

**INTERPRETATION NOTE: NO.15 (Issue 4)**

DATE: 20 November 2014

**ACT : TAX ADMINISTRATION ACT NO. 28 OF 2011**  
**SECTION : SECTIONS 104 and 107**  
**SUBJECT : EXERCISE OF DISCRETION IN CASE OF LATE OBJECTION OR APPEAL**

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***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 referred to in section 103 which were made by the Minister, after consultation with the Minister of Justice and Constitutional Development, and published in Government Notice No. 550 in the *Government Gazette* No. 37819 of 11 July 2014;
- **“section”** means a section of the TA Act;
- **“senior SARS official”** means a senior SARS official referred to in section 6(3);
- **“TA Act”** means the Tax Administration Act No. 28 of 2011;
- **“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,<sup>1</sup>

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.<sup>2</sup>

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.<sup>3</sup> 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 objection and appeal procedures, which are contained in the TA Act and the rules, apply to any dispute under, amongst others, the following tax Acts<sup>4</sup> administered by the Commissioner:

- Diamond Export Levy Act No. 15 of 2007
- Diamond Export Levy (Administration) Act No. 14 of 2007
- Employment Tax Incentive Act No. 26 of 2013

<sup>1</sup> Section 104(2).

<sup>2</sup> Section 104(3).

<sup>3</sup> Section 107(1).

<sup>4</sup> 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.

- 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.

### 3. The law

The relevant sections of the TA Act and the 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.<sup>5</sup> 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.<sup>6</sup>

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.

An aggrieved taxpayer may, before lodging an objection, request the reasons for the assessment as provided for under rule 6(1). Under rule 6(2) this request must –

- be in the prescribed form and manner;
- specify the taxpayer's delivery address; and
- be delivered to SARS within 30 days from the date of assessment.<sup>7</sup>

<sup>5</sup> Section 269(5).

<sup>6</sup> Section 269(5).

<sup>7</sup> See **Annexure B** for the definition of "date of assessment".

Rule 7 deals with objections and, more specifically, provides the manner and terms for lodging a valid objection. Rule 7(1) deals with the timing of the objection and provides that a notice of objection must be delivered to the Commissioner within 30 days after –

- the date of the assessment or decision when no reasons for the assessment are requested by the taxpayer;
- the delivery of a notice by SARS under rule 6(4) stating that adequate reasons for the assessment had been provided; or
- the delivery of a notice by SARS providing the reasons for the assessment as requested by a taxpayer under rule 6.

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

“a ‘business day’ as defined in section 1 of the [TA] Act”.

A “business day” is defined in section 1 as –

“a day which is not a Saturday, Sunday or public holiday, and for purposes of determining the days or a period allowed for complying with the provisions of Chapter 9, excludes the days between 16 December of each year and 15 January of the following year, both days inclusive;”.

Since “day” in the rules means a “business day” as defined in the TA Act, “business day” will be used for purposes of this Note.

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 official<sup>8</sup> 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 before 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 rules irrespective of when it is requested. A taxpayer may, for example, request an extension if that taxpayer was not 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 Constitution of the Republic of South Africa, 1996 read with the Promotion of Administrative Justice Act.<sup>9</sup> In particular, the senior SARS official’s decision must be reasonable. Essentially, for a decision to be reasonable, the senior SARS official 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

<sup>8</sup> 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.

<sup>9</sup> No. 3 of 2000.

application of those principles to particular circumstances can only be done on a case-by-case basis.<sup>10</sup>

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.

Generally speaking, the requirement of reasonable grounds will be met 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.<sup>11</sup>

<sup>10</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC), 1995 (3) SA 391(CC) at 436.

<sup>11</sup> Section 153(3).

#### 4.2.2 The length 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 sought the more likely it is that the justification and supporting evidence will need to be more detailed. 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:<sup>12</sup>

“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 (calculated from the end of the 30-day period referred to in 4.1, in other words the period for lodging an objection may not exceed 51 business days after the date of assessment or decision, the delivery of a notice under rule 6(4) or the delivery of the notice providing the reasons for the assessment under rule 6), 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. Consideration must therefore be given to its ordinary grammatical meaning, taking into account the context in which it appears and the purpose to which it is directed.

<sup>12</sup> (2004) 66 SATC 328 (N) at 333.

