Standing Committee on Finance: Report-Back Hearings

Date: 21 September 2011

Tax Administration Bill, 11 of 2011

Response Document

A. BACKGROUND

1. Process

Following a process involving the release of draft Bills, workshops with stakeholders and opportunities for written submissions, which stretched for over two years, the Tax Administration Bill was introduced in the National Assembly on 23 June 2011. The Standing Committee on Finance was formally briefed on the Bill on 2 August 2011. Public comments, together with an opinion by SARS's independent counsel on the constitutionality of the Bill – as offered during the course of the formal briefing, were presented at hearings held on 16 and 17 August 2011.

The closing date for the submission of written comments on the Bill to the Committee was 11 August 2011. Eleven written comments were received by 17 August 2011, two of which did not relate to matters covered by the Bill.

2. Public comments

Comments relating to the Bill were received from:

1. Association of Chartered Certified Accountants
2. Commission for Gender Equality
3. Law Society of South Africa
4. Professor Michael Katz
5. PricewaterhouseCoopers Tax Services)
6. South African Institute of Chartered Accountants
7. South African Institute of Professional Accountants
8. South African Institute of Tax Practitioners
9. Victor Thuronyi

SARS's constitutional counsel also submitted their opinion on the constitutionality of the Bill.

The comments of the Law Society of South Africa are regrettably based on an outdated draft of the Bill. Accordingly, no response has been made to comments on aspects of the outdated draft that have changed in or have been dealt with by commentators commenting on the Bill as introduced.

B. GENERAL SUBMISSIONS

1. Rationale for Bill

Overall, commentators are supportive of the need for the Bill and its objectives of consolidating the administrative provisions of the various tax Acts into a single piece of legislation and simplifying the provisions. They complimented the Bill on its simplification of tax obligations. The Bill is also considered to be laid out in a logical manner, greatly aiding taxpayers and tax practitioners in identifying the relevant provisions of the Bill.

2. Consultation process

Comment:

The initiative SARS had taken in what was a difficult and time consuming exercise is applauded and appreciation is expressed for the consultative approach adopted by SARS in drafting the Bill. The process followed by SARS is considered to be a model for the legislative drafting process. However, concerns raised during the commentary and consultation process were not addressed by SARS.

Response

It is recommended that the last comment above not be accepted. Slide seventeen of the Commissioner's formal presentation to the Committee sets out eleven examples of the significant changes resulting from the consultation process. These were as follows:

- Introduction of a Tax Ombud
- Removal of advance notice of leaving South Africa
- Limitation of information request to available records
- Reasonable specificity limitation on information requests
- Protection of legal professional privilege during seizure
- Right to claim damages arising from search & seizure
- Reportable arrangement failure no longer an offence
- Estimated assessments – burden of proof on SARS
- Interest neutrality & remittance of interest
- Security for audited refund
- Permanent VDP.

3. Reasonable conduct by SARS and "anti-abuse" provisions

Comment

Various comments were made that specific clauses should contain provisions that require SARS's officials to act reasonably or otherwise protect a taxpayer from the abuse of power.

Response

It is suggested that these comments are generally misconceived.

The obligation to act reasonably

The concerns that SARS officials will act unreasonably, unless the Bill requires them to act reasonably, are misconceived. Once the Bill is read together with the Promotion of Administrative Justice Act, 2000 ("PAJA") most, if not all, of the issues raised will fall away.

All administrators (including SARS) must comply with PAJA, unless the statutes which govern them are inconsistent with PAJA. The Constitutional Court, in this regard, has held that all statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA (*Zondi v MEC for Traditional & Local Govt Affairs* 2005 (3) SA 589 (CC) at par 101).

The obligation on SARS and its officials to act reasonably is also implicit in the duty under section 7 of the Constitution to give effect to the right to administrative fairness, which *inter alia* mandates that the administrative conduct be reasonable.

Accordingly, it is then not necessary for the Bill itself to spell out all the relevant aspects of administrative justice, for example that conduct by SARS officials in the determination of appropriate time periods for compliance with information requests, should be reasonable.

'Anti-abuse' provisions

The mere fact that administrative provisions are capable of being abused and infringing taxpayer rights does not render such provisions unconstitutional.

All powers are capable of being abused, but if this happens, the Courts have the power and duty to review and set aside the conduct of the officials concerned. This has been made clear by the Constitutional Court.

> "Any power vested in a functionary by the law (or indeed by the Constitution itself) is capable of being abused. That possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute."
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> (*Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) at par 37)

It is accordingly neither practical nor possible to legislate against abuse. In addition to the Courts' statutory and inherent power to review and set aside the "abusive" conduct, the Bill also affords taxpayers general and specific remedies.

4. Balance of the Bill

Comment

The powers of SARS and obligations of taxpayers have been increased substantially. Balance, equity and fairness cannot be achieved through vague "checks and balances". Balance can only be achieved through granting specific rights for taxpayers or imposing specific obligations on SARS. While it is acknowledged that some concessions have been made in favour of taxpayers, these are relatively minor and go no further than incorporating the existing rights and remedies that taxpayers have under the Constitution and administrative law.

Response

It is recommended that the comment not be accepted, although amendments are recommended later in this response to address some of the specific issues that have been raised.

In evaluating the question of whether an appropriate balance between SARS and taxpayers has been achieved in the Bill, three interrelated aspects of the law must be considered:

- The overall constitutional framework within which the Bill will operate beginning with the Constitution, continuing with the legislation flowing from the Constitution, such as the Public Protector Act, 1994, and Promotion of Administrative Justice Act, 2000, and concluding with the power of the Courts to review SARS's actions.
- The overall checks and remedies proposed by the Bill, such as the setting of explicit authority levels for exercising powers; the objection, alternative dispute resolution and appeal system; and the proposed Tax Ombud.
- The specific checks proposed with respect to individual powers, which clearly include specific additional rights granted to taxpayers and specific additional obligations imposed on SARS.

In other words, the Bill must be considered holistically. Attempting to list new powers, some of which are in reality modifications or restatements of existing powers,[1] and comparing them to an incomplete list of new overall checks and remedies gives an incomplete picture.

5. Extension of legal professional privilege to accountants

Comment

Statutory legal privilege should apply to tax advice provided by tax practitioners, regardless of whether the tax practitioner is an admitted attorney or advocate. This should be granted along similar lines to that adopted in New Zealand and subject to similar requirements and restrictions, either explicitly or though an amendment to the definition of information in clause 1.

Most tax advice (which is legal advice on a specialist area of law) is provided by persons who are not admitted attorneys or advocates, such as chartered accountants. It is submitted that legal privilege should be extended to communications between clients and suitably qualified tax advisors, who are not admitted attorneys or advocates, in order to keep pace with the modern world and to give effect to the public interest purpose of legal privilege.

A further reason is that pure legal professional privilege creates an uneven playing field and a competitive advantage for law firms over other tax practitioners, which advantage some law firms have sought to exploit.

Response

It is recommended that the comment be held over for consideration together with a future Regulation of Tax Practitioners Bill. Legal professional privilege (LPP) is a near absolute common law right that originated in the UK in the sixteenth century. It protects communications between lawyers and their clients while obtaining legal assistance. No similar privilege exists for communications with accountants, doctors, priests and others. Where privilege is extended outside the legal profession, even on a limited basis, this is done by statute. Commentators draw on Germany, New Zealand and the USA as examples of foreign jurisdictions that offer a limited privilege in respect of non-lawyers who give tax advice.

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[1] Two examples illustrate the point with respect to the modification or restatement of existing powers.

- *Translation of documents (clause 33):* This power is currently granted by section 74 of the Income Tax Act, 1962, and section 57 of the Value Added Tax Act, 1991. As noted in C.4.5. below, clause 33 is narrower than the existing provisions.
- *The power to apply for a preservation order and to seize assets in anticipation thereof (clause 163):* The right to apply to a Court for a preservation order is an existing power under the common law, which SARS has used successfully in the past.

In addition, some of the items listed are simply incorrect.

- *The limitation of taxpayers' rights of access directly to the High Court on tax disputes (clause 105)*: The exception in clause 105 specifically permits applications to the High Court for review.
- *Substantially enhanced criminal offences (clause 234)*: Not all the current statutory offences in the tax Acts have been included in Chapter 17. Also, the "just cause" defence is now applicable to all offences covered by clause 234. None of the offences have been "enhanced" in the sense that fines or prison terms are increased in the Bill.

Finally, the *prohibition of undesirable persons registering as tax practitioners (clause 240)* is not a new power of SARS but rather a protection for taxpayers using the services of tax practitioners.

The matter is currently under review by the Australian Treasury, which issued a discussion paper in April 2011. After setting out the case for the extension of privilege the discussion paper notes the arguments against it. These include the increased scope of documents that would be covered by privilege, the unique duties lawyers have to the law and the courts, the role of the courts in supervising lawyers, the potential for delay and abuse, the "floodgate" argument for other professionals and the potential for difficulties in the international and inter-agency context. The period for public comment has now closed, but a decision has not been communicated. Canada does not offer a similar privilege to non-lawyers. The UK limits HMRC's right to request opinions from tax advisers, but not from their clients or others who may hold them. The question of a broader privilege in the UK has recently been litigated up to the Court of Appeal. The Court denied it to accountants after noting that;

> "Thus, not only has Parliament not created any statutory extension of LPP to legal advice sought from and given by accountants on tax matters, but this position has been reached after consideration of the position by several responsible bodies, making diverging recommendations on the point, including two committees, some of whose recommendations did lead to legislation. Parliament's failure to change the law in this respect is not an accident."
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> (*Prudential Plc & Anor, R (on the application of) v Special Commissioner of Income Tax & Ors* [2010] EWCA Civ 1094. The ruling is currently on appeal to the Supreme Court of Appeal.)

While the issue of a level playing field between lawyers and other professionals with respect to privilege is acknowledged,[2] the following comment by the Australian Financial Services Minister, Bill Shorten, is instructive; "The (admittedly receding) lawyer in me would argue that the lawyer-client privilege is one safeguarded by the additional duties incumbent upon lawyers as officers of the court, and that the absence of such a duty among accountants is fatal to your profession's claim." At least in Australia, however, tax practitioners are subject to statutory regulation.

The question of a limited privilege for tax advice by non-lawyers is a contentious one internationally. SARS's view is that just as is the case in Germany, the USA and (if a limited privilege is extended in that country) Australia, a prerequisite for considering the extension of privilege in tax matters to non-lawyers is that the tax practitioners are regulated, not by self-constituted professional bodies, but by law.

[2] The Court of first instance in the *Prudential* case suggested that one way in which the issue of a level playing field could be addressed is by reducing the scope of LPP in the tax arena. These comments were not supported by the Court of Appeal. In the USA, Mark Everson, an ex-Commissioner of the IRS has gone a step further by suggesting that; "Congress should take a hard look at the doctrine of attorney-client privilege as it applies to corporations. Communications pertaining to patents, or threatened or actual litigation, should remain protected. But communications about, say, commercial transactions and financing and even government-mandated filings and disclosures might not." ("Lawyers and Accountants Once Put Integrity First" *New York Times* 18 June 2011)

C. SPECIFIC SUBMISSIONS

1. CHAPTER 1: DEFINITIONS

1.1. Clause 1: Definition of "business day"

Comment

It is proposed that the days between 16 December and 15 January also be excluded for purposes of the time period within which to respond to a letter of audit findings in clause 42 on the grounds that most organisations and SARS operate on skeleton staff during this period.

Response

It is recommended that this comment not be accepted. The period between 16 December and 15 January is excluded for dispute resolution purposes, since many Courts are in recess over this period. The intention is to align the dispute resolution process with the Courts procedural rules. SARS cannot and does not otherwise "close business" during this period given the clear prejudice to both SARS, in collecting tax, and taxpayers, for example those waiting for refunds subject to an audit.

1.2. Clause 1: Definition of "senior SARS official"

Comment

The term *"senior SARS official"* is defined in clause 1 of the Bill as a SARS official referred to in clause 6(3). It is submitted that the definition of senior SARS official as described in clause 6(3) is too broad and should be more clearly defined, given the wide powers and discretion granted to a senior SARS official.

Response

It is recommended that the comment not be accepted. It is part of our law that implicit in the power to delegate is the obligation to delegate suitably experienced and appropriately skilled persons, especially in view of the fact that a delegation does not absolve the delegator from final accountability. As the required experience and skill is dependent on the nature of the delegated power, it will differ from case to case and it would, accordingly, be impossible to prescribe them in respect of each power nor is this the approach taken in other statutes assigning the power to delegate to heads of institutions.

The fact that a delegated senior SARS official is not suitably experienced and appropriately skilled is not in itself a ground for review – see section 6 of the Promotion of Access to Information Act, 2000, ("PAJA") – but will increase the risk that a decision taken by such official can be successfully challenged on review under PAJA on one or more of the grounds listed. This

in itself will ensure that senior SARS officials will be carefully selected through internal processes.

It is further SARS's intention to publish the names and/or designations of delegated senior SARS officials on its website.

1.3. Clause 1: Definition of "serious tax offence"

Comment

The definition refers to the generic term of "fine" and may include even a small amount. In comparison the current definition associates a serious tax offence with imprisonment exceeding two years.

Response

It is recommended that the comment be accepted and that the definition be amended to provide that a "serious tax offence" is one in respect of which the person has been sentenced to a period of imprisonment exceeding two years without the option of a fine or to a fine exceeding the equivalent amount prescribed in the Adjustment of Fines Act, 1991.

The recommended amendments to the definition in clause 1 are set out below.

> "'**serious tax offence**'' is a tax offence for which a person may be liable on conviction to ~~a fine or to~~ imprisonment for a period exceeding two years without the option of a fine or to a fine exceeding the equivalent amount of a fine under the Adjustment of Fines Act, 1991 (Act No. 101 of 1991);'"

2. CHAPTER 2: GENERAL ADMINISTRATION PROVISIONS

2.1. Clause 3: Administration of tax Acts

Comment

Administration of a tax Act means to obtain full information in relation to anything that may affect the liability of a person for tax in respect of a previous, current or future tax period. SARS should not be entitled to call for information prior to the conclusion of transactions affecting the future tax periods.

Response

It is recommended that the comment not be accepted. Obtaining "real-time" information (i.e. before the end of the relevant tax period) from taxpayers is key to effective risk management and is fully aligned with international best practice. Risk assessment, as reflected in clause 40, is one of the bases of SARS's audit selection process and involves assessing the risk profile of

taxpayers (‘‘risk assessment’’) and then allocating resources in accordance with the risk profiles (‘‘risk-led resource allocation’’) which should result in more targeted audits.

A resource to risk strategy means allocating resources according to the level of risk displayed by a taxpayer. This ensures that resources are deployed effectively and efficiently to counter the largest risks with the aim of encouraging high risk taxpayers towards becoming lower risk. Although traditional post filing audits are still being used to address non-compliance, other effective approaches are being increasingly used.

SARS’s real-time risk management approach is aligned with international best practice. According to the OECD Forum on Tax Administration’s *Guidance Note on Compliance Management of Large Businesses: Experiences and Practices of Eight OECD Countries*, published in July 2009, various tax administrations have adopted methods to engage in real-time dialogue with their taxpayers, and have developed tools to provide early certainty to taxpayers and to increase early identification and resolution of issues.

