

PROCLAMATIONS • PROKLAMASIES

PROCLAMATION NO. 17 OF 2018

by the

President of the Republic of South Africa

COMMISSION OF INQUIRY INTO TAX ADMINISTRATION AND GOVERNANCE  
BY THE SOUTH AFRICAN REVENUE SERVICE

In terms of section 84(2)(f) of the Constitution of the Republic of South Africa of 1996, I hereby appoint a Commission of Inquiry into tax administration and governance by the South African Revenue Service (SARS) with the terms of reference attached hereto and appoint the former judge of the Supreme Court of Appeal who has been discharged from active service, Honourable Mr Justice Robert Nugent as Commissioner, assisted by Mr Michael Katz, Advocate Mabongi Masilo and Mr Vuyo Dominic Kahla.

Given under my Hand and the Seal of the Republic of South Africa at  
CAPE TOWN on this 23 day of MAY Two Thousand and  
Eighteen.



President

By Order of the President-in-Cabinet:



Minister of the Cabinet

## SCHEDULE

### TERMS OF REFERENCE OF THE COMMISSION OF INQUIRY INTO TAX ADMINISTRATION AND GOVERNANCE BY SOUTH AFRICAN REVENUE SERVICE

**WHEREAS** taxation forms a crucial basis for a democratic government, imposed for the purpose of funding the constitutional obligations of Government including the provision of public services to all;

**AND WHEREAS** the significant revenue shortfalls in two consecutive years in 2016/17 and (projected for) 2017/18 are identified as key fiscal risks and a factor in South Africa's credit rating;

**AND WHEREAS** delays in VAT and other refunds form part of a systematic policy to reach revenue targets, taking account of the findings of the Office of the Tax Ombud;

**AND WHEREAS** the public must have confidence that SARS is managed to the highest standard of ethics, integrity and efficiency;

**AND WHEREAS** certain practices in the tax system have undermined taxpayer morality and confidence;

**AND WHEREAS** administrative provisions relating to revenue collection must be transparent, applied fairly and applied without fear or favour;

**AND WHEREAS** reports in the public domain that potentially undermine taxpayer morality need to be assessed for the veracity thereof and possible corrective measures need to be implemented to maintain taxpayer morality and confidence;

**AND WHEREAS** deterioration in revenue collection, transparency of, and fairness in tax administration present a threat to fiscal sustainability, service delivery to the public and the continued deepening of our democratic gains,

**THEREFORE** a Commission of Inquiry (the Commission) is hereby appointed in terms of section 84(2)(f) of the Constitution of the Republic of South Africa, 1996.

1. The Commission must enquire into, make findings, report on and make recommendations on the following:
  - 1.1. The adequacy and legality of steps that SARS took, or failed to take -
    - 1.1.1. in light of the revenue shortfalls, relative to the budgets announced on 24 February 2016 and 22 February 2017, to improve revenue collection, including steps to change the timing of tax refunds;
    - 1.1.2. in the management of tax and customs settlements, to ensure that the settlement process was not compromised or selective having regard to favouring (or discriminating against)-
      - 1.1.2.1. a domestic prominent influential person (as defined in section 1 of the Financial Intelligence Centre Act, 2001);
      - 1.1.2.2. an immediate family member (as contemplated in section 21H(2) of the Financial Intelligence Centre Act, 2001) of a domestic prominent influential person; and
      - 1.1.2.3. known close associates of a domestic prominent influential person;(herein called "relevant persons");
    - 1.1.3. in the management of the audit case selection process, to ensure that the case selection process was not compromised or selective having regard to favouring (or discriminating against) relevant persons;
    - 1.1.4. in the management of or participation in, investigations into any malpractices or allegations of malpractices, whether SARS information was deliberately compromised by the omission or withholding of information that the SARS leadership was aware was critical or necessary to ensure a fair and transparent investigation;
    - 1.1.5. in ensuring that criminal transgressions were not concealed or ignored under the auspices of taxpayer confidentiality;
    - 1.1.6. in ensuring that the Prevention and Combating of Corrupt Activities Act, 2004 (PRECA), Financial Intelligence Centre Act, 2001 (FICA), South African Revenue Service Act, 1997 (SARS Act), Customs and Excise Act, 1964, the Tax Administration Act, 2011 and other applicable legislation

- were fully adhered to in respect of information that was provided by the Financial Intelligence Centre or was made available to the public;
- 1.1.7. in ensuring that all material matters affecting the credibility of SARS were reported to the Minister of Finance and/or Parliament; and
  - 1.1.8. in ensuring that performance bonuses to SARS employees in the senior management structure of SARS, as contemplated in section 18(3) of the South African Revenue Service Act, 1997, were duly authorised particularly in the context of growing revenue shortfalls and the need for fiscal prudence.
- 1.2. The influence of institutional factors on SARS' performance of its duties with particular reference to the quality of decision making in audit selection, technical capacity in auditing, technical capacity in tax and customs enforcement, technical capacity in transfer pricing and illicit capital flows, oversight of mining rehabilitation trusts or companies, payment of refunds, technical capacity in risk assessment and inspections including—
- 1.2.1. due consideration of the factors that must be taken into account in any decision, approval or discretion exercised in terms of the Tax Administration Act, 2011 and the Acts mentioned in Schedule 1 of the South African Revenue Service Act, 1997;
  - 1.2.2. whether material deviations occurred in the practice and protocols that relate to these areas;
  - 1.2.3. whether any abuse of such decision making powers took place and, if so whether such abuse resulted in undue benefits to SARS' senior managers, or any connected persons in relation to the aforementioned persons (In these Terms of References, the term "connected persons" means a "connected person" as defined in section 1 of the Income Tax Act, 1962).
- 1.3. Whether the tax administrative processes to determine or detect compliance or non-compliance of taxpayers with regards to the obligation to submit tax returns, declare taxable income and settle tax liabilities or the tax administrative processes to issue tax assessments, determine taxable income, enter into settlements, reopen assessments and collect revenue resulted in any non-standard treatment of any persons referred to in:

