WEBBER WENTZEL
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To

Allen Wicomb
Standing Committee on Finance

MEMORANDUM

From

Webber Wentzel

Your reference	Our reference	Date
	N Keyser/C Alexander	14 September 2015

Dear Mr Wicomb

Submissions on the Draft Tax Administration Laws Amendment Bill 2015

1. Introduction

1.1 On 22 July 2015, the South African Revenue Service ("**SARS**") published the draft Tax Administration Laws Amendment Bill, 2015 (the "**DTALAB**"), which proposes amendments to a number of tax Acts, including the Tax Administration Act 28 of 2011 (the "**TAA**").

1.2 The purpose of these submissions is to summarise Webber Wentzel and its clients' comments and concerns in respect of the DTALAB. These submissions are primarily limited to the more profound proposed amendments to the TAA, which affect the interests and rights of the taxpayer.

1.3 Unless the context indicates otherwise, all references to sections below are to sections of the TAA and all references to paragraphs are to paragraphs of the DTALAB.

2. Procedure where legal professional privilege is asserted

2.1 Legal privilege applies to-

2.1.1 any communication between a client and his legal advisor (independent or in-house)[1], where he or she was consulted in his or her professional capacity

[1] *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) paras 11-15; *Mohamed v President of the Republic of South Africa and Others* 2001 (2) SA 1145 (C) at 1153G-1156J.

and provided confidential legal advice that does not facilitate the commission of a fraud; and

2.1.2 communications made by a litigant or third party to a legal advisor for purposes of contemplated litigation.[2]

2.2 The optimal functioning of an adversarial legal system is premised upon the notion of freedom of consultation between legal practitioners and their clients, which would not otherwise exist if either could be compelled to disclose the details of their exchanges for purposes of giving or receiving advice.[3] That is the very reason why legal privilege exists. This was noted in the *Sasol III* case[4], where the court endorsed the following passage in Wigmore,[5] in which it was stated that legal advice privilege was required:

> *In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent.*

2.3 Propositions such as this one have been endorsed in numerous jurisdictions around the world. In *Baker v Campbell*,[6] for example, the High Court of Australia neatly captured the reason that legal advice privilege must exist:

> *[T]he privilege is necessary so that persons may confidently seek and receive advice about conduct which has, or may have constituted crime, fraud or a civil offence.*

2.4 And, more significantly, the Court explained further that if legal privilege was not upheld —

> *The long-term tendency would be for law enforcement authorities to press for extra-judicial methods of investigation and decision-making.*

2.5 Legal professional privilege is a fundamental right which can only be relaxed with the greatest circumspection.[7]

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2 *Competition Commission v Arcelormittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA) paras 20-21.

3 *Safatsa* at paras 53 and 54.

4 *Sasol III (Edms) Bpk v Minister van Wet en Orde en 'n Ander* 1991 (3) SA 766 (T).

5 Wigmore, *On Evidence* (McNaughton revision 1961) para 2291 at 545.

6 (1983) 153 CLR 52.

2.6 Paragraph 40 introduces section 42A, which requires a taxpayer who alleges that a document is subject legal professional privilege to respond to certain questions. The intention of section 42A is plainly to provide SARS with information to enable it to evaluate the veracity of a taxpayer's claim that certain information is privileged. We demonstrate below, however, that the particular information sought under the present draft of section 42A is so intrusive that it actually undermines the very purpose of legal privilege. Moreover, we submit that the same purpose can be achieved with a less-intrusive mechanism. Such less-intrusive mechanism must be preferred as a matter of constitutional law.[8]

2.7 In this regard, section 42A proposes the following list of requirements that are to be fulfilled where a person alleges privilege in terms of information requested in an audit or interview:

(a) a description of each document in respect of which the privilege is asserted;

(b) if other than a legal practitioner, the author of the document;

(c) the name of the legal practitioner;

(d) the capacity in which the legal practitioner was acting;

(e) the specific purpose of the legal advice or in connection to what it was given;

(f) the name of the client to whom the legal advice was given by the legal practitioner;

(g) confirmation in writing that the client is claiming privilege in respect of the document;

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7 *S v Safatsa and Others* 1988 (1) SA 868 (A) ("***Safatsa***") at para 52.

