The Standing Committee on Finance
Parliament of the Republic of South Africa
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Cape Town

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15 August 2011

Chair,

Representations on the Tax Administration Bill, Bill 11 of 2011

We present herewith PwC's written submissions on the above-mentioned Bill.

In this set of submissions, we include only what we consider to be the most critical matters.

We have tried to keep our submissions concise, but this does mean that you might require further clarification. In this respect, we have requested the opportunity to present oral submissions at the hearings scheduled for 16 and 17 August 2011 where we shall highlight certain of the submissions made herein.

Our representations relate to the following areas:

General submissions

1. Rationale for Bill
2. Balance of the Bill

Specific submissions

3. Practice generally prevailing
4. Tax Ombud
5. Information gathering powers
6. Search and seizure
7. Legal professional privilege
8. Due date for payment of assessment

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9. Dispute resolution SARS deadlines
10. Security by taxpayers
11. Appointment of third party to satisfy tax debts
12. Interest
13. Reportable arrangement penalties
14. Remittance of penalties
15. Understatement penalties
16. Consequential amendments to tax Acts

General submissions

1. Rationale for Bill

1.1 Overall we are supportive of the need for the Bill and the objectives it seeks to achieve of consolidating the administrative provisions of the various tax Acts into a single piece of legislation and simplifying the provisions related to administration. The Bill is laid out in a logical manner and this greatly aids taxpayers and tax practitioners in identifying the relevant provisions of the Bill.

1.2 In this regard, we applaud SARS for the initiative that they have undertaken in what was a difficult and time consuming exercise.

1.3 However, while SARS has consulted widely in this process, including with ourselves, we remain concerned with respect to a number of matters on which we have made submissions that we believe have not been adequately addressed in the Bill or have been disregarded or rejected by SARS. We have addressed these below.

2. Balance between rights and obligations

2.1 In the memorandum on the objects of the Bill, it is stated that:

"It seeks to … achieve a balance between the rights and obligations of both SARS and taxpayers in a transparent relationship.

Importantly, the TAB seeks to achieve a balance between the powers and duties of SARS, on the one hand, and the rights and obligations of taxpayers, on the other. This balance will contribute to the equity and fairness of tax administration. International experience has demonstrated that if taxpayers perceive and experience the tax system as fair and equitable, they will be more inclined to fully and voluntarily comply with it."

2.2 Unfortunately, the equity and fairness alluded to is, from the point of view of taxpayers and tax practitioners, in reality not achieved. While it is acknowledged that some concessions have been made in favour of taxpayers, these are relatively minor and in many respects and in most respects go no further than incorporating the existing rights and remedies that taxpayers have under the Constitution and administrative law. The powers of SARS and obligations of taxpayers have been increased substantially. For example, the increased powers available to SARS and obligations of taxpayers include the following:

- Significantly increased information gathering powers, including:
    - the power to inspect premises with no notice to determine the identify of the occupants, or whether the premises are being used for trade or whether the persons are registered for tax (s45);
    - the power to require persons to translate documents into an official language at their own cost (s33);
    - the power to require persons to present themselves for interview (s47);
    - the power to search without a warrant (s63);
- Increased obligations on taxpayers to assist during field audits (s49);
- The power to issue jeopardy assessments (s94);
- An increased burden of proof for taxpayers (s102);
- The limitation of taxpayers' rights of access directly to the High Court on tax disputes (s105);
- The right to demand security from taxpayers for tax which has or may become payable (s161);
- The power to accelerate the due date for payment of tax in certain circumstances (s162);
- The power to apply for a preservation order and to seize assets in anticipation thereof (s163);
- The power to hold financial management, shareholders of companies and transferees personally liable in certain circumstances (ss181, 182 and 183);
- The power to compel a taxpayer to repatriate foreign assets to pay a tax debt (s186);
- The power to withhold a refund subject to finalisation of an audit (s190);
- Substantially increased reportable arrangement penalties (s212);
- Limitations on amounts of penalties that may be remitted (s217);
- The imposition of understatement penalties where a reasonable tax position is taken (s223);
- Substantially enhanced criminal offences (s234); and
- The prohibition of undesirable persons registering as tax practitioners (s240).

2.3 On the other hand, the concessions made by SARS as part of the consultation process are relatively minor. These concessions include, for example, the following:

- The introduction of the Tax Ombud (but see our submissions in this regard);
- The right of taxpayers to be kept informed on the progress of audits (but see our submissions in this regard);
- A reduction in the prescription period of tax debts from 30 years to 15 years; and

- The introduction of a permanent voluntary disclosure programme.

2.4 In our view, balance, equity and fairness cannot be achieved in relation to the additional powers granted to SARS and obligations imposed on taxpayers by simply putting in place vague so-called “checks and balances” in relation to those additional powers. Balance can only be achieved where specific additional rights are granted to taxpayers and specific additional obligations are imposed on SARS.

2.5 The result is that there is little balance, equity and fairness between the powers of SARS and the obligations of taxpayers on the one hand and the duties of SARS and the rights of taxpayers on the other. In fact, the Bill is significantly skewed in favour of SARS. It must be borne in mind that the Bill was drafted by SARS. There is a natural tension between taxpayers and SARS. SARS is driven by its mandate to collect the maximum amount of taxes while taxpayers are motivated by the desire to pay the minimum amount of tax (for the most part within the law).

