



Mr A Wicomb

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Committee Secretary:

Standing Committee on Finance

Tel: 021 403 3759

Email: awicomb@parliament.gov.za.

SAIPA's Response to Tax Administration Bill (B11 – 2011)

The South African Institute of Professional Accountants (SAIPA) would like to thank the Standing Committee on Finance for the opportunity to provide comments on the Tax Administration Bill (B11 – 2011).

We trust that our submission will receive your favourable consideration. We would welcome an opportunity to come and present our submission. Should you require any further information or wish to discuss this matter in more detail, the writer can be contacted on:

082 0643453 or 011-207 7873, or fngwenya@saipa.co.za

Regards

Faith Ngwenya

Technical Executive



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Definition: Chapter 1

Definition: “**business day**” means any day which is not a Saturday, Sunday or public holiday, and for purposes of determining the days or a period allowed for complying with the provisions of Chapter 9, excludes the days between 16 December of each year and 15 January of the following year, both days inclusive;

Business day: We welcome the revised definition of `business day`.

Recommendation:

We propose, however, that the days between 16 December and 15 January also be excluded for purposes of section 42 (3) (time period within which to respond to letter of audit findings contemplated in section 42(2) (b) on the grounds that most organisations, and SARS operate on skeleton staff during this period.

Tax Ombud (section 15, section 16, Section 20 (2)): Chapter 2

Tax ombud

15 (4) the expenditure connected with the functions of the office of the Tax Ombud is paid out of the funds of SARS.

16. (1) The mandate of the Tax Ombud is to, subject to section 18(4), review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS.

20. (2) (2) The Tax Ombud’s recommendations are not binding on taxpayers or SARS.

Comments

There is a general perception that the SSMO has not been successful in achieving the desired outcome. One of the reasons for the perceived poor delivery could be the lack of resources devoted to it and the numerous queries evoked by SSMO. Although the Office Tax Ombud is not designed to replace the SSMO, it is feared that a similar fate could befall the Tax Ombud office if it is inadequately resourced and lack binding authority.

If a well-resourced Tax Ombud Office with the necessary binding authority is forthcoming, SAIPA would support the re-location of resources from the SSMO division to the Tax Ombud’s office. It may not be necessary to have a separate SSMO division since its function would fall within the office of the Tax Ombud.



Recommendation:

SARS in its budget should clearly demarcate the financial resources devoted to the Office of the Tax Ombud – this disaggregation of the SARS budget demonstrates SARS commitment to the Tax Ombud office.

SAIPA agrees that the Tax ombud must address service delivery failures, administrative hurdles and procedural violations. However we are of the view that the office of Tax Ombud should not address matters dealing with the interpretation of tax laws as this should be dealt with in the tax courts which by their nature are designed to deal with interpretation of tax laws. We are however concerned that Section 20 (2) states that *'the Tax Ombud's recommendations are not binding on taxpayers or on SARS'*, which indicates that the Tax Ombuds lack authority, which would have been most welcomed.

This non-binding provision is an obstacle to the effectiveness of the Office of the Tax Ombud, it remains a body with no teeth. This means that the problems experienced by taxpayers due to certain divisions of SARS simply ignoring correspondence; and matters never being brought before the relevant committees as well as SARS not exercising its discretion as it should in speedily resolving taxpayer queries will still be the ultimate result if the Tax Ombuds is not given sufficient authority to bring matters brought before it to finality. If a taxpayer does not object or appeal within the time periods prescribed in the various tax laws, the taxpayer loses his or her claim, but there is no sanction against SARS if it does not keep to the relevant time periods.

Recommendation:

It is recommended that this clause be amended to ensure that the Ombud can at the very least take decisive action against SARS to act in accordance with the various Tax laws. This includes the Ombud being able to mandate SARS to attend to correspondence, convene the relevant committees to consider various applications, give coherent reasons to taxpayers for decisions and to also be bound by the time lines already stipulated in the various Tax laws, thereby aligning the provisions of the TAB to the mandate of the Tax Ombud's office.

- 1) It is also recommended that decisions taken by the Tax Ombud should be challengeable in courts of law. This would provide a fair and reasonable administration of justice.
- 2) The outcome/finding/recommendation of the Tax Ombud, if not adhered to by either party, should consequently benefit the non-defaulting party.

The office of Tax Ombud if functioning maximally, benefits taxpayers tremendously. The Tax Ombud would create opportunities for cost effective, time-consuming escalation with regards to tax administration issues than is currently available from court. Tax ombud would better facilitate the achievement of greater access to fair and reasonable results and also provide a much needed relief to cases that end up before the courts.



