FAIR PLAY

OFFICE OF THE TAX OMBUD
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THE RIGHT TO KNOW ABOUT YOUR TAX MATTERS

Welcome to the 21st issue of our newsletter, themed **The Right to Know About Your Tax Matters**. This issue comes at a crucial time, during the SARS tax season, when many individuals and businesses file tax returns. We have a selection of insightful articles dealing with various tax-related matters, including taxpayers' right to appeal and have tax complaints finalised within a reasonable time. The newsletter also includes two opinion pieces from external contributors giving their insights on **Taxpayer education is crucial in building an effective tax culture** and **Home-office expenses: during the times of the pandemic and post-pandemic**.

We urge our readers to share this newsletter with their contacts. The more people who know about the Office of the Tax Ombud and its free and impartial services, the better it is for the country's tax administration system.

We hope this issue is as enjoyable to read as it was for us to put together.

Pearl Seopela
Senior Manager: Communications & Stakeholder Relations

Tax Ombud's corner

As the Office of the Tax Ombud, we are committed to promoting a healthy balance between taxpayer rights and SARS's powers.

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The right to object and appeal

The importance of the ability of taxpayers to challenge the legality of actions and decisions within the tax system is internationally recognised.

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More tax education is crucial

SARS has to consider investing in taxpayer education to achieve high levels of tax compliance and an increased tax base.

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Tax Ombud's corner

Judge Bernard Makgabo Ngoepe
Tax Ombud

Knowledge is power, and as the Office of the Tax Ombud, we are passionate about and committed to promoting awareness on the rights of taxpayers. The theme of this issue is *The Right to Know About Your Tax Matters* and we hope it will expand your understanding of the tax recourse sphere and tax matters as a whole.

In the previous issue, I reiterated the call for all to help our government and make a meaningful contribution towards improving South Africa and the lives of people who call her home. In July this year, we witnessed social unrest that caused further devastation to our economy, which was already struggling to recover from the impact of the Covid-19 pandemic.

The anarchy that gripped large parts of the country has aggravated our many existing challenges as a country. There can be no justification for widespread looting and destruction of property and loss of life. More businesses have closed down and many more people left jobless, forcing thousands more citizens to turn to government for assistance. Our government relies on taxes to provide the services required, but the tax base is dwindling while unemployment is exploding.

I believe the country's challenges are severe but not insurmountable. They require all of us, citizens, business and government, to have a common goal of improving the lives of all people in the country and actively taking actions that lead to attaining those objectives. I also extend condolences to all those who have lost their loved ones to the Covid-19 pandemic and the during the July anarchy.

It is a given that the South African Revenue Service (SARS) will be required to go the extra mile to ensure that all taxes due are collected. We are optimistic that the additional burden placed on SARS by the country's circumstances will not tempt the revenue collector to go overboard and infringe taxpayer rights when collecting taxes due. If the temptation is too strong, we promise to continue protecting taxpayers' rights.

As the Office of the Tax Ombud, we are committed to promoting a healthy balance between taxpayer rights and SARS's powers. As I have said since our establishment over eight years ago, we are neither for SARS nor taxpayers; we look at facts and use them to make informed and sound decisions. SARS's implementation of almost all of our recommendations signifies the strength of our inputs in improving the country's tax administration system.

As we move forward towards economic recovery, I urge full tax compliance – including those with resources to evade paying taxes. To expect only the middle class to pay taxes while the rich evade their obligations is not sustainable. Pay taxes due; it is the moral and legal thing to do, and does make a difference in the lives of people. As we have seen, any unrest or instability in the country can affect all, the poor and the rich; it does not discriminate.

While encouraging tax compliance, I also call on those in power to ensure that the taxes collected are utilised correctly and to the citizens of our country to hold the government accountable for every cent of tax collected. Theft by a few politically connected persons and public servants is enraging taxpayers, some of whom have threatened a tax boycott. If the money raised from tax is used to improve service delivery and look after the needy, I am confident that this will enhance tax compliance.

"I believe the country's challenges are severe but not insurmountable. They require all of us, citizens, business and government, to have a common goal of improving the lives of all people in the country and actively taking actions that lead to attaining those objectives."

Institutions such as the Office of the Tax Ombud (OTO) must continue to ensure that governance and the rule of law prevail. We will intervene in tax disputes between SARS and taxpayers and investigate systemic issues without fear or favour. The full independence of the OTO would greatly strengthen taxpayer confidence in our impartiality and we yet again call on government to respond accordingly. Our independence is paramount.

In a few weeks' time, we will be presenting our latest annual report to stakeholders so that they can engage us on whether we are delivering on our objectives or not. We always look forward to those robust discussions on pertinent issues needing attention to help improve the country's tax administration system.

