# NEW RULES IN TERMS OF S 107A & S 107B OF INCOME TAX ACT
# SUMMARY OF COMMENTARY RECEIVED & SARS' RESPONSE

## SECTION 107A RULES:

| Rule | Comment | SARS' Response |
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| | [Abbreviations:<br>JP- NCD: Judge President: Northern Cape Division (Kgomo JP)<br>JP-OPD: Judge President: Orange Free State Provincial Division (Malherbe JP):<br>JP-TPD: Judge President: Transvaal Provincial Division (Ngoepe JP)<br>JP-ECD: Judge President: Eastern Cape Division (Somyalo JP)<br>AJP-CPD: Acting Judge President: Cape of Good Hope **Provincial Division** (Traverso AJP)<br>(D&LCD): Judge President: Durban & Coast Local Division (Tshabalala JP)<br>PWC: PriceWaterhouseCoopers Litigation & Legal Services (Pty) Ltd<br>DTT: Deloitte & Touche<br>E&Y: Ernst & Young<br>LLSA: Law Society of South Africa : standing committee on exchange control and taxation (Professor Henry Vorster)<br>GTKF: Grant Thornton Kessel Feinstein (Ernst Mazansky)<br>Werksmans: Werksmans Attorneys (Mr. David Gewer & Ms. Doelie Lessing)<br>SA Banking Council: Mr. Nico van Loggerenberg] | |
| **General Comments** | | |
| | **AJP-CPD**:<br>We commend the South African Revenue Service for its response to complaints from taxpayers regarding the existing dispute resolution procedures. We are confident that the proposed new rules and innovative settlement procedures will facilitate a more speedy and efficient system. | SARS appreciates the support. |
| | **JP- NCD:**<br>Apart from essentially supporting the New Dispute Resolution Rules relating to | SARS appreciates the support. |

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| | SARS, the Judges of this Division have no contribution or comments to make. | |
| | **JP-OPD:**<br>The proposed rules appear to be in order. | SARS appreciates the support. |
| | **JP-TPD**:<br>Apart from [comments regarding rules 1 – definition of 'taxpayer'; 4(c); 5(1)(a); 6(2) & 7(1)] I am of the opinion that the proposed Rules are in order. | SARS appreciates the support. |
| | **JP-ECD:**<br>I have discussed the matter with a number of my Bench who do income tax work. The overall impression is that the alternative dispute resolution procedures are extremely interesting and, hopefully, will lead to a speedy resolution of tax dispute cases while, at the same time, leaving the litigation avenue open in appropriate cases.<br>We also feel that the ultimate test of the new Rules will come when they are implemented in practice as often it is only through the benefits of practical experience that the actual working mechanisms of such a system, both advantages and disadvantages, come to be highlighted. | SARS appreciates the support. |
| | **SA Banking Council:**<br>We wholeheartedly support the intention to significantly improve the manner in which disputes between SARS and taxpayers are resolved. By definition, the proposal whereby a dispute – meaning a disagreement on the interpretation of either the relevant facts involved or the law applicable thereto – is resolved to the best advantage of both the State and the taxpayer, without all the disadvantages as identified in the draft proposal, is a way of managing conflict between SARS and taxpayers. | SARS appreciates the support. |
| | PWC:<br>▪ The new rules seems to be a hybrid of the existing Rules and the High Court Rules and would have been more effective had the existing Rules been retained and expanded by the inclusion of only the discovery procedure, the pre-trail conference and by the addition of time limits for each action. | ▪ SARS is of the view that the existing Regulation B rules have several shortcomings which were manifested in practice. The procedures preceding rule 14 (discovery), i.e. rules 9 – 13, are essential to ensure that the issues in appeal are documented, akin to pleadings in other civil matters in the High Court, and the issues 'crystallized' for purposes of discovery. |

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| | ▪ The alternative dispute resolution process can be faulted for its extremely limited applicability and will therefore not relieve the burden on the Tax Courts. A formal process of arbitration would have been a much better form of alternative dispute resolution due to the finality of an award made by the Arbitrator.<br>▪ The litigation process is too cumbersome, prolonged and repetitive, as it may take up to 50 months for a matter to be ready for enrolment, due to the duplication of processes, such as the pre-trail conference, the limitation of issues and statements of grounds of assessment and appeal. | ▪ SARS seeks to introduce a cost-effective ADR process in order to make it accessible to all taxpayers. Formal arbitration is considered too expensive – however, rule 7 provides for the use of a private facilitator where the parties agree thereto, in which event the parties will share the cost. The normal rule would be that facilitators would be properly trained SARS officials.<br>▪ In the past, some matters could have taken longer than 50 months from objection to enrolment and finalise. SARS will review these time periods with a view to amending them as the process becomes more streamlined. |
| **Rule 1 - Definitions** | | |
| **"assessment"** | SA Banking Council:<br>The rules deal with assessments *and decisions* by SARS. However, the empowering section for the regulations only deals with assessments and not with decisions (or rulings). Clearly to the extent that a taxpayer is subject to an adverse ruling for instance in regard to a directive, it would appear that the taxpayer should be entitled to use the dispute resolution process, however, this might be *ultra vires* to legislation. | In the Income Tax Act, "assessment" is defined to also mean "…any decision of the Commissioner which is subject to objection and appeal".<br>A "decision", in turn, would include a 'ruling' or 'directive' made in terms of the Income Tax Act. |
| **definition of 'deliver'** | **SAICA**:<br>Definition states that where the document has been faxed or transmitted electronically, the original document must be handed to that person or sent by registered post to reach that person within 10 days of it being so faxed or electronically submitted. This implies that registered post will always be delivered within 10 days by the South African Post Office, which practically is not possible for the taxpayer or the Commissioner to control. Should this not be amended to deem the documents to have been received after 10 days of posting by registered post where such proof of posting is furnished? | Comment accepted & appropriate changes effected to final rules. |
| | **DTT:**<br>▪ The definition of "*deliver*" allows for documents to be delivered by electronic means. We suggest that the rules should provide that all assessments and | ▪ A dedicated SARS address, which includes a physical and postal address, email, fax |

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| | subsequent correspondence issued by SARS should contain an e-mail address for this purpose. | and Call Centre number, will be provided in the IT 34 assessment. |
| | ▪ The provision to the definition of "deliver" in Rule 1 may be unworkable due to the inefficiencies of the postal service. We suggest the following wording: *"Provided that in the case of (c) and (d), the original document must be handed to that person within 10 days of it being so telefaxed or transmitted, or sent by registered post."* The present wording could result in delivery being "out of time" due to delays caused by the postal service. The wording we propose would result in delivery being deemed to have taken place if the party has actually posted the document. | ▪ Comment accepted & necessary changes effected to final rules. |
| | **GTKF**:<br>In the proviso to the definition of "deliver" in rule 1 it is stated that, in the case of paragraphs (c) and (d), the original document must be hand delivered or sent by registered post within 10 days. What is the consequence of this requirement not being met. | SARS is of the view that it would have a discretion, in appropriate circumstances and where there is no prejudice to the Commissioner, to accept the fax or email concerned without the original being delivered subsequently. The rationale for requiring the original is mainly to avoid potential disputes regarding the originality of the contents of an email or fax. |
| **New definition of "taxpayer"** | **JP-TPD**:<br>I propose that the definition of "taxpayer" be extended as follows: In respect of any procedure to be performed by a taxpayer in terms of these Rules, the definition of "taxpayer" shall include his attorney or accountant or other person duly authorised in writing to act upon his behalf. | SARS is of the view that it is essential that the objection submitted in terms of rule 4 be signed by the taxpayer, to ensure that the taxpayer is (a) aware of, and (b) agrees with the basis upon which his or her tax liability is contested.<br>This aspect is elaborated on below in response to commentary on rule 4(c). |
| **Rule 3: Reasons for assessment** | | |
| **3 (1)**<br>Any taxpayer who is aggrieved by any assessment may by written notice delivered to the Commissioner within | **SAICA & DTT**:<br>In terms of Rule 3, the taxpayer must deliver a request for reasons for the assessment within 30 days of the assessment. In terms of Rule 4, the taxpayer must deliver an objection within 30 days of the assessment, or within 30 days after receiving the reasons for the assessment. We are concerned that neither of these rules contain a procedure for a taxpayer to follow if, for some reason, he | Comment accepted & appropriate changes effected to final rules (rule 26). |

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| 30 days after the date of the assessment, request the Commissioner to furnish reasons for the assessment. | falls outside either of these time limits.<br><br>In terms of section 81(2) of the Act, the Commissioner can extend the time period for lodging objections. However, both the Act and the Rules are silent in regard to extending the time period for requesting reasons for an assessment. In terms of the Act, the refusal of the Commissioner to extend the time period is subject to objection and appeal. This process of objection and appeal could be lengthy. Unlike many of the time limits presented in the Rules, there is no procedure to approach the tax court immediately with an application to condone the late filing of a request for reasons or filing an objection. It appears therefore that the taxpayer has no recourse if he fails to request reasons for an assessment within the prescribed time period and the Commissioner refuses to condone the late request. If the taxpayer is late in delivering his objection, if the Commissioner refuses to extend the time period for delivering the objection, his only recourse is to lodge an objection against such refusal.<br><br>We note that rule 26, which deals with extensions of the time periods and condonation applications does not apply to rules 3, 4 and 6. In our view, in order to give effect to the principle that it is in the public interest to allow litigation to be finalised as soon as possible, the Act and the Rules should allow a taxpayer to apply to the Tax Court in instances where the Commissioner does not condone the late delivery of a request for reasons or the late delivery of an objection. This would avoid the necessity of having to await the outcome of an objection against the refusal of the Commissioner to condone the late delivery of a request for reasons for an assessment or an objection. Section 81(3) of the Act may have to be amended to allow for this procedure. | |
| | **E & Y:**<br><br>Recommended that the taxpayer be given the same time as the Commissioner in respect of notice to request the Commissioner to furnish reasons for the assessment.<br><br>SA Banking Council:<br><br>The days prescribed appear to be grossly in favour of SARS and do not make provision for condonation, other than at a later stage from the Court. It is important to note that where a Court hears an application for condonation it decides with reference to the merits of the actual dispute and the likelihood of the applicant being successful. As a result hereof taxpayers are unduly prejudiced since its unclear to them as to the status of contentious disputes until the court decides on them. The rules should clearly incorporate the option to utilise the ADR process in regard to the issue of condonation so that earlier on the status of a dispute can be clarified. | SARS is of the view that there are valid reasons for the differences in time periods – one taxpayer v. large administration with approximately 5 million taxpayers to administer.<br><br>SARS will review these time periods with a view to amending them as the process becomes more streamlined.<br><br>The taxpayer may, at the outset, request reasons to enable him or her to understand the basis of the assessment. Where the taxpayer objects and SARS does not comply with the prescribed time period, such taxpayer will be sufficiently aware of the merits involved to enable him to approach the Tax Court in terms |

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| | | of rule 26. |
| | **E & Y**:<br>Recommended that the notice [requesting reasons] must be delivered to the Commissioner within 30 days after the *date of delivery* of the assessment and not the date of the assessment. | It is assumed that "delivery" as defined in rule 1 is contemplated by the commentator. In s 1 of the Act "date of the assessment" is defined to mean "the date specified in the notice of such assessment as the due date [normally 30 days after date of assessment or "1st date"] or, where such due date is not so specified, the date of such notice. Assessments are deemed to be served (s 1 – definition of "assessment") where it was dispatched by registered post or any other kind of post addressed to the taxpayer at his last known address (s 106). In rule 1, "delivery" is defined to include sending by registered post. The date of "delivery" may therefore be before the "date of the assessment" [due day normally 30 days after date of notice]– giving even less time within which to formulate a request for reasons (if this is the underlying concern of the commentator).<br>Generally, it is proposed that it would be better and avoid confusion if the same date applicable to payment & objection period applies to a request for reasons. |
| **3(2)**<br>Where in the opinion of the Commissioner adequate reasons have already been provided, the Commissioner must, within 30 days after receipt of the notice contemplated in subrule (1), notify the taxpayer accordingly in writing which must refer to the documents wherein such | **LLSA**:<br>▪ The probability of a dispute, regarding the adequacy of the Commissioner's reasons for the assessment, arising at a very early stage in the proceedings cannot be discounted. Rule 3 does not provide the taxpayer with a remedy against the decision by the Commissioner that adequate reasons have been furnished. In the past this was not of any importance but under the new Rules an objection which lacks specificity is rendered invalid *ab initio* (Rule 5(1)(a)). It is thus now very important for the taxpayer to be furnished with adequate reasons for the assessment. Rule 20(2), assuming its validity, would not cover a dispute of this nature.<br>▪ Such a dispute is not, in our view, one of a procedural nature; it is one concerning an administrative decision by the Commissioner adversely affecting the rights of the taxpayer and which is open to challenge under the | ▪ Comment accepted & necessary changes effected to final rules (rule 26) to provide for access to the Tax Court in the event of a dispute regarding adequacy of reasons.<br>▪ SARS is of the view that, ideally, the Tax Court should handle all interlocutory matters |

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| reasons were provided.<br><br>**3(3)**<br>Where in the opinion of the Commissioner adequate reasons have not yet been provided, the Commissioner must provide written reasons for the assessment within 60 days after receipt of the notice contemplated in subrule (1): | Constitution and administrative law. Given the limited powers of the tax court under section 83(13) of the Act, the aggrieved taxpayer's only remedy is a substantive application to the High Court for a review of the Commissioner's decision not to furnish further reasons for the assessment. It is considered undesirable that the taxpayer should be limited to such a cumbersome, time consuming and costly remedy or that the Commissioner should be exposed to such applications which, in the context of the Rules, are interlocutory in nature.<br><br>▪ In our view section 83(13) of the Act should be amended to confer on the tax court all the powers of the High Court and the Rules could then validly provide for a dispute of this nature to be resolved, on application, by the tax court. In such applications the tax court will comprise the President sitting alone. It is to be noted that an application to the High Court in relation to such a dispute would be an application for review of the Commissioner's decision not to provide further reasons for the assessment, on one or more of the traditional grounds of review as constitutionally expanded and developing. It would, in our view, be fair and appropriate for Rule 3 to provide that the Commissioner's decision not to provide further reasons is subject to objection and appeal. The result of this would be that the court hearing the application would not be sitting as a court of review but would be entitled to substitute its own decision for that of the Commissioner. | in any dispute related to an assessment. SARS is of the view that rule 26, in its amended form, enables the Tax Court to consider any decision of the Commissioner regarding adequacy of reasons in terms of rule 3.<br><br>▪ This comment raises the question whether an amendment to the Income Tax Act is necessary to confer powers on the Tax Court to make interlocutory orders as contemplated in these rules.<br>▪ SARS' preliminary view is that the powers given to the Tax Court, and consequently the rules governing such powers, are *intra vires*. What would be *ultra vires* is if powers are given in a rule to vary something in the Act. These are powers in rules relating to the administration of the rules and are consequently *intra vires* the rules promulgated in terms of s 107A of the ITA.<br>▪ Essentially, ensuring access to the Tax Court to pursue interlocutory issues operates in favour of the taxpayer for the very reasons stated by the commentator. Having regard to the *contra fiscum* rule, it appears unlikely that a Court would interpret the rules to exclude access to the Tax Court by a taxpayer.<br>▪ However, having regard to earlier judgments, albeit pre-constitutional, wherein the 'Special Court' was held to be a "creature of statute" and "an inferior tribunal" with no inherent powers, SARS are of the view that the matter is not free of doubt. In order to eliminate any doubt it would be preferable to review the issue with a view to |