8 See, for example, para 95 of the Constitutional Court's unanimous judgment in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC) in which Khampepe J held: "*A limitation will not be proportional if other, less restrictive means could have been used to achieve the same ends. And if it is disproportionate, it is unlikely that the limitation will meet the standard set by the Constitution, for section 36 'does not permit a sledgehammer to be used to crack a nut.' A provision which limits fundamental rights must, if it is to withstand constitutional scrutiny, be appropriately tailored and narrowly focused.*" (Footnotes omitted.)

(h) if the document is not in possession of the client, from whom did the person asserting privilege obtain it; and

(i) if the person obtained the document from the client or another person, the instructions of the client or the other person regarding the document.

2.8 We are particularly concerned with subsections (a), (c), (e), (h) and (i). These requirements may effectively compel a taxpayer to waive legal privilege in the particular document as well as undermine the purpose of legal privilege by requiring the taxpayer to disclose information about the content of the privileged document.

2.9 Legal professional privilege belongs in each case to the person seeking legal advice and it cannot be waived by a third party.[12] Subsections (h) and (i) are therefore problematic in the context of connected parties, as it could lead to privilege inadvertently being waived and could lead to SARS having insight into matters that are legally privileged.

2.10 We respectfully submit that if section 42A is enacted in its present form, and in particular subsection (e) (though subsections (a), (c), (h) and (i) are also problematic), it will have the effect of undermining the fundamental right of the taxpayer to legal professional privilege and thus be unconstitutional. ***That is so since the information sought in subsection (e) goes far beyond permitting SARS an opportunity to verify whether the document was indeed privileged or not: it actually reveals the precise topic on which the taxpayer sought legal advice. And, in turn, this will divulge some of the content of the advice (for example, that the taxpayer sought an opinion regarding transfer pricing for a particular year of assessment). This is impermissible as, once a document is protected by legal privilege, this also protects the taxpayer from having to reveal any of the content of such document, including what the taxpayer sought legal advice about.***

2.11 In any event, we submit that such an invasive scheme is not necessary in order to achieve the purpose of verifying a taxpayer's claim to legal privilege, as there are less-restrictive means of achieving the purpose which do not undermine the right to

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12 *Competition Commission v Arcelormittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA) para 27.

legal privilege. Section 42A(3) adequately caters for disputes regarding the assertion of privilege by a taxpayer by invoking a procedure similar to that set out in section 64(3) where an independent legal practitioner from the panel is appointed to make a determination as to whether the document qualifies as legally privileged or not. There is no reason why questions must be answered about the document if it could simply and efficiently be referred to an attorney on the panel who will be able to determine if it is subject to legal privilege or not. This procedure must accordingly be preferred to the information sought under section 42A.

2.12 Section 42A(3) goes further by providing that the determination is subject to review by an application the High Court and must be instituted within 30 days of the taxpayer or person having received the determination. We are, however, concerned that the 30-day period as provided in section 42A(3) contravenes the rules of procedure for judicial review as set out in section 7 of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"), which allows for a period of 180 days. This provision therefore violates the constitutional right to administrative action that is procedurally fair.[17]

2.13 In this regard, we refer you to the case of *Brümmer v Minister for Social Development and Others*[18] in which the Constitutional Court unanimously found that the requirement that a court review of a refusal to disclose records sought in terms of the Promotion of Access to Information Act 2 of 2000 ("**PAIA**"), had to be instituted "*within 30 days*" (in terms of section 78(2) of PAIA) was unconstitutional. The Court replaced the 30-day period by reading the words "*within 180 days from the date when the requestor receives notice of the decision*" into PAIA. We submit that this decision is plainly correct and it demonstrates that the 30-day period presently set out in section 42A(3) would not pass constitutional muster.

