



## The South African Institute of Tax Practitioners

15 August 2011

Honourable T Mufamadi, MP  
Chairperson: Standing Committee of Finance  
Parliament  
**CAPE TOWN**  
8000

**PER E-MAIL: [AWICOMB@PARLIAMENT.GOV.ZA](mailto:AWICOMB@PARLIAMENT.GOV.ZA)**

Dear Sir / Madam

### **RE: CALL FOR COMMENT – 2011 DRAFT TAX ADMINISTRATION BILL**

Thank you for the opportunity to comment on the 2011 Tax Administration Bill ('TAB') introduced in the National Assembly by Minister Pravin Gordhan.

Set out below please find our general and specific comment as provided by the national Tax Technical Committee of the Institute.

### **1 INTRODUCTION**

We acknowledge that the purpose of TAB is to provide a single body of law that outlines common procedures, rights and remedies and to achieve a balance between the rights and obligations of both SARS and taxpayers in a transparent relationship.

We commend and appreciate the fact that the drafters of TAB took cognisance of the Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution') and consulted widely prior to the tabling of the TAB.

The harmonisation and incorporation of all the administrative provisions of the various fiscal statutes of South Africa, other than the Customs and Excise legislation, into one piece of legislation is supported. The style used in drafting the Bill is also welcomed and is certainly easier to follow than the other fiscal statutes.

The general and specific comments set out hereunder take the above into account.

### **2 GENERAL**

#### **2.1 Legal professional privilege (LPP)**

In line with international precedent, the South African Revenue Service (SARS) has been entrusted with extensive powers to compel taxpayers to disclose information. Apart from general information-seeking powers (ss 74–74D of the Income Tax Act 58 of 1962),



PO Box 73, Featherbrooke Estate, South Africa, 1746 Tel: (0027) 011 662 2837 info@thesait.org.za www.thesait.org.za

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legislation has recently been introduced to compel taxpayers to report certain transactions, referred to as 'reportable arrangements', up front ((ss 80M-80T, introduced by s 6(1) of the Revenue Laws Second Amendment Act 20 of 2006).

In a recent decision by a US district court, however, a taxpayer's right to refuse to disclose certain information to the Internal Revenue Service (IRS) was upheld: *United States v Textron Inc & Subsidiaries* 507 F Supp 2d 138, 2007 US Dist, Lexis 63921; 2007-2 US Tax Case (CCH) P50, 605; 100AFTR 2d (RIA) 5848 (*Textron*). (The judgment is available at [http://taxprof.typepad.com/taxprof\\_blog/files/Textron.pdf](http://taxprof.typepad.com/taxprof_blog/files/Textron.pdf)).

The TAB seeks to introduce additional information gathering powers for SARS, which we support in order to bring tax evaders to book. However, this must be balanced with taxpayers' rights to privacy and legal professional privilege.

#### Concern:

It is contended, in line with international views, that not to confer and recognise legal professional privilege in respect of all duly registered tax practitioners is iniquitous and may be constitutionally invalid. Our view is supported by research done by Professor Lynette Olivier and published in SA Law Journal in 2009 (see attached as annexure "A").

#### Recommendation / solution:

It would be far preferable if clients of registered tax practitioners obtained legal professional privilege, where advice or assistance is procured from an attorney, advocate or a tax practitioner are treated equally. The training which the tax advisor has undergone should not result in a distinction being drawn and the consequences facing the taxpayer.

## **2.2 Recovery of costs from SARS**

It is noted that SARS can recover the fees that it may incur in recovering debts from taxpayers, but taxpayers have no recourse to recover costs from SARS where, for example, SARS does not deliver the service required of it under its own Service Charter or under the provisions of section 195 of the Constitution. In addition, the TAB seeks to provide additional powers to SARS to call on third parties to attend an investigation enquiry into the tax affairs of a taxpayer.

#### Concern:

It is unfortunate that the draft TAB does not address the manner in which taxpayers should be entitled to recover costs from SARS, where SARS for example

1. abuses its powers under the law; or
2. where taxpayers incur costs as a result of the inefficiencies of SARS; or
3. call on a third party to attend to an enquiry into the tax affairs of another party (taxpayer).

We are aware that taxpayers have, on numerous occasions, had to submit documents to SARS and, unfortunately, those documents are lost by SARS and taxpayers have to supply further copies thereof, sometimes copies of the same documents having to be submitted on two or three or, in some cases, six occasions.



### Recommendation / solution:

We appeal that taxpayers should be entitled to recoup both actual costs and wasted costs of, for example, the printing of copies under the tariff referred to in the Promotion of Access to Information Act 2 of 2000 ('PAIA').

In addition, taxpayers should also be entitled to recover the wasted time and effort and professional costs incurred in attending to SARS repeated calls for the same information, despite the fact that that information has been submitted and has been lost SARS.

### **2.3 Tax Ombudsman**

We commend the introduction of a Tax Ombud. We do, however, wish to express the following concern:

#### Concern:

It is most unfortunate that the Tax Ombud will not be reporting directly to the Standing Committee on Finance.

