



2022

**SAICA
TAX DEBT
MANAGEMENT GUIDE**

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THE SOUTH AFRICAN INSTITUTE OF CHARTERED ACCOUNTANTS

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SAICA Tax Debt Management Guide

Tax debt management

Chapter 11 of the Tax Administration Act, No. 28 of 2011 (the TAA) contains the unique powers of SARS to recover a tax debt. The recovery mechanisms contained in the TAA may be used to recover all tax types in the Republic. 'Tax' is defined in section 1 of the TAA and includes a tax, duty, levy, royalty, fee, contribution, penalty, interest, and any other moneys imposed under a tax Act.

The TAA provides for a range of persons who are liable to tax in various capacities in certain circumstances. The term 'taxpayer' is defined to accommodate all these categories.

The TAA defines a 'taxpayer' as:

- a person who is or may be chargeable to tax or with a tax offence (which could mean someone with a tax offence that is not a registered taxpayer)
- a representative taxpayer
- a withholding agent
- a responsible third party or
- a person who is the subject of a request to provide assistance under an international tax agreement

In terms of section 152 of the TAA a person chargeable to tax is a person upon whom the liability for tax due under a tax Act is imposed and who is personally liable for the tax.

This guide includes the various provisions in terms of which SARS may raise a tax debt by assessment, including special circumstances allowing SARS to take steps to collect tax debt without informing the taxpayer.

Remedies to the taxpayer in circumstances where SARS does not follow the legislated process in raising and collecting tax debt will be considered.

Suspension of payment provisions and examples, with screenshots as to how to request this on eFiling at different stages within the dispute process will also be considered.

1. Debt due to SARS

Powers and Duties of SARS and SARS Officials

In relation to debts due to SARS it is important for taxpayers to be aware of the specific provisions in the TAA that describes the powers and duties of SARS and SARS officials. Taxpayers should confirm that these powers and duties have been exercised by a SARS official who has the required authority to exercise such power. Should a power be exercised by a person not authorised to do so, the exercise of that power can be challenged on the basis that the person's conduct is unlawful and arguably invalid.

Section 6 of the TAA describes the powers and duties of SARS, the Commissioner and SARS officials. Section 1 of the TAA defines a '**senior SARS Official**' as a SARS official referred to in section 6(3). Section 6 provides the following in respect of the powers and duties of SARS and SARS officials:

The powers and duties of SARS may be exercised for purposes of the '**administration of a tax Act**'. The term 'administration of a tax Act' is frequently used in the TAA and has the meaning assigned in **section 3(2)** of the TAA.

Section 3(2) comprehensively sets out the purpose of SARS' actions under the TAA as follows:

- obtain full information in relation to:
 - anything that may affect the liability of a person for tax in respect of a previous, current, or future tax period ;
 - a taxable event; or
 - the obligation of a person (whether personally or on behalf of another person) to comply with a tax Act;
- ascertain whether a person has filed or submitted correct returns, information, or documents in compliance with the provisions of a tax Act ;
- establish the identity of a person for purposes of determining liability for tax;
- determine the liability of a person for tax;
- collect tax debts and refund tax overpaid;
- investigate whether a tax offence has been committed, and, if so:
 - to lay criminal charges; and
 - to provide the assistance that is reasonably required for the investigation and prosecution of the tax offence;
- enforce SARS' powers and duties under a tax Act to ensure that an obligation imposed by or under a tax Act is complied with;

- perform any other administrative function necessary to carry out the provisions of a tax Act;
- give effect to the obligation of the Republic to provide assistance under an international tax agreement; and
- give effect to an international tax standard.

Powers and duties which are assigned to the Commissioner by the TAA must be exercised by the Commissioner personally, but he or she may delegate such powers and duties in accordance with section 10 of the TAA.

Powers and duties required by the TAA to be exercised by a senior SARS official must be exercised by:

- the Commissioner ;
- a SARS official who has specific written authority from the Commissioner to do so; or
- a SARS official occupying a post designated by the Commissioner in writing for this purpose.

Performing a task ancillary to a power or duty under subsection (2) or (3) may be done by a SARS official under the control of an official referred to in subsection (3)(a), (b) or (c).

Powers and duties not specifically required to be exercised by the Commissioner or by a senior SARS official, may be exercised by a SARS official.

The Commissioner may, by public notice, specify that a power or duty in a tax Act other than this Act must be exercised by the Commissioner personally or a senior SARS official.

What is a debt due to SARS?

Section 169 of the TAA explains debt due to SARS as follows:

- an amount of tax due or payable under a tax Act is a tax debt due to SARS for the benefit of the National Revenue Fund;
- a tax debt is recoverable by SARS in the prescribed manner from any assets of the taxpayer or, where there is a representative taxpayer who is not personally liable under section 155 of the TAA, from any assets belonging to the person represented which are in the representative's possession or under his or her management or control;
- SARS is regarded as the creditor for the purposes of any recovery proceedings related to a tax debt;

- SARS need not recover a tax debt under the provisions of the TAA if the amount thereof is less than R100 or any other amount that the Commissioner may determine by public notice, but if the amount is not recovered it must be carried forward in the relevant taxpayer account

Once a tax debt has become an 'outstanding tax debt', SARS may institute recovery proceedings. It is important to note that the recovery powers imposed under the TAA may be used only if an amount of tax is not paid within the prescribed period for payment.

Below is an example of the power of SARS to collect outstanding tax debt:

SARS APPOINTS DEBT COLLECTORS TO RECOVER R16.6-BILLION OWED

Pretoria, 09 March 2018 – The South African Revenue Service (SARS) has appointed eight debt collection agencies to recover as much as possible of the R16.6-billion in debt owed to SARS.

The objective is to boost revenue collection by outsourcing the recovery of older and relatively small amounts due to SARS. The contract takes effect immediately and will run until 28 Feb 2019.

At present, over 2.3 million taxpayers and traders owe SARS just under R150-billion.

The agencies that have been appointed are, CSS Credit Solution Services (Pty) Ltd, ITC Business Administrators (Pty) Ltd, Medaco Capital Services (Pty) Ltd, New Integrated Credit Solutions (Pty) Ltd, Norman Bisset & Associates Group (Pty) Ltd, Revenue Consulting (Pty) Ltd, Transactional Capital Recoveries (Pty) Ltd and Van De Venter Mojapelo (Pty) Ltd.

Taxpayers and traders with outstanding accounts will only be contacted, via electronic channels. The agencies will embark on the traditional debt collection activities, including outbound calls; tracing of taxpayers, sending out notices (can be SMSs, emails or letters/notices).

Under no circumstances should debtors pay money directly to the debt collection agency. All outstanding taxor duties must only be paid directly to SARS via authorised payment channels.

The debt collection agencies have also been tasked with encouraging non-compliant taxpayers to submit their outstanding returns to SARS so as to avoid the imposition of any further interest or penalties and criminal charges. SARS invites all taxpayers to please co-operate with the service providers above. Failure to do this could result in criminal prosecution.

The revenue collected by SARS is vital for fuelling the growth and development of our country and assisting SARS to achieve its tough target of R1.217 trillion. Compliant taxpayers who pay their dues should be justifiably proud that they contribute to this national agenda as responsible citizens.

SARS thanks these taxpayers and is committed to improving its service to the taxpaying public while introducing measures to make it easier for all taxpayers to comply with their fiscal obligations.

Those with queries are encouraged to contact the SARS Contact Centre at 0800 00 7277 (0800 00 SARS), or visit [Owing SARS Money webpage](#) to validate the agencies' mandate to engage them.

There is a period of limitation on the collection of taxes by SARS and it can be found in section 171 of the TAA:

SARS activities for the recovery of a tax debt cannot be initiated after 15 years from the date of the assessment of tax, or where a decision that was subject to objection or appeal that gave rise to a tax liability, has become final.

What is the process for an application for civil judgment by SARS?

In terms of section 172 of the TAA if a person has an outstanding tax debt, SARS may, after giving a taxpayer at least 10 business days' notice, file a certified statement with a competent court setting out the amount of tax payable by the taxpayer and certified by SARS as being correct.

SARS can file such a statement regardless of whether or not the tax debt is subject to an objection or appeal under Chapter 9 of the TAA, **unless** the 10-business-day period after SARS received a request for suspension of a payment obligation or after SARS revoked a suspension, has not expired or the obligation to make payment has been suspended by SARS under section 164 of the TAA.

SARS is not required to give the taxpayer prior notice of its intention to file the statement if SARS is satisfied that giving notice would prejudice the collection of the tax.

The judgment procedure and the effect of SARS filing a statement with the clerk or registrar of a relevant court is discussed in section 174 of the TAA:

The certified statement filed under section 172 of the TAA has the effect of a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement.

This effectively means that once SARS has filed the statement with the court it can start proceedings to execute the judgment in line with the powers given to SARS in the TAA.

SARS' Short Guide to the TAA states that SARS can bring sequestration or liquidation proceedings against a taxpayer even if the debt is disputed.

The institution of sequestration, liquidation and winding-up proceedings by SARS is described in section 177 and 178 of the TAA:

SARS can put in motion proceedings for the sequestration, liquidation or winding-up of a person for a tax debt. SARS may start these proceedings whether or not the person is present in the Republic or has assets in the Republic.

If the tax debt is subject to an objection or appeal under Chapter 9 or a further appeal against a decision by the tax court under section 129, the proceedings may only be instituted with permission of the court before which the proceedings are brought.

Despite any law to the contrary, such a proceeding may be instituted in any competent court and that court may grant an order that SARS requests, whether or not the taxpayer is registered, resident or domiciled, or has a place of effective management or a place of business, in the Republic.

Note:

Generally, SARS will file for a **statement** and **sequestration** of the taxpayer's estate only after the taxpayer has **failed to comply** with demand for payment. Where a taxpayer has not so complied, the taxpayer will find it difficult to challenge SARS' powers in this regard.

Please refer to the following case law that reflects the powers of SARS to collect a tax debt in Annexure A:

- *K Siphayi v SARS (case number 34975/2019)*
- *Metlika Trading Ltd and Others v CSARS, case number 427/03438/03*

2. Collection of tax from third parties

A tax debt arises from an assessment, which may be in the form of an original assessment, an additional assessment, a reduced assessment, an estimated assessment, or a jeopardy

assessment. In terms of the 'pay now, argue later rule', payment of a tax debt is not suspended by an objection or appeal or pending the decision of a court of law in relation to an appeal under section 133 of the TAA, unless a suspension of payment order is granted by a senior SARS official under section 164(3) of the TAA. As part of the debt-recovery mechanisms, SARS is permitted to appoint a third party as an agent to recover long-outstanding tax debts.

SARS' Short Guide to the TAA explains collection of tax from third parties as follows:

'Under the Act any third party who holds or owes or will hold or owe money for or to the taxpayer may by notice by a senior SARS official be required to pay the amounts to SARS and will, pursuant to such appointment be a responsible third party for purposes of liability and recovery under the Act. A person who holds or owes or will hold or owe money for or to a debtor can be compelled to pay a debtor's tax to SARS. Money includes pensions, wages, salaries, and other remuneration.'

The liability of a third party appointed to satisfy tax debts is dealt with in section 179 of the TAA:

A senior SARS official may by way of notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage, or other remuneration, for or to a taxpayer, require the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt.

Should the third party be unable to comply with the notice, it must inform the SARS of the reasons for not being able to comply. The SARS official may then withdraw or amend the notice as needed.

A third party, who receives such a SARS notice, must pay the money to SARS according to the notice. If the third-party parts with the money contrary to the notice, the third party becomes personally liable for the money.

A person affected by the notice may request SARS to amend the notice to extend the period over which the amount must be paid to SARS to allow the taxpayer to pay the basic living expenses of the taxpayer and his or her dependents.

Historically there were instances where monies had been removed out of taxpayer accounts without the taxpayer being notified of the tax debt outstanding,

In the 2015 legislative cycle SARS amended the TAA to allow for prior notice and debt relief to protect taxpayers' rights. Any third party receiving the AA88 third party appointment notice from SARS should confirm that the taxpayer had received prior notification as stipulated in section 179(4).

Section 179(5) – 2015 amendment:

SARS may only issue the notice after having delivered a final demand to the taxpayer at least 10 business days prior. The final demand must set out the recovery steps that SARS may take

if the tax debt is not paid and the available debt relief mechanisms including, in respect of recovery steps that may be taken under this provision:

- (a) If the tax debtor is an individual, then he or she may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid, based on the basic living expenses of the debtor and his or her dependants or
- (b) If the tax debtor is not an individual, that the tax debtor may within five business days of receiving the demand, apply to SARS for a reduction of the amount to be paid based on serious financial hardship

Section 179(6) – 2015 amendment:

SARS is not required to issue the final demand as referred to above if a senior SARS official is satisfied that to do so would prejudice the collection of the tax debt.


SARS’ website explains third party appointments as follows:

THIRD PARTY APPOINTMENTS

What is a Third Party Appointment?

- If a taxpayer has outstanding tax debts (this includes penalties), the Tax Administration Act empowers the Commissioner for the South African Revenue Service (SARS) to appoint a third party to recover money held by third parties on behalf of the taxpayer. Third parties could be an employer or a bank, etc.
- The Third Party Appointment process involves the appointment of a third party (employer, bank or any other person who has the management, custody or control of any income, monies or property of the taxpayer.) to collect any outstanding taxes including administrative penalty amounts from a taxpayer. The third party is responsible to pay the relevant amount to SARS on the taxpayer’s behalf.
- This means that if you do not respond to any of the notices or demands informing you of your outstanding tax debts, SARS may appoint your employer or any other third party who holds money on your behalf or owes you money, including salary, wages and other types of remuneration, to pay the outstanding amounts to SARS.
- Failure by a third party appointment to act may lead to that third party being held personally liable for the tax debt and can also be found guilty of an offence. If convicted, the person is subject to a fine or to imprisonment for not longer than two years.

Top Publications

 [An Employers Guide to the AA88 Third Party Appointment Process](#)

SARS’ Third Party Appointment (AA88) Guide explains the process to be followed in respect of third party appointments.

