The South African Institute of Tax Practitioners

Taxation Laws Amendment Bills, 2012

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General Comments

The Institute adopted a policy during July 2012 to comment on broader themes and tax policy only. The Technical 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.

Specific Comments

Amendment 15 - Tax Admin Amendment Bill - Para 20 Fourth Schedule - Provisional Tax Penalties

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

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.

We need to bring the tax costs down and R1 million taxable income is not very high.

Proposed:

Using turnover of R30 million as the category and not taxable income of R1 million and the monetary threshold should be increased by 8% per annum.

Amendment 22 - Research and Development

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

Need confirmation that the necessary Committee and forms are finalised.

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;"

Is this not what the Fourth Schedule would define as an employee. Concern at the fact that *"non employees"* are *"employees"* of SARS.

Amendment 32 – Section 46

Clarity on the right to object and appeal the decision not to extend the time.

And all other such similar provisions.

Why does Section 104 (2) list a 2(a) and 2(b) and not have all such discretions subject to objection and appeal clearly.

Amendment 39 – Section 95

- Estimated assessments-

    - Not subject to objection and appeal unless taxpayer submits return to SARS and no reduced / additional assessment raised.

Problem with the limitation of the right to object to an estimated assessment is if there is no basis for the assessment, how do you complete the return.

Clause 48 – Section 223 (3)

Remission is only for a reportable arrangement. What if the taxpayer had advise 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.

There should be the discretion to consider mitigating factors.

Registration of tax practitioners and reporting of unprofessional conduct

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:

Registration of tax practitioners and reporting of unprofessional conduct / continued

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' 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.

Registration of tax practitioners and reporting of unprofessional conduct / continued

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 position in the legal profession in which practicing attorneys as well as state prosecutors are equally regulated.

However, to achieve the desired outcome of improving tax compliance of tax practitioners, we set out below our proposed enhancements to the current draft legislation.

Clause 57: Amendment to Section 240

Concerns:

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.

Clause 57: Amendment to Section 240 / continued

The term “related profession” is not defined.

The term “serious” is open to interpretation.

Recommendations:

The word “related” should be removed.

In addition, 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

Clause 58: Insertion of Section 240A

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."

Clause 58: Insertion of Section 240A / continued

Concern 1:

The Commissioner is currently given a discretionary power and the Commissioner **may** 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."*

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' is not yet finalised or published in the *gazette*.

Clause 58: Insertion of Section 240A / continued

Recommendation:

We recommend that the Commissioner must 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 expectation with SAIPA that it is already recognised by the Commissioner as a ‘controlling body’. This is highly irregular and unacceptable.

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

Clause 58: Insertion of Section 240A / continued

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:

Delete the words. Alternatively, it must be rephrased.

Clause 58: Insertion of Section 240A / continued

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.

Clause 58: Insertion of Section 240A / continued

Recommendations:

1. The aim of the regulation and registration requirement is tax practitioners. It therefore logically follows 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".

Clause 58: Insertion of Section 240A / continued

Recommendations:

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.

Clause 58: Insertion of Section 240A / continued

Recommendations:

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 (the formerly the Accounting Practices Board ('APB'). The *Taxation Standards Council* should then comprise of the various stakeholders representatives, including SARS, business, public and the recognised controlling bodies.

Clause 58: Insertion of Section 240A / continued

Recommendations:

4. The requirement should be that the prospective [applicant] 'controlling body' must have at least 1 000 tax practitioner members and be registered with SARS.

Clause 58: Insertion of Section 240A / continued

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:

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.

This provision is only applicable to voluntary recognised controlling bodies.

Clause 58: Insertion of Section 240A / continued

Recommendation:

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.

Amendment 59 – Section 241 – Complaint to controlling body – but what about SARS officials

Proposal:

The taxpayer may lodge a formal compliant 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 in the opinion of the taxpayer that -

(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;

Items to be considered

Section 130

Order for costs should be applicable to Tax Board.

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.

Recovery of costs from SARS Where no Tax Court Hearing

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 the tax morale of citizens.

Recovery of costs from SARS / continued

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.

Recovery of costs from SARS / continued

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.

Section 221
Substantial understatement

Exceeds 5% or R1 million.

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

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

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".

Legal professional privilege (LPP) / continued

Background:

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. Our view is supported by research done by Professor Lynette Olivier and published in SA Law Journal in 2009.

Legal professional privilege (LPP) / continued

Recommendation:

It would be fair if the public and clients of “registered tax practitioners” obtained legal professional privilege. It is also equitable that advice or assistance procured from an attorney, advocate or a tax practitioner is treated equally. The training which the tax professional has undergone should not result in a distinction being drawn from one individual to another, with resulting legal consequences facing the taxpayer. In addition, it also increases the cost to the taxpayer to become compliant, as he/she will need to consult a legal practitioner in addition to the tax practitioner.

Conclusion

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