

Bringing  
**Accounting**  
to life



The South African Institute of Professional Accountants isn't just about the title, it's about using 35 years of experience to make meaningful contributions to your accounting career.

**TAX ADMINISTRATION ACT 2018**

# References

1. *Silke* Chapter 33
2. Tax Administration Act:
  1. Section 1: “business day”, “date of assessment”, self-assessment”
  2. Sections 22, 29, 98, 99, 102, 104, 164, 208-220, 221-224 and 239-243.

# Continued

- The Constitution of the Republic of South Africa, 1996
- Everyone has the right to administrative action that is lawful, reasonable and procedurally fair
- The purpose of the Tax Administration Act is to incorporate into one piece of legislation certain generic administrative provisions which were previously duplicated in various Tax Acts
  - to provide for registration requirements;
  - to provide for the submission of returns and the duty to keep records; and
  - to make provision in respect of tax assessments; to provide for dispute resolution.



**SAIPA**<sup>TM</sup>  
YOUR WEALTH

# The Tax Administration Act

Act No. 28 of 2011

Chapter:	Sections	Topics
<b>3</b>	<b>22 – 24</b>	<b>Registration</b>
<b>4</b>		<b>Returns and records</b>
	25 – 33	Submission of returns and record keeping
	34 – 39	Reportable arrangements
<b>5</b>		<b>Information gathering</b>
	40 – 44	General rules for inspection, verification, audit and criminal investigation
	45 – 49	Inspection, request for relevant material, audit and criminal investigation
	50 – 58	Inquiries
	59 – 66	Search and seizure
<b>6</b>	<b>67 – 74</b>	<b>Confidentiality of information</b>

#SAIPAproud

# The Tax Administration Act

Act No. 28 of 2011

Chapter:	Sections	Topics
<b>7</b>	<b>75 – 90</b>	<b>Advance rulings</b>
<b>8</b>	<b>91 – 100</b>	<b>Assessments</b>
<b>9</b>		<b>Dispute resolution</b>
	101 – 103	General
	104 – 107	Objection and appeal
	108 – 115	Tax board
	116 – 132	Tax court
	133 – 141	Appeal against tax court decisions
	142 – 150	Settlement of dispute

# The Tax Administration Act

Act No. 28 of 2011

Chapter:	Sections	Topics
<b>10</b>		<b>Tax liability and payment</b>
	151 – 161	Taxpayers
	162 – 164	Payment of tax
	165 – 166	Taxpayer account and allocation of payments
	167 – 168	Deferral of payment
<b>11</b>		<b>Recovery of tax</b>
	169 – 171	General
	172 – 176	Judgment procedure
	177 – 178	Sequestration, liquidation and winding-up proceedings
	179 – 184	Collection of tax debt from third parties

# The Tax Administration Act

Act No. 28 of 2011

Chapter:	Sections	Topics
<b>11 (cont.)</b>	<b>185</b>	<b>Assisting foreign governments</b>
	186	Remedies with respect to foreign assets
<b>12</b>	<b>187 – 189</b>	<b>Interest</b>
<b>13</b>	<b>190 – 191</b>	<b>Refunds</b>
<b>14</b>		<b>Write off or compromise of tax debts</b>
	192 – 194	General provisions
	195 – 196	Temporary write off of tax debt
	197 – 199	Permanent write off of tax debt
	200 – 205	Compromise of tax debt
	206 – 207	Records and reporting

# The Tax Administration Act

Act No. 28 of 2011

Chapter:	Sections	Topics
<b>15</b>		<b>Administrative non-compliance penalties</b>
	208 – 209	General
	210 – 212	Fixed amount penalties
	213	Imposition of percentage based penalty
	214 – 215	Procedure
	216 – 220	Remedies
<b>16</b>		<b>Understatement penalty</b>
	221 – 224	Imposition of understatement penalty
	225 – 233	Voluntary disclosure programme
<b>17</b>	<b>234 – 238</b>	<b>Criminal offences</b>



# The Tax Administration Act

Act No. 28 of 2011

<b>Chapter:</b>	<b>Sections</b>	<b>Topics</b>
<b>18</b>	<b>239 – 243</b>	<b>Registration of tax practitioners and reporting of unprofessional conduct</b>
<b>19</b>	<b>244 – 257</b>	<b>General provisions</b>
<b>20</b>	<b>258 – 272</b>	<b>Transitional provisions</b>



SAIPA™  
YOUR WEALTH

# Registration requirements

Applies equally to a tax payer who is required to register for tax or voluntarily registers for tax

