

**TAX ADMINISTRATION:  
A COMPARISON BETWEEN INCOME TAX ACT AND THE TAX  
ADMINISTRATION ACT: ASSESSMENTS, OBJECTIONS, PENALTIES  
AND INTEREST**

by

CHARLES WILLIAM HALL

Student number: 11349922

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Study leader:

Mr. J.A. Nell

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*I can do all things through Christ who strengthens me – Philippians 4:13 (KJV).*

## ABSTRACT

# TAX ADMINISTRATION A COMPARISON BETWEEN INCOME TAX ACT AND THE TAX ADMINISTRATION ACT: ASSESSMENTS, OBJECTIONS, PENALTIES AND INTEREST

by

CHARL HALL

**Supervisor:** Jan Nell

**Department:** Taxation

**Degree:** Magister Commercii in Taxation

Tax administration sections have always formed part of the tax legislation in South Africa. South Africans have been warned for years of the introduction of separate legislation to govern the tax administration sections of all the applicable tax Acts.

This became a reality with the introduction of the Tax Administration Act (TAAAct) on 1 October 2012.

This study will focus on the changes from the Income Tax Act to the Tax Administration Act in relation to assessments, objections, penalties and interest.

All the different types of assessments have now been defined under the Tax Administration Act. We also see the introduction of a new type of assessment in the form of a jeopardy assessment. This type of assessment can be raised by a senior SARS official where the Commissioner is satisfied that the collection of taxes may be in jeopardy. The biggest change regarding objections is the change to the timeframe in which a taxpayer is allowed to lodge an objection. Under the Tax Administration Act, an objection has to be lodged within 30 business days after the date of the assessment and not within

30 business days after the due date as under the Income Tax Act. Furthermore, SARS will now be obliged to provide taxpayers with detailed reasons for assessments.

The administrative non-compliance penalties that formed part of the Income Tax Act have now been combined under one chapter in the Tax Administration Act. The biggest change with regard to penalties can be seen in the movement from the additional tax penalty (old 200% penalties) to the new understatement penalty.

Taxpayers will need to ensure that they are aware of the possible implications they may face under the Tax Administration Act. It has now become even more important for taxpayers to seek the advice of qualified tax practitioners when faced with complex tax matters. This will assist the taxpayer in preventing unwanted penalties being raised and would ensure compliance in respect of their tax affairs.

Keywords:

*Tax Administration*

*Assessment*

*Objection*

*Appeal*

*Penalty*

*Interest*

## OPSOMMING

# BELASTING ADMINISTRASIE VERGELYKING TUSSEN INKOMSTE BELASTING WET EN BELASTING ADMINISTRASIE WET: AANSLAE, BESWARE, BOETES EN RENTE

deur

CHARL HALL

**Studieleier:** Jan Nell

**Departement:** Belasting

**Graad:** Magister Commercii in Belasting

Belasting administrasie was nog altyd deel van die belasting wetgewing in Suid-Afrika. Die Suid-Afrikaanse regering waarsku al 'n paar jaar dat wetgewing ingestel gaan word waarin al die belasting administrasie artikels van die verskillende belasting wette saamgevoeg gaan word in een wetgewing.

Die bogenoemde het 'n realiteit geword met die promulgering van die Belasting Administrasie Wetgewing op 1 Oktober 2012.

Die studie fokus op die verandering van die Inkomste Belasting Wet na die Belasting Administrasie Wetgewing in verband met aanslae, besware, boetes en rente.

Onder die Belasting Administrasie Wetgewing is al die verskillende tipes aanslae nou gedefinieer. Onder die Belasting Administrasie Wetgewing sien ons 'n nuwe toevoeging deur die Suid Afrikaanse Inkomste Diens (SAID) by wyse van 'n beskermende aanslag "*jeopardy assessment*". Hierdie aanslag kan uitgereik word deur 'n senior SAID beampte met die goedkeuring van die Kommissaris waar die invordering van belasting gelde in gedrang is.

Die grootste verandering in terme van besware is die feit dat belasting betalers nou besware moet indien binne 30 besigheidsdae vanaf die datum van aanslag. Onder die Inkomste Belasting Wet was belasting betalers kans gegun om beswaar aan te teken binne 30 besigheidsdae vanaf die betalings datum van die aanslag. Die SAID is nou verplig om gedetailleerde gronde vir 'n aanslag aan belastingbetalers te verskaf.

Die verskeie administratiewe nie-nakomings boetes wat deel was van die Inkomste Belasting Wet is nou gekombineer in die Belasting Administrasie Wetgewing. Die grootste verandering kan gesien word in die beweging van die ou addisionele belasting boetes (200% boetes) na die nuwe onderskatting boetes in die Belasting Administrasie Wetgewing.

Belasting betalers gaan nou meer as ooit tevore moet verseker dat hulle die belasting wetgewing nakom en dat al hulle belasting aangeleenthede op datum is. Belasting betalers gaan ook meer moet gebruik maak van gekwalifiseerde belasting kenners wanneer dit kom by gekompliseerde belasting sake. Dit sal voorkom dat belasting betalers beboet word met onnodige boetes en sal verseker dat die belasting betalers die wetgewing nakom.

Sleutelwoorde:

*Belasting Administrasie*

*Aanslae*

*Besware*

*Appel*

*Boetes*

*Rente*

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# **TAX ADMINISTRATION**

## **A COMPARISON BETWEEN INCOME TAX ACT AND THE TAX ADMINISTRATION ACT: ASSESSMENTS, OBJECTIONS, PENALTIES AND INTEREST**

### **CHAPTER 1**

### **INTRODUCTION**

#### **1.1 BACKGROUND**

Tax administration, the transformation from Income Tax Act, No. 58 of 1962 to the Tax Administration Act, No. 28 of 2011, analysed in South Africa.

The promulgation on 4 July 2012 and enactment of the Tax Administration Act ('TAAct') on 1 October 2012, has generated renewed interest into the administration of the tax system in South Africa (Croome, 2012). An extensive search done on leading electronic journal databases, including EBSCOHost, Emerald, Google Scholar, Proquest and SABINET, as well as numerous discussions within the practice, suggest that no in-depth academic research has been undertaken to the changes and effects of the TAAct.

The TAAct is aimed at incorporating into one piece of legislation certain administrative sections generic to all tax Acts, as well as administrative sections previously duplicated under different tax Acts (South African Revenue Services, 2012:4). The TAAct will apply to the following tax Acts:

- Transfer Duty Act, 1949
- Estate Duty Act, 1955
- Income Tax Act, 1962
- Value-Added Tax Act, 1991
- Skills Development Levy Act, 1998
- Unemployment Insurance Contributions Act, 2002
- Diamond Export Levy Act, 2007

- Diamond Export Levy (Administration) Act, 2007
- Securities Transfer Tax Act, 2007
- Securities Transfer Tax Administration Act, 2007
- Mineral and Petroleum Resources Royalty Act, 2008
- Mineral and Petroleum Resources Royalty (Administration) Act, 2008
- Voluntary Disclosure Programme and Taxation Laws Second Amendment Act, 2010

The TAAct will not apply to the administrative sections of the Customs and Excise Act, 1964 (South African Revenue Services, 2012:9).

Although research has been conducted on the sections relating to assessments, objections, penalties and interest of the TAAct (Croome, 2012; Buttrick, 2013; Croome, 2013, Mazansky 2013 & Kotze, 2013), much less research has been done on the changes and implications of these changes, from the Income Tax Act ('the Act') to the TAAct and how it will affect the day to day administrative aspects of a taxpayer.

It is becoming more evident that the sections relating to assessments, objections, penalties and interest, in specific, will not be taken lightly by the South African Revenue Service ("SARS"). Taxpayers will have to be well informed of the changes and resultant effects of these changes.

## **1.2 PROBLEM STATEMENT**

The Income Tax Act, 1962 (the Act) has always contained an administrative section. This section, however, was never stringently enforced within practice or by SARS, and for years there has been speculation of a separate act to govern tax administration in South Africa.

This fact has now finally become a reality with the enactment of the TAAct on 1 October 2012. After the incorporation of the TAAct, various articles were published on certain sections of the TAAct, but no in-depth study has been done on the changes and implications of these changes.

Sections that have been commented on relate mainly to assessments, objections, penalties and interest. Only the basic elements of these sections have been commented on. There is a knowledge gap in practice as to how these sections have changed, what the implications of these changes are and if the changes made were to the best advantage of the taxpayer and SARS.

The following questions therefore remain unanswered:

- what changes were effected from the Act to the TAAct;
- what are the implications of these changes; and
- were these changes made to the best advantage of the tax community as a whole within South Africa?

### **1.3 PURPOSE STATEMENT**

The main goals of this study are:

- To compare the changes of the sections relating to assessment, objections, penalties and interest, from the Act to the TAAct;
- To analyse these sections in order to determine the implications of these changes; and
- To comment and make recommendations to propose solutions to possible problem areas (i.e. inconsistencies) in the legislation.

### **1.4 RESEARCH OBJECTIVES**

The study will be guided by the following specific research objectives:

- To compare the changes in legislation from the Act to the TAAct;
- To analyse the changes in legislation;
- To interrogate the effects of the changes in legislation; and

- To identify and comment on possible problem areas (inconsistencies) in the changes. Recommendations and possible solutions will also be made i.t.o the problem areas identified.

## **1.5 IMPORTANCE AND BENEFITS OF THE STUDY**

The enactment of the TAAct on 1 October 2012 brought uncertainty to taxpayers and professionals within practice. Uncertainty arose as to what changes were made, what the implications of these changes are as well as what effect these changes will have on the tax administration system in South Africa. Although administration sections were always in place they were never enforced stringently in practice or by SARS. However this view seems to be changing since the enactment of the TAAct.

From a theoretical perspective, the study will make the following valuable contributions to some of the most important sections of the TAAct. It will address the changes in depth, implications of these changes and commentary to the sections relating to assessments, objections, penalties and interest.

From a practical perspective this study should be able to provide people within the accounting, audit and tax fields with a better understanding and interpretation of the sections of the TAAct.

## **1.6 DELIMITATIONS**

The study will have several delimitations applicable to it in relation to the context as well as theoretical perspectives of the study. Firstly, it will be limited to the context of the relevant sections of the Act as well as the TAAct relating to assessment, objections, penalties and interest. As such, the study will not focus on the changes from the Act to the TAAct in relation to sections outside of the scope of assessments, objections, penalties and interest. The study is concerned with the changes from the old administration legislation to the new administration legislation. In addition, the study is concerned with the impact of these changes in practice, for taxpayers as well as for SARS.

Secondly, the study is focused on the effects of the changes from the old legislation to the new legislation with regard to assessments, objections, penalties and interest. Therefore, the administrative sections outside this scope will not be examined. The study will, in addition, also focus on identifying possible problem areas (i.e., inconsistencies) with regard to the applicable sections.

Finally, the study will focus on literature published within practice, as well as by SARS, relating to assessments, objections, penalties and interest. The Act as well as the TAACT and its sections relating to the above-mentioned sections will form the basis of the study.

## **1.7 ASSUMPTIONS**

This study is underlined by the following assumptions. As such, it is assumed that:

1. All taxpayers are involved and comply with the administration requirements of the TAACT.
2. Tax administration will become a very important aspect to consider in any new and existing business.
3. TAACT will be stringently enforced by SARS and will be used as a method by SARS as well as by Government to force compliance amongst all taxpayers.
4. All taxpayers can identify instances of non-compliance and can do something to better the overall compliance of their tax affairs.
5. Qualitative (non-empirical) research is the most appropriate means to explore this research phenomenon.
6. The necessary data and information for this research study will be collected through in-depth literature reviews and analyses of all applicable acts of law.

## **1.8 DEFINITION OF KEY TERMS**

This study involves a number of key concepts, namely assessment (original, additional, reduced, jeopardy), date of assessment, business day, effective date, Commissioner as well as senior SARS officials. Key terms will be considered for both the Act as well as the

TAAct. The manner in which these key terms are defined in the study is considered below.

Key terms under the Income Tax Act No. 58 of 1962 (the Act) will be considered as follows:

**Assessment:** For the purpose of this study under the Income Tax Act, means the determination of an amount upon which any tax leviable under the Act is chargeable or the amount of any such tax or any loss ranking for set-off or of any capital loss determined i.t.o par. 9 of the 8<sup>th</sup> Schedule by the Commissioner. An assessment is issued by way of notice of assessment; this can be in hard copy or in electronic form (Income Tax Act, No. 58 of 1962).

**Business day:** For the purpose of this study, a business day is defined as any day excluding a Saturday, Sunday or public holiday (Income Tax Act, No. 58 of 1962).

**Commissioner:** For this study means, a Commissioner for the South African Revenue Service (Income Tax Act, No. 58 of 1962).

**Date of assessment:** For this study means, in relation to any assessment, the date specified in the notice of assessment as the due date or, where the due date is not specified, the date of such notice of assessment (Income Tax Act, No. 58 of 1962).

**Taxpayer:** For the purpose of this study, a taxpayer is defined as any person chargeable with any tax leviable under the Act (Income Tax Act) and includes any person required by the Act (Income Tax Act) to furnish any return (Income Tax Act, No. 58 of 1962).

Key terms under the Tax Administration Act No. 28 of 2011 (TAAct) will be considered as follows:

**Additional assessment:** For the purpose of this study means, in relation to S 92 of the TAAct, an assessment to be made by SARS if at any time SARS is satisfied that an



assessment does not reflect the correct application of a tax Act (Tax Administration Act, No.28 of 2011).

**Administrative non-compliance penalty:** For the purpose of this study it refers to a penalty imposed by SARS under chapter 15 of the TAAAct, and excludes any understatement penalty (Tax Administration Act, No.28 of 2011).

**Assessment:** For the purpose of this study under the TAAAct, means the determination of a tax liability or refund, by way of a self-assessment or assessment by SARS (Tax Administration Act, No.28 of 2011).

**Business day or day:** Under this study a business day or day refers to any day other than a Saturday, Sunday or public holiday. For the purposes of chapter 9 of the TAAAct (objections), the days between the 16<sup>th</sup> of December and 15<sup>th</sup> of January are also excluded (Tax Administration Act, No.28 of 2011).

**Commissioner:** Under the TAAAct has the same meaning as under the Income Tax Act, for the purpose of this study.

**Date of assessment:** For the purposes of this study under the TAAAct, is the date of the issue of the notice of assessment if assessment is done by SARS. If it is a self-assessment and a return is required, the date that the return is submitted. If no return is required, the date of the last payment of the tax for the tax period or, if no payment was made, the effective date (Tax Administration Act, No.28 of 2011).

**Effective date:** For the purpose of this study, in relation to additional or reduced assessments, refers to the date the tax due is payable under the original assessment. The effective date in relation to a jeopardy assessment is the date so specified in the assessment (Tax Administration Act, No.28 of 2011). The meaning of effective date in relation to interest will be discussed in depth under penalties and interest in a later chapter.

**Jeopardy assessment:** For the purpose of this study means, an assessment issued by SARS when the Commissioner is satisfied that the collection of tax would be in jeopardy. This assessment is issued in advance before the due date of the return (Tax Administration Act, No.28 of 2011).

**Original assessment:** The first assessment in respect of a tax period. When a return submitted by a taxpayer does not incorporate a determination of the tax liability, SARS has to issue an original assessment (Tax Administration Act, No.28 of 2011).

**Practice generally prevailing:** For the purpose of this study refers to an official publication regarding the application or interpretation of a tax Act (Tax Administration Act, No.28 of 2011).

**Reduced assessment:** For the purpose of this study, means an assessment issued by SARS after the successful dispute of the taxpayer, to give effect to a settlement, to give effect to the successful appeal of a taxpayer and to correct an error in an assessment (Tax Administration Act, No.28 of 2011).

**Repeat case:** For the purpose of this study, refers to a second or further case of the behaviour as listed in the table for the underestimation penalties in chapter 16 of the TAAAct within 5 years of the previous case (S 221 of the TAAAct).

**SARS official (i.e. Senior Official):** For the purpose of this study, refers to the Commissioner, an employee of SARS, or a person contracted by SARS for purposes of the administration of a tax Act. The person mentioned in the last instance has to carry out the provisions of a tax Act under the direct supervision, direction and control of the Commissioner (Tax Administration Act, No.28 of 2011).

