

IN RE : CARMOL DISTRIBUTORS (PTY) LTD [IN
LIQUIDATION]
PROCEDURAL STEPS IN LODGING AN OBJECTION
AND APPEAL AGAINST ASSESSMENT(S) RAISED BY
SARS

DATE : 2 FEBRUARY 2018

MEMORANDUM

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PROCEDURAL STEPS IN LODGING AN OBJECTION AND APPEAL
AGAINST ASSESSMENT(S) RAISED BY SARS

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1. INTRODUCTION

The relevant chronological sequence of events are as follows:

- On 10 October 2017 SARS delivered ***“Audit Findings: Corporate Income Tax”*** as well as ***“Audit Findings: Payroll Taxes”*** (***“the initial Audit Findings”***);
- Pursuant to the initial Audit Findings, the liquidators of Carmol Distributors (Pty) Ltd (in liquidation) (***“the***

liquidators”) submitted a reply, dated 27 October 2017 (*“the response to the initial Audit Findings”*);

- Subsequent to the liquidators’ response to the initial Audit Findings SARS raised additional assessments in respect of the 2012, 2013, 2014, 2015 and 2016 years of assessment, accompanied by a document styled *“Finalisation of Audit: Corporate Income Tax”*, dated 6 December 2017 (*“the final Audit Findings”*) as well as assessments for payroll taxes styled *“Finalisation of Audit: Payroll Taxes”* (*“the final Payroll Audit Findings”*), dated 6 December 2017;
- Subsequent to the final Audit Findings and the final Payroll Audit Findings SARS delivered Notices of Assessment in respect of Corporate Income Tax, dated 7 December 2017 for the 2012, 2013 and 2016 years of assessment and dated 14 December 2017 for the 2014 and 2015 years of assessment, as well as EMP217 for payroll taxes styled *“Carmol: Summary payroll taxes (EMP217)”*, which document is not dated. For all practical purposes I take the date of all the assessments as **6 December 2017**.

- In the result the liquidators are not in a position to formulate objections to the assessments in the form and manner referred to in Rule 7 of the Tax Rules promulgated under section 103 of the TAA (**“the Rules”**). The liquidators have requested reasons in terms of Rule 6.
- Hardly any of the liquidators contentions contained in the response to the initial Audit Findings have been addressed in the final Audit Findings or in the final Payroll Audit Findings;
- The following may be mentioned: any reference to **“day”** means a **“business day”** as defined in section 1 of the TAA. **“Business day”** means a day which is not a Saturday, Sunday or public holiday, and for purposes of determining the days or a period allowed for complying with the provisions of Chapter 9, excludes the days between 16 December of each year and 15 January of the following year, both days inclusive.

2. PROCEDURAL STEPS TO LODGE AN OBJECTION AND APPEAL AGAINST ASSESSMENT(S) RAISED BY SARS

The following procedural steps are to be followed by the liquidators:

- As the liquidators are not in a position to understand the basis for the assessment(s) raised by SARS to enable them to formulate an objection, the liquidators will in terms of Rule 6(1) request SARS to provide reasons for the assessment(s);
- The important effect of a request for reasons under Rule 6(1) is that the liquidators need not lodge an objection until a response is received from SARS;
- The request must be delivered to SARS within **30 days** from the date of assessment. The payroll tax assessments are dated 6 December 2017 and the corporate income tax assessments are dated 7 and 14 December 2017, respectively. For all practical purposes I take the date of the assessments as **6 December 2017**. The liquidators request for reasons should be delivered to SARS on or before **15 February 2018**;
- In terms of Rule 6(3) the liquidators may request SARS to extend the **30 day** period within which reasons may be

requested. If SARS is satisfied that reasonable grounds exist for the delay in complying with the 30 day period SARS may extend it for a period not exceeding **45 days**. The liquidators will not request such an extension;

