Guide to the Voluntary Disclosure Programme

South African Revenue Service

Guide to the Voluntary Disclosure Programme

Preface

This guide provides general guidance on the voluntary disclosure programme under Chapter 16 of the Tax Administration Act 28 of 2011 (TA Act). While this guide reflects SARS's interpretation of the law, taxpayers who take a different view may use the normal avenues for resolving such differences.

This guide is not an "official publication" as defined in section 1 of the TA Act, and accordingly does not create a practice generally prevailing under section 5 of that Act. It should, therefore, not be used as a legal reference. It is also not a binding general ruling under section 89 of Chapter 7 of the TA Act. Should an advance tax ruling be required, visit the **SARS website** for details of the application procedure.

This guide is based on legislation as at the date of issue.

All guides, forms and returns referred to are available on the **SARS website**. Unless indicated otherwise, the latest issues of these documents should be consulted.

For more information you may –

- visit the SARS website at **www.sars.gov.za** or the SARS Voluntary Disclosure Programme web page **here**;
- contact the SARS Voluntary Disclosure Programme Unit:

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Physical address	**:**	Gramick Office Park 281 Middel Street Brooklyn Pretoria 0001
Telephone	**:**	0800 864 613
E-mail	**:**	**vdp@sars.gov.za**

- contact the SARS National Contact Centre –
  - if calling locally, on 0800 00 7277; or
  - if calling from abroad, on +27 11 602 2093 (only between 8am and 4pm South African time);
- visit your nearest SARS branch , preferably after making an appointment via the **SARS website**; or
- contact your own tax advisor or tax practitioner.

Comments on this guide may be e-mailed to **policycomments@sars.gov.za**.

Leveraged Legal Products
SOUTH AFRICAN REVENUE SERVICE
24 August 2023

Contents

Glossary

In this guide unless the context indicates otherwise –

- **“applicant”** means a person that applies for voluntary disclosure relief;
- **“application”** means an application submitted for voluntary disclosure relief;
- **“Chapter”** means a Chapter of the TA Act;
- **“default”** means a “default” as defined in section 225;
- **“Income Tax Act”** means the Income Tax Act 58 of 1962;
- **“PAYE”** means Pay-As-You-Earn, namely, “employees’ tax” as defined in paragraph 1 and deducted or withheld under paragraph 2 of the Fourth Schedule to the Income Tax Act;
- **“section”** means a section of the TA Act;
- **“senior SARS official”** means a “senior SARS official” as defined in section 1;
- **“TA Act”** means the Tax Administration Act 28 of 2011;
- **“tax period”** means a “tax period” as defined in section 1;
- **“understatement penalty”** means the penalty imposed under Chapter 16;
- **“understatement penalty table”** means the understatement penalty percentage table contained in section 223(1);
- **“VAT”** means value-added tax levied under the VAT Act;
- **“VAT Act”** means the Value-Added Tax Act 89 of 1991;
- **“VDP”** means the Voluntary Disclosure Programme under Part B of Chapter 16;
- **“VDP Unit”** means the SARS division that considers the applications;
- **“valid voluntary disclosure”** means a disclosure meeting all the requirements under section 227;
- **“vendor”** means a “vendor” as defined in section 1(1) of the VAT Act;
- **“voluntary disclosure agreement”** means an agreement concluded under section 230;
- **“voluntary disclosure relief”** means relief granted under section 229; and
- any other word or expression bears the meaning ascribed to it in the TA Act.

1. Introduction

The VDP was introduced as a permanent measure to increase voluntary compliance in the interest of enhanced tax compliance, good management of the tax system, and the best use of SARS resources.[1] Intended to encourage taxpayers to voluntarily disclose tax defaults, the VDP is administered under Part B of Chapter 16 and contains the requirements for a valid voluntary disclosure and available relief.[2]

The VDP is applicable to all taxes[3] administered by SARS, except for the customs and excise legislation.[4] Taxpayers qualifying for the VDP will (on the conclusion of a valid voluntary disclosure agreement) be granted relief on applicable understatement penalties, qualifying administrative penalties,[5] criminal prosecution in relation to a valid voluntary disclosure, and the conclusion of the voluntary disclosure agreement.

When dealing with provisions creating tax privileges, such as the VDP, a strict interpretation is applied to determine whether an applicant meets all the requirements under Part B of Chapter 16 to qualify for voluntary disclosure relief.

2. Applying for voluntary disclosure relief

A taxpayer may apply for voluntary disclosure relief if a default (see **2.1**) has been committed. The requirements for the relief being granted are that the disclosure of the default must –[6]

- be voluntary;
- relate to a default that has not occurred within five years of the disclosure of a similar default;
- be full and complete in all material respects;
- relate to a behaviour referred to in column 2 of the understatement penalty table in section 223;
- not result in a refund due by SARS; and
- be made in the prescribed form and manner.

These requirements are considered in detail in **2.4**.

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1 See the *Memorandum on the Objects of the Tax Administration Bill, 2011.*

2 Section 225 to 233.

3 Section 1 defines "tax", for purposes of administration of the TA Act, to include "a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act".

4 See definition of "tax Act" in section 1. The provisions of the TA Act apply to the customs and excise legislation in specified scenarios only. Chapter 16 does not specifically specify that it applies to the customs and excise legislation. Section 1 defines "customs and excise legislation" to mean "the Customs and Excise Act, 1964 (Act No. 91 of 1964), the Customs Duty Act, 2014 (Act No. 30 of 2014), or the Customs Control Act, 2014 (Act No. 31 of 2014)".

5 See **4.1** considering the specific penalties for which relief is granted.

6 Section 227.

2.1 Definition of “default”

The definition of “default” in section 225 forms the basis of the VDP. The definition reads as follows:

> “ **‘[D]efault’** means the submission of inaccurate or incomplete information to SARS, or the failure to submit information or the adoption of a ‘tax position’, where such submission, non-submission, or adoption resulted in an understatement.”

For the purpose of the VDP, a default is the –

- submission of inaccurate or incomplete information to SARS;
- failure to submit information; or
- adoption of a tax position,[7]

if such default resulted in an understatement.

Submission of inaccurate or incomplete information to SARS

If a word is not defined in a tax Act, the ordinary meaning as applied to the subject matter with regard to which it is used should be considered.[8]

Cambridge Dictionary defines “inaccurate” as –[9]

- “not completely correct or exact”.

Dictionary.com defines “inaccurate” as –[10]

- “not accurate; incorrect or untrue”.

Cambridge Dictionary defines “incomplete” as –[11]

- “not having some parts, or not finished”.

CollinsDictionary.com defines “incomplete“ as –[12]

- “does not have all the parts or details that it needs”.

The submission of inaccurate or incomplete information to SARS may take various forms. The most common example is a taxpayer omitting to disclose income or overstating expenditure in a return.

Failure to submit information

Cambridge Dictionary defines “failure” as –[13]

- “the fact of not doing something that you must do or are expected to do”.

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7 The term “tax position” is defined in section 221.

8 Kellaway, E.A. (1995) *Principles of Legal Interpretation of Statutes, Contracts and Wills*, Butterworth Publishers Durban. See also *Natal Joint Municipal Pension Fund v Endumeni Municipality*, 2012 (4) SA 593 (SCA).

9 **www.dictionary.cambridge.org/dictionary/english/inaccurate** [Accessed 24 August 2023].

10 **www.dictionary.com/browse/inaccurate** [Accessed 24 August 2023].

11 **www.dictionary.cambridge.org/dictionary/english/incomplete** [Accessed 24 August 2023].

12 **www.collinsdictionary.com/dictionary/english/incomplete** [Accessed 24 August 2023].

13 **www.dictionary.cambridge.org/dictionary/english/failure** [Accessed 24 August 2023].

CollinsDictionary.com defines "failure" as –[14]

- "the fact that you do not do it, even though you were expected to do it".

The failure to submit information to SARS in this context occurs generally when a taxpayer is obliged under a tax Act to submit information and fails to do so. For example, if a taxpayer fails to register for VAT, and fails to submit to SARS the necessary and relevant information relating to VAT registration. Importantly, the net effect of such default must result in an understatement as considered below.