SARS’ Third-Party Appointment (AA88) Guide:

“SARS will issue the Third-Party Appointment (AA88) Notice in the following manner:

- Via the e@syFile™ Employer application
- Via the post using the employer’s postal address

On receipt of the AA88 Notice, the employer must do the following:

- Review the list of impacted taxpayers (manage outcomes)
- Deduct the stipulated amount from the salary or wages of the respective employees, as indicated on the AA88

- Pay the amounts over to SARS by the due date, as indicated on the AA88 Notice

Where the employer is unable to execute the request, the employer must provide feedback on reasons for his/her inability to execute the request using one of the following channels:

- Log on to e@syFile™ Employer to view the AA88 Notice and provide a response to SARS by selecting one of the outcomes from the drop-down list
- Contact the SARS Contact Centre or visit a SARS branch where an agent will assist the employer with capturing the outcomes in relation to the taxpayers listed on the AA88 Notice

Who might be appointed as a third party?

Possible third parties who can be appointed for individual taxpayers include:

- Employers
- Any debtor who owes the taxpayer money
- Financial institutions, such as banks
- Attorneys
- Medical aid schemes (in case of members of the medical fraternity)
- Investment managers
- Insurance companies

These third parties will only be appointed if they hold money on behalf of the taxpayer.

Further information relating to the obligation of employers in this instance can be found in the abovementioned guide.

What is the liability of financial management of a taxpayer for tax debts?

In terms of section 180 of the TAA a person is personally liable for any outstanding tax debt of the taxpayer to the extent that the person's negligence or fraud resulted in the failure to pay the tax debt if the person controls or is regularly involved in the management of the overall financial affairs of a taxpayer and a senior SARS official is satisfied that the person is or was negligent or fraudulent in respect of the payment of the tax debts of the taxpayer

Not every person involved in the financial management of the taxpayer will become personally liable if the taxpayer does not settle its tax debts. The person involved in the financial management of the taxpayer must have acted fraudulently or negligently and that must have resulted in the taxpayer not paying its tax debts.

What is the liability of shareholders for tax debts?

In terms of section 181 of the TAA, where a company (other than a listed company) is wound up other than by means of an involuntary liquidation without having satisfied its outstanding tax debt, including its liability as a responsible third party, withholding agent, or a representative taxpayer, employer or vendor, the persons who are shareholders of the company within one year prior to its winding up are jointly and severally liable to pay the tax debt to the extent that:

- they received assets of the company in their capacity as shareholders within one year prior to its winding-up and
- the tax debt existed at the time of the receipt of the assets or would have existed had the company complied with its obligations under a tax Act

The liability of the shareholders is secondary to the liability of the company. The persons who are liable for the tax debt of a company under this section may avail themselves of any rights against SARS as would have been available to the company.

It is important to note that section 181 cannot apply where a company is placed into liquidation voluntarily.

What is the liability of a transferee for tax debts?

In terms of section 182 of the TAA a person (referred to as a transferee) who receives an asset from a taxpayer who is a connected person in relation to the transferee without consideration or for consideration below the fair market value of the asset is liable for the outstanding tax debt of the taxpayer. This liability is limited to the lesser of:

- the tax debt that existed at the time of the receipt of the asset or would have existed had the transferor complied with the transferor's obligations under a tax Act and
- the fair market value of the asset at the time of the transfer, reduced by the fair market value at the time of any consideration paid

Example:

- Transferor A and transferor B are connected persons in relation to each other.
- Where transferor A had a tax debt of R1m payable to SARS in December 2017 and transferee B receives an asset during January 2018 with a fair market value of R800 000, for R500 000 SARS may seek to recover R300 000 from B to reduce A's tax debt of R1m.

What is the liability of a person assisting in dissipation of assets?

In terms of section 183 of the TAA, if a person knowingly assists in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt of the taxpayer, the person is jointly and severally liable with the taxpayer for the tax debt to the extent that the person's assistance reduces the assets available to pay the taxpayer's tax debt.

In terms of section 184 of the TAA SARS has the same powers of recovery against the assets of a person who is personally liable under section 155 (personal liability of a representative taxpayer), 157 (personal liability of a withholding agent) or 179 to 183 (liability of a third party appointed to satisfy the tax debt of another) as they have against the assets of the taxpayer and the person has the same rights and remedies as the taxpayer has against such powers of recovery.

Please refer to the following case law that provides some insight on the collection of tax from third parties in Annexure A:

- *SIP Project Managers (Pty) Ltd v The Commissioner for the South African Revenue Service (Case Number 11521/2020)*
- *Nondabula v Commissioner: SARS (2018 (3) SA 541 (ECM))*

3. Assisting Foreign Governments

Collection of taxes in terms of double taxation agreements

SARS has the power to assist a foreign government with which South Africa has concluded an international tax agreement (DTA), to collect and recover the foreign tax debt out of assets held by the foreign taxpayer in South Africa.

In terms of section 185 of the TAA SARS may assist a foreign government to recover foreign taxes owing by a person where there is an agreement for reciprocal assistance in the collection of taxes in terms of a so-called double taxation agreement between the Republic and the foreign country concerned.

If SARS has, in accordance with any arrangements made with the government of any other country by an international agreement, received:

- a request for conservancy of an amount alleged to be due by a person under the tax laws of the other country where there is a risk of dissipation or concealment of assets by the person, a senior SARS official may apply for a preservation order under section 163 as if the amount were a tax payable by the person under a tax Act or
- a request for the collection from a person of an amount alleged to be due by the person under the tax laws of the other country, a senior SARS official may, by notice, call upon the person to state, within a period specified in the notice, whether the person admits liability for the amount or for any lesser amount.

Such a request must be in the form prescribed by the Commissioner and must include a formal certificate issued by the competent authority of the other country stating the amount of the tax due, whether the liability for the amount is disputed in terms of the laws of the other country, if the liability for the amount is so disputed, whether such dispute has been entered into solely to

delay or frustrate collection of the amount alleged to be due and whether there is a risk of dissipation or concealment of assets by the person.

In any proceedings, the certificate is conclusive proof of the existence of the liability alleged and *prima facie* proof of the other statements contained therein. If, in response to the notice, the person:

- admits liability
- fails to respond to the notice or
- denies liability but a senior SARS official, based on the statements in the certificate or, if necessary, after consultation with the competent authority of the other country, is satisfied that:
 1. the liability for the amount is not disputed in terms of the laws of the other country
 2. although the liability for the amount is disputed in terms of the laws of the other country, such dispute has been entered into solely to delay or frustrate collection of the amount alleged to be due or
 3. there is a risk of dissipation or concealment of assets by the person

the official may, by notice, require the person to pay the amount for which the person has admitted liability, or the amount specified, on a date specified, for transmission to the competent authority in the other country.

If the person fails to comply with the notice, SARS may recover the amount in the certificate for transmission to the foreign authority as if it were a tax payable by the person under a tax Act. No steps taken in assistance in collection by any other country under any such arrangements, for the collection of an amount alleged to be due by any person under a tax Act, and no judgment given against any person in pursuance of arrangements in that other country for any such amount, may affect the person's right to have the liability for any such amount determined in the Republic in accordance with the relevant tax Act.

SARS Short Guide to the TAA explains tax recovery on behalf of foreign governments.

'The Act empowers the Commissioner to assist in the collection of taxes due to a country with which the RSA has entered into an international tax agreement, for example a Double Taxation Agreement (DTA), providing for reciprocal assistance in the collection of taxes.

Under an international tax agreement, SARS may receive two types of requests for recovery assistance of an amount alleged to be due by a person, referred to as "the debtor", under the tax laws of the requesting country, i.e.:

- a request for conservancy in respect of assets of that person located in the RSA, in which case:
 - a senior SARS official may, if satisfied there is a risk of dissipation or concealment of the assets, authorise an application for a preservation order in respect of the assets;

- *and for purposes of a preservation order application, the amount due to the requesting country is regarded as a tax payable by the debtor under a tax Act; and*
- *a request for the collection of the amount under prescribed procedures.*

These two requests may also be combined, i.e., the requesting country may request assistance with collection of the amount and, in view of dissipation or concealment concerns, also request the application of conservancy measures.

A request for conservancy or collection must be in the prescribed form and include a formal certificate stating the following:

- *The amount of the tax due;*
- *Whether the liability for the amount is disputed in terms of the laws of the requesting country;*
- *If the liability for the amount is disputed, whether the dispute has been entered into solely to delay or frustrate collection of the amount alleged to be due; and*
- *Whether there is a risk of dissipation or concealment of assets by the person.'*

Remedies with respect to foreign assets:

SARS' Short Guide to the TAA:

'Where a taxpayer has offshore assets, which could be utilised to satisfy tax debts, provision is made that SARS may apply to the High Court for an order to compel the repatriation of these assets. This is not an ex parte application, and accordingly notice of the application must be given to the taxpayer concerned.'

The compulsory repatriation of foreign assets of taxpayer.

In terms of section 186(1), in order to collect a tax debt, a senior SARS official may apply for an order referred to in subsection (2) below, if:

- the taxpayer concerned does not have sufficient assets located in the Republic to satisfy the tax debt in full and
- the senior SARS official believes that the taxpayer:
 - has assets outside the Republic or
 - has transferred assets outside the Republic for no consideration or for consideration less than the fair market value
 which may fully or partly satisfy the tax debt.

Compulsory repatriation of foreign assets of taxpayer

In terms of section 186(2) of the TAA a senior SARS official may apply to the High Court for an order compelling the taxpayer to repatriate assets located outside the Republic within a period prescribed by the court in order to satisfy the tax debt.

In addition to issuing the order the court may:

- a) limit the taxpayer's right to travel outside the Republic and require the taxpayer to surrender his or her passport to SARS
- b) withdraw a taxpayer's authorisation to conduct business in the Republic, if applicable
- c) require the taxpayer to cease trading or
- d) issue any other order it deems fit

An order made under subsection (2) applies until the tax debt has been satisfied or the assets have been repatriated and utilised in satisfaction of the tax debt.

4. Write-off or compromise of tax debts

Generally, SARS is obliged to enforce the provisions of a tax Act and to collect what is due and not forgo taxes. However, Chapter 14 of the TAA provides for the write-off or compromise of tax debts and prescribes the circumstances under which SARS may deviate from the general rule and take a decision to 'write off' a tax debt or not to pursue its collection.

SARS' Short Guide to the TAA

'Tax debtors are expected to take responsibility for their tax obligations and to organise their affairs in such a way as to be able to discharge those responsibilities when required. They should give at least the same priority to tax obligations as their other responsibilities. If tax debtors cannot or anticipate they will not be in a position to, meet their tax obligations they should contact SARS at the earliest opportunity to discuss the matter and make appropriate alternative arrangements, preferably before the due date for payment.'

When deciding the most appropriate manner in which to deal with outstanding tax obligations, SARS will give considerable weight to the tax debtors' individual circumstances and compliance history, for example, the history in lodging correct returns and documents and paying taxes on time. It may, however, occur that taxpayers cannot pay a tax debt or that it would be uneconomical to pursue a tax debt, hence the need for provisions dealing with the write-off or compromise of a tax debt.'

What is the purpose of Chapter 14 of the TAA?

In terms of section 193 of the TAA it is the duty of SARS to assess and collect taxes, duties, levies, and other charges and not to forgo any such collections. This principle is reiterated in section 193 of the TAA, which goes on to rationalise that SARS may, when required by

circumstances, deviate from the strictness and rigidity of this general rule if it would be to the best advantage of the State.

The purpose of this Chapter is to prescribe the circumstances under which SARS may deviate from the general rule and take a decision to 'write off' a tax debt or not to pursue its collection. In terms of sections 193(3) and 194 the provisions apply only in respect of a tax debt owed by a 'debtor' if the liability to pay the tax debt is not disputed by the 'debtor'.

For purposes of these provisions, 'debtor' means a taxpayer with a tax debt.

In terms of section 194 of the TAA the permanent write-off of a tax debt and compromise of tax debt apply only in respect of a tax debt owed by a 'debtor' if the liability to pay the tax is not disputed under Chapter 9 of the TAA.

What is the compromise and write-off of a tax debt?

'Compromise' is defined in section 192 of the TAA as 'an agreement entered into between SARS and a debtor in respect of a tax debt in terms of which:

- the debtor undertakes to pay an amount (pursuant to an instalment payment agreement under section 167 of the TAA) less than the full amount of the tax debt due by that debtor in full satisfaction of the tax debt and
- SARS undertakes to permanently write off the remaining portion of the tax debt on the condition that the debtor complies with his undertaking and any further conditions as may be imposed by SARS'.

'Write-off' as defined in section 192 is to reverse an outstanding tax debt either in whole or in part.

SARS Short Guide to the TAA explains the write-off of a tax debt.

'A temporary write off is an internal decision that has no effect on a taxpayer, as the taxpayer is not absolved from liability. A temporary write off is authorised if it is uneconomical to pursue collections, for example if more time, effort and money will be spent than what the debt is worth.'

"Tax may be written off temporarily or permanently when a debt is irrecoverable and the effort and cost of pursuing it will prove ineffective, or pursuing it is a legal impossibility. A temporary write off is generally merely a suspension of the recovery of a debt, and the debt may still be recoverable during the prescription period. This period, under the Act, will be 15 years from the date a tax debt comes into existence. This is the date of assessment of tax or the date on which a decision that is subject to objection and appeal becomes final and gives rise to a tax liability by a taxpayer. However, a permanent write off under Part C of Chapter 14 will be final.

Only a senior SARS official may approve a write off, and absent this approval and a notice by SARS to the tax debtor that an amount of a tax debt is written off; no amount tendered or paid by a tax debtor can constitute a full and final settlement of a tax debt.'

What is the temporary write-off of a tax debt?

