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RE: ANNEXURE C 2016 PROPOSAL: OBJECTION TIME PERIODS UNDER THE TAX ADMINISTRATION ACT

The submission provided below relates to the 2016 Annexure C Budget Review proposal relating to the time periods for objection. We welcome the suggestion that the current period for lodging objections is too short, especially for complex matters. Corresponding adjustments to the time periods for dispute resolution should also be considered.

1. Background

Before lodging an objection, a taxpayer aggrieved by an assessment may request reasons for the assessment (Rule 6(1)). This request must be made within 30 days from the date of assessment (Rule 6(2)). [Note: The term “day” in the Rules means a “business day”. The time period between 16 December of each year and 15 January of the following year are excluded.]

An aggrieved taxpayer may also object to an assessment (Section 104 of the Tax Administration Act). A senior SARS official may, within prescribed limits, extend the period prescribed in the Rules (Section 104(4) and (5)).

Rule 7(1) deals with the timing of the objection and provides that a notice of objection must be delivered to the Commissioner within 30 days after –

- the date of the assessment;
- SARS has informed the taxpayer that adequate reasons for the assessment had been provided; or
- SARS has provided the reasons for the assessment.

An objection not lodged within the 30 day period is invalid.

A senior SARS official may extend the 30 day period if satisfied that reasonable grounds exist for the delay in objecting (TAA sec. 104(4)). The SARS official's decision must comply with the requirements for administrative justice, and the decision must be reasonable. In effect, the SARS official must consider all relevant matters (e.g. reasons for the delay; length of the delay; prospects of success on the merits; and any other relevant factor) (refer Interpretation Note 15, Issue 4).

The extension by the senior SARS official cannot exceed 21 days (i.e. from the end of the above-mentioned 30-day period). This means that the total period for lodging an objection generally cannot exceed 51 days after the date of assessment. The only basis upon which an aggrieved taxpayer could object after the 51 day period is where the senior SARS official is satisfied that “exceptional circumstances” exist.

The concept of “exceptional circumstances” is not defined for this purpose (but see the terminology associated with penalties in section 218 of the Tax Administration Act). The ordinary meaning requires that the circumstances must be such that they would be regarded as something out of the ordinary, unusual and of analogous serious nature. Each case must be evaluated on its own merits to decide whether the taxpayer should be allowed to object once the above 51 day cut-off period has elapsed. It is for the aggrieved taxpayer to show adequate facts and arguments motivating the requested “exceptional circumstance” extension. If the senior SARS official does not grant an extension, the taxpayer may object and appeal the official's decision. Unfortunately, the test remains rather subjective in nature.

If more than three years have elapsed from the date of the assessment, an objection simply cannot be lodged (section 104(5)). In this circumstance, SARS's hands are completely tied even if SARS has sympathy for the taxpayer's plight. On the other hand, if a taxpayer has properly objected to an assessment within the prescribed three-year period (with the objection disallowed), the taxpayer may appeal within 30 days (section 106(4)).

In summary, an objection must generally be lodged within 30 days, but SARS can extend this period by a further 21 days if "reasonable grounds" exist. Once the 51 day period has elapsed, an objection can only be lodged if there are "exceptional circumstances" but only if within the three-year period from assessment. Beyond the three-year period, the taxpayer is statutorily barred from lodging any objection.

2. Concerns and recommendations

A. Longer objection periods for complex cases

We agree that the standard 30-day period should be extended for complex cases. The determination of complexity is admittedly difficult as even the most innocuous query can result in a complex interpretation issue which could potentially be precedent setting. However, we suggest that the longer standard period should at least mirror the extended 3-year period for circumstances under section 99(4). Under this approach, we would suggest a 90-day period for the following circumstances:

- Substance-over-form investigations,
- GAAR investigations,
- Corporate formation and reorganisation transactions,
- Transfer pricing investigations, and
- Hybrid entities / instruments.

B. Longer reasonable ground extensions

We note that the need for longer objection response periods often depends on different variables than the legal area of the dispute. All taxpayers have greater problems responding to SARS requests when SARS requests are open-ended or the underlying information in dispute is extensive. These concerns require a more discretionary analysis than the section 99 extensions described above.

We also note that taxpayers often have trouble obtaining external information or have difficulty responding to various other factors. For instance, many companies lack personnel solely dedicated to tax and may have difficulty in reaching their external tax advisors in a timely fashion. Smaller taxpayers also lack the administrative capacity to respond to SARS requests when core business operations are under pressure. Unfortunately, ignorance in terms of tax obligations and procedures is not uncommon.

We therefore strongly suggest that the 21-day extension for “reasonable grounds” be extended. The current 21-day period is far too short, leaving too much room for taxpayers to be capriciously excluded from contesting assessments that could (and should) rightly be disputed. In practice, it appears to be virtually impossible to lodge an objection once the 51 day cut-off has elapsed. This is particularly prejudicial to a taxpayer that has good substantive grounds to contest an assessment.

We would accordingly suggest that the 21-day extension period for “reasonable grounds” be extended to a period of at least six months.

We understand that SARS may have concerns about certain taxpayers abusing the process. However, the “bad few” should not become grounds for curtailing the rights of many legitimate taxpayers. In any event, SARS has the power to collect on the “pay-now-argue-later” basis or alternatively request some type of security. The suspension of payment rules would also need to be addressed in light of extending the time periods for lodging an objection. This empowers SARS to weed out instances where more accommodating objection timeframes (compared to those currently available) are being abused.

We thank you for your attention on this matter and await the release of the 2016 Tax Administration Legislation.

Yours sincerely

Keith Engel (CEO) in conjunction with Carmen Moss-Holdstock (Tax Administration Workgroup)