

COMMENTS ON THE INTERPRETATION NOTE ON S93 (1) d

Prepared by Mark Silberman

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COMMENTS ON THE INTERPRETATION NOTE ON S93 (1) d

INTRODUCTION

An interpretation note needs to interpret aspects as well as practical circumstances in regard to the laws and processes, but should never create new laws. SARS has been on a modernisation crusade for many years now and many aspects of interpretation guides don't deal properly with practical processes simply because the legal issues don't fit. A quick promulgation of laws by treasury on many occasions does not allow SARS to change their systems quickly or sometimes even at all.

There are many issues that taxpayers encounter in regard to all processes with no help from the laws and no mechanism in place to deal with errors that occur other than mechanisms available like objection or an application for a reduced assessment in terms of s 93 (1) d. In many situations these mechanism don't work owing to the time that it takes and the skills shortage at SARS.

SOME BACKGROUND TO INTERPRETATION NOTE ON S93 (1) d

The interpretation note on s 93 (1) d deals with undisputed errors that may occur on an **assessment by SARS** or by the **taxpayer on a tax return**. Taxpayers should always be aware that in many instances an electronic correction can be undertaken. Where this is available there is no need to use the objection or s 93(1) d process. <https://www.sars.gov.za/individuals/what-if-i-do-not-agree/request-for-corrections/>.

The correction attempt should always be used first!

According to the **Interpretation Note** (Note) The Tax Administration Act (Act) was changed in 2015 to make an undisputed error which may appear on an assessment or tax return "**readily apparent**" and not just "**apparent**" trying to make the error stronger. The change in the wording is SARS/Treasury attempting to narrow the use of this section, interpreting the words of the act by giving examples of the errors which will be accepted or not to reduce the assessment simply because the words of the section do not fit in with what SARS want. In my view they have moved the goalposts of what the Act tries to do making it very confusing.

(1) SARS may make a reduced assessment if –

- (d) SARS is satisfied that there is a readily apparent undisputed error in the assessment by
 - (i) SARS; or
 - (ii) the taxpayer in a return; or..

How simple is the language in the act? An issue is SARS **may** and even if there is an error SARS may not make the reduced assessment because it does not say **must**. Other than **may** the language is simple and does not need an interpretation. What does SARS do, they move the goal posts by changing the process thus moving legislation to conform with their policy which no one knows about narrowing the focus.

The Note talks about the misuse by taxpayers of the s 93 (1) d and sets out the rules according to what they want. There is no question that in many instances the objection process is the way to go where there is legal interpretation and other matters that don't fit into s 93(1) d. Taxpayers must know when to use the objection process. Unfortunately, this is costly and a tedious process which can take a very long time to resolve. The intention of s 93 (1) d is to give taxpayers an easier alternative process where there is a "**readily apparent undisputed error**" subject to all the other conditions that SARS specifies.

The question that needs to be asked is if this section is a workable section as up and until now there has been no guidance and clearly SARS sees the section differently to the meaning in the language of the act?

INTERPRETATION OF A READILY APPARENT UNDISPUTED ERROR

The real issue with this Note is the interpretation of a “**readily apparent undisputed error**” to the satisfaction of SARS. This is the test that has to be passed to the satisfaction of SARS amongst some other things in order to obtain a reduced assessment. If this test fails there is no other way of rectifying the error other than going through a review or court process as an objection cannot be lodged -see s 104(2)(c).

As the Note points out, many of the words used like “**readily apparent**” are not defined in the Act and one therefore has to look at the English meaning which should make it very simple, but it is not simple at all as **readily apparent** takes on different meanings in different situations according to the Note. The Note explains the English meaning according to the dictionary but then puts a twist on the words according to specific situations of an error which narrows the circumstance of where this section can be used. Some of these will be pointed out when the examples are discussed below.

Looking at the words “**readily apparent**” as strengthened in 2015 is an attempt to make the disputed error easier to identify and just not be **apparent**. The Note says that the error must be **clearly visible** and must be **identified without hesitation or difficulty** such error being either on the return or on the assessment. However in some of the examples unless documentation is uploaded with the request for a reduction the error can never be readily apparent.

DETERMINATION OF THE ERROR

The Note says that at first glance SARS must be able to easily determine an undisputed error. This is just not possible unless the application request has all the supporting documentation some of which will be looked at and some of which won’t in terms of the note depending on the circumstances of the claim for reduction.

“**Readily apparent**” must be “able to be identified without hesitation” is clearly at odds with what happens in practice as there is no prescribed mechanism other than making the application by way of the correct SARS contact address and attaching all the supporting documentation which describes the error properly.

This is clearly not possible without referring to something else, like supporting documents, prepared tax calculation etc. Therefore the concept of a “**readily apparent**” and an undisputed error can never be applied to an assessment or a tax return without looking at other supporting documentation. In my opinion this is just not possible. This makes the legislation and interpretation not functional.

The taxpayer always has to check an assessment against something else like a spreadsheet or computer produced calculation as assessments are complex. So the words readily apparent and undisputed error cannot be the situation in many instances simply because it’s not possible and has to be explained in the application. This cannot be easily identifiable. In some instances this could be interpretation and should go the route of objection. The same would apply to a tax return. If one were to look at a tax return in its current form then it would be very difficult to see that there is a readily apparent error unless one compares each item to the source documentation, i.e. books of account, certificates etc.

