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Dear Mr Momoniat and Ms Collins

RE: ANNEXURE C PROPOSALS 2016: TAX ADMINISTRATION

Thank you for the opportunity to contribute proposals for the inclusion in Annexure C of the Budget Review 2016.

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 OMBUD (SECTIONS 15 TO 21 OF THE TAA)

Problem Statement

The introduction of the Tax Ombud's office has been a welcome change given the current SARS climate. Taxpayers and tax practitioners are increasingly making use of the office of the Tax Ombud. However, many taxpayers are hesitant to approach the office, due to fears that they may later become subject to increased audit or scrutiny by SARS. Taxpayers therefore rather choose to stay 'below the radar' rather than to escalate any issues they may have.

As a result, systematic issues go undetected, or if detected and complaints are made to the Tax Ombud, the quantum of these systematic issues are deflated. Since the Tax Ombud is not able to investigate systematic issues on its own accord, it is reliant on the complaints mechanism process in order to detect any issues. Therefore, any assistance that may come from the Tax Ombud's office in relation to systematic issues will predominantly be reactive, rather than proactive.

In addition, while the Tax Ombud may make recommendations, SARS is not bound by these recommendations. In refusing to accept a recommendation by the Tax Ombud, SARS is not obliged to provide any formal reasons, nor are there parameters which govern SARS' decision to not to follow a recommendation. In other words, SARS is given an unfettered discretion when making the decision not to follow or to follow a recommendation from the Tax Ombud.

Proposed solution / recommendation

It is proposed that the legislation governing the powers of the Tax Ombud be amended to:

- Provide for safeguards to taxpayers when raising complaints to the Tax Ombud, so that they are not later subject to excess scrutiny by SARS;
- Allow the Tax Ombud to investigate systematic issues on its own accord; and
- Provide for strict objective parameters that SARS must follow when deciding whether to follow the Tax Ombud's recommendation.

2. SECTION 99(4) EXTENSION OF PRESCRIPTION WHERE AUDIT OR INVESTIGATION INVOLVES SUBSTANCE OVER FORM, ANTI-AVOIDANCE, TRANSFER PRICING OR HYBRID INSTRUMENT RULES

Problem Statement

Section 99(4) of the Tax Administration Act will allow SARS to extend prescription where an audit or investigation involves the application of the substance over form, anti-avoidance, transfer pricing or hybrid instrument rules. Whilst SARS is required to provide the taxpayer with 60 days prior notice of the notice to extend prescription, the section does not require SARS to provide the taxpayer with any details regarding the basis on which SARS is seeking to do so. Based on the reference to “where an audit or investigation under Chapter 5 relates to ...”, it would appear that the provision of section 99(4) can only be invoked once an audit or investigation is underway. Whilst section 48 of the Tax Administration Act requires SARS to advise the taxpayer of the initial basis and scope of any audit or investigation, the scope may be broad and / or relate to more than one year of assessment. Thus whilst the taxpayer may be aware that an audit or investigation is under way, they may not be aware that SARS is considering the application of the substance over form, anti-avoidance, transfer pricing or hybrid instrument rules.

Proposed Solution

We submit that notice to taxpayers envisaged in section 99(4) should specifically state the grounds on which SARS is seeking to extend prescription e.g. the SARS is current auditing XYZ transaction entered into by the taxpayer in the 2012 year of assessment and is invoking the provisions of section 99(4) on the basis that the general anti-avoidance rules could be of application to the transaction.

3. THE INTERPLAY BETWEEN CHAPTER 15 OF THE TAA AND THE PENALTY REMISSION CRITERIA IN PARAGRAPH 20(2) OF FOURTH SCHEDULE TO THE ITA

Problem Statement

In accordance with Paragraph 20(2) of the Fourth Schedule, the underestimate penalty is classified as a percentage based penalty in terms of Chapter 15 of the TAA. This specific wording brings the underestimation penalty within the ambit of Chapter 15 of the TAA.

This means that the procedure for requesting remission of the penalty applies (section 215 of the TAA) as well as the remittance criteria set out in sections 216, 217 and 218 of the TAA respectively.

It is therefore clear that the TAA is intended to work inter-relatedly with a specific tax Act (and in this case the ITA).

For example, as contemplated in section 220 of the TAA, in order to have the underestimate penalty reduced by SARS, taxpayers must first request remission of the penalty, and only upon a negative response to its request for remission, is it entitled to object. In addition, in determining 'first incidence' as defined, an underestimate penalty qualifies as an incidence of non-compliance. Therefore taxpayers who wish to apply for penalty remission in the case of a late payment penalty in the case of VAT for example, would be disqualified from relying on the first incidence penalty remission criteria on the basis that an underestimate penalty has been imposed in the preceding 36 months.

However, according to SARS' most recent policy interpretation, taxpayers are not entitled to rely on the TAA when requesting remission of an underestimate penalty. This is because section 4(3) of the TAA provides that in the event of an inconsistency in the TAA and a tax Act, the provision of the Tax Act will prevail.

While we do not dispute that Paragraph 20(2) of the Fourth Schedule applies in the case of applying for remittance of the penalty, SARS is also entitled to exercise its discretion to remit the penalty should the taxpayer meet the requirements of section 217 of the TAA (first incidence of non-compliance) or section 218 of TAA (exceptional circumstances). This is further supported by section 215(5) of the TAA, which provides that *"If a tax Act other than this Act provides for remittance grounds for a penalty, SARS may despite the provisions of section 216, 217 and 218 remit the penalty or a portion thereof under such grounds."*

Proposed solution / recommendation

It is proposed that the position is clarified, that in the case of the imposition of an underestimate penalty, taxpayers may request remission under either Paragraph 20(2) of the Fourth Schedule or the TAA remission criteria.

This clarification can easily be remedied by amending section 215(5) of the TAA.

4. ADHERENCE TO TIME LINES

Problem statement

There are a number of instances where the TAA prescribes time periods within which the taxpayer and SARS must respond.

Examples that specifically applies to SARS include keeping the taxpayer informed in the event of an audit (section 42), the dispute resolution process (Chapter 9), responding to deferral of payment requests (sections 167 and 168) and confirmation of tax compliance status (section 256).

Rule 56 of the Rules promulgated under section 103 of the TAA provides the taxpayer with remedies if SARS doesn't comply with a period prescribed under these rules. The remedy is an application for default judgment in the event of non-compliance with rules.

No similar remedy is available to a taxpayer where SARS doesn't comply with the other periods prescribed in Tax Acts. The procedure provided for in rule 56 is also an expensive one.

Proposed solution

The TAA should be amended to provide for a simpler, more cost efficient way for taxpayers to deal with instances where SARS doesn't comply with a period prescribed under a Tax Act or the TAA.

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

Yours sincerely

Mr Piet Nel

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