A senior SARS official may decide to temporarily write off an amount of tax debt if satisfied that it would be uneconomical to pursue the debt at that time or for the duration that the debtor is subject to business rescue proceedings under Chapter 6 of the Companies Act (Act 71 of 2008), as referred to in section 132 of that Act. A tax debt is 'uneconomical to pursue' if a senior SARS official is satisfied that the total cost to recover that debt will exceed the anticipated amount to be recovered. In evaluating the cost of recovery versus the anticipated amount to be recovered, a senior SARS official must consider the following:

- the amount of the tax debt
- the length of time that the tax debt has been outstanding
- the steps taken to date to recover the tax debt and the costs involved in those steps, including steps taken to locate or trace the debtor
- the likely costs of continuing action to recover the tax debt and the anticipated return from that action, including any likely recovery of costs that may be awarded to SARS
- the financial position of the debtor, including that debtor's assets and liabilities, cash flow, and possible future income streams and
- any other information available regarding the recoverability of the tax debt.

The decision to temporarily write off a tax debt does not absolve the debtor from the liability for that tax debt. Such a decision may be subsequently withdrawn by a senior SARS official if satisfied that the tax debt is no longer uneconomical to pursue, and that the write-off decision would jeopardise the general tax collection effort.

When is a tax debt uneconomical for SARS to pursue?

In terms of section 196 of the TAA a tax debt is uneconomical to pursue if a senior SARS official is satisfied that the *total* cost of recovery of that tax debt will in all likelihood exceed the anticipated amount to be recovered in respect of the outstanding tax debt.

In order to determining whether the cost of recovery is likely to exceed the anticipated amount to be recovered a senior SARS official must take the following into account:

- the amount of the tax debt
- the length of time that the tax debt has been outstanding
- the steps taken to date to recover the tax debt and the costs involved in those steps, including steps taken to locate or trace the debtor
- the likely costs of continuing action to recover the tax debt and the anticipated return from that action, including the likely recovery of costs that may be awarded to SARS

- the financial position of the 'debtor', including that 'debtor's' assets and liabilities, cash flow, and possible future income streams
- any other information available with regard to the recoverability of the tax debt.

What is the permanent write-off of tax debt?

In terms of section 197 of the TAA a senior SARS official may authorise the permanent write off of an amount of tax debt to the extent satisfied that the tax debt is 'irrecoverable at law' or if the debt is 'compromised'. SARS must notify the debtor in writing of any amount of tax debt 'written off'.

In terms of section 198 of the TAA a tax debt is irrecoverable at law if:

- it cannot be recovered by action and judgment of a court
- it is owed by a debtor that is in liquidation or sequestration and it represents the balance outstanding after notice is given by the liquidator or trustee that no further dividend is to be paid or a final dividend has been paid to the creditors of the estate or
- it is owed by a debtor that is subject to a business rescue plan referred to in the Companies Act, to the extent that it is not enforceable in terms of s 154 of that Act.

A tax debt is not irrecoverable at law if SARS has not first explored action against or recovery from the assets of the persons who may be liable for the debt under Part D of chapter 11 (collection of tax debt from third parties).

What is the procedure for writing off tax debt?

In terms of section 199 of the TAA before deciding to 'write off' a tax debt, a senior SARS official must:

- determine whether there are any other tax debts owing to SARS by the debtor
- reconcile amounts owed by and to the debtor, including penalties, interest, and costs
- obtain a breakdown of the tax debt and the periods to which the outstanding amounts relate and
- document the history of the recovery process and the reasons for deciding to write off the tax debt.

In deciding whether to support a business rescue plan referred to in the Companies Act or a compromise made to creditors under s 155 of that Act, a senior SARS official must consider the information as referred to in that Act as well as the following information and aspects covered in sections 200 (compromise of a tax debt), 201(1) (request by debtor for compromise of a tax debt), 202 (consideration of a request to compromise a tax debt) and 203 (circumstances where not appropriate to compromise a tax debt) of the TAA.

Compromise of a tax debt (section 200)

SARS' Short Guide to the TAA states the following on the compromise of a tax debt:

'The broad principle is that SARS is obliged to enforce the provisions of a tax Act to the fullest extent, to collect what is due and not forgo taxes. However, the provisions relating to settlements and compromises recognise and give effect to special circumstances which might arise during disputes and in the collection environment.'

The TAA provides for the compromise of tax debt as follows:

A senior SARS official may authorise the compromise of a portion of a tax debt upon request by a debtor, which complies with the requirements as set out below, if:

- the purpose of the compromise is to secure the highest net return from the recovery of the tax debt and
- the compromise is consistent with considerations of good management of the tax system and administrative efficiency.

The request by a debtor for the compromise of a tax debt needs to meet the following criteria in section 201:

A request by a debtor for a tax debt to be compromised must be signed by the debtor and be supported by a detailed statement setting out:

- the assets and liabilities of the debtor reflecting their current fair market value
- the amounts received by or accrued to, and expenditure incurred by, the debtor during the 12 months immediately preceding the request
- the assets which have been disposed of in the preceding three years, or such longer period as a senior SARS official deems appropriate, together with their value, the consideration received or accrued, the identity of the person who acquired the assets and the relationship between the debtor and the person who acquired the assets, if any
- the debtor's future interests in any assets, whether certain or contingent or subject to the exercise of a discretionary power by another person
- the assets over which the debtor, either alone or with other persons, has a direct or indirect power of appointment or disposal, whether as trustee or otherwise
- details of any connected person in relation to that debtor
- the debtor's present sources and level of income and the anticipated sources and level of income for the next three years, with an outline of the debtor's financial plans for the future
- the debtor's reasons for seeking a compromise.

The debtor's request for a compromise must be accompanied by the evidence supporting the claims for not being able to make payment of the full amount of the tax debt and the debtor must warrant that the information provided in the application is accurate and complete. A senior SARS official may require that the application be supplemented by other information.

SARS' consideration of the request to compromise tax debt (section 202):

In considering a request for a compromise, a senior SARS official must have regard to the extent that the compromise may result in:

- savings in the costs of collection
- collection of a greater amount than would otherwise have been recovered
- the abandonment by the debtor of some claim or right, which has a monetary value arising under a tax act, including existing or future tax benefits, such as carryovers of losses, deductions, credits, and rebates

In determining the position without the compromise, a senior SARS official must have regard to:

- the value of the debtor's present assets
- future prospects of the debtor, including arrangements which have been implemented or are proposed which may have the effect of diverting income or assets that may otherwise accrue to or be acquired by the debtor or a connected person in relation to the debtor
- past transactions of the debtor
- the position of any connected person in relation to the debtor.

What are the circumstances where it is not appropriate for SARS to compromise a tax debt?

In terms of section 203 a senior SARS official may **not** compromise any amount of a tax debt if:

- the debtor was a party to a compromise agreement with SARS within a period of three years immediately before the request for the compromise
- the tax affairs of the debtor (other than the outstanding tax debt) are not up to date
- another creditor has communicated its intention to initiate or has initiated liquidation or sequestration proceedings against the debtor
- the compromise will prejudice other creditors (unless the affected creditors consent to the compromise) or if other creditors will be placed in a position of advantage relative to SARS
- it may adversely affect broader taxpayer compliance or
- the debtor is a company, or a trust and SARS has not first explored action against or recovery from the personal assets of the persons who may be liable for the debt under ss 179–184 (collection of tax from third parties).

The procedure for compromise of tax debt.

In terms of section 204 to 'compromise' a tax debt, a senior SARS official and the debtor must sign an agreement setting out:

- the amount payable by the debtor in full satisfaction of the debt
- the undertaking by SARS not to pursue recovery of the balance of the tax debt and
- the conditions subject to which the tax debt is compromised by SARS, which may include a requirement that the debtor must comply with subsequent obligations imposed in terms of a tax Act, pay the tax debt in the manner prescribed by SARS, or give up specified existing or future tax benefits, such as carryovers of losses, deductions, credits, and rebates.

SARS' Short Guide to the TAA:

'When entering into discussions concerning a compromise, a taxpayer is required to be open, honest and frank. SARS does not have to adhere to a compromise if material facts were not disclosed during the settlement, if facts were misrepresented, or if there was fraud. The negotiated terms are confidential, unless disclosure is authorised by agreement.'

"SARS does not have unfettered power to settle or compromise and is obliged to take into consideration various factors in the procedure for compromises. The debtors' current, past and future circumstances must support a compromise and SARS must be satisfied that no other creditor will be advantaged or disadvantaged. A creditor may, however, consent to being disadvantaged.'

When is SARS not bound by compromise of tax debt?

In terms of section 205 SARS is not bound by a compromise if the debtor:

- fails to disclose a material fact to which the compromise relates
- supplies materially incorrect information to which the compromise relates
- fails to comply with a provision or condition contained in the compromise agreement or
- is liquidated or the debtor's estate is sequestrated before the debtor has fully complied with the conditions contained in the compromise agreement.

SARS' register of tax debts written-off or compromised:

In terms of section 206 SARS must maintain a register of the tax debts written off or compromised in terms of these provisions. The register must contain the details of the debtor, including name, address and taxpayer reference number, the amount of the tax debt written off or compromised and the periods to which the tax debt relates, and the reason for writing off or compromising the tax debt.

Reporting by the Commissioner of tax debts written-off or compromised:

In terms of section 207 the amount of tax debts written off or compromised during a financial year must be disclosed in the annual financial statements of SARS relating to administered revenue for that year and the Commissioner must on an annual basis provide to the Auditor-General and to the Minister a summary of the tax debts which were written off or compromised in whole or in part during the period covered by the summary.

This report must be in a format which, subject to s 70(5), does not disclose the identity of the debtor concerned. The report, containing details of the number of tax debts written off or compromised and the amount of revenue forgone in respect of main classes of taxpayers or sections of the public, must be submitted within 60 business days following the end of the fiscal year.

5. The 'pay now, argue later' rule

Payment of any tax due is not suspended by an objection or an appeal. This is made clear in section 164 of the TAA.

The Pay now, argue later rule in section 164(1) states that unless a senior SARS official directs otherwise

- the obligation to pay tax and
- the right of SARS to receive and recover tax,

will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133 (appeal against a decision of the Tax Court).

SARS' Short Guide to the TAA on the 'pay now, argue later' rule:

'Also known as the "pay-now-argue-later" rule, the obligation to pay tax, which arises upon the issue of an assessment, is not automatically suspended by an objection or appeal. The obligation can only be suspended by SARS upon request by the taxpayer. A taxpayer who pays disputed tax and whose objection or appeal is upheld is entitled to interest from the date of payment of the disputed amount to the date on which such amount is refunded. This rule applies across all taxes.'

Section 164(2) provides for a request for suspension of payment:

- a taxpayer may request a Senior SARS Official to suspend the payment of tax or a portion thereof due under an assessment
- if the taxpayer intends to dispute or disputes the liability to pay that tax under Chapter 9 of the TAA.

Note:

When a taxpayer formulates an objection, the taxpayer must decide whether to pay the tax knowing that if the objection or appeal is successful a refund will be received with interest. Should a taxpayer decide not to do so the taxpayer will need to apply for a suspension of payment under section 64. However, should the objection or appeal be unsuccessful the taxpayer will be liable for interest from the second date of the assessment issued. Taxpayers should carefully consider the practical implications in this regard.

A senior SARS official may suspend payment of the disputed tax or portion thereof having regard to relevant factors.

The relevant factors in section 164(3) to be considered include:

- whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets.
- the compliance history of the taxpayer with SARS.
- whether fraud is prima facie involved in the origin of the dispute.
- whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus if the disputed tax is not paid or recovered or
- whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the *fiscus*.

In the court case Metcash Trading Ltd v C: SARS and Another, the Constitutional Court held that the "pay-now-argue-later" rule as provided for in the Value- Added Tax Act is not unconstitutional and it has since been codified in the TAA.

A suspension of payment may be revoked if the dispute process is not followed.

In terms of section 164(4) if payment of tax was suspended under section 164(3) and subsequently:

- no objection is lodged
- an objection is disallowed, and no appeal is lodged or
- an appeal to the Tax Board or Court is unsuccessful and no further appeal is noted

the suspension is revoked with immediate effect from the date of the expiry of the relevant prescribed time period or any extension of the relevant time period under this Act.

Other specific provisions in section 164 of the TAA:

In terms of section 164(5) a senior SARS official may deny or revoke a request for suspension of payment in specific circumstances:

- after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious
- the taxpayer is employing dilatory tactics in conducting the objection or appeal
- on further consideration of the factors referred to in subsection (3), the suspension should not have been given
- there is a material change in any of the factors referred to in subsection (3), upon which the decision to suspend the amount involved was based.

In terms of section 164(6) no recovery proceedings may be taken by SARS during the period running from the day that on which SARS receives a request for suspension of payment, or a suspension is revoked, and ending ten business days after the notice of SARS' decision or revocation has been issued to the taxpayer unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.

In terms of section 164(7) if an assessment or a decision subject to objection or appeal referred to in section 104(2) is altered in accordance with:

- an objection or appeal
- a decision of a court of law pursuant to an appeal under section 133
- a decision by SARS to concede the appeal to the tax board or the tax court or other court of law.

Then a due adjustment must be made, amounts paid in excess refunded with interest at the prescribed rate, the interest being calculated from the date that excess was received by SARS to the date the refunded tax is paid and amounts short-paid are recoverable with interest calculated as provided in section 187(1).

Refunds subject to set-off:

In terms of section 164(8) the provisions of section 191 (set-off of refunds) apply with the necessary changes in respect of an amount refundable and interest payable by SARS.

Section 191 provides for tax debts to be set off against refunds due by SARS. An amount that is refundable under section 190, including interest thereon in terms of section 188(3)(a), is treated as a payment by the taxpayer that is recorded in the taxpayer's account, of an outstanding tax debt, if any, and any remaining amount must be set off against any outstanding debt under customs and excise legislation. The refund will then be payable to the extent that there is any balance remaining after this set-off.

This set-off provision does not apply to a tax debt for the period from the lodgement of a request for suspension until 10 business days after notice of SARS' decision or revocation has been

issued to the taxpayer as referred to in section 164(6), or which is subject to an instalment payment agreement under section 167 or a compromise agreement under section 204.

