Observatory for the Protection of Taxpayers' Rights

Below you will find a questionnaire filled in by or with the contribution of the National Reporter of South Africa, Prof. Jennifer Roeleveld, a representative from the Academia.

This questionnaire comprises the National Reporter assessment on the level of compliance of the minimum standards and best practices on the practical protection of taxpayers’ rights identified by Prof. Dr. Pistone and Prof. Dr. Philip Baker at the 2015 IFA Congress on “The Practical Protection of Taxpayers’ Rights”. This report was filled in considering the following parameters:

1. It contains information on those issues in which there were movements towards or away from the level of compliance of the relevant standard/best practice in South Africa between 2015 and 2017.

2. It is indicated, by the use of a checkmark (☑) whether there were movements towards or away from of the level of compliance of the relevant standard/best practice in South Africa between 2015 and 2017.

It contains a summarized account on facts (legislation enacted, administrative rulings, circulars, case law, tax administration practices) that serves as grounds for each particular assessment of the level of compliance of a given minimum standard / best practice, in a non-judgmental way.

© 2018 IBFD. No part of this information may be reproduced or distributed without permission of IBFD.
### Country: South Africa

<table>
<thead>
<tr>
<th>Minimum Standard</th>
<th>Best Practice</th>
<th>Shift towards</th>
<th>Shift away</th>
<th>Development</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Identifying taxpayers, issuing tax returns and communicating with taxpayers</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Implement safeguards to prevent impersonation when issuing unique identification numbers</td>
<td></td>
<td></td>
<td></td>
<td>No change</td>
</tr>
<tr>
<td>The system of taxpayer identification should take account of religious sensitivities</td>
<td></td>
<td></td>
<td></td>
<td>No change</td>
</tr>
<tr>
<td>Impose obligations of confidentiality on third parties with respect to information gathered by them for tax purposes</td>
<td>Where tax is withheld by third parties, the taxpayer should be excluded from liability if the third party fails to pay over the tax</td>
<td></td>
<td></td>
<td>No change</td>
</tr>
<tr>
<td>Where pre-populated returns are used, these should be sent to taxpayers to correct errors</td>
<td></td>
<td></td>
<td></td>
<td>No change</td>
</tr>
<tr>
<td>Provide a right of access for taxpayers to personal information held about them, and a right to apply to correct inaccuracies</td>
<td>Publish guidance on taxpayers’ rights to access information and correct inaccuracies</td>
<td></td>
<td></td>
<td>No change</td>
</tr>
<tr>
<td>Where communication with taxpayers is in electronic form, institute systems to prevent impersonation or interception</td>
<td></td>
<td></td>
<td></td>
<td>No change</td>
</tr>
<tr>
<td>Where a system of “cooperative compliance” operates, ensure it is available on a non-discriminatory and voluntary basis</td>
<td></td>
<td></td>
<td></td>
<td>No change</td>
</tr>
<tr>
<td>Provide assistance for those who face difficulties in meeting compliance obligations, including those with disabilities, those located in remote areas, and those unable or unwilling to use electronic forms of communication</td>
<td></td>
<td>✔️</td>
<td></td>
<td>Revenue authority (SARS) has increased the number of mobile offices to assist those who are located in remote areas to meet their compliance obligations.</td>
</tr>
<tr>
<td><strong>2. The issue of tax assessment</strong></td>
<td>Establish a constructive dialogue between taxpayers and revenue authorities to ensure a fair assessment of taxes based on equality of arms</td>
<td></td>
<td></td>
<td>No change</td>
</tr>
<tr>
<td>Minimum Standard</td>
<td>Best Practice</td>
<td>Shift towards</td>
<td>Shift away</td>
<td>Development</td>
</tr>
<tr>
<td>------------------</td>
<td>---------------</td>
<td>---------------</td>
<td>------------</td>
<td>-------------</td>
</tr>
<tr>
<td><strong>2. The issue of tax assessment (cont)</strong></td>
<td>Use e-filing to speed up assessments and correction of errors, particularly systematic errors</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>3. Confidentiality</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Provide a specific legal guarantee for confidentiality, with sanctions for officials who make unauthorised disclosures (and ensure sanctions are enforced)</td>
<td>Encrypt information held by a tax authority about taxpayers to the highest level attainable</td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>Restrict access to data to those officials authorised to consult it. For encrypted data, use digital access codes</td>
<td>Ensure an effective fire-wall to prevent unauthorised access to data held by revenue authorities</td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>Audit data access periodically to identify cases of unauthorised access</td>
<td></td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>Introduce administrative measures emphasising confidentiality to tax officials</td>
<td>Appoint data protection/privacy officers at senior level and local tax offices</td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>If a breach of confidentiality occurs, investigate fully with an appropriate level of seniority by independent persons (e.g. judges)</td>
<td></td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>Introduce an offence for tax officials covering up unauthorised disclosure of confidential information</td>
<td></td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>Provide remedies for taxpayers who are victims of unauthorised disclosure of confidential information</td>
<td></td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>Exceptions to the general rule of confidentiality should be explicitly stated in the law, narrowly drafted and interpreted</td>
<td></td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>If “naming and shaming” is employed, ensure adequate safeguards (e.g. judicial authorisation after proceedings involving the taxpayer)</td>
<td>Require judicial authorisation before any disclosure of confidential information by revenue authorities</td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>No disclosure of confidential taxpayer information to politicians, or where it might be used for political purposes</td>
<td>Parliamentary supervision of revenue authorities should involve independent officials, subject to confidentiality obligations, examining specific taxpayer data, and then</td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>Minimum Standard</td>
<td>Best Practice</td>
<td>Shift towards</td>
<td>Shift away</td>
<td>Development</td>
</tr>
<tr>
<td>--------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>---------------</td>
<td>------------</td>
<td>-------------</td>
</tr>
<tr>
<td><strong>3. Confidentiality (cont).</strong></td>
<td>Freedom of information legislation may allow a taxpayer to access information about himself. However, access to information by third parties should be subject to stringent safeguards: only if an independent tribunal concludes that the public interest in disclosure outweighs the right of confidentiality, and only after a hearing where the taxpayer has an opportunity to be heard</td>
<td>No change</td>
<td>No change</td>
<td>No change</td>
</tr>
<tr>
<td>If published, tax rulings should be anonymised and details that might identify the taxpayer removed</td>
<td>Anonymise all tax judgments and remove details that might identify the taxpayer</td>
<td>No change</td>
<td>No change</td>
<td>No change</td>
</tr>
<tr>
<td>Legal professional privilege should apply to tax advice</td>
<td>Privilege from disclosure should apply to all tax advisors (not just lawyers) who supply similar advice to lawyers. Information imparted in circumstances of confidentiality may be privileged from disclosure</td>
<td>No change</td>
<td>No change</td>
<td>No change</td>
</tr>
<tr>
<td>Where tax authorities enter premises which may contain privileged material, arrangements should be made (e.g. an independent lawyer) to protect that privilege</td>
<td></td>
<td>No change</td>
<td>No change</td>
<td>No change</td>
</tr>
<tr>
<td><strong>4. Normal audits.</strong></td>
<td>Audits should respect the following principles: (1) Proportionality (2) <em>Ne bis in idem</em> (prohibition on double jeopardy) (3) <em>Audi alteram partem</em> (right to be heard before any decision is taken) (4) <em>Nemo tenetur se detegere</em> (principle against self-incrimination). Tax notices issued in violation of these principles should be null and void</td>
<td></td>
<td>✓</td>
<td>Recent Tax case: Port Elizabeth Tax court of South Africa IT 13726 (as yet unreported). Although this case does not set a precedent for higher courts it does challenge the Commissioners non-compliance with the Tax Administration Act (due procedures) and offends both the constitution and the principle of legality. The Commissioner may not issue an additional assessment without notice as this does not comply with the peremptory prescripts of the applicable legislation and is constitutionally unsound. Entire additional assessment was declared to be invalid, interest had to be remitted and the commissioner was ordered to pay all of the appellant’s costs of the appeal.</td>
</tr>
<tr>
<td>In application of proportionality, tax</td>
<td></td>
<td></td>
<td></td>
<td>No change</td>
</tr>
</tbody>
</table>
authorities may only request for information that is strictly needed, not otherwise available, and must impose least burdensome impact on taxpayers

