

PRESENTATION TO THE SCoF

2011 08 17

TAX ADMINISTRATION BILL



SAICA

THE SOUTH AFRICAN INSTITUTE
OF CHARTERED ACCOUNTANTS

develop.influence.lead.

Presenters



Muneer Hassan: Project Director Tax

Wessel Smit: Member of SAICA's NTC

Puleng Owen Manyaka: Project Manager Tax



Introductory Comments

- Consultative process
- 2 years / workshops
- Simplification
- SARS drafting of the TAB
- Balance



Focus Areas

- Tax Ombud
- Statutory privilege for tax practitioners
- Prescription of debts
- Search and seizure without a warrant
- Provisional tax issues
- Constitution of tax court



Tax Ombud

CHAPTER 2 Clause 15 / 16

SAICA submission pages 2 – 4

Welcome the introduction of the Tax Ombud

- Independence

Office: Funding SARS budget / **Proposal: NT**

Budget

Reporting: Minister of Finance / **Proposal:**

Parliament



Tax Ombud

- Mandate

Facilitate resolution by mediation & conciliation

Proposal: Compel SARS to comply with procedural provisions of the Act / Make nominal awards

- SSMO

Retained

Proposal: SSMO be removed

Tax Ombud



- Review of complaint

Review systemic & emerging issues

**Proposal: Report on these issues to SARS
clauses 19 / 20**

Statutory Privilege for Tax Practitioners



- Legal professional privilege (“LPP”) common law rule applies between client / legal advisor
- LPP applies
 - Acting in professional capacity;
 - Purpose of obtaining legal advice / litigation;
 - Confidence; and
 - Not for purpose of committing crime / fraud

Statutory Privilege for Tax Practitioners



Basis:

- Encourage taxpayers to communicate with their tax advisors in confidence
- Level competitive advantage
- International precedent:

Statutory privilege: US (regulated), UK (un-regulated), NZ (un-regulated)

Australia – considering statutory privilege

Statutory Privilege for Tax Practitioners



Proposal:

Limited statutory privilege similar to the NZ model rules / requirements:

- confidential;
- advice given re operation of tax law; and
- not illegal or wrongful.

Amendment to the definition of information i.e. excludes opinions prepared by tax practitioners registered with a professional body which is entitled institute disciplinary action against its members.

Prescription of Debts



CHAPTER 11 Clause 171
SAICA submission page 14

Prescription of debts:
15 years
Document retention period:
5 years
Proposal: Alignment

Search and seizure without a warrant



CHAPTER 5 : Clauses 59 to 63 **SAICA submission pages 10 - 11**

Search without a warrant appears to go against a person's constitutional right to privacy.

Clause 63 appears to confer greater powers on SARS than what is generally conferred on the police. Whilst the police are required to obtain warrants to search and seize documents, it is not clear why SARS officials should be exempted from this requirement.

Search and seizure without a warrant



(Constitution of the Republic of South Africa 1996
Chapter 2 - Bill of Rights 14. Privacy)

1) Everyone has the right to privacy, which includes the right not to have:

a) their person or home searched;

b) their property searched;

c) their possessions seized; or

d) the privacy of their communications infringed.

Search and seizure without a warrant



SARS official must have “reasonable grounds” – very subjective – it is proposed that these requirements be clarified and made less subjective.

No provision is made to protect a person against an abusive SARS official nor are there any provisions which would hold SARS officials/SARS **liable** for negligent, gross negligence or malignant behaviour.

Search and seizure without a warrant



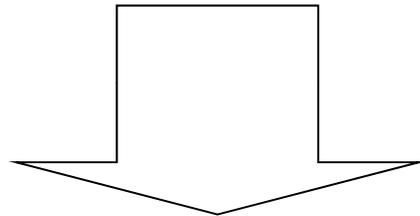
Warrants can be issued within hours provided proper grounds for the warrant exists.

Cases of *Mistry v Interim Medical and Dental Council of South Africa* (1998 (4) SA 1127 C) and *Park-Ross v Director: Office for Serious Economic Offences* (1995 (2) SA 148 C), which cases held that the search of premises and seizure of documents, without a warrant, was invalid under the provisions of the Constitution.

Search and seizure without a warrant



Proposed solution?



At minimum we suggest, that SARS should be entitled to seize documents where approved by a SARS senior official, but that they be placed in the **custody of the court** and that the court, if it is possible, sanction the seizure after the event.

Provisional Tax amendments – par 19



Paragraph 19 of the 4th Schedule SAICA submission pages 17

The amendment to the definition of “basic amount” and the automatic 8% per year increase is welcomed.

The proposed amendment appear to solve the previous “automatic” 16% increase for the first provisional tax payment for taxpayers with a February year-end, if the taxpayer is up to date with his/her income tax returns.

Provisional Tax amendments – remaining problem areas par 19



If a taxpayer is for example “one-year behind” in filing his/ her tax return, there will be an **automatic 24%** increase to the last year of assessment, which might not be justified compared to the actual taxable income.

For **companies** with a February year-end they might still have an “automatic” 16% uplift for the second provisional tax payment from there last assessed amount, as companies have 12 months after year-end to file their tax returns.

Provisional Tax amendments – par 20



Paragraph 20 of the 4th Schedule SAICA submission page 17

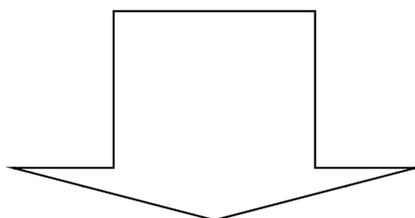
It appears that the proposed amendment to par 20 of the 4th Schedule only effectively changed the name of the “penalty” from “additional tax” to “understatement penalty”.

The new understatement penalty is still linked to the taxable income numbers without regards to the actual tax paid.

Provisional Tax underestimate penalty



Example of problem

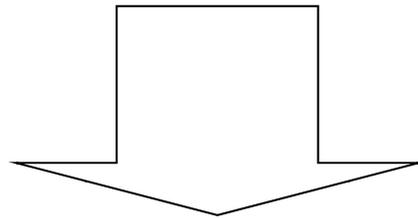


If a taxpayer who estimates taxable income at R1m and pays provisional tax to ensure that such an amount is fully taxed. “If a late bonus payment say, an extra R500,000 is received, the fact that this R500,000 might be fully taxed at 40% through the PAYE system does not save the taxpayer from the provisional tax penalty.

Provisional Tax underestimate penalty



Proposed solution



“Underestimate penalty” should not be solely calculated with reference to the taxable income, and the actual tax paid should also be taken into account in the calculation formula.

Constitution of tax court



CHAPTER 6: Clause 118 SAICA submission page 13

Currently: S 83(4) of the Income Tax Act provides that the tax court will consist of a judge, an **accountant** and a representative of the commercial community.

Clause 118(1)(b) of the TAB, however, refers to a **registered accountant**. This would, at a stroke, disqualify a large number of CA(SA)s on the panels around the country, including most of the tax specialists – PROPOSAL: RETAIN REFERENCE TO “ACCOUNTANT”



Additional Issues for note

- Access to audit working papers
- Taxpayer has to request for interest s88 of ITA / s45 of VAT Act
- Definition of “senior SARS official” – clause 1 / 6(3)
- Keeping taxpayer informed remedy – clause 42
- Refunds of excess payments no time period – clause 190
- VDP welcome permanent feature – clause 255 - 233