South African Institute of Tax Practitioners

16 August 2013

Mr TA Mufamadi, MP
Chairperson: Standing Committee on Finance
Parliament
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Dear Mr Mufamadi

RE: CALL FOR COMMENT: DRAFT TAXATION LAWS AMENDMENT BILL, 2013 AND THE TAX ADMINSTRATION LAWS AMENDMENT BILL, 2013

Thank you for the opportunity to contribute commentary on the draft Tax Laws Amendment Bill (TLAB), 2013 and the Tax Administration Laws Amendment Bill (TALAB), 2013.

Set out below, is an extract of the pertinent policy issues extracted from our comprehensive technical submissions made to National Treasury. The technical submissions consisted of five distinct submissions dealing with individual tax issues, corporate tax issues, international tax issues, VAT issues and Tax Administration issues. The consolidated commentary for these submissions was developed from both an internal review of the provisions as well as from consultations with members, stakeholders and industry. The commentary reflects the collective view of members, stakeholders and industry role players consulted.

1 EFFECTIVE DATES

1.1 Problem statement – Retrospective amendments:

Various proposed amendments in the TLAB and the TALAB have been introduced with retrospective effect despite the fact that these changes could be to the detriment of the taxpayer. Examples of the retrospective effective dates (going back to 1 July 2013) are:

1.1 Research and Development expenditure (s11D), (Clause 37)
1.2 Deductible interest limitation in respect of acquisition of indebtedness (s23K(10),s23N, 23O), (Clause 65, 67,70);
1.3 Deferral of expenditure incurred between taxable payors and exempt payees (s23M), (Clause 68)
1.4 Deductible interest limitation in respect of loans between exempt persons and domestic companies (s23P), (Clause 71)

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1.5 Application of the Tax Administration Act ('TAA') to prior or continuing actions (s270), (Clause 72)

Specific attention is drawn to the section 270 amendment that deals with the application of the TAA to prior or continuing actions. The proposed amendment have the effect that the understatement penalties are applied retrospectively and supersede all prior legislation. There is thus a clear contradiction with these amendments. Furthermore, the taxpayer is prejudiced with these rules as a taxpayer could now be subject to a penalty that didn't apply at the time the offence was committed – this could be regarded as unconstitutional.

The above amendment becomes effective from 1 October 2012. This results in taxpayers that have the same year end but one decides to submit its tax return before 1 October 2012 and the other one after that date, being treated differently – one is assessed under the old legislation and the other is assessed under the new legislation despite the fact that both were entitled to submit their returns after 1 October 2012.

Proposed solution / recommendation:

The above TAA provision (section 270) should not be applied retrospectively as this is in some instances prejudicial to the taxpayer and results in the taxpayer being burdened in some instances with penalties that wouldn't have applied at the time of the offence – the constitutionality of the amendment is thus under scrutiny.

To avoid taxpayers (with the same year ends) being treated differently merely because they decided to submit their returns at different times (either before or after 1 October 2012), these amendments should cater for years of assessment and not just a fixed date.

These cases of retrospective legislation could result in a person having to suffer in law (criminal or civil) for an act which was not unlawful when he/she committed it. Retrospective legislation destroys the certainty of law and undermines many characteristics of the rule of law. The changes proposed should be made to become effective on a date that is after the consultation process has been finalized and the law has been promulgated. Retrospective legislation (unless to the benefit of the taxpayer) is unacceptable as it breaches one of the fundamental principles of tax as provided by Adam Smith - certainty.

1.2 Problem statement – Prospective amendments if for the benefit of a taxpayer:

Taking the retrospective legislation mentioned above into account, it becomes difficult to comprehend why certain amendments to the legislation (which would be to the benefit of the taxpayer) have been delayed till 1 January 2014 or 1 March 2014. Examples of this are the tenant

construction and improvement on leased land (s12N, Clause 45), the exclusion of bone fide errors from understatement penalties (s222 of TAA, Clause 2.62) and the exemption of bursaries to employee relatives (s10(1)(q), Clause 28(1)(u)).

