

For attention

8 August 2011

Honourable T Mufamadi MP

Chairperson Standing Committee on Finance

By email:

Committee Secretary

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ACCA SUBMISSION ON THE TAX ADMINISTRATION BILL: B11 2011

The Association of Chartered Certified Accountants (ACCA) supports any piece of legislation that simplifies the tax system. We believe that consolidating the administrative parts of various tax statutes is a step in the right direction. However although the TAB simplifies administration of tax laws it introduces significant new powers to the South African Revenue Services (SARS). It is our firm believe that these powers should be balanced by the establishment of an independent and empowered Tax Ombud. Furthermore we believe that the protection offered to tax payers against abuse and unwarranted compliance expenses should be improved.

Our submission is presented in three parts. Part 1 is a general comment on the tax system. It provides 12 tenets of taxation that we believe should be present in all tax systems. SARS has indicated that the TAB forms part of a broader revision of the tax laws and we believe that the 12 tenets could assist in this process. Part 2 addresses specific areas in the TAB that we feel should highlighted. In part 3 we share our views on tax simplification which we hope can be accommodated within the TAB. Part 4 provides a brief overview of the ACCA.

We wish to note our appreciation for the consultative approach adopted by SARS and National Treasury in drafting the TAB. The ACCA participated fully in this process and made a number of extensive submissions. We believe that the process followed by SARS should serve as a model for all legislative drafting processes.

Kind regards

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We believe that all tax systems should reflect the following 12 tenets¹ to ensure that the system is fair, accountable and transparent. We present these here as a guideline for the review and drafting of the TAB.

1. AVOIDANCE/EVASION

There is a clear division between tax avoidance (or planning, or mitigation), which is legal, and tax evasion, which is not. The former attempts to reduce the amount of tax that is payable by means that are within the law, while making a full disclosure of the material information to the tax authorities. In contrast, tax evasion works outside the rules by hiding income through non-disclosure, or making wrongful deductions.

Tax law must be clear and certain and businesses will always look to minimise the impact of tax as part of their normal commercial activity. But, while most businesses try only to comply with the law, there are cases of convoluted tax planning schemes designed simply to exploit loopholes in the law. ACCA does not support this artificial activity.

2. TAX AS A PERCENTAGE OF GDP

ACCA accepts that the current unprecedented degree of economic turmoil may require special measures from national governments. Notwithstanding current conditions, we believe that levels of taxation should be clearly stated as a percentage of gross domestic product (GDP), as far as is practicable.

ACCA does not seek to enter the political debate on the appropriate level of tax and public spending. But substantial tax increases represent a significant burden on businesses and individuals and should be subject to an impact assessment designed to challenge the need for new regulations and to establish an accurate and updated estimate of costs. Once new measures are put in place, there should be a means of measuring and evaluating their impact in terms of their proclaimed public policy objectives.

Government should rationalise and set a target of tax levels as a percentage of GDP, as part of its economic management, and then be held to account via objective measurement and variance analysis.

¹ Roy-Chowdhury, C. 2010. ACCA's 12 Tenets of Taxation. Accountancy Futures, Edition1. 2010.

3. TAX SIMPLIFICATION AND STABILITY

ACCA believes that tax legislation and operations should be simple to understand and comply with. Research shows that, globally, companies spend almost two months per year complying with tax regulations – 15 days for corporate income taxes, 21 days for labour taxes and contributions and 21 days for consumption taxes.

It is essential that the volume of legislation is kept to a minimum. Much of the increase in tax law and administration in recent years is due to new anti-avoidance measures introduced by tax authorities. Small businesses in particular have no time to engage in esoteric tax planning and are simply trying to cope with the volume of laws. Changes in tax law – particularly those which reverse tax breaks or incentives and on which basis businesses have made plans – should be kept to an absolute minimum.

4. OPENNESS, TRANSPARENCY AND ACCOUNTABILITY

Tax policies should be transparent and non-discriminatory unless part of a declared discriminatory policy, such as one aimed to encourage new enterprise, for example. ACCA's view is that this use of tax by elected governments is legitimate but such taxes should then meet the principles of being transparent, simple and effective. Governments should be wary of over-complicating the tax system with too much tinkering to 'reward' certain groups of taxpayers. On major issues of tax policy, there should be clear consultation where the options are specified at the start, and properly considered with an audit trail.

