

DISCUSSION PAPER
ON A PROPOSED SYSTEM FOR

ADVANCE TAX RULINGS

2003

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1. INTRODUCTION

Certainty is one of the canons of taxation. With a view to promoting certainty, the Minister of Finance announced in the 2003 Budget Review that the South African Revenue Service (SARS) is actively reviewing the possibility of introducing an advance ruling process and plans to release a discussion document in this regard. This document serves as that discussion document and provides details of the proposed system.

A process of consultation provides SARS with the opportunity to share its views and options with taxpayers and various stakeholders and explain why it favours particular options. It also provides stakeholders with an opportunity to comment on the design of the system before legislation is introduced.

Taxpayers and stakeholders are therefore invited to comment on the proposed system before the final legislation is developed.

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2. THE EXISTING POSITION IN SOUTH AFRICA

No formal advance tax ruling system currently exists in South Africa. However, taxpayers often approach SARS for guidance or views on the interpretation of certain provisions of the legislation administered by SARS and in certain circumstances SARS complies with these requests. *The views and rulings given in response to these requests can be divided into the following two categories:—*

• General views

These represent the views of SARS based on the interpretation of a specific provision of the relevant Act.

These views are developed and formulated by SARS and conveyed to stakeholders through interpretation notes, guides and brochures.

This function is limited to matters of general application, for example, the rates at which SARS would accept claims for wear and tear allowances.

• Specific views

Views and specific rulings are given based on a specific set of circumstances, usually arising from a dispute between a taxpayer and a branch office or relating to a strategically important decision or transaction.

As there is no statutory basis for these views and rulings they are not binding on either SARS or taxpayers.

3. THE INTERNATIONAL POSITION

3.1. OBJECTIVES

Generally, internationally accepted advance ruling systems seek to achieve the following objectives:

- To give certainty to the tax treatment of transactions.
- To promote self-assessment.
- To promote good relations between tax authorities and taxpayers.
- To ensure greater consistency in the application of the law.
- To minimise controversy and litigation.
- To achieve a more co-ordinated system.

3.2 ADVANTAGES

Internationally, especially in the developed economies, an advance ruling system has over the years become an important mechanism to provide certainty in a complex and sophisticated legislative environment.

The advantages to taxpayers of an advance ruling are that they provide certainty regarding the tax consequences of particular transactions and decisions can be made with the knowledge of their full costs. The publication of rulings provides additional dissemination of administrative practice and benefits taxpayers generally, even if the published rulings officially have no precedential value.

There are advantages from the point of view of tax authorities as it promotes greater taxpayer confidence in the administration of the tax system and fosters a good working relationship between taxpayers and the authorities. Another advantage is that it provides tax authorities with the opportunity to preview the type of transactions taxpayers are contemplating. This often exposes defects and unintended consequences in the legislation. Tax authorities can thus better prepare for issues that will arise when assessments have to be issued in the future and can respond positively much sooner to amend legislation where anomalies are identified.

3.3 RISKS

3.3.1 Risks for the taxpayer

- Exposing the trade secrets in the case of a ruling being published, although the publication is on an anonymous basis.
- The denial of a tax ruling or a negative ruling may restrict the taxpayer's behaviour because it alerts the tax authorities to a potential audit if the taxpayer carries out the proposed transaction.

3.3.2 Risks for the tax authority:

- Capacity issues and skills shortages translating into incorrect rulings.
- Possible abuse of rulings by taxpayers.

3.4 MODELS OF ADVANCE RULING SYSTEMS

In the development of this document, a general overview study was conducted of the advance ruling systems of 54 countries, which culminated in a closer study of the systems in the following countries:

Australia, Canada, India, Mexico, Netherlands, New Zealand, Sweden and the USA.

However the following excerpt from the general introduction to "The International Guide to Advance Rulings" published by the International Bureau of Fiscal Documentation (© 1997 – 2002) is informative:

"Despite the fact that a rulings procedure serves similar purposes in all countries, there are significant differences in the procedures adopted in the various countries summarized in this service. Some countries have highly developed systems sanctioned by statute. Others have very informal, almost ad hoc procedures, stemming from largely unpublished administrative practice. While there has been some confluence of substantive tax law amongst countries, there has not necessarily been any similar developing uniformity in the administration of tax law. Different countries may have very different "tax cultures" resulting in different administrative procedures, and the nature of an advance rulings procedure adopted by a particular country is undoubtedly influenced accordingly. It is thus difficult to make any broad comparisons or generalizations about the private rulings procedures used around the world.