2.6 A major problem with this Bill is that SARS has a naturally biased point of view in terms of what is fair and equitable. As such, the Bill is drafted in a very much one-sided manner so as to suit SARS while paying little attention to the needs and rights of taxpayers.

2.7 SARS have stated that the Bill recognises that the majority of taxpayers are compliant and that there is a minority of taxpayers who seek to evade tax. While we agree that the majority of taxpayers are compliant and a minority is non-compliant, we do not agree that the Bill effectively recognises the difference between the two. There is a very real concern that the additional powers conferred on SARS could be abused to target compliant taxpayers.

2.8 By way of example:

- SARS could undertake an audit of a taxpayer in terms of s41 (this does not necessarily mean that the taxpayer is viewed as being non-compliant, but the audit could be done purely on the basis of random selection or any other consideration) —this aspect is not considered objectionable;
- SARS identifies a tax position adopted by the taxpayer, in relation to a year of assessment that is about to prescribe in terms of s99, with which it disagrees;
- SARS does not comply with the provisions of s42(2)(b) , i.e. does not give the taxpayer an opportunity to respond to the audit findings by virtue of the provisions of s42(5), based on a contention that prescription will prejudice the outcome of the audit and issues the assessment immediately;
- The notice of assessment is issued on 30 March with a due date for payment of 31 March in terms of s92 read with ss96 and 162; and
- SARS immediately gives notice to the taxpayer’s bank in terms of s179 requiring the bank to pay over any money held for the taxpayer to SARS.

2.9 The above may sound far-fetched; however, there are real life examples where SARS has acted precisely in this manner in relation to taxpayers that are not considered to be non-compliant. Unfortunately, there is nothing in the Bill that would prevent SARS from continuing to act in this manner as the relevant checks and balances that would otherwise limit SARS's ability to behave in this way are absent. It is particularly noticeable that SARS applies these types of tactics more often in February and March each year when it is under pressure to maximise revenue collections ahead of the end of the government financial year and to meet or exceed its revenue collection targets.

2.10 We have requested a number of changes to be made to the Bill in order to achieve greater balance, equity and fairness. Unfortunately, most of these have been rejected or ignored.

2.11 Some of these are addressed in greater detail under the specific submissions below. Examples of these requests include:

- Increasing the independence and powers of the Tax Ombud;
- Extending legal professional privilege to tax advice by registered tax practitioners;
- Requiring SARS to comply with informing taxpayers on the outcome of audits before raising assessments;
- Introducing third party oversight of SARS's power to inspect premises and power of search and seizure without a warrant;
- Expanding the range of official publications on which taxpayers should be entitled to rely as SARS practice generally prevailing;
- Minimum time periods between issuing notice of assessments and the due date for payment thereof;
- Providing safeguards for the use by SARS of its extraordinary collections powers in terms of collecting tax debts from third parties;
- Relaxing the proposed limitations on the remission of penalties;
- Scrapping the imposition of understatement penalties where the taxpayer has taken a reasonable tax position; and
- Imposing consequences on SARS for missing deadlines in the dispute resolution process.

2.12 Submission: the Bill needs to be balanced and the skewed position in favour of SARS should be remedied by including some or all of the recommendations included in this document.

2.13 In precisely the same way that the taxpaying community must acknowledge the existence of certain non-compliant or negligent taxpayers as well as downright abusive tax evaders, we call on SARS and the legislature to honestly and soberly acknowledge that SARS employs fallible human beings that are occasionally prone to abuses of power —from which ordinary law-abiding taxpayers need protection.

Specific submissions

3. Practice generally prevailing

3.1 The term "practice generally prevailing" is defined in s5 as a practice set out in an official publication. An "official publication" is in turn defined in s1 as a binding general ruling, interpretation note, practice note or public notice. This concept is important for, *inter alia*, the issuing of additional assessments by SARS. For example, an additional assessment may not be issued by SARS in terms of s99 if the amount in question was not originally assessed to tax in accordance with a practice generally prevailing at the time of the original assessment. In this regard, the provision acts as a safeguard for taxpayers and provides certainty in the sense that SARS will be bound by its own practices.

3.2 It is acknowledged that the existing provision is a significant improvement on the draft version which limited the term only to publications binding on SARS (in effect binding general rulings). However, it is submitted that the term "official publication" is not sufficiently broad to capture all SARS publications on which taxpayers should be entitled to rely. SARS publishes comprehensive guides on a range of tax matters on which taxpayers should be entitled to rely. These comprehensive guides include, for example, those on capital gains tax and secondary tax on companies.

3.3 Submission: the definition of "official publication" should be expanded to cover comprehensive guides issued by SARS and any other guides on which taxpayers should be able to rely.

4. Tax Ombud

4.1 The proposed introduction of a Tax Ombud is a welcome change. However, we are concerned that the proposal does not go far enough.

4.2 In this context, it is worth considering the *status quo*. Currently, taxpayers have an internal remedy available to them in the form of the SARS Service Monitoring Office (SSMO) which was established in 2003. The SSMO was a SARS initiative to provide taxpayers with a remedy for service failures. The SSMO has no powers and is for all intents and purposes simply a complaints department established for the purposes of hearing service-related failures.