or,

if applicable, the relevant tax Act

Section 67 of the Income Tax Act

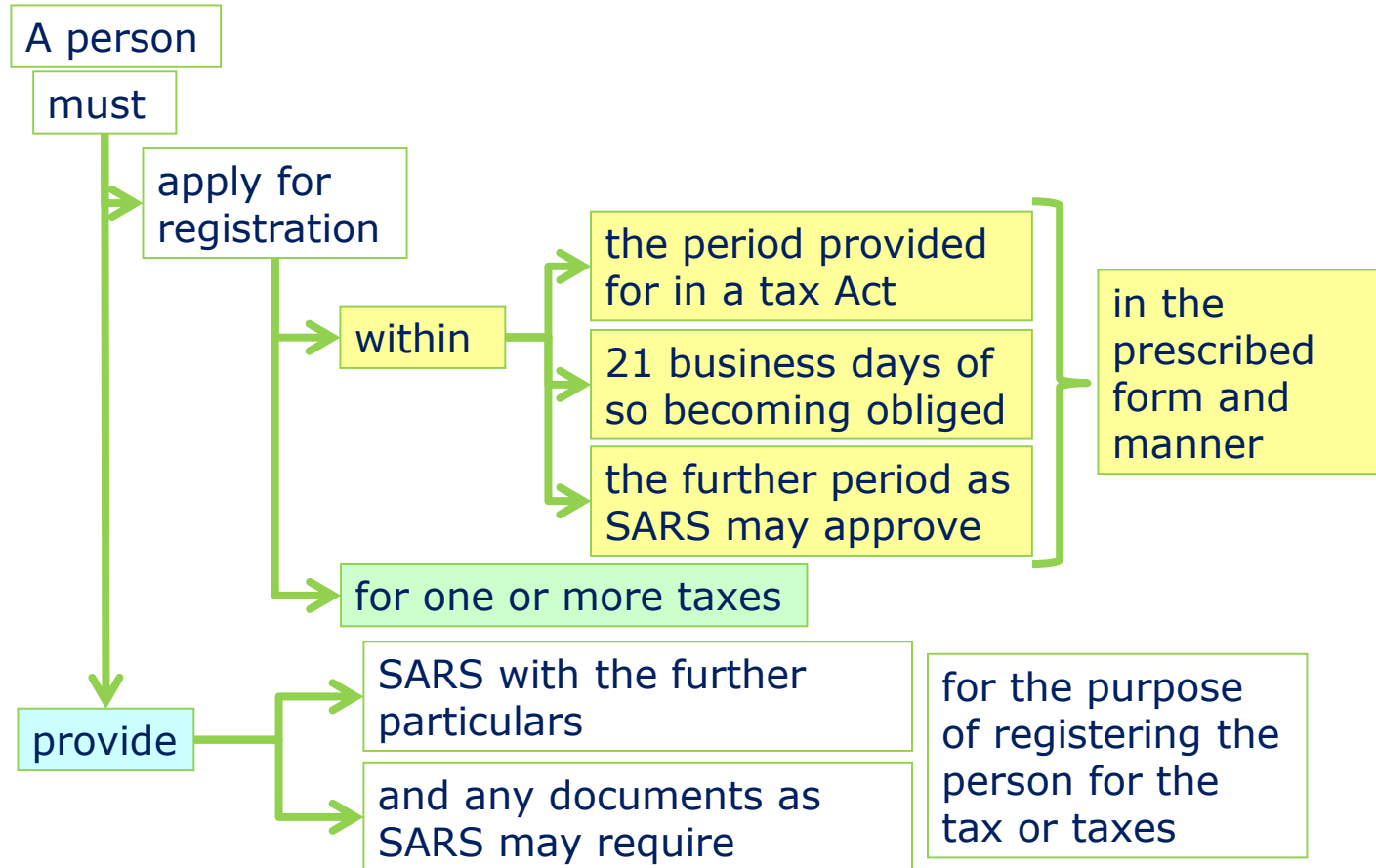
Paragraph 15 of the Fourth Schedule

Section 23 of the Value-Added Tax Act

Section 10 of the Unemployment Insurance Contributions Act

Section 22(1)

# Registration requirements



# Communication of changes in particulars

A person who has been registered ... must communicate to SARS within 21 business days any change that relates to:

address

postal address

physical address

electronic address used for communication with SARS

representative taxpayer

banking particulars used for transactions with SARS

such other details as the Commissioner may require by public notice

Section 23



SAIPA™  
YOUR WEALTH

# Changes in Particulars

A person who wilfully and without just cause

fails or neglects to register

fails or neglects to notify SARS of a change in registered particulars

is guilty of an offence and, upon conviction, is subject to a fine or to imprisonment for a period not exceeding two years.

Section  
234(a)

# Business days

- What does a business day mean? This is defined in section 1 as any day that is not a Saturday, Sunday or a public holiday.
- The above would not form part of the 21 days.
- Business days excludes the 16 days between 16 December and 15 January of the following year, inclusive.

Section 1

# Returns

All the “tax Acts” now refer to a “return” in most instances where information is required to be submitted to SARS



What is a return?

Section 1

“return” means

a form

a declaration

a document

or other  
manner

of submitting information to SARS that incorporates a self-assessment or is the basis on which an assessment is to be made by SARS

# Submission of Returns 25 (1)

1. A person who submits a form whether statutorily or voluntarily must do so in
2. The prescribed manner
3. By the specified date whether prescribed by the notice or the tax act
4. Non receipt of the required form by the tax payer does not negate the tax payers obligation to submit the form, i.e. the onus is on the taxpayer to collect or download the required forms.





SAIPA™  
YOUR WEALTH

#SAIPAproud

# Submission of return

A return must

Section 25

contain the information prescribed by a tax Act or the Commissioner

and be a full and true return

be signed by the taxpayer or by the taxpayer's duly authorised representative

and the person signing the return is regarded for all purposes in connection with a tax Act to be cognisant of the statements made in the return

Section 25(5)

SARS may,

prior to the issue of an original assessment by SARS,

request a person to submit an amended return to correct an undisputed error in a return

# Third party returns



When can SARS request another person (other than the taxpayer) to submit a return?

The Commissioner may by public notice

Section 26

require a person who

employs, pays amounts to, receives amounts on behalf of or otherwise transacts with another person,

or has control over assets of another person,

to submit a return by the date specified in the notice.

A person required to submit a return must do so in the prescribed form and manner and the return must contain the information prescribed by SARS and must be a full and true return.



**SAIPA**<sup>TM</sup>  
■ YOUR WEALTH

# Other returns required

SARS may require a person to submit further or more detailed returns regarding any matter for which a return is required or prescribed by a tax Act.

A person required to submit a return must do so in the prescribed form and manner and the return must contain the information prescribed by SARS and must be a full and true return

Section 27

# Other returns required

## financial statements prepared

SARS may require a person who submits financial statements or accounts prepared by another person in support of that person's submitted return, to submit a certificate or statement by the other person setting out the details of—

- (a) the extent of the other person's examination of the books of account and of the documents from which the books of account were written up; and
- (b) whether or not the entries in those books and documents disclose the true nature of the transactions, receipts, accruals, payments or debits in so far as may be ascertained by that examination

A person who prepares financial statements or accounts for another person must, at the request of that other person, submit to that other person a copy of the certificate or statement referred to

Section 28

# Duty to keep records

A person must keep the records, books of account or documents that

- enable the person to observe the requirements of a tax Act
- are specifically required under a tax Act by SARS by public notice; and
- enable SARS to be satisfied that the person has observed these requirements.

The requirements of this Act to keep records, books of account or documents for a tax period apply to a person who

has submitted a return for the tax period

is required to submit a return for the tax period and has not submitted a return for the tax period

is not required to submit a return but has, during the tax period, received income, has a capital gain or capital loss, or engaged in any other activity that is subject to tax or would be subject to tax but for the application of a threshold or exemption.

Section 29(1)  
and (2)



SAIPA™  
YOUR WEALTH

# Duty to keep records

## Section 33

... a senior SARS official may by notice require a person who must furnish the information to SARS, to produce a translation in one of the official languages

## Section 29(3)

Records, books of account or documents need not be retained by the person who:

has submitted a return for the tax period

after a period of five years from the date of the submission of the return

is not required to submit a return

after a period of five years from the end of the relevant tax period



But what is the retention period if SARS audit the person's records, etc.?

# Duty to keep records – s 32

Despite section 29(3), if...

- records, books of account or documents are relevant to an audit or investigation under Chapter 5 which the person subject to the audit or investigation has been notified of or is aware of.
- or a person lodges an objection or appeal against an assessment or decision under section 104(2).
- the person must retain the records, books of account or documents relevant to the audit, investigation, objection or appeal until the audit or investigation is concluded or the assessment or the decision becomes final.

# Inspection of records – s 31

- Records, books of account and documents ... must at all reasonable times during the required periods ... be open for inspection by a SARS official in the RSA.
- The records, books of account and documents referred to in section 29 whether in the form referred to in section 30(1) or in a form authorised under section 30(2), must at all reasonable times during the required periods under section 29, be open for inspection by a SARS official in the Republic for the purpose of:
  - a) determining compliance with the requirements of sections 29 and 30; or
  - b) an inspection, audit or investigation under Chapter 5.





**SAIPA**<sup>™</sup>  
YOUR WEALTH

Please note that your income tax return has been identified for verification in terms of the Tax Administration Act.

In the accompanying Notice of Assessment (ITA34) you will find all the information which SARS captured from your return.

