

Reduced Assessment Request

As explained by our founder, Nico Theron, in his book *Practical Guide to Handling Tax Disputes*, the Tax Administration Act, 2011 provides various remedies to taxpayers to challenge SARS' assessments. One of those ways is objecting/appealing against the assessment. ([see SARS objections and appeals](#)). Another way is requesting a reduced assessment under the relevant statutory provisions.

Successfully obtaining a reduced assessment when relying on this remedy requires great skill and expertise. The circumstances under which such requests can be allowed are very narrowly defined and are very limited. However, it is often more effective than objecting/appealing but may also be the taxpayer's only choice if objection/appeal is not an option (for whatever reason).

Since there is no prescribed process for relying on this remedy, it is often perceived as being ineffective. In our experience, however, it can be very effective. We have a magnificent success rate with this remedy.

SARS Decision Revision

Not all of SARS' decisions are subject to the SARS objection and appeal process ([see SARS objections and appeals](#)). Taxpayers may nevertheless be aggrieved by a decision taken by SARS. In these cases, taxpayers can request, what is called, a 'section 9 review' of SARS' decision.

Examples of decisions not subject to objection and appeal include:

not to allow a VDP application ([see Voluntary Disclosure Program](#))

to audit a taxpayer (see SARS audit assistance)

not pay a refund due to a taxpayer ([see tax refunds](#))

not to grant suspension of payment pending and objection or appeal

not to issue a tax clearance certificate

not to reduce an assessment under section 98

not to reduce an assessment in terms of section 93(1)(d) ([see SARS reduced assessments](#))

All the above decisions (and more) are challengeable in terms of a section 9 review. A section 9 reviews in essence entails that a SARS official or senior SARS official reconsiders a previous decision taken by SARS. The process is often a more practical and more economical alternative to having SARS' decisions reviewed under the Promotion of Administrative Justice Act.

It, however, does require considerable technical knowledge of the applicable tax law and also an understanding of the process to be followed to ensure the intended end is eventually achieved.

Our founder, Nico Theron, authored the book, [Practical Guide to Handling Tax Disputes](#) in which he discusses, amongst other things, this remedy. We know exactly what this remedy entails and how and when to use it. We also have a very high success rate with this remedy.

TAX DISPUTES: THE RELEVANCE OF SARS' PRE-ASSESSMENT OBLIGATIONS

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By [Unicus Tax Team](#) In [Objections](#)

The Tax Administration Act imposes several obligations on SARS, aimed in part and insofar relevant here, at ensuring that SARS treat taxpayers in a procedurally fair manner as is also required by the Constitution. These obligations, subject to a few exceptions, include:

- The obligation to notify taxpayers that it has been selected for audit;
- The obligation to keep the taxpayer informed of the progress of the audit;
- The obligation to inform the taxpayer of proposed adjustments and the grounds for such proposed adjustments consequent upon an audit before raising the assessment; and
- The obligation to allow taxpayers an opportunity to inform SARS why adjustments should not be made before SARS raises assessment.[\[1\]](#)

Whether SARS complied with these obligations, hereinafter referred to as SARS' "pre-assessment obligations", is very relevant to a tax dispute that follows the issue of an assessment in consequence of an audit conducted by SARS. The reason for this is that the tax court has fairly recently found that non-compliance by SARS with these obligations rendered SARS' assessment, unlawful, irrespective of the merits. Let me explain by way of example:

SARS conducted an audit on Mr A and found that Mr A received a lump sum that ought to have been taxed at the normal tax rates instead of at the special tax rates applicable to severance benefits and that Mr A incorrectly claimed certain farming related expenditure. SARS accordingly raised an additional assessment to rectify the position. However, prior to raising the assessment, SARS failed to keep the taxpayer informed of the progress of its audit and failed to notify the taxpayer of their intention to raise the assessment before they raised it. The fact that SARS failed to comply, in this case, with two of its pre-assessment obligations rendered the assessment unlawful and invalid – meaning simply that whether the normal tax rates or the special tax rates apply to the lump sum and whether the farming expenditure incurred should be allowed becomes irrelevant.

Taxpayers who are dissatisfied with an assessment from SARS, especially one following an audit, would therefore do well to be fully aware, not only of the basis for its disagreement with SARS' underlying adjustments (or stated differently, the merits of the assessment raised by SARS) but also of what SARS' pre-assessment obligations are and whether SARS complied with same. The reason for this is simple: when launching a tax dispute, you need to belt and braces your defence. [\[2\]](#)

In our experience dealing with tax disputes, SARS, when raising an assessment after an audit, more often than not, in our opinion, arguably fails to comply with one or more of these

obligations in some way, especially in cases where an additional assessment includes the imposition of understatement penalties^[3].

To identify when this happened is not easy though – neither is crafting a defence on these grounds. It requires, amongst other various other things, scrutiny of the correspondence between the taxpayer and SARS between the date the audit commenced and the date on which SARS issued the relevant assessment – correspondence which is very often overlooked in preparing for a tax dispute. Further still, knowing what SARS’ response is likely to be to a defence on these grounds (and rest assured, these defences, in our experience, tend to meet strong opposition) in respect of a challenge launched along these grounds can also be crucial to the prospects of success.