There should also be openness on the application of tax policy. So-called 'stealth taxes', such as the phenomenon of 'fiscal drag', whereby personal tax thresholds are not increased in line with rising prices and incomes, thus bringing more individuals into higher-rate tax bands, cannot be justified.

5. CERTAINTY

The tax systems in many jurisdictions can be criticised for their lack of certainty in outcomes or operations. The UK and US authorities do not explicitly ban particular types of tax planning, as they are within the law, but nonetheless take a negative view of them. Companies using these legitimate tax-planning techniques may find themselves having to report to the authorities or becoming the subject of onerous tax enquiries.

Often, these artificial 'blocks' are used by the tax authorities as a way of 'fine-tuning' legislation. This is unacceptable for companies trying to plan their business activities. It should always be possible for different taxpayers who look at legislation to come to the same interpretation of the law.

6. TAX COMPETITIVENESS

The globalisation of business means that each country should ensure its tax rates are competitive and its regime user-friendly. Tax is a key factor in ensuring the overall attractiveness of a location to new business. The danger with competition, however, can lie in very low tax rates, where offshore tax havens or flat tax systems can lead to 'beggar my neighbour' approaches which can entrench wealth inequality.

ACCA supports the principle of nations being free to determine their tax affairs within the context of a global competitive environment. But governments must be wary of causing retaliatory action and trade wars by drastic business tax cuts.

7. EFFICIENCY

Tax systems should be efficient for governments in terms of their ability to secure the revenue that is due to them and to prevent tax leakage and the development of a black economy. But a tax system should also be efficient for taxpayers in terms of their ability to comply with its requirements. It should not be forgotten that small businesses represent the bulk of economic activity in most countries and the burden of regulation can have a disproportionate effect on small firms, as the smaller the business the heavier the compliance cost.

8. SUNSET CLAUSES

Tax systems should have a review principle that demands tax legislation be periodically overhauled and consolidated to bring it up to date and make it easier to follow. Out-dated laws should be removed. All anti-avoidance legislation should have sunset clauses attached. This will ensure they are regularly reviewed.

9. CLEAR LINK FROM TAX TO SPEND (HYPOTHECATION)

There is a lack of credibility with tax systems in that taxpayers do not know why they are being taxed and what the revenue is being spent on. It would be of benefit to society, individuals and businesses if there was a clear link from tax taken to its application.

10. AVOIDANCE OF DOUBLE TAXATION

An essential principle of tax law must be that income be subject to tax only once. This applies both to direct tax and consumption taxes, such as VAT where input tax recovery should be available at each stage of the transaction chain.

In the case of direct taxes there needs to be an efficient and effective mechanism available in all countries to give relief to a company which has already paid tax in another jurisdiction before subjecting that same income, in whole or in part, to taxation. In practice, too many countries do not consider it important enough to offer this tax relief. The 'arm's-length' principle, whereby tax authorities treat transactions between connected parties by reference to the amount of profit that would have arisen if the same transactions had been executed by unconnected parties, is a long-established convention which should be the basis of international tax affairs.

11. HUMAN RIGHTS

Taxpayers have rights as well as responsibilities. They are obliged to pay their tax in full and on time. But states have a responsibility to not impose their will in the field of taxation in an arbitrary or vexatious way. For instance, the incorporation into UK law since October 2000 of the European Human Rights Act has empowered taxpayers to challenge pernicious tax law in certain cases. For example, where it could be argued there is fundamental uncertainty or unjustified additional cost of operating in one particular business vehicle rather than another. A similar approach throughout tax jurisdictions should become the norm.

12. 'TAX SHIFTING' – GREEN TAXES

One of the most important ways in which elected governments can use taxation for social policy is to change behaviour which is damaging to the environment. Accountants should play an active part in efforts to reduce global CO2 emissions. The concept of 'tax shifting', by increasing carbon taxes on the usage of fossil fuels but reducing them for payroll, income or corporate taxes, should be promoted. Governments must also look to use tax policy to aid positive change by incentivising investment in new, cleaner technologies across a wide range of industries.