Please review this information against your relevant material.

If you find any errors, correct these by submitting a revised income tax return ... online.

**HUMAN  
ERROR**

RETURN TYPE	STATUS
<u>ITR12</u>	Filed through eFiling
Query SARS Status	Request Correction



By selecting the 'request correction' the ITR12, as it was submitted (or filed) to SARS, is opened and can be corrected.

# HUMAN ERROR

## The Dispute Process

- Please note that your income tax return has been identified for verification in terms of the Tax Administration Act.
- In the accompanying Notice of Assessment (ITA34) you will find all the information which SARS captured from your return.
- Please review this information against your relevant material.
- If you find any errors, correct these by submitting a revised income tax return ... online.

RETURN TYPE	STATUS
<u>ITR12</u>	Filed through eFiling
<a href="#">Query SARS Status</a>	<a href="#">Request Correction</a>

## An undisputed error S 25 (5)

- The letter from SARS refers to “an error” whilst the Tax Administration Act refers to ‘an undisputed error in a return’.
- SARS may, prior to the issue of an original assessment by SARS, request a person to submit an amended return to correct an undisputed error in a return.
- The Tax Administration Act doesn’t define the term “undisputed error”. According to the dictionary ‘undisputed’ means.
- Not disputed or called in question; accepted.

# Correcting an error in a return

Should you realise that you made an error when completing your return, the Request for Correction process allows you to correct a previously submitted return/declaration for:

## **Income Tax**

- Individual Income Tax Returns (ITR12) and Provisional Tax (IRP6)
- Companies and Close Corporations (ITR14) and
- Trusts (ITR12T).

## **Value-Added Tax (VAT)**

Vendor Declaration (VAT201), only in the following scenarios:

- Overstated: The vendor wants to decrease the VAT201 for a specific tax period.
- Understated: The vendor wants to increase the VAT201 for a specific tax period.

Make the necessary corrections to the return and submit to SARS.  
An assessment follows as with the original return.

<http://www.sars.gov.za/ClientSegments/Individuals/What-If-Not-Agree/Pages/Request-for-Corrections-.aspx>

# A mistake was made on the return

Section  
93(2)

SARS may reduce an assessment despite the fact that no objection has been lodged or appeal noted.

Section  
93(1)(d)

SARS may make a reduced assessment if:

SARS is satisfied that there is a readily apparent undisputed error in the assessment by

SARS; or

the taxpayer in a return.

Section  
99(2)(d)

Section 99(1) does not apply to the extent that it is necessary to give effect to

an assessment referred to in section 93(1)(d) if SARS becomes aware of the error referred to in that subsection before expiry of the period for the assessment under subsection (1);



SAIPA™  
YOUR WEALTH

# Withdrawal of assessments

## Section 98

1. SARS may, despite the fact that no objection has been lodged or appeal noted, withdraw an assessment which —
  - (a) was issued to the incorrect taxpayer;
  - (b) was issued in respect of the incorrect tax period; or
  - (c) was issued as a result of an incorrect payment allocation.
  - (d) ...
2. An assessment withdrawn under this section is regarded not to have been issued, unless a senior SARS official agrees in writing with the taxpayer as to the amount of tax properly chargeable for the relevant tax period and accordingly issues a revised original, additional or reduced assessment, as the case may be, which assessment is not subject to objection or appeal.

Dear Taxpayer,



Tax Period	Scope
2003, 2005 & 2008	Possible under declaration of taxable income



## NOTIFICATION OF AUDIT

The South African Revenue Service (SARS) conducts audits on taxpayers and traders to verify compliance with legislation under its control. As a result, taxpayers and traders are selected through various means and processes.

This letter serves to inform you that, in terms of the Acts administered by the Commissioner for SARS, an audit of Personal Income Tax will be conducted on the taxpayer's tax affairs for the years under audit.



SAIPA™  
YOUR WEALTH

# Requests for relevant material and the period of limitations for issuance of assessments

Section  
99(1)

- An assessment may not be made
- 3 years after the date of the original assessment by SARS

**OR**

- self-assessment (for which a return is required), ... self-assessment (... no return is required),
- ... five years after the date of assessment of an original assessment or from the date of the last payment of the tax for the tax period or effective date ...



# Requests for relevant material and the period of limitations for issuance of assessments

Section  
99(1)

## HOWEVER!!

That SARS may, by prior notice of at least 30 days to the taxpayer, extend a period under subsection (1) or an extended period under this section, before the expiry thereof, by a period approximate to a delay arising from:

- (a) failure by a taxpayer to provide all the relevant material requested within the period under section 46(1) or the extended period under section 46(5); or
- (b) resolving an information entitlement dispute, including legal proceedings.

## HOWEVER!!

SARS may, by prior notice of at least 60 days to the taxpayer, extend a period under subsection (1), before the expiry thereof, by three years in the case of an assessment by SARS or two years in the case of self-assessment, where an audit or investigation under Chapter 5 relates to:

- (i) the application of the doctrine of substance over form;
- (ii) the application of Part IIA of Chapter III of the Income Tax Act, section 73 of the Value-Added Tax Act or any other general anti-avoidance provision under a tax Act;
- (iii) the taxation of hybrid entities or hybrid instruments; or
- (iv) section 31 of the Income Tax Act.

# No limitation of time applies to

Section  
99(1)

in the case of an **assessment by SARS**, the fact that the full amount of tax chargeable was not assessed, was due to:

- (i) fraud;
- (ii) misrepresentation; or
- (iii) non-disclosure of material facts

