

## DRAFT INTERPRETATION NOTE

DATE:

**ACT : TAX ADMINISTRATION ACT 28 OF 2011**  
**SECTION : SECTION 240(3)(d)**  
**SUBJECT : PERSONS NOT ELIGIBLE TO REGISTER AS A TAX PRACTITIONER  
AND DEREGISTRATION OF REGISTERED TAX PRACTITIONERS FOR  
TAX NON-COMPLIANCE**

### *Preamble*

In this Note, unless the context indicates otherwise –

- “**compliant**” and “**non-compliant**”, whether used in conjunction with “tax” or otherwise, means tax compliant or tax non-compliant to the extent referred to in section 256(3), and “**compliance**” and “**non-compliance**” must be construed accordingly;
- “**section**” means a section of the TA Act;
- “**tax practitioner**” means a person who is required to register as a tax practitioner under section 240;
- “**the TA Act**” means the Tax Administration Act 28 of 2011; and
- any other word or expression bears the meaning ascribed to it in the TA Act.

### 1. Purpose

This Note provides guidance on when, due to non-compliance, a person may not register as a tax practitioner, and when SARS must deregister a registered tax practitioner, as well as the period of non-qualification for registration.

### 2. Background

Subject to specified exceptions,<sup>1</sup> a natural person who provides advice on the application of a tax Act, or who completes or assists in completing a return on behalf of another person, must register with or fall under the jurisdiction of a recognised controlling body,<sup>2</sup> and **must register with SARS** within prescribed periods.<sup>3</sup> Persons who are not registered with **both** a recognised controlling body and SARS, may not practice as a tax practitioner and those who do are guilty of a criminal offence, which, upon conviction carries a fine or imprisonment of up to two years upon conviction.<sup>4</sup>

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<sup>1</sup> Those contained in section 240(2).

<sup>2</sup> See definition of “controlling body” and “recognised controlling body” in section 239.

<sup>3</sup> Section 240(1).

<sup>4</sup> Section 234(2)(c).

Section 240(3) prohibits SARS from registering a person as a tax practitioner and requires that SARS deregisters a registered tax practitioner under certain circumstances, section 240(3)(d) specifically dealing with tax non-compliance.<sup>5</sup> In accordance with section 256(3), tax compliance is measured against the obligation to register for tax and submit returns, as well as the obligation to pay outstanding tax debts or make arrangements in relation to such returns or debts.

Deregistration of tax practitioners affects livelihoods, business continuity, as well as the taxpayers whom they serve. It is in the interest of persons who want to practice as tax practitioners to remain tax compliant or remedy their non-compliance as soon as possible. Prospective or registered tax practitioners are therefore encouraged to act upon a notice by SARS in order to be registered expeditiously, avoid deregistration, or reduce the period of deregistration.

### 3. The law

The relevant sections are quoted in the **Annexure**.

### 4. Application of law

#### 4.1. Conditions for non- or deregistration as a tax practitioner

Section 240(3)(d) stipulates two conditions which both have to be satisfied before SARS is prohibited from registering a prospective tax practitioner or is obliged to deregister a registered practitioner:

- Non-compliance for an aggregate period of at least six months during the preceding 12-month period.
- The failure to demonstrate compliance or remedy non-compliance within the period specified by SARS in a notice.

#### 4.2. Condition one: Non-compliance

Condition one requires that a prospective or registered tax practitioner be non-compliant for an **aggregate** of at least six months during the **preceding** 12-month period.

The *Dictionary.cambridge.org* defines “aggregate” as –<sup>6</sup>

“something **formed** by **adding together** several amounts or things”.

Therefore, the months during which non-compliance is present must be **added** together and if the total number of months **forms** at least six months during the preceding 12-month period, condition one is satisfied. Stated differently, condition one requires non-compliance for at least six out of 12 months. To avoid not being eligible to register, deregistration, or to be registered pursuant to the application of section 240(3)(d), a person cannot merely be tax compliant for six out of 12 months. In such a case, the person will simultaneously be non-compliant for the same amount of time, and condition one will still be satisfied. Compliance must therefore be maintained for at least seven out of the preceding 12 months for the aggregate period of six months to no longer be satisfied.

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<sup>5</sup> Section 240(3)(d) applies with effect from the date of promulgation of the Tax Administration Laws Amendment Act 22 of 2018, namely 17 January 2019.

<sup>6</sup> <https://dictionary.cambridge.org/dictionary/english/aggregate> [Accessed 7 June 2022].

Furthermore, since the use of the word “preceding” in section 240(3)(d) requires SARS to look back at the 12 months that go before, the satisfaction of condition one must be determined from a specific point in time. For this reason, the period over which compliance is measured is not static – the preceding 12 months move or roll forward as time goes by, which necessitates measurement from different points in time when compliance is verified. SARS therefore continuously verifies tax compliance across tax types.