Moreover, an effective Tax Ombud Office would contribute dramatically to the implementation of SARS's 'Service Charter' which reflects SARS's commitment to the public. The 'Client Service Charter' demonstrate SARS commitment to assist the public by providing clear, accurate information and accessible professional service. A well-functioning Tax Ombud Office would give legitimacy to SARS 'Client Service Charter'. A Tax Ombud office functioning effectively is the foundation for a win-win situation for all contending stakeholders.

Statements concerning accounts (section 28): Chapter 4

28. (1) SARS may require a person who submits financial statements or accounts prepared by another person in support of that person's submitted return, to submit a certificate or statement by the other person setting out the details of—

(a) the extent of the other person's examination of the books of account and of the documents from which the books of account were written up;

SAIPA understands the need for accountants who submit financial statements for a taxpayer to issue a certificate or statement confirming the fairness of the statement, the following are our concerns:

- The format of the statement and the required details must be clarified,
- It is not clear whether this statement is viewed as a standard supporting document that must be accompanied with all company returns,
- Not all types of business require any form of assurance, Section 28(1)(a) implies that the preparer of the financial statements would have 'examined' the books of account which is not a requirement in non audited financial statements, and
- If SARS used this statement as part of an audit, it is not clear how the financial statements will be tested in the process of detecting risks.

Issuance of Warrants (Section 60): Chapter 5

60. (1) A judge or magistrate may issue the warrant referred to in section 59(1) if satisfied that there are reasonable grounds to believe that—

(a) a person failed to comply with an obligation imposed under a tax Act, or committed a tax offence; and

(b) relevant material likely to be found on the premises specified in the application may provide evidence of the failure to comply or commission of the offence.

(2) A warrant issued under subsection (1) must contain the following information:

(a) the alleged failure to comply or offence that is the basis for the application;

(b) the person alleged to have failed to comply or to have committed the offence;



- (c) the premises to be searched; and*
- (d) the fact that relevant material as defined in section 1 is likely to be found on the premises.*

We submit that the wording of section 60 (2)(a) is inadequate. To prevent fishing expeditions and to protect the taxpayer's constitutional rights, the warrant should at least contain sufficient detail of the alleged offence or failure that the taxpayer can determine, by reading the warrant, what exactly SARS suspects the taxpayer to have done and in respect of what tax year the offence is suspected of having taken place. This will enlighten the taxpayer as to what documents SARS is allowed to search for. Therefore the warrant should not simply refer to an alleged contravention of sections of the Income Tax Act or the VAT Act, but it should also contain a description of how and when the taxpayer is suspected of having contravened those provisions.

Much more details should be furnished on the warrant; SAIPA does not suggest that the details disclosed in a warrant should be a reflection of a charge sheet. It must be borne in mind, however, that, in the past, Courts have nullified warrants because of inadequate disclosure of details.

Search without warrants (section 63): chapter 5

63. (1) a senior SARS official may without a warrant exercise the powers referred to in section 61(3)—

- (a) if the person who may consent thereto so consents in writing; or*
- (b) if the senior SARS official on reasonable grounds is satisfied that—*
 - (i) there may be an imminent removal or destruction of relevant material likely to be found on the premises;*
 - (ii) if SARS applies for a search warrant under section 59, a search warrant will be issued; and*
 - (iii) the delay in obtaining a warrant would defeat the object of the search and seizure.*

While we understand the need for this section (search and seizure without warrants), we do have some concerns.

Recommendation:

- 1) We recommend that searches without warrants must also be accompanied by a clause similar to clause 60 (2). An official document from SARS should be produced by the officials carrying out the search. The details of the searches relating to the tax offence should be comprehensive indicating the reasons and scope of the search amongst other things; this is to limit phishing expeditions and to enforce a person's constitutional rights.
- 2) The official conducting the search without a warrant must produce an official document from SARS which identifies the official by an ID number and contain details similar to the details referred to in a warrant (see item 1 above).



- 3) The document authorizing the search (without warrants) should have the contact details of Senior SARS officials; the alleged tax offender should be able to engage with a senior SARS official to confirm the validity of the search.
- 4) In addition, this document should expressly provide information with regard to the person's rights
- 5) SAIPA submits that while a SARS official may not have time to apply for a warrant, a senior SARS official should, at least, be able to draft such a document in order that a taxpayer may know exactly what the SARS official is looking for.