In most countries, tax authorities have generally been willing to answer inquiries made by taxpayers. Even without a formalized rulings procedure, it has become common for a binding administrative rulings procedure to develop in some countries, whereby the tax authorities will issue a ruling which they will honour even in the absence of a legislative requirement to do so. However, this practice is not universal."

Broadly there is a choice between two models that are followed by those countries that were researched:—

- A non-statutory approach – an administrative (non statutory) system provided by a tax authority whereby taxpayers request the tax authorities to provide rulings in respect of a proposed transaction which ruling the tax authority accepts as binding. Canada is an example of this model.
- A statutory approach – a statutory binding ruling system on how the tax laws apply to a particular arrangement or transaction. These binding rulings give taxpayers certainty about how the tax authority will apply the tax laws and help taxpayers to meet their obligations. New Zealand is an example of this model.

A variation of the statutory model is where a completely independent authority established by law provides the rulings, as in Sweden and India. The Swedish system entitles taxpayers as well as the tax authority to request rulings which are binding on the tax authority.

4. A PROPOSED SOUTH AFRICAN MODEL

Globalisation is an important factor impacting on any economy. South Africa needs to align its tax system with international standards and trends.

It is, however, important that any tax changes be considered with due cognisance of South Africa's unique economic condition, being a mixture of developed and developing economies.

South Africa has over the past 3 years introduced substantial changes to the tax regime. It is therefore proposed that a specific regime for advance rulings be introduced to improve certainty and to promote investment and economic growth.

It also has to be taken into consideration that South Africa transitioned to a democratic society that is governed by the rule of law and a world class Constitution. SARS proposes an advance ruling system that operates within a legislative framework, takes into account the Constitution, emerging international markets and the economic position in Africa and the rest of the world. *Such a system should have the following features:—*

4.1 Purpose

- To promote clarity regarding the interpretation and application of tax law.
- To promote certainty and consistency in the application of tax law.
- To assist taxpayers to comply with tax laws.
- To promote good relations with taxpayers.
- To minimise controversy and tax litigation.

4.2 Statutory basis

The Advance Ruling System should have a statutory basis. Enabling legislation should be put in place to govern the operation thereof.

4.3 Structure

A centralised unit in SARS is preferred to optimise the use of skills and to ensure consistency. In exceptional circumstances, the Commissioner should be empowered to appoint skilled persons outside of SARS to give advice on specific matters. In making such an appointment great care would have to be taken to ensure secrecy and to avoid conflicts of interest.

4.4 Taxes to be covered

It is proposed that an advance ruling system in South Africa cover all taxes, duties or levies imposed in terms of any Act administered by SARS other than the Customs and Excise Act, 1964. The Customs and Excise Act already contains a system for determination by the Commissioner of classification of tariffs and transaction values. An investigation will be carried out to determine whether this system should in the future be aligned with the proposed advance ruling system in order to maintain consistency and uniformity within SARS.

4.5 Proposed types of rulings

It is proposed that there be five types of rulings, outlined as follows:

4.5.1 Binding general ruling

4.5.1.1 Nature of ruling

These will be written rulings in which SARS provides guidance on policy, procedure and interpretation of tax laws. These rulings will be initiated by SARS, but taxpayers may suggest that rulings be issued on a particular provision of a tax law. The rulings will consist of interpretation notes, guides and brochures which will contain specific notes to identify them as general binding rulings.

4.5.1.2 Exclusions and refusals

As SARS will be deciding which topics are of general interest and on which general rulings can be given, the question of exclusions and refusals does not arise.

4.5.1.3 Period for which ruling is given

The period for which the ruling will apply will be specified in the ruling and SARS will be bound only in respect of transactions or courses of action that take place during the period specified in the ruling. The length of the period of validity of the ruling will depend on the nature of the ruling. On expiry of the ruling SARS may renew it for a further period.

