Exchange control requirements for payment of imports

When an entity's business activities involve the importation of goods into South Africa (SA), it is advisable that the entity approach its Authorised Dealer (AD).

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Authorised Dealers

Most commercial banks in SA have been appointed by the South African Reserve Bank (SARB) to act as ADs to assist the Financial Surveillance Department (FinSurv) of the SARB in the administration of the Exchange Control Regulations through the Currency and Exchanges Manual for Authorised Dealers (manual).

The manual contains the permissions and conditions applicable to transactions in foreign exchange that may be undertaken by ADs and/or on behalf of their clients.

The entity will need to explain to the AD what goods are to be imported to enable the AD to advise whether an import permit, issued by International Trade Administration Commission (ITAC) will be required or not.

Documentary evidence

Documents required by the AD to make payment of imports in foreign currency include:

- commercial invoices issued by the supplier;
- transport documentation of the goods to SA;
- Freight Forwarders Certificate of Receipt (FCR) or Freight Forwarders Certificate of Transport (FCT);
- SARS customs declaration documents (in some instances, Tariff Determination number).

Foreign currency for the payment of the imported goods may cover the following:

- the actual price of imported goods;
- bona fide freight charges;
- insurance cover;
- buying commissions and retainer fees due to agents, provided that the rate of commission or fee is normal in the particular trade concerned;
- other incidental charges incurred in the purchase and shipment of the goods and/or cancellation of orders, but not included in the actual price; and/or
- interest payments of up to the applicable base rate plus 3% for credit extended shorter than one year.

Advance payments for goods to be imported may also be made including cost of capital goods not exceeding a total value of R10 million. Payment for the importation of capital goods in excess of R10 million may only be provided up to 50% of the cost of the goods to be imported.

However, importers must confirm to their ADs that the order for the capital goods would otherwise be refused if the advance payment is not made and that such payment is normal in the trade concerned.

Where the credit terms extended to the local importer exceed 12 months, prior written approval of the FinSurv is required. Such extended credit terms would normally relate to the importation of capital goods.

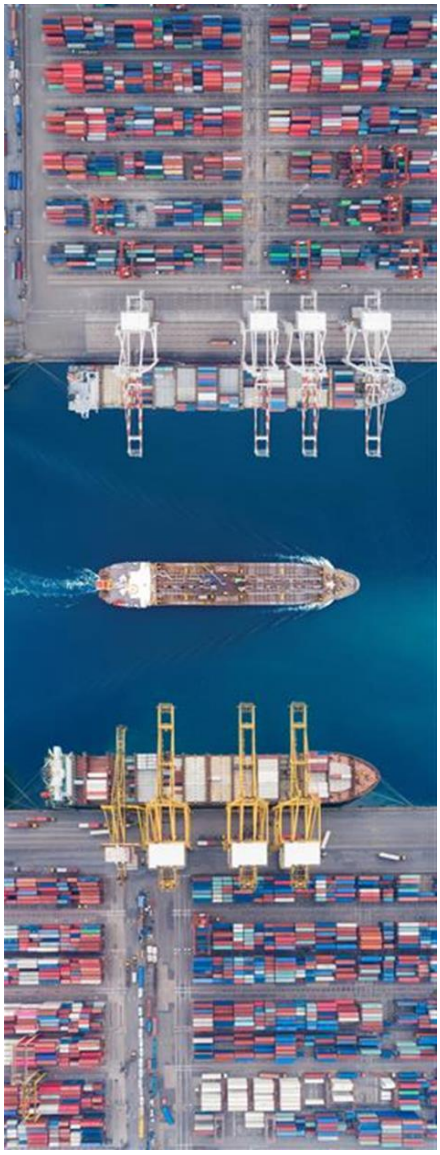
However, payments in respect of imports where the required import documents are older than 12 months may be effected, provided that no interest has been charged by the foreign supplier and the documents listed above are supplied to the AD with relevant explanations for the delay.