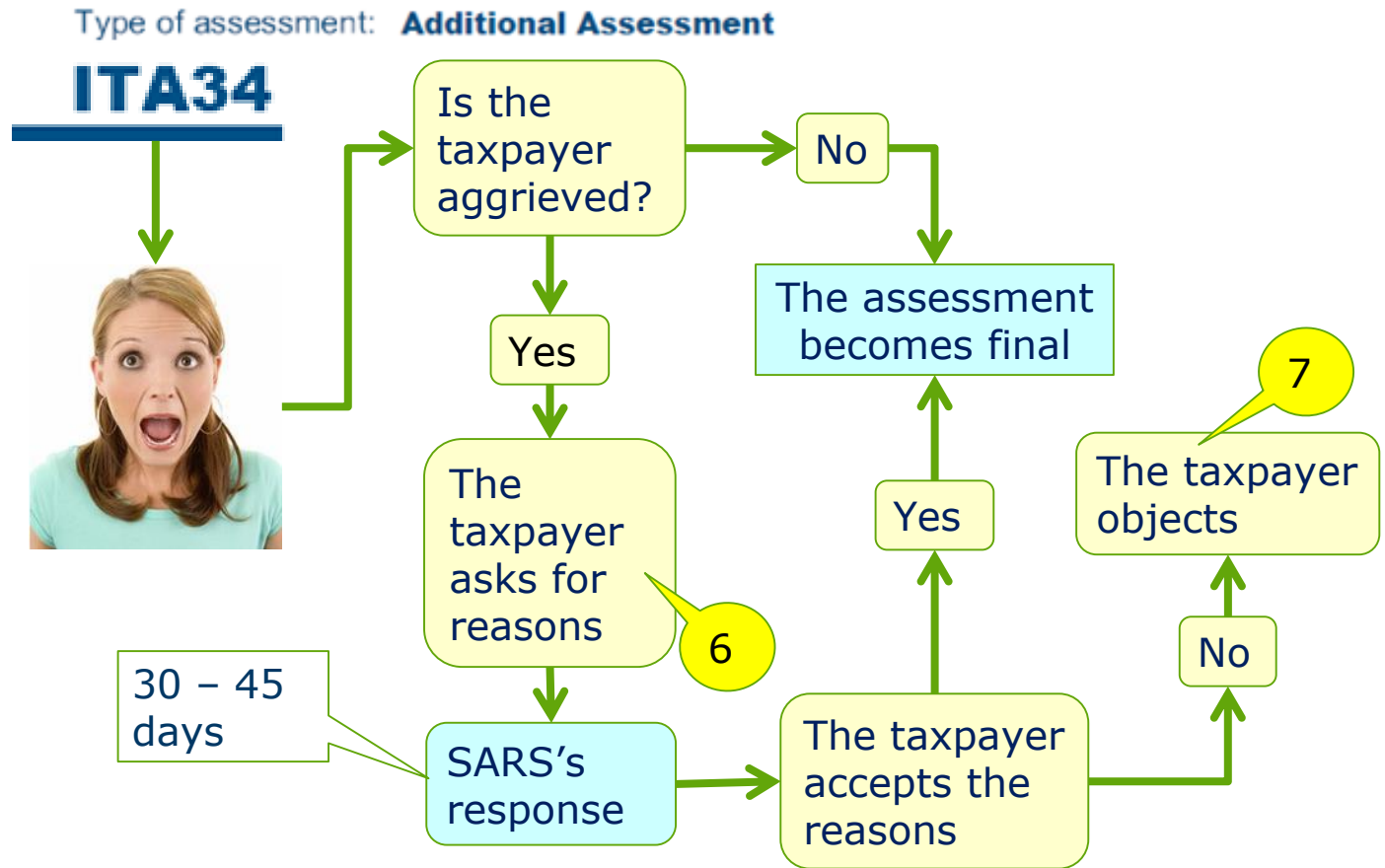
**self-assessment** ... was due to:

- (i) fraud;
- (ii) intentional or negligent misrepresentation;
- (iii) intentional or negligent non-disclosure of material facts; or
- (iv) the failure to submit a return or, if no return is required, the failure to make the required
- (v) payment of tax;



SAIPA™  
YOUR WEALTH

# The start of the process



#SAIPAproud

# Timing of the objection

## Section 104(3)

A taxpayer ... must lodge an objection ... within the period prescribed in the 'rules'.

**WHEN?**

## Section 1

... the date of the issue of the notice of assessment



## Rule 7

... within 30 days after the date of the assessment ...

"day" means a "business day" as defined in section 1 of the Act;

Act not amended yet.

### VALUE-ADDED TAX Notice of Assessment

**VAT217**

#### Details

VAT registration number:	<del>XXXXXXXXXX</del>
Customs code:	<del>XXXXXXXXXX</del>
Date:	2016-07-06
Type of assessment:	1
<b>Tax Period:</b>	<b>201602</b>
Due date:	2016-08-01
Second date:	2016-08-31

# Date of Assessment

- a) in the case of an assessment by SARS, the date of the issue of the notice of assessment; or
  
- b) in the case of self-assessment by the taxpayer:
  - of the tax for the tax period, the effective if a return is required, the date that the return is submitted; or
  - if no return is required, the date of the last payment of the tax for the tax period or, if no payment was made in respect date.

# Appeals and Condonation

- The onus is on the taxpayer to prove ‘Exceptional Circumstances’.
- At the discretion of SARS to judge whether the circumstance is exceptional or not.
- General principle would be “unavoidable, beyond the control of, no alternate but...”
- “unusual facts or circumstances must be proven”.

# The request for reasons

DISP01

## Rule 6(1):

A taxpayer who is aggrieved by an assessment may, **prior to lodging an objection**, request SARS to provide the reasons for the assessment required to enable the taxpayer to formulate an objection in the form and manner referred to in rule 7.

NOTICE OF ASSESSMENT	DESCRIPTION	DATE
ITA34	ORIGINAL ASSESSMENT	2017/01/28
ITA34	REDUCED ASSESSMENT	2017/01/28
ITA34	ADDITIONAL ASSESSMENT	2017/05/18
Request Historic Notice	Dispute	Request For Reason

How is the request made?

## Rule 6(2):

The request must-

- (a) be made in the prescribed form and manner;
- (b) specify an address at which the taxpayer will accept delivery of the reasons; and
- (c) be delivered to SARS within 30 days from the date of assessment.



## Grounds for Objections Rule 7 (2)

- A tax payer who makes an objection must have sufficient grounds upon which the objection is laid.
- The taxpayer must have supporting documentation available.
- The onus is on the taxpayer to object and provide reasons and evidence in support of the objection.
- However SARS must give a reason for not allowing the objection.

# The tax court



Has jurisdiction over tax appeals lodged under section 107.

Sections 122, 123, 124, 126, 127, 128 and 129 of the Act sets out the procedures in the tax court.

The court decides the matter on the basis that the burden of proof is upon the taxpayer, unless an appeal against an understatement penalty when the tax court must decide the matter on the basis that the burden of proof is upon SARS.

The court can confirm the assessment or 'decision'; order the assessment or 'decision' to be altered; or refer the assessment back to SARS for further examination and assessment.

If the taxpayer goes to the courts, it may require legal assistance and there are additional costs.



SAIPA™  
YOUR WEALTH

# The process continued



Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

An appeal against a decision of the tax court lies -

- (a) to the full bench of the Provincial Division of the High Court which has jurisdiction in the area in which the tax court sitting is held; or
- (b) to the Supreme Court of Appeal, without an intermediate appeal to the Provincial Division, if -
  - (i) the president of the tax court has granted leave under section 135; or
  - (ii) the appeal was heard by the tax court constituted under section 118(5).



