

	EXTERNAL POLICY ALTERNATIVE DISPUTE RESOLUTION	Document # SC-CC-26	Revision 0	Effective 04.06.2007
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REVISION HISTORY				
REV	DESCRIPTION OF CHANGE	AUTHOR	APPROVAL	OWNER
0	Initial Release	S.M. Halibate	DCOO – Ops Policy and Performance Management	Head: Dispute Resolution Unit
1				
2				
3				

REFERENCE TO LEGISLATION & OTHER REFERENCES	
This procedure must be read with the following:	
TYPE OF REFERENCE	REFERENCE
Legislation and Rules Administered by SARS:	Customs and Excise Act, Act No. 91 of 1964: Sections 77I 3(1), 77B(2) Customs and Excise Rules: Rules 77I.01 to 77I.23. Revenue Laws Amendment Act, Act No. 45 of 2003
Other Legislation:	Promotion of Administrative Justice Act, Act No. 3 of 2000: Preamble and Sections 3 and 5 Sections 77J, 77L
International Instruments:	Revised Kyoto Convention: General Annex - Chapter 10

REFERENCE TO QUALITY DOCUMENTS		
This procedure must be read with the following quality documents:		
DOCUMENT #	DOCUMENT TITLE	QUALITY REQUIREMENTS
SC-CC-24	External Policy - Administrative Appeal	All
SC-CC-25-A1	Introduction to Alternative Dispute Resolution	All

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1 PURPOSE

- To provide a standard approach to be followed by stakeholders when a dispute is referred to Alternative Dispute Resolution (ADR), as provided for in Section 771 of the Customs and Excise Act (Act No. 91 of 1964), as amended (hereinafter referred to as the Act).

2 SCOPE

- This procedure covers the ADR Process flowing from an internal administrative appeal or as an alternative to judicial proceedings.
- The settlement procedure provided for in part C of Chapter XA of the Act is covered to the extent that it may be applied during the ADR process in an attempt to settle a dispute.
- This procedure does not cover the internal administrative appeal process.

3 DEFINITIONS AND ACRONYMS

ADR	Alternative Dispute Resolution.
Aggrieved person	Any person making use of the dispute resolution procedures as provided for in these rules and includes any duly authorised representative of such person.
Commissioner	Includes, depending on the context, the delegated officer who made the decision in a dispute against which an appeal is lodged.
Day	Any reference to "day" in this guideline means a business day. A business day is any day other than a Saturday, Sunday or a public holiday: Provided that the days between 16 December of a year and 15 January of the following year, both inclusive, shall not be taken into account in determining days or the period allowed for complying with any provision of these guidelines in this part or the rules.
Decision	Includes – (a) Any determination or other Act of an administrative nature for the purposes of this Act; (b) Any amendment or withdrawal and making of a decision; and (c) Any refusal to make a decision;
Deliver	(a) handing the relevant document to the relevant person; (b) sending the relevant document to the relevant person by registered post; (c) telefaxing the relevant document to the relevant person; or (d) transmitting the relevant document to the relevant person by electronic means, Provided that in the case of paragraphs (c) and (d), the original signed document must be handed to that person or be sent by registered post to that person within ten days after it being so telefaxed or transmitted by electronic means.
Dispute	A disagreement on the interpretation of either the relevant facts involved or the law applicable thereto, or both the facts and the law.
Documents	Includes documents as contemplated in section 101 of the Act.
Internal Administrative Appeal	The internal administrative appeal procedure contemplated in Part A of Chapter XA of the Customs and Excise Act.
QMS	Quality Management System.
SARS	The South African Revenue Service established in terms of the South African Revenue Service Act, 1997 (Act No. 34 of 1997).
Settle	To resolve a dispute by compromising any disputed liability, otherwise by way of either the Commissioner or the person concerned accepting the other party's interpretation of the facts or the law applicable to those facts, or of both the facts and the law.
The Act	The Customs and Excise Act, 1964 (Act No. 91 of 1964 as amended).

