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Ms N. Nkumanda
The National Treasury
240 Vermeulen Street
PRETORIA
0001

Ms A. Collins
Legal & Policy
The South African Revenue Service
Lehae La SARS
PRETORIA
8000

BY E-MAIL: NOMBASA.NKUMANDA@TREASURY.GOV.ZA; ACOLLINS@SARS.GOV.ZA

Dear Ms Nkumanda and Ms Collins

RE: CALL FOR COMMENT: DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL, 2015

Thank you for the opportunity to contribute commentary on the draft Tax Administration Laws Amendment Bill, 2015.

Set out below, is the consolidated commentary 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.

Please note that all references to 'clauses' refer to clauses of the Draft Tax Administration Laws Amendment Bill, 2015, unless indicated otherwise.

1 LEGAL PROFESSIONAL PRIVILEGE (clause 40/section 42A of the TAA)

Problem statement:

The concern with this proposed section is that as soon as a taxpayer alleges that relevant material is privileged, he will be required to provide information of such a detailed nature, that it effectively nullifies the whole reason for claiming privilege in the first place. The information for which the privilege is sought may thus indirectly be divulged.

Section 42A(1)(e), for instance, requires that a person alleging privilege provide SARS with the specific purpose of the legal advice or in connection to what it was given.

A taxpayer would therefore seek to be as general as possible in describing the purpose of the legal advice, while SARS would want as much detail as possible. This may lead to disagreements between both parties as to what constitutes an acceptable level of specificity. The more detail SARS will require regarding the specificity of the legal advice, the greater the erosion of legal professional privilege.

Proposed solution / recommendation:

It is proposed that SARS clarify that s42A(1)(e) will not be interpreted in a way that will require the taxpayer to disclose information of a very detailed nature pursuant to the proposed section.

2 FOREIGN REQUESTS FOR RELEVANT MATERIAL (clause 41/s46 of the TAA)

Problem statement:

It is unclear whether the proposed amendment requires that SARS obtain the relevant material from the South African or the foreign member of a multinational group. Assuming that SARS requires the material from the foreign group member, then the proposed amendment will be extra-territorial, and thereby violate an important international law principle.

Proposed solution / recommendation:

The 'exchange of information' article in the different tax treaties has always been available to SARS for the purpose of obtaining the required material. We see no reason why this mechanism cannot be used to obtain the required information.

3 REDUCED ASSESSMENTS (clause 48/s93(1)(d) of the TAA)

Problem statement:

The SAIT appreciates the fact that many taxpayers have incorrectly attempted to use section 93(1)(d) to raise substantive issues which should be dealt with via the objections and appeals process, thereby unnecessarily consuming SARS' administrative capacity. We are also cognizant of the risk fraudulent refund claims pose to the *fiscus* and understand the efforts of SARS to do whatever is necessary to prevent these.

However, we submit that the fact that the majority of requests for correction are submitted within six months of an assessment being raised by SARS is not enough of a reason to limit the scope of section 93(1)(d) to such a short period. There are taxpayers only later (after six months) discover that they were unfairly taxed as a result of legitimate undisputed factual errors made by them in their returns. This typically occurs where taxpayers who previously submitted their own returns subsequently make use of a tax practitioner who discovers legitimate errors (excluding unclaimed deductions). The proposed amendment will prejudice such taxpayers.

In terms of section 99(1), SARS has three years to issue an assessment. For VAT and PAYE, the period is five years. The proposed amendment will result in an imbalance between taxpayers' remedies and SARS powers: the time-frame within which a taxpayer may fix legitimate errors will be reduced to six months, while SARS retains (or extends) the three/five year period to make the necessary changes to the errors they may have made in the assessments.

Proposed solution / recommendation:

It is proposed that the amendment be abandoned.

4 WITHDRAWAL OF ASSESSMENTS (clause 49/s98(1)(d) of the TAA)

Problem statement:

According to the *Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2013*, s98(1)(d) was amended because of the recognition by both SARS and National Treasury that “*in practice, erroneous assessments are often only discovered after all prescription periods and remedies have expired and it becomes apparent that it would be unreasonable and inequitable to recover the tax due under such assessments. Examples are assessments that result from...an undisputed error by the taxpayer in a return....*”

Both SARS and National Treasury recognised, even at that time, that there were circumstances where erroneous assessments could occur for a number of reasons other than incorrectly-submitted third party returns. This has not changed, despite there being taxpayers who have sought to incorrectly raise substantive issues using the current section 98(1)(d). While we appreciate the fact that a lot of SARS resources are currently being utilised to deal with illegitimate s98 applications, one cannot “throw the baby out with the bath water”, and deprive those with a real need for the current provision from accessing this important remedy.