Indeed then, it is difficult to identify and use SARS’ pre-assessment obligations (or rather, failure to comply with same) to bolster a defence. But, if masterfully executed (as is required), it is a tremendously powerful tool at taxpayer’s disposal during a dispute with SARS.

[1] For a detailed exposition of these obligations, see Lexis Nexis’ [Practical Guide To Handling Tax Disputes](#), authored by Unicus’ managing partner Nico Theron.

[2] There is some debate over whether a taxpayer can launch a challenge against an assessment in consequence of non-compliance by SARS with its pre-assessment obligation *via* objection and appeal procedures. Suffice it here simply to state that following the judgment in *Absa Bank Limited and Another v Commissioner for the South African Revenue Service (2019/21825) [2021] ZAGPPHC 127; 2021 (3) SA 513 (GP) (11 March 2021)*, taxpayers would arguably be entitled to dispute assessments on these grounds in the High Court directly.

[3] There does, however, in our experience, appear to be some effort from SARS lately to change this.

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SARS, like taxpayers, must comply with specified time periods

09 December 2020 [CFO South Africa](#)



Tax specialist Nico Theron explains that SARS also faces adverse consequences if they don't comply.

By Nico Theron, Unicus Tax Specialists SA and author of Practical Guide to Handling Tax Disputes, published by LexisNexis.

Most taxpayers know that the time periods that govern objections and appeals against assessments by SARS are very strict and, indeed, are very strictly applied by SARS. For example, a taxpayer must object and appeal within a prescribed time period.

For the taxpayer, failing to comply with these time periods could have devastating consequences. The rigidity of the rules cut both ways, though – the rules also prescribe strict time periods within which SARS must do certain things.

For example, SARS must decide on an objection within 60 business days. However, when SARS does not abide by these time periods, (which, according to our experience at Unicus Tax Specialists SA and also according to the Tax Ombud Systematic Investigation Report 2020, is often the case) there are seemingly no consequences for SARS. In a recent case though, SARS arguably paid the ultimate price for their perceived nonchalant attitude towards prescribed time periods in the tax objection rules.

The case in question is the case of Candice-Jean van der Merwe v C:SARS (case no A322/2019) (“the Van der Merwe case”), which was an appeal by the taxpayer to the full bench of the Western Cape High Court against a decision by the tax court in favour of SARS.

The case in the tax court (CM v CSARS, 00035/2019) involved complex and rather interesting procedural issues which are not discussed in detail here save to state that the taxpayer's approach in the tax court was nothing more than “an abuse of process”. The taxpayer therefore lost in the tax court. I am in respectful agreement with the judgment by the tax court in favour of SARS.

The taxpayer nevertheless succeeded on appeal in the Western Cape High Court. Why? Because, among other things, SARS did not comply with the prescribed time period in the rules, and failed to apply for condonation in consequence of such failure.

The reason why this should be such a terrible blow for SARS is that the taxpayer's case should have been unwinnable (as confirmed in the dissenting judgment of the High Court, which I am in respectful agreement with). The only reason the taxpayer managed to pull this win off (if one follows the logic in the majority judgment), and thereby seemingly secured some R44 million reduction, is because SARS tripped over a procedural hurdle – it failed to apply for condonation for being five days late. I can only speculate as to why SARS failed to complete the simple task of applying for condonation in this case.

Two possible reasons come to mind: (a) SARS takes the view that it is simply not required to formally apply for condonation if it misses deadlines, despite it being clear from the rules that they should or (b) SARS was not required, in this particular case, to comply with any specific time period because the taxpayer did not follow due process. Whilst I suspect the latter was the reason in this particular case, suffice it here to state that, in our experience at Unicus Tax, it is not uncommon for SARS to not formally apply for condonation if it misses prescribed deadlines, almost as if it is not required to do so.

The Van der Merwe case goes to show that SARS must comply with time periods and if they don't, they must apply for condonation (or make another appropriate application as provided for in the tax court rules) to get their non-compliance with the rules remedied. If they do not follow this process, they should indeed suffer adverse consequences, as do taxpayers where they fail to comply with the rules.

In the Van der Merwe case, the "prejudice" caused to the taxpayer in consequence of SARS' non-compliance with the rules was only "remedied" long into the process and after having already been through a tax court procedure. This need not always be the case. The objection rules provide various remedies to taxpayers to hold SARS to account for failure to comply with the rules if the taxpayer knows:

- What SARS' obligations are;
- What the time periods are that apply to SARS;
- What remedies are available to the taxpayer to remedy non-compliance by SARS with the rules; and
- How to use them effectively,

Any possible prejudice to the taxpayer consequent upon SARS' failure to comply with the objection rules can be remedied, often even without ultimately resorting to litigation. In my book, *Practical Guide to Handling Tax Disputes*, published by LexisNexis, I discuss all of these things, including the remedies available to taxpayers to challenge an assessment or decision by SARS.

To purchase a copy of *Practical Guide to Handling Tax Disputes*, [Click here](#) to visit the LexisNexis online bookstore.