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| | | possibly amend the principal act, so as to remove any doubt regarding the jurisdiction of the Tax Court to make the orders contemplated in the new rules. A proposal in this regard will be made to the Minister of Finance. |
| | **E & Y**:<br>Recommended that an independent committee be set up to ensure objectivity in respect of the Commissioner's discretion to give adequate reasons for his assessment. | SARS is of the view that it is not practical and is unnecessary where the taxpayer has remedies against such determination of "adequacy" by the Commissioner (effected in rule 26). |
| | **GTKF:**<br>The problem with the concept in sub-rule (2) that the Commissioner (in practice the relevant assessor) must form the opinion as to whether adequate reasons have already been provided. In this sense the assessor is judge in his or her own cause. In my view the rules should specifically state that if the Commissioner is going to take the view that adequate reasons have already been provided, a person more senior to the assessor who originally gave the reasons must issue that letter. | SARS is of the view that such matters can be arranged internally, and is in the process of ensuring that SARS officers are given guidance and training in regards to recording decisions and the provision of "adequate reasons" for a qualifying decision. |
| | **E & Y**:<br>In terms of Section 89(1) of the Income Tax Act, No. 58 of 1962, any tax chargeable in terms of the Income Tax Act, should be paid on such days "… as may be notified by the Commissioner". These days are normally notified by the Notice of Assessment as being between the first due date and the second due date. This is a 30 day period. Rule 3(3) allows the Commissioner a total of 105 days to provide reasons for assessment to the taxpayer requesting same. The rule does not state as to whether payment of tax in terms of Section 89(1) would still have to be made by the taxpayer despite the fact that he or she would still be waiting for the reasons for the assessment from the Commissioner. A suspension of payment would be reasonable taking into account that an assessment without reasons would appear incomplete. | A "suspension" of the obligation to pay any tax pending appeal can only be granted by the Commissioner in terms of s 88 of the ITA (in this regard, Media Release 27 of 2000 provides some guidance on the issue of suspension of the obligation to pay tax). As interpreted by the Constitutional Court in the **Metcash** judgment, this application can only be made after an objection has been lodged, i.e. the discretion to *suspend* payment only operates post-objection. A request for reasons in terms of rule 3 will normally be pre-objection.<br>It must be accepted that, if a request for reasons would automatically result in a suspension, this may result in frivolous requests for reasons in order to effect deferment of the taxes due. Furthermore, a request for reasons does not automatically mean that the taxpayer intends to dispute his or her liability. This is effected by an |

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| | | objection, in which event his or her constitutional right to access to court operates i.e. he may request the Commissioner to suspend the liability to pay pending the appeal. |
| **3(3)**<br>**...** Provided that where in the opinion of the Commissioner more time is required due to exceptional circumstances or the complexity of the matter, the principle or the amount involved, the Commissioner must, before expiry of that 60 day period, inform the taxpayer that written reasons will be provided not later than 45 days after the date of expiry of that first 60 day period. | **GTKF**:<br>I also have a conceptual problem with the proviso to sub-rule (3). The requirement here is that 60 days are insufficient because the matter is so complex or the circumstances are so exceptional or the principle is so important that the Commissioner needs extra time. But this raises another question: If the matters are so complex and so exceptional that he needs more time, does this mean that, in issuing the original assessment adversely as far as the taxpayer is concerned, he did so without applying his mind properly? This certainly seems to be the inference that can be drawn, and granting the Commissioner extra time seems to me to be condoning a practice whereby assessors issue assessments based on "gut feel" without properly thinking through the issues. To re-emphasise: If 60 days are not enough to give their reasons and they need 105 days, how did they manage to formulate the reasons in sufficient detail and with sufficient thought at the time the assessment was issued? This question equally applies to rule 5(4) and 10(2)? | What is envisaged here is additional time that may be required to properly *formulate* adequate reasons in complex matters – this does not mean that the assessment was not based on proper grounds, for example as a result of an extensive in-depth audit. The findings of such audit may need to be properly summarized to reflect, formulate and refine the *reasons* for the assessment.<br>It should be borne in mind that s 33 of the Constitution read with the Promotion of Administrative Justice Act, 2000 (Act No.3 of 2002 – "the AJA") do not implement a *right* to reasons, only a right to *request* reasons in respect of administrative action that *materially* and *adversely* affects the rights of the taxpayer. In terms of s 5 of the AJA, an administrator has 90 days within which to provide reasons after receipt of a request in terms of the AJA. The mere fact that an administrator takes this time, allowed by law, to provide reasons does not *per se* mean that he "did not apply his mind". |
| **Rule 4 - Objection** | | |
| **General** | SA Banking Council:<br>▪ The process has not been fully integrated into the Tax Legislation. *(Note: it is not applicable to Customs and Excise Act, 1964).* For example, with reference to VAT, in terms of the paragraph entitled "Application to other taxation laws" page 3 of the "Request for Comment: New Dispute Resolution Process Rules", it is stated that: *"various other tax Acts were also amended to specifically provide that the objection and appeal procedures and rules relating thereto ….. will equally apply …."*<br>▪ In terms of the proposed amendments to the VAT Act, the area of dispute | These rules will apply in full to objection & appeals in terms of the VAT Act in view of the provisions of sections 32(2A) and 33(1) of the VAT Act (as amended by Act (60 of 2001). |

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| | resolution is not covered. As far as the current legislation is concerned, Section 33 of the VAT Act refers to Section 83 of the Income Tax Act, which in turn refers to Section 107A of the Income Tax Act.<br>▪ The implication of this is that in terms of the VAT Act, a taxpayer has 30 days to object to the assessment / decision before the Commissioner needs to consider the objection. There is no prescribed time within which the Commissioner needs to reach a decision. Once a decision is reached, the taxpayer has a further 30 days within which to take the matter on appeal to the special court.<br>▪ The proposed rules do not appear to apply to VAT since the amendments fail to incorporate the changes discussed | |
| **4(a)**<br>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; | **LLSA**:<br>To the extent that section 107, 107A or section 81(1) empowers the Minister to prescribe the form of the objection; the Minister cannot delegate this power to the Commissioner. If there is a need for the form of the objection to be prescribed it must be prescribed by the Minister - the Act does not give the Commissioner the power to prescribe the form of the objection. | SARS is of the view that the Commissioner may prescribe these forms in terms of section 65 of the Act.<br>Rule 4(a) was amended to provided that an objection must be in such form as may be prescribed by the Commissioner "…in terms of s 65 of the Act" to remove any uncertainty in this regard. |
| | **LLSA** :<br>The 2nd question is why it is considered necessary that there should be a form prescribed for the objection? There is in our view no need for the objection to be in a form prescribed as the provisions of the Act and the Rules are adequate in providing that it must contain sufficient detail. | If an objection is on a readily recognisable form this will ensure that the SARS branch office receiving it will be able to process it as such upon receipt . In SARS' experience an "objection" is often included in a taxpayer's letter in between other issues (for example providing information or collections issues) consequently had not always easily recognisable as an objection. Comparatively, it is predominantly the accepted norm that objections and appeals must be made on prescribed *pro forma* documents. |
| | **SAICA** :<br>Sub-Rule (a) requires that the objection must be lodged in such a form as may be prescribed by the Commissioner: SARS. It is submitted that it would be far preferable if the form of the objection was prescribed in the regulations. Alternatively the Commissioner: SARS is urged to prescribe the form required at the same date on which the regulations are promulgated. | SARS is of the view that to gazette the forms with the rules will be too cumbersome. Such forms may need to be amended more often than the rules as using them in practice reveals deficiencies. |

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| | **GTKF**:<br>Can it be assumed that the form to be prescribed by the Commissioner in rule 4(a) will be prescribed at the same time that these regulations are gazetted? | It is envisaged that all the prescribed forms for purposes of the new rules will be available when the rules commence. |
| **4(b)**<br>…which objection must—(b) be in writing **specifying in detail the grounds** upon which it is made | **LLSA:**<br>Rule 4(b) requires that the objection must specify in detail the grounds upon which the objection is made. There can be no objection to this as the provision is the same as it has always been. It must at this stage just be noted that it is in practice often impossible to file a detailed objection simply because the basis of the assessment is not known or is unclear. The position is not alleviated by Rule 3 as the Commissioner can, perhaps in the honest but mistaken belief that he has given adequate reasons, refuse to give the reasons sought by the taxpayer. This has not really been a problem thus far because the taxpayer would in practice in due course simply amplify the objection as soon as the Commissioner explains the basis of the assessment as the case progresses from the objection; through the appeal and the preparation for the hearing in the tax court. This usually happens when the file leaves the assessor's office and finds its way to the relevant office in Pretoria.<br>The objection to Rule 4(b) stems from Rule 5(1)(a) which now provides for the objection to be invalid if it does not comply with Rule (4)(a), (b) or (c). The problem is that the taxpayer might through no fault of its own, perhaps inadvertently and perhaps even as a result of an incorrect decision on the part of SARS not to furnish further reasons, fail to record the detailed grounds of the objection with sufficient specificity. What is the prejudice to the Commissioner that would justify such a failure or oversight to be visited with invalidity? The whole approach in the past was, with respect more correctly, that the taxpayer aggrieved by an assessment should not be unsuited in the pursuit of the objection on purely technical and procedural grounds that can be remedied at any stage without any obvious prejudice to the Commissioner. We have considered Rule 26 but we do not think that it addresses the principle that an objection is invalid for want of compliance with a purely technical and procedural requirement, the rectification of which will in all but, perhaps, the most exceptional cases entail no prejudice to the Commissioner. | The invalidity sanction incorporated here was borrowed from the Canadian example. Practical experience has manifestly revealed the necessity of compelling the taxpayer at the outset to formulate proper grounds of objections. Under the new rules, having regard to all the formal processes before trial in the Tax Court (statements; discovery; pre-trail etc.), it would simply waste both SARS and the taxpayer's time and efforts if detailed grounds of assessment are only provided post these processes or shortly before trial. To alleviate the concerns raised, however, two remedies were implemented:<br>▪ Rule 5(1)(a) was amended to enable a taxpayer to, within 10 days of being notified by SARS that the objection is invalid, deliver an amended objection; and<br>▪ Rule 26 was amended to ensure any decision by the Commissioner in terms of rule 5(1)(a) to 'deem' the objection invalid will be subject to objection & appeal in the "expedited" manner contemplated in rule 26 read with Part B. |
| **4(c)**<br>objection must…**be signed by the taxpayer** | **PWC** :<br>Provision should be made for the signature of the person representing the taxpayer by power of attorney or proxy.<br>**JP-TPD**: Rule 4(c): I suggest that *ex abundante cautela* this sub-paragraph be altered to read: 'be signed by the taxpayer or by a person acting on his behalf as set out in the definition of "taxpayer". | It has been SARS' experience in appeals that taxpayers easily distance themselves from what is stated by the accountant/legal representative in the letter of objection, on the basis that they haven't seen nor signed such letters. When it becomes problematic during trials, they simply |

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| | **LLSA**: Rule 4(c) requires the objection to be signed by the taxpayer. Why is that so? In the past the objection was signed by the taxpayer or its representative and we do not know of any case in which this has given rise to any difficulty. Surely, this is not in accordance with modern developments and it is difficult to imagine a reason why the Commissioner would wish to insist on this requirement. We would suggest that the objection must be signed by the taxpayer or its representative or in the case of a taxpayer who is not a natural person, by an authorised officer or a representative. There should really be no resistance to the objection being filed, unsigned, in electronic format and the rules should make provision for this.<br><br>**SAICA**: Rule 4(c) requires that the objection be signed by the taxpayer. Tax practitioners often sign an objection on behalf of a taxpayer and it is submitted therefore that Rule 4(c) should allow for the duly appointed tax practitioner or advisor to sign the objection on behalf of the taxpayer. The rule's wording should therefore be amended along the following lines: *"Be signed by the taxpayer or his/her duly appointed advisor."*<br><br>**WERKSMANS**: Provision should be made for a taxpayer's representative, e.g. its attorney or tax adviser, to sign an objection on the taxpayer's instruction and behalf.<br><br>**GTKF**: I respectfully believe it is very impractical to insist that each and every objection must be signed by the taxpayer himself or herself and not, as is presently the case, on the taxpayer's behalf. In motivating the latter course of action I submit the following: Based on the experience in my office, the vast majority of objections lodged arise from small technical problems owing to errors in the assessment, usually "finger trouble", e.g. an amount has been incorrectly punched into the computer, an amount of expenditure has not been captured, and so on. It would be highly disruptive and unreasonable to expect the taxpayer to visit our offices for the purpose of signing letters of objection of this nature. Sometimes taxpayers are not available, for example, they are non-residents. It will be extremely cumbersome to have to send them the letter for signature. You would know better than I what problems arise out of the fact that objections are lodged on behalf of taxpayers and not by them personally, but in my experience there is very little, if any, abuse of the system and I have never come across the situation where a taxpayer has distanced himself or herself from the objection lodged by the accountant or attorney; and if this does happen, the examples are far and few between, and not sufficiently numerous to warrant this rule. Given the whole changed procedure for objection and appeals, including bringing the judicial process more closely aligned to High Court procedures, it is likely that on the more complex matters the objections will have to be drafted by lawyers anyway rather than by the auditors. It follows, | state that whatever is stated in the letter of objection is "contrary to their instructions" or a "misunderstanding" between them and the accountant or legal representative concerned. At the same time, the accountant or legal representative are seldom held accountable for 'misrepresentations' made in letters of objections.<br><br>The importance of an "objection" is demonstrated by the fact that lodging an objection may be used as a deferment tool or could result in a suspension of payment. It is *not* simply an accounting or administrative process – it is necessary that the taxpayer concerned agrees that his/her liability for the amount is contested and that the basis of the assessment originates from the taxpayer concerned (i.e. are not based simply on legalistic arguments, "Philly busting" or other creative means.)<br><br>To alleviate some of the concerns, rule 5(c) was amended to provide that another person may sign on behalf of the taxpayer provided that 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/<br><br>Any document in the procedures after rule 4, provides that either the taxpayer or his or her representative may sign (i.e. only the notice of objection *must* be signed by the taxpayer or the failure to do so properly explained. |

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| | therefore, that the document is likely to be more legally precise than might otherwise be the case, and in this scenario it really ought not to cause the SARS problems if the taxpayer does not sign personally. | |
| | **DTT**:<br>It could be specified that in the case of an objection delivered by way of electronic means, the signature of the taxpayer is required on the "original document" which must be sent subsequent to the delivery of the objection by electronic means. Alternatively, provision could be made for the use of electronic signatures. | SARS has amended the proviso to the definition of 'deliver' accordingly. |
| 4(c)<br>…and be delivered to the Commissioner at the address specified in the assessment for this purpose, within 30 days | **E&Y:**<br>The discretion granted to the Commissioner in Section 81(2) to extend the prescribed period for the submission of an objection by the taxpayer is not included in rule 4. Its inclusion would clarify the position in cases where the objection is not submitted within the prescribed period and there are reasonable grounds for such a delay. | The provision of s 81(2) ITA remains unchanged and governs the position – it is unnecessary to repeat it in the rules. The rules must always be read together with the Act.<br>Any decision by the Commissioner in terms of s 81(2) not to condone a late objection, is subject to objection and appeal in terms of the Act. It is therefore unnecessary to include it in rule 26.<br>An interpretation note (No. 15 of 2003) will be issued regarding the application of s 81(2). |
| **Rule 5 - Commissioner's Decisions** | | |
| 5(1)(a)<br>Where a taxpayer delivers an objection that does not comply with the requirements of rule 4*(a)*, *(b)* or *(c)*, that objection will be invalid | **JP TPD**:<br>I suggest that the following be incorporated in this sub-rule: "If the Commissioner informs the taxpayer that, in his view, the objection is invalid, the taxpayer may within 10 days of such notice submit a further or amended objection."<br>**WERKSMANS**:<br>When the Commissioner informs the taxpayer that its objection is invalid, the taxpayer must be afforded an opportunity, within a certain number of days, to comply with the requirements of rule 4 so as to constitute the objection valid.<br>Similarly, we believe that rule 5(3) should then prescribe a period of time after the receipt of the rectified objection within which the Commissioner must alter or withdraw the assessment or disallow the objection. | Comment accepted & necessary changes effected to final rule.<br>Comment accepted & necessary changes effected to final rule.<br>Rule 5(3)(b) has been amended to provide that the Commissioner must notify the taxpayer of his or her decision "…**within 90 days after the date of receipt of the taxpayer's objection in terms of rule 4 or the proviso to subrule (1)(a) above."** |