Proposed solution / recommendation:

The effective date for section 12N should be 1 July 2013 (as per so many other provisions in the draft legislation) so as to allow for the deduction of impending improvements. For section 222 of the TAA, the effective date should be the date the TAA was introduced.

1.3 Problem statement –withholding tax on interest:

The withholding tax on interest became effective on 1 July 2013 according to legislation already promulgated. However, the current draft legislation retrospectively removes this withholding tax obligation and postpones it till 1 January 2015.

It is iniquitous and unconstitutional that the effective date of the interest withholding tax in the draft legislation can backdated the current legislation and that it also backdates it to a period before the proposed amendments are being discussed. Uncertainty thus prevails with regard to whether withholding tax on interest should actually be withheld from 1 July 2013 till 1 January 2015. Furthermore, uncertainty of the effective dates also has an impact on the calculation of provisional tax payable by a company. Another concern is the forms that would be required to be completed in respect of this withholding appear not to have been released as yet.

Proposed solution / recommendation:

The Commissioner must issue an official statement immediately as to when the withholding tax on interest becomes effective. Should the effective date be 1 July 2013, the necessary forms should be made available for recording this withholding tax.

2 SMALL BUSINESS CONCERNS

The National Development Plan (2030) makes it quite clear that more emphasis is needed to support small businesses. It continues and states that a key element for this strategy is to reduce the regulatory burden on small businesses. It appears that draft legislation has failed to take this strategy into account in certain respects, as is explained below.

2.1 Streamling the VAT registration process – voluntary registrations (Clause 187, 188, 189)

Problem statement:

Although the intention behind the introduction of a two-pronged approach to voluntary registration (fast-track registration and traditional registration) is understandable, this new proposed approach raises certain concerns for small businesses, such as the fact that the time involved to re-classify the business (from fast-track to traditional registration) is not legislatively catered for and this could have a serious impact on the viability of a small business.

The requirement, for the traditional voluntary registration option, that an activity of R5 million level of expenditure or a contractual commitment to make this level of expenditure needs to be incurred before registration can be applied for is also onerous for small businesses. This is because it is difficult for a small business to secure a contract with a total spend of R5 million or more without a valid VAT registration. So it seems that traditional voluntary VAT registrations is not an option for many businesses, but especially small businesses.

SARS has also not addressed the issue of whether VAT will be recoverable in relation to this R5 million pre-registration expenses. Should this not be recoverable, then the small business would forfeit the "VAT" on these amounts. Subsequently trying to claim a section 18 adjustment for the change in use would not be possible as no tax invoices would have been received and this section is only applicable to goods and services that are on hand at the time of the claim, rendering costs incurred on consumables, trading stock, municipal charges etc. not being subject to the section 18 adjustment.

The restriction of input tax to the value of output tax or the restriction of VAT refunds until taxable supplies of R100 000 seems arbitrary and is bound to adversely affect legitimate businesses from a cash-flow perspective. The additional administrative burden imposed on SARS to administer this is also considered unnecessary.

From an operational perspective it is questionable whether these proposals will actually streamline the VAT registration process. No mention is made of what the process will be to change a business's classification from no-refund to full-refund.

Proposed solution / recommendation:

Eligibility to register shouldn't be a factor that inhibits business and the registration process should not be to the detriment of a legitimate taxpayer. It is therefore suggested that in order to avoid elaborate schemes from being developed to combat the abuse of refunds, a concerted effort should be made to ensure that SARS has appropriate risk and audit capacity to detect this abuse, rather than impede the registration process. A rather simple method of verifying if input VAT has been correctly

claimed from SARS is to only allow an input tax deduction if proof of payment can be provided for the goods/services purchased.

Clarification in respect of the following is required:

- the nature of the expenses that would be included in the R5 million monetary limit; and
- the recoverability of the R5 million pre-registration VAT expenses.

It is suggested that the R5 million limit be reduced to assist certain small businesses to register for VAT. The option to claim the VAT back on the non-capital goods or services retrospectively from the date of commencement of trade once this limit is reached should be catered for in the legislation.

