The South African Institute of Tax Practitioners

19 October 2012

Mr. T.A. Mufamadi, M.P.
Chairperson: Standing Committee on Finance
Parliament
CAPE TOWN
8000

BY E-MAIL: AWICOMB@PARLIAMENT.GOV.ZA

Dear Honourable Mr. Mufamadi

RE: PULIC HEARINGS // CALL FOR COMMENT: DRAFT TAX ADMINISTRATION AMENDMENT BILL, 2012

Thank you for the opportunity to assist the Committee in its work and present our comments on the draft Tax Administration Amendment Bill, 2012 ('TAAB') published on 5 July 2012 by the South African Revenue Service.

Set out below please find our general and specific comment as provided by the SAIT National Tax Technical Committee. Members of the Committee include representatives of KPMG, E&Y, ENS, UKZN, FPI and Busa.

Kindly note that the South African Institute of Tax Practitioners ('SAIT") is the only professional 'controlling body' in South Africa concerned solely with taxation law, hence the Southern African Institute for Business Accountants and the Institute of Certified Bookkeepers mandated SAIT as the leading representative on matters relating to taxation.

1 INTRODUCTION

The Institute adopted a policy during July 2012 to comment on broader themes and tax policy only. The Technical Tax Committee is of the view that technical amendments and changes that reflect the position of interest groups will not be advanced, unless it has a social and general impact on the South African economy, the tax profession and society.

Set out below please find our comment for your consideration.

2 GENERAL

Set out below we list general concerns not specifically addressed in the draft Tax Administration Amendment Bill, 2012.

2.1 Legal professional privilege (LPP)

Concern:

During SARS' presentation before the Parliamentary ScoF in 2011 SARS Commissioner Mr Magashula proposed that the various submissions by stakeholders regarding LPP be addressed during the regulation of tax practitioners' process. We are surprised that the draft Tax Administration Amendment Bill, 2012 propose to introduce the registration of tax practitioners with a 'controlling body', but no provision is made for codifying LPP in relation to "registered tax practitioners".

Background:

It is contended, in line with international views, that not to confer and recognise legal professional privilege in respect of certain duly registered tax law specialists is iniquitous.

We recognise the fact that the United Kingdom ('UK') courts are currently considering extending LPP to professionals other than attorneys (solicitors), however, it is our respectful submission that the South African versus UK context differ materially. The UK has a completely unregulated tax law environment, whereas in South Africa the TAAB now seeks to introduce formal regulation for registered tax practitioners.

Recommendation:

Our recommendation is not to extend LPP to all accountants in South Africa. We recognise SARS' concern that accountants are trained primarily in accounting principles. The concern is valid due to the fact that in the South African education environment, taxation case law exclusively form part of the post graduate training curricula of accountants and general legal practitioners, such as the LL.M, M. Com, H. Dip or Pg. Dip qualifications in taxation law.

However, it would only be fair and equitable if the general public seek the advice of a post graduate tax law specialist and then be able claim legal professional privilege through that particular qualified 'registered tax practitioner'.

This notion will also result in a more equitable situation where advice or assistance procured from an attorney, advocate or a post graduate tax law 'registered tax practitioner' is treated equally. The training which the post graduate 'registered tax practitioner' has undergone should not result in a distinction being drawn from one individual to another, with resulting legal consequences facing the general taxpayer. In practice, the current scenario result in an increase in cost (i.e. hamper access to justice) to the general taxpayer, as he/she will need the services of an attorney to be able to be duly represented.

2.2 Recovery of costs from SARS

2.2.1 It is noted that SARS can recover 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 Tax Administration Act, 2011 now provides additional powers to SARS to bring non-

compliant taxpayer to book. However, honest taxpayers' rights must be upheld to protect the tax morale of our people.

Concern:

It is unfortunate that the draft Tax Administration Amendment Bill, 2012 do not address the manner in which taxpayers / individuals should be entitled to recover costs from SARS, where SARS for example abuses its powers under the law, or where taxpayers incur costs as a result of the inefficiencies of SARS.

We are aware that taxpayers have, on numerous occasions, had to submit documents to SARS and, unfortunately, 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. The recent introduction of the IT14SD brought about similar challenges and resulting wasted cost to taxpayers where information submitted are either lost or disregarded.

Recommendation:

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 by SARS.

It is recommended that the Tax Ombud as envisaged in the Tax Administration Act, 2011 be granted the power to issue a compliance notice for cost under certain circumstances determined by this Committee.

2.2.2 Recovery of cost in the Tax Board vis-à-vis the Tax Court

Concern:

Currently section 130 only deals with costs of Tax Court.

