10 September 2015

Mr. AG Wicomb
Committee Secretary
Standing Committee on Finance
Parliament Street
CAPE TOWN
8007

By e-mail: **awicomb@parliament.gov.za**

STANDING COMMITTEE ON FINANCE (the "SCoF")

SUBMISSION ON THE DRAFT TAXATION LAWS AMENDMENT BILL ("TLAB") AND TAX ADMINISTRATION LAWS AMENDMENT BILL ("TALAB"), 2015

Dear Allan

The CFO Forum is a high-level discussion group formed and attended by the Chief Financial Officers of major JSE listed and larger state-owned companies. Its aim is to contribute positively to the development of South Africa's policy and practice on financial matters that affect business, for example in the areas of: government regulatory issues and initiatives, taxation, financial reporting, corporate law and governance, capital market regulation and stakeholder communications for enterprises on behalf of its members, who represent a significant part of South African business. The CFO Forum was created in 2011.

The CFO Forum welcomes the opportunity to provide its comments on the draft tax amendments for 2015 released by National Treasury on 22 July this year.

As a general point, the CFO Forum does consider that public submissions made on the draft TALAB ought to attract the particular attention of the SCoF. That particular legislation is drafted by the same body tasked with its day to day enforcement.

1. The Rebate for Foreign Taxes

Relevant clause of the 2015 Draft TLAB

Clause 5 of the 2015 draft TLAB: Section 6*quin* of the Income Tax Act, No. 58 of 1962, as amended (the "**Act**").

Problem statement

It is proposed that the Rebate for Foreign Taxes available under section 6*quin* (the "**Rebate**") be removed in its entirety from 1 January 2016.

The CFO Forum supports the efforts of National Treasury to address the negative effect of multinational companies' tax avoidance strategies on national tax bases – known as base erosion and profit shifting or "**BEPS**".

However, the Rebate is a legitimate measure to mitigate juridical double tax[1] faced by taxpayers in doing business with the rest of Africa.

The CFO Forum does not support the removal of the Rebate for the following reasons:

- it will lead to increased project costs for local service providers in the form of double tax;
- it is not aligned with South Africa's objective of becoming a regional services centre; and
- it will adversely impact the cash flow of local service providers and increase the administrative burden.

The CFO Forum views the proposal to remove the Rebate as contrary to South Africa's objective of becoming a regional services centre for the rest of the African continent. It is submitted that it will negatively impact on improving the attractiveness of South Africa as a jurisdiction in which to do business with the rest of Africa.

The Rebate is a useful incentive to attract investment into South African service providers, especially where their focus will be on clients in the rest of Africa. On that point, it is noted that a strong case was made by National Treasury itself in the relevant Explanatory Memorandum.

The removal of the Rebate will have adverse commercial consequences for those service providers. These businesses support the policy intention of South Africa becoming a service centre to the rest of Africa. Such businesses provide employment opportunities in this country.

The Rebate was introduced in 2011 and was well received despite the compliance burden of having to render returns every 60 days.

The scope of the Rebate is limited solely to foreign withholding taxes levied on payment for services rendered from South Africa.

Those withholding taxes are in practice imposed by foreign countries in respect of payments funded from those countries. That imposition is generally in in contradiction of the applicable tax treaty with South Africa.

[1] Juridical double tax is the imposition of comparable taxes by at least (2) two tax jurisdictions on the same taxpayer.

It is understood that intention behind the introduction of the Rebate was for the South African Revenue Service ("**SARS**") to liaise with the foreign revenue authorities to ensure that the provisions of the tax treaties are correctly applied.

There are protracted refund application processes with foreign revenue authorities, if a process is available or "deemed" acceptable by the foreign revenue authority. Outcomes in accordance with tax treaties cannot be guaranteed in many of these application processes, as the domestic withholding tax rules will be applied to override the application (in contradiction of the applicable treaty as mentioned above). Alternatively, the foreign revenue authorities simply ignore the refund applications despite their local regulations.

Taxpayers prejudiced in this way are left with no practical recourse. In other words, taxpayers never recover these withholding taxes even if they were protected from the necessary withholding tax under the terms of the applicable tax treaty and, therefore, suffer the effect of juridical double tax, the very purpose a tax treaty seeks to alleviate.

In the event that the Rebate is removed, taxpayers will be left with only partial relief through a tax deduction mechanism, but under more restrictive conditions. In this regard, a tax deduction is only allowed in respect of taxes "*proved to be payable*" (i.e. the foreign withholding tax must be a final tax and correctly imposed having regard to the relevant tax treaty).

Foreign withholding taxes levied in disregard of the terms of a tax treaty cannot be "*proved to be payable*". This means that it is questionable whether a tax deduction will actually be available in many circumstances.

Experience indicates that in practice, SARS does not allow a tax deduction if it disagrees with the foreign revenue authority's application and interpretation of the relevant laws in the levying of the withholding tax. So the taxpayer is left with the unreasonable onus of having to challenge the application and interpretation of foreign laws. Even when tax deductions are allowed, the overall tax burden is still significantly higher when compared to the tax burden under the Rebate.

The CFO Forum does not consider the removal of the Rebate as:

- advantageous to promote investment into South Africa to the rest of the African continent; and

- reasonable for taxpayers to be encumbered with the additional cost of juridical double tax.

If foreign revenue authorities incorrectly levy a withholding tax SARS should liaise with those authorities to ensure that the provisions of the tax treaties are correctly applied. In the event that the Rebate is removed, it is submitted that there will be little incentive for the South African government to monitor and follow up on the application of its tax treaties.

The CFO Forum was astonished at the claim made by National Treasury that the Rebate is being abused. This is given the compliance requirement of having to render returns within 60 days. It should also be borne in mind that any foreign withholding tax ultimately refunded to the taxpayer is then treated as tax payable to SARS.

