

INTERPRETATION NOTE: NO.15 (Issue 3)

DATE: 10 July 2013

ACT : TAX ADMINISTRATION ACT NO. 28 OF 2011 (TA Act)
SECTION : SECTIONS 104, 106 and 107
SUBJECT : EXERCISE OF DISCRETION IN CASE OF LATE OBJECTION OR APPEAL

Preamble

In this Note unless the context indicates otherwise –

- “**assessment**” means an assessment as defined in section 1, namely, the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS;
- “**decision**” means a decision referred to in section 104(2);
- “**Income Tax Act**” means the Income Tax Act No. 58 of 1962;
- “**rules**” mean the rules made under section 103 of the TA Act;
- “**existing rules**” mean the “Rules Promulgated under Section 107A of the Income Tax Act, 1962 (Act No. 58 of 1962), Prescribing the Procedures to be Observed in Lodging Objections and Noting Appeals Against Assessments, Procedures for Alternative Dispute Resolution and the Conduct and Hearing of Appeals before a Tax Court” published in *Government Gazette* No. 24639 of 1 April 2003;
- “**section**” means a section of the TA Act;
- “**senior SARS official**” means a senior SARS official referred to in section 6(3);
- “**taxpayer**” means a taxpayer as defined in section 151; and
- any word or expression bears the meaning ascribed to it in the TA Act.

1. Purpose

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

2. Background

A taxpayer who is aggrieved –

- by an assessment made on the taxpayer; or
- by certain decisions made under the TA Act or tax Acts,¹

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

An objection against an assessment or decision must be lodged in the manner, under the terms, and within the period prescribed in the rules.²

A person whose objection has been disallowed may appeal to the tax board or tax court against that outcome and in such event the appeal must be lodged in the manner, under the terms, and within the periods prescribed in the TA Act and the rules.³

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

The TA Act came into operation on 1 October 2012 and incorporates into one piece of legislation certain administrative provisions that are generic to all tax Acts⁴ and administrative provisions previously duplicated in different tax Acts. The objection and appeal procedures as contained in the TA Act and the rules will therefore apply to any dispute under, amongst others, the following tax Acts administered by the Commissioner:

- Diamond Export Levy Act No. 15 of 2007
- Diamond Export Levy (Administration) Act No. 14 of 2007
- Estate Duty Act No. 45 of 1955
- Income Tax Act No. 58 of 1962
- Mineral and Petroleum Resources Royalty Act No. 28 of 2008
- Mineral and Petroleum Resources Royalty (Administration) Act No. 29 of 2008
- Securities Transfer Tax Act No. 25 of 2007
- Securities Transfer Tax Administration Act No. 26 of 2007
- Skills Development Levies Act No. 9 of 1999
- Tax Administration Act No. 28 of 2011
- Transfer Duty Act No. 40 of 1949
- Unemployment Insurance Contributions Act No. 4 of 2002
- Value-Added Tax Act No. 89 of 1991

The Customs and Excise Act No. 91 of 1964, contains its own provisions relating to dispute resolution.

¹ Section 104(2).

² Section 104(3).

³ Section 107(1).

⁴ The term “tax Act” is defined in section 1 and means the TA Act or an Act, or portion of an Act, referred to in section 4 of the SARS Act, excluding the Customs and Excise Act.

3. The law

For ease of reference, the relevant sections of the TA Act and existing rules are reproduced in **Annexure B**.

4. Objections

4.1 Section 104

A taxpayer who had the right to object or appeal against an assessment or decision under the repealed or amended provisions of a tax Act, and who was still entitled to but had not yet exercised that right before the commencement date of the TA Act, may object under the comparable provisions of the TA Act.⁵ The periods of time run from the date that the right or entitlement first arose, but subject to the provisions of the TA Act. Accordingly, if a longer period applies under the TA Act that longer period applies.⁶

Section 104(3) stipulates the requirements for a valid objection. It requires that the objection must be lodged in the manner, under the terms, and within the period prescribed in the rules.

Section 103(1) prescribes that, after consultation with the Minister of Justice and Constitutional Development, the Minister of Finance may by public notice make “rules” governing the procedures to lodge an objection and appeal and conduct the hearing of an appeal before a tax board or tax court. The existing rules previously promulgated under section 107A of the Income Tax Act apply until such time as new rules are finalised and published under section 103(1).⁷

Existing rules 4(a) to (d) deal with the manner and terms for lodging a valid objection. Existing rule 4(e) deals with the timing of the objection and provides that an objection must be delivered to the Commissioner within 30 days after –

- the date of the assessment or decision; or
- when the taxpayer has requested reasons for the assessment under existing 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.