Adoption of a tax position

The word "default" includes the "adoption of a 'tax position' " if the adoption resulted in an understatement.

Dictionary.com defines "adoption" as –[15]

> "the act of accepting, embracing, or starting to use something, as an idea, behavior, characteristic, or principle".

For purposes of Chapter 16, the term "tax position" is defined in section 221 and means an assumption underlying one or more aspect of a tax return,[16] including whether –

- an amount, transaction, event or item is taxable;
- an amount or item is deductible or may be set-off;
- a lower rate of tax than the maximum applicable to that class of taxpayer, transaction, event or item applies; or
- an amount qualifies as a reduction of tax payable.

A tax position can yield a permanent reduction or deferral of tax payable. Examples of a tax position include, amongst others, an allocation or a shift in income between jurisdictions (that is, transfer pricing), the characterisation of income or a decision to exclude reporting taxable income in a tax return (that is, deferred revenue), and a vendor applying the payments basis for VAT purposes on certain supplies made while having to account for VAT on the invoice basis.[17] Adoption of a tax position requires a conscious decision made by the taxpayer. An incorrect statement because of an inadvertent error in a tax return is not viewed as the adoption of a tax position.

A "tax position" is generally the result from a taxpayer's interpretation of the relevant authorities, for example, a tax Act, tax law, or a court judgment. The "tax position" is a position taken that is not based on reasonable grounds. Assuming a tax position has an inherent risk, taxpayers should not adopt an insensible approach.[18]

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14 **www.collinsdictionary.com/dictionary/english/failure** [Accessed 24 August 2023].

15 **www.dictionary.com/browse/adoption** [Accessed 24 August 2023].

16 Section 1 defines a "return" as "a form, declaration, document or other manner of submitting information to SARS that incorporates a self-assessment, is a basis on which an assessment is to be made by SARS or incorporates relevant material required under section 25, 26 or 27 or a provision under a tax Act requiring the submission of a return".

17 See section 15 of the VAT Act.

18 For a detailed consideration, see the *Short Guide to the Tax Administration Act, 2011 (Act No. 28 of 2011*). See also the *Guide to Understatement Penalties*.

Understatement

The default must result in an understatement. The term "understatement" is defined in section 221 as any prejudice to SARS or the *fiscus* as a result of –

- failure to submit a return required under a tax Act or by the Commissioner;
- an omission from a return;
- an incorrect statement in a return;
- the failure to pay the correct amount of tax[19] when a return is not required; or
- an impermissible avoidance arrangement.[20]

The different forms of understatement will not be considered in this guide. For a detailed consideration of "understatement", see the *Guide to Understatement Penalties*.

The understatement must result in the imposition of an understatement penalty under Chapter 16 (see **2.4.5**).

In an application relating to more than one tax period, the net understatement of the tax periods must be considered for purpose of the default and to determine if there was an understatement. For example, if a vendor applies for voluntary disclosure relief in relation to various VAT periods for which VAT returns have been submitted but completed as nil returns, the understatement will be calculated by considering the total output tax less the total input tax for all of the VAT periods involved. If the total input tax for all the periods exceeds the total output tax, there would be no understatement and the definition of "default" would not be met. Furthermore, a vendor is required to disclose the figures for each period individually and not lump the figures together for a larger period.

If one default has understatement implications for more than one tax type or that affects multiple tax periods, only one application must be submitted. If an applicant identifies different defaults before making the application, the applicant must also make one application for the different defaults in the different tax types.

A disclosure of a default of under-declared gross income can, in some cases, result in a reduced assessed loss after the default is considered to have met the requirements for a valid voluntary disclosure. Although the reduced assessed loss will not result in a tax liability, a shortfall can be calculated[21] and an understatement penalty will still be levied, which will bring it within the meaning of "understatement".

The same principle applies if the default involved the over-claiming of VAT refunds, for example, if a VAT vendor was eligible for a VAT refund of R10 000 but claimed R20 000. This scenario meets the definition of "understatement" as there is a prejudice to SARS or the *fiscus* that can be quantified in a shortfall.

[19] Section 221 defines "tax" as "tax as defined in section 1, excluding a penalty and interest". Section 1 defines "tax" as "for purposes of administration under this Act, includes a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act".

[20] Defined in section 221 to mean "an arrangement in respect of which Part IIA of Chapter III of the Income Tax Act is applied and includes, for purposes of this Chapter, any transaction, operation, scheme or agreement in respect of which section 73 of the Value-added Tax Act or any other general anti-avoidance provision under a tax Act is applied".

[21] See section 222(3)(*c*).

A taxpayer that under-declared income, but the under-declaration does not result in an understatement, cannot use the VDP to correct the under-declaration. Such a disclosure will not meet the requirements of a valid voluntary disclosure and the default should be corrected through the normal SARS channels[22] and not through the VDP. An example of this is a natural person making a disclosure to SARS of an under-declaration of foreign interest for previous tax periods. Should the amount of the foreign interest disclosed be below the exempt amount under the relevant provision of the Income Tax Act, such a disclosure does not result in an understatement as it does not result in a shortfall.

The treatment of capital gains tax must also be noted.[23] A capital gain is added to a taxpayer's taxable income at the applicable inclusion rate.[24] A capital loss cannot be set off against taxable income, but must be set off only against future capital gains. A disclosure of a net capital loss will be disregarded under the VDP since such a disclosure does not result in an understatement penalty. In this scenario, the normal provisions and procedures under the TA Act should be followed to address the capital loss.

A reportable arrangement[25] that was not disclosed is subject to a non-disclosure penalty under section 212. Such non-disclosure does not qualify as a default for VDP purposes if the only result is a non-disclosure penalty since that does not constitute an understatement penalty. However, if the amounts forming part of a reportable arrangement were not declared in a tax return leading to an understatement, such understatement may qualify as a default for VDP purposes.

Prescription of periods

Section 99(1) prescribes periods after which SARS may not raise an assessment. These periods vary from three years to five years depending on the type of assessment. However, these prescribed periods will not apply, amongst others, in the following cases:[26]

- Assessment by SARS, if the full amount of tax chargeable was not assessed because of –
  - fraud;
  - misrepresentation; or
  - non-disclosure of material facts.
- Self-assessment, if the full amount of tax chargeable was not assessed because of –
  - fraud;
  - intentional or negligent misrepresentation;
  - intentional or negligent non-disclosure of material facts; or
  - the failure to submit a return or, if no return is required, the failure to make the required payment of tax.

The VDP provisions do not override the prescription rules under section 99. A default will generally include at least one of the behaviours listed above and therefore the prescribed periods after which SARS may not raise an assessment under section 99(1) will generally not apply. However, the specific facts and circumstances of each case will determine whether prescribed periods may be re-opened. A disclosure needs to be full and complete in all material respects (see **2.4.4**). An applicant should therefore include in a disclosure, a default that occurred in any

22 For example, by means of a Request for Correction available through eFiling.
23 Paragraphs 9 and 10 of the Eighth Schedule to the Income Tax Act.
24 Section 26A of the Income Tax Act.
25 Sections 34 to 39.
26 Section 99(2)(*a*) and (*b*).

tax period, including a default relating to a tax period that may have ordinarily prescribed under section 99(1) or (2). The facts of the specific case will dictate whether the prescription rules of section 99 apply. Should the applicant not be in possession of all of the supporting documentation, the VDP Unit may consider reasonable estimates (see **2.4.4**).

2.2 Persons that may apply for voluntary disclosure relief

A person may apply for voluntary disclosure relief, whether in a personal, representative, withholding or other capacity.

The terms “representative taxpayer” and “withholding agent” are defined in section 1 of the TA Act to have the meanings as assigned in section 153(1) and 156 respectively.

A “representative taxpayer” means a person who is responsible for paying the tax liability of another person as an agent, other than as a withholding agent, and includes a person who is –[27]

- a representative taxpayer under the Income Tax Act;
- a representative employer under the Fourth Schedule to the Income Tax Act; or
- a representative vendor under section 46 of the VAT Act.

These specific Acts require, amongst others, that the person must reside in South Africa for that person to be a representative. Examples of a representative taxpayer include, amongst others, a public officer of a company or close corporation, treasurer, accountant, director, trustee, curator, and liquidator.

