



SOUTH AFRICAN REVENUE SERVICE

INTERPRETATION NOTE NO.15

DATE: 18 June 2003

INCOME TAX

ACT : INCOME TAX ACT, 1962 (the Act)

SECTION : Sections 81(1), 81(2) read with section 107A rules

**SUBJECT : OBJECTION: EXERCISE OF A DISCRETION – LATE
OBJECTION**

1. Background

In terms of section 81(1) of the Act a taxpayer, who is aggrieved by any assessment in which such taxpayer has an interest, must lodge an objection against that assessment in the manner and within the period prescribed by the Act and the rules promulgated in terms of section 107A of the Act. Section 81(2) provides that the period within which an objection must be made, may be extended where the Commissioner is satisfied that reasonable grounds exist for the delay in lodging the objection.

Section 3(1) of the Act provides that the powers conferred and duties imposed upon the Commissioner by or under the provisions of the Act may be exercised or performed by him/her personally or by an employee engaged in carrying out those provisions under his control, direction or supervision. Employees of SARS, therefore, perform these powers and duties in order to carry out their daily tasks relating to the collection of taxes. The reference to the Commissioner in this note therefore includes an employee of SARS, to the extent that the employee has the delegated power to perform the functions.

An objection lodged against an assessment within three years of the due date is, as a rule, considered by SARS. This may have created a perception that SARS would, contrary to the provisions of section 81(2), as a matter of course condone an objection lodged out of time. This is not the case. Section 81(2) provides that the Commissioner may extend the period within which the objection must be made where he/she is satisfied that there are reasonable grounds for the delay in lodging the objection. The period of the delay should therefore be justified by the reasons for such delay.

The purpose of this note is to provide guidance as to the interpretation of the provisions of section 81(2) with reference to the exercise of a

discretion and to indicate what factors the Commissioner will take into account in considering whether a late objection may be condoned.

Various other tax Acts administered by the Commissioner have also been amended to provide that the objection and appeal procedures and rules relating thereto and the settlement circumstances as contained in the Income Tax Act, will also apply to any dispute in terms of those Acts. These Acts include the:

- Marketable Securities Tax Act, 1948 (Act No. 32 of 1948)
- Transfer Duty Act, 1949 (Act No. 40 of 1949)
- Estate Duty Act, 1955 (Act No 45 of 1955)
- Stamp Duties Act, 1968 (Act No. 77 of 1968)
- Value-Added Tax Act, 1991 (Act No. 89 of 1991)
- Tax on Retirement Funds Act, 1996 (Act No. 38 of 1996)
- Uncertificated Securities Tax Act, 1998 (Act No. 31 of 1998)
- Skills Development Levies Act, 1999 (Act No 9 of 1999)
- Unemployment Insurance Contributions Act, 2002 (Act No. 4 of 2002)

The Customs and Excise Act, 1964 contains its own provisions relating to dispute resolution.

The factors relevant to the exercise of the Commissioner's discretion as indicated in this note are therefore also relevant to the exercise of a discretion where objections have been lodged in terms of the provisions of the Acts listed above.

2. The law

Section 81(1) read with rule 4 of Part A of the rules promulgated in terms of section 107A, specifies that an objection must be delivered to the Commissioner within 30 days after the date of the assessment. This requirement is also reflected on the reverse side of an assessment notice in accordance with the provisions of section 77(5) of the Act. The aforementioned rule 4 provides as follows:

"A taxpayer who is aggrieved by an assessment may object to an assessment, which objection must –

- (a) be in such form as may be prescribed by the Commissioner in terms of section 65 of the Act;
- (b) be in writing specifying in detail the grounds upon which it is made;
- (c) specify an address at which the taxpayer will accept notice and delivery of the Commissioner's decision in respect of such objection and all documents in terms of the proceedings contemplated in rule 26;
- (d) be signed by the taxpayer: Provided that where the taxpayer is unable to personally sign the objection, the person signing

on behalf of the taxpayer must state in an annexure to the objection-

- (i) the reason why the taxpayer is unable to sign the objection;
 - (ii) that he or she has the necessary power of attorney to sign on behalf of the taxpayer; and
 - (iii) that the taxpayer is aware of the objection and agrees with the grounds thereof; and
- (e) be delivered to the Commissioner at the address specified in the assessment for this purpose, within 30 days after-
- (i) in the case where the taxpayer has requested reasons under rule 3, either the date of the notice by the Commissioner that adequate reasons have been provided or the date that reasons were furnished by the Commissioner, as the case may be; or
 - (ii) in any other case, the date of the assessment.”

'Delivered' in paragraph (e) above means-

- (a) handing the document to the relevant person;
- (b) sending the document to the relevant person by registered post;
- (c) telefaxing the document to the relevant person;
- (d) transmitting the document to the relevant person by electronic means; or
- (e) ...:

Provided that in the case of paragraphs (c) and (d), the original, signed document must be handed to that person or sent by registered post to that person within ten days of it being so telefaxed or transmitted by electronic means;”.

3. Application of the law

3.1 The notice of objection must reach the Commissioner's office within 30 days after the date of the assessment. The reference to “day” means any day other than a Saturday, Sunday or public holiday. The days between 16 December of a year and 15 January of the following year, both inclusive, shall not be taken into account in determining the days allowed for complying with the provisions of section 81(2) read with the rules promulgated in terms of section 107A.

