South African Institute of Tax Professionals

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The South African Revenue Service
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RE: ANNEXURE C FOR 2017 BUDGET: COMMENTS PERTAINING TO THE TAX ADMINISTRATION ACT

We have attached the comments from the SAIT Tax Administration Act Work Group on the Annexure C tax proposals for the 2017 Budget. We appreciate the opportunity to participate in the process and would welcome further dialogue.

Please do not hesitate to contact us should you need further information.

Yours sincerely

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ANNEXURE C SUBMISSIONS FOR 2017 BUDGET REVIEW-TAX ADMINISTRATION ACT

1. GENERAL

1.1 On 3 November 2016, National Treasury invited the public to provide tax proposals of a technical nature in relation to unintended anomalies, loopholes and other technical matters that would improve or correct current tax legislation.

1.2 On behalf of our members, we set out our proposed recommendations of a technical nature in more detail below, as it pertains to specific sections of the Tax Administration Act, 2011 (**TAA**).

2. DENIAL OF REQUEST FOR SUSPENSION OF PAYMENT IN TERMS OF SECTION 164 OF THE TAA: ALTERNATIVE LEGAL RECOURSE REQUESTED

2.1 Given the current negative South African economic climate, the high cost of living pursuant to a weak Rand, drought and inflation, coupled with steadily raising interest rates and continuing high unemployment, it has created a situation where most taxpayers (both corporate and individual) are financially strained, and would not have available cash resources to settle a tax debt which the taxpayer fully believes is not legally owing (and which the taxpayer accordingly disputes).

2.2 The trend that has arisen in respect of section 164 of the TAA, is that duly completed and fully motivated submissions for the suspension of payment, are denied by the relevant senior SARS official. This has the result of placing the taxpayer in an unfair position without any further recourse to any effective internal remedies in which to provide relief while finding an alternative mechanism to resolve his current position with SARS.

2.3 In terms of current practice, SARS' view in considering a taxpayer's request for a suspension of payment turns on whether the taxpayer has in fact met all the requirements under section 164 of the TAA. Where the taxpayer is unable to comply or meet all of the requirements or, alternatively SARS takes the view that the taxpayer is not in a position to make payment, the request for suspension is denied in the majority of cases. The denial of the request to suspend payment, effectively results in

the taxpayer being without any recourse to any other internal remedy. The TAA does not provide an alternative internal remedy for the aforementioned position, which places the taxpayer in a potentially prejudicial position.

2.4 The taxpayer's only other option is to take the matter up on review before the High Court, which is not protected by secrecy, but is in open and in public court. A further problem with High Court review is that this can be expensive for taxpayers, and in particular taxpayers whose dispute falls within the R1 million threshold for appeal to the tax board. This group of taxpayers, as regards the actual tax dispute, has access to a semi-informal tribunal where it is possible to self-represent, the purpose of which is to make access to an independent review financially accessible to smaller taxpayers. In contrast, the dispute concerning SARS' decision to invoke the "pay now, argue later" rule is not heard by an affordable tribunal.

2.5 It should also be noted that, before the actual High Court review of the SARS decision, an interim urgent interdict is necessary, to prevent SARS from taking any collection proceedings pending the outcome of the review, which typically takes 6 to 12 months to be heard.

2.6 A denial of a request to suspend payment under section 164 of the TAA only leaves the taxpayer with an administrative review remedy and temporary relief by way of the 10-business day grace period under section 164(6) of the TAA (which is sporadically adhered to in any event).

PROPOSAL:

2.7 It is proposed to amend section 104(2) of the TAA to include a new subsection (d). The new subsection (d) would allow an objection to a decision under section 164(6) of the TAA. Practically this would result in two dispute processes running parallel (i.e. the merits of the case and the denial to suspend payment), however that is already the case where the taxpayer takes SARS' decision on High Court review, and this alternative would provide a remedy outside of the High Court review process. The key advantages of the objection and appeal process being followed are that:

a) this would maintain taxpayer secrecy; and

b) this would facilitate appeal to the tax board, with less formalities and lower cost, for smaller tax disputes, making justice more financially accessible.

