

# Pay Now, Argue Later: Are There Any Exceptions To This Rule?



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We look at exceptions to SARS' pay now, argue later rule and how they are being applied

At first glance, it appears that the "pay now, argue later-rule" approach, which applies when SARS' demands payment of all outstanding or assessed taxes, is set in stone.

In terms of Section 164 (1) of Tax Administration Act (TAA), a taxpayer's obligation to pay taxes, and SARS' right to recover taxes, is not suspended by an objection, appeal, or pending the decision of the Tax Court. This means that, in most cases, a taxpayer's pleas for an extension of their obligation to pay these taxes falls on deaf ears.

The question is whether there is a legal remedy which taxpayers may employ in order to postpone their obligation to pay such taxes?

The exemption

Happily, there is such a remedy. Section 164 (2) of the TAA, which provides as follows:

*"A taxpayer may request a senior SARS official to suspend the*

*payment of tax, or a portion thereof, due under an assessment if the taxpayer intends to dispute, or disputes, the liability to pay that tax under Chapter 9.”*

So far, so good. However, I fear that many taxpayers, and their representatives, are unaware of the existence of this powerful tool.

Unfortunately, this provision is couched in rather vague terms. Firstly it does not prescribe what is meant by a taxpayer who “intends to dispute” a liability to pay tax. Nor does it prescribe a time period in which a taxpayer must deliver the request for the postponement to SARS. It also does not prescribe that the request should be in writing – for present purposes – I assume that it should be. Lastly, it does not define what is meant by a “senior SARS official”.

What facts must the request contain?

In terms of the provisions of Section 164 (3) of the TAA this request must deal in detail with the following factors:

- (a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;
- (b) the compliance history of the taxpayer with SARS;
- (c) whether fraud is prima facie (based on initial impression) involved in the origin of the dispute;
- (d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus if the disputed tax is not paid or recovered; or
- (e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the fiscus.

A senior official may suspend the payment of the disputed

taxes, or a portion of those taxes, if these aspects have been adequately explained and addressed in the request.

The importance of making such a request can be found in Section 164 (6) of the TAA. This provision prohibits SARS from initiating any collection proceedings to collect the disputed taxes for the period which commences on the date that the request is delivered to SARS, to a date which is ten days after SARS has informed the taxpayer of its decision. The exception is if SARS has a reasonable belief that there is a risk that the taxpayer will dissipate their assets.

### The Problem

In two recent matters, SARS demanded payment of the disputed taxes, and threatened to institute recovery proceedings, despite the fact that the taxpayer's had delivered requests for the postponement of their tax obligation. SARS apparently based its actions on the fact that the taxpayers had failed to deliver their objections on the date that SARS demanded payment of the disputed taxes.

In terms of section 164 (2) of the TAA, a taxpayer may make such a request when the taxpayer intends to dispute their tax liability. In other words, a taxpayer is not obliged to note an objection prior to requesting a postponement of its obligation to pay the disputed taxes. In the premises, SARS' view in these matters is incorrect.

Based on these two recent matters, if you find yourself in a similar situation, I suggest that you should state – in your written request for the postponement – that you are currently preparing an objection, and that it will be delivered to SARS on, or before, a particular date. I also suggest that when you deliver that objection, that you also deliver a copy to the same person, to whom you delivered your request for the postponement.

So, when should you deliver your request? While the TAA is

silent on this point, I suggest that you should do so as soon as you become aware of the assessment or your liability to pay the disputed tax. It would also be a good idea to note the date on which you so became aware in your request for the postponement. By doing so, you will demonstrate to SARS that you are serious about your tax obligations and your request for the postponement.

### SARS' Response

Section 164 of the TAA does not prescribe a time period in which SARS must respond to your request for postponement. In both the cases mentioned above, SARS did not respond. Instead they continued to threaten the taxpayers with collection proceedings. In my opinion, this is a clear violation of SARS' obligation to refrain from doing so, while it considers the application.

The appropriate course of action, would be to notify SARS, in terms of Section 11 (4) of the TAA, that you intend to approach the High Court for an order directing SARS to consider your application and inform you of its decision, as it is obliged to do, and also to interdict it from instituting any collection procedures, until it has done so.

SARS' decision, regarding your application, is not subject to objection and appeal. Consequently, where SARS declines your application you are entitled to request reasons for that decision, and seek a review of that decision by the High Court.

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