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Submission File

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Office of the Tax Ombud
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BY E-MAIL: Office@taxombud.gov.za

Dear Sir

PUBLIC COMMENTS ON THE REVIEW BEING CONDUCTED IN TERMS OF SECTION 16(1)(b) OF THE TAX ADMINISTRATION ACT NO 28 OF 2011, WITH RESPECT TO SARS' DISREGARD OF THE TIMEFRAMES PRESCRIBED BY THE RULES FOR THE RESOLUTION OF DISPUTES

1. The South African Institute of Chartered Accountants ("SAICA") sets out in **Annexure A**, our comments and submissions to the Office of the Tax Ombud (OTO) on the issues experienced by our members regarding the perceived South African Revenue Services' ("SARS") disregard of the timeframes prescribed by the rules promulgated in terms of section 103 of the Tax Administration Act, 2011 (the Rules), for the resolution of disputes.
2. This represents a collation of our member's experiences as to challenges faced with regards to the dispute process, specifically SARS' disregard for the timeframes as provided in the Rules. Many of the matters have arisen over many years and represent a conflation of old practice, new laws and systems.
3. SAICA will continue to communicate and collaborate with the OTO and SARS to address the challenges identified, including sharing these results with SARS.
4. We would like to thank the OTO for the opportunity to participate in this review in seeking to make our tax administration system more efficient and effective.

Should you wish to clarify any of the above matters please do not hesitate to contact us.

Yours sincerely

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The South African Institute of Chartered Accountants



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A. BACKGROUND

1. The OTO recently indicated that it intends conducting a systemic matter review, subsequent to public concerns expressed over the SARS' disregard of dispute timeframes prescribed by the Rules for the resolution of disputes.
2. To enable such review, the OTO has sought, and obtained, the approval of the Minister of Finance ("the Minister") in terms of section 16(1)(b) of the Tax Administration Act, 2011 ("the TAA") to review as a systemic and emerging issue relating to a service matter or the application of the provisions of the TAA or procedural or administrative provisions of a tax Act, the alleged disregard by SARS of the Rules.
3. Following such approval, the OTO invited formal submissions from various stakeholders in respect of the review of the complaints regarding SARS' disregard of the Rules and where possible, stakeholders are to provide necessary examples.
4. SAICA has, in its efforts to collaborate on making the tax system more effective and efficient, sought to clarify what the trends of the challenges are rather than assuming that individual complaints by themselves reflected such trends

B. OVERVIEW OF SAICA DISPUTE TIMEFRAMES SURVEY

5. The SAICA Dispute Timeframes Survey results dealt with a number of specific issues and concerns based on survey results of 779 responses, mostly from SAICA members. The purpose of the survey was not only to confirm whether the extent of the frustrations were perceptions or reality, but also what was driving such frustrations.
6. Qualitatively (data to sufficiently describe the phenomenon of interest), the sample, given a total population of 35 000 (our total SA based membership), provides a 96,7% confidence level (i.e. very high) that the margin of error is less than 3,3%.
7. The survey was persuasive in that the extent of the frustrations with SARS' disregard of timeframes is critical, but also considered the impact on business as a result of delays. Main challenges include SARS not providing or providing inadequate reasons for assessment, thus delaying the dispute process. Furthermore, there are many cases of SARS repeatedly requesting the same documentation or issuing letters of invalid assessments, thereby necessitating repeated lodging of objections with no option to access the rest of the dispute process. Delays in resolving the dispute also affect the tax compliance status of the taxpayer which creates further problems from a business perspective.
8. Of the 779 respondents, 97% dealt with disputes, with 35% having dealt with disputes sometimes and 63% dealt with disputes either frequently or all the time.
9. Furthermore, 55% of the respondents are tax practitioners (TP), with 26% being members in business (MIB) and the balance is made up of other constituencies, possibly indicating persons who have attempted to personally resolve the tax dispute for personal income tax purposes. The results therefore represent a very diverse perspective and point of view.
10. Geographically, the MIB respondents were from 8 of the provinces (53% from Gauteng and none from Mpumalanga) and the TP respondents had taxpayer clients **from all 9 provinces** with 43% of the clients in Gauteng.