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

# The “administrative non-compliance penalty”

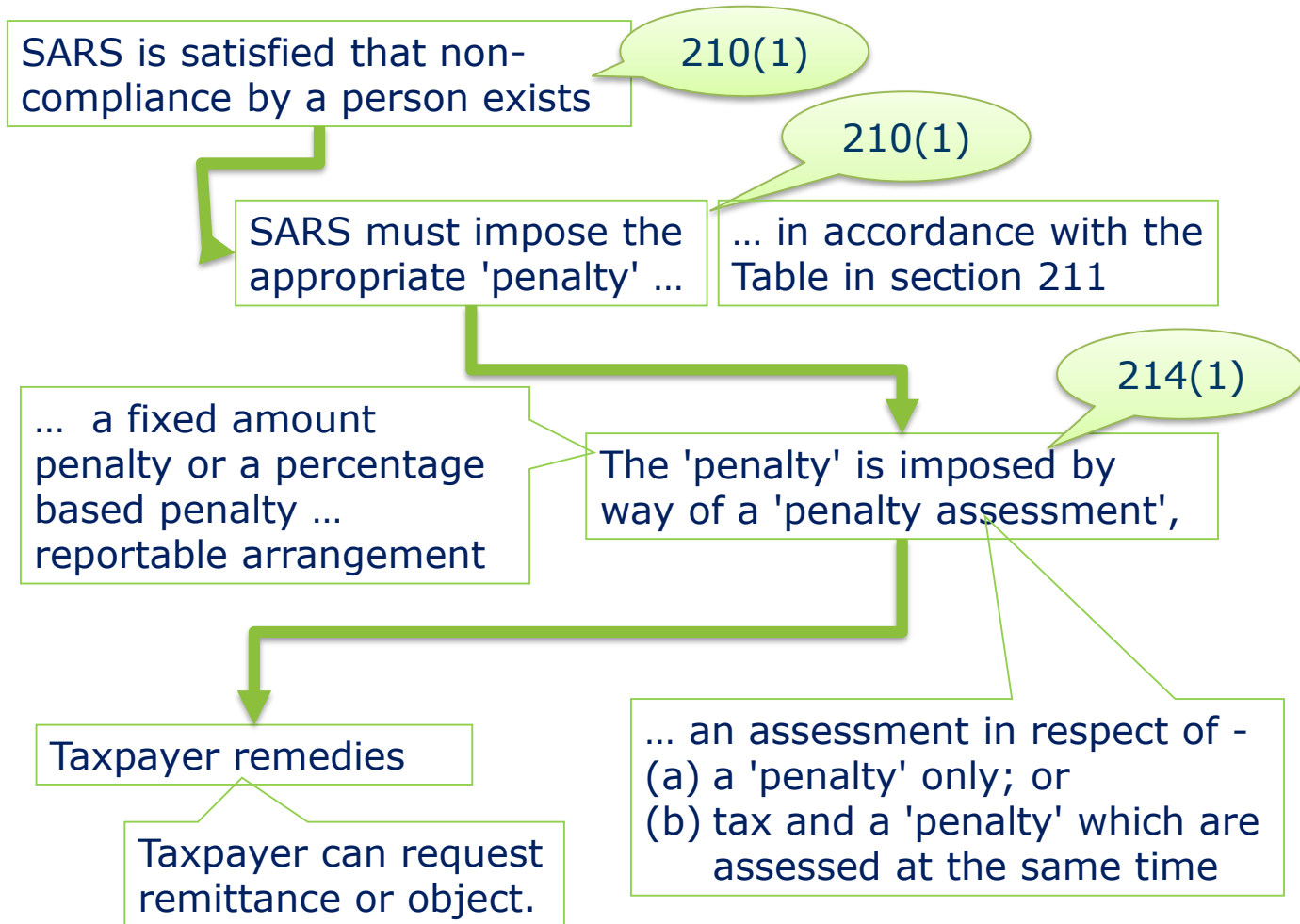
“administrative non-compliance penalty” has the meaning assigned in section 208;

Chapter 15 –  
sections 208 - 220

Can also be  
imposed under a  
Tax Act.

The purpose of Chapter 15 is to ensure—  
(a) the widest possible compliance with the provisions of a tax Act and the effective administration of tax Acts; and  
(b) that an ‘administrative non-compliance penalty’ is imposed impartially, consistently, and proportionately to the seriousness and duration of the non-compliance.

... compliance with the provisions of a tax Act ...





SAIPA™  
YOUR WEALTH

# What is “non-compliance”?

Section  
210(2)

Non-compliance  
is

failure to  
comply

with an  
obligation

that is imposed by  
or under a tax Act

and

is listed in a public  
notice issued by SARS,

For this non-compliance,  
SARS must impose a 'penalty'

in accordance with the Table:  
Amount of Administrative Non-  
Compliance Penalty

Section 210(2) excludes three 'failures' – see the next slide. 

The reason – they are subject to specific penalties.



SAIPA™  
YOUR WEALTH

# What is “non-compliance”?

Section  
210(2)

Whilst the following are also, in a sense, non-compliance, they are not ‘non-compliance’ (as defined in section 210):

non-compliance in respect of which an understatement penalty under Chapter 16 has been imposed; or

the  
failure to

pay tax subject to a percentage based penalty;

disclose information subject to a reportable arrangement penalty

They are subject to the following other penalties:

... an understatement penalty ... a percentage based penalty ... a reportable arrangement penalty ...



**SAIPA**<sup>TM</sup>  
■ YOUR WEALTH

**Table: Amount of Administrative Non-Compliance Penalty**

1 Item	2 Assessed loss or taxable income for 'preceding year'	3 'Penalty'
(i)	Assessed loss	R250
(ii)	R0-R250 000	R250
(iii)	R250 001-R500 000	R500
(iv)	R500 001-R1 000 000	R1 000
(v)	R1 000 001-R5 000 000	R2 000
(vi)	R5 000 001-R10 000 000	R4 000
(vii)	R10 000 001-R50 000 000	R8 000
(viii)	Above R50 000 000	R16 000

... the year of assessment immediately prior to the year of assessment during which a 'penalty' is assessed

... persons ... that did not trade



## PENALTIES

Imposition of penalties for non-compliance

Enquiries should be addressed to SARS:

### Contact Detail:

SARS  
 Alberton 1528  
 Contact Centre Tel: 0800 00 7277  
 SARS online: [www.sars.gov.za](http://www.sars.gov.za)

### Details

Reference Number: ~~XXXXXXXXXX~~ Always quote this reference number when contacting SARS  
 Date: 20160615  
 Type of notice: Penalty  
 Due date: 20160801



### Penalty Summary Information

Tax Type	Non Compliance Description	Method of Calculation	Taxable Amount/Liability Amount	Calculated Penalty
Income Tax	ITR12 Non-Submission 2015	Fixed	3107664.90	2000.00

Dear Taxpayer – IMPOSITION OF PENALTIES FOR NON-COMPLIANCE  
 Information in the possession of ... SARS appears to indicate that you have not met your legal obligations to submit income tax returns and/or to inform SARS of changes in your contact details.



SAIPA™  
YOUR WEALTH

# Example

## Facts:

A taxpayer experienced some cash flow problems and made the following payment in respect of the EMP201 (employees' tax) for April 2017 to SARS on 10 May 2017.

## Application of the law:

"tax", for purposes of administration under this Act, includes a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act

162(1)

Tax must be paid by the day and at the place notified by SARS, the Commissioner by public notice or as specified in a tax Act, and must be paid as a single amount or in terms of an instalment payment agreement under section 167.

# Imposition of percentage based penalty

213(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.

213(2)

In the event of a change to the amount of tax in respect of which a 'penalty' was imposed under subsection (1), the 'penalty' must be adjusted accordingly with effect from the date of the imposition of the 'penalty'.