This is often the case where goods are imported by a South African subsidiary of a multinational entity (MNE). The South African subsidiary will purchase the goods offshore from a related entity and import such goods into SA but not immediately pay for them.

In some instances, the payment may be outstanding for over a year or more. Such outstanding amounts will be recorded as payables in the South African subsidiary's financials under short-term debts with no interest charged.

Should the South African subsidiary decide to settle those payables, it will have to obtain prior written approval from FinSurv via the AD.

Should the required documents not be available for each import, the payment will not be approved. In that case, the resultant tax consequences for the South African entity would need to be considering in dealing with the payables (short-term debt) that cannot be settled with their related party. Therefore, it is crucial for importers, in particular, local subsidiaries of MNEs, to maintain good records for imported goods.



SARS expedited compromise campaign to tackle long-standing tax debt

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The South African Revenue Service (SARS) recently engaged with Recognised Controlling Bodies (RCBs), to address the significant tax debt owed by their clients, which according to SARS, now exceeds R96 billion. This collaborative session highlighted the importance of partnerships between SARS, RCBs, and tax practitioners in promoting voluntary compliance and reducing outstanding liabilities.

Following the session, SARS and the RCBs agreed to launch an expedited tax debt compromise campaign. The campaign is part of a general alignment and commitment between SARS and the RCBs to find ways to recover the long-standing tax debt rapidly within the provisions of the Tax Administration Act (TAA).

Key highlights

- SARS is introducing a streamlined process to help taxpayers, particularly those linked to tax practitioners, settle long-standing debts.
- The campaign targets debts older than 12 months that are not under dispute, not linked to insolvent or deceased estates, and not subject to fraud or ongoing business rescue.
- The formal application process runs from 13 October to 31 December 2025. Taxpayers can apply for full settlement or instalment plans of up to six months.
- SARS has dedicated resources to resolve qualifying applications within four weeks, aiming to make compliance easier and more accessible.
- After 31 December 2025, SARS will intensify enforcement actions, including civil judgments and writs of execution, to address continued non-compliance.

It is important to note that during this time wherein the campaign is ongoing, the normal debt-compromise process remains open to all taxpayers.

Eligibility and criteria:

- Taxpayers must be clients of registered tax practitioners.
- The tax debt must be at least 12 months old at the time of lodging the application.
- The tax debt must not be in dispute (unless the taxpayer is willing to withdraw the dispute).
- Entities subject to specific legal processes (such as liquidations, estates, and business rescue cases), companies that have been deregistered, cases subject to criminal investigation and audit, as well as cases within the write-off process are not eligible.
- No ongoing suspension or previous compromise/business rescue write-off.
- Tax affairs must be up to date.

Next steps

RCBs and tax practitioners have been urged by SARS to inform their members and/or clients about the campaign, encourage eligible clients to participate, and coordinate submissions to SARS.

This campaign underscores SARS' commitment to supporting taxpayers in meeting their obligations while taking decisive action to recover outstanding debts.

The approval of debt compromise under the campaign is not automatic, it requires authorisation by a senior SARS official and follows strict governance.

Looming prescription risk during tax disputes

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It is very common during a dispute with the South African Revenue Service (SARS) over an original, estimated, additional or revised assessment SARS issued for income tax or value-added tax (VAT) or other taxes for a particular tax year/s, for example 2017 and 2018, that the issue in dispute in that assessment/s may have ripple effects on the following/future tax year/s, i.e. 2019 and 2020, that were not in dispute but were anticipated and in some instances, not anticipated.

When preparing the notice of objection to the assessment/s, taxpayers and their advisors must always be weary of the looming danger of prescription in the following or future tax years that are not in dispute but may be affected directly or indirectly by the outcome of the dispute that is about to be initiated on the filing of the objection.

This looming danger applies equally to SARS and the taxpayer as both may be affected by prescription, resulting from raising additional/revised assessments or objecting to those assessments.

These ripple effects may include:

- The reduction in assessed losses carried forward for the following years of assessment, i.e. 2019 and 2020, due to the disallowance of expenses in the assessments issued for 2017 and 2018 years of assessment. If that is the case, it may result in the taxpayer having to adjust down the assessed losses utilised for 2019 and 2020 which may result in more tax payable in respect of those tax years.