4.5.1.4 Binding effect

These rulings will be binding on SARS but not on taxpayers.

4.5.1.5 Withdrawal or modification of ruling

It is proposed that provision be made for the withdrawal or modification of binding general rulings at an earlier date than that specified in the ruling.

- Where a tax law is amended affecting a binding general ruling, the ruling will cease to be binding on SARS from the date that the amendment becomes effective.
- If the tax board or a court overturns or modifies an interpretation of the tax law on which the ruling is based, *the ruling will cease to be binding on SARS from the date of the judgment unless—*
 - the board or court decision is under appeal;
 - the board or court decision is fact-specific and the general interpretation in the ruling is still correct; or
 - the board or court reference to the matter was merely obiter dicta.
- Where a ruling covers a series of transactions or a continuing course of action or a transaction that has not been completed, SARS may withdraw or modify the ruling prospectively if it is subsequently found that the ruling was issued in error. This means that the withdrawal will only apply to those transactions or courses of action that occur after the date of withdrawal.

4.5.1.6 Publication of ruling

These rulings will be published in brochures, guides, the Government Gazette and on the SARS's website.

4.5.1.7 Fees for ruling

There will be no fees charged for these rulings.

4.5.2 Binding private ruling

4.5.2.1 Nature of the ruling

These will be written rulings issued to a taxpayer (or where there is a joint application to more than one taxpayer) who seeks guidance on how SARS interprets and applies the tax law to a specific transaction(s) or course of action. It is proposed that a private binding ruling only be considered in respect of a proposed transaction(s) or a proposed course of action that is still to be implemented by the taxpayer(s) concerned at the time of the application for the ruling. The ruling will be given based on the facts that the taxpayer presented in the application and it will not be SARS's duty or responsibility to verify these facts.

4.5.2.2 Exclusions and refusals

An application for a binding private ruling will not be considered—

- where SARS is undertaking an audit or investigation on how the tax law applies to a similar transaction or course of action that the taxpayer or a connected person in relation to the taxpayer entered or implemented in the past;
- where the matter on which a ruling is required relates to an issue similar to that which is before the courts or is the subject of an objection or appeal by the taxpayer for an earlier period or by any other taxpayer or is the subject of draft legislation;
- where it relates to the fair market value of property;
- where it relates to the duty of an employer to determine whether a person is an independent contractor or labour broker or personal service company or personal service trust;
- in respect of a proposed transaction in an international context, where it would require an opinion or view regarding the interpretation of foreign law;
- where it relates to the pricing of goods or services supplied or rendered by or to a connected person;
- on frivolous or vexatious issues;
- on issues submitted for academic purposes;
- where the application contains alternative courses of action by the taxpayer; or
- where the transaction is not seriously being contemplated.

In addition to the abovementioned exclusions, SARS may refuse to give a binding private ruling –

- where the ruling mainly concerns facts and inferences to be drawn from these facts, such as the characterisation of a proposed transaction as on revenue account or of a capital nature or where the pertinent facts cannot be established at the time of the application;

- regarding the application of any anti-avoidance provisions or mechanisms;
- where the pertinent facts cannot be established at the time of the application;
- where the correctness of the ruling would depend on assumptions to be made about a future event or other matters which cannot be reasonably made at the time of the application;
- where it would be unreasonable to make a ruling because it would be unduly time consuming and resource-intensive;
- where the matter should be dealt with by the competent authorities of the parties to a double tax agreement
- where an advance ruling has already been given to the taxpayer on a similar matter;
- where the tax treatment of the applicant is dependant on the tax treatment of the other party to the transaction and the other party has not applied for a ruling; or
- where the transaction or course of action is part of another transaction or course of action which may have a bearing on the tax consequences and details of that transaction or course of action are not available or have not been disclosed.

4.5.2.3 Period for which ruling is given

It is proposed that binding private rulings be valid for a specific period depending on the circumstances and this period will be specified in the ruling. Where a taxpayer does not complete the transaction or course of action within the prescribed period, the taxpayer may apply for an extension of the period but this application must be made before the expiration of the period specified in the ruling. The taxpayer must also confirm that in the implementation of the transactions or course of action to date there have been no material deviations from what was set out in the original application and that there will not be material deviations from it during the completion of the transactions or course of action. If there have been any deviations from the original application or will be any deviations in the future there must be full disclosure when the application for extension is made. A refusal to extend the period will be subject to internal review.

