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New Tax Dispute Resolution Rules: Good news for many taxpayers

On Friday 10 March 2023, Minister of Finance approved new dispute resolution rules under section 103 of the Tax Administration Act, 2011 ("Rulese"). The new Rules repeal the Rules promulgated on 11 July 2014 and comes into effect immediately.

These Rules prescribe the procedures in lodging objections and appeals against assessment or decision, procedures for alternative dispute resolution, conduct and hearing of appeals, application on notice before tax court and transitional rules.

The good news
The big change that came about with the new Rules is that taxpayers are now permitted 80 business days from the date of assessment or decision to lodge an objection, as opposed to the 30 business days period under the old Rules. Taxpayers have, in the past, raised concerns that the period permitted to deliver objection is not sufficient, which makes it impossible for the taxpayers to formulate their objection considering the length of time South African Revenue Service ("SARS") enjoys to complete an audit.

The new Rules also came with transitional measures and provide measures for specific requests in respect of procedural matters taken or instituted under the old Rules but not yet completed before the new Rules came into force.

How does the transition of new Rules work

- Where the assessment or decision was issued or made before 10 March 2023 and 30 business days from that date expired before 10 March 2023, then the taxpayer is trapped by the old Rules and must request for condonation under Rule 68 (1) and (3) of the new Rules.

- Where the assessment or decision was issued or made before 10 March 2023 and 30 business days from that date expire after 10 March 2013, then the taxpayer has an additional 50 business days to lodge the objection without having to request for condonation.
- Where an assessment or decision was issued or made after 10 March 2023, the taxpayer has 80 business days from the date of the assessment or decision to lodge an objection.

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While the new Rules presumably provide taxpayers with sufficient time to formulate their grounds of objection, we caution that this extension by a further 50 business days is not a ticket for taxpayers to be reactive or delay in dealing with SARS dispute. A good rule of thumb is that taxpayers should deal with all correspondence received from SARS immediately.

The step to extend the period of filing the objection by a further 50 business days appears to be aligned to SARS' strategic objectives, which seeks to provide clarity and certainty, as well as make it easy and seamless for taxpayers and traders to comply with their obligations.

The new Rules were published in the Government Gazette shortly before 16:00 on Friday, 10 March 2023.

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Customs & Excise and VAT requirements for goods imported for consumption in South Africa.

Customs and Excise legislation requires that in order to import any goods into South Africa one has to register as "Importer of Record".

There are two categories of import registration in this regard, entity with physical presents in South Africa and an entity in foreign country intending to import and trade in the country. The foreign importer into South Africa must nominate a local registered agent with customs.

Such local registered agent will act as principal for all activities and interactions with customs on behalf of the principal, however certain requirements are necessary before appointing a local registered agent. A registered agent who is a person (individual or juristic persons) must also meet certain Customs and Excise legislation before acting on behalf of a foreign principal.

For VAT purposes, the VAT Act imposes VAT at the standard rate of 15% on the importation of goods by any person. Such VAT is payable by such person when the goods are cleared for home consumption in terms of the Customs and Excise Act. Where a local registered vendor appoints an agent for the purposes of importing the goods into South Africa, the import of such goods would be deemed to be made by the vendor in its principal capacity and not an agent.

Equally, the principal, i.e. the vendor, will be entitled to recover the VAT paid as input tax to the extent that such supplies are consumed, used or utilised in the course of making taxable supplies.

The agent will be required to provide the principal with certain documentation within 21 days to enable to vendor to recover the VAT paid as input tax.

In certain instances, a non-resident who is not registered for VAT in South Africa may appoint an agent for the purposes of importing the goods in South Africa. In such situation, the VAT Act deems the agent to be the principal in this instance in respect of the goods imported, subject to certain requirements.

Equally, the agent may the recover the VAT paid as input tax to the extent that such supplies are consumed, used or utilised in the course of making taxable supplies.

Effectively, the non-resident would not be required to account for VAT on the goods imported.

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The Effect of the "Associated Enterprise" Amendment on South African Transfer Pricing Documentation

The effect is that the amendment has broadened the scope of section 31 of the Act as it requires the taxpayer to also consider transactions entered into with cross-border companies that have significant influence on the taxpayers pricing. Taxpayers should also ensure that the arm's principle is considered when setting the price for transactions conducted with associated enterprises.

In preparing the transfer pricing documentation for years of assessment commencing on or after 1 January 2023, taxpayers must also document transactions entered into with any company that has significant influence on the pricing of the transaction through its participates in management, control or capital.

Contact the SNG Grant Thornton team for a detailed analysis of your associated enterprises transactions.
The South African transfer pricing regulations are outlined in section 31 of the Income Tax Act No. 58 of 1962 ("the Act"). Section 31(1) of the Act defines transactions that are in the ambit of section 31 in the "affected transaction" definition which includes any transaction between a South African tax resident, permanent establishment or a controlled foreign company and a non-resident that are connected.