The non-compliance (in the normal sense) is now that the taxpayer didn't pay when required.

... was not paid as and when required ...

# ... as and when required under a tax Act ...

## Paragraph 6(1) of the Fourth Schedule

If an employer fails to pay any amount of employees' tax for which he or her is liable within the period allowable for payment thereof in terms of paragraph 2 SARS **must** in accordance with Chapter 15 of the Tax Administration Act, impose a penalty equal to ten per cent of such amount.

... within the period allowable for payment thereof in terms of paragraph 2 ...

**10%**

## The obligation

### Paragraph 2(1) of the Fourth Schedule

“... shall ... pay the amount so deducted or withheld to the Commissioner within seven days after the end of the month during which the amount was deducted or withheld”.

## Application of the law:

It is clear that the payment was not made within the period of seven days after the end of the relevant month (the month being April 2017).

SARS must then, in accordance with Chapter 15 of the Tax Administration Act, impose a penalty equal to ten per cent of such amount.

## Comment:



Does “such amount” refer to the amount actually paid?

SARS generally applies the 10% to the amount actually paid.

The words “such amount” in paragraph 6(1) refers to the “amount of employees’ tax for which he or her is liable”.

Section 213(1) uses the words “equal to the percentage of the amount of unpaid tax as prescribed in the tax Act”.

# What if the penalty is not paid?

- It is clear that the payment was not made within the period of seven days after the end of the relevant month (the month being April 2017).
- SARS must then, in accordance with Chapter 15 of the Tax Administration Act, impose a penalty equal to ten per cent of such amount.
- SARS generally applies the 10% to the amount actually paid.
- Section 213(1) uses the words “equal to the percentage of the amount of unpaid tax as prescribed in the tax Act”.

# ... as and when required under a tax Act ...

## Paragraph 14(6) of the Fourth Schedule

... employer fails to render ... a return  
... within the period prescribed ...

Note the use of words "may impose".

... the Commissioner **may** impose on that employer a penalty, ... under Chapter 15 of the Tax Administration Act, ...

... which is deemed to be a percentage based penalty ...

... for each month that the employer fails to submit a complete return ...

... which in total may not exceed 10 per cent of the total amount of employees' tax deducted or withheld or which should have been deducted or withheld by the employer from the remuneration of employees for the period ...

This is the EMP501 and the interim one is due (normally) on 31 October, with the final one due 31 May.



But, is it listed in a public notice?

# Late is Late – possible 10% penalty

- Provisional tax for first period for the 2018 year of assessment, which was due on 31 March 2017 – the taxpayer authorised the payment to be released to SARS at 17:15 on 1 April 2017.
- Notice issued by SARS on 1 March 2017 – Payments for financial year-end by Friday, 31 March 2017.
- Taxpayers who are making payments or submissions on 31 March 2017, are urged to do so by **12:00 midday**. Payments or submissions received after their specified deadlines will be marked as late and may be liable for penalties and interest.
- This would be marked as late and would attract a penalty of 10%.



# Provisional Tax – possible 10% penalty

- Paragraph 27(1) of the Fourth Schedule.
- 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.
- Within the period of six months ... ending on the last day.

# Provisional Tax – underestimation 20%

- Paragraph 20 (1) 4<sup>th</sup> schedule.
- 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 ...
- This penalty is referred to as the underestimation penalty.
- It is only applied to the “final or last estimate of taxable income”.

# Imposed under a tax Act

## Underestimation penalty

**Facts:** From IT14027 with adjustments

A company submitted its return for payment of provisional tax on 30 June 2015.

It estimated its income for the year of assessment in an amount of R431 638 and made payment in the amount of R64 905,54 in accordance with the estimation.

On 30 September 2015 the company made a further payment of R1 377 466,22.

This was followed by a return of income filed on 8 October 2015 in which the appellant disclosed a taxable income for the year of assessment in the amount of R5 050 076.

The taxable income assessed for the relevant year of assessment:

R5 050 076

More than R1 million:

\* 80% \* 28%

R1 131 217

If not, use 90% or the tax on the 'basic amount'

Rebates

0

Employees' tax

0

Provisional tax

R55 953,10

Provisional tax

R64 905,54

R120 858,64

Amount subject to penalty

1 010 358,36

20% thereof

202 071,67

... paid by the end of the year of assessment ...

# Imposed under a tax Act

## Value-Added Tax Act

... fails to pay any amount of:

... tax within the period for the payment of such tax specified in the said provisions,

... tax payable in respect of the importation of the goods ...

... tax on the date on which in terms of the Customs and Excise Act ...

the Commissioner must ... impose a penalty equal to 10 percent of the said amount of tax

... the provisions of section 14, 28(1) or 29 ...

... in accordance with Chapter 15 of the Tax Administration Act, ...



SAIPA™  
■ YOUR WEALTH

# The “understatement penalty”

#SAIPAproud

# The “understatement penalty”

1

In this Act, unless the context indicates otherwise,  
... the following terms have the following meaning:

“understatement penalty” means a  
penalty imposed by SARS in  
accordance with Part A of Chapter 16

Chapter 16 –  
sections 221 - 224

Note, the “understatement penalty” replaced the  
open-ended discretion under the old law which  
allowed SARS to impose additional tax up to 200%

# The “understatement penalty”

Section  
221

‘understatement’  
means

any prejudice to  
SARS or the *fiscus*

as a  
result of:

- (a) a default in rendering a return;
- (b) an omission from a return;
- (c) an incorrect statement in a return;
- (d) if no return is required, the failure to pay the correct amount of ‘tax’; or
- (e) an ‘impermissible avoidance arrangement’

- (a) a default in rendering
- (b) an omission from
- (c) an incorrect statement in

a return;



# The “understatement penalty”

Section  
222(1)

In the event of an  
‘understatement’ by a taxpayer,

the taxpayer  
must pay,

in addition to the ‘tax’ payable  
for the relevant tax period,

the understatement  
penalty

unless

the ‘understatement’ results from  
a *bona fide* inadvertent error.

determined under  
subsection (2)

102(2)

**NB!**

The burden of proving ... the facts on which SARS  
based the imposition of an understatement  
penalty under Chapter 16, is upon SARS.

# Understatement penalty S 222 (1)

- In the event of understatement, the tax payer must pay...
- In addition to the 'tax' payable for the relevant tax period
- The understatement penalty
- Unless the 'understatement' results from a *bona fide* inadvertent error
- The burden of proving ... the facts on which SARS based the imposition of an understatement penalty under Chapter 16, is upon SARS

# ***Bona fide* inadvertent error**

Judge Boqwana (in Tax Case 13772)

- The *bona fide* inadvertent error has to be an innocent misstatement by a taxpayer on his or her return, resulting in an understatement, while acting in good faith and without the intention to deceive.
- With whom does the onus rest with?

# If no return is required, the failure to pay the correct amount of 'tax'

## Facts:

Never Res is an individual who is deemed, under the relevant treaty, exclusively to be resident of a country other than the RSA.