4.5.2.4 Binding effect

It is proposed that the rulings be binding on SARS but not on taxpayers. Binding private rulings will be binding on SARS only in respect of the taxpayer(s) named in the application in respect of the proposed transaction or course of action described in the application. SARS will not be bound if there is fraud, misrepresentation, non-disclosure of material facts or the transaction or course of action is not implemented as set out in the ruling application. (See 4.6)

4.5.2.5 Withdrawal or modification of ruling

It is proposed that provision be made for the withdrawal or modification of these rulings in certain circumstances.

- Where a tax law is amended that affects a binding private ruling, the ruling will cease to be binding on SARS from the date that the amendment becomes effective.

- If the tax board or a court overturns or modifies an interpretation of the tax law on which the ruling is based, *the ruling will cease to be binding on SARS from the date of the judgment unless—*
 - the board or court decision is under appeal;
 - the board or court decision is fact-specific and the general interpretation in the ruling is still correct;
 - the board or court reference to the matter was merely obiter dicta.
- Where it is discovered by SARS that a ruling it has issued is incorrect the ruling will be withdrawn or modified if the taxpayer has not yet commenced the proposed transaction or course of action.
- Where it is found that a ruling issued by SARS is incorrect as a result of an error by SARS and the taxpayer has commenced with the transaction or course of action, the ruling will generally be withdrawn prospectively.
- In the following circumstances where a ruling given by SARS is incorrect consideration will be given to the withdrawal or modification of a ruling with retrospective effect to the date the assessment(s) may be amended in terms of sections 3 or 79 of the Income Tax Act or equivalent sections in the other Acts:—
 - Where there is a person(s) other than the person to whom the ruling was given who will suffer significant disadvantage if the ruling is not withdrawn and the person to whom the ruling was given will suffer comparatively less if the ruling is withdrawn.
 - The ruling is incorrect and the effect of the ruling will materially erode the South African tax base and it is in the public interest to withdraw or modify the ruling retrospectively
 - The tax law affecting the ruling given is amended retrospectively.

Before SARS decides whether a ruling is to be withdrawn the taxpayer will be given the opportunity to state any proposition of law or fact relevant to the decision to withdraw or modify the ruling. *Some of the factors that will influence the decision to withdraw or modify the ruling prospectively rather than retrospectively are that the withdrawal or modification of the ruling—*

- arises merely because different inferences have been drawn by SARS from the original facts submitted in the application;
- will cause unusual hardship for the taxpayer;
- will result in discrimination between taxpayers; or
- will be inequitable as the taxpayer acted in good faith in relying on the ruling.

Taxpayers will have a right to object and appeal against any assessment issued as a result of the prospective or retrospective withdrawal or modification of a ruling.

4.5.2.6 Publication of ruling

It is proposed that these rulings be published but that they be edited to ensure that they do not disclose the identity of the parties involved or enable the identity of the parties to be ascertained. The taxpayer will be given the opportunity to check the edited version before publication. If it is not possible to publish the ruling in detail

without disclosing the identity of the taxpayer a summary of the ruling will be published. (See also 4.11) The rulings published will not be binding on SARS.

4.5.2.7 Fees for ruling

Fees will be charged to the applicant for the ruling. (See 4.8)

4.5.3 Binding class ruling

4.5.3.1 Nature of ruling

These written rulings will be issued in response to a request from an entity concerning the application of a tax law to a specific class of taxpayers and a particular transaction or course of action. As in the case of binding private rulings they will only be considered in respect of proposed transactions or a proposed course of action that is still to be implemented by the taxpayers concerned at the time of the application for the ruling. The purpose will be to ensure that each participant in the transaction does not have to apply individually for a binding private ruling. An example may be the tax treatment of a share incentive scheme for the employees of a company. One of the matters that will have to be considered when these rulings are given is whether the characteristics of the different taxpayers who enter into the transactions will affect the ruling and if they do this will have to be identified and dealt with in the ruling. The ruling will be given based on the facts that the taxpayer presented in the application and it will not be SARS duty to verify these facts.

