

Status of SARS interpretation notes

[May 25, 2018 Nyasha Musviba](#)



Ben Strauss (Director at Cliffe Dekker Hofmeyr).

From time to time, the South African Revenue Service (SARS) issues interpretation notes. According to the SARS website (www.sars.gov.za), interpretation notes are intended to provide guidelines to stakeholders (both internal and external) on the interpretation and application of the provisions of the legislation administered by the Commissioner.

To date, SARS has issued more than 90 interpretation notes, some of which have been withdrawn.

Previously, SARS issued practice notes. Most of the practice notes have been withdrawn. However, some important practice notes are still extant. Notably, for instance, Practice Note 31 dated 3 October 1994 is still around. Put simply, it states that, despite the fact that a taxpayer is not a moneylender by trade, the taxpayer may deduct interest incurred on borrowed money against interest incurred on money it has lent.

It appears as if SARS does not have specific powers to issue interpretation notes. The only references to the term interpretation note in the Tax Administration Act, No 28 of 2011 (TAA) are the following:

- Section 89(3) of the TAA states that a binding general ruling may be issued as an interpretation note.
- The term official publication is defined in s1 of the TAA to mean a binding general ruling, interpretation note, practice note or public notice issued by a senior SARS official or the Commissioner.

However, interpretation notes do have important statutory implications for taxpayers. A practice generally prevailing is a practice set out in an official publication regarding the application or interpretation of a tax Act (s1 of the TAA as read with s5(1) of the TAA).

A practice generally prevailing may come into play as follows under the TAA:

- The Tax Ombud may, among other things, not review SARS policy or a practice generally prevailing, other than to the extent that it relates to a service matter, or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS (s17 of the TAA).
- SARS may only settle a dispute with a taxpayer if, among other things, it is appropriate and to the best advantage of the State (s146 of the TAA). However, it is

deemed to be inappropriate and not to the best advantage of the State to settle a dispute if in the opinion of SARS no circumstances in s146 exist and, among other things, the settlement would be contrary to the law or a practice generally prevailing and no exceptional circumstances exist to justify a departure from the law or practice (s145(a)(ii) of the TAA).

- In terms of s99(1) of the TAA, SARS is barred from issuing an assessment if, among other things:
- in the case of an additional assessment, the amount which should have been assessed to tax under the preceding assessment was, in accordance with the practice generally prevailing at the date of the preceding assessment, not assessed to tax; or the full amount of tax which should have been assessed under the preceding assessment was, in accordance with the practice, not assessed;
- in the case of a reduced assessment, the preceding assessment was made in accordance with the practice generally prevailing at the date of that assessment; or
- in the case of a tax for which no return is required, if the payment was made in accordance with the practice generally prevailing at the date of that payment

So, an interpretation note could set out a practice generally prevailing and, accordingly, could have a significant impact on the rights of taxpayers under the TAA.

What impact do interpretation notes have on the interpretation of tax laws?

In the case of *Commissioner for SARS v Marshall NO 2017 (1) SA 114 (SCA)*, the Supreme Court of Appeal was called upon to interpret certain provisions of the Value-Added Tax Act, No 89 of 1991. In its judgment, the Court referred with approval to certain sections of SARS's Interpretation Note No 39 issued on 8 February 2013. The Court held as follows:

These interpretation notes, though not binding on the courts or a taxpayer, constitute persuasive explanations in relation to the interpretation and application of the statutory provisions in question. Interpretation Note 39 has been in circulation for years and has not been brought into contention until now. (Footnote omitted.)

Courts of late have referred to the provisions of interpretation notes during the course of their judgments (see, for example, *Volkswagen South Africa (Pty) Ltd v Commissioner for SARS 2018 (1) SA 716 (SCA)* where the Supreme Court of Appeal referred to certain provisions of SARS Interpretation Note 59, of 10 December 2010, to establish SARS's view on the nature of government grants).

The taxpayer in the Marshall case appealed to the Constitutional Court. The Court held as follows in relation to the use of interpretation notes in the interpretation of legislation (*Marshall NO and Others v Commissioner for SARS (CCT208/17) [2018] ZACC 11 (25 April 2018)*) at page 6):

Why should a unilateral practice of one part of the executive arm of government play a role in the determination of the reasonable meaning to be given to a statutory provision? It might conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned, but not where the practice is unilaterally established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts

of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided. (Footnote omitted.)

Accordingly, it is now settled law that courts should not have regard to SARS interpretation notes when interpreting legislation, but may have regard to interpretation notes where the practice of SARS is evidenced by an interpretation note which has been recognised by SARS and the taxpayer. Conceivably, Practice Note 31 above would constitute such a note.

However, a few questions arise in light of the judgment:

- Do SARS interpretation notes serve any purpose?
- Is it possible for a SARS interpretation note to unilaterally set out a practice generally prevailing as defined and contemplated in the TAA, that is a practice regarding the application or interpretation of a tax Act?

Suffice to say that both SARS and taxpayers should be very careful when relying on SARS interpretation notes.