**Self-assessment:** For the purpose of this study, means the determination of an amount of tax payable under a tax Act by the taxpayer (Tax Administration Act, No.28 of 2011).

**Taxpayer:** For the purpose of this study, refers to a person liable for tax, representative taxpayer, withholding agent, responsible third party or a person who, subject to a request,

provides assistance under an international tax agreement (Tax Administration Act, No.28 of 2011).

**Understatement penalty:** For the purpose of this study refers to a penalty imposed by SARS under Part A of chapter 16 of the TAAAct.

## 1.9 ABBREVIATIONS USED

Below is a table that contains a list of abbreviations used in this document.

**Table 1: List of abbreviations used in this document.**

<b>Abbreviation</b>	<b>Meaning</b>
ADR	Alternative Dispute Resolution
SARS	The South African Revenue Service
SAIT	South African Institute of Tax Practitioners
TAAAct	Tax Administration Act No. 28 of 2011
S	Specific section of an Act addressed in this document
i.t.o.	In terms of
Par.	Paragraph
the Act	Income Tax Act No.58 of 1962
TALAB	Tax Admin Laws Amendment Bill 2013

## 1.10 RESEARCH DESIGN AND METHODS

As stated previously the enactment of the TAAAct has caused quite a bit of uncertainty and raised quite a few questions within practice. Uncertainty exists within practice as to how certain sections of the TAAAct will be applied, how it has changed from the old legislation and what the implications will be (Lumsden, 2012; Kotze, 2013 & Croome, 2013).

A detailed analysis of the TAAAct as well as the Income Tax Act is required with regard to the administration sections in order to establish what the changes are, how it will affect taxpayers and what the implication of these changes would be.

Given the above and the nature of the resources that will be used to conduct the research, a non-empirical study (i.e. a pure conceptual study or literature review) will be used. The TAAct as well as the Income Tax Act will be used as the basis for this study. The relative sections selected for this study will be compared from the one legislation to the other and will be expanded on through the use of other research articles published on the relative sections.

The purpose of the study is to compare, analyse and deliver comments on the changes from the old to the new legislation relating to the sections applicable to assessments, objections, penalties and interest of the South African tax administration system.

## **1.11 OVERVIEW OF CHAPTERS**

Chapter 1 of this study consists of the introduction, context settings and the research objectives of the study. Definition of key concepts used through the study is also provided in chapter 1. Chapter 2 will focus on the changes with regard to assessments. A detailed view will be given on the different types of assessments as well as various other assessment specific aspects. Chapter 3 will focus on the changes with regard to objections. A detailed overview will be provided on the objection process in South Africa. A brief overview of the alternative dispute resolution and appeal process will also be provided. Chapter 4 will focus on the introduction of a new interest strategy by SARS as well as the introduction of new penalties to be charged against taxpayers for non-compliance or understatement of taxes. It will focus on the changes with relation to the new interest sections to be promulgated, but will contain a brief overview of the current interest regime in South Africa. Chapter 4 will focus mainly on the penalty regime under the Act as well as the newly introduced penalties under the TAAct. Lastly, in chapter 5, a summary and conclusion based on the research performed will be provided. An overall conclusion will be provided on the different sections discussed in this mini-dissertation. Recommendations and (or) solutions will be provided on possible problem areas identified through the study. Recommendations will also be made for future research.

## CHAPTER 2

# ASSESSMENTS

### 2.1 INTRODUCTION

With the enactment of the TAAct, tax administration in South Africa has attracted renewed interest. Various articles by both practice and SARS have since been published on a variety of aspects of the new legislation.

This chapter will focus on the changes regarding assessments and various aspects relating to assessments from the Act to the TAAct, as stated in the objectives set out in chapter 1.

### 2.2 ASSESSMENTS

Since the enactment of the new legislation, the section relating to assessments in the TAAct has been the focus of most articles written in respect of the TAAct. The Act made provision for original, additional, reduced and estimated assessments which were not fully defined or given their own definitions. The different types of assessments, as defined in chapter 1, have now all been defined under the TAAct. A taxpayer can now be issued with an original, reduced, additional, estimated or jeopardy assessment.

After a tax return was submitted by a taxpayer SARS issues a notice of assessment in relation to the return submitted. The following has to be on the notice of assessment for the assessment to be valid:

- date assessment was issued;
- tax period subject to assessment;
- amount of tax due or refundable under the assessment; and
- the date by which the tax due by the taxpayer has to be paid.

(South African Revenue Services, 2012:37.)

A jeopardy assessment is a new concept introduced by SARS to protect the collection of taxes. The purpose of an assessment is seen by SARS as the process of determining a tax liability by a taxpayer, or tax refund due to a taxpayer (South African Revenue Service, 2012:34). All assessments issued by SARS have to be recorded and kept on record. They may only be destroyed after a certain period of time as notified by the Auditor General.

### **2.2.1 Self-assessment concept**

Under the Act SARS would be responsible for raising an assessment against a taxpayer with regard to a return filed under a tax Act (i.e. VAT, Income Tax and so forth). This has evolved over the years with the introduction of the e-filing system as well as the TAAct where a new self-assessment concept was introduced by SARS. This was implemented to assist with the modernisation of the tax collection system in South Africa (South African Revenue Service, 2012:34).

The taxpayer is required to report the basis of the assessment and simultaneously submit a calculation of the tax due, together with the payment of the amount thereof. The role of SARS in this regard is purely to verify the accuracy of the assessment, by way of a combination of risk, random verification and audits (South African Revenue Service, 2012:35). Through the introduction of this concept SARS emphasises that it is the taxpayers' responsibility to ensure the accuracy of relevant tax calculations.

We see the onus of proving the correctness of an assessment in this regard moving from SARS to the taxpayer. Income tax is not seen as a self-assessment tax, as SARS issues an assessment on the return submitted. Provisional tax, VAT and PAYE on the other hand are seen as self-assessment taxes (South African Revenue Services, 2012:6).

### **2.2.2 Original assessment**

The term "original assessment" was never separately defined in the Act. It is now a separately defined concept in the TAAct. An original assessment under the TAAct refers to the first assessment issued on a taxpayer in respect of a tax period (South African

Revenue Services, 2012:35). The term “original assessment” bears great importance under the TAAct as a number of rules expressly apply to it.

An original assessment can be issued by SARS if:

- a tax return does not incorporate a tax calculation (i.e. annual income tax return);
- no return is required but an amount of tax is due and payable (original assessment is issued on date of payment);
- a self-assessment tax is submitted and a tax calculation is required (i.e. VAT or PAYE); or
- the taxpayer is obliged to submit a tax return and fails to do so (SARS can base original assessment on an estimation).

(Clegg, 2012:22.)

### **2.2.3 Additional assessment**

Under the Act, in certain circumstances where the Commissioner was satisfied that certain criteria as listed in S 79 (1) of the Act were not met, an additional assessment was raised. Under the TAAct, SARS attempts to simplify the circumstances in which an additional assessment can be raised. A concept of prejudice to SARS or the fiscus has been introduced through the TAAct (South African Revenue Services, 2012:35). Examples of prejudice to SARS, or the fiscus, can be seen where a taxpayer underestimated income in a tax return or incorrectly applied a tax Act, and there was prejudice to SARS or the fiscus in the fact that the correct amount of tax was not assessed.

Prejudice in this regard can refer to the disadvantage that SARS or the fiscus would incur by a taxpayer not being assessed correctly due to non-disclosure or underestimation of income. It is in these circumstances that SARS will now raise additional assessments on taxpayers.

An additional assessment can, however, not be raised if the amount that should have been assessed was not so assessed due to the fact of practice generally prevailing being applied (Clegg, 2012:22). An additional assessment is normally issued subsequent to an original assessment.

#### **2.2.4 Reduced assessment**

The term “reduced assessment” has remained much the same as it was under the Act. A reduced assessment can be issued by SARS to give effect to the outcome of a dispute or to rectify an error by SARS or the taxpayer. No reduced assessment will be issued if the preceding assessment was based on an application of practice generally prevailing (Clegg, 2012:23). A reduced assessment may be issued by SARS without the taxpayer necessarily objecting or appealing to an assessment.

#### **2.2.5 Jeopardy assessment**

Another new concept introduced by SARS through the TAAct is a jeopardy assessment. Uncertainty still remains as to how this concept will be handled by SARS (Buttrick, 2013). In simple terms: a jeopardy assessment refers to an assessment raised before a return is due to secure the collection of tax, where SARS suspects that the tax collection could be in jeopardy.

“The raising of a jeopardy assessment at a stage before any tax return is due is clearly a drastic measure by SARS” (van der Walt, 2012). Comments from practice suggested that a taxpayer be notified of the intention by SARS to raise a jeopardy assessment. SARS’s view on this was that it would defeat the purpose of a jeopardy assessment (Standing Committee on Finance, 2011:41). This could potentially enable SARS to collect tax with an assessment where no return is required.

A jeopardy assessment issued by SARS has to be accompanied by detailed grounds of assessment set out by SARS. The onus is on SARS in this regard to prove the validity of a jeopardy assessment (Clegg, 2012:24).



There are certain factors to be considered by a senior SARS official before they can issue a jeopardy assessment, with the approval of the Commissioner. The jeopardy assessment has to be approved by the Commissioner before it can be issued by a senior SARS official. A senior SARS official does not have the final authority to approve the assessment (van Deventer, 2012).

The following factors should be considered by the senior SARS official:

- merits of the tax case to be contested later on;
- honesty or dishonesty of the taxpayer in past dealings with SARS;
- transparency, or the lack thereof, from the taxpayer;
- the taxpayer's general historic compliance record;
- quantum of the assessment and how it compares to the resources of the taxpayer;
- possible criminality of the taxpayer's actions;
- non-disclosure of assets; and
- the ease with which the taxpayer could dispose of assets and externalise the profits (i.e. dissipation of assets).

(van der Walt, 2012.)

Relief for the taxpayer is that the assessment can be placed under review with the High Court, and that the burden of proof for the assessment falls on SARS (Buttrick, 2013). The reality is that any review is a costly remedy for the taxpayer to undertake (van der Walt, 2012). The normal objection and appeal process is also available to a taxpayer aggrieved by the jeopardy assessment (South African Revenue Services, 2012:36).

If not utilised correctly by SARS, this section of the TAAct could be greatly burdensome to SARS and the taxpayer. Although the burden of proof is on SARS in this regard, it is most likely that a number of jeopardy assessment cases would be decided by the courts in years to come.

This can be seen as a "protective assessment" for SARS, but will it be utilised for the intention that it was created for or will it be misused to meet budget targets?

## 2.2.6 Estimation of assessment (Estimated assessment)

Under S 78(1) of the Act the Commissioner could base an assessment on estimation if the taxpayer defaulted in submitting a return or information, or where the Commissioner was not satisfied with the return or information submitted. The term estimated assessment is replaced in the TAAct with the concept of an original, additional, reduced or jeopardy assessment based on estimation (South African Revenue Services, 2012:36).

The section relating to estimated assessments has been simplified from the Act, and SARS will now focus on raising the assessment with information readily available to them. In this regard SARS is not obliged to search for information not readily available to SARS before making an estimated assessment (Clegg, 2012:23).

Under the TAAct (same applied for the Act) SARS can issue a taxpayer with an estimated assessment in the following circumstances:

- the taxpayer fails to submit a return when required;
- taxpayer submits an incorrect or inadequate return;
- information is not provided by taxpayer when requested;
- taxpayer provides incorrect or inadequate information;
- taxpayer cannot submit an accurate return; and
- a basis exists to raise a jeopardy assessment.

(South African Revenue Services, 2012:36.)

An estimated assessment raised as a result of no return being submitted, is final, unless a return is submitted in due course. The raising of an additional assessment by SARS does not remove the obligation by the taxpayer to submit a return. In order for the taxpayer to be able to object and appeal against the estimated assessment a taxpayer will have to submit a corrected return within the turnaround time for lodging objections, normally 30 business days after the date of the estimated assessment (Clegg, 2012:23).

The estimated assessment raised due to non-submission of a return will not be subject to objection and appeal, unless the return is submitted within 30 business days after the date of the estimated assessment (South African Revenue Services, 2012:36).

SARS has to provide the taxpayer with grounds of assessment on each estimated assessment raised stipulating the exact reasons for the assessment so raised (Clegg, 2012:24).

A senior SARS official and taxpayer can enter into a written agreement to base the assessment on an estimation where the taxpayer cannot render an accurate return. The taxpayer will forego the right to objection and appeal in terms of the signed agreement and the assessment so raised will be regarded as final. An assessment based on estimation will still be open to underestimation penalties (South African Revenue Services, 2012: 37).

There are, however, certain remedies available to the taxpayer in order to rectify the matter. Where an estimated assessment is raised due to the non-submission of a return or the submission of an inadequate return, the taxpayer can rectify the matter by submitting a complete and correct return. If an incorrect return has been submitted by the taxpayer, the taxpayer will have to follow the objection and appeal process against the estimated assessment raised. Lastly, as stated above, the taxpayer can enter into an agreement with a senior SARS official to base the assessment on estimation.

In the event that the taxpayer made no attempt to submit a complete and corrected return within 30 business days after the date of the estimated assessment, the taxpayer will forgo the right of objection and appeal against the assessment and the estimated assessment raised by SARS will become final.

The treatment of taxpayers who do not submit returns or submit returns based on incorrect information seems to be fair in this regard by SARS. It will be up to the taxpayer to rectify the matter before the estimated assessment raised becomes final.

### **2.2.7 Date of assessment**

The date of the assessment now forms an integral part of the objection process.

Previously, in terms of the Act, an objection had to be filed within 30 business days after the due date of an assessment. This fact has now changed under the TAAct as objections now have to be filed within 30 business days of the date of the assessment (Croome, 2013). This movement puts the taxpayer at a timing disadvantage, due to the fact that under the old legislation the taxpayer had more time to formulate an objection to SARS.

Taxpayers have been warned by SARS that they will enforce this interpretation of the TAAct very stringently.

### **2.2.8 Prescription of assessment**

The prescription of an assessment refers to the circumstances that prohibit SARS from raising a further assessment on a taxpayer. Previously, under the Act, the prescription of an assessment was dealt with under the section applicable to the type of assessment (additional assessments S79 and reduced assessments S79A). Under S79 of the Act the Commissioner could generally not raise an additional assessment more than three years after the date of the original assessment. The prescription period would be null and void where the amount that should have been taxed was not so taxed due to fraud or misrepresentation. This has been carried through to the TAAct. Under S79A of the Act the Commissioner could not raise a reduced assessment more than three years after the date of assessment nor could it be raised in circumstances where the taxpayer accepted the assessment or the assessment was made i.t.o practice generally prevailing. This has also been carried through to the TAAct.

Under the TAAct the relevant sections have all been simplified and combined under S 99. In general the rule is that SARS cannot raise an assessment more than three years after the date of issue of an original assessment.

The following needs to be considered under the TAAAct with regard to the periods of limitation:

- An original assessment is issued by SARS (Income Tax) – SARS can issue an assessment within three years after the date of the original assessment.
- Self-assessment by a taxpayer (VAT and PAYE), where a return is required – SARS can issue an assessment within five years after the date of submission of the return or the date SARS was so compelled to raise an assessment.
- Original assessment was raised by SARS because a self-assessment return was not filed (VAT, PAYE and no return filed) – SARS can issue an assessment within five years after the date of the taxpayer's last payment of tax or if no payment has been made within five years after the due date of the payment required.
- No return is required but payment is required – SARS can issue an assessment five years after the date of the last payment.
- SARS cannot raise another assessment after an assessment was raised to give effect to the outcome of a dispute. This provision has been carried forward from the Act.

(South African Revenue Services, 2012: 37 & PWC, 2012:47.)

Accordingly the period depends on whether the underlying liability arose from an assessment issued by SARS or a self-assessment by the taxpayer. If the original assessment was issued under the application of practice generally prevailing SARS may not issue an additional or reduced assessment (South African Revenue Services, 2012:37). The same applies to circumstances where no return is required and a payment is made in line with practice generally prevailing (South African Revenue Services, 2012:37). If the original assessment or payment was made in line with practice generally prevailing the Commissioner cannot issue an additional assessment. This was provided for under the Act as well (S79(1) of the Act).

