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SUBMISSION

2018 Draft Tax Administration Laws Amendment Bill

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Dear Allen and Teboho

Representation on the Draft Tax Administration Laws Amendment Bill, 2018 ("TALAB 18")

We present herewith our written submissions on the above-mentioned draft Bill.

Our submissions include a combination of representations, ranging from serious concerns about the impact or effect of certain provisions to simple clarification-suggestions for potentially ambiguous provisions. We have deliberately tried to keep the discussion of our submissions as concise as possible, which does mean that you might require further clarification. You are more than welcome to contact us in this regard.

Yours sincerely

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Attached:
• Detailed submissions

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Proposed Amendments

Clause 2.5 : Amendment to paragraph 1 of the Fourth Schedule of the Income Tax Act

Comment	Recommendation
The proposed amendment deletes a director of a private company from the definition of an "employee". It is unclear if it is the intention that payments to such directors will no longer be subject to employees' tax (e.g. salary payments to a director who is also a CEO, CFO, etc, would be subject to provisional tax) or whether it is the view of SARS that such taxpayers would in any event fall under paragraph (a) of the "employee" definition and it is therefore unnecessary to specifically refer to directors of private companies?	SARS should clarify its position in this regard.

Clause 2.5 : Amendment to paragraph 1 of the Fourth Schedule of the Income Tax Act

Comment	Recommendation
Section 5(1)(b) of the TALAB: It is proposed that the definition of '*provisional taxpayer*' is amended to refer to '*any person who derived any income*' instead of the current wording of '*taxable income*'. The proposed amendment will result in all taxpayers who received capital gains during the year of assessment having to register as provisional taxpayers and submit provisional tax returns. As the various financial institutions only issue the IT3(c) certificates during May of the following tax year, it would be extremely difficult to calculate the taxable capital gain as at 28 February. By its very nature, a taxpayer would only be aware of a capital gain at the time of disposal at the earliest. However, the obligation to submit a provisional tax return is 6 months into the year and at the end of the year. The result is that such taxpayers could be subject to penalties for the late/non-submission of a return even though the gain arose at a later date. The suggested change would therefore be administratively burdensome on the taxpayer and SARS and not necessarily realise the expected revenue that SARS projects	The proposal should be reconsidered in view of the additional administrative burden it will create for taxpayers and SARS. Alternatively relief should be provided to taxpayers insofar as administrative penalties are concerned.

Clause 2.10 : Value-Added Tax Act,1991: Amendment of section 20

Comment	Recommendation
Section 20(1B): Material error on tax invoice: The original document containing the material error cannot be referred to as the "original tax invoice" as the document did not meet the requirements of section 20(4) or (5). As such, there is no concern of raising two tax invoices for the same supply as the original document was not a valid tax invoice by virtue of the material error. Further, the practical reality is that ERP systems are generally set up to cancel a tax invoice by means of a credit/debit note event as defined in section 21(1) of the VAT Act.	Guidance must be provided to vendors as to the manner in which the originally flawed document must be cancelled. Confirmation whether this materially-flawed document constitutes an additional event for the raising of a credit or debit note. It must also be clarified how the valid (corrected) tax invoices will be treated in the VAT return for past periods. Whilst the EM clarifies what a "material error" is, i.e. an error of such a nature that the document reflecting it is precluded from being used to deduct input tax, it is recommended that the term be defined in the VAT Act. Clarification is sought pertaining to the manner in which changes can be made to the invalid document ; for example, will a supplier be able to write on a tax invoice in order to ensure it is a valid document?

Clause 2.10 : Value-Added Tax Act,1991: Amendment of section 20

Comment	Recommendation
Section 20(1B): Material error on tax invoice: The proviso pegs the time of supply to the date of the original tax invoice, there is concern on what the position is where the time of supply was originally triggered by an event other than the invoice such as the receipt of consideration, or in accordance with some other event in terms of section 9 [for example connected parties in section 9(2), or due or received as contemplated in section 9(3)(a)]. The proposed proviso in these circumstances may shift the time of supply to the original invoice date.	We recommend that this proviso be amended to achieve its purpose, which is that the original time of supply remains, notwithstanding the cancellation and issuance of a new tax invoice.
The proposed insertion of section 20(1B) includes sub-paragraph (iii) which requires that the supplier or the recipient (as the case may be) obtains and retains information sufficient to identify the transaction to which the original tax invoice and the corrected tax invoice refer.	Guidance must be provided as to what will be accepted as "sufficient information", i.e. what will be the minimum requirement of documents to be kept, etc. Practical implementation of this requirement should be considered in light of ERP system limitations.

Clause 2.11 : Value-Added Tax Act,1991: Amendment of section 21

Comment	Recommendation
Section 21(1)(d): Credit notes in the context of a going concern: The section imposes a limitation in that it may only be invoked if a going concern was supplied as contemplated in section 11(1)(e). It may be that a going concern is supplied as contemplated in terms of section 8(25) as opposed to 11(1)(e) of the VAT Act.	We recommend that the proposes provision be amended to include a going concern which is supplied in terms of section 8(25), to ease the compliance burden of vendors which have amalgamated or merged.