<table>
<thead>
<tr>
<th>Minimum Standard</th>
<th>Best Practice</th>
<th>Shift towards</th>
<th>Shift away</th>
<th>Development</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. Normal audits (cont).</td>
<td>In application of <em>ne bis in idem</em> the taxpayer should only receive one audit per taxable period, except when facts that become known after the audit was completed</td>
<td>No change</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>In application of <em>audi alteram partem</em>, taxpayers should have the right to attend all relevant meetings with tax authorities (assisted by advisors), the right to provide factual information, and to present their views before decisions of the tax authorities become final</td>
<td>No change</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>In application of <em>nemo tenetur</em>, the right to remain silent should be respected in tax audits.</td>
<td>No change</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Tax audits should follow a pattern that is set out in published guidelines</td>
<td>✓</td>
<td>See case above</td>
<td></td>
</tr>
<tr>
<td></td>
<td>A manual of good practice in tax audits should be established at the global level</td>
<td>No change</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Taxpayers should be entitled to request the start of a tax audit (to obtain finality)</td>
<td>No change</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Where tax authorities have resolved to start an audit, they should inform the taxpayer</td>
<td>No change</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Taxpayers should be informed of information gathering from third parties</td>
<td>No change</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Reasonable time limits should be fixed for the conduct of audits</td>
<td>No change</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Technical assistance (including representation) should be available at all stages of the audit by experts selected by the taxpayer

<table>
<thead>
<tr>
<th>Minimum Standard</th>
<th>Best Practice</th>
<th>Shift towards</th>
<th>Shift away</th>
<th>Development</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. Normal audits (cont.)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The completion of a tax audit should be accurately reflected in a document, notified in its full text to the taxpayer</td>
<td>The drafting of the final audit report should involve participation by the taxpayer, with the opportunity to correct inaccuracies of facts and to express the taxpayer’s view</td>
<td>✓</td>
<td></td>
<td>See case mentioned above. SARS seems to differentiate between a verification and audit. In cases where there was an audit it provides an audit report. Where it was conducting a verification – it revises an assessment without issuing a letter of findings to a taxpayer.</td>
</tr>
<tr>
<td>Following an audit, a report should be prepared even if the audit does not result in additional tax or refund</td>
<td></td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>5. More intensive audits.</td>
<td>More intensive audits should be limited to the extent strictly necessary to ensure an effective reaction to non-compliance</td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>If there is point in an audit when it becomes foreseeable that the taxpayer may be liable for a penalty or criminal charge, from that time the taxpayer should have stronger protection of his right to silence, and statements from the taxpayer should not be used in the audit procedure</td>
<td></td>
<td>No change</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Entering premises or interception of communications should be authorised by the judiciary</td>
<td></td>
<td>No change</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Authorisation within the revenue authorities should only be in cases of urgency, and subsequently reported to the judiciary for ex post ratification</td>
<td></td>
<td>No change</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Inspection of the taxpayer’s home should require authorisation by the judiciary and only be given in exceptional cases.</td>
<td>Where tax authorities intend to search the taxpayer’s premises, the taxpayer should be informed and have an opportunity to appear before the judicial authority, subject to exception where there is evidence of danger that documents will be removed or destroyed</td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>Minimum Standard</td>
<td>Best Practice</td>
<td>Shift towards</td>
<td>Shift away</td>
<td>Development</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------</td>
<td>---------------</td>
<td>------------</td>
<td>-------------</td>
</tr>
<tr>
<td>Access to bank information should require judicial authorisation</td>
<td></td>
<td></td>
<td></td>
<td>No change</td>
</tr>
<tr>
<td>Authorisation by the judiciary should be necessary for interception of telephone communications and monitoring of internet access. Specialised offices within the judiciary should be established to supervise these actions</td>
<td></td>
<td></td>
<td></td>
<td>No change</td>
</tr>
</tbody>
</table>