4.3 Although the proposed Tax Ombud is a slight improvement on the SSMO in that it is appointed by and reports directly to the Minister of Finance, it is not, contrary to what is stated in the memorandum on the object of the Bill, truly independent of SARS. This is because the costs of the Tax Ombud's office are paid out of the funds of SARS and the staff are employed by SARS and seconded to the Tax Ombud.

4.4 The Tax Ombud only has powers to review complaints and to attempt to resolve these through mediation or conciliation. It is has no powers to compel SARS to do or to refrain from doing anything. Nor may the Tax Ombud review any matter unless the taxpayer has exhausted the available complaints resolution mechanisms within SARS, which would include the existing SSMO.

4.5 The effect of all this is that the Tax Ombud as proposed in the Bill is little more than a legislated form of the SSMO and will do little to enhance taxpayers' rights. Rather, the proposal as currently structured would simply add another step in the process before a taxpayer has access to the courts under the Promotion of Administrative Justice Act.

4.6 It is worth noting that in the US the Taxpayer Advocate may issue a Taxpayer Assistance Order in certain circumstances. This order may require the IRS to cease any action, take any action or refrain from taking any action in relation to certain administrative matters within a specified time period.

4.7 Submissions:

(i) The Tax Ombud's office should be truly independent of SARS and in this regard should be funded out of the Treasury and the staff should not be SARS officials.

(ii) The Tax Ombud should be given the power to compel SARS to act in a certain way in relation to those matters on which it has authority in a similar manner to that afforded to the Taxpayer Advocate in the US.

5. Information-gathering powers

5.1 The debacle surrounding the proposed suspension of s45 of the Income Tax Act has highlighted the application (or rather lack thereof) of the existing information-gathering powers afforded to SARS. SARS has known about funnel funding schemes (one of the main targets of the proposed suspension of s45) since 2007. However, it has become apparent that SARS has not fully used the existing information-gathering powers available to it to get to the bottom of these schemes. It is notable that the most recently revised proposals seek to invoke information-gathering powers that were legislated in 2008 (s41(5)), only after taxpayers made submissions as to the (baffling) non-application of these pre-existing powers.

5.2 While it is acknowledged that in some respects enhanced powers for SARS are justified, the lack of application of the existing provisions begs the question of why SARS has not used these provisions to their full extent in the past. This lack of application is responsible, at least partly, for the debacle related to the proposed suspension of s45 of the Income Tax Act.

5.3 Submission: The Standing Committee should ask pointed questions of SARS on why they have not used these powers to their full extent in the past.

5.4 S45 of the TAB gives SARS the power to enter and inspect premises without notice for purposes of determining the identity of the person occupying the premises, whether the person is conducting a trade, whether the person is registered for tax or whether the person is complying with the record-keeping requirements of the Bill. It is considered that this limitation of a taxpayer's constitutional rights is grossly excessive in relation to its stated purpose and is open to abuse by SARS. While it is acknowledged that the tax base needs to be broadened and those persons operating outside the tax net need to be brought within it, there are far less injurious and more subtle procedures that could be followed in this regard, aside from a gang of tax collectors invading business premises and potentially disrupting trade of compliant persons.

5.5 There is certainly no valid reason why SARS should be able to enter any business premises without notice for purposes of determining whether a person is registered for tax or whether a person is keeping adequate records. After all, once the identity of a person is known, the information regarding tax registration is held by SARS itself and once it has been established that a person is registered for tax there should be no risk involved with giving notice to such a person of SARS's intention to verify compliance with the record-keeping requirements.

5.6 When it comes to persons whose identity is not known and where there is a reasonable suspicion that a person is conducting a business and is not registered for tax, there is no reason why SARS should not be required to obtain a warrant to inspect such premises.

5.7 Submission: s45 should be refined to make it less invasive by requiring a warrant to be obtained for purposes of identifying persons and whether a trade is being conducted and should exclude the registration for tax and compliance with record-keeping requirements from its ambit.

5.8 S33 of the Bill provides SARS with the power to require persons providing information to translate the information into an official South African language. The cost of such a translation is not borne by SARS but by the person providing the information. It is considered that conferring this power on SARS is unreasonable. This is particularly so given that SARS has wide powers to request information from persons other than the taxpayer in question.

5.9 Submission: Persons should be required only to provide information to SARS in its original format. Should SARS require translations of such information this should be undertaken by SARS at its own cost.

5.10 In terms of s42, a taxpayer has the right to be informed of the status or outcome of an audit. However, the provision does not stipulate any time period for SARS to provide taxpayers with status updates.

5.11 Furthermore, SARS is not obliged to provide the taxpayer with a status update or outcome of the audit where SARS has a reasonable belief that compliance with those obligations would

impede or prejudice the audit. It is difficult to contemplate a situation where compliance with the reporting obligations would impede or prejudice the audit'. It is apparent from the memorandum on the objects of the Bill that the primary motivation behind this limitation is for SARS to be able to ignore the rights of taxpayers where prescription is imminent.

