

Ref #:
Submission File

20 February 2017

Ms F Bhayat & Ms I Botha
The Director-General: Justice and Constitutional Development
Private Bag X81
Pretoria
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BY E-MAIL: fbhayat@justice.gov.za
inbotha@justice.gov.za

Dear Ms Bhayat and Ms Botha

COMMENTS ON THE DRAFT CODE ISSUED IN TERMS OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT, 3 OF 2000

INTRODUCTION

1. We welcome the opportunity to comment on the final updated draft Code of Good Administrative Conduct ("the draft Code") that will be issued in terms of section 10(5A) of the Promotion of Administrative Justice Act 3 of 2000 ("the PAJA").
2. The Code has been outstanding for a considerable amount of time and we are pleased that the Department of Justice has now addressed this matter, given that section 10(6) PAJA envisaged 28 February 2009 as the latest issue date.
3. This alignment is a longstanding public concern in ensuring that government across all levels and entities are better informed of how they need to implement and consider PAJA in their actions to ensure that PAJA is experienced as effective by all citizens.
4. We have centred our comments around Good Administrative Conduct ("GAC") in the context of the South African tax administration system as implemented by the South African Revenue Service ("SARS"), through the Acts administered by the Commissioner, most specifically the Tax Administration Act 28 of 2011 ("the TAA").

COMMENTS

Defining Good Administrative Conduct

5. At the outset, GAC is described in the draft Code as conduct that follows the Constitution, the law and policies of the government that are designed to ensure:
 - a. Responsiveness to the needs of the society;

- b. Fair and rational decision-making;
 - c. An accountable and transparent public administration;
 - d. Public participation in decision-making; and
 - e. Speedy, simple and cost-efficient service delivery.
6. While we fully agree with the stated objectives of a code of conduct, we consider that in practice the code needs to translate into public (i.e. transparency) enforceable minimum standards of behaviour against which compliance is measured (accountability).
7. The draft code should focus more on putting these ideals into practice.
8. By way of example, while it is recognised that SARS has progressively improved some of its tax administrative procedures, it is often difficult for taxpayers to obtain the required level of transparency of the steps taken by SARS that affect taxpayer rights and legitimate expectations or to receive the required notifications from SARS regarding procedural steps to be taken particularly in the area of tax disputes, where these rights and expectations are often adversely affected.

9. Submission: It is submitted that the draft Code must set out the manner and timelines in which administrators must be educated how their actions and behaviour must be adapted to ensure that the minimum behavioural standards demanded by the GAC are achieved. This requires that specific measures of conduct must also be stipulated to ensure a uniform application for all administrators and timelines for those government institutions to review, align, implement and inform the public.

Code of conduct and not guidance

10. Whilst it is stated that the draft Code must serve as guidance, this statement in our view waters down the real purpose of providing a more comprehensive and conclusive minimum set of standards for administrator behaviour as required by section 10(5A). This by law remains a Code of Administrative Conduct and not just guidance which administrators can choose whether to follow or not, they are compelled to implement its principles.
11. Administrators must be required, and not merely be encouraged to issue specific procedural guidelines for the benefit of their staff (internal focus) and the persons whose rights are potentially affected (external guides). As this is a Code of Conduct by law and not a guide, its implementation should be compulsory with stated maximum implementation time periods.

12. Submission: We submit that further work on the draft Code is required to develop a clear set of minimum behavioural standards and to clarify that it is not optional for administrators to follow the GAC.

13. Consideration must in our view be given to include specific action that may be taken against administrators that do not adhere to the minimum standards required of them.

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| 14. | We further submit, considering that the complexity of the legal disciplines covered by the draft Code, including constitutional law, administrative law and more specifically tax laws and potential adverse impact on taxpayer rights and legitimate expectations, more comprehensive Code is required to deal meaningfully with these complex issues and to establish a uniform code of conduct for administrators. |
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No reference to relevant case law.