A “day”, as defined in existing rule 1, means –

“a day as contemplated in section 83(23) of the Act”.

⁵ Section 269(5).

⁶ Section 269(5).

⁷ The term “rules of court” used in section 264(2) is an abbreviated reference to the rules published under section 107A of the Income Tax Act. Those rules include among other things the procedures for lodging objection and appeal against an assessment and are not restricted to the rules governing the conduct and hearing of an appeal before the tax court. Draft rules were published for a second round of public comment on the SARS website on 5 July 2013.

Section 83(23) of the Income Tax Act read as follows before its repeal with effect from 1 October 2012:⁸

“(23) Any reference in this Part and the rules to “day” means any day other than a Saturday, Sunday or public holiday: Provided that 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 days or the period allowed for complying with any provision in this Part or the rules.”

The definition of a “day” in the existing rules is the same as the definition of a “business day” in the TA Act. For the purposes of this Note the term “business day” will be used.

The “date of assessment”, in the case of an assessment issued by SARS, is the date of issue of the notice of assessment.⁹ For self-assessment see the definition of “date of assessment” in **Annexure B**.

An objection that is *not lodged* within the time limit of 30 business days is an invalid objection. Under section 104(4) a senior SARS official¹⁰ may extend the period for lodging an objection if satisfied that reasonable grounds exist for the delay in lodging the objection. The extension may be granted after the 30 business day period has elapsed or alternatively taxpayers can request an extension in advance of the expiry date of that period if aware that the deadline will not be met. The extension will run from the expiry of the 30 business days stipulated in the existing rules irrespective of when it is requested.

For example, a taxpayer may not be in a position to fully formulate and substantiate the grounds of objection within 30 business days because of outstanding information or documentation which will only be received after the expiry of that period.

The TA Act does not prescribe the manner in which the discretion to extend the period for lodging an objection under section 104(4) should be exercised. The senior SARS official’s decision must comply with the requirements for administrative justice which are contained in section 33 of the Constitution¹¹ read with the Promotion of Administrative Justice Act No. 3 of 2000. In particular, the Commissioner’s decision must be reasonable. Essentially, for a decision to be reasonable the Commissioner is required to consider all relevant matters. In considering the limitation of constitutional rights, the Constitutional Court held that there is no absolute standard which can be laid down for determining reasonableness and necessity and that, although principles can be established, the application of those principles to particular circumstances can only be done on a case-by-case basis.¹²

⁸ Section 83 of the Income Tax Act was repealed by section 271 read with paragraph 66 of Schedule 1 to the TA Act.

⁹ Before 1 October 2012 the term “date of assessment” was defined in section 1 of the Income Tax Act as the “due date” or if no due date was specified, the date of the notice of assessment. Generally the due date fell after the date of issue of the assessment.

¹⁰ Section 6(3) requires powers and duties exercised by a senior SARS official to be exercised by the Commissioner, a SARS official with specific written authority from the Commissioner or a SARS official occupying a post designated by the Commissioner.

¹¹ Constitution of the Republic of South Africa, 1996.

¹² *S v Makwanyane* 1995 6 BCLR 665 (CC), 1995 (3) SA 391(CC) at 436.

For the purpose of considering an extension to the period for lodging an objection, the senior SARS official is required to consider all relevant matters. These would include –

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

Despite these factors being 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.

4.2 Factors relevant to the exercise of the senior SARS official's discretion in considering a request to extend the period in which to lodge an objection

4.2.1 The reasons for the delay

A request for an extension of the period in which to lodge an objection must state the actual circumstances and the reasons for failure to lodge the objection within the time limit in full. Without detailed reasons being furnished the senior SARS official will not be in a position to exercise the discretion to extend the period in which to lodge the objection.

The period may be extended by the senior SARS official if the delay was caused as a result of circumstances beyond the taxpayer's control. Such circumstances may include, for example, a delay as a result of illness of the taxpayer or the taxpayer's 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 senior SARS official that under the specific circumstances the objection was lodged as soon as possible.

The following are examples of situations which will not be regarded as a sufficient reason for failure to comply with the requirements of the TA Act in submitting an objection on time:

- Ignorance of the law with regard to the period within which an objection must be lodged.
- Failure without good cause by the taxpayer's tax practitioner to lodge the objection on time. The use of a tax practitioner does not absolve the taxpayer from the responsibility of complying with the TA Act.