2.14 As an alternative to the enactment of section 42A, we respectfully suggest the following less-restrictive means of testing the veracity of a claim to legal privilege:

2.14.1 a procedure similar to the procedure as set out in section 64(3) be used, i.e. where a taxpayer or person alleges that relevant material is subject to legal

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17 Section 33(1) and (2) of the Constitution of the Republic of South Africa, 1996.

18 2009 (6) SA 323 (CC).

professional privilege, the information could be given to the appointed attorney for determination without the taxpayer or person having to answer intrusive questions; or

2.14.2 where a taxpayer or person alleges legal professional privilege in respect of a document, request the practitioner who drafted the document to confirm the privilege under oath or solemn declaration; or

2.14.3 delete the requirements set out in subsection (a), (c), (e), (h) and (i) in their entirety.

3. Request for relevant material

3.1 Paragraph 41 proposes an amendment to section 46 that purports to allow a senior SARS official to require a non-South African entity, who is not a taxpayer, to provide relevant material to SARS within 90 days from the date of the request.

3.2 We respectfully submit that the TAA is not applicable outside of the borders of South Africa. The non-South African entity would only be obliged to provide the relevant material in those instances where a treaty exists between South Africa and the country of the non-South African entity; and in accordance with the terms of that treaty. SARS cannot force non-South African entities to provide relevant material in terms of the TAA. Consequently the proposed amendment to section 46 will not be effective as the TAA has no extra-territorial force.

3.3 Paragraph 41 proposes a further amendment to section 46 that aims to prohibit the taxpayer from relying on relevant material held by a connected person located outside of South Africa if it was not produced when initially requested. The prohibition is subject to review by a competent court, but it is limited to exceptional circumstances.

3.4 We are concerned that if the proposed amendments to section 47 are enacted, it will have the implications of:

3.4.1 infringing the right to a fair trial; and

3.4.2 infringing the constitutional doctrine of the separation of powers. This is not least because such a prohibition on the adducing of relevant evidence before

a court effectively ties the court's hands at the expense of the proper administration of justice. There can be no basis for such a drastic interference with the powers of a court.

4. Interviews

4.1 The current section 47 allows SARS, by notice, to require a person (whether or not chargeable to tax) to be interviewed by a SARS official in relation to his or her tax affairs, so as to clarify issues of concern to SARS, *exclusively* "*to render further verification or audit unnecessary*".

4.2 According to the SARS Short Guide to the TAA, at paragraph 5.3.3, the purpose of section 47, "*from the perspective of the person being interviewed*", is "*to possibly avoid more intrusive and potentially protracted verification and audit*". It is apparent, therefore, that the current purpose of section 47 is exclusively to *quench*, not to *fuel*, further investigation - in other words, to bring the investigation to an *early end*, rather than to elicit information that might justify extending or expanding it.

4.3 Paragraph 42 proposes an amendment to section 47 that allows SARS to not only require the taxpayer whose tax affairs is under verification or audit to be interviewed, but also current employees of the taxpayer or persons who hold an office in the taxpayer. Significantly, the proposed amendment also frees SARS from the qualification that the interviews must be aimed *exclusively* at rendering further verification or audit unnecessary, with the result that the section 47 interviews will simply form part of the on-going information gathering process. This changes the entire focus and rationale for the existing provision.

4.4 We are aware that SARS has been requesting interviews of more than 30 of a taxpayer's employees at a time (in one example), regardless of whether those employees have any personal knowledge about the supposed scope of the audit. We have also seen SARS requesting to interview an entire department of a company. We have also heard of SARS requesting interviews with factory workers and IT departments of companies, who are unlikely to be able to shed any light on tax related issues.

4.5 We respectfully submit that the actual purpose of these interviews is rarely to conclude an audit. The purpose is usually to obtain information and, in the absence

of a presiding officer, the interviews easily devolve into fishing expeditions, which was clearly not the original intention of the provision. This creates a myriad of problems for the taxpayer who then has to spend more time and effort to correct the frequently incorrect impressions SARS gains from these interviews - as the taxpayers are not given the opportunity to put the most appropriate persons forward.

