The uniform rules of the High Court issued under section 43 of the Supreme Court Act governing the service of subpoenas in civil matters in the high court will apply in respect of subpoenas issued under this rule.

44. Procedures in tax court

(1) At the hearing of the appeal, the proceedings are commenced by the appellant unless—

(a) the only issue in dispute is the facts upon which an understatement penalty is imposed by SARS under section 222(1) of the Act; or

(b) SARS takes a point *in limine.*

(2) A party—

(a) must present all evidence, including leading witnesses, on which the party's case is based and must adhere to the rules of evidence; and

(b) may present a document specifically prepared to assist the court in understanding the case of the party and which is not presented as evidence in the appeal.

(3) At the conclusion of the evidence, the parties may be heard in argument and the party heard first may reply to new points raised in the argument presented by the other party or to other points with the leave of the president of the tax court.

(4) The hearing of an appeal may be adjourned by the president of the tax court from time to time to a time and place that the tax court deems convenient.

(5) The tax court may reserve its decision until a later date and where the decision is reserved, the judgment must be delivered by the president of the tax court in the manner considered fit.

(6) The registrar must by notice deliver the written judgment of the tax court to the parties within 10 days of delivery thereof.

(7) If a party or a person authorised to appear on the party's behalf fails to appear before the tax court at the time and place appointed for the hearing of the

appeal, the tax court may decide the appeal under section 129(2) of the Act upon—

(a) the request of the party that does appear; and

(b) proof that the prescribed notice of the sitting of the tax court has been delivered to the absent party or absent party's representative,

unless a question of law arises, in which case the tax court may call upon the party that does appear for argument.

45. Postponement or removal of case from roll

(1) If the parties agree to postpone the hearing of the appeal that has been set down for hearing, or to have that appeal removed from the tax court's roll, the party initiating the proceedings must notify the registrar thereof.

(2) An application by a party to postpone or remove an appeal from the roll, which is opposed by the other party, may be heard and determined by the president of the tax court in the manner referred to in section 118(3) of the Act and the president may make an appropriate cost order under section 130(3) of the Act.

46. Withdrawal or concession of appeal or application

(1) If at any time before it has been set down under rule 39 an appeal or application under Part F is withdrawn by the appellant or conceded by SARS under section 107 of the Act, notice of the withdrawal or concession, whichever is applicable, must be given to the other party.

(2) If an appeal or application has been set down for hearing under rule 39, or is part-heard, and the appellant withdraws or SARS concedes the appeal or application, the relevant party must—

(a) deliver a notice of withdrawal or concession, whichever is applicable, to the other party and to the registrar; and

(b) in such notice, indicate whether or not the party consents to pay the costs of the other party.

(3) If a notice of withdrawal or concession is delivered after the appeal or

application has been set down for hearing without a consent to pay the other party's costs, the aggrieved party may apply under Part F for costs under section 130(1)*(e)* of the Act which application may be dealt with by the president of the tax court in the manner referred to in section 118(3) of the Act.

47. Costs

(1) Where the tax court makes an order as to costs or if a consent to pay costs is made by a party under these rules, at the request of a party, the registrar may—

(a) perform the functions and duties of a taxing master; or

(b) at the request of the tax court or the party, appoint any other person to act as taxing master on such terms and for such period as the registrar considers appropriate.

(2) The registrar must be satisfied that the person appointed by the registrar to act as taxing master is suitably qualified or experienced to perform the functions and duties of a taxing master.

(3) A party may apply to the tax court under Part F for reconsideration of items or portions of items in the bill of costs taxed by the registrar or the person appointed to act as taxing master and an order under rule 52(7).

(4) The fees, charges and rates to be allowed by the tax court are, as far as applicable, those fixed by the tariff of fees and charges in cases heard before the Division of the High Court within which area of jurisdiction the tax court sits.

48. Witness fees

(1) A witness in proceedings before the tax court is entitled to be paid in accordance with the tariff of allowances prescribed by the Minister for Justice and Constitutional Development and published under section 42 of the Supreme Court Act by public notice.

(2) Despite subrule (1), a tax court may, at the request of a party, order that no allowances or only a portion of the prescribed allowances be paid to a witness.

49. Request for recordings

(1) If the appellant requires from the registrar under section 134(3) of the Act—

(a) a transcript of the evidence or part thereof given at the hearing of the appeal; or

(b) a copy of the recording of the evidence or a part thereof given at the hearing of the appeal for purposes of private transcription, the appellant must pay to the registrar the costs as prescribed by the Commissioner in a public notice issued under section 134(3) of the Act.

(2) The appellant must pay the costs as follows:

(a) if a transcript is required, payment must be made within 20 days of delivery of the transcript and the invoice by the registrar; or

(b) if a copy of the recording of the evidence is required, payment in full must be made upon receipt of the copy and invoice by the registrar.