A company or close corporation that conducts business or has an office in South Africa must appoint a public officer of the company or close corporation, within one month from the commencement of business operations or acquisition of an office for the purposes of section 246.

Accordingly, a representative taxpayer may apply for voluntary disclosure relief on behalf of a taxpayer. The taxpayer and the representative taxpayer must both be registered on eFiling, and the representative taxpayer must be linked to the tax types and profiles of the taxpayer.[28] A taxpayer is not relieved from any liability, responsibility or duty imposed under a tax Act because of the taxpayer’s representative’s failure to perform such responsibilities, duties or liability of tax payable by the taxpayer.[29] The voluntary disclosure relief is thus granted to the taxpayer and not to the representative taxpayer.

A withholding agent means a person that must under a tax Act withhold an amount of tax and pay it to SARS.[30] A withholding agent is personally liable for an amount of tax withheld and not paid to SARS or an amount that should have been withheld under a tax Act but was not so withheld.[31] Such an amount paid or recovered from a withholding agent is regarded as an amount of tax that is paid on behalf of the relevant taxpayer for the taxpayer’s liability under the relevant tax Act.[32]

[27] Section 153(1).
[28] For more information, see the *External Guide: How to Register for eFiling and Manage your User Profile (GEN-ELEC-18-G01)*.
[29] Section 153(3).
[30] Section 156.
[31] Section 157(1).
[32] Section 157(2).

Under section 228, a senior SARS official may issue a non-binding private opinion[33] as to a person's eligibility for relief under the VDP if the person provides sufficient information to do so, which information need not include the identity of any party to the default.[34] A non-binding private opinion[35] provides informal guidance by SARS about the tax treatment of a particular set of facts and circumstances or transaction.[36] A non-binding private opinion does not have a binding effect[37] upon SARS and may be cited only in proceedings, (including court proceedings) involving the person to whom the non-binding private opinion was issued.

2.3 Disqualification of person subject to audit or criminal investigation

A person seeking voluntary disclosure relief that has been given notice of the commencement of an audit or criminal investigation into the affairs of the person, and the audit or investigation has not been concluded and is related to the disclosed default, will not qualify for voluntary disclosure relief because the disclosure of the default is regarded as not being voluntary for purposes of section 227.[38]

If a notice of commencement of audit or criminal investigation has been issued, the disclosure will be regarded as voluntary if the audit or criminal investigation does not relate to the disclosed default. *Cambridge Dictionary* defines "relate" as –[39]

- "to find or show the connection between two or more things".

However, an applicant may still qualify for the voluntary disclosure relief if a senior SARS official is of the view, having regard to the circumstances and ambit[40] of the audit or investigation, that –

- the default for which the person has sought relief would not have been detected during the audit or investigation; and
- the application would be in the interest of good management of the tax system and the best use of SARS's resources.[41]

A person is deemed to have been notified of an audit or criminal investigation, if notice of the audit or investigation has been given to any of the following: [42]

- A representative of the person
- An officer, shareholder or member of the person, if the person is a company
- A partner in partnership with the person
- A trustee or beneficiary of the person, if the person is a trust

33 Section 88.

34 The request for a non-binding private opinion should be submitted with the VDP01 form via eFiling or a branch office.

35 As defined in section 75.

36 Section 75 defines "transaction" as "any transaction, deal, business, arrangement, operation or scheme and includes a series of transactions".

37 Section 75 defines "binding effect" as "the requirement that SARS interpret or apply the applicable tax Act in accordance with an 'advance ruling' under section 82".

38 Section 226(2).

39 **www.dictionary.cambridge.org/dictionary/english/relate** [Accessed 24 August 2023].

40 *Dictionary.com* defines "ambit" as "a sphere of operation or influence; range; scope". **www.dictionary.com/browse/ambit** [Accessed 24 August 2023].

41 Section 226(2).

42 Section 226(3).

- A person acting for or on behalf of or as an agent or fiduciary of the person

An applicant that has not been notified of the commencement of an audit or criminal investigation into such applicant's affairs must still meet all the requirements under section 227 for that disclosure to be considered a valid voluntary disclosure (see **2.4.2**).

An audit

Merriam-Webster Dictionary defines "audit" as –[43]

> "**1 a:** a formal examination of an organization's or individual's accounts or financial situation".

CollinsDictionary.com describes "audit" as –[44]

> "a formal, often periodic examination and checking of accounts or financial records to verify their correctness".

Based on the dictionary meanings it can be concluded that "audit" is a formal examination of the financial and accounting records and needs to include the supporting documents of the taxpayer to determine whether the taxpayer has correctly declared its tax position[45] to SARS. An audit is considered to commence once a Notification of Audit letter is issued to the taxpayer and is concluded once a Letter of Findings is issued to the taxpayer.[46]

SARS will not have to issue a Notice of Commencement of an audit and Notice of Completion of the audit if a senior SARS official has a reasonable belief that providing the taxpayer with such notices would impede or prejudice the purpose, progress or outcome of the audit.[47] In this instance although the applicant will not be issued with a Notice of Commencement of an audit, the applicant's application will not necessarily be disqualified under section 226(2). Whether an audit has commenced will have to be determined based on the specific facts and circumstances. Notification of commencement of an audit is only one of the criteria that may exclude a taxpayer from applying for voluntary disclosure relief. The requirements under section 227(*a*) to (*f*) should also be considered to determine if the application meets the requirements for a valid voluntary disclosure. If an applicant was aware that an audit had commenced, the application may not meet the requirement of "voluntary" under section 227(*a*) and would be denied on that basis (see **2.4.2**).

Example 1 – Audit has commenced before application but disclosure not disqualified under section 226(2)

Facts:

On 5 February 2023, SARS issued Company B with a Notification of Audit letter in respect of the income tax return for the 2022 year of assessment setting out the ambit as gross income.

Company B submitted an application on 3 March 2023 for a non-disclosure of income received from an offshore investment not linked to the bank account known to SARS during the 2022 year of assessment.

43 **www.merriam-webster.com/dictionary/audit** [Accessed 24 August 2023].

44 **www.collinsdictionary.com/dictionary/english/audit** [Accessed 24 August 2023].

45 The term "tax position" is defined in section 221.

46 Section 42.

47 Section 42(5).

After considering the specific circumstances and ambit of the audit, the senior SARS official was of the view that, even though the audit of gross income relates to all income including offshore income, the default for which Company B had sought voluntary disclosure relief would not have been detected during the audit.

Result:

Company B had been given notice of the commencement of an audit, which had not been concluded and was related to the disclosed default. The applicant should therefore have been disqualified under section 226(2).

However, the senior SARS official was of the view that the default that Company B had sought relief for would not have been detected during the audit and thus the application was not disqualified under section 226(2). The requirements under section 227(*b*) to (*f*) would also need to be met (see **2.4**) for the application to be a valid voluntary disclosure.

Chapter 5 provides for SARS's information gathering powers and procedure. Under section 40 SARS may select a person for inspection, verification or audit on the basis of any consideration for the proper administration of a tax Act, including on a random or risk assessment basis.[48] In *Cart Blanche Marketing CC & others v C: SARS*[49] the High Court had to consider whether a decision under section 40 was reviewable. The court held that the wording, context and purpose of section 40 suggest that provided that the intended audit is to be undertaken for the proper administration of a tax Act, there is no limitation to the considerations on which a decision to select a taxpayer is to be found. The decision to select a taxpayer for an audit does not adversely affect the taxpayer's rights and does not have a direct external legal effect. The court held that the threshold for SARS to pass before it can use section 40 must be extremely low.

The separate mention of inspection, verification and audit in section 40 is an indication that these are three different processes.

Cambridge Dictionary defines "inspection" as –[50]

> "the act of looking at something carefully, or an official visit to a building or organization to check that everything is correct and legal".

SARS conducts various types of inspections that include documentary and physical inspections. A physical inspection can be an inspection of documents, an asset or of a premise. An inspection may be conducted without earlier notice to the taxpayer to ensure that the records that have to be retained are actually retained by the taxpayer.[51]

Dictionary.com defines "verification" as –[52]

> "**5.** the process of research, examination, etc., required to prove or establish authenticity or validity".

