

Tax

Objections and appeals

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Agrieved taxpayers are entitled to ask the SA Revenue Service to provide adequate reasons for an assessment at which it has arrived.

That's what rule 3(1)(a) promulgated under s107A (the Rules) of the Income Tax Act (58 of 1962 (ITA)), says. Written notice of the request must be submitted within 30 days of the date of assessment and it suspends the running of the 30-day period within which a taxpayer may lodge an objection.

Ideally, the reasons given by the Commissioner should put the aggrieved taxpayer in a position to decide whether the assessment should be challenged.

After the taxpayer has received SARS' reasons – or where the reasons weren't provided on the grounds that adequate motivation had already been given, or where the taxpayer did not request any reasons, the taxpayer may lodge an objection against the assessment.

The Commissioner may allow or disallow the objection. But, where an objection is disallowed by the Commissioner, either in full or in part, the taxpayer may appeal.

Unlike the issuing of assessments, neither the Rules nor the ITA, provide an aggrieved taxpayer with a process to request reasons for the disallowance. Clearly, a taxpayer who is considering appealing against the disallowance of their objection, and does not have the benefit of requesting the Commissioner's reasons and did not previously request reasons, would be disadvantaged.

s33 of the Constitution, provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

Furthermore, s5(1) of the Promotion of Just Administrative Act, 3 of 2000 (PAJA), holds that any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request the administrator concerned to furnish written reasons.

It follows, therefore, that a taxpayer, aggrieved by the disallowance of his objection, has the right in terms of the Constitution and PAJA, to request written reasons for the Commissioner's decision. On receipt of the request, under PAJA the Commissioner is obliged to give the taxpayer adequate written reasons for the disallowance within 90 days.

While the ITA does not confer on a taxpayer the right to request reasons for the disallowance of the objection to an assessment, the taxpayer does have that right under the Constitution and PAJA.

However, exercising the rights under PAJA comes with some disadvantages.

Under PAJA, unlike under Rule 3 of the Rules, a request for reasons does not stop the running of the period within which an appeal must be lodged. Therefore, even though PAJA requires the Commissioner to respond to a request for reasons to SARS within 90 days, the Rules require that an appeal must be lodged within 30 days from the date of the notice of disallowance.

In practice, a taxpayer should within the 30-day period, submit a request for reasons and also lodge a notice to appeal, subject to a reservation of the right to supplement the grounds of appeal based on the Commissioner's

response to the request for reasons made under PAJA. Alternatively, a taxpayer could submit the request for reasons and only once they have been received, submit a notice of appeal against the disallowance of their objection.

In terms of s83(1A), the taxpayer may submit a notice of appeal after the 30 days period has passed, provided the Commissioner is satisfied that reasonable grounds exist for the delay in submitting the notice. The latter option obviously carries more risk, especially in the event the Commissioner decides on the facts that the delay caused by waiting for written reasons is not a reasonable ground or that adequate reasons had already been given.

In the *Guide on Tax Dispute Resolution*, SARS expresses the view that, where a taxpayer has already been provided with adequate reasons, whether in terms of Rule 3, PAJA or otherwise, that taxpayer will not again be able to request reasons in respect of the same assessment or decision.

Should this view be correct, it is even more important for the Rules to be changed.

There is, therefore, a lacuna in the law, specifically in the provisions of the ITA and the Rules, as neither provides the taxpayer with a process to exercise his/her rights to request reasons provided for under the Constitution and PAJA. A process of this nature would enable the taxpayer, prior to noting an appeal, to request reasons for the disallowance of an objection.

This inconsistency should be rectified by an amendment to the Rules to recognise the taxpayers' right to request reasons even after the objection stage. An amendment to this effect would not be complex as the Rules could be drafted on the same principles as the current Rule 3, which governs the request for reasons in respect of assessments. ♦

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