We will continue to promote taxpayer awareness about the rights and the complaints processes involved. Despite extensive awareness campaigns conducted, an alarmingly large percentage of our population still does not know much about the Tax ombud and the OTO's services. Slowly but effectively, we are addressing this matter, despite the logistical challenges posed by the Covid-19 pandemic.

Thank you for the continued support. We are resilient people, and we shall overcome.

THE RIGHT TO OBJECT AND APPEAL, AND FINALISATION WITHIN A REASONABLE TIME

Frik Pretorius
Office of the Tax Ombud
Specialist: Legal

The importance of the ability of taxpayers to challenge the legality of actions and decisions within the tax system is internationally recognised. The right to appeal is seen as fundamental to the fairness of the tax system. The conduct of an objection or appeal should be subject to due process or a fair hearing, characterised by impartiality on the part of the SARS officials involved as well as the judicial officers. The impartiality of decision-makers is founded in the rule against bias, i.e. *nemo iudex in sua causa*, which essentially means no one may be the judge in his or her own cause. This rule is founded in the principles of good administration as decisions are more likely to be sound and the public to have faith in an administrative process if the decision-maker is unbiased.

WHEN AND HOW DOES A TAX DISPUTE ARISE?

Essentially, there are two kinds of disputes with SARS:

1. Disagreements on the interpretation of law:

In such disputes, the normal dispute resolution steps are followed, namely objection and appeal, alternative dispute resolution, appeal to the tax board and/or the tax court, and further appeals to the Higher Courts; and

2. Disagreements on administration of law:

Such complaints may be reported within SARS's internal administrative complaints resolution process, which commences at the SARS contact centre or branch level.

If not satisfactorily resolved, it may be escalated to the Complaints Management Office (CMO), which falls under the SARS Service Escalation Office at its Head Office. Only after exhausting SARS's internal administrative complaints resolution process may the taxpayer lodge a complaint with the Tax Ombud, unless there are compelling circumstances why the Tax Ombud may be approached directly.

REASONS FOR AN ASSESSMENT

Once an assessment has been raised, the taxpayer has 30 business days from the date of the assessment to request reasons for the assessment.

The grounds for an adverse assessment by SARS should generally enable the taxpayer to understand the basis for the assessment and to object. However, if this is not the case, the taxpayer may request SARS to give its reasons for the assessment. In terms of SARS dispute resolution rule 6, any taxpayer who is aggrieved by any assessment may request SARS to provide these reasons so that the taxpayer can formulate an objection.

The important effect of a request for reasons under rule 6 is that the taxpayer need not lodge an objection until a response is received from SARS.

The essential requirements for a request for reasons are:

- The request must be made in the prescribed form, if any,
- It must specify an address at which the taxpayer will accept delivery of the reasons, and
- The request must be delivered to SARS within 30 days from the date of assessment.

DOES A TAXPAYER NEED TO PAY THE AMOUNT OF TAX IN DISPUTE?

Pay-now-argue-later rule

Taxpayers are required to pay a tax debt before a dispute is finalised or resolved. This principle is known as "pay now, argue later". Thus, the obligation to pay tax, which arises upon the issue of an assessment, is not "automatically" suspended by an objection or appeal.

Request for suspension of payment

SARS can only suspend the obligation to pay upon request by the taxpayer.

In terms of section 164, there is no suspension of the obligation to pay tax or the right of SARS to receive and recover tax, pending objection or appeal, unless a senior SARS official directs otherwise.

A taxpayer need not first object against an assessment before requesting a suspension, as the taxpayer may first require reasons under rule 6 in order to formulate the objection. A request for suspension may therefore be made if the taxpayer intends to object. If a suspension is given and the taxpayer does not object, the suspension is automatically revoked and the taxpayer must pay the amount in dispute.

OBJECTING TO AN ASSESSMENT

If you have received an assessment and you feel aggrieved by it, you may object to it.
The objection must comply with the following:

- It must be on a Notice of Objection form and include substantiating documents.
- It must specify detailed grounds for objection.
- You must have signed it.

Note that the objection must be delivered to SARS at the address specified on the assessment, **within 30 business days after the date of assessment.**

An objection that does not comply with the requirements may be invalid.

In terms of the dispute resolution rules, you may submit a revised objection within 20 days of receipt of the notice of invalidity by SARS.

WHAT MUST SARS DO WITH AN OBJECTION?

After receiving the objection, or the substantiating documents, SARS must consider the objection and either disallow it or allow it in whole or in part. This is according to dispute resolution rule 9.