The prescription periods will be void if the assessment is raised to correct the under-assessment of tax due to fraud, misrepresentation or non-disclosure of material facts. The onus is on the Commissioner to prove that the under-assessment was due to fraud, misrepresentation or non-disclosure of material facts (Mazansky, 2013).

It is proposed under the draft Tax Administration Laws Amendment Bill 2013 (TALAB 2013) that SARS would be able to extend the prescription period of a reduced assessment. This will enable SARS to issue a reduced assessment in respect of an error made by the taxpayer. The reduced assessment will only be issued if the taxpayer notified SARS of the error in time, the error is not disputed and a reduced assessment has not been issued by SARS before the end of the prescription period (National Treasury, 2013).

This will, if enacted, benefit a taxpayer where an honest mistake has been made on a tax return.

National Treasury is also proposing that the prescription period be extended in the event of delays caused by the taxpayer. Delays are often experienced by SARS in complex matters such as transfer pricing and GAAR audits that taxpayers deliberately employ as dilatory tactics in providing information to SARS. Taxpayers often delay providing information to SARS up until the prescription period has lapsed. It is proposed under the TALAB 2013 that the period for prescription may be extended where a taxpayer, without just cause, does not provide the required information to SARS on time (National Treasury, 2013).

SARS is seeking protection through the introduction of this amendment and taxpayers will have to make sure that they comply within a reasonable turnaround time.

### **2.2.9 Withdrawal of assessment**

The section relating to the withdrawal of assessments by SARS has not changed from the Act to the TAAAct. An assessment can be withdrawn by SARS if:

- it was issued to the incorrect taxpayer;
- it was issued in respect of an incorrect tax period; or
- it reflects an incorrect payment allocation.

An assessment that has been withdrawn by SARS is deemed to have never been issued by SARS (South African Revenue Services, 2012:37).

### **2.2.10 Grounds for assessment**

There is some good news for taxpayers. When a return is subject to an audit and SARS wishes to include amounts they believe should be subject to tax under an assessment, the taxpayer can request reasons for the grounds of the assessment so raised (S 42(2)(b) of the TAAct).

Under the Act a taxpayer could request SARS to provide grounds for an assessment raised. The Act, however, did not contain a provision compelling SARS to provide the taxpayer with grounds for the assessment raised. Under the TAAct SARS is now compelled to provide the taxpayer with grounds of assessment within 21 working days after date of the assessment being issued (Croome, 2013).

In future SARS will have to be absolutely certain of the grounds under which they raise an assessment as detailed reasons will have to be provided to the taxpayer.

### **2.2.11 Finality of assessments**

Under S 81(5) of the Act, if a taxpayer did not object to an assessment or an objection was allowed or withdrawn, the assessment would become final. SARS was, however, not precluded from raising an additional assessment, reduced assessment or even a withdrawal of the assessment.

Under the TAAct an assessment or decision subject to objection and appeal would only be final in the following circumstances.

*From the taxpayer's perspective:*

- If an estimated assessment was raised due to the fact that no return was filed as and when it should have been (or incorrect or inadequate return was filed), and no actual return (or no correct and completed return) is filed within the objection period after the estimated assessment.
- Estimated assessment was so raised as a result of an agreement between the taxpayer and a senior SARS official.

- No objection is lodged against an assessment.
- No appeal is lodged against a disallowed objection.

(PWC, 2012:47-48.)

SARS would however be able to raise additional assessments in these cases.

*From both the taxpayer's and SARS's perspective:*

- Settlement of a dispute.
- Tax Board decisions, not referred to the Tax Court.
- Tax Court decisions that do not carry the right to further objection and appeal.

(PWC, 2012:48.)

SARS would still be able to raise additional assessments in the above circumstances, if the original assessment so raised was based on fraud, misrepresentation, or material non-disclosure (South African Revenue Services, 2012:38).

Where an assessment is issued to give effect to the judgement of the High Court, the assessment is final for both the taxpayer and SARS, and SARS may not raise an additional assessment (South African Revenue Services, 2012:38).

## **2.3 CONCLUSION**

Assessments dealt with under S77 – S80 of the Act, are now dealt with under S91- S100 of the TAAAct. An assessment issued always contains a liability whether it is a self-assessment or a SARS administered assessment. If an assessment is issued by SARS it is always affected by a notice of assessment (IT 34).

If an assessment is based on an estimate by SARS, or it was not fully based on the return submitted by a taxpayer, the notice of assessment has to be accompanied by an explanation from SARS of how the assessment was raised (grounds of assessment).



The major differences between the Act and the TAAct are:

- the defining of all of the different types of assessments;
- the changes regarding the due date and date of assessment in respect of objections;
- the movement by SARS towards a complete self-assessment tax system; and
- the introduction of a new type of assessment namely the jeopardy assessment.

In chapter three a comparison will be conducted on the sections relating to objections from the Act to the TAAct.

## CHAPTER 3

# OBJECTION AND APPEAL

### 3.1 INTRODUCTION

When a taxpayer feels aggrieved by an assessment raised by SARS, or a decision made by SARS under the TAACT or tax Acts, a taxpayer has the right under the TAACT (as it was in the Act) to lodge an objection against the assessment or decision (South African Revenue Service, 2012:39). An objection has to be filed by a taxpayer not later than 30 business days after the date of the assessment. Previously, under the Act, a taxpayer was granted 30 business days after the due date of an assessment.

After an objection has been lodged by a taxpayer SARS has a general turnaround time of 90 business days to deal with the objection. The taxpayer will then be issued with an outcome of the objection by SARS. If the taxpayer is not satisfied with the outcome of the objection, the taxpayer can follow the alternative dispute resolution (ADR) and appeal process.

The Minister of Finance will publish “rules” to govern the procedures of objection and appeal in South Africa by public notice from time-to-time. Currently these “rules” are promulgated under S 107A of the Act and will apply until such time that the new rules are published under S 103(1) of the TAACT (SARS Interpretation Note 15, 2013:3).

### 3.2 OBJECTION

#### 3.2.1 Reasons for assessment

Before an objection is lodged, a taxpayer has the right to request reasons for the assessment raised by SARS. This provision has not changed much from the Act to the TAACT. This is currently still applied under rule 3 of the rules to the Tax Court and has been carried forward into the new draft rules under the TAACT. The new rules will become effective once promulgated by the Commissioner.

A taxpayer has 30 business days after the date of assessment to deliver the request for reasons of assessment to the Commissioner, in the prescribed form (SILKE, 2012:1121 & SILKE, 2013:1139). This request has to be delivered to the Commissioner in writing and must be signed by the relevant taxpayer involved or the taxpayer's representative. The request has to be delivered to the relevant SARS office and must contain the address of the taxpayer or representative to whom SARS has to respond.

The Commissioner has 30 business days after the date on which the request has been received to refer the taxpayer to reasons already provided by SARS in a prior notice. If no such reasons are available, the Commissioner has 60 business days in which to provide the taxpayer with adequate reasons for the assessment. This period may be extended by the Commissioner with a further 45 business days, depending on the complexity of the matter or if the Commissioner needs more time due to exceptional circumstances (Notes on South African Income Tax, 2013:710).

The taxpayer has 30 business days after the date on which reasons were provided by the Commissioner or indicated as already provided, to lodge an objection against the assessment so raised.

This section of the objection process raises concerns within practice as there are no set rules of who at SARS will deal with the request (a senior SARS official, Commissioner or duly authorised person). Will the request be delivered to the relevant person at SARS? As in most cases these requests are just delivered to the relevant SARS branch and become part of the general stream of information.

Taxpayers and practitioners will have to follow up constantly with SARS to ensure that the request has been received by the authorised person and that it is correctly dealt with by SARS.

### **3.2.2 Objections**

As stated in the introduction, an objection (dispute) is normally lodged by a taxpayer when the taxpayer does not agree with an assessment raised by SARS. As it was under the Act, the TAAct also provides that the burden of proof is upon the taxpayer when lodging an objection or appeal.

The taxpayer will therefore have to be able to substantiate the objection with valid grounds and show that the taxpayer was entitled to a deduction, expense or other taxable effect that was not taken into account in the assessment under objection.

Under the TAAct provision is made that the burden of proof would be on SARS to substantiate the validity of an assessment based on an estimate or the grounds under which an understatement penalty was raised. In the case of a jeopardy assessment the onus is on SARS to show that the assessment was issued on reasonable grounds (South African Revenue Services, 2013:43). SARS, however, does not carry the burden of proof relating to a jeopardy assessment under objection and appeal.

### **3.2.3 Assessments and decisions subject to objection**

Under S81 of the Act provision was made for the objection against an assessment by which the taxpayer was so aggrieved. No specific provision was made for the lodging of an objection against certain decisions. This has now all been simplified in the TAAct. Under S104 of the TAAct provision is now made for the objection against an assessment and a decision by which the taxpayer is aggrieved.

The following assessments and decisions can be objected to by a taxpayer under the TAAct (this section has been clarified in the TAAct):

- Any assessment against which the taxpayer is so aggrieved.
- A decision by SARS not to extend the period for objection and appeal when so requested by the taxpayer.
- Decision that can be objected or appealed under any tax Act.

- Decision by SARS not to authorise a refund.
- Decision by SARS not to remit a penalty imposed for administrative non-compliance.
- Decision by SARS not to remit an understatement penalty.

(South African Revenue Services, 2012:39-40 & Clegg, 2012:50.)

### **3.2.4 Criteria for a valid objection**

An objection lodged by a taxpayer or on behalf of a taxpayer has to meet certain criteria in order for SARS to accept it as a valid objection. SARS has the right to decline any invalid objection lodged by a taxpayer or on behalf of any taxpayer.

The following criteria will have to be met for an objection to be considered valid:

- It has to be lodged within 30 business days after the date of assessment (under the Act it was 30 business days after the due date of the assessment). Objections lodged outside this time frame will be considered as invalid.
- It has to be lodged in the prescribed form. NOO1 for individual taxpayers, assessed and additional taxes for corporate taxpayers as well as for PAYE penalties and ADR1 for all other taxpayers, VAT, PAYE assessments (South African Revenue services, 2013).
- The grounds of the objection must be explained in full.
- An address where the taxpayer would be available to accept notice and documents relating to dispute has to be specified.
- The objection has to be signed by the taxpayer or the representative so authorised by a power of attorney.
- The objection has to be delivered to the SARS address specified for the purpose of the assessment. A NOO1 is to be lodged via SARS's online e-filing profile and an ADR1 is to be submitted manually at a SARS branch.

(South African Revenue Services, 2012:40.)

The criteria set out above formed part of the Act as well.

### 3.2.5 Suspension of payment

Since the enactment of the TAAct, renewed emphasis has also been placed on the principal of “pay now argue later”. Although this statement was also part of the old legislation it was never stringently enforced.

This view has now changed and SARS has warned taxpayers that they will still be liable for tax due even if they are in dispute resolution with SARS (Kotze, 2013). The section on suspension of payment applies to disputes lodged under the normal objection and appeal processes.

A taxpayer has to lodge a request to suspend payment together with the prescribed documents for a valid objection to SARS. The request for payment suspension will then be taken under review by a senior SARS official, and not the Commissioner, where a decision will be made whether or not to suspend payment (Buttrick, 2013). Where a senior SARS official declines the request for suspension of payment by a taxpayer, the decision will not be open to objection and appeal under the applicable sections. The only relief available to the taxpayer will be in the form of a review to the courts (Standing Committee on Finance, 2011:41).

Concern was raised within practice whether a fair and logical approach would be followed by the senior SARS official making the decision to suspend payment or not.

The fact that an objection has been lodged is now, more than ever, not reason enough for SARS to defer payment until a later date. The objection process is not seen as a negotiation process with SARS and therefore SARS will no longer tread lightly regarding this matter (South African Revenue Service, 2012:48). Suspension of payment on disputed tax is not an automatic right. An application by the taxpayer to suspend payment on taxes pending objection has to be lodged with SARS. This request can be lodged before an objection is submitted.

The following will be used as a guide by the senior SARS official making the decision of whether or not to suspend payment:

- compliance history of the taxpayer;
- amount of tax due involved;
- the ease with which the taxpayer could dissipate assets during the period of suspension;
- the ability of the taxpayer to provide adequate security for the amount of tax due;
- the possibility of financial hardship for the taxpayer;
- whether sequestration or liquidation proceedings are imminent;
- involvement of fraud in the origin of the dispute; and
- failure by the taxpayer to provide information requested by SARS.

(South African Revenue Services, 2013:58-59.)

These guidelines were part of the Act as well.

After taking the above factors into account a senior SARS official can still decline the request for suspension of payment. The senior SARS official can decline the request if it is felt that:

- the objection lodged was frivolous or vexatious;
- dilatory tactics are being used by the taxpayer in making the objection;
- given further consideration of the factors the suspension should not be allowed; or
- there was a material change in the facts given.

(South African Revenue Services, 2013:58-59.)

A request for suspension of payment will be revoked with immediate effect if no objection is lodged, no appeal has been noted or an appeal that was unsuccessful to the tax board or court is not taken further by the taxpayer. SARS raised the concern that the provision might be misused by taxpayers to delay the payment of taxes due (South African Revenue Services, 2013:59). Provision was therefore made for SARS to review the suspension from time to time during the dispute process.

This gives SARS the added power to withdraw an approved request for suspension of payment at any time when SARS feels that payment of the taxes could be in jeopardy.

When looking at the provision SARS seems to be covered, and taxpayers asking for suspension of payment will have to hope that their application is dealt with in a fair and independent manner.

In order to create some fairness it can be recommended that the taxpayer be afforded the opportunity to meet with the senior SARS official in cases where the request for suspension exceeds a certain amount or that the decision made by the senior SARS official be reviewed by a panel attending to request for suspension of payments.

Collection steps against a taxpayer are suspended until 10 days after the date of the notice of SARS's decision not to allow the request, or the decision by SARS to revoke a request for suspension of payment (South African Revenue Services, 2013:59). This suspension is automatically lifted when SARS expects that a taxpayer can easily dissipate assets. When a request for suspension has been granted, the payment will be suspended until the objection has been dealt with, but interest will still be raised on the amount of taxes due (South African Revenue Services, 2013:59).

Concern raised in this regard is whether SARS would be lenient towards a taxpayer in a case where a payment should not have been due in the first place.

A taxpayer has to lodge a written request, and it seems that the compliance history of the taxpayer as well as the amount of tax in question will play a vital role in the decision to suspend payment (Buttrick & Kotze, 2013). There is a positive note for taxpayers in the fact that SARS can no longer engage in recovery proceedings for the payment when it receives a request for the suspension, until 10 business days after SARS has issued a decision and notified the taxpayer (Milner, 2012).



A taxpayer who pays the amount of tax due before an objection or appeal is lodged will be refunded the amount overpaid as well as interest from the date of overpayment, if the objection or appeal was successful (S 164(7) of the TAAct).

### **3.2.6 Late objections**

If the objection is filed late, the onus is on the taxpayer to provide reasons to SARS for the late filing of the objection (it is recommended that this is done before the end of the 30 business day period). This provision has been carried over from the Act to the TAAct. SARS will decide on the validity of these reasons and if the objection should be allowed (Croome, 2013). Renewed emphasis has been placed on the matter of late objections through the TAAct and SARS has warned that no late objections will be accepted. It is therefore recommended that taxpayers and representatives make sure that they meet the deadline of when an objection should be lodged and that they apply for condonation of late objection timeously when the prospect of lodging an objection late arises.

The taxpayer will have to apply to SARS for condonation of late objection where an objection is lodged after the 30 business day time frame specified. Extensions of up to 21 business days can be granted by SARS if reasonable grounds exist for the lodging of a late objection by a taxpayer. Reasonable grounds can be seen as a matter that is not absurd and out of the ordinary (South African Revenue Services, 2012:40).

