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Hon. Yunus Carrim (MP)

Standing Committee on Finance

National Assembly

Parliament of the Republic of South Africa

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Dear Honourable Chairperson

COMMENTS ON THE DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL, 2015

In response to your request for comments on the 2015 Draft Tax Administration Laws Amendment Bill (DTALAB), please find set out below comments from BASA. For purposes of this document, the Income Tax Act No 58 of 1962, as amended, will be referred to as the Act and the Tax Administration Act No 28 of 2011, as amended, will be referred to as the TAA.

General

While reviewing the amendments to this DTALAB, it would appear that a number of provisions throughout have removed the discretion afforded to the Commissioner and replaced this with the phrase "on application". Clarity is sought on whether this

implies that the directive process will be expanded to accommodate these applications and the forms revised for directive applications? If, in this regard, changes to the directive application systems are difficult to implement, the DTALAB must be amended to reflect the 'process of application', alternatively, an explanatory memorandum must be issued in this regard.

1. Clause 6 amending paragraph 1 of the Fourth Schedule to the Act

Problem statement

The purpose of the insertion of the words "settlor or beneficiary" to the definition of 'personal service provider' is not clearly explained. The term "settlor", which is akin to a trustee under South African legislation, is not a term generally used in relation to trust law in South Africa and is not a defined term for the purposes of the amendment to the definition of a "personal service provider".

Proposed solution

The term "settlor" should be defined with clear precision within the context that it is intended.

2. Clause 7 amending paragraph 5 of the Fourth Schedule to the Act

Problem statement

As amended by section 19 of Act 18 of 2009 and section 271 of Act 28 of 2011 read with paragraph 79 of Schedule 1 to that Act by inserting the words "on application by the employer". No clarity has been provided as to the format, content and processes to be followed for the application to be made by an employer who intends to make use of this provision.

Solution

We suggest that SARS clarifies the prescribed form and manner to be followed in order to submit such an application to SARS.

3. Clause 9 amending paragraph 11A of the Fourth Schedule to the Act

Problem statement

Our understanding is that remuneration does not include CGT however s8C does include capital distributions and this amendment is merely to include these as being subject to PAYE and not the future capital gains.

Proposed solution

Please confirm our understanding.

4. Clause 16 amendment to Paragraph 19 of the Fourth Schedule of the Act

Problem statement of paragraph 19(1)(a)

In paragraph 19(1)(a) it is proposed that the wording "should the Commissioner so require" be removed from the paragraph that deals with the submission of provisional tax returns for a company.

By removing this discretion, all companies would be required to file provisional tax returns. This would mean that companies that are dormant, nominee companies, etc. would also be required to file provisional tax returns, notwithstanding the fact that these entities would never be liable for tax. This creates an unnecessarily administration burden on such entities to lodge such returns and on SARS to process and follow up on such returns without any real economic or operational benefit. This is particularly relevant where a company is already coded as "dormant" by SARS.

Proposed solution

It is proposed that the definition of "provisional taxpayer" be amended to allow the Commissioner to exclude companies under the circumstances described above.

Problem statement of paragraph 19(3)

It is proposed that the wording "which increased estimate is not subject to objection or appeal" be inserted in paragraph 19(3) of the Fourth Schedule to the Act. The amendment states that any increase in the estimate made by the Commissioner in terms of para 19(3) is not subject to objection or appeal. The reason given in the MOO is that the opportunity for objection and appeal still exists at assessment stage and that any overpayment of provisional tax will be refunded with interest.

The pre-TAA wording "…and the estimate as increased shall be final and conclusive…" was deleted by Act 28 of 2011 as it seems that the old limitation on taxpayers' rights to dispute (i.e. object and appeal to) unreasonable increased provisional tax estimates by SARS (especially in respect of the first provisional tax period) was regarded as prejudicial. This also coincided with the introduction of paragraph 28A of the Fourth Schedule to the ITA and the limitation of taxpayers' ability to request a refund of an overpayment of provisional tax in terms of section 190 of the TAA.

It would be unfair to force a taxpayer to make an unreasonable SARS increased provisional tax payment with no ability to dispute such increased estimate and no ability to claim a refund of such unreasonable overestimated amount. This is not fair to a taxpayer who must now compromise his own liquidity while waiting for a refund that may only be paid out much later. Interest is also only paid from the period commencing 6 months after year end. That leaves the taxpayer out of pocket with respect to the interest between the date of the provisional tax payment and 6 months after year end.

