8 August 2016

The National Treasury
240 Vermeulen Street
PRETORIA
0001

The South African Revenue Service
Lehae La SARS, 299 Bronkhorst Street
PRETORIA
0181

BY EMAIL: Mmule Majola (mmule.majola@treasury.gov.za)
Adele Collins (acollins@sars.gov.za)

RE: COMMENTS IN RELATION TO THE 2016 TAX ADMINISTRATION BILL

The submission relates to the 2016 Tax Administration Bill. Our comments include our previous submissions in terms of late objections and the ability to access the Voluntary Disclosure Programme and the Special Voluntary Disclosure Programme. Although the proposed legislation is a step in the right direction, we request that the proposed amendments go further if they are to have any meaning.

1. Tax Ombud

The independence of the Tax Ombud is essential to the entity's success. The amendments take a step forward toward full independence, but continue to hamstring the Tax Ombud. We fail to the reason the continued limitations.

T (012) 941 0400
F (086) 626 0650
E info@thesait.org.za
W www.thesait.org.za

Riverwalk Office Park, Building A
C/O Garsfontein & Matroosberg
Roads, Pretoria, South Africa, 0081
Reg no 2007/014730/08

PO Box 712
Menlyn Retail Park
0063

In the main, we fail to see why the Tax Ombud cannot review systemic tax issues without first seeking the support of the Minister of Finance. The Tax Ombud should be free to advise and comment on systemic issues as the Tax Ombud sees fit. This power is merely a "power of free" speech" – nothing more. All tax legislation, including tax administration, remains fully in the hands of the Minister of Finance (in conjunction with SARS).

The power for the Tax Ombud to freely comment is important, especially in the case of Parliament and public discourse. While National Treasury ultimately has the theoretical power over tax administration legislation, tax administration legislation is written and driven solely by SARS in practice. The enforcer of the (tax) law should not have an almost exclusive say over legislation in terms of enforcement. In essence, the law cannot be written exclusively by the police of any law without some assurance that public rights are protected in a meaningful way. Involvement of the Tax Ombud in this public discourse is essential given the lack of any other meaningful counter-weights in this area.

We further raise two other issues. The legislation requires SARS to respond to Tax Ombud queries but sets no timelines. This lack of any time lines for SARS has become a common theme in the Tax Administration Act. The Tax Administration Act consistently imposes various strict timelines for taxpayers with no corresponding time lines on SARS. This one-sided approach to the Tax Administration Act is widely perceived to be patently unfair and cause of common complaint. We doubt that this approach would be prevail if taxpayer rights had an effective voice in policy development.

Lastly, we believe that the Tax Ombud needs to have some powers beyond mere advice to Parliament. The Tax Ombud should have the power to request temporary injunctions against SARS action before the courts. Taxpayers, especially those of lesser means, often need protection to hold back the large administrative machinery of SARS in egregious cases. In effect, the Tax Ombud is often in the same position as a "public defender" in a criminal case so members of the public have representation when then they cannot individually afford protection.

../3

T (012) 941 0400
F (086) 626 0650
E info@thesait.org.za
W www.thesait.org.za

Riverwalk Office Park, Building A
C/O Garsfontein & Matroosberg
Roads, Pretoria, South Africa, 0081
Reg no 2007/014730/08

PO Box 712
Menlyn Retail Park
0063

2. Time Periods for Objections

A. Background

Under current law, taxpayers have essentially three periods for objections. Taxpayers have an initial automatic 30-day period for objection, a 21 day extension for reasonable grounds and up to three years for special circumstances. As a practical matter, the private sector consensus is that SARS's acceptance of extensions for special circumstances are fairly rare.

In Annexure C, the suggestion was raised that more flexible time periods would be given for taxpayers to object, especially in complex cases. The resulting legislation seemingly fulfils this suggestion by extending the reasonable grounds extension from 21 days to 30 days. While our members appreciate the slight extension, we humbly request changes that are more substantial.