The restrictions on input tax and refunds until R100 000 needs to be re-considered as it can have a detrimental effect on small businesses' cash flows and hence their ultimate existence. Should the small business survive this cash flow difficulty, SARS should be required to pay it interest on the delayed refund.

If SARS will indeed revise their VAT registration policies and procedures to actually fast-track registrations under section 23(3)(d) of the VAT Act, this will be an attractive option for all businesses to follow, and will render the provisions of section 23(1)(b) and 23(3)(b) superfluous, especially where the enterprise is expected to earn revenue in excess of R100 000 in the first month or two after registration.

2.2 Compulsory registration

Problem statement:

Existing businesses with taxable supplies that have already exceeded the threshold of R1 million within the preceding 12 months or existing or future businesses that have a written contractual commitment to make taxable supplies exceeding R1 million within the next 12 months will be obliged to register for VAT in terms of the draft TLAB. Securing a R1 million contract for a small business will be difficult to obtain. This makes it almost impossible for a small business to qualify for compulsory registration based on the expected taxable supplies of R1 million.

Proposed solution / recommendation:

The recommendations under the voluntary registration point above should be considered so as to provide relief for the small business should it not be able to qualify for compulsory registration.

2.3 Retirement savings – base used to calculate tax deductible contributions (Clause 32(1)(j), 32(1)(k), 32(1)(l), 129(1)(b))

Problem statement:

The use of the greater of "remuneration" or "taxable income" when calculating the percentage limit of retirement fund contributions (27,5%) could be discriminatory towards individuals with assessed losses, who do not earn remuneration, or to sole traders who have a low taxable income (for example an entrepreneur who contributes, say, R20 000 per month to a fund but in a particular year he has a large deduction due to a fire in his premises that destroys his trading stock, resulting in his taxable income being reduced to a very low amount). Furthermore, the taxable income of a sole proprietor may vary year on year (more than compared to an employee) and this could adversely influence the deductions that he/she would be entitled to claim for tax purposes.

Proposed solution / recommendation:
The percentage limit for employees can remain as is proposed. However, this limit should be calculated on the higher of "remuneration" or "income" as defined. This will thus be protective of sole proprietors and ensure that persons with assessed losses, but no remuneration, will also be able to quality for the deduction.

2.4 Removal of dividend character overlap – owner managed business/partnerships (Clause 7(q))

Problem statement:

The amendment, that an amount will be treated as "gross income" rather than as a "dividend" when it can be characterized as both, has a very broad application and can thus be to the detriment of professional practices or owner managed businesses whose partners/directors regularly draw amounts from the business on loan account or via dividends which could be construed as a payment for services rendered.

Proposed solution / recommendation:

The section should be amended so as to ensure that these scenarios do not fall within the anti-avoidance provisions.

2.5 Anti-hybrid debt instrument re-characterisation rules – exclusion of small business corporations (s8F & 8FA), (Clause 16 &18)

Problem statement:

The exclusion of small business corporations ('SBC') from the ambit of section 8F and section 8FA is welcomed. The concern, however, is that not all small businesses qualify as a SBC as defined in section 12E(4)(a) (such as small investment and professional service provider entities), and thus would potentially be subject to the recharacterisation provisions.

Proposed solution / recommendation:

To prevent small property development companies, rental property owing companies, investment companies and personal service providers from being subject to the provisions as sections 8F and 8FA, we suggest that the exclusion from section 8F and 8FA should not be linked to a SBC as defined in section 12E but should rather be linked to only certain requirements in section 12E that relate to the size of the business, not those that relate to the nature of the activities or income. Furthermore, instruments held between companies that form part of the same group of companies (as defined in section 41(1)) should be treated as exempt from section 8F and 8FA.