4.5.3.2 Exclusions and refusals

The same exclusions and refusals as set out in 4.5.2.2 will apply to these rulings.

4.5.3.3 Period for which ruling is given

It is proposed that binding class rulings be valid for a specific period depending on the circumstances and this period will be specified in the ruling. Where the transaction or course of action is not completed within the prescribed period, the entity may apply for an extension of the period but this application must be made before the expiration of the period specified in the ruling. The entity must also confirm that in the implementation of the transactions or course of action to date there have been no material deviations from what was set out in the original application and that there will not be material deviations from it during the completion of the transactions or course of action. If there have been any deviations from the original application or will be any deviations in the future there must be a full disclosure when the application for extension is made. A refusal to extend the period will be subject to internal review.

4.5.3.4 Binding effect

These rulings will be binding on SARS but not on taxpayers. SARS will not be bound if there is fraud, misrepresentation, non-disclosure of material or the transaction or course of action was not implemented as set out in the ruling application. (See 4.6)

4.5.3.5 Withdrawal or modification of ruling

It is proposed that provision be made for the withdrawal or modification of these rulings in certain circumstances.

- Where a tax law is amended that affects a binding class ruling, the ruling will cease to be binding on SARS from the date that the amendment becomes effective.
- If the tax board or a court overturns or modifies an interpretation of the tax law on which the ruling is based, *the ruling will cease to be binding on SARS from the date of the judgment unless—*
 - the board or court decision is under appeal;
 - the board or court decision is fact-specific and the general interpretation in the ruling is still correct;
 - the board or court reference to the matter was merely obiter dicta.
- Where it is discovered by SARS that a ruling it has issued is incorrect the ruling will be withdrawn or modified if no taxpayer has as yet not commenced the proposed transaction or course of action.
- Where it is found that a ruling issued by SARS is incorrect as a result of an error by SARS and taxpayers have commenced with the transaction or course of action, the ruling will generally be withdrawn prospectively.
- *In the following circumstances where a ruling given by SARS is incorrect consideration will be given to the withdrawal or modification of a ruling with retrospective effect to the date the assessments may be amended in terms of sections 3 or 79 of the Income Tax Act or the equivalent sections in other Acts:—*
 - Where there are persons other than the persons to whom the ruling was given who will suffer significant disadvantages if the ruling is not withdrawn and the persons to whom the ruling was given will suffer comparatively less if the ruling is withdrawn.
 - The ruling is incorrect and the effect of the ruling will materially erode the South African tax base and it is in the public interest to withdraw or modify the ruling retrospectively
 - The tax law affecting the ruling given is amended retrospectively.

Before SARS decides whether a ruling is to be withdrawn the taxpayers will be given the opportunity to state any proposition of law or fact relevant to the decision to withdraw or modify the ruling. *Some of the factors that will influence the decision to withdraw or modify the ruling prospectively rather than retrospectively are that the withdrawal or modification of the ruling—*

- arises merely because different inferences have been drawn by SARS from the original facts submitted in the application;
 - will cause unusual hardship for the taxpayers;
 - will result in discrimination between taxpayers; or
 - will be inequitable as the taxpayers acted in good faith in relying on the ruling.
- Taxpayers will have a right to object and appeal against any assessment issued as a result of the prospective or retrospective withdrawal or modification of a ruling.

4.5.3.6 Publication of the ruling

It is proposed that these rulings be published with the name of the principal, name and description of the transaction or course of action, tax consequences and ruling. (See also 4.11)

4.5.3.7 Fees for ruling

Fees will be charged for the ruling. (See 4.8)

4.5.4 Binding product ruling

4.5.4.1 Nature of ruling

These rulings will normally be given to promoters of investments and will deal with the tax treatment which will apply to investors in the product.