The set-off provision allows SARS to set off a refund against existing tax debts. It does not allow SARS to withhold tax refunds to satisfy future tax debts and there is no mechanism to enable a taxpayer to request SARS to retain a refund to be set off against future tax debts.

Amounts less than R100 or any other amount that the Commissioner may determine by public notice, are not refundable but the amount must be carried forward in the taxpayer account.

Note:

SARS decision not to suspend payment:

The decision by SARS not to grant a suspension of payment is not subject to objection and appeal. Taxpayer remedies include the section 9 internal SARS remedy or pursuing the matter in the High Court on the basis that SARS has not complied with the rules of administrative justice under PAJA.

Please refer to the following case dealing with the ‘pay-now-argue-later rule’ in Annexure A:

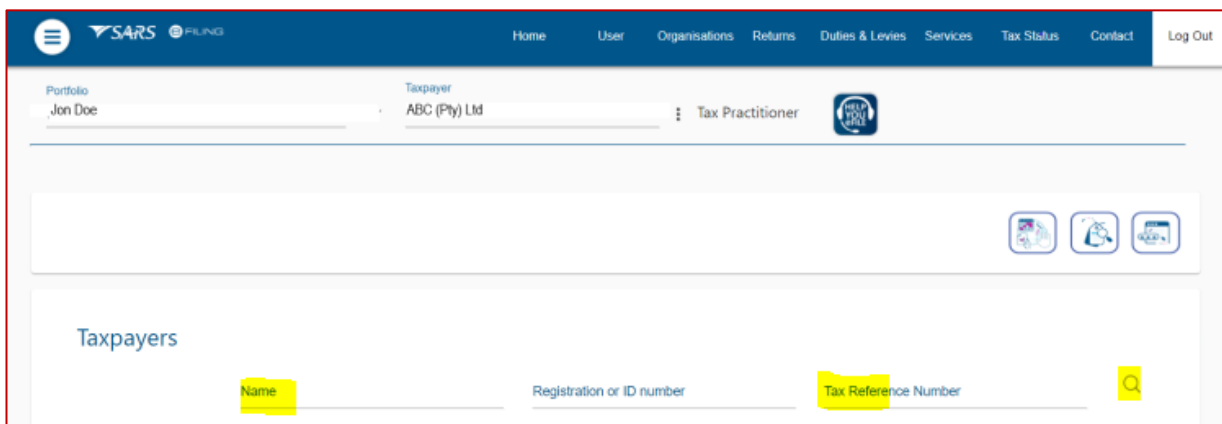
- *Zimbabwe Revenue Authority v Packers International (Private) Ltd* (2017) 79 SATC 140

6. Suspension of payment eFiling examples:

Please refer to the screenshots below for examples on how to request suspension of payments on eFiling at the different stages within the dispute process.

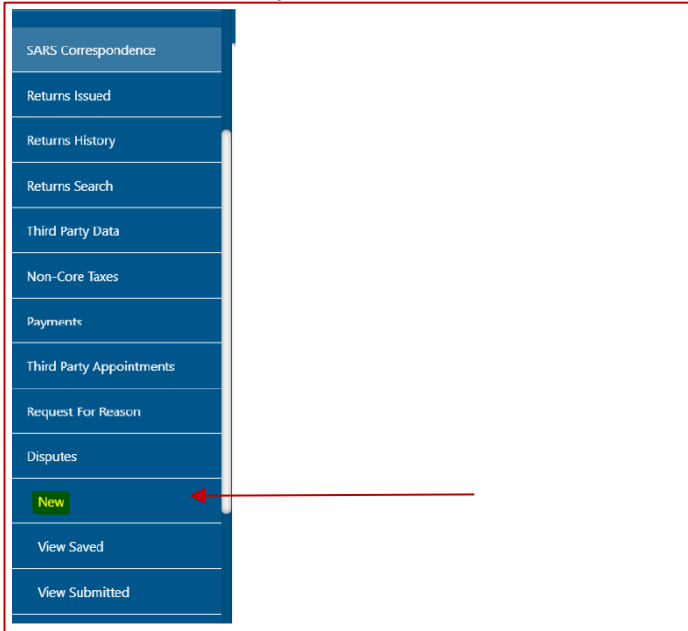
Step 1:

After logging onto your eFiling profile you need to search for the relevant taxpayer. This is performed by completing the name of the taxpayer / the reference number and selecting the search button as indicated below.



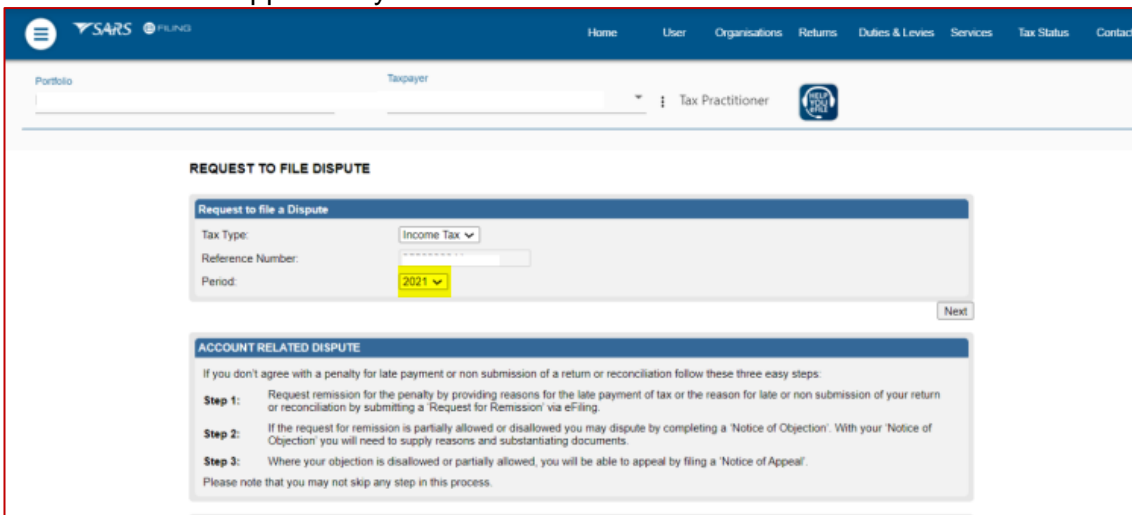
Step 2:

On your right pane after scrolling down, you will note the option “Disputes”, please select “Disputes” followed by “New.”



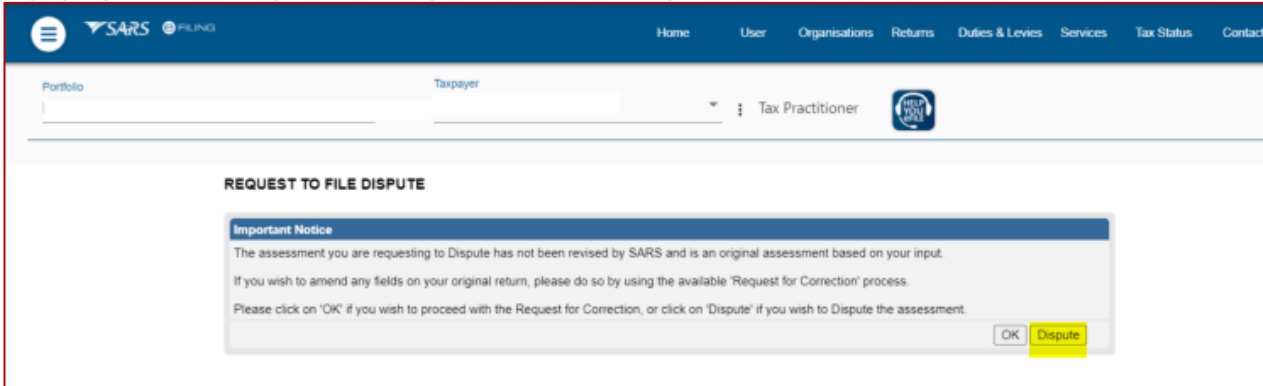
Step 3:

Please select the applicable year.



Step 4:

A pop up will come up as below, please click on dispute.



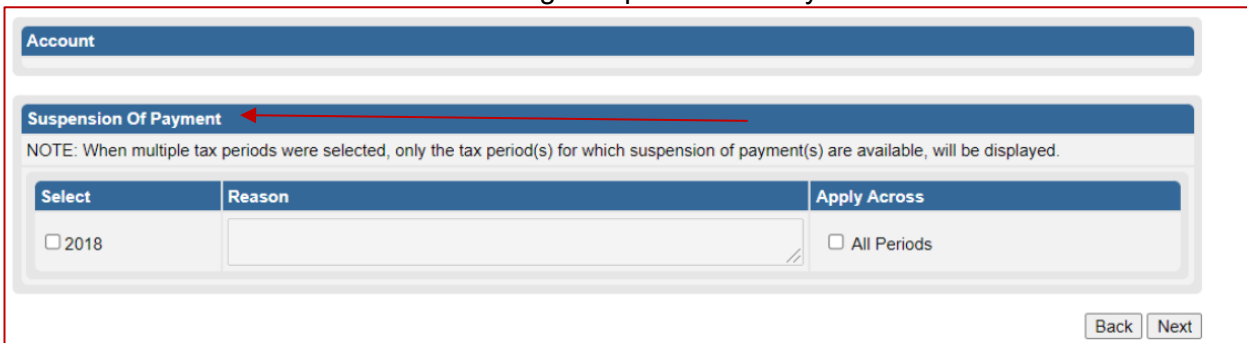
REQUEST TO FILE DISPUTE

Important Notice
The assessment you are requesting to Dispute has not been revised by SARS and is an original assessment based on your input. If you wish to amend any fields on your original return, please do so by using the available 'Request for Correction' process. Please click on 'OK' if you wish to proceed with the Request for Correction, or click on 'Dispute' if you wish to Dispute the assessment.

OK Dispute

Step 5:

Scroll down to the bottom until the heading "Suspension of Payment"



Suspension Of Payment

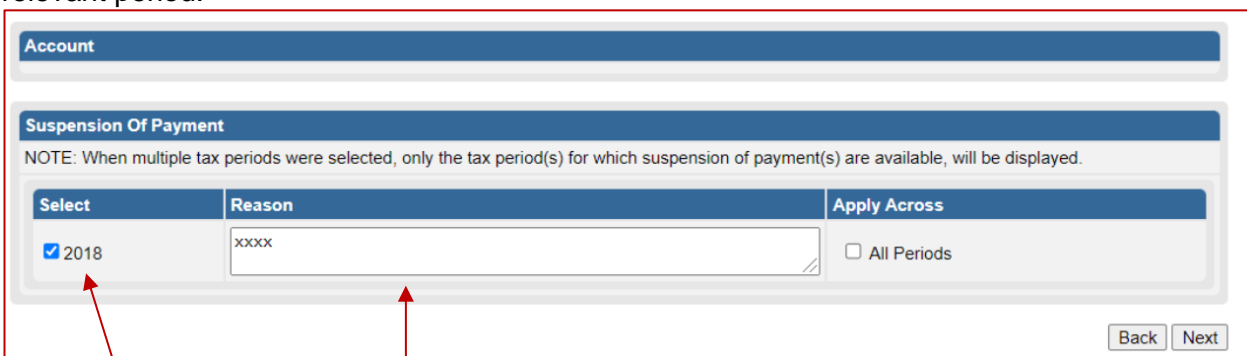
NOTE: When multiple tax periods were selected, only the tax period(s) for which suspension of payment(s) are available, will be displayed.

Select	Reason	Apply Across
<input type="checkbox"/> 2018		<input type="checkbox"/> All Periods

Back Next

Step 6:

Complete the required details, including the reason for the suspension of payment and tick the relevant period.



Suspension Of Payment

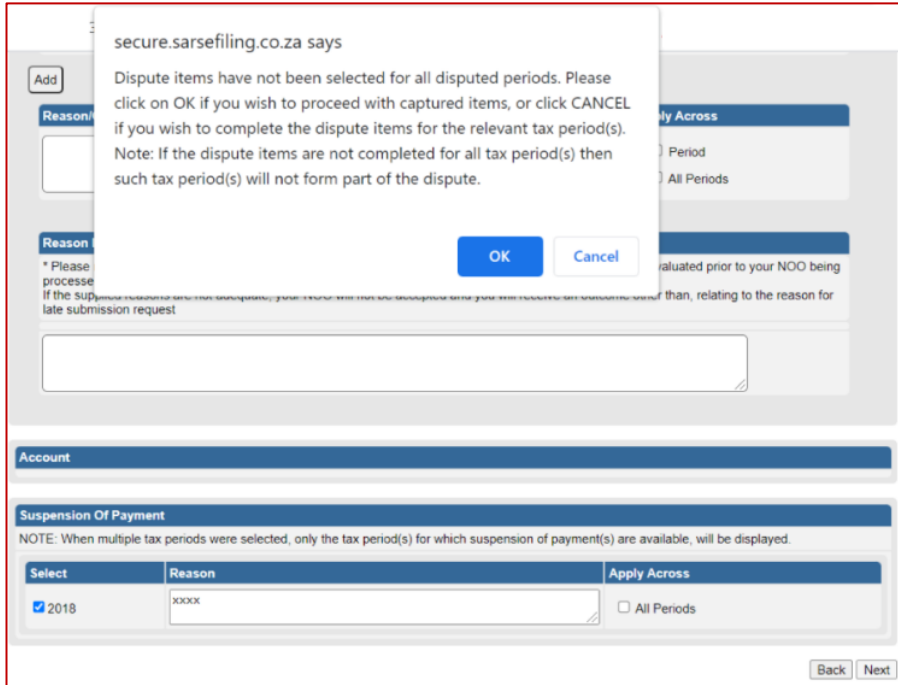
NOTE: When multiple tax periods were selected, only the tax period(s) for which suspension of payment(s) are available, will be displayed.