3 RESEARCH AND DEVELOPMENT (R&D)

One of the key objectives of the National Development Plan - 2030 ('the plan') is to expand science, technology and innovation outputs. The plan states that this objective will be achieved by increasing research and development (R&D) spending by government and by encouraging industry to also do so. The plan also appreciates that in order for South Africa to stay competitive and move up the value chain, R&D for innovation is essential. One of the areas identified in the plan as being essential to ensure that South Africa has a sharp innovative edge and continues to contribute to global scientific and technological advancement is that innovation and enhanced cooperation between public science and technology institutions and the private sector is required. It is against this backdrop that the proposed amendments are judged.

3.1 Definition of R&D – requirement to be for use to the general public (S11D), (Clause 34)

Problem statement:

The National Development Plan – 2030 acknowledges that South Africa, as a middle-income country, has to compete on the basis of excellent products and brands, and effective entry into global distribution channels. This will require greater commitment to R&D and its commercialisation, an efficient logistics platform and effective economic diplomacy.

Taking cognizance of the above, it is submitted that the definition of 'research and development' is too restrictive in respect of the following:

- That the computer programs must be mainly intended for the purposes of the sale to, or for use by the general public [item (a)(i)(cc)];
- That it must be for the purposes of applied scientific knowledge mainly intended for the purposes of the sale to, or for use by the general public [item (a)(ii)];
- That significant and innovative improvements must be mainly intended for the purposes of the sale to, or for use by the general public [item (b)].

It is not clear why the requirement for the R&D to be globally novel has been introduced and why the above items (intended for sale or licensing to the respective business) do not qualify, if they meet the other requirements of the provision and do not pertain to one of the disqualified fields.

Proposed solution / recommendation:

With many small businesses trying to compete with global giants the R&D being done in South Africa to attempt to improve local developments to match or surpass global competition should be recognized. Particularly in light of the retrospective nature of the changes to this section and taking into account the reasons for section 11D (to incentivize South African companies to increase R&D), we suggest that reasons for the above amendments be provided in the explanatory memorandum as the changes appear to narrow the definitions of R&D and thus do not assist South African to become a world-leader in various sectors of the economy.

3.2 Definition of R&D – items not included any more

Problem statement:

The discovery of technological knowledge (previously included under section 11D(1)(a)(i)) is no longer catered for in the new definition of R&D. Neither is the "knowledge essential to the use of such invention, design or computer program" (previously included under section 11D(1)(a)(ii)(d)) catered for. This latter knowledge, such as drafting of operating manuals, enables the developer to

sell or license the invention or computer program and is considered to be an integral part of the R&D process.

Proposed solution / recommendation:

Although sections 11D(1)(a)(ii) and 11D(1)(a)(iii) are intended to replace section 11D(1)(a)(i), we suggest that the discovery of technological knowledge be specifically included in the definition of R&D. Knowledge essential to the use of such invention, design or computer program should also be specifically included in the definition of R&D.

3.3 Definition of R&D – requirement to know if it is already utilized or known

Problem statement:

Proviso (f) of the definition of 'research and development' is unreasonable in that it requires a taxpayer to know whether or not the intellectual property is already utilized or known by other persons somewhere else in the world. This is not always possible due to the competitive and secretive nature of certain research.

Proposed solution / recommendation:

As definition of 'research and development' already requires the research to be innovative and will lead to the advancement of knowledge, this requirement is not considered necessary.

3.4 Definition of R&D – pharmaceutical inclusions

Problem statement:

It is submitted that the inclusion of certain categories of pharmaceutical research (such R&D in respect of certain clinical trial and generic medicine) is greatly welcomed, however, clarity is required as to the exactly what categories of pharmaceutical research is envisaged in this section. Extension of these R&D deductions to other industries of a similar nature has not been proposed but is considered relevant.

Proposed solution / recommendation:

Regulations or guidelines (issued preferably by the Department of Science and Technology) need to be issued as a matter of urgency in order for taxpayers to clearly understand what categories of pharmaceutical research would qualify for a R&D deduction.

The National Development Plan – 2030 indicates that successful countries have grown their ability to innovate and learn by doing, by investing public funding to help finance research and by

promoting development in critical areas. The plan highlights many examples of this – the space programme, defense and aerospace in the United States; integrated value chains, just-in-time manufacturing and total quality management in Japan; high-tech manufacturing in Singapore; and almost everything in China today. Based on this information, we recommend that R&D deduction be extended to other similar industries.