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| | **LLSA**:<br>Rule 5 in our view has the effect, even if one assumes that it is not designed for that purpose, of unsuiting the taxpayer in the pursuit of its objection on purely technical grounds. The following observations are of concern –<br>a) Non-compliance with Rule 4(a), (b) or (c) brings about the invalidity of the objection. One must ask the question of why this needs to be so when non-compliance entails no prejudice to the Commissioner and the Commissioner has all the powers at his disposal to avoid prejudice to him in even the most exceptional cases. There are always issues surrounding the specificity of the taxpayer's objection. In most cases this is dictated by the basis, to the extent disclosed by SARS, on which the assessment or the revised assessment was issued. Why should the objection be rendered invalid simply because the Commissioner notifies the taxpayer that for some reason it does not comply with Rule 4(a), (b) or (c)? For instance, that it lacks the specificity as to the grounds of the objection?<br>b) It is necessary to mention an example. The Commissioner issues an assessment disallowing a deduction with no or inadequate or incorrect reasons disclosed for the disallowance. The Commissioner decides in terms of Rule 3 that he has given adequate reasons. The taxpayer objects merely on the basis that it is entitled to the deduction in terms of section 11(a) of the Act, as read with section 23 of the Act and that there is no other provision or principle that disentitles it to the deduction. The Commissioner might adopt the attitude that such an objection fails the specificity requirement of Rule 4(b) and issue a notice of invalidity in terms of Rule 5(1)(a); c) The taxpayer would, in terms of the Rules in such a case have only Rule 26(3) to rely on. But there will inevitably be the debate whether the Court can condone a non-compliance which has as its consequence, the *ab initio* invalidity of the objection. Applications for condonation by a litigant have at their root the powers of a court to condone procedural non-compliance which are capable of being addressed by an appropriate cost order. Such applications are generally not available to validate actions which are void and invalid *ab initio*.<br>c) We have also not seen anything in the Rules to the affect that the decision of the Commissioner to issue an invalidity notice in terms of Rule 5(1)(a) is subject to objection and appeal. This raises the question of whether the taxpayer's response to an invalidity notice is an objection or an application for review, even assuming that it is entitled to apply for "condonation" under Rule 26. Is the court hearing the application for condonation sitting as a court of review or it is sitting as a special court on appeal, entitled to substitute its own decision for the decision of the Commissioner? This is a fundamental and material question which has implications that go beyond the ordinary | Comment accepted & appropriate changes effected to final rules (rule 26). |

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| | perceptions of fairness. It raises the fundamental issue of the grounds upon which the taxpayer may challenge the invalidity notice and in this regard we refer to what we have stated in 3 above. In our view, the administrative decision of the Commissioner to issue an invalidity notice under Rule (5)(1)(a) must be expressed to be subject to objection and appeal.<br><br>d) The specificity of the grounds of an objection has never been a material issue in tax appeals. The courts have adopted the attitude that any argument in support of the objection is competent provided that it is covered by the broad terms of the objection. But the objection, however sparsely stated, was never visited with *ab initio* invalidity and the Commissioner did not have the power to decide in the adequacy of the scope of the objection. The draft Rules now bring to the fore both the adequacy of the specificity of the objection as a pre-requisite to its validity and the scope of the tax court's powers to interfere with the Commissioner's decision, communicated under Rule 5(1)(a), that the objection is invalid.<br><br>e) As a pre-requisite to the validity of the objection, the taxpayer must specify in detail the grounds upon which the objection is made. But what does this mean? The issues that have to be decided on appeal to the tax court are sometimes purely issues of law; at other times purely issues of fact and, at yet other times, mixed issued of fact and law. Often it is not easy correctly to categorise the issues that have to be decided. The requirement that the taxpayer must specify in detail the grounds upon which the objection is made, at the risk of invalidity, is imprecise in its ambit. It is of no consequence under the present system but has fundamental and material consequences under the draft rules largely because of the power of the Commissioner to issue an invalidity notice under Rule 5(1)(a).<br><br>In our view the Commissioner's right to issue an invalidity notice under Rule 5(1)(a) must be circumscribed as follows –<br><br>a) Should the Commissioner adopt the view that the objection lacks the required specificity he must give notice of this fact and disclose the reasons for his view.<br><br>b) The taxpayer must then be given 14 days within which to supplement his or her objection should he or she so wish.<br><br>c) The Commissioner may then decide to issue an invalidity notice in terms of Rule 5(1)(a).<br><br>The Commissioner's decision to issue an invalidity notice must be rendered subject to objection and appeal. | |
| **5(1)*(b)*** Where the | **LLSA**: | |

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| taxpayer has failed to deliver his or her objection at the address specified in the assessment for this purpose, as required by rule 4*(d)*, any document delivered in terms of rule 4 will be deemed not to be a valid objection in terms of rule 4 *ab initio* | Rule 5(1)(b) calls for comment. The current practice is that the objection is delivered to the SARS office issuing the assessment under objection. It is now provided that the objection will be void (invalid) *ab initio* if it is not delivered to the address specified for that purpose in the assessment. Is it intended that the current practice will change and, if so, how is this change to be incorporated in assessments? | SARS intends to state in the notice of assessment the SARS address where an objection must be delivered, which details should include a physical, postal, email and fax address.<br>At this stage, it will remain the address of the relevant SARS branch office indicated on the notice of assessment. |
| **5(2)(a)**<br>Where the Commissioner is satisfied that the taxpayer has not furnished all the information, documents or things required to decide on the taxpayer's objection, the Commissioner must, not later than 60 days after receipt of the objection, notify the taxpayer accordingly and request him or her in writing to provide the information, documents or things as specified in that notice. | **LLSA**:<br>Sub-rule 5(2) brings about another dimension which in effect negates the discovery rules provided for in the new Rules. In terms of Rule 3 the taxpayer can ask for reasons for the assessment; the Commissioner can refuse reasons on the grounds that he has, in his opinion, given adequate reasons; the taxpayer has no adequate remedy; he must file his objection at the risk of the Commissioner responding with an invalidity notice in terms of Rule 5(1)(a); his response to such a notice is not clear; the Commissioner's decision is not rendered subject to objection and appeal and it might be that an appeal to the Tax Court is limited to the conventional, but now developing, grounds of review. On the other hand the Commissioner can now ask for all "*information, documents or things*" required to decide on the objection. At this stage, it must be remembered, the Commissioner would have exercised all his considerable powers to obtain "*information, documents and things*" necessary to issue the disputed assessments in the first place! We are now in the litigation stage. The Commissioner can refuse, in terms of the Rules, to disclose further information but the taxpayer is not, yet, entitled to discovery and must disclose at the request of the Commissioner all information, documents and things that the Commissioner in his absolute discretion may require to be disclosed. This decision of the Commissioner is not made subject to objection and appeal. It appears not to be open to challenge on any basis. | Comment accepted & appropriate changes effected to final rules (rule 26) – all decisions concerned are subject to 'expedited" objection & appeal procedure in the manner contemplated in rule 26 read with Part B (application on notice). |
| **5(2)(c)**<br>The Commissioner may extend the period [within which information must be provided by the taxpayer] by not more than 30 days, where the Commissioner is satisfied | **E & Y:**<br>Request clarity with regard to SARS' discretion to extend the 30 days in respect of delivery of a valid document.<br>**GTKF**: In sub rule (2)(c), I do not think that it is reasonable that the taxpayer must get the Commissioner's permission for the extra 30 days and justify this with grounds. After all, when the Commissioner requires extra time for example in sub-rule (4)) he need merely inform the taxpayer and not get the taxpayer's | Rule 5(2)(c) is aimed at ensuring that attempts are made by taxpayers to procure the information requested from them. The failure by taxpayers to submit requested information within a reasonable period is a major problem for SARS, especially where such delays effect further deferments of the payment of tax. |

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| that reasonable grounds exist on which the taxpayer is not able to provide the information, documents or things specified by the Commissioner within that period and the taxpayer has, before expiry of that period, requested the Commissioner in writing that the period be extended, stating the grounds for the failure to provide such information, documents or things within that period. | permission – why the inequality of approach? | The maximum period within which requested information must be submitted will be 60 days i.e. 3 calendar months. It is submitted that this is sufficient time and the Commissioner's decision not to grant an extension, is subject to objection and appeal in terms of rule 26(1). |
| **5(3) & (4)** | **LLSA**:<br>Sub-rules 5(3) and (4) prescribes the period within which the Commissioner must respond to an objection. There are no prescribed consequences if the Commissioner were simply to ignore these time constraints. Whilst non-compliance with procedural technicalities on the part of the taxpayer is visited with invalidity the Commissioner may with impunity ignore the Rules. The remedy under Rule 26(5) is conjectural and devoid of any practical significance to the taxpayer for the reasons stated in our comments on that Rule.<br>SA Banking Council:<br>These rules do not appear to make provision for situations of non-compliance with the rules. The obvious example is where SARS fails to comply with one of the rules, the taxpayers only rights of recourse is to approach the SARS Service Monitoring Officer, or alternatively the High Court by way of application. Obviously the latter would negate and to a large extent, delay the process. | SARS accepts that this is an extremely valid criticism of the new rules. The only remedy a taxpayer has, if SARS fails to comply with the new prescribed time periods, especially in dealing with objections, is to bring a court application (as provided for in rule 26) for an order against SARS to comply with such time periods. Although the taxpayer may recover his costs by requesting the Court to make a cost order against SARS, it cannot be denied that the process for obtaining such a court order may be intricate and time-consuming for the taxpayer concerned.<br>An alternative option in respect of the dealing with objections would be the Australian system where, if an objection is not dealt with within the prescribed time period, such objection is "deemed to be disallowed". The rationale for such provision is that the matter is at least "forwarded" in the appeal process and eventually resolved as opposed to being indefinitely delayed during the objection stage. |

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| | | This was considered by the SARS Task Team in consultation with *inter alia* the Tax Advisory Committee, but was considered undesirable and, in any event, *ultra vires* (s 81(4) requires the Commissioner to **consider an objection)**. A taxpayer requires that his or her objection be considered – not automatically by operation of law be "deemed to be disallowed."<br>To alleviate the concern to the extent possible, the rule 26 application on notice procedure was 'simplified' in the new Part B to the rules in an attempt to expedite such matters. Pro forma notice of motion & founding affidavits will be made available to taxpayers wishing to pursue this procedure where SARS fails to deal with the objection within the prescribed period. |
| **5(3)**<br>The Commissioner may on receipt of the objection contemplated in rule 4, or the information contemplated in subrule (2), alter or withdraw the assessment or disallow the objection | **SAICA**:<br>It should be a requirement under the rules that the SARS official that makes a decision on the objection should be different to the official who made the decision to issue the assessment in dispute. | SARS is of the view that this is not practical – especially where an audit has been done and the auditor is entrenched in the facts. For another SARS officer to become as involved, may amount to duplication of the work.<br>If the objection is disallowed and the taxpayer appeals against such decision, the matter will submitted under the new rules to other SARS officers for purposes of ADR (if appropriate) or litigation before the Tax Board or the Tax Court. |
| **5(3)**<br>**Disallowing the objection** | DTT:<br>We note that the Commissioner is not obliged to give reasons for a decision to refuse the appeal at this stage. In our view, the Commissioner, at this stage in the proceedings, is bound to take a decision with regard to the objection. In this regard, the Commissioner is bound by the provisions of:<br>• The Act;<br>• Constitution of The Republic of South Africa Act 108 of 1996; and<br>• Promotion of Administrative Justice Act 3 of 2000, ("the PAJA").<br>Accordingly, he must make a decision on all factors available at this stage and, in our view, is bound to give reasons, if requested, as soon as he has taken the | It is envisaged in most cases that a clear statement of the basis of the disallowance of the objection will be given.<br>It should be borne in mind that s 33 of the Constitution read with the AJA do not implement a *right* to reasons, only a right to *request* reasons in respect of administrative action that *materially* and *adversely* affected the rights of the taxpayer.<br>Reasons at this stage will probably not differ |

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| | decision (i.e. before the taxpayer has to deliver a notice of appeal). Although Rule 10 provides that the Commissioner must give reasons for an assessment at a later stage in the litigation process, in our view, taxpayers have the right to reasons for the refusal of an objection once the decision to refuse the objection is taken. While we agree that the rules should impose time limits on both the taxpayer and the Commissioner, we are of the view that the time periods prescribed in this rule and in a number of other rules, may be unrealistic. For example, the Commissioner may request information from the taxpayer under Rule 5 which cannot be provided within 90 days. | much from reasons given for assessment, plus may, in any event, be requested in terms of s 5 of the AJA.<br>In the statement of grounds of assessment in terms of rule 10(3), such statement, in any event, must set out "a clear and concise statement of the grounds upon which the taxpayer's objection is disallowed". |
| 5(4)<br>Where, in the opinion of the Commissioner, more time is required due to exceptional circumstances or the complexity of the matter, the principle or the amount | **E & Y**:<br>Recommended that the amount involved should not be used as a decisive factor. | SARS is of the view that it is an important factor, albeit not *per se* decisive. |
| **Rule 6 - Notice of Appeal** | | |
| **6(2)**<br>A taxpayer who wishes to appeal must, within 30 days after the date of the notice of the Commissioner under rule 5(3), deliver to the Commissioner a notice of appeal which must be in such form as may be prescribed by the Commissioner and be signed by the taxpayer | **JP-TPD**:<br>The form of the Notice of Appeal has not been placed before me. In a number of tax cases recently Mr Justice Kirk-Cohen has suggested that the Notice of Appeal be, for practical purposes, in the form of a Notice of Appeal from the Magistrates Court to the High Court in civil matters. It may be a wise precaution to amend this sub-rule to accord therewith as there are many decisions of the High Court as to the requirements of such a Notice of Appeal.<br>In regard to the signature of the Notice of Appeal I suggest that, after the words "be signed by the taxpayer", the following words appear "as defined in Rule 1". | SARS will endeavour to draft the prescribed notice of appeal to ensure that all necessary information, available at that stage of the procedure, is included.<br>For purposes of the statement of grounds of appeal contemplated in rule 12, most of the applicable requirements of a proper notice of appeal are included. The Uniform High Court Rules of Court, in any event, shall apply save as is otherwise provided in these rules. |
| **6(2) (cont.)** | **LLSA**:<br>Under Rule 6(2) the notice of appeal must be signed by the taxpayer. This is a retrogressive departure from present practice and we again ask why this requirement should be insisted upon by SARS. In terms of Rule 11, the notice of appeal now assumes technical and procedural significance as opposed to the current, single sentence, notice of appeal. It will invariably be drafted by lawyers | Rule 6(2) has been amended to provided that either the taxpayer ***or*** his or her representative may sign the notice of appeal. |

