24 November 2017

The National Treasury
240 Madiba Street
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The South African Revenue Service
Lehae La SARS, 299 Bronkhorst Street
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BY EMAIL: Nombasa Nkumanda (Nombasa.Nkumanda@treasury.gov.za)
Adele Collins (acollins@sars.gov.za)

RE: ANNEXURE C PROPOSALS FOR 2018 BUDGET: TAX ADMINISTRATION

We have attached the Annexure C Proposals from the SAIT Tax Administration Technical Work Group. We appreciate the opportunity to participate in the process and would welcome further dialogue.

In this respect, we make submissions in relation to the following critical areas of Tax Administration (several of which have been raised by us before):

- Entitlement to letters of findings before adjustments
- Disparity between Taxpayers' rights and SARS' rights to correct assessments
- Problems with Voluntary Disclosure Programme tax provisions
- Problems with the "Pay now, Argue later" rule

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

Sincerely,

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Chair of the Tax Administration Technical Work Group

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ANNEXURE C SUBMISSIONS FOR 2018 BUDGET – TAX ADMINISTRATION

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ANNEXURE C SUBMISSIONS FOR 2018 BUDGET – TAX ADMINISTRATION

1. ENTITLEMENT TO LETTERS OF FINDINGS BEFORE ADJUSTMENTS

1.1 Problem:

1.1.1 Section 42 of the Tax Administration Act (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.

1.1.2 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. As a result, many taxpayers are receiving inquiries from SARS without understanding the reasons for the inquiry and often left confused as to what SARS is really looking for. The net result is a prolonged guessing-game, leaving many taxpayers apprehensive caused by the uncertainty. Inquiries without stated reasoning is raised as one of the biggest causes for concern by practitioners.

1.1.3 At a legislative level, this approach by SARS undermines the intent of section 42 of the TAA, since SARS would then be able to avoid its obligations to keep a taxpayer informed, merely by changing the "label" of the relevant interaction with the taxpayer.

1.1.4 It is important to note that section 42 was inserted into the TAA in order to comply with administrative justice provisions, and that the narrow application of section 42 arguably results in a breach of administrative justice requirements.

1.2 Recommendation:

1.2.1 In order to preserve within the TAA the rights that are afforded in terms of administrative justice provisions, 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.

1.2.2 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,

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regardless of the form of the interactions between SARS and the taxpayer prior to this intended assessment. SARS will also find that this form of clarity will accelerate the process of audit inquiries when uncovering issues and may even result in quicker collectible assessments when taxpayers understand their vulnerability when valid issues are raised.

2. DISPARITY BETWEEN TAXPAYERS' RIGHTS AND SARS' RIGHTS TO CORRECT ASSESSMENTS

2.1 Loss of taxpayer rights if deadlines missed is excessive penalty

2.1.1 One of the challenges within the current political and economic environment is a breakdown in trust between taxpayers and SARS, and a reduction in perceptions of legitimate power within SARS. These issues are aggravated by the disparity that exists between SARS' entitlements to correct assessments (usually at least three years for income tax and five years for self-assessed taxes such as VAT), and a taxpayer's entitlements to have its assessments corrected.

2.1.2 This issue is approached, in the detailed submissions below, in relation to the request for reduced assessment (section 93 of the TAA).

2.1.3 However, this key issue could also be considered in relation to the objection and appeal system.

2.1.4 In this respect, 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 30 business days if reasonable grounds exist for the delay in lodging the objection - resulting in a maximum of 60 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.

2.1.5 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:

2.1.5.1 A natural or human-made disaster.

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2.1.5.2 A civil disturbance or disruption in services.

2.1.5.3 A serious illness or accident.

2.1.5.4 Serious emotional or mental distress.

2.1.6 It is therefore very unusual for taxpayers to be able to demonstrate "exceptional circumstances". The policy question arises as to why the circumstances have to be "exceptional" for a taxpayer to "get their tax bill fixed". In other words, why should taxpayers be compelled to overpay their taxes, simply because the relevant error was not found within 60 business days?

2.1.7 We note that the penalty for failure to meet the required deadlines often has a severe impact on many innocent taxpayers. Taxpayers effectively lose the right to defend themselves with information merely because of missed deadlines. This timeline can easily lead to extreme results when SARS auditors seek to cast a wide net. It is not uncommon for SARS auditors to issue assessments denying all deductions unless proof is submitted in the 30/60 day period. The net result can easily lead to gross taxation, thereby completely wiping out business profits of a company for an entire year.

2.1.8 In view of the adverse impact of missing information deadlines, taxpayers easily experience the legislation as being there to "catch them out", or "make them overpay on a technicality". This is the common view amongst many taxpayers, many of whom believe that SARS has become interested in squeezing revenue at any cost.

2.1.8 We also doubt whether the wholesale right to defend oneself due to a missed information deadline is widely accepted international practice. While we understand that taxpayers must submit timely information in order to ensure viable SARS information, the sanction for information delays should be more reasonable.