5. More intensive audits (cont).

| Seizure of documents should be subject to a requirement to give reasons why seizure is indispensable, and to fix the time when documents will be returned; seizure should be limited in time |                                                                               |               |            | No change   |
| If data are held on a computer hard drive, then a backup should be made in the presence of the taxpayer’s advisors and the original left with the taxpayer |                                                                               |               |            | No change   |
| Where invasive techniques are applied, they should be limited in time to avoid disproportionate impact on taxpayers |                                                                               |               |            | No change   |

6. Review and appeals.

| E-filing of requests for internal review to ensure the effective and speedy handling of the review process |                                                                               |               |            | No change   |
| The right of appeal should not depend upon prior exhaustion of administrative reviews |                                                                               |               |            | No change   |
| Reviews and appeals should not exceed two years |                                                                               |               |            | No change   |
| *Audi alteram partem* should apply in administrative reviews and judicial appeals |                                                                               |               |            | No change   |

<p>| Where tax must be paid in whole or in part before an appeal, there must be an effective mechanism for providing interim suspension of payment | An appeal should not require prior payment of tax in all cases | ✓ | | A senior SARS official may suspend payment of disputed tax or a portion thereof having regard to relevant factors including: ☐ whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets; ☐ the compliance history of the taxpayer with SARS; ☐ whether fraud is <em>prima facie</em> involved in the origin of the dispute; ☐ whether payment will result in irreparable hardship to the taxpayer not |</p>
<table>
<thead>
<tr>
<th>Minimum Standard</th>
<th>Best Practice</th>
<th>Shift towards</th>
<th>Shift away</th>
<th>Development</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>7. Criminal and administrative sanctions.</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Proportionality and <em>ne bis in idem</em> should apply to tax penalties</td>
<td></td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>Where administrative and criminal sanctions may both apply, only one procedure and one sanction should be applied</td>
<td></td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>Voluntary disclosure should lead to reduction of penalties</td>
<td></td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>Sanctions should not be increased simply to encourage taxpayers to make voluntary disclosures</td>
<td></td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td><strong>8. Enforcement of taxes.</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Collection of taxes should never deprive taxpayers of their minimum necessary for living</td>
<td>✓</td>
<td></td>
<td>No change. Where SARS collects tax debt from third parties, a person affected by the notice/taxpayer may request SARS to amend the notice to allow the taxpayer to pay basic living expenses and his /her dependents. [§ 179(5)(a)]</td>
<td></td>
</tr>
<tr>
<td>Authorisation by the judiciary should be required before seizing assets or bank accounts</td>
<td></td>
<td></td>
<td>No change</td>
<td></td>
</tr>
<tr>
<td>Taxpayers should have the right to request delayed payment of arrears</td>
<td>✓</td>
<td></td>
<td>A taxpayer may within 5 days of receiving a letter of demand apply to SARS for a reduction of the amount to be paid based on his/her living expenses and those of his/her dependants. [§ 179(4) of TAA]</td>
<td></td>
</tr>
<tr>
<td>Bankruptcy of taxpayers should be avoided, by partial remission of the debt or structured plans for deferred payment</td>
<td>No change</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Temporary suspension of tax enforcement should follow natural disasters</td>
<td>No change</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


| The requesting state should notify the taxpayer of cross-border requests for information, unless it has specific grounds for considering that this would prejudice the process of investigation. The requested state should inform the taxpayer unless it has a reasoned request from the requesting state that the taxpayer should not be informed on grounds that it would prejudice the investigation | The taxpayer should be informed that a cross-border request for information is to be made | No change, taxpayer still not informed in all circumstances |

### Minimum Standard

<table>
<thead>
<tr>
<th>Best Practice</th>
<th>Shift towards</th>
<th>Shift away</th>
<th>Development</th>
</tr>
</thead>
</table>


<p>| Where a cross-border request for information is made, the requested state should also be asked to supply information that assists the taxpayer | No change |
| Provisions should be included in tax treaties setting specific conditions for exchange of information | No change |
| If information is sought from third parties, judicial authorisation should be necessary | No change |
| The taxpayer should be given access to information received by the requesting state | No change |
| Information should not be supplied in response to a request where the originating cause was the acquisition of stolen or illegally obtained information | No change |
| A requesting state should provide confirmation of confidentiality to the | No change |</p>
<table>
<thead>
<tr>
<th>requested state</th>
<th></th>
<th>No change</th>
</tr>
</thead>
<tbody>
<tr>
<td>A state should not be entitled to receive information if it is unable to provide independent, verifiable evidence that it observe high standards of data protection</td>
<td>For automatic exchange of financial information, the taxpayer should be notified of the proposed exchange in sufficient time to exercise data protection rights</td>
<td>No change</td>
</tr>
<tr>
<td>Taxpayers should have a right to request initiation of mutual agreement procedure</td>
<td>No change</td>
<td></td>
</tr>
</tbody>
</table>

**10. Legislation.**

<table>
<thead>
<tr>
<th>Retrospective tax legislation should only be permitted in limited circumstances which are spelt out in detail</th>
<th>Retrospective tax legislation should ideally be banned completely</th>
<th>No change – however retrospective legislation was applied where it was warranted eg. S12 E of the Income Tax Act, where policy makers realized that the Tax legislation was not brought in line with the New Companies Act.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public consultation should precede the making of tax policy and tax law</td>
<td>No change</td>
<td></td>
</tr>
</tbody>
</table>

**Minimum Standard**

<table>
<thead>
<tr>
<th>Best Practice</th>
<th>Shift towards</th>
<th>Shift away</th>
<th>Development</th>
</tr>
</thead>
</table>