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11. A large percentage (49%) of the TP respondents service more than 100 taxpayer clients each.
12. The survey found that more than 26% of respondents had a material number of clients (more than 25% of total clients) with SARS disputes. It would appear that the majority of the disputes relate to personal income tax followed by VAT.
13. With respect to MIB, 86% of businesses have in-house resources to deal with disputes and sometimes they employ both internal and external resources in this regard. Reasons cited for use of external resources include complexity of issues in disputing, the frustrating process and the time taken to resolve disputes.

C. EXECUTIVE SUMMARY OF FINDINGS

14. We set out below the collective experiences of SAICA members who participated in the request for comments and have attempted to identify the trends/areas with respect to SARS' disregard of timeframes in terms of the Rules.
15. We have identified the following main aspects or challenges that may be of concern in a particular trend/area, namely:
 - 15.1. Insufficient reasons for the assessment provided, even after a specific request for reasons is submitted;
 - 15.2. Delays in making a decision on objections lodged;
 - 15.3. Objections are considered invalid without adequate reasons provided, in many instances resulting in multiple submissions of the objection with no option to appeal until the objection is considered 'valid';
 - 15.4. Objections are disallowed without adequate reasons therefore affecting the taxpayer's ability to formulate a reasonable appeal;
 - 15.5. Delays in informing the taxpayer as to whether a matter referred to the alternative dispute resolution (ADR) process is considered suitable for that process; and
 - 15.6. Lack of communication throughout all steps in the dispute process.
16. We do, however, acknowledge that in certain instances, as discussed with SARS, taxpayers and/or tax practitioners contribute to what may be perceived to be the SARS' disregard of the Rules by not complying with timelines in respect of submission of documentation requested and incorrectly completing related dispute forms, or not providing enough detail regarding the grounds for the dispute.
17. However, as conveyed to SARS, it cannot incorrectly use the rules to compel taxpayers to comply and must use the remedies provided in law, which there are various. For example, SARS should not be declaring an objection invalid under the rule 7(2) formality provisions where taxpayers don't provide the supporting documentation but must request the documents under rule 8 and thereafter disallow the objection or SARS should apply to the Tax Court under Rule 56 for a default judgement or compulsion order.



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D. SPECIFIC SURVEY FINDINGS AND CONCLUSIONS

Request for reasons

Findings

18. In terms of Rule 6 of the Rules, a taxpayer who is aggrieved by an assessment, may request reasons for that assessment within 30 days of the date of assessment, extended to 45 days where a SARS official approves of such extension.
19. Where SARS believes that “*reasons that enable the taxpayer to object*” have been provided, this must be communicated to the taxpayer within 30 business days of delivery of the request for reasons. Where the reasons provided are not considered sufficient to enable the taxpayer to formulate an objection, SARS must provide reasons to the taxpayer within 45 days of delivery of the request.
20. Based on the results of our survey, **77% of respondents** have noted that prior to commencing with the dispute process, a **request for reasons** is submitted.
21. This is indicative of a lack of clear reasons from SARS to taxpayers as to why an assessment has been altered. It should be noted that section 96 of the TAA compels SARS to provide grounds of assessment (i.e. reasons) for all assessments that are not fully based on a return submitted by the taxpayer, for example additional assessments like reconciliation assessments, audit or verification assessments based on other evidence etc.
22. For the 23% of respondents who do not request reasons for assessments, **59%** do not do so as on the basis that they **believe that they will not in any event receive a response from SARS** and hence proceed directly to lodge an objection.
23. This apathy towards the process is, in our view, symptomatic of taxpayers perceiving the process as ineffective.
24. Some are of the view that the reason for the adjustment is apparent from the assessment and hence object without requesting reasons, whilst others believe that the time taken to request and await reasons will delay the dispute process and will not be supported by their clients in this regard.
25. In some instances, the option to request reasons is not available on eFiling. Though the law has a single process, SARS have, over the years, implemented differentiated dispute processes for various tax types which has been quite problematic.
26. For those who do request reasons, 50% of the respondents have experienced SARS not responding at all to the request. In 24% of cases, SARS refers the taxpayer to other SARS correspondence which SARS believes sets out adequate reasons for the assessment and only in 21% of cases, SARS issues reasons within 45 days of delivery of the request.
27. Where SARS refers taxpayers or tax practitioners to other correspondence setting out reasons, in many instances, this correspondence may not be found on the eFiling profile and/or has not been received by post, which SARS strangely still uses for eFiling taxpayers.



