

**INTERPRETATION NOTE 1 (Issue 3)**

DATE: 20 February 2019

**ACT : INCOME TAX ACT 58 OF 1962**  
**SECTION : PARAGRAPHS 17 TO 27 OF THE FOURTH SCHEDULE**  
**SUBJECT : PROVISIONAL TAX ESTIMATES**

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### **Preamble**

In this Note unless the context indicates otherwise –

- “**basic amount**” means the amount described in paragraph 4.3.1;
- “**paragraph**” means a paragraph of the Fourth Schedule to the Act;
- “**section**” means a section of the Act;
- “**the Act**” means the Income Tax Act 58 of 1962;
- “**TA Act**” means the Tax Administration Act 28 of 2011; and
- any other word or expression bears the meaning ascribed to it in the Act.

All interpretation notes referred to in this Note are available on the SARS website at [www.sars.gov.za](http://www.sars.gov.za). Unless indicated otherwise, the latest issue of these documents should be consulted.

## **1. Purpose**

This Note provides guidance on the interpretation of the law relating to provisional tax and considers –

- who is a provisional taxpayer;
- the calculation of provisional tax including how estimates of taxable income must be made;
- the consequences of an incorrect or late submission of estimates;<sup>1</sup>
- the consequences of a late payment of provisional tax; and
- the consequences of failure to submit an estimate on time.

## **2. Background**

Employees who earn remuneration generally pay tax in the form of employees’ tax (PAYE) on a monthly basis. This results in the collection of an employee’s normal tax liability being spread throughout the year with a potential additional payment or a refund at the end of the year of assessment. However, for people who do not earn “remuneration” as defined in the Fourth Schedule, for example, a self-employed person earning business income, in the absence of a provisional tax system the full amount of tax would be payable only on assessment at the end of the year of

<sup>1</sup> Paragraph 20A, repealed with effect from years of assessment commencing on or after 1 March 2015, has not been dealt with in this Note. However, for the penalty for underpayment as a result of underestimation, which consolidates the underestimation and late submission penalty see 4.4.2(b).

assessment, without the option or obligation of making interim payments like those paying PAYE monthly.

Provisional tax is not a separate tax payable by certain persons. It is merely a method used to collect normal tax,<sup>2</sup> that will ultimately be payable for the year of assessment concerned, during the year. Otherwise stated, provisional tax is an advance payment of a taxpayer's normal tax liability. A provisional taxpayer is generally required to make two provisional tax payments, one six months into the year of assessment and one at the end of the year of assessment, but has the option to make an additional payment, generally known as the third or top-up payment, after the end of the year of assessment.

Provisional tax payments are calculated on estimated taxable income (which includes taxable capital gains) for the particular year of assessment.<sup>3</sup> These estimates of taxable income are submitted to SARS on an IRP6 return. The returns, which can be obtained through e-filing, the SARS contact centre or a SARS branch office, **must be submitted even if the amount of the provisional tax payment is nil.** The normal tax payable on the estimated taxable income is calculated at the relevant rate of tax that is in force on the date of payment of provisional tax. This would generally be the rate of tax as prescribed in the tax tables which are fixed annually by Parliament.<sup>4</sup> The Commissioner may, from time to time, prescribe alternative tax tables for optional use by provisional taxpayers falling within a certain category.<sup>5</sup>

Provisional tax payments may not be refunded<sup>6</sup> or reallocated to different periods or different taxpayers. However, at the end of the year of assessment the provisional tax payments, together with any PAYE withheld during the year, are set off against the taxpayer's liability for normal tax. Any excess of provisional tax and PAYE over the liability for normal tax is refunded to the taxpayer<sup>7</sup> and any shortfall is payable by the taxpayer to SARS. Interest is generally payable from the effective date,<sup>8</sup> by SARS in the case of a refund and by the taxpayer in the case of a shortfall.

There are certain rules that must be adhered to when making estimates of taxable income for provisional tax purposes. Certain penalties and interest will be imposed if the estimates are inaccurate or if the submission of the estimates or the payment of provisional tax is late. This Note discusses these rules and the interest and penalties which may be imposed.

### 3. The law

The relevant legislation is quoted in the **Annexure**.

<sup>2</sup> That is, income tax on "taxable income" as defined in section 1(1) and read with section 5(1).

<sup>3</sup> Paragraph 17(3).

<sup>4</sup> Paragraph 17(4), read with section 5(2) and the Rates and Monetary Amounts and Amendment of Revenue Laws Act applicable to the relevant year of assessment.

<sup>5</sup> Paragraph 17(5).

<sup>6</sup> Paragraph 29.

<sup>7</sup> Paragraph 28, read with section 190 of the TA Act.

<sup>8</sup> See **4.4.3(b)** for the definition of "effective date".

## 4. Application of the law

### 4.1 Who is liable to pay provisional tax?

A “provisional taxpayer”<sup>9</sup> is –

- (a) any person (other than a company) who derives income by way of –
  - (i) any remuneration from an employer that is not registered for employees’ tax purposes under paragraph 15; or
  - (ii) any amount which does not constitute remuneration<sup>10</sup> or an allowance or advance<sup>11</sup> (such as a travelling allowance, subsistence allowance and public office allowance);
- (b) any company; and
- (c) any person notified by the Commissioner that he or she is a provisional taxpayer,

but excluding the following persons:<sup>12</sup>

- (i) Any approved public benefit organisation;<sup>13</sup>
- (ii) Any approved recreational club;<sup>14</sup>
- (iii) Any body corporate, share block company or association of persons contemplated in section 10(1)(e);
- (iv) A small business funding entity;
- (v) A deceased estate;<sup>15</sup>
- (vi) Non-resident owners or charterers of ships or aircraft within the ambit of section 33; and
- (vii) Any natural person who does not derive income from the carrying on of any business,<sup>16</sup> if that person’s taxable income for that year of assessment –<sup>17</sup>
  - (aa) will not exceed the annual tax threshold;<sup>18</sup> or
  - (bb) which is derived from interest, dividends, foreign dividends, rental from the letting of fixed property and any remuneration from an

<sup>9</sup> Paragraph 1.

<sup>10</sup> As defined in paragraph 1.

<sup>11</sup> As contemplated in section 8(1).

<sup>12</sup> Definition of “provisional taxpayer” in paragraph 1.

<sup>13</sup> As contemplated in paragraph (a) of the definition of “public benefit organisation” in section 30(1) and approved by the Commissioner under section 30(3).

<sup>14</sup> As contemplated in the definition of “recreational club” in section 30A(1) and approved by the Commissioner under section 30A(2).

<sup>15</sup> Effective 1 March 2016.

<sup>16</sup> The meaning of a “business” is discussed in the SARS *Guide on the Ring-Fencing of Assessed Losses Arising from Certain Trades Conducted by Individuals*, issued 8 October 2010.

<sup>17</sup> This requirement was different for natural persons below 65 years of age or 65 years or older for years of assessment commencing before 1 March 2015.

<sup>18</sup> The term “tax threshold” is defined in paragraph 1 and means the maximum amount of taxable income of a person during a year of assessment that would result in no tax being payable by that person taking into account the applicable normal rates of tax and the rebates available in section 6. The tax thresholds change annually and differ for persons under the age of 65, persons 65 years of age and older and persons 75 years of age and older.

employer that is not registered for employees' tax purposes under paragraph 15, will be R30 000 or less.

A person earning only remuneration (such as salary, wages, bonuses and pension) would generally pay tax on a monthly basis in the form of PAYE. Accordingly, that person would not be a provisional taxpayer, which is reasonable given that the appropriate normal tax should be collected through the PAYE system and not through provisional tax.

There is no requirement to register as a provisional taxpayer.<sup>19</sup> A taxpayer who is a provisional taxpayer as defined must request an IRP6 provisional tax return on e-Filing, from the SARS contact centre or from a SARS branch office, complete it and submit it, along with any payment required, within the required periods.

#### Remuneration from an employer that is not registered for employees' tax purposes

Certain employers do not register under paragraph 15 for employees' tax purposes. Multinational employers often do not have a legal entity in South Africa that is able to register, whilst embassies and other diplomatic missions are generally not subject to South African legislation.<sup>20</sup> Even though these employers are not registered, the amounts paid to employees<sup>21</sup> constitute "remuneration" as defined in paragraph 1.

Prior to 1 March 2017, the fact that these employees were receiving remuneration had the effect that they were neither automatically provisional taxpayers, nor employees under the employees' tax system. SARS was obliged to identify each relevant employee, and notify them individually that they were provisional taxpayers in order to get them on register, an administratively onerous task.

From 1 March 2017, the legislation was amended to provide that any employee who is paid remuneration by an employer that is not registered with SARS for purposes of employees' tax, is a provisional taxpayer. The amendment ensures that employees who bypass the employees' tax collection system are automatically included in the provisional tax net.

The amendment could impact South African residents employed directly by non resident multinational employers, expatriate employees who have been temporarily seconded to render services in South Africa, and local recruits of embassies and diplomatic missions, amongst others.

<sup>19</sup> Definition of "provisional taxpayer" in paragraph 1 read with paragraph 19 and section 22 of the TA Act.

<sup>20</sup> Under customary international law; and also under the Diplomatic Immunities and Privileges Act 37 of 2001.

<sup>21</sup> Certain non-resident employees of embassies and other diplomatic missions are not liable to tax on their remuneration in South Africa, and they are excluded from these provisions.

**Example 1 – Remuneration paid to an expatriate by an employer that is not registered under paragraph 15**

*Facts:*

XXV Ltd, an Australian company, seconded seven expatriate chemical engineers, who are not resident in South Africa, to render employment services in South Africa for a period of three years. The secondment agreement provides that the services must be performed in South Africa, and the duration is for the period 1 March 2018 to 28 February 2021. XXV Ltd operates its payroll in Australia and is not registered in South Africa as an employer under paragraph 15.

*Result:*

Paragraph (a)(i) of the definition of a “provisional taxpayer” in paragraph 1 includes any person who derives income by way of remuneration from an employer that is not registered under paragraph 15. The expatriates are thus provisional taxpayers and will be required to file provisional tax returns.

Certain **foreign employers operating** in South Africa, for example, as a branch operation, run a “shadow payroll” in South Africa. A shadow payroll is a voluntary mechanism to assist with the reporting and tax withholding obligations in a host country for an employee who remains on the payroll system in his or her home country during the host country assignment. Notwithstanding that the shadow payroll (often operated by an accounting or legal firm representing the foreign employer in South Africa) is registered for employees’ tax, the foreign employer itself is not registered under paragraph 15. Employees of these foreign employers are therefore provisional taxpayers under paragraph (a)(i) of the definition of a “provisional taxpayer” in paragraph 1, despite all taxes on remuneration being paid to SARS under the employees’ tax system via the shadow payroll.