Where the taxpayer requests that the period be extended beyond the 21 business days (22 business days to 3 years after date of assessment) the taxpayer will have to show that exceptional circumstances exist for the late lodging of the objection. Exceptional circumstances refer to something that is out of the ordinary and of an unusual nature (South African Revenue Services, 2012:40).

If extension is granted by SARS, the period of extension will be valid from the expiry of the 30-day period specified, irrespective of when the request was made (SARS Interpretation Note 15, 2013:4).

The application lodged for condonation of late objection will go under review of a senior SARS official. The senior SARS official has to take all of the relevant factors into consideration and must make a decision that will be in line with the constitution of South Africa. There is no standard set of rules to be used by a senior SARS official reviewing the application for condonation of late objection. The standards to be used by the senior SARS official will therefore differ on a case-by-case basis (SARS Interpretation Note 15, 2013:4).

As stated above, all the relevant factors should be considered by the senior SARS official and this would include the following:

- the reasons for the delay;
- length of the delay;
- prospects of success; and
- any other factors deemed to be necessary for making the decision, for example, SARS's interest in the final tax liability.

(SARS Interpretation Note 15, 2013:5.)

SARS's interpretation note on the exercise of the discretion in a case of late objection and appeal can be consulted for a more in-depth explanation of the factors to be considered by a senior SARS official.

Condonation of late objection is not a right and the onus will be on the taxpayer to prove that relevant factors exist for the condonation of a late objection (SARS Interpretation Note 15, 2013:5-7). There is some hope for taxpayers in the fact that the decision by a senior SARS official not to grant condonation of late objection will be subject to objection and appeal.

Where three years have lapsed after the date of assessment a senior SARS official may not grant extension. In a case like this, the senior SARS official will not be making a decision, the request for condonation or extension will be denied based upon operation of law (SARS Interpretation Note 15, 2013:8). This also applies in the instance where there

was a change in the practice generally prevailing that was applicable at the date of the assessment (South African Revenue Services, 2013:49). This provision seems to be fair toward both SARS and taxpayers as it affords the taxpayer more than enough time to work through the assessment and seek advice if the taxpayer is unsure of the correctness. SARS also seems to be covered by the fact that the opening of unnecessary objections would be prevented.

### **3.2.7 SARS outcome**

Nothing has changed under this section from the Act to the TAAct. SARS has to notify a taxpayer of the outcome of a valid objection. The norm is that SARS has 90 working days to deal with a valid objection. The objection can be allowed in whole or in part by SARS and a revised assessment has to be issued to give effect to the outcome. Where an objection has been disallowed by SARS, detailed grounds for the disallowance of the objection have to be provided to the taxpayer together with an explanation of the appeal process.

### **3.2.8 Test cases**

This is a new provision introduced by SARS under the TAAct. Where there are several disputes relating to similar issues SARS, under the TAAct, may use the outcome of one of the settled disputes as an example as to how all other disputes relating to similar matters be dealt with.

The selection of a test case will be carried out by a senior SARS official. The taxpayer has to be informed by the senior SARS official of the intention to use the dispute as a test case and the taxpayer will have to give consent. If a taxpayer does not want the dispute to become a test case, the taxpayer has 30 business days after receiving the notice to notify SARS accordingly. If no response is received by SARS the senior SARS official will continue with the process of using the dispute as a test case.

SARS can lodge an application to the Tax Court for the dispute to be seen as a test case, where a taxpayer refuses (South African Revenue Services, 2012:42). All test cases have to be heard by the Tax Court.

It is set out in the rules to the objection process that, if SARS is successful in a test case, the legal costs incurred would be for the account of the appellant in the test case. The appellant will also be liable for the legal costs incurred by SARS in a ratio to be determined by the Tax Court. If, however, the appellant is successful, the legal costs will be for the account of SARS.

### **3.3 APPEAL**

In terms of the Act, if the taxpayer was not satisfied with the outcome of the objection from SARS the taxpayer can lodge an appeal in the prescribed form and time frame. The same rule applies under the TAAct. The taxpayer will have 30 business days after the date of the outcome of the objection letter to lodge an appeal. The TAAct provides a clearer provision of the general process of appeal than that provided by the Act.

As stated above, the notice of appeal has to be lodged within 30 business days of the notice of the disallowance of the objection. An NOA has to be completed for individuals, corporate assessed tax and PAYE penalties and an ADR 2 for all other taxes. Detailed grounds of appeal have to be set out in the appeal and it must be signed by the taxpayer.

Under the TAAct provision is made for an extension in the period to lodge an appeal; this provision was not included in the Act. Extension for the submission of an appeal may be granted by the Commissioner for a further 21 days if reasonable grounds exist, or 45 days if exceptional circumstances exist (the same criteria as mentioned under objections will apply to reasonable grounds and exceptional circumstances under appeal) (Notes on South African Income Tax, 2013:712-713).

When an appeal is lodged by a taxpayer it can be dealt with in three different ways:

- Alternative dispute resolution (ADR) and if not resolved it can go to the Tax Board or Tax Court.

- The appeal can go the Tax Board and then the Tax Court.
- The appeal can go straight to the Tax Court.

### **3.3.1 Alternative dispute resolution (ADR)**

The ADR process formed part of the Act as well. The inclusion of this under the TAAct will promote the process of the taxpayer approaching SARS on a face-to-face basis. The rules have remained more or less the same.

As it was under the Act, the TAAct also provides for the taxpayer to choose whether or not to enter into an ADR with SARS when lodging an appeal. If the taxpayer does not choose to enter the ADR process with SARS, the Commissioner can ask the taxpayer if the taxpayer wants to do so within 20 business days after the date of receipt of the appeal (Notes on South African Income Tax, 2013:712-713).

Through the ADR process a dispute lodged with SARS can be resolved by the taxpayer outside of the Tax Board or Tax Court. There has to be mutual agreement between the taxpayer and SARS for the alternative dispute resolution to exist. All proceedings in the appeal process are suspended during the ADR process. The taxpayer will still have the right to appeal to the Tax Court if the alternative dispute resolution is unsuccessful.

All ADR procedures have to commence 20 business days after the receipt of the notice of appeal by the Commissioner and be finalised within 90 business days after the date of receipt of the notice of appeal.

A taxpayer has to be physically present at the ADR meetings and may be accompanied by a representative. It is in very limited exceptional circumstances that the taxpayer will be excused from the proceedings.

The fact that an appeal has been lodged does not suspend the obligation for payment of taxes due by the taxpayer. The taxpayer will have to lodge a request for suspension of payment in the same manner as discussed under objections.

Should the taxpayer and SARS come to an agreement under the ADR process, the Commissioner has 60 business days to issue a revised assessment. If the ADR process fails, the Commissioner has to notify the taxpayer of the hearing of the appeal by the Tax Board within 40 business days. Alternatively, the Commissioner has 90 business days to meet with the taxpayer to resolve and limit the matters within the dispute (Notes on South African Income Tax, 2013:713).

It is, however, inappropriate to enter into an ADR agreement in the following circumstances:

- intentional tax evasion or fraud exists;
- settlement would be in contravention of the law or established practice;
- it is in public interest that the matter be heard and settled by the courts;
- compliance amongst taxpayers will be promoted if the matter is heard and settled by the courts; or
- the Commissioner is of the opinion that the taxpayer's non-compliance with a tax Act is of a serious nature.

(Notes on South African Income Tax, 2013:713.)

The ADR process is seen as a cost-effective manner for the taxpayer and SARS to resolve disputes without involving the court. Instead of SARS being seen as a threat in the matter, the taxpayer is given the opportunity to sit on a one-to-one basis with SARS to discuss the matter, as well as possible resolutions.

### **3.3.2 Appeal to Tax Board**

As it was under the Act, an appeal to the Tax Board will be applicable under the TAAAct where a taxpayer is dissatisfied with the outcome of an objection received from the Commissioner. The provisions have remained more or less the same from the Act to the TAAAct. A few of the changes are set out below.

An appeal made to the Tax Board must be in respect of taxes not in excess of R 500 000 or the taxpayer and a senior SARS official must agree that the appeal be heard by the Tax Board. Under the Act the taxpayer and the Commissioner had to agree to the matter (South African Revenue Services, 2013:50 & Silke, 2012:1124). In a case where the amount of tax in dispute exceeds the R 500 000 threshold the senior SARS official involved has to decide whether the Tax Board will hear the appeal or whether a request should be made to refer the appeal to the Tax Court (under the Act this discussion was to be made by the Commissioner). The final decision on whether or not to refer the appeal to the Tax Court now rests with the Chairperson.

The fact that a senior SARS official has the right to enter into an agreement with a taxpayer under this section can raise concern within practice. Should the decisions in an advanced stage of appeal not rest with the Commissioner, and should he rather not be assisted by senior SARS officials in making these decisions?

The panel of which the Tax Board must consist of has not changed from the Act to the TAAct. The Tax Board shall consist of an advocate or attorney, who will act as chairperson, and if considered necessary by the taxpayer or the Commissioner and accountant or representative from the commercial community (South African Revenue Services, 2013:50 & Silke, 2012:1124).

As it was under the Act, the taxpayer involved in the appeal has to be present at the Tax Board hearing. The senior SARS official involved in the matter has to be physically present as well. The taxpayer may elect that the representative who prepared the appeal be present at the hearing as well. Under the Act, if a taxpayer failed to appear at a Tax Board hearing, the Tax Board may, at the request of the SARS representative, confirm the assessment and the taxpayer would forward the right of appeal to the Tax Court.

This rule has been retained in the TAAct. The same situation applies if the SARS representative (senior SARS official under the TAAct) fails to appear at the Tax Board hearing; SARS will forward the right to appeal to the Tax Court. If the Chairperson of the Tax Board is satisfied that valid grounds exist for the non-appearance of the taxpayer or SARS, the Tax Board will not confirm the assessment or decision. This section will only

apply if the taxpayer or SARS furnishes the clerk of the Tax Board with reasons for the non-appearance within 10 business days after the date of the hearing. Under the Act it was 7 business days (Silke, 2012:1142, Silke, 2013:1124 & South African Revenue Services, 2013:50-51).

The onus is still on the taxpayer to prove to the Tax Board that an amount is not subject to tax (Notes on South African Income Tax, 2013:715). The Tax Board will hear the appeal taking all the facts into consideration. A time constraint has been imposed under the TAAct for the delivery of the outcome by the Tax Board. The Tax Board has to issue a written statement of the outcome to the parties involved within 60 business days after the hearing (South African Revenue Services, 2013:51). It can only be hoped that this will result in a rapid response time and a more effective turnaround for appeals heard by the Tax Board.

Under the TAAct we notice that the taxpayer and SARS are affected by a time constraint when they are not satisfied with the outcome of the Tax Board. Only 21 business days will now be granted after the date on which the outcome was received, to lodge a request with the clerk of the Tax Board for the appeal to be heard by the Tax Court. Under the Act a period of 30 business days was allowed (Silke, 2012:1124 & Silke 2013:1142). This puts SARS and the taxpayer at a timing disadvantage as they will have a shorter time to formulate a request for transfer to the Tax Court. It is possible that this period might have been shortened to ensure that more matters are heard by the Tax Court or that a more effective turnaround time is created for matters heard by the Tax Court. The period may only be extended if grounds for exceptional circumstance exist.

The outcome of the Tax Board will be final if no further appeal is noted by the taxpayer or SARS.



### 3.3.3 Appeal to Tax Court

As it was under the Act, an appeal to the Tax Court can be lodged by a taxpayer or SARS when they are aggrieved by the outcome of the Tax Board under the TAAct.

The Tax Court will hear an appeal if the amount of tax being disputed exceeds R 50 million or if the Commissioner and the taxpayer so agree that the appeal be heard by the Tax Court. The panel hearing the appeal in the Tax Court will consist of:

- a judge or acting judge of the High Court (who will be the president of the court);
- accountant with no less than 10 years' experience;
- a representative from the commercial community; and
- a registrar of the High Court, to be appointed by the Commissioner.

(Silke, 2012:1124 & South African Revenue Services, 2013:52.)

This has remained the same from the Act to the TAAct.

In certain circumstances where SARS, the president of the High Court or the taxpayer deems it fit, the following people can be requested to form part of the panel of the Tax Court:

- a registered mining engineer, if the dispute relates to the mining industry; or
- a sworn appraiser, where the appeal involves the valuation of assets.

(Silke, 2012:1124 & South African Revenue Services, 2013:52.)

Where the appeal lodged relates to a matter of law only, the appeal will be heard by the president of the court only and he alone will issue an outcome on the appeal. The Commissioner or any person authorised by him may attend the hearing. The taxpayer as well as a representative, appointed by him, may be present at the hearing (Silke, 2012:1125 & Silke, 2013:1143). Under the rules of the Tax Court we see that no party is required to be physically present at the Tax Court hearing. When the Tax Court hearing is conducted it will be deemed that the onus is on the taxpayer to prove that an amount is not subject to tax. Where an understatement penalty has been imposed by SARS the TAAct

makes provision for the onus to be on SARS to prove their claim (Notes on South African Income Tax, 2013:715).

Under the Act the sittings of the Tax Court would not be made public and the president of the Tax Court could indicate which judgements or decisions are to be made public. Under the TAAct all judgements now have to be made public and must be done in such a way as not to reveal the identity of the taxpayer. Under the TAAct provision is also made that the sittings of the Tax Court be held in public (South African Revenue Services, 2013:52). The application for the sittings to be held in public can be lodged by a party involved in the appeal or a party not involved in the appeal. This was done by SARS to apply and promote an open justice system in South Africa (South African Revenue Services, 2013:52).

After an appeal has been heard by the Tax Court, the court may:

- confirm the assessment or decision;
- order the assessment or decision to be altered;
- refer the assessment back to SARS for further examination and assessment (where an assessment is adjusted in this manner by SARS, it will be subject to objection and appeal); and
- where an understatement penalty was raised the Tax Court can reduce, increase or confirm the penalty so raised.

(Silke, 2013:1143.)

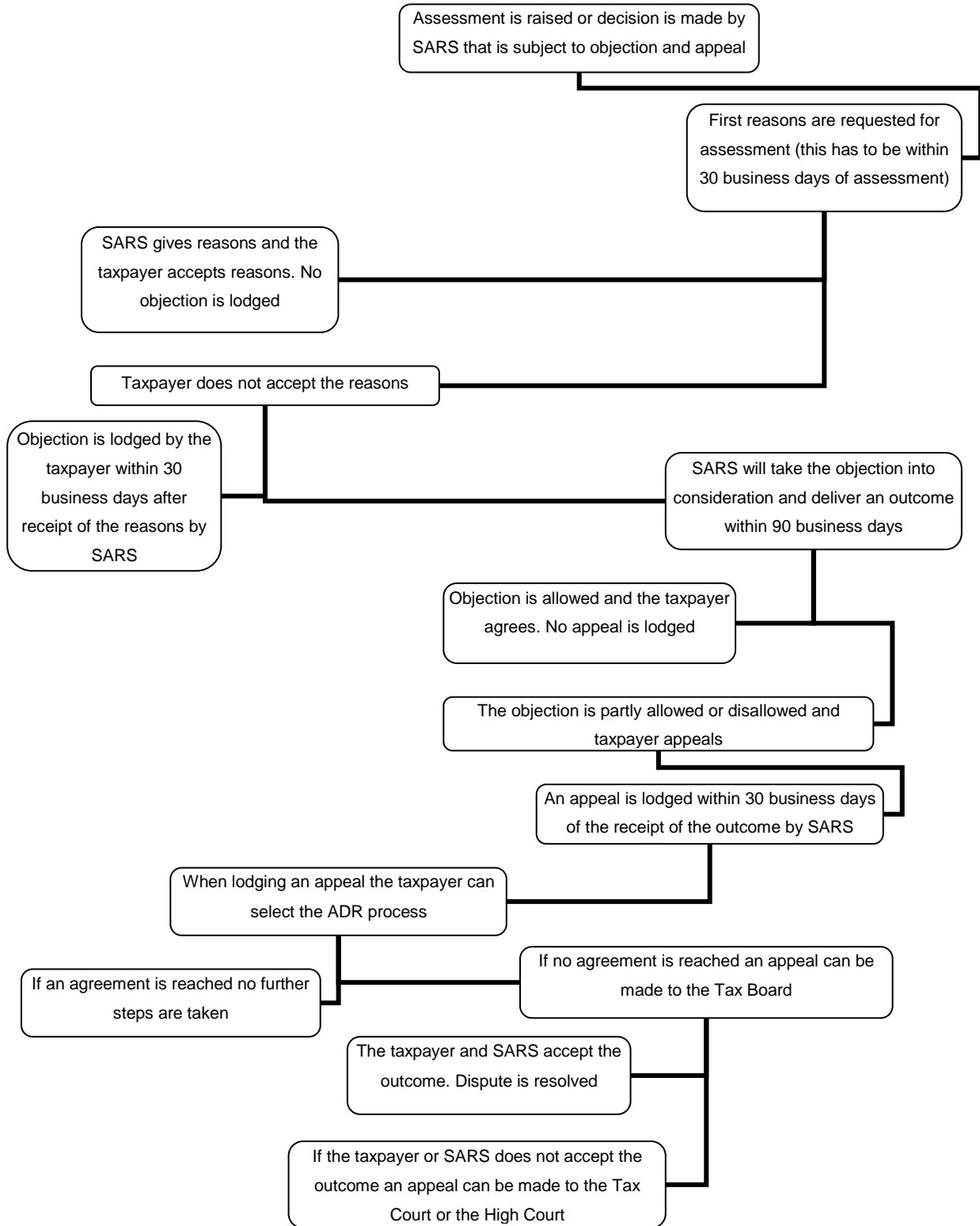
This has remained the same from the Act to the TAAct, except for the instance where an understatement penalty has been raised.