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4 POLICY

- The ADR process will be administered in accordance with the provisions of Sections 77I of the Act and the procedures as encapsulated within this document.
- This procedure will also apply where a person has delivered a notice to the Commissioner in terms of section 96(1) of the Act and the Commissioner is of the opinion that the matter is appropriate for the ADR Process.

5 PROCEDURE

5.1 INTRODUCTION

- See Annexure SC-CC-25-A1.

5.2 IMPLEMENTATION

- The provisions contained in this procedure will be applicable to all decisions taken on or after 4 June 2007, the date on which Part B of Chapter XA of the Act comes into operation.

5.3 ALTERNATIVE DISPUTE RESOLUTION PROCESS (SECTION 77I OF THE ACT)

- The ADR Process may be initiated by either the aggrieved person or SARS. An aggrieved person may elect the ADR process following a decision of an appeal committee or the Divisions Tariff or Valuation under the Internal Administrative Appeal Process or as an alternative to judicial proceedings. SARS, however, finally determines whether a matter is suitable for ADR. As regards Tariff and Valuation matters it should be noted that due to the technical nature thereof, ADR would normally only be resorted to in cases where all the relevant facts and / or arguments were presented to and considered by the Tariff or Valuation Division and the importer does not agree with their decision. Thus in cases where new arguments arise after a Tariff or Valuation determination was made, these would normally, prior to applying for ADR, be re-submitted, via the Branch Office concerned to the Tariff or Valuation Division for re-consideration of the determination in light of the new arguments raised. In cases where the Tariff or Valuation Division reviews the appellant's counter arguments and does not agree therewith, application can then be made for ADR.
- Application for ADR must be made on a duly completed form DA 52, supported by all relevant documents and delivered to either the Commissioner or the chairperson of the appeal committee as the case may be.

5.4 APPLICATION FOR ALTERNATIVE DISPUTE RESOLUTION AFTER INTERNAL ADMINISTRATIVE APPEAL (RULES 77I.02 TO 77I.04)

- Application for ADR may be made by any person dissatisfied with a decision as contemplated in Section 77B(2) of the Act. (Rule 77I.02)
- An application for ADR must be submitted to the Commissioner on a duly completed form DA 52 within 30 days from the date of the notice informing an appellant in an Internal Administrative Appeal of the decision of the appeal committee or the Commissioner. The Commissioner may agree to extend the period for submission of the form DA 52. (Rule 77I.03)
- A copy of form DA 52 is attached.
- Within 20 days of receipt of the form DA 52, the Commissioner must inform the applicant by notice whether the matter is appropriate for ADR and that it may be resolved by way of the procedures contemplated in the rules. (Rule 77I.04)

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5.5 ALTERNATIVE DISPUTE RESOLUTION AS AN ALTERNATIVE TO JUDICIAL PROCEEDINGS (RULES 771.05 TO 771.07)

- The Commissioner must within ten days after receipt of a notice in terms of Section 96(1) of the Act inform the person delivering such notice that he is of the opinion that the matter is appropriate for ADR (Rule 771.05).
- Within ten days after the date of the above notice by the Commissioner such person must deliver a duly completed form DA 52 to the Commissioner should he / she agree to the ADR process (Rule 771.06).
- Should a duly completed form DA 52 not be delivered within ten days after the date of the notice by the Commissioner, the matter may not be dealt with under the procedures contemplated in these rules (Rule 771.07).

5.6 DELIVERY OF APPLICATION FOR ADR

- Should a person choose to make use of the ADR process, the duly completed form DA52 **must** be delivered at the address specified in either the notice of the final decision of the appeal committee or Tariff or Valuation Division under the Internal Administrative Appeal Process or the address specified in the notice by the Commissioner that the matter is appropriate for ADR in terms of Rule 771.05.
- The said form DA 52 must be supported by all relevant documents.

5.7 THE TERMS OF THE ALTERNATIVE DISPUTE RESOLUTION (RULES 771.08 AND 771.09)

- The terms governing the ADR proceedings are set out in Schedule A to these rules and reproduced on the reverse side of the prescribed form DA 52. The terms of ADR must be accepted in writing by the person applying for ADR (Rule 771.09). The acceptance is effected when the aggrieved person signs the declaration on the reverse side of the form. For any agreement or settlement to have effect, both the Commissioner and the aggrieved person have to agree to the ADR process.

