COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON THE DRAFT RULES (DRAFT RULES) TO BE PROMULGATED UNDER SECTION 103 OF THE TAX ADMINISTRATION ACT NO. 28 OF 2011 (THE ACT)

The LSSA refers to its previous comments dated 26 March 2013 (the March comments) to the initial Draft Rules, a copy of which is attached, as well as to its new comments to the recently amended Draft Rules, which are set out hereunder:

1. Kindly confirm whether Point 1 raised in the March comments has been addressed.

2. A definition for the term "address" should be inserted to mean both postal address and electronic address specified by the taxpayer for purposes of the Rules.

3. We refer to the suggested amendments raised in point 2 of the March comments regarding the definition of "assessment". It was suggested that other decisions, which are not subject to objection and appeal in terms of the TAA or other tax statutes, also be covered by the Draft Rules. In this regard we draw your attention to rule 104(2) which states:

   "*The following may be objected to and appealed against in the same manner as an assessment:*
   (a) ...
   (b) ...
   (c) any other decision that may be objected to or appealed against under a tax Act".

   It is suggested that the definition of "assessment" be amended to read as follows:
   "'*assessment*'" *includes, for purposes of the Rules,* **any decision, including** *a decision referred to in section 104(2) of the Act.*

   Rule 2

4. We refer to point 3 of the March comments. In terms of rule 2(2), the same meaning ascribed to "*the date of delivery of a document*" for SARS, the clerk or registrar should apply to taxpayers, appellants or applicants, or *vice versa*. Accordingly, the "date of delivery" should be the date of delivery of the document, **alternatively**, the date of receipt. Whichever meaning is chosen, it should be consistently and uniformly applied across the board to SARS, taxpayers, appellants and applicants alike. It seems unfair to have a different meaning, and thus application, for SARS, the clerk and registrar (which is more lenient in practice) than to persons "other than SARS" being taxpayers, applicants and appellants.

   Rule 6

5. Rule 6 should be amended such that SARS is required to provide reasons "in writing". The words "in writing" should be inserted in sub-rules (1) and (5).

6. Consideration could be given to replacing date of assessment in Sub-rule 2(c) with date of receipt.

7. Consider deleting the words “a SARS official is satisfied that” in Sub-rule 3.

8. Consider deleting the phrase “in the opinion of a SARS official” in Sub-rule 4 or alternatively stating that it should be a senior SARS official. The same applies to Sub-rule 5.

9. Is it intended that the reasons provided are capable of being varied or departed from in the Rule 32 statement?

Rule 7

10. Rule 7(1)(a) does not address a situation where a taxpayer invokes rule 6(8). The time period for lodging an objection must be suspended if the taxpayer pursues the remedy in terms of rule 6(8) and the 30 days should only commence upon receipt of a final judgement. Accordingly, Rule 7(1) should be amended to read as follows:

“*A taxpayer... must deliver a notice of objection within 30 days after –*

(a) delivery of a notice under rule 6(4) or the reasons requested under rule 6 ***where rule 6(8) has not been invoked****; or*

(b) the exhaustion of rule 6(8); or

(c) where the taxpayer has not requested reasons, the date of assessment”.

11. The phrase in Sub-rule 4 “if SARS is in possession of the current address of the taxpayer” seems problematic. SARS should be obliged to attempt to notify the taxpayer making use of whatever addresses it has on record.

Rule 8

12. SARS should specify the required documents in Sub-rule 1.

13. In Sub-rule 3 the following changes are proposed: “...SARS may extend the period for delivery of the requested documents for a further period, not exceeding 20 days...”

Rule 9

14. There is currently no mechanism in Rule 9 to the extent that SARS fails to adhere to the time periods expected of it. We suggest similar wording to rule 6(8) be inserted herein so the taxpayer may exercise its rights when SARS fails to reply within the prescribed/extended time periods. A corresponding amendment must then be made to Rule 52.

15. The previous Rules made provision for SARS, pursuant to receipt of an objection, to alter an assessment by the issuance of a reduced assessment or withdrawal of assessment. The Draft Rules do not make such provision and we suggest Rule 9(5) be amended to cater for such circumstances.