PART 2 – SPECIFIC COMMENTS

TAB	Comment	Proposal
Chapter 1		
<p>Section 1 “serious tax offence” is a tax offence for which a person may be liable on conviction to a fine ... </p>	<p>The reference to fine generic and may include even a very small amount. In comparison the current definition associates a serious tax offence with imprisonment exceeding two years.</p>	<p>Insert a minimum fine amount above which an offence will be deemed to be a serious tax offence.</p>
Chapter 2		
<p>Section 3(2)(a)(i) Administration of a tax act means to obtain full information in relation to anything that may affect the liability of a persons for tax in respect of a previous, current or future tax period</p>	<p>SARS should not be entitled to call for information prior to the conclusions of transactions affecting future tax periods.</p>	<p>Remove the term “future tax period”</p>
<p>Section 16 Mandate of the Tax Ombud</p>	<p>As a result of the significant powers granted to SARS that enables them to (without compensation)</p> <ul style="list-style-type: none"> - Randomly investigate any tax payer (including compliant tax payers) (S40) - Order any person to provide material related to the tax affairs of another person (S46) - Order any person to appear before a senior SARS official and share information related to the tax affairs of another person (S47) <p>Tax payers should be provided with a mechanism that will protect them from frivolous action by SARS.</p>	<p>The mandate of the Tax Ombud should be expanded to include a review of</p> <ul style="list-style-type: none"> - Faulty procedures - Unfair treatment - Bias or prejudice - Misleading or inadequate advice by the revenue authorities - Refusal by authorities to answer reasonable questions - Mistakes in handling claims of taxpayers - Frivolous investigations conducted randomly by SARS - The compliance burden imposed on tax payers due to SARS administrative actions

		The mandate of the Tax Ombud should also include the power to issue penalties against SARS for possible misconduct and making recommendations for the improvement of the tax system.
Chapter 4		
<p>Section 26</p> <p>The Commissioner may ...require a person who employs, pays amounts to...transact with another person...to submit a return with the required information...</p>	<p>A tax payer has the right to know what information is being shared with SARS about his affairs. A tax payer's privacy and reputation should be protected. Secrecy should only be allowed in the event that SARS suspect fraud or unlawful conduct.</p> <p>This section allows SARS to gather information from persons other than the tax payer's employer. Transactions between a small business and his/her clients are also included in this provision. Small business owners, in providing this information to SARS will be subject to additional cost of compliance even though they cannot recoup the cost from their clients.</p> <p>SARS should be prevented from conducting frivolous inquiries that does not increase the tax base but only increase compliance costs.</p>	<p>Insert a new section requiring SARS to inform the tax payer that additional information is being obtained from third parties.</p> <p>Insert a new section requiring SARS to compensate the third party providing the information to SARS.</p>
<p>Section 28 (1)</p> <p>SARS may require a person...to submit a certificate or statement by the other person setting out the details of...</p>	<p>Align the required certificate or statement that should accompany the financial statements with the requirements of the Companies Act, 2008 and the Close Corporations Act, 1984.</p>	<p>Replace section 28(1)(a) and (b) with the following:</p> <p>Submit an Accounting Officer Report as contemplated by section 62 of the Close Corporations Act, 1984 or if so directed by SARS submit an Independent Review Report as contemplated in section 30(7) (b) of the Companies Act, 2008 or if so directed by SARS submit an Audit Report as required by section 30(7) (a) of the Companies Act, 2008.</p>
<p>Section 34 Definitions</p> <p>Financial reporting</p>	<p>In terms of the Companies Act, 2008 only those companies that are required to be</p>	<p>Replace the section with the following:</p>