5.12 It is submitted that prescription can never be an acceptable excuse to deny a taxpayer the constitutionally enshrined right to fair administrative action given the lengthy prescription period and exceptions thereto afforded to SARS. The discretion given to SARS to override its obligation to inform taxpayers of its audit findings and give them an opportunity to make representations undermines the purpose and objective of s99 of the Bill which sets out the periods of prescription for the issue of assessments if this power is to be invoked in cases where prescription is imminent.

5.13 The provision is also in conflict with section 3 of the Promotion of Administrative Justice Act and section 33 of the Constitution. There can be no valid reason for SARS to be empowered to move directly from an audit to the issue of an assessment without providing the taxpayer with an opportunity to make representations on the findings of the audit. In any event, section 3(4) of the Promotion of Administrative Justice Act empowers an administrator to depart from the proposed process in certain circumstances. These circumstances should be adequate to address any concerns that SARS may have.

5.14 Submissions:

(i) SARS should be obliged to keep taxpayers informed of the progress on audits at stipulated intervals.

(ii) SARS should not have the discretion not to comply with the reporting requirements provided for in s42.

6. Search and seizure

6.1 SARS has now acquired the right in terms of s63 to search premises and seize information without a warrant in certain circumstances. The circumstances in which SARS may search without a warrant are where a senior SARS official is satisfied that there may be an imminent removal or destruction of information, if SARS applied for a search warrant it will be issued and the delay in obtaining the warrant would defeat the object of the search and seizure.

6.2 The importance of a warrant within a constitutional democracy and the balance between the limitation of a taxpayers constitutional rights and public interest to prosecute tax evaders has recently been clarified by the Constitutional Court in the *Minister of Safety and Security vs GW van der Merwe & others* [2011] ZACC 19.

6.3 The Court, when commenting on search warrants, said that when limiting the taxpayer's rights such limitation is achieved by a search warrant by specifying the procedure for the warrant to

prevent abuse. Safeguards, the Court said, also ensure that in exercising the right it is done within the confines of the authoring law and the Constitution. The Court makes it quite clear that a search or seizure is a substantial limitation of a taxpayer's constitutional rights and a search warrant is the mechanism to balance the right of the state with that of the taxpayer.

6.4 Where a search or seizure without a warrant is authorised by legislation it needs to be held to a higher constitutional norm than a search with a warrant as the protection mechanism is excluded, namely the warrant itself. In this regard, leaving the decision to search without a warrant to the discretion of a SARS official is questionable in the extreme and leaves this power open to abuse.

6.5 While the concern that has led SARS to propose such a power is understandable, the question that must be asked is whether the power afforded to SARS is balanced by the necessary safeguards. This power should only be used in the circumstances envisaged and should be subject to safeguards to ensure that it is not used for purposes for which it is not intended.

6.6	Submission: At the very least, the decision by a SARS official to invoke s63 should be subject to review by a court after the search and seizure.

7. Legal professional privilege

7.1 As part of the consultation process on the Bill, we and other interested parties requested that SARS include in the Bill a provision extending a statutory legal privilege for the provision of tax advice provided by registered tax practitioners, regardless of whether the tax practitioner is an admitted attorney or advocate. SARS has rejected this request, seemingly on the basis that in its view legal privilege and regulation of tax practitioners should go hand-in-hand. International practice in this regard is mixed, with some jurisdictions that have a statutory privilege for tax advisors also regulating them while others have no regulation. However, this impasse is not necessarily insurmountable. New Zealand has a statutory privilege although it does not regulate tax practitioners. However, only approved groups of tax advisors qualify for the statutory privilege subject to them being subject to a professional code of conduct and disciplinary procedures. In the absence of tax practitioners being regulated, a similar model would be a suitable compromise in the context of South Africa and would enable members of approved professional bodies to qualify for privilege.

7.2 In any event, it should be noted that in terms of the Bill, only persons who are registered with SARS as tax practitioners may provide tax advice or compliance services to another person. It is specifically provided in s240 that a person may not register as a tax practitioner if the person has in the last 5 years been removed from a related profession or convicted of certain offences. The result is that tax practitioners are regulated to some extent insofar as their conduct is concerned. Should a tax practitioner be suspended from the membership of a professional body

in terms of that body's disciplinary procedures or convicted of certain offences, that person would be disqualified from acting as a tax practitioner.

7.3 We are of the view that respecting the confidentiality of communications between tax practitioners and taxpayers is a fundamental right that should be afforded to taxpayers and that will go a long way towards making the Bill more balanced as between the powers and duties of SARS and the rights and obligations of taxpayers. We set out below our detailed motivation in this regard.

7.4 Legal professional privilege first appeared in English common law in the 16th century. In essence, the rule is that communications between a client and legal advisor may not be disclosed without the client's consent. The rationale for the rule has been concisely set out as follows:

"The privilege is usually said to exist for the following reasons. Human affairs and the legal rules governing them are complex. Men are unequal in wealth, power, intelligence and capacity to handle their problems. To remove this inequality and to permit disputes to be resolved in accordance with the strength of the parties' cases, lawyers are necessary, and privilege is required to encourage resort to them, and to ensure that all the relevant facts will be put before them, not merely those the client thinks favour him. If lawyers are only told some of the facts, clients will be advised that their cases are better than they actually are, and will litigate instead of compromising and settling. Lawyer-client relations would be full of 'reserve and dissimulation, uneasiness and suspicion and fear' without the privilege; the confidant might at any time have to betray confidences."