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It is only on enquiry with the Contact Centre or SARS branch that one is able to access such correspondence.

28. What is concerning is that even where the reasons are provided, 83% of respondents note that the reasons are only sometimes or not at all sufficient to enable them to formulate an objection.
29. Many respondents have found the SARS response to be vague or generic, with a large number commenting that it would appear that the SARS staff dealing with the issue are not competent enough to understand the reason for the adjustment and do not provide justification in terms of the relevant tax legislation as to why the adjustment/s were made.
30. The reasons in many instances are one liners which seem to have been chosen from a drop box of pre-determined responses.
31. The lack of clear reasons leads to a delay in the dispute as one would need to employ other means to identify the reasons – either following up via the Contact Centre or branch – before the taxpayer is enabled to formulate an objection.

Legal challenges

32. In the instances where SARS either provides no reasons for the assessment or inadequate reasons, or reasons that do not appear to be supported by the relevant legislation (where this is referred to), it is difficult for the taxpayer or tax practitioner to adequately formulate their grounds of objection or refute SARS views as to why the assessment was raised. Should SARS respond to the objection with completely different views as to why the assessment was raised, this would result in the respondent having to formulate new grounds of objection which is not efficient or effective in dealing with these matters.
33. Furthermore, if there is no opportunity to further engage before SARS makes a decision on an objection and the next step is to lodge an appeal, this may result in an amendment to the grounds of the objection. In terms of Rules 10(4) and (5), this requires further documentary evidence to be submitted to validate any amendments to the grounds of objection (as compared to the initial objection lodged) and adds to the dispute process. This may also affect the taxpayer's chance of success in the dispute.
34. SARS have also taken a peculiar interpretation as to what "reasons that enable a taxpayer to prepare an objection" means.
35. When SARS changed the dispute rules in 2014, the constitutional aligned wording of "adequate reasons" was deleted and replaced with "reasons that enable the taxpayer to formulate an objection".
36. SARS interpret this to mean that they don't have to comply with the constitutional requirement to provide the rationale for their decisions in terms of the dispute rules and that taxpayers should use the Promotion of Administrative Justice Act, 2000 to request such rationale.
37. This over complicates the dispute process.



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38. SAICA has made a submission to SARS in 2018 on why we disagree with this approach in law and why we believe SARS have confused the rationale of decisions with rationality thereof. We attach such submission in **Annexure B**.

Process challenges

39. Some of the explanations for not requesting reasons include that the request is not always available on the eFiling platform.
40. Submitting the request manually could result in such request being 'ignored' and the timeframe to submit the objection may pass whilst the taxpayer or tax practitioner is awaiting a response to the request for reasons. It may only be realised on follow up that the request was not 'received' by SARS and one would then need to prove exceptional circumstances for submitting a late objection.
41. There is a perception that the SARS system does not allow more than a certain number of lines of the letter of assessments, hence resulting in generic 'reasons' being provided due to system functionality not supporting more detailed input.
42. For certain types of audits, giving rise to relevant assessments, separate letters providing reasons are generated, but these are not issued via eFiling and it is only when calling the Contact Centre or visiting the SARS branch that one is able to attain such letter/correspondence. In our view, given that the assessment is issued via eFiling, related correspondence should be made available on the same platform to ensure immediate access to such without necessitating further follow up by relevant persons.
43. The narrow application of the IT system poses process challenges on SARS officials.
44. The system issues affecting one's ability to submit a request for reasons online (in certain instances) is a process challenge but directly affects the taxpayer's ability to use the legal remedies. As noted in the Southern Region Operational Stakeholder meetings in 2018, if the SARS system prevents a valid objection from being delivered to SARS, then effectively the taxpayer has no right to dispute tax assessments.
45. SARS providing reasons via channels other than eFiling where such correspondence can't reasonably be expected to reach the taxpayer or practitioner timeously is a further challenge and is inefficient, in our view.