4.6 We also note that the interviews are usually conducted by teams of on average eight SARS officials, including legal advisors, which is extremely intimidating for the person being interviewed.

4.7 We have to point out that SARS has obtained reliable information in writing from taxpayers since the inception of the Income Tax Act of 1962 without any problems and we therefore fail to see why a more intrusive method of information gathering is necessary for SARS.

4.8 It is important to consider that the TAA currently allows for SARS to have witnesses subpoenaed and cross-examined under oath or solemn declaration, using the formal process of an inquiry provided for under Part C of Chapter 5 of the TAA. This inquiry procedure is subject to certain requirements which constitutionally safeguard taxpayers from arbitrary, abusive or unduly invasive behaviour by SARS officials.

4.9 The effect of the proposed amendments to section 47 is to authorise SARS to conduct an inquiry without the constitutional safeguards of:

4.9.1 the permission of a judge (in order to avoid abuse);

4.9.2 reasonable grounds that the taxpayer has not complied with a tax Act and a description thereof in a court order (in order to avoid a fishing expedition);

4.9.3 limiting of the scope of the inquiry;

4.9.4 the presence of a presiding officer (in order to avoid inadmissible evidence);

4.9.5 legal representation; and

4.9.6 protection against self-incrimination.

4.10 We are concerned that if the proposed amendments to section 47 are enacted, it will have the following implications:

4.10.1 the provision is open to abuse as there are no safeguards or limits in relation to the purpose for which a taxpayer may be interviewed or the procedures to be followed in the course of such an interview;

4.10.2 incorrect or misleading information may be gathered by SARS officials - we have seen SARS putting complex suppositions to interviewees who are not assisted by legal representatives and are too intimidated to say when they believe that the questioner is not 100% correct or that they don't know whether the questioner is 100% correct or are not given the opportunity to clarify or contextualise responses;

4.10.3 incorrect information may be disclosed by parties who may not have any personal knowledge of the relevant transactions, which may result in inadmissible evidence such as hearsay evidence (which is inadmissible in court precisely because it is unreliable), irrelevant evidence and evidence that is not placed in the proper context being elicited, as the person may effectively be cross-examined without being protected by the rules of evidence and without the constitutional safeguards in relation to inquiry procedures;

4.10.4 there is no determined process to record the proceedings, therefore there is always the risk that a dispute arises at a later stage over what the interviewee actually said with no way of resolving such a dispute;

4.10.5 the status of the "evidence" solicited by the interview is unclear - if 2 interviewees say that a transaction had a commercial purpose and a third interviewee says that he heard the transaction was driven by tax purposes, the third person's evidence would be inadmissible as he does not have direct personal knowledge of the transaction, but SARS may draw an incorrect conclusion based on his statements;

4.10.6 as the taxpayer has to prove that assessments are incorrect, an unfair burden may thus be placed on the taxpayer to prove the correctness or otherwise of the unreliable and inadmissible "evidence" gathered by SARS in the interview process and on which an assessment was based;

4.10.7 SARS may want to cross examine witnesses during a trial on what was supposedly said by a person in an interview who may or may not have had personal knowledge of the transactions in question; and

4.10.8 the verification and audit process may be unduly protracted (We note SARS' statements that the process will shorten the time to conduct an audit, but we have in practice seen that it has the opposite effect).

4.11 This is therefore an intrusive mechanism for obtaining information, which is in our submission a violation of the taxpayer's constitutional right to just administrative action, right to privacy,[19] and right against self-incrimination (to the extent that the information elicited may be used in subsequent criminal proceedings).[20]

4.12 Moreover, section 47 already, but even more so after the proposed amendments, is potentially in conflict with the fundamental constitutional principle of the rule of law,[21] as articulated by the Constitutional Court in *Dawood*:[22]

> *It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that section 36 [of the Constitution] requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. … If rights are to be infringed without redress, the very purposes of the Constitution are defeated.*

4.13 It is thus vital, in order to ensure that section 47 becomes *more* (not less) consistent with the Constitution, that *more* (not less) substantive guidelines and procedural

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19 Section 14 of the Constitution of the Republic of South Africa, 1996.