Proposed solution

The proposed clause "…which increased estimate is not subject to objection or appeal…" is unreasonable and should be deleted.

Amendments to the TAA

General

In the Memorandum on the objects of the Tax Administration Bill, 2011 under "Objects of the Bill" under general the following was stated:

"It seeks to provide a simplified and single body of law that outlines common procedures, rights and remedies and to achieve a balance between the rights and obligations of both SARS and taxpayers in a transparent relationship."…

"Importantly, the TAB seeks to achieve a balance between the powers and duties of SARS, on the one hand, and the rights and obligations of taxpayers, on the other. This balance will contribute to the equity and fairness of tax administration. International experience has demonstrated that if taxpayers perceive and experience the tax system as fair and equitable, they will be more inclined to fully and voluntarily comply with it."…

"In drafting the TAB, due regard was given to the following principles of international best practice in tax administration:

(a) Equity and fairness to ensure that the tax system is fair and also perceived to be fair, which should in turn enhance compliance.

(b) Certainty and simplicity so that tax administration is not seen as arbitrary but transparent, clear and as simple as the complexity of the system allows.

(c) Efficiency, where compliance and administration costs are kept to a minimum and payment of tax is as easy as possible.

(d) Effectiveness, so that the right amount of tax is collected, active or passive non-compliance is kept to a minimum, and the system remains flexible and dynamic to keep pace with technological and commercial development."

It appears that the stated objects of the TAA are undermined by the current proposals and that the taxpayer's rights are eroded while SARS's powers are broadened. This is distorting the balance between the taxpayer's rights and SARS' powers, and SARS should thus re-evaluate and test this balance against the provisions of the Constitution on the limitation of taxpayers' rights, like SARS did at inception of the Act.

We again emphasize our concern at the lack of separation of powers between legislator and administrator as regards the TAA. SARS drafts, implements and administers this powerful piece of legislation and there appear to be limited checks and balances in place to prevent the abuse of its powers.

Once SARS faces resistance from taxpayers who are fully entitled to question and understand the basis on which SARS assesses them, or requests information from them, SARS immediately amends the legislation to prevent taxpayers from being able to ask questions. This is confirmed in the Explanatory Memorandum as well as in the SARS Short Guide to the Tax Administration Act, 2011. This is concerning from an administrative justice and constitutional perspective.

A number of the proposed amendments attempt to allow SARS the ability to unilaterally determine what is relevant and what constitutes non-compliance without due engagement with the taxpayer who is entitled to protect and enforce his/her rights or to extents SARS' powers to an unreasonable level. Since the first draft of the Tax Administration Act was circulated for comments only 8 amendments have been deleted or relaxed after one session with the Industry and we believe this is because there is no oversight.

5. Clause 33 inserting section 3(3)(b) in the TAA

Problem statement

We are of the view that SARS may retain the information provided by third parties but can only exchange the information as and when required under an international tax agreement or in terms of an international tax standard.

Our view is therefore that SARS can only exchange the information gathered with another Revenue Authority if it is provided for in a Double Taxation Agreement, Agreement for the Exchange of Information or duly ratified Intergovernmental Agreement between the two countries, further SARS can exchange the information with other signatories to the Multilateral Convention on Mutual Administrative Assistance. If, however, there is a country that exists to which no one of these agreements applies, SARS cannot exchange information with that country or its Revenue Authority.

Further, each country may have its own data protection legislation that would prevent information such as this from being shared cross border.

Proposed solution

We suggest that you include the word "only" between retain and exchange of information.

"SARS may retain and only exchange the information…"

6. Clause 34 amending section 6(4)(a) and (b) of the TAA

Problem statement

We are concerned that reference to "a person" can include a person other than a SARS official delegated by the Commissioner.

Proposed solution

We suggest that you replace "a person" with "a SARS official"

7. Clause 40 inserting section 42A in the TAA

Problem statement

We refer to SARS' presentation to the Standing Committee of Finance on the 4th of August 2015. It is concerning that SARS feels the need to insert a

provision like this to effectively and timeously gather information critical to finalising audits with accurate outcomes as according to SARS, assertions of legal privilege are increasingly used to prevent or delay SARS access to information.