In these circumstances, SARS may direct<sup>22</sup> that the expatriate provisional taxpayers are not required to submit returns of estimates of taxable income. SARS will only consider such an application if –

- employees’ tax has been correctly deducted or withheld via the shadow payroll on the full remuneration that is subject to tax in South Africa;
- there is no risk of loss to the fiscus; and
- the expatriate has no taxable income other than remuneration in South Africa.

Applications for directives of this nature must be in writing and directed to the local SARS office.

#### **4.2 When is provisional tax payable and how is it calculated?**

In the context of provisional tax it is particularly important to note that if –

- a day notified by SARS or specified in the Act for payment, submission or other action; or
- the last day of a period within which payment, submission or other action under the Act must be made,

<sup>22</sup> Under paragraph 19(1)(a).

falls on a Saturday, Sunday or public holiday, the action must be done not later than the last business day before the Saturday, Sunday or public holiday.<sup>23</sup>

#### 4.2.1 Provisional taxpayers other than companies

Provisional tax is payable three times in respect of a year of assessment:<sup>24</sup>

- (i) The **first period** for which the payment of provisional tax becomes due, is the period ending six months from the start of the taxpayer's year of assessment. This means that for a year of assessment that starts on 1 March and ends on 28 February or 29 February, the first period for which provisional tax becomes due will be the period ending on 31 August. The first provisional tax payment must be made on or before the last business day of that period. The taxpayer will be required to estimate taxable income for that year of assessment and pay half of the estimated liability for normal tax less certain payments already made. The first provisional tax payment is calculated as follows:<sup>25</sup>

	R
Estimated taxable income for the year of assessment	<u>XXXX</u>
Normal tax on estimated taxable income	XXXX
<i>Less:</i> Primary, secondary and tertiary rebates under section 6	(XXXX)
<i>Less:</i> Tax credit for medical scheme fees under section 6A	(XXXX)
<i>Less:</i> Additional medical expenses tax credit under section 6B	(XXXX)
<i>Less:</i> Foreign tax credit under section 6 $quin$ <sup>26</sup>	<u>(XXXX)</u>
<i>Total tax payable (A)</i>	XXXX
Half of the normal tax payable on estimated taxable income (A / 2)	XX
<i>Less:</i> Employees' tax deducted from the provisional taxpayer's remuneration <i>during</i> the first period	(X)
<i>Less:</i> Foreign tax credits under section 6 $quat$ proved to be payable by the end of the first period	<u>(X)</u>
First provisional tax payment	<u>XXXX</u>

- (ii) The **second period** for which the payment of provisional tax becomes due, is the period ending on the last day of the year of assessment. This means that for a year of assessment which starts on 1 March and ends on 28 February or 29 February, the second period for which provisional tax becomes due will be the period ending on 28 February or 29 February, as appropriate. The second provisional tax payment must be made on or before the last business day of the year of assessment in question. The taxpayer will be required to estimate taxable income for that year of assessment and pay the total estimated

<sup>23</sup> Section 244(1) of the TA Act.

<sup>24</sup> Paragraph 21, read with paragraph 23A.

<sup>25</sup> Effective calculation applying paragraph 21(1)(a) and paragraph 17. "Total estimated liability" under paragraph 21 is determined after deducting applicable rebates (excluding the rebate under section 6 $quat$ ) because rebates impact on the amount of normal tax a taxpayer is liable to pay.

<sup>26</sup> The rebate available under section 6 $quin$  was deleted for years of assessment commencing on or after 1 January 2016.

liability for normal tax less certain payments already made. The second provisional tax payment is calculated as follows:<sup>27</sup>

	R
Estimated taxable income for the year of assessment	<u>XXXX</u>
Normal tax on estimated taxable income	XXXX
<i>Less:</i> Primary, secondary and tertiary rebates under section 6	(XXXX)
<i>Less:</i> Tax credit for medical scheme fees under section 6A	(XXXX)
<i>Less:</i> Additional medical expenses tax credit under section 6B	<u>(XXXX)</u>
<i>Total tax payable</i>	XXXX
<i>Less:</i> Employees' tax deducted from the provisional taxpayer's remuneration <i>during</i> the year	(X)
<i>Less:</i> First provisional tax payment (if actually paid)	(X)
<i>Less:</i> Foreign tax credits (that is, foreign taxes that qualify for a foreign tax credit under section 6 <i>quat</i> and section 6 <i>quin</i> ) <sup>28</sup> for the year	____(X)
Second provisional tax payment	<u>XXXX</u>

- (iii) The **third period** for which the payment of provisional tax can be made<sup>29</sup> is for the period ending on the last day of the year of assessment but payment must be made not later than seven months after the end of that year of assessment in order to reduce possible interest.<sup>30</sup> This means that for a year of assessment which starts on 1 March and ends on 28 February or 29 February, the third provisional tax payment must be made by 30 September in order to reduce the provisional taxpayer's exposure to interest payable. The payment is commonly referred to as a "top-up payment" and is voluntary. Paragraph 23A refers to the payment as an "additional payment of provisional tax". Unlike with the first and second period, the payment is generally not determined through an estimation of taxable income but is based on actual taxable income for the year as this figure is often known to the provisional taxpayer when making the top-up payment. The top-up payment is a mechanism which assists the taxpayer to avoid or reduce the imposition of interest on underpayments of provisional tax, but is not taken into account in the calculation of the penalty for underpayment of provisional tax as a result of underestimation which takes into account only provisional tax payments made by the end of the year [see **4.4.2 (b)**]. The top-up payment is calculated as follows:

<sup>27</sup> Effective calculation applying paragraph 21(1)(b) and paragraph 17.

<sup>28</sup> The rebate available under section 6*quin* was deleted for years of assessment commencing on or after 1 January 2016.

<sup>29</sup> At the option of the provisional taxpayer for the purpose of avoiding or reducing interest which may become payable under section 89*quat*(1).

<sup>30</sup> Paragraph 23A read with section 89*quat*.



	R
Estimated/actual taxable income for the year of assessment	<u>XXXX</u>
Normal tax on estimated/actual taxable income	XXXX
<i>Less:</i> Primary, secondary and tertiary rebates under section 6	(XXXX)
<i>Less:</i> Tax credit for medical scheme fees under section 6A	(XXXX)
<i>Less:</i> Additional medical expenses tax credit under section 6B	<u>(XXXX)</u>
<i>Total tax payable</i>	XXXX
<i>Less:</i> Employees' tax deducted from the provisional taxpayer's remuneration <i>during</i> the year	(X)
<i>Less:</i> First provisional tax payment (if actually paid)	(X)
<i>Less:</i> Second provisional tax payment (if actually paid)	(X)
<i>Less:</i> Other provisional tax top-up payments (if any, if actually paid)	(X)
<i>Less:</i> Foreign tax credits (that is, foreign taxes that qualify for a rebate under section 6 <i>quat</i> (1) and section 6 <i>quin</i> <sup>31</sup> ) for the year	<u>(X)</u>
Top-up payment	<u>XXXX</u>

A person other than a company may apply to SARS for permission to draw accounts to a date falling after the end of the year of assessment.<sup>32</sup> An approved application will have the following effect on provisional tax:

- The dates for the first and second periods will be as prescribed by the Commissioner and may accordingly differ to the dates discussed above.<sup>33</sup>
- Top-up payment payments must be paid by not later than 6 months after the end of the year of assessment (as opposed to the 7-month period referred to above).<sup>34</sup>

#### 4.2.2 Provisional taxpayers who are companies

Provisional tax is payable three times during the year of assessment:

- (i) The **first period**<sup>35</sup> for which the payment of provisional tax becomes due, is the period ending six months from the start of the company's year of assessment. Payment must be made on or before the end of this period. In other words, if the company's financial year begins on 1 June, the first period will be the period ending on 30 November of that year and payment must be made on or before 30 November. The company is required to estimate taxable income for that year of assessment and pay half of the total

<sup>31</sup> The rebate available under section 6*quin* was deleted for years of assessment commencing on or after 1 January 2016.

<sup>32</sup> Section 66(13A).

<sup>33</sup> Paragraph 21(2). Subject to objection and appeal under section 3(4)(e), read with section 104 of the TA Act.

<sup>34</sup> Paragraph 23A, read with section 89*quat*.

<sup>35</sup> Paragraph 23.

estimated liability for normal tax less certain payments already made. The first provisional tax payment is calculated as follows:<sup>36</sup>

	R
Estimated taxable income for the year of assessment	
<i>Less:</i> Foreign tax credit under section 6quin <sup>37</sup>	<u>XXXX</u>
Normal tax on estimated taxable income (A)	XXXX
Half of the normal tax payable on estimated taxable income (A / 2)	XX
<i>Less:</i> Employees' tax deducted from the provisional taxpayer's remuneration <i>during</i> the first period <sup>38</sup>	(X)
<i>Less:</i> Foreign tax credits under section 6quat proved to be payable by the end of the first period	<u>(X)</u>
First provisional tax payment	<u>XXXX</u>

- (ii) The **second period** for which the payment of provisional tax becomes due, is the period ending on the last day of the year of assessment. Payment must be made on or before the last day of the year of assessment. Accordingly, if the company has a financial year-end of 31 May, the second period for purposes of provisional tax will be the period ending on 31 May and payment must be made on or before this date. The taxpayer will be required to estimate taxable income for that year of assessment and pay the total estimated liability for normal tax less certain payments already made. The second provisional tax payment is calculated as follows:<sup>39</sup>

	R
Estimated taxable income for the year of assessment	<u>XXXX</u>
Normal tax on estimated taxable income	XXXX
<i>Less:</i> Employees' tax deducted from the provisional taxpayer's remuneration <i>during</i> the year	(X)
<i>Less:</i> First provisional tax payment (if actually paid)	(X)
<i>Less:</i> Foreign tax credits (that is, foreign taxes that qualify under for a rebate under section 6quat and section 6quin <sup>40</sup> ) for the year	<u>(X)</u>
Second provisional tax payment	<u>XXXX</u>

<sup>36</sup> Effective calculation applying paragraph 23 and paragraph 17.

<sup>37</sup> The rebate available under section 6quin was deleted for years of assessment commencing on or after 1 January 2016.