3.5 Prototypes

Problem statement:

Section 11(2)(b) states that no deduction is allowed in respect of capital assets used in R&D. The incurral of costs in respect of prototypes is often a necessity before a product can be developed and sold and should therefore constitute R&D. As a result of this these expenses incurred should be excluded from the provisions of section 11(2)(b).

Proposed solution / recommendation:

The treatment of expenses incurred in respect of prototypes should be clarified and distinguished from other capital assets that are used in research and development as they tend not to be capital assets that are created as a result of research and development but rather they are a necessity before a product can be developed and sold.

4 TAXTION OF FOREIGN VERSUS LOCAL BUSINESS

According to the National Development Plan (2030), South Africa must institute aggressive trade and foreign investment policies to place the country on a more competitive global path, and retain an influential space for the country in key multilateral institutions. Thus attracting foreign investment is key to South Africa's success, however, what our Government does not appear to be considering is that many South African domestic companies are wanting to shift their money off shore due to stringent exchange control regulations and uncertain and unduly complex South African tax legislation. It is in this context that the amendments are discussed.

4.1 Section 9D – South African outbound businesses vs foreign inbound businesses

Problem statement:

The exemptions to section 9D appear to have an inequitable effect on South African outbound multinationals if compared to foreign branches of inbound multinationals for whom no changes over the last few years have been enacted. An example of the detrimental effect of these exemptions on South African outbound multinationals is as follows:

If the high tax rate exemption for controlled foreign companies ('CFC') is used (second proviso to s9D(2A)) by a South African multinational company wishing to establish a treasury function in, say the United Kingdom, the exemption would not be applicable because the tax rate in the UK is going to drop to 20%, (which would not be at least 75% of the net normal tax payable in South Africa). As the UK is one of the countries for which it has been indicated renegotiations with the DTAs is not going to take place and is a bone fide country within which to business, it seems strange that this would not be, from a tax perspective, a suitable country in which to set up a South African outbound multinational's treasury operation.

Overall, it appears that SARS is trying to tax the "low hanging fruit" as the foreigners are difficult to trace and thus collect revenue from. If the lack of legislation as how exactly to tax foreigners is not addressed soon, the tax base will soon be eroded.

Proposed solution / recommendation:

To prevent the South African companies from being taxed extensively and to prevent tax base erosion from occurring, it is suggested that horizontal monitoring be introduced similar to that used by the Dutch Revenue Authorities. Furthermore, from a section 9D perspective, it is proposed that the 75% of the South African tax rate referred to in the second proviso to s9D(2A) be lowered to 70% to provide South African outbound multinationals with the opportunity to conduct their affairs in countries that would make commercial sense. We are, however, not suggesting that a designated country exemption be re-introduced.

4.2 Deductible interest limitation in respect of acquisition indebtedness (s23N, Clause 67) and deductible interest limitation in respect of loans between exempt persons and domestic companies (s23P, Clause 71)

Problem statement:

Both these sections, due to *inter alia* the proposed calculation methodology to be used, appear to create a further disincentive for foreign direct investment into South Africa.

Proposed solution / recommendation:

Creating a disincentive to invest in South Africa is not desirable and clearly contrary to the National Development Plan. It is therefore proposed that the recommendations in our Corporate Tax Submission to yourselves be considered.

4.3 Exemption for international shipping transport entities (s9D, s10(1)(o)(i), 12C, 12Q)

Problem statement:

Although we are fully supportive of this initiative based on our discussions above, it is uncertain how widely these provisions will apply due to the requirement that the ship must be a 'South African ship' as defined.

Proposed solution / recommendation:

It is hoped that sufficient research has been done to justify this requirement and we propose that the effectiveness of these provisions be regularly monitored.