2.2. Clause 5: Practice generally prevailing

Comment

The term “practice generally prevailing” is defined in clause 5 as a practice set out in an “official publication” – which is defined in clause 1 as a binding general ruling, interpretation note, practice note or certain public notices. This concept is important for, *inter alia*, the issuing of additional assessments by SARS. For example, an additional assessment may not be issued by SARS in terms of clause 99 if the amount in question was originally assessed to tax in accordance with a practice generally prevailing at the time of the original assessment. In this regard, the provision acts as a safeguard for taxpayers and provides certainty in the sense that SARS will be bound by its own practices.

It is submitted that the term “official publication” is not sufficiently broad to capture all SARS publications on which taxpayers should be entitled to rely. SARS publishes comprehensive guides on a range of tax matters on which taxpayers should be entitled to rely. These comprehensive guides include, for example, those on capital gains tax and secondary tax on companies.

Response

It is recommended that the comment not be accepted. Practice generally prevailing works to taxpayers’ or SARS’s benefit depending on the circumstances. As an example of the second, taxpayers’ late objections are restricted where they are based on a practice generally prevailing at the time of assessment.

SARS's guides are intended as an explanatory service to taxpayers. They normally summarise the applicable law and provide practical examples which may or may not be regarded by a court as reflecting the correct interpretation of the relevant provisions. They do not undergo the comprehensive and time consuming review that official publications, as defined in the Bill, undergo.

SARS guides would, however, generally afford protection from understatement penalties in that a taxpayer would be able to assert that relying on a SARS guide means the tax position taken by the taxpayer is reasonable (see clause 223(1)(iii)).

Comparatively, non binding guides are not uncommon and include, for example, disclaimers that the information provided *"is only a guideline, is not intended to be exhaustive, and is not meant to restrict the spirit or intent of the legislation"* (Canadian CRA publications – see for example the VDP Information Circular IC00-1R2 of 22 October 2007).

2.3. Clause 12: Right of appearance in proceedings

Comment

Permitting SARS officials who are admitted advocates or attorneys to represent SARS in legal proceedings poses a direct and material interference in the judicial process.

Response

It is recommended that this comment not be accepted. There has been a long standing arrangement with the Bench that SARS employees, who are admitted advocates or attorneys with the right of appearance in the higher Courts, may appear in the Tax Court and higher Courts to deal with tax appeals.

Attorneys, who are on the non-practising roll of practitioners, and advocates who are employed as SARS officials would naturally still be officers of the Court, accountable to the Court and subject to the discipline of the Court. The provision for the right of appearance is largely similar to prosecutors, whose right of appearance is regulated by legislation dealing with the National Prosecuting Authority. Section 25(2) of the National Prosecuting Authority Act, 1998, which essentially determines that any prosecutor who has obtained particular legal qualifications and who has at least three years actual prosecuting experience has the right to appear in any court.

The appearance of revenue officials in litigation proceedings, including before the higher courts, is a fairly common feature in other comparable jurisdictions.

2.4. Clauses 15 to 21: Tax Ombud

2.4.1. *General*

Comment

The proposed introduction of a Tax Ombud is a welcome change. However, in light of the significant powers granted to SARS by the Bill, there is a concern that the proposals contained in the Bill do not go far enough.

Response

SARS is of the view that the Bill's model for the Tax Ombud is both consistent with international practice and provides a substantial remedy to taxpayers on administrative and procedural matters, as discussed in more detail below.

2.4.2. *Tax Ombud: Gender equality*

Comment

Clause 14 is not gender sensitive because it does not advocate for both men and women to be considered for the position of Tax Ombud.

Response

It is suggested that the comment not be accepted. The Bill was drafted in a gender neutral style. As an example, the Bill, in contrast to most other countries surveyed, uses the term "Ombud" instead of "Ombudsman". The proposed legislative model for a Tax Ombud is largely based on the Canadian model, where the term "Tax Ombudsman" is used despite equal protection afforded to gender equality in the Canadian Constitution.

The Minister of Finance, in exercising the power to appoint the Tax Ombud, is clearly obliged to do so in a manner consistent with the Constitution.

2.4.3. *Independence of the Tax Ombud*

Comment

The proposed Tax Ombud is an improvement on the SARS Service Monitoring Office (SSMO) in that he or she is appointed by and reports directly to the Minister of Finance. As the costs of the Tax Ombud's office are paid out of the funds of SARS and the staff are employed by SARS and seconded to the Tax Ombud, the Tax Ombud is not truly independent of SARS.

To be truly independent of SARS the office should be funded by Treasury and the staff should not be SARS officials. The Tax Ombud should also be accountable to Parliament.

Response

It is recommended that the comment be partially accepted. The Tax Ombud is appointed by the Minister and is completely independent from SARS. The use of SARS funding and secondment of SARS personnel is a practical matter, which will simplify the Tax Ombud's administration, ensure staff are knowledgeable about tax and SARS's internal processes, and will simplify the administration of secrecy around taxpayers' affairs. Canada, the UK and the USA all fund and staff their equivalent offices through their tax administrations for these reasons. In order to improve the Tax Ombud's control over the secondment of staff it is recommended that the Tax Ombud be empowered to request the secondment of staff and that the process be "in consultation" rather than "after consultation".

In as far as reporting to Parliament is concerned, care has to be taken that the Tax Ombud does not intrude on the role and status of the Public Protector as a state institution mandated by the Constitution to investigate and report any improper conduct in state affairs. The Public Protector reports to Parliament on an annual basis and may also report on particular investigations. In order to enhance the public visibility of the Tax Ombud's annual report it is recommended that the Minister of Finance tables it in Parliament. The relevant committees may then convene hearings on it, should its contents warrant such a step. This brings the Tax Ombud closer to the Canadian model.

The recommended amendments to clause 15 are set out below.

> "(1) The staff of the office of the Tax Ombud must be employed in terms of the SARS Act and be seconded to the office of the Tax Ombud **[by the Commissioner]** at the request of the Tax Ombud **[after]** in consultation with the **[Tax Ombud]** Commissioner."

The recommended amendment to clause 19 is set out below.

> "(3) The Minister must table the annual report of the Tax Ombud in the National Assembly."

2.4.4. *Mandate of Tax Ombud*

Comment

The mandate of the Tax Ombud should be expanded to include a review of matters such as faulty procedures, unfair treatment and bias or prejudice.

Response

It is suggested that the comment is misconceived. The Tax Ombud's mandate is already sufficiently widely stated to cover most, if not all, the issues mentioned.

Comment

The Tax Ombud should be given the power to compel SARS to act in a certain way in relation to those matters on which it has authority in a similar manner to that afforded to the Taxpayer Advocate in the USA, housed within the Internal Revenue Service. In that country the Taxpayer Advocate may issue so-called "taxpayer assistance orders", which afford relief to taxpayers. The Tax Ombud also should have the power to award nominal amounts to taxpayers, as is done in some other countries, as recompense for the aggravation and wasted costs incurred in dealing with SARS, particularly where SARS has failed to act in compliance with its obligations under the SARS Act and the Constitution of the Republic of South Africa, 1996.

Response

It is recommended that the comment not be accepted. Providing a Tax Ombud with determinative authority will not improve the process of problem resolution, since both the taxpayer and SARS will have to have the right to challenge the Tax Ombud's decision before a Court. All that is achieved by providing determinative authority over SARS, with cost implications, is the introduction of an intermediate quasi-judicial tier, which is not the function of a Tax Ombud.

As the Canadian Taxpayers' Ombudsman put it in his Annual Report 2009 – 2010; "An ombudsman's effectiveness is dependent on using moral suasion to convince the organization that the recommendations are sound, reasonable, and should be implemented. Moral suasion is exercised through discussion, mediation, and when necessary, publicity. The power to report has been called the ultimate sanction of the ombudsman. Shining a light on a problem by issuing a public report allows the ombudsman to generate a public debate and marshal support for recommendations."

In the UK model, while the service level agreement between Her Majesty's Revenue and Customs (HMRC) and the Adjudicator sets up a mechanism for resolving disagreements, it specifically provides that "HMRC is not bound to accept the [Adjudicator's] report, conclusion, or recommendations." The Adjudicator may recommend the payment of direct costs and a "small payment" in respect of worry or distress caused to individuals, in terms of HMRC's own code of practice. HMRC's 2010 Redress Guidance, however, noted; "As a public service we have to balance the need to provide appropriate redress where we have made mistakes, with the fact that financial redress payments are funded by the public. In achieving this difficult balance we need to manage people's expectations and make sure that we consider redress in a wider sense rather than just think about money. The

redress payments we make are ex-gratia and we are under no legal obligation to pay them. They are not intended, in any way, to be akin to damages, which may be awarded by the courts."

In the USA model, which is held up as an example of determinative powers by commentators, the Taxpayer Advocate's decisions may be overruled in writing by the Commissioner or a Deputy Commissioner. The Taxpayer Advocate includes such action in her annual report.

Comment

Clause 16(2)*(f)* does not go far enough. It mandates the Tax Ombud to identify and review systemic and emerging issues related to service matters or the application of the provisions of this Act that impact negatively on taxpayers but does not say what the Tax Ombud must do with this information.

Response

It is recommended that the comment be accepted. The Tax Ombud's report should deal with the systemic and emerging issues mentioned. The recommended amendment to clause 19 is set out below.

"(2) The reports must—
(a) contain a summary of at least ten of the most serious issues encountered by taxpayers and identified systemic and emerging issues referred to in section 16(2)*(f)*, including a description of the nature of the issues;"

3. CHAPTER 3: REGISTRATION

Clause 22: Registration requirements

Comment

Clause 22(4) states that where a taxpayer has applied for registration, but has not submitted all particulars and documents as required by SARS, such person will be regarded as not having applied for registration. An application for registration should only be rejected should the information provided not be sufficient to identify the taxpayer or the period from which registration is to be effective. The Bill endows SARS with adequate powers to enable it to request and to obtain all other peripheral information from taxpayers.

Response

It is recommended that this comment be partially accepted. SARS does not lightly reject applications for registration, since one of its statutory functions is to secure the widest possible enforcement of the tax Acts. On the other hand, registration may be the starting point for a fraud on the fiscus. It is therefore recommended that SARS be afforded a discretion to decide

whether the taxpayer should be regarded not to have applied by changing the words “is regarded not to have applied” in clause 22(4) to “may be regarded not to have applied”. The validity of the application will then depend on the extent and seriousness of the non-compliance with the requirements for registration.

4. CHAPTER 4: RETURNS AND RECORDS

4.1. Clause 25: Submission of return

Comment

A taxpayer or that taxpayer’s authorised representative is required to sign a return submitted on behalf of that taxpayer. It is unclear as to what constitutes an “electronic signature” and whether this would, for example include clicking on the “submit button” when submitting a return via e-filing. It is proposed that the Bill defines the term “electronic signature” for electronic communication purposes.

Response

It is recommended that this comment be accepted. In order to ensure flexibility in the face of technological progress, clause 255(1) should be amended to ensure that the requirements for an “electronic signature” and “digital signature” for purposes of the Bill may be addressed in the rules for electronic communication to be issued by the Commissioner. The recommended amendments are set out below.

> **“255.** (1) The Commissioner may by public notice make rules prescribing—
> *(a)* procedures for submitting a return in electronic format and for other electronic communications between SARS and other persons; and
> *(b)* requirements for an electronic or digital signature of a return or communication.

4.2. Clause 26: Third party returns

Comment

A taxpayer has the right to know what information is being shared with SARS about his affairs. The clause allows SARS to gather information from persons other than the taxpayer’s employer, including transactions between a small business and its clients. Small business owners will incur additional costs in order to provide the information, which costs cannot be recouped from their clients. SARS should be prevented from conducting frivolous inquiries that do not increase the tax base but only increase compliance costs.

Response

It is recommended that this comment not be accepted. The law currently obliges third parties who pay certain amounts to taxpayers, for example salary, wages, pensions, dividends, interest, investment proceeds or rent, to submit returns of such amounts. Under the Bill, the required returns will be listed in a public notice issued under clause 26. Taxpayers will thus be well aware of what information is submitted to or may be required from third parties by SARS.

Far from being frivolous, enhanced third party reporting will provide the basis for the taxpayers' convenience through the more comprehensive pre-population of returns and improved compliance through cross-checking of declared amounts.

4.3. Clause 28: Statement concerning accounts

Comment

Align the required certificate or statement that should accompany the financial statements with the requirements of the Companies Act, 2008 and the Close Corporations Act, 1984.

Response

It is suggested that this comment is misconceived. Clause 28 does not require an audit or review of a taxpayer's financial statements and it is not limited to companies or close corporations. It applies where a taxpayer submits financial statements prepared by another person (whether an accountant or not). SARS may then require the preparer to state to what extent the underlying records were examined and, in so far as the examination would reveal this, to what extent they disclose the true nature of what they record. In other words, all SARS wants to know is what work was done in preparing the financial statements and how reliable the underlying records are.

4.4. Clause 32: Retention period in the case of audit, objection or appeal

Comment

Notwithstanding the five year period prescribed in clause 29(3), taxpayers are required to keep records until such time as an audit is concluded if those records were relevant to such audit. This may create an undue burden to retain records beyond the requisite period, especially, since SARS may extend prescription in the case of alleged fraud, misrepresentation, or non-disclosure of material facts.

It is proposed that taxpayers be required to retain records for a period of 5 years from the date of the assessment of a return (as opposed to the date of

submission of the return), unless that taxpayer has been given notice by SARS that the assessment will be the subject of an audit.

Response

It is recommended that this comment be accepted. The recommended amendment to clause 32 is set out below.

> "*(a)* records are relevant to an audit or investigation under Chapter 5 which the person subject to the audit or investigation has been notified of or is aware of;"

Calculating the period for the retention of records from the date of the submission of the return works in taxpayers' favour as the starting point is not extended into the future by the making of further assessments in respect of the return. No amendment is recommended in this regard.

4.5. Clause 33: Translation

Comment

Clause 33 of the Bill provides SARS with the power to require persons providing information to translate the information into an official South African language. The cost of such a translation is not borne by SARS but by the person providing the information. It is considered that conferring this power on SARS is unreasonable. This is particularly so given that SARS has wide powers to request information from persons other than the taxpayer in question.

Response

It is recommended that this comment not be accepted. It is a reasonable requirement that South African taxpayers provide information in one of the official languages. Outside the tax context, section 28(1)*(a)* of the Companies Act, 2008 already requires companies to keep accounting records in one of the official languages.

The power to require a translation where information is not in one of the official languages is already granted by section 74 of the Income Tax Act, 1962, and section 57 of the Value-Added Tax Act, 1991. These sections require that the translation be prepared and certified by a sworn translator and provision is made that SARS may require "any other person" to provide a translation if the taxpayer defaults in doing so. Clause 33 is narrower in that it removes the requirement for a sworn translator and is restricted to the person to whom a request for information is directed. If a request is made for information in respect of a third party, clause 46(3) of the Bill further restricts the request to records that are maintained or should reasonably be maintained.

4.6. Clause 34: Definitions – Reportable arrangements

Comment

Financial reporting standards is defined to mean, in the case of a participant that is a company required to submit financial statements in terms of the Companies Act, 2008, financial reporting standards as defined in section 1 of that Act, or in any other case, the International Financial Reporting Standards ("IFRS").