<p>standards means in the case of a participant that is a company required to submit financial statements in terms of the Companies Act,financial reporting standards as defined in section 1 of the Act...or in any other case, the International Financial Reporting Standards (IFRS)</p>	<p>audited should file their financial statements with the Companies Commission. These companies tend to be larger in terms of size and as a result are required by the Companies Act, 2008 to prepare financial statements in terms of IFRS.</p> <p>The Companies Act, 2008 exempts smaller companies from the requirement to prepare financial statements in terms of IFRS.</p> <p>Section 34 of the TAB seems to imply that all companies should compare deductions allowed in terms of the Income Tax Act with expenses allowed in terms of IFRS.</p> <p>This means that all companies will as a result of the TAB, in effect have to prepare financial statements in terms of IFRS – negating the benefits provided for in the Companies Act.</p>	<p>Financial Reporting Standards means in the case of companies, financial reporting standards as prescribed by the Companies Act, 2008. In any other case any appropriate accounting framework that provides fair presentation.</p>
<p>Section 35(1)(c) An arrangement is a reportable arrangement if...a tax benefit...will be derived...to a participant by virtue of an arrangement and the arrangement...gives rise to an amount...that is...disclosed as (i) a deduction for purposes of the income tax act but not as an expense for purposes of financial reporting standards</p>	<p>This section requires that companies should report the details of a certain transactions to SARS if the transaction results in a reduction of tax.</p> <p>This provision will result in all companies having to file a reportable arrangement on a monthly basis.</p> <p>The definition of financial reporting standards as provided in Chapter 4, seems to indicate that all companies should prepare financial statements in terms of IFRS. Companies that are required to prepare financial statements in terms of IFRS will always show a difference between depreciation claimed for tax purposes and depreciation claimed as an expense in terms of IFRS.</p> <p>It should also be considered that most companies are small companies i.e. they are classified by the Companies Act, 2008 as having a public interest score of less than 100 points. Small companies are not required by the Companies Act, 2008 to prepare financial statements in terms of International Financial Reporting Standards (IFRS). They are allowed to prepare financial statements either on a modified cash basis or tax basis of accounting. This means that they calculate depreciation in accordance with the Income Tax Act provisions i.e. Practice Note 19. They do not calculate depreciation in accordance with IFRS. Their depreciation expense will therefore always be the same as the</p>	<p>Remove section 35(1)(c), (d) and (e) and replace with the following</p> <p>A reportable arrangement should only be reported if the sole purpose of the transaction is to avoid the payment of tax.</p>

	<p>depreciation deduction claimed for income tax purposes.</p> <p>However the definition of financial reporting standards seems to imply that they will also be subject to IFRS for the purposes of section 35(1) (c). Thus forcing them also to report reportable arrangements.</p>	
Chapter 5		
<p>Section 40</p> <p>SARS may select a person for inspection,on the basis of any consideration...including on a random or a risk assessment basis</p>	<p>Chapter 5 of the TAB grants information gathering powers to SARS. Although these powers are important to ensure everybody pays their fair share of tax we believe that they need to be tempered so as to protect the tax payer from abuse.</p> <p>Most tax payers are compliant with tax laws. This is evidenced by the record amounts of taxes that are collected each year by SARS. Compliant tax payers incur significant costs to administer and pay their fair share of tax.</p> <p>They should not be subject to additional inspection costs that are allocated on a random basis by SARS. In addition most of these inspections will not increase the tax base but will instead increase the compliance costs of already compliant tax payers.</p> <p>Tax payers should be protected from abuse. This can be achieved by forcing SARS to pay compensation to the tax payer for disruptive random tax inspections that do not produce any additional tax.</p> <p>Frivolous random tax inspections will negatively affect small businesses the most. According to the Federation of Small Businesses (UK) "tax inspections last longer in small businesses and produce the least additional tax, often at a significant psychological cost to the business owner. Over the past few years the taxman has stepped up the pressure on small business with a huge increase in investigations. But the crackdown has yielded only a small increase in the amount clawed back by the revenue</p>	<ol style="list-style-type: none"> 1. Remove the word "random" from the section 2. Include a sentence requiring SARS to have some suspicions about a taxpayer upon which to seek information. 3. Include a general provision that entitles the tax payer to compensation in the event that the inspection turns out to be frivolous. 4. The TAB should explicitly provide for a mechanism whereby the taxpayers is empowered to recover costs from SARS related to: <ol style="list-style-type: none"> a. Abuse of power by SARS b. Inefficiencies and loss of taxpayer documents by SARS c. Lack of performance by SARS in terms of the SARS charter.

