

SOUTH AFRICAN REVENUE SERVICE

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**RULES [PROMULGATED UNDER SECTION 77I OF THE
CUSTOMS AND EXCISE ACT, 1964 (ACT NO. 91 OF 1964),
PRESCRIBING THE PROCEDURES TO BE FOLLOWED FOR
ALTERNATIVE DISPUTE RESOLUTION] MADE BY THE MINISTER OF FINANCE
UNDER SECTION 77I OF THE ACT**

By virtue of the power vested in me by section 77I of the Customs and Excise Act, 1964 (Act No. 91 of 1964), I, Trevor Andrew Manuel, Minister of Finance, hereby, after consultation with the Minister for Justice and Constitutional Development, make rules as set out in the Schedule hereto, prescribing the procedures to be followed for alternative dispute resolution.

These rules apply **with effect from 4 June 2007** in respect of all final decisions made under Part A of Chapter XA of the Customs and Excise Act, 1964, on or after that date.

**T.A. MANUEL, MP
MINISTER OF FINANCE**

SCHEDULE

(a) By the insertion of the following rules after the rules for Part A of Chapter XA:

“PART B: ALTERNATIVE DISPUTE RESOLUTION

RULES FOR SECTION 77I OF THE ACT

Definitions

77I.01 In these rules, any meaning ascribed to any word or expression in the Act, shall bear the meaning so ascribed and, unless the context otherwise indicates -

“aggrieved person” - means any person who makes use of the dispute resolution procedures provided for in these rules and includes any duly authorised representative of such person;

“deliver” means -

- (a) handing the relevant document to the relevant person;
- (b) sending the relevant document to the relevant person by registered post;
- (c) telefaxing the relevant document to the relevant person; or

(d) transmitting the relevant document to the relevant person by electronic means:
Provided that in the case of paragraphs (c) and (d), the original, signed document must be handed to that person or sent by registered post to that person within ten days after it being so telefaxed or transmitted by electronic means;

“documents” includes documents as contemplated in section 101 of the Act;

“the Act” means the Customs and Excise Act, 1964.

Application for alternative dispute resolution after internal administrative appeal

77I.02 Any person who is dissatisfied with a decision contemplated in section 77B(2) of the Act may apply for alternative dispute resolution.

77I.03 An application for alternative dispute resolution must be submitted to the Commissioner or to the chairperson of an appeal committee, as applicable, on form DA 52 and must, unless the Commissioner agrees to extend the period, be delivered within 30 days from the date of the notice informing the appellant in an internal administrative appeal of the decision of the Commissioner or the appeal committee.

77I.04 The Commissioner must, within 20 days of receipt of an application for alternative dispute resolution, inform the applicant by notice whether the matter is appropriate for alternative dispute resolution and may be resolved by way of the procedures contemplated in these rules.

Alternative dispute resolution as an alternative to judicial proceedings

77I.05 Where a person has delivered a notice to the Commissioner in terms of section 96(1) of the Act and the Commissioner is of the opinion that the matter is appropriate for alternative dispute resolution he or she must inform that person within ten days after the receipt of such notice.

77I.06 (a) Where a person does not agree to alternative dispute resolution he or she must notify the Commissioner within 10 days after the date of the notice referred to in rule 77I.05.

(b) Where a person agrees to alternative dispute resolution he or she must deliver a duly completed form DA 52 to the Commissioner in the manner prescribed in the rules for section 96 of the Act, within ten days after the date of the notice by the Commissioner referred to in rule 77I.05.

77I.07 Where a duly completed form DA 52 is not delivered within ten days after the date of the notice by the Commissioner referred to in rule 77I.05, the matter may not be dealt with under the procedures contemplated in these rules.

The terms governing the alternative dispute resolution

77I.08 The terms governing the alternative dispute resolution proceedings are set out in Schedule A to these rules as reproduced on the reverse of form DA 52.

77I.09 A person who applies for alternative dispute resolution on form DA 52 must accept in writing the terms governing alternative dispute resolution as set out in Schedule A to these rules by signing the declaration on the reverse side of the form before alternative dispute resolution may take place.