The Tax Court is not a court of law and the Commissioner is not bound by the ruling given by the Tax Court. It is, however, a competent court to decide an issue between parties (CIR v City Deep Ltd, 1924 AD 298 (1 SATC 18)).

If the decision by the Tax Court is not appealed to the High Court by SARS or the taxpayer, the decision of the Tax Court is final. The decision can be appealed to the High Court within 21 business days after the date of the notice by the Tax Court and will be dealt with in terms of S 133 to S 141 of the TAAct.

Below is a table setting out the manner in which to approach the dispute resolution process in South Africa.

**Table 2: Steps to be taken in the dispute resolution process.**



### 3.4 CONCLUSION

Objections and appeals dealt with under S81 – S83A are now dealt with under S101 – S132 of the TAAct. A significant change from the Act to the TAAct is the time frame in which a taxpayer has to lodge an objection. The date of the assessment will now be used under the TAAct and not the due date of the assessment as it was under the Act. An objection has to be lodged within 30 business days after the date of the assessment if no reasons for the assessment were asked for by the taxpayer.

It is seen in practice that SARS is applying the time frame in which an objection has to be lodged very stringently and that an objection lodged out of the time frame will be declined, unless valid grounds exist for the late filing of the objection. Under the TAAct it seems that the taxpayer's compliance history will be vital in the decision by SARS to condone the late lodging of an objection by a taxpayer. Does this time frame limit place SARS in a better position than the taxpayer?

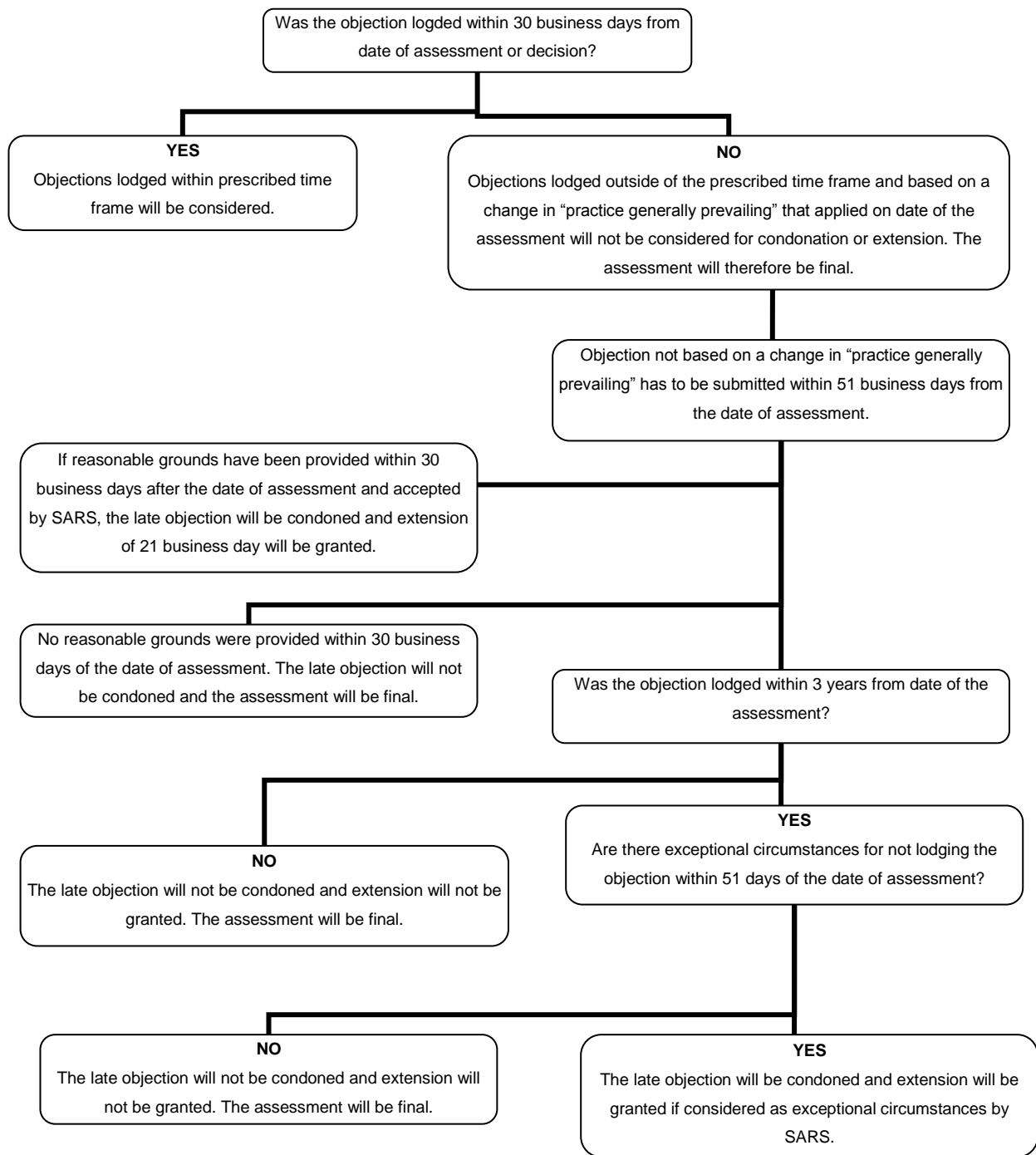
Suspension of payment requests will become a vital part to consider under the TAAct when taxpayers lodge an objection. As stated earlier in the chapter, it can only be hoped that SARS will be lenient towards taxpayers lodging a request where the amount due should not have been due in the first place.

Renewed emphasis is placed on the ADR process by SARS in order to resolve disputes. Taxpayers are being urged to undertake this approach with SARS as it is a more cost effective way to resolve disputes. This also puts the taxpayer in a face-to-face approach with SARS in order to resolve a dispute.

It must be remembered that the onus is always on the taxpayer to prove that an amount should not be subject to tax. Under the TAAct we notice a change in the fact that the onus will rest on SARS to prove the grounds for understatement penalties raised if these penalties are under dispute by the taxpayer.

The objection process in South Africa, as well as the timeframes applicable to the process, can be summarised by the following table.

**Table 3: Objection process and the applicable timeframes.**



(SARS Interpretation Note 15, 2013:10.)

In chapter 4 a comparison will be conducted on the sections relating to interest and penalties from the Act to the TAAAct.

## CHAPTER 4

### PENALTIES AND INTEREST

#### 4.1 INTRODUCTION

Where a taxpayer fails to comply with a tax Act or fails to effect payment of taxes due when required, penalties and interest can be imposed on the taxpayer. The different types of penalties and a brief description of the interest to be raised by SARS will be discussed below.

#### 4.2 PENALTIES

The TAACT makes provision for three types of penalties: administrative non-compliance penalties, understatement penalties as well as criminal offences which address serious tax offences (Lumsden, 2013). In this study the focus will mainly be on the first two mentioned penalties.

##### 4.2.1 Administrative non-compliance penalties

Administrative penalties became part of the tax administration legislation on 1 December 2008 when SARS introduced the administrative non-compliance penalty table. Administrative penalties refer to the administrative non-compliance of a taxpayer. This includes: failure to submit a tax return when required, failure to register as a taxpayer when required to do so and so forth. A penalty would be imposed if and when a taxpayer (natural person) has two or more returns due (Farrand & Geldenhuys, 2012).

Administrative non-compliance penalties under the Act were dealt with in terms of S 75B. The purpose of the penalty was to ensure the widest possible compliance with the provisions of the Act and to achieve effective administration of the tax system in South Africa (S 75B(1) of the Act).

When raising the penalty the Commissioner has to act impartially, consistently and according to the seriousness of the non-compliance (S 75B(2) of the Act). Under the Act the Commissioner could only remit an administrative penalty if exceptional circumstances exist for the non-compliance (S 75B(5) of the Act).

The administrative non-compliance penalties provided for under the Act have been carried over to the TAACT and have been expanded on to ensure compliance amongst all taxpayers (South African Revenue Services, 2013:73). There are two types of administrative non-compliance penalties that can be raised namely:

- fixed amount penalties; and
- percentage-based penalties.

Fixed amount penalties are raised when a taxpayer does not comply with an administrative obligation under a tax Act. The non-compliance matters will be listed in a public notice from time-to-time issued by the Commissioner. Fixed amount penalties are normally raised when there is failure to submit a return by a taxpayer (Farrand & Geldenhuys, 2012 and Arendse, 2013). Under the TAACT a fixed amount penalty is referred to as a penalty raised for general non-compliance (South African Revenue Services, 2012:59). The penalty commences at R 250 and can be raised to a maximum of R 16 000 per month. The amount of the penalty raised depends on the amount of an assessed loss or taxable income for the preceding year. The penalty is raised for every month that the taxpayer remains non-compliant. The effective date for the penalty will be from the date of the non-compliance by the taxpayer.

The table below sets out the fixed amount penalties to be raised in terms of the TAACT.

**Table 4: Fixed amount penalty table.**

<b>Item</b>	<b>Assessed loss or taxable income for 'preceding year'</b>	<b>'Penalty' (R)</b>
(i)	Assessed loss	250
(ii)	R0 – R 250 000	250
(iii)	R 250 001 – R 500 000	500
(iv)	R 500 001 – R 1 000 000	1 000

(v)	R 1 000 001 – R 5 000 000	2 000
(vi)	R 5 000 001 – R 10 000 000	4 000
(vii)	R 10 000 001 – R 50 000 000	8 000
(viii)	Above R 50 000 000	16 000

(South African Revenue Services, 2013:75.)

The above mentioned table remained the same from the Act to the TAAAct.

The following persons, except those who fall under item (viii) of the table or those that did not trade during the year of assessment, will be treated under item (vii) of the table:

- a company listed on a recognised stock exchange;
- a company with gross receipts or accruals exceeding R 500 million in the preceding year;
- a company that forms part of a group of companies and a company within the group is included in the sections above; or
- a person or entity, exempt from tax under the Act but liable for tax under another tax Act and with gross receipts or accruals exceeding R 30 million.

(S 211(3)(a)-(d) of the TAAAct).

As stated above the Commissioner regularly publishes updates as to what is seen as non-compliance by SARS through public notice which will be used to determine when a penalty will be imposed. To date only one such a notice has been published by the Commissioner which reads that an administrative non-compliance penalty will be charged when a taxpayer has two or more returns outstanding (South African Revenue Services, 2012).

Although the prescribed notice has not yet been issued by the Commissioner, the table below contains examples of non-compliance matters that may attract penalties in the future.



**Table 5: Non-compliance that may attract administrative penalties.**

Duty	Penalties could be imposed for
Registrations	<ul style="list-style-type: none"> <li>• Not registering when required.</li> <li>• Registering outside of prescribed time for registration.</li> <li>• Not completing a registration form in full or correctly.</li> <li>• Not submitting supporting documentation.</li> </ul>
Change in details	Not informing SARS when there is a change in the taxpayers address, representative or banking details.
Returns	<ul style="list-style-type: none"> <li>• Not filing a return.</li> <li>• Not filing a return on time.</li> <li>• Not using the prescribed form.</li> <li>• Not signing the return as required.</li> </ul>
Retaining records	<ul style="list-style-type: none"> <li>• Not retaining records in the original form or in an authorised manner.</li> <li>• Not retaining records for the prescribed period.</li> <li>• Not keeping records open for inspection by SARS.</li> </ul>
Information gathering	<ul style="list-style-type: none"> <li>• Not attending an interview when requested.</li> <li>• Not providing information available when requested at all or on time.</li> <li>• Not co-operating during a field audit or investigation.</li> </ul>
Debt management	Not providing full and accurate information when requesting a deferred or instalment payment arrangement.

(South African Revenue Services, 2013:75.)

As stated above the fixed amount penalty will be raised on a monthly basis until the non-compliance has been corrected. Where SARS is in possession of the taxpayers' current address the period for which the penalty can be imposed will be limited to 35 months after the date of the penalty assessment.

If SARS is not in possession of the current address of the taxpayer the period for which the penalty can be imposed will be limited to 47 months after the date of the non-compliance (South African Revenue Services, 2013:74).

A penalty assessment must be issued in respect of a taxpayer guilty of non-compliance. The penalty assessment issued has to meet the criteria of a valid assessment as discussed under chapter 2. SARS may, however, from time-to-time issue a reminder of the monthly increase if the non-compliance by the taxpayer continues. This reminder can be in any form and can include notice by short messaging service (SMS) (South African Revenue Services, 2013:74). The reminder to taxpayers for penalties raised will hopefully ensure compliance amongst all taxpayers in future.

A penalty raised is regarded as tax in terms of the Act and will be interest bearing from the effective date. The effective date is seen as the payment date under the penalty assessment or date of increment under S 211 of the TAACT (South African Revenue Services, 2013:75). It is only fair that taxpayers incur interest on the amount due to SARS for penalties raised as this promotes compliance amongst all taxpayers. It is also fair that taxpayers who are non-compliant and do not pay their penalties are penalised for this, with interest being raised on late payments.

Percentage-based penalties are raised when an amount of tax has not been paid as and when required under a tax Act. Under the TAACT, percentage based penalties refer to penalties raised for specific non-compliance matters (South African Revenue Services, 2012:59). The circumstances that trigger the imposition of the penalty remain under the applicable tax act (Farrand & Geldenhuys, 2012). Percentage-based penalties raised refer to (as it was under the Act) a 10% penalty raised on late payment of employee tax (PAYE), VAT and provisional tax, to mention a few. The effective date of the penalty will be the date of non-payment by a taxpayer. The provision for penalties on late payment is fair towards the promotion of compliance amongst all taxpayers as taxpayers who are non-compliant should be penalised for their actions.

The below mentioned table contains some examples of percentage-based penalties to be raised by SARS.

**Table 6: Examples of percentage-based penalties.**

Tax	Incident
Income Tax S 35 A	SA resident buys immovable property from non-resident and the taxpayer does not withhold or pay the fixed percentage to SARS. A 10% penalty to be imposed.
Turnover Tax 6 <sup>th</sup> Sched par 11(6)	Late payment penalty to be imposed if a micro-business does not pay VAT or a vendor deregistered because the value of supplies no longer exceeds R 1million and does not pay VAT.
Provisional Tax 4 <sup>th</sup> Sched	<ul style="list-style-type: none"> <li>• 10% penalty imposed for late or non-payment.</li> <li>• 20% penalty if a taxpayer fails to file an estimate.</li> <li>• 20% penalty for understatement of provisional tax.</li> </ul>
Employee Tax 4 <sup>th</sup> Sched	<ul style="list-style-type: none"> <li>• Employer fails to file a return, a penalty can be imposed by SARS on a monthly basis. Penalty imposed may not exceed 10% of the total amount of employee's tax.</li> <li>• A penalty of 10% can be imposed for late payment.</li> <li>• Non-disclosure of fringe benefits on employee tax certificates triggers a penalty of 10% on the cash equivalent of the fringe benefit.</li> </ul>
VAT S 39	Late payment attracts a 10% penalty.

