South African Institute of Tax Professionals

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Dear Ms. Mputa and Ms. Collins

RE: ANNEXURE C PROPOSALS 2015

Thank you for the opportunity to contribute proposals for the inclusion in Annexure C of the Budget Review 2015.

Set out below, is the consolidated commentary on **Tax Administration matters only**, developed from both an internal review of the provisions as well as from consultations with members, stakeholders and industry. The commentary reflects the collective view of members, stakeholders and industry role players consulted.

We have also included various submissions on policy matters for which we would like the opportunity to further discuss with National Treasury.

All references to chapters and sections below refer to chapters and sections of the Tax Administration Act (No. 28 of 2011) (hereinafter 'TAA'), unless stated otherwise.

1. TAX ADMINISTRATION ACT – POLICY MATTERS

1.1. Alternative information gathering procedures (Chapter 5)

Problem statement

Chapter 5 of the TAA sets out the various information gathering powers that SARS has and how such powers should be executed. SARS are by law limited to the information gathering powers in this chapter.

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However, it seems that some of the information gathering activities conducted by SARS, such as verifications and business information meetings do not fall within the scope of any of the legislative provisions in terms of which SARS can exercise these powers. This is problematic for taxpayers as it is unclear what the procedures are that SARS needs to follow and what the taxpayer's rights and obligations are in such instances. For example, verification procedures currently conducted by SARS seem exactly the same as a field audit, yet it is unclear whether SARS is conducting an audit under section 42 of the TAA or requesting relevant material under section 46 of the TAA.

Proposed solution/recommendation

SARS should either confirm to taxpayers under which relevant provisions the various audits and business information gathering procedures are conducted or the legislation should be clarified and amended to empower SARS to conduct these activities and also regulate how they are to be conducted.

1.2. Request for extension to submit objection (Rule 7(3))

Problem statement

Rule 7(3) of the Rules promulgated under section 103 makes the decision not to extend the time period for lodging an objection subject to objection and appeal. However, it does not state what happens in the interim. For example, on the 25th day after the date of an assessment, a taxpayer submits a request for the extension of an objection. Suppose then that SARS responds negatively on day 32 by not granting the extension and the objection is then lodged on day 40. By day 40 the objection is late as it exceeds the 30 day period. If the taxpayer does submit on day 30 to avoid this and SARS do extend, then the extension is meaningless as the taxpayer then cannot resubmit an amended objection through eFiling.

Proposed solution/recommendation

Rule 7(3) should expressly provide for the timing consequences of the original objection where the decision to extend an objection is objected to and the taxpayer is successful or unsuccessful. In this regard it is proposed that if an extension is requested properly before the end of the relevant time period, the taxpayer should be allowed to submit the objection within 10 days after SARS has denied the request to extend the period for lodging an objection.

1.3. Refunds (Section 190(6))

Problem statement

Section 190(6) states that a decision not to authorise a refund is subject to objection and appeal. However, it is unclear when exactly this decision is taken as the law does not compel SARS, like in the repealed section 44(8) of the Value-Added Tax Act (No. 89 of 1991) to notify the taxpayer of this decision. With no formal

notification or time period it is unclear how the taxpayer can exercise this right. For purposes of the Promotion to Administrative Justice Act (No. 3 of 2000), an "administrative action" as defined in section 1 of the said Act includes "…any failure to take a decision…". It is, however unclear whether the failure to notify a taxpayer of why a refund is not released would constitute a 'decision' for purposes of section 190(6) of the TAA.

Proposed solution / recommendation

It is proposed that SARS should be made subject to a fixed time period to release a refund 1. after an assessment was issued which wasn't followed by information gathering procedures, or 2. after the information gathering procedures instituted have been finalised (which procedures in any case do not place any burden on SARS to finalise it within a specified period of time). Should SARS not release the refund within the fixed time period (with or without notice), that decision must be deemed to constitute a decision not to release a refund in for purposes of section 190(6) of the TAA.

1.4. Practice generally prevailing (section 5)

Problem statement

In terms of section 99(1)(d), SARS is barred from issuing additional assessments if the full amount of tax that was supposed to be assessed by SARS was not assessed due to the practice generally prevailing at the time.

The term "practice generally prevailing" is defined in section 5(1) as "a practice set out in an official publication regarding the application or interpretation of a tax Act". An official publication is then defined in section 1. Guides issued by SARS are excluded from this definition. A lot of the current guides, especially the BRS Guide, instruct taxpayers on how to treat or disclose various tax events, as opposed to offering mere guidance (or suggestions), like the interpretation notes. Taxpayers who rely on the instructions of such guides in their treatment of various tax events currently do not enjoy the protection offered by section 99(1)(d). In other words, even though a taxpayer could prepare and submit a tax return based on well-known accepted SARS practices as a laid out in a guide, SARS could conceivably still issue additional assessments in respect of such a tax return.

