

No. R. 468

1 April 2003

CIRCUMSTANCES UNDER WHICH THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE MAY SETTLE A DISPUTE BETWEEN THE COMMISSIONER AND ANY PERSON, AS CONTEMPLATED IN SECTION 107B OF THE INCOME TAX ACT, 1962 (ACT NO. 58 OF 1962), AND SECTION 93A OF THE CUSTOMS AND EXCISE ACT, 1964 (ACT NO. 91 OF 1964)

By virtue of the power vested in me by section 107B of the Income Tax Act, 1962, and section 93A of the Customs and Excise Act, 1964, I, Trevor Andrew Manuel, Minister of Finance, hereby prescribe in the Schedule hereto the circumstances under which the Commissioner for the South African Revenue Service may settle a dispute between the Commissioner and any person, notwithstanding any provision contained in the relevant Act or any other Act administered by the Commissioner, where such a settlement would be to the best advantage of the state.

**T. A. MANUEL, MP
MINISTER OF FINANCE**

SCHEDULE

Definitions

1. For the purposes of these regulations, any word or expression to which a meaning has been assigned in the Act shall, unless the context otherwise indicates, bear the meaning so assigned, and—

“dispute” means a disagreement on the interpretation of either the relevant facts involved or the law applicable thereto, or of both the facts and the law;

“SARS” means the South African Revenue Service;

“settle” means to resolve a dispute by compromising any disputed liability, otherwise than by way of either the Commissioner or the person concerned accepting the other party's interpretation of the facts or the law applicable to those facts, or of both the facts and the law, and “settlement” shall be construed accordingly; and

"the Act" means the Income Tax Act, 1962, or the Customs and Excise Act, 1964, as the case may be.

Purpose of regulations

2. (1) The basic principle in law is that it is the duty of the Commissioner to assess and collect taxes, duties, levies, charges and other amounts according to the laws enacted by Parliament and not to forgo any such taxes, duties, levies, charges or other amounts properly chargeable and payable.

(2) Circumstances may, however, require that the strictness and rigidity of this basic principle be tempered where it would be to the best advantage of the state.

(3) The purpose of these regulations is, therefore, to prescribe the circumstances whereunder it would be inappropriate and whereunder it would be appropriate that the basic rule be tempered and for a decision to be taken to settle a dispute.

Circumstances where the Commissioner may not settle a dispute

3. It will be inappropriate and not to the best advantage of the state to settle a dispute, where, in the opinion of the Commissioner,—

- (a) the action on the part of the person concerned which relates to the dispute, constitutes intentional tax evasion or fraud and no circumstances contemplated in regulation 4 exist;
- (b) the settlement would be contrary to the law or a clearly established practice of SARS on the matter, and no exceptional circumstances exist to justify a departure from the law or practice;
- (c) it is in the public interest to have judicial clarification of the issue and the case is appropriate for this purpose;
- (d) the pursuit of the matter through the courts will significantly promote compliance of the tax laws and the case is suitable for this purpose; or
- (e) the person concerned has not complied with the provisions of any Act administered by the Commissioner and the Commissioner is of the opinion that the non-compliance is of a serious nature.

Circumstances under which the Commissioner may settle a dispute

4. The Commissioner may, where it will be to the best advantage of the state, settle a dispute, in whole or in part, on a basis that is fair and equitable to both the person concerned and SARS, having regard to *inter alia*—

- (a) whether that settlement would be in the interest of good management of the tax system, overall fairness and the best use of SARS's resources;
- (b) the cost of litigation in comparison to the possible benefits with reference to—
 - (i) the prospects of success in a court;
 - (ii) the prospects of the collection of the amounts due; and
 - (iii) the costs associated with collection;
- (c) whether there are any—
 - (i) complex factual or quantum issues in contention; or
 - (ii) evidentiary difficulties,which are sufficient to make the case problematic in outcome or unsuitable for resolution through the alternative dispute resolution procedures or the courts;
- (d) a situation where a participant or a group of participants in a tax avoidance arrangement has accepted the Commissioner's position in the dispute, in which case the settlement may be negotiated in an appropriate manner required to unwind existing structures and arrangements; or
- (e) whether the settlement of the dispute will promote compliance of the tax laws by the person concerned or a group of taxpayers or a section of the public in a cost-effective way.

Process of settlement

5. (1) A dispute may be settled, as contemplated in regulation 4, by the Commissioner personally or any SARS official delegated by the Commissioner for that purpose.

(2) The Commissioner or the relevant delegated SARS official must ensure that he or she does not have, or did not at any stage have, a personal, family, social, business, professional, employment or financial relationship with the person concerned.

Agreement in terms of which dispute is resolved

6. (1) All disputes settled in whole or in part, as contemplated in regulation 4, must be evidenced by a written agreement between the parties in the format as may be prescribed by the Commissioner and must include details on—

- (a) how each particular issue was settled;
- (b) relevant undertakings by the parties;
- (c) treatment of that issue in future years;
- (d) withdrawal of objections and appeals; and
- (e) arrangements for payment.

(2) The Commissioner has the right to recover any outstanding amounts in full where the person concerned fails to adhere to any agreed payment arrangement.

(3) Any settlement will be conditional upon full disclosure of material facts known to the person concerned at the time of settlement.

Rights and obligations of parties

7. (1) The person concerned should at all times disclose all relevant facts in discussions during the process of settling a dispute.

(2) The written agreement will represent the final agreed position between the parties and will be in full and final settlement of all or the specified aspects of the dispute in question between the parties.

(3) SARS must adhere to the terms of the agreement, unless it emerges that material facts were not disclosed to it or there was fraud or misrepresentation of the facts.

(4) Subject to regulation 8, SARS must adhere to the secrecy provisions with regard to the information relating to the person concerned and SARS may not disclose the terms of any agreement to third parties unless authorised by law or by the person concerned.

(5) SARS must, where the dispute is not ultimately settled, explain the further rights of objection and appeal to the person concerned.

Reporting requirements

8. (1) The Commissioner must—

- (a) maintain a register of all disputes settled in the circumstances contained in these regulations; and
 - (b) fully document the process in terms of which each dispute was settled, which document must be signed on behalf of the Commissioner and the person concerned.
- (2) The Commissioner must on an annual basis provide to the Auditor-General and to the Minister of Finance a summary of all disputes which were settled in whole or in part during the period of 12 months covered by that summary, which must—
- (a) be in such format which, subject to section 4(1)(b) of the Act, does not disclose the identity of the person concerned, and be submitted at such time as may be agreed between the Commissioner and the Auditor-General or Minister of Finance, as the case may be; and
 - (b) contain details of the number of disputes settled or part settled, the amount of revenue forgone and estimated amount of savings in costs of litigation, which must be reflected in respect of main classes of taxpayers or sections of the public.