

BRIEFING NOTE TO THE STANDING COMMITTEE ON FINANCE
on the
RECOMMENDATIONS
of the
COMMISSION OF INQUIRY INTO TAX ADMINISTRATION AT THE
SOUTH AFRICAN REVENUE SERVICE

The central conclusion reached by the Commission at the end of its inquiry was that a massive failure of integrity and governance occurred at SARS over the four-year period under inquiry (1 April 2014 to 31 March 2018). The legislative framework governing SARS contributed to that by the absence of constraints upon the appointment and exercise of authority by the Commissioner of SARS. The recommendations of the Commission fall into two categories. First and foremost are recommendations directed at introducing governance mechanisms that will inhibit a recurrence. The second category are recommendations directed at correcting the consequences of failures that occurred. The recommendations are dealt with in this note with reference to the person or body to whom they are addressed for implementation.

RECOMMENDATIONS ADDRESSED TO THE PRESIDENT

In its Interim Report delivered to the President towards the end of September 2018 the Commission recommended

- (a) That the President take steps without delay to remove the current Commissioner of SARS from office.
- (b) That the President thereupon takes steps without delay to appoint a new Commissioner of SARS.

It was recommended further that a new Commissioner of SARS be appointed through an open and transparent process that is subject to critical appraisal, but without compromising the urgency of the appointment.

The President duly acted upon the first recommendation by removing the then Commissioner of SARS from office. The President announced in his State of the National Address that he was in the process of selecting a new Commissioner of SARS. We understand that such selection will be made after receiving recommendations from a panel appointed by the President to interview candidates, whose recommendations will be made public once a selection has been made, which is consistent with the recommendations of the Commission.

RECOMMENDATIONS ADDRESSED TO THE LEGISLATURE

Appointment and Removal of the Commissioner of SARS

Consistent with those recommendations the Commission has recommended legislative changes to regulate the appointment, suspension and dismissal of the Commissioner of SARS. Its recommendations are that:

1. The SARS Act be amended to provide for the appointment of the Commissioner of SARS by the President, after consultation with the Minister of Finance, in accordance with a transparent process, which it is recommended should be along the following lines:
 - 1.1 The President should, of his own volition, or after a call for nominations, at his discretion, select one or more suitable candidates for appointment.
 - 1.2 The candidate or candidates should
 - 1.2.1 be, and be reputed to be, of unblemished integrity;
 - 1.2.2 have proven experience of managing a large organization at a high level;
 - 1.2.3 not be aligned to any constituency, and if so aligned, should renounce that alliance upon appointment.
 - 1.3 The candidate or candidates for appointment should submit to a private interview by a panel of four or more members selected by the President. The function of the panel is to evaluate the candidate or candidates against the criteria above and make motivated non-prescriptive recommendations to the President.
 - 1.4 Members of the panel should be apolitical and not answerable to any constituency, and should be persons of high standing who are able to inspire confidence across the tax-paying spectrum.

1.5 The panel must, upon its evaluation, make motivated non-prescriptive recommendations to the President on the suitability or otherwise for appointment of the candidate or candidates. If the recommendation is against the appointment of a particular candidate, it is the prerogative of the President to reject the recommendation and appoint the candidate nonetheless, or to select an alternative candidate or candidates to repeat the process.

1.6 Upon appointment of a candidate, the recommendations of the panel, in whichever direction, should be made public.

2. Provision should be made in the SARS Act for the removal of the Commissioner of SARS by the President on specified grounds, through a process that is transparent. In formulating the grounds for removal care should be taken to achieve the correct balance between upholding the autonomy of SARS and the ability to remove an incumbent Commissioner whose continuing incumbency undermines the efficiency and efficacy of SARS and thus the country. Provision should also be made for the suspension of the Commissioner pending proceedings for removal.

Appointment of a Deputy Commissioner of SARS

The Commission observed in its report that a principal element of good governance in an organisation is the oversight role of senior management structures that are able to restrain any abuse of authority. The current

legislation contains no such requirement, leaving the Commissioner of SARS with sole and unfettered authority. The Commission sought to correct that weakness by recommending the creation of the post of at least one Deputy Commissioner as follows:

Provision be made in the SARS Act for the appointment of a Deputy Commissioner of SARS by the President, after consultation with the Minister of Finance, with no management line functions, according to a process that is broadly similar to the process for the appointment of the Commissioner, and for the removal of the Deputy Commissioner by the President on specified grounds, and in accordance with a transparent process.

Allied to that, the Commissioner of SARS should be required to appoint an advisory Executive Committee, to be constituted by him or her but it must include the Deputy Commissioner. Thus the recommendation that

the SARS Act be amended to require the Commissioner of SARS to appoint an advisory Executive Committee that must include the Deputy Commissioner.

Appointment of an Inspector General of SARS

The Commission considered it vital that an outside oversight body be created that would be capable of inquiring into possible governance

failures at SARS on an ongoing basis, whether that be initiated itself, or in response to concerns expressed from inside or outside the organization, and to take appropriate steps for correction. The body should have investigative powers similar to a Commission of Inquiry but would have no authority to interfere directly in the operations of SARS.

Various proposals were made to the Commission as to the nature of that body. One proposal was to expand the role of the Tax Ombud. The Commission considers that taxpayer affairs should be kept separate from matters concerning the governance of SARS and rejects that proposal. Another was that an oversight Board should be established. The Commission considers that to be unwieldy and ineffective.