Rule 9 requires SARS to notify the taxpayer of its decision in writing:

- within 60 days after delivery of the taxpayer's objection, or
- if SARS requested substantiating documents under rule 8, 45 days after:
  - delivery of the requested documents, or
  - if the documents were not delivered, the expiry of the period within which the documents must be delivered.

However, where SARS requires more time to deal with the objection due to exceptional circumstances, the complexity of the matter or the principle or the amount involved, it may extend the initial period by a period not exceeding 45 days. SARS must, before expiry of the initial period, inform the taxpayer accordingly.

WHAT IF SARS DOES NOT DEAL WITH AN OBJECTION TIMEOUSLY?

If SARS fails to deal with the objection within the prescribed period, a taxpayer has the following remedies:

- Pursue a complaint through SARS's internal administrative complaints resolution process and if unsuccessful, submit a complaint to the Tax Ombud.
- Under rule 56, apply for a default judgment. An application for a default judgment is a procedural application under the rule referred to in Section 129(2) of the Act. In terms of dispute resolution rule 56, the taxpayer must deliver a notice informing SARS that if it fails to deal with the objection with 15 days of delivery of the notice, an application will be made to the tax court for a default judgment. If the matter proceeds to the tax court, the court may:
  - Order SARS to deal with the objection within the period prescribed by the court, or
  - If SARS cannot show good cause for the default in dealing with the objection, make an order under section 129(2) of the TAA, including making a final order in favour of the taxpayer. The tax court under section 130(3) of the TAA may make a costs order against SARS.

WHAT RECOURSE DOES THE TAXPAYER HAVE IF SARS DISALLOWS THE OBJECTION OR ALTERS THE ASSESSMENT UNFAVOURABLY?

Any taxpayer entitled to object to an assessment and who is dissatisfied with the final decision of SARS in respect of the objection, may **appeal** against that decision. A taxpayer who wishes to appeal must complete the prescribed form and deliver it to the SARS office that dealt with the objection or to the address stated by SARS for this purpose in the notice of disallowance.

On the Notice of Appeal, you must indicate which of the grounds specified in the objection apply to your appeal.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

The notice must be delivered within 30 days after delivery of the notice of disallowance of the objection. SARS may extend this period by 21 business days if it is satisfied that reasonable grounds exist for the delay, or for up to 45 business days if exceptional circumstances exist that justify an extension beyond 21 business days.

What is ADR?

ADR is a form of dispute resolution other than litigation, or adjudication through the courts. It is less formal, less cumbersome and less adversarial and is a more cost-effective and speedier process of resolving a dispute with SARS.

Who can initiate ADR?

A taxpayer or SARS can initiate ADR. SARS, however, finally determines whether a matter is suitable for ADR.

When can you opt for ADR?
You can opt for ADR at the stage you note your appeal against the disallowance of your objection against a decision or assessment with which you are dissatisfied.

How do you initiate ADR?
You can initiate ADR by indicating that you wish to make use of the ADR process in your Notice of Appeal. SARS will inform you within 30 business days of your Notice of Appeal whether the matter is suitable for an ADR process.

ADR MONETARY THRESHOLD

Amount of tax in dispute is less than R1 000 000.00:
This ADR must be held at the Enforcement Office in the region where the taxpayer is registered for tax.

Amount of tax in dispute is more than R1 000 000.00:
This ADR will be held at SARS Head Office in Brooklyn, Pretoria.

ADR PROCESS – HOW DOES IT WORK?

The process is determined by the dispute resolution rules issued under the Tax Administration Act, 2011. (You can find a copy of these rules on the SARS website, here.)

First, the Commissioner authorises a senior SARS official to compile a list of facilitators and appoint one official as the facilitator. The facilitator is bound by a code of conduct and must seek a fair, equitable and legal resolution of the matter between yourself and SARS. The process is also governed by a set of terms and conditions to which you agree.

However, you can also agree with SARS not to use a facilitator and only have party-to-party ADR discussions.

The facilitator, if used, will then arrange an ADR meeting and notify all the parties. If there is no facilitator, the parties will arrange the meeting themselves.

The meeting is conducted in an informal manner.

During the meeting, both parties state their case and provide supporting documents if needed.

During this process, the facilitator will endeavour to resolve the dispute.

You can either represent yourself or, if there are exceptional circumstances, have a representative of your choice. The facilitator must agree to this and excuse you from the facilitation.