4.5.4.2 Exclusions and refusals

An application for a binding product ruling will not be considered—

- where SARS is undertaking an audit or investigation on how the tax law applies to similar transactions or courses of action to that in respect of which the ruling is sought;
- where it relates to an issue that is before the courts or is the subject of an objection or appeal by any taxpayer or is the subject of draft legislation;
- in respect of a proposed transaction in an international context, where it would require an opinion or view regarding the interpretation of foreign law;
- on frivolous or vexatious issues;
- on issues submitted for academic purposes;
- where the application contains alternative courses of action by the investors; or
- where the transaction is not seriously being contemplated;

In addition to the abovementioned exclusions, SARS may refuse to give a binding product ruling –

- regarding the application of any anti-avoidance provisions or mechanisms;
- where the pertinent facts cannot be established at the time of the application;
- where the correctness of the ruling would depend on assumptions to be made about a future event or other matter;
- where it would be unreasonable to make a ruling because it would be unduly time consuming and resource-intensive; or
- where the investor in the product is not personally at risk due to mechanisms such as non-recourse or limited recourse financing; or
- where an advance ruling has already been given to the promoter on the matter.

4.5.4.3 Period for which ruling will apply

It is proposed that binding product rulings be issued for a limited period and if the promoter wishes the ruling to apply for a further period an application for the extension of the ruling must be made. The rulings will apply prospectively to investments made in the product after the ruling has been given and continue to apply until the date specified in the ruling.

4.5.4.4 Binding effect

These rulings will bind SARS but not taxpayers. SARS will not be bound if there is fraud, misrepresentation, non-disclosure of material facts or the transaction or course of action was not implemented as set out in the ruling application. (See 4.6)

4.5.4.5 *Withdrawal or modification of ruling*

It is proposed that provision be made for the withdrawal or modification of these rulings in certain circumstances.

- Where a tax law is amended that affects a binding product ruling, the ruling will cease to be binding on SARS from the date that the amendment becomes effective.
- If the tax board or a court overturns or modifies an interpretation of the tax law on which the ruling is based, *the ruling will cease to be binding on SARS from the date of the judgment unless—*
 - the board or court decision is under appeal;
 - the board or court decision is fact-specific and the general interpretation in the ruling is still correct;
 - the board or court reference to the matter was merely obiter dicta.
- Where it is discovered by SARS that a ruling it has issued is incorrect the ruling will be withdrawn or modified if taxpayers have not yet commenced the proposed transaction or course of action.
- Where it is found that a ruling issued by SARS is incorrect as a result of an error by SARS and taxpayers has commenced with the transaction or course of action, the ruling will generally be withdrawn prospectively.
- *In the following circumstances where a ruling given by SARS is incorrect consideration will be given to the withdrawal or modification of a ruling with retrospective effect to the date the assessments may be amended in terms of sections 3 or 79 of the Income Tax Act or equivalent sections in other Acts:—*
 - Where there are persons other than the persons to whom the ruling was given who will suffer significant disadvantages if the ruling is not withdrawn and the persons to whom the ruling was given will suffer comparatively less if the ruling is withdrawn.
 - The ruling is incorrect and the effect of the ruling will materially erode the South African tax base and it is in the public interest to withdraw or modify the ruling retrospectively
 - The tax law affecting the ruling given is amended retrospectively.

Before SARS decides whether a ruling is to be withdrawn the taxpayers will be given the opportunity to state any proposition of law or fact relevant to the decision to withdraw or modify the ruling. *Some of the factors that will influence the decision to withdraw or modify the ruling prospectively rather than retrospectively are that the withdrawal or modification of the ruling—*

- arises merely because different inferences have been drawn by SARS from the original facts submitted in the application;
- will cause unusual hardship for the taxpayers;
- will result in discrimination between taxpayers; or
- will be inequitable as the taxpayers acted in good faith in relying on the ruling.

Taxpayers will have a right to object and appeal against any assessment issued as a result of the prospective or retrospective withdrawal or modification of a ruling.

4.5.4.6 Publication of the ruling

It is proposed that these rulings be published with the name of the promoter, name and description of the product and the tax consequences for the investors. (See also 4.1.1)

4.5.4.7 Fees for the ruling

Fees will be charged for the ruling. (See 4.8)

4.5.5 Non-binding private opinion

4.5.5.1 Nature of the opinion

It is proposed that these written opinions be given on any aspect of a taxpayer's tax affairs at the request of the taxpayer. These opinions would not be given by the proposed Tax Ruling Unit but by the officers at the branch offices of SARS. These opinions will not be given as a right to taxpayers but at the discretion of SARS.