We are not aware of any other Revenue Authority that has resorted to similar legislative changes. International best practice is that a Revenue Authority can challenge the legal privilege assertion in a High Court where the client claims legal professional privilege.

It is our view that compliance with the wording of the proposed section could in itself amount to the waiving of legal privilege by merely providing the information set out therein. In our view certain of the subsections are broadly worded and depending on the specific information required to be provided to SARS in terms of those requirements, legal privilege could be undermined.

The purpose of the insertion of s42(1) is, according to the Draft Memorandum On The Objects Of The TALAB 2015 ("MOO"), to provide a procedure for claiming legal privilege in the context of information requests, interviews and audits.

The purpose of section 42A is to preserve legal privilege. The provisions are similar in many respects to those relating to claims of legal privilege in the context of search and seizure operations, however, a superseding step is sought to be introduced which essentially requires that a taxpayer seeking to rely on legal privilege as a ground for withholding a document must provide all of the information set out in s42A(1) to SARS. If SARS disputes the validity of a claim of legal privilege, the section provides for safekeeping of the documents by a panellist appointed in terms of s111 of the TAA and such panellists are to be chosen from among the ranks of attorneys and advocates (legal professionals who are required to maintain independence) – the rules of privilege would therefore still apply to such panellists in relation to the taxpayer's information and provision of information to SARS by such panellists would be unlawful to the extent that it was in breach of the taxpayer's right to legal privilege. The panellist is to rule on the validity of the claim of legal

privilege. If either SARS or the taxpayer is dissatisfied with the ruling of the panellist, provision is made for approach to a court to determine the issue.

Despite the fact that the section as a whole provides for the process of protecting legal privilege, there are subsections which are contentious. The relevant subsections that we have identified as being potentially problematic are ss42(1)(a), (e) and (i). In terms of these provisions of the TALAB, a taxpayer claiming legal privilege in respect of documents must provide SARS with a description of the document, the "specific purpose of the legal advice or in connection to what it was given" and "if the person [a person other than the client and in whose possession the relevant document is in] obtained the document from the client or another person, the instructions of the client or other person regarding the document".

The information required to be given to SARS is required to be given despite the existence of a claim of legal privilege over the relevant documents and the type of information required to be given in the three subsections set out above may, in certain circumstances and depending on exactly what the provisions mean, lead to legally privileged information being required to be given and thereby arguably leading to a waiver of the right to legal privilege. We are therefore of the view that the requirement that this information be given could possibly infringe the right to legal privilege due to the current wording. For example, where a description of a document is required (s42A(1)(a)), if the description 'legal opinion' suffices then no infringement of privilege would occur however if something more were required that may be problematic. S42(1)(e) poses even more of a challenge to privilege as information of the "specific purpose" of the advice is sought. If it says that the specific purpose is "to obtain advice regarding interpretation of statutory provisions", for example, that would not be problematic however, more may be required in terms of that subsection. s42A(1)(i) is ambiguous as the "instructions regarding the document" may be read to mean instructions pertaining to, for example, storage of the document or regarding how long to keep it or in what format etc. The wording of the above subsections would need to be revised to give proper context as to what information will satisfy the requirements set out therein.

In providing the required information, there would also exists the risk of waiving legal privilege as alluded to above and of providing information to SARS which effectively gives SARS insight into the content of the legal advice which is the subject of the claim of legal privilege.

Our view is that s42A as a whole does not, prima facie, infringe the right to legal professional privilege but there is potential for infringement depending, in each case, on what information regarding the description, purpose and instructions in relation to a document are actually required to be given to SARS at the stage where a claim of legal privilege is made. We are also of the view that revision of the offending subsections may ameliorate the effects of the provision as a whole and may assist in ensuring that the provision stands up to constitutional scrutiny.

Reading the provisions of s42A brought to mind the recent case of A Company and Others v Commissioner for the South African Revenue Services (16360/2013) [2014] ZAWCHC 33; 2014 (4) SA 549 (WCC) . The conclusion in this case is relevant for present purposes. The court held that "attorneys' fee notes are not amenable to any blanket rule that would characterise them as privileged communications per se. Mere reference in fee notes to advice sought or given does not equate to disclosure of the substance of the advice. The position would be different if the fee note set out the substance of the advice, or contained sufficient particularity of its substance to constitute secondary evidence of the substance of the advice. Only one of the invoices in question contained information from which the nature of the legal advice could be discerned. The remaining invoices would have to be furnished as requested by the respondent." This illustrates the importance of, in each case, evaluating whether or not the provision of certain information will lead to the substance of advice being revealed, as that determines whether legal privilege is infringed or not.