In terms of the Companies Act, 2008, only those companies that are required to be audited should file their financial statements with the Companies Commission. These companies tend to be larger in terms of size and as a result are required by the Companies Act, 2008, to prepare financial statements in terms of IFRS. The Companies Act, 2008, exempts smaller companies from the requirement to prepare financial statements in terms of IFRS.

Clause 34 of the Bill seems to imply that all companies should compare deductions allowed in terms of the Income Tax Act, 1962, with expenses allowed in terms of IFRS. This means that all companies will, as a result of the Bill, in effect have to prepare financial statements in terms of IFRS – negating the benefits provided for in the Companies Act, 2008.

Response

It is recommended that this comment be accepted. The recommended amendment to the definition of "financial reporting standards", based on the requirements of the same definition in section 1 of the Companies Act, 2008, and the associated Regulation 27 thereto, is set out below.

> **"'financial reporting standards'** means, in the case of a ~~'participant' that is a~~ company required to submit financial statements in terms of the Companies Act, 2008 (Act No. 71 of 2008), financial reporting standards ~~as defined in section 1 of~~ prescribed by that Act~~,~~ or, in any other case, ~~the International Financial Reporting Standards~~ the Generally Accepted Accounting Practice or appropriate financial reporting standards that provide a fair presentation of the financial position of the taxpayer."

4.7. Clause 35: Reportable arrangement

Comment

Clause 35(1)(*c)* requires that companies should report the details of a certain transactions to SARS if the transaction results in a reduction of tax and meets other set criteria. The definition of financial reporting standards, as provided in Chapter 4, seems to indicate that all companies should prepare financial statements in terms of IFRS. Companies that are required to prepare financial statements in terms of IFRS will always show a difference

between depreciation claimed for tax purposes and depreciation claimed as an expense in terms of IFRS. This provision will result in all companies having to file a reportable arrangement.

Response

It is recommended that the comment be accepted. Although the definition of "pre-tax profit" used in clauses 35(1)(*c*), (*d*) and (*e*) does not refer to IFRS, but rather to "Statements of Generally Accepted Accounting Practice", which does not give rise to the stated concern, it would be preferable to use consistent terminology. If the definition of "financial reporting standards" is amended as recommended above, it is recommended that it be used in the definition of "pre-tax profit", so enhancing consistency and also avoiding the difficulty pointed out with respect to the use of IFRS.

The recommended amendments to the definition of "pre-tax profit" in clause 34 are set out below.

> **"'pre-tax profit'**, in relation to an 'arrangement', means the profit of a 'participant' resulting from that 'arrangement' before deducting any normal tax, which profit must be determined in accordance with ~~Statements of Generally Accepted Accounting Practice~~ "financial reporting standards" after taking into account all costs and expenditure incurred by the 'participant' in connection with the 'arrangement' and after deducting any foreign tax paid or payable by the 'participant' in connection with the 'arrangement';"

5. CHAPTER 5: Information Gathering

5.1. Clause 40: Selection for inspection, verification and audit

5.1.1. *Reference to "person" or "another person"*

Comment

Throughout this chapter, reference is made to "person" or "another person". These terms are not defined for purposes of this Part or for purposes of the Bill in clause 1.

Response

"Person"

It is recommended that the comment be partially accepted. The term "person" is not defined in the Bill but in the relevant tax Act. If "person" is defined in a tax Act, it will have that meaning when administering that tax Act. As an example the Value-Added Tax Act, 1991, defines a "foreign donor funded project" as a person in order to fulfil certain international obligations, while other tax Acts do not. If "person" is not defined in a tax Act, the term

will have its ordinary meaning. The meaning of “person” is therefore determined by the tax type in issue.

In clause 41(3) a member of the public may regard a “person” who is not able to produce an identity card as not being an authorised SARS official. “Person” in this context refers to the individual who does not produce a SARS identity card when requested and who may accordingly be assumed not to be a SARS official. It is, however, recommended that the clause be clarified in the light of the comment made.

The recommended amendments to clause 41 are set out below.

> “(3) If the official does not produce the authorisation as required under subsection (2), a member of the public is entitled to assume that the ~~person~~ official is not a SARS official so authorised".

“Another person”

It is recommended that the comment be partially accepted. Regarding the use of the term “another person” in Chapter 5, it is submitted that where it is used in clause 46(1) the meaning is clear from the context, i.e. it is used in the context of “the taxpayer or another person” (for example an employee of the taxpayer or a third party). However, it is accepted that in clause 46(3) the use of the term may be confusing and it is recommended that it be amended as follows:

> “(3) A request by SARS for relevant material from ~~another~~ a person other than the taxpayer is limited to the records maintained or that should reasonably be maintained by the person in relation to the taxpayer.”

In clause 47 the term is no longer relevant in the light of the recommendation in 5.8. below.

5.1.2. *Disruptive random tax inspections*

Comment

Compliant taxpayers incur significant costs to administer and pay their fair share of tax. They should not be subject to the additional costs of frivolous inspections conducted on a random basis. The word “random” should be removed from clause 40, SARS should only seek information on the basis of suspicion of wrongdoing and taxpayers should be entitled to compensation in respect of frivolous inspections.

Response

Random selection and suspicion-based engagement

It is recommended that this aspect of the comment not be accepted. In the tax administration environment it is widely accepted that the most effective system to regulate a tax base involves a combination of random selection and risk-triggered selection. The principle of random selection, which is a common feature of tax administrations, is premised on the reality that it is impossible to audit all taxpayers and seeks to ensure that each taxpayer has an equal chance of being subject to scrutiny. Random auditing is also a mechanism to measure compliance levels, and to identify emerging issues. The data collected from random audits is capable of being used to test the relevance of risk assessment criteria and to develop a more effective risk assessment program. Random selection is used in a number of other tax jurisdictions.[3]

The principle of random tax auditing is considered to be an internationally settled legal principle. The principle was *inter alia* upheld by the Australian Federal High Court in a case involving a random audit of the top 100 companies, which was challenged by one of the selected companies. The Court held that the resources of the Australian taxation office do not extend to auditing the returns of every taxpayer and that, inevitably, there will be a random aspect to those who are finally selected for closer examination. On the issue whether there should be a suspicion of wrongdoing before a taxpayer is selected for audit, the Court held:

> "It is the function of the Commissioner to ascertain the taxpayer's taxable income. To ascertain this he may need to make wide-ranging enquiries, and to make them long before any issue of fact arises between him and the taxpayer."
>
> (*Industrial Equity Ltd v Deputy Commissioner of Taxation*(1990) 170 CLR 649 at paras 14-24, emphasis added)

The Canadian Supreme Court of Appeal has also confirmed the legality of the principle, and has held:

> "A spot check or a system of random monitoring may be the only way in which the integrity of the tax system can be maintained."
>
> (*R v McKinlay Transport Limited* 47 CRR 151 (SCC) at 168)

Our Constitutional Court has, in two separate judgments concerning the interplay between a person's right to privacy and the right of state regulators to conduct searches, referred to the decision by the Canada Supreme Court

[3] For further reading on the use of random auditing by tax administrators, the OECD Forum on Tax Administration released an Information Note in September 2004 entitled *Compliance Risk management: Use of Random Audit Programs*. Recent examples of random audit programs in Canada, France, Ireland, UK and USA covering a broad range of sectors, including the SME sector, are set out in the OECD Forum on Tax Administration's *OECD Comparative Information Series (2010)*.

of Appeal in the *McKinlay Transport case* with approval. See *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) and *Magajane v Chairperson, North West Gambling Board and Others* 2006 (5) SA 250 (CC).

Compensation for frivolous inspections

It is recommended that this aspect of the comment not be accepted. The distinction between regulatory or compliance audits and prosecutorial audits, as well as the broad obligation of participants in a regulated environment to tolerate administrative inspections, has been recognised and applied by our Constitutional Court. See *Mistry v Interim Medical and Dental Council of South Africa and others* 1998 (4) SA 1127 (CC) and *Magajane v Chairperson, North West Gambling Board and others* 2006 (5) SA 250 (CC).

An inspection provided for in clause 45 is restricted to establishing only who an occupier of premises is, whether the person is registered for tax, and if the record retention obligations are complied with. The purpose of unannounced inspections is intended to support the development of a compliant tax base and is an important element in the effective administration of the tax Acts. These inspections are therefore considered "regulatory", "compliance", or "administrative" inspections. An administrative inspection is a minimal, justifiable, intrusion on the privacy right of a person.

Within this context inspections in general cannot be considered frivolous. To the extent that an individual inspection may be considered frivolous, taxpayers have access to internal remedies within SARS, as well as external remedies ranging from the Tax Ombud to the Courts.

5.2. <u>Clause 41</u>: Authorisation for SARS official to conduct audit or criminal investigations

Comment

Clause 41 requires SARS officials to produce written authorisation before they may exercise powers or duties under a tax Act in person. The taxpayer should also be afforded an opportunity to verify the authorisation produced (e.g. the opportunity to telephone SARS and confirm the identity and authority of the relevant SARS official).

Response

It is recommended that the comment not be accepted. In common with, for example, section 304(2) of the Children's Act, 2005, section 42(3) of the Local Government: Municipal Property Rates Act, 2004, section 56(2) of the Marine Living Resources Act, 1998, and section 61 of the South African Police Services Act, 1995, this is not a matter that requires legislation as it is implicit. The authorisation will, however, provide a verification telephone number and SARS will consider other steps to ensure that the authorisation may be verified.

5.3. Clause 42: Keeping the taxpayer informed

5.3.1. *Status of audit*

Comment

In terms of clause 42(1), a taxpayer has the right to be informed of the status of an audit. However, the provision does not stipulate any time period for SARS to provide taxpayers with status updates. The legislation should be amended to give taxpayers the right to have the audit concluded within a reasonable period and guidelines should be provided as to what will be deemed reasonable.

Response

It is recommended that this comment be partially accepted. The frequency of reports will form part of the public notice to be issued setting out the "form and manner" of the stage of completion reports to be issued by SARS. The requirement that an audit is completed within a reasonable time is implicit in view of the overriding obligation on SARS to comply with a taxpayer's right to administrative justice. Stage of completion reports will allow taxpayers to monitor the progress of audits and will constantly remind SARS officials and their management to conclude the audit within a reasonable time period.

Given the difference in the type, complexity and ambit of audits, it is simply not possible to prescribe fixed time periods for audits. Audit durations may range from days in simple cases to years if aggressive tax planning or transfer pricing is involved. Internal guidelines on appropriate time periods for the completion of audits, given the necessity to collect outstanding tax as expeditiously as possible, are already in place and will be further enhanced as part of the implementation of the Bill.

5.3.2. *Outcome of audit and taxpayer response*

Comment

Clause 42(2) provides for certain actions to be taken by SARS upon conclusion of an audit. It is uncertain what procedures will be in place to ensure that the fact that the audit has been concluded is communicated?

Clause 42(2)*(b)* and (3) provides for the extension of periods for SARS and taxpayers, based on the complexities of the audit. It is uncertain how these periods are determined and what are the criteria to classify audit "complexities"?

Response

The duty to communicate the fact that an audit has been concluded is imposed on SARS by law. Internal procedures are being established to ensure SARS's compliance with this duty. If a taxpayer is, for some reason,

not informed of the finalisation of an audit, this will become apparent when the taxpayer requests a stage of completion report.

The degree of complexity of an audit is a question of both law and fact and is, accordingly, very dependent on the circumstances of the matter. SARS must be able to demonstrate the basis for its reliance on the exception to the 21 business day period prescribed for the pre-assessment audit findings report. Taxpayers wishing to make use of the exception to the 21 business day period will similarly have to demonstrate the basis for their reliance on the exception.

5.3.3. *Compliance will impede or prejudice the progress or outcome of the audit*

Comment

SARS is not obliged to provide the taxpayer with a stage of completion report or pre-assessment audit findings letter where a senior SARS official has a reasonable belief that compliance with those obligations would impede or prejudice the audit. It is difficult to contemplate a situation where compliance with the reporting obligations would "impede or prejudice" the audit. It is apparent from the memorandum on the objects of the Bill that the primary motivation behind this limitation is for SARS to be able to ignore the rights of taxpayers where prescription is imminent.

It is submitted that prescription can never be an acceptable excuse to deny a taxpayer the constitutionally enshrined right to fair administrative action given the lengthy prescription period and exceptions thereto. The provision is also in conflict with section 3 of the Promotion of Administrative Justice Act, 2000, ("PAJA") and section 33 of the Constitution, 1996. In any event, section 3(4) of PAJA empowers an administrator to depart from the standard process in appropriate circumstances. This should be adequate to address any concerns that SARS may have.

Response

It is recommended that this comment not be accepted. Although prescription may be a factor and may arise for various reasons, including deliberate stalling by the taxpayer, it is not the most important reason for the exception provided. The exception may also be invoked where taxpayers have been involved in potentially criminal activities but the decision has been taken not to pursue the matter criminally or in cases where it appears that the taxpayer is taking steps to frustrate the collection of tax once the assessment is issued.

If the taxpayer does not receive a pre-assessment audit findings letter, SARS remains obliged under clause 42(6) to provide the grounds of the assessment within 21 business days of the assessment. Thereafter, the taxpayer will have all the normal remedies, such as engaging with SARS on the grounds provided, requesting more comprehensive reasons before

formulating grounds of objection and the normal objection and appeal processes, coupled with the right to request suspension of the collection of the disputed debt. It is submitted that this is an example *par excellence* of an alternate process envisaged by section 3(4) of PAJA.

5.3.4. *Remedies if clause 42 is not complied with*

Comment

The clause does not provide specific remedies if it is not complied with and should enable a person to claim compensation from SARS in circumstances where the application of this section is found to be unreasonable.

Response

It is recommended that this comment not be accepted. If a taxpayer is dissatisfied with the duration of an audit or SARS's invocation of one of the exceptions in this clause, the taxpayer has the right to pursue an administrative complaint with SARS and, if not resolved, the Tax Ombud, as well as, during or after this process, approaching the High Court for relief.

The issue of whether SARS should pay compensation for unreasonable actions has been thoroughly considered given the request for such remedies from the commencement of the public comment process. It is clear from the research conducted that most international authors on tax administration state that such sanctions are detrimental to proper tax administration by a revenue authority. This follows from the fact that its officials would be severely constrained in the proper execution of their duties or in the initiation of an audit or investigation, for fear of facing claims in the event of errors or where the authority cannot prove its case. The authors recommend an Ombudsman as a more effective mechanism to enforce taxpayer rights. See, for example, Duncan Bentley, *Taxpayers Rights: An International Perspective,* 1998 Bond University at 56.

5.4. Clause 43: Referral for criminal investigation

Comment

Clause 43(2) provides that "*(A)ny relevant material gathered during an audit after the referral, must be kept separate from the criminal investigation and must not be used in any criminal proceedings instituted in respect of the offence*". It is uncertain as to how SARS proposes this be monitored.

Response

This is a matter of internal management and corporate governance. It should be borne in mind that should SARS not comply with this rule, it will prejudice the outcome of any prosecution following a criminal investigation in that evidence derived from audit information contrary to this rule may be held to be inadmissible.

5.5. Clause 44: Conduct of criminal investigation

Comment

Clause 44(3) provides that "information obtained during a criminal investigation may be used for purposes of audit as well as in subsequent civil and criminal proceedings." The word "related" should be inserted after "subsequent".

