

## CUSTOMS AND EXCISE: APPEAL AND DISPUTE PROVISIONS

*This **draft legislation** is released for public information. The amendments contained in this draft are merely proposals which are **subject to change and final approval by the Minister of Finance**. Early comments on this draft will be considered for possible inclusion in a revised draft Bill.*

*It is the intention to release the revised draft Bill in the first seven days of October, prior to the commencement of the informal Parliamentary process.*

*There will be an opportunity to comment on the revised draft Bill, either directly to the National Treasury and SARS or during the public hearings in the Parliamentary Committees in mid-October 2003.*

*Due to time constraints, it will not be possible to respond individually to comments received. However, receipt of comments will be acknowledged and fully considered by the National Treasury and SARS.*

*Comments may be submitted to either:*

*Ms. Michelle Franks  
E-mail: [michelle.franks@treasury.gov.za](mailto:michelle.franks@treasury.gov.za)  
Fax No.: (012) 323-2917*

*or*

*Ms. Christell Brodrick  
E-mail: [cbrodrick@sars.gov.za](mailto:cbrodrick@sars.gov.za)  
Fax No.: (012) 422-5192*

### Insertion of Chapter XA in Act 91 of 1964

. The following Chapter is hereby inserted in the Customs and Excise Act, 1964 after Chapter X:

#### **“Chapter XA – Internal Administrative Appeal; Alternative Dispute Resolution; Dispute Settlement**

##### **Part A: Internal Administrative Appeal**

##### **Definitions**

**77A.(a)** For the purposes of this Chapter—  
‘Commissioner’ includes, depending on the context, the delegated

officer who made the decision in dispute against which an appeal is lodged;

'day' means any day other than a Saturday, Sunday or a public holiday;

Provided that the days between 16 December of a year and 15 January of the following year, both inclusive, shall not be taken into account in determining days or the period allowed for complying with any provision in this Part or the rules;

'decision' includes—

- (a) any determination or other act of an administrative nature for the purposes of this Act;
- (b) any amendment or withdrawal of a decision; and
- (c) any refusal to take a decision;

'officer' includes, depending on the context, an officer who is delegated by the Commissioner and acts on behalf of the Commissioner as contemplated in section 3 (2);

'SARS' means the South African Revenue Service.

(b) Any decision made by the Commissioner or an officer under the provisions of this Act, including any amendment or withdrawal thereof, shall be deemed to be effective from the date any notice or communication in respect of such decision is issued in writing or the date specified in such notice or communication.

### **Persons who may appeal**

77B.(1) Any person who may institute judicial proceedings in respect of any decision by an officer may, before or as an alternative to institute such proceedings—

- (a) lodge an appeal against a decision or withdrawal and making of a new decision by the Commissioner;
- (b) appeal to the appeal committee contemplated in this section in respect of those matters and decisions of which officers the appeal committee is authorized by rule to consider and make recommendations to the Commissioner.

(2) If dissatisfied with a final decision as contemplated in (a) or

(b) and the Commissioner thinks the matter is appropriate, make use of the alternative dispute procedure contemplated in section 771.

### **Submission of appeal**

77C.(a) Any person who intends submitting an appeal as provided in this Part must do so—

- (i) within 90 days from the date such person was notified of such decision;
- (ii) within 90 days after the date any such person became aware or the date such person might reasonably be expected to have become aware of such decision; or
- (iii) where the Commissioner on good cause shown is satisfied that such person was prevented from submitting an appeal as required in paragraphs (i) and (ii), within a further period of 90 days.

(b) The appeal may be brought by the person concerned or a duly authorized representative.

(c) Such appeal must be in writing and must set forth the particulars and be supported by the documents prescribed by rule.

### **Time within which appeal must be considered**

77D.(a) An appeal shall be considered within 90 days after the date of the filing of a notice of appeal and the Commissioner shall notify the person who lodged the appeal of the final determination or decision in writing.

(b)(i) No appeal shall be considered by the appeal committee later than 180 days after the date of the decision, unless the period is on good cause shown extended by the Commissioner.

(ii) Where the Commissioner refuses to extend the said period it may be extended on application by the person concerned by the High Court.

### **Appointment and function of appeal committee**

77E. (1) The Commissioner may appoint a committee of officers or a committee of officers and other persons to consider and decide appeals.

(2) An appeal committee may—

(a) consider decisions in respect of the matters prescribed by rule; and

(b) recommend to the Commissioner to—

(i) confirm the decision appealed against; or

(ii) amend any such decision or withdraw it or withdraw it and make a new decision from a date specified—

(aa) in sections 47(9)(d), 65(5) and 69(4);

(bb) in respect of any other relevant procedure in this Act; or

(cc) the date in section 3(2).