15. As a general observation on the draft Code, we submit that it is regrettable that the draft Code does not rely on the vast body of case law in point developed, considering that such case law not only contains the fundamental legal principles but lends legal certainty to the minimum behavioural standards demanded from administrators.

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| 16. | <u>Submission:</u> The draft Code must in our view be expanded to incorporate and reflect the principles established through case law. |
| 17. | We further submit that case law in point must be relied on in the examples used to clearly demonstrate to administrators what is required of them. It also provides a useful guidance as to how the courts will analyse whether a relevant administrator has met its Constitutional obligation. |

No reference to legitimate expectations.

18. We note that the draft Code makes no reference to the required conduct of administrators to ensure that legitimate expectations are not adversely affected.
19. For example where a SARS official communicates to a taxpayer that a particular step in a dispute process will ensue, the taxpayer acts on the expectation created and the SARS official subsequently takes another step not communicated and which adversely impacts on the taxpayer.

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| 20. | <u>Submission:</u> While it is acknowledged that dealing adequately with legitimate expectations, both from a substantive and procedural perspective, makes for a complex legal topic, we consider it imperative that this is dealt with in the draft Code and that at least some attempt is made to cover the ground on the underlying principles and the required minimum standards of behaviour. |
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CHAPTER 1

General information about good administrative conduct

21. We fully support the purpose of the draft Code to set minimum standards for procedures followed by administrators, which would include SARS officials.
22. Given the draconian nature of SARS' powers, application of fair procedure under PAJA is even more critical.
23. We furthermore support the view that all the steps leading up to a final decision must be included in the test to determine that the entire administrative decision-making process results in final decisions that are lawful, reasonable, procedurally fair and in line with constitutional values. In this regard, we fully support the notion that administrative action

must be justifiable in relation to its impact on the affected person (reasonability test), that it must make sense having regard to the information which was before the administrators and the reasons given for the administrative action (rationality test), that it must be authorised by legislation (lawfulness test) and that persons affected by administrative action are consulted before decisions are taken and must be given information about decisions made (procedural fairness test).

24. We value the emphasis by the draft Code of the importance of the Constitutional values, including references to section 33 (requiring just administrative action) and section 195 (requiring administrators to observe democratic principles) as well as reference to fundamental government initiatives, including the reference to the “Batho Pele White Paper”. This emphasis in our view contribute to establishing the overall objective of GAC.
25. The draft Code furthermore serves as a reminder to administrators that PAJA must specifically be considered in all administrative decision-making that has an adverse external effect. We note that this is an aspect often overlooked by administrators and in our experience, SARS faces specific challenges in this regard.
26. By way of example, in tax disputes with SARS, taxpayers are often required to set out the principles regarding fair administrative action and the need for a balanced approach. In many instances where tax disputes are conducted in such a manner that is contrary to these principles, it seems unclear whether the SARS officials are even aware of the principles underlying procedural fairness and whether they have received any training their obligations and on applying the relevant principles.

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| 27. | <u>Submission:</u> We would recommend that the importance of these aspects are addressed in more detail, namely that it must be set as a minimum standard that administrators must clearly demonstrate in their conduct the fact that they grasp the relevance of the underlying constitutional principles and clearly demonstrate how they are taking this into account in their conduct. |
| 28. | It may also be product that senior administrators are obliged in terms of the Code to empower the administrators under their control to be aware of their obligations and how to apply the principles of the code. |

CHAPTER 2: ADMINISTRATIVE ACTION

Overall over simplicity in approach

29. We note that one of the shortcomings of the draft Code is that the approach followed in explaining the minimum standards of behaviour and the examples used are considered to be over-simplistic.
30. Whilst we agree for example with the statement on page 3 in the preface to the draft Code that it is not a legal textbook and that administrators must seek legal advice in difficult cases, our sense in reading the draft Code is that the overall minimum standards may be described in over-simplistic terms and therefore does not adequately clarify the desired behaviour required for administrators.