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48 Section 40. For a detailed discussion, see the *Short Guide to the Tax Administration Act, 2011 (Act No. 28 of 2011).*

49 [2020] 4 All SA 434 (GJ).

50 **www.dictionary.cambridge.org/dictionary/english/inspection** [Accessed 24 August 2023].

51 Section 45(1).

52 **www.dictionary.com/browse/verification** [Accessed 24 August 2023].

A verification is the process of verifying the information declared by the taxpayer on the declaration or in a return submitted to SARS. This is done by comparing the information in the return against the financial and accounting records (such as the trial balance or income statement) to ensure that the declaration or return is a fair and accurate representation of the taxpayer's tax position. An example of a verification is the request for a company to complete and submit an Income Tax Supplementary Declaration (commonly referred to as an IT14SD) with the relevant required supporting documents.[53] The IT14SD is a supplementary declaration in which a company must reconcile income tax, VAT, PAYE and customs declarations after the initial submission of the Income Tax Return for Companies (IT14/ITR14) for the applicable year of assessment as specified in the verification letter. It is possible that a taxpayer will be subject to both a verification and audit of the same year of assessment.

In *Reed v Minister of Finance and Others*[54] Louw AJ held that there is a substantial overlap between the meanings of "audit" and "investigate" in their ordinary usages, but "investigate" seems to be a lesser order or formality than audit.

Section 226(2) refers only to the word "audit" and does not include "inspection" or "verification" as stipulated in section 40. Based on the principle in interpretation of *expressio unius est exclusion alterius* (the expression of one thing is the exclusion of another) an inspection and a verification is not considered to be an "audit" for purposes of section 226(2).

Example 2 – An applicant is selected for verification before submission of the application

Facts:

On 31 August 2022, SARS issued Company A with a letter informing it that the 2021 year of assessment was selected for verification. The letter detailed that the company had the option to submit either a revised ITR14 or an IT14SD. Company A has a year of assessment ending 30 June.

Company A submitted an application on 3 January 2023 for a default relating to the 2022 year of assessment.

Result:

Company A will not be disqualified from the voluntary disclosure relief under section 226(2), since no notice of the commencement of an audit or criminal investigation into the company's affairs had been given. Even though Company A has been informed of a verification, a verification is not an audit for purposes of section 226(2), and the voluntary disclosure for the 2022 year of assessment will not be disallowed on this basis.

However, section 227 should also be considered to determine if the application meets the requirements for a valid voluntary disclosure (see **2.4.2**). If Company A became aware of a default in the 2022 year of assessment as a result of the verification process on the 2021 year of assessment, the disclosure will not be regarded as voluntary for purposes of section 227(*a*).

53 For more information on an IT14SD, see the *External Guide: How to Complete and Submit the Income Tax Supplementary Declaration (IT14SD)*.

54 [2017] ZAGPPHC 916.

An applicant that has been selected for verification or inspection may not be disqualified from voluntary disclosure relief under section 226(2) since the inspection or verification does not constitute an "audit". Note that a verification process will not be suspended if a person applies for voluntary disclosure relief. If a taxpayer becomes aware of a default as a result of a verification or inspection, the default will not meet the requirement of being "voluntary" and the requirement of section 227(*a*) will not have been met (see **2.4.2**). This will depend on the facts of each case.

Criminal investigation

If at any time before or during the course of an audit it appears that a taxpayer may have committed a serious tax offence, the investigation of the offence must be referred to a senior SARS official responsible for criminal investigations for a decision as to whether a criminal investigation should be pursued.[55]

A "serious tax offence" is defined in section 1 as –

> "a tax offence for which a person may be liable on conviction to imprisonment for a period exceeding two years without the option of a fine or to a fine exceeding the equivalent amount of a fine under the Adjustment of Fines Act 101 of 1991".

If an applicant has been given notice of the commencement of a criminal investigation into the applicant's affairs that has not been concluded and relates to the disclosed default, the applicant will not qualify for voluntary disclosure relief since the disclosure of the default is regarded as not being voluntary for purposes of section 227 (see 2.4.2).

2.4 Requirements for a valid voluntary disclosure

For a valid voluntary disclosure the disclosure must –[56]

- be voluntary (see **2.4.2**);
- involve a "default" which has not occurred within five years of the disclosure of a similar "default" by the applicant or a person referred to in section 226(3) (see **2.1** and **2.4.3**);
- be full and complete in all material respects (see **2.4.4**);
- involve a behaviour referred to in column 2 of the understatement penalty table (see **2.4.5**);
- not result in a refund due by SARS (see **2.4.6**); and
- be made in the prescribed form and manner (see **2.4.7**).

All six of these requirements must be met for the application to be a valid voluntary disclosure. The onus is on the applicant to satisfy SARS that the above requirements have been met.

2.4.1 Disclosure

Cambridge Dictionary defines "disclosure" as –[57]

> "to make something known publicly, or to show something that was hidden".

To disclose something involves the act of making something known that was hidden.

[55] Section 43.

[56] Section 227(*a*) to (*f*).

[57] **www.dictionary.cambridge.org/dictionary/english/disclose** [Accessed 24 August 2023].

The word "disclosure" was considered in *Reed v Minister of Finance and Others*[58] in which Louw AJ stated as follows:[59]

> "According to the Shorter OED the verb "disclose" (also originally from the Latin "dis" meaning "no" on "un" plus "claudere" meaning close, thus "unclose") means to open up something closed or folded up, to expose to view, make known or reveal, come into light and disclosure as noun carries the meanings of the action of making known or visible. If somebody knows something then it is difficult to see how, without straining language into incomprehensibility, another person can "disclose" the thing known to the first person. Determining whether something is (disclosable) is not a subjective matter but is purely objective – does the person have knowledge of the thing or not; if not, it can be disclosed, if yes it cannot be disclosed."

In the *Reed* case, the taxpayer was aware that SARS was looking into his tax affairs and made a VDP application subsequent to this fact becoming known. It was held that the taxpayer had not disclosed in the application to SARS anything that SARS was unaware of.

The word "disclosure" was also considered in *Purveyors South Africa Mine Services (Pty) Ltd v C: SARS*[60] in which Mathopo JA stated:

> "An equally important word to attribute meaning is the word 'disclosure' which appears twice in the section. Disclosure means 'to open up to the knowledge of others, to reveal'. In his article titled '*Tax Amnesties in Africa: An analysis of the voluntary disclosure Programme in Uganda*', Solomon Rukundo stated the following:
>
>> 'Voluntary disclosure occurs when a taxpayer, unprompted and of their own volition, comes forward to disclose their tax liabilities, misstatements or omissions in their tax declarations in order to return to a fully compliant status with respect to legal obligations'. The taxpayer must not have been prompted by any compliance action by URA such as: initiation of a tax investigation, request for tax information, tax advisory letter, tax health check/review, notice of audit, tax query, or compliance visit by URA officers (URA 2020c). Voluntariness of a disclosure is a key policy objective of the programme. If disclosures made by taxpayers prompted by compliance actions were to be accepted, there would be no incentive for taxpayers to correct past deficiencies until it was clear that they are going to be held accountable. The requirement of voluntariness is in line with the model tax amnesty described earlier.'".

The judgment is considered in detail below (see **2.4.2**).

Example 3 – Application not a "disclosure" under section 227

Facts:

Company D was registered for VAT purposes since 1 March 2014 and was required to submit returns on a bi-monthly basis (Category B). Company D had not submitted VAT returns since January 2016.

Company D submitted an application for voluntary disclosure relief under the VDP on 9 June 2022 for a default relating to non-submission of VAT returns since January 2016.

58 [2017] ZAGPPHC 916.

59 In [35].

60 [2021] ZASCA 170 in [19].

Result:

The VAT returns for the periods January 2016 to May 2022 reflect as outstanding on SARS's records. As SARS was already aware of the outstanding VAT returns, the application cannot be viewed as a valid "disclosure". Accordingly, Company D will not qualify for the voluntary disclosure relief.

If it is apparent, from information available to the VDP Unit, that a taxpayer intentionally submitted nil returns to avoid having outstanding returns so that an application can be made for voluntary disclosure relief, the application will be rejected. Such application will not be regarded by the VDP Unit as a valid voluntary disclosure.