(3) The chairperson of the appeal committee must maintain a record of the proceedings prescribed by rule.

### **Decision of Commissioner**

77F. (1) The Commissioner may—

(a) refer the matter back to the committee for further consideration;

(b) reject or accept or accept and vary the recommendation of the committee;

(c) confirm or amend the decision or withdraw it and make a new decision.

(2) Whenever any representations or an appeal has been considered by the Commissioner any period within which any person may prosecute an appeal against or institute any judicial proceedings in connection with such decision, shall commence on the date on which the Commissioner in writing advises the person concerned of the final decision of the appeal.

### **Obligation to pay amount demanded**

77G. Notwithstanding anything to the contrary contained in this Act, the obligation to pay and right to receive and recover any amount demanded in terms of any provision of this Act, shall not, unless the Commissioner so directs, be suspended by an appeal in terms of this section or pending a decision by court.

## **Rules**

77H. The Commissioner may make rules—

- (a) to prescribe at which office any committee of officers shall be constituted, and the composition of such committee;
- (b) to prescribe which decisions or categories of decisions of officers may be appealed against to the appeal committee;
- (c) to prescribe appeal procedures, conduct of meetings of committees and such forms as may be required for the purpose of this section;
- (d) in respect of all matters which are required or permitted in terms of this section to be prescribed by rule;
- (e) any matter relating to the appointment of persons other than officers to an appeal committee which may include requirements relating to qualifications, conduct, resignation, removal from office and remuneration;
- (f) any other matter which the Commissioner may consider reasonably necessary and useful for the purposes of administering the provisions of this section.

## **Part B**

### **Alternative Dispute Resolution**

77I. (1) The Minister may, after consultation with the Minister of Justice, promulgate rules to provide for—

- (a) alternative dispute resolution procedures in terms of which the

Commissioner and the person aggrieved by a decision may resolve a dispute; and

(b) categories of decisions which are or are not suitable for alternative dispute resolution.

(2) The rules so published shall be part of this Act.

## **Part C: Settlement of dispute**

### **Definitions**

77J. (1) For the purposes of this chapter—

'dispute' means a disagreement on the interpretation of either the relevant facts involved or the law applicable thereto, or of both the facts and the law;

'settle' means to resolve a dispute by compromising any disputed liability, otherwise than by way of either the Commissioner or the person concerned accepting the other party's interpretation of the facts or the law applicable to those facts, or of both the facts and the law, and

'settlement' shall be construed accordingly.

### **Purpose of Chapter**

77K. (1) The basic principle in law is that it is the duty of the Commissioner to assess and collect taxes, duties, levies, charges and other amounts according to the laws enacted by Parliament and not to forgo any such taxes, duties, levies, charges or other amounts properly chargeable and payable.

(2) Circumstances may, however, require that the strictness and rigidity of this basic principle be tempered where it would be to the best advantage of the state.

(3) The purpose of this chapter is to prescribe the circumstances whereunder it would be inappropriate and whereunder it would be

appropriate that the basic rule be tempered and for a decision to be taken to settle a dispute.

(4) A person may make use of alternative dispute resolution procedures in the circumstances and in accordance with the rules published by the Minister in terms of section 77I.

### **Circumstances where inappropriate to settle**

77L. (1) It will be inappropriate and not to the best advantage of the state to settle a dispute, where, in the opinion of the Commissioner,—

- (a) the action on the part of the person concerned which relates to the dispute, constitutes intentional tax evasion or fraud and no circumstances contemplated in subsection 77J exist;
- (b) the settlement would be contrary to the law or a clearly established practice of the Commissioner on the matter, and no exceptional circumstances exist to justify a departure from the law or practice;
- (c) it is in the public interest to have judicial clarification of the issue and the case is appropriate for this purpose;
- (d) the pursuit of the matter through the courts will significantly promote compliance of the tax laws and the case is suitable for this purpose; or
- (e) the person concerned has not complied with the provisions of any Act administered by the Commissioner and the Commissioner is of the opinion that the non-compliance is of a serious nature.

