

5 August 2013

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Dear Ms Mpotulo and Ms Collins

RE: CALL FOR COMMENT: DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL, 2013

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

Set out below, is the consolidated commentary developed from both an internal review of the provisions as well as from consultations with members, stakeholders and industry on the **tax administration matters only**. The commentary reflects the collective view of members, stakeholders and industry role players consulted.

1 SECTION 64K OF THE INCOME TAX ACT (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 is 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.

2 PARAGRAPH 11 OF THE SIXTH SCHEDULE (Clause 8)

Problem statement:

The amendment, in clause 8(1)(b) of the TALAB, refers to insertion after subparagraph (4A) of the following subparagraph and then proceeds to insert "(4A)".

Proposed solution / recommendation:

The amendment, in clause 8(1)(b) of the TALAB, should insert "(4B)" and not "(4A)".

3 SECTION 1 OF THE TAX ADMINISTRATION ACT (Clause 1)

Problem statement:

The change from "the basis" to "a basis" in the definition of "return" is too broad and could potentially be to the detriment of the taxpayer should a SARS official claim that the original assessment issued was only "a basis" of assessment and subsequently include other bases of assessment.

The definition of "tax debt" does also not appear to clarify whether tax that has not yet been assessed falls within the definition.

Proposed solution / recommendation:

To prevent any abuse of power on the part of a SARS official, we recommend that the change from "the basis" to "a basis" be scrapped.

Clarity should be provided on whether or not tax that has not yet been assessed falls within the definition.

4 SECTION 25 (Clause 25)

Problem statement:

Allowing the Commissioner to require returns other than those specifically referred to in the Act is considered too broad and could potentially be to the detriment of the taxpayer should this power be misused.

Proposed solution / recommendation:

The request for any further returns should be determined via the Parliamentary processes only.

5 SECTION 68 (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.

6 SECTION 99 (Clause34)

Problem statement:

This section provides for an extension of the prescription periods equal to the periods that taxpayers do not provide the information requested by SARS without just cause. This extension of the prescription period is at the discretion of SARS. No clarity is given as to under what circumstances this discretion will be invoked.

Proposed solution / recommendation:

SARS should be required to prove that the taxpayer has employed a dilatory tactic if this section is to be exercised. In instances where the taxpayer is not intentionally drawing out the 3 year prescription period, taxpayers should be provided with an opportunity to decide whether or not they would like the period to be extended. Alternatively, the objective circumstances in which SARS may extend the period should be clarified.

In addition, the scope of this section should be limited to whatever is reflected in the specific documents and should not be open to anything else that SARS finds within the extended period.

This decision should also be made subject to the objection and appeal procedures.

7 SECTION 103 (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 SECTION 222 (Clause 62)

Problem statement:

No clarity is provided of what would constitute a “bona fide inadvertent error” as the examples in the Explanatory Memorandum do not constitute legislation.

The amendment to section 222(2) requires the penalty to apply to ‘each’ shortfall, which could result in an extremely onerous penalty and possibly even a duplication of penalties.

Proposed solution / recommendation:

This term “bona fide inadvertent error” should be defined in the Act or the examples mentioned in the Explanatory Memorandum should be incorporated into the Act. The onus to prove that the error was not a bona fide inadvertent error should be on SARS and this should be incorporated into the section.

It is recommended that the wording of section 222(2) should remain as is so as to prevent the imposition of an extremely onerous penalty.

9 SECTION 223 (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.

Problem statement:

There appears to be no reason why any differentiation between an in-house and an external tax practitioner should take place when issuing an opinion.

Proposed solution / recommendation:

This proposal should be reconsidered. It is also suggested that in-house tax practitioners be required to register as tax practitioners so that they can then also be reported to the relevant controlling body in terms of section 241 of the Tax Administration Act as is the case for external tax practitioners.

10 SECTION 240 (Clause 67)

Problem statement:

An amendment to replace the "direct supervision" requirement with that of "acceptance of accountability" has been proposed due to the arguable adverse practical implications of tax practitioner firms having to register "intermediate managers" between trainees or article clerks.

This new amendment requires the partner or director who is a registered tax practitioner to accept accountability for the actions of both intermediate manager and the trainees or article clerks, for example, for the purposes of complaints by taxpayers or SARS to the relevant recognised controlling body.

SAIT agrees to that the "direct supervision" requirement was too vague but that the "acceptance of accountability" provision has far reaching implications. However, if the tax practitioners are provided with explicit and clear guidance by SARS and the recognised controlling bodies as to the implications and ramifications of these provisions then the amendments can be entertained.

Proposed solution / recommendation:

In providing this explicit and clear guidance we recommend that the Explanatory Memorandum be amended to clearly stipulate that nothing in the Tax Administration Act prohibits a person from registering as a tax practitioner should they so choose. Thus a person can elect the level of accountability that they are prepared to accept. One firm may therefore choose to register their lower levels of staff should they not wish to accept accountability for them. Whereas, another firm might be prepared to accept accountability for their lower level staff members and thus not require them to register as tax practitioners. We recommend that in the latter instance the tax

practitioners clearly document why they decided not to register a particular person and why they are willing to accept accountability for him/her.

To summarise, the Explanatory Memorandum should make it clear as to what does acceptance of accountability really mean and how far-reaching is it. It should also highlight that the impact of this acceptance of accountability should be based on the internal decisions taken by each firm. Thus each firm will need to assess its own risk matrix to accommodate the statutory provisions of acceptance of accountability.

11 SECTION 270 (Clause 72)

11.1 Retrospective effect of the amendment

Problem statement:

Section 270 deals with the application of the TAA to prior or continuing actions. The proposed amendments have the effect that the understatement penalties are applied retrospectively and supersede all legislation before. 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 proposed amendments become 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 TAA provisions 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.

11.2 Effect on relief provided by the Voluntary Disclosure Programme ('VDP')

Problem statement:

In terms of section 227 VDP relief is available for "understatement penalties" but not for "additional taxes". Thus should a taxpayer now be subject to a section 76 of the Income Tax Act penalty, the requirements for this penalty as well as the punishment is not the same as per the TAA requirements. Thus the two sections as not alternatives to each other.

Proposed solution / recommendation:

VDP relief should still be accessible should the taxpayer be subject to the “additional taxes” rather than the understatement penalty.

12 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). Criminalising 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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