	services”.	
<p>Section 47(1) A senior SARS official may...require a person, whether or not chargeable to tax, to attend...at the time and place designated...for the purpose of being interviewed by a SARS official concerning the tax affairs of the person or another person...</p>	<p>The cost of tax investigation and collection should not be transferred from SARS to another person just because that person entered into a transaction with a tax payer that is the subject of an investigation.</p> <p>Hundreds of thousands of business transactions are entered into between contracting parties on a daily basis. However the current provision introduces an artificial barrier to freedom of association and trade.</p> <p>The cost of doing business will increase as the transaction price will have to provide for the possible risk and cost of being summoned to appear before a SARS official, even though the transaction is perfectly legitimate.</p>	<p>Remove section 47(1) or alternatively the TAB should provide for compensation to be paid to any person required to appear before a SARS official.</p>
Chapter 18		
<p>Section 241 A senior SARS official may lodge a complaint with a controlling body</p>	<p>We support the provisions contained in section 241. However a number of professional bodies currently regulate their members in term of the tax profession.</p>	<p>We suggest that SARS and the various professional bodies arrange a meeting to prepare and issue a guidance note that will assist and advise members on their professional conduct in relation to taxation. The document should set out the fundamental principles which govern the conduct of members, namely: Integrity, Objectivity, Professional competence and due care, Confidentiality and Professional behaviour.</p> <p>The ACCA is already a signatory to a similar agreement with the revenue office in the UK.</p>

PART 3 – TAX SIMPLIFICATION

The Minister of Finance, Pravin Gordhan in his recent budget speech said that “We need to do things differently. We need to have the courage to pilot new approaches and build new partnerships, promoting innovation throughout our economy”.

We believe than a new approach would be to appoint an Office of Tax Simplification to review South Africa’s tax laws to identify areas of simplification. A simplified tax regime would greatly enhance the ability of small businesses to focus less time on tax compliance and more time on growing their businesses and employing more people.

The drive towards tax simplification is not unique to South Africa, indeed the new Government in the United Kingdom (UK) recently established the Office of Tax Simplification to conduct a review and make recommendations on how to simplify the tax system, ease administration and reduce uncertainty for small businesses.

According to the proposal an Office of Tax Simplification will be able to provide independent advice to parliament and National Treasury. The Office should be empowered to:

- Examine evidence and identify the areas of the tax system that cause the most day-to-day complexity and uncertainty for small businesses
- Provide the Government with independent advice on where there are areas of complexity within the South African tax system with the potential for simplification and recommend priority areas for simplification
- Consider the impact of any simplification in these areas on different business sectors, specifically the small business sector.

It is clear that the South African revenue authorities have already made some progress towards simplification. In 2005 the then Minister of Finance, Trevor Manuel, said that a rewrite of the Income Tax Act was on the cards. Furthermore the Tax Administration Bill is a good example of how tax law could be drafted in simpler language. However we believe that an Office of Tax Simplification will greatly enhance this process.

PART 4 - ABOUT THE ACCA

- ACCA (the Association of Chartered Certified Accountants) is the global body for professional accountants. We aim to offer business-relevant, first-choice qualifications to people of application, ability and ambition around the world who seek a rewarding career in accountancy, finance and management.
- Founded in 1904, ACCA has consistently held unique core values: opportunity, diversity, innovation, integrity and accountability. We believe that accountants bring value to economies in all stages of development. We aim to develop capacity in the profession and encourage the adoption of global standards. Our values are aligned to the needs of employers in all sectors and we ensure that, through our qualifications, we prepare accountants for business. We seek to open up the profession to people of all backgrounds and remove artificial barriers, innovating our qualifications and their delivery to meet the diverse needs of trainee professionals and their employers.
- ACCA works to strengthen a global profession based on the application of consistent standards, which we believe best supports international business and the desire of talented people to have successful, international careers. We champion the needs of small and medium sized business (SMEs) and emerging economies, and promote the value of sustainable business.
- To achieve this we work with global bodies such as the International Federation of Accountants (IFAC) and with 71 global accountancy partnerships. Above all, we seek to bring long-term value to economies in which we develop and support professional accountants.
- We support our 147,000 members and 424,000 students in 170 countries, helping them to develop successful careers in accounting and business, with the skills needed by employers. We work through a network of 83 offices and centres and more than 8,500 Approved Employers worldwide, who provide high standards of employee learning and development.
- ACCA works in the public interest, assuring that its members are appropriately regulated for the work they carry out and, promoting principles-based approaches to regulation. We actively seek to enhance the public value of accounting in society through international research and we take a progressive stance on global issues to ensure accountancy as a profession continues to grow in reputation and influence.