Clause 2.17 : Value-Added Tax Act,1991: Amendment of section 51

Comment	Recommendation
The amendment to section 51 proposes to include joint ventures.	The term “joint venture” should be defined.

Clause 2.19: Amendment of section 42 of the Tax Administration Act

Comment	Recommendation
The proposed amendment to section 42(1) states that a Senior SARS official involved in or responsible for an audit must provide the taxpayer with an '*audit engagement letter*' as prescribed by the Commissioner by public notice and thereafter a report indicating the stage of completion of the audit. The term '*audit engagement letter*' is inconsistent with the other provisions of the TAA and should be aligned with the wording used in section 226(2) being '*notice of the commencement of an audit*'. This will provide clarity as the stated intention in the 2018 Memorandum on the Objects of the TALAB is to ensure that taxpayers are notified of the start of an audit in order to keep all parties informed.	We recommend that the term 'audit engagement letter' be replaced with 'notice of commencement of an audit'.
The proposed amendment does not specify the time period within which a taxpayer needs to be notified prior to the commencement of an audit or post finalisation of audit alternatively during the investigation phase.	It is crucial that a taxpayer be notified of the commencement of an audit within a reasonable time period prior to the audit commencing.The legislation should clearly stipulate such a time period.

Clause 2.19: Amendment of section 42 of the Tax Administration Act

Comment	Recommendation
The section 42(1) proposed amendment aims to keep all parties informed but is limited to the audit process. In order to enhance this provision we recommend that the amendment be extended to similarly apply to verification processes. This will provide further certainty to taxpayers and ensure alignment with the recently published SARS Service Charter where SARS endeavours to notify taxpayers of verification within 15 business days of submission of a return.	We recommend that the proposed amendment be extended to similarly apply to verification processes.

Clause 2.25: Amendment of section 221 of the Tax Administration Act

Comment	Recommendation
The proposed replacement of the phrase '*default in rendering a return*' with the phrase '*failure to submit a return*' in the definition of an understatement, needs to be clarified or alternatively aligned further. SARS needs to clearly differentiate between the late filing of a return (which may result in administrative non-compliance penalties) and the 'failure to submit a return.	We recommend that SARS clearly stipulate the difference between 'failure to submit a return' and the late filing of a return and provides further guidance in this regard.

Clause 2.26: Amendment of section 221 of the Tax Administration Act

Comment	Recommendation
The alternative proposed amendment still refers to *'default in rendering a return'* (refer Clause 2.25 above). We recommend that the wording in section 221 and section 222 be aligned in order to achieve consistency.	We recommend that the wording in section 221 and section 222 be aligned in order to achieve consistency.

Clause 2.27: Amendment of section 240 of the Tax Administration Act

Comment	Recommendation
We have no objection in principle with non-compliant tax practitioners being deregistered. However, we have some concerns with the proposal. Firstly, when an individual lodges a request for suspension of payment in terms section 164, the individual is still classified as non-compliant on SARS' systems. Frequently, these requests for suspension are never attended to. SARS should accordingly ensure that its systems are aligned with the law and that section 256(3) should include not only a suspended debt but also a debt for which suspension has been requested. Secondly, it is submitted that the 6-month period is too short and should be extended to a year in order to cater for extraordinary circumstances.	We recommend that SARS's tax compliance system be fully aligned with the law, that a request for suspension of payment be included in section 256(3) and that the period of non-compliance be extended to 12 months.

MATTERS NOT ADDRESSED IN THE DRAFT BILL

Comment	Recommendation
Section 42 prescribes that a letter of audit findings be issued to the taxpayer with a right of response within 21 days before adjustments are potentially made to the assessments. The section does not differentiate between a verification versus and audit process and in many cases SARS does not issue letters of findings during the verification process.	It is suggested that Section 42 be amplified to differentiate between verification and audit (and or any potential scenario where assessments could be raised, i.e. investigations) and that a letter of findings is made compulsory in both instances.
Section 93 and the test being “readily apparent undisputed error” which has not been clarified in the suggested amendments to the act and which are continually very narrowly interpreted by SARS	Suggested amendment to Section 93 to the wording in the previous act being that SARS may issue a reduced assessment if satisfied that an assessment contains and undisputed error by SARS or the taxpayer.
Chapter 16 Part B of the TAA (VDP): no suggested amendment to provide clarity on limitation of period for disclosure.	It is suggested that Part B be amended in line with Section 29, 32 and 99 of the TAA being maximum 5 years.
Section 227(e) of the TAA: not result in a refund due to SARS.	It is suggested that this section be amended to include a holistic view of the full disclosure of the default and not per tax period.

Comment	Recommendation
Section 226 read with 227(a) of the TAA: VDP must be voluntary which is extremely narrowly interpreted by SARS and application are more often than not rejected on this basis	It is submitted that voluntary and “commencement of audit or criminal investigation” be amended/refined to ensure clarity to taxpayers.
Section 232 of the TAA: VDP not subject to objection or appeal	It is submitted that this section be deleted or amended to grant taxpayers the right to validly oppose the decision of the VDP Unit.