
SOUTH AFRICAN REVENUE SERVICE

**DRAFT GUIDE
TO THE VOLUNTARY
DISCLOSURE
PROGRAMME**

Another helpful guide brought to you by the
South African Revenue Service



Draft 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. 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 Tax Administration 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 Tax Administration 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**;
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- visit your nearest SARS branch , preferably after making an appointment via the **SARS website**;
- contact your own tax advisor or tax practitioner;
- 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).

Comments on this guide may be emailed to policycomments@sars.gov.za.

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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;
- “**tax period**” means a “tax period” as defined in section 1;
- “**the TA Act**” means the Tax Administration Act 28 of 2011;
- “**understatement penalty**” means the penalty imposed under Chapter 16 of the TA Act;
- “**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 a SARS division that considers the VDP 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 the SARS resources.¹ The VDP is 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

One of the main benefits of the VDP is the granting of relief for an understatement penalty³ under Chapter 16. The VDP provisions in Part B of Chapter 16 do not override the other specific provisions in the TA Act.

The VDP is applicable to all taxes⁴ administered by SARS except for the customs and excise legislation.⁵ Taxpayers qualifying for the VDP will be granted relief on applicable understatement penalties, qualifying administrative penalties,⁶ criminal prosecution in relation to a valid voluntary disclosure, and the conclusion of the voluntary disclosure agreement.

A strict interpretation is applied to determine whether an applicant meets the requirements under Part B of Chapter 16 to qualify for voluntary disclosure relief. This principle was confirmed in *Western Platinum Ltd v C: SARS*⁷ in which the Supreme Court of Appeal held that it is a well-established principle of interpretation when dealing with provisions creating tax privileges to reject a construction of such a provision that implied the extension of such privilege and to interpret the provision strictly.⁸

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 must –⁹

- be voluntary (SARS must not be aware of the default);
- 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

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

² Section 225 to 233.

³ Section 229(b).

⁴ 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”.

⁵ 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)”.

⁶ See 4.1 discussing the specific penalties for which relief is granted.

⁷ [2004] 4 All SA 611 (SCA).

⁸ See also *Commissioner for Inland Revenue v D & N Promotions (Pty) Ltd* 1995 (2) SA 296 (A).

⁹ Section 227.

- be made in the prescribed form and manner.

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

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’,¹⁰

if such default resulted in an understatement.

Submission of inaccurate or incomplete information to SARS

The word “inaccurate” is defined in the *Cambridge Dictionary* as “not completely correct or exact”.¹¹ In the *CollinsDictionary.com* the word is described as “not accurate; imprecise, inexact, or erroneous”.¹²

The word “incomplete” is defined in the *Cambridge Dictionary* as “not having some parts, or not finished”.¹³ In the *CollinsDictionary.com* the word is described as “does not have all the parts or details that it needs”.¹⁴

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

Failure to submit information

The word “failure” is defined in the *Cambridge Dictionary* as “the fact of not doing something that you must do or are expected to do”.¹⁵ In the *CollinsDictionary.com* the word is described as “the fact that you do not do it, even though you were expected to do it”.¹⁶

The failure to submit information to SARS occurs 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 discussed below.

¹⁰ The term “tax position” is defined in section 221.

¹¹ www.dictionary.cambridge.org/dictionary/english/inaccurate [Accessed 20 October 2021].

¹² www.collinsdictionary.com/dictionary/english/inaccurate [Accessed 20 October 2021].

¹³ www.dictionary.cambridge.org/dictionary/english/incomplete [Accessed 20 October 2021].

¹⁴ www.collinsdictionary.com/dictionary/english/incomplete [Accessed 20 October 2021].

¹⁵ www.dictionary.cambridge.org/dictionary/english/failure [Accessed 20 October 2021].

¹⁶ www.collinsdictionary.com/dictionary/english/failure [Accessed 20 October 2021].

Adoption of a tax position

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,¹⁷ 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.¹⁸

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 tax¹⁹ 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 1). 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.

¹⁷ 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”.

¹⁸ See section 15 of the VAT Act.

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”.

In the case of a VDP 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 under the VDP 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.

A VDP applicant with a default that has implications for more than one tax type must submit one application. A VDP applicant with more than one default that are not related must submit separate applications for each default.

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 calculated²¹ 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.

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 channels²² 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 can, however, not 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. In this scenario, the normal provisions and procedures under the TA Act should be followed to address the capital loss.

A reportable arrangement²⁵ 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 as there was no understatement involved.

²¹ See section 222(3)(c).

²² For example, by means of a Request for Correction available through eFiling.