5.8 PERIOD OF DISPUTE RESOLUTION (RULES 77.10 AND 771.11)

- The ADR must be concluded within 90 days, or such further period as SARS may agree to (Rule 771.11). The period within which the ADR proceedings are conducted commences either 20 days after date of notice by the Commissioner in terms of Rule 771.04 or on receipt of a form DA 52 by the Commissioner in terms of Rule 771.06 (Rule 771.10).
- The period ends on the date of termination of proceedings in the manner provided for in the terms governing the ADR procedures.

5.9 THE FACILITATOR (RULE 771.12 AND 771.13)

5.9.1 APPOINTMENT

- SARS may appoint a facilitator, who may be an appropriately qualified officer of SARS. The facilitator will be bound by a Code of Conduct (Rule 771.12).
- The facilitator must be appointed within 15 days after the periods envisaged in Rule 771.04 or 771.06, as the case may be, and the Commissioner must inform the aggrieved person who has been appointed as facilitator.

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5.9.2 ROLE OF THE FACILITATOR

- The facilitator's objective is to seek a fair, equitable and legal resolution of the dispute between an aggrieved person and SARS.
- The facilitator may, if requested at the commencement of the ADR process, make a recommendation at the conclusion of the proceedings should no agreement or settlement be reached between the parties. Such recommendation will be admissible during any subsequent proceedings, including court proceedings (Rule 771.13).
- The facilitator cannot, however, make a ruling or decision which binds SARS or an aggrieved person, nor can the facilitator compel the aggrieved person and SARS to settle the dispute.
- At the conclusion of the facilitation, all agreements, settlements or recommendations must be recorded in writing.
- The facilitator has the authority to summarily terminate the ADR process without prior notice in inter alia the following circumstances:
 - Any party fails to attend the ADR meeting or fails to carry out a request made by the facilitator;
 - The facilitator is of the opinion that the dispute cannot be resolved or either of the parties agree that the issues in dispute cannot be resolved in the ADR process; or
 - For any other appropriate reason.

5.10 PROCEEDINGS (RULES 771.14 AND 771.15)

- The ADR proceedings will be conducted in accordance with the terms set out in Schedule A. (Rule 771.14). The procedure to be adopted, the time place and date and requirements as to the furnishing of submissions and documentation, will be determined by the facilitator after consultation with the aggrieved person and the officer(s) or appeal committee or the Divisions Tariff or Valuations of SARS.
- The aggrieved person must be personally present during the ADR proceedings. He or she may however be accompanied by any representative of his / her choice. The facilitator may, in exceptional circumstances, allow the aggrieved person to be represented in his / her absence by a duly authorised representative of his / her choice. (Rule 771.15)
- Should the facilitator agree, the parties may lead or bring witnesses in the ADR process, the facilitator may also require either party to produce a witness to give evidence.
- At the conclusion of the meeting, either at the instance of the facilitator or by mutual agreement, the facilitator must record all issues which were resolved and issues upon which no agreement or settlement could be reached.
- The facilitator must deliver a report to the parties within ten days of the conclusion of the ADR process.

5.11 RESERVATION OF RIGHTS (RULES 771.16 AND 771.17)

- The ADR proceedings will be without prejudice and not one of record, and any representation made or document tendered in the course of the proceedings may not be tendered in any subsequent proceedings as evidence by any other party, unless:
 - It is used with the knowledge and consent of the party who made the representation or tendered the document during the proceedings;
 - Where such representation/document is already known to, or in possession of, that party; or where it was obtained by that party otherwise than in terms of the ADR proceedings (Rule 771.16).

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- No person may subpoena any person involved in the ADR process (including the facilitator), in whatever capacity, to compel disclosure of any representation made or document tendered in the course of the proceedings (Rule 771.17).