**11. Revenue practice and guidance.**

<table>
<thead>
<tr>
<th>Taxpayers should be entitled to access all relevant legal material, comprising legislation, administrative regulations, rulings, manuals and other guidance</th>
<th>No change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Where legal material is available primarily on the internet, arrangements should be made to provide it to those who do not have access to the internet</td>
<td>No change</td>
</tr>
<tr>
<td>Binding rulings should only be published in an anonymised form</td>
<td>No change</td>
</tr>
<tr>
<td>Where a taxpayer relies upon published guidance of a revenue authority which subsequently proves</td>
<td>No change</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td><strong>Adoption of a charter or statement of taxpayers’ rights should be a minimum standard</strong></td>
<td>A separate statement of taxpayers’ rights under audit should be provided to taxpayers who are audited</td>
</tr>
<tr>
<td>A taxpayer advocate or ombudsman should be established to scrutinise the operations of the tax authority, handle specific complaints, and intervene in appropriate cases. Best practice is the establishment of a separate office within the tax authority but independent from normal operations of that authority</td>
<td>✓</td>
</tr>
<tr>
<td>The organisational structure for the protection of taxpayers’ rights should operate at local level as well as nationally</td>
<td></td>
</tr>
</tbody>
</table>
Information to be submitted

38. The ‘promoter’ or ‘participant’ must submit, in relation to a reportable arrangement, in the prescribed form and manner and by the date specified—

(a) a detailed description of all its steps and key features, including, in the case of an ‘arrangement’ that is a step or part of a larger ‘arrangement’, all the steps and key features of the larger ‘arrangement’;
(b) a detailed description of the assumed ‘tax benefits’ for all ‘participants’, including, but not limited to, tax deductions and deferred income;
(c) the names, registration numbers, and registered addresses of all ‘participants’;
(d) a list of all its agreements; and
(e) any financial model that embodies its projected tax treatment.

Reportable arrangement reference number

39. SARS must, after receipt of the information contemplated in section 38, issue a reportable arrangement reference number to each ‘participant’ for administrative purposes only.

CHAPTER 5
INFORMATION GATHERING

Part A

General rules for inspection, verification, audit and criminal investigation

Selection for inspection, verification or audit

40. SARS may select a person for inspection, verification or audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis.

Authorisation for SARS official to conduct audit or criminal investigation

41. (1) A senior SARS official may grant a SARS official written authorisation to conduct a field audit or criminal investigation, as referred to in Part B.
(2) When a SARS official exercises a power or duty under a tax Act in person, the official must produce the authorisation.
(3) If the official does not produce the authorisation, a member of the public is entitled to assume that the official is not a SARS official so authorised.

Keeping taxpayer informed

42. (1) A SARS official involved in or responsible for an audit under this Part must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a report indicating the stage of completion of the audit.
(2) Upon conclusion of the audit or a criminal investigation, and where—
(a) the audit or investigation was inconclusive, SARS must inform the taxpayer accordingly within 21 business days; or
(b) the audit identified potential adjustments of a material nature, SARS must within 21 business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment or decision referred to in section 104(2).
(3) Upon receipt of the document described in subsection (2)(b), the taxpayer must within 21 business days of delivery of the document, or the further period requested by the taxpayer that may be allowed by SARS based on the complexities of the audit, respond in writing to the facts and conclusions set out in the document.
a senior SARS official may seize the assets if the official has reasonable grounds to believe that the assets will be so disposed of or removed.

(12) Assets seized under this section must be dealt with in accordance with the directions of the High Court which made the relevant preservation order.

Payment of tax pending objection or appeal

164. (1) Unless a senior SARS official otherwise directs in terms of subsection (3)—
(a) the obligation to pay tax; and
(b) the right of SARS to receive and recover tax,
will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.

(2) A taxpayer may request a senior SARS official to suspend the payment of tax or a portion thereof due under an assessment if the taxpayer intends to dispute or disputes the liability to pay that tax under Chapter 9.

(3) A senior SARS official may suspend payment of the disputed tax having regard to—
(a) the compliance history of the taxpayer;
(b) the amount of tax involved;
(c) the risk of dissipation of assets by the taxpayer concerned during the period of suspension;
(d) whether the taxpayer is able to provide adequate security for the payment of the amount involved;
(e) whether payment of the amount involved would result in irreparable financial hardship to the taxpayer;
(f) whether sequestration or liquidation proceedings are imminent;
(g) whether fraud is involved in the origin of the dispute; or
(h) whether the taxpayer has failed to furnish information requested under this Act for purposes of a decision under this section.

(4) If the payment of tax which the taxpayer intended to dispute was suspended under subsection (3) and subsequently—
(a) no objection is lodged;
(b) an objection is disallowed and no appeal is lodged; or
(c) an appeal to the tax board or court is unsuccessful and no further appeal is noted,
the suspension is revoked with immediate effect from the date of the expiry of the relevant prescribed time period or any extension of the relevant time period under this Act.

(5) A senior SARS official may deny a request in terms of subsection (2) or revoke a decision to suspend payment in terms of that subsection with immediate effect if satisfied that—
(a) after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious;
(b) the taxpayer is employing dilatory tactics in conducting the objection or appeal;
(c) on further consideration of the factors referred to in subsection (3), the suspension should not have been given; or
(d) there is a material change in any of the factors referred to in subsection (3), upon which the decision to suspend the amount involved was based.

(6) During the period commencing on the day that—
(a) SARS receives a request for suspension under subsection (2); or
(b) a suspension is revoked under subsection (5),
and ending 10 business days after notice of SARS' decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.

(7) If an assessment or a decision referred to in section 104(2) is altered in accordance with—
(a) an objection or appeal;
179. Liability of third party appointed to satisfy tax debts.—(1) A senior SARS official may authorise the issue of a notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt.

[Sub-s. (1) substituted by s. 66 of Act No. 39 of 2013 and by s. 57 (a) of Act No. 23 of 2015.]