2.8 As an alternative to the taxpayer bringing an urgent application before the High Court, for an interim interdict, it is proposed that this is either replaced with:

(a) Granting the taxpayer the right to approach the tax ombudsman for an urgent interim interdict to suspend SARS' ability to collect the debt pending the review or objection and appeal process in relation to SARS' decision in section 164 of the TAA. Factors to be taken into account in order not to burden the tax ombudsman is that the request for suspension has been denied and that the taxpayer has or intends to dispute the decision. The tax ombudsman decision would not be a final decision and it would not take away the right of either SARS of the taxpayer to approach the court under the objection and appeal process; and/or

(b) SARS' rights to collect would be automatically suspended by the objection and appeal process (or review process, if our submissions in relation to replacing the High Court review process with an objection and appeal process are not accepted), provided that the taxpayer either paid a minimum deposit (say 10% of the disputed amount), or tendered appropriate security for the full disputed tax.

3. PAY NOW, ARGUE LATER RULE IN SECTION 164 OF THE TAA – APPLICATION BEYOND CHAPTER 9 OF THE TAA

3.1 The suspension of the obligation to pay tax, in terms of section 164 of the TAA, is only possible if the taxpayer intends to dispute or disputes the liability to pay that tax under Chapter 9. Chapter 9 includes the objection and appeal process.

3.2 However, in various instances the remedy in relation to a disputed tax debt is not objection and appeal under Chapter 9. For example, section 93 of the TAA allows for SARS to issue a reduced assessment in certain circumstances, and section 98 of the TAA allows for SARS to withdraw an assessment in certain circumstances. If SARS makes a decision in relation to one of these sections, which decision the taxpayer believes is incorrect, the taxpayer's legal remedy is not to object and appeal in terms of

Chapter 9, but rather to take SARS' decision on review to the High Court in terms of the Promotion of Administrative Justice Act.

3.3 In these circumstances, the relevant taxes involved, are also factually disputed.

PROPOSAL:

3.4 It is therefore proposed that section 164 of the TAA should also be available to the taxpayer, to suspend the obligation to make payment of the relevant tax, if the taxpayer is disputing or intends to dispute the relevant tax through any relevant legal remedy, not only under Chapter 9. In other words, the ability for SARS to suspend a tax debt should also apply where the tax debt is disputed in terms of a review by the High Court.

4. THE VOLUNTARY DISCLOSURE PROGRAMME PROVISIONS

4.1 The SARS VDP Unit may reject an application for Voluntary Disclosure Programme (VDP) relief if it is of the view that the requirements in sections 226 and 227 of the TAA are not met.

4.2 Recent experience has shown that the VDP Unit's interpretation of the qualification criteria is extremely narrow and, in our view, erroneous.

4.3 Such decisions by the VDP Unit are not currently subject to objection or appeal under Chapter 9. A taxpayer who disagrees with such a decision must take the matter on judicial review. Because of the cost and delay involved in such a process, few taxpayers are willing or able to do so.

4.4 The VDP serves an important policy objective, which is to bring more taxpayers, assets and income into the South African tax net. The recent Special VDP expands that aim further. Decisions by the VDP Unit to incorrectly narrow the qualification criteria run contrary to this policy.

4.5 The submission also relates to the VDP provisions in the TAA. The submission applies equally to the Additional voluntary disclosure (**SVDP**) relief in terms of the Rates and Monetary Amounts and Amendment of Revenue Laws Act, 2016 (not yet promulgated).

4.6 In terms of section 231 of the TAA, if subsequent to the conclusion of a voluntary disclosure agreement, it is established that a VDP applicant failed to disclose a matter that was material for the purposes of making a valid voluntary disclosure, a senior SARS official may:

(a) withdraw any relief granted under s 229 of the TAA;

(b) regard an amount paid in terms of the voluntary disclosure agreement as constituting part-payment of any further outstanding tax debt in respect of the relevant default; and

(c) pursue criminal prosecution for a tax offence.

4.7 Section 231(2) of the TAA states that any such decision taken in terms of section 231 of the TAA is subject to objection and appeal.

4.8 Further, if a voluntary disclosure agreement has been concluded, SARS may, despite anything to the contrary contained in a tax Act, issue an assessment or make a determination for purposes of giving effect to the agreement (see section 232(1) of the TAA).

4.9 However, as regards such an assessment issued or determination made to give effect to a voluntary disclosure agreement, this is not subject to objection and appeal in terms of section 232(2) of the TAA.

In practice, clause 7 of SARS standard VDP agreement, reads as follows:

*(a) "7 **ASSESSMENT BY THE COMMISSIONER***

7.1 To give effect to this Agreement the Commissioner may issue an assessment or make a determination. Although great care is taken to ensure accuracy, it must be noted that any amount payable given to the Applicant by SARS for purposes of indicating the amount of tax payable is merely an indicative amount and is not an assessment of the Applicant's final liability.