Time taken to respond to objections

46. Of the respondents who do dispute assessments, 86% have noted that these are lodged timeously – i.e. within 30 days of the assessment. A small percentage requests condonation for a period not exceeding 30 days of the due date for the objection with an even smaller percentage requesting an extension due to exceptional circumstances. It can be concluded then that the vast majority do not attempt to intentionally delay the dispute process.
47. It would appear from the responses, that in 46% of cases, SARS does not comply with the timeframes with regards to making a decision in respect of the objection lodged. In the rest of the cases, the decision appears to be timeous taking into account those situations where further documentation or an extension is requested.



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48. It is unclear as to why there is such a large incidence of non-compliance by SARS. During our National Stakeholder engagements with SARS, the issue of delays with the dispute process is often raised, with no resolution reached regarding how this will be addressed. In some instances, SARS has attempted to refute the suggestion that delays in processing objections is endemic. However, it is clear from the results of the survey that delays are prevalent given the high incidence of SARS not responding with the relevant timeframes as set out in the Rules.
49. It is also concerning that this practice of non-responses or delays beyond what is legally allowed would not just be a service delivery challenge, but in effect transgressions of the law.

Process challenges

50. Where SARS does not respond at all to the objection lodged, it is difficult to ascertain the reasons for the delay. There is no mechanism to identify the status of the objection other than a call to the Contact Centre.
51. Whilst the objection remains undecided, this sometimes affects the tax compliance status of the taxpayer on the basis that the amount due in terms of the additional assessment is required to be paid even before the dispute is finalised.
52. Furthermore, whilst there is an option to request a suspension of debt in terms of section 164 of the TAA, based on the experience of members, these requests are not processed timeously giving rise to requests for tax clearance certificates being denied and in some instances, payment is effected from the taxpayer's bank account by third party agents.

Communication challenges

53. SARS does not sufficiently communicate as to why the processing of an objection is delayed, leaving taxpayers or tax practitioners to follow up via the Contact Centre or branch.

Multiple requests for documentation

54. In rare instances (**6%**), SARS have requested supporting documentation prior to making a decision on the objection lodged and in some instances, SARS requests an extension on the basis that they needed more time to review the information or need additional documentation prior to making a decision.
55. With respect to those instances where SARS requested supporting documentation, **89%** of members responded that **SARS already had such documentation** in their possession.

Process challenges

56. There seems to be an issue with data integrity in that information submitted appears to be 'lost' at some point. Hence the multiple requests for the same documentation.
57. This is worrisome that documents submitted cannot be accessed or found by subsequent SARS officials in the dispute process. It also creates considerable delays in the process and additional wasted cost to taxpayers when they have to resubmit information.



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58. We are aware of SARS' view that in some instances, the taxpayer does not provide all of the information requested and therefore there is a further request for the same documentation.
59. From a system perspective, the system also has limitations in that it is sometimes impossible to specify the documentation required and hence a generic letter is submitted, seemingly requesting the same documentation. It would appear that the onus is then on the taxpayer or tax practitioner to enquire as to what the additional documentation requirement is, by calling the Contact Centre or visiting a SARS branch.
60. In some instances, a specific letter may be issued, but this is only discovered on a visit to a branch or by calling the Contact Centre.
61. Whilst we acknowledge that some members may be at fault by not responding to requests for information timeously, in those instances where documentation has been submitted, the multiple requests for what appears to be the same information is a waste of time and resources.
62. Even if the SARS system does not allow the generation of a letter specifying the documentary requirements, it should be required that the staff member requesting additional documents create a separate document specifying the requirements, such document to be distributed together with the 'generic' letter.
63. Furthermore, the SARS system should send notifications to the taxpayer or tax practitioner alerting these parties to the new request.