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| | or those of other disciplines who presume themselves competent, on occasion justifiably, to indulge in such efforts. In the High Court pleadings, interlocutory and procedural notices are not signed by the litigant in person. Why should this be so in the special court? Why can the notice not be signed by the taxpayer's representative and why can it not be electronically transmitted without a signature? What prejudice to SARS is the Rule attempting to address? | |
| | **SAICA**:<br>Rule 6(2) provides that a notice of appeal must be submitted in the form prescribed by the Commissioner and that such notice must be signed by the taxpayer. Once again it is submitted that the form should be prescribed either in the regulations themselves or should be published by the Commissioner at the date on which the regulations take effect. Furthermore, the requirement that the notice be signed by the taxpayer should in our view allow for the notice of appeal to be signed by the taxpayer or his/her duly appointed advisor. | SARS is of the view that the Commissioner may prescribe these forms in terms of section 65 of the Act.<br>Rule 6(2) was amended to provided that the notice of appeal must be in such form as may be prescribed by the Commissioner "…in terms of s 65 of the Act" to remove any uncertainty in this regard. |
| | **GTKF**: In sub-rule (2) once again, I assume that the prescribed form will be published at the same time as the regulations, and my comment regarding personal signature by the taxpayer in re rule 4 above, applies here as well. | The rules will be too cumbersome and inflexible to change if all prescribed forms are included in the rules – obviously such forms must comply with the Act and the rules.<br>It is envisaged that all the prescribed forms for purposes of the new rules will be available when the rules commence. |
| | **DTT:**<br>As is the case with rule 3 and 4, we believe that the Rules should allow for a taxpayer to lodge an application to condone the late filing of an appeal rather than have to object and appeal against the decision of the Commissioner not to allow a late filing. We note that Rule 26, does not apply to failures to comply with rule 6. Section 83(1A) of the Act may have to be amended to allow for this purpose. | In terms of s 81(1A) read with (1B), as amended by Act 60 of 2001 with effect 1 April 2003, the taxpayer may request the Commissioner to 'condone' the late filing of an appeal where the taxpayer can show reasonable grounds for the delay.<br>Only where the Commissioner refuses to 'condone', does the taxpayer need to pursue the objection and appeal route against such decision by the Commissioner (in terms of s 81(1A)) |
| **Rule 7 - Alternative Dispute Resolution** | | |
| **General** | **PWC**:<br>The alternative dispute resolution process can be faulted for its extremely limited | SARS seeks to introduce a cost-effective ADR |

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| | applicability and will therefore not relieve the burden on the Tax Courts. A formal process of arbitration would have been a much better form of alternative dispute resolution due to the finality of an award made by the Arbitrator. | process in order to make it accessible to all taxpayers. Formal arbitration is considered too expensive – however, rule 7 does not prohibited the use of a private facilitator where the parties agree thereto, which agreement would probably need to include an agreement to share the cost thereof. The normal rule would be that facilitators would be properly trained SARS officials. |
| | **WERKSMANS**:<br>It is not clear what the status and role of the facilitator of the ADR proceedings would be, e.g. would the facilitator's role be restricted to dispute resolutions or would it also cover the settlement of disputes in terms of the Regulations? Apart from having the authority to allow representation on behalf of an absent taxpayer and to make a recommendation if requested, it is not clear what other authority is vested in the facilitator, especially taking into account that it is required that the parties must resolve the issue in the sense that one must convince the other of its interpretation of the law and/or facts. | The facilitator will endeavour to facilitate and agreement whereby either the Commissioner or the taxpayer accepts, either in whole or in part, the other party's interpretation of the facts or the law applicable to those facts or both.<br>If no such agreement can be reached, the facilitator may attempt to facilitate a settlement subject to guidelines issued in terms s 107B, in terms of which only designated SARS persons may *settle.*<br>The facilitator, whether private or a SARS officer, would not have the authority to settle obo SARS – his or her function is limited to facilitating such an "agreement" or "settlement". |
| | SA Banking Council:<br>The rules do not appear to provide any clarity in regard to whether or not ADR can be used in regard to certain elements of a dispute of where the ADR process was used whether or not there could be a partial settlement. While this is incorporated to a large extent in terms of Rule 9 to the extent that a matter falls within the jurisdiction of the tax court, perhaps it would be more beneficial to provide for ADR at an earlier stage. Often both parties would benefit where the Courts are only used to settle matters that the parties themselves couldn't agree on. | SARS is of the view that ADR under rule 7 should only be available in respect of taxpayers who, by filing a notice of appeal, demonstrates a serious intention to pursue his or her dispute to the Tax Board or Court. ADR is introduced at this stage in an attempt to *avoid* such litigation. |
| **7(1)**<br>The Commissioner may –<br>a) request the taxpayer where the Commissioner | **JP-TPD**: The use of the words "whether the dispute" in sub-paragraph (a) and the words "whether or not the taxpayer's dispute" in sub-paragraph (b) render this Rule ambiguous or, more likely, void. I suggest that Rule 7(1) be altered to read as follows:<br>"7(1)(a) Where the Commissioner is of the opinion that the matter is | Comments accepted and appropriate changes effected to rule 7(1). |

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| is of the opinion that the matter is suitable for alternative dispute resolution, whether the dispute; or<br><br>b) where the taxpayer has indicated in his or her notice of appeal that he or she wishes to make use of alternative dispute resolution decide, whether or not the taxpayer's dispute,<br><br>may be resolved by way of the procedures contemplated in this rule and must inform the taxpayer accordingly by notice within 20 days of receipt of the notice of appeal. | suitable for alternative dispute resolution, and may be resolved by way of the procedures contemplated in this rule, he must inform the taxpayer accordingly by notice within 20 days of receipt of the notice of appeal.<br><br>(b) Where the taxpayer has indicated in his notice of appeal that he wishes to make use of alternative dispute resolution, the Commissioner must inform the taxpayer by notice within 20 days of receipt of the notice of appeal whether or not he agrees thereto.<br><br>**WERKSMANS**: In accordance with the contents of rule 7(1)(a), rule 7(1) must provide for a period within which the taxpayer can respond to the Commissioner's request that the ADR proceedings be followed. The draft rule currently only provides for the situation where the taxpayer has indicated in its notice of appeal that it wishes to make use of the ADR proceedings. | Comments accepted and appropriate changes effected to rule 7(1) – the taxpayer must respond within a stipulated time period to the 'invitation' by the Commissioner. |
| | **E & Y**: In terms of sub-paragraph (a) of Rule 7, the Commissioner may request the taxpayer that the matter be resolved by the alternative dispute resolution process. The taxpayer may make a similar request of the Commissioner in the notice of appeal. It is suggested that it be stated in Rule 7 that the Commissioner should state the reasons for suggesting the alternative dispute resolution process. In case the Commissioner rejects the request by the taxpayer for the alternative dispute resolution process, reasons for such a decision should be provided to the taxpayer in terms of the Rules. In the spirit of the alternative dispute resolution process as stated in the Media Release No. 17 of 2002, it is suggested that the rules clearly facilitate the withdrawal of an issue through the alternative dispute resolution process. Rule 7 as it now reads leaves a very high level of discretion as against the taxpayer, at the hands of the Commissioner. | In view of the fact that ADR is an "off the record" process and either party may participate in it with full reservation of rights to pursue the tax appeal to the Tax Board or Tax Court, neither party is required to furnish reasons why he or she requires ADR, or why he or she refuses a request for ADR by the other party |
| | **GTKF**: In sub-rule 1 I am not sure it is correct English to use the expression "to make use of alternative dispute resolution" – I think it would be better to state "to make use of alternative dispute resolution procedures". | Comments accepted and appropriate changes effected to rule 7. |
| **7(2)(c)** | **PWC**: | |

| Rule | Comment | SARS' Response |
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| *(c)* The taxpayer … must be personally present … Provided that the…[facilitator] may, in exceptional circumstances, allow that the taxpayer … may be represented in the absence of the taxpayer … by any representative of his or her choice | This denies the taxpayer the right of legal representation under normal circumstances. The taxpayer **should** be allowed at all times to be represented by a person under his power of attorney. | SARS is of the view that the presence of the taxpayer or representative taxpayer will be more conducive towards reaching an agreement or settlement, and that the taxpayer should only be allowed in exceptional circumstances to send a legal representative in his or her absence. The rule has been amended to provided that the facilitator, in exceptional circumstances, may allow the taxpayer or his or her representative taxpayer to be represented in their absence by a representative of their choice. |
| | **SAICA**:<br>It is unclear from a review of Rule 7(1)(c) whether the person to be appointed by the Commissioner in accordance with the rules governing alternative dispute resolution, whether such person will be an officer of the Commissioner: SARS or an independent person. It is submitted that it would be in the interests of justice that such person is independent of both the Commissioner and the taxpayer thereby ensuring that the decision or opinion issued by the person facilitating alternative dispute resolution is both seen to be and is factually independent of the Commissioner: SARS. The rules regarding the appointment of arbitrators in commercial disputes should in our view be followed in appointing the person to review a matter referred to alternative dispute resolution. At Rule 7(2)(c), it is believed that the taxpayer should be allowed at all times to be represented by a person under his power of attorney. | SARS is of the view that it will be more cost effective for both SARS & the taxpayer if the facilitator is a SARS employee. As far as possible, SARS will seek to ensure independency and objectivity in the appointment of such persons. The rules do not prescribe that the facilitator *must* be a SARS officer – therefore, in certain cases, an external person could be used if both parties agree to share the cost thereof. |
| 7(2)(d)<br>A dispute which is subject to the procedures in terms of this rule, must be resolved by either the Commissioner or the taxpayer accepting either in whole or in part the other party's interpretation of the facts or the law applicable to those facts | **WERKSMANS**:<br>The reference to a party's interpretation of the facts or the law applicable to those facts in rule 7(2)(d) should be extended to refer to a party's interpretation of the facts and/or the law applicable to those facts. In addition, as rule 7(2)(d) envisages a situation where a dispute is not completely resolved the wording of 7(2)(d) should provide for such partial resolution by reading as follows - "A dispute which is subject to the procedures in terms of this rule will be regarded as being resolved to the extent that either the Commissioner or the taxpayer accepts the other party's interpretation of the facts and/or the law applicable to those facts." | Comments accepted and appropriate changes effected to rule 7. |
| **7(3)(a)**<br>The period within which the alternative dispute | WERKSMANS:<br>Rule 7(3)(a) must provide for a situation where the Commissioner requested the taxpayer that the ADR proceedings be followed. | The same period of 20 days (10 + 10 days in terms of rule 7(1)(a)) will apply i.e. 20 days after |

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| resolution proceedings in terms of this rule is conducted commences 20 days after the date of receipt by the Commissioner of the notice of appeal contemplated in rule 6, and ends on the date of termination of the proceedings in the manner provided for in the terms governing the alternative dispute resolution procedures | In addition, the Rules do not specifically provide for a manner in which the ADR proceedings must be terminated. The reference in rule 7(3)(a) to the termination of the proceedings in the manner provided for in the Rules should, therefore, either be extended to provide for the particular manner, or otherwise the rule should simply refer to the date of termination of the ADR proceedings as provided for in rule 7(4). This decision will impact on the wording of rule 7(5), which also refers to the termination of the proceedings in the manner provided for in the terms governing the ADR procedures. | the notice of appeal irrespective who initiates.<br><br>The terms governing the ADR procedure (Schedule A to the rules) will provide for the manner in which the proceedings may be terminated. |
| **7(4)**<br>The parties must finalise [ADR] not later than 90 days after the date of receipt by the Commissioner of the notice of appeal, or such further period as the Commissioner may agree to. | WERKSMANS:<br>It is suggested that rule 7(4) refer to the termination of the ADR proceedings, as several other sub-rules refer to the termination of the proceedings and not the finalisation. Related to the issue referred to [in note 24], it is not clear whether the 90 days period referred to in rule 7(4) would include any time spent on settling a dispute that could not be resolved, as envisaged by rule 7(2)(e)(ii).<br>SA Banking Council:<br>In terms of rule 7(4) (of the draft rules made in terms of section 107A of the Income Tax Act), the parties must finalise the alternative dispute resolution proceedings not later than 90 days after the date of receipt by the Commissioner of the notice of appeal, or such further period to which the Commissioner may agree. We would add here that the Commissioner's discretion must be exercised reasonably. Practically, 90 days after the date of receipt by the Commissioner of the notice of appeal might not fit into the time available by Counsel for the taxpayer. In other words, Counsel might just be unavailable within that period. | Comments accepted and appropriate changes effected to rule 7(4).<br><br>Clearly, the exercise of this discretion will have to be based on reasonable grounds indicating the necessity of extending this period. |
| **7(5)**<br>Where the proceedings are terminated in the manner provided for in the terms governing the alternative dispute resolution procedures, the taxpayer will, unless | R Smith (CA in practice):<br>This rule makes it clear that should settlement not be reached, further proceedings may follow. Taxpayer can not negotiate with SARS under the regulations as they stand. This simply due to the fact that full disclosure may place taxpayer in a position where (even unknowingly) such full disclosure will bring into force and effect paragraph 3, and SARS will: a) either not be empowered to settle under the regulations, or, b) elect not to settle and to proceed in terms of any of the sections within Para 3 for their own reasons. | During ADR, the rights of the taxpayer are protected by virtue of the "reservation of rights" subrule (6) of rule 7.<br>Essentially, subject to certain exceptions, the ADR proceedings shall not be one of record, and any representation made or document tendered in the course of the proceedings may |

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| he or she informs the Commissioner otherwise, be deemed to pursue his or her appeal in the manner contemplated in rules 8 to 29 | Taxpayer who has a wish to, as part of the process, make revelations about facts not known to SARS which may increase tax liability, cannot do so. He may, by doing so, place SARS in a position to proceed against him. He has no defence or limitation in this regard. This is a serious flaw & places an unacceptable pressure on the taxpayer in the negotiation process. This portion of the rules may even be unconstitutional within the context of the spirit of negotiations of this nature. It empowers SARS to place (knowingly or unwittingly) undue pressure on the taxpayer to accept the settlement position of SARS, since failure to settle will result in further action. An additional problem being that after failure to settle SARS may be in a position to levy additional taxes based on the full disclosure requirements, such taxes previously not having been known to SARS. | not (barring certain exceptions) be tendered in any subsequent proceedings as evidence by any other party. |
| **7(7)(a)(ii)**<br>The proceedings in terms of this rule shall not be one of record, and any representation made or document tendered in the course of the proceedings—(ii) may not be tendered in any subsequent proceedings as evidence by any other party, except with the knowledge and consent of the party who made the representation or tendered the document during the proceedings in terms of this rule | WERKSMANS:<br>Rules 7(7)(a)(ii) creates an opportunity for a party to protect documents from being used in a subsequent hearing of the matter by a court simply by using such documents during ADR proceedings. Rule 7(7)(a)(ii) must be subject to the general principle of full disclosure of non-privileged information during the trial. The same comment applies to rule 7(7)(b). | Comments accepted and appropriate changes effected. |
| | DTT:<br>Rule 7(7)(a)(ii) could be amended to clarify that such representation or document presented in terms of this rule may not be tendered in any proceedings instituted in terms of the Act or any other law. The word "subsequent" could be interpreted to mean that the representation or document cannot be used only in proceedings that are "subsequent" to the Rule 7 procedure, i.e. proceedings in the tax court. Such an interpretation could allow such items to be used in a criminal hearing which, we assume, is not the | Rule 7(6)(b) now provides that such documents may not be tendered in "any subsequent proceedings" as evidence by any other party (barring certain exceptions). In SARS' view, "any proceedings" would include criminal proceedings. |