7.2 Despite anything to the contrary which may have been issued by SARS during or after the assessment or determination, the assessment issued or determination made to give effect to this Agreement is not subject to objection or appeal (as per section 232 of the TA Act).

7.3 This Agreement and the corresponding assessment or determination giving effect thereto do not prevent the Commissioner from selecting the Applicant for inspection, verification or audit in the normal course of SARS operations or from applying the provisions of any Act under its administration in the normal course of SARS operations."

4.10 Reference is made to section 232 of the TAA.

4.11 Whilst one may understand that section 232(2) of the TAA prohibition on lodging and objection and appeal intends to prevent taxpayers from instituting (probably frivolous) objection procedures based purely on the erroneous submissions made by it under the VDP, the issue is that the wording used in Clause 7 restricts itself to this intent.

4.12 Section 232 of the TAA deals with the Assessment issued *to give effect to* the VDP Agreement. SARS' own VDP Guide supports this by stating:

4.13 Implementing the VDP Agreement:

(a) The VDP agreement is a contract between SARS and the applicant.

(b) Both SARS and the applicant are obliged to give effect to the terms of the contract. As such, SARS will ensure that assessments are adjusted or raised where required and that full effect is given to the relief granted by the Act.

(c) The applicant on the other hand must ensure that payment is effected on the date(s) agreed in terms of the VDP agreement and that any other duty or obligation is given effect to on the agreed terms.

4.14 The problematic wording in Clause 7 is the following: "*Although great care is taken to ensure accuracy, it must be noted that any amount payable given to the Applicant by SARS for purposes of indicating the amount of tax payable is* ***merely an indicative amount*** *and is* ***not an assessment of the Applicant's final liability***.

Despite anything to the contrary which may have been issued by SARS during or after the assessment or determination, the assessment issued or determination made to give effect to this Agreement is not subject to objection or appeal."

4.15 The wording implies that SARS may issue an assessment with a different amount, or contrary to the principles submitted, and the taxpayer may not object/appeal. Surely that cannot be the case because then SARS won't, in spirit, be issuing the assessment to give effect to the agreement. However, with these terms included in the VDP Agreement, the argument may be made that the assessment *does* follow the agreement.

4.16 The upshot of the prohibition in section 232(2) of the TAA on lodging and objection or appeal is that a taxpayer may be placed in a position where SARS issues an assessment different to what was agreed or submitted, and then be left with no remedies.

4.17 It follows that there may be a situation that SARS differs from the submitted VDP information, and the agreement is signed, but because SARS has stated it is merely indicative, a taxpayer is deprived of its rights to object and appeal.

4.18 The prohibition on the lodgement of an objection or appeal is thus clearly a major cause for concern with taxpayers, as they are not able to dispute any assessment issued or determination made should this differ from the agreement. Of course there is scope to take the decision on review, but this represent scant comfort and is clearly a barrier to the uptake of the VDP and the SVDP.

PROPOSAL:

4.19 Decisions concerning qualification for VDP relief in terms of Part B of Chapter 16 of the TAA should be subject to objection and appeal. This amendment should apply retrospectively to 1 January 2016, so that applications incorrectly rejected in recent times can be reviewed.

4.20 The proposal would be that section 232(2) of the TAA be either deleted, or at the very least allow for a taxpayer to be able to object or appeal where the assessments issued or determination made differs from the terms of the agreement signed.

5. INTERNAL REVISED ASSESSMENT

5.1 There has been a trend by SARS, specifically in the employees' tax space to issue what is called an *"Internal Revised Assessment"*. The Internal Revised Assessments are generally raised, it seems, to remedy reconciliation differences and most are raised outside the self-assessment prescription periods under section 99(1)(b), read with section 99(2)(b) of the TAA. The difficulty with the Internal Revised Assessment reference is that is does not technically fall within Chapter 8 of the TAA as it is not definitively an Original Assessment, an Additional Assessment, a Reduced Assessment, a Jeopardy Assessment or an Estimated Assessment. The Internal Revised Assessment further does not seem to be included under section 104(2) of the TAA either.

5.2 The mere issuing of the Internal Revised Assessment itself, does not seem to sterilise the objection or appeal process, as it is still an *"assessment"* within the meaning ascribed in section 1 of the TAA, however the reasoning behind the issuing of that type of assessment is unclear.