31. In this regard it is akin to an employee code of conduct, which should set principles but also sufficient content to enable the employee to measure his or her conduct against it.

32.	<u>Submission:</u> The draft Code, in setting out the minimum standards of behaviour required from administrators must go further than merely rehashing the high level constitutional principles but provide sufficient guidance to enable administrators to actually apply it in their daily interactions and processes.
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Examples over-simplistic

33. In this regard the examples, such as those used in Chapter 2, page 13 and 14, are over simplistic and therefore do not add sufficient value in terms of explaining the required minimum behavioural standards to administrators.

34. An example should have sufficient factual, legal and rationality explanations to enable the administrator to associate his or her conduct to it.

35.	<u>Submission:</u> Given that this draft Code should enable administrators to measure their conduct and procedures against it, the examples used in the draft Code in our view have to be developed with due regard to the complexities involved.
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36.	The examples must therefore be expanded to demonstrate a considerably wider variety of approaches in applying the underlying principles.
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Failure to take a decision

37. The draft Code sets out in clear terms the various components of what constitutes administrative action that may potentially be taken on judicial review by a taxpayer, including the failure to take a decision (page 12).

38. However, the latter is an area that has not received much attention, and which adversely impact rights and legitimate expectations of taxpayers on a regular basis.

39. In the tax environment, failure to take decision within either reasonable time periods or within those time periods prescribed by law poses a significant challenge.

40. For example, where SARS omits to take a decision to pay a refund to a taxpayer, where no justification exists for such omission, this adversely impacts on the rights of a taxpayer. There are no prescribed time frames in the Tax Administration Act, 28 of 2011 ("the TAA") for paying a refund or for notifying taxpayers why the failure occurred, and without any minimum standards set for taking a decision. This, as has been our member's experience, opens up the process to arbitrary application. The only remedy for a taxpayer is to pursue a time consuming and costly judicial review process.

41. The failure to take a decision where there are prescribed time periods is also very problematic. For example though SARS are compelled by law to respond to a request for reasons under the section 103 tax dispute rules or to make a decision on an objection, these time lines are rarely complied with.

42.	<u>Submission:</u> A minimum behavioural standard should propose that set timeframes should be provided to the public in the absence of a specific legislative provision (i.e. what would
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be a reasonable time period for the given action) and it should also set out at least some of the factors that must be taken into account to ensure that reasonable, rational lawful and procedurally fair time frames are adhered to in all instances. Where there is deviation, a set reasonable time period should be made public by the administrator to inform the person why such deviation occurred and what the deviated time period will result in.

43. Furthermore, where legislation does impose specific time frames, the Code should clearly note that failure to adhere should result in corrective or punitive action by management to ensure that administrators are held accountable for fair administrative actions.

When is a decision taken for purposes of administrative action?

44. On page 12 of the draft Code, mention is made of the list of steps that need to be taken before it can be said to be a “decision” which would be the subject matter of the “administrative action” was taken.. The list is as follows:
- a. An application, request or claim has been addressed to the authority by a subject;
 - b. all the relevant information must have been gathered and place before the authority who must make the decision;
 - c. there must have been an evaluating process where the authority considers all the information before him/her, identifying the relevant and irrelevant information and assigning a degree of significance to each component of the relevant information and has considered the relevant empowering provision;
 - d. a conclusion must have been reached in pursuance of the evaluation process; and
 - e. there must have been an exercise of the statutory power based on the conclusion reached.
45. We address in more detail our concerns with the first two listed items.

An application, request or claim has been addressed to the authority by a subject

46. A decision is defined in section 1 of PAJA as:

“Means any decision of an administrative nature, made, proposed to be made, or required to be made, as the case may be,”]

47. It is unclear whether decision required to be made requires an application, request or claim to proceed it being a decision.
48. For example the decision not to allow an expense or not to pay a refund.