Proposed solution / recommendation:

It is proposed that the current provision be retained as is. Instead, SARS can provide clarity on what would be considered an “undisputed factual error by a taxpayer in a return”. This can be done through an interpretation note and would let taxpayers know what SARS considers to be substantive issues not within the ambit of section 98(1)(d). The quality of the s98 applications would in this way be improved, resulting in less SARS resources being needlessly consumed in the process.

5 PERIOD OF LIMITATIONS FOR ISSURANCE OF ASSESSMENTS (clause 50/s99 of the TAA)

5.1 The meaning of “reasonable period” (s99(3)(a) of the TAA)

Problem statement:

It is acknowledged that information entitlement disputes may hamper SARS from completing an audit and issuing an assessment within the requisite three years provided for in section 99(1). We therefore understand the need for SARS to seek for more time to issue assessments in such instances.

Our concern pertains to the meaning of “reasonable period”, cited in the proposed section 99(3)(a), which will allow SARS to extend the time-frame within which they may issue an assessment in instances where taxpayers fail to provide relevant material within “a reasonable period”. The proposed amendment does not clarify how a “reasonable period” will be objectively determined. We submit that this uncertainty is likely to lead to more litigation between SARS and taxpayers, as it may be left to a court to decide what constitutes a reasonable period in each particular case, and thus whether SARS was empowered to issue a disputed assessment in the first place.

Proposed solution / recommendation:

It is therefore proposed that SARS provide an objective criteria for the purpose of determining what would be considered a “reasonable period”. This would provide more certainty to taxpayers and not result in SARS taking a very long time to finalise assessments.

6.2 The meaning of “complex matter” (s99(3)(d) of the TAA)

Problem statement:

This proposed amendment will allow SARS to extend the three year period for issuing an assessment where an audit or investigation of a “complex matter” is being conducted. The ordinary dictionary meaning of complex is “*not easy to analyse or understand; complicated or intricate*”. This is an extremely vague and wide concept, and is potentially applicable an innumerable number of provisions in the various tax Acts.

Given the far-reaching implications of this term, our concern is that it would be very simple for SARS to assert that an audit relates to a complex matter, thus enabling them to repeatedly exceed the current three year period on a large range of audits.

Proposed solution / recommendation:

It is proposed that specific clarity be provided as to what matters in the various tax Acts would be considered “complex”. This would give taxpayers assurance that there are matters that will not be subject to the proposed extension.

6 VOLUNTARY DISCLOSURE (clause 65/s227(b) of the TAA)

Problem statement:

The SAIT appreciates the fact that the proposed amendment seeks to prevent taxpayers from submitting overly frequent voluntary disclosure applications for similar defaults occurring far too often.

The unintended consequence of the proposed amendment, however, is that taxpayers who discover defaults involving 'small' amounts (relative to their overall tax burden) may be reluctant to disclose them via the VDP route as they may not want to waste the opportunity on a small matter. They may instead choose to 'save' their VDP opportunity for defaults where a larger amount of tax is at stake. The *fiscus*, which may never uncover the smaller defaults, thus loses an opportunity to recover tax from a willing taxpayer.

Proposed solution / recommendation:

It is proposed that section 227(b) not be changed as it provides the fiscus with an opportunity to recover taxes it may otherwise not recover.

Alternatively, the amendment could be made to apply only to taxpayers who make use of VDP very often (i.e. every two or three years) for similar defaults. We consider the proposed five years to be harsh.

Yours sincerely,

Lesedi Seforo
Tax Technical Advisor

Cc: cecil.morden@treasury.gov.za
Cc: ismail.momoniat@treasury.gov.za
Cc: klouw@sars.gov.za
Cc: csmit@sars.gov.za
Cc: shenson@sars.gov.za
Cc: mkingon@sars.gov.za
Cc: policycomments@sars.gov.za