(South African Revenue Services, 2013:76.)

It seems that SARS will no longer be taking these administrative penalties lightly and that they will be used to enforce overall taxpayer compliance. In order to prevent these penalties in the future taxpayers will have to ensure that they do everything possible to remain compliant in their tax affairs.

The reportable arrangement penalty contained in S 80S of the Act has been carried forward to the TAAct. Under the Act a penalty of R 1million can be imposed by the Commissioner on a participant failing to disclose a reportable arrangement. Under the TAAct a penalty will be imposed on a monthly basis (limited to 12 months) in respect of a participant failing to disclose the reportable arrangement.

A penalty of R 50 000 per month will be imposed in the case of a participant other than the promoter and an amount of R 100 000 per month will be imposed if the participant is the promoter (S 212(1) of the TAAct). The penalty will be doubled in the event that the tax benefit exceeds R 5million and will be tripled in the event of the tax benefit exceeding R 10million (S 212(2) of the TAAct).

A taxpayer can lodge a request with SARS for remittance of the administrative non-compliance penalty raised. The application has to be completed on the prescribed RFR (request for remission) form. The lodging of a request for remission automatically suspends the collection of the penalty due by SARS. The collection of the penalty due will be suspended until the period ending 21 business days after the notice of SARS's decision (S 215(3) of the TAAct). The suspension period can be lifted by SARS if it is feared that the taxpayer may dissipate assets or fraud existed in the origins of the non-compliance or remittance request.

An administrative non-compliance penalty can be remitted by SARS in the following instances:

- the penalty was imposed for failure to register;
- failure is nominal or a first incidence;
- exceptional circumstances exist for the non-compliance; or
- the penalty was imposed under incorrect circumstances by SARS.

(South African Revenue Services, 2012:61).

Remittance of the admin non-compliance penalty can be dealt with in one of the following manners:

- 1- *Remittance of a penalty raised for the failure of registration as a taxpayer as and when required:*

In this instance the penalty can be waived in whole or in part by SARS, if the taxpayer voluntarily approached SARS and disclosed the failure to register as a taxpayer or the taxpayer has filed all the returns required under a tax Act (S 216 of the TAAct).

- 2- *Remittance of a penalty raised for nominal or first incidence of non-compliance:*

For the remittance of the above mentioned penalty to apply we will have to consider the following:

First incidence: A penalty has not been imposed in the past 36 months.

If a penalty has been imposed by SARS in respect of a first incidence of non-compliance in terms of S 210 (failure to comply with the obligation under a tax Act), S 212 (reportable arrangement penalty) or S 213 (percentage based penalty) of the TAAct or an incidence of non-compliance as described in S 210 of the TAAct and the duration of the non-compliance is less than 5 business days, SARS may remit the penalty raised. It will be considered by SARS to remit the penalty or a portion thereof up to an amount of R 2 000.

SARS, however, has to be satisfied that reasonable grounds for the non-compliance exist and that the non-compliance has been remedied for the penalty raised in terms of S 210 and S 212 to be remitted. In the case of a penalty raised under S 212 of the TAAct, the R 2 000 limit will be increased to R 100 000.

In terms of a penalty raised under S 213 of the TAAct, SARS may remit the penalty or a part thereof if SARS is satisfied that the penalty was imposed in respect of a first incidence or involved a penalty of less than R 2 000, reasonable grounds for the non-compliance exist and that the non-compliance has been remedied.

### 3- *Remittance of a penalty in exceptional circumstances:*

An administrative non-compliance penalty raised may be remitted by SARS if exceptional circumstances exist. The following is seen by SARS as exceptional circumstances:

- a natural or human-made disaster;
- a civil disturbance or disruption in service;
- a serious illness or accident;
- serious emotional or mental distress;
- any of these acts by SARS;
  - capturing error
  - processing delay
  - provision of incorrect information in an official publication or media release issued by the Commissioner
  - delay in providing information to any person
  - failure by SARS to provide sufficient time for a adequate response to information required by SARS
- serious financial hardship which:
  - in relation to an individual refers to the lack of basic living requirements and
  - in relation to a company means an immediate danger to the continuity of business operations and the continued employment of its employees; and
- other circumstances of an analogous nature.

(S 218 of the TAAct.)

Remittance of percentage based penalties will be dealt with under the tax Act that triggered the penalty. If the specific tax Act under which the penalty was imposed does not contain specific grounds for remittance of the penalty, it will be dealt with under the TAAct (South African Revenue Services, 2013:77).

The decision by SARS not to remit an administrative non-compliance penalty raised is subject to the normal objection and appeal rules.

#### 4.2.2 Understatement penalties

Under S 76 of the Act SARS was able to raise additional taxes of up to 200% when additional assessments were issued and a possible understatement existed. However, this was rarely imposed by SARS and taxpayers generally only had late payment penalties to deal with (Kriel, 2013). A taxpayer was able to lodge a request for remittance of the penalty raised and where the taxpayer was not satisfied with the outcome of the remittance the decision could be objected and appealed (S 76 of the Act).

This view changed dramatically with the introduction of the TAAct. Understatement penalties are now being applied stringently by SARS and it seems that it will be virtually impossible to get these penalties waived (KPMG, 2013).

Understatement refers to the prejudice to SARS or the fiscus that can arise in respect of any tax period (each period is considered in isolation). It can range from failure to submit a return, omission in a tax return, incorrect declaration in a tax return to not making a tax payment.

Understatement penalties will be imposed regardless of the fact that a taxpayer might be in a loss position, or that a refund is due to the taxpayer (Lumsden, 2013). Comments from practice raise concerns as to whether the application regarding loss or refund positions is fair towards taxpayers. The underestimation penalty will be determined in terms of the new underestimation table introduced in the TAAct. This table is dependent on taxpayer behaviour with regard to the underestimation.

Taxpayers will therefore have to ensure that they take precautions and that they seek the advice of tax practitioners to ensure that possible underestimation of taxes does not occur (Lumsden, 2013).

The following table, as set out in S 223(1) of the TAAct, will be utilised by SARS to determine the behaviour and percentage of the understatement penalty applicable to a taxpayer.

**Table 7: Understatement penalty table.**

<b>Item</b>	<b>Behaviour</b>	<b>Stand ard case</b>	<b>Obstructive or repeat case</b>	<b>Voluntary disclosure after audit notification</b>	<b>Voluntary disclosure before audit notification</b>
i	Substantial Understatement	25%	50%	5%	0%
ii	Reasonable care not taken	50%	75%	25%	0%
iii	No reasonable grounds for tax position taken	75%	100%	35%	0%
iv	Gross negligence	100%	125%	50%	5%
v	Intentional tax evasion	150%	200%	75%	10%

(South African Revenue Services, 2013:79.)

The behaviours listed in the table above will have an impact on the type of penalty and the percentage of the penalty, which will be imposed on a taxpayer in an understatement situation. In order to understand the table we will have to consider each of the behaviours on its own merit. Substantial understatement is the only penalty that has been defined in the TAAct. The other behaviours have not yet been defined in the TAAct and no interpretation note has been drafted by SARS. We will therefore have to draw on SARS's short guide to the TAAct and international interpretation (Lumsden, 2013).

It has to be noted that a repeat case is seen as a second or further case of the behaviour as listed in the table within 5 years of the previous case (S 221 of the TAAct).

**Substantial Understatement:** A case where the prejudice to SARS or the fiscus exceeds the greater of 5% of tax due or refundable under a tax Act for the relevant period or R 1million (S 221 of the TAAct). A substantial understatement will be applicable in circumstances where none of the other behaviours are applicable (Lumsden, 2013).

**Reasonable care not taken:** Reasonable care is not defined in the TAAct; therefore it has to be given its ordinary meaning. Legally taxpayers are responsible for their tax affairs.



Taxpayers therefore have to take reasonable care in retaining records and in providing complete and accurate information to SARS (South African Revenue Services, 2013:80).

The term reasonable care not taken has created some concern within practice (Lumsden, 2013). A taxpayer is required to take the same reasonable care when completing a return that any other ordinary person would have taken. If a taxpayer uses a tax practitioner to complete a return and the practitioner does not take reasonable care in completing the return, the taxpayer would be held liable and an understatement penalty will be raised on the taxpayer (Lumsden, 2013).

The onus is therefore on the taxpayer to ensure that the practitioner has been provided with all of the relevant information (Lumsden, 2013).

***No reasonable grounds for tax position taken:*** The purpose of this section in the table is to penalise taxpayers who assume an unreasonable interpretation of a tax Act (Lumsden, 2013). An understatement penalty will be raised if a taxpayer does not have a reasonably arguable position (South African Revenue Services, 2013:80). A taxpayer's interpretation would be seen as reasonably arguable if "having regard to the relevant authorities, it would be concluded that what is being argued by the taxpayer is at least as likely as not, correct" (Lumsden, 2013).

The purposes of this section in the table is not to levy a penalty where SARS disagrees with the position taken by the taxpayer, but rather to raise a penalty where the taxpayer assumes an unreasonable tax position (South African Revenue Services, 2013:80). If a taxpayer bases a tax position on assumption the taxpayer is open to an inherent risk. It is therefore expected of taxpayers to adopt a sensible approach in the adoption of a tax position and to consider the integrity of the tax position taken by the taxpayer (South African Revenue Services, 2013:80).

***Gross negligence:*** The term gross negligence requires something more than just "negligence" (Lumsden, 2013). Gross negligence is seen as doing, or not doing, something in a way that suggests or implies a high level of disregard for the circumstances and it involves recklessness (Lumsden, 2013 & South African Revenue Services,

2013:80). Unlike evasion, gross negligence does not require wrongful intent or guilty mind and the intent to breach a tax obligation, is not considered (South African Revenue Services, 2013:80).

***Intentional tax evasion:*** For intentional tax evasion knowledge of illegality is considered a crucial aspect (Lumsden, 2013). Intentional tax evasion refers to a taxpayer wilfully failing to comply with the requirements of a tax Act in order not to pay taxes that they are legally obliged to pay or inflating an amount of tax refundable (Van der Zwan, 2013). A taxpayer had to have acted with the intention to evade tax and the intention of the taxpayer will be a crucial point in raising the penalty (Van der Walt, 2013).

SARS must determine (once a “behaviour” has been identified) if the taxpayer made a voluntary disclosure before an audit verification was issued, whether the taxpayer was obstructive in engaging with a SARS official or if the matter is a repeat case for the taxpayer. If none of the previously mentioned is applicable the behaviour will be set as a substantial understatement by SARS (South African Revenue Services, 2012:63).

The penalty to be imposed will be calculated by multiplying the difference between the tax calculated by SARS and the tax calculated or submitted by the taxpayer with the highest penalty percentage applicable per the penalty table in the TAAAct (Arendse & Williams, 2012). A penalty can be raised on a taxpayer even if a loss situation exists. The penalty will be calculated by applying the marginal tax rate with the difference in the calculation by SARS and the taxpayer (Arendse & Williams, 2012).

It seems that taxpayers will have to ensure that regular tax reviews are conducted in order to prevent the possibility of understatement. If these precautions are not put into place, SARS will raise penalties and the taxpayer will have difficulty in getting these penalties waived and will ultimately be out of pocket (KPMG, 2013 & Lumsden, 2013).

As stated, it will be difficult to get these penalties waived as SARS no longer has free reign deciding whether or not to waive penalties. The question raised here is: will this be fair to taxpayers who made an honest mistake or is this SARS’s way of ensuring overall compliance by all?

A substantial understatement penalty raised is the only penalty to date under the TAAct where provision is made for the remittance of the penalty raised (S 223(3) of the TAAct and Lumsden, 2013).

As stated in S 223(3) of the TAAct, SARS may remit a penalty raised for substantial understatement if it is satisfied that the taxpayer:

- made full disclosure of the arrangement that gave rise to prejudice to SARS or the fiscus by no later than the due date of the return; and
- the taxpayer was in the possession of an opinion by a registered tax practitioner which:
  - was issued by no later than the due date of the return;
  - took account of the specific facts of the arrangement; and
  - confirmed that the taxpayers position is more likely than not to be upheld in court if the matter proceeds to court.

(Arendse & Williams, 2013 and Lumsden, 2013.)

A decision by SARS not to remit a penalty for substantial underestimation will be applicable to objection and appeal under the rules set out in the TAAct (Lumsden, 2013 and South African Revenue Services, 2013:81).

Ultimately, a taxpayer will have difficulty and most likely no success in obtaining a remission for a penalty that was raised in terms of any other behaviour mentioned above (South African Revenue Services, 2013:81 & Lumsden, 2013). A concern has been raised in practice with regard to the fact that the decision by SARS, as to which behaviour would be applicable, is not subject to objection and appeal under the TAAct (Lumsden, 2013). A taxpayer will have to argue the penalties under alternate Acts such as PAJA (Promotion of Administrative Justice Act) or the Constitution (Lumsden, 2013 and Van Eeden & Botha, 2013).

The question from practice is whether SARS will apply these penalties fairly or if it will be applied to benefit SARS? It has been seen in practice that SARS is trying to apply these penalties to additional assessments or returns submitted before the enactment of the

TAAct (KPMG, 2013). The penalties can be raised by SARS in respect of estimated and agreed assessment if it is seen fit to do so by SARS (Kriel, 2012).

### **4.3 INTEREST**

#### **4.3.1 Income Tax Act**

Interest charged by SARS for late payment of taxes due, as well as interest paid by SARS on refunds, is still being dealt with under the relevant sections of the Act. The manner in which interest is dealt with by SARS will remain under the relevant sections of the Act until all of the sections have been promulgated under the TAAct. Only certain sections relating to interest were promulgated when the TAAct came into effect on 1 October 2012. All of the sections that did not commence will only commence once they have been promulgated by the Minister of Finance at a future date (SARS Interpretation Note 68, 2013:3-6).

The Minister of Finance will, from time-to-time, determine the prescribed interest rates to be used by SARS and publish these rates in the Government Gazette. These rates are currently published under the following tables:

- Interest rate table 1 – interest charged on outstanding taxes, duties and levies and interest rates payable in respect of refunds of tax on successful appeals and certain delayed refunds.
- Interest rate table 2 – interest rates payable on credit amounts (overpayment of provisional tax) under section 89quat (4) of the Act.

Interest charged by SARS for the late payment of taxes by a taxpayer is charged at a higher rate than interest paid by SARS for the overpayment of provisional taxes by a taxpayer (Income Tax Act, No. 58 of 1962).

Currently under the Act interest on late payment by a taxpayer will be raised from the effective date (date payment should have been made) until the date of actual payment (South African Revenue Services, 2013:65). Interest on the late payment of taxes will be charged on a daily basis, except for interest raised in respect of late payment of assessed income tax which will be charged on a monthly basis.

Interest raised by SARS in respect of refunds to taxpayers will be from the later of the effective or date the excess was received by SARS until the date of payment by SARS (South African Revenue Services, 2013:65). Interest will accrue on a daily basis. Income tax and VAT refunds are two of the most commonly known refunds receivable by taxpayers. Under S 89quat of the Act, only provisional taxpayers are to receive interest on refunds. This is mainly due to the overpayment of provisional taxes. VAT refunds not paid within 21 business days after the submission of the VAT return, will accrue interest until the date of payment. Interest will, however, not accrue in instances where information is required from the taxpayer or where invalid banking particulars have been provided by the taxpayer. The 21 business days will not apply and interest will only accrue from the date that the information is provided or the banking particulars have been corrected (S 45 of the VAT Act).

Any interest paid by a taxpayer to SARS does not qualify for an S 11(a) deduction. Interest received by a taxpayer must be included in the relevant tax year's taxable income. Allocation of late payment by a taxpayer will firstly be allocated to penalties, then towards interest and the balance remaining will be set off against the capital amount.