Wording of Sections

(2) A person that is unable to comply with a requirement of the notice, must advise the senior SARS official of the reasons for the inability to comply within the period specified in the notice and the official may withdraw or amend the notice as is appropriate under the circumstances.

(3) A person receiving the notice must pay the money in accordance with the notice and, if the person does not pay the money contrary to the notice, the person is personally liable for the money.

(4) SARS may, on request by a person affected by the notice, amend the notice to extend the period over which the amount must be paid to SARS, to allow the taxpayer to pay the basic living expenses of the taxpayer and his or her dependants.

(5) SARS may only issue the notice referred to in subsection (1) after delivery to the tax debtor of a final demand for payment which must be delivered at the latest 10 business days before the issue of the notice, which demand must set out the recovery steps that SARS may take if the tax debt is not paid and the available debt relief mechanisms under this Act, including, in respect of recovery steps that may be taken under this section—

(a) if the tax debtor is a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on the basic living expenses of the tax debtor and his or her dependants; and

(b) if the tax debtor is not a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on serious financial hardship.

[Sub-s. (5) added by s. 57 (b) of Act No. 23 of 2015.]

(6) SARS need not issue a final demand under subsection (5) if a senior SARS official is satisfied that to do so would prejudice the collection of the tax debt.

[Sub-s. (6) added by s. 57 (b) of Act No. 23 of 2015.]
IN THE TAX COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

In the matter between:

[Blacked out]

Appellant

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE

Respondent

JUDGMENT

REVELAS J:

[1] The appellant had been the Chief Executive Officer of [Blacked out] [Pty] Ltd ("[Blacked out]") for just over sixteen years,
when his employment with S... came to an end in 2012. The appellant also traded as a cattle farmer under the name ..., trading as ... Farm Beef.

[2] In his submitted income tax return for 2012, the appellant claimed farming expenses amount of R1,781,604.00 to be deducted. The amount claimed was for expenses incurred in respect of bush clearing, cattle rails, fencing and irrigation. The appellant submitted that these expenses were incurred for purposes of trade, and are of an expense nature, as the respondent contended and such expenses ought to have been be allowed as deductions in terms of paragraph 12(1) of the Income Tax Act, No. 58 of 1962, as amended ("the ITA"). This claim was disallowed by the respondent.

[3] The other sum of money that became a subject of dispute is the severance package paid out to the appellant by his erstwhile employer when he resigned. When the appellant’s services at S... came to an end, S... paid him the amount of R7 ...0 as an amount equal to a severance package calculated in accordance with S...’s retrenchment policies. It was described as a "lump sum payment for separation package" in his Income Tax return for 2012.

[4] The year of assessment with regard to the aforesaid amounts is 2012. An additional assessment was issued on 31 January 2013.
[5] On the basis that the appellant did not satisfy the requirements of section 11(a) read with section 23(g) of the ITA, the claim was disallowed. The respondent did not accept that the lump sum payment paid by S to him was as a result of a retrenchment and therefore was not taxable as a retrenchment benefit, and was taxed as “other” income.

[6] On 24 and 26 April 2013 respectively, a letter of objection and a notice of objection to the assessment was submitted by the appellant. Subsequently the appellant was notified that certain farming expenses he had claimed were disallowed as deductions, and that the farming financial statements were not uploaded with other supporting documents but were uploaded with the objection.

[7] On 7 October 2013 and 27 November 2014 (his objections being rejected), the appellant filed the present appeal against the abovementioned two assessments or rulings of the respondent. The late filing of the February 2014 appeal was condoned in March 2014.

[8] On 25 May 2017 the Registrar of the Tax Court was notified that the parties would argue only the following:
(i) As a point *in limine*, whether the audit conducted prior to the additional assessment is valid, and whether the subsequent additional assessment is valid, and

(ii) Whether the lump sum payment received by the appellant at the termination of his employment was a “severance benefit” as defined in the ITA.

[9] The issue pertaining to the claim for the deductions of farming expenditure against the appellant’s income would stand over for argument at a later stage.

[10] The year of assessment by the respondent and the subject matter of this appeal is 2012. An additional assessment was issued on 27 March 2013, after the appellant admitted some returns.

[11] The amount of R7 0.00 was taxed as “other income” under code 4214 on the additional assessment. The appellant contends that it was a lump sum payment and thus could not be taxed as normal taxable income as the respondent had done. The appellant submits that the amount of R7 0.00 ought to have been taxed according to the tax table for retirement and retrenchment lump sums.
These questions raise the crux of what has to be determined in this appeal, namely whether the appellant was retrenched or not.

[12] The Respondent alleges in its Rule 31 statement, “Grounds of Assessment” and its opposition to the appeal, that it conducted a personal income tax audit on the appellant during January 2013. Its investigations showed that (i) the payment received by the appellant was incorrectly declared as a “lump sum payment” for a “separation package” in the appellant’s income tax return for 2012.

[13] The respondent contends that it was not a severance benefit as contemplated in the ITA, because the appellant was relieved of his duties in terms of clause 14.2 of his employment contract with S, which deals with severance payments pursuant to a dismissal. Accordingly the appellant argues, the sum paid out to him constitutes taxable income in his tax return. In addition, the respondent stated that the appellant failed to provide sufficient proof of the retrenchment in the form of supporting documentation and a IRP5 form in particular. It had requested that appellant on 6 May 2013 to furnish his IRP5 certificate.

[14] The appellant explained that he was unable to obtain an IRP certificate from S since there was a dispute regarding his retrenchment of which he advised the respondent in writing.
[15] A further request for supporting information was made by the respondent on 17 July 2013. Thereafter the respondent simply advised the appellant that his objection was disallowed since no reply was received to its queries of 6 May 2013 and 17 July 2013. The present appeal was then lodged.

[16] The aforesaid is essentially what is in dispute before the parties. The parties agreed that the only question to be determined in this appeal is the one relating to the taxation of the lump sum payment paid by the appellant’s employer (S) upon the termination of the appellant’s employment relationship.