Additionally, for each month that a non-compliant person ignores a notice from SARS to remedy non-compliance (see **4.3**), a month is added to the aggregate, and as each month moves the rolling period forward, earlier compliant periods will fall outside the period under consideration. Conversely, for each month that a person is compliant, the non-compliant aggregate period will diminish in relation to the rolling period under consideration. It is therefore in the interest of persons who want to practice as tax practitioners to remain tax compliant or remedy their non-compliance as soon as possible.

Examples of the application of section 240(3)(d) are contained in **Annexure B**.

#### **4.3. Condition two: The failure to demonstrate compliance or remedy non-compliance**

Condition two prohibits SARS from registering a prospective tax practitioner and obligates it to deregister a registered tax practitioner if the relevant person **fails** to demonstrate compliance or remedy non-compliance within the period specified in a **notice** received from SARS.

Should the recipient not respond or responds but fails to demonstrate compliance or remedy non-compliance, condition two will be satisfied. Prospective and registered tax practitioners are therefore encouraged to liaise with SARS, using the contact information provided in the notice, particularly if compliance can be demonstrated or assistance is needed to remedy non-compliance.

#### **4.4. Interrelationship between condition one and two**

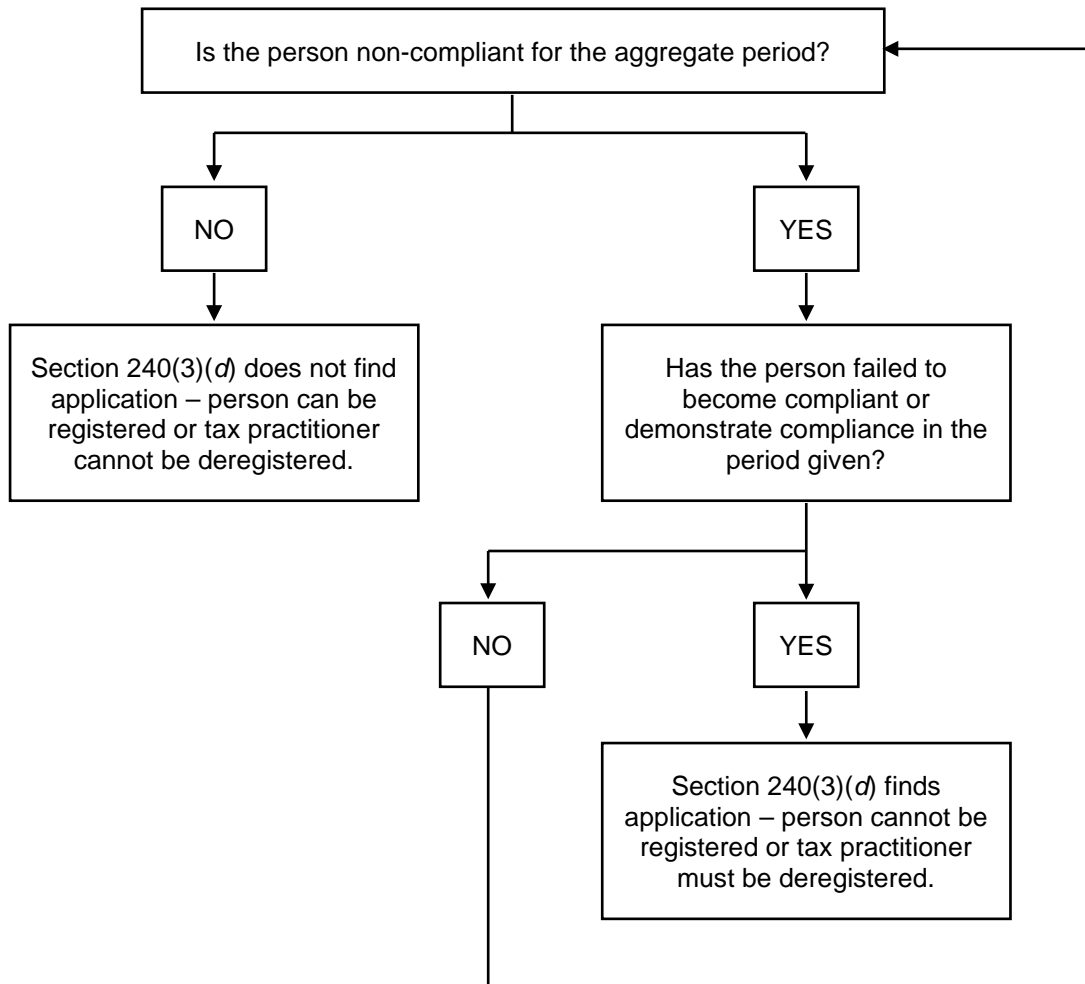
As indicated by the word “and” in section 240(3)(d),<sup>7</sup> both condition one and two have to be satisfied. Additionally, condition two is contingent on condition one, since the failure to demonstrate compliance or remedy non-compliance can only arise if the records at SARS’ disposal show that a person is tax non-compliant on an aggregate basis. Stated differently, for as long as condition one is satisfied, condition two remains in place. However, condition two becomes superfluous when condition one is no longer satisfied.