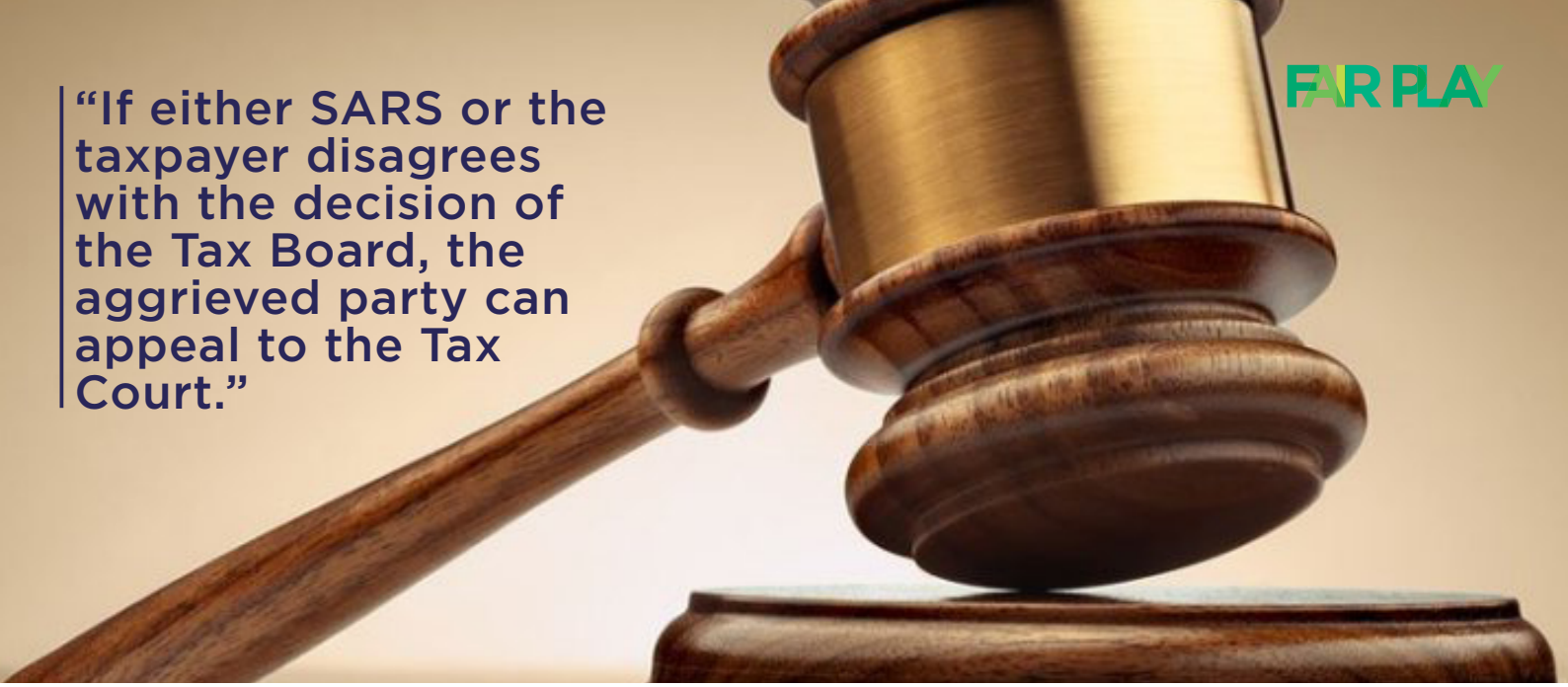
If the dispute is resolved between you and SARS, this must be recorded and the record signed by you and the SARS representative.

A settlement agreement must be approved by a senior SARS official.

To give effect to the agreement reached, SARS will, where necessary, issue a revised assessment within 45 days.

If the dispute is not resolved through ADR, you may continue to appeal to the Tax Board if the tax in dispute is below R1 000 000, or to the Tax Court.

"You should approach facilitation with a positive attitude and in the spirit of reconciliation, seeking an amicable solution. This approach will be an advantage and a seasoned facilitator will see opportunities to settle the matter between the parties."



> "If either SARS or the taxpayer disagrees with the decision of the Tax Board, the aggrieved party can appeal to the Tax Court."

RIGHTS AND OBLIGATIONS OF PARTIES

- You should at all times disclose all relevant facts during the ADR process.
- The ADR proceedings may not be electronically recorded.
- Representations made during the course of the ADR meeting are made without prejudice, meaning they may not be used against you in any subsequent proceedings.
- The facilitator cannot be subpoenaed to give evidence of the ADR proceedings.

Facilitation is usually a less formal, speedier and more cost-effective method of resolving a dispute.

You should approach facilitation with a positive attitude and in the spirit of reconciliation, seeking an amicable solution. This approach will be an advantage and a seasoned facilitator will see opportunities to settle the matter between the parties.

HOW IS THE APPEAL SET DOWN BEFORE THE TAX BOARD?