20 Section 35(3)(j) of the Constitution of the Republic of South Africa, 1996. The proviso in section 47(1)(b) that the interview may not be conducted "*for purposes of a criminal investigation*" is insufficient to cure this violation, as it does not exclude the possibility that the information elicited may subsequently be used in criminal proceedings which were not yet contemplated at the time of the interview.

21 Section 1(c) of the Constitution.

22 *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC), para 47.

guardrails be imposed on SARS. Only in this way can the legislature ensure, as it is constitutionally obliged to do, that section 47 interviews are appropriately focussed and fair.

4.14 As an alternative to the enactment of the proposed amendments to section 47, we respectfully suggest the following:

4.14.1 delete section 47 entirely as it is, even in its current form, open to abuse and potentially unconstitutional;

4.14.2 provide for information to be requested in writing so that there is no subsequent dispute as to what the taxpayer said. This is a cheap and effective mechanism of obtaining relevant material and is more likely to be accurate; or

4.14.3 create a formal deposition procedure with built-in safeguards, as provided for in other jurisdictions, which will allow SARS to gather relevant material while observing the rights of the taxpayer.

4.15 If section 47 is to have any proper purpose at all (to distinguish it from an inquiry), it must be to provide an efficient and fair procedure to render further information-gathering processes unnecessary, that is, to bring the investigation to an early end. In order to achieve this, it must set out sufficient guidelines to ensure that SARS officials do not deviation from its genuine purpose, as well as safeguards to ensure that the taxpayer's rights are not undermined, including an explicit provision that any incrimination information elicited cannot be used against the taxpayer in subsequent related or unrelated criminal, civil or administrative proceedings.

5. Answering questions under oath

5.1 Paragraph 43 proposes an amendment to section 49 that requires any person on the premises where an audit is being conducted to give reasonable assistance to a SARS official, which includes answering questions about the audit under oath or solemn declaration, if so required by a SARS official.

5.2 The proposed amendment to section 46(7) (by paragraph 41) already allows a SARS official to request relevant material to be provided under oath or solemn declaration (previously, only a senior SARS official could request this).

5.3 It makes sense to ask parties to provide information by way of affidavit - as a person can only state in an affidavit information that is in his or her personal knowledge and there can subsequently be no dispute as to what the person had said.

5.4 However, it is unclear why section 49(1)(c) is required if section 46(7) already exists. On what basis is broader powers required? It seems that a SARS official wants to ask persons on the premises where an audit is being conducted if they have given SARS all of the files, but this is something which is in of itself problematic, as the person may or may not know whether all the information has been provided. There is limited use for an affidavit by an employee stating that to his or her knowledge all information has been given, when it is possible that another person in the organisation, who may not even be in the same country as the premises where the audit is being conducted, may know of other documents.

5.5 Our respectful opinion is that SARS will still be required to call a witness if they want to use that affidavit at a trial, unless the parties agree at a pre-trial hearing that evidence can be given to the court on affidavit. This is in line with the practice in the High Court.

5.6 In considering the enactment of the proposed amendment to section 46(7) and section 49(1)(c), we respectfully suggest that:

5.6.1 the amendment to section 46(7) be enacted on condition that the relevant material is given ***in writing*** and after consultation with the taxpayer or the taxpayer's legal advisors; and

5.6.2 section 49(1)(c) be deleted as the enactment of the proposed amendment, together with our suggestion stated in 5.6.1 above, will render section 49(1)(c) superfluous.

6. Reduced Assessments

6.1 The current section 93 allows SARS to issue reduced assessments if:

6.1.1 a dispute was resolved in taxpayer's favour;

6.1.2 necessary to give effect to a settlement;

6.1.3 necessary to give effect to a judgement (if there is no further right to appeal); or

6.1.4 there is an undisputed error in the assessment (as a result of an error by SARS or the taxpayer in a return),

and no objection or appeal is necessarily required.