16. We refer to Point 5 of the March comments, and we repeat same for your consideration: We note there is no opportunity for the taxpayer to request reasons for SARS disallowing the objection

pursuant to Rule 9. Arguably the disallowance of the objection is a decision and constitutes administrative action for which reasons should be provided.

17. It is suggested that the words "must be" should be replaced by "ought to have been" in Sub-rule 1(b)(ii).

18. Sub-rule 2 appears to be unnecessarily complicated and could lead to unnecessary disputes. If a senior SARS official is of the view that more time is required for whatever reason then the extension should be available to SARS and not only for the specified reasons.

19. In Sub-rule 3 insert the word "senior" before the word "official".

Rule 10

20. Rule 10(3) and 10(4) are in conflict with one another. We suggest deleting sub-rule (3) in its entirety.

21. We refer to Point 9 of the March comments. We submit that SARS should be expected to file its statement of grounds of assessment (now referred to as "the statement of grounds of appeal") first (in accordance with the procedure in the previous Rules to the Income Tax Act, No 58 of 1962), followed by the taxpayer's statement of grounds of appeal (now referred to as "grounds of opposing the appeal"). The historical procedure worked well and we submit there is no reason to change it. In our view it is a more efficient method of crystallizing the issues in dispute than requiring the Taxpayer to deal *in vacuo* with contentions which are, with respect, frequently sketchily set out in the letter of findings and or reasons. .

22. Suggest deleting the phrase "when the SARS electronic filing service is no longer available" in Sub-rule 2(b).

23. There appears to be contradiction between Sub-rule 2(c) and Sub-rule 3 and 4. May the taxpayer raise a new ground of objection or not?

24. Suggest deleting the words "should these procedures be available" in Sub-rule 2(e). It is unclear what this means.

25. Sub-rule 4 probably requires a stipulated time period.

26. Sub-rule 5 the reference to twenty days doesn't seem to add value. Since the taxpayer would never know when the decisions have been taken it would have no way of enforcing the twenty day rule in practice.

Rule 12

27. The purpose of the reference to the "administration" of the Tax Act is not immediately obvious in Sub-rule 2(c). Does the concept of "administration" include the concept of interpretation?

28. The concept of a right of participation in the test case referred to in Sub-rule 3(c) is problematic. It could be objectionable from a confidentiality point of view and problematic for a taxpayer before the

tax court to have to share the forum with a third party. The matter of participation or cooperation should be one which is addressed by the taxpayers inter se. The concept of forcing one taxpayer to participate in a dispute between another taxpayer and SARS is problematic. As a matter of course, if a particular matter disposes of a tax issue which is of general application this would be regarded as a legal precedent in regard to other taxpayers (depending on the hierarchy of courts). This follows as a matter of law.

29. The procedures referred to in Sub-rule 5(c) are problematic having regard to the practicalities of tax litigation. It is quite frequently the case that the real issues in a tax appeal crystallise over a period of time and often what appears to be the main issue in a case is superseded by other issues by the time of the hearing. This therefore makes the selection of a test case and determination of the issues quite impractical, particularly at an early stage of the "pleadings".

30. It is unclear what the purpose of Sub-rule 9 is.

31. It is understood that these Rules intend to deal with a process which is outlined in section 106 of the main Act. Is it intended that a taxpayer's notice opposing a test case decision as contemplated in Sub-rule 3(a) brings the process to an end for that taxpayer? This appears to be in conflict with the requirements of section 106 which appears to give the power to the SARS official regardless of objections. It is respectfully suggested that further consideration should be given to this process.

Rule 13

32. Is it necessary to have the phrase "in an attempt to resolve the dispute" in Sub-rule 1? Is this not implicit in the willingness to participate?

Rule 16

33. The word "agrees" should be "agree" in the first line of Sub-rule 1.

34. Possibly the SARS employee ought to be a senior employee.

Rule 17

35. The use of the word "build" in Sub-rule c may not be correct. Perhaps this should be replaced with "contribute to" or "conform with".