Select	Reason	Apply Across
<input checked="" type="checkbox"/> 2018	xxxx	<input type="checkbox"/> All Periods

Back Next

Step 7:

The below pop-up screen will appear. Please ensure that the “OK” button is selected in the event that you are happy with the selected periods. It is very important to read through the below notification.



secure.sarsefiling.co.za says

Dispute items have not been selected for all disputed periods. Please click on OK if you wish to proceed with captured items, or click CANCEL if you wish to complete the dispute items for the relevant tax period(s). Note: If the dispute items are not completed for all tax period(s) then such tax period(s) will not form part of the dispute.

OK Cancel

Account

Suspension Of Payment

NOTE: When multiple tax periods were selected, only the tax period(s) for which suspension of payment(s) are available, will be displayed.

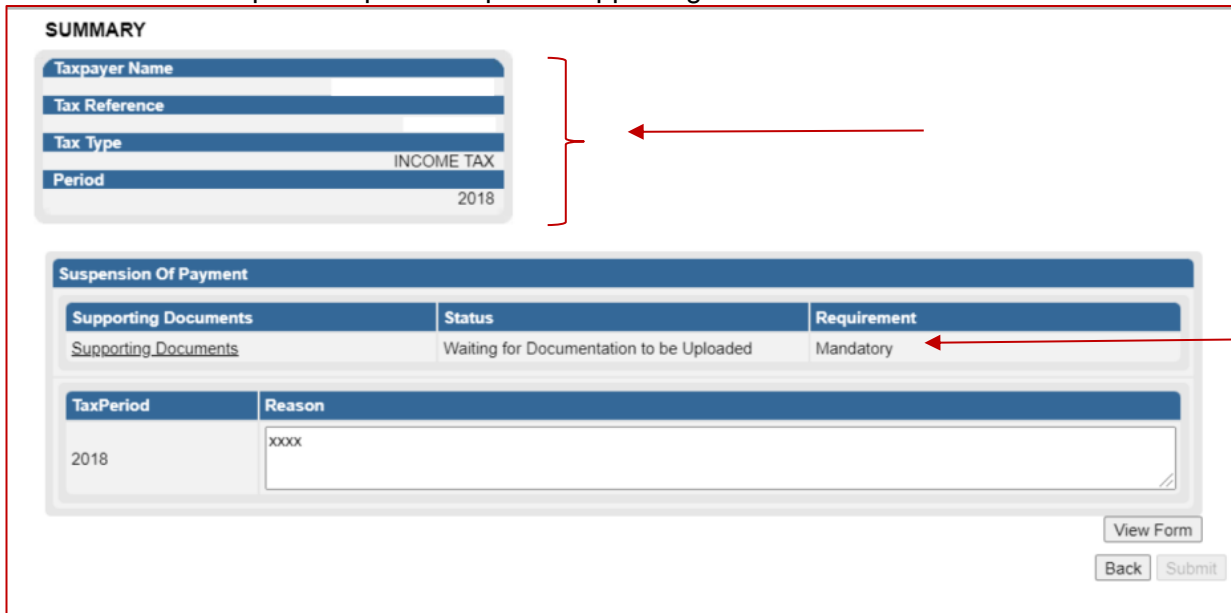
Select	Reason	Apply Across
<input checked="" type="checkbox"/> 2018	xxxx	<input type="checkbox"/> All Periods

Back Next

Step 8:

The below screen will then appear. Please ensure that the details under the “Summary” are correct.

You will also be required to provide/upload supporting documents in order to be able to submit.



SUMMARY

Taxpayer Name	
Tax Reference	
Tax Type	INCOME TAX
Period	2018

Suspension Of Payment

Supporting Documents	Status	Requirement
Supporting Documents	Waiting for Documentation to be Uploaded	Mandatory

TaxPeriod	Reason
2018	xxxx

View Form

Back Submit

Step 9:

In order to upload the supporting documents, you would need to choose a file from your desktop and select “upload”.

Supporting documents include but not limited to Letter to SARS, PoA.

SUPPORTING DOCUMENTS FOR DISPUTES

For more information on how to use this functionality, please click [here](#).

TAXPAYER DETAILS

Taxpayer Name: [Redacted]
 Tax Reference Number: [Redacted]
 Return Type: Organisation Income Tax (ITR14/IT12E/ITR12T)

UPLOAD SUPPORTING DOCUMENTS

Please ensure that all documents are correctly classified and successfully uploaded before submitting this group.

Document Name: No file chosen

Very important:

- The following file types may be uploaded: .pdf, .doc, .docx, .xls, .xlsx, .jpg and .gif.
- The maximum allowable size of each file uploaded may not exceed 5Mb per document.
- The following files may not be uploaded as they will result in the entire group of documents being rejected:
 - Documents with the same name.
 - Password protected documents.
 - Spread sheets with multiple sheets.
 - Blank or empty documents.

UPLOADED DOCUMENTS

No documents have been uploaded.

DOCUMENT GROUP

Please provide a group name for all the documents that you have uploaded above.

Document group name:

Status: Waiting for Documentation to be Uploaded

Step 10:

The below view will appear of the saved suspension of payment. You will note that the status will only change once you have uploaded the supporting documents.

DISPUTE WORK PAGE

Taxpayer Name: [Redacted] eFiling Status: Saved

Tax Reference: [Redacted]

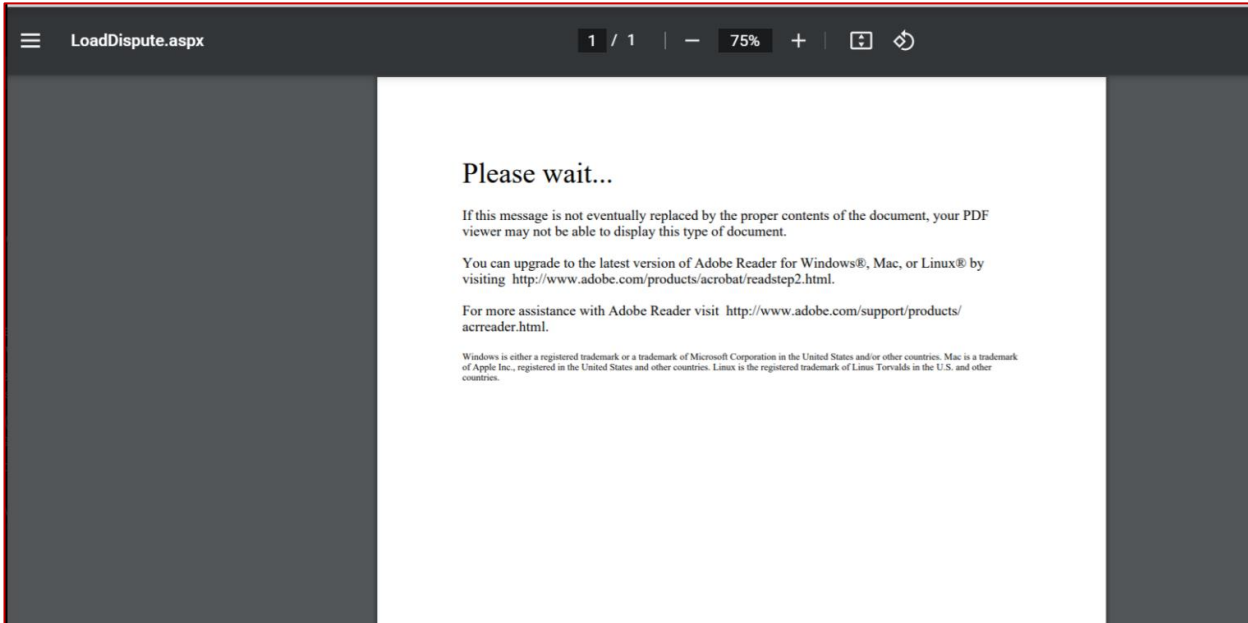
Case Reference Number: [Redacted]

DISPUTE	DESCRIPTION	STATUS	DATE	LAST UPDATED BY
SUS	Suspension of Payment	Saved	2021/09/15	

SUPPORTING DOCUMENTS	STATUS	TYPE	DATE	SIZE (Kb)	NO. OF DOCS
Dispute Supporting Documents	Waiting for Documentation to be Uploaded		2021/09/15	0	0

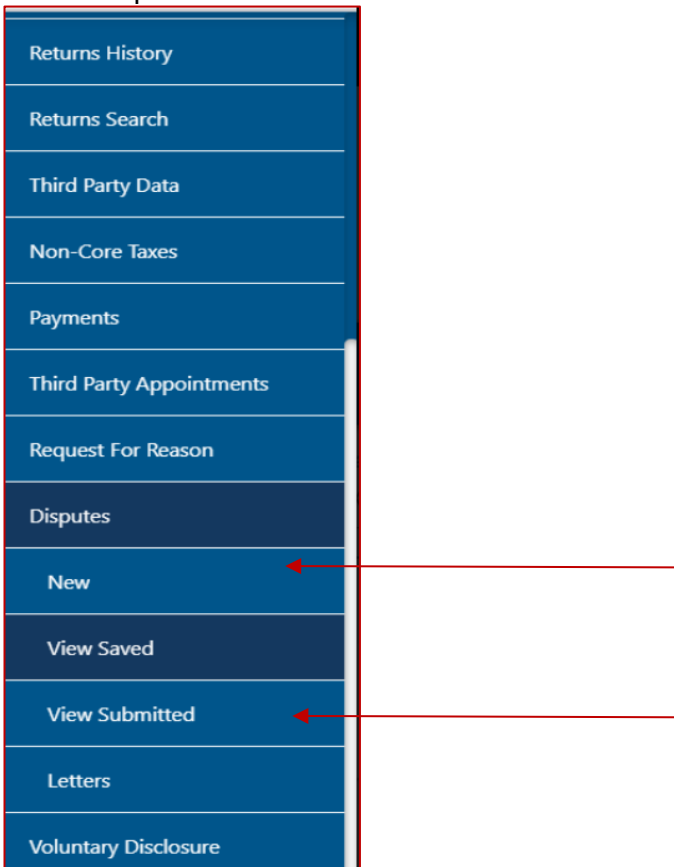
Step 11:

Once happy with the uploaded documents you can select the “view form” option as per step 8 above, the following will appear. The form will then download onto your desktop. You may save and view the saved document.

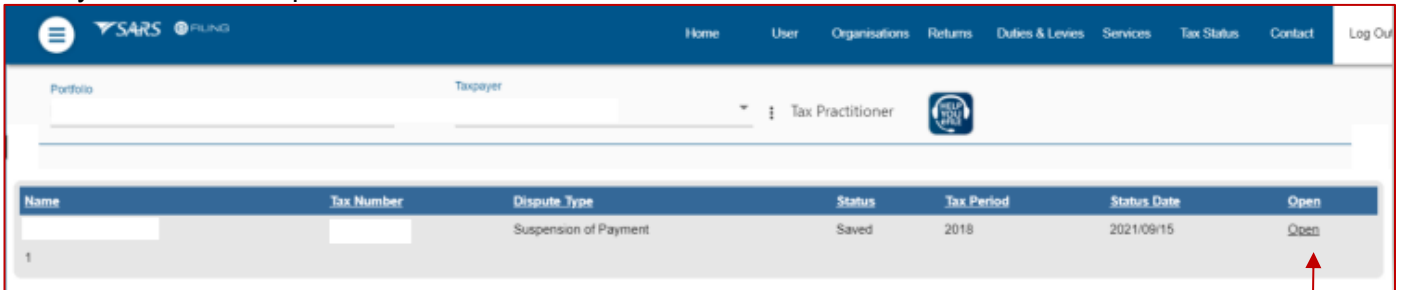


Step 12:

Once you are happy with your form, you can click back. Go to “Disputes” the “View Saved.”



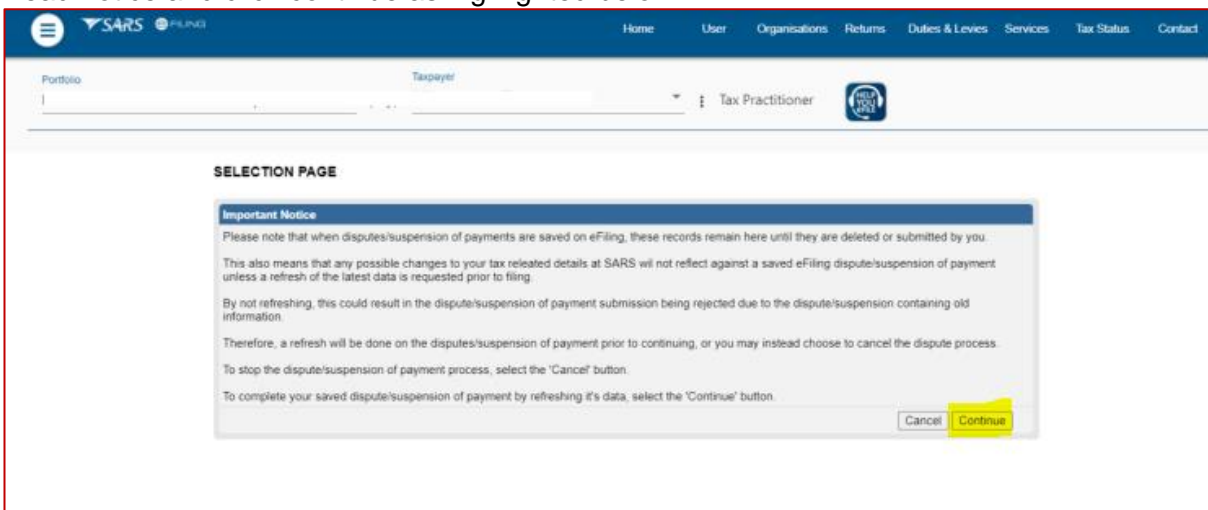
Step 13:
Then you will select “open.”



The screenshot shows the SARS eFiling interface. At the top, there is a navigation bar with 'SARS eFILING' and various menu items. Below this, there are input fields for 'Portfolio' and 'Taxpayer', and a 'Tax Practitioner' dropdown. A table displays a list of disputes. The first row is highlighted, and the 'Open' button in the 'Open' column is highlighted with a red arrow.