Recommendation:

For both Tax Court and Tax Board, the Order of Costs should cover the costs of the taxpayer from the inception of the audit by SARS including in particular the items conceded by SARS along the way.

2.3 Section 221 - Substantial understatement

Concern:

Currently the substantial understatement penalty is imposed when the prejudices to SARS exceeds 5% or R1 million.

If any understatement is only R100 then any penalty percentage is either NIL *de minimis* as outside table threshold of R1 million or higher that the rate applicable to substantial understatement.

Recommendation:

A general comment on the underestimated penalty is that mitigating factors should be considered.

3 SPECIFIC COMMENT

3.1 Registration of tax practitioners and reporting of unprofessional conduct

3.1.1 Introduction

The Institute welcomes the renewed focus on tax practitioners' compliance levels. We believe that the proposed requirement to register with a professional 'controlling body' will significantly improve the compliance levels of the entire tax profession, for three reasons:

1. Tax practitioners currently not affiliated with a professional tax/law 'controlling body' will be subject to a code of conduct [specific to taxation] and also to a programme of continuing professional development.
2. Tax practitioners currently affiliated with a professional tax/law 'controlling body' will notice the change in regulation and SARS' renewed focus on the profession, and will hence be vigilant regarding tax compliance in general.
3. Professional 'controlling' bodies will improve their acceptance and retention policies, as a non-compliant tax practitioner will pose a significant reputational risk to the body as well as to fellow members.

A significant aspect not covered is the regulation of SARS officials. We recommend that the regulation of the tax profession should include SARS officials as well, similar to the position in the legal profession in which practicing attorneys as well as state prosecutors are equally regulated. It is inequitable to regulate only individuals in private practice, as SARS officials also interpret the law on a daily basis and assist the general public with submitting tax returns in the branches via eFiling. In addition, SARS has dedicated departments acting in the same capacity as a tax practitioner in private practice, for example the Advanced Tax Ruling ('ATR') division. The general public can approach the ATR division and obtain a binding ruling for a fee on the interpretation of tax law.

It is respectfully submitted that the regulation of individuals in the tax profession should include all individuals, whether in public or private employment capacity, in order to protect our peoples' rights. This equitable approach will strike an appropriate and equitable balance that will protect our people of this country and uphold the rule of law in line with the spirit of our Constitution of the Republic.

3.1.2 Specific comment

3.1.2.1 Amendment 15: Para 20 Fourth Schedule - Provisional Tax Penalties

The proposed amendment to automatically impose a penalty for underestimation on taxpayers with a taxable income in excess of R1 million has not been made due to a principle but to expedite the correction of a flaw in the current tax program.

Whilst there is relief possible by para (c), the fact that it is done automatically means that even if 79% of actual and not 80% (not significantly incorrect estimate) a penalty will be raised and the associated costs of objection and appeal will result.

It is imperative that the tax costs be reduced and R1 million taxable income is not excessive.

Recommendation:

A turnover of R30 million should be used as the category and not taxable income of R1 million. In addition we recommend that the monetary threshold be increased by 8% per annum.

3.1.2.2 Amendment 22 - Research and Development

Concern:

The effective date regarding new rules changed from 1 April 2012 to 1 October 2012.

Recommendation:

Confirmation should be required by the necessary Committee and forms are finalised.

3.1.2.3 Amendment 23: Section 1

Definition of SARS official–

> *"(c) a person contracted or engaged by SARS for purposes of the administration of a tax Act and who carries out the provisions of a tax Act under the control, direction or supervision of the Commissioner;"*

The question arises whether this is not what the Fourth Schedule would define as an employee. Our concern is the fact that *"non employees"* are *"employees"* of SARS.

3.1.2.4 Clause 48: Section 223 (3)

The remission is only for a reportable arrangement.

Concern:

We are concerned on the position when the taxpayer had advised on any other dispute now adjusted why is this not covered.

Advice on the capital or revenue nature or other such issue should leave the taxpayer with the comfort of no additional tax even if in the end the professional advice was not correct.

Recommendation:

There should be the discretion to consider mitigating factors.

3.1.2.7 Clause 57: Amendment to s 240 of the Tax Administration Act, 2011

Concern 1:

1. The current substitution for paragraph (a) in subsection (3) of the following paragraph

   "(a) during the preceding five years has been removed from a related profession by a 'controlling body' for serious misconduct; ***[and]*** *or".*

is problematic during certain specific scenarios, for example, when an estate agent is removed by the Estate Agency Affairs Board. Although the estate agent may not be perceived by SARS and our Institute to be a "related profession", the current wording may be a problem in practice when interpreted by a court of law.

Concern 2:

The term "related profession" is not defined.