Proposed solution

Our recommendation would be that this insertion is deleted completely in order to allow the common law principles to apply. Alternatively, that S42A(1) is removed, which will allow the same process as under Search and Seizure

provisions to be applied to investigations and audits. If SARS does not agree we recommend that the following words be inserted at the end of s42A(1): "provided that the provision of such information would not be tantamount to disclosure of the substance of the relevant material".

It would then also be important that the overbroad language of the subsection be revised to give guidance as to exactly what level of detail is required to be given under ss42(1)(a), (e) and (i).

8. Clause 41 amending section 46 of the TAA

Problem statement amendment to section 46(2)(b)

The wording of s 46(2)(b) appears to contradict what the MOO intends. The TAA is not applicable outside of South Africa.

It is proposed that section 46 be amended to provide SARS the authority to request relevant material held by a 'connected person' in relation to the taxpayer, located outside of South Africa. Such information must be submitted to SARS within 90 days from the date of the request.

The onus will be on the South African taxpayer to ensure that the information is provided to SARS. The proposal further states that: "If a taxpayer fails to provide material referred to in subsection (2)(b), the material may not be produced or used by the taxpayer in any subsequent proceedings, unless a competent court under exceptional circumstances, which may not include an assertion that the material was held by a connected person referred to in that subsection, directs otherwise".

SARS would therefore be in a position to request relevant material from **any** connected person, which means that SARS would be able to impose this additional burden on a taxpayer that holds as low as a 20 per cent shareholding in a foreign entity. It would be extremely difficult to convince a connected but not controlled foreign entity to make such relevant material available to SARS.

The penalty for not being able to do this, i.e. the fact that this information may not be used by the taxpayer in subsequent proceedings is also considered unreasonable.

Proposed solution

The proposed amendments are regarded as unreasonable and impractical and should be reconsidered.

Alternatively, we would like SARS to clarify the following in the amendment to s46(2)(b):

- This request of information will only be addressed to the South African based taxpayer to obtain information relating to the tax affairs of the same taxpayer from their "off-shore connected entities" and not directly to the "off-shore connected entities";

- This request of information cannot be extended to the Bank as third party where a client of the Bank also holds an account at a connected off-shore entity of that bank as such information can only be obtained by SARS from the foreign Revenue Authority through the relevant article in the DTA.

Proposed solution

We suggest that the amendment to s46(7) be deleted.

9. Clause 42 amending s47(1) of the TAA

Problem Statement

The DTALAB proposes an amendment to section 47 of the TAA that allows the SARS to not only require the taxpayer whose tax affairs is under verification or audit to be interviewed but also, third parties such as current employees of the taxpayer or persons who hold office in the taxpayer to be interviewed.

The current provision does not allow SARS to require a third party to attend an interview in respect of the tax affairs of a taxpayer under investigation and the intention as indicated in the initial purpose of section 47 was to expedite and end the process of verification and audit and not to be used as a process to gather further information or extend the audit and verification process.

Chapter 5.3.3 of the SARS Short Guide to the TAA provides a basis of the original purpose of section 47 and also details the limitations of requiring a person to attend an interview and produce relevant information.

Two of these limitations are highlighted as follows:

- The interview is limited to the tax affairs of the person required to attend, i.e. a third party may not be interviewed regarding the tax affairs of another person;
- The purpose of the interview is limited to the administration of the tax Act and is further limited in that it may only be used for the purpose of:
  - clarifying issues of concern to SARS to render further verification or audit unnecessary; and
  - may not be used for purposes of criminal investigation.

The TAA also provides an enquiry procedure that is subject to certain requirements which safeguards taxpayers. These procedures are found in Chapter 5 of the TAA and contain the following requirements:

1. protect taxpayers from self-incrimination;
2. provide for a limited enquiry;
3. the enquiry being done in the presence of a presiding officer;
4. SARS must provide permission from a judge.