7.5 Initially the common law concept of legal professional privilege applied to communications made for the purpose of litigation, but has since been extended to all communications for the purpose of giving or receiving legal advice as evidenced in the following extract from the judgment of Botha AJ in the case of *S v Safatsa*:

"The conflict between the principle that all relevant evidence should be disclosed and the principle that communications between lawyer and client should be confidential has been resolved in favour of the confidentiality of those communications. It has been determined that in this way the public interest is better served because the operation of the adversary system, upon which we depend for the attainment of justice in our society, would otherwise be impaired: see Waugh v British Railways Board [1980] AC 521 at 535, 536

The privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation."

7.6 Legal professional privilege has been established as a “basic or fundamental common law right”. However, it is not a right that applies to all communications with legal advisors. In order for a communication to be privileged it must meet the following requirements:

- The communication must be with a legal advisor acting in a professional capacity;
- It has to be made for the purpose of obtaining legal advice or litigation;
- It must be made in confidence; and
- It must not be for the purpose of committing a crime or fraud.

7.7 What is not clear in our common law is whether that right extends to communications only between clients and admitted attorneys or advocates or also to communications with other suitably qualified legal advisors.

7.8 The fact of the matter is that most tax advice (which is legal advice on a specialist area of law) is provided by persons who are not admitted attorneys or advocates. For example, tax advice is also provided by a variety of suitably qualified professionals, such as chartered accountants. It is submitted that, in the modern world and given the public interest purpose of legal privilege, legal privilege should be extended to communications between clients and suitably qualified tax advisors who are not admitted attorneys or advocates. It is in the public interest to encourage taxpayers to communicate with their tax advisors in the comfort that such communications will be confidential and protected. Tax practitioners fulfil a vital role in the South African tax system, not only in terms of providing tax advice to taxpayers on how to minimise their tax liabilities, but also on advising taxpayers on the tax law, how to comply therewith and to pay taxes that are legally due.

7.9 A further reason as to why legal privilege should extend to tax advice provided by persons who are not admitted attorneys or advocates is that it creates an uneven playing field and a competitive advantage for law firms over other tax practitioners, an advantage that law firms have been quick to promote. Lawyers are no more qualified to advise on tax law than any other suitably qualified person and should not enjoy a competitive advantage in this regard. Such a situation is not in the public interest, particularly considering that lawyers constitute a small minority of tax practitioners and other tax practitioners include in their number some of the most experienced and respected tax practitioners in the country.

7.10 The development of the common law has not kept pace with the modern world. Legal privilege should not be dependant on the specific nature of the qualification of the person giving the advice but on the nature of the advice given and the context in which it is given. It is therefore submitted that it is appropriate that Parliament intervene in order to provide a statutory remedy to the shortcomings of the common law.

7.11 The argument for legal privilege not being extended to tax advice provided by tax practitioners is that SARS may, arguably, be entitled to request any confidential communications between a

taxpayer and his tax advisor, including in relation to matters that are subject to objection or appeal or in respect of which other disputes before the courts are pending. This position is contrary to the fundamental principles set out above.

International precedent

7.12 A number of jurisdictions have a statutory intervention to extend legal privilege to tax advisors.

United States

7.13 In the United States legal privilege is extended to communications between a taxpayer and a federally authorised tax practitioner for tax advice to the extent the communication would be considered a privileged communication between a taxpayer and an attorney. However, the statutory privilege is limited to non-criminal matters and does not apply to communications in connection with the promotion of tax shelters. Tax practitioners in the US are fully regulated.

United Kingdom

7.14 In the United Kingdom the revenue authority is statutorily restricted from obtaining communications between a tax advisor and taxpayer the purpose of which is the giving of tax advice. The restriction only applies to obtaining such information from the tax advisor and not from the taxpayer. Tax advisors in the UK are not regulated. The issue of whether legal privilege should extend to tax advice provided by accountants is currently the subject of judicial consideration in the United Kingdom in the case of *Prudential Plc v Special Commissioner of Income Tax*. Prudential Plc is arguing that the common law legal privilege should extend to tax advice provided by an accountant. The matter was decided in favour of the respondent in the High Court and the Court of Appeal as these courts considered themselves bound by precedent of the latter court in this regard and these courts suggested that an appropriate intervention would be for legal privilege to be extended by statute. The matter is to be heard on appeal by the Supreme Court.

New Zealand

7.15 In New Zealand a statutory privilege applies to ‘tax advice documents’ in terms of the Tax Administration Act. In terms of these provisions a person who is called upon to disclose information is not required to disclose a book or document that is a tax advice document. A ‘tax advice document’ is a book or document that is:

- confidential;
- created by:
    - the person for the purpose of instructing a tax advisor to give advice about the operation and effect of tax laws;

- a tax advisor or employee of a tax advisor for the purpose of recording research and analysis to give advice about the operation and effect of tax laws;
- a tax advisor or employee of a tax advisor for the purpose of giving advice about the operation and effect of tax laws; and

- is not created for purposes of committing, promoting or assisting the committing of an illegal or wrongful act.