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| | intention. Care would have to be taken to cater for situations where the Commissioner has a legal obligation to disclose such information. | |
| **7(7)(c)**<br>The Commissioner may issue a code of ethics to which any person appointed to facilitate the proceedings in terms of this rule will be bound | LLSA: a) There are instances known to us in which senior SARS officials have been dictated to with regard to the decisions that they must make in exercising their discretion any powers under the Act. In any event there will inevitably be the perception of bias on the part of the SARS employee appointed to preside in these proceedings. The code of ethics is all important and we think that the Commissioner must be obliged to issue and publish this Code if these proceedings are to gain credibility. The Code must be issued for comment by public institutions and we would have a contribution to make to this Code.<br>b) The Commissioner must be given the power, by agreement with and at the request of the taxpayer, to appoint an independent facilitator. Perhaps the facilitator can be appointed by the Commissioner from the panel appointed to preside as chairpersons of the tax board. We think that in appropriate cases and where the Commissioner agrees, this will enhance the acceptability of the procedure. See section 74C(7) of the Act. | The Code of Conduct is based on best mediation/arbitration practice.<br>In consequence of input by the Department of Justice and Constitutional Development, is was decided close before the commencement date (i.e. 1 April 2003) to include the Code of Conduct in Schedule B to the rules. Consequently, it was not possible given the time available to circulate the Code for external commentary.<br>In terms of rule 7(4) the Commissioner may appoint any person, including a person employed by SARS, to facilitate the proceedings in terms of rule 7. The use of an external facilitator is therefore not prohibited by rule 7. |
| **7(7)(d)**<br>The [facilitator] may...be requested [by the parties] to make a recommendation … if no agreement or settlement …. is ultimately reached between the parties, which recommendation will be admissible during any subsequent proceedings including court proceedings. | PWC: The purpose of this recommendation is unclear and its admissibility during trial is uncertain, since it will be in the form of an opinion.<br>SAICA: The purpose of the recommendation at Rule 7(7)(d) is unclear and its admissibility during trial is uncertain, since it will be in the form of an opinion.<br>DTT: Rule 7(7)(d) allows for the parties to request a "recommendation" if they are unable to reach agreement. This recommendation is, in terms of this rule as drafted, admissible in subsequent proceedings. The admissibility of the recommendation is factor that could, conceivably, cause either party to refuse to agree to accept a recommendation. A party may fear that a court could give undue weight to a recommendation. We believe that a recommendation may be useful in assisting parties to settle the matter. We suggest that, when applying for the recommendation, the parties can agree that the recommendation is admissible, but failing such agreement, the recommendation will be inadmissible. | SARS was advised by external mediation & arbitration experts that such a recommendation is useful in mediation & arbitration practice in the sense that (a) it ensures *bona fide* attempts by both parties to settle, and (b) where litigation ensues, it may impact on a cost order.<br>The rights of the parties are protected in that they must *agree* at the commencement of the proceedings that such recommendation be made. |
| (8)*(a)* Any agreement whereby a dispute which is subject to the procedures in terms of this rule is resolved in whole or in part, must be internally reported in the manner as may be | WERKSMANS:<br>Rule 7(8)(a) must be made subject to the secrecy provisions contained in the Income Tax Act. | An internal report under 7(8)(a) will be subject to secrecy. |

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| prescribed by the Commissioner | | |
| **Rules 8 - Appeal to Board or Court** | | |
| (3)*(a)* The Chairman of the Board…must furnish his or her decision to the clerk of the Board… within 20 days of the hearing of the appeal | WERKSMANS:<br>The period of 20 days of the hearing of the appeal should be changed to refer to 20 days of the delivery of the judgment on the appeal. | The idea of this period is to **oblige** the chairman to submit the judgment within 30 days after the hearing of the matter, and was introduced in accordance with one of the underlying purposes of the s 107A rules, i.e. the introduction of time periods to ensure the expedited processing of disputes. |
| **Rules 9-29 - Litigation Procedure** | | |
| **General remarks** | PWC:<br>The litigation process is too cumbersome, prolonged and repetitive, as it may take up to 50 months for a matter to be ready for enrolment, due to the duplication of processes, such as the pre-trail conference, the limitation of issues and statements of grounds of assessment and appeal. | SARS will review time periods after implementation & as the process becomes more effective. |
| **Rule 9 - Limitation of Issues Meeting** | | |
| **General** | SAICA: The "limitation of issues meeting" should be abandoned and be accommodated under Rule 16(2) [Pre-trial meeting] | The rationale for the limitation of issues meeting at this point of the procedures, is to endeavour to limit the issues in dispute for purposes of the anticipated litigation, i.e. before the more formal steps thereof have to be complied with (i.e. filing of statements and discovery etc.)<br>It is *by agreement* – if any party feels it is unnecessary or a 'duplication' of the pre-trial, he or she need not agree to hold such a meeting. |
| **9(1)**<br>**…** the Commissioner may arrange to meet with the taxpayer which meeting must be held at any office of SARS to be agreed | PWC:<br>The meetings need to take place between the legal representatives of the parties at an agreed venue and not with the official of the local Receiver of Revenue office where the meeting is held. | Comments accepted and appropriate changes effected. |
| | SAICA: Rule 9 provides for the parties to prepare a minute recording the facts, dispute and issues the Court is required to decide upon. It is not clear as to who is to prepare this minute. At present it appears that both parties are to prepare | Comments accepted and appropriate changes effected.<br>Rule 9(2) now provides that SARS must within |

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| | minutes, which cannot be practically possible. It should be amended to provide for the minutes to be prepared by SARS and signed by both SARS and the taxpayer or his representative.<br><br>WERKSMANS: We suggest that the minute referred to in paragraph 9(2) be signed by both parties and that a particular party be made responsible for the preparation of the minute. This would give compliant party an opportunity to take steps against a defaulting party.<br><br>GTKF: In sub-rule (2) the "parties" must prepare "a minute" – both cannot prepare. The rule must designate which party is to prepare the minute for submission to the other, while the other must have the right to dispute the contents thereof.<br><br>DTT: Rule 9(2) evisages the preparation of a minute. It is unclear as to whether both parties must each prepare a minute, or, if not, on which party the responsibility rests. In any case, provisions should be made for both parties the sign the minute. | 15 days after the meeting, prepare and deliver to the taxpayer a minute. Where the taxpayer does not agree with the content of the minute, he or she must deliver an additional minute within ten days of the date of the delivery of the minute by the Commissioner indicate exactly in what aspects he or she disagrees with the Commissioner's minute. |
| **Rules 10-13 - Statement of grounds of assessment; appeal & issues in appeal** | | |
| | WERKSMANS:<br><br>(In re rule 10, 11, 12 and 13) It appears that, apart from the requirement that the taxpayer must either admit or deny the facts and legal grounds set out by the Commissioner in its statement of grounds of assessment, the statements of grounds of assessment and appeal are a repeat of the objection and assessment and reasons for assessment. The admission and denial of any facts or legal grounds relied upon by the Commissioner, can be dealt with sufficiently during the pre-trial conference as envisaged by rule 16 or the meeting regarding the limitation of issues in dispute envisaged by rule 9. These rules (16 and 9) could rather be amended to require that the minutes of the meetings envisaged by them should contain a statement by both the Commissioner and the taxpayer, each setting out the facts and legal grounds of its case and a statement by the taxpayer indicating which of the Commissioner's facts and legal grounds it admits or denies.<br><br>This would further avoid a situation where, in terms of the current timing prescribed in rule 16(1)(a), a situation may arise (if discovery was requested) where a pre-trial conference is due prior to the statements of grounds of assessment and appeal are due.<br><br>In any event, it is unusual to require the party initiating the proceedings to "plead" to the facts and legal grounds of the respondent – normally the defendant/respondent is the party delivering a plea. In summary, we do not regard the issue of statements of grounds of assessment and grounds of appeal | One of the major criticisms regarding the 'old' procedure before the Tax Court is the lack of pleadings (wherein facts and legal grounds are denied or admitted) to enable a court to understand what is in dispute and what not – in terms of the new rules this is effected by the statements in terms of rules 10 & 11. Rules 10& 11 will determine the "issues in appeal" in terms of rule 12, and will ensure the issues are crystallised for purposes of any discovery in terms of rule 14.<br><br>The pre-trial only occurs after discovery. |

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| | as necessary steps in the tax litigation procedure. It follows that we believe that rule 12 should be amended to provide that the issues on appeal are those defined in the minutes of the meetings envisaged by rules 9 and 16 and that rule 13 should deal with amendments to these minutes. | |
| **10 Statement of grounds of assessment** | PWC & SAICA:<br><br>This statement will allow the Commissioner to introduce new reasons for the assessment, which might invalidate the earlier assessment. For example, it has been held by the Courts in Section 103 cases, that the Commissioner needs to be satisfied regarding the existence of the requirements for the application of Section 103, at the time of the actual assessment and that he cannot obtain such satisfaction at a later stage. See: *ITC 1563* – 55 SATC 314 at 318; *ITC 1274* - 40 SATC 185 and 197. Therefore, in such a case the statement will serve no purpose and may also be contrary to the "reasons for assessment" in Rule 3 and should consequently be abandoned. | The purpose hereof is, after proper legal consideration, to refine, supplement and enhance the legal basis upon which the assessment is based – similar to the pleadings procedure in other civil litigation proceedings.<br><br>The grounds of assessment, where not provided in full during the issue of the assessment or where no reasons have been requested, may in certain cases only be properly formulated at this stage of the procedures.<br><br>The idea is not to *novate* the grounds of assessment (e.g. apply s 103 where a deduction was disallowed under s 11(a)).<br><br>It should be borne in mind that reasons for administrative action are not required to be exhaustive. This was expressly recognised in *Hamata and Ano v Chairperson, Peninsula Technikon Internal DisciplinaryCommittee and Others* 2000 (4) SA 621 (C) at 634E–G.<br><br>SARS has been advised by constitutional experts that there are certain circumstances under which reasons may be supplemented, for example:<br><br>▪ where the decision in question is made the subject of attack by way of appeal or review and SARS is called upon to meet that attack.<br>▪ SARS may, if called upon to do so, supplement reasons already given.<br>▪ a decision may be justified on a purely legal basis where all the relevant evidence is available. |

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| | DTT:<br>As previously mentioned, we are of the view that the Commissioner should be obliged to give reasons for his assessment at an earlier stage in the proceedings, prior to the noting of the appeal and the proceedings in terms of Rule 9. | Section s 33 of the Constitution read with the AJA do not implement a *right* to reasons, only a right to *request* reasons in respect of administrative action that *materially* and *adversely* affects the rights of the taxpayer.<br>What may be required under certain circumstances is a clear statement of the basis of the decision (e.g. "the deduction is disallowed on the basis that it was not incurred in the production of income"). |
| | GTKF:<br>It seems to me that the statement contemplated in sub-rule (3) should be issued before the notice of appeal is issued by the taxpayer under rule 6. After all, rule 6(1) refers to a taxpayer who is dissatisfied with the decision of the Commissioner to disallow the objection – surely the taxpayer needs the information contained in the statement in rule 10(3) to decide whether or not he or she is dissatisfied. | What a disallowance basically entails is informing the taxpayer that he or she did not, in the grounds of objection, persuade SARS to the contrary (i.e. the basis for the assessment.)<br>Through the objection procedure the taxpayer is pursuing remedies against the assessment – it is submitted that each and every step of dealing with that remedy does not require compliance, once again, with *all* procedural fairness requirements provided that, overall, the taxpayer is sufficiently informed of the basis of the assessment and SARS persistence, despite the objection, with it.<br>What is contemplated in rule 10(3) is, to the extent that it is not a repeat of the grounds of assessment, after proper legal consideration, to refine, supplement and enhance the basis why the objection did not persuade SARS to the contrary. |
| **Rule 11 - Statement of grounds of objection** | | |
| **11(1)**<br>The taxpayer …must, within 60 days after the delivery by the Commissioner of the statement of the grounds | SAICA: Rule 11 deals with the statement of the grounds of appeal. It appears, on the present wording of the rule, that there is nothing to prevent the taxpayer from expanding on the grounds of objection filed pursuant to Rule 4, when he delivers his grounds of appeal. If this is not the intention of the Commissioner, this should be clarified in the rule.<br>Due to the legal nature of this document, the Appellant's legal representative will | What is intended here is that the grounds of objection, after proper legal consideration, be refined (including, for example, 'dropping' certain grounds initially raised), supplemented and enhanced and as such be reflected in the **statement of the grounds of appeal.** |

| Rule | Comment | SARS' Response |
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| of assessment, deliver to the Commissioner a statement of the grounds of assessment. | be the responsible party for the preparation of the "statement of the grounds of appeal", and should be allowed to sign such statement, especially since he will be mandated to appear in court on behalf of the Appellant.<br>DTT: This rule deals with the statement of the grounds of appeal. It appears, on the present wording of the Rule, that there is nothing to prevent the taxpayer from expanding on the grounds of objection filed pursuant to Rule 4, when he delivers his grounds of appeal. If this is not the intention of the Commissioner, this should be clarified in the Rule. | If 'expand' entails that new, different grounds are introduced which changes the *very basis* of the initial objection, then this will amount to a *novation* and this is not what is contemplated in rule 11, as is the case in rule 10.<br>Such amendment or 'novation' of the grounds, in SARS' view, will have to be effected in the manner contemplated in rule 13, i.e. with the consent of the other party failing which, with the leave of the court. |
| **11(2)**<br>The statement must be in writing and be signed by the appellant… | PWC & SAICA:<br>Due to the legal nature of this document, the Appellant's legal representative will be the responsible party for the preparation of the "statement of the grounds of appeal", and should be allowed to sign such statement, especially since he will be mandated to appear in court on behalf of the Appellant.<br>LLSA:<br>Rule 11 again requires the statement of Grounds of Appeal to be signed by the taxpayer. For the reasons stated this must be amended to permit signature by the appellant's representative. Ideally there should be no signature prescription as this precludes an electronic transmission. | The statement may be signed by either the taxpayer of his or her representative in terms of rule 11(2). |
| **Rule 13 - Amendment of statements of grounds of assessment and grounds of appeal** | | |
| **13(2)**<br>The Court may on application on written notice grant leave to amend the statement of the grounds of assessment or the statement of grounds of appeal, subject to such orders as to postponement and costs as to the Court deems appropriate | LLSA :<br>*Ultra vires* & void for reasons stated in respect of rule 26. Rule 13(2) needs to be amended to provide that the Court may on application after 14 days' written notice by either party to the other, grant relief of the type contemplated in that sub-rule. We also refer to what is stated in regarding the validity of Rule 13(2). | See SARS' arguments in this regard on page 6-7. |
| **Rule 14 - Discovery** | | |
| | LLSA: In so far as the Commissioner is concerned, there is an inconsistency between Rule 14, on the one hand, and Rule 5(2) on the other hand. The | It should be borne in mind that, from the outset, SARS is not a party to the transaction |

| Rule | Comment | SARS' Response |
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| | Commissioner can call for all the documents he wants under Rule 5(2) but the taxpayer must wait for discovery until his entitlement arrives under Rule 14. By this time the Commissioner would have exercised all his powers under section 74 (and all of its subsequent sections), it would have issued the assessments, hopefully not spuriously, on the basis of all the information, documents and things that it has the power to gather, and it would have exercised its powers under Rule 5(2). There would be nothing left for the appellant taxpayer to "*discover*" at this stage which is not already known to or in the possession of the Commissioner. The discovery process is thus reduced to an exercise in futility. The process is meaningless because it ignores the very basis of the litigation. That basis, as we perceive it, is the following –<br><br>a) One must proceed from the assumption that SARS does not issue assessments capriciously or maliciously. It does so only after exercise of its information gathering powers under the Act and after due and proper consideration of the facts known to it. Under the common law its decision is rebuttably presumed to be procedurally correct.<br><br>b) Statutorily the onus to prove its decision incorrect is upon the taxpayer. The decision of SARS is reflected in the assessment issued by it and it is that assessment that is rendered subject to objection and appeal.<br><br>c) The statutory role and function of the Commissioner changes when once he has issued an assessment. Before the issue of the assessment he is cast in the role of a tax gatherer with all the constitutionally tolerated invasions of the taxpayers rights under the Bill of Rights that he Courts will allow. Once the assessment is issued and the taxpayer disputes it, the Commissioner assumes the role of a litigant and in that role he ought to enjoy no procedural advantages over the taxpayer. In a court of law and in such a dispute the battle ground must be evened. The draft Rules do not achieve this objective.<br><br>Discovery in the High Court is a reciprocal process. In the draft Rules it is a one-sided process. The taxpayer must await discovery under Rule 14. The Commissioner can demand discovery, not only of documents but of information and "*things*" under Rule 5(2). In the process the taxpayer is stuck with the Commissioner's decision that he has given adequate reasons for the assessments, the objection must be formulated on that basis at the risk of the Commissioner's decision that it is invalid, the taxpayer's remedy against such a decision is suspect; the Commissioner is given a free hand under Rule 5(2) to indulge in a fishing expedition in which the taxpayer must pliantly participate and await a meaningless discovery after the notice of appeal in terms of Rule 14. Fairness in litigation is not exemplified by such a process. | concerned and the taxpayer has exclusive knowledge of all documents and other information relevant to his her tax liability, or not, in issue. The reality is that many taxpayers provide "as little as possible" in response to, for example, a request for information in terms of s 74A of the ITA. SARS cannot procure or request such information the existence of which it is not aware of.<br><br>The information gathering process, in an effort to establish the correct facts from which the correct tax liability of the taxpayer is established, is an ongoing process. It clearly extends beyond assessment, even beyond the Tax Court in view of the provisions of section 83(13)(a) (in terms of which the Tax Court can refer the matter back to SARS for further *investigation*, and re-assessment.)<br><br>Where the grounds of objection, made in terms of rule 5, demonstrates that there are other information that impacts on the issue, it follows logically that such information would be required to enable SARS to consider the objection.<br><br>A taxpayer may request information (excluding 3rd party information) from his or her tax file, at any stage, from SARS officer concerned or from the designated deputy information officers in terms of s 32 of the Constitution read with the Promotion of the Access to Information Act, 2 of 2000.<br><br>The right to discovery (under rule 14) is available to the SARS to procure such information, relevant to the issues on appeal, the existence of which it was not made aware of in the pre-assessment stage or by virtue of the objection. If a taxpayer fails to discover such document, this will mean, in terms of rule 14, that he or she will not be able to "litigate by ambush" and produce & use it at the trial for the first time. The same, obviously applies to SARS. |

