

**DAVIS TAX COMMITTEE COMMENTS ON THE BORDER MANAGEMENT
AGENCY BILL, 2015**

Introduction

The Davis Tax Committee (DTC) has been requested as a matter of urgency to provide its views on the Border Management Agency Bill, 2015 ('the Bill') insofar as the Bill impacts upon revenue (taxes and customs and excise) collection for the fiscus of South Africa. Given the time constraint imposed to provide the views, this response is not as comprehensive as the DTC would have preferred.

1. Background

The purpose of the Bill is to provide for the establishment, organisation, regulation and control of the Border Management Agency (BMA); to provide for the transfer, assignment, and designation of law enforcement border related functions to the BMA; and to provide for matters connected thereto. The functions of the BMA are (a) to perform border law enforcement functions within the borderline and at ports of entry; (b) to coordinate the implementation of its border law enforcement functions with the principal organs of state and may enter into protocols with those organs of state to do so; and (c) to provide an enabling environment to facilitate legitimate trade.¹

2 Functions of the BMA

Clause 5 of the Bill ascribes various functions to the BMA, the key purpose of which is that "the functions of the Agency are to perform border law enforcement functions within the borderline and at ports of entry".²

Clause 1 of the Bill defines "border law enforcement functions" as the functions referred to in clause 5 read with the functions listed in Column 3 of Schedule 1 and in clauses 24, 25 and 26. Column 3 of Schedule 1 to the Bill lists various legislative functions and powers that are assigned to the BMA. For the purposes of this correspondence, the relevant powers assigned by the Bill are powers in terms of the South African Revenue Service Act, 1997 (Act 34 of

¹ Section 5(1)(a) of the BMA.

² Section 5(1)(a) of the BMA.

1997) (“the SARS Act”), the Value-added Tax Act, 1991 (Act 89 of 1991) (“the VAT Act”), the Customs Duty Act, 2014 (Act No. 30 of 2014) and the Customs Control Act, 2014 (Act No. 31 of 2014).

3. Evaluation

This evaluation by the DTC is purely to examine the implications for revenue (taxes and customs and excise) collection and administration.

3.1 *Assignment of SARS functions in terms of the SARS Act*

In terms of section 3 of the SARS Act, SARS’s objective is the efficient and effective collection of revenue. In order to achieve this objective SARS is tasked to secure efficient and effective enforcement of tax legislation as widely as possible.

The Commissioner of the BMA is assigned the powers tasked to SARS in terms of section 4(1)(a) of the SARS Act. Section 4(1)(a) of the SARS Act provides as follows:

To achieve its objective SARS must—

- (a) secure the efficient and effective, and widest possible enforcement of—
 - (i) the national legislation listed in Schedule I: and
 - (ii) any other legislation concerning the collection of revenue that may be assigned to SARS in terms of either legislation or an agreement between SARS and the organ of state or institution entitled to the revenue

Legislation listed in Schedule I of the SARS Act is national tax legislation that is presently administered by SARS. In effect, the Bill seeks to empower the Commissioner for the BMA to secure enforcement of national tax legislation that is administered by the Commissioner for SARS.

SARS is created by the SARS Act for the specific purpose of collection of revenue. The revenue collection function covers an enormous and diverse number of rules. This function is assigned to SARS to perform under the policy control of the Minister of Finance and is subject to directives and guidelines on policy matters issued by the Minister of Finance.³ SARS is mandated to perform its functions in the most cost-efficient manner and in

³ Section 4(3)(a) of the SARS Act.

accordance with the basic values and principles governing public administration contained in the Constitution of South Africa.⁴ In order to enable SARS to perform its functions, it has been granted infrastructural powers to “do all that is necessary or expedient to perform its functions properly”.⁵ These powers are peculiar to SARS as a national revenue collection agency and are intended to facilitate the revenue collection function.

The centrality of SARS to the administration and collection of taxes (includes duties, levies, royalties, fees, contributions, penalties and interest) is exemplified by the Tax Administration Act, 2011 (Act No. 28 of 2011) (“the TAA”). The purpose of the TAA *inter alia* is to prescribe the powers and duties of persons engaged in the administration of tax laws.⁶ The powers of the Commissioner may be delegated to a specific individual or an incumbent of a specific post.⁷

4.2 It is the considered view of the DTC that the assignment of key revenue collection functions of SARS to the BMA is inappropriate for the following reasons:

4.2.1 Tax administration and collection laws and regulations are organised in ways that mirror the way in which tax authorities are organised; that is, the laws are primarily organised around the different bureaucratic functions that are necessary for the administration of the tax system. This functional organisation extends beyond collection, and covers other corresponding functional categories such as the control of goods at ports of entry, regulations and rulings, record keeping and returns, audits and investigations, dispute settlements, internal investigations as well as functions performed by the tax ombud. The BMA should not have to recreate a revenue collection infrastructure that has already been painstakingly created by SARS. The unification of the Inland Revenue and Customs and Excise agencies into a national revenue collection agency (SARS) in 1996 has ensured that SARS has developed an integrated operational system to improve revenue collection. The advantage of a shared database and the ability to exchange data among different divisions of SARS cannot be overly-estimated.