7.16 A tax advisor is defined as a person who is subject to the code of conduct and disciplinary process of an approved advisor group. An approved advisor group is a group that is approved by the Commissioner and includes persons who have a significant function of giving advice on tax laws, are subject to a professional code of conduct and a disciplinary process enforcing compliance with the code of conduct. Tax advisors are not regulated in New Zealand.

7.17 Any 'tax contextual information' included in a tax advice document must be disclosed. Tax contextual information includes facts or assumptions, descriptions of steps in transactions, advice not relating to tax laws, and advice relating to the collection of tax debts.

Australia

7.18 Australia does not currently have a statutory privilege for tax advice provided by accountants. However, the Australian Tax Office has a formal policy in place to the effect that certain documents relating to advice provided by professional accounting advisors should be confidential. Australia is in the process of considering a statutory privilege for tax advisors. The rationale for the concession is embodied in the following extract from the guidelines:

> *"While recognising that the Commissioner has the legislative power to request access to most documents, it is accepted that there is a class of documents which should, in all but exceptional circumstances, remain within the confidence of taxpayers and their professional accounting advisors. In respect of such documents the ATO acknowledges that taxpayers should be able to consult with their professional accounting advisors on a confidential basis in respect of their rights and obligations under taxation laws to enable full and frank discussion to take place and for advice to be communicated on that basis."*.

Germany

7.19 The German Fiscal Code provides that, *inter alia*, tax consultants, auditors, tax representatives and certified accountants may refuse to provide information entrusted to them or which became known to them in their professional capacities.

7.20	Submission: A limited statutory privilege should be introduced for registered tax practitioners along similar lines to that adopted in New Zealand and subject to similar requirements and restrictions.

8. Due date for payment of assessment

8.1 The Bill does not provide for a minimum time period between the date the assessment is issued and the date that may be indicated on the assessment as the due date for payment. In practice, we have seen SARS issue assessments with a due date for payment as the same date on which the notice of assessment is issued. This practice is particularly common around the end of the government financial year. Bizarrely, we have even seen assessments issued with a due date for payment before the date on which the notice of assessment is issued.

8.2 The first draft of the Bill issued for public comment contained a provision to the effect that the due date for payment of an assessment may not be less than 30 calendar days after the date an assessment is issued. This provision has since been removed from the Bill. The result is that the ability of SARS to set due dates for payment of assessments remains open to abuse and we have little doubt that SARS will continue to abuse this power as they have done in the past.

8.3	Submission: it is submitted that the Bill should prescribe a minimum time period between the date a notice of assessment is issued and the due date for payment thereof as was originally proposed in an earlier draft of the TAB.

9. Dispute resolution SARS deadlines

9.1 Under both the existing provisions and the proposed provisions contained in the Bill, there are no consequences for SARS failing to comply with the legislated timelines for responding to objections, etc. Given that the proposed Tax Ombud will have no power to compel SARS to act or, even if it did, there would be no consequences for SARS were it to ignore such an instruction, taxpayers have no ability to force SARS to comply other than through the lodging of a notice of motion with the High Court. Given the cost impediments for most taxpayers in this regard, SARS is free to ignore the deadlines imposed in it at will and in practice does so on a regular and habitual basis.

9.2 Where taxpayers fail to comply with the statutorily imposed deadlines on them to lodge objections and appeals they lose the right to object or appeal and the assessment or decision in question becomes final.

9.3 It must be borne in mind that the dispute resolution process is heavily weighted in favour of SARS given the burden of proof and the pay-now-argue-later principle in terms of which the tax is payable notwithstanding that the liability may be subject to objection and appeal. In order to align the implications for taxpayers and SARS missing deadlines in the dispute resolution

process, there should be consequences for SARS not complying with the deadlines to consider an objection by a taxpayer.

9.4	Submission: An objection that is not considered by SARS within the statutory deadlines should be deemed to have been allowed in full. Alternatively, such a deeming authority should vest in the Ombud.

10. Security by taxpayers

10.1 In terms of s161, SARS has the right to require taxpayers to provide security for the payment of tax which has or may become payable in the future in certain prescribed circumstances. SARS is entitled to prescribe the nature, amount and form of the security and, if the required security is in the form of a cash deposit, to collect it as if it were a tax debt. SARS is not required to have regard to the person's ability to provide such security.

10.2 The circumstances in which SARS is entitled to demand security are, in some cases, relatively minor. For example, SARS could demand security where a taxpayer has 'frequently' failed to inform SARS of a change of address, failed to notify SARS of a change of public officer or submitted tax returns a few days late. There is no definition of the word 'frequently' in this context.

10.3 The provision is draconian in that it gives SARS an unfettered right to demand security in any form that it desires in even relatively minor circumstances. The only recourse that a taxpayer currently has in relation to such a decision is to take the matter on review to the High Court.

10.4	Submissions: At the very least this provision should be subject to objection and appeal. However, ideally it should be subject to some independent oversight such as an application to the High Court. This should not be burdensome to SARS given the exceptional circumstances in which the provision should be invoked.