Response

It is suggested that this comment is misconceived. No purpose is achieved by inserting the word "related" in clause 44(3) as only information relevant to the subsequent civil or criminal proceedings will constitute evidence in such matters. Any concern that clause 44(3) is too broad, or that an injustice may occur through the misuse of material obtained through a criminal investigation, is alleviated by section 35(6) of the Constitution. In terms of this section evidence that is obtained in a manner that violates a fundamental right is inadmissible, if the admission of that evidence "would render the trial unfair or otherwise be detrimental to the administration of justice".

5.6. Clause 45: Inspection

Comment

Clause 45 of the Bill gives SARS the power to enter and inspect premises without notice for purposes of determining the identity of the person occupying the premises, whether the person is conducting a trade, whether the person is registered for tax or whether the person is complying with the record-keeping requirements of the Bill. It is considered that this limitation of a taxpayer's constitutional rights is grossly excessive in relation to its stated purpose and is open to abuse by SARS. A warrant should be required for purposes of identifying persons and whether a trade is being conducted. The clause should exclude the registration for tax and compliance with record-keeping requirements from its ambit.

Response

It is recommended that this comment be partially accepted. Given the extremely limited scope of an inspection, the checks and balances appropriate to a wide ranging search and seizure are not appropriate. Similar powers are contained in section 55(2) of the Value-Added Tax Act, 1991, where the vendor is required to keep all books of account, records and documents, whether in their original form or in a form authorised by the Commissioner in terms of that section, open for inspection (at all reasonable times) by any person acting under the authority of the Commissioner.

On reconsideration, however, it is possible to narrow the scope of the provision still further and thereby resolve a tension that exists between subclause (1)(*b*), which provides for an inspection to determine whether a trade or enterprise is being conducted, and subclause (2), which prohibits entry into any part of a private residence which is not being used for these purposes. It is therefore proposed that a SARS official should have a reasonable belief that a trade or enterprises is being conducted at the premises to be inspected. Such a belief could be based on, for example, advertising, signs at the premises or third party information. The recommended amendments to clause 45 are set out below.

> **"45.** (1) A SARS official may, for the purposes of the administration of a tax Act and without prior notice, arrive at a premises where the SARS official has a reasonable belief that a trade or enterprise is being conducted and conduct an inspection to determine only—
> *(a)* the identity of the person occupying the premises;
> ~~*(b)* whether the person occupying the premises is conducting a trade or an enterprise;~~
> *(~~c~~b)* whether the person occupying the premises is registered for tax; or
> *(~~d~~c)* whether the person is complying with sections 29 and 30."

5.7. Clause 46: Request for relevant material

Comment

Clause 46(1) empowers SARS to require any person to submit relevant material in relation to a taxpayer, whether the taxpayer is identified by name or is otherwise "objectively identifiable". The term "objectively identifiable" is too vague and should be defined.

Response

It is recommended that this comment not be accepted. The purpose of clause 46(1) is to enable SARS to obtain material concerning a person whose exact identity is unknown to SARS. It is intended that if the name of a person is unknown, but the identity of that person can be ascertained through applying recognisable criteria, then that request for relevant material is authorised.

As is evident from the context, if SARS does not have the name of the taxpayer there could be other factors that indicate such person exists. As stated in paragraph 2.2.5.3 of the Memorandum of Objects of the Bill, the term "objectively identifiable" includes, for example, where a taxable event demonstrates that a taxpayer exists, but SARS does not have such person's name or other details. For this purpose, "taxable event" is defined in clause 1 to mean an occurrence which affects or may affect the liability of a person to tax. For example, SARS may be aware of a financing transaction entered into by a financial institution and may accordingly request the financial

institution to provide the names of the clients involved as they are objectively identifiable given the occurrence of a "taxable event" i.e. the receipt of interest.

There is no ambiguity in the phrase "objectively identifiable" and the ordinary meaning of the phrase is intended. As no special meaning is intended by the phrase, no purpose will be served by defining it. It is submitted that the context where the term is used (a taxpayer "identified by name or otherwise objectively identifiable") read with definitions such as "taxpayer", "relevant material" and "taxable event", gives sufficient clarity as to the ambit and application of this term.

Comment

The taxpayer may be compelled to disclose documents which might be privileged and to which SARS is under common law rules not even entitled because the material may be "forseeably relevant".

Response

It is recommended that this comment not be accepted. The Bill does not attempt to codify or oust the common law right to legal professional privilege.

Comment

This clause seems to have a very wide application and could be construed to be a "fishing expedition" or "witch-hunt" clause.

Response

The concern that the ambit of the clause will allow "fishing expeditions" is simply misconceived. This term is used in the context of overbroad demands for discovery in civil matters or criminal matters where there is an endeavour not to obtain evidence to support a case, but to discover whether there is a case at all.

Internationally, it is established law that tax information gathering, audits and investigations are distinguishable from other civil or criminal investigations. For example, the Australian Federal High Court held that the strong reasons which inhibit the use of curial processes for the purposes of a "fishing expedition" have no application to the administrative process of assessing a taxpayer to income tax. It held that it is the function of the revenue authority to ascertain the taxpayer's taxable income. To ascertain this it may need to make wide-ranging enquiries, and to make them long before any issue of fact arises between the revenue authority and the taxpayer. (*Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at paras 14-24)

Clause 46 carefully prescribes how and for what purpose relevant material may be requested. The request must be made for the purpose of administering a tax Act and must be in connection with a taxpayer identified

either by name or through objectively identifiable factors. The material requested must be described with “reasonable specificity” and the authority of a senior SARS official is required when material is requested either concerning a class of taxpayers, or to be provided under oath or solemn declaration. SARS may only request material from a third party which is actually maintained by the third party, or should reasonably be maintained by the third party. An extension of time to comply with a request for material may be requested if there is good cause.

Thus while clause 46 extends SARS’s powers to gather information, each individual request for information must be consistent with specific requirements to be valid and enforceable.

The ambit of the information gathering powers of SARS must also be seen in the following context:

- Information is the lifeblood of a revenue authority’s taxpayer audit activity, and the whole rationale of taxation would break down and the whole burden of taxation would fall only on diligent and honest taxpayers if a revenue authority had no power to obtain confidential information about taxpayers who may be negligent or dishonest (stated by the Privy Council in *New Zealand Stock Exchange and National Bank of New Zealand v CIR* (1991) 13 NZTC 8,147).
- In an environment of increasing self-assessment, comprehensive information gathering powers are critical to a revenue authority’s effective operation (Bentley, *Taxpayer’s Rights: Theory, Origin and Implementation,* 2007 Kluwer Law International at 314).
- Particularly in the context of information provision taxpayers’ rights are not absolute and the aim of taxpayers’ rights should not be to undermine a revenue authority’s duty and ability to obtain information in order to collect tax that is legally due under the laws of the jurisdiction in which the taxpayer operates (Bentley, *ibid* at 317).
- The need for broad information gathering powers has been recognised internationally (*Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649; *R v McKinlay Transport Limited*47 CRR 151 (SCC) at 168; and *USA v BDO Seidman* 02 C 4822).

Comment

What remedies are in place for the affected taxpayer in the event that the third party provides incorrect information to SARS, other than common law remedies? What is the situation if the third party is not in a position to provide the relevant material?

Response

Taxpayers will generally be provided with stage of completion reports and pre-assessment audit findings, so they will be aware of an audit into their affairs and will be able to respond to any incorrect information that has been supplied. Even after the audit engagement process, if an assessment is raised upon information provided by a third party that is incorrect, a taxpayer

has the right to dispute that assessment in accordance with the provisions of Chapter 9.

Third parties, under clause 46(3), are only obliged to provide information from records they maintain or they should reasonably maintain. If the information requested related to records which are not and should not reasonably be maintained, the third party should inform SARS.

Comment

Clause 46(4) states that the relevant material has to be submitted "at the place and within the time specified in the notice". How and where will "the place" be determined? The term "within the time specified" is not defined. There should be a minimum time limit specified. It is also uncertain what is meant by the term "notice"? Please clarify if there is a difference between a "request" and a "notice".

Response

It is recommended that this comment not be accepted. As a starting point, it should be noted that the clause 46 does not refer to a "notice". The terms "require" (as verb) and "request" (as noun) are used consistently throughout.

Where and when requested information must be provided is very much dependent on which SARS office is requesting the information and the extent of the information requested, which would determine how long it will take the taxpayer or third party to provide it. A "one size fits all" rule will be unfair to either SARS or taxpayers.

If an unreasonable time period is prescribed by an official then the person affected has the statutory right in terms of clause 46(5) to request an extension of the period of time.

Comment

Clause 46(6) provides that the "relevant material required by SARS under this section must be referred to in the request with reasonable certainty". What is meant by the term "with reasonable certainty"? What remedies are available to a person if the request is too broad?

Response

Clause 46(6) provides that the "relevant material… must be referred to in the request with reasonable specificity", which essentially means that the request must be specific to the extent that a person receiving the request to submit relevant material must understand what is required to be submitted. The normal meaning of "specific" or "specificity" would therefore apply.

A request that is too broad implies that the request goes beyond what is permitted by the Bill. In such instances the taxpayer may approach the

SARS official, or that official's manager, or a senior SARS official to withdraw or amend the request in terms of clause 9(1)*(b)*.

5.8. Clause 47: Production of relevant material in person

Comment

Clause 47(1) provides that a person, whether or not chargeable to tax, may receive a notice to attend in person at the time and place designated in the notice for the purpose of being interviewed concerning the tax affairs of the person or another person.

It is submitted that this power is too wide. It is recommended that the time designated for the interview should be within normal working hours and that this be embodied in the legislation. Further, information may be requested during such an interview, which may incriminate the interviewee. The legislation should provide that an interviewee may be accompanied by an attorney or other legal representative so as to safeguard his or her rights during the interview.

Response

It is recommended that this comment not be accepted. The wrong impression is created that a person may be called to "appear before" a SARS official to be interrogated. Clause 47 is intended to shorten a verification or audit by providing a process to dispose of the matter though a face to face discussion. Unnecessary correspondence is avoided and the consequence is beneficial to both taxpayers and SARS.

The only purpose for requesting an interview permitted by the clause is to clarify issues in order to render further verification or audit unnecessary. Its use for the purposes of a criminal investigation is specifically prohibited. It is therefore submitted that there is no need to further prescribe when a SARS official may request an interview in that the narrow circumstances when an interview may be requested are already contained in clause 47.

During filing season, SARS has extended its working hours, since small business owners and other taxpayers find it more convenient to visit SARS outside normal working hours. Interviews outside normal working hours should be permitted subject to the overarching requirement that SARS acts reasonably in setting the time of the interview.

Finally, the legislation does not preclude an interviewee from being accompanied by a legal advisor. This is an existing common law right that need not be restated.

Comment

The cost of tax investigation and collection should not be transferred from SARS to another person just because that person entered into a transaction

with a taxpayer that is the subject of an investigation. The cost of doing business will increase as the transaction price will have to provide for the possible risk and cost of being summoned to appear before a SARS official, even though the transaction is perfectly legitimate.

Response

It is proposed that this comment be accepted. The benefits of a shorter verification or audit process accrue to the taxpayer, not the third party, so it is recommended that interviews be restricted to the taxpayer's affairs.

The recommended amendment to clause 47 is set out below.

> **"**(1) A senior SARS official may, by notice, require a person, whether or not chargeable to tax, to attend in person at the time and place designated in the notice for the purpose of being interviewed by a SARS official concerning the tax affairs of the person ~~or another person~~, if the interview—…"

Comment

Clause 47(3) provides that the "relevant material" required by SARS under subsection (2) must be referred to in the request with "reasonable certainty". Please clarify if there is a difference between a "request" and a "notice"? What is meant by the term "with reasonable certainty"? What remedies are available to a person if the request is too broad?

Response

The meaning of the term "with reasonable **specificity**" has been dealt with in 5.7 above. It is, however, accepted that the reference in clause 47(3) to a "request" is inconsistent with the formulation in clause 47, which requires the issue of a notice to a taxpayer to attend an interview. It is therefore recommended that "request" be replaced by "notice".

The recommended amendment to clause 47 is set out below.

> **"**(3) Relevant material required by SARS under subsection (2) must be referred to in the ~~request~~ notice with reasonable specificity."

Comment

A practical concern is the proximity of the SARS office to the residence or place of work of the taxpayer.

Response

It is recommended that this comment be accepted. Greater guidance should be provided as to the proximity of the place for the interview, which may be a temporary or mobile office.

The recommended amendment to clause 47 is set out below.

> "(4) A person may decline to attend an interview, if the distance between the place designated in the notice and the usual place of business or residence of the person exceeds the distance prescribed by the Commissioner by public notice."

5.9. Clause 48: Field audit

Comment

Clause 48(1) refers to "reasonable prior notice". 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 others may take the view that reasonable prior notice constitutes two or three days notice.

Response

It is suggested that this comment is misconceived. Clause 48(1) prescribes a minimum notice period of 10 business days, which the taxpayer may waive if he or she wishes to in order to expedite the audit.

5.10. Clause 49: Assistance during field audit or criminal investigation

Comment

The Bill must clarify in clause 49(1) what-

- comprises "appropriate facilities";
- regarding the provision that "appropriate facilities, to the extent that such facilities are available", is the procedure if appropriate facilities are not available;
- is considered to be "reasonable assistance" as regards the submission of "relevant material as required"?

Response

What appropriate facilities will be will depend on the nature and ambit of the audit or investigation but they are limited to the facilities that are available. If the required facilities are not available, SARS and not the taxpayer will have to make alternative arrangements that will enable it to perform the required functions.

What reasonable assistance will be will, again, depend on the circumstances of the audit or investigation.

Comment

This provision does not offer the taxpayer an opportunity to exercise his or her right to silence or secure legal representation in instances where premises are inspected during audits and criminal investigations. Instead it is required of the taxpayer to make admissions which may prejudice him or her. This is unconstitutional.

Response

It is recommended that this comment not be accepted. The taxpayer's right against self-incrimination is protected by clause 72. Although the Constitution only recognises a right to legal representation as part of a post-arrest fair trial procedure under section 35 of the Constitution, the Bill in no instance prevents a taxpayer or any other person from obtaining or using legal representation. A taxpayer is also given prior notice of the audit or investigation thereby enabling the taxpayer to secure legal representation for purposes of providing legal advice during the audit or investigation.

5.11. <u>Clause 52</u>: Inquiry proceedings

Comment

Clarity is required regarding the following:

- What is the legal status of the "inquiry" is, i.e. is it akin to a court of law, and if so, which level of the judiciary;
- What is meant by the "conduct of the inquiry"? It would appear that the correct term to be used is the "scope of the inquiry";
- It is not clear whether or not the "legal representative" only needs to be a lawyer or whether or not the "legal representative" needs to be an advocate.

Response

As is the case in section 74C of the Income Tax Act, 1962, the Bill contemplates the holding of an inquiry that is, in essence, an information gathering and not an adjudicative process. Accordingly, the inquiry does not have the legal status of a court of law.

The presiding officer of the inquiry determines the conduct of the inquiry or the procedures to be followed during the enquiry. In terms of clause 51 the ambit or "scope" of the enquiry is determined by a High Court judge in the order appointing the presiding officer.

Under clause 52(3), any person appearing before the enquiry has the right to have a representative present, which is clearly not limited to a "legal representative".