- Allowance of expenses where the expenses were previously disallowed in the original assessment. This may mean that the assessed losses may increase, resulting in less tax payable by the taxpayer in the tax years in dispute, i.e. 2017 and 2018 and in the following tax years not in dispute, i.e. 2019 and 2020.

- Where the dispute is settled, the settlement with SARS will only relate to the tax years in dispute, that is 2017 and 2018 but the following tax years not in dispute may also need to be adjusted because of settlement.

- Depending on the outcome or anticipated outcome of the dispute in respect of the tax years in dispute, the tax filings for the following tax years may nevertheless need to be reconsidered by the taxpayer to properly cover the risks identified or legal interpretation adopted and applied for the tax years in dispute.

Depending on the complexity of the issues in dispute, the period potentially affected by those issues and the amounts involved, the ripple effects may extend to numerous future tax years and involve complex adjustment to those tax years.

By not monitoring this risk, taxpayers risk paying taxes not legally due to the fiscus and SARS risk losing tax revenues that are legally due.

It is important to always remember that prescription continue to run for the years not in dispute. In most instances, prescription will run from the date of the original assessment unless an additional or revised assessment is subsequently issued.

In the courts

The I-CAT International Consulting case[1], highlights the risks where prescription was not adequately mitigated. In this case, I-CAT claimed a deduction of expenses in the amount of R17 million in the 2014 year of assessment.

In July 2015, SARS denied the deduction when it issued an additional assessment for the 2014 tax year. SARS and the taxpayer went through the dispute resolution process from September 2015 until the dispute was resolved when a settlement agreement was signed in October 2019. It was acknowledged in the settlement agreement that the expenses of R7 million were incurred in 2014 and the balance of R10.1

[1] I-Cat International Consulting (Pty) Ltd v Commissioner for the South African Revenue Service (Case no 41667/2021) [2023] ZAGPPHC 268 (24 April 2023)

million were incurred in 2015 which fell outside of the issues in dispute for the 2014 tax year, but that I-CAT may endeavour to address such issues in terms of section 93 of the Tax Administration Act (TAA).

In December 2019, I-CAT submitted a request to SARS for a reduced assessment in terms of Section 93 of the TAA in respect of its 2015 tax assessment claiming the R10.1 million deduction (Section 93 request). The original assessment in respect of the 2015 year of assessment was issued on 26 February 2016 and had prescribed on 25 February 2019, three years after the date of the original 2015 assessment was issued and while the dispute in respect of the 2014 tax year was ongoing. SARS declined the request as it was of the opinion that the 2015 assessment has become prescribed in terms of Section 99 of the TAA.

I-CAT launched a review application in the High Court for the review of SARS' decision declining the section 93 request. The High Court came to its aid and held that it is not a strange occurrence that parties agree to include something in a settlement that is only indirectly linked to the issues. That it cannot merely ignore the relevant provisions of the settlement hence it needs to attach an interpretation to those provisions. That at the time the settlement was entered into between the parties, SARS knew that the balance of the expense amount was incurred in 2015. SARS knew that I-CAT's right to apply for a reduce assessment in respect of this balance in terms of Section 93 of the TAA had already prescribed. In the premises SARS knew that I-CAT would no longer possess any right to approach it. Notwithstanding, SARS agreed to include such a clause in their settlement agreement full well knowing that such provision served no purpose, was superfluous and insignificant.