The online Oxford Dictionary<sup>13</sup> defines “exceptional” as follows:

“Unusual; not typical.”

The circumstances referred to must thus be of such a nature that they would be considered as being 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:<sup>14</sup>

“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 business days is exceptional and therefore justifies the requested extension.

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 or disruption in services;
- 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” as used in section 104(5)(c) 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 an application for an extension of time

The obligation to provide facts and arguments supported by documentation and evidence when submitting an application for an extension of the period in which to lodge an objection lies with the taxpayer. SARS bears no responsibility, but reserves the right, to make further enquiries.

<sup>13</sup> [www.oxforddictionaries.com/definition/english/exceptional](http://www.oxforddictionaries.com/definition/english/exceptional). [Accessed 4 November 2014].

<sup>14</sup> *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.

In ITC 1795<sup>15</sup> 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.

#### **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 or lodge an appeal, a taxpayer may object and appeal against such a decision.<sup>16</sup>

Under section 104(5) (see **4.3**) 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.

#### **4.6 Periods in which to resubmit invalid objections**

Rule 7(2) provides that SARS may regard an objection as invalid if a taxpayer did not deliver an objection in the manner and terms set out in rule 7(2). SARS must notify the taxpayer and state the grounds for invalidity in a notice which must generally be issued to the taxpayer within 30 business days of delivery of the invalid objection. Such taxpayer may, under rule 7(5), submit a new objection within a period of 20 business days of the delivery of the notice without having to apply for an extension. However, a taxpayer who does not submit a new objection or who submits a new objection without complying with the requirements of rule 7(2), must apply for an extension of the period in which to lodge an objection.<sup>17</sup>

### **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 days<sup>18</sup> after the date of the notice informing the taxpayer of the decision under section 106(4).

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<sup>15</sup> (2005) 67 SATC 297 (G).

<sup>16</sup> Section 104(2)(a) and (b).

<sup>17</sup> Rule 7(6).

<sup>18</sup> Rule 10(1).



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

- 21 business days if satisfied that reasonable grounds exist for the delay in noting the appeal;<sup>19</sup> or
- up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days.<sup>20</sup>

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.

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.

### Legal and Policy Division SOUTH AFRICAN REVENUE SERVICE

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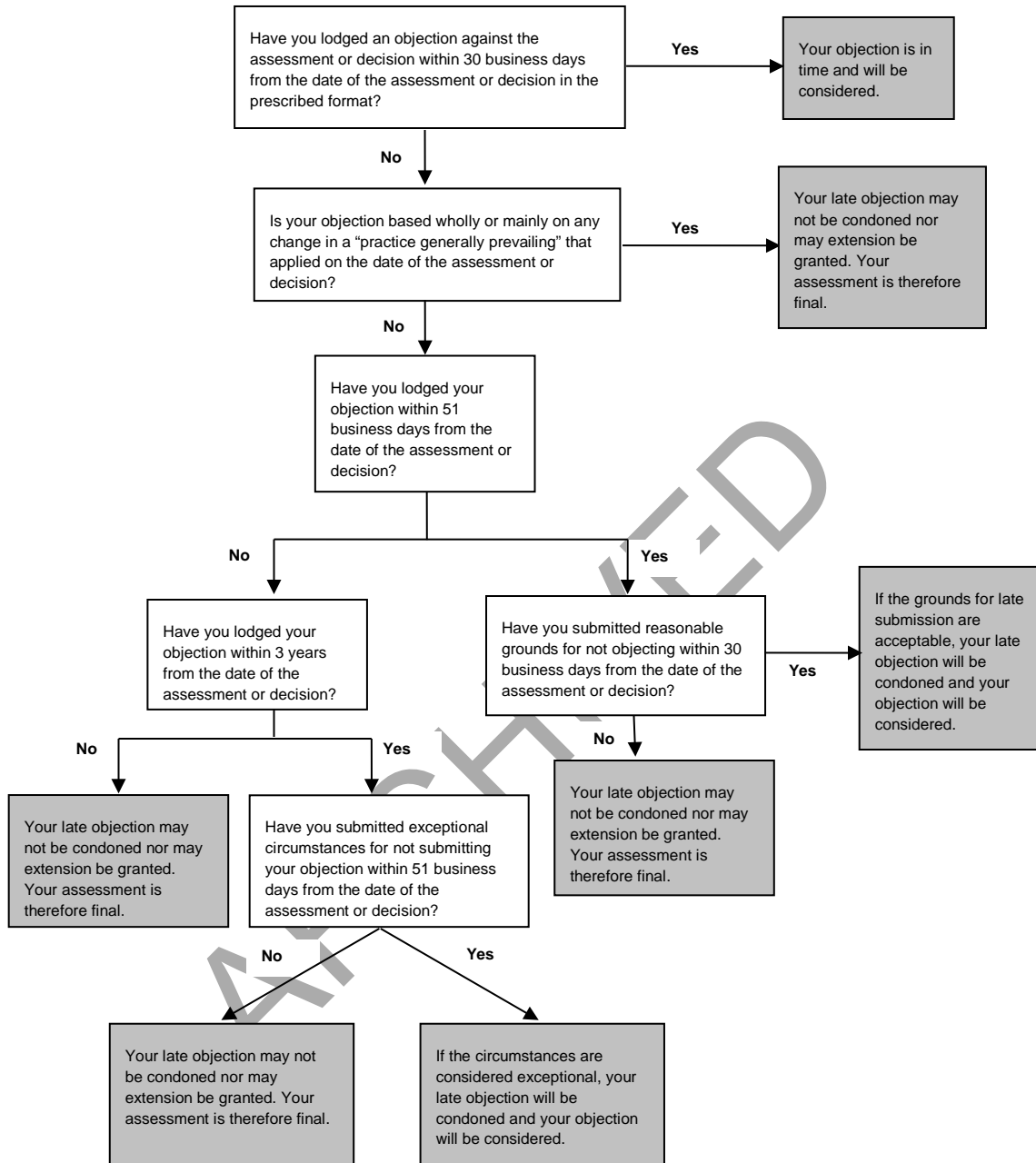
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<sup>19</sup> Section 107(2)(a).