2.4.2 Voluntary

Since the entire programme is based on the **voluntary**[61] disclosure of a default by an applicant, the meaning and application of "voluntary" is of utmost importance. *Cambridge Dictionary* defines "voluntary" as –[62]

> "done, made, or given willingly, without being forced or paid to do it".

In *Reed v Minister of Finance and Others*[63] the court considered whether the application made by the taxpayer under the VDP was indeed "voluntary". During a SARS desk audit of a close corporation, of which the taxpayer is a majority member, the SARS auditor discovered that the taxpayer had not submitted income tax returns for 22 years. The auditor called the close corporation's tax consultant and advised that he had looked at the taxpayer's position and noticed that the taxpayer did not have a tax number. The taxpayer was then advised by his tax consultant to make use of the VDP and submit an application. SARS declined the application as it was considered not to be "voluntary". The taxpayer then applied to have the decision reviewed by the High Court.

Louw AJ stated that "voluntary" was not defined. Its meaning must therefore be found in the two main sections in which it is used, namely, sections 226 and 227. He stated the following:[64]

> "Section 226 thus contains threshold requirements that are specific to the person of the applicant. The crucial factor is a lack of knowledge that there is a pending audit or investigation. Put differently, the applicant has to be ignorant of any pending audit or investigation or audit or investigation that have already commenced. The VD applicant must allege and prove this ignorance. "Voluntary" thus means bringing information to SARS when there is no causal SARS investigation underfoot and if there is, in ignorance of it."

Louw AJ held that the taxpayer knew, through his tax consultant, that the SARS auditor was "looking into" his tax affairs. The question was then whether the "looking into" was considered an "audit" or "investigation" as contemplated in sections 226 and 227. He stated that there is a substantial overlap between the meanings of "audit" and "investigate" in their ordinary uses and that investigate seems to be a lesser order or formality than audit.[65] The hygiene test to which the SARS auditor deposed is just an investigation. The investigation may be preliminary in nature because at the time that it is conducted there is no reason to suspect any wrongdoing by a taxpayer. It is considered "scoping" in nature. A SARS official looking into a taxpayer's tax affairs

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61 Section 227(*a*).

62 **www.dictionary.cambridge.org/dictionary/english/voluntary** [Accessed 24 August 2023].

63 [2017] ZAGPPHC 916.

64 In [30].

65 In [33].

is thus doing an investigation. As the taxpayer was aware that his tax affairs were being looked into, the application was thus considered not to be "voluntary".[66]

In *Purveyors South Africa Mine Services (Pty) Ltd v C: SARS*[67] the court considered whether the application made by the taxpayer was "voluntary" for purposes of section 227(*a*). In 2015 the taxpayer had imported an aircraft into South Africa which it used to transport goods and personnel to other countries in Africa. The taxpayer was liable for the payment of import VAT to SARS on the importation of the aircraft, which it failed to pay. During the later part of 2016, the taxpayer had reservations about its failure to pay the import VAT[68] and engaged with representatives of SARS to obtain a view on its liability for such tax. It then conveyed to SARS a broad overview of the facts and nothing more. Following these engagements, the taxpayer was advised by SARS on 1 February 2017 that the aircraft should have been declared in South Africa and import VAT paid to SARS. The taxpayer was also warned that penalties were applicable because of the failure to have paid the import VAT. Approximately a year later, the taxpayer applied for voluntary disclosure relief, which SARS declined on the basis that the requirements of section 227 had not been met.

The primary issue in this appeal was whether SARS was correct in rejecting Purveyors' voluntary disclosure application for non-compliance with section 227, and more specifically on the ground that it was not made voluntarily. According to Mathopo JA, the issue resolved itself into the question of whether the exchange or discussions between the representatives of SARS and the officials of Purveyors had any material bearing on the application.[69]

Mathopo JA was of the view that the first and perhaps most important question to consider is the approach to be adopted by the court in construing section 227. In interpreting section 227, reference was made[70] to the following statement by the court in the case of *C: SARS v United Manganese of Kalahari (Pty) Ltd*:[71]

> "It is unnecessary to rehearse the established approach to the interpretation of statutes set out in *Endumeni* and approved by the Constitutional Court in *Big Five Duty Free*. It is an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. The approach is as applicable to taxing statutes as to any other statute. The inevitable point of departure is the language used in the provision under consideration."

Mathopo JA held that the starting point to notice about section 227 is that it relates to "voluntary disclosure". Each of these words is of wide and general import. This was explained as follows:[72]

> "Cardinal among words to which meaning ought to be given is 'voluntary'. According to the *Shorter Oxford English Dictionary on Historical Principles*, the word 'voluntary' means: 'performed or done of one's own free will, impulse or choice; not constrained, prompted, or suggested by another.' An equally important word to attribute meaning is the word 'disclosure' which appears twice in the section. Disclosure means 'to open up to the knowledge of others, to reveal'."

66 In [35].

67 2022 (3) SA 139, 84 SATC 215.

68 VAT charged on the importation of goods under the VAT Act.

69 At SATC 215 in [14].

70 At SATC 215 in [18].

71 2020 (4) SA 428 (SCA), 82 SATC 444 at 8.

72 At SATC 215 in [19].

Mathopo JA held that an equally important word to attribute meaning is the word “disclosure” which appears twice in the section.[73] Disclosure means “to open up to the knowledge of others, to reveal”. In his article titled *Tax Amnesties in Africa: An Analysis of the Voluntary Disclosure Programme in Uganda*, Solomon Rukundo stated the following:

> 'Voluntary disclosure occurs when a taxpayer, unprompted and of their own volition, comes forward to disclose their tax liabilities, misstatements or omissions in their tax declarations in order to return to a fully compliant status with respect to legal obligations'. The taxpayer must not have been prompted by any compliance action by URA such as: initiation of a tax investigation, request for tax information, tax advisory letter, tax health check/review, notice of audit, tax query, or compliance visit by URA officers (URA 2020c).
>
> Voluntariness of a disclosure is a key policy objective of the programme. If disclosures made by taxpayers prompted by compliance actions were to be accepted, there would be no incentive for taxpayers to correct past deficiencies until it was clear that they are going to be held accountable. The requirement of voluntariness is in line with the model tax amnesty described earlier.“

On the language used in section 227 and its purpose Mathopo JA stated the following:[74]

> “The language used in the section clearly indicates the legislature’s intention to arm the Commissioner with extensive powers to prevent taxpayers from disclosures which are neither voluntary nor complete in all material respects. The fact that the section provides that the disclosure application must be made in the prescribed form or manner rather than obtaining *ad hoc* advice from SARS is a clear indication that the mischief sought to be prevented is one where a taxpayer discloses information to SARS and later on makes a voluntary disclosure application. The purpose of the application is designed to ensure that errant taxpayers who are not compliant must come clean, out of their own volition and without any prompting, to make amends in respect of their defaults by informing SARS. No purpose would be served if the TAA enables errant taxpayers to obtain informal advice and when it does not suit them, to then apply for voluntary disclosure relief. Whether a voluntary disclosure has been prompted by a compliance action is a question of fact to be determined by examining the circumstances in which it was made.”

Mathopo JA held that it is clear from the facts that from the onset and well before the submission of their application for voluntary disclosure relief, Purveyors knew that it was liable for import VAT on the aircraft and penalties that would not to be waived. Purveyor’s application was thus not voluntary based on the following: [75]

- Firstly, it was prompted by a compliance action on the part of SARS, which was aware of the default following interactions between the two parties.
- Secondly, Purveyors itself appreciated that it was liable for fines and penalties that had to be paid before it would be tax-compliant.
- Thirdly, it was not motivated by any desire to come clean, but rather to avoid the payment of fines and penalties. This is underscored by the absence of any evidence that Purveyors had been contemplating an application and its failure to follow the process.

Mathopo JA agreed with SARS that the application made by the taxpayer was not “voluntary” because –[76]

> “upon a true analysis of the facts of the present case, Purveyors’ application does not pass the test. The application was not voluntarily made. Purveyors, in its application, did not disclose information of which SARS was unaware. The submission that the application should be treated as if no exchanges, approaches or contact was made with SARS representative is without merit. To construe 227 in the way for which Purveyors contended would defeat the purpose of the section

[73] At SATC 215 in [19].
[74] At SATC 215 in [20].
[75] At SATC 215 in [22].
[76] At SATC 215 in [29].