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| | | SARS' right to request further information in terms of rule 5(2) is clearly limited to information, documents or things required to decide on the taxpayer's objection, and the exercise of this power would be subject to the Income Tax Act, as well as any other law including the Constitution. |
| | TRAVERSO AJP (CPD): We are not in favour of the parties being able to call for discovery as of right. The reasons for our view are as set out in a recent judgment of the Cape Special Income Tax Court in the case of *Rosstech Drilling Services CC* (Case NO: 10847). For the reasons set out in the decision, we suggest that discovery should be by leave of a Judge in chambers who after hearing the parties can decide whether discovery is necessary and if so, whether and how is should be limited. If the parties have the right to call for discovery, this new procedure will become routine and will result in considerable unnecessary effort and expense for the taxpayer which would be contrary to the aims of the new procedure. It is unlikely that the Commissioner will ever have any items to discover. As the proposed rule 14(1) reads an appellant may have to discover literally thousands of vouchers which may be relevant simply to establish the quantum of an already audited claim. Because discovery has to be made before the issues are limited parties will not at that stage be able to restrict the list of items *"relating to any matter in issue"*. We would strongly urge that the discovery procedure be made subject to the control of a Judge. | As a result of the limitation of issues meeting (rule 9), the ensuing statements of grounds of assessment and grounds of appeal (rules 10 – 11) which in turns determines the issues in appeal in terms of rule 12, it is respectfully submitted that the issues, before discovery, will be sufficiently defined and crystallised to ensure that discovery is limited to documents relevant to the issues on appeal.<br>After delivery of the statements (akin to 'pleadings'), they may only be amended by consent between the parties or with leave of the Tax Court in terms of rule 13. The operation of rules 10-13 is comparable to the "close of pleadings" contemplated in the Uniform High Court Rules ("UHC rules").<br>In terms of rule 35(1) of the UHC rules, a notice to make discovery after the close of pleadings may be given by either party without requiring leave by a judge. Before the close of pleadings, such notice may not, save with the leave of a judge, be given. |
| | TRAVERSO AJP (CPD): The proposed rule does not provide for production and inspection of the discovered items. A procedure based upon that contained in rule 35(6) of the Uniform High Court Rules needs to be included in the proposed rules. It is undesirable that the matter should be dealt with in terms of proposed rule 20(1) as the forms and time periods in the High Court rule are not *per se* appropriate. | Comment accepted & required changes effected.<br>Rule 14(2)(b) was inserted to provide that the production or inspection of the documents, information or things takes place at a venue and in a manner as may be agreed between the parties. |
| | TRAVERSO AJP (CPD): The proposed rule refers to the discovery of *"things"*. We are unsure what is envisaged. On a literal interpretation *"things"* might include all items of stock in trade, tools and machinery etc which may relate to | In terms of rule 1, "things" means things as defined in section 74(1) of the Act. Section 74(1) defines it to include any corporeal or incorporeal |

| Rule | Comment | SARS' Response |
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| | the matter in issue. There is no reference to *"things"* (other than an express reference to tape recordings) in the Uniform High Court Rules and the reference here would seem to be inappropriate. | thing and any document relating thereto. |
| **14(2)(c)**<br>Any party to whom a notice to discover has been delivered, must make discovery on oath of all documents, information or things relating to any matter in the appeal within 40 days after receipt by that party of that notice, specifying separately—(c) the documents, information or things in respect of which he or she has a valid objection to produce. | DTT: We envisage that most disputes arising out of this Rule will be in respect of Rule 14(2)(c). As this rule involves the question of legal privilege (and, perhaps the Promotion of Access to Information Act), it may be of assistance to taxpayers if the Commissioner listed those typical documents which he would have an objection to discovering in principle, and those which he would not. This may avoid a plethora of litigation such as that which arose in respect of the "discovery" of the State's dockets in criminal proceedings. For example, is the Commissioner willing to discover the taxpayer's tax file or the working papers of a tax audit? | It is submitted that the provisions of rule 14 and the Promotion of Access to Information Act sufficiently govern this issue.<br>Absent any basis for refusal of access the working papers of a tax audit, whether in terms of the common law or the grounds of refusal listed in the Access Act, a taxpayer may have such access.<br>It would be impractical, if not impossible, to list *pro ante* typical documents where SARS will have an objection to discovery in principle, as this will depend on the facts and circumstances of each case. |
| **14(3)**<br>If either party believes that there are [additional documents etc]…which may be relevant …that party may give notice to that other party requiring him or her to make such documents, information or things available for inspection, or to state under oath within 10 days that those documents, information or things are not in his or her possession, in which event he or she must state their whereabouts, if known to him or her. | WERKSMANS:<br>A time period during which the additional discovery notice must be given should be prescribed. | Comment accepted & required change effected. |

| Rule | Comment | SARS' Response |
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| **Rule 16 - Pre-Trial** | | |
| **16(1)(a)**<br>The Commissioner must arrange for a pre-trial conference to be held—(a) where either party was requested to make discovery, within 60 days after all parties who were so requested have delivered their discovery notices | WERKSMANS:<br>As indicated [in notes on rule 10, 11, 12 and 13] the result of rule 16(1)(a) is that, where the parties were requested to make discovery, a pre-trial conference would be due to take place even before a meeting regarding the limitation of issues in dispute was held, or the statements of grounds of assessment and appeal are due. | SARS is of the view that this is incorrect – the pre-trial must take place either within 60 days after all parties have delivered their discovery notices in terms of rule 14, or after receipt by the Commissioner of the statement of the grounds of appeal in terms or rule 11.<br>The delivery of the statements in terms or rule 10 or 11 **can only occur** after receipt of the minutes of the limitation of issues meeting, or, where no such meeting place, within 90 days after either ADR, a notice in terms of 83A(13)*(a)* of the Act (i.e. after Tax Board judgment) or the notice of appeal in terms of rule 6. |
| **16(2)**<br>During the pre-trial conference the Commissioner and the appellant must attempt to reach consensus on… | SAICA:<br>The pre-trial conference should also reach consensus "on the statement of grounds of assessment" (provided for in Rule 11), as the same parties will be involved at all times. | If what is contemplated by the commentator is a "stated case" wherein it is indicated which of the issues on appeal are not in dispute, it would be possible by agreement between the parties under rule 16(2)*(g)*, i.e. "any other means by which the proceedings may be shortened". |
| **16(2)(f)**<br>During the pre-trial conference the Commissioner and the appellant must attempt to reach consensus on – (f) the exchange of witness statements | PWC & SAICA:<br>Witness statements at pre-trial hearings relate to motion proceedings and have no place in trial procedures where *viva voce* evidence is presented. Acceptance of witness statements will turn the pre-trial conference into a separate motion procedure hearing, outside Court. | Comment accepted & required changes affected. |
| **16(3)**<br>This conference must take place at any office of SARS to be agreed between the parties | PWC: The meetings need to take place between the legal representatives of the parties at an agreed venue and not with the official of the local Receiver of Revenue office where the meeting is held.<br>WERKSMANS: Must be amended to make provision for a situation where the parties do not agree on an office, eg in such a situation, the assessment office would be the relevant office. | Comment accepted & required changes affected. |
| **16(4)**<br>The Commissioner and | WERKSMANS: To avoid failure by both parties to draw up the minutes of the meeting, rule 16(3) should hold a specific party responsible for preparing the | Comment accepted & required changes affected. |

| Rule | Comment | SARS' Response |
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| appellant must agree which party must draw up the minutes dealing with the matters set out in subrule (2), which minutes must be signed by both parties. | minutes.<br>TRAVERSO AJP (CPD): Rule 16(3) allows the parties to decide upon which will draw up the minute. Rule 16(4) places a duty on the Appellant which will be inappropriate where it is decided that the Commissioner is to draw up the minute. We would suggest that the Commissioner should be made responsible for the drawing up of the minute unless the parties agree otherwise. This avoids an *impasse* where the parties may have difficulty agreeing. Furthermore, the party drawing up the minute should be responsible for the delivery thereof in terms of Rule 16(4). | |
| **16(5) & (6)**<br>The appellant must ensure that a copy of the minutes is delivered to the Commissioner and to the Registrar within 10 days of the conclusion of the pre-trial conference.<br>The pre-trial conference may, at the request of one or both parties, or at the discretion of the Court, be continued before the Court before the appeal is heard. | LLSA: The pre-trial conference is dealt with in Rule 16. In terms of Rule 16(5) the appellant must ensure that a copy of the minutes is filed within 10 days of the conclusion of the pre-trial conference. How the appellant must procure this or what the penalties are for non-compliance is not stated. What is quite clear from the Rules is that the appellant alone is not able to "*procure*" compliance with this Rule. The following observations are pertinent –<br>a) In terms of sub-rule (3) the parties must agree on the party to prepare the minutes and the minutes must be signed by both parties. A variety of possibilities presents itself. We mention, by way of possibilities that it is agreed that the Commissioner must prepare the minutes; he does not do so within 10 days; or he does so within 10 days but the taxpayer disputes the content and it is not signed within 10 days; alternatively it might be agreed that the taxpayer prepares the minutes; the Commissioner does not sign within 10 days due to pressure of work or because of a dispute. But the Rule enjoins the taxpayer alone to procure the filing within 10 days. How should it do so?<br>The obligation to procure the filing of the pre-trial minutes must surely be on both parties . A remedy must be provided if either party is dilatory or disputes the content of the minute drafted by the other. | Comment accepted & required changes affected. |
| **Rule 17 - Date of hearing** | | |
| **General** | DTT: We would like to deal with these Rules together, although they deal with completely different aspects. However, both rules illustrate the difficulty we have with the appointment and employment of the "Registrar" of the tax court. We are concerned that the appointed of the Registrar in terms of section 83(20) of the Act and his employment as envisaged in section 83(21) may be unconstitutional, despite the wording of section 83(22). Regardless of the constitutionality of his appointment, we are concerned that it may appear to taxpayers, who are effected by certain of his functions and decisions, that the Registrar cannot be impartial due to the fact that he is appointed by and employed by one of the litigants. With regard to Rule 17, the Registrar arranges a date for the hearing | After due consideration, SARS is of the view that the current system whereby the Commissioner arranges with the taxpayer a date for the hearing, must be retained.<br>Rule 17.(1) was accordingly amended to provide that after delivery of the pre-trial conference minute in terms of rule 16(4), the Commissioner must arrange a date for the hearing of the appeal and inform the Registrar accordingly. |

| Rule | Comment | SARS' Response |
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| | after consulting both parties. There is no time limit in which he must do this, and there would be instances where the arranging of a certain date would benefit one of the parties. For example, there may be certain instances where the failure to arrange a date would benefit the Commissioner, such as where SARS has delayed in obtaining witnesses or preparing its case. It is important to bear in mind that the Registrar is appointed and employed by the Commissioner. This could be seen by taxpayers as implying bias (even when none exists) against taxpayers. Accordingly, if any dispute arises with regard to Rule 17, we are concerned that "justice would not be seen to be done". In view of his appointment and employment, we are of the view that the Registrar should not have the role envisaged in this Rule. Alternatively, the rule could provide that the Registrar must, after consulting with the parties, arrange a date for the hearing of the matter within, say, thirty days after the receipt of the pre-trial conference minute. This will at least ensure that there are no delays in obtaining a date although the risk that the date chosen could prejudice the taxpayer will remain. With regard to rule 27(1), in our view, the position of the Registrar is untenable. He must either assume the role of taxing master or appoint somebody to act as such, presumably on his behalf. As such, the Registrar must perform a *quasi*-judicial role in respect of a matter in which his employer is involved. In our view, this could be seen as contravening the "*nemo index in re sua*" principle in instances where the amount in dispute could, conceivably, exceed the amount of tax which was subject to the litigation. We suggest that an independent person acts as taxing master, possibly the taxing master of the High Court.<br><br>PWC: The Registrar is under no time constraint to consult with the Appellant and the Commissioner regarding the hearing of the appeal and it is suggested that he/she be compelled to act within 15 days. | Consequently, the management of the roll of the Tax Court will remain the responsibility of the Commissioner.<br><br>SARS is of the view that the Registrar always had and will have the required degree of independency to ensure the required degree of impartiality. SARS is not aware of any compliant in the past whereby an allegation of bias was levied against the Registrar, and a taxpayer at all times will be free to pursue such complaints with SARS, its SSMO or the Judge President of the relevant area where the matter is due to be heard.<br><br>The current structuring of the Registrar's office is aimed at dedicated and expert attention to the administration of the Tax Court, to ensure the effective & efficient finalisation of matters.<br><br>SARS is, however, committed to review the structure and efficiency of the Registrar's office when and where required. |
| **17(1)**<br><br>After receipt by the Registrar of the pre-trial conference minute, he or she must, in consultation with the appellant and the Commissioner, arrange a date for the hearing of the appeal… | WERKSMANS: No provision is made, from rule 15 onwards, to ensure that the matter is set down timeously and within an acceptable period. The remainder of the rules prescribe certain actions to be taken with reference to a number of days prior to the hearing, but not subsequent to previous actions taken. This is clearly against the intention of the Rules to ensure the finalisation of tax disputes within acceptable time periods – a period should be prescribed by rule 17(1) within which the Registrar must arrange and allocate a date for the hearing following the receipt of the Registrar of the pre-trial conference minute.<br><br>E & Y: Time frame should be put on the Registrar in which the date for the hearing should be put onto the roll. | The availability of court dates within a given jurisdiction will be dependant on the Judge President – it may therefore be that the court is not sitting one the day on which such prescribed period expires.<br><br>All reasonable attempts will be made to place the matter on the first available court date which is as far as possible convenient to both parties . |
| **18 Dossier** | | |
| **18.**(1) At least 30 days | WERKSMANS: We suggest that, should the parties have participated in ADR | Comments accepted & changes effected. |