Period of dispute resolution

77I.10 The alternative dispute resolution proceedings must commence within 20 days after the date of the notice by the Commissioner informing the applicant that the matter is appropriate for alternative dispute resolution as contemplated in rule 77I.04 or receipt of an application form DA 52 by the Commissioner as contemplated in rule 77I.06, as the case may be.

77I.11 The alternative dispute resolution proceedings must, unless the Commissioner extends the period, end not later than 90 days after the date of the notice by the Commissioner informing the applicant that the matter is appropriate for alternative dispute resolution as contemplated in rule 77I.04 or receipt of an application form DA 52 by the Commissioner as contemplated in rule 77I.06.

The facilitator

77I.12 (a) The Commissioner may appoint any person, including a person employed by SARS, to facilitate the alternative dispute resolution proceedings.

(b) Any person so appointed to facilitate the proceedings will be bound to the code of ethics set out in Schedule B to these rules.

77I.13 The person appointed to facilitate may, if the Commissioner and the aggrieved person agree thereto at the commencement of the proceedings, be requested to make a recommendation at the conclusion of the proceedings if no agreement or settlement as contemplated in rule 77I.18 or 77I.19 is ultimately reached between the parties, which recommendation will be admissible during any subsequent proceedings including court proceedings.

Proceedings

77I.14 The alternative dispute resolution proceedings will be conducted in accordance with the terms set out in Schedule A to these rules.

77I.15 During the alternative dispute resolution proceedings the aggrieved person -

(a) may be accompanied by any representative of his or her choice; and

(b) must be personally present unless the facilitator, in exceptional circumstances, allows the aggrieved person to be represented in his or her absence by a duly authorized representative of his or her choice.

Reservation of rights

77I.16 Subject to section 4 (3) of the Act and rule 77I.13, the proceedings in terms of this rule shall not be one of record, and any representation made or document tendered in the course of the proceedings -

(a) is made or tendered without prejudice; and

(b) may not be tendered in any subsequent proceedings as evidence by any other party, except -

(i) with the knowledge and consent of the party who made the representation or tendered the document during the proceedings in terms of this rule;

- (ii) where such representation or document is already known to, or in the possession of, that party; or
- (iii) where such representation or document is obtained by that party otherwise than in terms of the proceedings in terms of this rule.

77I.17 No person may -

- (a) subject to the circumstances listed in paragraph (b)(i) to (iii) of rule 77I.16, *subpoena* any person involved in the alternative dispute resolution proceedings in whatever capacity to compel disclosure of any representation made or document tendered in the course of the proceedings; or
- (b) *subpoena* the facilitator of the alternative dispute resolution proceedings to compel disclosure of any representation made or document tendered in the course of the proceedings.

Agreement or settlement

77I.18 A dispute which is subject to the procedures in terms of this rule may be resolved by agreement whereby either the Commissioner or the aggrieved person accepts, either in whole or in part, the other party's interpretation of the facts or the law applicable to those facts or both.

77I.19 Where -

- (a) the Commissioner and an aggrieved person are, despite all reasonable efforts, unable to resolve the dispute as contemplated in rule 77I.18; and
- (b) the Commissioner personally or any official delegated by the Commissioner in terms of section 77N of the Act, is of the opinion that the circumstances of the matter comply with the requirements contemplated in section 77M of the Act,

the parties may attempt to settle the matter in accordance with the provisions of Part C of Chapter XA of the Act.

77I.20 Where an agreement contemplated in rule 77I.18 or a settlement contemplated in rule 77I.19 is concluded, the Commissioner must give effect to that agreement or settlement, as the case may be, and notify the aggrieved person thereof within a period of 60 days after the date of the conclusion thereof.

77I.21 Where an agreement contemplated in rule 77I.18 or a settlement contemplated in rule 77I.19 can not be achieved, or where the proceedings are terminated in the manner provided for in paragraph 7(g) of Schedule A to the rules, the Commissioner must inform the aggrieved person of his or her further rights regarding the institution of judicial proceedings within 10 days of the conclusion or termination of such proceedings.

77I.22 Any agreement or settlement reached through the alternative dispute resolution process has no binding effect in respect of any other matters relating to that aggrieved person not actually covered by the agreement or settlement, or any other person.