B. Time Periods for Reasonable Grounds

Of main concern to most practitioners and taxpayers is the short time periods for reasonable ground extensions. The need for a longer period in this regard exists for multiple reasons. The required SARS notice is often left solely on e-filing not to be noticed by (less sophisticated) taxpayers for many months, many SARS notices are often vague in terms of the issues at hand and requests for information are often open-ended. All of these issues leave taxpayers in confusion with many simply shutting down (only to consult their advisors when time spans have long since passed).

../4

T (012) 941 0400
F (086) 626 0650
E info@thesait.org.za
W www.thesait.org.za

Riverwalk Office Park, Building A
C/O Garsfontein & Matroosberg
Roads, Pretoria, South Africa, 0081
Reg no 2007/014730/08

PO Box 712
Menlyn Retail Park
0063

The level of skill within private operations can also be problematic. Operational business systems fail and the press of business can easily cause the short 30/21 day time periods to pass. Obtaining the right tax advisors as well as retrieval and collection of information all takes time. Most business operational statistics / books have to be examined to provide a more detailed set of information be required during the objection period. In short, life is complicated and ready responses to SARS inquiries are harder to handle for some taxpayers than others.

Given the above, we would again strongly suggest that the period for reasonable ground extensions be extended to a period of 6 months as opposed to a mere 30 days. This is a big issue for many taxpayers and practitioners who often feel that the current system has become oppressive.

C. Longer objection periods for complex cases

We also reassert our position that the initial 30-day period should be extended to 90 days for complex cases. Under section 99(4), SARS recognizes the need for greater time periods of assessment beyond the three-year period in the cases of obvious complex cases. These circumstances are as follows:

- Substance-over-form investigations,
- GAAR investigations,
- Corporate formation and reorganisation transactions,
- Transfer pricing investigations, and
- Hybrid entities / instruments

../5

T (012) 941 0400
F (086) 626 0650
E info@thesait.org.za
W www.thesait.org.za

Riverwalk Office Park, Building A
C/O Garsfontein & Matroosberg
Roads, Pretoria, South Africa, 0081
Reg no 2007/014730/08

PO Box 712
Menlyn Retail Park
0063

3. "Awareness" and Voluntary Disclosure

A. Background

One of the most important preconditions for voluntary disclosure relief is the lack of awareness of SARS pre-existing involvement in regards to the matter of tax disclosure. More specifically, under current section 226, voluntary disclosure relief is currently unavailable if the person applying for relief is "aware" of either:

- A "pending audit or investigation" into the tax affairs of the person seeking relief that relates to the disclosure relief requested; or
- An ongoing audit or investigation (i.e. one commenced but not concluded) into the tax affairs of the person seeking relief that relates to the disclosure relief requested.

The proposed legislation properly recognises the difficulty many taxpayers are facing in respect of the awareness determination, especially in determining whether pending SARS action exists and whether the action is in regard to the matter under consideration for disclosure. Under the proposed change, the term "pending audit" is accordingly subject to further definition as follows:

> 'pending audit' means, where–
> (a) a taxpayer has been notified of an intended audit; or
> (b) an application has been made for an inquiry order in terms of section 50 [alternative wording: an order has been granted in terms of section 51]; or
> (c) an application has been made for a warrant in terms of section 59; [alternative wording: a warrant has been issued in terms of section 60]

../6

T (012) 941 0400
F (086) 626 0650
E info@thesait.org.za
W www.thesait.org.za

Riverwalk Office Park, Building A
C/O Garsfontein & Matroosberg
Roads, Pretoria, South Africa, 0081
Reg no 2007/014730/08

PO Box 712
Menlyn Retail Park
0063

B. Comments

The proposed amendment is admittedly a step forward at clarification but still falls far short of the clarification required. Firstly, the term "investigation" remains wholly undefined. More importantly, the new definition merely shifts the concern to the core issue – what does notification actually mean?

We would suggest that the term firstly be limited to a written (printed or electronic) form of notification aimed directly at the taxpayer. Public statements / warnings from SARS about their general direction (e.g. public statements about the HSBC investigation) should be outside the ambit of the notification intended Informal conversations need to be excluded.