The clerk must place the appeal before the Tax Board within 30 days after:

- Receipt of a notice by the taxpayer requesting the clerk to set the matter down before the Tax Board;
- The ADR process was terminated and the taxpayer requested the clerk to set the matter down before the Tax Board;
- Receipt of a decision by the chairperson to condone non-appearance before the Tax Board.
- Receipt of an order by the tax court to condone non-appearance before the Tax Board.

If the taxpayer fails to notify the clerk about the termination of ADR proceedings and that he or she wishes to proceed with the appeal, SARS may apply for a default judgment under rule 56 in order to obtain final judgment in the appeal.

The clerk of the Tax Board has sole discretion to allocate a date for the hearing and will inform the taxpayer about the date, time and place of the hearing at least 20 days before it is held.

DECISIONS OF THE TAX BOARD

The Board may make the following decisions:

- Confirm the assessment,
- Order the assessment or decision to be altered, or
- Refer the assessment back to SARS for further examination and assessment.

The chairperson of the tax board cannot make an order as to costs in the matter. Only the Tax Court can make costs orders.

The chairperson will hear the case and make a ruling, which must be given within 60 days after the hearing.

The clerk of the tax board must furnish SARS and the taxpayer with a copy of the board's decision within 10 days of receiving the decision.

If either SARS or the taxpayer disagrees with the decision of the Tax Board, the aggrieved party can appeal to the Tax Court.

REDUCED ASSESSMENTS AND WITHDRAWAL OF ASSESSMENTS

Must a taxpayer always object to an assessment if there is a problem with it?

The answer is no.

There is a difference between an assessment which is the subject of a substantive dispute and just an error in assessment. A substantive dispute essentially means there is a disagreement between SARS and the taxpayer on the interpretation of either the relevant facts involved or the law that applies, or of both the facts and the law.

If the assessment contains errors, whether caused by SARS or the taxpayer, it is not necessary to object against the assessment if it is an undisputed error. The taxpayer must submit a request for correction.

Expert's corner

Taxpayer education is crucial in building an effective tax culture

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Our revenue collector, SARS, has undergone some transformation over the past couple of years to remain efficient and effective in pursuing tax dodgers and collecting every rand and cent owed by the taxpayers. This transformation will undoubtedly yield great rewards for our fiscus and revenue base, which needs more financial resources to address various socio-economic needs in our country, especially during the fight against the Covid-19 pandemic. It is estimated that the National Treasury will spend approximately R3 billion to upgrade its technology infrastructure and artificial intelligence capabilities. One would agree that perhaps SARS's stance is a step in the right direction, as most global revenue authorities invest in advanced technology for tax administration. However, a question may be asked: is the technological investment on its own enough to improve tax compliance levels and increase our tax base?

TAX EDUCATION IS AS IMPORTANT AS INVESTING IN TECHNOLOGY

The subject of taxation is a complex one across all nations, and there are laws enacted in our tax framework that regulate or govern how transactions should be taxed. The basic principle of taxation requires some primary knowledge for one to understand its relevance and how everything fits together from a tax perspective. Unfortunately, the layperson might struggle to make sense of this subject matter. Thus, it is my opinion that parallel to the technological investment, SARS has to consider investing in taxpayer education to achieve high levels of tax compliance and an increased tax base.

In the last decade or so, South Africa has seen an emergence of the so-called "tenderpreneurs", some of whom became multimillionaires overnight, with most of their income drivers coming directly from government-funded projects. The reality of these tenderpreneurs is that some, if not most of them, have low levels of higher education, let alone tax knowledge. Others have no formal education at all, and suddenly, they have government project appointment letters to the tune of millions, and lo and behold, they fall into the Commissioner's tax net without knowing it. I have personally witnessed and interacted with some of these businesspeople.

> "SARS has to consider investing in taxpayer education to achieve high levels of tax compliance and an increased tax base."

TAX ASPECTS OVERLOOKED WHEN INFORMAL BUSINESS IS FORMALISED

Initiatives by various government institutions have been undertaken to regularise, for example, informal township businesses through formal registrations and the formation of private companies and co-operatives. A well-known township bricklayer suddenly has a registered construction company, and many others followed on the same tangent and converted their sole-trader businesses into private companies. There's no doubt that the concept of formal trading is a brilliant one, especially for the township economy. However, the one most fundamental aspect of formal business had been left out or ignored, and that's the part that explains the primary tax responsibilities that arise as a direct consequence of formalising trading. Insufficient taxpayer education is being provided to assist this class of businesspeople in understanding their businesses' tax aspects.