Should the above proposal be promulgated, it will have the following effects:

- It would provide SARS with excessive power and the ability to gather incorrect and incriminating information from third parties, who may at times not have the necessary knowledge in the specific tax related affairs under investigation.
- Place an unfair burden on a taxpayer to prove the correctness of information or evidence that was potentially unreliable and inadmissible in the interview process.
- Will result in the interview becoming part of an on-going information gathering process for further audit and investigation, which could drag the process out for years to come.
- The amendments will diminish the protection provided by the enquiry procedures set out in Chapter 5 of the TAA and could possibly lead to a

taxpayers being faced with SARS enquiries that do not provide the abovementioned safeguards.

We are further of the view this eliminates the purpose of a public officer of the person who in this regard would be the relevant person to contact. Furthermore, we are of the view that should SARS wish to conduct an audit or verification, prior notice to the public officer of the taxpayer must be supplied.

Proposed solution

The proposed clause 42 of the 2015 DTALAB causes the process for obtaining relevant material to become an intrusive process violating the privacy and rights of a taxpayer and should be deleted.

10. Clause 43 amending s49(1)(b) of the TAA

Problem Statement

In the event where a person misunderstood the specific question or base his answer on his perception of the facts; providing the information under oath or solemn declaration would make this perception fact.

Proposed solution

We request that SARS delete this amendment.

11. Clause 44 amending s51 of the TAA

Problem Statement

While reviewing the amendment to s51 we noticed that s51(1) states:

"A judge may grant the order referred to in section 50(2) if satisfied that there are reasonable grounds to believe that…"

We believe that this should refer to section 50(1).

Proposed solution

We suggest that SARS corrects this.

12. Clause 48 and 49 amendments to Sec 93 and 98 of the TAA

Problem Statement

As per the MOO SARS will restrict taxpayers to request corrections within 6 months of the date of assessment due to the fact that some taxpayers use this method to circumvent the objection route and that some practitioners use this period to obtain fraudulent refunds for multiple years. We are of the view that SARS can manage these obstacles with changes to the SARS risk engines. Some errors are only picked up later when assessments has been raised or even 12 months after the assessment has been raised.

The current provisions contained in section 98(1)(d) of the TAA find application in situations where there is an undisputed factual error by the taxpayer in a return, a processing error by SARS or a fraudulent submission of a return. Section 98 relates mainly to the situation where erroneous assessments are discovered after the expiry of all prescription periods and provides remedies to both SARS and the taxpayer. Section 98(1)(d) is aimed to remedy this situation by allowing for the withdrawal of assessments in specified narrow circumstances to the relief of the taxpayer by not imposing a duty to collect tax debt that SARS agrees was not due.

The proposed amendments to section 98 which removes the wording "an undisputed factual error by the taxpayer in a return" and replaces it with "the failure to submit a return, or submission of an incorrect return, by a third party under section 26 or by an employer under a tax Act" seek to limit the original purpose of section 98, which was an avenue for taxpayers that made factual errors that lead to an unintended tax debt and inequitable recovery of that tax debt by SARS, to only third party non-submissions or incorrect submissions to SARS.

It now seems that the effect of the above on taxpayers is that taxpayers, who have made factual errors, have the option of requesting a correction if the time limit for lodging an objection or appeal has expired. However, the proposed amendment to section 93 of the TAA states that a correction must be requested by the taxpayer within six months from the date of assessment for the preceding year of assessment, or such further period not exceeding six months that SARS under exceptional circumstances may allow.

This does not make logical sense as this time period would already have lapsed before the current return that contains the error is even submitted and will therefore not allow a practical avenue for taxpayers who have made factual undisputed errors with a means of correcting this.

Proposed solution

The proposed clauses 48 and 49 of the 2015 DTALAB are unclear and should be clarified.

We request that the period of correction be extended to at least 18 months after the date of assessment as SARS has the luxury of re-opening an assessment within 3 years and per the proposed amendment a taxpayer will be limited to only 6 months and this is not reasonable.

13. Clause 50 insertion of Sec 99(3)

Problem Statement

Despite the fact that this was discussed in detail with SARS by Industry bodies two years ago SARS proposes this amendment again. The proposal that SARS can unilaterally extend the prescription period, is absurd.