[17] The appellant also raised a point in limine, namely whether the audit conducted prior to the issuing of the additional assessment is valid and whether the subsequent additional assessment is therefore valid. If the assessment is found to be invalid, the matter will be disposed of on that basis alone.

In Limine:

[18] The appellant states that the respondent’s reference to a personal audit that was conducted in respect of himself in the
respondent’s Rule 31 “Statement of Grounds of Assessment”, is the first word he has heard of such an audit.

[19] The respondent’s reliance on a procedurally flawed audit conducted without the appellant’s knowledge as a new ground of assessment in its Rule 31 statement is impermissible. In the unreported case of *Sasol Oil (Pty) Ltd v CSARS*¹, the court precluded the respondent from introducing a new ground of assessment in similar circumstances against the appellant, as being contrary to the principle of legality.

[20] An additional assessment is administrative action as contemplated in section 33 of the Constitution, which protects the right to administrative action that is lawful reasonable and fair. The section also provides that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. Therefore an assessment, that is procedurally flawed for a lack or failure to give reasons, offends the principle of legality and set out in *Albutt v Centre for the Study of Violence and Reconciliation*², *Wessels v Minister of Justice and Constitutional Development*³.

¹ GNP Case No. 17583/2012  
² 2010 (3) SA 293 (CC) at para [49] et seq  
³ 2010 (1) SA 128 at para 141 (GNP)
Section 40 and 42 of the Tax Administration Act, No 28 of 2011 (the “TAA”) clearly give effect to and echo the administrative justice provisions set out in section 33 of the Constitution. They read as follows:

"40. Selection for inspection, verification or audit. – SARS may select a person for inspection, verification or audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis.

42. Keeping taxpayer informed. –

(1) A SARS official involved in or responsible for an audit under this Part must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a report indicating the stage of completion of the audit.

(2) Upon conclusion of the audit or a criminal investigation, and where –

(a) the audit or investigation was inconclusive, SARS must inform the taxpayer accordingly within 21 business days; or

(b) the audit identified potential adjustments of a material nature, SARS must within 21 business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the audit, including the
grounds for the proposed assessment or decision referred to in section 104 (2).

(3) Upon receipt of the document described in subsection (2) (b), the taxpayer must within 21 business days of delivery of the document, or the further period requested by the taxpayer that may be allowed by SARS based on the complexities of the audit, respond in writing to the facts and conclusions set out in the document.

(4) The taxpayer may waive the right to receive the document.

(5) Subsections (1) and (2) (b) do not apply if a senior SARS official has a reasonable belief that compliance with those subsections would impede or prejudice the purpose, progress or outcome of the audit.

(6) SARS may under the circumstances described in subsection (5) issue the assessment or make the decision referred to in section 104 (2) resulting from the audit and the grounds of the assessment must be provided to the taxpayer within 21 business days of the assessment or the decision referred to in section 104 (2), or the further period that may be required based on the complexities of the audit.”

[22] The respondent’s breach of the legality principle is further compounded by its failure to comply with section 42(1) of the TAA which requires the SARS official responsible for the audit to provide the taxpayer with a report indicating the stage of completion of the audit. The appellant was not kept informed regarding the status of the
audit. In addition the papers do not reveal any written conclusions or findings as would be required at the end of an audit. It was also pointed out that the respondent also did not discover any audit file for 2012. It was also required that a financial inspection had to precede any additional assessment. None of this occurred.

[23] The outcome of the audit was not conveyed to the appellant either. In this regard section 42(2)(b) of the TAA was flouted by the respondent. Accordingly the appellant was deprived of the opportunity to respond to any of the issues raised, particularly the question of the circumstances surrounding his resignation and the nature of the lump sum paid to him.

Lump Sum:

[24] A ‘severance benefit’ is defined in the Income Tax Act, 58 of 1962 ("the ITA") as "any amount (other than a lump sum benefit an amount contemplated in paragraph (d) (ii) or (iii) of the definition of ‘gross income’)^4 received by or accrued to a person by way of a lump sum from or by arrangement with the person’s employer or an associated institution in relation to that employer in respect of the

---

^4 With regard to payments of awards associated with the cessation of employment relationships, in terms of insurance contracts, and or policies in certain circumstances.
relinquishment, termination, loss, repudiation, cancellation or variation of the person’s office or employment or of the person’s appointment (or right or claim to be appointed) to any office of employment, if –

(a) such a person has attained the age of 55;
(b) such relinquishment, termination, loss, repudiation, or variation is due to the person becoming permanently incapable of holding the person’s office or employment due to sickness, accident, injury, or incapacity through infirmness of mind or body;

or such termination or loss is due to –

(i) the person’s employer having ceased to carry on or intending to cease carrying on the trade in respect of which the person was employed or appointed; or
(ii) the person having become redundant in consequence of a general reduction in personnel or a reduction in personnel of a particular class by the person’s employer

unless, where the person’s employer is a company, the person at any time held more than five percent of the issued shares on members’ interest in the company...."
‘Gross income’, in relation to any year or period of assessment means:

(i) in the case of any resident, the total amount in cash or otherwise, received by or accrued to or in favour of such a resident; or

(ii) in the case of any person other than a resident the total amount, in cash or otherwise, received by or accrued by to or in favour of such person form a source within the republic during such year or period of assessment, excluding receipts or accruals of a capital nature, but including without in any way limiting the scope of this definition such amounts (whether of a capital nature or not) so received or accrued ...”

If the appellant was afforded the opportunity to explain his position, he could have informed the respondent that his services came to an end during a retrenchment process as contemplated in paragraph (b)(ii) of the definition, when S terminated the services of a substantial amount of its employees, i.e. 31% of its work force.