5.12. Clause 53: Notice to appear

Comment

The Bill should address the following practical considerations as regards section 53(1) ─

- Proximity of the SARS office to the residence or place of work of the "*person*" or "*another person*";
- Costs associated with complying with this provision, such as costs to travel to SARS office, etc.

Response

It is suggested that this comment is misconceived. An inquiry is authorised by a High Court judge and is generally held within the area in which the taxpayer whose affairs are in issue resides or carries on business, and witnesses would usually be in the same area.

Clause 55 already provides that the presiding officer may direct that a person receive witness fees to attend an inquiry in accordance with the tariffs prescribed in terms of section 51*bis* of the Magistrates' Court Act, 1944, which are also intended to cover travelling costs.

Comment

This provision is again unlawful as a spouse is a competent witness but cannot be compelled to testify against another partner. This provision does not take cognisance of this fact.

Response

It is suggested that this comment is misconceived. The Bill does not in any way seek to override the common law privilege from compulsion to testify that applies between married persons. The presiding officer will be aware of this privilege as he or she will be an advocate or attorney designated by a High Court judge from a panel appointed by the Minister of Finance in consultation with the relevant Judge President.

5.13. Clause 56: Confidentiality of proceedings

Comment

The provisions of the Bill of Rights must be adhered to with specific reference to the provisions that "(E)vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice".

Response

It is suggested that this comment is misconceived. Clause 57 specifically deals with admissibility of evidence and is aligned with the Constitution. Any residual concern is alleviated by section 35(6) of the Constitution, which is quoted in the comment above.

5.14. <u>Clause 57</u>: Incriminating evidence

Comment

Clause 57(1) provides that a "person may not refuse to answer a question during an inquiry on the grounds that it may incriminate the person". This is in direct contravention of the Bill of Rights which provides in section 35(3) that "(E)very accused person has a right to a fair trial, which includes the right", amongst others, "to be presumed innocent, to remain silent, and not to testify during the proceedings" and "not to be compelled to give self-incriminating evidence".

Response

It is suggested that this comment is misconceived. It overlooks clause 57(2) which prevents the use of self-incriminating evidence in criminal proceedings against that person. It is accordingly submitted that clause 57 complies with the judgments and observations made by the Constitutional Court in *Ferreira v Levin* 1996 1 BCLR 1 (CC) and *Bernstein and others v Bester and Others NNO* 1996 (2) SA 751 (CC).

5.15. <u>Clause 59</u>: Application for warrant

Comment

Clause 59(1) provides that an application for a warrant to enter "*a premises*" where relevant information is kept may be authorized. It is uncertain whether these premises include the premises of auditors of the person?

Response

"Premises" would refer to any premises where the relevant information is kept and can include the premises of the auditors of the person.

Comment

The term "magistrate" is not defined and is therefore unclear, and it is proposed that the term should be defined similar to the definition of "judge" contained in clause 1 of the Bill.

Response

It is recommended that this comment be accepted for the sake of clarity. The recommended amendment to clause 1 is set out below.

> '"**magistrate**" means a judicial officer as defined in section 1 of the Magistrates' Court Act, 1944 (Act No. 32 of 1944), whether in chambers or otherwise.'

Comment

A search and seizure is a serious intrusion into the taxpayer's right to privacy. It is submitted that in all circumstances, regardless of the amount which may be the subject of an investigation, a judge should be required to approve the search and seizure warrant and not a magistrate.

Response

It is recommended that this comment not be accepted. A magistrate and a judge are both independent of SARS. In terms of the Criminal Procedure Act, 1977, a magistrate may issue a search and seize warrant in criminal investigations, which are potentially more intrusive on the right to privacy.

Section 21 of that Act authorises the issue of warrants by either a magistrate or a judge, but does not differentiate between the circumstances under which they both may issue a warrant. In contrast, clause 59 only allows magistrates to issue warrants in smaller matters where the amount potentially in dispute is, in line with the current regulation determining the quantum of disputes dealt with by the Tax Board, less than R500 000.

5.16. <u>Clause 60</u>: Issuance of a warrant

Comment

The provisions of this clause seems very wide as it suggests that a warrant may be applied for without any effort made on the part of SARS to obtain the relevant material or information by way of "non-confrontational" means. This type of action should be limited to extreme situations or where all other avenues to obtain the relevant material or information have been exhausted.

Response

It is suggested that this comment is misconceived. A warrant to search and seize must be authorised by a magistrate or a judge, who will consider whether it is appropriate to issue the warrant in the specific circumstances of the case.

Comment

Clause 60(2) provides that "(A) warrant issued… must... contain the following information…" The term "information" in this instance clearly refers to the general meaning and not the term as defined in clause 1. Consideration should be given to substitute the term with a synonym of "information".

Response

It is recommended that this comment be accepted. The word "information" may be deleted without loss of meaning. The recommended amendment to clause 60 is set out below.

> "(2) A warrant issued under subsection (1) must contain the following ~~information~~:"

5.17. <u>Clause 61</u>: Carrying out search

Comment

Clause 61(3) gives far-reaching powers to the "official" as regards the seizure of relevant material as well as any computer which may contain relevant material which may be retained "for as long as is necessary to copy the information required". Provision should be made for compensation should it be found that the seizure of relevant material was unwarranted and caused financial and other losses for the person affected by the unwarranted actions of SARS.

Response

It is recommended that the comment not be accepted. Provision is made in clause 66(1) for a request for the return of materials, which would include a computer or storage device, and payment of the costs of physical damage caused during a search and seizure. If SARS refuses such a request, provision is made in clause 66(2) for the High Court to review the matter.

5.18. <u>Clause 62</u>: Search of premises not identified in warrant

Comment

All the other provisions of this Chapter make provision that the search of any premises has to be executed by a "SARS official" whereas this clause provides that "SARS may enter the premises". This provision needs to be amended to be provide that a "SARS official may enter the premises".

Response

It is recommended that this comment be accepted. The recommended amendments to clause 62 are set out below.

"If a senior SARS official has reasonable grounds... a SARS official may enter and search the premises and exercise the powers granted in terms of this Part, as if the premises had been identified in the warrant."

5.19. Clause 63: Search without a warrant

Comment

Where a search or seizure without a warrant is authorised by legislation, it needs to be held to a higher constitutional norm than a search with a warrant as the protection mechanism is excluded, namely the warrant itself. Leaving the decision to search without a warrant to the discretion of a SARS official is questionable in the extreme and leaves this power open to abuse.

Further, it is not clear why this clause is required as warrants can be issued within hours provided proper grounds for the warrant exists.

The grounds upon which a senior SARS senior may exercise these powers should be clarified and be made less subjective and set out objectively what a senior SARS official needs take into account when applying the powers conferred by this provision. Documents must be placed in the custody of the court and the court must sanction the seizure after the event.

Response

It is recommended that this comment not be accepted. The oral presentations to the Committee accepted the need for search and seizure without a warrant, although some questioned whether it was consistent with the Constitution in its current form. Alternative proposals are that—

- It should only be invoked in even more limited circumstances than currently contemplated.
- Only the Commissioner should be able to authorise it, based on similar paperwork to that required for a warrant.
- There should be a post-search provision that compels SARS to approach a Court to validate it.

Balanced against these proposals are the facts that—

- The requirements proposed in the Bill for a search and seizure without a warrant are already stricter than those contained in seventeen other South African statutes[4].
- The very need for warrantless search and seizure is based on time being of the essence in a small number of cases.

[4] These are the: Health Professions Act, 1974 - section 41A*(h)*; Criminal Procedure Act, 1977 - section 22; South African Police Service Act, 1995 - section 13(6); Counterfeit Goods Act, 1997 - section 5(2); National Prosecuting Authority Act, 1998 - section 29(10); Inspection of Financial Institutions Act, 1998 - section 4; National Forest Act, 1998 - section 67; the Competition Act, 1998 - section 47; National Veld And Forest Fire Act, 1998 - section 27; Nuclear Energy Act, 1999 - section 38; Firearms Control Act, 2000 - section 115(4); Immigration Act, 2002 - section 33(9); International Trade Administration Act, 2002 - section 44; Explosives Act, 2003 - section 6(6); Anti-Personnel Mines Prohibition Act, 2003 - section 19; Second-Hand Goods Act, 2009 - section 29(5); and the Civil Aviation Act, 2009 - section 34.

- Comparable or broader powers apply in twenty OECD countries.
- Leading counsel in the constitutional arena have provided the Committee with an opinion that concludes that our courts have emphasised that such narrow exceptions to the warrant requirement are appropriate and consistent with the Constitution, and that the clause in its current form is compatible with the Constitution.

As far as the proposal that there should be *ex post facto* approval by a judge of the search and seizure before SARS may use the seized material is concerned, it should be borne in mind that any search and seizure is subject to immediate review by a Court on application by an aggrieved taxpayer. SARS's duty to act in a justifiable manner is thus inherently subject to scrutiny by a court. A statutory post-search court process is, therefore, unnecessary.

6. CHAPTER 6: CONFIDENTIALITY OF INFORMATION

6.1. Clause 68: SARS confidential information and disclosure

Comment

Just as a former SARS official may not disclose any SARS information to anyone outside of SARS, similarly a former employee of a taxpayer should not disclose information to SARS. At present only SARS has a right to this secrecy clause.

Response

It is recommended that this comment not be accepted. The public policy underlying the secrecy provisions is to encourage all taxpayers to register and make full and proper disclosure of their income, unperturbed by some apprehension that that information may be disclosed to third parties. The manifest judicial policy is to protect taxpayers' right to privacy in respect of their information and to relax the secrecy provisions only in exceptional cases, subject to guidelines established by the courts. This form of privacy protection is reinforced by the mandatory protection of SARS records and private information by the Promotion of Access to Information Act, 2000.

This rationale does not apply in the context of information held by private entities. Information held by private entities may instead be subjected to contractual duties of confidentially between the entities and their employees, which would survive the end of the employment arrangement. This point aside, a question that may be asked is why a taxpayer who is compliant with its tax obligations would have difficulty with the disclosure of the fact by its ex-employees to SARS.

Comment

The Tax Ombud must also be mandated to act between the taxpayer and SARS on issues relating to ethics. Currently there is no real recourse for taxpayers should a SARS official act unethically.

Response

It is suggested that this comment is misconceived. The Tax Ombud may consider these issues where they result in a service, procedural or administrative issue. Further, the SARS Ethics Office exists to monitor the ethical behaviour of SARS officials.

6.2. Clause 72: Self-incrimination

Comment

It is recommended that the Bill provides clear guidance by detailing circumstances under which a competent court may make the self-incriminating admission admissible in court under clause 72.

Response

It is recommended that this comment not be accepted. The discretion of any court to admit evidence in criminal matters is regulated by section 35(5) of the Constitution, 1996. This section provides that evidence obtained in a manner that violates any right in the Bill of Rights (which includes the right not to be compelled to give self-incriminating evidence under section 35(3)(*j*)), must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

7. CHAPTER 8: ASSESSMENTS

7.1. Clause 94: Jeopardy assessments

Comment

SARS should give the taxpayer prior notice that a “jeopardy assessment” is to be made.

Response

It is recommended that this comment be partially accepted. Prior notice will defeat the object of a jeopardy assessment, which is intended to enable SARS to collect taxes, on an expedited basis, in circumstances where the collection of tax is in jeopardy. However, in order to ensure that this power is only approved at the highest level in SARS, it is recommended that the discretion to issue jeopardy assessment should be that of the Commissioner and not a senior SARS official.

The recommended amendments to clause 94 are set out below.

> "(1) SARS may make a jeopardy assessment in advance of the date on which the return is normally due, if ~~a senior SARS official~~ the Commissioner is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy."

Comment

Taxpayers should be able to object to an assessment or a decision of SARS to invoke a jeopardy assessment.

Response

It is suggested that this comment is misconceived. Clause 94(2) makes it clear that the right of review in the High Court is in addition to the right to object and appeal under Chapter 9.

8. CHAPTER 9: DISPUTE RESOLUTION

8.1. Clause 102: Burden of proof

Comment

It is recommended that in the case of jeopardy assessments and third party liability the burden of proof should be upon on SARS.

Response

Jeopardy assessments

It is recommended that this comment be accepted. The unusual aspect of a jeopardy assessment is its making. Thus it is recommended that SARS should bear the burden of proof in the High Court review procedure referred to in clause 94(2) to show that the making of the jeopardy assessment was reasonable under the circumstances. As far as the amount of the jeopardy assessment is concerned, this is part of an assessment thus the normal remedies should apply. SARS will, in any event, bear the burden of proof under clause 102(2) to the extent that the assessment was based on an estimation.

The recommended amendment to clause 94 is set out below.

> "(3) In any proceedings under subsection (2), SARS bears the burden of proving that the making of the jeopardy assessment is reasonable under the circumstances."

Third party liability

It is recommended that this comment not be accepted. Under clause 184 SARS has the same powers of recovery against the assets of a responsible third party as SARS has against the assets of the taxpayer. Accordingly, the third party would have the same rights and remedies as would the taxpayer. For example, if SARS obtains a judgment against the third party, the latter would be able to contest it or request the rescission thereof as the taxpayer would be able to.

However, in order to enhance clarity the following amendment to clause 184 is recommended.

> "SARS has the same powers of recovery against the assets of a person referred to in this Part as SARS has against the assets of the taxpayer, and the person has the same rights and remedies as the taxpayer has against such powers of recovery."

8.2. Clause 104: Objection against assessment or decision

Comment

The exceptional circumstances referred to in clause 104(5)*(a)* should include complex matters.

Response

It is recommended that this comment not be accepted. Given the wide range of issues that may arise in lodging an objection, "exceptional circumstances" within the context of condoning the late lodgement of an objection should not be limited by a definition. An attempt to do so may unnecessarily constrain the discretion of a SARS official to condone the late filing of an objection.

Furthermore, in dealing with the meaning of "exceptional circumstances", the Constitutional Court has held that:

> "…one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation. If something can be imagined and outlined in advance, it is probably because it is not exceptional."
>
> *(S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) at 699)

8.3. Clause 106: Decision on objection

Comment

Clause 106(3) should provide for a maximum period of 30 days to alter the assessment to reflect the fact that an objection has been allowed as well as

a 30 day period for the refund of any taxes overpaid by the taxpayer as a consequence of the allowance of the objection.

Response

It is recommended that this comment not be accepted. The period required to alter an assessment or to authorise a refund will depend on the circumstances of the case, such as the number of tax periods involved and the complexity of the adjustments to be made. A taxpayer is compensated for delay by the payment of interest on the refund.

Comment

Under both the existing provisions and the proposed provisions contained in the Bill, there are no consequences for SARS failing to comply with the legislated timelines for responding to objections, etc. Given that the proposed Tax Ombud will have no power to compel SARS to act or, even if it did, there would be no consequences for SARS were it to ignore such an instruction. Taxpayers have no ability to force SARS to comply other than through the lodging of a notice of motion with the High Court.

Where taxpayers fail to comply with the statutorily imposed deadlines on them to lodge objections and appeals they lose the right to object or appeal and the assessment or decision in question becomes final. An objection that is not considered by SARS within the statutory deadlines should be deemed to have been allowed in full. Alternatively, such a deeming authority should vest in the Tax Ombud.