- 1.3.1. section 8(1)(e)(i) of the Income Tax Act, 1962;
  - 1.3.2. section 18(3) of the South African Revenue Service Act, 1997; or
  - 1.3.3. any connected persons to the aforementioned persons.
- 1.4. Whether the process and practices to determine and enforce compliance by all taxpayers in respect of goods indicated in Part 2A of Schedule 1 of the Customs and Excise Act, 1964 resulted in intentional non-enforcement of laws in respect of any taxpayers that resulted in loss of revenue to the State, including the veracity of reports in the public domain of collusion between SARS officials and industry leaders in illicit tobacco trade.
  - 1.5. Whether SARS neglected to comply with applicable legislation and internal policies regarding any appointment, employee grievance, disciplinary process, performance bonus, termination of services and any changes made to the functions performed in respect of senior SARS employees.
  - 1.6. With regard to the reports of the number of senior or experienced SARS employees that have left the employ of SARS since 2014, to inquire into the reasons why they left, whether any employees were coerced in any manner into resigning; whether any severance benefits were paid to those employees; whether there was any obligation to inform the Minister of Finance of these resignations and severance benefits; and if such an obligation existed whether that obligation was discharged.
  - 1.7. Whether SARS followed due and proper process in the appointment of key members of SARS staff, including members of EXCO.
  - 1.8. Whether SARS acted responsibly in regard to its obligations to account to the Executive, Minister of Finance and the Standing Committee on Finance within the relevant areas;
  - 1.9. Whether SARS, in the discharge of its obligations to collect revenue utilised the services of debt collection, legal, audit or forensic firms rationally, reasonably and prudently and in accordance with its mandate and objectives.

- 1.10. Whether any SARS official, in utilising the services of any debt collection, legal, audit or forensic firm influenced or attempted to influence the outcome of the services rendered or the outcome of any report following the services so rendered.
- 1.11. Whether the post-2014 Large Business Centre function review lead to inefficiencies and ineffectiveness with specific reference to enforcement of compliance with legislation giving effect to the international efforts of curbing base erosion and profit shifting.
- 1.12. Whether the change in the operating model of SARS post 2014 contributed to inefficiencies and ineffectiveness with particular reference to the revenue shortfall in 2016/17 and 2017/18.
- 1.13. Whether, having regard to any firm of consultants advising on the new operating model, an obligation existed on the consultant(s) to demonstrate improvements in efficiencies or cost saving or revenue collection or any other similar cost/benefit obligation as may be set out in the terms of reference and / or contractual obligations and, if so, whether this was proven.
- 1.14. Whether the current governance and operating models of SARS is the most effective and efficient model and, if not, make recommendations as to the most suitable governance and operational models for SARS for the future;
- 1.15. Whether sections 49 to 57 of the Public Finance Management Act, 1999, were complied with, in particular:
  - 1.15.1. actions envisaged in section 51(1)(e) and (2), in relation to acts by senior SARS employees that may have undermined internal control systems of the SARS;
  - 1.15.2. implementing the relevant recommendations and findings of the Auditor-General; and
  - 1.15.3. implementing and enforcing procedures for the disclosure of financial interests described in internal policies of SARS as they relate to SARS employees that report to the Commissioner.



- 1.16. Whether any processes to award tenders, or awarded tenders resulted in any undue benefit being received by any SARS employee or any connected person to the aforementioned employee or any person or entity that is not part of the tender award.
- 1.17. Whether any legal proceedings or complaints instituted by SARS against other state institutions (for example the Auditor-General), the media or any other person for reasons that do not relate to their tax affairs were instituted for reasons that are rational and in the best interest of SARS;
- 1.18. Whether any media statement issued by SARS, or any similar statement or comment issued by any SARS official, whether in his or her official capacity or not, during the period September 2014 until March 2018, brought SARS into disrepute and / or contradicted the official position of the South African Government.
2. The Commission must in its enquiry for the purpose of its recommendations consider the period 1 April 2014 to 31 March 2018.
3. The Commission must submit interim reports in accordance with the following table:

Interim report	30 September 2018
Final report	30 November 2018

4. The Commission may investigate any other SARS revenue administration, process or governance matter the Commission considers necessary but those other investigations may not cause any delay in the submission of the reports on the applicable dates referred to in paragraph 3.
5. The Commission may request the advice or input of:
- 5.1. The South African Revenue Service
  - 5.2. the Davis Tax Committee;
  - 5.3. the Office of the Tax Ombud;
  - 5.4. the Financial Intelligence Centre;
  - 5.5. the South African Reserve Bank;

- 5.6. the National Treasury;
  - 5.7. any other person or organisation that is able to assist the Commission, including taxpayers or professional bodies involved with tax affairs of clients.
6. The Commission must take into account in its recommendations the protection of the State's current and future revenue; the characteristics of a good tax system, namely equity, efficiency, neutrality, certainty, transparency and buoyancy of the tax system; trends in taxpayer compliance and the cost of compliance; and any recommendation by the Davis Tax Committee and tax policy framework determined by the National Treasury.
7. Regulations must be made in terms of the Commissions Act, 1947 and must apply to the Commission in order to enable the Commission to conduct its work meaningfully and effectively and to facilitate the gathering of evidence by conferring on the Commission powers as are necessary, including the power to enter and search premises, secure the attendance of witnesses and compel the production of documents and any other required information.