Legal professional privilege (Section 64): chapter 5

We are of the view that legal professional privilege as contained in section 64 should be extended both on the part of SARS and the taxpayer. The professional privilege on the part of the taxpayer should not only be limited to an attorney, but should include accountants, auditors or any other professional that may be engaged by the taxpayer. The taxpayer should be informed of his/her rights and be provided with clear counsel.

Professional privilege is of great importance to allow a taxpayer the access to proper legal counsel, which should not be limited to communication made for the purpose of litigation only, but to allow a taxpayer the freedom to seek advice and relevant counsel with regards to the interpretation and application of taxation law. The legal privilege will allow the taxpayer to obtain proper advice, which can only be obtained when the professional giving the advice has all the relevant facts and information on the table. A taxpayer should be reserved a right not to provide information to a professional if in turn the professional is obligated to disclose such to the authorities.

It should be noted that the legal privilege that we propose will not impede the collection or assessment of taxes, as SARS still has the powers and authority to request information or supporting documentation from the taxpayer, conduct audits, conduct search and seizure, appointment of agent to settle outstanding taxes, and many more. Also, the legal privilege will not override the person's obligations with regards to reportable arrangements, reporting in terms of FICA and FAIS.

We recommend the following framework for legal privilege:

- 1) The legal privilege will only apply to 'tax advice documents' to the extent that such is held by the tax practitioner that is appropriately qualified to give such advice, who has a significant function of giving advice on tax law, registered with a professional body or institute, which has an appropriate professional code of conduct and disciplinary processes enforcing compliance with such code of conduct.

Tax advice documents is a book, document, communication, minutes of meeting, notes taken during meeting, and record of advice or opinion that is:



- Confidential;
- Created by:
 - o The person for the purpose of instructing a tax advisor to give advice about the operation and effect of tax laws (including the documentation and information disclosed to the tax advisor or employee of a tax advisor for the purpose of giving advice or opinion about the operation and effect of tax laws);
 - o 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;
 - o 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.

Self-incrimination (section 72): Chapter 6

Section 72 states that *'an admission by the taxpayer of the commission of an offence under a tax Act.... is not admissible in criminal proceedings against the taxpayer unless a competent court directs otherwise'*

Recommendation

It is recommended that the Bill provides clear guides detailing circumstances under which a competent court may make the self incriminating admission admissible in court.

Jeopardy assessments (Section 94): Chapter 8

94. (1) SARS may make a jeopardy assessment in advance of the date on which the return is normally due, if a senior SARS official is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy.

Recommendation

It is recommended that SARS should inform the taxpayer that a 'jeopardy assessment' is in danger of being invoked in terms of S94(1). In our view the jeopardy assessment opens the taxpayer to unfair treatment if he is not forewarned of such. It is further suggested that that taxpayers should be able to object (to an assessment or a decision of SARS) to invoke a 'jeopardy assessment'.



The fairness of this clause is also questionable because it will put SARS ahead of other creditors in situations of financial stress.

Personal liability of responsible third party (Section 159): Chapter 10

159. A responsible third party is personally liable to the extent described in Part D of Chapter 11.

Currently it is not clear in the Bill how a third party should be informed of any impending liabilities. Will the third party receive an assessment in the same manner as the offending original taxpayer? Will the third party have a right to institute NOOs or ADR in the same manner as the original taxpayer?

If SARS is obliged to assess the third party, then the third party can object on the same grounds as the original taxpayer – it is obviously unfair to hold third liable for a tax that can be disputed. SARS is therefore compelled to advise the third party of the grounds upon which the taxpayer is being liable for the original taxpayers' debt. SARS would have to inform a third party of the offending taxpayer's tax information details; provision for disclosure under these circumstances, must be made in the secrecy provision.

If SARS does not formally issue an assessment to the third party, then a situation could arise whereby the revenue authority may unilaterally remove funds from a bank account of a taxpayer (in this case the third party) without their knowledge. It is highly unlikely that this is SARS practice and therefore, the required procedure to follow should be outlined in this Bill. The procedures should be formal and provide the third party with comprehensive details.

Burden of proof (Section 102): Chapter 9

102. (2) The burden of proving whether an estimate under section 95 is reasonable or the facts on which SARS based the imposition of an understatement penalty under Chapter 16, is upon SARS.

It is recommended both in both cases - 'jeopardy assessment' and 'third party liability' – that the burden of proof should reside with SARS. Section 102 (2) of TAB should be amended to accommodate the inclusion of 'jeopardy assessment' and 'third party liability'.