#### **4.3.2 Tax Administration Act**

Chapter 12 of the TAAct will form the framework for the modernisation of SARS accounting system with regard to interest (South African Revenue Service, 2012:53).

S 187 – S189 of the TAAct will govern the manner in which interest should be dealt with. As stated above when the TAAct came into effect on 1 October 2012 only certain sections relating to the new interest regime came into effect. The sections which did not commence will become effective once promulgated by the Minister of Finance at a future date.

The following sections did not commence on 1 October 2012:

- S 187(2), (3)(a)-(e) and (4)
- S 188 (2) and (3)
- S 189 (2) and (5)

Schedule 1 to the Act has been issued by the Minister of Finance and once all the sections have been promulgated the sections to be repealed as per the schedule will be repealed and dealt with under the TAAct. Currently all these sections are still to be dealt with under the applicable tax Act (SARS Interpretation Note 68, 2013:1).

These interest provisions can be aligned across all taxes, and SARS is moving towards the calculation of interest on a daily basis and compounding the interest on a monthly basis. SARS will be moving toward an interest system where the periods that SARS are entitled to interest are aligned with the periods where SARS is obliged to pay interest (South African Revenue Services, 2013:65).

Under the TAAct, as it was under the Act, interest will accrue from the effective date until the date of payment by a taxpayer. Interest to be paid by SARS on a refund will accrue to the taxpayer from the later of the effective date or the date that the excess was received by SARS to the date of refund (S 188(1) of the TAAct). The effective date refers to the date payment should have been made under a tax Act.

The effective date for interest calculations by SARS, for the different tax types, will be as follows:

- VAT, transfer duty, donations tax, employees tax and SDL will be the date by which the tax for the tax period is due and payable (S 187(3)(a)).
- Income tax (excluding provisional tax) will be the date falling seven months after the last day of the tax year in the case of a taxpayer with a February year end. In all other cases six months after the last day of the tax year (S 187 (3)(b)).
- Estate duty will be the date of assessment or 12 months after death, whichever comes first (S 187 (3)(c)).
- Fixed amount administrative non-compliance penalty will be the date that the penalty is due and payable (S 187 (3)(d)).
- Percentage based administrative non-compliance penalties would be the date that the tax should have been paid under the tax period (S187 (3)(e)).
- Understatement penalty will be the date for such understatement (S 187 (3)(f)).

- Additional and reduced assessments will be the date the tax should have been paid under the original assessment (S 187 (4)).
- Jeopardy assessment date so specified in the assessment for payment (S 187 (5)). (South African Revenue Services, 2012:54.)

As of the 1<sup>st</sup> of October 2012 the effective date as described under S 187 (3)(f) and (5) came into effect and will be dealt with under the TAAct. The rest of the sections will only apply once the new interest regime has been promulgated (SARS Interpretation Note 68, 2013:2-3).

Under the TAAct, as it was under the Act, the prescribed rate of interest will be advised by the Minister of Finance from time-to-time and published in the Government Gazette (S 189(3)).

Under S 187 (6) and (7) of the TAAct the taxpayer can lodge a request for remittance of interest raised by SARS. This provision was available to taxpayers under the Act as well. The request for remittance of the interest will be taken under review by a senior SARS official. Only circumstances beyond the taxpayers control will be taken into consideration by the senior SARS official when making the decision.

The following is considered as circumstances beyond the control of the taxpayer:

- a natural or human-made disaster;
- a civil disturbance or disruption in service; and
- a serious illness or accident.

(South African Revenue Services, 2013:67-68.)

The remittance of interest as set out above will only apply to understatement penalties and jeopardy assessments as contained under S 187(3)(f) and (5) that came into effect on 1 October 2012. Request for remittance of interest on other taxes will remain under the relevant sections until all the sections of the TAAct have been promulgated (SARS Interpretation Note 68, 2013:3).

Interest still being dealt with under the Act is open to remittance and the taxpayer will be able to object and appeal against the decision not to remit interest under the Act.

Again we see that it will be difficult to get the interest raised waived by SARS and that this will be another way for SARS to ensure taxpayer compliance across all taxes. SARS will only consider waiving interest raised if the circumstances under which they were raised were beyond the control of the taxpayer (Arendse, 2013).

#### **4.4 CONCLUSION**

Admin non-compliance penalties previously dealt with under S 75B and S 76 of the Act are now dealt with under chapter 15 (admin non-compliance penalty S 208 – S 220 of the TAAAct) and chapter 16 (understatement penalty S 221 – S 224 of the TAAAct).

We see a more aggressive shift from the Act to the TAAAct with regard to penalties. SARS's reasoning for this is the enforcing of compliance amongst all taxpayers and these penalties are seen as a motivator towards total tax compliance by all taxpayers (South African Revenue Services, 2013:73)

A taxpayer is held liable for all of its tax affairs, whether the services of a tax practitioner are used or not. It is therefore recommended that taxpayers deal with their affairs in the most effective manner possible. It is advised that taxpayers consider the assistance of qualified tax practitioners to perform tax reviews of the taxpayers' affairs when advised of audits by SARS. This will ensure minimisation of potential penalties (Lumsden, 2013). Taxpayers will have to ensure that they take care in completing tax returns and that they have systems and processes in place to ensure complete accuracy of information.

Where taxpayers are unsure of the implications of transactions it is recommend that the advice of qualified practitioners are acquired in order to ensure compliance and minimise the possibility of penalties (Lumsden, 2013).



It has also been made clear by SARS that taxpayers should not assume that where penalties were reduced previously they would now be reduced on the same grounds under the TAAct. This can be seen from the limited circumstances mentioned above under which SARS will now consider the remittance of penalties raised.

The sections relating to interest payable by taxpayers and interest payable by SARS is still undergoing some changes and will only take effect at a later date when promulgated by the Minister of Finance.

All of the sections relating to interest are still being dealt with under the applicable tax Act. SARS is moving towards a modernised interest system and the goal is to align all of the interest provisions under one section in the TAAct (South African Revenue Services, 2013: 65).

The sections relating to interest charged on penalties and jeopardy assessments are being dealt with under the TAAct. The remittance of the two instances mentioned is also dealt with under the TAAct and we see again that it would be difficult for taxpayers to get the interest charged remitted.

In chapter 5 comments and possible recommendations on the changes from the Act to the TAAct will be provided. An overall conclusion on all of the different aspects discussed in the study will be provided as well as recommendations for future studies.

## CHAPTER 5

### COMMENTS, RECOMMENDATIONS AND CONCLUSION

#### 5.1 INTRODUCTION

As stated previously, South Africans have been notified numerous times of the possibility of an administration act being introduced combining the administrative aspects of the tax system. This finally became a reality with the promulgation and enactment of the TAAct.

The newly enacted TAAct contains 20 chapters covering all administrative aspects of the tax system in South Africa. This study has been based on the following chapters from the TAAct:

Assessments – Chapter 8

Objections – Chapter 9

Interest – Chapter 12

Penalties – Chapters 15 and 16

These chapters have been identified as having been largely commented on and written about by SARS as well as in practice. However, no in-depth comparison has been conducted on the changes from the old to the new legislation as of yet. It can be gathered through the articles used for this study that the TAAct will be used by SARS as a tool to promote and enforce taxpayer compliance across all tax types, with the exclusion of the Customs and Excise Act.

The TAAct will become an integral part of tax planning. Taxpayers will have to incorporate the TAAct and its implications with careful consideration when it comes to their tax affairs. This will prevent unwanted penalties and interest being levied against a taxpayer.

The last chapter of the research study contains comments on some of the important changes in the legislation from the Act to the TAAct. Possible problem areas as well as recommendations to the problem areas will be identified.

An overall conclusion will be given on each section addressed in the study and recommendations for further research will be made at the end of the chapter.

## 5.2 COMMENTS AND RECOMMENDATIONS

### 5.2.1 Assessments

Each different type of assessment has now been defined under the TAAct. The following comments can be made on the definitions under the TAAct.

**Assessment:** The complex definition in the Act has been simplified and is in layman's terms under the TAAct now defined as the determination of a tax liability or refund by way of assessment or self-assessment. It is further recommended that the format of a notice of assessment, being in hard copy or electronic format be made part of the definition under the TAAct. This will prevent confusion in the fact that SARS can issue an assessment in hard copy (at a SARS branch) or in electronic version (via e-filing).

**Self-assessment:** It is recommended that the definition be adjusted to clarify the type of taxes seen as self-assessment taxes and that it is made clear that assessed tax is not seen as a self-assessment tax. Clarity on this matter is provided in SARS' short guide to the TAAct (South African Revenue Services, 2012:7).

**Original assessment:** The definition could be simplified as being the first assessment issued in respect of a tax period where no determination of a tax liability is required. The definition, as set out under the TAAct, only refers to an assessment raised i.t.o S 91 of the TAAct. The amendment of the definition would clarify the purpose of an original assessment and will clarify that it is the first assessment to be raised on a taxpayer i.t.o a tax period.

**Additional assessment:** The definition states that an additional assessment may be raised where SARS is satisfied that an assessment does not reflect the correct application of a tax Act. Correct application of tax Act may be seen as being rather broad. It is recommended that some clarity is provided as to what SARS would view as incorrect

application of a tax Act. It could refer to the exclusion of information in a tax return, incorrect application of a tax Act or section, intentional misrepresentation due to fraud or tax evasion, to mention a few.

The definitions relating to reduced and jeopardy assessments define the purpose of these assessments in an effective manner as set out in the TAAct.

**Jeopardy assessment:** As stated in chapter 2, this is a new concept by SARS. It is to the taxpayer's advantage that the onus is on SARS to prove the grounds for the jeopardy assessment being raised. This prevents SARS from raising a jeopardy assessment in the absence of adequate grounds. The issuing of a jeopardy assessment should only be considered as a final resort by SARS in a matter where concerns for jeopardy of the collection of taxes exist. It is recommended that provision be made for an amount limit when considering the grounds for raising a jeopardy assessment.

It is also recommended that the taxpayer be notified of SARS's intention to raise a jeopardy assessment. However, SARS maintains that this would defeat the purpose of the assessment (Standing Committee on Finance, 2011:41). On the other hand, this would create an opportunity for the taxpayer to present its case to SARS as to why a jeopardy assessment should not be raised. In this way SARS and the taxpayer can enter into an agreement without a jeopardy assessment being raised. This could save costs and would prevent jeopardy assessments being issued without valid grounds.

Provision should be made for SARS to provide adequate reasons in writing to the taxpayer. Detailed grounds should be set out and proof provided by SARS substantiating the grounds for the jeopardy assessment.

**Prescription of assessment:** The general rule carried through to the TAAct is that an assessment (reduced, additional etc.) cannot be raised 3 years after the date of the original assessment. Self-assessment taxes have a prescription period of 5 years. Taxpayers have to ensure they comply with this section as SARS will not take objections into consideration where the prescription period has lapsed.

SARS may not raise another assessment on a taxpayer if the initial assessment raised was raised to give outcome on a dispute case. This ensures that no unnecessary assessments are raised. The fact that SARS can issue an assessment if fraud or misrepresentation existed serves as a protection for the tax system in South Africa.

It is proposed under the TALAB that the prescription period be extended in the case where a taxpayer employs dilatory tactics in providing information to SARS. This is often experienced in more complex cases, such as transfer pricing and GAAR audits. This provision should be included under the TAACT as this would be an effective way to ensure compliance amongst all taxpayers. Taxpayers involved in such dealings should be penalised for their actions. It is stated in the amendment that the extension would apply in instances where, without just cause, a taxpayer does not provide information to SARS. Clarity should be given as to what is seen as just cause by SARS. If a taxpayer did not receive the notice to provide information and had nothing to act upon, would this then be seen as just cause?

Another proposal under the TALAB is that the prescription period be extended in the instance whereby a taxpayer made an error on their tax return and a reduced assessment is requested to rectify the matter. SARS had to be notified in time, the error should not be disputed and a reduced assessment should not have been issued before the end of the prescription period. This provision should be made part of the TAACT as human errors are often unavoidable and a taxpayer should be afforded the opportunity to rectify such errors. In the same vein, in the instance whereby the error is made by SARS and a reduced assessment is being requested, the prescription period should again be extended. This should be seen as an improvement of the tax administration system in South Africa.

**Grounds of assessment:** In terms of S 42(2)(b), a taxpayer may request for the grounds of an assessment from SARS where, after an audit was conducted on a return, SARS wants to subject certain amounts to tax. As a result SARS is bound under the TAACT to provide grounds for the assessment. Provision should be made for detailed grounds of assessment to be made in writing to the taxpayer. A letter stating that amounts have been added back and that an additional assessment is to be raised will not suffice. Detailed grounds referring to specific sections and reasons should be given.

SARS must deliver these grounds to the taxpayer within their prescribed turnaround time of 21 business days. It is recommended that the taxpayer be afforded the opportunity to meet face-to-face with SARS to discuss the matter before hand. This will save time and costs for both parties.

### 5.2.2 Objections

**Reasons for assessment:** Should a taxpayer feel aggrieved by an assessment and thereby wish to lodge an objection against such, he or she should firstly consider requesting reasons for the assessment. Both money and time would be saved should the taxpayer be satisfied with the given reason as there would be no need for a dispute to be lodged. Provision should be made under the new rules (rule 6), for detailed reasons to be provided and for those reasons to be put in writing to the taxpayer (SAIT, 2013).

As stated in chapter 3, no clear grounds are provided as to where the request should be submitted to SARS or who at SARS would deal with the request. Should the request be lodged at any SARS branch or at a specific branch? It can be recommended that provision be made on e-filing for taxpayers to lodge a request for reasons for assessment. It could also be recommend that a form similar to an ADR 1 be created for the taxpayer to complete and submit together with a letter to the relevant SARS branch and that a receipt of acknowledgement be given to the taxpayer. It is recommended that the request be dealt with by a senior SARS official and that measures are put in place to issue a taxpayer with a tracking reference. This will ensure that the request is dealt with in an effective manner and that it does not form part of the general stream of information submitted to SARS.

**Date of assessment Vs. Due date:** Previously under the Act, an objection had to be lodged within 30 business days after the due date. Under the TAAct, an objection has to be lodged within 30 business days after the date of assessment. This puts the taxpayer at a timing disadvantage under the TAAct. It does still, however, leave the taxpayer with sufficient time to formulate and lodge an objection. Should the taxpayer be concerned that the 30 business days timeframe would not be adhered to, the taxpayer may request that the period be extended. Taxpayers and tax practitioners will have to ensure that they

comply with the new timeframe for lodging of objections, as it seems that this new amendment will be stringently enforced by SARS.

***Objection against assessments and decisions:*** Clear grounds are given in the draft rules of the objection process as to how a taxpayer should proceed when lodging an objection against an assessment. However, no clear grounds are provided for on how a taxpayer should proceed when lodging an objection against a decision by SARS (SAIT, 2013). It is therefore recommended that clear grounds be provided as to how a taxpayer should proceed and what would be required when lodging an objection against a decision by SARS. Similar rules as set out for the lodging of objections against assessments should be stipulated for objections against decisions.

***Suspension of payment:*** This rule is stringently being enforced by SARS under the TAAAct. Provision should be made for the rule to request suspension of payment to not apply in cases where SARS made an error in the assessment or where the taxpayer made an error on the return and whereby the payable amount should not be due in the first place. This would prevent unnecessary resources being wasted on lodging requests for the suspension of payment. When lodging the objection, the taxpayer should mention that the assessment was based on an error by SARS or the taxpayer themselves and that the objection is being lodged to correct the error.

The taxpayer should set out detailed grounds and substantiate the objection with supporting documentation. The objection should reflect no payable amounts due should the assessment be rectified. In these circumstances SARS should not be able to force taxpayers to pay the amount due as it would have to be refunded to the taxpayer once the objection has been finalised and a revised assessment has been issued. Provision should be made for detailed grounds to be provided for in writing by the senior SARS official making the decision as to whether payment should be suspended or not. Adequate reasons explaining why suspension would not be granted should be delivered to the taxpayer.

Clarity should also be given on the prescribed manner and form in which the request should be made to SARS. Should the request be made in a letter addressed to the Commissioner, should a specific SARS form be completed or merely included in the forms required when lodging an objection?