2.2 Reduced assessments under section 93 of the TAA

2.2.1 Problem:

2.2.1.1 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.

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2.2.1.2 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. There is also no consistency from SARS in dealing with requests for reduced assessment and it would seem that SARS appears to interpret the words "readily apparent" to mean "effortlessly obvious", which it is submitted is not the legal test. It is therefore submitted that the number of cases in which SARS is likely to grant requests for corrections is likely to drop dramatically unless there is a clear and consistent interpretation within SARS (i.e. by way of perhaps standard operating procedure) to ensure that the SARS' assessors give consequential affect thereto.

2.2.1.3 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.

2.2.1.4 Since then, SARS and National Treasury accepted that the three year period would be retained and that SARS would 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' was purportedly to ensure that 'substantive issues are properly challenged through the objection and appeal system'.

2.2.1.5 The SARS: Dispute Resolution Guide – Issue 1 (2014) is also by no means helpful as it effectively states that the taxpayer can apply for Section 93 reduced assessment, where typically two scenarios are present:

2.2.1.5.1 Mistake by taxpayer – here an example is given of a taxpayer forgetting to claim a retirement fund contribution in his tax return, and SARS suggests that the taxpayer makes use of the Request for Correction ("**RFC**") process; or

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2.2.1.5.2 Mistake by SARS – here an example is given of a processing error of the double inclusion of an amount of income by SARS, which could be fixed by SARS voluntarily if SARS discovers this, alternatively that the taxpayer can follow the RFC process.

2.2.1.6 In other words, the SARS Guide indicates that taxpayers can request a reduced assessment where they have made an error, however no guidance is given concerning the "readily apparent" requirement.

2.2.1.7 The interpretation of section 93 has become much more complicated with the inclusion of the wording "readily apparent undisputed error" which now causes much confusion to taxpayers as well as SARS officials (as one internal governance committee does not necessarily regard "readily apparent" in a similar manner as another committee in a different region), which naturally causes discrimination between taxpayers.

2.2.2 Recommendation:

2.2.2.1 As set out above, the current wording has caused much frustration to the taxpaying community, as SARS interprets the section far too narrowly and therefore makes the implementation thereof very selective/discriminatory, alternatively ineffective and contradictory to the intention of the legislature.

2.2.2.2 If an error in an assessment is undisputed, it means that both SARS and the taxpayer are in agreement on the merits, regardless of how readily apparent the error was before it was discovered. Therefore, it would not be fair and reasonable to prevent a reduced assessment from being made based on a subjective determination by SARS of whether the error was readily apparent. We submit that any error that is not in dispute with SARS should be allowed to be corrected in the manner set out in Section 93.

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3. PROBLEMS WITH VOLUNTARY DISCLOSURE PROGRAMME (VDP) TAX PROVISIONS

3.1 Introduction

3.1.1 The VDP is set out in Part B of Chapter 16 of the TAA. The VDP serves an important policy objective, which is to bring more taxpayers, assets and income into the South African tax net. The VDP allows taxpayers to voluntarily regularise their tax affairs in relation to past non-compliance. It is important to note that the VDP is not a tax amnesty, in that there is no relief from the actual underlying taxes. There is also no relief from interest payable on the relevant taxes. The only relief is in relation to certain penalties that could potentially otherwise apply.

3.1.2 The VDP is particularly important at this stage, where SARS is projecting a R50 billion tax shortfall in 2017/8, and higher shortfalls in later years. In relation to VDP, the extra tax collections "walk through the door" to SARS, without any audit effort expended by SARS to identify past problems.

3.1.3 However, there are various technical issues with the VDP tax provisions. This is highly problematic within the current context, since uncertainty or perceived inequity in relation to VDP has the result that taxpayers are disinclined to apply for VDP. Given these risks, taxpayers frequently rather adopt a "find me first" approach.

3.2 Period of disclosure for VDP

3.2.1 Problem:

3.2.1.1 There is currently no limitation of period in relation to a disclosure in terms of the VDP.

3.2.1.2 By contrast, section 29 of the TAA requires that a taxpayer should ordinarily retain tax related records for a period of five years from the date of submission of the relevant tax return (or five years from the date of the end of the relevant tax period, where no return was required to be submitted). This period is extended in terms of section 32 of the TAA, where there is an audit, investigation, objection or appeal. Whereas the burden of proof in tax matters is ordinarily on taxpayers, the taxpayer is not obliged to retain documents past the record retention period, and accordingly ordinarily SARS cannot assess a

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taxpayer to tax in relation to these earlier periods (where tax records may have supported the taxpayer's tax submissions, but the taxpayer has lawfully no longer retained these records).