Never Res invested in a company (resident in the RSA) and derived dividends, as beneficial owner, therefrom. This is the only amounts that accrued to him from a source in the RSA.

In the section 64G(3)(i) declaration Never Res stated that the dividend is subject to a reduced rate as a result of the treaty.

It was subsequently established that the relevant limit on the rate was in fact 15% and not the 10% as stated.

Never Res didn't furnish a return of income in the RSA.



Can SARS levy a penalty in this instance?

# An 'impermissible avoidance arrangement'

This was added to the Act with effect 19 January 2017.

The intention was "to enhance clarity with regard to whether and the extent to which understatement penalties are imposable in GAAR matters..."

According to SARS, the "amendments ... clarify that this prevails in respect of understatement penalties, which is also in line with international law ..."

"impermissible avoidance arrangement" means

221

an arrangement in respect of which Part IIA of Chapter III of the Income Tax Act is applied

any transaction, operation, scheme or agreement in respect of which section 73 of the Value-Added Tax Act

any other general anti-avoidance provision under a tax Act is applied

# Example

Based on the information at my disposal the following adjustments have been made in terms of the Income Tax Act (the Act):

## Summary of adjustment(s) made:

Details				
Tax Period(s)	Provisions of the Act	Brief description of adjustment	Adjustment amount	Understatement penalty
2015	Section 24I (10A) of ITA	Unrealised foreign loss	R 2,436,264.00	R 170,566.00
Total			R 2,436,264.00	R 170,566.00

## Reason(s) for adjustment:

- The claim of R 2,436,264.00 in respect of Foreign exchange loss has not been taken into account due to the following reason(s):
  - It has been incurred but deferred until realisation of the foreign exchange differences.
- In terms of the Tax Administration Act an understatement penalty of 25% has been imposed as a result of an incorrect statement in a return and the behaviour is considered to be reasonable care not taken in completing the return. This amount can be found under "Omission of Income" on the Notice of Assessment (ITA34).



How was this understatement penalty calculated?



SAIPA™  
YOUR WEALTH

# The “understatement penalty”

We now know that, in the event of an ‘understatement’ by a taxpayer, the taxpayer must pay, in addition to the ‘tax’ payable for the relevant tax period, the understatement penalty.



But how is this ‘understatement penalty’ determined?

222(2)

The understatement penalty is the amount resulting from applying the highest applicable understatement penalty percentage in accordance with the table in section 223 to each shortfall determined under subsections (3) and (4) in relation to each understatement in a return.

So there is a ‘table’ and we need a ‘shortfall’. It then applies to each understatement in a return.

Remember that ‘tax’ excludes penalty and interest

221

# The “understatement penalty”

There is an ‘understatement’  
by a taxpayer

This is based on the  
‘behaviour’ of the taxpayer

And then depends on  
whether it is a standard  
case, obstructive, or a  
‘repeat case’

or if the  
taxpayer made a  
voluntary  
disclosure was

Determine the highest  
applicable percentage

Apply to the  
relevant ‘shortfall’

**Remember:**

The onus of proof



# Remedies

## **Facts:** From IT14027 with adjustments

A company submitted its return for payment of provisional tax on 30 June 2015.

It estimated its income for the year of assessment in an amount of R431 638 and made payment in the amount of R64 905,54 in accordance with the estimation.

On 30 September 2015 the company made a further payment of R1 377 466,22.

This was followed by a return of income filed on 8 October 2015 in which the appellant disclosed a taxable income for the year of assessment in the amount of R5 050 076.

In view of the discrepancy between the estimated earnings in the return for payment of provisional tax and the return of income SARS imposed an underestimation penalty in terms of the Income Tax Act.

On the IT34.

# Remedies

218

The Tax  
Administration Act

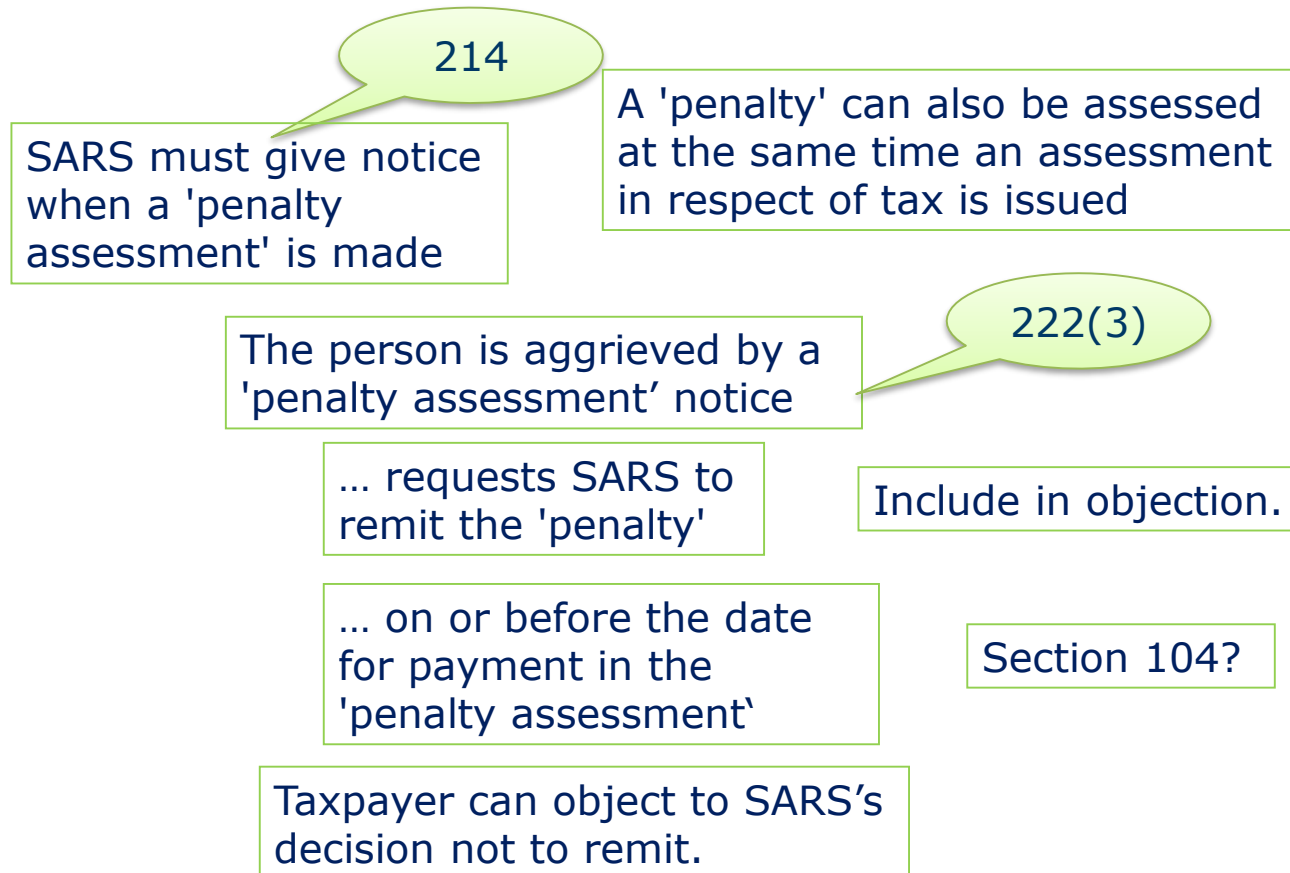
If a tax Act other than this Act provides for remittance grounds for a 'penalty', SARS may despite the provisions of section 216, 217 or 218 remit the 'penalty' or a portion thereof under such grounds.