The following two questions may be asked, to determine whether section 240(3)(d) applies. Firstly, is a person non-compliant for the aggregate period? If the answer is yes, condition one is satisfied. Secondly, has the person failed to become compliant in the period given? If the answer is yes, condition two is satisfied, and as both conditions are satisfied, section 240(3)(d) finds application. If the answer to the latter question is no, condition two is not satisfied but because time has passed, the first question must be posed again to establish whether it still finds application in the current rolling period

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<sup>7</sup> The section states that “[a] person may not register as a tax practitioner under subsection (1) or SARS may deregister a registered tax practitioner if the person or the registered tax practitioner, as the case may be ... has “not been tax compliant to the extent referred to in section 256(3) and has failed to.....”.

under determination. If the answer to the first question is yes, the person is still non-compliant for the specific aggregate period under consideration and condition one is still satisfied, leading to the second question in relation to condition two. As demonstrated below, this cycle continues until the answer to the first question is no, in which event the answer to the second question is irrelevant.



A person who remedies non-compliance only after expiration of the notice will remain in this cycle until such time as the non-compliance no longer satisfies condition one. The duration of this cycle will depend on the person's past and future record of compliance as both can either assist or impair the road to becoming compliant for seven out of 12 months. A tax practitioner who is compliant but neglects to demonstrate such within the notice period, can upon demonstration, once again be registered, as that person was compliant all along. Prospective or registered tax practitioners are therefore encouraged to act upon a notice from SARS in order to be registered, avoid deregistration, or reduce the period of deregistration.

Examples of the application of section 240(3)(d) are contained in **Annexure B**.

## 5. Conclusion

Subject to specified exceptions, a natural person who provides advice on the application of a tax Act, or who completes or assists in completing a return on behalf of another person, must register with or fall under the jurisdiction of a recognised controlling body and **must register with SARS, within the prescribed periods.**

Section 240(3)(d) prohibits registration as a tax practitioner and requires deregistration of a registered tax practitioner by SARS, if a prospective or registered tax practitioner has not been compliant for an aggregate period of at least six months during the preceding 12-month period, and has failed to demonstrate compliance or remedy the non-compliance.

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**Annexure A – The law**

1.

**‘serious tax offence’** means 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, 1991 (Act No. 101 of 1991);

**‘tax offence’** means an offence in terms of a tax Act or any other offence involving—

- (a) fraud on SARS or on a SARS official relating to the administration of a tax Act; or
- (b) theft of moneys due or paid to SARS for the benefit of the National Revenue Fund;

**239. Definitions.**—In this Chapter, unless the context otherwise indicates, the following terms, if in single quotation marks, have the following meanings—

**‘controlling body’** means a body established, whether voluntarily or under a law, with power to take disciplinary action against a person who, in carrying on a profession, contravenes the applicable rules or code of conduct for the profession; and

**‘recognised controlling body’** means a ‘controlling body’ recognised by the Commissioner under section 240A.

**240. Registration of tax practitioners.**—(1) Every natural person who—

- (a) provides advice to another person with respect to the application of a tax Act; or
- (b) completes or assists in completing a return by another person,

must—

- (i) register with or fall under the jurisdiction of a ‘recognised controlling body’ by the later of 1 July 2013 or 21 business days after the date on which that person for the first time provides the advice or completes or assists in completing the return; and
- (ii) register with SARS as a tax practitioner in the prescribed form and manner, within 21 business days after the date on which that person for the first time provides the advice or completes or assists in completing the return.

(2) The provisions of this section do not apply in respect of a person who only—

- (a) provides the advice or completes or assists in completing a return for no consideration to that person or his or her employer or a connected person in relation to that employer or that person;
- (b) provides the advice in anticipation of or in the course of any litigation to which the Commissioner is a party or where the Commissioner is a complainant;
- (c) provides the advice as an incidental or subordinate part of providing goods or other services to another person; or
- (d) provides the advice or completes or assists in completing a return—
  - (i) to or in respect of the employer by whom that person is employed on a full-time basis or to or in respect of the employer and connected persons in relation to the employer; or
  - (ii) under the supervision of a registered tax practitioner who has assigned or approved the assignment of those functions to the person.

(2A) A tax practitioner who has assigned or approved the assignment of functions to a person under subsection (2)(d)(ii) is regarded as accountable for the actions of that person in performing those functions for the purposes of a complaint to a recognised controlling body under section 241(2).