49. Submission: We submit that this requirement must therefore be further expanded to clarify what is required from administrators in circumstances where there is seemingly no application, request or claim from the subject.

All the relevant information must have been gathered and placed before the authority who must make the decision

50. It is submitted that the obligation to gather information to enable a lawful decision lies with the administrator and not the subject.
51. Though providing the relevant information may be compelled or not by specific legislation, the obligation to be properly informed is on the administrator. This was clearly demonstrated in *SARS v Pretoria East Motors (Pty) Ltd* (291/12) [20140 ZASCA 91 (12 June 2014) where the court found that the SARS auditor cannot assess or disallow an expense on the basis that she doesn't know or understand. The obligation was on her to properly inform herself prior to issuing the additional assessment.
52. Furthermore, we also express concern with repetitive requests for such information or multiple subsequent requests where the initial request should reasonable served this purpose.

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| 53. | <u>Submission:</u> We submit that clarification should be given as to the obligation to be properly informed prior to taking a decision and the lack of information cannot serve as a cause for a negative decision as in the <i>Pta East</i> case. |
| 54. | Furthermore guidance should be given as to when repetitive request or repetitive requests following incomplete requests cross the Rubicon of fair administrative action. |

Evaluating process to be followed

55. The draft Code makes the following statement on page :
- There must have been an evaluating process where the authority considers all the information before him/her, identifying the relevant and irrelevant information and assigning a degree of significance to each component of the relevant information and has considered the relevant empowering provision.*
56. By way of an example, we find in practice that SARS officials do not clearly communicate how they conduct any evaluating process in deciding on which information they rely on and which information is considered irrelevant when they issue an assessment. There is accordingly no measure of transparency in their internal processes.

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| 57. | <u>Submission:</u> Administrators must be given detailed guidance of how an evaluation process must be approached in practice and the measure of information that must be provided to those whose rights and legitimate expectations are adversely affected. |
| 58. | Particular attention must be given to the reasonable time frames, especially in the absence of a specific legislative provision. |

A conclusion must have been reached in pursuance of the evaluation process

59. While an evaluation process in itself is of cardinal importance, we consider that an area that is lacking is the conclusions reached by administrators following on the evaluation process followed.

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| 60. | <u>Submission:</u> We submit that clear guidance must be given on the manner of documenting the conclusions and the level of transparency to be provided to those affected by the decision making. This includes guidance on informing persons affected of the conclusion and what constitutes reasonable time frames in this regard. |
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There must have been an exercise of the statutory power based on the conclusion reached.

61. It is not always clear from administrator behaviour whether there is sufficient clarity in the mind of the administrator that a statutory power had been exercised.

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| 62. | <u>Submission:</u> We submit that the measure of transparency required must in our view be clarified to illustrate the minimum standard of behaviour required. |
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CHAPTER 3: LAWFUL ADMINISTRATIVE ACTION

Sub-delegation

63. Considering the significant impact that the exercise of unlawful sub-delegation has on taxpayer rights and legitimate expectations (with reference to *Shuttleworth* case) it is important that this area is addressed in considerable more detail than the passing comment made on page 49 under 11.18.
64. Specific guidance must in our view be given as to the minimum standards that must be adopted by administrators. It will also be appreciated that if consideration is given to the remedies that may be relied on in an instance where sub-delegation results in a taxpayer's rights being adversely impacted, as this outcome may be important in providing the required direction to administrators.
65. We set out below specific examples in terms of taxpayer rights and legitimate expectations, which serve to demonstrate the issues accounted in practice.