36. The word "be" in Sub-rule d seems inappropriate since the facilitator may in fact not be independent and preferably the requirement is that the facilitator should act independently and impartially.

37. In Sub-rule g the word "on" should be "an".

Rule 18

38. Consider establishing a process for the withdrawal or recusal of the facilitator on request as contemplated in Sub-rule 3.

Rule 19

39. The reference to "appropriate" reason in Sub-rule 2(d) may give rise to difficulties as it does not give indication to the facilitator as to what reasons might be appropriate.

Rule 20

40. Consider replacing the word "cessation" with the word "conclusion" in Sub-rule 7.

Rule 21

41. Consider replacing the word "termination" with the word "conclusion" in Sub-rule 2.

Rule 22

42. Regarding Sub-rule 3(c) the consent of the parties should be obtained in writing; the document should have been in the possession of the party otherwise than via the ADR process.

43. Sub-rule 3(c)(iv) could be problematic. Firstly it potentially conflicts with the concept that ADR hearings are without prejudice and cannot be relied on in subsequent proceedings and secondly it provides unilateral decision making to SARS to determine whether or not a document or representation is "fraudulent". Clearly it is completely unacceptable for a taxpayer to tender fraudulent documentation or representations but this should be determined objectively and have different consequences.

Rule 23

44. In practice it might be difficult for a taxpayer to determine if a SARS official is duly authorised to conclude an agreement referred to in Sub-rule 2(a). Is there a method whereby this is made known?

45. In Sub-rule 4 the "date of the agreement" might not be known to the appellant as it may well be triggered by a signature to which the taxpayer is not privy.

Rule 24

46. In Sub-rule 2(a) please refer to our comment above regarding authority.

47. Regarding Sub-rule 4 the same comment applies as Sub-rule 23(4).

Rule 25

48. Consider inserting the words "deemed to have been" prior to the word "terminated" in Sub-rule 1.

49. In Sub-rule 3(b) a period seems to be required for delivery.

Rule 31

50. Please see our previous comments in relation to changes, in relation to Sub-rule 3.

Rule 32

51. Rule 32 deals with SARS' statement of grounds of opposing the appeal. SARS should be prohibited from introducing anything new in its statement of grounds of opposing the appeal which differs from the grounds of assessment and reasons. In other words, SARS should be bound to the grounds of assessment. Sub-rule (3) has attempted to achieve this however falls somewhat short. Instead, rule 32(3) should be amended to read along the following lines:

    "*SARS may not include in the statement* ***any new ground, material fact or applicable law, which has not been previously included in its grounds of assessment, nor may SARS include*** *a ground that constitutes a novation of the factual or legal basis of the disputed assessment*".

52. Insert "the" before the word "appeal" in the heading.

Rule 33

53. Rule 33 entitles the taxpayer to file a reply to SARS' statement of grounds of opposing of appeal. However sub-rule (2) refers to "*any new grounds, material facts or applicable law set out in the statement of grounds of opposing the appeal.*" SARS is not entitled to introduce anything new in its grounds of opposing the appeal. This is highlighted by what the Draft Rules attempt to achieve, in a matter of speaking, by rule 32(3). It is submitted this should also be apparent from rule 32, which, in its current wording, remains unclear and fails to achieve this. Hence the suggested amendments to rule 32(3). In addition, rule 33(2) should also be amended to further clarify the fact that SARS is precluded from introducing new facts and/or law in its statement of grounds of opposing the appeal by deleting the following words: "*any new grounds, material facts or applicable law set out in...*" If such words are not removed, it will read as if SARS will always be able to introduce new/fresh arguments. Such wording conflicts with rule 32(3).

54. Insert the word "the" before the word "appeal" in the heading.

Rule 34

55. Clarification is sought as to the inter relationship between this Rule and those relating to the formulation of the objection, the assessment and the reasons and the issues raised above in relation to the statements.

Rule 38

56. In Sub-rule 4 is it necessary to minute the discussion or simply the agreements reached?

Thank you for the opportunity to comment.