Paragraph 20(2) of  
the Fourth Schedule

... the amount of any estimate ... was seriously calculated with due regard to the factors having a bearing thereon and was not deliberately or negligently understated ...

Remember, this penalty must be reduced by any penalty imposed under paragraph 27(1) in respect of payment

# Remedies



# The 'remittance request'

... must include

a description of the circumstances which prevented the person from complying with the relevant obligation under a tax Act in respect of which the 'penalty' has been imposed; and

and

the supporting documents and information as may be required by SARS in the prescribed form.

No form yet.

<http://www.sars.gov.za/ClientSegments/Individuals/What-If-Not-Agree/Pages/Admin-Penalty.aspx>

# The regulation of tax practitioners

Budget Review 2002

"Many ... taxpayers receive advice and assistance from tax consultants and advisors. ... the final responsibility for the contents of a tax return legally rests with the taxpayer, ... In order to promote better compliance and ensure that taxpayers receive advice consistent with the tax legislation, SARS will initiate discussion on the regulation of tax consultants and advisors in South Africa, with appropriate sanctions in the event of non-compliance with tax legislation."

15 July 2008

The revised draft Regulation of Tax Practitioners Bill released for public comment.

1 October 2012: Tax Administration Act, 2011

Section 240 - must register with SARS as a tax practitioner

Section 241 - senior SARS official may lodge a complaint with a 'controlling body'



The Tax Administration Laws Amendment Act, 2012 (21 of 2012)

21 December 2012

Section 240A



must recognise as a 'recognised controlling body':

the Independent Regulatory Board for Auditors



a Law Society established in terms of the Attorneys Act

the General Council of the Bar of South Africa, a Bar Council and a Society of Advocates

a statutory body that the Minister is satisfied is similar to the statutory bodies

the release of criteria for recognition and the receipt of applications for recognition, the following five controlling bodies have been recognised by SARS in terms of the Act:

- Institute of Accounting and Commerce – IAC
- South African Institute of Chartered Secretaries and Administrators – ICSA
- South African Institute of Chartered Accountants – SAICA
- South African Institute of Professional Accountants – SAIPA
- South African Institute of Tax Practitioners – SAIT



SAIPA™  
YOUR WEALTH

# Recognition of controlling bodies

## Section 240A



may recognise a 'controlling body', for natural persons that provide advice with respect to the application of a tax Act or complete returns, as a 'recognised controlling body' if the body

maintains  
relevant  
and  
effective

minimum qualification and experience requirements

continuing professional education requirements

codes of ethics and conduct

disciplinary codes and procedures

is approved in terms of section 30B of the Income Tax Act for purposes of section 10(1)(d)(iv) of the Act

has at least 1 000 members when applying for recognition or reasonable prospects of having 1 000 members within a year of applying





# Who is a tax practitioner?

Section 240

Every natural person who

provides advice to  
another person

with respect to the application  
of a tax Act

completes or assists in completing

a return by another person

must

register  
with or

or fall under the  
jurisdiction of

a 'recognised  
controlling body'

by 1 July  
2013

OR, within 21 business days  
after first giving advice

register with SARS as a tax practitioner



SAIPA™  
YOUR WEALTH



## Who is a tax practitioner?

Section 240

The provisions ... do not apply in respect of a person who

provides the advice or completes or assists in completing a return solely

for no consideration to that person or his or her employer or a connected person in relation to that employer or that person

to or in respect of the employer by whom that person is employed on a full-time basis or to or in respect of the employer and connected persons in relation to the employer

under the direct supervision of a person who is a registered tax practitioner



SAIPA™  
YOUR WEALTH

# Complaint to controlling body

Section 241 allows for SARS to lodge a complaint with a controlling body, if a person who carries on a profession governed by the 'controlling body', did or omitted to do anything with respect to the affairs of a taxpayer, including that person's affairs, that in the opinion of the official:

- (a) was intended to assist the taxpayer to avoid or unduly postpone the performance of an obligation imposed on the taxpayer under a tax Act;
- (b) by reason of negligence on the part of the person resulted in the avoidance or undue postponement of the performance of an obligation imposed on the taxpayer under a tax Act;
- (c) constitutes a contravention of a rule or code of conduct for the profession which may result in disciplinary action being taken against the person by the body; or
- (d) constitutes conduct under subsection (2) by a registered tax practitioner.



# Complaint to controlling body

Section 241(2) allows for a senior SARS official may lodge a complaint with a 'recognised controlling body' if a registered tax practitioner has, in the opinion of the official:

- (a) without exercising due diligence prepared or assisted in the preparation, approval or submission of any return, affidavit or other document relating to matters affecting the application of a tax Act;
- (b) unreasonably delayed the finalisation of any matter before SARS;
- (c) given an opinion contrary to clear law, recklessly or through gross incompetence, with regard to any matter relating to a tax Act;
- (d) been grossly negligent with regard to any work performed as a registered tax practitioner.



SAIPA™  
YOUR WEALTH

# Complaint to controlling body

Section 241(2) allows for a senior SARS official may lodge a complaint with a 'recognised controlling body' if a registered tax practitioner has, in the opinion of the official:

- (a) ...;
- (b) ...;
- (c) ...;
- (d) ...;
- (e) knowingly given false or misleading information in connection with matters affecting the application of a tax Act or participated in such activity; or
- (f) directly or indirectly attempted to influence a SARS official with regard to any matter relating to a tax Act by the use of threats, false accusations, duress, or coercion, or by offering gratification as defined in the Prevention and Combating of Corrupt Activities Act, 2004.

# Disclosure of information regarding complaint and remedies of taxpayer

Before a complaint is lodged or information is disclosed,

SARS must deliver to:

Section 242

the taxpayer concerned and the person against whom the complaint is to be made

notification of the intended complaint and information to be disclosed.

... may, within 21 business days after the date of the notification, lodge with SARS an objection to the ...

information as in the opinion of the official is necessary to lay before the 'controlling body'

If on the expiry of that period of 21 business days no objection has been lodged or, if an objection has been lodged and SARS is not satisfied that the objection should be sustained, a senior SARS official may thereupon lodge the complaint.

Section 243(1): The complaint is to be considered by the 'controlling body' according to its rules.



# Sections 102 and 164

Section 102: Burden of Proof

Section 164: Payment of tax pending recovery or appeal



SAIPA™  
■ YOUR WEALTH

# Questions ???

#SAIPAproud