SUBMISSION: IMPROVEMENT REQUIRED FOR ADR PROCESS

Dear Mr Kosie Louw,

1. Introduction

1.1. The purpose of this submission is to deal with some of the practical difficulties encountered with the Alternative Dispute Resolution (“ADR”) process and to make suggested changes in the rules governing this process to improve the efficiency thereof.

1.2. At the outset it must be stated that the quality of the ADR process has already improved to some extent, following the promulgation of the Rules made under section 103 of the Tax Administration Act, 28 of 2011 (“the TAA”) (“the rules”) in January 2015. There are, however, still a number of inconsistencies that may require further attention.

2. Appointment of facilitator

2.1. There are inconsistencies around the provisions of the rules and their application in practice around the appointment of a facilitator with no insight in or opportunity for participation by taxpayers in this process.

2.2. Under Rule 16(1)(a), SARS must establish a list of facilitators of ADR proceedings who may be a SARS official. On a practical note, all facilitators of ADR proceedings have, to date, since the new rules became operative, been SARS officials. There seems to be no procedure in place for a taxpayer to have insight into the appointment process, the list of facilitators or to elect a particular facilitator. This
is becoming an issue especially because of inconsistencies between different facilitators in the manner in which they oversee ADR proceedings.

2.3. Taxpayers requesting information before the ADR proceedings regarding the identity of the facilitator, or who express an interest in choosing the facilitator, are met with some resistance. There should be no reason why a taxpayer should not, in principle, be granted the right of such participation or insight. The rules should be amended to allow for this, possibly within an agreed time frame, after which SARS should be allowed to revert to a default position in appointing a facilitator of its choice.

3. **Recommendation by facilitator**

3.1. There is currently a lack of clarity around the consequences of recommendation to be made by a facilitator, and the new rules possibly do not go far enough to address related issues.

3.2. Under rule 21(1), it is currently required that the parties agree to a recommendation at the commencement of the ADR process.

3.3. On the basis of the potentially adverse consequences of requiring a facilitator recommendation, the rules should be amended to the effect that the parties must agree to a recommendation within a reasonable period after the conclusion of the ADR proceedings. A specific time frame may be written into the rules for this.

3.4. The rules should possibly clarify what the consequences are for a cost order if a recommendation is agreed on and if no recommendation is agreed on, having due regard to the possibility that the recommendation may be in favour of a party on one matter but unfavourable on another.

3.5. The rules should also clarify the position in relation to a partial recommendation agreed on, for example, a request for a recommendation only on specific issues in dispute.

4. **Role assumed by facilitator**

4.1. There is still a significant measure of inconsistency in terms of the role assumed by a facilitator, which may impact adversely on the outcome of an ADR process.

4.2. In our experience, some facilitators assume an active role and participate by posing specific questions at both SARS and the taxpayer.
4.3. While this is absolutely welcomed, the rules should ideally be extended to the effect that the facilitator’s conduct in the ADR process should set out in more detail what is acceptable and unacceptable practice to ensure a higher measure of consistency.

5. **Temporary impasse**

5.1. There is no clarity in the rules on how one should deal with a temporary impasse which may potentially be overcome by the parties submitting supplementary relevant material. The required time frames for both parties to be able to agree on the conclusion of the ADR process are not governed by the rules. The time frame may be unduly extended due to the need for referral to an internal SARS committee, and the role of the committee in the process is not entirely clear.

5.2. The rules should be amended to provide clarity in the circumstances outlined above and should provide for time frames to conclude on matters referred to the ADR process.

6. **Role of Committees**

6.1. The role of committees in their decision making role in the ADR process are not dealt with in the rules.

6.2. It would appear that SARS officials do not participate in the ADR process with any particular mandate to conclude on any issues in dispute and that the decision on any issue is ultimately taken by a committee, subsequent to the conclusion of the ADR process.

6.3. While the role of the committee is perceived to contribute to a more consistent outcome, this may be considered procedurally unjust to the taxpayer, who is then not given the opportunity to make representations to the final decision-makers. The question that arises is why these ultimate decision makers are then not rather the representatives of SARS in the ADR process itself.

6.4. In the interest of transparency, clarity on the role of the committee should be addressed in the rules.

6.5. Clarity should furthermore also be given on the time frame of the involvement of and on the conclusion by the committee in the ADR process.

7. **Agreement versus settlement agreement**
7.1. In practice the ADR process does not as a rule observe the requirements in terms of rules 23 and 24, which must be read together, to first seek an agreement (in principle) and then a settlement agreement (not in principle). The endeavour to reach agreement in terms of rule 23 is more often than not simply ignored with SARS officials in the ADR process often insisting on proceeding with settlement discussions. This is in direct contravention of rule 23 and 24.

7.2. The SARS officials often seek to ignore the merits of a taxpayer’s grounds regarding the issues in dispute and this lack of interest in considering the underlying merits is considered procedurally unfair and directly contributes to numerous ADR processes being derailed and ending inconclusively. This is unfortunate, particularly in view thereof that the ADR process is aimed at resolving a tax dispute in an efficient manner, without having to resort to a more costly litigation process.

7.3. It is suggested that taxpayer remedies and procedural steps should be introduced in the ADR process where a SARS official is considered obstructive in considering merits as contemplated in rule 23 read with rule 24.

7.4. There furthermore remains misconceptions about the manner of implementation of a settlement agreement, which should technically not require to be implemented in accordance with any specific provision in any tax Act concerned.

7.5. This should be adequately addressed through an amendment to the rules and possibly an amendment to the SARS internal process to enable a settlement amount to be imposed on a taxpayer in terms of an assessment without having to reflect this as an adjustment or liability under any other substantive provision in a tax Act.

8. Specific expertise required

8.1. On the basis of the level of complexity of the issues in dispute, a taxpayer may require that specific expertise is available as part of the SARS delegation participating in the ADR process. This is not limited to a particularly industry, but typically by way of example would include issues around R&D disputes, Section 24C disputes and mining tax issues.

8.2. Requests for the presence of such expertise are not dealt with on a satisfactory basis, and it is considered necessary that the rules are extended to specifically enable the calling of expertise, with a focus on minimum qualifications, specific experience relating to the matter in dispute and possibly a subsequent conclusion or
recommendation by such person which must then be incorporated in the report to the committee, and made available to the taxpayer.

9. **Conclusion**

9.1. It is therefore recommended that the rules should be amended to specifically address the above mentioned issues.

9.2. It is further recommended that the SARS internal processes are amended to give proper effect to a settlement agreement concluded as a consequence of the conclusion of an ADR process without having to reflect the outcome in terms of other substantive provisions of any tax Act.

Yours faithfully

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