Competent authority delegation

66. The TAA currently provides for a delegation of powers to the "competent authority" to carry out exchange of information procedures in terms of the relevant double taxation agreements. In an example, the competent authority appointed a SARS official who was not an employee of the competent authority to execute the exchange of information request, a procedure clearly reserved for the competent authority. It is important in a competent authority information request that the competent authority maintains independence from the revenue authority.
67. In another example, in a transfer pricing dispute involving a mutual agreement procedure ("MAP") the administrators seemed to be misconstrue the operation of the MAP process, which led to considerable time delays and costs for the taxpayer.
68. Delegated powers are in some instances unlawfully sub-delegated to SARS officials without there being any specific empowering provision.
69. More detailed guidance to administrators is required to clarify the minimum behavioural standards in this regard.

R&D approvals processes

70. In another example, the research and development (“R&D”) initiative between SARS and the Department of Trade and Industry (“DST”) whereby SARS will not for income tax purposes allow a deduction for the section 11D allowance for R&D expenditure until the DST has pre-approved the R&D it is considered that the pre-approval process may not be sufficiently transparent and it is difficult to discern whether the significant measure of delegation is lawful.
71. In terms of subsection 11D(11) a joint committee, comprising members appointed by SARS, national treasury and the DST must approve the R&D while the Minister of Finance may appoint alternative persons to the committee if any of the appointees are not available. This seems to be an overly broad delegation of powers with no minimum standard of qualification linked to membership of the committee, and no clear guidance on standing in the event of a judicial review.
72. Previous significant time delays in obtaining pre-approvals, has now been addressed by virtue of the recent changes to the section 11D allowance to enable taxpayers to claim the deduction despite these delays. While this amendment is welcomed, this still does not address the transparency or standing issues mentioned above. Preventing a delay in the first place is imperative for various reasons, but specifically for financial reporting purposes, but a taxpayer may not be able to avail properly of the judicial review process where it is not clear against which state institution proceedings should be instituted.
73. There is currently no specific process in place in the TAA whereby a taxpayer could intervene to expedite the pre-approval process through the said committee and in this way fundamental rights and legitimate expectations are potentially negatively impacted. While the draft is considered to be a step in the right direction to create awareness for and a commitment by administrators to adhere to be more transparent in carrying out these administrative decision making processes we consider that guidance in this regard should go considerably further to ensure efficient service delivery and administrative decision making.

Delegation of Senior SARS official powers

74. Most importantly is the delegation framework between SARS officials. Given that that the TAA allows certain decisions and powers only to be exercised by Senior SARS officials, understanding whether a power was delegated and legally so is critical.
75. This should be taken in context that SARS have to date still not issued a list of Senior SARS officials which effectively means that no one knows who their administrators are and when a delegation or unlawful execution of powers has occurred.

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| 76. | <u>Submission:</u> We submit that while the draft Code, which clearly sets out the need for adherence of principles of simple administration processes in general, we consider it important that a mechanism is created whereby specific institutions such as SARS are encouraged to be more forthcoming in the guidance they provide where rights and legitimate expectations are adversely affected. |
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Overlap of issues around lack of transparency and unlawful delegation

77. In a number of cases where transparency of decision-making is in issue, the question of unlawful delegation also arises and it is difficult for taxpayers to determine under which banner the issue must ideally be approached.
78. By way of example, the decision making process in an ADR process is frustrated by virtue thereof that the entire decision making function is delegated, without the required legislative provisions in place to so, to internal SARS committees. We consider it imperative that minimum behavioural standards must be set for administrators to ensure that both transparency and sub-delegation are adequately addressed.
79. Submission: it is submitted that the issue of sub-delegation is considered in considerably more detail and that minimum standards of behaviour and transparency by administrators are set at the hand of the underlying principles.

CHAPTER 4: FAIR PROCEDURE

Bias

80. With regards to the statement on page 19 that decisions must be made in an even-handed and impartial manner, the draft Code must expand considerably on this aspect to clarify the principles and minimum behavioural standards required.
81. The need to manage any perception of bias must also be addressed.
82. By way of example, in an ADR process the perception of bias is an issue which is often encountered in practice, especially since the facilitator is invariably appointed from a list of persons appointed by SARS. Tax administrators are not involved nor invited to be involved in the appointment of a facilitator and this invariably contributes to the perception of bias in the ADR process.
83. Submission: we submit that minimum behavioural standards must be set to manage the perception of bias.