Therefore, section 31(1) will only be applicable if the transacting parties are "connected persons" in terms of section 1 of the Act. However, with effect from years of assessment commencing on or after 1 January 2023, the "affected transaction" definition in section 31(1) was amended to include "associated enterprises". Therefore, section 31(1) will now apply to transacting parties are either "connected persons" or "associated enterprise".
"Associated enterprise" is not defined in the Act, however, SARS released a draft interpretation note for commentary on the 13th of January 2023 on the definition of "associated enterprise". The draft interpretation note provides guidance on the interpretation and application of the definition of an "associated enterprise" which refers to the definition as contemplated in Article 9 of the OECD Model Tax Convention ('MTC').
Article 9 of the OECD MTC defines "associated enterprise" as:
• "An enterprise of a contracting state participates directly or indirectly in the management, control, or capital of an enterprise of the other contracting state, or
• The same persons participate directly or indirectly in the management, control, or capital of an enterprise of a contracting state and an enterprise of the other contracting state"

Therefore, in addition to the capital requirement, companies that are either directly or indirectly controlled or managed or are under common control or management with a non-resident company are considered to be associated enterprises. The draft interpretation note further states that "the outcome of such participation in management must result in or have the consequence of controlling, effecting or influencing the terms or conditions, which includes pricing, any transaction [...]" in order for the company to be considered an "associated enterprise".

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In relation to "control" the draft IN indicates that control is the "…ability of a person, and the exercise of that ability, to directly or indirectly materially influence the terms or conditions of the transaction [...], especially the pricing.".

Article 9 does not indicate the exact percentage that the contracting state must hold in the management, control, or capital of the enterprise of the other contracting state.
In the absence of guidance in the draft note, we presume that being a majority participant in the management, control, or capital will result in high risk of the being classified as an associated enterprise where there is significant influence on the pricing of transactions

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Employment Tax Incentive (ETI) vs s12H learnership allowance.

The ETI is an incentive aimed at encouraging employers to hire young and less experienced work seekers and it came into effect on 1 January 2014. The ETI effectively reduces the overall employer cost of hiring young people by allowing the employer to reduce the amount of Pay-As-You-Earn (PAYE) liability while leaving the wage received by the employee unaffected. The employer can claim the incentive for up to a period of 24 qualifying months for all qualifying employees. However, the employer must be a qualifying employer and employ qualifying employees in order to claim the ETI.

An employer is a qualified employer if the employer is:

- registered for PAYE and is tax compliant;
- is not the Government or a municipal entity; and
- has not been disqualified by the Minister of Finance.

An individual is a qualifying employee if he/she:

- has a valid South African ID or an asylum seeker permit ID issued in terms of the Refugees Act,
- Is 18 to 29 years of age,
- Is not a domestic worker,
- Is not a connected person to the employer,
- Was employed by the employer or an associated person to the employer, after 1 October 2013 and,
- is paid the minimum wage or where a minimum wage is not applicable, a remuneration of at least R2 000 per month but not more than R 6 500. (Where an employee works less than 160 hours per month, excluding overtime, the remuneration should be grossed up to 160 hours to see whether the employee would qualify).

The table below sets out the ETI Calculation Formulae based on the salary paid to each qualifying employee:

	(New) Formula Effective from 1 March 2022		(Old) formular applicable up to 28 February 2022	
Monthly Remuneration	**Formula First 12 Months**	**Formula Second 12 Months**	**Formula First 12 Months**	**Formula Second 12 Months**
R0 to R1 999,99	75% of Monthly Remuneration	37,5% of Monthly remuneration	50% of Monthly Remuneration	25,0% of Monthly Remuneration
R2 000 to R4 499,99	R1 500,00	R750	R1 000,00	R500
R4 500 to R6 499,99	R1 500 - (75% x (Monthly remuneration - R4 500)	R750 - (37,5% x (Monthly remuneration - R4 500)	R1 000 - (50% x (Monthly remuneration - R 4 500)	R500 - (25% x (Monthly remuneration - R4 500)

In addition to any other t relax deductions allowable in terms of the Income Tax Act, employers are allowed to claim learnership allowance in terms of section 12H for qualifying learnership agreements. The learnership allowance is intended to be an incentive for employers to train employees in a regulated environment to encourage skills development and job creation. Training contracts qualifying for these deductions are learnership agreements and apprenticeships registered with a SETA.

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The employer can claim an "annual allowance" of R40 000 (R60 000 for disability) per year, for NQF level 1-6 and R20 000 (R50 000 for disability) per year, for NQF level 7-10. The allowance will be apportioned if the Learnership Agreement is not for the full year.

The employer can also claim a "completion allowance" of R40 000 (R60,000 for disability) for NQF level 1-6 and R20 000 (R50 000 for disability) for NQF level 7-10, in addition to the annual allowance. A completion allowance is a once off allowance claimed in the year of assessment in which the learner successfully completes the registered Learnership Agreement.

If the Learnership is for more than 24 months, the completion allowance is multiplied by the number of consecutive 12-month periods within the duration of that learnership.

These government incentives are both aimed at creating jobs and to encourage skills development for young job seekers. The ETI reduces the monthly PAYE liability whereas the learnership allowance is a tax deduction from the taxable income of the employer.

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