Secondly, even if this limitation exists, there are many forms of direct written / electronic communication to a taxpayer that would create confusion. Is a mere request for information sufficient? How does one know exactly whether the request explicitly relates to the matter to be voluntarily disclosed? The SARS target of examination should have to be disclosed (at least in a general way) for voluntary disclosure to be removed. Open-ended requests should not cut-off the opportunity for relief.

Lastly, the notification needs to have a time limit. Many forms of notice are often raised but left outstanding with little action. Notifications should probably be ignored after a 2/3 year time frame.

C. Related Interpretation Issue: The Word "Voluntary"

As discussed in our prior submission, the word "voluntary" is sometimes interpreted as a separate requirement. Under this interpretation, pending possible action by SARS (e.g. various forms of awareness or notification) can render an application involuntary. The net result is to deny the application for relief.

../7

T (012) 941 0400
F (086) 626 0650
E info@thesait.org.za
W www.thesait.org.za

Riverwalk Office Park, Building A
C/O Garsfontein & Matroosberg
Roads, Pretoria, South Africa, 0081
Reg no 2007/014730/08

PO Box 712
Menlyn Retail Park
0063

We believe that term "voluntary disclosure relief" should not be viewed as a separate requirement. The term is merely a label for the relief intended. The terms "voluntary disclosure relief" should be replaced with the terms "relief under this Part" throughout Part B of the Tax Administration Act.

D. Use of the word "not" in section 226(2)

Subsections (1) and (2) of section 226 for voluntary disclosures have become confused. As a general matter, eligible matters for voluntary disclosure must be unrelated to an audit or investigation. This is the main channel for seeking relief as described under section 226(1).

However, under section 226(2) related matters may still be brought forward upon the discretionary direction of a SARS official. This channel was clarified in 2015. According to the 2015 objects of memorandum, the purpose of this channel is to allow for related matters to be disclosed where the related matter would not otherwise be detected during the audit / investigation (see section 226(2)(b)). The memorandum of objects than provides an explanation of a PAYE audit with related VAT matters. Under this example, voluntary disclosure of the related VAT matter will be allowed where the VAT and PAYE issues have no correlation to one another and where the VAT issue would not otherwise be detected.

It is now proposed that the secondary section 226(2) channel be limited to matters that are not related to the default under audit / investigation. This limitation effectively eliminates the secondary channel currently in existence. Matters that are unrelated are the sole domain of section 226(1). Section 226(2) is designed solely for a specified set of "related" matters. We accordingly request that the proposed use of the term "not" be dropped from the proposed amendment to section 226(2) so that section 226(2) continues to have meaning.

../8

T (012) 941 0400
F (086) 626 0650
E info@thesait.org.za
W www.thesait.org.za

Riverwalk Office Park, Building A
C/O Garsfontein & Matroosberg
Roads, Pretoria, South Africa, 0081
Reg no 2007/014730/08

PO Box 712
Menlyn Retail Park
0063

4. Penalties for impermissible avoidance

We doubt that the proposed penalty for impermissible avoidance arrangements will have much impact because no tax advisor would knowingly proceed with an arrangement of this kind nor disclose a transaction as such. Any transaction skating "close to the edge" would be covered with a variety of advisory opinions to the contrary.

That said, if the amendment is to proceed, we think that the amendment should be slightly narrowed.

- The penalty should not apply if triggered by the "use or misuse" test because this aspect of the legislation is wholly untested under South African law (being a Canadian derivation). Taxpayers should not be subject to a penalty for a concept that remains wholly uncertain.

- The penalty should also not apply if an impermissible arrangement is deemed to exist because of round-trip financing (section 80D) or a tax-indifferent or accommodating party (section 80E). These deeming rules are fairly wide and can trigger an impermissible arrangement even if the sole or main tax purpose of the transactions cannot be explicitly proven (see section 80G).

Yours sincerely

Carmen Moss-Holdstock

Chair of the Tax Administration Work Group

T (012) 941 0400
F (086) 626 0650
E info@thesait.org.za
W www.thesait.org.za

Riverwalk Office Park, Building A
C/O Garsfontein & Matroosberg
Roads, Pretoria, South Africa, 0081
Reg no 2007/014730/08

PO Box 712
Menlyn Retail Park
0063