Examples of fair process

84. We consider that the statement on page 20 of the draft Code that by following the right procedures will have a positive impact on service delivery and decision-making is too vague and require that the significance of this is pertinently addressed. We further consider that the examples of fair process on page 20 are too simplistic and require expansion to illustrate the circumstances. It seems that the example used suggests it is optional to follow a fair process, which is clearly not what is required from administrators.
85. Most examples used in the draft Code seems to evolve around tender processes.
86. Submission: We submit that while tender processes have in the past been the subject of administrative disputes, it is submitted that a wider variety of more complex processes must be used to demonstrate the principles and behaviour required.

Documentation of processes

87. We do not consider that enough attention has been given in the draft Code to the need for administrators to document the decision-making process.
88. While it is stated on page 25 that it is important to make notes, it is considered that the importance of proper documentation of the process must be emphasized with more certainty. The additional steps mentioned on page 25 must receive further attention to ensure that they are not considered to be mere optional steps. In this regard attention may need to be given to the circumstances in which they are most likely to apply and therefore to provide more clarity.
89. By way of example, in a tax dispute it may be relevant to the outcome of the dispute to determine what the procedures were that were followed by an administrator, and such information may potentially be requested from SARS in terms of the PAIA.
90. Where the procedures have not been properly documented a taxpayer's rights and legitimate expectations may be severely prejudiced.

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| 91. <u>Submission:</u> it is submitted that significantly more focus must be placed in the draft Code on the documenting of processes followed to also ensure that the documentation of a process is not merely incidental but is actually an imperative for all administrators. |
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CHAPTER 5: CONSULTATION PROCEDURES WHERE AN INDIVIDUAL IS AFFECTED

Use of templates

92. While mention is made of the importance of using template forms which cater for the mandatory steps, as this will enhance compliance by every administrator, we submit that the opposite is also true, i.e. templates provide reasons for administrators not to apply their minds.
93. In our view guidance should be clarified that templates are as guidance to the principles and not responses and rationality of decisions.
94. For example in practice it is found that SARS uses standard responses and effectively circumvent the requirement to provide adequate reasons both in terms of the rules and PAJA.
95. In many instances these prepopulated responses have no bearing on the decision taken even if it purports to do so. The template that SARS uses should not have prepopulated responses but rather guidance on the decision making process.
96. In this regard please consider relevant case law, including *Commissioner, South African Police Service v Maimela* 2003 (5) SA 480 (T) and *Nomala v Permanent Secretary, Department of Welfare* 2001 (8) SA BCLR 844 (E), where the court found the use of standard forms wholly unacceptable.

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| 97. <u>Submission:</u> We submit that the statement that standard forms must be used clarified as to how they are to be used in a decision making process to ensure that the requirements of a valid decision are met. |
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CHAPTER 6: CONSULTATION PROCESS WHERE THE PUBLIC IS AFFECT

Consultation procedures where public affected

98. The statements made on page 28 of the draft Code under 6.4 and 6.5 on the procedure to be followed do not in our view provide any guidance to an administrator and seems to leave the decision making process wide open.

99. Submission: We submit that due consideration must be given to consider specific examples to illustrate the thought processes to be followed by an administrator in ensuring that the correct decision making processes are observed.

100. We furthermore submit that more detailed guidance is also required on the factors to be considered in deciding on the appropriate procedure.

CHAPTER 7: REASONABLE AND JUSTIFIABLE DEPARTURES

Exceptional circumstances

101. Consideration must be given to provide guidance to administrators on what would constitute exceptional circumstances for uplifting the requirement of exhausting internal remedies.

102. This is an area of much uncertainty and in practice the tax administration is inclined to adopt an overly narrow approach, not having due regard to the Constitutional values and the purposive approach to statutory interpretation.