11. Appointment of third party to satisfy tax debts

11.1 In terms of s179, SARS is granted the power to require a third party who holds money or owes money to a taxpayer to pay the money to SARS in satisfaction of a tax debt. SARS has stated that this provision is intended to be used only:

- as a last resort to collect amounts owing by taxpayers; and
- with due regard for the taxpayer's financial and cash-flow circumstances (e.g. consider if an individual has mortgage bond payments, or if a business has employee salaries to pay, etc.).

However, it has become apparent that in practice SARS does not use the equivalent existing provision as a last resort for the collection of amounts of tax — but in certain instances has used

it as a first resort — nor with any regard for the hardship that may be suffered by the taxpayer or other stakeholders like employees.

11.2 For example, in a recent case that came before the Western Cape High Court (*The Oceanic Trust Co. Ltd N.O. v C:SARS*), SARS issued an assessment on 20 July 2009 with a due date for payment of 1 September 2009. Soon after the issue of the assessment, on 23 July 2009 SARS appointed Standard Bank as the taxpayer's agent in terms of s99 of the Income Tax Act and required it to pay over any money that it held for the taxpayer. This was done notwithstanding that the due date for payment of the assessment had not yet arrived.

11.3 The above example is but one of many where SARS has abused its powers of collection. The concern is that, notwithstanding SARS's stated position that this mechanism will be used as a last resort, there are no safeguards in place to prevent the power being abused, as has happened frequently in practice in the past. Accordingly, we are of the view that suitable safeguards should be introduced before the power may be applied.

11.4 Submission: Safeguards that should be put in place include that SARS may not invoke the provision before a debt is payable. Furthermore, it should specifically be provided that this provision may be used only once SARS has exhausted specified steps to collect the tax directly from the taxpayer concerned and with due regard for the taxpayer's other cash-flow obligations (especially employee salaries).

12. Interest

12.1 In terms of s187, interest is payable on any tax debt not paid in full by the effective date, generally determined over the period from the effective date to the date the tax debt is settled. A tax debt includes any debt in relation to a penalty levied by SARS. The effective date for purposes of a percentage based penalty is the date by which the tax should have been paid.

12.2 The effect is that interest is levied on percentage based penalties from the date that the tax in respect of which the penalty is levied should have been paid. For example, where a taxpayer pays an amount of tax late and SARS imposes a penalty in terms of s213, interest is also payable on the penalty in addition to the tax from the date that the tax should have been paid. This is unduly harsh. A penalty is already punishment for not complying with a tax Act. To then subject that penalty to interest from the date that the tax in question should have been paid is a punishment on a punishment and akin to levying interest on a traffic fine from the date that the traffic offence was committed.

12.3 Submission: interest on penalties should be leviable only from the due date for payment thereof which due date should not be earlier than when the penalty was in fact levied.

13. Reportable arrangement penalties

13.1 In terms of s212, any participant or promoter in a reportable arrangement (a reportable arrangement is essentially an arrangement that gives rise to a tax benefit and which has certain characteristics which taint it as reportable) that fails to report the arrangement as required is liable to a penalty. The amount of the penalty is determined as R50,000 (R100,000 in the case of a promoter of the arrangement) for each month that the failure to report continues up to a maximum of 12 months. The penalty is doubled where the anticipated tax benefit exceeds R5 million and tripled where the benefit exceeds R10 million. The effect is that a promoter could face penalties of up to R3.6 million and a participant up to R1.8 million. These penalties are substantially more than in the current position where the penalty is fixed at R1 million. Two concerns arise with regard to these penalties.

13.2 Firstly, while the replacement of the existing lump sum penalty (which has no regard to the period of non-compliance, with a monthly penalty is in theory beneficial, in practice it is more likely that most reportable arrangements that are not reported as required, will be subject to the maximum penalty. This is because the provisions are complex, subjective in many respects and subject to interpretation. The situation is made worse by the fact that there is currently no guidance on how SARS interprets the reportable arrangement provisions. It is therefore likely to be quite common that, where a participant does not report what is ultimately held to be a reportable arrangement within the prescribed time period, that person would still not have reported 12 months later.

13.3 Secondly, the existing provisions in the Income Tax Act provide the Commissioner with a discretion to reduce the penalty if there are extenuating circumstances and the non-disclosure is remedied within a reasonable time or the penalty is disproportionate to the tax benefit. However, in terms of s217, the penalty may only be reduced by an amount of up to R100,000 and then only in the case of a first incidence of non-compliance.

13.4 Given the complexity and subjectivity of the reportable arrangement provisions, the penalty regime proposed is overly harsh. Take for instance our firm. PwC advises on numerous transactions with an objective of reducing a client's liability for tax where it could be said to be the promoter and the tax benefits associated with these are generally substantial. After all, that is one of the functions we perform as tax advisers. That is not to say that these arrangements would be regarded as impermissible tax avoidance. Taxpayers and their tax advisers are fully within their rights to structure their affairs in such a way as to minimise the taxes paid by them, provided that they do so within the realms of the law. Arguably, many of these transactions would not be reportable as they may, in our view, not have the requisite tainting elements or be excluded arrangements. However, it is conceivable that SARS may take a different view in this regard. The mere fact that a transaction is reportable does not make it an impermissible tax avoidance arrangement. By the same token, a transaction that does not constitute impermissible tax avoidance may be reportable.