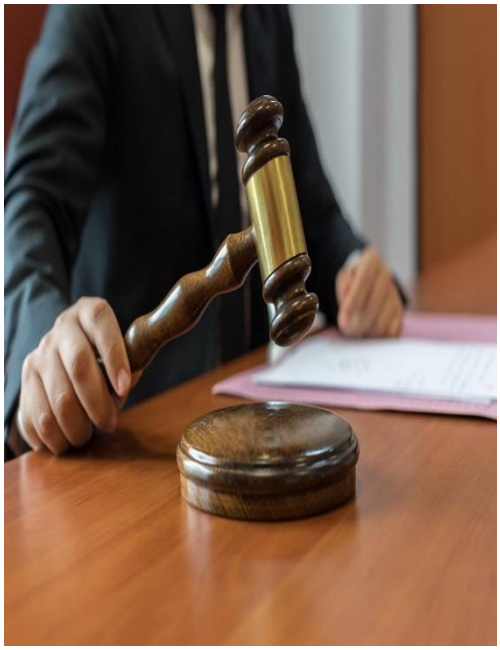
Court held that the parties did not include the clause in their settlement agreement in error or to serve no purpose. It was part and parcel of their resolution of the dispute which they dealt with under chapter 9 of the TAA. This would, however, only be possible if the three-year prescription period as provided for in section 99(1) of the TAA was not applicable.

In view thereof, the Court held that it is necessary to give effect to the resolution of the dispute under chapter 9 as contained in the settlement agreement hence the three-year prescription period as provided in section 99(1) of the TAA cannot not apply. In addition, that the Court's interpretation of the relevant clause provides a sensible and business-like meaning unlike SARS'.

Key takeaways

In hindsight, it may have been prudent for I-CAT to have considered objecting to the 2015 original assessment at any time prior to October 2018 when it finalised and filed its Rule 31 statement (I-CAT's grounds of appeal) in the Tax Court. At that time, I assume that I-CAT was well aware of SARS' case, and it was clear that R10.1 million was only paid and incurred in 2015.

However, I cannot confirm these facts as I have not perused the pleadings. The crucial point is that I-CAT should have, in my opinion, have taken steps to mitigate the prescription for the 2015 tax year. Reliance on a clause in a settlement agreement and embarking on a review application based on such a clause in the Courts is potentially risky, time consuming and expensive.



Virgin Mobile v SARS: The tax tug-of-war on compliance with timing periods

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The Supreme Court of Appeal (SCA) delivered a decisive judgment in favour of the Commissioner for the South African Revenue Service (the Commissioner/ SARS) against Virgin Mobile South Africa (Virgin Mobile).

The judgment offers a much-needed decision on the interpretation of the timing rules in the Tax Administration Act, No. 28 of 2011 (TAA).

The importance of this judgment cannot be under-estimated as it affects how and when SARS can be penalised for non-compliance with the time periods in the TAA.

Where it all began

In the case, SARS issued additional tax assessments (the assessments) against Virgin Mobile for the 2014, 2015, and 2016 years of assessment. Virgin Mobile appealed the assessments in May 2019. Thereafter required to file a statement of grounds opposing the appeal within 45 days, as per Rule 31 (the Rule 31 statement) of the rules promulgated under section 103 of the TAA (the rules).

SARS failed to do so, prompting Virgin Mobile to send numerous reminders to SARS requesting SARS to remedy the non-compliance. Later, on the 13th of October 2020, Virgin Mobile filed a notice under Rule 56(1)(a) of the rules (the notice) for SARS to remedy the default within 15 days.

On 20 October 2020, SARS duly filed the Rule 31 statement within the 15-day period afforded but did not apply for condonation for the late filing, leading Virgin Mobile to apply for default judgment on 30 November 2020.

SARS filed a notice in terms of Rule 30 of the Rules, read with Rule 42, requesting Virgin Mobile to withdraw the default judgment application as SARS was of the view that it had complied with the notice, thereby curing its earlier default and non-compliance. SARS held that should Virgin Mobile fail to withdraw the default judgment application, it would approach the court with an application in terms of Rule 30 of the Rules to set it aside as an irregular step. Virgin Mobile did not withdraw its application as it argued that SARS, along with its Rule 31 statement, should have also applied for condonation for the late filing of its Rule 31 statement which it had not done so, hence the default judgment application.

This then prompted SARS to launch the Rule 30 application in the tax court, which was dismissed with costs.