Part F

Applications on notice

50. Procedures under this Part

(1) For the purpose of this Part—

(a) the party bringing the application is the applicant and the party against whom relief is sought is the respondent; and

(b) a reference to the tax court means the president of the tax court acting in the manner referred to in section 118(3) of the Act.

(2) The rules referred to in Parts A to E and G, to the extent applicable and together with the necessary changes as required by the context, apply to this Part.

(3) A document required to be delivered under this Part must be delivered—

(a) to the registrar at the address specified by public notice under rule 3;

(b) to SARS at the address specified under rule 2(1);or

(c) to the taxpayer or appellant, at the address specified under rule 2(1).

(4) An application under this Part interrupts the periods prescribed for purposes of proceedings under Parts A to E of these rules for the period commencing on the date of delivery of a notice of motion under rule 57 and ending of the date of—

(a) delivery of a notice of withdrawal of the application by the applicant;

(b) an agreement between the applicant and respondent to terminate proceedings under this Part; or

(c) delivery of the judgment of the tax court to the parties.

(5) The tax court hearing an application under this Part may—

(a) make an order as referred to in this Part, together with any other order it deems fit, including an order as to costs; and

(b) reserve its decision until a later date and where the decision is reserved, the judgment must be delivered by the president of the tax court in the manner considered fit.

(6) The registrar must by notice deliver the written judgment of the tax court to the applicant and the respondent within 10 days of delivery thereof.

51. Application provided for in Act

(1) An application to the tax court provided for in the Act must, unless otherwise specified, be brought in the manner provided for in this Part.

(2) An interlocutory application relating to an objection or appeal must, unless the tax court before which an appeal is set down otherwise directs, be brought in the manner provided for in this Part.

52. Application provided for under rules

(1) A taxpayer or appellant may apply to a tax court under this Part—

(a) if SARS fails to provide the reasons under rule 6 for an assessment required to enable the taxpayer to formulate an objection under rule 7, for an order

that SARS must provide within the period allowed by the court the reasons regarded by the court as required to enable the taxpayer to formulate the objection;

(b) if an objection is treated as invalid under rule 7, for an order that the objection is valid;

(c) if the period of time to lodge an objection to an assessment has not been extended under section 104(4) of the Act, for an order extending the period within which an objection must be lodged by a taxpayer subject to the provisions of section 104(5) of the Act; or

(d) if the period of time to lodge an appeal to an assessment has not been extended under section 107(2) of the Act, for an order extending the period within which an appeal must be lodged by an appellant for a period not exceeding 45 days from the date of the order.

(2) A party who failed to obtain an extension of a period by agreement with the other party under rule 4 may apply to the tax court under this Part for an order, on good cause shown—

(a) condoning the non-compliance with the period; and

(b) extending the period for the further period that the tax court deems appropriate.

(3) SARS may for purpose of rule 12 apply to a tax court under this Part for an order—

(a) that an objection or appeal be selected as test case;

(b) that an objection or appeal be stayed pending the determination of the test case; or

(c) whether a taxpayer or appellant requesting participation in the test case should be allowed to do so.

(4) A party to an agreement under rule 23 or a settlement under rule 24 pursuant to alternative dispute resolution proceedings under Part C, may apply to a tax court under this Part for an order that—

(a) the agreement or settlement be made an order of court; or

(b) if SARS fails to issue the assessment to give effect to an agreement or settlement within the period prescribed under rule 23(3) or 24(3), as the case may be, SARS must issue the assessment.

(5) A party who failed to deliver a statement as and when required under rule 31, 32 or 33, may apply to the tax court under this Part for an order condoning the failure to deliver the statement and the determination of a further period within which the statement may be delivered.

(6) A party seeking an amendment of a statement under rule 35, may apply to the tax court under this Part for an appropriate order, including an order concerning a postponement of the hearing.

(7) A party may apply to the tax court under this Part for an order as to whether items or portions of items in the bill of costs taxed under rule 47 may be allowed, reduced or disallowed.

53. Application against decision by chairperson of tax board

(1) A party may, despite the procedures set out in Part D, apply to a tax court against a decision by a chairperson of a tax board that concerns—

(a) the non-appearance of a person at a hearing of the tax board under section 113(13) of the Act; or

(b) the extension of the period within which a request to refer a tax board decision to the tax court under section 115 of the Act must be made.

(2) A party may apply to the tax court to may make an order—

(a) condoning a party's non-appearance at a tax board hearing; or

(b) allowing a party's request for extension of the referral of the appeal to the tax court.