4.2.2 The period of the delay

In addition to the reasons for the delay (see **4.2.1**), the taxpayer must justify the period of the delay and the extension sought. The longer the extension the more detailed the justification and supporting evidence will need to be. The extension of the period for lodging an objection is not a right and it is therefore incumbent upon the taxpayer to substantiate the request for the extension.

4.2.3 The prospects of success on the merits

A senior SARS official will take into consideration the fact that an objection may have a good prospect of success. However, the strength of a taxpayer's case and the validity of the grounds of objection are not decisive factors and do not detract from the taxpayer's obligation to furnish acceptable reasons for the delay in lodging an objection.

In ITC 1777 Galgut DJP stated the following:¹³

"In an application to set aside a default judgment or for condonation of a party's failure to comply with a rule of court in time, our law requires the party concerned to show 'good cause' for his failure to take the necessary step timeously. To show good cause he must not only explain the reason for his failure. He must also show that he has a reasonable prospect of success on the merits of the litigation at issue; he must have what is called a *prima facie* case ... In these regards the reported cases establish the approach that the stronger the party's case is on his prospects of success, the more lenient the court will be in regard to the excuses for his default; and conversely, the weaker his explanation for his default, the stronger his prospects of success on the merits, in the abovesaid sense, must be."

4.3 Limitation on the extension of time to lodge an objection

Section 104(5) places a limitation on the extension of time that a senior SARS official may grant for the lodging of an objection. It applies with effect from the commencement of the TA Act on 1 October 2012. The extension of the period for lodging an objection is prohibited –

- for a period exceeding 21 business days (reckoned from the end of the 30-day period referred to above, in other words after 51 business days of the date of assessment or decision), unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay;
- if more than three years have lapsed from the date of the assessment or the decision; or
- if the grounds for the objection are based wholly or mainly on a change in a practice generally prevailing, which applied on the date of the assessment or decision.

The term "exceptional circumstances" is not defined for the purposes of section 104, but its ordinary meaning contemplates something out of the ordinary and of an unusual nature. In a criminal bail case the Constitutional Court was required to consider what constituted exceptional circumstances and stated the following:¹⁴

"In this regard I am not persuaded that there is any ... validity in the complaint raised ... that the term 'exceptional circumstances' is so vague that an applicant ... does not know what it is that has to be established. ... In any event, one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation. If something can be imagined and outlined in advance, it is probably because it is not exceptional."

Each case must be considered according to its own merits in order to determine whether the reason for requesting an extension of more than 21 days is exceptional and therefore justifies the requested extension.

¹³ (2004) 66 SATC 328 (N) at 333.

¹⁴ *S v Dlamini; S v Dladla & others; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC), 1999 (4) SA 623 (CC) at 669.

Section 218 lists what comprises exceptional circumstances in the context of the remission of penalties. Although not directly relevant to section 104(5), it nevertheless provides an indication of the type of things which, taking into account the particular facts and circumstances, may constitute exceptional circumstances for purposes of section 104(5). For example, exceptional circumstances may include –

- a natural or human-made disaster;
- a civil disturbance;
- a serious illness or accident; and
- serious emotional or mental distress.

The mere existence of one of these factors is not sufficient. The taxpayer would need to demonstrate that the factor was the reason for the delay.

The term “practice generally prevailing” is defined in section 1 and has the meaning assigned in section 5. Section 5(1) provides that a practice generally prevailing is a practice set out in an official publication regarding the application or interpretation of a tax Act.

An “official publication” is defined in section 1 as a binding general ruling, interpretation note, practice note or public notice issued by a senior SARS official or the Commissioner. It does not include a guide or brochure.

The objection process and timeframes are illustrated in **Annexure A**.

4.4 Format of application

In considering a request to condone a late objection under section 104(4), a senior SARS official will consider whether the objection was lodged in the manner and terms set out in existing rule 4(a) to (d). Failure to comply with those requirements will result in the objection, and consequently the request for an extension, not being entertained.

The obligation to provide facts and arguments supported by documentation and evidence lies with the taxpayer and SARS bears no responsibility, but reserves the right, to make further enquiries.

In ITC 1795¹⁵ the taxpayer failed to provide proof of the expenses claimed and the Commissioner accordingly denied the objection. The taxpayer then lodged a late appeal and failed to provide valid reasons for the delay in noting the appeal. The court held that based on the facts and circumstances of the case the Commissioner was correct in not entertaining the late lodgement.