Taxpayer education is crucial in building an effective tax culture, compliance and citizenship. There is a huge tax

> "As the revenue collector, SARS has to invest a little bit more in structured taxpayer education and strive to build a progressive tax morality citizenship."

education gap in our country, which perpetuates high non-compliance and tax immorality levels, and this gap has to be closed as a matter of urgency. It breaks my heart when a taxpayer representative, who had excellent business prospects, suddenly has to shut down their business because of contravening tax laws, which were never explained to them at inception, or find themselves in massive tax debts due to lack of tax knowledge.

> "Unfortunately, the picture that's before our very eyes is that of a feared and ruthless institution that waits for taxpayers to commit errors of non-compliance and non-payment and then pounces on them like a cat on a mouse."

I know there's always a temptation to hold the company's accountants and tax practitioners responsible for instances of non-compliance, but that is not enough, as the representative taxpayer remains the accounting/public officer of the institution. I wish to put the blame squarely on SARS's broad shoulders. As the revenue collector, SARS has to invest a little bit more in structured taxpayer education and strive to build a progressive tax morality citizenship. SARS should constantly be seen as walking side by side with taxpayers.

WAITING TO POUNCE

Unfortunately, the picture that's before our very eyes is that of a feared and ruthless institution that waits for taxpayers to commit errors of non-compliance and non-payment and then pounces on them like a cat on a mouse. I admit that as citizens, we have a moral obligation to declare our income and pay taxes that are due to SARS, but the truth of the matter is that some (even wealthy) people don't know what, when and why taxes should be paid. All of this is because there's not enough emphasis on tax education.

IF TANZANIA CAN, WHY NOT SA?

Some of the studies conducted show that taxpayer education provides a good base for revenue collection. As a direct result of investment in taxpayer education, Tanzania increased its revenue collection by almost three times what it was before the education intervention programme was implemented. Surely, SARS can do a little better in educating taxpayers than sending them to jail down the line?

The survival of both corporate and individual taxpayers is of great importance to SARS and our country, as they provide gross income from which taxes will be derived. Therefore, investing in taxpayer education will reposition our revenue collection institution and progressively assist our country to implement its social programmes.

Disclaimer: This opinion article was contributed by an external stakeholder who does not have any affiliation with the OTO. The article does not necessarily reflect the views of the Office.

HOME-OFFICE EXPENSES:
DURING THE TIMES OF THE PANDEMIC AND POST-PANDEMIC

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The increased publication and communication of the right of taxpayers to "claim home expenses" because of the culture of working from home has increased the drive by many taxpayers to claim home expenses.

Noteworthy is that the pandemic has not introduced new tax legislation in claiming home-office expenses – Section 23(b) of the Income Tax Act still applies. Generally, an individual taxpayer may not claim a deduction against taxable income regarded as private expenses, such as rent or any expenses in connection with any premises used for personal use. However, when the individual taxpayer conducts a business from their residential premises (home), the Income Tax Act does make provision for the deduction of expenses relating to the residential premises.

Most importantly, however, the existing income tax provision does not apply to an employee. An employee as defined by the Fourth Schedule of the Income Tax Act as:

(a) any person (other than a company) who receives any remuneration or to whom any remuneration accrues,
(b) any person who receives any remuneration or to whom any remuneration accrues by reason of any services rendered by such person to or on behalf of a labour broker, and
(c) any labour broker.

It is only commission earners, professionals and consultants that are eligible to claim home-office expenses, including agents and representatives whose remuneration is normally derived mainly from commission based on sales or turnover attributable to that agent or representative.

A practical example of a commission earner is a company sales representative whose remuneration is based on the volume of the product sold. An individual whose commission earning is more than 50% of remuneration (as defined above) is also classified as a commission earner.

THE NEW EMPLOYER/EMPLOYEE SCENARIO

However, with the outbreak of the pandemic, two new scenarios unfolded, as outlined below:

- employees have been requested by their employees to work from home for the duration of the lockdown, and
- a culture of employees working from home permanently is rapidly gaining ascendency.

While the new employer/employee scenario is not accommodated in the existing provision of the tax legislation, SARS is willing to grant employees who work from home a deduction against their taxable income for home-office expenses.

EXISTING PROVISION FOR HOME-OFFICE EXPENSES, INCLUDING THE FREQUENT, REGULAR AND EXCLUSIVE REQUIREMENTS

The deductibility of expenses relating to a home office is determined by reference to a general deduction formula:

(i) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature,
(ii) expenditure actually incurred during the year of assessment on repairs of property occupied for the purpose of trade or in respect of which income is receivable,
(iii) wear-and-tear expenses (s11)(e), and
(iv) the expenses must not be domestic or private, including the rent, cost of repairs or expenses in connection with any premises not occupied for the purposes of trade.