<sup>38</sup> This calculation is calculating the company's first provisional tax payment and therefore this item refers to employees tax that might have been deducted from payments made to the company and not to employees tax which the company may have withheld from, for example, salary payments to its employees.

<sup>39</sup> Effective calculation applying the paragraph 23 and paragraph 17.

<sup>40</sup> The rebate available under section 6quin was deleted for years of assessment commencing on or after 1 January 2016.

- (iii) The **third period** for which payment can be made is for the period ending on the last day of the year of assessment. However, payment must be made not later than seven months after the end of the year of assessment if the company's year of assessment ends on the last day of February, otherwise the payment must be made not later than six months after the end of the year of assessment, in order to reduce possible interest. For companies, the end of the year of assessment is the financial year-end. For example, if the financial year-end of the company is 31 May, the top-up payment would need to be made by 30 November to reduce possible interest.

	R
Estimated/actual taxable income for the year of assessment	<u>XXXX</u>
Normal tax on estimated/actual taxable income	XXXX
<i>Less:</i> Employees' tax deducted from the provisional taxpayer's remuneration <i>during</i> the year	(X)
<i>Less:</i> First provisional tax payment (if actually paid)	(X)
<i>Less:</i> Second provisional tax payment (if actually paid)	(X)
<i>Less:</i> Other provisional tax top-up payment (if any, if actually paid)	(X)
<i>Less:</i> Foreign tax credits (that is, foreign taxes that qualify for a rebate under section 6quat(1) and section 6quin <sup>41</sup> ) for the year	___(X)
Top-up payment	<u>XXXX</u>

#### 4.2.3 Additional information relating to the payment of provisional tax

The Commissioner may release a provisional taxpayer from making a first provisional tax payment if the Commissioner is satisfied that the provisional taxpayer's taxable income for the year of assessment concerned cannot be estimated based on the available facts at the time the payment should be made.<sup>42</sup> The Commissioner's decision is subject to objection and appeal.<sup>43</sup>

### 4.3 The first period – estimates of taxable income, penalties and interest

#### 4.3.1 Estimates of taxable income

For the first period, a provisional taxpayer is required to submit a return to the Commissioner which includes an estimate of the total taxable income (estimate) that will be derived by the taxpayer in the relevant year of assessment.<sup>44</sup> The amount of the first provisional tax payment is based on this estimate (see 4.2.1 and 4.2.2). The return must be submitted even if the amount of the provisional tax payment is nil.

Taxable income is equal to gross income *less* exempt income *less* all amounts allowed to be deducted or set off<sup>45</sup> *plus* all amounts included or deemed to be

<sup>41</sup> The rebate available under section 6quin was deleted for years of assessment commencing on or after 1 January 2016.

<sup>42</sup> Paragraph 24.

<sup>43</sup> Section 3(4)(e), read with section 104 of the TA Act.

<sup>44</sup> Paragraph 19(1).

<sup>45</sup> Under Part 1 of Chapter II of the Act.

included in taxable income under the Act, for example, the amount of taxable capital gains.

An estimate must include taxable capital gains made or that are anticipated to be made during the year of assessment. This includes situations where, in the first period, there is a reasonable expectation that a taxable capital gain will be made during the second period.

For persons other than companies, the estimate must exclude the taxable portion of lump sum benefits<sup>46</sup> and severance benefits<sup>47</sup> received by or accrued to (or to be received by or accrue to) the taxpayer during the year of assessment.

The amount of the estimate cannot be less than the “basic amount” unless the circumstances of the case justify the submission of an estimate of a lower amount.<sup>48</sup> The “basic amount” is the taxable income assessed for the *latest preceding year of assessment*, less any taxable capital gain included therein and, for persons other than a company, any taxable portion of a lump sum benefit or severance benefit, other than any amount included under paragraph (eA) of the definition of “gross income”.<sup>49</sup> Also excluded are any amounts (other than severance benefits) contemplated in paragraph (d) of the definition of “gross income”.

The obligation under paragraph 19 is to submit an estimate of the total taxable income for the year of assessment. The use of the basic amount may or may not fulfill this requirement depending on the facts of the particular case. For example, if a provisional taxpayer realised a capital gain during the current year the use of the basic amount is likely to be inappropriate if the capital gain is significant. Similarly the use of the basic amount, with or without the escalation referred to in the proviso to paragraph 19(1)(d), may not be appropriate if the provisional taxpayer has introduced a new line of business. The use of the basic amount may have an impact on possible penalties for the underpayment of provisional tax – see **4.4.2(b)**.

The “latest preceding year of assessment”<sup>50</sup> means the latest of the years of assessment –<sup>51</sup>

- preceding the year of assessment for which the estimate is made, and
- for which a notice of assessment<sup>52</sup> was issued by the Commissioner 14 calendar days<sup>53</sup> or more before the date on which the estimate was submitted to the Commissioner.

<sup>46</sup> As defined in section 1(1), namely, retirement fund lump sum benefits and retirement fund lump sum withdrawal benefits.

<sup>47</sup> As defined in section 1(1).

<sup>48</sup> Paragraph 19(1)(c).

<sup>49</sup> Paragraph 19(1)(d)(i) and (ii).

<sup>50</sup> Paragraph 19(1)(e).

<sup>51</sup> As provided in paragraph 19(1)(e).

<sup>52</sup> Depending on the circumstances this could be a notice applicable to an original, reduced or additional assessment. The latest notice of assessment issued for a particular year of assessment must be considered.

<sup>53</sup> See section 4 of the Interpretation Act, No. 33 of 1957 for the “Reckoning of the number of days” – if the last day is a Sunday or public and public holiday it is excluded from the count.

The basic amount must be increased by 8% of the basic amount per year if an estimate is made *more than* 18 months after the end of the latest preceding year of assessment.<sup>54</sup>

The 8% escalation is added for each year from the end of the latest preceding year of assessment to the end of the year of assessment for which the estimate is made. The escalation is calculated on a simple basis, not on a compound basis.

The addition of the 18-month rule, effective from 1 October 2012, will have the effect that taxpayers who are reasonably up to date with the submission of tax returns will not be subject to the 8% per year escalation on the basic amounts used for the first provisional tax payment.

### **Example 2 – Determining whether to increase the basic amount**

*Facts:*

X's year of assessment ends on 28 February each year. X submitted a first period provisional tax estimate for the 2018 year of assessment on 31 August 2017. A notice of assessment was issued to X for the 2017 year of assessment on 18 August 2017. X's taxable income for the 2017 year of assessment was R210 000. A notice of assessment for the 2016 year of assessment was issued on 29 July 2016. X's taxable income as assessed in 2016 was R150 000. X did not have any taxable capital gains or retirement or severance related lump sums in 2016.

*Result:*

X's latest preceding year of assessment is 2016 because it is the latest year of assessment for which X was issued a notice of assessment 14 days or more from the date on which the first provisional tax estimate of taxable income was submitted. X's 2017 assessment is not the latest year of assessment and cannot be used to calculate the basic amount as the notice of assessment was issued less than 14 days before the date on which the first provisional tax estimate of taxable income was submitted.

Accordingly, X must use the 2016 assessment to determine the basic amount. The estimate is made on 31 August 2017 which is not more than 18 months after the end of the latest preceding year of assessment (29 February 2016). The 8% escalation is not applied and X's basic amount will be the amount of taxable income as assessed in 2016, that is, R150 000.

### **Example 3 – Determining whether to increase the basic amount**

*Facts:*

X's year of assessment ends on 28 February each year. X was required to submit a first period provisional tax estimate for the 2018 year of assessment on 31 August 2017. For the 2015 year of assessment, a notice of assessment was issued on 30 June 2015. X's taxable income as assessed in 2015 was R170 000. The 2016 and 2017 returns have not yet been submitted. Taxable income as assessed in 2015 included a taxable capital gain of R10 000 and a severance benefit of R20 000.

<sup>54</sup> Paragraph 19(1)(d).

*Result:*

X's latest preceding year of assessment is 2015 because it is the latest year of assessment for which X was issued a notice of assessment 14 days or more from the date on which the first provisional tax estimate of taxable income was submitted. X's 2016 and 2017 assessments have not been issued.

The estimate of taxable income is made on 31 August 2017 which is more than 18 months after the end of the latest preceding year of assessment (28 February 2015). The basic amount must therefore be increased. The basic amount of R140 000 (taxable income assessed for 2015 of R170 000 – taxable capital gain of R10 000 – severance benefit of R20 000) must be increased by 8% for each year up to and including the current year, that is, an 8% increase for 2016, 2017 and 2018. X's basic amount for the first provisional tax estimate for 2018 will therefore be R173 600 [R140 000 + (R140 000 × 8% × 3)].

The Commissioner may estimate taxable income if a provisional taxpayer has failed to submit an estimate as required under the Fourth Schedule.<sup>55</sup>

**Under paragraph 19(3) the Commissioner may:**

- Request a provisional taxpayer to justify the estimate submitted or to furnish particulars of income and expenditure or any other particulars that may be required for the year of assessment for which the provisional tax payment is being made. Justification for the estimate or the request for further information and support may be requested when the provisional taxpayer submits an estimate which is above, below or equal to the basic amount.
- Exercise the discretion referred to in the preceding point at any time.
- Increase a provisional taxpayer's estimate to an amount the Commissioner considers reasonable if, after requesting justification or the particulars referred to above, the Commissioner is not satisfied with the estimate.

**The increase of an estimate is not subject to objection and appeal.<sup>56</sup>** Provisional taxpayers that are dissatisfied with the decision to increase an estimate **may request an internal review of that decision.<sup>57</sup>** A request for such a review does not suspend the obligation to make payment.<sup>58</sup> In certain circumstances, provisional taxpayers that have liquidity concerns may apply to enter into an instalment payment agreement with SARS.<sup>59</sup> Even when instalment payment arrangements are made, provisional taxpayers are liable to pay interest on the outstanding amounts.

<sup>55</sup> Paragraph 19(2).

<sup>56</sup> Paragraph 19(3).

<sup>57</sup> Section 9 of the TA Act. Although it is arguable that an increased estimate results in an additional assessment under section 92 the TA Act, read with the definition of "assessment" in section 1 of that Act, SARS will accept that an increased estimate does not result in an additional assessment for the purposes of the application of section 9 of the TA Act.

<sup>58</sup> Under section 164 of the TA Act, payment may only be suspended pending an objection or appeal.

<sup>59</sup> See Part D of Chapter 10 of the TA Act for detail regarding the requirements and consequences.