| Rule | Comment | SARS' Response |
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| before the hearing of the appeal, the Commissioner must deliver to the appellant and the Registrar a dossier containing copies of… | proceedings and a recommendation was made by the facilitator, such recommendation also be included in the dossier. Apart from the dossier provision should be made for the parties to file bundles containing discovered documents that they wish to use at the trial. | |
| | GTKF: Given that the dossier is put before the court under rule 22(1), how come in rule 18 it is not required to include the original return, a copy of the assessment and any other relevant correspondence? How else will the court see these documents? | Comments accepted & changes effected. |
| **…(h)** the notice of expert witness and summary contemplated in rule 15 | TRAVERSO AJP (CPD):<br>Rule 18(1)(h) requires that the dossier should include the expert notices and summaries contemplated in rule 15. The time scale in rule 15 will preclude this as the expert notices and summaries only need to be filed 30 and 20 days before the hearing while the dossier needs to be delivered not less than 30 days before the hearing. The time periods in rule 15 and/or rule 18 need to be adjusted and synchronised. | Comments accepted & changes effected. |
| (2) The dossier must be paginated and contain an index of its contents. | DTT: Rules 25 and 18(2) - It is unclear who should be responsible for the pagination of the dossier initially. We believe that this should be attended to by the Commissioner who is responsible for lodging the document. | The dossier will be paginated by SARS, as is the current position. |
| **Rule 19 - Places at which the Court sits** | | |
| **General** | LLSA: Rule 19 seeks by regulation to endow the Registrar of the tax court with powers that it does not have under statute. The times of the sittings of the Court, both as to hours of the day and the periods in which the Court is in session, are determined in terms of the Supreme Court Act and the Registrar simply has no say in determining these matters. The times of sitting are determined by the JP of the division concerned and even he is subject to the Supreme Court Act in determining times and sessions. The position is simply that the tax court will sit whenever the JP decides and that the Registrar can consult the JP merely on the enrolment of appeals. They will be set-down when the JP has a judge or judges available for this purpose. | Nothing more than what is stated is envisaged here - the Judge President will inform the Registrar accordingly and the Registrar may *request* more sittings etc. The Registrar would have no power to *compel* the Judge President concerned. |
| **19(2)**<br>(2) Every appeal must be heard and determined by the Court in the area determined in terms of subrule (1), which is | PWC & SAICA:<br>The parties should be allowed to agree where the appeal may be heard, without the consent of the Judge President of the Court. | Comments accepted & changes effected. |

| Rule | Comment | SARS' Response |
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| nearest to the residence of the appellant: Provided that the appellant and the Commissioner may agree that the appeal may be heard by a Court for another area, provided that the consent of the Judge President of the High Court having jurisdiction in that other area is obtained for such hearing | | |
| **Rule 20 – Procedures not covered by rules or Act** | | |
| (1) Save as in these rules is otherwise provided the general practice and procedure of the Court shall be that of the High Court in so far as such practice and procedure are applicable.<br>(2) If during any proceedings in terms of the Act and rules, a dispute arises as to any procedural issue not covered by the Act and the rules, the President of the Court must decide on the procedures to be followed | TSHABALALA JP (D&LCD):<br>I have discussed the proposed new procedures with those of my colleagues who sit in the Tax Court and we think it is not a sensible step to incorporate the Rules of Court applicable in High Court procedure into the pre-appeal process for the Tax Court. The Tax Court is intended to be informal, inexpensive and expeditious, accommodating the taxpayer himself if he is minded to proceed without legal assistance. Compelling such a person to follow the High Court pre-trial procedure, as the present new rules provide, will probably make an appeal either more difficult for the taxpayer in person and certainly more expensive if he has to engage lawyers or even accountants to represent him. | The newly introduced ADR procedures, as well as the Tax Board, are aimed at attempting to resolve the dispute outside the litigation arena.<br>Consequently, it is anticipated that only highly contested matters that could not be resolved proceed before the Tax Court (and only cases where the tax in dispute exceeds R100 000).<br>SARS also intends to issue a manual setting out a step-by-step approach to the litigation procedure, which will hopefully enable a taxpayer to represent himself before the Tax Court if he or she so desires. |
| | GTKF: Having regard to the rules generally, and in particular to what is stated in rule 20(1) that High Court rules and procedures will apply, it is clear that under the rules only attorneys or advocates will be entitled to argue the case, and other representatives of the taxpayer will no longer be entitled to audience before the court. This is probably a good thing, but court appeals will now be more expensive than before.<br>This is partially addressed by the alternate dispute resolution procedures, but I | Rule 22 contemplates that either the appellant him- or herself may appear, tender evidence & argue the case. In terms of rule 20, the High Court rules will only apply "save as is provided in these rules" – i.e. the taxpayer by virtue of rule 20(1) may be represented by any representative of his or her choice with the necessary power of |

| Rule | Comment | SARS' Response |
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| | think one needs to make the special Board a more effective forum. This should be done by considerably increasing the threshold of tax in dispute which can be heard by the Board and, secondly, as a matter of policy, the Commissioner taking the view that, if the decision goes against him at the Board, he will take the matter to the court only in extremely exceptional cases. | attorney.<br>Increasing the Board's jurisdiction is a possibility that may be considered as the new procedures become more streamlined. |
| | LLSA: *Ultra vires* & void for reasons stated in respect of rule 26. Rule 20(2) purports to permit the President of the tax court to determine procedural issues not governed by the Act or the Rules. There is no statutory authority for the Minister to confer, by regulation, such powers on the President of the tax court. The Act constitutes the tax court which, in limited and special circumstances, is composed only of the President. In such circumstances, only the President is the court. The court, statutorily, only has the powers conferred upon it in terms of section 83(13) of the Act. These powers do not include the power to issue procedural directives such as those contemplated in Rule 20(2). | See SARS comments on pages 6-7. |
| **22 Procedures in Court** | | |
| **22(1)** At the hearing of the appeal, the Court has before it the dossier referred to in rule 18 and… | DTT:<br>We are of the view that the words "the Court has before it the dossier referred to in Rule 18 and" are superfluous to Rule 22(1) and should be deleted.<br>We note that the Rule does not provide for an application by the Commissioner for "absolution from the instance" where the taxpayer has not discharged the onus on him. This would have previously been dealt with in terms of Rule 29(7)(b) of the Magistrate's Court Rules. We suggest that, in order to decrease litigation costs, the Commissioner be entitled to apply for a dismissal of the appeal in terms of this doctrine, which can be applied on the same basis that it is applied in the High Court. The commissioner as "respondent" in the tax court would have an option to apply from absolution from the instance in appropriate circumstances. | Comment accepted & change effected.<br>In terms of rule 20 of these rules, the provisions of the Uniform High Court rules, to the extent applicable, dealing with "absolution from the instance" will be applicable. |
| 22(1)<br>At the hearing of the appeal, … unless the Commissioner or his or her representative takes a point *in limine*, the proceedings are commenced by the appellant | WERKSMANS: It seems inappropriate to prescribe that, in all instances, the taxpayer must start a trial. We believe it would be more appropriate for the normal rules of evidence to apply (i.e. the party on whom the burden of proof rests has the duty to begin) | In terms of the Income Tax Act, the onus is on the taxpayer.<br>The main justification for placing the onus of proof on the taxpayer in tax appeals is that matters concerning the tax position taken by a taxpayer are primarily within the knowledge of the taxpayer. It would be very difficult and costly for the Commissioner to discharge the onus of proof. This approach is consistent with the rationale for a partial self-assessment system, that is, taxpayers have more information about |

| Rule | Comment | SARS' Response |
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| | | their tax liabilities and are, therefore, in a better position to assess their own tax liability than the Commissioner. |
| **22(2)**<br>(2) The appellant … must …adhere to the rules of evidence | PWC: The Commissioner or his representatives should also adhere to the rules of evidence at the hearing of an appeal and not only the Appellant. Therefore, Rule 22(2) should be amended to refer to "the parties or their representatives" and not only to "the Appellant or the person appearing on his or her behalf". | In terms of rule 22(3) the Commissioner must 'in **like manner'** produce all evidence etc. |
| **22(5)**<br>The appellant or the person appearing on his or her behalf may reply to any new points raised in the argument presented by the Commissioner | MALHERBE JP (OPD):<br>The followings words must be added to rule 22(5): "…or to any other points with the leave of the court." | Comment accepted & change effected. |
| 22(9) The Registrar must by notice in writing deliver the decision of the Court to the Commissioner and the appellant or any person nominated by him or her. | WERKSMANS:<br>A time period should be prescribed by rule 22(9) within which the Registrar must deliver the decision of the court. | It is anticipated that this will be as soon as is reasonably possible, and does not require a prescribed time period.<br>The rights of both parties are protected in the sense that the period of 21 days during which a notice of intention to appeal must be provided, only commences upon delivery of the judgment by the Registrar. |
| **26 Extension of prescribed periods, condonation and non-compliance with rules** | | |
| **General** | WERKSMANS: If it is required from a compliant party to take action or to make application to court to compel a defaulting party to comply with the Rules, the cost of such application should be for the account of the defaulting party. We recommend that consideration be given to a less expensive manner of compelling compliance with the Rules, eg a procedure similar to the service of a notice of bar in normal High Court proceedings. If the non-compliant party remains in default for a certain number of days after having been served with a notice of bar, such default should have the same result as contemplated by rule 25(5) (sic) [26(5)?]. | Rule 26 was substantially altered to address most of these concerns, including inserting a simplified application on notice procedure in Part B to the rules. |
| | DTT: As previously mentioned, we note that Rule 26(1) does not apply to the time limits prescribed in Rules 3, 4 and 6. We presume that it is not intended that taxpayers could apply to court for the condoning of failing to comply with Rule 4 and Rule 6 in terms of Rule 26(3) due to the fact that, with regard to the | Rule 26 has been amended accordingly. |

| Rule | Comment | SARS' Response |
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| | late delivery of objections and the noting of appeals. these aspects is catered for in the Act. As mentioned previously, we believe it would be preferable if Rules 26(1) and 26(3) applied to the time periods prescribed in Rules 3, Rule 4, and Rule 6. This may entail an amendment to the Act to allow for the late delivery of objections and noting of appeals to be dealt with in terms of the Rules. | |
| | LLSA: The powers of the tax court are circumscribed by section 83(13) of the Act and cannot be extended by regulations or rules promulgated under section 107 or 107A. Rule 26, for the most part, is *ultra vires* because it empowers the court to issue orders – a) extending any period prescribed by the Rules; (Rule 26(1)); b) condoning non-compliance with the Rules; (Rule 26(3)); c) ordering a defaulting party to comply with the Rules within such period as the Court may decide; (Rule 26(4)); d) of such nature as the court may deem appropriate, and none of these powers fall within the ambit of the powers conferred on the court by section 83(13) of the Act. See *SBD 75* 2 (1997) SBDR 98. The Minister is not empowered by section 107 or 107A to extend the powers of the court by regulation.. Without detracting from those reservation we present the following comments for consideration -<br>a) In practice the Judge-President of a division of the High Court seconds a judge or acting judge to be the President of the tax court for a period, and for the hearing of specific cases, determined by the Judge-President. The tax court is thus only "*in session*" periodically as determined by the Judge-President at his or her convenience. Moreover, the seconded judge or acting judge acts as the President of the tax court only in relation to those appeals that have been enrolled during the period of his or her secondment as President. The Act does not require the Judge-President to designate a judge or an acting judge as a "*permanent*" President and in the past the Law Society and, as far as we are aware, the Bar Councils, have made representations to the Judges-President that the President of the tax court should, for good reason, be rotated.<br>b) The Minister is not empowered by regulation to deprive the Judges-President of the discretion conferred on them by section 83(6) of the Act. It is in any event to be doubted whether the Judges-President have the resources to second a judge to be available as President of the tax court on a continuing basis to provide the taxpayer and the Commissioner with access on a continuing basis for the hearing of applications, *inter alia*, under Rule 26.<br>c) In order to give effect to the intention apparently underlying Rule 26, amendments would be required not only to the Income Tax Act but also to the legislation governing the High Court. There is currently no | SARS has addressed this issue above on pages 6-7. |

| Rule | Comment | SARS' Response |
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| | procedure in terms of which the taxpayer or the Commissioner can apply to the tax court for relief of the type contemplated in Rule 26. Subject to appropriate amendments to the Act it would be less cumbersome to provide that these, essentially interlocutory applications, should be heard be one of the panel of chairpersons of the tax board. (See section 74C(7) of the Act).<br><br>Our difficulties with regard to the powers of the tax court to entertain applications for condonation of the type contemplated in Rule 26 are not cured by section 83(4)(c) of the Act. We say this for the following reasons –<br><br>a) Section 83(4)(c) reads as follows - "*(c) when an appeal before the court involves a matter of law only or constitutes an application for condonation, the court shall consist of the President of the court sitting alone.*"<br><br>b) First, the sub-section deals with the composition of the court in contradistinction to the powers of that court which are circumscribed by section 83(13). Secondly, the sub-section clearly contemplates an appeal "*before the court which involves …. or constitutes an application for condonation*". The applications contemplated under Rule 26 are not appeals. They are applications for the relief envisaged by that Rule.<br><br>c) The Act only provides for the tax court to hear appeals against decisions of the Commissioner which are specifically rendered subject to the objection and appeal procedures; [See, for instance, section 3(4) of the Act] or in other circumstances an "*appeal*" to the tax court to review the decision of the Commissioner [See *CIR v Transvaal Suikerkorporasie Bpk* 47 SATC 34]. An appeal, in either sense, necessarily presupposes an administrative decision by the Commissioner. In relation to the applications contemplated in Rule 26, there is no decision by the Commissioner which is the subject to appeal. One of the consequences is that an appeal before the tax court can never "*constitute an application for condonation*" so that section 83(4)(c) cannot be interpreted as empowering the tax court to entertain applications under Rule 26.<br><br>d) There is another consequence of Rule 26 read with section 83(4)(c) of the Act that needs to be noted.<br><br>e) Since an application under Rule 26 is not "*an appeal before the court [which] involves ….. or constitutes an application for condonation*" the composition of the court must be as prescribed by section 83(4)(a) or (b) and, clearly, cannot comprise the President alone. The practical implication of this is the notorious difficulty of the availability of the other members of the court and the resultant inordinate delay in the proceedings. The Rules should have as their objective, the implication and acceleration of the proceedings and not their protraction by interlocutory applications and procedures. Again we would suggest a less | |