103. Submission: we submit that guidance on this must in our view aim to provide a more consistent approach to administrators in general.

CHAPTER 8: REASONABLENESS

104. An avoidable issue that routinely crops up in tax disputes is the question of the administrator not properly considering all the relevant facts and circumstances in taking administrative decisions. This inevitably results in lengthy drawn out processes and unnecessary disputes that are in any event set aside as a result of unreasonable conclusions drawn.

105. Under the heading of reasonableness on page 38 the draft Code very briefly makes mention of the requirement for an administrator to apply his or her mind to the matter.

106. Submission: we submit that considering the importance of this aspect, and very much so in tax matters, that considerably more attention must be given to provide proper guidance and to deal with the factors that must be considered in ensuring that an administrator conforms with this requirement.

CHAPTER 9: INFORMING PEOPLE OF THE DECISION

Communicating the decision

107. The emphasis placed on page 40 on the clarity required of communication with affected persons is valued.
108. However we do have concern that no guidance is given as to what would be seen as a fair communication procedure or practice i.e. does the administrator have to take reasonable steps to ensure that the taxpayers either receives or becomes aware of the communication?
109. For example in tax, SARS has adopted the practice and in fact aligned the law that adding documents to SARS Efiling, a government E-Service, is in fact a notification method.
110. This is applied notwithstanding that such method requires the taxpayer to log into SARS system as there is no other way of being informed. The use by SARS of SMS or email notification is seen as additional and not a legal obligation.
111. This in many instances leads to taxpayers not receiving communications timeously which directly impacts on taxpayer rights.
112. Furthermore, SARS may phone a taxpayer with an obscure request for information and merely leave a message without the ability to contact them about such request. On failure to respond to the obscure request, a detrimental action such as assessment may follow.
113. This approach therefore, if followed by all government administrators, would mean that there is no obligation on administrators to ensure effective communication, merely access to communication.

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| 114. | <u>Submission:</u> The citizen's right to a fair communication procedure should be explained and also what this entails. |
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CHAPTER 10: GIVING REASONS FOR DECISIONS

Giving reasons for decisions

115. We welcome and support the suggestion in the draft Code that there must be a rational connection between the decision and the reasons given. This is of particular relevance to SARS in the context of the reasons to be provided under the dispute rules made in terms of section 103 of the TAA.
116. We point out that apart from making a note of the reasons for the decision taken by an administrator as stated in 10.4 on page 42 of the draft Code, more importantly the administrator must in clear rational terms communicate the reasons for the decision to the person who's rights and legitimate expectations are adversely affected by the decision.

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| 117. | <u>Submission:</u> Considering that this is an area of administrative law which is in our view lacking in practice, we submit that significantly more attention must be given to the minimum standards of behaviour required, also with reference to relevant case law. In |
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this regard, we point you to Minister of Environmental Affairs and Tourism and others v Phambili and another [2003] 2 All SA 616 (SCA) and CSARS v Sprigg Investment 117 CC (36/10)[2010] ZASCA 172 (1 December 2010).

118. We submit that one of the practical issues that needs to be addressed in the context of a request for reasons is the distinction between the rationale of a decision (i.e. what connects the facts to the law which is important in dealing with a request for reasons), and the rationality of a decision (which is in issue in a judicial review process).
119. Administrators must be given due guidance on how to distinguish between different administrative processes and how to approach the various processes in practice.