54. Application for withdrawal of chairperson of tax board

(1) An application for the withdrawal of a chairperson of the tax board under section 111(7) of the Act may be made to—

(a) that chairperson before or during the hearing of the appeal by the tax board; or

(b) if the application made to that chairperson was refused, the tax court in the manner provided for in this Part.

(2) For purpose of the application to the tax court by the applicant, the chairperson must postpone the hearing *sine die*.

(3) The tax court to which an application is made may order the withdrawal of the chairperson if satisfied that there—

(a) is a conflict of interest on the part of the chairperson that may reasonably be regarded as giving rise to bias which the chairperson may experience with the case concerned; or

(b) are other circumstances that may reasonably be regarded as giving rise to bias and affect the chairperson's ability to remain objective for the duration of the case, together with any other order it deems fit, including an order as to costs.

(4) The applicant must within 10 days of delivery of the judgment of the tax court by the registrar under rule 50(6), request the clerk to convene or reconvene, as the case may be, the tax board under rule 26.

55. Application for withdrawal of member of tax court

(1) An application for the withdrawal of a member of the tax court under section 122 of the Act, may be made in the manner provided for in this Part to—

(a) if the appeal has been set down under rule 39, the tax court where the appeal has been set down; or

(b) if the appeal has not been set down under rule 39, the tax court where the application is set down under this Part.

(2) If an application for the withdrawal of a member of the tax court is—

(a) made after the appeal has been set down but before the hearing, the applicant must request the registrar to postpone the hearing of the appeal *sine die*; or

(b) during the hearing of the appeal, the tax court must postpone the hearing of the appeal *sine die*.

(3) The tax court to which an application is made under this rule may order the withdrawal of the member if satisfied that there—

(a) is a conflict of interest on the part of the member that may reasonably be regarded as giving rise to bias which the member may experience with the case concerned; or

(b) are other circumstances that may reasonably be regarded as giving rise to bias and affect the member's ability to remain objective for the duration of the case.

(4) The applicant must within 10 days of delivery of the order of the tax court by the registrar, request the registrar to set the appeal down under rule 39.

(5) If an application for the withdrawal of a member of the tax court is successful, the registrar after receipt of the notice of the applicant requesting set down, must select another person from the panel of members of the tax court established under section 120 of the Act for the hearing of the appeal.

56. Application for default judgment in the event of non-compliance with rules

(1) If a party has failed to comply with a period or obligation prescribed under these rules or an order by the tax court under this Part, the other party may—

(a) deliver a notice to the defaulting party informing the party of the intention to apply to the tax court for a final order under section 129(2) of the Act in the event that the defaulting party fails to remedy the default within 15 days of delivery of the notice; and

(b) if the defaulting party fails to remedy the default within the prescribed period, apply, on notice to the defaulting party, to the tax court for a final order under section 129(2) of the Act.

(2) The tax court may, on hearing the application—

(a) in the absence of good cause shown by the defaulting party for the default in

issue make an order under section 129(2) of the Act; or

(b) make an order compelling the defaulting party to comply with the relevant requirement within such time as the court considers appropriate and, if the defaulting party fails to abide by the court's order by the due date, make an order under section 129(2) of the Act without further notice to the defaulting party.

57. Notice of motion and founding affidavit

(1) Every application must be brought on notice of motion which must set out in full the order sought, be signed by the applicant or the applicant's representative and must be supported by a founding affidavit that contains the facts upon which the applicant relies for relief.

(2) Copies of the notice of motion and founding affidavit, together with all annexures, must be delivered to the registrar and the respondent.

58. Address and due date

In the notice of motion, the applicant must -

(a) indicate an address, if different from the address referred to in rule 50(3), at which the applicant will accept notice and delivery of all documents in proceedings under this Part;

(b) set forth a day, not less than 10 days after delivery thereof to the respondent, on or before which the respondent is required to notify the applicant, whether the respondent intends to oppose that application; and

(c) state that if no such notification is given, the application will be set down for hearing on the first available day determined by the registrar, being not less than 15 days after service of that notice on the respondent.

59. Set down for hearing where no intention to oppose

(1) If the respondent does not, on or before the day set out in the notice under rule 58*(b)*, deliver to the applicant a notice of intention to oppose the

application, the applicant may apply to the registrar to set the matter down.

(2) An application must be heard by a court having jurisdiction within any area in which the appellant resides or carries on business unless the applicant and the Registrar agree that it be heard in another area.

(3) The registrar must deliver to the parties a written notice of the time and place appointed for the application at least 10 days before the date on which it has been set down.