SARS, thereafter, appealed this decision in the high court, which also dismissed the appeal with costs. In the appeal, the high court reasoned that the rules governing tax dispute resolution must be interpreted in the context of accountability, fairness, and procedural compliance. Rule 31 imposes a mandatory obligation on SARS to file the statement within the prescribed period. The high court emphasised that the procedural rules are designed to ensure fair dispute resolution and accountability, and SARS' failure to apply for condonation undermined these principles. The high court rejected the argument that filing within the 15-day period after a Rule 56(1)(a) notice could remedy the default without condonation, as it would render the provisions of Rule 4 and Rule 52 of the rules redundant and diminish accountability.

SARS wasn't ready to throw in the towel though - it approached the SCA for leave to appeal, which was granted, and the matter was heard therein.

Here, the important question left for the SCA to decide was what the proper interpretation of Rule 56(1) of the rules is. SARS argued that by filing the Rule 31 statement within the 15-day period after receiving the notice, it had remedied its default. Therefore, Virgin Mobile's application for default judgment was an irregular proceeding. SARS contended that it was not required to apply for condonation for the late filing once it had remedied the default within the specified period. SARS further argued that Rule 56(1)(a) of the rules allowed it to remedy its default by filing the statement within the specified 15-day period without needing to apply for condonation.

On the other hand, Virgin Mobile argued that SARS' default included not only the failure to file the statement on time but also the failure to apply for condonation for the late filing. Virgin Mobile maintained that without condonation, the Rule 31 statement was invalid, and thus, it was entitled to apply for default judgment. Virgin Mobile argued that SARS' failure to file the statement within the original 45-day period constituted a default that required condonation to be remedied. Virgin Mobile contended that SARS needed to apply for condonation under Rule 52 of the rules for the late filing of the Rule 31 statement.

In considering both parties' arguments, the SCA opted for a reading of the provision which favoured a more coercive cooperation over punitive action. The SCA held that the purpose of the notice was fulfilled when SARS complied by filing its Rule 31 statement, which in effect meant that there was no need for a condonation application and that, if a party fails to comply with either rules 31, 32 or 33 of the rules, it may voluntarily approach the tax court with a condonation application and request a further period within which it may deliver the statement. However, Rule 56(1) of the rules, on the other hand, is coercive in that once the innocent party applies this rule, it does so to somewhat force the defaulting party to comply with the rules, failing which a final order will be made against it.

The SCA went on to state that Rule 56(1) of the rules serves the purpose of a compliance notice and is a procedural mechanism which assists an innocent party to advance the appeal, either by ensuring compliance or by securing a default judgment. Therefore, Rule 56(1) of the rules was not intended to serve as a punitive action or trump card to be used by the innocent party to punish the defaulting party.

The underlying objective of the notice is aimed at facilitating finality of the dispute by coercing compliance. Once compliance has been achieved, it will have served its purpose. It is for this reason that, after compliance with the notice, there is no need for the defaulting party to apply for condonation. Thus, SARS succeeded as the SCA deemed the default judgment application unnecessary and upheld SARS' appeal with the costs.

Key takeaways for taxpayers

For taxpayers, this judgment may mean that SARS can delay or not comply with responding to an objection or appeal or filing its Rule 31 statement or any time periods in Chapter 9 (Dispute Resolution) of the TAA and simply wait for the taxpayer to file its Rule 56(1) notice providing it with 15 days to remedy its non-compliance or default. SARS will only then have to remedy its default within the 15 days afforded without any explanation to the taxpayer, but more importantly to the Court, why it failed to comply with the legislated timeline(s). SARS would have obtained an extension without agreeing with the taxpayer or receiving condonation from the Court. This, I suspect would alleviate SARS' pressure in complying with timelines but may have unintended negative consequences for SARS and taxpayers in that it may affect the speedy resolution of tax disputes, delay certainty for taxpayers, and dent SARS' reputation as an efficient tax revenue service.

Due to the importance and wide implication of the issue in dispute, Virgin Mobile's application for leave to appeal the SCA judgment to the Constitutional Court of South Africa is welcome.

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