Reporting requirements

- 77I.23 Any -
- (a) agreement in terms of rule 77I.18 whereby a dispute which is subject to the procedures in terms of this rule is resolved in whole or in part, must be reported internally in the manner as may be required by the Commissioner.
 - (b) settlement of a dispute in terms of rule 77I.19 must be reported in accordance with the provisions of Part C of Chapter XA of the Act.

SCHEDULE A

THE TERMS OF ALTERNATIVE DISPUTE RESOLUTION (“ADR”)

1. Main Rule

ADR is only available if these terms are accepted. Both the Commissioner and the aggrieved person have to agree to the ADR process for any agreement or settlement to have any effect.

2. Who may initiate ADR?

ADR may be initiated by–

- (a) a person dissatisfied with a decision of the Commissioner or an appeal committee under the internal administrative appeal procedure contemplated in Part A of Chapter XA of the Act; or
- (b) the Commissioner subsequent to the receipt of a notice in terms of section 96(1) of the Act where he or she is of the opinion that the matter is appropriate for ADR.

3. ADR following the disallowance of an internal administrative appeal

- (a) A person who appealed against any decision of the Commissioner and whose appeal has been disallowed in whole or in part by the Commissioner or an appeal committee under the internal administrative appeal procedure contemplated in Part A of Chapter XA of the Act, may apply for ADR.
- (b) An application for alternative dispute resolution must, unless the Commissioner agrees to extend the period, be submitted to the Commissioner on form DA 52 within 30 days from the date of the notice informing the appellant that his or her appeal has been disallowed.
- (c) The Commissioner must, within 20 days of receipt of an application for alternative dispute resolution, inform the applicant by notice whether the matter is appropriate for alternative dispute resolution.

4. ADR as an alternative to judicial proceedings

Where a person has delivered a notice to the Commissioner in terms of section 96(1) of the Act and the Commissioner is of the opinion that the matter is appropriate for alternative dispute resolution he or she must inform that person within ten days of the receipt of such notice.

5. Acceptance of ADR

- (a) Where a person referred to in paragraph 4 does not agree to alternative dispute resolution he or she must notify the Commissioner within ten days from the date of the notice by the Commissioner.

- (b) Where a person referred to in paragraph 4 agrees to alternative dispute resolution he or she must deliver a form DA 52 to the Commissioner within ten days of the date of the notice by the Commissioner.

6. How must application be made for ADR?

Application for ADR must be made on a form DA 52 which must be duly completed and supported by all relevant documents and then delivered -

- (a) in the circumstances contemplated in paragraph 3, to the Commissioner or the chairperson of the appeal committee, as applicable;
- (b) in the circumstances contemplated in paragraph 4, as prescribed in the rules for section 96 of the Act.

7. The facilitator

- (a) The Commissioner must, within 15 days after he or she has notified the applicant that the dispute may be referred to ADR, or within 15 days after receipt of an application form DA 52, as the case may be, appoint a facilitator to facilitate the ADR process.
- (b) The Commissioner must inform the aggrieved person of who has been appointed as facilitator.
- (c) The facilitator will, in the normal course, be an appropriately qualified officer of SARS and will be bound by a Code of Conduct.
- (d) The facilitator's objective is to seek a fair, equitable and legal resolution of the dispute between an aggrieved person and the Commissioner.
- (e) The facilitator cannot make a ruling or decision which binds the Commissioner or an aggrieved person nor may he or she compel that person and the Commissioner to settle the dispute.
- (f) At the conclusion of the ADR process the facilitator must record the terms of any agreement or settlement reached by the parties, or, if no agreement or settlement is reached, he or she shall record that fact.
- (g) The facilitator has the authority to summarily terminate the process of dispute resolution without prior notice if -
 - (i) any person fails to attend the meeting referred to in paragraph 9;
 - (ii) any person fails to carry out a request made in terms of paragraph 8;
 - (iii) he or she is of the opinion that the dispute cannot be resolved;
 - (iv) either of the parties agree that the issues in dispute cannot be reconciled in the resolution process; or
 - (v) for any other appropriate reason.