Name	Tax Number	Dispute Type	Status	Tax Period	Status Date	Open
		Suspension of Payment	Saved	2018	2021/09/15	Open

Step 14:
Read notice and click continue as highlighted below.



The screenshot shows the 'SELECTION PAGE' in the SARS eFiling interface. A blue box titled 'Important Notice' contains the following text:

Please note that when disputes/suspension of payments are saved on eFiling, these records remain here until they are deleted or submitted by you. This also means that any possible changes to your tax related details at SARS will not reflect against a saved eFiling dispute/suspension of payment unless a refresh of the latest data is requested prior to filing.

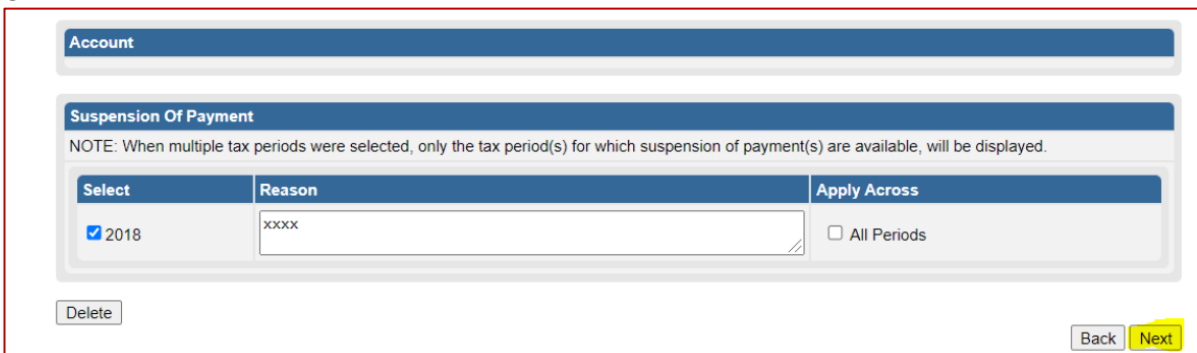
By not refreshing, this could result in the dispute/suspension of payment submission being rejected due to the dispute/suspension containing old information.

Therefore, a refresh will be done on the disputes/suspension of payment prior to continuing, or you may instead choose to cancel the dispute process. To stop the dispute/suspension of payment process, select the 'Cancel' button.

To complete your saved dispute/suspension of payment by refreshing it's data, select the 'Continue' button.

At the bottom right of the notice box, the 'Continue' button is highlighted in yellow.

Step 15:
Click “Next”



The screenshot shows the 'Suspension Of Payment' form in the SARS eFiling interface. It includes a 'Delete' button and a 'Next' button highlighted in yellow.

Account

Suspension Of Payment

NOTE: When multiple tax periods were selected, only the tax period(s) for which suspension of payment(s) are available, will be displayed.

Select	Reason	Apply Across
<input checked="" type="checkbox"/> 2018	xxxx	<input type="checkbox"/> All Periods

Buttons: Delete, Back, Next

Step 16:

Once you are happy with the form and all relevant documents have been uploaded. Click “Submit.”

SUMMARY

Taxpayer Name	
Tax Reference	
Tax Type	INCOME TAX
Period	2018

Suspension Of Payment

Supporting Documents	Status	Requirement
Supporting Documents	Uploaded	Mandatory

TaxPeriod	Reason
2018	XXXX

View Form
Back **Submit**

Step 17:

You can view the submitted suspension of payment by following step 12 and clicking “view submitted.”

That will then prompt you to the below screen where you will see when submission took place.

Portfolio Taxpayer Tax Practitioner

Dispute Search

Dispute Type: Please Select

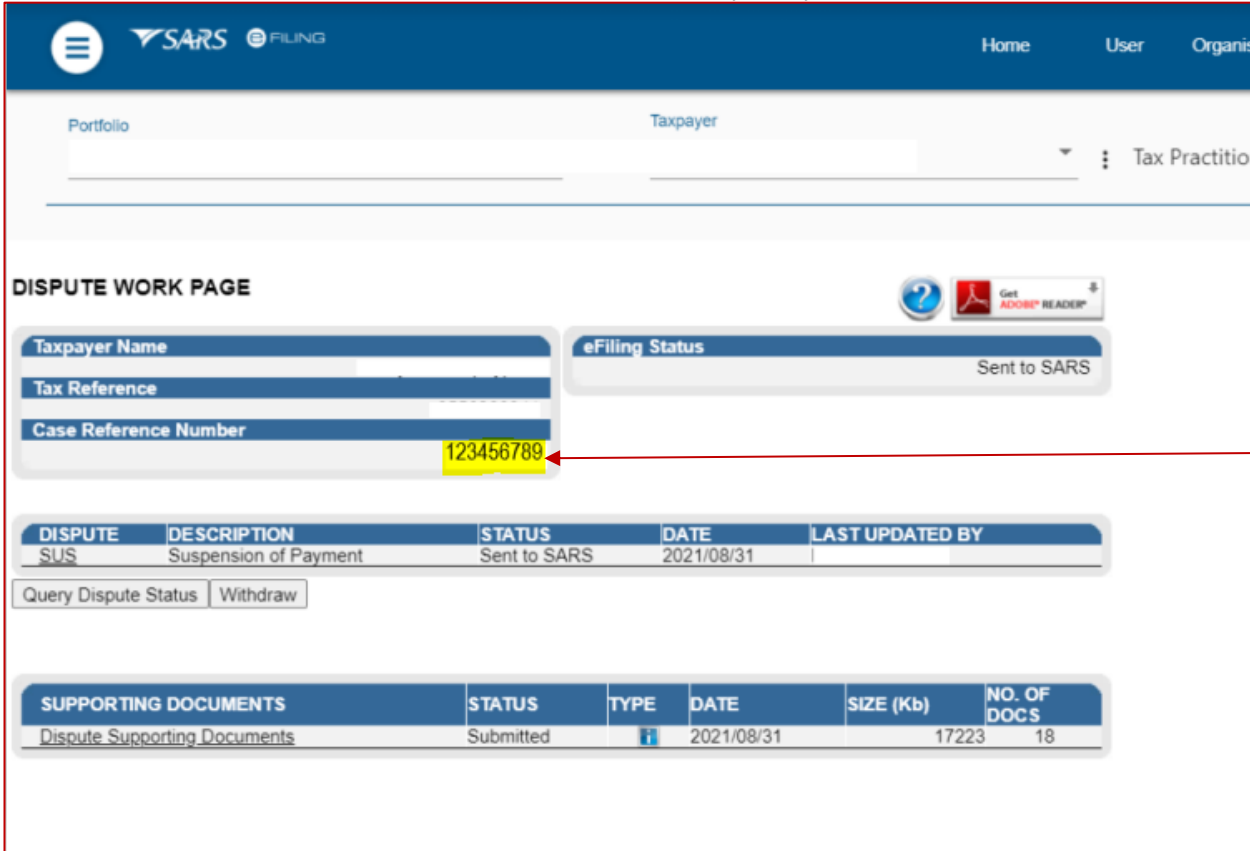
Income Tax Ref: TaxPayer Name: From Date: To Date:

Search

Name	Tax Number	Dispute Type	Status	Tax Period	Status Date	Supporting Documents	Open
		Notice of Objection	Sent to SARS	2019	2021/09/09	Submitted	Open
		Suspension of Payment	Sent to SARS	2019	2021/08/31	Submitted	Open

Step 18:

The below screen is a view of the submission made. The work page entails the taxpayer's name, tax reference number and the case number allocated to you by SARS.



The screenshot shows the SARS eFiling portal interface. At the top, there are navigation links for Home, User, and Organisations. Below this, there are input fields for Portfolio and Taxpayer, and a dropdown menu for Tax Practitioner. The main section is titled "DISPUTE WORK PAGE" and includes a help icon and an Adobe Reader icon. There are three input fields: Taxpayer Name, Tax Reference, and Case Reference Number (highlighted in yellow with a red arrow pointing to it, containing the value 123456789). To the right of these fields is an "eFiling Status" box showing "Sent to SARS". Below this is a table with columns: DISPUTE, DESCRIPTION, STATUS, DATE, and LAST UPDATED BY. The table contains one row: SUS, Suspension of Payment, Sent to SARS, 2021/08/31. Below the table are buttons for "Query Dispute Status" and "Withdraw". At the bottom is another table with columns: SUPPORTING DOCUMENTS, STATUS, TYPE, DATE, SIZE (Kb), and NO. OF DOCS. It contains one row: Dispute Supporting Documents, Submitted, i, 2021/08/31, 17223, 18.

7. Remedies to the taxpayer in circumstances where SARS does not follow the legislated process in raising and collecting tax debt:

SARS Short Guide to the TAA:

'The Tax Ombud provides taxpayers with a cost-effective mechanism to address administrative difficulties, which operates in addition to other existing mechanisms to do so. It is important to note that the creation of a Tax Ombud is not the only balancing factor to SARS's powers under the Act. Taxpayer protection and remedies are specifically afforded in the Act sections or parts dealing with SARS's powers, in addition to overarching remedies such as the right to request SARS to internally review a decision and the internal complaints resolution mechanisms.'

Potential remedies available to taxpayers where SARS does not follow the legislated process in raising and collecting tax debt:

- Remedies specifically afforded in the TAA dealing with SARS' powers
- Contact SARS via email address listed on the SARS website
- Contact your SARS relationship manager if you qualify as a large business taxpayer
- Escalation via SARS' complaints management Office

There are three preferred ways to send SARS your complaint:

- Via eFiling,
 - Visit your nearest [SARS Branch](#)
 - By calling the SARS Complaints Management Office
-
- Contact a trusted tax advisor
 - Contact the Tax Ombud's Office
 - SARS can be called upon to review their own decisions in terms of s9 of the TAA
 - If a taxpayer wants to take a matter to the High Court, a section 11(4) notice in terms of the TAA must be provided

Annexure A – Case law

The powers of SARS to collect a tax debt:

K Siphayi v SARS (case number 34975/2019)

Considering the rapidly deteriorating economic climate that taxpayers find themselves in, it is important to note that, in certain circumstances, the South African Revenue Service has the right to hold taxpayers personally liable for the tax debts of other taxpayers.

Section 184 of the Tax Administration Act, No. 28 of 2011 (“**TAA**”) gives SARS the power to recover tax debts from, *inter alia*, a representative taxpayer as well as from a withholding agent, as if they themselves were the taxpayer. In turn, the representative taxpayer/ withholding agent have the same rights and remedies as the taxpayer would have had against SARS. However, SARS is obliged to first provide notice to the representative taxpayer/ withholding agent which it intends to hold personally liable for the taxpayer’s tax debt.

The High Court case of *K Siphayi v SARS (case number 34975/2019)* dealt with circumstances where Mr. Siphayi was held personally liable for a tax debt of about R14 million owed by Kenny Bricks CC, in which Mr. Siphayi was the sole member.

SARS attempted to deduct funds from Mr. Siphayi’s bank account in respect of the tax debt owing by Kenny Bricks CC.

The applicants, Mr. Siphayi and Kenny Bricks CC, approached the High Court in order to obtain an urgent interdict preventing SARS from deducting the tax debt from the bank account of Mr. Siphayi.

Mr Siphayi alleged that the urgency of the matter lay in the fact that if the tax debt of Kenny Bricks CC was deducted from the bank account of Mr. Siphayi, then he would be severely affected in his ability to conduct his business.

Being satisfied that the matter was in fact urgent, the court went on to consider the merits of the matter.

SARS contended that the required notices in terms of the TAA, were sent to Mr. Siphayi via email and they were also posted to a physical address via registered mail. The emails were sent on 7 June 2019 and 6 August 2019, respectively but nothing further was said as to whether these emails were delivered or not. In respect of the registered mail, the tracking notes reflected that they were returned because the registered letters were not collected at the post office.

Mr Siphayi contented that he did not receive the notices on 7 June 2019 and 6 August 2019. Had he received them he would have acted upon them and made the relevant representations as requested in the notices. It was contended further for the applicant that:

“[9]...Section 253 (1) [of the TAA] provides that a notice, document or other communication issued, given, sent or served in the manner referred to in section 251 or 252, is regarded as received by the person to whom it was delivered or left, or if posted it is regarded as having been received by the person to whom it was addressed at the time when it would, in the ordinary course of post, have arrived at the a addressed place. Subsection (1) does not apply if— (a) SARS is satisfied that the notice, document, or other communication was not received or was received at some other time; or - (b) a court decides that the notice, document, or other communication was not received or was received at some other time.

[10]... if SARS is satisfied that a notice, document or other communication (other than a notice of assessment) issued, given, sent or served in a manner referred to in section 251 or 252 (excluding paragraphs (a) and (b) thereof)— (i) has not been received by the addressee; or - (ii) has been received by that person considerably later than it should have been received; and the person has in consequence been placed at a material disadvantage, the notice, document or other communication must be withdrawn and be issued, given, sent or served anew.

The court ordered that SARS, and the Commissioner for SARS were interdicted from deducting monies from the Mr. Siphayi’s bank account in terms of section 184 of the TAA. In addition, SARS was ordered to resend the notices of intention to hold Mr. Siphayi liable for the tax debts of Kenny Bricks CC.

The takeaway

Taxpayers can be held liable for the tax debts of another person.

If SARS seeks to hold another person liable for the tax debts of the taxpayer, due process must be followed. In particular, the correct methods of service of notices as envisaged in the TAA must be followed and taxpayers must be afforded the opportunity to make representations before they are held liable for the tax debt of another taxpayer.

Metlika Trading Co Ltd v CSARS 2005 (3) SA 1 (SCA)

The on-going tax litigation between SARS on the one hand and King on the other is throwing valuable light on the seldom-explored outer limits of SARS’s powers to access or freeze a taxpayer’s assets (including those situated abroad) that can be realised to secure payment of a tax debt.