The additional provisional tax payable on an increased estimate must be settled within a period determined by the Commissioner.<sup>60</sup> A payment is subject to a late payment penalty if not paid within the period permitted.<sup>61</sup>

It is not possible to provide an exhaustive list of situations in which the Commissioner's discretion under paragraph 19(3) may be exercised. However, the following are some examples:

- An increase in taxable income resulting from events like legislative changes, mergers or acquisitions.
- Financial results that support an increase in taxable income.
- The estimate submitted by the taxpayer is based on a basic amount that is outdated.
- It is the taxpayer's first year of assessment.
- The provisional taxpayer fails to justify the estimate when requested to do so by SARS.

A nil estimate, based on the premise that the "basic amount" is nil, will not be accepted as an estimate made in respect of a taxpayer's first year of assessment. A taxpayer in this position does not have a "basic amount" as defined<sup>62</sup> and is required to submit an estimate of the total taxable income in relation to that particular year of assessment.<sup>63</sup>

#### 4.3.2 Penalties

The Act provides for certain penalties to be levied when taxpayers fail to comply with provisional tax obligations. The only penalty applicable to the first period is the penalty levied for the late payment of provisional tax.

The penalties applicable to the second period (that is, the penalty for late payment and for underestimating taxable income) are discussed in 4.4.2.

##### (a) Penalty for the late payment of provisional tax

A penalty of 10% will be imposed on the late payment of provisional tax for the first period.<sup>64</sup> The penalty of 10% is calculated on the amount of provisional tax not paid. For example, if an amount of R2 000 was not paid or is paid late, the penalty that is charged will be 10% of R2 000, that is, R200.

The Commissioner may remit all or a portion of the penalty under the provisions of the TA Act<sup>65</sup> if satisfied that –

- reasonable grounds exist for the late payment;
- the non-compliance has been remedied, that is, the full amount of the provisional tax due has been paid in full; and

<sup>60</sup> Paragraph 25(1).

<sup>61</sup> Paragraph 27. The penalty is calculated in the same manner as set out in 4.3.2.

<sup>62</sup> See paragraph 19(1)(d).

<sup>63</sup> In such cases, the provisions of paragraphs 19(1)(a) or 19(1)(b) will be applicable and will be subject to the provisions of paragraph 19(3).

<sup>64</sup> Paragraph 27, read with Chapter 15 of the TA Act.

<sup>65</sup> Under section 217(3) of the TA Act.

- either –
  - the penalty was imposed for a first incidence of non-compliance; or
  - the amount of the penalty involved was less than R2 000.

This penalty, or a relevant portion of the penalty, will also be remitted if the taxpayer is able to satisfy SARS that “exceptional circumstances” rendered the taxpayer incapable of complying with the obligation to make payment of provisional tax by the due date. The “exceptional circumstances”<sup>66</sup> may be grouped into the following categories:

- External factors, namely, a natural or human-made disaster or a civil disturbance or disruption in services.
- Personal factors, namely, a serious illness or accident; serious emotional or mental distress; or serious financial hardship (for example, in the case of a business, the risk to continuity of business operations along with continued employment of employees or for an individual, the lack of basic living requirements).
- Acts by SARS, namely, a capturing error, a processing delay, provision of incorrect information in an official publication or media release, delay in providing information to any person or a failure to provide sufficient time for an adequate response to a request for information.
- Other circumstances of comparable seriousness.

The decision by SARS not to remit all or a part of the penalty is subject to objection and appeal.<sup>67</sup>

### 4.3.3 Interest

The interest provisions in the TA Act are not yet effective. Accordingly, interest which may be imposed under the provisional tax regime is still levied under the Act. The only interest which is charged in respect of the first period is when provisional tax is overdue, that is, the payment is late.

Interest applicable to the second period (that is, interest for late payment or the underestimate of provisional tax) is discussed in **4.4.3**.

#### (a) Interest on overdue payments

Interest is levied at the prescribed rate when the first provisional tax payment is not paid in full within the period prescribed for payment.<sup>68</sup> The prescribed rate is the rate of interest fixed by the Minister of Finance by notice in the *Gazette* under the Public Finance Management Act, 1999. The prescribed rate may vary over time. A list of the prescribed rates applicable for different periods of time is available on the SARS website.

The interest is determined on the amount of provisional tax that remains unpaid and is calculated from the end of the period in which payment should have been made until the date payment is made. For example, if provisional tax of R500 is due on

<sup>66</sup> As set out in section 218(2) of the TA Act.

<sup>67</sup> Section 220 of the TA Act.

<sup>68</sup> Under section 89bis(2). See **4.2.1**, **4.2.2** and **4.2.3** for detail on the period prescribed for payment.



31 August and the amount is paid on 14 October, interest at the prescribed rate will be levied for the period 1 September up to and including 14 October. Interest will be payable even if a taxpayer has been granted instalment arrangements.

The Commissioner may, at the Commissioner's discretion, waive the interest levied depending on the circumstances of the case.<sup>69</sup>

#### **4.4 The second period – estimates of taxable income, penalties and interest**

##### **4.4.1 Estimates of taxable income**

For the second period, a provisional taxpayer is required to submit a return to the Commissioner which includes an estimate of the total taxable income that will be derived by the taxpayer in the year of assessment (second period estimate). The amount of the second provisional tax payment is based on this estimate (see **4.2.1** and **4.2.2**). The return must be submitted even if the amount of the provisional tax payment is nil.

In relation to the first period, the estimate of taxable income cannot be less than the "basic amount" unless the circumstances of the case justify the submission of a lower amount (see **4.3.1**). This limitation does not apply to the second period estimate and a provisional taxpayer is free to determine that the second period estimate is equal to the basic amount for the second period or to another amount which is more or less than the basic amount. See **4.3.1** for the principles applicable to the estimate of taxable income and the calculation of the basic amount, these principles, including the Commissioner's ability to estimate or increase estimates of taxable income, are also applicable to the second period. Practically, because the second period estimate is made at or close to the end of the year of assessment it means that a taxpayer is often in a position to make a relatively accurate estimate of taxable income for the year of assessment concerned and does not base the second period estimate on the basic amount. The basic amount for the second period remains relevant in the determination of the possible penalty for the underpayment of provisional tax as a result of underestimating taxable income [see **4.4.2(b)**] even if it is not used in determining the second period estimate.

##### **4.4.2 Penalties**

Two penalties are potentially levied in respect of the second period, namely –

- a penalty for the late payment of provisional tax,<sup>70</sup> and
- a penalty for the underpayment of provisional tax as a result of underestimation.<sup>71</sup>

###### **(a) Penalty for the late payment of provisional tax**

The penalty for the late payment of provisional tax in the first period is discussed in **4.3.2(a)**. The penalty is calculated and applied in exactly the same manner for the second period.

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<sup>69</sup> Section 89bis(2).

<sup>70</sup> Paragraph 27.

<sup>71</sup> Paragraph 20.

**(b) Penalty for the underpayment of provisional tax as a result of underestimation**

A penalty<sup>72</sup> may be levied when the actual taxable income as finally determined is more than the taxable income estimated on the second provisional tax return. The calculation of the potential penalty depends on whether actual taxable income is more than R1 million or whether actual taxable income is equal to or less than R1 million.

The penalty is still leviable even though the Commissioner may have increased the estimate under paragraph 19(3) (see **4.3.1**). The second estimate submitted by the taxpayer, and not the increased estimate by the Commissioner, must be used to determine whether the estimate is less than the amounts detailed below.<sup>73</sup>

*Actual taxable income is more than R1 million*

A penalty will be levied if the second period estimate of taxable income for the year of assessment is less than 80% of actual taxable income as finally determined for the year of assessment. The amount of the penalty is 20% of the difference between the amount of normal tax payable for the year of assessment on 80% of actual taxable income, after taking into account any amount of a rebate deductible in the determination of normal tax payable, and the amount of employees' tax and provisional tax paid by the end of the year of assessment.

Lump sum benefits, severance benefits and any amount contemplated in paragraph (d)<sup>74</sup> of "gross income" are not taken into account when calculating this penalty.

*Actual taxable income is equal to or less than R1 million*

A penalty will be levied if the second period estimate of taxable income is less than –

- 90% of actual taxable income as finally determined; and
- the basic amount applicable to the second period.

In applying these criteria, a penalty will not be levied if the second period estimate of taxable income was greater than the applicable basic amount.

The amount of the penalty is 20% of the difference between the lesser of –

- the amount of normal tax payable for the year of assessment on 90% of actual taxable income as finally determined; and
- the amount of normal tax payable for the year of assessment on the basic amount applicable to the second period,

and the amount of employees' tax and provisional tax paid by the end of the year of assessment.

<sup>72</sup> Paragraph 20(1). The penalty is deemed to be a percentage based penalty imposed under Chapter 15 of the TA Act. The procedures for imposing and for requesting the remittance of the penalty, in sections 214 and 215 of the TA Act, respectively, thus apply to this penalty.

<sup>73</sup> Paragraph 20(1) refers to the estimate of taxable income *submitted* by the provisional taxpayer. This interpretation is also consistent with the purpose and intention of the penalty.

<sup>74</sup> Paragraph (d) was added to this exclusion with effect for years of assessment commencing on or after 1 March 2015.

The amount of normal tax payable for the year of assessment is determined after taking into account any amount of a rebate deductible in the determination of normal tax payable.<sup>75</sup>

Lump sum benefits, severance benefits and any amount contemplated in paragraph (d) of “gross income” are not taken into account when calculating this penalty.

#### **Example 4 – Penalty on underpayment as a result of underestimation**

##### *Facts:*

Y is a natural person. As a provisional taxpayer Y was required to submit provisional tax returns for the 2018 year of assessment. Y’s basic amount, based on the notice of assessment for the 2017 year of assessment, was R300 000. Y expected taxable income to be less than the basic amount because of proven poor trading conditions and therefore submitted first and second period estimates of taxable income of R200 000 for the year.

On assessment, Y’s taxable income was finally determined as R280 000. No employees’ tax was paid during the year. Y paid provisional tax during the year of R24 191. Y is 58 years of age and is not a member of a medical scheme registered under the Medical Schemes Act, 1998.

##### *Result:*

Y’s estimate of R200 000 was less than 90% of taxable income as finally determined ( $R280\,000 \times 90\% = R252\,000$ ) and less than the basic amount (R300 000). Y is liable for a penalty at the rate of 20% on the difference between the *lesser* of normal tax payable on –

- 90% of taxable income [that is, tax on R252 000 = R36 694,20 (R50 329,20 – the primary rebate of R13 635)]; and
- the basic amount [tax on R300 000 = R49 347,60 (R62 982,60 – the primary rebate of R13 635)],

and the total provisional and employee’s tax paid during the 2018 year of assessment (R24 191).