The importance of a taxpayer submitting a proper detailed application for an extension of time in which to lodge an objection or appeal cannot therefore be overemphasised.

¹⁵ (2005) 67 SATC 297 (G).

4.5 Refusal to grant an extension

In the event that a senior SARS official, having considered the reasons furnished for not lodging the objection within the prescribed time, decides not to grant an extension of the period in which to submit an objection, a taxpayer may object and appeal against such a decision.¹⁶

Under section 104(5) (see **6**) a senior SARS official may not grant an extension of the period to lodge an objection if more than three years have elapsed from the date of the assessment or the decision. In these circumstances the senior SARS official does not make a decision; the request for condonation or an extension is simply denied by operation of law. An objection which is delivered to SARS more than three years after the date of the assessment or decision cannot, therefore, be entertained.

5. Appeal – extension of the period in which an appeal against an unsuccessful objection may be lodged

Any taxpayer who has lodged an objection to an assessment or decision and who is dissatisfied with SARS's decision to disallow the objection in whole or in part under section 106(2), may appeal against that decision within 30 business days¹⁷ after the date of the notice informing the taxpayer of the decision under section 106(4).

A senior SARS official may extend the period of 30 business days prescribed by the existing rules within which to lodge an appeal by –

- 21 business days if satisfied that reasonable grounds exist for the delay in noting the appeal;¹⁸ or
- up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days.¹⁹

The factors relevant to the exercise of a discretion in extending the period in which to lodge an objection are also relevant to the exercise of a discretion in extending the period to lodge an appeal. As indicated in **4.1**, these factors are neither all-embracing nor individually decisive and each case will be considered on its own merits.

6. Conclusion

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

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

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

¹⁶ Section 104(2).

¹⁷ Existing rule 6(2).

¹⁸ Section 107(2)(a).

¹⁹ Section 107(2)(b).

No extension can be granted for –

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

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

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

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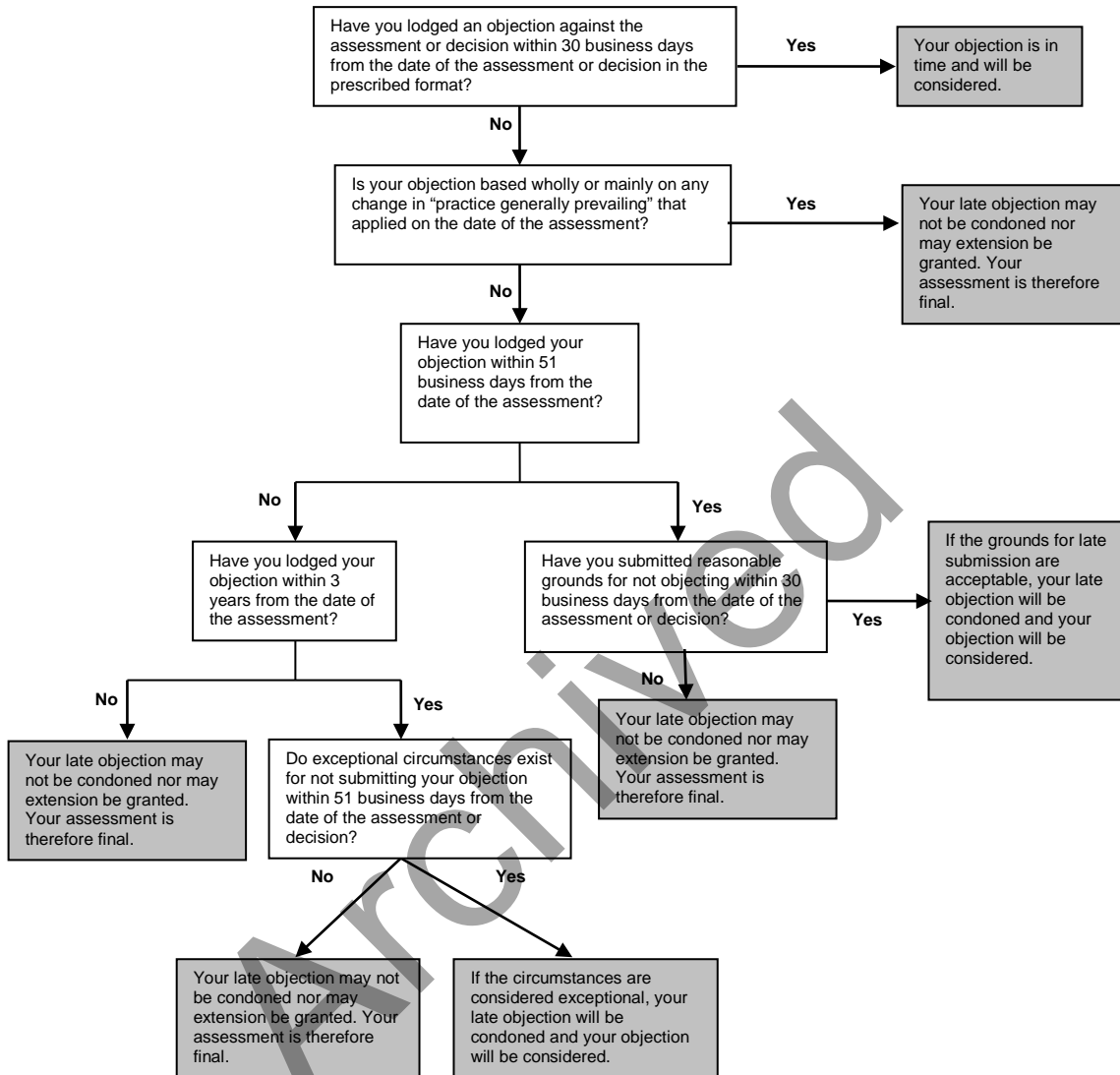
Date of first issue: 18 June 2003