Proposed solution

The CFO Forum does not support the proposal to delete the Rebate and consequently the proposed clause 5 of the 2015 draft TLAB should be removed from the final Taxation Laws Amendment Bill, 2015.

It is considered that National Treasury should, at least, present a statistical analysis of the extent of the abuse of this Rebate before proceeding with a process to remove it. In this regard, The CFO Forum recommends that National Treasury retains the Rebate for at least another (5) five years during which time it can monitor the use of the Rebate and monitor the foreign countries that routinely fail to apply the terms of their tax treaties with South Africa.

The CFO Forum also considers that any perceived abuse should be countered with improved administration and compliance efforts rather than removing the Rebate entirely. Provisional tax returns could be amended to include fields for Rebates claimed and for the related foreign withholding taxes ultimately refunded to the taxpayer.

In addition, the term services could be defined so as to exclude certain services such as rental and interest for which the CFO Forum understands the Rebate was never intended.

These recommendations should ease the administrative burden on both taxpayers and SARS and assist in countering any perceived abuse.

2. Prescription

Relevant clause of the 2015 Draft TALAB

Clause 50 of the 2015 draft TALAB: Section 99(3) of the Tax Administration Act, No. 28 of 2011, as amended (the "**TAA**").

Problem statement

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 Act 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. The CFO Forum is of the view that the relevant prescription periods are in line with international norms.

Where no fraud, misrepresentation or non-disclosure of material facts is present, the current prescription periods provide certainty to both SARS and taxpayers. Such certainty is a vital part of an efficient and effective world class tax system. In addition, our courts have sought to uphold an element of certainty in their interpretations of the predecessors to section 99. That has not always been in favour of the taxpayer. To extend the relevant prescription periods would jeopardise the objective of section 99 in this regard and undermine the element of certainty now established from South African judicial precedent.

The CFO Forum is of the view of 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' 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.

In the event that 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*". The CFO Forum would have expected that at the very least any extensions to prescription would be narrowly delineated depending on the circumstances. For example, the number of days exceeded by the taxpayer in responding to a SARS query could be used a reference point in extending prescription in that circumstance.

Proposed solution

The proposed clause 50 of the 2015 draft TALAB is unnecessary and should be deleted from the final Taxation Laws Amendment Bill, 2015 in totality.

3. Powers to interview third parties

Relevant clause of the 2015 Draft TALAB

Clause 42 of the 2015 draft TALAB: Section 47 of the TAA.

Problem statement

In its current form, section 47 of the TAA allows SARS, by notice, to require a person to be interviewed by a SARS official in relation to his or her tax affairs.

A number of important limitations are currently provided for in that section. In this regard, the purpose of these interviews has to be to clarify issues of concern to SARS or to clarify that further verification or audit will be unnecessary. In addition, the interview must not be for purposes of a criminal investigation.

It is now being proposed that SARS be granted the power to require employees or office holders of the taxpayer (i.e. third parties) to attend an interview in respect of the tax affairs of that taxpayer.

A limitation concerning the purpose of the interview is also being proposed for removal. If the proposed changes are accepted, the interview must be intended to obtain relevant material to clarify issues of concern to SARS regarding the verification or audit.

These proposals are being made notwithstanding that the TAA currently allows for a formal inquiry in Part C of Chapter 5 of the TAA. That inquiry procedure is subject to certain requirements. It is the view of the CFO Forum that those requirements provide safeguards against the possible abuse of power by SARS officials.

The CFO Forum is gravely concerned with the proposed amendments to section 47. In effect, it appears that SARS will be able to hold an inquiry without the important safeguards provided for in Part C of Chapter 5 of the TAA.

We respectfully contended that Parliament could never intend for those safeguards to be circumvented to the detriment of a taxpayer's constitutional right to privacy and to protection from self-incrimination.

In addition, the proposed amendment allows for any employees of the taxpayer to be interviewed by SARS, no matter their relationship to or knowledge of the tax affairs of the taxpayer and without prior consent from the taxpayer. Accordingly, incorrect or incriminating information may be gathered by SARS from third parties who do not

have the necessary knowledge or skill or even the necessary authority from the taxpayer.

Consequently, the proposed amendment could be considered to be administratively unfair. In this regard, already the taxpayer already bears the onus of proving that an assessment is incorrect. This onus will now have to be discharged against a backdrop of potentially unreliable and inadmissible "evidence" gathered by SARS in an interview process. The CFO Forum considers that the taxpayer should, at the very least, be required to provide its consent to SARS through its duly appointed public officer before a third party may be interviewed under section 47.

Further, the initial purpose of section 47 was for SARS to determine that more intrusive and potentially protracted verification and audits were unnecessary. The proposed amendments nullify that purpose.

Proposed solution

The proposed clause 42 of the 2015 draft TALAB is unnecessary and should be deleted from the final Taxation Laws Amendment Bill, 2015 in totality.

The TAA already allows for a formal inquiry in Part C of Chapter 5 of the TAA with appropriate safeguards.

4. Removing taxpayers' right to object and appeal against unreasonable increased provisional tax estimates by SARS

Relevant clause of the 2015 Draft TALAB

Clause 16(b) of the 2015 draft TALAB: Paragraph 19(3) of the Fourth Schedule to the Act

Problem statement

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 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 Act 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.

Proposed solution

The proposed clause 16(b) of the 2015 draft TALAB wording "…*which increased estimate is not subject to objection or appeal*…" is unreasonable and should be deleted.

*****

Yours faithfully

Simon Ridley
CFO Forum Chairperson
Simon.Ridley@standardbank.co.za

Christine Ramon
Taxation sub-committee Chairperson
CRamon@AngloGoldAshanti.com