PROPOSAL:

5.3 National Treasury should consider:

(a) amending Chapter 8 of the TAA introducing a new category of assessment (being an Internal Revised Assessment) and the trigger for raising that type of assessment; or

(b) revise the e-filing system to only issue assessments in line with Chapter 8 of the TAA, being original, additional, reduced, jeopardy or estimated, as the case may be.

6. REDUCED ASSESSMENTS UNDER SECTION 93 OF THE TAA

6.1 Section 93 of the TAA was amended by the Tax Administration Laws Amendment Act, 2015, to provide that SARS may only issue a reduced assessment if SARS is satisfied that there is a (currently undefined) 'readily apparent' undisputed error in the assessment.

6.2 In practice, it appears that taxpayers are severely negatively impacted by this amendment. What is 'readily apparent' to one person may not be so to another. The number of cases in which SARS is likely to grant requests for corrections is likely to drop dramatically and a lack of consistency in interpretation between SARS' assessors may be taken as a given. To date, several negative decisions have been received from SARS, where SARS appears to interpret the words "readily apparent" to mean "effortlessly obvious", which it is submitted is not the legal test.

6.3 The previous wording of the TAA stated that SARS may issue a reduced assessment if satisfied that an assessment contains an undisputed error by SARS or the taxpayer. The reduced assessment could be made within five years of the date of the original assessment in the case of VAT, which is a self-assessment tax, and within three years of the date of the original assessment in the case of income tax.

6.4 Since then, SARS and National Treasury accepted that the three year period will be retained and that SARS will attempt to mitigate the risks presented by older requests for correction through its risk management systems. The insertion of the phrase 'readily apparent' in addition to the requirement that the error be 'undisputed' is to ensure that 'substantive issues are properly challenged through the objection and appeal system'.

6.5 In terms of the objection and appeal system, the taxpayer has only 30 business days in which to object to an assessment. A senior SARS official may under section 104(5) of the TAA extend the 30 business day period by up to 21 business days if reasonable grounds exist for the delay in lodging the objection - resulting in a maximum of 51 days in total. The period in which an objection may be lodged may be extended by up to three years if 'exceptional circumstances' exist which gave rise to the delay.

6.6 An indication of how SARS is likely to interpret the term 'exceptional circumstances' is found in Interpretation Note 15, dealing with the exercise of SARS' discretion in the case of late objections or appeals. The Interpretation Note indicates that the term 'exceptional circumstances' may be understood to be referring to, among others:

(a) A natural or human-made disaster.

(b) A civil disturbance or disruption in services.

(c) A serious illness or accident.

(d) Serious emotional or mental distress.

PROPOSAL:

6.7 National Treasury needs to consider withdrawing this amendment to section 93 of the TAA on the basis that it was not properly consulted on and it has been far too narrowly interpreted by SARS.

7. ISSUING OF LETTER OF AUDIT FINDINGS – SHOULD APPLY IN RELATION TO ALL ADDITIONAL ASSESSMENTS

7.1 Section 42 of the TAA requires that, upon conclusion of the audit, SARS provide the taxpayer with a letter of audit findings and 21 business days in which to respond to the letter of audit findings, before issuing the relevant assessment.

7.2 The problem that has arisen in practice is that SARS is in various instances alleging that this section only applies to a formal audit, and not to a "verification", an adjustment that SARS wishes to make as a result of a request for relevant material, and so on.

This approach by SARS makes a mockery of section 42 of the TAA, since SARS would then be able to avoid its obligations to keep a taxpayer informed, which were inserted into the TAA in order to comply with administrative justice provisions, merely by changing the "label" of the relevant interaction with the taxpayer.

PROPOSAL:

7.3 It is recommended that section 42 of the TAA should be amended such that it is compulsory for this section to be complied with, in relation not only to any "audits", but also any: verifications or any other process the result of which is a potential assessment being raised. In other words, the taxpayer should be entitled to receive a letter of findings setting out the potential adjustments of a material nature, and 21 business days within which to respond, before any additional assessment is issued by SARS, regardless of the form of the interactions between SARS and the taxpayer prior to this intended assessment.