This implies that all the above requirements must be met for a home-office expense to be deductible against taxable income.

Generally, the home-office expenditure will be the type of expense referred to in section 23(b) of the ITA, namely:

- rent of the premises,
- interest on bond (if applicable), and

- cost of repairs to the premises, and other expenses in connection with the premises.

Usually, these expenses are deductible against taxable income but are apportioned based on the percentage of floor space occupied by the taxpayer for trade purposes.

OCCUPIED AND EQUIPPED FOR TRADE PURPOSES

Another equally important requirement is that the part of the home in respect of which a claim is submitted must be occupied for purposes of a "trade", and secondly must be equipped explicitly for purposes of the trade.

It is clear from this terminology that for a part of a private home (a room in this situation) to be considered "specifically equipped" for trade purposes, that part must be fitted with the instruments, tools and equipment required to conduct that trade. Therefore, for example, taxpayers who meet clients at their homes would not be permitted a deduction under "home-office" expenses if they meet their clients in their dining or sitting rooms. It is obvious that the dining room and lounge are not used exclusively for trading purposes.

A separate office would need to be equipped and maintained. An office that requires specialised equipment, such as a mechanic's tools, an architect's drawing board or a doctor's examination room equipment, must be equipped with these items. The room utilised to conduct work from home must be regularly and exclusively used for purposes of the trade. However, a home office that is maintained and is only used occasionally, for example, once on a weekend due to the taxpayer maintaining separate business premises, is not used frequently enough to constitute "regular" use. Regarding the requirement of exclusivity, it is considered that this provision contemplates that the part used for trade may not be used for any purpose other than the taxpayer's trade. A deduction is not permitted where it is evident that the taxpayer conducts any activities of a private nature in the part used for trade, such as permitting children to use the room as a playroom.

It is also unlikely that employees living in a small two-bedroom apartment with two children can claim a portion of the apartment as a home-office because the "exclusive" requirement of the dedicated office would not have been met.

With reference to the times of the pandemic, if the taxpayer used the "private" residence for 60 days in the year, for example, during lockdown level five and/or lockdown four, then it is likely that the taxpayer did not meet all the requirements as stated above. The taxpayer can therefore not claim home-office expenses when submitting an ITR12 for the 2021 tax year.

However, the same facts may not apply for the 2022 tax year. Depending on the facts and circumstances of the individual taxpayer, the taxpayer could claim the home-office expense in 2022.

DOCUMENTATION REQUIRED

However, for these expenses to be claimed, SARS would require the following documents:

- A letter from the employer indicating that the employee works more than 50% of the time from home and does not have a physical office space at the employer's premises. The letter must indicate that the employee is expected to perform his/her duties from home. In this regard, the nature of the duties and how the duties were performed must be supplied. The taxpayer's response will be utilised to determine whether a dedicated home-office space is required to perform the official task as designated by the employer. It is given that a taxpayer who merely utilises a laptop computer to perform official work-related tasks may not require a "dedicated" office space to perform official tasks.
- The taxpayer must explain exactly where he/she performs their duties at home. Taxpayers are reminded that the area claimed as "home-office" must be used exclusively, regularly and frequently for business purposes. It cannot be an area that is also used for private purposes. A room must be specifically set aside for this purpose. SARS would require evidence that official duties were performed mainly in the "dedicated" office, being a room in an apartment, flat or house. A photo of this dedicated office space (essentially a room) must be supplied as well, and the entire room must be visible in the picture. A dedicated room will meet the exclusivity requirements as explained above.
- a list of business equipment and furniture occupying the home office must be supplied,
- a detailed calculation of the home-office expenses must be submitted.
- Should the taxpayer qualify for a deduction in respect of home-office expenses, the amount must be calculated on the following basis:

> **A** / **B** x **total costs**, where:
>
> **A** = the area in m^2 of the area specifically equipped and used regularly and exclusively for business purposes.
>
> **B** = the total area in m^2 of the residence (including any outbuildings and the area used for trade in the residence).
>
> **Total costs** = the costs incurred in the acquisition and upkeep of the property (excluding expenses of a capital nature).

The individual taxpayer is reminded that only expenses relating to the premises must be apportioned based on floor area (such as for example rent, interest on bond, rates and taxes, cleaning, etc.). Expenses that do not relate to the premises (such as wear and tear on equipment and furniture) do not need to be apportioned based on floor area. This will be discussed later in this brief.

> **"While the new employer/ employee scenario is not accommodated in the existing provision of the tax legislation, SARS is willing to grant employees who work from home a deduction against their taxable income for home-office expenses."**

CONSUMABLES

In addition to the expenses related to the premises, other typical home-office expenditures may include:

- Cell phones
- Internet / data costs
- Stationery

These expenses are collectively termed "consumables".