Concurrent processes

120. We also express concern that government agencies introduce concurrent process to those in PAJA which undermines the purpose of PAJA.
121. For example SARS have amended the rules of the tax court in an effort to do away with adequate reasons as required in the Constitution and have attempted to replace the constitutional obligation with a lesser one, namely to enable the taxpayer to object.
122. This SARS argue in their Dispute Resolution Guide (relying on the Sprigg case) means they are not compelled to give the rationale for a decision as was previously required and that such requests have to be done under PAJA.
123. In our view this approach from SARS is misguided as all administrative actions are subject to the authority of the Constitution and PAJA is just one statutory embodiment thereof.
124. The approach is also non-sensical as it would mean that a taxpayer would have to submit an objection within 30 days without understanding why a decision went against him as constitutionally required and then follow a 90 day PAJA rational request after the fact i.e. after the intended corrective administrative action i.e. the objection process has been finalised.
125. Should this be the approach by government, it means all governmental agencies can create parallel processes whereby the offending administrative action can proceed without explanation while a PAJA process is used to just defer the process.

126. Submission: It is submitted that the Constitution did not envisaged contradicting parallel processes and all such alternatives must still conform to the Constitutional norm of facts, law and rationale for a decision.

127. We request that parallel process be expressly dealt with.

CHAPTER 11: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

Time frame for judicial review

128. It will be appreciated if guidance will be given on the remedies available to a person where the administrator frustrates the procedural time frame to access the judicial review process.
129. By way of an example, a taxpayer lodged an objection and SARS for an excessive period does not abide by the prescribed time frame to decide on the objection.
130. It cannot be said in these circumstances that the taxpayer has exhausted the internal remedies available as the next step in the process will be to agree to participate in the ADR process and to note an Appeal.
131. These steps cannot be initiated until such time that SARS has notified the taxpayer of its decision on the objection and this therefore creates significant procedural uncertainty as to when the judicial review process should be initiated, and any hesitation on the part of the taxpayer may result therein that the time frame for initiating a judicial review procedure is exceeded. Surely one cannot simply assume in this instance that the test of being in the interest of justice will be met. We will appreciate guidance on this.

132. <u>Submission:</u> we submit that minimum behavioural standards must be set and guidance will be appreciated on the point in time when a judicial review procedure should be initiated in these circumstances.

Extension of time frame to initiate judicial review

133. While provision is made for requesting extension of the time frame to initiate a judicial review procedure, this is clearly impractical where the time frame has already been exceeded.

134. <u>Submission:</u> We submit that attention must be given to the manner in which time frames for judicial review processes must be extended. Practical guidance and minimum standards must be set for administrators.
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Request for withdrawal of unlawful, unreasonable or irrational decisions as an alternative to judicial review

135. We request that more detailed guidance is given on the internal procedures to be followed to ensure that decisions are lawful, reasonable and rational.
136. While it is clearly understood that this serves as guidance/a minimum standard to administrators and not to taxpayers, it will nevertheless be useful if further consideration can be given to the real impact that failure to adhere to procedurally fair, lawful, reasonable, and rational administrative action has on the persons' rights and legitimate expectations.

137. <u>Submission:</u> We submit that particular attention must be given to deal with the circumstances in which decisions must or may be withdrawn, as an alternative remedy to judicial review to the extent that this will serve the objective of efficient service delivery.

Guidance must include some consideration of the factors that an administrator must consider to decide on a request for withdrawal on grounds of unlawfulness irrationality or unreasonableness.

138. We further submit that a request for withdrawal should be competent in any case of unlawful decision making, even in the absence of a specific legislative provision. This aspect must please be clarified. This will also be in the interest of efficient administration and not spending time and resources on disputes based on unlawful administrative conduct.

CHAPTER 12: GOOD ADMINISTRATIVE CONDUCT PRACTICAL EXAMPLES

139. Submission: we submit, as stated above, that the examples must be expanded significantly to deal with the appropriate levels of complexity involved in applying the minimum standards of behaviour required from administrators.

140. Please do not hesitate to contact Pieter Faber at pieterf@saica.co.za or Christel van Wyk at christelvw@saica.co.za to discuss any aspect of this submission.

Yours faithfully

Pieter Faber
SENIOR EXECUTIVE: TAX
The South African Institute of Chartered Accountants

Christel van Wyk
PROJECT DIRECTOR: TAX