60. Notice of intention to oppose and answering affidavit

If the respondent wishes to oppose the grant of an order sought in the notice of motion, the respondent must

(a) on or before the day set out in the notice under rule 58*(b)*, deliver to the applicant and the registrar a notice of intention to oppose the application;

(b) if the respondent is the taxpayer or the appellant, indicate in the notice of intention to oppose an address, if different from the address referred to in rule 50(3),at which the respondent will accept notice and delivery of all documents in proceedings under this Part; and

(c) within 15 days of notifying the applicant of the intention to oppose the application, deliver an answering affidavit, if any, together with relevant annexures, to the applicant and the registrar.

61. Replying affidavit

(1) Within 10 days of delivery of the respondent's answering affidavit under rule 60*(c)*, the applicant may deliver a replying affidavit to the respondent and the registrar.

(2) The tax court may in its discretion permit further affidavits to be filed.

62. Set down for hearing where no answering affidavit

(1) If no answering affidavit is delivered by the respondent within the period

referred to in rule 60*(c)*, the applicant may within five days of the expiry of that period apply to the registrar to set the matter down.

(2) The registrar must deliver to the parties a written notice of the time and place appointed for the application at least 10 days before the date on which it has been set down.

63. Application for set down by respondent

(1) If the applicant fails to apply for set down within the period referred to in rule 59 or 62, as the case may be, to the registrar to allocate a date for the application, the respondent may apply to the registrar to allocate a day for the application within 10 days of the expiry of the period referred to in rule 59 or 62.

(2) The registrar must deliver to the parties a written notice of the time and place appointed for the application at least 10 days before the date on which it has been set down.

64. Judgment by tax court

(1) The tax court after hearing an application under this Part may reserve its decision until a later date and where the decision is reserved, the judgment must be delivered by the tax court in the manner considered fit.

(2) The registrar must by notice deliver the written judgment of the tax court to the parties, or the clerk of the tax board if appropriate, within 10 days of delivery thereof.

Part G

Transitional arrangements

65. Definitions

Any meaning given to a word or expression in the Act and Part A to F must, unless the context otherwise indicates, bear the same meaning in this Part, and—

'Income Tax Act' means the Income Tax Act, 1962 (Act No. 58 of 1962); and

'the previous rules' means the rules promulgated under section 107A of the

Income Tax Act and repealed under section 269(1) of the Act with effect from the date that these rules commence.

66. Application of rules to prior or continuing action

(1) Subject to this Part, these rules apply to an act or proceeding taken, occurring or instituted before the commencement date of these rules, but without prejudice to the action taken or proceedings conducted before the commencement date of the comparable provisions of these rules.

(2) A request for reasons, objection, appeal to the tax board or tax court, alternative dispute resolution, settlement discussions, interlocutory application or application in a procedural matter taken or instituted under the previous rules but not completed by the commencement date of these rules, must be continued and concluded under these rules as if taken or instituted under these rules.

(3) A document delivered by the taxpayer, appellant, SARS, clerk or registrar under the previous rules, must be regarded as delivered in terms of the comparable provision of these rules, as from the date that the document was issued or delivered under the previous rules.

(4) If, before the commencement of these rules and before an appeal has been heard by the tax court—

(a) a statement of grounds of assessment has been delivered by SARS under rule 10 of the previous rules but the statement of grounds of appeal by the taxpayer under rule 11 of the previous rules has not been delivered, the appellant must within 45 days of the commencement of these rules deliver a statement of grounds of appeal under rule 31; or

(b) a statement of grounds of appeal by the taxpayer under rule 11 of the previous rules has been delivered and the appeal has not been heard by the tax court, the issues in appeal for purposes of rule 34 are regarded as the grounds of assessment under rule 10 of the previous rules read with the statement of the grounds of appeal under rule 11 of the previous rules.

67. Applications of new procedures

A party in a dispute which has not been decided on by a tax board or a tax court before the commencement of these rules may use a procedure provided for in these rules provided that -

(a) the procedure sought to be used follows in sequence after the last action taken by either of the parties; and

(b) the period contained in the relevant previous rule has not expired, counting from the commencement date of these rules.

68. Completion of time periods

(1) If the period for an application, objection or appeal prescribed under the previous rules had expired before the commencement date of these rules, nothing in these rules may be construed as enabling the application, objection or appeal to be made under these rules by reason only of the fact that a longer period may be prescribed under these rules.

(2) If the previous rules prescribed a period within which a party, clerk or registrar must deliver a document, and that period expires after the commencement date of these rules, the first day of the prescribed period for any further procedures under these rules is regarded as commencing on the day after the last day of that expired period.

(3) If an objection or an appeal could have been lodged before the commencement date of these rules but is lodged after the period prescribed under the previous rules, an application for the condonation of the late lodging of the objection or appeal must be considered under these rules.

10. INDEMNITY

Whilst every reasonable care has been taken in the production of this update we cannot accept responsibility for the consequences of any inaccuracies contained herein or for any action undertaken or refrained from taken as a consequence of this update.