Concern 3:

The term "serious" is open to interpretation.

Recommendations:

1. The word "related" should be removed. In the interest of certainty, the word "profession" should precede by the word "tax".

2. We recommend that the term "serious" be defined to bring the disqualification to register in line with the disqualification criteria to hold office as a director under the Companies Act, 2008.

3.1.2.8 Clause 58: Insertion of section 240A of Act 28 of 2011

In terms of s 240A(2)

"The Commissioner may recognise a 'controlling body' for natural persons providing advice with respect to the application of a tax Act or completing returns as a 'recognised controlling body' if the body—

(a) maintains relevant and effective—
(i) minimum qualification and experience requirements;
(ii) continuing professional education requirements;
(iii) codes of ethics and conduct; and
(iv) disciplinary code and procedures;
(b) is approved in terms of section 30B of the Income Tax Act for purposes of section 10(1)(d)(iv) of the Act; and

(c) has at least 1 000 members when applying for recognition or reasonable prospects of having 1 000 members within a year of applying."

Concern 1:

The Commissioner is currently given a discretionary power and the Commissioner may [perhaps arbitrarily] elect to recognise or not to recognise a 'controlling body'.

In a recent speech delivered by the current Commissioner, Mr Oupa Magashula, at the SAIPA Conference, the Commissioner commented that—

> *"The first phase will be the compulsory registration of tax practitioners with a* ***recognised controlling body such as SAIPA****."*
> [emphasis added]

This statement raises various concerns, especially the fact that this is draft legislation and the requirements to recognise a professional body as a 'recognised controlling body' as envisaged in the TAAB is not yet approved by this Committee and/or promulgated by the President.

Recommendation:

We recommend that the Commissioner be compelled to recognise a 'controlling body' if it meets the requirements in terms of s 240A. In addition, the recognition should only be granted after the law is promulgated if it meets the requirements in terms of s 240A. The statement by the Commissioner created a legitimate [legal] expectation with SAIPA that it is already recognised by the Commissioner as a 'controlling body'. This is highly irregular and unacceptable practice.

In addition, a recognised 'controlling body' should be published in the *gazette*.

Concern 2:

The words "…providing advice with respect to the application of a tax Act or completing returns as a 'recognised controlling body' " are confusing.

Recommendation:

We recommend that the word be deleted. Alternatively, it must be rephrased.

Concern 3:

We submit that the following references are too wide in scope:

> *"minimum qualification and experience requirements;*
> *"continuing professional education requirements"; and*
> *"codes of ethics and conduct; and*
> *"has at least 1 000 members when applying for recognition or reasonable prospects of having 1 000 members within a year of applying"*

This is exasperated by the fact that s 241 mandate a senior SARS official to report a registered tax practitioner to a recognised controlling body for, *inter alia,* perceived [subjective] incompetence in practicing taxation law. In addition, it is questionable whether a professional body with less than 1 000 members will be able to contribute its share of the 50% disciplinary cost as envisaged in s 241.

Recommendations:

1. We understand from SARS that the aim of the regulation and registration requirement is tax practitioners. It should therefore logically follow that the 'controlling body' "must establish minimum qualification and experience requirements in taxation law" for its "registered tax practitioners" (as defined).

   Alternatively, we recommend that the 'controlling body' must maintain a relevant and effective "minimum taxation, accounting, auditing or law qualification with specific taxation law experience requirements".

2. The requirement to recognise a 'controlling body' should be that the 'controlling body' maintains relevant and effective "continuing professional education requirements in taxation law". If this is not explicitly stated, the 'controlling body' will initially be recognised, but be set-up for failure in its duty towards this co-regulation model. The impact on its members losing a licence to practice as tax practitioners, and hence their income earning tool, will be catastrophic.

3. The requirement should be that a 'controlling body' must maintain relevant and effective "codes of ethics and conduct in relation to taxation law". Alternatively, the Minister may by regulation appoint a *Taxation Standards Council* to issue a minimum code of conduct and taxation standards, similar to the current Financial Reporting Standards Council established under the Companies Act, 2008. The *Taxation Standards Council* should then comprise of the various stakeholders representatives, including SARS, business, public and the recognised controlling bodies. An unintended consequence of failing to prescribe a standard code of conduct in relation to taxation will invariably result in two individuals being subjected to different disciplinary sanctions for the same law they practice.

Example 1:

Mrs. S.A.I. Tax Practitioner is required, annually, to apply to SARS for a Tax Clearance Certificate and submit it to her 'controlling body' to remain in good standing. This is a requirement of the code of conduct in relation to taxation of her tax specific recognised 'controlling body'.