## **Circumstances where appropriate to settle**

77M. (1) The Commissioner may, where it will be to the best advantage of the state, settle a dispute, in whole or in part, on a basis that is fair and equitable to both the person concerned and SARS, having regard to *inter alia*—

- (a) whether that settlement would be in the interest of good management of the tax system, overall fairness and the best use of the Commissioner's resources;
- (b) the cost of litigation in comparison to the possible benefits with reference to—
  - (i) the prospects of success in a court;
  - (ii) the prospects of the collection of the amounts due; and
  - (iii) the costs associated with collection;
- (c) whether there are any—
  - (i) complex factual or quantum issues in contention; or
  - (ii) evidentiary difficulties,which are sufficient to make the case problematic in outcome or unsuitable for resolution through the alternative dispute resolution procedures or the courts;
- (d) a situation where a participant or a group of participants in a tax avoidance arrangement has accepted the Commissioner's position in the dispute, in which case the settlement may be negotiated in an appropriate manner required to unwind existing structures and arrangements; or
- (e) whether the settlement of the dispute will promote compliance of the tax laws by the person concerned or a group of taxpayers or a section of the public in a cost-effective way.

## **Power to settle and disclosure**

77N. (1) A dispute may be settled, as contemplated in subsection (4), by the Commissioner personally or any official delegated by the



Commissioner for that purpose.

(2) The Commissioner or the relevant delegated official must ensure that he or she does not have, or did not at any stage have, a personal, family, social, business, professional, employment or financial relationship with the person concerned.

### **Procedure for settlement**

77O. (1) The person concerned should at all times disclose all relevant facts in discussions during the process of settling a dispute.

(2) Any settlement will be conditional upon full disclosure of material facts known to the person concerned at the time of settlement.

(3) All disputes settled in whole or in part, as contemplated in subsection 77J, must be evidenced by a written agreement between the parties in the format as may be prescribed by the Commissioner and must include details on—

(a) how each particular issue was settled;

(b) relevant undertakings by the parties;

(c) treatment of that issue in future years;

(d) withdrawal of objections and appeals; and

(e) arrangements for payment.

(4) The written agreement will represent the final agreed position between the parties and will be in full and final settlement of all or the specified aspects of the dispute in question between the parties.

(5) The Commissioner must, where the dispute is not ultimately settled, explain the further rights of objection and appeal to the person concerned.

(6) Subject to subsection 77M, the Commissioner and delegated official must adhere to the secrecy provisions with regard to the information relating to the person concerned and may not disclose the terms of any agreement to third parties unless authorised by law or by the person concerned.

(7) SARS must adhere to the terms of the agreement, unless it emerges that material facts were not disclosed to it or there was fraud or

misrepresentation of the facts.

(8) The Commissioner has the right to recover any outstanding amounts in full where the person concerned fails to adhere to any agreed payment arrangement.

### **Register of settlements and reporting**

77P. (1)The Commissioner must—

(a) maintain a register of all disputes settled in the circumstances contained in these regulations; and

(b) fully document the process in terms of which each dispute was settled, which document must be signed on behalf of the Commissioner and the person concerned.

(2) The Commissioner must on an annual basis provide to the Auditor-General and to the Minister of Finance a summary of all disputes which were settled in whole or in part during the period of 12 months covered by that summary, which must—

(a) be in such format which, subject to section 4(1)(b), does not disclose the identity of the person concerned, and be submitted at such time as may be agreed between the Commissioner and the Auditor-General or Minister of Finance, as the case may be; and

(b) contain details of the number of disputes settled or part settled, the amount of revenue forgone and estimated amount of savings in costs of litigation, which must be reflected in respect of main classes of taxpayers or sections of the public.”.

(2) Subsection (1) shall come into operation on the date fixed by the President by proclamation in the *Gazette*.

**REVISED DRAFT** OF SECTION 93 OF ACT 91 OF 1964

**Substitution of section 93 of Act 91 of 1964**

. The following section is substituted for section 93 of the Customs and Excise Act, 1964:

**“Remission or mitigation of penalties and forfeiture**

93.(1) The Commissioner may, on good cause shown by the owner thereof, direct that any ship, vehicle container or other transport equipment, plant, material or goods detained or seized or forfeited under this Act be delivered to such owner, subject to –

(a) payment of any duty that may be payable in respect thereof;

(b) payment of any charges that may have been incurred in connection with the detention or seizure or forfeiture thereof; and

(c) such conditions as the Commissioner may determine, including conditions providing for the payment of an amount not exceeding the value for duty purposes of such ship, vehicle container or other transport equipment, plant, material or goods.

(2) The Commissioner may, on good cause shown mitigate or remit any penalty incurred under this Act on such conditions as the Commissioner may determine.

(3)(a) Any person who, for the purposes contemplated in this section alleges ownership of any ship, vehicle, container or other transport equipment, plant material or goods shall have the burden of proving such ownership to the satisfaction of the Commissioner; and

(b) where two or more persons claim ownership of the same goods, ownership must be decided by a competent court and the Commissioner shall only grant release thereof to the person or persons as ordered by such court.”