The following must be borne in mind:

- Many employees will work from home using online electronic tools, and consequently, incur huge data costs,
- Some employers may consider supplying their employees with a cell phone and data.
- It is also possible that many employers will be reluctant to cover the data cost because employees "save" on travelling costs.
- the fact that these communication devices are tools required to perform tasks authorised by an employee makes a compelling case for the employer to supply the above-mentioned consumables. An employee cannot perform his or her functions without having access to these "tools".

TAX IMPLICATIONS FOR EMPLOYEES OF EMPLOYER-SUPPLIED CONSUMABLES

These communication devices, if supplied by employers to employees are nil-value fringe benefits (with no tax implication for the employee) even though the employee might use these devices incidentally for private purposes. This is as per paragraph 10 (2) (bA) of the Seventh Schedule of the ITA.

Moreover, the additional benefit for the employees is that there will be zero need to declare these items in their tax return – meaning less paperwork! Some employees may not even submit tax returns anyway because their earnings are below the tax threshold: R83 100 for the 2021 tax year and R87 300 for 2022.

TAX IMPLICATIONS FOR EMPLOYERS WHO SUPPLY CONSUMABLES

Employers can claim the cost of consumables against their taxable income. Employers must have a formal company policy indicating that employees working from home will receive "consumables" to perform their official tasks.

WEAR AND TEAR: OFFICE EQUIPMENT AND FURNITURE

The SARS guide permits the taxpayer to claim the following expenses if the items below are used for work purposes and are located in the "dedicated" home-office space.

These are:

Office equipment	Years
Electronic	3
Mechanical	6
Curtains	5
Generators (portable)	5
Generators (standby)	15
Valuable paintings	5
Photocopying equipment	5
Textbooks	3
Furniture and fittings	6

The above expenses must be written off over the stipulated years and cognisance must be given to the number of months they are used in a tax year. The relevant question is what value must be used to determine, for example, furniture and fittings. If the furniture and fittings were purchased many years ago, it is likely that the market value will be very low.

If an office chair was recently purchased and an invoice is available for a SARS audit, then the expense can be claimed over six years. But what happens if the taxpayer purchases an office chair costing R80 000? SAIPA would not purchase an office chair costing R80 000 even for its board members. The point here is simple. Taxpayers must be reasonable when claiming home-office expenses.

PITFALLS WHEN CLAIMING HOME-OFFICE EXPENSES

In addition, the affected taxpayer must be mindful of capital gains tax (CGT) consequences if the primary residence is sold in the future. If the house is a primary residence as defined in the Income Tax Act, then not all the primary residence exclusion of R2 million will be available.

If home-office expenses were claimed – that is, a portion of the primary residence was used for trading purposes - then the portion of the dedicated office space will be subject to normal CGT rules. The dedicated office space will not benefit from the R2 million primary residence exclusion.

This can best be explained by the following illustrated example.

The following facts are assumed:

- Proceeds – R4 200 000
- Base cost – R2 000 000
- % used as office = 20% of the primary residence
- Individual income tax bracket – 35%

The calculations alongside compare the CGT outcome for situations where no office expense was claimed and where office expense was indeed claimed.

The difference is **R33 600**, that is, more CGT is payable after claiming the home office than when zero office expense is claimed.

The existing rules allow for the apportionment of capital allowances. A huge capital allowance may likely lead to a loss, and it is not clear whether SARS would allow an assessed loss under these circumstances.

	Normal rules (taxpayer did not claim home-office expenses)	Claimed home-office expense 20%
Proceeds	R4 200 000	R4 200 000
Less base cost	R2 000 000	R2 000 000
Capital gain	R2 200 000	R2 200 000
Less	R2 000 000	R 1 760 000 (NB did not receive full R2 million benefit – the capital gain for the home office is excluded from the R2 million primary residence exclusion)
Capital gain	R200 000	R2.2m X 20% =R440 000
Less annual expenses	R40 000	R40 000
Net capital gain	R160 000	R400 000
X 40% (inclusive rate)	R64 000	R160 000
X 35%	R22 400	R56 000

CONCLUSION

Whilst it may be evident to the taxpayer that the requirements for claiming home-office expenses have been met, SARS has the "right" to request documentation as proof. One must be mindful that the taxpayer also has rights – everybody has rights – but the burden of proof is left to the taxpayer to motivate the legitimacy of the expenses.

Disclaimer: This opinion article was contributed by an external stakeholder who does not have any affiliation with the OTO. The article does not necessarily reflect the views of the Office.

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