8. Determining the process

The facilitator must, after consulting the aggrieved person and the officer(s) or appeal committee of SARS responsible for the decision under dispute -

- (a) determine the procedure to be adopted in the dispute resolution process;
- (b) determine a place, date and time at which the parties shall convene the ADR meeting; and
- (c) notify each party in writing which written submissions or any other document should be furnished or exchanged (if this is required at all), and when the submissions or documents are required.

9. ADR Meeting

A meeting between the parties to the dispute must be held for the purpose of resolving the dispute by consent, within 20 days of the appointment of the facilitator, or within such further period as the Commissioner and the aggrieved person may agree.

10. Rules for the ADR Meeting

- (a) The aggrieved person must be personally present during the ADR meeting and may be accompanied by a representative of his or her choice.
- (b) The facilitator may, in exceptional circumstances, excuse the aggrieved person from personally attending the meeting in which event he or she may be represented in their absence by a representative of their choice.
- (c) The meeting must be concluded -
 - (i) at the instance of the facilitator; or
 - (ii) after the parties agree that the meeting shall be concluded.
- (d) If both parties and the facilitator agree, the meeting may resume at any other place, date or time set by the facilitator.
- (e) The parties may for the purpose of resolving an issue in dispute, and only if the facilitator agrees, lead or bring witnesses in the ADR process.
- (f) The facilitator may require either party to produce a witness to give evidence.
- (g) At the conclusion of the meeting the facilitator must record -
 - (i) all issues which were resolved (through the ADR process);
 - (ii) any issue upon which agreement or settlement could not be reached; and
 - (iii) any other point which the facilitator considers necessary.
- (h) The facilitator must deliver a report to the aggrieved person and the Commissioner's designated representative within ten days of the cessation of the ADR process.
- (ij) The facilitator may, if requested at the commencement of the ADR process, make a recommendation at the conclusion of the proceedings if no agreement or settlement is ultimately reached between the parties.

11. Reservations of rights

- (a) The proceedings may not be electronically recorded, and any representations made in the course of the meeting will be without prejudice.
- (b) Any representation made or document tendered in the course of the dispute resolution proceedings may not be tendered in any subsequent proceedings as evidence by any other party, except in the circumstances contemplated in rule 771.16(b).
- (c) Neither party, except in the circumstances contemplated in rule 771.16(b), may *subpoena* any person involved in the alternative dispute procedure in order to compel disclosure of any representation made or documentation produced in the course of the ADR process. The facilitator may not be *subpoenaed* under any circumstances.
- (d) Any recommendation made by the facilitator in terms of paragraph 10(ij), will be admissible during any subsequent proceedings including court proceedings.

12. Agreement or Settlement

- (a) Any agreement or settlement reached between the parties must be recorded in writing and must be signed by the aggrieved person and by the Commissioner's designated official.

- (b) Should the parties not resolve all issues in dispute, the agreement or settlement in paragraph (a) must stipulate those areas in dispute –
 - (i) that are resolved; and
 - (ii) that could not be resolved and on which the aggrieved person may institute judicial proceedings in a competent Court.
- (c) Any agreement or settlement reached through the ADR process has no binding effect in respect of any other matters relating to that aggrieved person not actually covered by the agreement or settlement, or any other person.

13. Days

A day has the meaning as defined in section 77A(1) of the Act.

SCHEDULE B

CODE OF CONDUCT FOR FACILITATOR

The terms of this Code of Conduct will be binding upon every person appointed as a facilitator (“**the facilitator**”) by the Commissioner to facilitate the alternative dispute resolution process (“**ADR**”) as contemplated in rule 77I.12 of the rules promulgated under the provisions of section 77I of the Customs and Excise Act, 1964 (Act No. 91 of 1964).

1. Professionalism

Every facilitator is duty bound to build the integrity, fairness and efficacy of the ADR process and to preserve the independence and impartiality of the facilitator.