The penalty payable for the underestimation of provisional tax is therefore R2 500,64 [ $20\% \times (R36\,694,20 - R24\,191)$ ].

The penalty for the underpayment of provisional tax as a result of underestimation must be reduced by any penalty for the late payment of provisional tax imposed on the late payment of the *second* provisional tax payment [see **4.3.2(a)** and **4.4.2(a)**].<sup>76</sup>

<sup>75</sup> Paragraph 20(1)(b)(i)(aa) and (bb).

<sup>76</sup> Paragraph 20(2B), effective for years of assessment commencing on or after 1 March 2014.

**Example 5 – Penalty on underpayment as a result of underestimation when the Commissioner has increased the estimate under paragraph 19(3)**

*Facts:*

ABC (Pty) Ltd (ABC), a provisional taxpayer, was required to submit provisional tax returns for the 2017 year of assessment. ABC's year-end is 30 June. ABC's basic amount, based on the notice of assessment for the 2016 year of assessment, was R4 million.

ABC submitted a first period estimate of R4 million by the due date for submission, 31 December 2016, and paid the tax due of R560 000  $[(R4 \text{ million} \times 28\%) / 2]$  by the due date for payment, 31 December 2016. On 9 January 2017 the Commissioner requested ABC to justify the first period estimate. The Commissioner was not satisfied with the estimate and increased the estimate to taxable income of R4,5 million. On 16 January 2017 SARS issued an additional assessment which required a further payment of R70 000  $[(R4,5 \text{ million} \times 28\%) / 2 - R560 000]$  by 30 January 2017. ABC made the payment on 30 January 2017.

ABC submitted a second period estimate of R4,5 million by the due date for submission, 30 June 2017 and paid the tax due of R630 000  $[(R4,5 \text{ million} \times 28\%) - (R560 000 + R70 000)]$  by the due date for payment, 30 June 2017. On 7 July 2017 the Commissioner requested ABC to justify the second period estimate. The Commissioner was not satisfied with the estimate and increased the estimate to taxable income of R5 million. On 14 July 2017 SARS issued an additional assessment which required a further payment of R140 000  $[(R5 \text{ million} \times 28\%) - (R560 000 + R70 000 + R630 000)]$  by 31 July 2017. ABC made the payment on 31 July 2017.

On assessment, ABC's taxable income was finally determined as R7 million. No employees' tax was paid during the year.

*Result:*

ABC's second period estimate of R4,5 million was less than 80% of taxable income as finally determined ( $R7 \text{ million} \times 80\% = R5,6 \text{ million}$ ). ABC is liable for a penalty at the rate of 20% on the difference between –

- tax on 80% of actual taxable income, that is, R1 568 000 ( $R5,6 \text{ million} \times 28\%$ ); and
- tax paid during the year of assessment, that is, R1 260 000 ( $R560 000 + R70 000 + R630 000$ ).\*

Therefore, the penalty on underpayment as a result of underestimation is R61 600  $[(R1 568 000 - R1 260 000) \times 20\%]$ .

\* Taxes paid during the year of assessment were the first and second provisional tax payments (R560 000 and R630 000 respectively) and the additional payment for the first period (R70 000). The additional payment for the second period (R140 000) was made only after the end of the year of assessment on 31 July 2017 and may not be taken into account in the calculation of the penalty.

A provisional taxpayer who fails to submit an estimate of taxable income for the second period or who does not submit the estimate by the last day of the period ending four months after the last day of the year of assessment, is deemed for purposes of paragraph 19 and for calculating the penalty on the underpayment as a result of underestimation, to have submitted a nil estimate of taxable income.<sup>77</sup>

The deemed submission of a nil estimate of taxable income may have a significant impact on the penalty calculation.

**Example 6 – Penalty for late payment and penalty on underpayment as a result of underestimation**

*Facts:*

DBA (Pty) Ltd (DBA), a provisional taxpayer, was required to submit provisional tax returns for the 2017 year of assessment. DBA's year-end is 30 June. DBA's basic amount, based on the notice of assessment for the 2016 year of assessment, was R4 million.

DBA submitted a first period estimate of R4 million by the due date for submission, 30 December 2016, and paid the tax due of R560 000  $[(R4 \text{ million} \times 28\%) / 2]$  by the due date for payment, 30 December 2016. On 9 January 2017 the Commissioner requested DBA to justify the first period estimate. The Commissioner was not satisfied with the estimate and increased the estimate to taxable income of R4,5 million. On 16 January 2017 SARS issued an additional assessment which required an additional payment of R70 000  $[(R4,5 \text{ million} \times 28\%) / 2 - R560 000]$  by 30 January 2017. DBA paid the amount on 30 January 2017.

DBA submitted a second period estimate of R4,5 million on 2 January 2018 and also paid the tax due of R630 000  $[(R4,5 \text{ million} \times 28\%) - (R560 000 + R70 000)]$  on this date. The due date for submission of the estimate and payment of the related tax was 30 June 2017. The reason for the late submission and payment was that DBA was suffering cash flow constraints.

On 12 January 2018 the Commissioner requested DBA to justify the second period estimate. The Commissioner was not satisfied with the estimate and increased the estimate to taxable income of R5 million. On 19 January 2018 SARS issued an additional assessment which required a further payment of R140 000  $[(R5 \text{ million} \times 28\%) - (R560 000 + R70 000 + R630 000)]$  by 2 February 2018. DBA made the payment on 2 February 2018.

On assessment, DBA's taxable income was finally determined as R7 million. No employees' tax was paid during the year.

*Result:*

DBA's second period estimate was not submitted before the subsequent provisional payment, that is the first provisional payment for 2018, which was due on 31 December 2017. As a result, DBA is deemed under paragraph 19(6) to have submitted a nil estimate of taxable income for the purposes of paragraph 19 and the penalty for underpayment as a result of underestimation.

<sup>77</sup> Paragraph 19(6).

A deemed submission of a nil estimate for paragraph 19 means that DBA did not have a liability to pay provisional tax under paragraph 17 and therefore the late payment penalty under paragraph 27 does not arise.

The deemed estimate of nil taxable income is less than 80% of taxable income as finally determined (R7 million  $\times$  80% = R5,6 million) and accordingly DBA is liable for the penalty at the rate of 20% on the difference between –

- tax on 80% of taxable income, that is, R1 568 000 (R5,6 million  $\times$  28%); and
- tax paid during the year of assessment, that is, R630 000 (R560 000 + R70 000)\*.

Therefore, the penalty on underpayment as a result of underestimation is R187 600 [(R1 568 000 – R630 000)  $\times$  20%]. This penalty must be reduced by the late payment penalty levied for the second period,<sup>78</sup> which in DBA's case amounted to Rnil. The final penalty for underpayment of provisional tax as a result of underestimation is therefore R187 600 (R187 600 – Rnil).

\* Taxes paid during the year of assessment were the first provisional tax payments (R560 000) and the additional payment for the first period (R70 000). The second period payment (R630 000) and the additional payment for the second period (R140 000) were made only after the end of the year of assessment and may not be taken into account in the calculation of the penalty.

The deemed submission of a nil estimate of taxable income has the effect of consolidating the penalty for failing to submit an estimate on time<sup>79</sup> with the penalty for underestimating provisional tax.

*Possible remission of all or a part of the penalty for the underpayment of provisional tax as a result of underestimation*

Taxpayers may apply to the Commissioner to reduce the penalty, as calculated above, for underestimating taxable income. The Commissioner may remit all or part of the penalty if the Commissioner is satisfied or partly satisfied that the second period estimate of taxable income –

- was seriously calculated with due regard to any factors having a bearing on it; and
- was not deliberately or negligently understated.<sup>80</sup>

The word “serious”, from which the word “seriously” is derived, is not defined in the Act and must therefore be given its ordinary grammatical meaning. “Serious” is defined in the Concise Oxford English Dictionary<sup>81</sup> to mean the following:

“Demanding or characterised by careful consideration or application. Solemn or thoughtful. 2. Sincere and in earnest.”

<sup>78</sup> Paragraph 20(2B).

<sup>79</sup> Paragraph 20A, which dealt with this penalty, was repealed with effect from years of assessment commencing on or after 1 March 2015. Refer to the repealed paragraph 20A for detail.

<sup>80</sup> Paragraph 20(2).

<sup>81</sup> Concise Oxford English Dictionary. Edited by Catherine Soanes, Angus Stevenson. 11th Edition Revised New York: Oxford University Press, 2006.

The Collins English Dictionary<sup>82</sup> defines “serious” to mean the following:

“Grave in nature or disposition; thoughtful. 4. Requiring effort or concentration.”

“Seriously” modifies the verb “calculate” by describing the degree to which a taxpayer must go in calculating the estimate. Thus, the calculation must be one which has been carefully considered and is thoughtful, earnest and sincere. A taxpayer must therefore have sensibly (and by careful reasoning and judgment, in a mathematical manner, and using experience, common sense and all available information) determined the amount of the estimate before the Commissioner is able to reduce a penalty.

Provisional taxpayers who merely rely on the basic amount to estimate the second period amount of taxable income are unlikely to meet these requirements for a reduction in the penalty for underestimating taxable income. The reason for this is that, as noted above, the Commissioner is entitled to reduce or remit the penalty only if, amongst other requirements, he is satisfied that the estimate was “seriously calculated”. In the absence of particular facts and circumstances which demonstrate that the use of the basic amount was actively considered and was appropriate under the circumstances, this requirement will not be met.

The Commissioner may also remit the whole or any portion of this penalty<sup>83</sup> if satisfied that the failure to submit the estimate on time was not due to an intent to postpone or evade payment of provisional tax or income tax.<sup>84</sup>

The decision not to reduce the penalty is subject to objection and appeal.<sup>85</sup>

See **4.3.2(a)** for additional circumstances under which the Commissioner may remit all or part of a percentage based penalty imposed under Chapter 15 of the TA Act.

#### **4.4.3 Interest**

In relation to the second period, interest is charged in two situations, namely, the –

- late payment of provisional tax, that is, the payment is overdue;<sup>86</sup> and
- underpayment of provisional tax.<sup>87</sup>

In contrast, SARS is required to pay the provisional taxpayer interest if there is an overpayment of provisional tax.<sup>88</sup>

##### **(a) Interest on the late payment of provisional tax**

The interest which is charged if provisional tax is overdue in the first period is discussed in **4.3.3**. The calculation for interest charged if provisional tax is overdue in the second period is performed in the same manner – see **4.3.3** for details.