Taxpayer account (Section 165): Chapter 10

165. (1) SARS must maintain one or more taxpayer accounts for each taxpayer.
(2) A taxpayer account referred to in subsection (1) must reflect the tax due in respect of each tax type included in the account.

It is not clear at what point a taxpayer may use a surplus in his/her account to offset a tax due, for example a Vat due or a future direct tax liability. Clarity on this would add value to this new administrative procedure. For example: a VAT refund is due to the taxpayer and has not yet been paid by SARS, while the same taxpayer is required to make payment with regards to employees' tax or provisional tax, can the VAT refund be used as a credit towards the payment of employees' tax or provisional tax?

Deferral of payment (Section 167) (chapter 10) and compromise of tax debt (section 200) (chapter 14)

167. (1) A senior SARS official may enter into an agreement with a taxpayer in the form prescribed by the Commissioner under which the taxpayer is allowed to pay a tax debt in one sum after a prescribed period or in instalments, if satisfied that—

- (a) criteria or risks that may be prescribed by the Commissioner by public notice have been duly taken into consideration; and
(b) the agreement facilitates the collection of the debt.

200. A senior SARS official may authorize the 'compromise' of a portion of a tax debt upon request by a 'debtor', which complies with the requirements of section 201, if—

- (a) The purpose of the 'compromise' is to secure the highest net return from the recovery of the tax debt; and
(b) the 'compromise' is consistent with considerations of good management of the tax system and administrative efficiency.

In both situations – deferral of payment and the compromise of tax debt – the decision, whether deferral or compromise may be awarded resides with a Senior SARS official. The taxpayer does not have administrative access to apply for these concessions.

Recommendation

It is recommended that the Tab provides administrative mechanism which would permit taxpayers to benefit from these concessions and be allowed to apply for these concessions if the necessary requirements are met.



Interest recovery (Section 188): Chapter 12

188. (1) Unless otherwise provided in a tax Act, interest payable under section 187 is imposed for the period from the effective date of the tax to the date the tax is paid.

Recommendation

It is recommended that SARS should issue IT3 certificates to taxpayers if interest is awarded for late refund (direct and indirect taxes). Banks, for example, will issue a certificate confirming the payment of interest. It is therefore expected that SARS would do the same. Interest received, (if exceeds the relevant thresholds for individuals) is taxable including the interest paid by SARS.

Alternatively, SARS could pre-populate the interest paid to the taxpayers IT form.

SARS should issue IT3 certificates to taxpayers if interest is awarded for late refund.

Refunds due to taxpayers (section 190 (3)): Chapter 13

190 (1) Subject to section 191, a person is entitled to a refund of—

(a) an amount properly refundable under a tax Act and if so reflected in an assessment; or (b) the amount erroneously paid in respect of an assessment in excess of the amount payable in terms of the assessment.

(2) SARS need not authorise a refund as referred to in subsection (1) until such time that a verification, inspection or audit of the refund in accordance with Chapter 5 has been finalised.

(3) SARS must authorise the payment of a refund before the finalisation of the verification, inspection or audit referred to in subsection (2) if security in a form acceptable to a senior SARS official is provided by the taxpayer.

Clause 190 (3) is a most welcome insertion in this Bill. It is a well known fact that many taxpayers did not have their VAT refunds returned on time because of a protracted, multi-tiered, and comprehensive audit process. It is also understood that VAT remains a high-risk for SARS because of its self-assessment nature and the 'potential' for vendors to claim non-deductible input claims, such as motor cars, entertainment and non-commercial accommodation.

The provision that payment of a refund may proceed before the completion of an audit on production of 'collateral' or security that the tax liability can be paid if the audit subsequently proves that a refund (or a lesser refund) was not due to the taxpayer but instead liability exists in favour of the revenue authority. This is a welcome provision in temporarily assisting the grieving taxpayer.

Although this solution – the early release of refund upon production of security – is a major break from the current impasse, we still however, have concerns. The lack of guidelines on the



estimated duration of the collateral and also that it is often costly to provide a bank-approved security which the small business sector may not easily afford, the SME's being the sector that would urgently require the refund in order to manage its cash-flows.

Recommendation

It is recommended that if within a stipulated period (SAIPA recommends a six-month period), refunds are not paid out to taxpayers/vendors and audits are still incomplete, the refund should be paid out to the taxpayers/vendors although security has not been delivered. Of course, the taxpayer/vendor must not be guilty of stalling the audit process.