The Note says that the error must not need a high degree of verification. A major problem is SARS are not prepared to look at the information on their own systems which will verify that an error has actually been made. If information which will prove an undisputed error is already available on the SARS e-filing system how can this be said to take a high degree of verification, all it requires is for someone to look and read it together with the application and perhaps even listen to the recorded calls available which are indicated by case number.

Based on the above the act must be changed or the policy must be changed because in this day of modernisation one has to look beyond the actual assessment or the tax return in order to find an error, it is not possible any other way.

FUNDAMENTAL ISSUE - IS WHAT IS ON THE SARS SYSTEM IN SUPPORT OF AN UNDISPUTED ERROR

The Note says the burden of proof is on the taxpayer as the taxpayer did the return resulting in an assessment. This is not true as many assessments result from what SARS calculates and in terms of s 1 the definition of assessment must all be included.

Taking this further one needs to look at the components and make up of an assessment, which are; -

- Tax return
- Supporting documents which could already be on the SARS system
- Supporting documentation in the taxpayer's possession

The point being made is that very often SARS has all the available evidence available to them linking the evidence without requiring any interpretation. SARS can clearly see that something is wrong and the only evidence is actually on the SARS e-filing system where the tax return is housed and where the history of all interactions with the taxpayer are recorded. How is it possible that SARS can make a decision without looking at their own history of what actually caused the error when it is pointed out to them. By doing it this way SARS are narrowing the focus and excluding their own errors. In my view undisputed errors are created because of system problems in many cases. Is it right that the taxpayer must go through an objection process that in today's times can take years to resolve to fix a SARS error. - See examples below.

EXAMPLE OF WHERE THIS SITUATION OCCURS

Example 1 Vat inputs reversed

A Vat assessment raised on the taxpayer for the June 2016 period dated 3 February 2017 was the result of various undisputed system failures thus preventing the taxpayer from complying timeously with a SARS requests for verification of the VAT return and is a situation where there is **NO FAULT BY THE TAXPAYER** which is clearly documented on the SARS system. The taxpayer went to extraordinary lengths to rectify the situation spending an enormous amount of hours even visiting a SARS branch and was actually shown the data on the SARS system.

The taxpayer did in fact make objections which were declined as no one at SARS was prepared to look at the data which was loaded on their system because it was late owing to various system failures, it was just so much easier to leave the assessment in place, ignore all requests and send final demands.

It cannot be that this is not an error by SARS. It can be proved to be **readily apparent** and **undisputed** because there is a full audit trail of telephone calls made and emails sent on the SARS

system. All it would have taken is for someone to look. Why should the taxpayer have to go through this process where there is a simple failure of systems which is clearly an error.

The statement “ if SARS cannot make this determination from merely looking at the return or assessment”, the error cannot be said to be readily apparent although there might well be an error” which is really an unreasonable statement.

Based on thousands of situations like the above the interpretation of **readily apparent** and **dispute** must be extended to include the records on the SARS system, otherwise they must issues a clear policy so this section is not handled by trial and error.

Example 2 Calculation on an assessment.

The writer has seen errors on the calculation of a Retirement Annuity which is clearly visible on the assessment when its compared to a calculation. Why must this one go through a lengthy objection process for this where its clearly **readily apparent** and **undisputed**.

Example 3 Journal Entries on a Statement of Account

A journal entry on any statement of account where SARS has not advised the taxpayer of the reasons for the entry must surely be an undisputed error as SARS has not complied with their own rules. We are seeing VAT refunds reversed without any reasons being put forward by SARS even after the taxpayer has complied with the requests for verification.

SOME OF THE EXAMPLES IN THE NOTE

Example 1 readily apparent in the note

The Result in example 1 is readily apparent but the example doesn't deal with how it can be proved. The medical certificate is not on the tax return and is not clearly visible so how can this be readily apparent unless SARS can see it or it has been uploaded.

The result in this example is at odds with what is said in the note. The certificate was entered incorrectly nevertheless the Note says this is an undisputed error. How can SARS see this as it's an entry from a tax certificate which may not be available to SARS. As the return is done manually where in fact is the documentation. Clearly this situation does not take into account the current environment as the medical aid details are automatically loaded and if there is an error the taxpayer can do a correction without going through this whole process.

Example 3 Omission on the tax return

The Note talks about the fact that an omission is not an error, but the English language definition says that an omission can be part and parcel of an error. In my view an omission on a tax return is very well an error where it is inadvertent. In Example 3 in the note the situation is if something is entered on a tax return incorrectly and it can be shown that it's an error then it's an error however if it's an omission then it must follow the normal dispute resolution process. I don't agree with this as in terms of SARS rules a correction can be done and the supporting document can be uploaded. If corrected.

Example 4 Error on a PBO certificate

This example deals when an error is made at the time of entry of the tax return details are entered when the PBO certificate is incorrect. The error is discovered afterwards when the certificate is corrected. According to the Note the request will be rejected on a s 93 (1) d application. The taxpayer did make a PBO payment and erred in that the error was not picked up. This interpretation is not correct as there is a readily apparent undisputed error which needs to be corrected.

The taxpayer could have done a correction to sort this out.

CONCLUSION

In its current form the s 93(1) d is not workable as there are too many if and buts which is confusing in the Note . The Note actually makes it worse as the facts can be very confusing. Unfortunately in todays times SARS are not in a position to make correct and fair decisions quickly leaving many tax returns unfinalized and in fact take years.

Mostly when one makes this application it really becomes a lottery. Owing to the rules that SARS applies to this situation one may as well go on the objection route as skilled decisions need to be made by SARS and there is a way forward if the objection is declined, which is not available on a s 93(1) d.