5 COMPLIANCE COSTS – PLEA FOR REDUCTION NOT ALWAYS CONSIDERED

SARS, in its Strategic Plan 2013/14 – 2017/18, states that it will achieve the objectives of the National Development Plan by reducing the cost of compliance and the cost of doing business in South Africa. Unfortunately, there are a few proposed amendments that do not achieve this objective. These are discussed below.

5.1 Employer verification of over 65 years of age (para 11B), (Clause 5)

Problem statement:

In terms of the amendment to section 11B of the Fourth Schedule in clause 5 of the TALAB, the employer must verify (previously obtain a written declaration) that the employee would be over the age of 65 on the last day of the year of assessment when determining the amount of SITE to be deducted from an employee's net remuneration. This provision appears to be applicable from 1 October 2012.

It is uncertain with whom and to whom the employer must verify that the employee would be over the age of 65 on the last day of the year of assessment. Whether a copy of the employee's identity document would be sufficient proof of this verification also needs to be confirmed.

Proposed solution / recommendation:

This requirement seems void as the identification number of an employee should be sufficient proof of the employee's age. Should the government still insist on verification, verification in the form of a copy of the employee's identity document should be regarded as sufficient proof that

the employee would be over the age of 65 on the last day of the year of assessment. This proof should be required to be kept by the employer for a period of five years.

5.2 Recognition of DTA relief for the withholding tax on services

Problem statement:

Where South Africa has a DTA with another country, the withholding tax would appear not to apply in the vast majority of situations. Furthermore, the tax will only apply in circumstances in which the service fees are from a South African source. In the majority of situations, the services are rendered outside of South Africa making the tax inapplicable.

Even for those countries where South Africa does have a DTA, certain of these countries do not recognize the treaty relief. This forces the South African companies into a difficult situation

Proposed solution / recommendation:

Taking the cost and practical difficulties of administrating this tax, we suggest that this tax be reconsidered or that remedies for the practical difficulties being experienced by taxpayers be taken into consideration.

5.3 Goods imported for oil and gas production (Clause 190(1)(c))

Problem statement:

This concession is welcomed, however, the practical implementation thereof is uncertain. For instance, clarity is need on what exactly is meant by proof is required - would a certificate suffice.

Proposed solution / recommendation:

It is hoped that the additional costs and security required will not outweigh the benefit of this proposal.

5.4 Payment and recovery of tax (s64K), (Clause 3)

Problem statement:

This amendment requires a shareholder to submit a return confirming the exempt dividends it received. This requirement is considered unnecessary and will only increase the already very high costs of tax compliance. Furthermore, the receipt of remuneration by an employee or interest by

a taxpayer from bank does not require the employee or the taxpayer to submit a separate return in respect of these amounts received – they are all included on the prepopulated return based on the information provided by the employer/bank to SARS. Reasons why the treatment of dividends received should be any different is not clear.

Proposed solution / recommendation:

Neither the employees' tax system nor the payment of interest to an individual requires the individual to submit a return to SARS confirming the amounts received. This amendment should therefore be deleted as it unlikely that it will result in a more effective and efficient collection of tax and will add to the administrative burden and cost of doing business and will equally affect tax-exempt organisations and micro business owners who don't have capacity for additional administrative obligations.

5.5 Place of legal notification (s11 of TAA), (Clause 2.24)

Problem statement:

This amendment requires a taxpayer to send all legal notices to an address specified by SARS for all High Court proceedings instituted by SARS – thus not necessarily to the SARS office where the taxpayer is registered. This will increase of the cost of legal assistance required by taxpayers should the address not be in the same jurisdiction as that where the taxpayer is registered.

Proposed solution / recommendation:

The amendment should be changed so as to limit the place of submission of legal notification to the jurisdiction of the High Court where the taxpayer is registered.

5.6 Fringe benefit valuation – defined benefit fund (Clause 136)

Problem statement:

Various sets of information are needed from a valuator to determine the taxable value of the benefit of an employer contribution to a defined benefit retirement fund. It is unfortunate that the costs of obtaining this valuator will ultimately be borne by the members of the fund, reducing their potential savings.