2. Every facilitator must –

- (a) conduct himself or herself with honesty and integrity and with courtesy to all parties;
- (b) act in good faith and with impartiality to all parties;
- (c) either decline an appointment or obtain technical assistance when a case is outside his or her field of competence;
- (d) duly act within the prescripts of the facilitation process and the law;
- (e) respect time and attempt to bring the dispute to an expeditious conclusion;
- (f) resist the exercise of improper influence from any person outside the facilitation process; and
- (g) continuously seek to upgrade his or her proficiency in the handling of customs disputes, skill and knowledge.

3. Conflict of interest

- (a) A facilitator must immediately disclose to the parties and to the Commissioner any fact that is likely to either affect his or her impartiality or create the impression that his or her impartiality is affected.
- (b) A facilitator should decline an appointment if a conflict of interest exists that will give rise to bias.
- (c) If one of the parties requests the facilitator to recuse him or herself, the facilitator may do so if it will facilitate the resolution of the dispute.
- (d) The Commissioner may not remove a facilitator once he or she has commenced with the ADR process, save by the request of the facilitator or by agreement between both parties.

4. Confidentiality

- (a) Information disclosed to the facilitator in confidence by a party during the course of the facilitation should be kept by facilitators in the strictest confidence and should not be disclosed to the other party unless authority is obtained for such disclosure from the party that disclosed the information.
- (b) The proceedings and outcome of all processes and related documentation will remain confidential, unless all the parties to the process agree otherwise or disclosure is allowed by any law.

5. Conclusion of facilitation

Facilitators should reduce all agreements, settlement or a recommendation (if requested by both parties) to writing in a clear and concise format.

6. Quality Control

- (a) The Commissioner has the right to request parties to submit evaluations of the facilitation process, including an assessment of the facilitator, from any party, which evaluations the Commissioner is entitled to treat confidentially.
- (b) The Commissioner may remove a facilitator from the list of facilitators for good reason, which includes the incompetence of the facilitator.”

- (b) By the insertion in item 202.00 of the Schedule to the Rules of the following form:

“DA 52 Application for Alternative Dispute Resolution (ADR) in Terms of the Customs and Excise Act, 1964”

APPLICATION FOR ALTERNATIVE DISPUTE RESOLUTION (ADR) IN TERMS OF THE CUSTOMS AND EXCISE ACT, 1964

Purpose: To apply for Alternative Dispute Resolution proceedings in accordance with the procedures contemplated in the rules for section 771 of the Customs and Excise Act, 1964.
Notes: (1) Where the space provided is insufficient please make use of an extension page and attach it to this application form. (2) Pages attached must be sequentially numbered and the total number thereof must be stated in the field provided.

Details of Applicant:			
Full name	Customs Client Number	Name of Agent / Consultant	Agent / Consultant Customs Client Number
Address for delivery of documents			
Registered name of business or name of applicant			
Business address: Street name and number			
Building name and floor number			
Suburb			
City / Town		Street code	
Postal Address			
Suburb			
City / Town		Postal code	
Business telephone and fax numbers (including code)		(.....)	(.....)
Business email address:			

Nature of dispute: (Indicate with an X in the applicable block(s))												
Customs duty	VAT	Excise duty	Ad Valorem Customs / Excise duty	Environmental levy	Fuel levy							
Rebates	Refunds	Warehousing	Penalty	Forfeiture	Interest							
Exports	Registration / Licensing	Other										
Office that made the original decision / assessment			Date of original decision		C	C	Y	Y	M	M	D	D
Name of office and person / committee who disallowed the Internal Administrative Appeal			Date of notice of disallowance of Internal Administrative Appeal		C	C	Y	Y	M	M	D	D

Grounds on which ADR is being applied for:	
	Nr of pages attached to this form

Declaration: I hereby apply that the above matter be referred to the Alternative Dispute Resolution process and declare that I – (1) have attached a copy of the notice of disallowance of the internal administrative appeal to this form; (2) have fully stated the grounds on which ADR is being applied for; (3) have attached all relevant documentation in respect thereof; and (4) have read and signed the terms of Alternative Dispute Resolution on the reverse side of this document.

Signature										
		C	C	Y	Y	M	M	D	D	
Full Name	Signature	Date						Capacity		

Deliver as prescribed in paragraph 6 of the terms of alternative dispute resolution (ADR)