²³ Paragraphs 9 and 10 of the Eighth Schedule.

²⁴ Section 26A of the Income Tax Act.

²⁵ Sections 34 to 39.

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 tax period, including a default relating to a tax period that may have ordinarily prescribed under section 99(1) or (2). The VDP Unit will then ascertain 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 a public officer of a company or close corporation, treasurer, accountant, director, trustee, curator, liquidator, and so forth.

²⁶ Section 99(2)(a) and (b).

²⁷ Section 153(1).

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.

A withholding agent means a person who must under a tax Act withhold an amount of tax and pay it to SARS.²⁸ 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.²⁹ 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.³⁰

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.³¹ 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.³² The voluntary disclosure relief is thus granted to the taxpayer and not the representative taxpayer.

Under section 228, a senior SARS official may issue a non-binding private opinion³³ 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. A non-binding private opinion³⁴ provides informal guidance by SARS about the tax treatment of a particular set of facts and circumstances or transaction.³⁵ A non-binding private opinion does not have a binding effect³⁶ 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 VDP 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 227.³⁷

²⁸ Section 156.

²⁹ Section 157(1).

³⁰ Section 157(2).

³¹ For more information, see the *External Guide: How to Register for eFiling and Manage your User Profile (GEN-ELEC-18-G01)*.

³² Section 153(3).

³³ Section 88.

³⁴ As defined in section 75.

³⁵ Section 75 defines "transaction" as "any transaction, deal, business, arrangement, operation or scheme and includes a series of transactions".

³⁶ 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".

³⁷ Section 226(2).

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. The word “relate” is defined in the *Cambridge Dictionary* as “to find or show the connection between two or more things”.³⁸

However, such 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 ambit³⁹ 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.⁴⁰

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:⁴¹

- 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
- 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

The word “audit” is not defined in the TA Act. The *Merriam-Webster Dictionary* defines “audit” as –⁴²

“**1 a:** a formal examination of an organization’s or individual’s accounts or financial situation”.

The *CollinsDictionary.com* describes “audit” as –⁴³

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

³⁸ www.dictionary.cambridge.org/dictionary/english/relate [Accessed 20 October 2021].

³⁹ The *Lexico Dictionaries* defines “ambit” as “The scope, extent, or bounds of something”.
www.lexico.com/definition/ambit [Accessed 20 October 2021].

⁴⁰ Section 226(2).

⁴¹ Section 226(3).

⁴² www.merriam-webster.com/dictionary/audit [Accessed 20 October 2021].

⁴³ www.collinsdictionary.com/dictionary/english/audit [Accessed 20 October 2021].

Based on the aforementioned 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 position⁴⁴ 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.⁴⁵

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.⁴⁶ In this instance although the applicant will not be issued with a notice of commencement of an audit, the applicant’s VDP 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. Note that 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 VDP application but disclosure not disqualified under section 226(2)

Facts:

On 5 February 2021, SARS issued Company B with a Notification of Audit letter of the income tax return for the 2020 year of assessment setting out the ambit as gross income.

Company B submitted a VDP application on 3 March 2021 for a non-disclosure of income received from an off-shore investment not linked to the bank account known to SARS during the 2020 year of assessment.

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 off-shore 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 VDP 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 VDP 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.

⁴⁴ The term “tax position” is defined in section 221.

⁴⁵ Section 42.

⁴⁶ Section 42(5).

Chapter 5 provides for SARS's information gathering powers and procedure. SARS may select a person for inspection, verification or audit on a random or risk assessment basis.⁴⁷ In *Cart Blanche Marketing CC and others v C: SARS*⁴⁸ 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.

The *Cambridge Dictionary* defines "inspection" as –⁴⁹

"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 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.⁵⁰

The *Dictionary.com* defines "verification" as –⁵¹

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

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.⁵² 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 SARS*⁵³ 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.

⁴⁷ Section 40. For a detailed discussion, see the *Short Guide to the Tax Administration Act, 2011 (Act No. 28 of 2011)*.

⁴⁸ [2020] 4 All SA 434 (GJ).

⁴⁹ www.dictionary.cambridge.org/dictionary/english/inspection [Accessed 20 October 2021].

⁵⁰ Section 45(1).

⁵¹ www.dictionary.com/browse/verification [Accessed 20 October 2021].

⁵² For more information on an IT14SD, see the *External Guide: How to Complete and Submit the Income Tax Supplementary Declaration (IT14SD)*.

⁵³ [2017] ZAGPPHC 987.

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

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).