It is proposed that the Commissioner for SARS be granted the power to extend the relevant prescription periods referred to in subsection 1 of section 99 of the TAA by an "appropriate period" that is regarded by the Commissioner to be reasonable or "if an audit or investigation under Chapter 5 relates to a complex matter such as the application of the general anti-avoidance provisions under a

tax Act, an audit or investigation under section 31 of the Income Tax Act No 58 of 1962, as amended ("ITA") or a matter of analogous complexity" for a period of up to three years.

The proposed amendment would provide SARS with excessive power and the ability to keep an assessment open for an extended period of time of up to eight years should these powers be abused.

Having regard to specific timelines required for submission of information to SARS, the relevant three and five year prescription periods set out in section 99(1) of the TAA are reasonable periods for SARS to complete any tax audits. Where no fraud, misrepresentation or non-disclosure of material facts are present, the current prescription periods provide certainty to both SARS and taxpayers and to extent the relevant periods would jeopardise the objective of section 99.

It is our view that current legislation already sufficiently empowers SARS to appropriately combat situations where taxpayers fail to respond to SARS' queries in an attempt to force prescription.

SARS can either disallow the expenditure under query/ include into taxable income potential income under query by raising a valid additional assessment before prescription or alternatively by raising an estimated assessment. This action by SARS would place the ball straight back into the court of the taxpayer that will be forced to object to such assessment should the taxpayer wish to do so. SARS' internal staffing challenges should not be resolved by changes to already fair and reasonable legislation. There are many examples of SARS only raising queries between two and three years after the submission and assessment of a tax return. Should SARS commence the process of raising queries and requesting relevant material earlier, the current three and five year prescription periods should be more than adequate.

If the proposed changes are accepted, SARS may obtain unintended power which may be abused. SARS might have the ability to raise various generic queries just before prescription in order to artificially extend prescription. It is also unclear whether such queries would extend prescription to the entire tax

return or whether prescription only directly related to issues covered by the specific SARS queries would be impacted.

In addition to this many of the concepts used in the proposed changes to section 99 of the TAA are unclear and undefined. Examples of these are: what is "an appropriate period", who determines whether the "relevant material" that the taxpayer fails to provide is relevant or not, what is "within a reasonable period", the definition of "a complex matter" and what is meant by a "matter of analogous complexity".

SARS can extend the prescription period with 3 years in the event where a taxpayer fails to provide relevant material to SARS within a reasonable time. SARS will determine whether it has been provided in a reasonable time despite the fact that SARS in most instances does not set a reasonable deadline for the submission of information. It is preposterous that SARS can extend the prescription for 3 years when a taxpayer might for legitimate reasons provide the information 2 months late. SARS is known not to be objective when they assess the reasons for late submissions. Even the MOO confirms the view that SARS do not trust taxpayers with the comment that "These failures to provide information or information entitlement disputes are often tactical or even vexatious, given the fact that taxpayers are very much aware of the period within which SARS must finalise the audit and issue additional assessments, if required."

Some of the complex matters SARS refers to are not that complex but it is due to the lack of understanding of the specific assessor or auditor or the fact that the auditor cannot find non-compliance and would need more time to "find alleged" non-compliance.

The taxpayer has no right to object or appeal to this autocratic decision of SARS.

Proposed solution

This insertion is very one-sided based on SARS' interpretation of "reasonable time", "appropriate period" and "complex matter" therefore we respectfully

request that SARS removes this insertion as it infringes on the Constitutional rights of the taxpayer to just administrative action and access to courts. As explained above this clause is also unnecessary as SARS current legislation already sufficiently empowers SARS to appropriately combat situations where taxpayers fail to respond to SARS' queries in an attempt to force prescription.

14. Clause 57 amendment to Sec 179

Each bank receives between 4000 and 8000 agent appointments on a monthly basis. The cost to action 1 appointment is more than R200. This process is currently a manual process and is very time consuming as a person has to verify the SARS details to that of the account holder; reserve the funds and pay it over immediately to ensure that no debit order reduce the value of the amount reserved. The alternative will be to transfer the amount into a suspense account and then pay it over to SARS. One of the big four banks currently transfers the amount into a suspense account for 5 days to provide the customer the opportunity to liaise with SARS to cancel the notice or reduce the amount as per the notice. Despite this very generous offer to their clients, only 5/4000 agent appointments gets withdrawn or reduced by SARS. To reconcile a suspense account with 4000-8000 entries per month will be a mammoth task and due to the 72 hours it needs to be preserved the entries will have to be date tracked and there will be no way to automate this process.