<sup>20</sup> Section 107(2)(b).

## Annexure A – Objection process and timeframes

The objection process and timeframes can be illustrated as follows:



## Annexure B – The law

### Definition of “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’.

### 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.

**Definition of “deliver” in rule 1**

**“deliver”** means to issue, give, send or serve a document to the address specified for this purpose under these rules, in the following manner:

- (a) by SARS, the clerk or the registrar, in the manner referred to in section 251 or 252 of the Act, except the use of ordinary post;
- (b) by SARS, if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment, by posting it on the electronic filing page of the taxpayer or appellant; or
- (c) by the taxpayer or appellant, by—
  - (i) handing it to SARS, the clerk or the registrar;
  - (ii) sending it to SARS, the clerk or the registrar by registered post;
  - (iii) sending it to SARS, the clerk or the registrar by electronic means to an e-mail address or telefax number; or
  - (iv) if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment, submitting it through the SARS electronic filing service.

**Rule 7 – Objection against assessment**

(1) A taxpayer who may object to an assessment under section 104 of the Act, must deliver a notice of objection within 30 days after—

- (a) delivery of a notice under rule 6(4) or the reasons requested under rule 6; or
- (b) where the taxpayer has not requested reasons, the date of assessment.

(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;
  - (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.

(3) The taxpayer may apply to SARS under section 104(4) for an extension of the period for objection.

(4) Where a taxpayer delivers an objection that does not comply with the requirements of subrule (2), 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, if—

- (a) the taxpayer used a SARS electronic filing service for the objection and has an electronic filing page;
- (b) the taxpayer has specified an address required under subrule (2)(c); or

(c) SARS is in possession of the current address of the taxpayer.

(5) A taxpayer who receives a notice of invalidity may within 20 days of delivery of the notice submit a new objection without having to apply to SARS for an extension under section 104(4).

(6) If the taxpayer fails to submit a new objection or submits a new objection which fails to comply with the requirements of subrule (2) within the 20 day period, the taxpayer may thereafter only submit a new and valid objection together with an application to SARS for an extension of the period for objection under section 104(4).

#### **Rule 10(1) – Appeal against assessment**

(1) A taxpayer who wishes to appeal against the assessment to the tax board or tax court under section 107 of the Act must deliver a notice of appeal in the prescribed form and manner within—

- (a) 30 days after delivery of the notice of disallowance of the objection under rule 9; or
- (b) the extended period pursuant to an application under section 107(2).

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