- **The requests for reasons in respect of the *Corporate Income Tax, the Payroll Taxes and the Constitutional Challenges* have already been drafted and will be delivered to SARS on **5 or 6 February 2018**.**
- After receipt of the request for reasons, the following should happen:
- Where SARS is satisfied that the reasons required to enable the liquidators to formulate an objection have been provided SARS must, within **30 days** after delivery of the request for reasons, notify the taxpayer accordingly. The notice must also refer to the documents wherein the reasons were provided (Rule 6(4)); OR
- Where in the opinion of a SARS official, the reasons required to enable the liquidators to formulate an objection have not

been provided, SARS must provide the reasons within **45 days** after delivery of the request for reasons (Rule 6(5));

- The period for providing the reasons may be extended by SARS if a SARS official is satisfied that more time is required by SARS to provide reasons due to exceptional circumstances, the complexity of the matter or the principle or the amount involved (Rule 6(6)). An extension may not exceed **45 days** and SARS must deliver a notice of extension to the liquidators before expiry of the 45 day period referred to in Rule 6(5);
- What reasons must be provided to the taxpayer?
- The reasons provide under Rule 6 must enable the taxpayer to formulate an objection. SARS is only required to provide its actual reasons (i.e. the facts and applicable law) and not its reasoning process. The liquidators may challenge the sufficiency of reasons provided by SARS;

- What are the remedies where a taxpayer is not able to formulate the objection based on failure to provide reasons or insufficient reasons are provided by SARS?
- If SARS fails to provide the reasons or provides insufficient reasons under Rule 6 required to enable the liquidators to formulate an objection under Rule 7, the liquidators may apply to the Tax Court under Part F (Applications on Notice) of the Rules for an order in terms of Rule 52(a) that SARS must provide within the period allowed by the court the reasons regarded by the court as required to enable the liquidators to formulate the objection. This application to the Tax Court under Rule 52(a) must be brought within **20 days** after delivery of reasons;
- In terms of Rule 7, if a taxpayer applies to the Tax Court under Part F for the reasons required to enable the taxpayer to object, the taxpayer needs only object after the outcome of the application;
- In the alternative to the abovementioned application to the Tax Court the taxpayer could also apply to the High Court for

an order compelling SARS to furnish the reasons for the assessment(s);

- Objection procedure:
- Upon receipt of sufficient reasons the liquidators must lodge their objection against the assessments in terms of Rule 7(1) within **30 days** after the date of delivery of the reasons;
- Where SARS fails to provide the reasons under Rule 6 required to enable the taxpayer to formulate an objection under Rule 7, and the taxpayer has applied to the Tax Court for an order that SARS must provide such reasons, the date of the final outcome of the application, including an appeal against the Tax Court judgment to the High Court, an objection should be lodged within **30 days** thereafter;
- The **30-day** period within which an objection must be lodged may be extended by SARS in terms of section 104(4) of the

TAA, where a senior official is satisfied that reasonable grounds exists for the delay in lodging the objection;

- In terms of Rule 9(1)(a) SARS must notify the taxpayer of the allowance or disallowance of the objection and the basis thereof under section 106(2) of the TAA within **60 days** after the delivery of the taxpayer's objection; OR
- If SARS requested substantiating documents under Rule 8, **45 days** after delivery of the requested documents or the expiry of the period within which the documents must be delivered;
- However, where SARS requires more time to deal with the objection SARS may extend the initial period by a period not exceeding **45 days**;
- What happens if SARS does not deal with an objection within the prescribed time period?
- If SARS fails to deal with the objection within the prescribed period, a taxpayer has the following remedies:

- Pursue a complaint within the SARS internal administrative complaints resolution process and if unsuccessful, submit a complaint to the Tax Ombud; OR
- Under Rule 56, apply for a default judgment. If SARS fails to deal with the objection within **15 days** of delivery of the notice, an application will be made to the Tax Court for a default judgment. If the matter proceeds to the Tax Court, the court may order SARS to deal with the objection within the period prescribed by the court or if SARS cannot show good cause for the default in dealing with the objection, make an order under section 129(2) of the TAA i.e. confirm the assessment, order the assessment to be altered or refer the assessment back to SARS for further examination and assessment or making a final order in favour of the taxpayer. The Tax Court under section 130(3)(b) may make a costs order against SARS;
- Appeal procedure against disallowance of the objection

- Any taxpayer entitled to object to an assessment and who is dissatisfied with the final decision of SARS in respect of the objection, may appeal against that decision.
- A taxpayer who wishes to appeal against the assessment to the Tax Board or Tax Court under section 107 of the TAA must deliver a notice of appeal in terms of Rule 10(1) within **30 days** after SARS has delivered the notice of disallowance of the objection under Rule 9 or the extended period pursuant to an application under section 107(2) of the TAA;
- In the notice of appeal the taxpayer may indicate a willingness to participate in alternative dispute resolution (“**ADR**”) proceedings in an attempt to resolve the dispute. SARS must inform the taxpayer by notice within **30 days** of the receipt of the notice of appeal, whether or not the matter is appropriate for ADR.
- If SARS is satisfied that the matter is appropriate for ADR it must notify the taxpayer within **30 days** of delivery of notice of appeal and the taxpayer must within **30 days** of delivery of the

notice by SARS deliver a notice stating whether or not the taxpayer agrees thereto;

- The parties must finalise the ADR proceedings within **90 days** after the commencement date;
- If the matter is not settled at the ADR proceedings SARS must deliver to the taxpayer a statement of grounds of assessment and opposing the appeal within **45 days** after delivery of the notice of appeal under Rule 10;
- The taxpayer must deliver to SARS a statement of grounds of appeal within **45 days** after delivery of the statement of grounds of assessment by SARS in terms of Rule 31;
- SARS may after delivery of the statement of grounds of appeal in terms of Rule 32 deliver a reply to the statement within **20 days** after delivery of such a statement;
- The taxpayer may, within **10 days** after delivery of the statement under Rule 31 deliver a notice of discovery to SARS requesting it to make discovery on oath of any document material to a ground of the assessment or opposing

the appeal to the extent that such document is required by the taxpayer to formulate its grounds of appeal under Rule 32;

- SARS may within **10 days** after delivery of the statement under Rule 32, deliver a notice of discovery requesting the taxpayer to make discovery on oath of any documents material to a ground of appeal in the statement under Rule 32 to the extent that such document is required by SARS to formulate its grounds of reply under Rule 33;
- A party may within **15 days** after delivery of the statement under Rule 32 or 33, as the case may be, deliver a notice of discovery;
- A party to whom a notice of discovery has been delivered must make discovery within **20 days** after delivery of the discovery notice;
- Neither party may, save with leave of the Tax Court or if the parties so agree, call an expert witness, unless that party has not less than **30 days** before the hearing of the appeal delivered a notice to the other party and the registrar of the

party's intention to do so and not less than **20 days** before the hearing of the appeal delivered to the other party and the registrar a summary of the expert's opinions and the relevance thereof to the issues in appeal under Rule 34;

- SARS may arrange for a pre-trial conference to be held by not later than **60 days** before the hearing of the appeal;
- In terms of Rule 39 the taxpayer must apply to the registrar to allocate a date for the hearing of the appeal within **30 days** after the delivery of the taxpayer's statement of grounds of appeal under Rule 32 or SARS' reply under Rule 33, as the case may be, and give notice thereof to SARS;
- If the taxpayer fails to apply for the date within the prescribed period, SARS must apply for a date for the hearing within **30 days** after the expiry of the period;
- The registrar in his or her sole discretion may allocate a date for the hearing and must deliver to the parties a written notice of the time and place appointed for the hearing of the appeal at least **80 days** before the hearing of the appeal.