Response

It is recommended that this comment not be accepted. The time periods within which an objection or appeal must be allowed or disallowed are dealt with in the rules promulgated under section 107A of the Income Tax Act, 1962, and in particular rules 4, 5 and 6. Similar provisions will be contained in the rules to be issued in terms of the Bill. Apart from the fact that failures to adhere to time periods would expose SARS to criticism in the report prepared by the Tax Ombud, the remaining remedy is not only an application to the High Court.

Currently, rule 26 of the rules provides that a taxpayer may approach the Tax Court on an expedited basis to obtain an order compelling SARS to deal with the matter. The Tax Court may order costs against SARS and, if the order directing SARS to deal with the matter is not complied with, order that the objection or appeal be allowed.

A taxpayer only loses the right to object after a period of three years, given the discretion afforded to SARS in the Bill to condone late objections. This period is aligned with the general prescription periods in civil matters. SARS also has the discretion to extend the period for an appeal in terms of the rules. In either case, the Tax Court has the power to review SARS's

decisions and make an appropriate order if it comes to a different conclusion.

8.4. Clause 118: Constitution of Tax Court

Comment

Currently, section 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 Bill, 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. It may be assumed that most of the panel members are CA(SA)s but very few would be registered with the Independent Regulatory Board for Auditors.

Response

It is recommended that this comment be accepted. The provisions of clause 120, including the requirement that accountants and representatives of the commercial community be of good standing and have appropriate experience, already regulate the appointment of these members of the Tax Court.

The recommended amendments to clause 118(1) are set out below.

> *"(b)* an ~~registered~~ accountant selected from the panel of members appointed in terms of section 120;"

8.5. Clause 142: Settlement of disputes

Comment

Clause 142 defines the term "dispute" to mean a disagreement which arises pursuant to the issue of an assessment. In our view, this definition is too narrow, since disputes often arise at the audit stage or even earlier, should the taxpayer approach SARS in circumstances which would otherwise be appropriate for settlement.

Response

It is recommended that this comment not be accepted. The definition supports the principle that was confirmed in the Taxation Laws Second Amendment Act, 2009. As was noted in response to a similar comment in that year that settlements should be permitted before assessments; "Permitting settlements before this point increases the risk that settlements will not be dealt with, quantified and reported to the Auditor-General and Minister of Finance as required by legislation."

This approach is also aligned with the international approach, although more generous than other countries, such as Australia, that only allow settlement after an appeal has been lodged, because it is only at that stage that the issues are fully crystallised and the taxpayer has demonstrated a serious intent to dispute liability.

8.6. Clause 145: Circumstances where settlement is inappropriate

Comment

It is uncertain what the remedy would be for a taxpayer who disagrees with SARS on this issue.

Response

As is generally the case with settlements negotiations, the settlement procedure requires voluntary participation and neither party may compel the other to enter into settlement negotiations. A process of internal review of officials' decisions is contained in clause 9(1)*(b)* whereby a taxpayer who disagrees with a decision that a settlement is inappropriate may request that official to withdraw or amend the determination, and also approach that official's manager or a senior SARS official with the request to review the SARS official's decision.

8.7. Clause 147: Procedure for settlement

Comment

This clause should provide for a time limit for the finalisation of settlement agreements and provide for a suitable remedy for a taxpayer where SARS fails to do so.

Response

It is recommended that this comment not be accepted. A significant feature of the settlement procedure provided for in Part F of Chapter 9 is the voluntary participation of both SARS and the taxpayer. Neither SARS nor a taxpayer may compel the other party to enter into settlement negotiations nor should one party be able to compel the other to conclude an agreement. To include a provision as proposed distorts the element of voluntariness in settlement negotiations.

Should a taxpayer feel that settlement negotiations are taking too long, they may be terminated and the matter will proceed to the Tax Board or Tax Court, as appropriate.

8.8. Clause 159: Personal liability of responsible third party

Comment

The Bill should provide for a process for a responsible third party to be informed of any impending liabilities to ensure that prior notice is provided.

Response

It is proposed that this comment be accepted. Clause 179 already contains provision for notice but clauses 180 to 183 do not. A specific notice requirement will provide additional certainty for affected third parties. It must be borne in mind, however, that these provisions will find their greatest application with respect to the "hard core" non-compliant.

The proposed amendments to clause 184 are set out below.

> "(2) SARS must provide a responsible third party with an opportunity to make representations—
> (*a*) before the responsible third party is held liable for the tax debt of the taxpayer in terms of section 180, 181, 182 or 183, if this will not place the collection of tax in jeopardy; or
> (*b*) as soon as practical after the responsible third party is held liable for the tax debt of the taxpayer in terms of section 180, 181, 182 or 183."

9. CHAPTER 10: TAX LIABILITY AND PAYMENT

9.1. Clause 161: Security by taxpayer

Comment

Under this clause SARS has the right to require taxpayers to provide security for the payment of tax which has or may become payable in the future in certain prescribed circumstances. Concerns are:

- SARS could demand security where a taxpayer has "frequently" failed to inform SARS of a change of address, failed to notify SARS of a change of public officer or submitted tax returns a few days late. There is no definition of the word "frequently" in this context.
- SARS is not required to have regard to the person's ability to provide such security.
- The provision is draconian in that it gives SARS an unfettered right to demand security in any form that it desires in even relatively minor circumstances, and the only recourse that a taxpayer currently has in relation to such a decision is to take the matter on review to the High Court.

At the very least this provision should be subject to objection and appeal. However, ideally it should be subject to some independent oversight such as an application to the High Court. This should not be burdensome to SARS

given the exceptional circumstances in which the provision should be invoked.

Response

It is recommended that this comment not be accepted. The right to demand security from taxpayers for tax which has or may become payable already exists in section 43 of the Value-Added Tax Act, 1991. The equivalent requirement for applying this section is that the taxpayer "has repeatedly failed to pay amounts of tax due by him or to carry out other obligations imposed upon him by this Act, or any other Act administered by the Commissioner." The word "repeatedly" was used in earlier drafts of the Bill but was replaced at the request of commentators, since it could arguably cover circumstances where non-compliance took place at long intervals. The Oxford Dictionary of English, Second Edition, defines "frequently" as "done many times at short intervals", while the Collins Concise English Dictionary, Sixth Edition, adds "habitually". It is, therefore, clear that frequently sets a high bar before the clause may be invoked.

Once this bar has been cleared, the senior SARS official responsible for requiring the security will only be able to require reasonable security. As the question of whether security should be required in the light of the compliance history of the taxpayer is not a question of law or interpretation, this decision is not made subject to objection and appeal. All other remedies, such as requesting SARS to review and withdraw the decision under clause 9 of the Bill and the pursuance of an administrative complaint internally in SARS or, if unresolved, through the Tax Ombud or the Courts, are available to the taxpayer.

9.2. <u>Clause 162</u>: Determination of time and manner of payment of tax

Comment

The Bill does not provide for a minimum time period between the date the assessment is issued and the date that may be indicated on the assessment as the due date for payment, and the ability of SARS to set due dates for payment of assessments remains open to abuse.

Response: Not accepted

It is recommended that this comment not be accepted. The minimum "grace period" before assessed tax must be paid is not currently prescribed in any tax Act. It is currently based on SARS's practice of 30 days but may be shorter in appropriate circumstances. A hard and fast rule cannot be prescribed, as the period for payment is typically determined by the tax type, the type of assessment, whether the taxpayer has existing outstanding tax debts and the risk of dissipation of assets. For example, the Supreme Court of Appeal held in *Singh v Commissioner, South African Revenue Service* 2003 4 SA 520 (SCA) that SARS may give the taxpayer as short a period as 24 hours within which to pay if the risk of dissipation of assets warranted it.

9.3. Clause 164: Payment of tax pending objection or appeal

Comment

Clause 164 affords a discretion to a senior SARS official to suspend payment of tax pending objection and appeal, based on specified criteria. Given the fact that some of the criteria in subsections (4) and (5) are subjective, the SARS official's decision should be made subject to objection and appeal.

Response

It is recommended that this comment not be accepted. The criteria were introduced into the Income Tax Act, 1962, and the Value-Added Tax Act, 1991, by the Taxation Laws Second Amendment Act, 2009. As was noted in response to a similar comment in that year that the equivalent provisions should be subjection to objection and appeal; "The decision in the Metcash [*Trading Ltd v Commissioner, South African Revenue Service, and Another* 2001 1 SA 1109 (CC)] case was that, as far as section 36 of the VAT Act was concerned, the exercise by SARS of its discretion in terms of section 36 of that Act constituted administrative action as contemplated by section 33 of the Constitution. A refusal to accede to a request for the suspension of the obligation to pay would be reviewable before a court in terms of the principles of administrative law… Hence, no explicit provision to this effect needs to be added to the current wording of the proposed amendment."

Other remedies, such as requesting SARS to review and withdraw the decision under clause 9 of the Bill, the pursuance of an administrative complaint internally in SARS and, if unresolved, through the Tax Ombud are also available to the taxpayer.

9.4. Clause 165: Taxpayer account

Comment

It is not clear at what point a taxpayer may use a surplus in his/her account to offset a tax due, for example a VAT due or a future direct tax liability. For example: a VAT refund is due to the taxpayer and has not yet been paid by SARS, while the same taxpayer is required to make payment with regards to employees' tax or provisional tax, can the VAT refund be used as a credit towards the payment of employees' tax or provisional tax?

Response

Clause 191 provides for set-off between tax types. In order to authenticate the correctness of a refund SARS is entitled to first subject it to verification or audit before authorising its payment. Accordingly a credit will only become available for set-off after any verification or audit.

9.5. Clauses 167 and 200: Instalment payment agreement and Compromise of tax debt

Comment

In both clauses the decision, whether deferral or compromise may be awarded, resides with a senior SARS official. The taxpayer does not have administrative access to apply for these concessions.

Response

It is suggested that this comment is misconceived. SARS already has systems and processes in place through which taxpayers can access such relief.

10. CHAPTER 11: RECOVERY OF TAX

10.1. Clause 171: Period of limitation on collection of tax

Comment

The period of 15 years should be changed to 5 years. Document retention is only required for 5 years. Taxpayers are currently experiencing great difficulties in obtaining tax clearance certificates as a result of debts arising "out of the past".

Response

It is recommended that the comment be addressed administratively. The current 30 year prescription period for tax according to the Prescription Act, 1969, is now prescribed in the Bill and is reduced to 15 years in order to ensure a more practical and realistic approach to SARS's debt book management and is more aligned with international best practice. Given the importance of tax collection, a period of five years would be wholly inappropriate, particularly given the fact that the prescription period for normal civil judgment debts is still 30 years in the Prescription Act, 1969.

It is understood that the concern around Tax Clearance Certificates being refused arises from small amounts that are identified as SARS modernises its systems. Rather than compromise important tax principles to address these once-off difficulties, SARS will explore the administrative write-off of the amounts as uneconomical to pursue under clause 195.

10.2. Clause 179: Liability of third party appointed to satisfy tax debts

Comment

The power to require a third party who holds money or owes money to a taxpayer to pay the money to SARS in satisfaction of a tax debt is open to abuse by SARS and should have additional safeguards including that:

- SARS may not invoke the provision before a debt is payable;
- SARS may only use this provision once SARS has exhausted specified steps to collect the tax directly from the taxpayer concerned; and
- SARS may only use this provision with due regard for the taxpayer's other cash-flow obligations (especially employee salaries).

Reference is made to the case of *Oceanic Trust Co Ltd v SARS*, case no. 22556/09, as an illustrative example of the improper collection of a debt before the due date of an assessment.

Response

It is recommended that comment not be accepted. Clause 179 is based on section 99 of the Income Tax Act, 1962, and section 47 of the Value-Added Tax Act, 1991. It is implicit in the structure of the Bill that this collection mechanism may only be used to collect tax debts that are due. In practice, it is normally preceded by debt notices to the taxpayer who has failed to pay the tax by the payment date and has not sought debt relief in the form of an instalment arrangement. These steps may, however, be eliminated where, for example, the taxpayer has a poor payment record or there is a risk of the dissipation of assets. In this regard it should be borne in mind that a tax liability is determined and the obligation to pay arises upon assessment. If anything, it is therefore arguable that the Bill should be amended to explicitly permit SARS to commence collection proceedings prior to the due date for payment if the period afforded for payment is abused.

Clause 179 provides two mechanisms to assist taxpayers.

- The third party required to effect the payment may advise SARS that it is unable to comply with the notice and depending on the reasons provided, SARS may withdraw or amend the notice. This mechanism currently exists in section 47 of the Value Added Tax Act, 1991, but now applies across taxes;
- SARS may, on request by a person affected by a notice, amend the notice to extend the period over which the amount must be paid to SARS, i.e. reducing the amount that must be paid from, for example, the taxpayer's salary, so as to allow the taxpayer to pay basic living expenses including those of dependants.

A proportionate approach is implicit in the debt management process, given the requirements of administrative justice, so SARS has implemented these measures administratively up until now.

The reference to the *Oceanic Trust Co Ltd* case requires further analysis. While it is conceded that the section 99 of the Income Tax Act, 1962, was applied prior to the due date for payment of the assessment and that the Court found against SARS on this point, the Court ultimately concluded that SARS was entitled to retain the R20 million that it had collected. The case involved a foreign trust that averred that it was not subject to tax. Following an audit that commenced in March 2008 and was finalised in July 2009, tax in excess of R1.5 billion was assessed for eight years and SARS proceeded

to collect what funds were available in South Africa. It should further be noted that in reaching its conclusion the Court expressed grave doubts as to the foreign trust's argument that it did not have a permanent establishment in South Africa and was therefore not subject to tax in South Africa.

The validity and usage of the current provisions upon which clause 179 is based has gained judicial acceptance in South African which is evident from the most recent cases of *Shaikh v Standard Bank of SA Ltd and Another* 2007 SCA 168 (RSA), and *Kluh Investments (Pty) Ltd v C:SARS and Another*, case numbers 26078/2010 and 8274/2011.

10.3. Clause 185: Tax recovery on behalf of foreign governments

Comment

The concept of the Commissioner granting assistance to the tax authorities of other countries is not new but the procedural safeguards have now been removed.

Response

It is suggested that this comment is misconceived. The interposition of the Tax Court in the process of tax recovery on behalf of foreign governments was removed by the Revenue Laws Second Amendment Act, 2008. This is in line with the South Africa's treaty obligations. As noted in the OECD Commentary on Article 27(6) of the OECD Model Tax Convention dealing with the issue; "The main purpose of this rule is to prevent administrative or judicial bodies of the requested state from being asked to decide matters which concern whether an amount, or part thereof, is owed under the internal law of the other state."

11. CHAPTER 12: INTEREST

11.1. Clauses 187: General interest rules

11.1.1. Clause 187(1)

Comment

In terms of clause 187, interest is payable on any tax debt not paid in full by the effective date, generally determined over the period from the effective date to the date the tax debt is settled. A tax debt includes any debt in relation to a penalty levied by SARS. The effective date for purposes of a percentage based penalty is the date by which the tax should have been paid.

This is unduly harsh. A penalty is already punishment for not complying with a tax Act. Interest on penalties should be leviable only from the due date for payment thereof which due date should not be earlier than when the penalty was in fact levied.

Response

It is recommended that this comment not be accepted. The percentage based penalty is imposed only when there is a failure to properly pay over or account for taxes collected from employees and customers. As is the case in current law interest is levied from the date of the failure.