> and produce an anomalous result. Such an interpretation would produce the result that a taxpayer who has not complied with his tax obligations would ask SARS for an opinion, disclose his transgressions and, upon receipt of that opinion, thereafter apply for a relief under ss 226 and 227. This is the very mischief which the legislature sought to avoid.”.

The Purveyors case confirms the principle that an applicant must act voluntarily, freely and not be prompted by any action by SARS for the disclosure to be regarded as “voluntary”. It is not the intention of the legislation to reward involuntary conduct.

An application made by a taxpayer subsequently to the taxpayer becoming aware of a possible default as a result of SARS requesting an inspection or verification related to the default will thus not be considered “voluntary”. Had it not been for the inspection or verification related to the default, the taxpayer would not have applied for the VDP.

Whether a disclosure is done voluntary will be determined having regard to the facts of each case.

Example 4 – Disclosure considered “voluntary” under section 227(*a*)

Facts:

On 10 April 2022, SARS issued Company Z with a notification of verification of the 2021 year of assessment. The company had the option to submit either a revised ITR14 or an IT14SD. Company Z has a year of assessment ending 31 March. Company Z chose to submit an IT14SD.

Company Z submitted an application for voluntary disclosure relief under the VDP on 6 May 2022 for a default relating to the 2022 year of assessment. The default was the omission of income from the 2022 ITR14. The taxpayer became aware of the default as a result of an in-house audit and not as a result of SARS’s verification being conducted.

Result:

The requirements under section 227 should be considered to determine if the application meets the requirement of a voluntary disclosure. As the 2022 year of assessment was not the year being verified and there is nothing that suggests that the default would have been detected during the verification of the 2021 year of assessment, the disclosure meets the requirement of it being “voluntary” under section 227(*a*).

Failure to register for tax type resulting in a default

A taxpayer whose default consists of failing to register for a tax type may involve the VDP Unit for guidance before commencing with the registration process. If a liability for tax is triggered by the registration for the tax type, the taxpayer can apply for voluntary disclosure relief.[77] This application must be submitted within a reasonable timeframe from the date after which the taxpayer has registered for the applicable tax type. The general practice of the VDP Unit is to allow a timeframe of 21 business days. This is not a fixed timeframe and can be extended depending on the facts of each case. If an applicant anticipates difficulties meeting this timeline, the VDP Unit should be contacted to make alternative arrangements.

Any information made known to SARS by a taxpayer during this registration process will not disqualify the application from meeting the voluntary requirement.

[77] For clarity on the treatment of input tax relating tax invoices issued to a person before being registered as a vendor, see VAT connect 13: VAT Connect Issue 13 (November 2021).

2.4.3 Involves a default which has not occurred within five years of the disclosure of a similar default

An application will not meet the legal requirements if the default relating to the current application has occurred within five years of the disclosure of a similar default by the applicant or a person referred to in section 226(3).[78]

CollinsDictionary.com defines "similar" as –[79]

> "**1.** showing resemblance in qualities, characteristics, or appearance; alike but not identical".

Whether a similar default has been disclosed is a factual question having regard to the type of default that is currently disclosed and the previous disclosure. A default includes a submission of inaccurate or incomplete information to SARS, the failure to submit information, or adoption of a "tax position" if any of these result in an understatement (see **2.1**). Since the default need only be similar and not the exact same, the default disclosed within five years from the previous default disclosure does not have to have identical characteristics. For example, a person that trades in the buying and selling of property, disclosed a default three years ago involving the non-declaration of deposits received from the letting of property. The current default disclosure involves the non-declaration of the sale of a property. The two defaults are not the same, but similar as they both involve the under-declaration of income in relation to property transactions. If a taxpayer has more than one source of income that are not similar in nature, the determination will depend on the specific facts of the applicable defaults.

An example of a similar default for VAT purpose is if a vendor disclosed a default in respect of the incorrect apportionment ratio used for the calculations of input tax deductions for the 2018 financial year and subsequently made an application for the failure to use an apportionment ratio for the 2020 financial year.

In a PAYE scenario, an example of a similar default is if an employer disclosed a default in respect of the calculations of fringe benefits on company-owned motor vehicles provided to employees for the periods of March 2016 to February 2017, and made a subsequent disclosure for the failure to increase the fringe benefit value of employer-provided motor vehicles for the periods of March 2020 to February 2021.

The above examples are not an exhausted list, and the facts of each case will be considered.

The test to determine whether a similar default occurred, is the nature of the default and does not relate to the person disclosing the default. Disclosure of the default can be made by either the taxpayer or a person referred to in section 226(3) (see **2.3**). If, for example, a representative of X applies for voluntary disclosure relief relating to a default of X's tax affairs, but the default is the same as an application submitted two years ago by X in person, the application will not be considered valid.

The period of five years is calculated from the date of the previous disclosure. In *Ex Parte Minister of Social Development and Others*[80] the Constitutional Court held that the general common law rule is that in the calculation of time the civilian method is applicable, unless a period of days is prescribed by law. According to the civil computation method, a period of time expressed in weeks, months or years expires at the end of the day preceding the corresponding calendar day in the subsequent month or year. If a default was disclosed on 4 December 2020 the five-year

78 Section 227(*b*).

79 **www.collinsdictionary.com/dictionary/english/similar** [Accessed 24 August 2023].

80 2006 (4) SA 309 (CC) in [24].

period will start on 4 December 2020 and end on 3 December 2025. Whether the previous disclosure was accepted or rejected as a voluntary disclosure is irrelevant.

Example 5 – Fewer than five years since the disclosure of a similar default

Facts:

Company Y submitted an application for voluntary disclosure relief in May 2020 for a default relating to the non-disclosure of income received of R800 000 in July 2017 from XYZ Trading (Pty) Ltd for services rendered. The application met all the necessary requirements, and the voluntary disclosure relief was granted.

In July 2022, Company Y applied to SARS for voluntary disclosure relief for non-disclosure of income received of R1 million in December 2021 from ABC (Pty) Ltd for services rendered.

Result:

The application submitted in July 2022 will not be considered valid under section 227, since the default relating to the current application had occurred within five years of the disclosure of a similar default in May 2020. Even if the application regarding the income from XYZ Trading (Pty) Ltd was rejected by SARS, the subsequent application will be considered invalid.

2.4.4 Full and complete in all material respects

The voluntary disclosure must be full and complete in all material respects.[81] The submission made to SARS must therefore include all the relevant material information relating to the default including full details of all parties involved in the default. Whether this requirement has been met, will be determined by the facts of each case.

Merriam-Webster Dictionary defines "complete" as –[82]

> "having all necessary parts, elements, or steps".

CollinsDictionary.com defines "complete" as –[83]

> "that something is as great in extent, degree, or amount as it possibly can be".

Dictionary.com defines "full" as –[84]

> "completely filled; containing all that can be held; filled to utmost capacity".

Dictionary.com defines "material" as –[85]

> "of substantial import; of much consequence; important."

If any significant or relevant information relating to the default is omitted from the voluntary disclosure, the disclosure will not be regarded as full and complete and will therefore not be a valid voluntary disclosure.

81 Section 227(*c*).

82 **www.merriam-webster.com/dictionary/complete** [Accessed 24 August 2023].

83 **www.collinsdictionary.com/dictionary/english/complete** [Accessed 24 August 2023].

84 **www.dictionary.com/browse/full** [Accessed 24 August 2023].

85 **www.dictionary.com/browse/material** [Accessed 24 August 2023].

An applicant may not omit certain amounts from a disclosure in order to avoid a refund that could disqualify the application (see **2.4.6**). This would result in the disclosure not being full and complete in all material respects. For example, an applicant disclosing a default on VAT omits certain input tax amounts and decides to claim these amounts in future periods falling outside the period for which the application was made in order to avoid a refund arising because of the disclosure.[86] Such a disclosure will not be considered full and complete.