(3) A person may not register as a tax practitioner under subsection (1) or SARS may deregister a registered tax practitioner if the person or the registered tax practitioner, as the case may be—

- (a) during the preceding five years has been removed from a related profession by a 'controlling body' for serious misconduct;
- (b) during the preceding five years has been convicted (whether in the Republic or elsewhere) of—
  - (i) theft, fraud, forgery or uttering a forged document, perjury or an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004); or
  - (ii) any offence involving dishonesty,for which the person has been sentenced to a period of imprisonment exceeding two years without the option of a fine or to a fine exceeding the amount prescribed in the Adjustment of Fines Act, 1991 (Act No. 101 of 1991);
- (c) during the preceding five years has been convicted of a serious tax offence; or
- (d) during the preceding 12 months has for an aggregate period of at least six months not been tax compliant to the extent referred to in section 256(3) and has failed to—
  - (i) demonstrate that he or she has been compliant for that period; or
  - (ii) remedy the non-compliance,within the period specified in a notice by SARS.

(4) If prosecution for a serious tax offence has been instituted but not finalised against a person or registered tax practitioner and if the person or registered tax practitioner continues with the commission of a serious tax offence after the criminal proceedings have been instituted, a senior SARS official may—

- (a) not register the person as a registered tax practitioner; or
- (b) suspend the registration of the registered tax practitioner,  
for the duration of the criminal proceedings commencing on the date that prosecution is instituted and ending on the date that the person or registered tax practitioner is finally acquitted.

#### **256. Tax compliance status.**

- (3) The taxpayer's tax compliance status may only be indicated as compliant if the taxpayer—
- (a) is registered for tax as required in terms of a tax Act;
  - (b) does not have any outstanding tax debt, excluding a tax debt—
    - (i) contemplated in section 167 or 204; or
    - (ii) that has been suspended under section 164; or
    - (iii) that may not be recovered for the period specified in section 164(6); or
    - (iv) that does not exceed the amount referred to in section 169(4) or any higher amount that the Commissioner may determine by public notice; and
  - (c) does not have any outstanding return, unless an arrangement with SARS has been made for the submission of the return.

**Annexure B – Examples****Example 1***Facts:*

A tax practitioner who is obliged to submit monthly value-added tax returns, submitted the returns as follows:

- Returns for January to May year 1, due on the 25<sup>th</sup> day of February to June year 1 respectively, were submitted on 25 July year 1.<sup>8</sup>
- All returns for June to September year 1 were submitted on time.
- The October year 1 return, due on 25 November year 1, remains outstanding.
- The November year 1 return was submitted on time, on 25 December year 1.

When compliance is verified on 1 January year 2, SARS determines that because the January to May year 1 returns were outstanding from February to June year 1, and the October return was outstanding for November and December year 1, the tax practitioner was non-compliant for seven out of the preceding 12 months (1 January year 1 to 31 December year 1). As such, SARS notifies the practitioner to either demonstrate compliance or remedy non-compliance (condition two), but the practitioner does not respond.

On 1 February year 2, although the January year 1 period was compliant as the return from the preceding December was submitted on time, this month no longer forms part of the previous 12-month period, it having rolled on to 1 February year 1 to 31 January year 2. SARS verifies compliance again, and finds that in addition to still not having submitted the return for October year 1, the tax practitioner has also not submitted the return for December year 1. Therefore, during the preceding 12 months, non-compliance of February to June, November and December year 1 is still included in the aggregate period and January year 2 is added, not only because the October year 1 return is still outstanding but also because the December year 1 return was not submitted.

*Result:*

As the aggregate for non-compliance is now eight out of the preceding 12-month period, SARS deregisters the tax practitioner.

**Example 2***Facts:*

The tax practitioner in Example 1 fixed the non-compliance on 25 January year 2, and submitted the January year 2 return on time.

When SARS verifies compliance on 1 February year 2, during the preceding 12-month period (1 February year 1 to 31 January year 2), non-compliance of February to June, November and December year 1 is still included in the aggregate period but January year 2 is not because compliance has been restored.

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<sup>8</sup> Return submission is governed by section 28(1) of the Value-added Tax Act 89 of 1991.



*Result:*

Deregistration is still not avoided as the aggregate period for non-compliance is seven out of the preceding 12-month period.

**Example 3***Facts:*

Provided the deregistered tax practitioner in Example 2 maintains tax compliance going forward, the aggregate periods of non-compliance will be as follows going forward:

- On 1 March year 2 – six (March to June, November and December year 1) out of the preceding 12-month period (1 March year 1 to 28 February year 2).
- On 1 April year 2 – five months (April to June, November and December year 1) out of the preceding 12-month period (1 April year 1 to 31 March year 2).

*Result:*

The tax practitioner can reregister with SARS after submitting the March year 2 return.