11.1.2. <u>Clause 187(2)</u>

Comment

Clause 187(2) provides that interest payable under a tax Act is calculated on the daily balance owing and compounded monthly. In our view, such a calculation is too complicated to apply to the general public. Simple interest should be retained.

Response

It is recommended that this comment not be accepted. The method proposed is that is used by the banking industry and in general commerce. Taxpayers who have, for example, an interest bearing bank account or purchased an item on credit will be familiar with it.

Comment

Clause 187(2) further provides that: *"...the Commissioner may prescribe by public notice when this method...will apply...*".The view is held that, should the new method be applied, the Commissioner has to inform the general public of this change, and the current wording provides the Commissioner with discretion as to whether to inform the general public or not.

Response

It is suggested that this comment is misconceived. While it is true the Commissioner has a discretion in publishing a public notice in respect of a particular tax type, which is necessary so that a phased approach may be adopted, the public notice is essential to bring the change into effect. The comment has, however, highlighted a tautology in the current wording and an omission in the transitional provision dealing with the calculation of interest.

The recommended amendments to clause 187 are set out below.

> "(2) Interest payable under a tax Act is calculated on the daily balance owing and compounded monthly, and the Commissioner may prescribe by public notice ~~when~~ <u>from which date</u> this method of determining interest will apply to a tax type~~ and from which date~~."

The recommended amendment to clause 270 is set out below.

> "(8) Interest arising on or after the commencement date of this Act but before the date prescribed by the Commissioner under section 187(2) must be—
> *(a)* calculated in accordance with the relevant tax Act until the date prescribed by the Commissioner; and
> *(b)* regarded as interest due under this Act."

11.1.3. Clause 187(6)

Comment

The view is held that the circumstances described in clause 187(6) under which a senior SARS official may exercise his/her discretion to waive interest are unfairly restrictive. These circumstances should be expanded to include instances where a taxpayer assumed a reasonable tax position without any intention to avoid or delay payment of tax. There is a cross-reference error in clause 187(6) in that it should read "circumstances referred to in subsection (5) are..."

Response

It is recommended that this comment be partially accepted. The narrowed circumstances were introduced into the Income Tax Act, 1962, by the Taxation Laws Second Amendment Act, 2010. As was noted in response to a similar comment in that year that the waiver of interest should be permitted if the taxpayer had reasonable grounds for the tax position taken; "Whether the taxpayer had reasonable grounds for the position taken or not, the fact remains that the taxpayer had the use of money due to the fiscus… The question of whether a taxpayer had reasonable grounds for the position taken is a relevant factor in determining whether and what additional tax or penalties are due. That said, discretion to cater for circumstances outside the taxpayer's control similar to the provisions of the Value-Added Tax Act is proposed."

The circumstances proposed under clause 187(6) are thus similar to the circumstances under current law in section 89*quat*(3) of the Income Tax Act, 1962, and section 39(7) of the Value-Added Tax Act,1991.

The incorrect cross-reference should, however, be corrected.

11.2. Clause 188: Deferral of payment and compromise of tax debt

Comment

SARS should issue IT3 certificates to taxpayers if interest is awarded for late refunds.

Response

The comment has been noted for the implementation process of the Bill.

12. CHAPTER 13: REFUNDS

12.1. Clause 190: Refunds of excess payments

12.1.1. Clause 190(2)

Comment

In terms of clause 190(2) there is no stipulated period of time during which SARS is to finalise any verification, inspection or audit. Consequently, a very long period of time may potentially elapse before taxpayers receive refunds legitimately due to them. It is proposed that any verification, inspection or audit should be finalised by SARS within a stipulated period of time, say six month, unless specified circumstances apply.

Response

It is recommended that this comment not be accepted. As noted in the response in 5.3.1. above, it is simply not possible to prescribe fixed time periods for audits given the differences in their type, complexity and ambit. Audit durations may range from days in simple cases to years if aggressive tax planning or transfer pricing are involved.

The comment also does not take into account the quantity and value of refund claims received and processed by SARS, the year on year improved efficiency of processing refunds, the risk inherent in not subjecting refund claims to diligent validation procedures, nor the checks provided for in the Bill that ensure that SARS acts responsibly when validating refunds.

In the 2009/10 year SARS processed corporate income tax refunds to the value of R10.9 billion, personal income tax refunds of R14.8 billion and value-added tax refunds of R117.4 billion.

It is widely accepted that refund claims present a substantial risk to the fiscus. SARS's capacity to subject refunds to diligent review is the most direct method of protecting the fiscus against abuse. As an example, in the 2009/10 year SARS saved the fiscus approximately R960 million in refunds through the suspension of approximately 16 000 unlawfully registered VAT vendors.

It is accepted that the risk inherent in refunds should not unduly impede the attentive processing of legitimate refunds, but a balance must be struck between subjecting refunds to scrutiny and effecting payment when refunds are legitimate. This balance finds expression in the Bill as a taxpayer may present adequate security to SARS and then demand the payment of a

refund even if SARS's verification or audit is incomplete. Further, SARS is obliged to keep a taxpayer informed of the progress of an audit.

12.1.2. Clause 190(4)

Comment

Clause 190(4) provides that a taxpayer's right to claim a refund will prescribe after a stated period of time. This prescription period should not apply where the amount of the refund is under dispute.

Response

It is suggested that this comment is misconceived. If an amount is disputed and the dispute is resolved in the taxpayer's favour the relevant assessment will be revised and a refund issued under clause 190(1)(*b*). Clause 190(4) only applies to erroneous payments where, for example, a taxpayer makes a transposition error when making payment of an assessment to SARS. The three year period is aligned with the general prescription periods in civil matters.

13. CHAPTER 15: ADMINISTRATIVE NON-COMPLIANCE PENALTIES

13.1. Clause 212: Reportable arrangement penalties

Comment

Since the penalty is imposed per month that an arrangement is not reported, this can result in a promoter attracting penalties of up to R3.6 million and a participant up to R1.8 million. It is more likely that these maximum penalties will be incurred by a participant because the rules of reporting are complex, subject to different interpretation, and because there is no guidance on the application of the rules. Currently the penalty may be remitted if there are extenuating circumstances and if the omission is remedied within a reasonable period. The Bill proposes that the penalty is imposed per month, the grounds upon which a penalty may be remitted are narrowed significantly, and the limitation of the extent of remission is subject to a limit of only R100 000. The amendment introduced by the Bill is extremely harsh and effectively imposes a penalty that is disproportionate to the omission.

As a minimum, the first incidence rule should not apply to promoters of reportable arrangements. Alternatively, it is recommended that the potential penalties for non-disclosure be determined only as a multiple of the tax benefit from the arrangement, since the imposition of fixed penalties may be unnecessarily punitive. Further, taxpayers should be able to request that such penalties be waived, if the taxpayer had reasonable grounds to view a transaction as not "reportable".

Response

It is recommended that this comment not be accepted. The proposed monthly penalty system gives direct effect to the current law's requirement that non-compliance be remedied within a reasonable period if part of the penalty is to be remitted. The penalty is also directly linked to the tax benefits to be derived from the potential tax avoidance arrangements that must be reported.

Thus arrangements granting a tax benefit of between R1 million and R5 million will attract a penalty of between R50 000 and R600 000 for participants that do not report them and between R100 000 and R1.2 million for promoters that do not report them, depending on the period for which the non-reporting takes place. The maximum penalties mentioned by the commentator only apply to arrangements with a tax benefit in excess of R10 million. Promoters are more heavily penalised for not reporting, since they are the minds behind these arrangements, have all the facts at their ready disposal and their reporting absolves the participants from the obligation to report.

Further, many arrangements will not be required to be reported in light of the general and specific exclusions. As examples, Government Notice No. 384 dated 1 April 2008 excludes the reporting of arrangements that do not give rise to a tax benefit in excess of R1 million or where the tax benefit from the arrangement is not the main or one of its main benefits

Finally, it should be noted that the reportable arrangement system that was in place from 2005 to 2008 imposed a penalty for non-reporting equal to the tax benefit to be derived, rather than a multiple of the benefit as proposed by the commentator. Commentators at the time considered this penalty to be excessive and it should be compared with the figures set out above. The proposed penalty provision is consistent with other penalty provisions in the Bill and is intended to provide more certainty to the penalty regime as a more effective and practical way of promoting tax compliance.

13.2. <u>Clauses 216 to 220</u>: Remittance of penalties (other than reportable arrangement penalties)

Comment

The limited grounds to remit a percentage based administrative penalty imposed for the late or non-payment of tax is too limited and results in an inequitable financial sanction in instances where the non-payment of a tax is not due to a substantial fault and the amount of the penalty imposed is not proportional to the act of non-payment. The limit on the amount of the penalty that may be remitted should be removed.

Response

It is recommended that this comment be accepted. Percentage based penalties are not capped and it is therefore not appropriate that the remittance that may be granted be capped. It is also inappropriate that a taxpayer be permitted repeated five day windows for non-compliance. It is recommended that a taxpayer may only qualify for the remission of the percentage-based administrative penalty if:

a) the non-payment is a first incident (in a 36 month period, according to the definition of the term) or the non-compliance involved an amount of less than R2 000;
b) reasonable circumstances for the non-compliance exist; and
c) the non-compliance in issue has been remedied.

The recommended amendments to clause 217 are set out below.

"217. (1) If a 'penalty' has been imposed in respect of—
(a) a 'first incidence' of the non-compliance described in section 210, 212 or 213;
(b) an incidence of non-compliance described in section 210 if the duration of the non-compliance is less than five business days; ~~or~~
~~(c) an incidence of non-compliance described in section 213 involving an amount of less than R2 000 or the duration of the non-compliance is less than five business days,~~

SARS may, in respect of a 'penalty' imposed under section 210 or~~,~~ 212 ~~or 213~~, remit the 'penalty', or a portion thereof if appropriate, up to an amount of R2 000 if SARS is satisfied that—
(i) reasonable circumstances for the non-compliance exist; and
(ii) the non-compliance in issue has been remedied.

(2) In the case of a 'penalty' imposed under section 212, the R2 000 limit referred to in subsection (1) is changed to R100 000.

(3) In the case of a penalty imposed under section 213, SARS may remit the 'penalty', or a portion thereof, if SARS is satisfied that—
(a) the 'penalty' has been imposed in respect of a 'first incidence' of the non-compliance described in section 210, 212 or 213, or involved an amount of less than R2 000;
(b) reasonable circumstances for the non-compliance exist; and
(c) the non-compliance in issue has been remedied."

14. CHAPTER 16: UNDERSTATEMENT PENALTY

14.1. Clauses 221 to 224: Understatement penalties

Comment

In terms of Part A of Chapter 16, penalties are levied on an understatement of a tax liability based on a understatement penalty percentage table set out in clause 223. In general, the introduction of the understatement percentage

table is welcomed as this will provide certainty and consistency in the case of understatements of tax payable.

However, there is a concern that the only circumstances in which no penalty will be levied in the case of an understatement is where the understatement in not substantial (as defined in clause 221) or where the taxpayer voluntarily discloses the understatement before notification of audit.

Circumstances could arise where a taxpayer takes a reasonable position in a tax return that ultimately results in a substantial understatement. For example, a taxpayer could reasonably contend that an amount of income is of a capital nature and not taxable for income tax purposes, but such amount is ultimately held by the courts to be taxable. In such circumstances the taxpayer faces a penalty of at least 25%. This situation is untenable and taxpayers should be free to adopt reasonable tax positions without fear of suffering understatement penalties.

It is submitted that no penalty should be applied where the taxpayer had reasonable grounds for the position taken and no regard should be had to the size of the understatement. Accordingly, item (i) of the table in clause 223 should be deleted.

Response

It is recommended that this comment be partially accepted. The model of imposing an understatement penalty through a table, which applies penalties to described behaviours and circumstances, has been approved of by all commentators as it introduces certainty.

The substantial understatement penalty is intended to act as a disincentive to taxpayers taking aggressive positions where large amounts are at stake, in the knowledge that if they are detected and successfully challenged, the worst that can happen is that the tax that should have been paid is paid, along with interest at market related rates.

The concern here relates to large corporate and high net worth taxpayers. The provisions have been reviewed in this light and two areas for improvement have been identified.

In terms of clause 221 a “substantial understatement” occurs when the prejudice to the fiscus is the *lesser* of 10% of the tax properly chargeable or refundable and R1 million. The penalty for a “substantial understatement” is therefore incurred from a potentially low monetary threshold. In order to resolve this difficulty it is recommended that a substantial understatement occur when the prejudice to the fiscus is the *greater* of 5% of the tax properly chargeable and R1 million. The 5% threshold is proposed bearing in mind the lower bound of the materiality threshold that is commonly used in audit practice when applied to net income.

The principles of corporate governance place a duty on larger taxpayers to include tax risk management in their governance structure. Even full compliance with such tax risk management will, however, not eliminate disagreements as to interpretation between taxpayers and SARS. It is therefore recommended that the power to remit a substantial understatement penalty be granted subject to a rigorous test that the substantial understatement occurred despite a diligent approach to tax compliance.

A two step test is recommended, given the size of the amounts and the sophistication of the taxpayers involved. The first step is that the taxpayer must have fully disclosed the arrangement that gave rise to the prejudice to the fiscus to SARS by no later than the date that the relevant return is due. The second is that the taxpayer must hold an opinion by a registered tax practitioner that confirms that the position is more likely than not to be upheld if the matter proceeds to Court. In order to ensure that the return is accurate it is proposed that this opinion must have been issued prior to the date that the relevant return is due and must take account of the specific facts and circumstances of the arrangement.

The recommended amendments to clause 221 are set out below.

> "'**substantial understatement**' means a case where the prejudice to SARS or the fiscus exceeds the ~~lesser~~ greater of ~~10~~five per cent of the amount of 'tax' properly chargeable or refundable under a tax Act for the relevant tax period, or R1 000 000."

The recommended amendments to clause 223 are set out below.

> "(3) SARS must remit a 'penalty' imposed for a 'substantial understatement' if SARS is satisfied that the taxpayer—
> (a) made full disclosure of the arrangement, as defined in section 34, that gave rise to the prejudice to SARS or the *fiscus* by no later than the date that the relevant return was due; and
> (b) was in possession of an opinion by a registered tax practitioner that–
> (i) was issued by no later than date that the relevant return was due;
> (ii) took account of the specific facts and circumstances of the arrangement; and
> (iii) confirmed that the taxpayer's position is more likely than not to be upheld if the matter proceeds to Court."

14.2. Clause 223: Understatement penalty tax percentage table

Comment

Reference is made to a "standard case" in the table. It is uncertain as to what is meant by a "standard case"?

Response

This is the case where none of the special cases set out in columns 4, 5 and 6 of the table apply.

Comment

Voluntary disclosure before notification of an audit should absolve a taxpayer from any understatement penalty.

Response

It is recommended that this comment be partially accepted. A significant risk to tax compliance is the perception that some are not paying their fair share and that their non-compliance goes unpunished. While coming forward voluntarily is to be welcomed in view of the benefits to SARS and society, it should not fully absolve the taxpayer from wrong doing in the past. That said, the hurdle to voluntary disclosure should not be set too high, so there is scope for the reduction of the penalty in these cases.

The recommended amendments to the table in clause 223, including an amendment to column 5 to simplify calculation, are set out below.