SARS not communicating a decision timeously

64. As noted earlier, **46% of respondents** who lodged disputes noted that SARS did not respond within the specified timeframes, as per the Rules, regarding the outcome of the objection.
65. The vast majority or **87%** indicate that where timeframes are not adhered to, **SARS provides no reasons for the delay**.
66. In some instances, resorting to using the complaints management system seems to prompt feedback from SARS.
67. Whilst one option may be for the taxpayer to make an application in terms of Rules 52 or 56 of the Rules, this could be a costly and time consuming exercise and there is often hesitation in following this route as can be seen from the fact that only **3% of respondents** have chosen this option when SARS have not complied with relevant timeframes.

Invalid objections

68. In terms of Rule 7(2):

'A taxpayer who lodges an objection to an assessment must -

- a) complete the prescribed form in full;
- b) specify the grounds of the objection in detail including-
 - (i) the part or specific amount of the disputed assessment objected to;



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- (ii) which of the grounds of assessment are disputed; and
 - (iii) the documents required to substantiate the grounds of objection that the taxpayer has not previously delivered to SARS for purposes of the disputed assessment;
 - c) if a SARS electronic filing service is not used, specify an address at which the taxpayer will accept delivery of SARS's decision in respect of the objection as well as all other documents that may be delivered under these rules;
 - d) sign the prescribed form or ensure that the prescribed form is signed by the taxpayer's duly authorised representative; and
 - e) deliver, within the 30 day period, the completed form at the address specified in the assessment or, where no address is specified, the address specified under rule 2.'
69. According to Rule 7(4), where a taxpayer delivers an objection that does not comply with the requirements of subrule (2) noted above, SARS may regard the objection as invalid and must notify the taxpayer accordingly and **state the ground for invalidity** in the notice within 30 days of delivery of the invalid objection.
70. In ongoing engagement with members, SAICA has identified that in certain instances SARS seemed to issue a decision of an invalid objection whereas members felt that the reasons provided for invalidating the objection is more aligned with a disallowance as it was not a ground specified in Rule 7(2).
71. Based on the survey results, **34% of respondents** noted that the majority of objections lodged (i.e. more than 50%) were not accepted by SARS on the basis that the **objections were invalid**.
72. On further enquiry, it would appear than just over **25% of respondents** were of the view that the objection was considered invalid by SARS for reasons other than that set out in Rule 7(4).
73. It would seem that where the issue is not non-compliance with Rule 7(2), the most common reasons for the objection being considered invalid is set out below:
- Source codes incorrect on objection form and it is not possible to amend these, therefore the objection may be submitted using incorrect source codes
 - No reasons are provided other than to note that it is invalid
74. Where there is non-fulfilment of a documentary requirement, some respondents have noted that the correct documentation is provided. However, there is a perception that the SARS official reviewing the documents may not review in detail everything that has been provided.
75. In some instances, after repeated requests for the same information (which is submitted each time), the assessor then starts requesting other documentation (not previously requested) after having made the decision that the objection was invalid based on what has already been provided.

Legal challenges

76. Where the reasons provided for an objection being considered invalid is more akin to a disallowance, this prevents the taxpayer access to lodge an appeal as they find themselves



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in a constant cycle of resubmitting objections in order to address the 'invalidity' of that already submitted.

- 77. This then also prevents access to resolution via the alternative dispute resolution (ADR) process where the matter may actually be resolved more efficiently.
- 78. It is unclear as to whether objections are being considered invalid due to non-compliance with Rule 7(2) or if there is an intention to delay the matter being subject to appeal.