The well-known entrepreneur, David King, was arrested in 2002 and was facing 322 charges, including fraud, money laundering, racketeering and the breach of exchange control regulations. King had reportedly been assessed to tax in excess of R900 million and one of his companies, Ben Nevis Holdings Ltd, had been assessed to tax in excess of R1 400 million. The Director of Public Prosecutions, SARS and the South African Reserve Bank had been successful in obtaining court orders, in South Africa and overseas, to freeze all of King’s funds, including the

assets in several trusts and business entities. The purpose of these orders was to preserve assets, which can later be realised, and the proceeds used to pay SARS the outstanding tax.

On 3 September 2002 the South African High Court issued a preservation and anti-dissipation order in respect of a South African-registered Falcon executive jet (originally valued at R200 million), which had been languishing and deteriorating at an airport in France since April 2003. The aircraft was owned by a partnership between Hawker Air Services (Pty) Ltd, Hawker Management (Pty) Ltd and Rand Merchant Bank, the last-mentioned being an undisclosed partner with a 99.8% interest in the aircraft. SARS had a VAT-related claim against the partnership of some R73 million. The preservation and anti-dissipation order had the effect of interdicting any disposal of the aircraft but did not create a preferential claim over the aircraft in favour of SARS. Despite that order, Carmel (claiming that it was not a party to the litigation and therefore was not bound by the order) purported to take over the interest of Rand Merchant Bank and Hawker Management (Pty) Ltd vis-à-vis the aircraft.

The High Court however, held that this was a contrived transaction, in fraudem legis, intended to bypass the preservation order, and that Carmel was a tool of King and under his control. A subsequent extension of that order required Carmel Trading Co Ltd to return the aircraft to South Africa; see *Metlika Trading Co Ltd v CSARS 2005 (3) SA 1 (SCA)*. The stalemate thereafter, a stalemate ensued. The aircraft remained in France. Carmel, despite professing a willingness to procure the aircraft's return to South Africa, refused to make funds available to do so and refused to consent to the aircraft's being returned to South Africa by the sheriff. Meanwhile, the aircraft was not being kept in a hangar, was fast deteriorating, and would soon become worthless. Hangarage would slow the rate of deterioration but would cost R150 000 per month. Consequently, the earlier preservation order granted by the court would soon be nugatory unless it could be amplified to enable the aircraft to be sold and the proceeds kept in trust pending a final resolution of the litigation. SARS was of the view that King was determined to thwart the sale of the aircraft and was "patently prepared to see the value of the Falcon lost rather than being used to pay SARS".

The appeal was against the order that the aircraft be sold. The High Court issued a variation order to the effect that the aircraft should be sold by the sheriff and the proceeds kept in trust pending finalisation of the litigation. It was this order that was the subject of the appeal. Carmel was opposing not just the terms of that particular order, but any sale of the aircraft. In his affidavit the Commissioner contended that – "the behaviour of the new partnership to leave the Falcon stranded and neglected in a foreign country is an obvious and desperate attempt to prevent our courts from eventually making an effective order in respect of this valuable asset [and King] is patently prepared to see the value of the Falcon lost rather than being utilized to pay [SARS]."

The court described Carmel's opposition to the sale of the aircraft as *schadenfreude* (which a dictionary defines as "malicious or smug pleasure in somebody else's misfortune") and said that Carmel's objection to the sale "lacks reality". Carmel argued that selling the aircraft would flout the Bill of Rights Carmel objected to the sale on the basis that section 25(1) of our Bill of Rights provides that no law can permit the arbitrary deprivation of property and argued that an order to

sell the aircraft and keep the proceeds in trust pending the finalisation of the main litigation amounted to “an arbitrary deprivation of Carmel’s property”.

The court held that this argument broke down on many levels. Firstly, the aircraft was not Carmel’s property, although it may have had a proprietary interest in it as a partner in the partnership that was a beneficial owner of the aircraft. However, a court had already found that Carmel’s purported taking over of a partnership interest was fraudulent, and the court now held that Carmel could not rely on a simulated or fraudulent agreement. Moreover, said the court, the partnership had been dissolved by the liquidation of one of the partners, and as a former partner, Carmel had no proprietary claim in respect of the partnership’s property, but at best a claim for a proportionate share of the proceeds. The court ruled further the sale would not amount to a “deprivation” of property. In effect, it would merely substitute a fund of money for a deteriorating asset and Carmel’s position would not, after the sale, be any different from what it was. The value of the asset was being retained for the owner and creditors. Moreover, said the court the sale was not “arbitrary” because there was sufficient reason for the deprivation, and it was procedurally fair. SARS would not get control of the proceeds of the sale, which would be kept in trust on behalf of the owner of the aircraft.

The takeaway

The decision of the Supreme Court of Appeal in the case under discussion makes clear, where a taxpayer is subject to the jurisdiction of the South African courts, our courts can make a preservation or anti-dissipation order in respect of his assets even if they are located in a foreign jurisdiction. (Breach of such an order could ground contempt of court proceedings against the taxpayer in the South African courts.) Moreover, our courts can order that an asset (even if located overseas) in respect of which a preservation order has been granted, be sold, and the proceeds held in trust pending the finalisation of the litigation.

Collection of tax from third parties:

SIP Project Managers (Pty) Ltd v The Commissioner for the South African Revenue Service (11521/2020) [2020] ZAGPPHC

Section 179 of the Tax Administration Act, No. 28 of 2011 (‘TAA’) deals with the liability of a third party appointed to satisfy tax debts. The section states (most relevantly) that:

‘(1) A senior SARS official may authorise the issue of a notice to a person who holds or owes or will hold or owe any money...for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer’s outstanding tax debt.

(2) ...

(3) A person receiving the notice must pay the money in accordance with the notice and, if the person parts with the money contrary to the notice, the person is personally liable for the money.

(4) ...

(5) SARS may only issue the notice referred to in subsection (1) after delivery to the tax debtor of a final demand for payment which must be delivered at the latest 10 business days before the issue of the notice, which demand must set out the recovery steps that SARS may take if the tax debt is not paid and the available debt relief mechanisms under this Act, including, in respect of recovery steps that may be taken under this section—

(a) ...

(b) if the tax debtor is not a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on serious financial hardship ...'

Briefly, from the section set out above, it is observed that the TAA gives the South African Revenue Service ('SARS') the power to issue a notice to a third party i.e., a bank that holds money on behalf of a taxpayer. This third-party notice will require the bank to pay over to SARS such money in satisfaction of a taxpayer's tax debt. Where the bank can comply with the requirements of the third-party notice, the bank must pay such money to SARS in accordance with the third-party notice. If the bank parts with the money contrary to the third-party notice, then the bank will be held personally liable for the taxpayer's tax debt. However, before SARS can issue this notice, there is a provision in section 179 which limits SARS's collection powers and safeguards taxpayers' rights i.e., the third-party notice may only be issued by SARS, after it delivers a letter of demand to the taxpayer. This letter of demand must be delivered at least 10 business days before the issue of the third-party notice by SARS. The letter of demand provides the taxpayer with an opportunity to make arrangements with SARS to pay the outstanding tax debt/a portion thereof before SARS can rely on the appointment of a third party to make payment of the taxpayer's tax debt.

The case of *SIP Project Managers (Pty) Ltd v The Commissioner for the South African Revenue Service* (11521/2020) [2020] ZAGPPHC highlighted the importance of due process being followed by SARS, when issuing a third-party notice contemplated in section 179 of the TAA above.

The taxpayer's case was as follows:

- In October 2019, SARS issued an additional assessment to the taxpayer, via the SARS e-filing system.
- According to the additional assessment, the taxpayer was assessed to owe SARS an amount of approximately R1,2m and the date for the payment of this amount, was 30 November 2019.
- The additional assessment did not come to the attention of the taxpayer. According to the taxpayer's accountant, he was alerted to the additional assessment for the first time on 6 February 2020, when the taxpayer informed him that Standard Bank South Africa ('SBSA') had received a notification to pay an amount of approximately R1,2m to SARS, from the taxpayer's bank account.
- Upon scrutinising the taxpayer's e-filing profile, the taxpayer's accountant located the additional assessment; however, there was no letter of demand, as contemplated in

section 179(5) of the TAA, to be found on the e-filing profile of the taxpayer, pursuant to the non-payment of the assessed amount.

- The taxpayer's accountant contacted the SARS official whose name was reflected on the third-party appointment notice issued to SBSA on 7 February 2020, who informed him that three letters of demand had been sent to the taxpayer before the third-party appointment notice was issued to SBSA, namely on 7 November 2019, on 11 November 2019 and on 22 January 2020.
- The SARS official forwarded copies of these three letters to the taxpayer's accountant. The taxpayer's accountant maintained that none of these letters were sent to him or the taxpayer, nor had they been uploaded on the taxpayer's e-filing profile.
- Upon contacting the SARS call centre to ascertain where he could locate the letters of demand on the taxpayer's e-filing profile, the taxpayer's accountant was informed that there were no letters of demand uploaded on the taxpayer's e-filing profile.
- The taxpayer then approached its legal advisers and a letter of demand for repayment of the amount paid over by SBSA in terms of the third-party notice, was sent to SARS on 10 February 2020.
- SARS did not respond to this letter of demand, which led to the application for declaratory relief being brought in the Pretoria High Court by the taxpayer against SARS. The taxpayer contended that no letter of demand was delivered prior to the issue of the third-party notice as required by section 179 of the TAA. Further, in the event that the court found that such a letter or letters were delivered, the taxpayer contended that the letters were either premature, as the tax debt was not yet payable at the time, or the 10-business day period prior to the issue of the third party-notice had not yet expired by the time that the notice was in fact delivered.

SARS's case was as follows:

- SARS abandoned relying on the letters dated 11 November 2019 and 22 January 2020 and relied only on the letter dated 7 November 2019, as being the demand letter referred to in section 179(5). The letter of 11 November 2019 was merely a reminder and did not comply with the requirements as set out in section 179(5).
- Further, the letter of 22 January 2020 was not issued at least 10 business days before the notice to SBSA was issued on 3 February 2020 and therefore did not meet the requirements for a letter of demand as required by section 179(5) of the TAA.
- SARS's explanation of the issue of the letter of demand dated 7 November 2019 was contradictory in respect of who sent the letters.
- SARS did not put forth adequate proof that the letter of demand was uploaded on the SARS e-filing system.
- In addition, SARS did not address the telephonic conversation held between the taxpayer's accountant and the SARS call centre personnel, wherein it was confirmed that the letters of demand were not uploaded on the taxpayer's e-filing profile.

In respect of whether a letter of demand was in fact delivered to the taxpayer, the judge referred to the case of *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) 371 (SCA), which states that:

'When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but instead of doing so: rests his case on a bare or ambiguous denial, the court will generally have difficulty in finding that the test is satisfied.'

In this regard, the judge found that no letter of demand was delivered to the taxpayer by SARS.

In respect of whether the letter of demand dated 7 November 2019 was premature, the court reasoned that it was clear that section 179 deals with a scenario where there is an outstanding tax debt due by the taxpayer. In this instance, this was not the position as at 7 November 2019, as the taxpayer would have an outstanding debt only after the due date for payment, namely 30 November 2019. SARS conceded that on this date there was not yet an outstanding tax debt owed by the taxpayer. The letter of demand dated 7 November 2019 was accordingly premature and therefore not lawful.

In respect of the third-party notice, the court stated that:

'[22] Subsection (5) to section 179 was introduced by an amendment to the Act in 2015. Prior to this amendment, there was no obligation on SARS to deliver a demand for an outstanding debt before issuing a third-party notice. The context of this amendment is that SARS may only use the method in sec 179 to obtain payment through a third party if it complies with the provisions of the requirements of the section. The wording of section 179(5) is unambiguous and clear – the notice to a third party “may only be issued after delivery of a final demand for payment which must be delivered at least 10 business days before the issue of the notice....”. This is a peremptory requirement before the step can be taken to issue a third-party notice for recovery of an outstanding tax debt.'

[23] The notice issued to the third party in terms of section 179(1) does not comply with the peremptory qualification as set out in subsection 5, in that the notice was issued in the absence of a letter of demand delivered to the applicant is required. The notice issued is therefore unlawful and declared null and void.'

[24] A finding that a legislative provision is peremptory is not the end of the matter. The Court must further enquire whether it was fatal that it had not been complied with. The Appellate Division as it then was laid down the test as “In deciding whether there has been compliance with the object sought to be achieved by the injunction and the question of whether this object has been achieved, are of importance”.¹

¹ Maharaj and others v Rampersad 1964 (4) SA 638 (a) at 646C.

[25] Once it is established that a legislative provision is peremptory and the question arises whether exact compliance therewith is required, the answer is sought in the purpose of the statutory requirement which is to be found ascertained from its language read in the context of the status as a whole'.²

The court ultimately ordered that the third-party notice issued to SBSA be declared null and void. In addition, not only was SARS ordered to repay the amount of approximately R1,2m to SBSA (together with interest), SARS was also ordered to pay the Taxpayer's costs of the application.

The takeaway

SARS has the power to issue a notice to a third party in satisfaction of a taxpayer's tax debt. However, SARS must ensure that it exercises its powers in accordance with the law.

- as a starting point, the taxpayer's tax debt must be outstanding
- hereafter, SARS is permitted to deliver a letter of demand to the taxpayer in accordance with the relevant rules for electronic communication
- finally, SARS may issue a third-party notice, at least ten business days after the letter of demand was issued to the taxpayer
- until then, SARS may not commence with mechanisms for the recovery of the taxpayer's tax debts from a third party

Taxpayers must closely monitor their e-filing profiles and check whether assessments, notices and letters have been issued by SARS. This is important, as not only does it dictate what action is required on the part of taxpayers, but it also impacts on the lawfulness of SARS's subsequent actions.

Nondabula v C:SARS [2017] ZAECMHC 21 (27 June 2017)

Can the High Court interdict SARS from collecting unpaid taxes?