Example 2 – An applicant is selected for verification prior to submission of the VDP application

Facts:

On 31 August 2020, SARS issued Company A with a letter informing it that the 2019 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 a VDP application on 3 September 2020 for a default relating to the 2020 year of assessment.

Result:

Company A will not be disqualified from the voluntary disclosure relief under section 226(2), as 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 2020 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 2020 year of assessment as a result of the verification process on the 2019 year of assessment, the disclosure will not be regarded as voluntary for purposes of section 227(a).

An applicant that has been selected for verification or inspection may not be disqualified from voluntary disclosure relief under section 226(2) as 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. The applicant may not meet the requirement under section 227(a) that for the disclosure to be a valid voluntary disclosure it must be “voluntary” (see 2.4.2), however, this will depend on the exact circumstances of the 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.⁵⁴

⁵⁴ Section 43.

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 as the disclosure of the default is regarded as not being voluntary for purposes of section 227 (see **2.4.2** for discussion on “voluntary”).

2.4 Requirements for a valid voluntary disclosure

For a valid voluntary disclosure the VDP application must –⁵⁵

- i. be voluntary (see **2.4.2**);
- ii. 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**);
- iii. be full and complete in all material respects (see **2.4.4**);
- iv. involve a behaviour referred to in column 2 of the understatement penalty table (see **2.4.5**);
- v. not result in a refund due by SARS (see **2.4.6**); and
- vi. 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

The term “disclosure” is not defined in the TA Act. The *Cambridge Dictionary* defines “disclosure” as –⁵⁶

“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.

The word “disclosure” was considered in *Reed v Minister of Finance and Others*⁵⁷ in which the judge stated as follows:⁵⁸

“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.”

⁵⁵ Section 227(a) to (f).

⁵⁶ www.dictionary.cambridge.org/dictionary/english/disclose [Accessed 20 October 2021].

⁵⁷ [2017] ZAGPPHC 987.

⁵⁸ At paragraph 35.

In this 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.

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 2020 for a default relating to non-submission of VAT returns since January 2016.

Result:

The VAT returns for the periods January 2016 to May 2020 reflect as outstanding on SARS’s records. As SARS was already aware of the outstanding VAT returns, the VDP application cannot be viewed as a valid “disclosure”. Accordingly, Company D will not qualify for the voluntary disclosure relief.

A VDP application made by a taxpayer who knowingly submits nil returns to avoid having outstanding returns and subsequently applies for voluntary disclosure relief, will be rejected. Such application will not be regarded by the VDP Unit as a valid voluntary disclosure.

2.4.2 Voluntary

As the entire programme is based on the **voluntary**⁵⁹ disclosure of a default by an applicant, the meaning and understanding of “voluntary” is of utmost importance. The word “voluntary” is not defined in the TA Act. The *Cambridge Dictionary* defines “voluntary” as –⁶⁰

“done, made, or given willingly, without being forced or paid to do it”.

In *Purveyors South Africa Mine Services (Pty) Ltd v C: SARS*⁶¹ 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 latter part of 2016, the taxpayer had reservations about its failure to pay the import VAT⁶² 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.

⁵⁹ Section 227(a).

⁶⁰ www.dictionary.cambridge.org/dictionary/english/voluntary [Accessed 20 October 2021].

⁶¹ 2020 JDR 1830 (GP), 83 SATC 176.

⁶² VAT charged on the importation of goods under the VAT Act.

The taxpayer was of the opinion that at the date of submission of the VDP application it had not been given notice by SARS of the commencement of an audit or criminal investigation into their affairs, which had not been concluded as contemplated by the provisions of section 226(2) (see 2.3) and that the effect thereof was that the VDP application was indeed “voluntary” as contemplated in section 227(a), despite SARS’s earlier knowledge of the default.⁶³

SARS clarified in its arguments that –⁶⁴

“a VDP application must comply with the requirements of section 227 whether made terms of sections 226(1) or 226(2) (for those subject to an audit or investigation and a senior SARS official considers it appropriate)”.

The court agreed with SARS’s argument that the taxpayer’s application was not “voluntary” based on the following reasons:⁶⁵

“The term is not defined but its ordinary meaning is “an act in accordance with the exercise of free will”. If there is an element of compulsion underpinning a particular act, it is no longer done voluntarily. In the context of part B of Chapter 16 of the TAA, a disclosure is not made voluntary where an application has been made after the taxpayer had been warned that it would be liable for penalties and interest owing from its mentioned default. It was submitted that the application was brought in fear of being penalised and with a view to avert the consequences referred to.”