Proposed solution / recommendation:

To avoid the undue complexity and administrative burden placed on the fund (and ultimately the members of the fund), it is suggested that an alternative to using the complex formula in determining the value of the fringe benefit would be to simply allow the value of the employer

contribution to be equal to the amount to be included in the taxable income of the employee. Furthermore, consideration should be given to deferring these proposals until the true extent of the risk of the current tax treatment is established as it is our understanding that there are very limited number of these funds still around (outside of funds established by law, such as the Government Pension Fund).

Problem statement:

Employer contributions to defined benefit funds will be valued based on a formula. However, employee contributions to such funds will, for deduction purposes, be included as the actual amount contributed. This seems to be anomalous.

Proposed solution / recommendation:

Employee and employer contributions to defined benefit funds should be valued on the same basis to avoid additional time and costs being incurred to determine the different values.

6 SARS CONFIDENTIAL INFORMATION AND DISCLOSURE (s68), (Clause 30)

Problem statement:

Expanding the definition of "SARS confidential information" results in SARS no longer being required to provide taxpayers with reasons for an assessment being raised or the method of calculation of the amount of tax. This goes clearly against the current rules of the tax court.

Proposed solution / recommendation:

This amendment should be scrapped as it hampers the dispute resolution process set out in section 103 read in conjunction with the tax court rules.

7 RULES FOR DISCPUTE RESOLUTION (s103), (Clause 35)

Problem statement:

According to the explanatory memorandum (EM) the amendment enables the Commissioner to prescribe the form and manner of delivery of documents under the dispute resolution process. The Act, however, only refers to form. The draft rules propose that taxpayers are compelled to use SARS's eFiling as a delivery mechanism for objections etc.

The SARS eFiling system currently provides no notification of delivery of documents onto this system, thus an assessment or response to an objection etc could be on the taxpayer's profile without the taxpayer being aware of this (unless the taxpayer vigilantly checks their profile on a daily basis – which is absurd).

Furthermore, the draft rules (subsidiary legislation) attempt to override and amend other primary legislation such as the Electronic Communications and Transactions Act, 2002 and the Promotion of Administrative Justice Act.

Proposed solution / recommendation:

The use of eFiling should not be the only manner in which delivery can take place. The EM and the Act should be aligned as to the form and "manner" of delivery.

8 UNDERSTATEMENT PENALTY (s223), (Clause 63)

Problem statement:

The basis for determining an understatement penalty is subject to interpretation as the Commissioner has widespread discretion when deciding on what penalty to levy on the taxpayer. Furthermore, no set-off rules apply. Should a company be in an assessed loss position then SARS is not at an actual disadvantage as there is no loss to the fiscus. SARS is also regularly asking the taxpayer in a letter of findings to justify why it should not levy a specific (highest) penalty. However, in terms of clause 102(2) of the TAA provides that the burden of proving the facts upon which SARS based the imposition of an understatement penalty under Chapter 16, is upon SARS.

Proposed solution / recommendation:

SARS officials (not the taxpayer) should ensure that they motivate why a certain penalty and percentage of penalty was chosen as the onus is on SARS and not the taxpayer. Furthermore, to ensure consistency of decisions taken when the discretion of the Commissioner is exercised in determining an understatement penalty, we suggest that a matrix (decision-tree) be compiled and be distributed to SARS officials, taxpayers and tax practitioners alike so as to remove the differences in interpretations. This approach would be consistent with other international revenue offices such as the ATO.

9 CRIMINAL OFFENCES (No specific clause)

Problem statement:

Various minor offences (such as failing to provide SARS with a change in your registered particulars – s234) have been charged as criminal offences. It thus appears that the law is being developed from a criminal perspective.

Proposed solution / recommendation:

Consideration should be given to de-criminalizing certain offences (such as the change of address notification as well as the appointment of a representative taxpayer). Criminalizing these offences appear to be overly harsh and monetary penalties should suffice to remedy and prevent this situation from occurring again.

Please do not hesitate to contact us if you have any queries in this regard.

Yours sincerely,

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