#### Recommendation / solution:

It is recommended that the South African Tax Ombud report directly to Parliament, after consultation with SARS and the Minister of Finance.

## **2 SPECIFIC COMMENT**

### **2.1 CHAPTER 2: GENERAL ADMINISTRATION PROVISIONS PART A - IN GENERAL**

#### **Clause 3 - Tax acts to be administered by SARS**

Clause 3(2)(a) refers to "future tax period".

#### Concern:

The concern that must be raised in this regard is that SARS may request information regarding a future tax period, despite the fact that the transactions relating thereto have not yet been finalised. It is hoped that the wording contained in the clause will not entitle SARS to call for information prior to the conclusions of transactions affecting future tax periods.

It is unfortunate that clause 3 only refers to the powers available to SARS, without setting out what remedies taxpayers may have where SARS either abuses its powers or fails to comply with the standards imposed under the provisions of section 195 of the Constitution of the Republic of South Africa, Act 108 of 1996, as amended ("**the Constitution**").



## **PART B - POWERS AND DUTIES OF SARS AND SARS OFFICIALS**

### **Clause 8 - Identity cards**

The requirement that SARS officials must produce their identity card is supported.

#### Concern:

Should an official fail to supply the taxpayer with such proof of identity, the taxpayer has every right to assume that that person is not a SARS official.

### **Clause 9 - Decision, notice, or communication**

It is noted that decisions made by SARS officials may be withdrawn at the request of a taxpayer or otherwise. Clearly, any withdrawal of a decision must comply with the constitutional imperative contained in section 33 dealing with the right to administrative justice and, as more fully set out in the Promotion of Administrative Justice Act No. 3 of 2000 (“**PAJA**”).

#### Comment:

Clause 9, therefore, is not only subject to the provisions of the draft TAB itself, but also to the right to administrative justice contained in the Constitution itself.

## **PART B - AUDIT AND INVESTIGATION**

### **Clause 37 - Field audit**

Clause 37(1) refers to “reasonable prior notice”.

#### Concern:

It is accepted that it is difficult to specify what is reasonable in a particular case. Unfortunately, in practice, certain SARS officials are reasonable and will require that the audit commences within the period of two weeks, whereas other officers, possibly located in the same office, may take the view that reasonable prior notice constitutes two or three days notice and this is clearly unacceptable.

#### Recommendation / solution:

Guidelines should, therefore, be set as to what constitutes “reasonable prior notice” and SARS officials need to be sensitive to the manner in which the period is determined. It is important also that the reasonability is consistent within SARS offices and across the country.

### **Clause 42 - Keeping the taxpayer informed**

#### Comment:

The proposal to inform taxpayers as to the status of the audit conducted on their affairs is commended.



## **PART D - SEARCH AND SEIZURE**

Clause 59 refers to the power that SARS may apply for a search and seizure warrant from a magistrate.

### Concern 1:

The term “magistrate” is not defined.

### Recommendation / solution 1:

The term “magistrate” should be defined similar to the definition of “judge” contained in clause 1 of the draft TAB.

### Concern 2:

Serious intrusion into the taxpayer’s right to privacy is made with a search and seizure.

### Recommendation / solution 2:

It is submitted that in all circumstances, regardless of the amount, which may be the subject of an investigation, a judge should always preferably be required to approve the search and seizure warrant and not a magistrate.

## **CHAPTER 6: CONFIDENTIALITY OF INFORMATION**

### **Clause 67 - General prohibition of disclosure**

The rationale for the provisions of clause 67(4) of the TAB is understood.

### Concern:

It is critical that the correct balance is struck between a taxpayer’s right to privacy enshrined in section 14 of the Constitution and SARS’ reputation. The proposed provision further undermines the taxpayer’s right to privacy and also it further waters down unnecessarily the secrecy provisions currently contained in section 4 of the Act.

### Recommendation / solution:

The provision should only be capable of being used where taxpayers have made false allegations against SARS and the reference to information in clause 67(4) should also be to false information, not merely to rebut information generally disclosed by a taxpayer.

## **PART B - JUDGMENT PROCEDURE**

### **Clause 172 - Amendment of statement**

It is noted that SARS may amend the amount of tax due specified in the statement, where SARS is of the opinion that the amount referred to in the statement is incorrect.

### Recommendation / solution:

The TAB should also allow for taxpayers to recover costs where SARS incorrectly files a statement with the court, as a result of SARS misallocating payments or for some or other reason, fails to recognise payments made by the taxpayer.

## **3 CONCLUSION**



Thank you for the opportunity to comment.

Please do not hesitate to contact us if you have any queries in this regard.

Yours sincerely

**Stiaan Klue**  
**Chief Executive**



PO Box 73, Featherbrooke Estate, South Africa, 1746 Tel: (0027) 011 662 2837 info@thesait.org.za www.thesait.org.za

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