We have concerns about the following:

- **Preserve the money for 72 hours**

Sec 179(2) requires the bank to preserve the money for 72 hours. The definition of preserve is to maintain (something) in its original or existing state. In the banking environment an amount can only be preserved in its original state where there is a court order to "freeze" the account. The word preserve is used in the TAA in the context of a preservation order (sec163) and this can only be done once a court order is issued. The other two terms used by banks are to reserve or pledge funds.

The definition of reserve means to "hold"' the amount in an informal manner. If a hold is placed on an amount the debit orders can still go through and the amount "reserved" will reduce over 72 hours and the bank will have to treat the original agent appointment as a new appointment and will therefore have to action the same instruction twice. Pledge is defined as "a solemn promise or undertaking" and in banking terms it is treated the same as that of a hold.

- **SARS withdraws or amends the notice**

Sec 179(2)(a) refers to "SARS "withdraws or amends" the notice,..". A notice can only be actioned on the date received and be off-set against the money held at the time. Banks have no guarantee that money will be held at a future date unless the client has a fixed investment with a specific maturity date and the account number of this investment will not be linked to the transactional account. SARS can withdraw (cancel) a notice and re-issue a notice but cannot amend the same notice. A notice has a specific PRN (Payment Request Number) number that SARS uses to allocate the payment. When there is any change to the notice a new PRN number will have to be issued.

- **Within the period specified in the notice**

Sec 179(2)(a) refers to "…upon the person advising SARS of the reasons for being unable to comply within the period specified in the notice; or…". The bank informs SARS of the reason it cannot recover the amount. These reasons include but are not limited to account closed, insufficient funds and the info as per the notice does not validate with the information on the bank's systems. Banks don't have a facility to keep an AA88 and action over a period provided by SARS other than to deduct and pay immediately.

- **Inform the person of the notice**

Sec 179(2)(b) states "after being informed by the person of the notice, the taxpayer requests SARS …" . Due to the volumes the bank will only be able to notify a client/taxpayer if this notification is built into the system. Currently bank systems only send clients notices once the debit goes through. To change

systems to send notices once money has been reserved will also result in notices when fraud is suspected per proposed amendment to sec190(5A).

- Sec 179(2)(b) further states that the taxpayer can request SARS to amend the notice to take the living expenses into account "and SARS amends the notice to extend the period over which the amount must be paid." As explained earlier in this document SARS cannot send an "instalment" type AA88 to the Banks. SARS can only cancel the previous AA88 and the re-issue a new AA88 with the amended amount that will be actioned immediately and SARS must then send a new AA88 each month until full debt is recovered.

  SARS has indicated that they want to automate the process in May 2016 and this will not be possible if monies must be "preserved" for 72 hours. An automated file will result in a deduction in the same way as debit orders and will be paid directly into the account of the creditor.

  During the SARS financial year-end and mini-year-ends SARS insists that the banks action all appointments and pay over the amounts as the balances of the SARS accounts is communicated to National Treasury at that time. With this amendment the last 3 days' collections will only be paid to SARS after the year-end.

  Proposed solution

  We request that sec179(2) be deleted and that SARS keep subsection (4) as it is currently and put an electronic application for a refund on e-filing where the taxpayer can apply for a refund where the taxpayer cannot meet its living expenses obligations.

15. Clause 60 amendment to Sec190(4)(a) and the inclusion of s190 (5A)

Problem Statement Sec190(4)(a)

Currently a taxpayer is entitled to claim a refund of an amount erroneously paid in respect of an assessment in excess of the amount payable in terms of the assessment as long as this claim is lodged within three years from the date of

the assessment. It is proposed to change the wording from "within three years from the date of the assessment" to "within three years from the date of payment".

Normally a payment of assessed taxes or an erroneous overpayment of assessed taxes (i.e. an amount erroneously paid in respect of an assessment) can only be made after assessment. This means that the proposed change would favour taxpayers. However, it is possible to make an advance or other payment into the assessed tax account. Such advance or other payment is a payment of assessed taxes. It is not a provisional tax payment that will only be consolidated to the assessed tax account on the date of assessment.

It would be unfair on taxpayers to limit the potential future refund of such an advance or other payment of assessed taxes to the date of such payment (which would precede the date of assessment).