5.12 AGREEMENT OR SETTLEMENT (RULES 771.18 TO 771.22)

- A dispute may either be resolved by agreement whereby either SARS or the aggrieved person accepts, either in whole or in part, the other party's interpretation of the facts or the law applicable to those facts or both (Rule 771.18). This agreement must be reduced to writing and signed by both parties.
- Should the parties fail to resolve the dispute as contemplated in Rule 771.18, the parties may attempt to settle the matter under the settlement provisions as set out in Part C of Chapter XA of the Act (Rule 771.19).
- Should a dispute be resolved either by agreement or settlement SARS must give effect to that agreement or settlement, as the case may be, within a period of 60 days after conclusion thereof (Rule 771.20).
- Should the dispute not be resolved by either agreement or settlement contemplated above or the proceedings are terminated, SARS must inform the aggrieved person of his / her further rights regarding the institution of judicial proceedings within 10 days of the conclusion or termination of such proceedings (Rule 771.21).
- Any agreement / settlement reached through the ADR process has no binding effect in respect of any other matters relating to that aggrieved person not actually covered by the agreement or settlement or any other person.

5.12.1 SETTLEMENTS

- Part C of Chapter XA of the Act deals with the settlement of disputes and has been in operation since the date of promulgation of the Revenue Laws Amendment Act, No. 45 of 2003.
- The purpose of Sections 77J to P is to enable SARS to settle a dispute which is to the benefit of the State. A dispute may be settled at any time as the settlement provisions are not limited for use only during the ADR process.
- ADR however, is a process to resolve disputes during which the settlement provisions may be applied in an attempt to settle the matter. These settlement provisions may only be applied if the circumstances of the matter comply with these regulations.
- The settlement procedures provide guidelines as to the circumstances when it would be appropriate and when it would be inappropriate to settle.

5.12.2 CIRCUMSTANCES WHERE INAPPROPRIATE TO SETTLE (SECTION 77L)

- Circumstances where it is inappropriate to settle will be for example, if in the opinion of SARS:
 - The action on the part of the person concerned which relates to the dispute, constitute intentional tax evasion or fraud (such matters may however be settled where one of the circumstances under which it would be appropriate to settle exist);
 - The settlement would be contrary to the law or a clearly established practice of the Commissioner on the matter, and no exceptional circumstances exist to justify a departure from the law or practice;
 - It is in the public interest to have judicial clarification of the issue and the case is appropriate for this purpose;
 - The pursuit of the matter through the courts will significantly promote compliance of the tax laws and the case is suitable for this purpose; or
 - The person concerned has not complied with the provisions of any Act administered by SARS and SARS is of the opinion that the non-compliance is of a serious nature.

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5.12.3 CIRCUMSTANCES WHERE APPROPRIATE TO SETTLE

- Where it will be to the best advantage of the State, SARS may settle a dispute, in whole or in part, on a basis that is fair and equitable to both the person concerned and SARS.
- SARS must, when contemplating the settling of a matter, have regard to a number of factors, including:
 - whether that settlement would be in the interest of good management of the tax system, overall fairness and the best use of SARS' resources;
 - the cost of litigation in comparison to the possible benefits with reference to -
 - The prospects of success in a court;
 - The prospects of collection of the amounts due; and
 - The costs associated with collection.
 - whether there are any-
 - Complex factual or quantum issues in contention; or
 - Evidentiary difficulties.
 - which are sufficient to make the case problematic in outcome or unsuitable for resolution through the ADR process or the courts;
 - a situation where a participant or a group of participants in a tax avoidance arrangements has accepted SARS' position in the dispute, in which case the settlement may be negotiated in an appropriate manner required to unwind existing structures and arrangements; or
 - whether the settlement of the dispute will promote compliance of the tax laws by the person concerned or a group of taxpayers or a section of the public in a cost-effective way.

5.13 REPORTING REQUIREMENTS

- Section 77P provides for reporting requirements in terms of which SARS must report on an annual basis to the Minister of Finance and the Commissioner on settlements reached.
- This report must be in such format as does not disclose the identity of the person concerned and contain details of the number of disputes settled or part settled, the amounts of revenue foregone and estimated amount of savings in costs of litigation, which must be reflected in respect of main classes of taxpayers.

6 QUALITY DOCUMENTS

Number	Title
DA 52	Application for Alternative Dispute Resolution in terms of the Customs and Excise Act, 1964