The respondent submitted that the appellant was not retrenched, but that his services were terminated through a dismissal in terms of
clause 14.1 of the employment contract with S[redacted]. Clause 14.1 relates to dismissals of employees for *inter alia* materially failing to perform their duties, in which case no severance package is paid out to an employee. In this regard the respondent relied on a letter by S[redacted] to the appellant which reads as follows:

"Dear [redacted]

*It is with sadness, but with respect that I have to advise you that the Board of Directors would like to ask you to stand down as Chief Executive Officer of the Company.*

*It is the opinion of the Board that the expenses have not been contained and as a consequence the Company will not be able to meet the expectations of its shareholders, consequently a change in leadership is appropriate at this time.*

*Let me assure you that we recognize and respect your passion, your energy and your operational capabilities, and in no way question your integrity and commitment.*
Your exit strategy can be discussed with me and the terms would be in line with your Agreement of Employment as introduced earlier this year.

You have done much to develop the [redacted] Group in your time with the company and I know your legacy will be remembered and appreciated."

[28] The respondent’s reliance on the letter is rather selective. The letter together with the type of severance or “separation package” in actual fact paid to the appellant, indicates that the appellant’s services were terminated as part of a retrenchment exercise or it was least treated as such by [redacted], in that the package paid to the appellant was equal to a package calculated in the course of a retrenchment, and in accordance with clause 14.2 of the relevant contract of employment. If the audit by the respondent had been conducted with due regard to section 40, 41 and 42 of the TAA, the outcome of the audit may have been very different.

[29] The same considerations apply to the farming expenses that were disallowed. A properly conducted audit would almost certainly have produced a different result. Since the issue of the farming expenses claim stood over by agreement and was not argued, the
merits of that claim requires no further consideration. The invalid audit renders such a discrimination moot in any event.

[30] The respondent’s non-compliance with sections 40 and 42 of the TAA clearly offends both the Constitution and the principle of legality. Accordingly, the respondent’s decision to conduct an additional assessment without notice, must be set aside as it does not comply with the peremptory prescripts of the applicable legislation and it is also constitutionally unsound. In the circumstances, the assessment is found to be invalid.

[31] The entire assessment must therefore be set aside.

Order:

1. The appeal is upheld.

2. The respondent’s entire 2012 additional assessment in respect of the appellant is hereby set aside.

3. The interest calculated in respect of the assessment is hereby remitted.

4. The respondent is to pay the appellant’s costs of the appeal.
E REVELAS

Judge of the High Court
I Agree:

[Signature]

A BAGE

Assessor
I Agree:

K Helm
Assessor
14 Power of Minister to appoint Tax Ombud

(1) The Minister must appoint a person as Tax Ombud—
   (a) For a term of five years, which term may be renewed

Prelex
Wording of para. (a) in force from 1 October 2012 until promulgation of Tax Administration Laws Amendment Act, 2016
(a) for a term of three years, which term may be renewed

15 Office of the Tax Ombud

(1) The Tax Ombud must appoint the staff of the office of the Tax Ombud who must be employed in terms of the SARS Act.

Prelex
Wording of sub-s. (1) in force from 1 October 2012 until promulgation of Tax Administration Laws Amendment Act, 2016
(1) The staff of the office of the Tax Ombud must be employed in terms of the SARS Act and be seconded to the office of the Tax Ombud at the request of the Tax Ombud in consultation with the Commissioner.

(4) The expenditure connected with the functions of the office of the Tax Ombud is paid in accordance with a budget approved by the Minister for the office.

Prelex
Wording of sub-s. (4) in force from 1 October 2012 until promulgation of Tax Administration Laws Amendment Act, 2016
(4) The expenditure connected with the functions of the office of the Tax Ombud is paid out of the funds of SARS.
16 Mandate of the Tax Ombud

(1) The mandate of the Tax Ombud is to—
   
   (a) Review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS; and

   (b) Review, at the request of the Minister or at the initiative of the Tax Ombud with the approval of the Minister, any systemic and emerging issue related to a service matter or the application of the provisions of this Act or procedural or administrative provisions of a tax Act.

Prelex

Wording of sub-s. (1) in force from 1 October 2012 until promulgation of Tax Administration Laws Amendment Act, 2016

(1) The mandate of the Tax Ombud is to review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS.

(2) In discharging his or her mandate, the Tax Ombud must—

   (f) identify and review systemic and emerging issues related to service matters or the application of the provisions of this Act or procedural or administrative provisions of a tax Act that impact negatively on taxpayers.

20 Recommendations

(2) The Tax Ombud’s recommendations are not binding on a taxpayer or SARS, but if not accepted by a taxpayer or SARS, reasons for such decision must be provided to the Tax Ombud within 30 days of notification of the recommendations and may be included by the Tax Ombud in a report to the Minister or the Commissioner under section.

Prelex

Wording of sub-s. (2) in force from 1 October 2012 until promulgation of Tax Administration Laws Amendment Act, 2016

(2) The Tax Ombud’s recommendations are not binding on taxpayers or SARS.
(b) is used directly by such taxpayer for-
   (i) the transportation of persons, goods, things or natural oil; or
   (ii) the transmission of electricity or any telecommunication signal,

   to the extent that such affected asset is used in the production of his income. Provided that such
   transportation or transmission is not carried on by that taxpayer in the course of carrying on any banking,
   financial services, insurance or rental business.

[Sub-s. (2) substituted by s. 19 (1) (a) of Act 59 of 2000 and by s. 28 (1) of Act 60 of 2001 and amended by
s. 16 (1) of Act 30 of 2002.]

(3) The allowance contemplated in subsection (2) shall not for any one year exceed-
   (a) 10 per cent of the cost incurred in respect of any asset contemplated in paragraph (a) of
   the definition of 'affected asset'; or
   (b) 5 per cent of the cost incurred in respect of any asset contemplated in paragraph (b), (c)
   or (d) of the definition of 'affected asset'.