4.5.5.2 Exclusions and refusals

In deciding on whether or not an opinion should be provided to a taxpayer regard will be had to the factors set out in 4.5.2.2, amongst others.

4.5.5.3 Period for which opinion will be given

As these opinions will not be binding on the taxpayer or SARS the period for which the opinion is given is not of critical importance but depending on the circumstances in each case periods may be prescribed.

4.5.5.4 Binding effect

These opinions will neither be binding on the taxpayer nor on SARS.

4.5.5.5 Withdrawal or modification

Every effort will be made to ensure the accuracy of the opinions and SARS will not lightly deviate from the opinions but if there are legislative changes, court decisions that overturn the opinion, changes to the prevailing practice or the opinion was issued in error, these opinions will not be valid and not binding on SARS.

4.5.5.6 Publication of the opinion

It is proposed that these rulings not be published but if it is found that the ruling is of significance to a number of taxpayers a binding general ruling on the subject will be issued.

4.5.5.7 Fees for the opinion

No fees will be charged for the opinion.

4.6 Certain rulings will be void

Rulings given will be void if the implementation of the transaction or course of action differs materially from that set out in the application.

In making advance rulings, certain assumptions will have to be made concerning future events and reaction to these events and these will be set out in the ruling. *A ruling will be void ab initio where—*

- any facts stated or assumptions made in the application or ruling are materially different from the transaction or course of action actually carried out;

- there is a misrepresentation or a non-disclosure of material facts pertaining to the proposed transactions or course of action; or
- SARS stipulates any condition in the ruling which is not carried out.

The measurement for materiality will be whether the differences are such that if SARS had been aware of them when making a ruling, a different ruling would have been given.

4.7 Information required

An application for any ruling will only be considered if the application is made in such form as may be prescribed by SARS and contains full disclosure of all the relevant facts and all information and documentation necessary to consider the application.

As an example, the facts, information and documents that may be prescribed by SARS in the case of private binding rulings are the following—

Applicant/representative information

- identity and applicable tax number(s) of taxpayer(s) applying for a ruling/on whose behalf an application is made;
- name of representative, contact details such as address, telephone, facsimile, e-mail;
- the authorisation of any representative applying on behalf of a taxpayer;

About ruling sought

- the expected time frame for the implementation of the proposed transaction(s) or course of action and period for which ruling is sought;
- whether this application (or a similar application) has been made by, or on behalf of the applicant (or a connected person in relation to the applicant) to any other office of SARS.
- a complete description of all transactions of a similar nature to the proposed transaction(s) that have been entered into by the taxpayer (or by a person that is a connected person in relation to the taxpayer) irrespective of whether they have been assessed to tax or are the subject of an audit or of a dispute regarding their tax effect;

Description of the transaction or course of action

- a complete description of the proposed transaction(s) or course of action and the purpose thereof;
- a summary of relevant facts contained in any supporting agreements or documentation as well as a copies of all the relevant agreements and documents;
- the impact the proposed transaction(s) could have on the liability for tax of the taxpayer(s) applying for the ruling or, where relevant, of a connected person in relation to the taxpayer(s);
- a complete description of transactions entered into by the taxpayer prior to submitting the application or that may be undertaken after the completion of the proposed transaction(s) and that may have a bearing on the tax consequences of the proposed transaction(s) or may be considered to be part of a series of transactions involving the proposed transaction(s);

- where the proposed transaction(s) or course of action involves any connected person, the particulars of that person and the nature of connection; where a group of companies is involved, the structure of group and where a trust is involved, the ultimate beneficiaries;
- where the application is made by a representative of the taxpayer, details of that representative's involvement with any transactions similar to the proposed transaction(s) or course of action that have been or are being implemented by another person or other persons;

Statutory provisions involved

- the relevant statutory provisions or issues involved and the taxpayer's interpretation of the application of those provisions including, where relevant, an analysis of all authorities which support the taxpayer's interpretation and those that do not, as well as reasons why the taxpayer's view should prevail;

Publication

- a draft copy of the ruling sought;
- a description of the information that the applicant believes should be deleted from the ruling applied for before publication thereof in anonymous form.

The Commissioner may call for supplementary information, in which case the required information must be submitted within the period determined by the Commissioner, failing which the application will lapse. An applicant may apply for an extension of such period. A refusal by the Commissioner to extend the period will be subject to internal review.