The Tax Administration Act ('TAA') grants powers under which SARS may instruct a third party in possession of a taxpayer's assets to make over all or portion of those assets in satisfaction of taxes owed by the taxpayer. In a recent decision of the High Court in the Eastern Cape, a taxpayer challenged the right of SARS to issue such a third-party instruction, and obtained an order confirming a temporary interdict against SARS that had been granted in earlier proceedings.

The facts in *Nondabula v C:SARS [2017] ZAECMHC 21 (27 June 2017)* are not easy to follow from the judgment, and are recorded chronologically below:

- The taxpayer ('N') operated a petrol station in Umzimkhulu and rendered returns of income for the 2014 and 2015 years of assessment.

² Ex parte Mothulhoe 1996 (4) SA 1131 (T) at 1137H – 11378F.

- N was assessed to tax in each of the years of assessment and paid the amounts of tax reflected in the respective Forms IT34 for the relevant years on or before 31 July 2014 and 31 October respectively.
- In April 2016, N received a statement of account from SARS which reflected that an additional assessment had been issued in respect of the 2014 year of assessment in the sum of R1 240 455.94.
- N submitted an objection against the assessment on 4 April 2016, but SARS refused to accept the objection on the technical ground that it contained both an objection and a request for waiver of penalties and notified N on 5 May 2016 of its decision.
- On 11 May 2016, SARS issued a letter of demand for payment of assessed taxes.
- N's accountant filed an objection through the SARS e-filing system and on 3 June 2016 addressed a further letter to SARS submitting relevant documentation and requesting SARS to note the objection.
- In subsequent correspondence, SARS raised technical issues against the validity of the objection but at no stage did SARS notify the reason for the additional assessment.
- On 29 September 2016 N received a final demand advising that unless he paid R1 422 637.83 within 10 days, further action would be taken.
- SARS thereafter issued a notice in terms of section 179 of the TAA requiring N's bankers to freeze his account and make payment of the assessed taxes to SARS.

The parties' assertions:

N did not take this lying down. He sought an order of the High Court interdicting SARS from issuing the section 179 notice and ordering its withdrawal pending the resolution of his dispute. In his founding affidavit, N stated that he had never received the additional assessment, and that he had not at any time been informed of the reasons for the additional assessment.

SARS, in its papers filed in response, made no attempt to provide a breakdown of the taxes that it had assessed. It merely denied that it was obliged to do so and did not advance any contention that N knew or ought to have known how the amount assessed had been determined.

However, SARS stated that it had identified that there was a discrepancy between a third-party notification by a bank and the return of income that reflected that N had failed to disclose interest from a bank deposit in the sum of R32 734. This was clearly far short of the adjustments that had been made to arrive at a tax liability of the magnitude of over R1.2 million, but it necessitated that SARS should issue an additional assessment in terms of section 95 of the TAA.

The judgment:

In the judgment, Jolwana AJ accepted that SARS is obliged in terms of section 92 of the TAA to issue an additional assessment if satisfied that an assessment does not reflect the right amount of tax to the prejudice of SARS.

The judgment then proceeded on the premise that the additional assessment was, in fact, an estimated assessment contemplated in section 95 of the TAA. It is unclear from the evidence recorded in the judgment whether the additional assessment was an estimated assessment, although, in the final analysis, nothing may turn on this fact.

Jolwana AJ then examined the requirements of section 96 of the TAA, which states that SARS must issue a notice of assessment and noted that it had two subsections. The first contained a list of information that had to be included in a notification of assessment in order that it may be a valid assessment. The second (to the extent relevant) states:

‘In addition to the information provided in terms of subsection (1) SARS must give the person assessed:

- (a) in the case of an assessment described in section 95 of an assessment that is not fully based on a return submitted by the taxpayer, a statement of the grounds for the assessment ...’

The court found that there was no evidence that a form IT34 – Notice of Assessment, having been delivered to N and that at no time had N been apprised of the reasons for the assessment. On the papers, SARS had advanced no reason why the requirements of section 96 of the TAA had not been met, nor had it claimed to have complied with them.

It appears that Jolwana AJ was of the view that there had not been a valid notification of assessment, stating in paragraph 21 of the judgment:

‘Once the stage provided for in section 92 is reached the first respondent is required to comply with the provisions of section 96 by issuing a notice of assessment with all the information required and provided for in section 96. I may mention that the whole of section 96 is couched in peremptory terms, meaning that the first respondent has no discretion when it comes to section 96. In any event it is not the first respondent’s case that it did have a legal basis for not complying with section 96.’

SARS had not complied with section 96 of the TAA, yet it proceeded to take further steps to recover the amounts that it asserted were payable.

After a brief discussion of the constitutional rights and duties of the parties, Jolwana AJ concluded at paragraph 26:

‘The least that is expected of the first respondent is to comply with its own legislation and most importantly promote the values of our Constitution in the exercise of its public power. This the first respondent failed to do. In failing to provide the applicant with all the information prescribed in terms of section 96 which the first respondent was obliged to provide the applicant, it acted unlawfully and unconstitutionally.’

The temporary interdict preventing SARS from issuing a notice in terms of section 179 of the TAA was therefore confirmed.

The takeaway

The issue in this matter came down to evidence and the question at issue was whether SARS had complied with section 96 of the TAA. No assertion appears to have been made in the affidavits filed by SARS that SARS had indeed issued a notice of assessment, nor that it had at any time delivered the notice of assessment to N or provided N with reasons for the assessment.

On the papers, it would appear that Jolwana AJ was justified in finding that the assessment upon which SARS placed reliance was defective for want of compliance with section 96 of the TAA. This rendered any follow-up actions unlawful.

The pay-now-argue-later rule

Zimbabwe Revenue Authority v Packers International (Private) Ltd (2017) 79 SATC 140

One of the most feared provisions of the Tax Administration 28 of 2011 is section 164(1) which states that that:

“Unless a senior SARS official otherwise directs . . .

(a) *the obligation to pay tax*; and

(b) the right of SARS to receive and recover tax *will not be suspended by an objection or appeal* or pending the decision of a court of law pursuant to an appeal..”

This is colloquially known as *the pay-now-argue-later* rule, namely, that a taxpayer is obliged to pay the tax reflected in an assessment as being due even if he disputes the correctness of the assessment.

This statutory rule stands on its head the usual legal principle that, if a debt is disputed, the alleged debtor has no legal obligation to pay the amount claimed from him unless and until a court of law rules that he is indeed so obliged *and enters judgment* against him.

In *Metcash Trading Limited v Commissioner for the South African Revenue Service* [2000] ZACC 21; 2001 (1) SA 1109 (CC) the Constitutional Court held that a similar provision in the Value-Added Tax Act, draconian though it may be, is not unconstitutional.

SARS is thus fully entitled to enforce the pay-now-argue-later rule and in practice usually does so.

The taxpayer is entitled to request a suspension of the obligation

The draconian impact of the rule is, however, ameliorated by section 164(2) of the Tax Administration Act which provides that –

“A taxpayer may request a senior SARS official to suspend the payment of tax...due under an assessment if the taxpayer intends to dispute or disputes the liability to pay the tax”.

Section 164(3) then says that a senior SARS official –

“may suspend payment of the disputed tax...having regard to relevant factors including...”

Then follows an itemised list of five factors, including whether the recovery of the disputed tax will be in jeopardy, whether there is a risk that the taxpayer will dissipate his assets, and the taxpayer’s compliance history vis-à-vis SARS.

The Act does not give an exhaustive list of factors justifying suspension of the obligation

Since section 164(3) refers to relevant factors *including* those listed, it is clear that the statutory list of relevant factors is not exhaustive; thus, other factors not listed may be relevant to SARS’s decision whether or not to suspend the obligation to pay the disputed tax.

Nor does this provision accord any relative weight to the various items in the list.

There has, to date, been no reported judgment by a South African court in which the court has been called on to scrutinise a *decision* by a senior SARS official *not to suspend* the taxpayer’s obligation to pay an assessed amount of tax in terms of this provision, and to determine whether that decision should be set aside on review as irrational.

In the light of this uncertainty, the decision of Supreme Court of Zimbabwe in *Zimbabwe Revenue Authority v Packers International (Private) Ltd* (2017) 79 SATC 140 is tantalising for holding out the promise of casting light on the circumstances in which the tax authorities should, as a matter of law, accede to a taxpayer’s request for a suspension of the obligation to pay an amount of assessed tax until a court has given judgment on the matter.

However, in this reported judgment, the taxpayer lost that invaluable opportunity in failing to make such a request for suspension, and the taxpayer instead embarked on a wrong-headed strategy to stop the Zimbabwean revenue authorities from enforcing the disputed assessment.

The assessment in question was for the eye-watering sum of over 19 million US dollars – a liability so large as to be financially catastrophic for the taxpayer.

The Zimbabwean tax legislation contains similar provisions to those in South Africa’s Tax Administration Act, firstly obliging a taxpayer to pay the amount of tax reflected in an assessment, notwithstanding that the taxpayer is contesting the assessment, but also giving the tax authorities

the power to suspend the obligation to pay the disputed tax until a court gives judgment on the dispute.

The Supreme Court of Zimbabwe made the important observation at page 144 of the judgement that –

“[T]he Commissioner [for the Zimbabwean tax authorities] *cannot exercise the discretion* [to suspend the payment of assessed tax] *mero motu* [ie on his own initiative]. He can only do so upon consideration of facts presented to him by a taxpayer who wishes to benefit from the exercise of discretion by the Commissioner. As a consequence, the taxpayer bears the *onus* to place the necessary facts before the Commissioner regarding the hardships facing him should the obligation to pay not be suspended.”

In other words, a taxpayer who seeks a suspension of the obligation to immediately pay a tax assessment, *must make a formal request for such suspension* and set out the grounds for his request. If the taxpayer fails to make such a request and put forward such grounds, *the tax authority cannot grant such a suspension on its own initiative*.

Nor it seems would the court have the inherent power to order a suspension of the obligation to pay, for this would be to usurp a power vested solely in the revenue authorities.

The Supreme Court of Zimbabwe then quoted from an earlier judgment (*Mayor Logistics (Pvt) Ltd v ZIMRA SC 7/14*) which held that –

‘As the facts on which the Commissioner would exercise the discretion would be within the exclusive knowledge of the taxpayer *he or she must place them before the Commissioner.*’

The court (at page 150) said that the issue will then arise as to –

“whether or not any facts have been placed before the Commissioner on whether or not there exist *hardships which would justify a suspension of the obligation to pay assessed tax* by a taxpayer.”

Unhappily for the taxpayer in this case *he failed to request a suspension of the obligation to pay the assessed tax* and instead put forward an entirely different (and ultimately unsuccessful) argument that the enforcement and tax-collection measures taken by the Revenue Authority should be halted by the court on constitutional grounds.

The failure to request suspension of the obligation to pay the assessed tax was an egregious strategic error by the taxpayer and his professional advisers for, as the court went on to say (at page 153):

“A court of law cannot go outside the pleadings on a dispute before it...”

In other words, a court must give judgment on the basis of the contentions put forward by the taxpayer. If the taxpayer fails to put forward a legal contention in the formal written statement of his case, the court cannot rule in the taxpayer's favour on the basis of that unexpressed contention.

In this case, as was noted, above, the taxpayer failed to request a suspension of the obligation to pay the disputed tax, and consequently could not argue in the Supreme Court that the Revenue Authority should have granted the request – or that the court should now order such a suspension.

Instead, the taxpayer in this matter chose to argue his case on the basis that the Revenue Authority had breached his *constitutional* rights by acting *arbitrarily*, that is to say, with no rational basis, in issuing the disputed assessment.

Here again, the taxpayer and his legal team misconceived the true nature of their case.

What the taxpayer should have done was, first, to request a suspension of the obligation to pay the assessed tax and then, if the Revenue Authority turned down the request, argue that *the decision to refuse the request* was arbitrary and lacked a rational basis.

Having failed to make such a request for suspension, the taxpayer was now painted into the corner of having to put forward the shaky argument that the *assessment to tax* issued by the Revenue Authority was itself *arbitrary* and should be set aside by the court (see page 153) because, in the words of the taxpayer –

“...the figure it is claiming has been made arbitrarily without any justification... It is arbitrary in the sense that [the Revenue Authority] estimates the figure it feels [the taxpayer] should pay... [and] has deliberately ignored the figures given by the [taxpayer] voluntarily and chose to rely on an unjustified estimate”.

This argument was a non-sequitur in all its facets.

What the taxpayer was, in effect, arguing was that the amount of tax reflected in the disputed assessment was *wrong* – or to be precise, the taxpayer's argument was that the amount was wrong because the Revenue Authority *did not utilise the figures supplied by the taxpayer*.

Even if it were true that the amounts taken into account by the Revenue Authority in arriving at the tax reflected in the assessment were not correct, that would not in itself make the assessment *arbitrary* – it would merely make the amount of the assessed tax *wrong*, and the way that a taxpayer contests a disputed assessment is by lodging a formal *objection* to the assessment – he cannot attack the assessment as being *invalid*, that is to say, of no legal force.

The takeaway

Although this decision of the Zimbabwean Supreme Court is not binding on South African courts, it seems safe to say that the approach taken by the court in this judgment holds true in terms of South Africa's Tax Administration Act, namely:

- the power to suspend the obligation to pay an assessed amount of tax is vested in a senior SARS official
- a taxpayer who seeks to have the obligation to pay an assessed amount of tax suspended, pending the judgment of a court, must make a formal request for such suspension
- the onus is on the taxpayer to set out grounds for the requested suspension
- if no such request is made, neither SARS nor the High Court has the power to grant a suspension of the obligation to pay the disputed tax

To these principles, it is suggested, the following can be added:

- If a suspension of the obligation to pay an assessed amount of tax is duly requested by the taxpayer, and the request is refused, such a decision is not subject to objection or appeal and *the decision by SARS to refuse to accede to the request* can be taken on review to the High Court in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA")
- An aggrieved taxpayer may ask for such decision to be set aside as arbitrary or irrational. SARS in deciding whether to grant a suspension of payment to a taxpayer must adhere to the rules of administrative justice in s33 of the Constitution and s3 of PAJA

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