It should be considered that provision be made for a timeframe in which SARS has to respond to the taxpayer regarding the request to suspend payment. If, for example, the objection relates to a simple matter SARS should notify the taxpayer of the suspension of payment within 30 business days after receiving the request to suspend payment. The timeframe may be extended in more complex cases.

As stated in the Standing Committee on Finance response document, the decision by a senior SARS official to not suspend the payment will not be open to objection and appeal. The only remedy for a taxpayer in this regard will be a review by the courts. A review by the courts can be a costly exercise and it is therefore recommended that provision be made for the objection and appeal against the decision of a senior SARS official to not suspend payment.

**Late objections:** A request for condonation of late objections needs to be filed under the TAAAct where objections are lodged outside of the 30 business day timeframe. It is recommended that each case be considered on its own merits. This would be fair toward taxpayers and SARS. Currently, condonation for late objections is put into writing by the taxpayer and submitted to SARS. Clarity should be given on the prescribed format and form to be completed by taxpayers. Provision should be made for SARS to respond within a certain timeframe and that adequate reasons have to be provided in writing if condonation is not granted.

As stated above; under the prescription of assessments, it is recommended under the TALAB that the period be extended in instances where a taxpayer has made an error on a return and a reduced assessment is to be issued. Provision should also be made for automatic condonation of late objection in these circumstances as objections lodged against these assessments would be outside of the 3 year prescription period. This would



also apply in instances whereby SARS made an error in an assessment and a reduced assessment is to be issued.

**SARS's outcome on objection:** Rule 9 of the draft rules to the objection process sets out the decision procedure once SARS has finalised an objection. It is recommended that the rule be changed and that provision be made for adequate reasons to be provided, in writing, to the taxpayer once an objection has been finalised (SAIT, 2013:2). The outcome of the objection should stipulate in as much detail as possible as to why an objection was disallowed or only partially allowed. A taxpayer may decide not to proceed with an appeal against the assessment if SARS provides adequate reasoning for the disallowance or partial allowance of the objection.

Provision for a timeframe in which SARS should deal with an objection should be considered. If an objection relates to a minor issue, SARS should be given 30 business days to finalise the objection. More time should be given in complex cases, up to a maximum of 90 working days.

**Test cases:** Where more than one objection relates to the same matter; SARS, under the TAAct, has the power to allocate one of the objections as being a test case. A taxpayer cannot, however, request that an objection be heard as a test case.

In agreement with the comments made by the South African Institute of Tax Practitioners (SAIT), it is recommended that taxpayers be afforded the opportunity to request that an objection be heard as a test case (SAIT, 2013:3). This will assist in preventing the duplication of objections, as well as in the saving of costs for taxpayers and SARS. Under the Australian Tax Office's 'Test Case Litigation Program', funding is provided to taxpayers if the objection is approved as a test case (SAIT, 2013:3). This should be considered by SARS as the aim of this program is to develop legal precedent and provide guidance on how specific provisions of the tax Acts governed by the revenue authority should be dealt with (SAIT, 2013:3).

If taxpayers are afforded the opportunity to request that an objection be heard as a test case, duplication of similar objections could be prevented and guidance could be provided on how such matters should be dealt with. This would also save resources as only one case would be heard and a precedence set as to how other similar matters should be dealt with.

Funding of these cases by SARS could assist in ensuring that the cases proceed to hearing and that they are finalised on as soon as possible (SAIT, 2013:3).

In determining whether a case would qualify for funding, the following criteria could be used as a measurement base:

- uncertainty or contention exists as to how the law operates;
- the issue relates to a substantial section of the public;
- the issue has a significant impact for a specific industry; or
- it is in the public interest that the issue be litigated.

(SAIT, 2013:3).

It can be recommended that a request be lodged by the taxpayer with a senior SARS official. The senior SARS official should then present the case to a panel consisting of accounting and legal professionals within SARS. Subsequently, the panel would decide whether the case should be heard and that funding be provided (SAIT, 2013).

***Appeal against an assessment:*** In agreement with the comment made by SAIT, it is recommended that the current rules remain and that the new rule not be taken into account by SARS. The current rule states that SARS has to provide the taxpayer with a “statement of assessment” before the taxpayer has to provide a “statement of grounds of appeal”. SARS, under the new draft rule, proposes that the taxpayer has to provide SARS with a “statement of grounds of appeal” before SARS will issue a “statement of grounds opposing the appeal” (SAIT, 2013:2).

There is concern around the fact that the taxpayer will no longer be afforded the opportunity to understand what SARS’s case is in terms of an assessment (SAIT, 2013:2).

The reason provided by SARS for the disallowance of an objection is often not adequate (SAIT, 2013:3). It is therefore recommended that provision be made for SARS to provide adequate and detailed reasoning for the disallowance of the objection as well as the opposing of an appeal. If the new rule is put in place, the taxpayer will be at a severe disadvantage and this needs to be amended. It is therefore recommended that the current rule remains in force as is. If the taxpayer is provided with adequate reasons in a “statement of assessment” or disallowance of objection letter, the taxpayer would be in a better position to understand SARS’s decision. This will enable the taxpayer to make a decision regarding whether or not to lodge an appeal against an assessment and will also enable the taxpayer to formulate proper grounds for appeal (SAIT, 2013:3).

***Alternative dispute resolution:*** This is a very effective process giving the taxpayer the opportunity to meet with SARS on a face-to-face basis and attempt to settle a dispute outside of the courts. This will save costs for both the taxpayer and SARS. Taxpayers should be more willing to interact with SARS on this basis when lodging an appeal.

It is, however, recommended that SARS keep to the timeframes of responding and interacting with the taxpayer involved. This will ensure that the process is dealt with timeously and in an effective manner.

### **5.2.3 Penalties and Interest**

A penalty system is necessary for a country’s revenue authority to ensure compliance in a fair manner amongst all taxpayers. The penalty system of a country should, however, be fair and be applied in a manner that is just and not unconstitutional.

***Admin non-compliance – Fixed penalties:*** It is agreed that taxpayers should be penalised for outstanding returns as currently stated in the rule promulgated by the Minister of Finance. It is recommended that this penalty be levied against companies and trusts as well to promote a fair and equal penalty system for all taxpayers.

The short guide to the TAA Act as provided for by SARS sets out possible actions which could attract administrative non-compliance penalties. The following recommendations can be made in this regard.

- **Registrations:** The issuing of penalties against taxpayers for incomplete registrations due to basic human error can be seen as unjust. In all instances registrations submitted to SARS should be scrutinised by the SARS employee submitting the registration. This will ensure that all registration requirements have been met by the taxpayer. The same applies in respect of supporting documents to be submitted with an application. As above the issuing of these penalties could be seen as unjust.
- **Change in details:** With the advent of the e-filing system, taxpayers now have the opportunity to ensure that details are correct when filing their returns, thereby making it virtually impossible for SARS to not have taxpayer information on their system. The onus remains with the taxpayer to inform SARS of name changes and changes in public officers in respect of companies. The issuing of penalties in this regard could be seen as unjust.
- **Returns:** As stated above, for SARS to raise penalties against taxpayers due to human error, is unfair. Again, with the introduction of e-filing, errors such as using incorrect returns or not signing returns have become void as returns are prepopulated online. A taxpayer should not be penalised for signing tax returns as the filing of such a return should be seen as a declaration of information that is true and correct.
- **Information gathering:** A taxpayer should be penalised for not co-operating with SARS and providing information in a timely manner.
- **Debt management:** It would be unfair if SARS was able to raise a penalty for not providing all of the correct information. The debt management forms should be checked for completeness by the senior SARS official dealing with the application before it is accepted by SARS.

Currently a fixed percentage penalty for non-compliance would only be raised in terms of an individual taxpayer with two or more returns outstanding (South African Revenue Services, 2012).

**Admin non-compliance - Percentage-based penalties:** Taxpayers should be penalised for making late payments. It is, however, not recommended that a penalty be imposed on a taxpayer for failing to file an estimate in terms of provisional taxes (South African Revenue Services, 2013:76). A 20% penalty is already raised against a taxpayer for the underestimation of provisional tax and this would result in a double penalty being raised. This would not support the promotion of compliance amongst all taxpayers.

**Remittance of the admin non-compliance penalties:** It is agreed that penalties should only be remitted by SARS in exceptional circumstances. The penalties are raised to ensure compliance amongst all taxpayers and it would defeat the purpose if the penalties were remitted for just any reason. Taxpayers should therefore ensure they are compliant and that they do everything possible to prevent penalties being raised.

Where a request for remittance is lodged by a taxpayer, the senior SARS official should consider each request in a case-by-case manner and as such, review each case independently. In the case of first or nominal incidence, it is recommended that the remittance limit of R 2 000 be increased to a more realistic figure. The limit appears to be somewhat unrealistic as penalties could easily exceed the limit by a substantial amount.

**Understatement penalties:** As stated in chapter 4 the 200% additional tax regime has undergone major changes to form the new understatement penalty regime as set out in chapter 16 of the TAAAct. A penalty for underestimation can be raised irrespective of whether the taxpayer is in a loss or refund position. This is fair if the taxpayer declared an understatement to obtain a greater tax benefit. This provision ensures the promotion of compliance amongst all taxpayers.

Concern has been raised in practice regarding the fact that the behaviour chosen by SARS in terms of the new penalty regime is not subject to objection and appeal (Lumsden, 2013). When arguing the selection of the behaviour, a taxpayer has to seek alternative Acts, such as the Promotion of Administrative Justice Act (PAJA) or the Constitution. This would be time consuming and expensive for a taxpayer. It is therefore recommended that provision be made for objection and appeal against the behaviours chosen by SARS. This would prove to be more cost and time effective for taxpayers.

Substantial understatement is the only behaviour that has been defined in terms of the TAAct. It has been defined quite specifically and clearly states what will be seen as substantial understatement (Khaki, 2012). It is recommended that each of the behaviours be given their own comprehensive definition under the TAAct. This will provide a clear understanding as to what SARS sees applicable under each behaviour.

The TALAB recommends that provision be made for “bona fide inadvertent error” by a taxpayer (Louw, 2013). This will prevent unnecessary penalties being raised against taxpayers who made an honest mistake in the completion of a return resulting in understatement. Errors are inadvertent and unintentional by nature (Kotze, 2013). It is therefore recommended that the term be defined or that reference is given as to what factors would indicate an error.

The mere mentioning of the factors in the explanatory memorandum to the TALAB is not sufficient. An occurring error by a taxpayer or a tax practitioner in the completion of a return should not be seen as a “bona fide inadvertent error” and should be subject to penalties.

The reduction of the penalty percentages applicable to underestimation penalties as set out in the TALAB, is widely welcomed. There is concern surrounding the effective date of the proposed amendment (Kotze, 2013). It is feared that taxpayers who made offences during the same tax periods but were subject to SARS enforcement audits at different times would potentially be subject to different penalty regimes (Kotze, 2013). It is therefore recommended that the amendments be back dated to the 1<sup>st</sup> of October 2012, being the promulgation date.

Under the TAAct, a request for remission of an understatement penalty can only be lodged by a taxpayer who has been raised with a substantial understatement penalty. It is recommended that provision be made for the request for remission against any of the understatement penalties raised. The criteria as set out in S 223(3)(b)(i)-(iii) should be applicable to all other underestimation penalties and a taxpayer in possession of a valid tax opinion should be able to lodge a request for remittance against any underestimation penalty raised.

In agreement with the amendment under the TALAB, a tax opinion should be obtained by a taxpayer from an independent tax practitioner. It is recommended that the proposed amendment enabling taxpayers to object and appeal against the decision to not remit any of the penalties, be promulgated. This would ensure that a fair and just penalty system is used in South Africa.

**Interest:** It is agreed that movement toward a new interest regime in South Africa is required. The sections set out in the TAAct, not yet promulgated, seek to achieve this. Once promulgated, all of the sections under the different tax Acts relating to interest will be unified under the TAAct. It is recommended that a unified interest rate be set for both refunds due by SARS and payments due by taxpayers. This will create a movement towards a simplified and unified interest regime in South Africa.

It is recommended that provision be made for interest on refunds due to non-provisional taxpayers. It is recommended that interest is raised on these refunds if they are delayed due to circumstances beyond the control of the taxpayer i.e. a delay in a SARS audit, amongst other factors.

Taxpayers can lodge a request for remittance against the interest so raised. It is however recommended that SARS provide the taxpayer with adequate and detailed reasons where the request for remittance is denied.

### **5.3 CONCLUSION**

Tax administration in South Africa has been at the forefront of many discussions in practice since the enactment of the TAAct. The TAAct has become an important part of tax legislation in South Africa. The TAAct will play an important role in the interpretation of transactions going forward. Taxpayers and tax practitioners will need to ensure that they are well informed of the possible implications under the TAAct when entering into transactions.

This study focused on the following chapters in the TAAct:

- Chapter 8 – Assessments
- Chapter 9 – Dispute Resolution
- Chapter 12 – Interest
- Chapter 15 – Admin Non-Compliance Penalty
- Chapter 16 – Understatement Penalty

We see the introduction of a jeopardy assessment by SARS. This enables SARS to collect taxes when it is feared that the collection of such taxes may be in jeopardy. It is hoped that this provision will be used in the correct and intended manner and not to meet budget targets.

The biggest change in respect of dispute resolution is seen as the change in the timeframe within which a taxpayer may lodge an objection. Objections must be lodged within 30 business days after the date of assessment and no longer within 30 business days of the due date. Although it appears that taxpayers are now at a timing disadvantage, 30 business days after the date of assessment should be sufficient to formulate and lodge an objection. Taxpayers will need to ensure that an extension is requested in cases where it is evident that the objection time limit will not be met.

We see a more aggressive approach regarding penalties under the TAAct. These penalties are necessary in order to enforce compliance amongst all taxpayers. Under the TALAB, however, some relief is proposed. Once these new amendments have been promulgated, South Africa will be on its way to a more fair penalty structure.

It is important that taxpayers take note of the following when it comes to penalties:

- it should not be assumed that where penalties have previously been reduced, they would in future be waived on the same grounds;
- caution should be taken when dealing with large or unusual transactions;
- systems and processes should be implemented to ensure that accurate information is provided when completing returns;



- tax opinions should be obtained from adequate tax practitioners in instances where the tax consequences are not clear or subject to interpretation; and
- taxpayers should consider engaging with a tax practitioner when advised of an audit by SARS, this will reduce potential understatement penalties (Lumsden, 2013).

Interest raised by SARS is still dealt with under the relevant sections of the specific tax Act. This will only change once the relevant sections under the TAAct have been promulgated by the Minister of Finance.

The TAAct and the enforcement thereof are not taken lightly by SARS and taxpayers will have to ensure they are abreast of the changes and possible implications they may face. Taxpayers should seek professional advice now more than ever to ensure they minimise the possible implications they could face under the TAAct.

#### **5.4 CONTRIBUTION AND RECOMMENDATION OF FUTURE RESEARCH**

From a theoretical perspective, the proposed study made the following contributions:

- as far as could be determined, this is one of the first practical studies on the specified sections of the TAAct;
- this study should hopefully provide taxpayers and tax practitioners with a better understanding of some of the sections of the TAAct; and
- this study was aimed at providing a simplified understanding and description of the relevant sections.

There are a few opportunities for future research regarding certain sections of the TAAct. The section relating to the regulation of tax practitioners and the reporting of unprofessional conduct (S 239 – S 243 of the TAAct) is still raising concerns within practice (Kotze, 2013). The sections relating to interest (S 187 – S 189 of the TAAct) will come under scrutiny again and be commented on once the remaining sections have been promulgated by the Minister of Finance. A study could also be conducted on the voluntary disclosure programme (S 225 – S 233 of the TAAct). This could be compared with other

countries to see how South Africa could improve the programme to ensure compliance amongst taxpayers.

As stated in the study, tax administration in South Africa will play an integral part in the promotion of compliance amongst all taxpayers in future. The TAAct will be important legislation going forward and will play an integral part in the advice given to taxpayers by practitioners. Taxpayers will have to ensure that they comply with the relevant sections of the TAAct and that they seek the advice of tax practitioners when it comes to complex tax matters.

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