3.2 An objection not lodged within the 30-day time limit, is in fact an invalid objection. It is only in the event that the objection complies with the provisions of section 81(1), with reference to the manner and terms, read with rules 4(a) to 4(d) above, that the Commissioner will exercise his/her discretion in terms of 81(2). The

Commissioner is, therefore, unable to entertain an objection which is not rendered in time; unless he/she is satisfied that reasonable grounds exist for the delay. The limitation of the period of time within which the objection must be lodged is of importance. In enacting time limits, it is the intention of the legislature that disputes should be brought to notice and resolved as speedily as possible so as to ensure the orderly administration of fiscal Acts and the collection of taxes.

- 3.3 There are no statutory guidelines in the Act as to how the discretion should be exercised. The Commissioner's decision must comply with the requirements for administrative justice which are contained in section 33 of the Constitution read with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000). In particular, the Commissioner's decision must be reasonable. For this purpose, the Commissioner is required to consider all relevant matters.

These would include matters such as-

- the prospects of success on the merits;
- the reasons for the delay;
- the length of the delay; and
- any other relevant factor, for example, the Commissioner's interest in the determination of the final tax liability in view of the broader public interest relating to budgeting and fiscal planning.

- 3.4 It is, however, important to note that despite the fact that these factors are relevant to the exercise of a discretion, they are neither all embracing nor individually decisive and each case must be considered on its own merits.

4. Factors relevant to the exercise of discretion

4.1 The prospects of success on the merits

The fact that an objection may have good prospects of success in the matter will be a factor that the Commissioner considers. However, the strength of the merits of the matter does not relieve the taxpayer from the obligation of furnishing acceptable reasons for the delay in lodging an objection. The validity of the grounds of objection is therefore not a decisive factor which is taken into account in determining whether a late objection may be condoned.

4.2 The reason/s for the delay

- 4.2.1 An objection lodged outside the 30-day time limit should, together with a request for the condonation thereof, state in full the actual circumstances and the reasons for failure to lodge the objection within the 30 day period as required by the relevant

provisions of the Act. Should reasons not be furnished, the Commissioner will not be in a position to exercise his/her discretion.

4.2.2 A late objection may be condoned by the Commissioner where the delay was caused as a result of circumstances beyond the taxpayer's control. Such circumstances would amongst others include a delay as a result of the illness of the taxpayer or his/her representative, the taxpayer being abroad at the time of the issue of the notice of assessment or postal delays. The taxpayer will, however, still be required to satisfy the Commissioner that the objection, under the specific circumstances, was lodged as soon as possible.

4.2.3 The time limit for the lodging of an objection is printed on the reverse side of an assessment notice. Ignorance of the law with regard to the period within which an objection must be lodged will therefore not be regarded as a sufficient reason for failure to comply with the requirements of the Act. Employing the services of a tax consultant or accountant does not absolve the taxpayer from his/her responsibility to comply with the provisions of the Act. Taxpayers should therefore ensure that the necessary action is taken to bring the dispute to the attention of SARS within the prescribed period of time.

4.3 The period of the delay

4.3.1 A taxpayer is required to furnish reasons for a delay in submitting an objection. The reasons should justify the period of such a delay and the longer the delay, the more convincing such reasons will have to be. The condonation of a late objection is not a right and it is therefore incumbent upon the taxpayer to substantiate the request for such condonation.

4.3.2 Where a taxpayer will not be able to formulate his/her grounds of objection within the required 30 day period, such taxpayer is advised to request an extension of time for submitting the grounds of objection before the 30 day time period expires. This would be the case where documentation/information required in order to formulate and/or substantiate the grounds of objection cannot be obtained within the prescribed time limit. The reasons for the delay should, however, be submitted together with the request for an extension of time.

5. Format of application

Before any reasons for a late objection will be considered, it is imperative that the taxpayer advances facts and arguments, supported by documentation, where necessary, as required in terms of rule 4. Due to the fact that the taxpayer seeks condonation for non-compliance with the requirements of the Act, an application for condonation will not

be regarded as having been filed in the absence of the necessary facts and/or documentation. The obligation to comply lies with the taxpayer and SARS bears no responsibility to make the relevant enquiries.

6. Refusal to grant condonation

Should SARS, after having considered the reasons furnished as to why an objection was lodged out of time, decide not to condone the late objection, the taxpayer may object and appeal against such a decision in terms of section 81(3) in accordance with the rules issued in terms of section 107A.

Attention is drawn to the recent Budget proposal that, in order to ensure finality and to be consistent with other SARS and commercial practices, the Commissioner's discretion, relating to the condonation of late objections, is to be limited to three years from the date of the assessment.

7. Condonation of a late appeal

Any taxpayer who is entitled to object to an assessment and who is dissatisfied with the decision of the Commissioner in terms of section 81(4) of the Act may appeal against that decision within 30 days after the date of the notice informing him or her of the Commissioner's decision in terms of section 81(4). The period of 30 days as prescribed by section 83 of the Act read together with the rules promulgated in terms of section 107A may be extended where the Commissioner is satisfied that reasonable grounds exist for the delay in noting the appeal.

It should be noted that the factors relevant to the exercise of a discretion in condoning a late objection are also relevant to the exercise of a discretion in condoning a late appeal. As indicated in paragraph 3.4, these factors are neither all embracing nor individually decisive and each case will be considered on its own merits.