⁴ See section 4(2) of the BMA Act read with section 195 of the Republic of South Africa Constitution Act 108 of 1996.

⁵ These powers are listed in section 5(1) of the BMA Act.

⁶ Section 2(c) of the TAA.

⁷ Section 6(2) read with section 10(2)(d) of the TAA.

4.2.2 The proposed assignment of the functions to the BMA in the Bill fragments the tax collection function that was specifically delegated to SARS. Indeed a core recommendation of the Katz Commission was the integration of hitherto disparate revenue collection services. A reversal would lead to various unintended consequences, including:

- Lack of clarity between SARS and the BMA as to which entity should collect what taxes;
- The lack of clarity in the previous point would compromise the certainty that the taxpayers require as to the tax collection entity in respect of various or all taxes;
- The fragmentation of the tax collection function may result in some tax amounts not being collected, or some tax claims by taxpayers being duplicated. This would lead to the integrity of the tax collection function being compromised and would appear arbitrarily interfered with; and
- SARS has, over time, developed robust and credible mechanisms of revenue collection, including employment and training of personnel to action and manage revenue collection. The involvement of the BMA in tax collection may interfere with the fundamental mechanics of revenue collection (some of which taxpayers are already familiar with) as well as introduce personnel who might not be completely familiar with revenue collection.

4.2.3 At present some 2 498 employees of SARS are involved in the implementation of SARS's customs policies. It stands to reason that the BMA will seek to absorb this staff were the Bill to be implemented. In the event that even a small percentage prefer to remain as 'SARS employees', the BMA could well be deprived of key skills to execute its proposed revenue collection functions.

4.2.4 A closer reading of the Bill (which is not clearly drafted) reveals that the assignment of the functions of SARS to the BMA is not strictly necessary to deliver on the key objectives of the Bill which are to provide for the establishment, organisation, regulation and control of the BMA; to provide for the transfer, assignment, and designation of law enforcement border related functions to the BMA; and to provide for matters connected thereto. Furthermore, assignment of the functions of SARS to the BMA is not necessary to further the

following purposes of the Agency (a) to perform border law enforcement functions within the borderline and at ports of entry; (b) coordination of the implementation of its border law enforcement functions with the principal organs of state and may enter into protocols with those organs of state to do so; and (c) the provision of an enabling environment to facilitate legitimate trade.⁸

4.2.5 SARS's collection functions and activities with regard to the control of goods at the ports of entry into South Africa have clearly improved. For example, during the last week of August 2015, it prevented some R78 million of foreign currency from illegally exiting the country via the Oliver Tambo airport. The legacy of these vital functions will be seriously compromised if the functions were to be transferred from SARS to the BMA.

4.2.6 Should it be that SARS does not have enough capacity at points of entry, it would be more efficient to enhance the SARS collection infrastructure as opposed to fragmenting the tax collection function assigned to it by legislation, and assigning to an untried agency with no experience of this complex revenue collection area.

5. Commissioner's powers in terms of the VAT Act

Section 13 of the VAT Act provides for the collection of tax on the importation of goods, determination of the value thereof and exemptions from tax. Section 13(5)(a) of the VAT Act provides that "the Commissioner may make such arrangements as the Commissioner may deem necessary for the collection (in such manner as the Commissioner may determine) by a SARS official, or the Managing Director of the South African Post Office Limited on behalf of the Commissioner, of the tax payable in terms of this Act in respect of the importation of any goods".

The Bill assigns to the Commissioner for the BMA the same powers as the Commissioner for SARS *to make arrangements for the collection of tax* payable on the importation of goods. Such arrangement would direct the collection of the taxes by a SARS official or the Managing Director of the South African Post Office Limited. The powers assigned to the

⁸ Section 5(1)(a) of the BMA.

Commissioner for the BMA in terms of section 13(5)(a) VAT Act are not the powers to collect the taxes but merely to make arrangements for the collection of taxes.

As noted, the administration and collection of taxes is governed by the TAA. The purpose of the TAA *inter alia* is to prescribe the powers and duties of persons engaged in the administration of tax laws. The powers of the Commissioner for SARS may be delegated to a specific individual or an incumbent of a specific post. The Bill seeks to delegate the powers of the Commissioner for SARS to the Agency. While this might not be in conflict with the Constitution of South Africa, it is undesirable and contrary to the TAA as well as the spirit thereof. It is, therefore, recommended that the power to delegate tax administration powers remain with the Commissioner for SARS.

6. Conclusion and recommendation

Based on the above, the Davis Tax Committee recommends that the functions and powers of SARS and the BMA be kept separate and that the Agency should not be assigned any of the current functions and powers of SARS with regard to revenue (taxes and customs and excise) collection and the control of goods that is associated with such collection functions. Of particular concern is the extraordinarily poor timing of the Bill. According to the 2014 Tax Statistics issued by SARS, the total of customs duties, import VAT, and ad valorem import duties collected amounted to R176.9 billion for the 2013-14 fiscal year. This was approximately 19% of the total revenue collected.

The DTC is of the view that to put so significant a contribution to the fiscus in a position of uncertainty, if the Bill were to be implemented, is fiscally imprudent at this critical juncture for the South African economy.