1 **Item**	**2** **Behaviour**	**3** **Standard case**	**4** **If obstructive or if it is a "repeat case"**	**5** **Voluntary disclose made after notification of an audit**	**6** **Voluntary disclose made before notification of an audit**
(i)	'Substantial understatement'	25%	50%	5%	0%
(ii)	Reasonable care not taken in completing return	50%	75%	25%	~~12~~0%
(iii)	No reasonable grounds for 'tax position' taken	75%	100%	~~37~~35%	~~18~~0%
(iv)	Gross negligence	100%	125%	50%	~~25~~5%
(v)	Intentional 'tax' evasion	150%	200%	75%	~~37~~10%

15. CHAPTER 18: REPORTING OF UNPROFESSIONAL CONDUCT

15.1. Clause 241: Complaint to controlling body of tax practitioner

Comment

The provisions contained in section 241 are supported. However a number of professional bodies currently regulate their members in the tax profession.

It is proposed that SARS and the various professional bodies arrange a meeting to prepare and issue a guidance note that will assist and advise members on their professional conduct in relation to taxation. The document should set out the fundamental principles which govern the conduct of members, namely: Integrity, Objectivity, Professional competence and due care, Confidentiality and Professional behaviour.

Response

The comment has been noted for the implementation process of the Bill, although significant difficulties are foreseen in obtaining consensus across all the diverse professional associations involved in tax practice. This will also not deal with tax practitioners who are not members of an association, which is part of the thinking behind a Regulation of Tax Practitioners Bill.

16. CHAPTER 19: GENERAL PROVISIONS

16.1. Clause 244: Deadlines

Comment

Clause 244(3)*(a)* states that an application for extension must be submitted to SARS in the prescribed form before the deadline expires. It is submitted that no such form is available. The prescribed form must be provided.

Response

The comment has been noted for the implementation process of the Bill.

16.2. Clause 246: Public officers of companies

Comment

Clause 246 requires the appointment of a Public Officer. In practice, it will be most helpful if the Commissioner—

- provides a standardised form that must be completed in order to facilitate the appointment of a Public Officer; and
- issues a letter confirming the appointment of a Public Officer, once such appointment has been approved.

Response

The comment has been noted for the implementation process of the Bill.

17. SCHEDULE 1: CONSEQUENTIAL AMENDMENTS TO TAX ACTS

17.1. General

Comment

Numerous consequential amendments to Tax Acts are proposed in Schedule 1 of the Bill. However, these amendments are not aligned with the amendments to the Tax Acts proposed in the 2011 draft Taxation Laws Amendment Bills.

Furthermore, Schedule 1 seeks to make amendments to provisions of Tax Acts that have yet to come into effect (such as the provisions relating to the dividends tax) with the effect that if the Bill comes into operation before these provisions become effective the amendments will be a nullity as they will be amending provisions of a Tax Act that do not exist at such time.

Response

It is recommended that the required technical corrections be made. It should, however, be noted that clause 272 specifically makes provision for different provisions of the Bill to come into operation at different times, which will alleviate the concerns expressed.

17.2. Schedule 1 paragraph 91: Amendment of paragraph 19 of Fourth Schedule to the Income Tax Act, 1962

Comment

The amendment to the definition of “basic amount” and the automatic 8% per year increase is welcomed. The proposed amendment solves 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 or her income tax returns. However if a taxpayer is for example “one-year behind” in filing his or 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.

Response

It is recommended that this comment not be accepted. All individuals should have submitted the tax returns for a year of assessment by the end of the following year of assessment, which is after the end of the filing season for the tax returns. The reduced period of 14 days from the date of issue of an assessment proposed in paragraph 91 and the automated processing of returns by SARS will allow returns submitted during the filing season to be taken into account in determining the basic amount for the subsequent second provisional tax payment. If the basic amount is too high compared to the actual taxable income, the taxpayer also has the option of basing the provisional tax payment on actual taxable income.

Comment

Companies with a February year-end may still have an automatic 16% uplift for the second provisional tax payment from their last assessed amount, as companies have 12 months after year-end to file their tax returns. As such, by the second provisional payment date companies may not have been assessed for the previous year of assessment and as such would be penalised with an automatic 16% uplift to their last year of assessment, although they are not "behind" in filing their income tax returns.

Response

It is recommended that this comment not be accepted. The second provisional tax payment is not only determined with reference to the basic amount. Even if the basic amount is adjusted based on the period of time since the last assessment, no understatement penalty will be imposed if provisional tax payments are equal to at least 90 per cent of the actual tax liability for the year of assessment.

17.3. <u>Schedule 1 paragraph 92</u>: Amendment of paragraph 20 of Fourth Schedule to the Income Tax Act, 1962

Comment

The under estimation penalty is linked to the taxable income numbers without regard to the actual tax paid. Thus the penalty will apply even if the actual tax paid by the taxpayer is correct or even if it's an over-payment. Late bonus payments are probably the best example. For example, if a taxpayer who estimates taxable income at R1 million 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. This appears to be grossly unfair because the full tax was in fact collected by SARS.

Response

It is recommended that this comment not be accepted. In respect of the example given, the requirement has been retained in paragraph 20 that SARS must consider whether the estimate was seriously calculated with due regard to the factors having a bearing on the estimation, or was not deliberately or negligently understated before imposing the understatement penalty. Under the circumstances described the understatement penalty would not be imposed or, if imposed, would be remitted.

18. ISSUES NOT ADDRESSED IN THE BILL

Comment

The pay-now-argue-later provisions provide that a taxpayer is entitled to interest on any payments of taxes made in terms of section 88. The current Income Tax Act does not contain any guidance or provisions which determine the administrative process the taxpayer needs to take in the event that SARS does not pay interest on any such amounts paid. Should the taxpayer issue summons on SARS and the Minister of Finance, write a letter of demand or approach a Court to get a judgement against SARS? The objection and appeal route is not available as any refund of the tax paid is not due to an assessment incorrectly issued by SARS.

Response

If for some reason interest is not paid as it should be, the normal process for demanding the payment of a debt should be followed, which would begin with writing SARS a letter of demand. Should this not result in a satisfactory response the taxpayer may pursue an administrative complaint internally in SARS and, if unresolved, through the Tax Ombud or the Courts.

Comment

A further matter not addressed in the Bill is the right of SARS to the working papers of Registered Auditors (RAs) as well as the procedures to be followed by SARS to obtain access to working papers of RAs. While it is appreciated that SARS has engaged with stakeholders in this regard to reach an “informal agreement”, the matter would perhaps be better addressed as it is in the United Kingdom by including the detail of the rights of SARS to access RAs workings papers and the procedures to follow in the Bill.

Response

It is recommended that this comment not be accepted. An informal approach has been used to good effect in Australia for a number of years and should be tested in South Africa before being rejected in favour of a more formalistic approach.

19. ISSUES IDENTIFIED BY SARS

While reviewing the comments SARS has identified several additional issues that it recommends should be addressed. These range from the correction of cross-referencing or minor textual and drafting errors, which require no comment, to the more significant issues that are dealt with below.

19.1. Clause 9(1)*(b)* – Decision or notice by SARS

The clause provides the right to request a decision (other than one that underlies an assessment) to be withdrawn or amended. The request can be made to the original official, the original official's manager or a senior SARS official. Its purpose is to facilitate the process of resolving administrative disputes.

However, only a taxpayer (as defined in clause 151) may make this request. The Bill may impact on a person other than the taxpayer and that other person may want the decision withdrawn or amended. It is recommended that clause 9(1)*(b)* be amended to permit a request by the relevant taxpayer or a person directly affected by a decision made by an official.

The recommended amendments to clause 9 are set out below, including minor textual changes.

> "**9.** (1) A decision made by a SARS official and a notice to a specific ~~taxpayer~~ person issued by SARS, excluding a decision given effect to in an assessment or a notice of assessment,—
>
> *(a)* is regarded as made by a SARS official, authorised to do so or duly issued by SARS, until proven to the contrary; and
>
> *(b)* may~~, subject to the provisions of this Act,~~ in the discretion of ~~the~~ a SARS official described in subparagraphs (i) to (iii) or at the request of the relevant ~~taxpayer~~ person, be withdrawn or amended by—
>
> (i) the SARS official;
>
> (ii) a SARS official to whom the SARS official reports; or
>
> (iii) a senior SARS official."

19.2. Clause 26: Third party returns

As a result of a technical oversight, this clause does not include the authority of the Commissioner to prescribe the due date for the submission of third party returns, as is done in respect of taxpayer returns in clause 25(1)*(b)*.

The recommended amendments to clause 26 are set out below.

> **"26.** The Commissioner may by public notice, at the time and place and by the due date specified, require a person who employs, pays amounts to, receives amounts on behalf of or otherwise transacts with another person, or has control over assets of another person, to submit a return with the required information in the form specified and in the manner as may be prescribed by the Commissioner in the notice."

19.3. Clause 72: Right against self-incrimination

The National Prosecuting Authority ("NPA") has expressed the concern that the ambit of this clause is too wide. The NPA is of the view that clause 72*(a)*

would severely undermine prosecution of tax offenders, if it were to be enacted in its present form.

In this regard the likely effect of clause 72*(a)* in its current form requires consideration:

- Clause 72(*a*) provides that an admission made in a return, application return or other document is not admissible in criminal proceedings against the taxpayer.

- The difficulty in using the term admission is that our courts have defined the term "admissions" extremely broadly. In *S v Molimi 2008* (3) SA 608 (CC) at par 28, for example, the Constitutional Court unanimously adopted the definition of Du Toit *et al* "as a statement or conduct adverse to the person from whom it emanates".

- When this definition is applied to clause 72(a) it might well mean in effect that virtually no part of a tax return could be used by the NPA in prosecuting a taxpayer. Anything which the NPA would want to use in this regard would almost certainly be "adverse" to the taxpayer.

- Thus, when clause 72(*a*) is considered in the light of the wide definition of admissions adopted by our courts, the concerns expressed of the NPA regarding its impact on prosecution of taxpayers are well founded.

SARS has also been advised by its constitutional experts that clause 72*(a)* is not required to be included in the Bill in its present form in order to render the Bill constitutionally compliant.

It must, therefore, be considered how clause 72*(a)* might be re-formulated to avoid these concerns, while nevertheless complying with its purpose – that is to ensure that all taxpayers are required, on pain of criminal punishment, to complete and submit tax returns and other documents. Any formulation of the clause must also obviously be consistent with the right against self-incrimination contained in the Constitution.

It is suggested that clause 72(*a*) be re-worded to be provide as follows. For the sake of convenience the whole of clause 72 in its current form is set out as well as the re-formulated clause, although no change of substance has been made to clause 72(*b*).

Current wording:

> **"72.** An admission by the taxpayer of the commission of an offence under a tax Act—
> *(a)* contained in a return, application, or other document submitted to SARS by a taxpayer; or
> *(b)* obtained from a taxpayer under Chapter 5,
> is not admissible in criminal proceedings against the taxpayer, unless a competent court directs otherwise."

Proposed wording:

> "**72.** (1) A taxpayer may not refuse to comply with his or her obligations in terms of any legislation to complete and file a return or any application on the grounds that to do so might incriminate him or her, and an admission by the taxpayer contained in a return, application, or other document submitted to SARS by a taxpayer is admissible in criminal proceedings against the taxpayer, unless a competent court directs otherwise.
>
> (2) An admission by the taxpayer of the commission of an offence under a tax Act obtained from a taxpayer under Chapter 5 is not admissible in criminal proceedings against the taxpayer, unless a competent court directs otherwise."

The new formulation of clause 72(1) has the following advantages:

- It makes expressly clear that all taxpayers are obliged to complete tax returns and that the danger of self-incrimination does not absolve them from this duty. It thus complies with the purpose of clause 72*(a)*.

- It avoids the concerns expressed by the NPA about the effect of clause 72*(a)* because the default position is now that the admissions in tax returns may be used in criminal proceedings.

- It preserves some residual power for the Court to depart from the default position and direct that, in a specific case, admissions in a tax return may not be used.

SARS's constitutional counsel have confirmed that they are of the view that this formulation is likely to survive constitutional scrutiny.

It is recommended that the new formulation of clause 72 be adopted.

19.4. Clause 182: Extent of liability of a transferee for tax debts

Clause 182(2) currently provides that the liability is limited to the lesser of the fair market value of the asset at the time of the transfer, reduced by the fair market value at the time of any consideration paid.

The extent of the liability should be the lesser of the amount in 182(2)*(a)* and the actual benefit to the transferee which will be the difference between the market value and the consideration paid (and not between the market value now and the market value when the transfer was made).

Clause 182(2)*(b)* should be amended to provide "*(b)* the fair market value of the asset at the time of the transfer, reduced by the fair market value ~~at the time~~ of any consideration paid at the time of payment."

19.5. Clause 187: General Interest Rules

Interest on understatement penalties

Interest on understatement penalties should be charged from the effective date for the payment of the tax understated, as is current law, as that is the date that the failure (i.e. the understatement) occurs. This is the current law, and clause 187 should be amended to clarify this.

The recommended amendment to clause 187 is set out below.

> "(3) The effective date... in relation to... *(f)* "an understatement penalty, is the effective date for the tax understated';"

Interest on jeopardy assessments

The manner in which clause 187 deals with the effective date for interest on jeopardy assessments is not clear.

The recommended amendment to clause 187 is set out below as a new subsection (5), and the existing subsections (5) and (6) will be renumbered.

> "(5) The effective date in relation to a jeopardy assessment is the date for payment specified in the jeopardy assessment."

19.6. Schedule 1 paragraph 25

It is recommended that this paragraph should be amended to include the newly proposed section 23K in the proposed amendment to section 3(4) of the Income Tax Act, 1962. This will ensure that decisions under section 23K are subject to objection and appeal.

19.7. Schedule 1 paragraph 29

It is recommended that the paragraph be deleted as an amendment to section 6*quat*(5) of the Income Tax Act, 1962, is already included in the Taxation Laws Amendment Bill, 2011.

19.8. Schedule 1 paragraph 31

It is recommended that the paragraph should be deleted as its amends section 9D of the Income Tax Act which will be deleted by the Taxation Laws Amendment Bill, 2011.

19.9. Schedule 1 paragraph 35

It is recommend that this paragraph be deleted as section 11D(20) is inserted through the Taxation Laws Amendment Bill, 2011, and in order to avoid duplication, the proposed changes will be effected in that Bill.

19.10. Schedule 1 paragraph 122

In order to motivate vendors to register for e-filing, vendors who file their returns and make payment via e-filing are able to make payment by the end of a particular month as opposed to the 25th of the month. The recommended deletion of "other than" extends the concession to vendors registered on e-filing using debit orders. However, if an e-filer fails to pay by the end of the relevant month, the vendor will be deemed to have been obliged to pay on the 25th of the month, from which date interest will be calculated on the unpaid amount as the case with vendors who are not e-filers.

The recommended amendments to paragraph 122 are set out below.

"*(a)* By the deletion in subsection (1) for paragraph (i) ~~and (ii)~~ of the proviso; and

(b) by the substitution in subsection (1) for paragraph (iii) of the proviso of the following paragraph:

''(iii) a vendor registered with the Commissioner to submit returns **[and payments]** electronically **[(other than by means of a debit order), must furnish the return and]** is deemed to have made payment within the period contemplated in subsection (1) if the vendor makes full payment of the amount of tax electronically within the period ending on the last business day of the month during which that twenty-fifth day falls;"