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Annexure A – Objection process and timeframes

The objection process and timeframes can be illustrated as follows:



Annexure B – The law

Definition of the term “date of assessment” in section 1

“date of assessment” means—

- (a) in the case of an assessment by SARS, the date of the issue of the notice of assessment; or
- (b) in the case of self-assessment by the taxpayer—
 - (i) if a return is required, the date that the return is submitted; or
 - (ii) if no return is required, the date of the last payment of the tax for the tax period or, if no payment was made in respect of the tax for the tax period, the effective date;

Section 104

104. Objection against assessment or decision.—(1) A taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment.

(2) The following decisions may be objected to and appealed against in the same manner as an assessment—

- (a) a decision under subsection (4) not to extend the period for lodging an objection;
- (b) a decision under section 107(2) not to extend the period for lodging an appeal; and
- (c) any other decision that may be objected to or appealed against under a tax Act.

(3) A taxpayer entitled to object to an assessment or ‘decision’ must lodge an objection in the manner, under the terms, and within the period prescribed in the ‘rules’.

(4) A senior SARS official may extend the period prescribed in the ‘rules’ within which objections must be made if satisfied that reasonable grounds exist for the delay in lodging the objection.

(5) The period for objection must not be so extended—

- (a) for a period exceeding 21 business days, unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection;
- (b) if more than three years have lapsed from the date of assessment or the ‘decision’; or
- (c) if the grounds for objection are based wholly or mainly on a change in a practice generally prevailing which applied on the date of assessment or the ‘decision’.

Existing rule 4

4. 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.

Definition of the term “deliver” in existing rule 1

“deliver” means —

- (a) handing the relevant document to the relevant person;
- (b) sending the relevant document to the relevant person by registered post;
- (c) telefaxing the relevant document to the relevant person;
- (d) transmitting the relevant document to the relevant person by electronic means; or
- (e) any other means of service authorised by the Court consisting of the President of the Court sitting alone:

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;

Section 107(1) to (3)

107. Appeal against assessment or decision.—(1) After delivery of the notice of the decision referred to in section 106 (4), a taxpayer objecting to an assessment or ‘decision’ may appeal against the assessment or ‘decision’ to the tax board or tax court in the manner, under the terms and within the period prescribed in this Act and the ‘rules’.

- (2) A senior SARS official may extend the period within which an appeal must be lodged for—
 - (a) 21 business days, if satisfied that reasonable grounds exist for the delay; or
 - (b) up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days.
- (3) A notice of appeal that does not satisfy the requirements of subsection (1) is not valid.

Existing rule 6(2)

(2) A taxpayer who wishes to appeal must, within 30 days after the date of the notice informing him or her of the decision of the Commissioner in terms of section 81(4) of the Act, deliver to the Commissioner a notice of appeal which must be in such form as may be prescribed by the Commissioner in terms of section 65 of the Act and be signed by the taxpayer or his or her representative.