The court further agreed with SARS that there was no disclosure (see 2.4.1) to SARS of information, which SARS was not already aware of. This case confirms that an applicant must act willingly and without force for the disclosure to be regarded as “voluntary”.

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

In *Reed v Minister of Finance and Others*⁶⁶ 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.

The judge 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. The judge stated the following:⁶⁷

“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

⁶³ 83 SATC 176 at 181.

⁶⁴ 83 SATC 176 at 184.

⁶⁵ 2020 JDR 1830 (GP) at 13.

⁶⁶ [2017] ZAGPPHC 987.

⁶⁷ At paragraph 30.

means bringing information to SARS when there is no causal SARS investigation underfoot and if there is, in ignorance of it.”

The judge 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. The judge 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.⁶⁸ 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 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”.⁶⁹

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

Facts:

On 10 April 2020, SARS issued Company Z with a notification of verification of the 2019 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 2020 for a default relating to the 2020 year of assessment. The default was the omission of income from the 2020 ITR14. The taxpayer became aware of the default as a result of an in-house audit and not as a result of the SARS 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 2020 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 2019 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. This application must be submitted within a reasonable timeframe from the date after which the taxpayer has registered for the applicable tax type. In general, the VDP Unit allows a timeframe of 21 business days.

⁶⁸ At paragraph 33.

⁶⁹ At paragraph 35.

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

A VDP application will not be considered valid 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).⁷⁰

The *CollinsDictionary.com* defines “similar” as –⁷¹

“1. showing resemblance in qualities, characteristics, or appearance; alike but not identical”.

A similar default is a factual question and will depend on the type of default being disclosed and the one previously disclosed. 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). As 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 who 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.

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 a VDP 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*⁷² the Constitutional Court held 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 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 2018 for a default relating to the non-disclosure of income received of R800 000 in July 2015 from XYZ Trading (Pty) Ltd for services rendered. The application met all the necessary requirements and the voluntary disclosure relief was granted.

⁷⁰ Section 227(b).

⁷¹ www.collinsdictionary.com/dictionary/english/similar [Accessed 20 October 2021].

⁷² 2006 (4) SA 309 (CC) at paragraph 24.

In July 2020, Company Y applied to SARS for voluntary disclosure relief for non-disclosure of income received of R1 million in December 2019 from ABC (Pty) Ltd for services rendered.

Result:

The VDP application submitted in July 2020 will not be considered valid under section 227, as the default relating to the current application had occurred within five years of the disclosure of a similar default in May 2018. Even if the VDP application regarding the income from XYZ Trading (Pty) Ltd was rejected by SARS, the subsequent VDP 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.⁷³ 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.

The *Merriam-Webster Dictionary* defines “complete” as –⁷⁴

“having all necessary parts, elements, or steps”.

The *CollinsDictionary.com* defines “complete” as –⁷⁵

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

The *Lexico.com* defines “full” as –⁷⁶

“Containing or holding as much or as many as possible; having no empty space”.

The *Lexico.com* defines “material” as –⁷⁷

“**2.1 Law** (of evidence or a fact) significant or relevant, especially to the extent of determining a cause or affecting a judgement.”

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.

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 VDP application was made in order to avoid a refund arising because of the disclosure.⁷⁸ Such a disclosure will not be considered full and complete.

⁷³ Section 227(c).

⁷⁴ www.merriam-webster.com/dictionary/complete [Accessed 20 October 2021].

⁷⁵ www.collinsdictionary.com/dictionary/english/complete [Accessed 20 October 2021].

⁷⁶ www.lexico.com/definition/full [Accessed 20 October 2021].

⁷⁷ www.lexico.com/definition/material [Accessed 20 October 2021].

⁷⁸ 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.

Once the VDP application has been submitted, SARS may request additional information from the applicant relating to the default. The applicant must provide SARS with the requested information within a reasonable timeline specified by SARS. An applicant that foresees being unable to submit the requested information within the timeframe, may request an extension from the VDP Unit. Requests for extension will be considered on the merits of the case. 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*.⁷⁹ 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.⁸⁰

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; or
- a form specifically authorised by a senior SARS official.

These records should be available for inspection purposes by a SARS official to verify compliance with the requirements as explained above, or for purposes of an inspection, audit or investigation.⁸¹

The burden 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.

⁷⁹ Section 29(3)(a).

⁸⁰ Section 29(2)(b) read with section 29(3).

⁸¹ Section 31.

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.⁸²

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:⁸³

- Substantial understatement⁸⁴
- 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 discussion on these behaviours, see the *Guide to Understatement Penalties*.