13.5 To suggest that promoters, whose business includes advising clients on how to minimise their tax liabilities, should be entitled to have any penalty levied on them reduced only by a maximum of R100,000, and then only in respect of the first incidence, is extreme.

13.6 Submission: As a minimum, the first incidence rule should not apply to promoters of reportable arrangements and SARS should have a discretion to remit the full amount of any reportable arrangement penalty.

14. Remittance of penalties (other than reportable arrangement penalties)

14.1 In terms of Chapter 15, SARS is obliged to impose fixed amount penalties or percentage based penalties for a variety of acts of non-compliance.

14.2 In principle, we have no problem with the levying of these penalties which are intended to penalise non-compliance. However, we have concerns with the circumstances under which the penalties may be remitted and the extent to which they may be remitted.

14.3 A penalty may only be remitted in full in certain prescribed exceptional circumstances in terms of s218 or under the voluntary disclosure programme. These exceptional circumstances include those such as natural disasters, civil disturbance, serious illness, serious financial hardship and certain prescribed actions by SARS that have contributed to the non-compliance. The result is that penalties may only be remitted in full in respect of a very narrow list of exceptional circumstances.

14.4 For other circumstances, the remission of penalties is regulated by s217. This section allows for a remission of penalties up to a maximum amount of R2,000 where the penalty has been imposed in respect of a first incidence of non-compliance, a failure to comply with certain obligations, such as the submission of a return or notifying SARS of a change of address if the non-compliance is remedied within 5 business days of the date by which the taxpayer should have complied or non-compliance consisting of the late payment of tax where the amount involved is less than R2,000 or the duration of non-compliance is less than 5 business days.

14.5 The limitation of the remittance of the penalty for nominal or first incidence of non-compliance to an amount of R2,000 is not in accordance with the existing provisions whereby SARS may remit the full amount of the penalty. It is submitted that to limit the amount of the penalty that may be remitted in these limited circumstances is unduly harsh and out of all proportion to the seriousness of the non-compliance. The implication is that a taxpayer could be faced with a situation where, for example, it makes a payment of employees' tax a day or two late due to an oversight and faces a penalty of 10% for the late payment of say R1 million, only R2,000 of that penalty may be remitted by SARS. If the employer's exemplary compliance history

demonstrates clearly that a remittance of the penalty is appropriate, then the maximum remittance of R2,000 (out of R1m) renders this remittance provision meaningless.

14.6 It should be noted that SARS is entitled to interest for the late payment of any tax in terms of s187 at market-related rates. This interest is only remittable in circumstances where the late payment is due to circumstances beyond the taxpayer's control. Furthermore, the interest is not deductible for income tax purposes and is therefore effectively penal in that the taxpayer pays a high rate of after-tax interest.

14.7 Submission: the limit on the amount of the penalty that may be remitted should be removed.

15. Understatement penalties

15.1 In terms of Part A of Chapter 16, penalties are levied on an understatement of a tax liability based on a understatement penalty percentage table set out in s223.

15.2 In general, we welcome the introduction of the understatement percentage table as this will provide certainty and consistency in the case of understatements of tax payable. However, we are concerned that the only circumstances in which no penalty will be levied in the case of an understatement is where the understatement in not substantial (as defined in s221) or where the taxpayer voluntarily discloses the understatement before notification of audit.

15.3 Circumstances could arise where a taxpayer takes a reasonable position in a tax return that ultimately results in a substantial understatement. For example, a taxpayer could reasonably contend that an amount of income is of a capital nature and not taxable for income tax purposes, but such amount is ultimately held by the courts to be taxable. In such circumstances the taxpayer faces a penalty of at least 25%. What is more, if the taxpayer subsequently takes another position resulting in any substantial understatement within 5 years the penalty is then at least 50%. This situation is untenable and taxpayers should be free to adopt reasonable tax positions without fear of suffering understatement penalties.

15.4 Submission: it is our submission that no penalty should be applied where the taxpayer had reasonable grounds for the position taken and no regard should be had to the size of the understatement. Accordingly, item (i) of the table in s223 should be deleted.

16. Consequential amendments to Tax Acts

16.1 Numerous consequential amendments to Tax Acts are proposed in Schedule 1 of the Bill. However, these amendments are not aligned with the amendments to the Tax Acts proposed in the 2011 draft Taxation Laws Amendment Bills with the effect that these two sets of Bills will conflict with of each other as many of the provisions of the Tax Acts are amended by both Bills.

16.2 Furthermore, Schedule 1 seeks to make amendments to provisions of Tax Acts that have yet to come into effect (such as the provisions relating to the dividends tax) with the effect that if the Bill comes into operation before these provisions become effective the amendments will be a nullity as they will be amending provisions of a Tax Act that do not exist at such time. On the other hand, no amendments are proposed in relation to other pending provisions of Tax Acts such as those relating to the withholding tax on interest due to come into effect on 1 January 2013.

16.3 Submission: Schedule 1 of the Bill requires substantial refinement to align it with the amendments to be introduced by the 2011 Taxation Laws Amendment Bills and amendments to Tax Acts that have already been promulgated, but which have yet to come into effect.

We trust that you find the above to be of assistance.

Yours sincerely,

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