Call for comment: Alternative Dispute Resolution Process

We refer to the recent call for comment regarding the Alternative Dispute Resolution Process ("ADR process") from the South African Revenue Service ("SARS"). Set out below please find the SAICA National Tax Committee’s comments. We welcome the opportunity to comment.

1. General comment

1.1 It is generally accepted that the purpose of the ADR process is to eliminate the need for matters that can be resolved outside of the formal litigation processes which are time consuming and expensive.

1.2 However, the down-side of the ADR process is that, fewer matters are resolved by way of the formal litigation process, the benefits of having matters interpreted by the Courts are lost.

1.3 As regards individual taxpayers, it is accepted that most matters could probably be resolved by way of the ADR process and should be resolved by way of the ADR process. That said, the majority of individual taxpayers are neither familiar with nor properly understand the procedures that need to be followed. Consideration should be given for a simplified document/procedure that can be followed by individuals – especially those who mainly earn remuneration / pensions / annuities / interest.

2. Specific comments

2.1 Involvement of legal interpretation department

2.1.1 It is not clear from the ADR process at which stage the SARS legal interpretation department becomes involved with disputes, i.e. at the time taxpayer objects to an assessment or only once an appeal has been lodged. There have been instances, admitted
this does not happen often, where taxpayers have lodged appeals, arrived at the ADR hearing meeting only to be informed after presenting their case that SARS is in agreement with the arguments raised by the taxpayer and concedes the matter. It is proposed that in such instances, the taxpayer should be notified that SARS intends to concede that matter in advance. Equally, a similar procedure should be in place should the taxpayer decide not to pursue the matter any further.

2.1.2 It is noted that clause 23 Part A of the Rules promulgated under section 107A of the Income Tax Act, No 58 of 1962 (“the Rules”) makes provision for either the taxpayer to withdraw his / her appeal or SARS to concede the appeal at any time before a date for a hearing by either the Board or the Court has been set in terms of clause 17 of the Rules. This rule should also apply to ADR hearings.

2.2 Facilitators

2.2.1 In terms of the ADR process, SARS must appoint a facilitator who has to be an appropriately qualified officer of SARS. The facilitator's objective is to seek a fair, equitable and legal resolution of the dispute between the taxpayer and SARS.

2.2.2 There is a perception in the marketplace that taxpayers can almost predict the outcome of a matter when the identity of the appointed facilitator is known, i.e. some facilitators stand accused of having acquired a reputation rightly or wrongly for not seeking a fair, equitable and legal resolution of disputes.

2.3 Agreement or Settlement: Issue of assessment to give effect

2.3.1 The taxpayer and SARS have to try to reach agreement on the interpretation and application of the relevant tax law. In the event that they fail to reach agreement to resolve the matter in terms of the ordinary provisions of the applicable Act, they may attempt to settle the matter under the settlement provisions. SARS must issue assessments which give effect to the agreement or settlement reached within a period of 60 days from the date of conclusion of the agreement based on the ordinary provisions contained in the relevant Act, or the settlement.

2.3.2 There is however, no time limitation which applies in respect of approval of settlement agreements. As such, a number of disputes are as yet not finalised as the settlement agreements have yet to be confirmed by SARS. We understand that settlement agreements in excess of certain pre-determined amounts need to be approved / reviewed by the Commissioner himself before these agreements can be finalised. In certain instances, consideration should be given to setting time limits for approving settlement agreements.

2.4 Obligatory attendance of representative taxpayer

2.4.1 Rule 7(5)(b)(ii) of the Rules provides that the representative taxpayer “must be personally present unless the facilitator, in exceptional circumstances, allows the taxpayer or his or her representative taxpayer to be represented in their absence by a representative of their choice”. We understand that this requirement has been introduced as the representative must be in a position to bind the taxpayer to any agreement or settlement reached.

2.4.2 It is noted that the representative taxpayer in the case of a company, its Public Officer is usually a director and often is not that close to or that familiar with the details of the specific case. Practically, this means that, where the facilitator is of the opinion that exceptional circumstances do not apply and the representative taxpayer is obliged to attend the
proceedings, the representative taxpayer is not in a position to properly respond to any issues raised by SARS during the proceedings and therefore would have to invite another person who is familiar with the details of the case usually the tax manager to attend the proceedings as well. If one takes into consideration the fact that the representative taxpayer often is under considerable time pressure as regards their normal duties, these representative taxpayers often can ill-afford to be tied up in proceedings where they are not able to make a constructive contribution.

2.4.3 Further, the various Acts do not prescribe the level of seniority a representative taxpayer has to be in order to qualify as a representative taxpayer or Public Officer. Where the representative taxpayer is not a director or a member of an executive committee, the representative taxpayer may in any event not be able to bind the taxpayer to any agreement or settlement without first presenting the proposed agreement or settlement to the board or a director of the taxpayer who is in a position to bind the taxpayer to any agreement or settlement. Equally, even if the representative taxpayer is a director, the internal approval levels of the taxpayer may dictate that agreements or settlements exceeding a pre-determined value have to be approved by the board – a situation which does not differ much from SARS own internal authorisation procedures.

Please do not hesitate to contact me should you wish to discuss the above.

Yours faithfully

M Hassan CA(SA)

PROJECT DIRECTOR: TAX

The South African Institute of Chartered Accountants