Complaints to controlling body of tax practitioner (Section 240 (3), Section 241): Chapter 18

240. (1) every natural person who—

(a) provides advice to another person with respect to the application of a tax Act;

or

(b) completes or assists in completing a document to be submitted to SARS by another person in terms of a tax Act, must register with SARS as a tax practitioner, in such form as the Commissioner may determine, within 30 days after the date on which that person for the first time provides advice or completes or assists in completing any such document.

(3) A person may not register as a tax practitioner under subsection (1) if the person—

(a) during the preceding five years has been removed from a related profession; and

(b) during the preceding five years has been convicted (whether in the Republic or elsewhere) of—

(i) theft, fraud, forgery or uttering a forged document, perjury or an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004); or (ii) any offence involving dishonesty, for which the person has been sentenced to a period of imprisonment exceeding two years without the option of a fine or to a fine exceeding the amount prescribed in the Adjustment of Fines Act, 1991 (Act No. 101 of 1991).

241. A senior SARS official may lodge a complaint with a 'controlling body' if a 'registered tax practitioner' or person who carries on a profession governed by the 'controlling body', did or omitted to do anything with respect to the affairs of a taxpayer,

SAIPA acknowledges the need for section 240 (3) and 241, we understand that it is not within the professional norm of a tax practitioner to participate in unlawful practices which transgresses any tax laws, and further we understands that professional bodies have an obligation in order to ensure proper governance within the tax discipline,



We make the following recommendations:

- There must be a formal procedure to be followed by SARS to report the tax practitioner to his/her controlling body. Tax practitioner should also have a right to appeal the decision for removal from the roll of tax-practitioner,
- Only the Commissioner may lodge a complaint with a `controlling body' if a `registered tax practitioner acted unlawfully (Section 241)
- There should be provisions for dealing with tax practitioners that do not belong to any controlling body
- Insert the word `impermissible;' before the word `avoid' in section 241 (a).
- This section should be linked with our recommendations on legal privilege – only tax practitioners registered with a professional body should be awarded the legal privilege applicable to `tax advice document'. If such a practitioner acted inappropriately, such unprofessional conduct should be reported by SARS.

Amendment of paragraph 20A of Fourth Schedule

Paragraph 94(b)

*....the taxpayer shall unless the Commissioner has estimated the said taxable income under paragraph 19(2) or has increased the amount thereof under paragraph 19(3), be required in respect of such taxable income proposes to substitute the phrase **(an amount by way of additional tax)** with a penalty equal to 20 per cent of the amount by which the normal tax payable by him or her...*

Penalties for under estimating even though sufficient tax was paid during the year of assessment, The current provision allows SARS to waive the penalty tax for under estimation where the taxpayer can show that the under estimation was not deliberate to postpone a liability, or where the taxpayer had made a proper estimation at the time.

Recommendation:

We recommend that SARS should waive the penalty tax, even if the taxable income was under estimated (deliberately or not) when sufficient tax was paid to SARS during the year of assessment. The taxpayer will at least now have grounds for an objection.



General observation

It was observed that the style used in the TAB of putting 'inverted commas' where a defined term is being used, could cause confusion, as this allows for the use of the same term in different meanings. It is suggested that consistency be maintained by using the same meaning for each term used in the bill.

Deadlines seem to only be relevant where the taxpayer is concerned and there are no deadlines in the TAB on the part of SARS. We are fully cognizant of the complexities that each assessment may have, however guidelines on the expected SARS response delivery date will be welcome.



Conclusion:

The Bill provides for a significant evolution of our tax system and its administration, which we support.

We hold the taxpayer's right to fair and reasonable administrative justice at the highest of priority, while at the same time acknowledging the importance of taxation, and the powers and authority required by SARS to administer and collect such tax effectively.

It is for these reasons that we acknowledge the importance of this Bill, and the motivation for our comments herein. We believe that an imposing and well resourced Tax Ombud with sufficient power to bind taxpayer and SARS in its rulings, as well as a limited statutory privilege for professional tax advisors will make for an improved tax system, while providing balance and faith in the system.

“Increases in the probability of punishment or the size of the penalty should reduce evasion, though the latter has not been convincingly established empirically. If citizens are dutiful, evasion can also depend on the context and factors such as tax morale and dissatisfaction with the tax system.” – Chapter 12 Administration and Compliance, Dimensions of Tax Design – The Mirrlees Review, 2010, Sir James Mirrlees, Jonathan Shaw, Joel Slemrod, and John Whiting