Disallowed objections

- 79. On average, it appears that a smaller percentage of members have objections disallowed by SARS.
- 80. Given the complaint that objections are considered invalid (for the wrong reasons) rather than being disallowed, this may have a bearing on these results.
- 81. Regarding communication of the disallowance, the vast majority is communicated electronically via eFiling or email.
- 82. There are instances (8%) where members claim that they have received no notification of the disallowance.
- 83. It is concerning to note that **78% of respondents** find that the reasons for disallowing the objection are insufficient and/or appear to be **generic and automated**, with no reference to the facts and circumstances or the relevant law and how such law was applied in the circumstances. In these cases, the SARS response does not provide adequate reasons to formulate an appropriate and concise appeal.
- 84. Some members note that the generic reasons provided as reasons for the assessment are provided again as reasons for disallowance of the objection which gives the impression that no consideration was given to the arguments presented or documentary evidence submitted.
- 85. In order to obtain more detail, one is required to call the Contact Centre or visit a SARS branch and these do not always cast more light on the issues at hand.

Legal challenges

- 86. Without being provided with reasons that enable a taxpayer to formulate an objection against the disallowance, it is very difficult to formulate an appropriate appeal. This would further disadvantage the taxpayer in the legal dispute process and is highly prejudicial to affected taxpayers.

Appeal and ADR

- 87. When an appeal is submitted, **66% of respondents** indicated that they have requested that the matter be referred for ADR.



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88. It appears that in majority of cases, **(78%) SARS responds more than 60 days after delivery** of the appeal, as to whether or not the matter is fit for ADR. This far exceeds the 30 days response timeframe.
89. **No reasons** are being provided for the delay in responding, in **80%** of the cases. In certain instances, SARS provides as a reason the fact that there is a backlog of tax disputes which seems reasonable given the lack of capacity of skilled staff within SARS, to review disputes.
90. In most instances, the taxpayer is notified of the matter being referred to ADR via electronic means – email or eFiling.
91. Quite a large percentage of members indicated that they received no notification of the referral (16%).
92. SARS maintains that there is no problem with the system and they use their personal experience as an example that the system is working. SARS have also indicated that they believe that taxpayers and/or tax practitioners may not receive notification if they do not update their details as they should be. They are of the view that eFilers update details only on the annual tax return and not the RAV01 form. In this way the system is not updated and therefore notification is sent, but to outdated contacts.
93. Members have pointed out that despite updating information on the various prescribed platforms, they have still experienced information being sent to an outdated address or not at all.
94. With respect to those cases that were referred to ADR (based on the experience of the respondents who participated), **64% indicated that these were resolved outside of the prescribed timeframes.**
95. It is again concerning that there is a high incidence (77%) of no reasons being provided for the delay with a small percentage of delays (9%) related to lack of SARS resources – namely lack of availability of senior SARS legal officials.
96. With respect to those matters referred to the ADR, **58% of respondents** noted that disputes were settled by the ADR process **less than 50% of the time.** Therefore, the success rate also seems to be relatively low.
97. At the last National SARS/RCB Stakeholder Meeting held in November 2018, one of the issues on the list of top priority agenda items included the perception that there was inadequate segregation of duties at SARS. Concern was raised specifically regarding the undue influence that members perceived auditors to have over the ADR committee and the ADR process. Unfortunately, this was not part of the survey, but may be an issue to pursue.

CONCLUSION

98. SAICA again reiterates that a collaborative approach in addressing complex problems which have to balance fair procedures with increased fraudulent activity (i.e. protecting the fiscus) is best suited in seeking amicable solutions.



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99. Many of the above matters have arisen over many years and represent a conflation of old practice, new laws and systems.
100. Though we cannot condone any practice that undermines the fiscal legal framework or any practices that seek to frustrate it, which needs to be addressed, SARS should during this process be acknowledged for its continual good work in refining its processes and systems in challenging circumstances and its willingness to engage with stakeholders to address challenges.