<sup>82</sup> Collins English Dictionary. 3rd Edition Glasgow: Harper Collins, 1991.

<sup>83</sup> Paragraph 20(2C).

<sup>84</sup> Effective in respect of years of assessment commencing on or after 1 March 2015.

<sup>85</sup> Section 104(1) of TA Act.

<sup>86</sup> Levied under section 89*bis*.

<sup>87</sup> Levied under section 89*quat*.

<sup>88</sup> Section 89*quat*(4).

**(b) Interest on the underpayment of provisional tax**

Interest is levied at the prescribed rate on the underpayment of provisional tax<sup>89</sup> from the effective date until the date of assessment of normal tax if actual taxable income as finally determined for the year of assessment exceeds –

- (i) R20 000, in the case of a company; or
- (ii) R50 000, in any other case.

An underpayment arises if the normal tax payable on actual taxable income as finally determined for the year of assessment exceeds the credit amount.<sup>90</sup>

Normal tax payable is after any applicable rebates and for purposes of calculating interest on the underpayment of provisional tax includes the additional amount<sup>91</sup> payable on the underestimation of the second period estimate of taxable income [see **4.4.2(b)**], the penalty for the failure to submit the second period estimate timeously<sup>92</sup> and the understatement penalty under section 222 of the TA Act.

The “credit amount”<sup>93</sup> means the sum of –

- all provisional tax paid in respect of the year (first, second and third periods);
- employees’ tax paid or withheld during the year; and
- foreign tax credits that qualify as a rebate under section 6quat.

The “effective date” in relation to any year of assessment is –

- if the provisional taxpayer is a company which has a year of assessment ending on the last day of February or is a person (other than a company) who has not been granted permission to render accounts for a period ending on a date other than the last day of February, the date falling seven months after the last day of such year; or
- in any other case, the date falling six months after the last day of such year.

**Example 7 – Interest on underestimation***Facts:*

Z’s year of assessment ends on the last day of February each year. Z’s notice of assessment for the 2017 year of assessment is dated 1 January 2018. Z’s final tax liability for the year on taxable income of R280 000 is R43 974,20 (R57 609,20 normal tax – R13 635 primary rebate). Z made provisional tax payments for the first and second periods amounting to R20 000 and also paid employees’ tax of R10 000. Z made a third payment of provisional tax of R12 000 on 28 September 2017. The prescribed rate of interest is, for the purposes of this example, 9,5% per year.

<sup>89</sup> Section 89quat.

<sup>90</sup> Section 89quat(2).

<sup>91</sup> Definition of “normal tax” section 89quat(1) and section 12(1) of Interpretation Act No. 33, 1957.

<sup>92</sup> Deleted in respect of years of assessment commencing on or after 1 March 2015. See paragraph 20A.

<sup>93</sup> As defined in section 89quat(1).



*Result:*

Z will be liable for section 89*quat* interest on the underpayment of provisional tax from 1 October 2017 up to and including 31 December 2017 on the amount by which the final tax liability exceeds the credit amount. Z's credit amount is R42 000 (R20 000 + R10 000 + R12 000), and the tax shortfall is therefore R1 974,20 (R43 974,20 – R42 000). The interest payable on the underestimation of provisional tax is R47,27 ( $R1\,974,20 \times 9,5\% \times 92 / 365$ , for October, November and December).

The Commissioner is authorised to direct that all or a portion of the interest not be paid if –

- (a) it is a natural person's first year of assessment as a provisional taxpayer and the Commissioner is satisfied that the circumstances warrant it;<sup>94</sup> or
- (b) the Commissioner, after considering the facts of a specific case, is satisfied that the interest payable is a result of circumstances beyond the control of the taxpayer.<sup>95</sup>

The Commissioner's decision in this regard is subject to objection and appeal.<sup>96</sup>

**(c) Interest received on the overpayment of provisional tax**

Interest is payable by SARS to a provisional taxpayer if that provisional taxpayer has overpaid provisional tax.<sup>97</sup> Provisional tax is considered to be overpaid if the credit amount<sup>98</sup> exceeds the normal tax payable as defined in **4.4.3(b)** on actual taxable income as finally determined for the year of assessment, and –

- that excess amount is more than R10 000; or
- actual taxable income is more than R20 000 in the case of a company, or R50 000 in the case of a person other than a company.

The interest that is payable to the taxpayer is calculated at the prescribed rate on the difference between the credit amount and the normal tax. It is calculated from the effective date<sup>99</sup> until the date on which the difference is refunded to the taxpayer.<sup>100</sup>

## **4.5 The third period – estimates of actual taxable income, penalties and interest**

### **4.5.1 Estimates of taxable income**

A voluntary provisional tax payment, often referred to as a "top-up" payment, can be made in respect of the third period. The payment is generally not determined through an estimation of taxable income but is instead based on actual taxable income for the year as this figure is often known to the provisional taxpayer when making the top-up payment.

<sup>94</sup> Section 89*quat*(3A).

<sup>95</sup> Section 89*quat*(3).

<sup>96</sup> Section 89*quat*(5).

<sup>97</sup> Section 89*quat*(4).

<sup>98</sup> See **4.4.3(b)** for the definition.

<sup>99</sup> See **4.4.3(b)** for the definition.

<sup>100</sup> Interest received by or accrued to a provisional taxpayer under this provision must be included in the taxpayer's section 24J interest computation.

#### 4.5.2 Penalties

No penalties are levied in respect of the third period.

#### 4.5.3 Interest

Interest will be levied at the prescribed rate from the effective date until the date of payment if the top-up payment is paid after the effective date.<sup>101</sup>

#### 4.6 Refunds of provisional tax

The Act permits a refund of provisional tax payments previously made only if the taxpayer's liability for normal tax has been assessed by the Commissioner and the sum of employees' tax deducted and provisional tax paid in respect of that period exceeds the total liability for normal tax as assessed.<sup>102</sup> Any excess may be refunded only after the taxpayer has been assessed for the relevant year of assessment. The right to receive a refund is subject to SARS's right to verify, inspect or audit the refund prior to authorising the payment of the refund.<sup>103</sup> Accordingly, requests to refund or reallocate provisional tax payments, for example, between different periods or different taxpayers cannot be accommodated.

### 5. Conclusion

Provisional tax is a method used to collect normal tax which will ultimately be payable for a particular year of assessment. There are potentially three payments, two of which are compulsory. The first compulsory payment must be made within the first period which ends six months after the start of the year of assessment. The second compulsory payment must be made on or before the end of the second period which ends on the last day of the year of assessment. A third payment, which is voluntary, must generally be made within seven months of the end of the year of assessment for persons with a year of assessment ending on the last day of February and by companies with a different financial year, within six months of the end of such financial year.

The calculation of the amount of a provisional tax payment involves estimating taxable income for the year concerned. Depending on which payment (first, second or third) and on the facts and circumstances of the case, certain penalties may be imposed and interest levied if the estimates are not accurate.

The Act permits a refund of provisional tax payments previously made only if the taxpayer's liability for normal tax has been assessed by the Commissioner and the sum of employees' tax deducted and provisional tax paid in respect of that period exceeds the total liability for normal tax as assessed.

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<sup>101</sup> Paragraph 23A(2) and section 89*bis*. See **4.4.3(b)** for the definition of the effective date.

<sup>102</sup> Paragraph 28(1)(a) and paragraph 29, read with Chapter 13 of the TA Act and, in the event of any inconsistency, section 4(3) of the TA Act.

<sup>103</sup> Section 190(2) of the TA Act.

SARS has a range of guides available on its website which provide further practical guidance on provisional tax matters, such as completing an IRP6 return.

**Legal and Policy****SOUTH AFRICAN REVENUE SERVICE**

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## Annexure – The law

### Section 89bis – Payments of employees' tax and provisional tax and interest on overdue payments of such taxes

(1) Payments by way of employees' tax and provisional tax shall be made in accordance with the provisions of the Fourth Schedule and shall be made at such place as may be notified by the Commissioner, and any such payments which relate to a taxpayer shall, for the purposes of this Act and subject to the provisions of paragraph 28 of the said Schedule, be deemed to have been made in respect of his liability for taxes as defined in subsection (3), whether or not such liability has been ascertained or determined at the date of any payment.

(2) If any amount of employees' tax is not paid in full within the period of seven days prescribed for payment of such amount by paragraph 2(1) of the Fourth Schedule, or if any amount of provisional tax is not paid in full within the relevant period prescribed for payment of such amount by paragraph 21, 22, 23, 23A or 25(1) of that Schedule, interest shall, unless the Commissioner having regard to the circumstances of the case otherwise directs, be paid by the person liable to pay the amount in question at the prescribed rate (but subject to the provisions of section 89quin) on so much of such amount as remains unpaid in respect of the period (reckoned from the end of the relevant period prescribed as aforesaid for payment of such amount) during which the amount underpaid remains unpaid.

(3) For the purposes of this section "taxes" means the taxes comprehended in the definition of "tax" in section 1, excluding donations tax.

(a) . . . . .

(b) . . . . .

### Section 89quat – Interest on underpayments and overpayments of provisional tax

(1) For the purposes of this section—

"**credit amount**", in relation to any year of assessment of any provisional taxpayer, means the sum of—

- (a) the provisional tax paid by the taxpayer under the provisions of paragraph 21 or 23 of the Fourth Schedule in respect of such year;
- (b) any additional provisional tax paid by the taxpayer in respect of such year under the provisions of paragraph 23A of that Schedule;
- (c) any amounts of employees tax deducted or withheld by the taxpayer's employer during such year; and
- (d) any amount of foreign taxes which may be deducted from the tax payable by such taxpayer in respect of the relevant year of assessment in respect of the provisions of section 6quat;

"**effective date**", in relation to any year of assessment of a provisional taxpayer, means—

- (a) where the provisional taxpayer is a company which has a year of assessment which ends on the last day of February or is a person (other than a company) who has not been granted permission by the Commissioner under the provisions of section 66(13A) to render accounts for a period ending on a date other than the last day of February, the date falling seven months after the last day of such year; or
- (b) in any other case, the date falling six months after the last day of such year as applicable for the purposes of the provisions of paragraph 21 or 23 of the Fourth Schedule;

“**normal tax**” includes any additional amounts payable in respect of section 76 and paragraphs 20 and 20A of the Fourth Schedule.