An applicant that has submitted an application for a default of one tax type (for example, income tax) but is still in the process of determining whether the same default also has implications for another tax type (for example, VAT) must disclose this information as part of the application for the disclosure to be considered full and complete.

Furthermore, if an applicant encounters difficulties to submit all of the information with the application, the application may be submitted stating this difficulty. Based on the information available at that time provided, the outstanding information will be provided within a reasonable time frame which is normally 21 business days.

Once the application has been submitted, SARS may request additional information from the applicant relating to the default. The applicant must provide the requested information within the timeline specified by SARS. An applicant that anticipates being unable to submit the requested information within the timeframe, may request an extension from the VDP Unit before the due date. Requests for extension will be considered having regard to the reason(s) and circumstances submitted for the request of extension of time. Having regard to the fact that the disclosure should be full and complete in all material respects, the information requested by the VDP Unit should be readily available by the taxpayer.

An applicant may apply for voluntary disclosure relief relating to a default for which the records may no longer be required to be retained under section 29(3)(*a*). However, for purposes of the VDP, the records relevant to the default is necessary, as the voluntary disclosure must be full and complete in all material respects for it to be a valid voluntary disclosure. Therefore, the prescribed retention period should not be used as a reason for not making a full and complete submission. An applicant that is unable to provide accurate records may submit reasonable estimates for SARS's consideration that must be justified by other forms of supporting documentation.

Section 29(1) provides that a person must keep the records, books of account or documents (hereinafter collectively referred to as "records") that –

- enable the person to observe the requirements of a tax Act;
- are specifically required under a tax Act or by the Commissioner by public notice; and
- enable SARS to be satisfied that the person has observed these requirements.

The records must be retained by the person for a period of five years *from the date of submission of the return*.[87] If a person had to submit a return but neglected doing so, there is no limitation on the number of years that records should be kept.[88]

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[86] Under paragraph (i) of the proviso to section 16(3) of the VAT Act, a vendor generally has five years to claim an input tax amount.

[87] Section 29(3)(*a*).

[88] Section 29(2)(*b*) read with section 29(3).

Under section 30(1), the records referred to in section 29 must be kept or retained in –

- their original form in an orderly fashion and in a safe place;
- the form, including electronic form, as may be prescribed by the Commissioner in a public notice[89]; or
- a form specifically authorised by a senior SARS official.

These records should be available for inspection by a SARS official to verify compliance with the requirements as explained above, or for purposes of an inspection, audit or investigation.[90] A document in electronic form must be capable of being accepted by SARS's computers or the equipment forming part of the SARS information system.[91]

The onus of submitting a full and complete disclosure rests upon the person making the disclosure. Each case will be considered having regard to its own facts and circumstances.

2.4.5 Must involve a specific behaviour

The voluntary disclosure must involve a behaviour referred to in column 2 of the understatement penalty table.[92]

The TA Act provides for different rates of an understatement penalty based on the type of behaviour or the degree of culpability involved. The behaviours listed in column 2 of the understatement penalty table are as follows:[93]

- Substantial understatement[94]
- Reasonable care not taken in completing return
- No reasonable grounds for "tax position" taken
- Impermissible avoidance arrangement
- Gross negligence
- Intentional tax evasion

For a detailed consideration of these behaviours, see the *Guide to Understatement Penalties*.

An application not involving at least one of these behaviours will not be a valid voluntary disclosure.

The principles of interpretation of legislation as confirmed by the courts are that it is an objective unitary process in which consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed, and the material known to those responsible for its production.[95]

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89 See Government Notice 644 in *Government Gazette* 37940 on 25 August 2014.

90 Section 31.

91 Rule 2(2) of Government Notice 644 in *Government Gazette* 37940 on 25 August 2014.

92 Section 227(*d*).

93 Section 223.

94 Defined in section 221 as "a case where the prejudice to SARS or the *fiscus* exceeds the greater of five per cent of the amount of 'tax' properly chargeable or refundable under a tax Act for the relevant tax period, or R1 000 000".

95 *Commissioner for South African Revenue Services v United Manganese of Kalahari* (*Pty*) *Ltd* 2020 (4) SA 428 (SCA); 82 SATC 444 and *South African Nursing Council v Khanyisa Nursing School (Pty) Ltd & another* [2023] ZASCA 86.

The VDP provisions are contained in Chapter 16 dealing with "Understatement Penalties". Part A of Chapter 16 deals with understatement penalty while Part B of that Chapter deals with the VDP. The purpose of the VDP is to grant relief from criminal prosecution for a tax offence, any understatement penalty to the extent referred to in column 5 or 6 of the understatement penalty percentage table in section 223, and certain administrative non-compliance penalties.

Thus, having regard to the language used in section 227(*d*), the context in which the provision appears and the apparent purpose to which it is directed, the provision cannot be limited only to a behaviour.

The understatement must result in the imposition of an understatement penalty under Chapter 16. An understatement penalty is the amount imposed under section 222, resulting from applying the highest penalty percentage in accordance with the table in section 223 to each shortfall determined in relation to each understatement. A shortfall is calculated on the difference between the correct amount of tax and the tax that was reported in a tax period. Therefore, the understatement must result in a shortfall. An understatement that does not result in a shortfall, but only results in the imposition of interest, will not meet the requirement.

2.4.6 Does not result in a refund due by SARS

For a voluntary disclosure to be valid, the disclosure submitted must not result in a refund due by SARS.[96]

Dictionary.com defines "refund" as –[97]

> "to make repayment to; reimburse".

The word "refund" in the context of section 227(*e*) does not imply a physical payment of an amount due. If a taxpayer has an outstanding tax debt or a debt due under the customs and excise legislation, an amount refundable by SARS will not be physically paid out but will be set off against such debt.[98]

An application relating to more than one tax period will be considered on the net position of the default over these tax periods for purposes of determining whether a refund is due by SARS (see **2.1** for a discussion on net position over more than one tax period). A default can include more than one tax period and must be considered for all the periods submitted as part of the application.

Disclosure of defaults resulting in a refund due by SARS should be corrected by applying the normal provisions and procedures under the TA Act and not through the VDP.

Example 6 – Disclosure resulting in a refund

Facts:

Company X registered as a vendor for VAT purposes in May 2023 under Category C (VAT returns should be submitted monthly). Company X applied for voluntary disclosure relief in May 2023 for a default relating to failure to register for VAT and submit VAT returns for the periods January 2023 to April 2023. Company X calculated the VAT liability for the periods as follows:

- January 2023 – R60 000 owing to SARS

96 Section 227(*e*).
97 **www.dictionary.com/browse/refund** [Accessed 24 August 2023].
98 Section 191.

- February 2023 – R70 000 refund payable to Company X
- March 2023 – R90 000 owing to SARS
- April 2023 – R110 000 refund payable to Company X

Result:

The application submitted in May 2023 will not be considered valid under section 227 since the disclosure of the default of failing to register for VAT results in a net refund of R30 000 (R60 000 – R70 000 + R90 000 − R110 000) owing to Company X for the period January 2023 to April 2023. Such default must be regularised through the normal SARS channels.

2.4.7 Prescribed form and manner

The applicant must complete and submit an application form (VDP01) through SARS eFiling.[99] The applicant must be registered on SARS eFiling to be able to access the VDP01.[100] Alternatively, an applicant may visit any SARS branch (by appointment), where the VDP01 will be captured on their behalf by a SARS official and submitted on the SARS system.

For more information on how to complete the VDP01 form, see the *External Guide: Voluntary Disclosure Programme (GEN-VDP-02-G01)*.

3. Voluntary disclosure agreement

3.1 Entering into voluntary disclosure agreement

The approval of an application and the voluntary disclosure relief granted to the qualifying applicant must be recorded in a written agreement between SARS and the qualifying applicant that is liable for the outstanding tax debt.[101]

The voluntary disclosure agreement must include details on –[102]

- the material facts of the default on which the voluntary disclosure relief is based;
- the amount payable by the person, which amount must separately reflect the understatement penalty payable;
- the arrangements and dates for payment; and
- relevant undertakings by the parties.

The voluntary disclosure agreement must be signed by both SARS and the qualifying person that is liable for the outstanding tax debt. Once the voluntary disclosure agreement has been signed by both parties, it will constitute a contract[103] between the parties to the agreement.