(3A) Where any affected asset in respect of which any deduction is claimed in terms of this
section was during any previous financial year brought into use for the first time by the taxpayer for the
purposes of any trade carried on by such taxpayer, the receipts and accruals of which were not included in
the income of such taxpayer during such year, any deduction which could have been allowed in terms of
this section during such previous year or any subsequent year in which such asset was used by such
taxpayer shall for the purposes of this section be deemed to have been allowed during such previous year or
years as if the receipts and accruals of such trade had been included in the income of such taxpayer.

[Sub-s. (3A) inserted by s. 19 (b) of Act 59 of 2000.]

(4) For the purposes of this section the cost to a taxpayer of any affected asset shall be deemed to be-

   (a) where such asset has been acquired to replace any asset which has been damaged or
   destroyed, the actual cost of such asset, less any amount which has been recovered or
   recouped in respect of the damaged or destroyed asset which has been excluded from the
   taxpayer's income in terms of section 8 (4) (e), whether in the current or any previous
   year of assessment; or
   (b) in any other case, the lesser of-
       (i) the actual cost of acquisition of the asset incurred by the taxpayer; or
       (ii) the cost which a person would, if he had acquired the said asset under a cash
       transaction concluded at arm's length on the date on which the transaction for the
       acquisition of the said asset was in fact concluded, have incurred in respect of the
direct cost of acquisition of the asset (including the direct cost of the installation or erection thereof).

(5) No deduction shall be allowed under this section in respect of any affected asset which has
been disposed of by the taxpayer during any previous year of assessment.

(6) The deductions which may be allowed or deemed to have been allowed in terms of this section
and any other provision of this Act in respect of the cost of any affected asset shall not in the aggregate
exceed the amount of such cost.

[Sub-s. (6) substituted by s. 19 (c) of Act 59 of 2000.]

[S. 12D inserted by s. 23 (1) of Act 30 of 2000.]

12E Deductions in respect of small business corporations

(1) Where any plant or machinery (hereinafter referred to as an asset) of a taxpayer which qualifies
as a small business corporation-
   (a) is brought into use for the first time by that taxpayer on or after 1 April 2001 for the
   purpose of that taxpayer's trade (other than mining or farming); and
   (b) is used by that taxpayer directly in a process of manufacture (or any other process which
   in the opinion of the Commissioner is of a similar nature) carried on by that taxpayer,
   a deduction equal to the cost of such asset shall be allowed in the year that such asset is so brought into use.

(2) For the purposes of this section the cost to a taxpayer of any asset shall be deemed to be the
lesser of the actual cost to the taxpayer or the cost which a person would, if he had acquired the said asset
under a cash transaction concluded at arm's length on the date on which the transaction for the acquisition
of the said asset was in fact concluded, have incurred in respect of the direct cost of acquisition of the asset,
including the direct cost of the installation or erection thereof or, where the asset has been acquired to
replace an asset which has been damaged or destroyed, such cost less any amount which has been
recovered or recouped in respect of the damaged or destroyed asset and has been excluded from the taxpayer's income in terms of section 8 (4) (e), whether in the current or any previous year of assessment.

(3) Any expenditure (other than expenditure referred to in section 11 (a)) incurred by a taxpayer during any year of assessment in moving an asset in respect of which a deduction was allowed or is allowable under this section from one location to another shall be allowed to be deducted from that taxpayer's income in that year.

(3A) Any expenditure and losses actually incurred by a small business corporation in the year of assessment during which that small business corporation commences trading shall be increased by an amount equal to such expenditure and losses, but limited to R20 000.

[Sub-s. (3A) inserted by s. 31 (1) (d) of Act 45 of 2003.]

(4) For the purposes of this section-

(a) 'small business corporation' means any close corporation or any company registered as a private company in terms of the Companies Act, 1973 (Act 61 of 1973), the entire shareholding of which is at all times during the year of assessment held by shareholders or members that are natural persons, where-

(i) the gross income for the year of assessment does not exceed R5 million: Provided that where the close corporation or company during the relevant year of assessment carries on any trade, for purposes of which any asset contemplated in this section is used, for a period which is less than 12 months, the amount of R5 million shall be reduced to an amount which bears to R5 million, the same ratio as the number of months (in the determination of which a part of a month shall be reckoned as a full month), during which that company or close corporation carried on that trade bears to 12 months;

[Sub-para. (i) amended by s. 17 (1) of Act 30 of 2002 and by s. 37 (1) of Act 12 of 2003.]

(ii) none of the shareholders or members at any time during the year of assessment of the company or close corporation holds any shares or has any interest in the equity of any other company as defined in section 1, other than-

(aa) a company contemplated in paragraph (a) of the definition of 'listed company';

(bb) any portfolio in a collective investment scheme contemplated in paragraph (e) of the definition of 'company'; or

(cc) a company contemplated in section 10 (1) (e) (i), (ii) or (iii);

[Sub-para. (ii) substituted by s. 21 of Act 74 of 2002 and by s. 31 (1) (b) of Act 45 of 2003.]

(iii) not more than 20 per cent of the total of all receipts and accruals (other than those of a capital nature) and all the capital gains of the company or close corporation consists collectively of investment income and income from the rendering of a personal service; and

[Sub-para. (iii) substituted by s. 31 (1) (c) of Act 45 of 2003.]

(iv) such company is not an employment company;

(b) 'employment company' means any company-

(i) which is a labour broker as defined in the Fourth Schedule to the Act, other than a labour broker in respect of which a certificate of exemption has been issued in terms of paragraph 2 (5) of the said Schedule; or

(ii) which is a personal service company as defined in the Fourth Schedule;

(c) 'investment income' means-

(i) any income in the form of dividends, royalties, rental, annuities or income of a similar nature;

(ii) any interest as contemplated in section 24J, any amount contemplated in section 24K and any other income which, by the laws of the Republic administered by the Commissioner, is subject to the same treatment as income from money lent; and

(iii) any proceeds derived from investment or trading in financial instruments (including futures, options and other derivatives), marketable securities or immovable property;

(d) 'personal service' means any service in the field of accounting, actuarial science, architecture, auctioneering, auditing, broadcasting, broking, commercial arts, consulting,