The view of the Commission is that the appropriate entity should be an Inspector-General, similar to that which exists in the tax authorities in the United States and Australia, with investigative powers similar to those of a Commission of Inquiry, capable of making recommendations to the appropriate authority, whether that be the Commissioner of SARS, the Minister of Finance, Parliament, and ultimately the President. The Commission considers this to be a vital recommendation. It recommends that

the SARS Act be amended to make provision for the appointment of an Inspector-General of SARS, for renewable periods of five years, with powers comparable to those of a Commission of Inquiry, according to a process broadly similar to the process for the appointment of the Commissioner of SARS. The functions of the Inspector-General should be to investigate matters of governance, on his own account or on

bonuses, and all other benefits of their employment, and alterations to those terms of employment'.

RECOMMENDATIONS TO BE ADDRESSED BY NATIONAL TREASURY

A weakness in the procurement process that was abused in the procurement of major consultancy contracts was identified, and the Commission recommended its correction as follows:

National Treasury should review the procurement process where multiple contracts are envisaged for a project to prevent the abuse arising from 'loss leaders' at the outset.

RECOMMENDATIONS TO BE ADDRESSED BY THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

The crime of fraud is committed where a false misrepresentation is unlawfully made, with intent to defraud, that causes actual prejudice or is potentially prejudicial to another. Silence might in itself constitute a misrepresentation.

The Commission found that the former Commissioner of SARS made misrepresentations to the Minister of Finance, positively and by silence, concerning the appointment of consultants to review SARS, and that he and another senior employee made misrepresentations to the relevant procurement committees of SARS, which could amount to fraud. It is possible that the consultancy concerned, Bain & Co, collaborated in those representations. It is a matter for the National Director of Prosecutions to decide whether the offence of fraud was committed. The Commission recommends that

the National Director of Public Prosecutions should consider prosecutions in connection with the award of the Bain & Co. contracts.

RECOMMENDATIONS TO BE ADDRESSED BY THE NEW COMMISSIONER OF SARS.

Various events occurred at SARS during the period under review, which are detailed in the body of the Commission's report, that the Commission considers needs to be corrected by the new Commissioner of SARS. Some of those matters have already received the attention of the Acting Commissioner of SARS. The following are the Commission's recommendations in that regard.

The Large Business Centre

The Large Business Centre, which played an important role in servicing large corporate taxpayers, was effectively eviscerated

It is recommended that the Large Business Centre be re-established.

The Former Compliance and Integrity Units

These units were closed down for no apparent good reason

It is recommended that the Compliance Unit be re-established, and that a high-level Integrity Unit be established.

Information Technology and the relevant Consultancy Contract

Further development of information technology was summarily halted and has not been resumed. It is vital that this be addressed urgently. The contract awarded to a consultancy to review information technology was probably awarded irregularly.

It is recommended that the new Commissioner of SARS recruit one or more suitably qualified persons from within or outside SARS to be placed in a position to take control of SARS information technology and to develop and implement a strategy to renew development of information technology.

It is recommended that SARS considers commencing proceedings to set aside the contracts and to recover expenditure incurred that added no value to SARS.

Employees in Supernumerary Posts and Former Employees

A number of skilled and experienced managerial employees were marginalised by being placed in supernumerary posts.

It is recommended that the new Commissioner of SARS evaluates employees in supernumerary posts and considers their placement in positions in which they are able to add most value to SARS. It is recommended as well that posts in the establishment be evaluated

It is recommended that SARS re-establish capacity to monitor and investigate the illicit trades, in particular the trade in cigarettes, within appropriate governance structures.

VAT Refunds

Systemic failure to refund VAT where appropriate has yet to be corrected.

'It is recommended that SARS urgently undertakes an operational investigation for the purpose of correcting systemic obstacles preventing the prompt refunding of VAT that is due.

Litigation and Legal Costs

Litigation was commenced, and legal costs incurred, in the interests of the former Commissioner of SARS and not in the interests of SARS.

It is recommended that SARS takes steps to recover from the former Commissioner legal costs and expense incurred by SARS for litigation commenced and instructions given as set out in that chapter.

Settlement of Taxpayer Disputes

Stringent governance measures in relation to the settlement of disputes is vital to avoid corruption and abuse.

It is recommended that the terms of reference of bodies authorised to settle claims be reviewed to ensure and, if necessary, strengthen governance mechanisms.

Lifestyle Audits

The declared tax liability of certain taxpayers was found to be inconsistent with their ostensible wealth, and a review of the audit processes concerning taxpayers of that nature is required.

It is recommended that the case selection and audit protocols be reviewed to consider further protocols to ensure proper investigation of tax returns with reference to the ostensible assets of the taxpayer concerned, and that the key performance indicators be reviewed to facilitate such investigations.

Debt Collection by Outside Agencies

It is doubtful that debt collection allotted to outside debt collectors provides value to SARS.

It is recommended that debt collection contracts be reviewed, and that the use of debt collection services be reviewed to determine whether they add sufficient value to SARS.

Inappropriate Media Statements

Various media statements issued by SARS were are befitting the organisation.

It is recommended that disciplinary action be considered against any executive for publishing the media statements referred to in this paragraph. It is further recommended that any such executive be deprived of any authority he or she might have to speak on behalf of SARS without the approval of the Commissioner.

Relations with Other Authorities and International Bodies

Healthy relations with other authorities and overseas organisations have broken down.

It is recommended that SARS take steps to restore the cordial relations that formerly existed with other state institutions including the National Prosecuting Authority, the Financial Intelligence Centre, the Auditor-General and the National Treasury, and develop protocols for interaction with the National Treasury.

It is recommended that steps be taken to restore cordial relations with the OECD.