An applicant may request a conference aimed at supplementing or clarifying information contained in the application, in which case the applicant must submit any supplementary information to the Commissioner before such conference. The recordal by SARS of the proceeds at any meeting will in the event of a dispute be conclusive.

4.8 Fees

The fee structure should be as follows:—

- An initial non-refundable fee in respect of the lodging of an application for a binding private, class or product ruling.
- Additional fees to be charged on a cost recovery basis per hour. A preliminary overview of the application will be made to determine the estimated total additional fees payable. The additional fees will represent the cost of the estimated time which will be spent by the rulings officers in researching and providing the ruling and their concomitant overheads. The applicant will be able to withdraw the application for a ruling at this stage without incurring any additional fee. If the applicant decides to proceed with the application and at a later stage decides to withdraw or the ruling is unfavourable to him or her, the fee for the hours spent by the rulings officers on the ruling will still be payable.

It will be a requirement for the additional fee to be paid before the ruling is communicated to the taxpayer. SARS may retain any fees paid by an applicant where a ruling is rendered void by reason of a misrepresentation or any material departure from the proposed course of action. Where the ruling is refused on any ground set out in 4.5.2.2 or 4.5.3.2 where SARS has the discretion to refuse to give a ruling, the initial fee will not be refunded.

4.9 Time frames

Time frames with regard to the period SARS will take to process rulings will be governed by management standards determined in line with international benchmarks, taking into account the nature and complexity of the transactions involved and the available capacity.

4.10 Appeal against rulings

It is proposed that an advance ruling by SARS not be regarded as an assessment as envisaged under the Income Tax Act. An advance ruling will therefore not be subject to the objection and appeal procedures. The advance ruling will not be binding on the taxpayer and the normal objection and appeal process will remain available to a taxpayer when the assessment is issued.

4.11 Publication

Out of 54 countries examined 74 per cent have a formalised advance tax ruling system. Of those who have a formal system, about 50 per cent do not publish their rulings mainly due to the desire to maintain taxpayer confidentiality, while the other half do, although mostly on an anonymous basis.

There is concern, however, that an advance ruling system may lead to the development of a private body of law which could give some taxpayers an unfair advantage and exclusive knowledge about the interpretation of areas of tax law. The solution to the problem is either the publication of the rulings in an edited form to protect the identity of the taxpayer or for SARS to decide which ruling will be of general interest to taxpayers or a class of taxpayers and to issue general rulings. In Canada and Australia private rulings are published in an edited format to protect the identity of the taxpayers. In Australia the edited ruling includes an explanation and reasons for the decision. If the identity of the taxpayer cannot be hidden in the ruling then a summary of the case in general terms is published.

In the interests of transparency and equity it is proposed that edited versions of the binding private rulings be published.

A published ruling would not be binding upon the Commissioner in respect of any taxpayer that was not a party to the application for that ruling. Any other taxpayer who wanted to have the ruling apply to him or her would have to apply for a separate ruling.

4.12 Subsequent disclosure requirements

It is proposed that taxpayers be compelled to disclose to the Commissioner any deviation between the proposed transaction(s) or course of action and the transaction(s) or course of action subsequently implemented. Failure to make such disclosure will result an offence and will invalidate the ruling.

5. CAPACITY

The advance ruling regime requires a high level of tax expertise, professionalism and high service standards, since it deals with sophisticated and innovative transactions. Internationally, the units dealing with these types of transactions are staffed by officials with specialised tax expertise and skills, mostly with an accounting and/or a law background. In South Africa, a strong team will have to be recruited and special efforts made to retain those specialised skills.

In order to ensure proper delivery of the service it will be necessary to phase the system in over a period while capacity is built up. The order in which the services will be phased in over the medium to long-term will be—

- Binding general rulings;
- Non-binding private opinions;
- Binding private rulings;
- Binding class rulings; and
- Binding product rulings.

The first phase which will be introduced is binding general rulings, non-binding private opinions and binding private rulings.

6. CONCLUSION

SARS believes that the proposed advance ruling system is important for investment and economic growth as it should provide more certainty regarding the tax environment in which taxpayers operate.