We are not sure how one would determine when an amount was paid erroneously as in all cases amounts paid to SARS in respect of an assessment are based on some calculation or understanding of the assessment or the assessment to be raised. Further, in some cases due to SARS account errors, a taxpayer could be forced to pay an amount of assessed taxes in order to obtain a tax clearance certificate.

Proposed solution

The proposed amendment should be amended not to prejudice a taxpayer aiming to claim a refund of an amount where the payment made in respect of an assessment is made before the date of such an assessment.

Problem statement sec 190(5A)

BASA welcomes the inclusion of paragraph 190(5A) to provide enabling legislation to report suspicious transactions to SARS, but does not agree with the additional obligations SARS places on the banks.

Sec190(5A)(a) obliges a bank to *"preserve the account for the period of 48 hours unless a competent court directs otherwise; and"*. SARS requests the Bank to preserve/freeze the account and not the amount suspected to be paid as a result of the tax offence. Currently SARS reviews the alleged suspicious transactions reported and request the Bank to reserve the amount and within 48 hours SARS provides an AA88 to recover the tax debt. In some instances SARS does not issue an AA88 within weeks and when a client approaches the bank, SARS instantly informs the bank to release the funds. SARS also confirms that it is fraud and then after hold has been placed weeks later requests banks to lift the hold as it is not fraud. SARS can therefore direct the bank to lift the hold and therefore it cannot only be when a competent court directs.

In most of the cases reported to SARS the refunded amount or a substantial portion thereof has already been withdrawn and there is no money to preserve. Many of the cases reported are legitimate transactions and it would be prejudicial to the client to preserve funds in these cases.

Sec190(5A)(b) obliges the bank to "*immediately report to SARS the suspicion and the grounds on which it rests; and* ". Any alleged suspicious transactions are identified through the bank's risk engines. Due to the increased risk of fraud syndicates, the "grounds" on which the suspicion rests is confidential and cannot be shared.

Proposed solution

We suggest that SARS amends the paragraph to read:

"(5A) If the person where the account into which an amount referred to in subsection (5) is deposited, is held, reasonably suspects that the amount is paid as a result of a tax offence the person must immediately report to SARS this suspicion.

16. Clause 68 amendment to Sec 251

Problem Statement

The insertion of sec251(1)(d)(iii) is welcomed.

Proposed solution

It is imperative that SARS e-filing sends a notification by mail/sms to the registered user as users do not use e-filing on a regular basis or this insertion must be deleted.

17. Clause 69 amendment to Sec 252

Problem Statement

The insertion of sec 252(1)(d)(iii) is welcomed but any correspondence to a company must be **sent directly to the company's e-filing profile** which includes the **Public Officer's business profile** and not to the personal profile of the Public Officer.

Despite the fact that the Public Officer had to go into the SARS branch offices to register for the single registration process and all contact data has been updated SARS sends company correspondence to the private addresses of the Public Officer which poses a confidentiality risk.

It is proposed to add the delivery of a document to the "*company or public officer's electronic filing page on the SARS electronic filing service as defined in rules issued under section 255(1), if the company or public officer is a registered user as defined in those rules*" as an official method of delivering documents to companies.

The SARS e-Filing system in its current form does not always notify registered users of all changes made/ documentation delivered to the various pages. SARS assumes that all taxpayers log into this service on a daily basis to check for changes made, documentation delivered or assessments issued. This is not true

and means that taxpayers may miss crucial documentation and/ or critical deadlines, for example as provided for in Chapter 9.

Without an email or sms to the relevant user of this service, such user may not be aware of changes made, documentation delivered or assessments issued on the SARS e-Filing system without logging in to the system itself.

The proposed effective date of this change is 1 October 2012.

Documentation could have been delivered to SARS e-Filing that the taxpayer was not aware of and cannot retrospectively be regarded as properly served on a taxpayer.

Proposed solution

This proposal will result in an acceptable method of delivery of documentation. It is imperative that SARS e-filing sends a notification by mail to the registered user of the company as users do not use e-filing on a regular basis or this insertion must be deleted.

It is also recommended that this change be made prospectively and not retrospectively.

We appreciate the opportunity to provide comments and hope that the consultation process is fruitful.

Yours faithfully

Leon Coetzee
Chairperson Direct Tax Committee