(2) If the taxable income of any provisional taxpayer as finally determined for any year of assessment exceeds—

- (a) R20 000 in the case of a company; or
- (b) R50 000 in the case of any person other than a company,

and the normal tax payable by him in respect of such taxable income exceeds the credit amount in relation to such year, interest shall, subject to the provisions of subsection (3), be payable by the taxpayer at the prescribed rate on the amount by which such normal tax exceeds the credit amount, such interest being calculated from the effective date in relation to the said year until the date of assessment of such normal tax.

(3) Where the Commissioner having regard to the circumstances of the case is satisfied that the interest payable in respect of subsection (2) is a result of circumstances beyond the control of the taxpayer, the Commissioner may direct that interest shall not be paid in whole or in part by the taxpayer.

(3A) Where any natural person has, in respect of the year of assessment during which he for the first time became a provisional taxpayer, become liable for the payment of interest under subsection (2), the Commissioner may, subject to the provisions of section 103(6), if he is satisfied that the circumstances warrant such action, direct that interest shall not be paid by such person in respect of such year of assessment.

(4) If in the case of any provisional taxpayer the credit amount in relation to any year of assessment exceeds the normal tax payable in respect of his taxable income as finally determined for that year and—

- (a) the amount of that excess exceeds R10 000; or
- (b) such taxable income exceeds—
  - (i) R20 000 in the case of a company; or
  - (ii) R50 000 in the case of any person other than a company,

interest shall be payable to the taxpayer at the prescribed rate on the difference between the credit amount and such normal tax, such interest being calculated from the effective date in relation to the said year until the date on which such difference is refunded to the taxpayer: Provided that where any interest is payable to the taxpayer on any amount in respect of any period in respect of the provisions of section 88, no interest shall be payable to the taxpayer in respect of the provisions of this subsection in respect of the said amount and period.

(5) Any decision of the Commissioner in the exercise of his discretion under subsection (3) or (3A) shall be subject to objection and appeal.

(6) The payment by the Commissioner of any interest under the provisions of this section shall be deemed to be a drawback from revenue charged to the National Revenue Fund.

## The Fourth Schedule

### Paragraph 1 – Definition

“**provisional tax**” means any payment in respect of liability for normal tax required to be made in terms of paragraph 17;

“**provisional taxpayer**” means—

- (a) any person (other than a company) who derives income by way of—
  - (i) any remuneration from an employer that is not registered in terms of paragraph 15; or<sup>104</sup>
  - (ii) any amount which does not constitute remuneration or an allowance or advance contemplated in section 8(1);
- (b) any company; and
- (c) any person who is notified by the Commissioner that he or she is a provisional taxpayer,

but shall exclude—

- (aa) any public benefit organisation as contemplated in paragraph (a) of the definition of “public benefit organisation” in section 30(1) that has been approved by the Commissioner in terms of section 30(3);
- (bb) any recreational club as contemplated in the definition of “recreational club” in section 30A(1) that has been approved by the Commissioner in terms of section 30A(2);
- (cc) any body corporate, share block company or association of persons contemplated in section 10(1)(e);
- (dd) any—
  - (A) person in respect of whose liability for normal tax for the relevant year of assessment payments are required to be made under section 33;
  - (B) natural person who does not derive any income from the carrying on of any business, if—
    - (AA) the taxable income of that person for the relevant year of assessment does not exceed the threshold; or
    - (BB) the taxable income of that person for the relevant year of assessment which is derived from interest, dividends, foreign dividends, rental from the letting of fixed property and any remuneration from an employer that is not registered in terms of paragraph 15 does not exceed R30 000;
- (ee) a small business funding entity; and
- (ff) a deceased estate.<sup>105</sup>

<sup>104</sup> Effective 1 March 2017.

<sup>105</sup> Effective 1 March 2016.

### Paragraph 17 – Payment of provisional tax

17. (1) Every provisional taxpayer shall in the manner provided in this Part make payments (called provisional tax) to the Commissioner in respect of his liability for normal tax in respect of every year of assessment.

(2) . . . . .

(3) Where for the purpose of determining any amount of provisional tax required to be paid by any provisional taxpayer in respect of any year of assessment the liability of such taxpayer for normal tax is required to be estimated in respect of such year, such liability shall be deemed to be the amount of normal tax which, calculated at the relevant rate referred to in subparagraph (4), would be payable by the provisional taxpayer in respect of the amount of taxable income estimated by such taxpayer in terms of paragraph 19(1) during the period prescribed by this Schedule for the payment of the said amount of provisional tax or if the amount so estimated has been increased by the Commissioner in terms of paragraph 19(3), the amount of normal tax which, calculated at the said rate, would be payable by the provisional taxpayer in respect of the amount of taxable income as so increased, or if the Commissioner has estimated the provisional taxpayer's taxable income in terms of paragraph 19(2), the amount of normal tax which, calculated at the said rate, would be payable by the provisional taxpayer in respect of the amount of taxable income so estimated.

(4) For the purposes of any calculation of normal tax under subparagraph (3) the rate at which such tax is to be calculated shall be the relevant rate which on the date of payment of the provisional tax in question is in force in respect of the year of assessment in respect of which such provisional tax is required to be paid under this Schedule, or if at the said date the rate has not been fixed, the relevant rate in respect of that year foreshadowed by the Minister of Finance in his budget statement, or if at that date the rate has not been fixed or so foreshadowed, the relevant rate which is in force in respect of the latest preceding year of assessment in respect of which rates have been fixed by Parliament.

(5) The Commissioner may from time to time, having regard to the rates of normal tax as fixed by Parliament or foreshadowed by the Minister in his or her budget statement or at the rebates applicable in terms of section 6(2) of this Act and taking into account any other factors having a bearing upon the probable liability of taxpayers for normal tax, prescribe tables for optional use by provisional taxpayers falling within any category specified by the Commissioner, or by provisional taxpayers generally, for the purpose of estimating the liability of such taxpayers for normal tax, and the Commissioner may prescribe the manner in which such tables shall be applied together with the period for which such tables shall remain in force.

(6) . . . . .

(7) The provisions of subparagraphs (3) and (4) shall not apply where the liability of a provisional taxpayer for normal tax is estimated in accordance with any tables prescribed for his use under the provisions of subparagraph (5) and not withdrawn under the provisions of subparagraph (6).

### Paragraph 19 – Estimates of the taxable income to be made by provisional taxpayers

(1)(a) Every provisional taxpayer (other than a company) shall, during every period within which provisional tax is or may be payable by that provisional taxpayer as provided in this Part, submit to the Commissioner (unless the Commissioner directs otherwise) a return of an estimate of the total taxable income which will be derived by the taxpayer in respect of the year of assessment in respect of which provisional tax is or may be payable by the taxpayer: Provided that such estimate will not include any retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit or any severance benefit received by or accrued to or to be received by or accrue to the taxpayer during the relevant year of assessment.

- (b) Every company which is a provisional taxpayer shall, during every period within which provisional tax is or may be payable by it as provided in this Part submit to the Commissioner (unless the Commissioner directs otherwise) a return of an estimate of the total taxable income which will be derived by the company in respect of the year of assessment in respect of which provisional tax is or may be payable by the company.
- (c) The amount of any estimate so submitted by a provisional taxpayer (other than a company) during the period referred to in paragraph 21(1)(a), or by a company (as a provisional taxpayer) during the period referred to in paragraph 23(a), shall not be less than the basic amount applicable to the estimate in question, as contemplated in item (d), unless the circumstances of the case justify the submission of an estimate of a lower amount.
- (d) The basic amount applicable to any estimate submitted by a provisional taxpayer under this paragraph shall, for the purposes of this paragraph, be deemed to be—
  - (i) as respects an estimate submitted by a provisional taxpayer (other than a company) under item (a), the taxpayers' taxable income, as assessed by the Commissioner, for the latest preceding year of assessment in relation to such estimate, less—
    - (aa) the amount of any taxable capital gain contemplated in section 26A;
    - (bb) the taxable portion of any retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit or severance benefit other than any amount contemplated in paragraph (eA) of the definition of "gross income" in section 1; and
    - (bbA) any amount (other than a severance benefit) contemplated in paragraph (d) of the definition of "gross income" in section 1, included in the taxpayer's taxable income for that year of assessment;
  - (ii) as respects an estimate submitted by a company under item (b), the company's taxable income, as assessed by the Commissioner, for the latest preceding year of assessment in relation to such estimate, less the amount of any taxable capital gain included therein in respect of section 26A.
  - (iii) . . . . .

Provided that, if an estimate under item (a) or (b) must be made more than 18 months after the end of the latest preceding year of assessment in relation to such estimate, the basic amount determined in respect of subitems (i) and (ii) shall be increased by an amount equal to eight per cent per annum of that amount, from the end of such year to the end of the year of assessment in respect of which the estimate is made.

- (e) For the purposes of item (d), the latest preceding year of assessment in relation to any estimate under this paragraph shall be deemed to be the latest of the years of assessment—
  - (i) preceding the year of assessment in respect of which the estimate is made; and
  - (ii) in respect of which a notice of assessment relevant to the estimate has been issued by the Commissioner not less than 14 days before the date on which the estimate is submitted to the Commissioner.

(1A) . . . . .

(2) If any provisional taxpayer fails to submit any estimate as required by subparagraph (1), the Commissioner may estimate the taxable income which is required to be estimated.



(3) The Commissioner may call upon any provisional taxpayer to justify any estimate made by the provisional taxpayer in respect of sub-paragraph (1), or to furnish particulars of the provisional taxpayer's income and expenditure or any other particulars that may be required, and, if the Commissioner is dissatisfied with the said estimate, he or she may increase the amount thereof to such amount as he or she considers reasonable, which increase of the estimate is not subject to objection or appeal.

(4) . . . . .

(5) Any estimate or increase made by the Commissioner under the provisions of sub-paragraph (2) or (3) shall be deemed to take effect in respect of the relevant period within which the provisional taxpayer is required to make any payment of provisional tax in respect of this Part.

(6) Subject to subparagraph (2), if an estimate of a provisional taxpayer's taxable income in respect of any year of assessment is not submitted in terms of subparagraph (1)(a) or (b) by the last day of a period of four months after the last day of the year of assessment, the provisional taxpayer shall, for the purposes of this paragraph and paragraph 20, be deemed to have submitted an estimate of an amount of nil taxable income.