6.2 Paragraph 48 introduces section 93(3) which requires the taxpayer to request a correction within six months, or a period exceeding six months in exceptional circumstances, from the date of assessment for the preceding year of assessment.

6.3 The proposed amendment has the following effects:

6.3.1 a reduced assessment will not be issued by SARS in the event that a reduced assessment is not requested by the taxpayer; and

6.3.2 the taxpayer most likely having to ask for a correction before a return is even due, which is impractical and impossible to comply with.

6.4 Our respectful opinion is that in most cases, SARS should issue the reduced assessment without the taxpayer having to ask - particularly after a settlement of a dispute or a judgement of court.

6.5 Further, there should only be a time limit where the assessment must be reduced as a result of an undisputed error and no objection or appeal.

6.6 We respectfully suggest that in order to make the provision workable, the time within which the reduced assessment must be requested in the case of an undisputed error must be calculalted from the date of the assessment containing the error, instead of the date of the previous year's assessments.

6.7 Moreover, exceptional circumstances will always exist if SARS collects taxes which both parties agree are not due. Therefore in such a case, the period should be three years. We do not believe that SARS intends to collect taxes which it itself agrees are not due to the State.

7. Withdrawal of assessments

7.1 Section 98(1)(d) currently allows SARS to withdraw an assessment in terms of section 98 where there is, amongst others, an undisputed factual error by the taxpayer in a return.

7.2 Paragraph 49 proposes to amend section 98(1)(d) to allow SARS to withdraw assessments only in the following circumstances:

7.2.1 if it was based on-

(aa) 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;

(bb) a processing error by SARS; or

(cc) a return fraudulently submitted by a person not authorised by the taxpayer;

7.2.2 the taxpayer has exhausted all remedies under the TAA or the time within which to object must have expired; and

7.2.3 it is in the interest of good management of the tax system.

7.3 With the proposed amendment, section 98(1)(d) provides for SARS to withdraw an assessment where there is, amongst others, errors made by parties other than the taxpayer, i.e. when a third party or employer has failed to submit a return or submitted an incorrect return. The amended section 98(1)(d) cannot be used to withdraw assessments even when there is an unintended tax debt or if there is an anomalous or inequitable result unless the error was due to the above, to a processing error by SARS or to a return fraudulently submitted by an unauthorised person.

7.4 SARS wants to amend section 98(1)(d) because taxpayers are using the provision and SARS will have to give taxpayers refunds if they fix their "old mistakes".

7.5 It is our respectful opinion that SARS should refund tax to a taxpayer if the taxpayer paid tax which was not due and which SARS agrees was not due. Tax is complex and many taxpayers are not advised correctly, which results in them not claiming

deductions to which they are entitled. If SARS agrees that this is the case, the taxpayer should be well within his or her rights to claim back the tax that was incorrectly paid. There is no justifiable reason why SARS should collect more tax than is due.

8. Period of limitations for issuance of assessments

8.1 The current section 99 provides that income tax assessments prescribe in three years; and (in accordance with the 2015 Budget Speech) income tax returns submitted on e-filing (treated as "self-assessments"), prescribe in five years.

8.2 Paragraph 50 proposes that section 99 be amended to allow SARS to unilaterally extend prescription by three years in the following instances:

8.2.1 if SARS believes that the taxpayer failed to provide relevant material within a reasonable period of time;

8.2.2 if SARS is involved in a litigious dispute with the taxpayer regarding relevant information to be provided to SARS; or

8.2.3 if it is a complex matter (such as the general anti-avoidance rules or transfer pricing).

8.3 We respectfully submit that the effect of the proposed amendments is that it introduces new uncertainty regarding the determination of a particular taxpayer's rights and further induces taxpayers to provide excessive information to SARS in the hope of avoiding an indeterminate prescription period.

8.4 We are concerned that if the proposed amendments are enacted, it will have the following legal difficulties:

8.4.1 determining what would constitute an "appropriate" period to extend prescription;

8.4.2 assessing what a "reasonable" time period would be to provide documentary requests; and

8.4.3 what matters or disputes would be classified as "complex".