Failing to obtain a tax clearance from SARS, will result in disciplinary action taken against her by the 'controlling body, and if found guilty of tax non-compliance, be subjected to her suspension from the 'controlling body'.

Example 2:

Mr. O.T.H.E.R Tax Practitioner is a member of another recognised 'controlling body', with a general professional code of conduct, and therefore not subjected to the same tax specific code of conduct as Mrs. S.A.I. Tax Practitioner.

Failing to obtain a tax clearance from SARS, for example, will not result in disciplinary action taken against him by his 'controlling body'.

In addition, the misconduct for which Mrs. S.A.I. Tax Practitioner was suspended in example 1, will probably also not attract the same sanction if Mr. O.T.H.E.R Tax Practitioner is subjected to disciplinary action by his 'controlling body'.

Mrs. S.A.I. Tax Practitioner, may therefore legitimately proceed and apply for membership of the same recognised 'controlling body' as Mr. O.T.H.E.R Tax Practitioner, as it is likely that the misconduct defined by

the tax specific code of conduct and professional body, may not be equal or the same as that of the recognised 'controlling body' of Mr. O.T.H.E.R Tax Practitioner.

4. The requirement should be that the prospective [applicant] 'controlling body' must have at least 1 000 tax practitioner members registered with SARS. In addition it must maintain relevant and effective "continuing professional education requirements in taxation law". If this is not explicitly stated, the 'controlling body' will initially be recognised, but be set-up for failure in its duty towards this co-regulation model.

5. The requirement to recognise a 'controlling body' as envisaged in the TAAB should include the requirement of registration and recognition as a professional body by South African Qualifications Authority ('SAQA'). The National Qualifications Framework Act, 2008 [Act No. 67 of 2008] empowers SAQA to register a professional body provided it meets the quality criteria listed in **"Annexure A"**.

6. The program of "continuing professional education requirements" must be defined as meeting the minimum requirements of the South African Qualifications Authority as envisaged in the National Qualifications Framework Act, 2008.

In terms of s 240A (3)

> *"The Minister may appoint a panel of retired judges or persons of similar stature and competence to decide, on behalf of a body recognised under subsection (2), complaints lodged under section 241."*

Concern 1:

We support this provision. However, there may be situations where the recognised 'controlling body' can easily discipline the registered tax practitioner without appointing a panel of retired judges.

Concern 2:

This provision is only applicable to voluntary recognised controlling bodies.

Recommendations:

1. The recognised controlling body should be afforded the opportunity to discipline the registered tax practitioner in a cost effective manner first. It is recommended that the disciplinary process by the recognised controlling body be finalised within 90 days. The findings of the "internal" disciplinary action must be communicated in writing with the Commissioner. If, in the opinion of the Commissioner, the complaint has not been adequately addressed, then the Commissioner can request the Minister to appoint the panel to perform the disciplinary action on behalf of the recognised body.

2. All controlling bodies should be treated equally, including statutory controlling bodies.

3.1.2.9 Amendment 59: Section 241 – Complaint to 'controlling body'

Concern:

In the same way that SARS has the right to report unprofessional acts of the tax professional to their controlling body, a formal basis of reporting unprofessional acts of SARS officials should be established.

Recommendation:

The taxpayer should be in a position to equally lodge a formal complaint with the Commissioner who will investigate and report back on the disciplinary action taken within 21 days, if that official did or omitted to do anything with regards to the affairs of the taxpayer.

We recommend the following wording to be included:

> *(a) By reason of negligence on the part of the official delayed the finalisation of the audit unnecessarily or caused undue financial hardships to the taxpayer;*
> *(b) Constituted a contravention of the rule or code of conduct of the officials profession or the charter of SARS;*
> *(c) Without exercising due diligence prepared or assisted in preparing or approving of any tax assessment or letter of audit findings;*
> *(d) Unreasonably delayed the finalisation of any matter before SARS;*
> *(e) Given an opinion contrary to clear law, recklessly or through gross incompetence, with regard to any matter relating to a tax Act;*
> *(f) Been grossly negligent with regard to any work performed;*
> *(g) Knowingly given false or misleading information in connection with matters affecting the application of any tax Act or participated in such activity"*

4 CONCUSION

Thank you for the opportunity to comment and participate in the development of sound administrative policy to the benefit of South Africa and its citizens.

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

Yours sincerely,

Alton Netshivhungululu
Deputy Chief Executive
The South African Institute of Tax Practitioners

cc: SAIT Tax Technical Committee
SAIT Submissions File
Keith.engel@treasury.gov.za
klouw@sars.gov.za
ftomasek@sars.gov.za
vsymington@sars.gov.za
mkingon@sars.gov.za