### **Paragraph 20 – Penalty for underpayment of provisional tax as a result of underestimation**

(1) If in respect of a year of assessment the taxable income of a provisional taxpayer, as determined under this Act, is—

- (a) more than R1 million and the final or last estimate of the taxable income submitted by that provisional taxpayer in terms of paragraph 19(1)(a) or (b) in respect of year of assessment is less than 80 per cent of the amount of the provisional taxpayer's taxable income, the Commissioner must impose a penalty, which is deemed to be a percentage based penalty imposed under Chapter 15 of the Tax Administration Act, equal to 20 per cent of the difference between—
  - (i) the amount of normal tax, calculated at the rates applicable in respect of that year of assessment and after taking into account any amount of a rebate deductible in terms of this Act in the determination of normal tax payable, in respect of a taxable income equal to 80 per cent of the provisional taxpayer's taxable income; and
  - (ii) the amount of employees' tax and provisional tax in respect of that year of assessment paid by the end of the year of assessment; or
- (b) R1 million or less and the final or last estimate of taxable income submitted by that provisional taxpayer in terms of paragraph 19(1)(a) or (b) in respect of that year of assessment is less than 90 per cent of the amount of the provisional taxpayer's taxable income and is also less than the basic amount applicable to that estimate, as contemplated in paragraph 19(1)(d), the Commissioner must impose a penalty, which is deemed to be a percentage based penalty imposed under Chapter 15 of the Tax Administration Act, equal to 20 per cent of the difference between—
  - (i) the lesser of—
    - (aa) the amount of normal tax, calculated at the rates applicable in respect of such year of assessment and after taking into account any amount of a rebate deductible in terms of this Act in the determination of normal tax payable, in respect of a taxable income equal to 90 per cent of the provisional taxpayer's taxable income; and

(bb) the amount of normal tax calculated in respect of a taxable income equal to such basic amount, at the rates applicable in respect of such year of assessment and after taking into account any amount of a rebate deductible in terms of this Act in the determination for normal tax payable; and

(ii) the amount of employees' tax and provisional tax in respect of such year of assessment paid by the end of the year of assessment:

Provided that any retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit or severance benefit received by or accrued to or to be received by or accrue to the taxpayer during the relevant year of assessment shall not be taken into account for purposes of this subparagraph.

(1A) . . . . .

(2) Where the Commissioner is satisfied that the amount of any estimate referred to in subparagraph (1) was seriously calculated with due regard to the factors having a bearing thereon and was not deliberately or negligently understated, or if the Commissioner is partly so satisfied, the Commissioner may in his discretion remit the penalty or a part thereof.

(2A) . . . . .

(2B) Any penalty imposed under subparagraph (1) in respect of a year of assessment must be reduced by any penalty imposed under paragraph 27(1) in respect of payment referred to in paragraph 21(1)(b) or 23(b).

(2C) If—

- (a) a provisional taxpayer is deemed in terms of paragraph 19(6) to have submitted an estimate of an amount of nil taxable income due to a failure to submit an estimate by the last day of a period of four months after the last day of the year of assessment; and
- (b) the Commissioner is satisfied that the provisional taxpayer's failure was not due to an intent to evade or postpone the payment of provisional tax or normal tax,

the Commissioner may remit the whole or any part of a penalty imposed under subparagraph (1).

(3) . . . . .

(4) . . . . .

## **Paragraph 21 – Payment of provisional tax by provisional taxpayers (other than companies)**

21. (1) Subject to the provisions of subparagraph (2), provisional tax shall be paid by every provisional taxpayer (other than a company) in the following manner, namely—

- (a) within the period of six months reckoned from the commencement of the year of assessment in question, one half of an amount equal to the total estimated liability of such taxpayer (as determined in accordance with paragraph 17) for normal tax in respect of that year, less the total amount of—
  - (i) any employees' tax deducted by the taxpayer's employer from the taxpayer's remuneration during such period; and
  - (ii) any tax proved to be payable to the government of any other country which will qualify as a rebate under section 6*quat*; and
- (b) not later than the last day of the year of assessment in question, an amount equal to the total estimated liability of such taxpayer (as finally determined in accordance with paragraph 17) for normal tax in respect of that year, less the total amount of—
  - (i) any employee's tax deducted by the taxpayer's employer from the taxpayer's remuneration during such year and the amount paid in terms of item (a); and

- (ii) any tax proved to be payable to the government of any other country which will qualify as a rebate under section 6quat.

(2) If the Commissioner has in terms of section 66 (13A) of this Act agreed to accept accounts from any provisional taxpayer in respect of any year of assessment drawn to a date falling after the end of such year, the period referred to in item (a) of subparagraph (1) shall, notwithstanding the provisions of that subparagraph, be reckoned from such date as the Commissioner upon application of the taxpayer and having regard to the circumstances of the case may approve, and in such case the last day of such year of assessment shall for the purposes of item (b) of that subparagraph be deemed to be the day preceding the first anniversary of the said date.

(3) . . . . .

### **Paragraph 23 – Provisional tax payments by companies**

23. Provisional tax shall be paid by every company which is a provisional taxpayer in the following manner, namely—

- (a) within the period ending 6 months after the commencement of the year of assessment in question, one half of an amount equal to the total estimated liability of such company (as determined in accordance with paragraph 17) for normal tax in respect of that year;
- (b) within the period ending on the last day of that year, an amount equal to the total estimated liability of such company (as so determined) for normal tax in respect of that year less the amount paid in terms of item (a),
- (c) . . . . .

less, in either case, the total amount of—

- (i) any employees' tax deducted by the taxpayer's employer from the taxpayer's remuneration during the relevant period; and
- (ii) any tax proved to be payable to the government of any other country which will qualify as a rebate under section 6quat.

### **Paragraph 23A – Additional provisional tax payments**

23A. (1) Any provisional taxpayer may for the purpose of avoiding or reducing his liability for any interest which may become payable by him in respect of any year of assessment under section 89quat, elect to make an additional payment of provisional tax in respect of such year.

(2) If any additional payment of provisional tax contemplated in subparagraph (1) is paid after the end of the period ending on the effective date in relation to the said year as determined under section 89quat(1), such payment shall be deemed for the purposes of section 89bis(2) to be an amount of provisional tax which was payable within the said period.

### **Paragraph 24 – Additional information relating to the payment of provisional tax**

24. The Commissioner may absolve any provisional taxpayer from making payment of any amount of provisional tax payable in terms of paragraph 21(1)(a) or paragraph 23(a), if the Commissioner is satisfied that the taxable income which may be derived by such taxpayer for the year of assessment in question cannot be estimated on the facts available at the time when payment of the amount in question has to be made.

### **Paragraph 25 – Extension of time for payment of provisional tax**

25. (1) If after the end of any period within which provisional tax is payable in terms of this Schedule the Commissioner has under the provisions of subparagraph (3) of paragraph 19 increased the amount of any estimate of taxable income submitted by any provisional taxpayer during such period, any additional provisional tax payable as a result of the Commissioner having made such increase shall, notwithstanding the provisions of paragraphs 21 and 23, be payable within such period as the Commissioner may determine.

### **Paragraph 27 – Penalty on late payment of provisional tax**

27. (1) If any provisional taxpayer fails to pay any amount of provisional tax for which he or she is liable within the period allowed for payment thereof in terms of paragraph 21 or 23, or paragraph 25(1), the Commissioner must, under Chapter 15 of the Tax Administration Act, impose a penalty, which is deemed to be a percentage based penalty imposed under Chapter 15 of the Tax Administration Act, equal to ten per cent of the amount not paid.

### **Paragraph 28 and 29 – Employees' tax and provisional tax to be set off against tax liability**

28. (1) There shall be set off against the liability of the taxpayer in respect of any taxes (as defined in subparagraph (8)) due by the taxpayer, the amounts of employees tax deducted or withheld by the taxpayer's employer during any year of assessment for which the taxpayer's liability for normal tax has been assessed by the Commissioner and the amounts of provisional tax paid by the taxpayer in respect of any such year, and if—

- (a) the sum of the said amounts of employees tax and provisional tax exceeds the amount of the taxpayer's total liability for the said taxes, the excess amount shall be refunded to the taxpayer; or
- (b) the taxpayer's total liability for the aforesaid taxes exceeds the sum of the said amounts of employees tax and provisional tax, the amount of the excess shall be payable by the taxpayer to the Commissioner.

29. No refund of any amount of employees' tax or provisional tax shall be made to the taxpayer concerned otherwise than as provided in paragraph 28 or in such circumstances as may be determined by the Commissioner in any deduction tables prescribed by him or her under paragraph 9.<sup>106</sup>

## **The Tax Administration Act, 2011**

### **Section 95 – Estimation of assessments**

(1) SARS may make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate if the taxpayer—

- (a) fails to submit a return as required; or
- (b) submits a return or information that is incorrect or inadequate.

(2) SARS must make the estimate based on information readily available to it.

(3) ...

<sup>106</sup> The deletion of the reference to paragraph 11B is effective for years of assessment commencing on or after 1 March 2016.

**Section 213 – Imposition of percentage based penalty**

(1) If SARS is satisfied that an amount of tax was not paid as and when required under a tax Act, SARS must, in addition to any other 'penalty' or interest for which a person may be liable, impose a 'penalty' equal to the percentage of the amount of unpaid tax as prescribed in the tax Act.

(2) ...

**Section 217(3) – Remittance of penalty for nominal or first incidence of non-compliance**

(3) If a 'penalty' has been imposed under section 213, SARS may remit the 'penalty' or a portion thereof, if SARS is satisfied that—

- (a) the 'penalty' has been imposed in respect of a 'first incidence' of non-compliance, or involved an amount of less than R2 000;
- (b) reasonable grounds for the non-compliance exist; and
- (c) the non-compliance has been remedied.

**Section 218 – Remittance of penalty in exceptional circumstances**

(1) SARS must, upon receipt of a 'remittance request', remit the 'penalty' or if applicable a portion thereof, if SARS is satisfied that one or more of the circumstances referred to in subsection (2) rendered the person on whom the 'penalty' was imposed incapable of complying with the relevant obligation under the relevant tax Act.

(2) The circumstances referred to in subsection (1) are limited to—

- (a) a natural or human-made disaster;
- (b) a civil disturbance or disruption in services,
- (c) a serious illness or accident;
- (d) serious emotional or mental distress;
- (e) any of the following acts by SARS :
  - (i) a capturing error;
  - (ii) a processing delay;
  - (iii) provision of incorrect information in an official publication or media release issued by the Commissioner;
  - (iv) delay in providing information to any person; or
  - (v) failure by SARS to provide sufficient time for an adequate response to a request for information by SARS;
- (f) serious financial hardship, such as—
  - (i) in the case of an individual, lack of basic living requirements; or
  - (ii) in the case of a business, an immediate danger that the continuity of business operations and the continued employment of its employees are jeopardised; or
- (g) any other circumstance of analogous seriousness.