8.5 The proposal that SARS be given the right to unilaterally extend prescription violates a fundamental principle of our legal system, namely that claims prescribe in the interests of certainty after a stated period of time.

8.6 SARS must start their audits timeously. If the provision stands, the information requests must be submitted at least 6 months before prescription, otherwise SARS can use the information request itself to extend prescription.

8.7 As an alternative to the enactment of the proposed amendments to section 99, we respectfully suggest that an original assessment be viewed in the same way as a self-assessments, making the prescription period five years, instead of imposing an uncertain discretionary regime.

9. Delivery of documents to companies

9.1 Section 252 currently deems SARS to have delivered a document to a company if:

9.1.1 handed to the public officer of the company;

9.1.2 left with a person over the age of 16 years;

9.1.3 posted to the company or the public officer's last known address;

9.1.4 sent to the company or the public officer's last email or fax address.

9.2 Paragraph 69 proposes to add to the abovementioned list that a document will be deemed to have been delivered to a company if the company or a public officer is a registered user on e-filing and the document is posted on the company's e-filing page.

9.3 Paragraph 69 goes further to introduce subsection (2) which states that the proposed amendment above, will be retrospective to 1 October 2012.

9.4 Judgement cannot be taken against a taxpayer where the taxpayer was not notified of a tax assessment.[23] We respectfully submit that it is unreasonable to expect a taxpayer to log on to e-filing daily to see if they have a notification from SARS. Many

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[23] *Singh v Commissioner for the South African Revenue Service* (500/2001) 2003 ZASCA 31

taxpayers only find out about assessments months after they were raised and many times the assessments only appear on the statement of account.

9.5 We are therefore concerned that the enactment of the proposed amendment could potentially have serious implications in that time periods may lapse which would effectively remove the taxpayer's remedies to object or take appropriate action.

9.6 Given the serious consequences of not objecting in time or making payments in time, our respectful opinion is that the proposed amendment should not be enacted.

9.7 Notwithstanding 9.6, if e-filing is used, we respectfully suggest that another alert should also be sent to the taxpayer such as an sms alert system, but we are concerned that there have been problems with the sms alerts in the past in that the alerts are not always sent out and sometimes alerts are incorrectly sent out.

10. Application of the TAA to prior or continuing action

10.1 Paragraph 72 proposes to amend section 270 by introducing, inter alia, subsection (6E) which provides that:

(a) the accrual and payment of interest on an understatement penalty imposed under section 222 must be calculated in the manner that interest upon additional tax is calculated in terms of the interest provisions of the relevant tax Act; and

(b) the effective date referred to in section 187(3)(f) for tax understated before 1 October 2012 will be regarded as the commencement date of this Act.

10.2 Our respectful opinion is that the proposed amendment is unclear for the following reasons:

10.2.1 interest on an understatement penalty imposed under section 222 has always been interpreted as being calculated with effect from the "effective date of the tax understated" as stated in section 187(3)(f) - i.e. the date on which the provisional tax should have been paid as set out in section 89*quat* of the Income Tax Act 58 of 1962 (the "**Income Tax Act**"). We are therefore of the view that the insertion of (a) is not necessary;

10.2.2 it is unclear whether interest on understatement penalties must then be imposed and waived on the same basis as interest on additional tax imposed under section 76 of the Income Tax Act was imposed and waived under section 89quat(2) and (3) of the Income Tax Act.

10.3 We respectfully suggest that the proposed amendment be re-drafted in order to deal make it clear that interest on understatement penalties (in respect of periods before 1 October 2012) must be imposed and waived on the same basis as interest on additional tax under the previous regime. This will deal with the unintended consequences of the retrospective effect of understatement penalties referred to in the Explanatory Memorandum.

11. Conclusion

Our issues and views on the proposed amendments to the TAA as set out in the DTALAB, which we have raised above, are fundamental and all-encompassing. This is the premise for our pragmatic and constructive proposals as set out herein. We respectfully trust that our proposals will be considered and included in deciding on the enactment of these proposed amendments.

Yours sincerely

WEBBER WENTZEL