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

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.⁸⁵

The word “refund” is not defined in the TA Act. The *Lexico.com* defines “refund” as –⁸⁶

“[a] repayment of a sum of money”.

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.⁸⁷

A VDP 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). This is since a default can include more than one tax period and must be considered for all the periods submitted as part of the application.

Disclosures 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.

⁸² Section 227(d).

⁸³ Section 223.

⁸⁴ 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”.

⁸⁵ Section 227(e).

⁸⁶ www.lexico.com/definition/refund [Accessed 20 October 2021].

⁸⁷ Section 191.

Example 6 – Disclosure resulting in a refund

Facts:

Company X registered as a vendor for VAT purposes in May 2021 under Category C (VAT returns should be submitted monthly). Company X applied for voluntary disclosure relief in May 2021 for a default relating to non-submission of VAT returns for the periods January 2021 to April 2021. Company X calculated the VAT liability for the periods as follows:

- January 2021 – R60 000 owing to SARS
- February 2021 – R70 000 refund payable to Company X
- March 2021 – R90 000 owing to SARS
- April 2021 – R110 000 refund payable to Company X

Result:

The VDP application submitted in May 2021 will not be considered valid under section 227 since the disclosure of the default results in a net refund of R30 000 (R60 000 – R70 000 + R90 000 – R110 000) owing to Company X. Such default must be regularised through the normal SARS channels.

2.4.7 Prescribed form and manner

The applicant must complete and submit a VDP application form (VDP01) through SARS eFiling.⁸⁸ The applicant must be registered on SARS eFiling to be able to access the VDP01.⁸⁹ 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 a VDP 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.⁹⁰

The voluntary disclosure agreement must include details on –⁹¹

- 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.

⁸⁸ Section 227(f).

⁸⁹ For more information, see the *External Guide: How to Register for eFiling and Manage your User Profile (GEN-ELEC-18-G01)*.

⁹⁰ Section 230.

⁹¹ Section 230(a) to (d).

The voluntary disclosure agreement must be signed by both SARS and the qualifying applicant. Once the voluntary disclosure agreement has been signed by both parties, it will constitute a contract⁹² between the parties to the agreement.

If at any point subsequent to the conclusion of a voluntary disclosure agreement, it is determined that the VDP 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 are any breaches of the voluntary disclosure agreement by the applicant, SARS may terminate the voluntary disclosure agreement under common law principles.⁹³

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-General⁹⁴ and the Minister of Finance a summary of all voluntary disclosure agreements concluded relating to applications received during the period.⁹⁵

The summary of voluntary disclosure agreements submitted to the Auditor-General and the Minister must –⁹⁶

- not disclose the identity of the applicant [subject to section 70(5)], 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:⁹⁷

- 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.

⁹² 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.

⁹³ 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.

⁹⁴ The institution contemplated in section 181(1)(e) of the Constitution of the Republic of South Africa, 1996.

⁹⁵ Section 233(1).

⁹⁶ Section 233(2).

⁹⁷ Section 229.

- 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.

Column 5 and 6 of the understatement penalty table is 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 ⁹⁸	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 –⁹⁹

- 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.

Considering the definition of “material” discussed 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.

⁹⁸ This is applicable where a senior SARS official exercises discretion under section 226(2).

⁹⁹ Section 231(1).

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 –¹⁰⁰

- 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;
- 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.¹⁰¹

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 will 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 decision¹⁰² made, may object¹⁰³ to or appeal¹⁰⁴ 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 and appeal a decision by the senior SARS official to –¹⁰⁵

- 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

¹⁰⁰ Section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000.

¹⁰¹ Section 232(1).

¹⁰² Section 104(2).

¹⁰³ Section 104.

¹⁰⁴ Section 107.

¹⁰⁵ Section 231(2).

- pursue criminal prosecution for a tax offence.

A decision made by a SARS official to reject a VDP application is not subject to objection and appeal, however, an applicant may request a SARS official to withdraw or amend such decision.¹⁰⁶

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.¹⁰⁷

Taxpayer information includes any information provided by a taxpayer or obtained by SARS about the taxpayer, including biometric information.¹⁰⁸

A SARS official who receives taxpayer information must preserve the secrecy of the information and may only disclose the information to another SARS official if the disclosure is necessary to perform the functions specified in those sections.¹⁰⁹ 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.

¹⁰⁶ Section 9.

¹⁰⁷ Section 69(1).

¹⁰⁸ Section 67(1)(b). Section 1 defines “taxpayer information” as “the meaning assigned under section 67(1)(b)”.

¹⁰⁹ Section 67(4).