99 Section 227(*f*).

100 For more information, see the *External Guide: How to Register for eFiling and Manage your User Profile (GEN-ELEC-18-G01)*.

101 Section 230.

102 Section 230(*a*) to (*d*).

103 See ADJ Van Rensburg *et al* "Requirements for a Valid Contract" 9 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 6 November 2020) in paragraph 328, for the requirements for a valid contract.

If at any point subsequent to the conclusion of a voluntary disclosure agreement, it is determined that the application submitted by the applicant is not a valid voluntary disclosure (see **2.4**), the voluntary disclosure relief will be withdrawn (see **4.2**).

If there is any breach of the voluntary disclosure agreement by the applicant, SARS may terminate the voluntary disclosure agreement under common law principles.[104]

To the extent that the parties do not enter into a voluntary disclosure agreement, the applicable penalties will be levied. The taxpayer must follow the normal SARS process to object to the assessments issued.

3.2 Reporting of voluntary disclosure agreements

The Commissioner is required annually to provide the Auditor-General[105] and the Minister of Finance a summary of all voluntary disclosure agreements concluded relating to applications received during the period.[106]

The summary of voluntary disclosure agreements submitted to the Auditor-General and the Minister must –[107]

- not disclose the identity of the applicant [subject to section 70(6)], and must be submitted at such time as may be agreed between the Commissioner and the Auditor-General or Minister, as the case may be; and
- contain details of the number of voluntary disclosure agreements and the amount of tax assessed, categorised according to the main classes of taxpayers or sections of the public.

4. Voluntary disclosure relief

4.1 Types of voluntary disclosure relief granted

An applicant that submitted a valid voluntary disclosure and concluded a voluntary disclosure agreement with SARS, is afforded, despite the provisions of a tax Act, the following voluntary disclosure relief:[108]

- The non-pursuance of criminal prosecution for a tax offence arising from the default.
- Relief of any understatement penalty to the extent referred to in column 5 or 6 of the understatement penalty table.
- 100% relief of an administrative non-compliance penalty that was or may be imposed under Chapter 15 or a penalty imposed under a tax Act. The relief excludes a penalty imposed under that Chapter or under a tax Act for the late submission of a return. Such administrative non-compliance penalties include a fixed amount penalty for general non-compliance and a percentage-based penalty for unpaid tax.

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104 See ADJ Van Rensburg *et al* "Breach of Contract" 9 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 6 November 2020) in paragraph 384 for a discussion on a breach of contract and paragraph 433 for a discussion on termination.

105 The institution contemplated in section 181(1)(*e*) of the Constitution of the Republic of South Africa, 1996.

106 Section 233(1).

107 Section 233(2).

108 Section 229.

Columns 5 and 6 of the understatement penalty table are as follows with the percentage being based on the different types of behaviour:

1 Item	2 Behaviour	5 Voluntary disclosure after notification of audit or investigation[109]	6 Voluntary disclosure before notification of audit or investigation
(i)	Substantial understatement	5%	0%
(ii)	Reasonable care not taken in completing return	15%	0%
(iii)	No reasonable grounds for tax position taken	25%	0%
(iv)	Impermissible avoidance arrangement	35%	0%
(v)	Gross negligence	50%	5%
(vi)	Intentional tax evasion	75%	10%

4.2 Withdrawal of voluntary disclosure relief

If subsequent to the conclusion of a voluntary disclosure agreement, it is established that the applicant failed to disclose a matter that was material for purposes of making a valid voluntary disclosure, a senior SARS official may –[110]

- withdraw any voluntary disclosure relief granted;
- regard an amount paid under the voluntary disclosure agreement to constitute part payment of any further outstanding tax debt relating to the default; and
- pursue criminal prosecution for a tax offence.

Having regard to the definition of "material" considered in **2.4.4** and read in this context, a matter is considered "material" if the disclosure would have resulted in the application not meeting all the requirements of a valid voluntary disclosure (see **2.4**). The determination of whether the non-disclosure of a matter is material will depend on the exact facts and circumstances of each case.

An applicant may object and appeal to the withdrawal of the voluntary disclosure relief (see **6**). SARS must comply with the requirements set out in the Promotion of Administrative Justice Act 3 of 2000 (PAJA), namely, it should provide –[111]

- adequate notice of the nature and purpose of the proposed administrative action;
- a reasonable opportunity for the taxpayer to make representations;
- a clear statement of the administrative action;

[109] This is applicable if a senior SARS official exercises discretion under section 226(2).
[110] Section 231(1).
[111] Section 3(2)(*b*) of the Promotion of Administrative Justice Act 3 of 2000.

- adequate notice of any right of review (object and appeal); and
- adequate notice of the right to request reasons under section 5 of PAJA.

5. Assessment or determination

SARS may, despite anything to the contrary contained in a tax Act, issue an assessment or make a determination for purposes of giving effect to the voluntary disclosure agreement.[112]

An assessment on the voluntary disclosure agreement can be issued for periods that have ordinarily prescribed under section 99(1) (see **2.1**) if the provisions of section 99(2) apply.

An applicant may not object or appeal to an assessment or determination giving effect to the voluntary disclosure agreement (see **6**).

Once an assessment is issued, interest and penalties will be imposed. Relief may be granted for certain penalties in specific circumstances (see **4.1**).

Any assessments issued or a determination made on the voluntary disclosure agreement does not prevent the Commissioner from selecting the applicant for inspection, verification or audit or from applying the provisions of any Act under its administration in the normal course of SARS operations.

6. Objection and appeal

A taxpayer that is aggrieved by an assessment or decision[113] made, may object[114] to or appeal[115] against the assessment.

Section 232(2), however, provides that an assessment issued, or determination made to give effect to a voluntary disclosure agreement, is not subject to objection and appeal. Accordingly, an applicant that is aggrieved by an assessment issued under a voluntary disclosure agreement may not object to or appeal against that assessment.

An applicant may object to and appeal against a decision by the senior SARS official to –[116]

- withdraw the voluntary disclosure relief granted to an applicant;
- regard an amount paid under the voluntary disclosure agreement to constitute part payment of any further outstanding tax debt relating to the relevant default; and
- pursue criminal prosecution for a tax offence.

A decision made by a SARS official to reject an application is not subject to objection and appeal. The applicant may, however, request the SARS official to withdraw or amend such decision.[117]

[112] Section 232(1).
[113] Section 104(2).
[114] Section 104.
[115] Section 107.
[116] Section 231(2).
[117] Section 9.

Withdrawal of decision or notice by SARS

Section 9 provides that a decision made by a SARS official, excluding a decision given effect to in an assessment or a notice of assessment, may in the discretion of the SARS official be withdrawn or amended. Under section 9(3) a decision made by a SARS official, and a notice issued to a specific person by SARS, excluding a decision given effect to in an assessment, or a notice of assessment, are treated as made by a SARS official authorised to do so or properly issued by SARS, until the contrary is proven.

Section 9(1) confers this discretion on the SARS official, or a SARS official to whom the SARS official reports or a senior SARS official, or as a result of a request by the relevant person to withdraw or amend the decision in question.

If all the material facts were known to the SARS official at the time that the decision was made, a decision or notice dealt with in section 9(1) may not be withdrawn or amended with retrospective effect, after three years from the later of the date of the written notice of that decision or the date of assessment of the notice of assessment giving effect to that decision if that is applicable.

7. Confidentiality of information

SARS officials, current and former, are required to preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official.[118]

Taxpayer information includes any information provided by a taxpayer or obtained by SARS about the taxpayer, including biometric information.[119]

A SARS official who receives taxpayer information must preserve the secrecy of the information and may disclose the information only to another SARS official if the disclosure is necessary to perform the functions specified in those sections.[120]

Any taxpayer information received under the VDP, including the VDP01 and supporting documents, may not be disclosed to a person who is not a SARS official or to another SARS official unless the disclosure is necessary and authorised by legislation.

[118] Section 69(1).

[119] Section 67(1)(*b*). Section 1 defines "taxpayer information" as "the meaning assigned under section 67(1)(*b*)".

[120] Section 67(4).