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| | formal and a less time consuming procedure. These applications should be heard and decided upon by the chairpersons appointed to the Special Board [Compare section 73C(7)]. They are all appointed by the Minister, they are experienced and specialist attorneys or advocates and they are impartial.<br><br>f) Although not directly relevant in this context, it is convenient to mention Rule 13 in the same context. It is *"the court that must grant leave to amend the statement of the grounds of the assessment or the statement of grounds of appeal"*. Here again the *"Court"* must comprise the members prescribed by section 83(4)(a) or (b) and not *"the President"* alone. Again there are the delays inherent in so composing *"the Court"* and again we repeat that it would be more appropriate and convenient that applications of this nature should be heard by one of the chairpersons of the Special Board. | |
| (3) The Court may upon application on notice and on good cause shown, condone any non-compliance with these rules | LLSA: The taxpayer's rights in respect of the late filing of an objection or an appeal are respectively dealt with in section 81(2) and (3) and section 83(1A) of the Act. The Commissioner may extend the period within which the objection or the appeal must be filed and should he refuse to do so that decision is rendered subject to objection and appeal.<br><br>This means that the tax court is entitled to substitute its own decision for that of the Commissioner. To the extent that Rule 26(3) purports to limit the taxpayer's remedy for the late filing of an objection or an appeal to an application for condonation, the Rule is *ultra vires*. An application for condonation on good cause shown imposes a different and more difficult onus on the taxpayer. Different considerations apply in such an application to those applicable when a court is merely considering an objection to the Commissioner's decision not to grant an extension under section 81(2) and (3) or section 83(1A). | Rule 26(3) has been amended to apply only to rules 5 and 8-18. |
| | GTKF:<br><br>Rule 26(3) allows the court to condone non-compliance with the rules. What happens if the rules are not complied with and the court does not condone? I would suggest that sub-rule (5) should also apply where there is non-condonation by the court. | This subrule (now subrule (4)) essentially ensures that a defaulting party can approach the Court for condonation even *before* an application based on such default is brought against such defaulting party by the other party. If the Court declines to condone, the only effect will be that the other party will have a clear basis to bring an application against the defaulting party in terms of subrule (5) based on such default. If condonation as a result of an application under subrule (4) was granted (which order will have to be coupled with an order regarding the relevant period within which the |

| Rule | Comment | SARS' Response |
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| | | relevant requirement must be complied with), this would mean that an application under subrule (5) can only be brought after expiry of the extended period granted by the Court in consequence of the condonation (during which period there would be no "non-compliance" as a result of the condonation). |
| **Rule 27: Costs** | | |
| **General** | LLSA: The court's power to make an order for costs is circumscribed by section 83(17). The Rules in several instances purport to confer on the court the power to make appropriate orders for costs. | SARS has addressed this issue above on pages 6-7. |
| | GTKF:<br>Regarding costs, I think it would be entirely reasonable that, should the appeal succeed, the costs be allowed to the taxpayer as a deduction to the extent that there has been no award in the taxpayer's favour. | Any deduction sought would obviously have to comply with the relevant provisions of the Act. |
| **27(1)**<br>Where the Court makes an order as to costs, the Registrar may either perform the functions and duties of a taxing master or appoint any person to act as taxing master on such terms and for such period as the Registrar may determine | SAICA:<br>With regard to Rule 27(1), in our view, the position of the Registrar is untenable. He must either assume the role of Taxing Master or appoint somebody to act as such, presumably on his behalf. As such, the Registrar must perform a *quasi*-judicial role in respect of a matter in which his employer is involved. In our view, this could be seen as contravening the "*nemo index in re sua*" principle in instances where the amount in dispute could, conceivably, exceed the amount of tax which was subject to the litigation. We suggest that an independent person acts as Taxing Master, possibly the Taxing Master of the High Court. | Rule 27 has be been amended to allow for any party to request that another person be appointed as taxing master.<br>The *rationale* for using the Registrar as taxing master is an attempt to make such taxation more efficient and cost-effective. |
| **27(4)**<br>The fees, charges and rates to be allowed by the Court are**, as far as applicable**, those fixed by the tariff of fees and charges in cases heard before the … Division of the High Court within whose area of jurisdiction the Court sits | WERKSMANS:<br>The fees, charges and rates applicable to cases heard before the provincial or local division of the High Court may not be applicable to the particular actions taken and pleadings prepared in respect of tax litigation. | It will be applied to the extent applicable. |

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| (5) In making [a cost] order against an appellant, the Court may require the appellant to pay the costs of the Commissioner as appears to the Court to be right and proper, having regard to the time occupied by the hearing of the appeal and where the Commissioner's representative is an employee of the Commissioner's office, the fee charged is deemed to be the average fee charged by a junior counsel of the division contemplated in subrule (4). | DTT & SAICA:<br>Rule 27(5) attempts to allow for the Commissioner to claim the costs of appearance of its "in-house" counsel. We are of the view that this rule is ill founded and no similar procedure is adopted in other forms of civil litigation. The adoption of such a rule could also be seen as being inequitable in certain instances such as where an individual taxpayer represents himself or where a corporate taxpayer is represented by in-house counsel or perhaps by somebody other than a legal practitioner, for instance an accountant. It seems inequitable that the taxpayer would not be entitled to recover costs in such instances, but the Commissioner could. We suggest that a suitable rule, which deals with both litigants fairly in this regard, is drafted, alternatively, we suggest that this proposed rule is removed from the rules.<br>WERKSMANS:<br>If the Commissioner is allowed a cost order in cases where SARS was represented by internal employees, a taxpayer who appears in person or who is represented by one of its employees, must also be allowed to obtain a cost order against the Commissioner. | Rule 27 has been amended to provide that the Court may require the appellant to pay the costs of the Commissioner, as it appears to the Court to be right and proper. |
| **Rule 28: Fees payable for Transcripts** | | |
| Where any person… requires a transcript of the evidence… that person must deposit with the Registrar a sum of R2 000… | SOMYALO JP (ECD): This Rule provides for a person wishing to obtain a transcript of the evidence or a portion of the evidence given at the hearing of a case, to deposit with the Registrar a sum of R2 000,00 or such lesser sum as in the opinion of the Registrar is sufficient to cover the costs for the transcript. In principle, we feel that it is undesirable for a particular sum of money to be included in the legislation. History has shown, all too often, that when this takes place, the amount prescribed shortly becomes inappropriate regard being had to the devaluation of money. To avoid this being the case, we would suggest that the Rule be amended to provide for the person seeking a transcript to deposit with the Registrar "….Such sum as in the opinion of the Registrar is sufficient to cover the costs for the transcript" (or a similarly worded provision). | Comment accepted & appropriate changes effected. |
| **Rule 30: Transitional Arrangement** | | |
| **30.**(1) | GTKF: In rule 30(1) I think that the expression "notice of objection" should read "notice of appeal". | Amended and effected in the New Part C |

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| | **SA Banking Council:**<br>▪ The wording of the draft is permissive – the Commissioner may settle, where settlement is to the advantage of the State. However, the proposal in our view does not bring an independent mind to the process. From a consumer protection perspective, there is no independent body hearing the evidence and taking a decision thereon. The processes proposed make it obligatory for both parties to present all facts, legal points and argument which then culminate in SARS finally deciding. To our way of thinking the dispute resolution process introduces the opportunity for SARS to have an independent arbiter evaluate the facts and make a decision.<br>▪ A decision taken at the dispute resolution meeting is not final and binding. In paragraph 4(2)(b) the Commissioner may only settle after consultation with the Minister of Finance. To our thinking, although time frames are prescribed in the proposal, the process is not introducing finality at the conclusion of the hearing.<br>▪ Paragraph 4(2)(a) - The proposed wording introduces uncertainty in that the quantum is undetermined. It is suggested that an upper limit for the dispute resolution process be fixed. If the magnitude is such that it will have a substantial impact on the national revenue collections, legal certainty as to what can be allowed in the dispute resolution process is to be preferred. An amount in excess thereof should be handled in the normal processes.<br>▪ Paragraph 4(2)(b) - The proposal that settlement is based on local or regional socio-economic reasons has a certain appeal. However, it introduces uncertainty within the South African tax regime. Should alleviation for socio-economic reasons be necessary, the preferred route would be in the national budget within appropriate legislation.<br>▪ Although regional economic entrepreneurial initiatives are encouraged by the respective governments by using certain tax incentives, the proposed dispute resolution process for a settlement of regional socio-economic reasons introduces uncertainty. It is felt that the provision is too open ended. | The purpose of section 107B is not to prescribe the process for settlement. It is an enabling provision which enables the Commissioner to settle a dispute which is to the benefit of the State.<br>This has now been deleted . |
| | Werksmans:<br>▪ The interaction between the regulations dealing with the settlement of disputes ("the Regulations") and the alternative dispute resolution ("ADR") procedures contained in rule 7 of the rules prescribing the procedures for | These are two separate provisions. ADR is a process to resolve disputes whereas S107B is |

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| | objections and appeal and the conduct and hearing of appeals before the Tax Court ("the Rules"), is not clear.<br><br>▪ On the one hand, it appears from rule 7(2)(e) that the parties to a dispute are obliged to firstly attempt to resolve the dispute in terms of this rule. Only if their attempts fail, are they allowed to, as a second option, settle the matter in accordance with the Regulations. If this interpretation is correct, the Regulations form a subsidiary part (a second leg) of the ADR process contained in rule 7 and, to clarify the situation, both rule 7 and the Regulations would need to be amended to either incorporate the Regulations in the Rules, or the contents of rule 7 in the Regulations.<br><br>▪ On the other hand, regulation 4(1)(c) of the Regulations seems to imply that the Regulations are not part of the ADR, as matters which are regarded as unsuitable for resolution through the ADR are eligible for settlement in terms of the Regulations. If it is the intention that the Regulations should not form part of the ADR referred to in rule 7 of the Rules, the Regulations would need to be extensively amended to, inter alia, incorporate rules similar to those contained in rule 7(7) regarding the nature of the proceedings (i.e. without prejudice) and measures to ensure compliance with the Regulations (e.g. something similar to rule 26 of the Rules).<br><br>▪ The Regulations, it appears, will be, inter alia, promulgated in terms of the Customs and Excise Act, 91 of 1964. However, they merely refer to "the Act" and to certain sections of "the Act". These references appear to be restricted to the Income Tax Act, 58 of 1962 and do not include the Customs and Excise Act. Clarification as to the meaning of "the Act" in the Regulations is therefore required.<br><br>**COMMENTS ON PARTICULAR REGULATIONS**<br><br>▪ Ad regulation 1: The definition of "dispute" provides only for a situation where there is a disagreement on the interpretation of either the facts or the law. This should be extended to provide for a situation where there is disagreement on both the facts and the law. The word "settle" is defined as, essentially, the resolution of a dispute other than a resolution as envisaged by rule 7(2)(d) of the Rules (ie where the parties actually reach agreement on the interpretation of the issues in dispute). However, a resolution envisaged by rule 7(2)(d) only provides for an agreement on the interpretation of the facts or the law and not also for an agreement on both the facts and the law. We therefore, suggest that the definition of "settle" be amended to read - "means to resolve a dispute by compromising any | merely a provision which empowers the Commissioner to settle a dispute. This power can be envoked at any time, i.e. before an assessment.<br><br>Accepted<br><br>Accepted. The words "or both" have been added to clarify the situation. |

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| | disputed liability, otherwise than by way of either the Commissioner or the person concerned accepting the other party's interpretation of the facts **and/or** the law applicable to those facts, and 'settlement' shall be construed accordingly". | |
| | ▪ Ad regulation 4 - Clause 4(1)(b)(iv) should be inserted and should read as follows: "The time period likely to be occasioned in respect of the litigation." | This is already covered to a large extent by Regulation 3. |
| | ▪ Ad regulation 5 - We suggest that regulation 5(2) be extended to provide that the Commissioner or the relevant delegated SARS official must ensure that he or she does not have, or did not at any stage have, a personal, family, social, business, **professional**, **employment** or financial relationship with the person concerned. | Not accepted in terms of adding professional. A new paragraph 6(4) has been added to provide that he does not obtain any reward or benefit. |
| | ▪ Ad regulation 6 - The wording of regulation 6(1) could be construed as granting to a settlement reached in terms of the Regulations a status prevailing over future legislative changes. To ensure that the Regulations are effectual, we suggest that regulation 6(1) imposes a liability on one of the parties to prepare the written agreement referred to in the regulation. | In terms of regulation 7(1), the settlement will be in full and final settlement of the dispute and the applicable law and facts *at the time of* concluding the settlement. Subject to regulation 6(2), 6(3) and 7(3), the settlement will be final and neither subject to future legislative amendments nor prevailing over such amendments in respect of the same facts. |
| | ▪ Ad regulation 7 - As the paragraph refers to the rights and obligations of both SARS and the relevant taxpayer, the heading of this paragraph must be extended to include SARS, ie it should read "Rights and obligations of the person concerned **and SARS**". | Amended to read "Rights and obligations of Parties" |
| | ▪ Regulation 7(4) should be more specific regarding the secrecy obligation it refers to, eg section 4 of the Income Tax Act. The words "within the knowledge of the person concerned and were" should be inserted after the word "were" on the second line of regulation 7.3. | The regulations are issued in terms of section 107B of the Income Tax Act , 58 of 9162, - 'secrecy provisions' would therefore clearly mean s 4 of the Act. |
| 3.<br>It will be inappropriate and not to the best advantage of the state to settle a dispute, where, in the opinion of the Commissioner,—(b) the settlement would be | **DTT:**<br><br>It is clear from the wording of Regulations 2(1) and 2(2) that the purpose of the Regulation is to allow the Commissioner to settle disputes (for reasons set out in Regulation 4) even where, by entering into such a settlement, the "basic principle" [see Regulation 2(2)] that the law must be applied is "tempered" in suitable cases. However, the wording of Regulation 3(b), if applied literally, would appear to render all the Regulations nugatory. It suggests that the | Not accepted. This becomes too open ended. It has been based on the Australian approach. |

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| contrary to the law or a clearly established practice of SARS on the matter, and no exceptional circumstances exist to justify a departure from the law or practice; | Commissioner cannot settle a matter if settlement would be "contrary to the law or a clearly established practice of SARS on the matter".<br><br>In our view, Regulation 3(b) should be deleted *in toto* as the rationale behind all of these Regulations is to allow SARS to settle matters precisely when the "disqualifying" factors set out in Regulation 3(b) are present. This will allow SARS to settle matters in instances not only when the law is unclear on the particular aspect but where the law is clear but other circumstances exist in which settlement would be beneficial to state. | |
| 4(1)<br>The Commissioner may, where it will be to the best advantage of the state, settle a dispute, in whole or in part, on a basis that is fair and equitable to both the person concerned and SARS, having regard to *inter alia*— | **GTKF:**<br><br>Regarding rule 4, what happens if the facts are sufficiently vague such that it is clear that, based on the principles involved, the decision could go either way; or, based on prior decisions of the court, there are legal arguments of equal weight supporting either view? In particular, I think of capital and revenue cases, though it is by no means limited to this example. I really think that the rules should facilitate a settlement, eg. by splitting it down the middle (shades of *Tuck's* case). Do you think that sub-rule (1)(a) is wide enough to deal with such a scenario? Alternatively is sub-rule (1)(c) worded sufficiently widely to bring such a scenario within its ambit? | Each case will depend on the circumstances thereof. |
| 4(2)<br>The Commissioner may, where it will be to the best advantage of the state, settle a dispute …(2) In instances where—(b) the settlement is based on local or regional socio-economic reasons… | DTT: We are concerned that the vagueness inherent in the phrase "local or regional socio-economic reasons" will potentially give rise to disputes and allegations of bias, discrimination or unequal treatment being levelled at SARS. We believe that these "reasons" should be amplified in order to give clarity to taxpayers. It is also unclear whether a matter which falls into Regulation 4(2), but not into Regulation 4(1) can be settled. For example, can a matter be settled purely on the basis of its magnitude, i.e. despite the fact that none of the considerations set out in Regulation 4(1) suggests that it would be to the best advantage of the State? We suggest that this aspect is clarified. | This has now been deleted . |
| **7(1)**<br>The person concerned **should** at all times disclose all relevant facts in discussions during the process of settling a dispute. | **GTKF:** In rule 7(1) the word "should" should read "must". More importantly, in the context, the "person" referred to in rule 7(1) is obviously the taxpayer. I think the Commissioner must also be obliged to disclose all relevant facts in discussions. Likewise, under sub-rule (3), the taxpayer must also have the right to resile from the agreement if the SARS does not disclose material facts. One such example could be if the Commissioner is aware of an unreported decision of the court which favours the taxpayer and the Commissioner has failed to inform the taxpayer of this fact. | A taxpayer would be aware of all material facts relevant to his or her tax affairs. It is difficult to conceive of facts regarding the tax affairs of a taxpayer in possession of the Commissioner, of which the taxpayer is not aware.<br><br>Regarding unreported judgments and other opinions on a certain point in law, the facilitator would be aware of such law and would be required, in terms of the code of conduct for the facilitator, to disclose it where deemed |

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| | | necessary and to the extent possible, having regard to the statutory secrecy provisions. |
| **7(3)**<br>SARS must adhere to the terms of the agreement, unless it emerges that material facts were not disclosed to it or there was fraud or misrepresentation of the facts. | **DTT:** In our view, this regulation is unnecessary as the matter is dealt with adequately in terms of Regulation 6(3). In any event, in our view, both parties (not merely SARS) should be bound by the settlement agreement subject to the condition that the other party has discloses all material facts available to it. | Regulation 6(3) imposes full disclosure as a requirement *before* a settlement may be concluded.<br>Regulation 7(3), provides SARS with the requisite power to resile from the settlement if, after the conclusion thereof, it appears that full disclosure, as required in regulation 6(3), was not made.<br>Regarding any duty of SARS to make full disclosure, see the response directly above. |