Proposed solution/recommendation

The definition of "official publication" in section 1 of TAA should be amended to include guides that instruct taxpayers as to the format, content and manner of disclosure of information. These "guides" should be renamed to a more appropriate description to be included in the amended definition.

1.5. Telephonic requests for relevant material (section 46)

Problem statement

Section 46 allows SARS to request relevant information orally, though it still requires that a reasonable time period for the submission of the information must be given by SARS. There have been instances where SARS officials contact taxpayers telephonically, requesting information that they expect to be provided over the phone. Section 46 does not specifically state that the initial request must be in writing. There are various issues involved in telephonically providing sensitive and confidential information to someone who may or may not be a SARS official (as no documents have been provided for validation purposes).

Furthermore, providing information over the phone results in no official record of what information was communicated. This would result in a dispute should SARS or the taxpayer contest what was said.

Proposed solution/recommendation

It is submitted that section 46 should be clarified to the effect that though information may be requested to be submitted orally, such request must be in writing and provide reasonable notice to the taxpayer to provide such information.

Furthermore, where SARS requires an oral submission of relevant information, it is submitted that section 46 should be amended to provide for a subsequent written confirmation by either SARS or the taxpayer of the information to be provided.

1.6. Public officers - penalties levied on both the public officer and the company for one default

Problem statement

Section 246(5) deems a public officer to be responsible for all acts, matters or things that the taxpayer company must do under a tax Act. Failure to fulfil these obligations (i.e. default) will result in penalties being levied on the public officer. Section 246(6) then deems everything done by the public officer in his or her representative capacity to have been done by the company. The corollary then is that the defaults of the public officer are deemed to be the defaults of the company.

Practically, the penalties on such defaults will first be levied on the company. However, section 246(5) then imposes the same penalties on the public officer. The provision does not seem to transfer the penalties from the company to the public officer. Theoretically, one default could result in the levying of a double penalty; one on the company and another on the public officer for exactly the same default.

Proposed solution/recommendation

Section 246 should be amended to clarify that though the default of the public officer is attributed to the company, only a single penalty can apply to any one default.

1.7. Preservation orders: section 163 as an execution mechanism

Problem statement

Section 163(7)(c) gives SARS the right to apply to the High Court to have a curator realise a taxpayer's assets in satisfaction of a tax debt.

The court in *CSARS v Tradex (Pty) Ltd & Two Others - HC 12949/2013 WC* - 9 September 2014 [at 75], when dealing with preservation orders, stated that it cannot see how it is justifiable that at a time when the tax liability is uncertain, a court can order the curator to realise a taxpayer's assets.

We agree with the view held by the court that section 163(7)(c) is not legally justifiable and administratively fair and that SARS should not have a right to apply to court to have the curator realise the taxpayers assets in respect of a future undetermined debt. We submit, as also stated by the court, that once the tax debt is determined, SARS has sufficient powers to then approach the court at such time to have the curator realise the assets in satisfaction of the determined and assessed outstanding tax debt.

Proposed solution/recommendation

Section 163(7)(c) TAA should be deleted for want of legality.

2. TAX ADMINISTRATION ACT – TECHNICAL CORRECTIONS

2.1. Ambiguity of the phrase "public officer's company" in sections 246(5) and (6)

Problem statement

Section 246(5) states the following:

"*A public officer is responsible for all acts, matters, or things that the public officer's company must do under a tax Act…*"

The intention of this provision is clearly to make the public officer responsible for all the acts, duties, etcetera of the company for which he or she is the public officer.

However, the underlined phrase "public officer's company" above could be interpreted to mean the company belonging to the public officer; i.e. the company owned by the public officer rather than the company for who the person is acting as the public officer.

The same principle applies to section 246(6).

Proposed solution / recommendation

It is submitted that section 246(5) TAA should be clarified as follow:

"A public officer is responsible for all acts, matters, or things that in respect of the company for which he or she is a public officer must do under a tax Act…"

Similarly, section 246(6) should perhaps be changed to read:

"A company for which a person is a public officer, is regarded as having done everything done by the public officer in his or her representative capacity."

Should you have any enquiries or wish to discuss the submissions made please do not hesitate to contact me.

Yours sincerely

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