8. ISSUING OF LETTER OF AUDIT FINDINGS – TECHNICAL AMENDMENTS

8.1 In many cases, the potentially subjective 'due process' within the SARS audit teams, does not result in a material change between the Letter of Audit Findings and the Letter of Assessment. Where the process appears to be flawed, is that the Letter of Audit Findings is signed off within the audit team by the auditor in charge of the case and a team leader / manager, but not necessarily a SARS employee that is a 'senior SARS official'. A senior SARS official generally only enters the fray where a decision is required to suspend the payment of tax, based on the premature assessments raised by SARS, without following due process.

PROPOSAL:

8.2 A possible amendment to section 42(2)(b) of the TAA could be where a 'senior SARS official' provides a taxpayer with a notice indicating the outcome of the audit, as opposed to the reference to 'SARS'. This would then require sign off at a higher level above the audit team and provide comfort to a taxpayer that the notice has followed due process at a higher level.

8.3 Where the notifications are dispensed of under section 42(5) of the TAA, the taxpayer only has a remedy by way of administrative review.

8.4 The proposal should be to either:

(a) delete section 42(5) of the TAA; or

(b) amend section 42(5) of the TAA so that a taxpayer is provided with reasons as to why sections 42(1) of the TAA does not apply.

8.5 SARS would in any event have the power to raise Jeopardy or Estimated Assessments under Chapter 8 of the TAA, without the need to exercise a discretionary power under 42(5) of the TAA, making the provision superfluous.

8.6 Further, SARS needs to promote awareness to the taxpayer in respect of:

(a) an audit;

(b) an investigation; or

(c) verification process that may have been instituted against the taxpayer as these aspects may preclude a taxpayer from applying for a VDP as they will not qualify under the VDP requirements.

9. REQUESTS FOR RELEVANT MATERIAL DURING A DISPUTE RESOLUTION PROCESS ON SUBSTANTIALLY THE SAME MATTER

9.1 Where a matter is at ADR stage and still within the 90-day period under Rule 15, SARS should be precluded from requesting relevant material for a subsequent or previous year of assessment, as it pertains to the matter in dispute.

PROPOSAL:

9.2 If a taxpayer disputes SARS' application of a particular section or provision of an act administered by SARS, for any particular tax year or tax period and the matter has proceeded to ADR stage under Rule 15, SARS should be precluded from requesting any information relating to that section or provision in any previous or subsequent year of assessment, until the earlier of:

(a) termination of the current ADR proceedings on the same matter under Rule 25;

(b) concession of the appeal by SARS;

(c) withdrawal of the appeal by the taxpayer; and/or

(d) a court decision.

9.3 This would avoid the situation where taxpayers are potentially disputing assessments on two or multiple fronts on substantially the same matter, with neither close to finality. It further avoids having to potentially defend different views by SARS officials and the potential for obtaining confidential information during ADR proceedings that could be used in the follow up audit.

10. NOTIFICATION OF AUDIT FOR VDP PURPOSES

10.1 A proposal that should be considered again relates to the 'notice' for purposes of section 226(2) of the TAA. It appears that SARS intends on retaining an element of subjectivity as it pertains to what constitutes a 'notice'.

PROPOSAL:

10.2 A potential solution would be for SARS to specifically indicate that the 'notice' (in whichever form it may be), is in fact a 'notice' for purposes of section 226(2) of the TAA, which is then an objective determination as to whether any disclosure, after the date of that 'notice', is in fact voluntary.

10.3 Practically, it should be a written statement made on the relevant SARS letter. The aforementioned would not affect the discretionary power available to a senior SARS official (under section 226(2)), to still allow the submission of an application under the VDP, if that official is satisfied that the 'default' would not otherwise have been detected during the normal course of an audit.

11. NOTIFICATIONS VIA EMAIL AND E-FILING

11.1 Currently, where SARS has raised an assessment, the taxpayer is only currently notified via e-filing and only the main user is notified via email. The problem that arises is that this form of notification is not always adequate. Often, a taxpayer may only realise an assessment has been raised after the time period to respond has lapsed, which results in SARS issuing/raising additional assessments on e-filing also resulting in the taxpayer not being able to respond timeously.

PROPOSAL:

11.2 To improve the mechanism to notify taxpayers and to simplify the system to allow for email and sms functions to be added to the system which the taxpayer can elect to opt for on the e-filing systems. This would enable all future assessments to be emailed to the relevant users allocated/indicated on the system via e-filing notices and emails.

11.3 To enable the system to operate more efficiently that the taxpayer can elect to include secondary users on the e-filing system and that these notifications would extend to notification via email and sms to these secondary users.