COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA)

ON THE DRAFT RULES UNDER SECTION 103 OF THE TAX ADMINISTRATION ACT, 2011

The Law Society of South Africa (LSSA) has considered the Draft Rules to be promulgated under Section 103 of the Tax Administration Act, 2011 (the Draft Rules) and wish to comment as follows:

1. Has the Minister of Justice and Constitutional Development been consulted in respect of the Draft Rules as required by Section 103 of the Tax Administration Act, 2011 (the TAA)?

2. The definition of "assessment" does not state that other decisions which are not subject to objection and appeal in terms of the TAA are covered by these Rules, in line with the longstanding principles set out in the matter of *KBI v Transvaalse Suikerkorporasie Bpk,* 47 SATC 34 (the TPD full bench decision), where it was held that any decision is subject to review in the Tax Court – on an exercise of a discretion by the Commissioner, the Tax Court can interfere on one of the recognised grounds of review (ITC 936 24 SATC 362 at 364 – 8 approved and applied).

3. It is suggested that Rule 2 (3)(a) be altered to state that the date of delivery is not the date that the taxpayer receives a document under the rules, but should also be the date of receipt as is the case with SARS, the Clerk and the Registrar in Rule 2 (3)(d).

4. Rule 7(4) should make reference to sub rule (2) and (3).

5. We note that there is no opportunity for the taxpayer to request reasons for SARS disallowing the objection pursuant to Rule 9. The disallowance of the objection is an administrative action and should be subject to all the provisions of the Promotion of Administrative Justice Act, 2000

(PAJA). Failure to state this in the Rules will cause unnecessary confusion and unnecessary litigation.

6. At Rule 10(1) reference should be made to the time period in Section 107(2).

7. Rule 11(2)(a) in the second line should not have the words "or the" before the words "request the clerk to set the matter down".

8. The word “principle” in Rule 41(2) should read "principal".

9. A major cause of concern is the fact that the taxpayer is now expected to file his/her/its grounds of objection first, whereas in the past SARS had to file its grounds of assessment first. We are of the view that this is unfair, particularly in light of the fact that the only documents available to the taxpayer to challenge an assessment or decision are those that would have been obtained from the letter of findings in Section 42 of the TAA and the reasons requested from SARS after raising the assessment in terms of Rule 6. Reasons have not been extensively defined. In *CSARS v Sprigg Investment 117 CC t/a Global Investment* [2011] 3 All SA 18 (SCA) "adequate reasons" for an assessment has been interpreted by the Supreme Court of Appeal in a very restrictive manner. This places the taxpayer in a position where the case that must be answered to will most likely be very vague, which in turn would be inconsistent with the provisions of Section 34 of the Constitution. Placing the taxpayer in this position may lead to constitutional challenges in respect of the Rules in their current form. It is suggested that SARS should still prepare detailed grounds of assessment as the first step in the pleadings to the Tax Court, to which the taxpayer can then respond with his/her/its detailed grounds of objection. This process seems to have worked well in the past and we submit that there is no reason to change it now.