3.2.1.3 As a result of the record retention period, a taxpayer will often not have records relating to periods prior to the record retention period. In practice, in VDP situations, SARS has required that a taxpayer estimate its tax liability for these earlier periods, alternatively SARS has alleged that the failure to declare tax liabilities for earlier periods results in the disclosure not being "full and complete in all material respects" as envisaged in section 227(c) of the TAA. This is problematic in that ordinarily the record retention period would protect a taxpayer from tax liability in relation to these earlier periods, and the taxpayer does not have appropriate records to defend itself.

3.2.1.4 It should be noted that, in the first voluntary disclosure program (that ran from 2010 to 31 October 2011), there was a limitation of five years in relation to the period for disclosure.

3.2.1.5 There are also technical legal issues in relation to VDP extending back to multiple past periods. For example, the normal period of limitation for issuing assessments is 3 years from assessment for income tax matters and five years for VAT matters. For SARS to assess prior to these periods, exceptional circumstances such as fraud, misrepresentation or non-disclosure would need to be present. It would accordingly be the exception rather than the rule for SARS to be able to issue any tax assessments for these earlier periods. In the circumstances, it appears unfair and unreasonable to require taxpayers to disclose and pay taxes in relation to these earlier periods, or face rejection of their VDP application.

3.2.1.6 Given these perceived inequities or risks, taxpayers frequently decide not to make VDP disclosures regarding tax positions arguably incorrectly adopted in earlier periods, and rather simply "fix this going forward". This significantly negatively impacts the take-up of VDP.

3.2.2 Recommendation:

3.2.2.1 The period for disclosure of information and documentation relating to a VDP should be limited to the record retention period in section 29 read with 32 of the TAA.

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3.3 VDP must not "result in a refund"

3.3.1 Problem:

3.3.1.1 One of the requirements for valid voluntary disclosure is that the disclosure must "*not result in a refund due by SARS*".

3.3.1.2 A tax position adopted erroneously or other error could affect multiple tax periods. This could potentially result in reductions of tax liability in certain periods, and increases in tax liability for other periods.

3.3.1.3 Because of the periodic nature of tax, it could then be argued that the default results in a refund in relation to a particular tax period, such that the VDP application is rejected (either as a whole, or as regards that period only).

3.3.1.4 In practice, SARS has been known to instruct taxpayers to apply for VDP only in relation to periods where the "default" results in increased tax liabilities, and to submit a request for correction or objection in relation to the periods where the "default" results in reduced tax liabilities.

3.3.1.5 However, as also set out in this submission, there are significant challenges associated with taxpayers attempting to have their tax assessments revised to correct overpaid taxes. There is accordingly a real risk to the taxpayer that they may be obliged to make payment of the underpaid taxes in one period, only to have the claim for overpaid taxes in another period rejected in the other period.

3.3.1.6 For example, assume that a taxpayer has identified an incorrect past tax position which, across five tax periods, results in a net tax liability of R13 million to SARS. The taxpayer would like to remedy this default by means of the VDP. However, amongst the five affected tax periods, there are "refunds" of R20 million and "payments" of R33 million. The taxpayer then faces the real risk that, in attempting to regularise a R13 million error, it may be compelled to pay R33 million (plus interest), with SARS potentially rejecting the corresponding "claim" of R20 million.

3.3.1.7 In these types of situations, taxpayers are strongly disincentivised to make any disclosure whatsoever to SARS, and the more common response is for taxpayers to decide to "let sleeping dogs lie".

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3.3.2 Recommendation:

3.3.2.1 Where the same issue results in an "understatement" in certain tax periods, and overpaid taxes in other tax periods, SARS should be authorised to accept the VDP application and process all relevant revised assessments so that only the net underpaid taxes are collected by SARS. In this respect, section 227(e) of the TAA should be amended to refer to not resulting in a refund on a net basis across all relevant affected tax periods. In other words, a VDP application should be allowed if it results in payments in some tax periods, and refunds in other tax periods (as long as SARS is not required to pay-out a net cash refund).

3.3.2.2 Section 93 of the TAA (the section dealing with reduced assessments) should be amended to include "if necessary to give effect to a voluntary disclosure agreement under Part B of Chapter 16". (Although this amendment is arguably not a necessary change given section 232(1) of the TAA, this amendment would provide clarity to taxpayers.)

3.4 No objection and appeal process for rejections of application for VDP

3.4.1 Problem:

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

3.4.1.2 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.

3.4.1.3 Many practitioners believe that certain decisions by the VDP Unit incorrectly narrow the qualification criteria for VDP. With the inability to access the normal objection and appeal process in relation to rejections of VDP applications, taxpayers are disinclined to "risk" a VDP application in various circumstances.

3.4.2 Recommendation:

3.4.2.1 Decisions concerning qualification for VDP relief in terms of Part B of Chapter 16 of the TAA should be subject to objection and appeal.

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3.4.2.2 It is submitted that this amendment should apply retrospectively to 1 January 2018, so that applications incorrectly rejected in recent times can be reconsidered.

3.5 "Notice" of an audit

3.5.1 Problem:

3.5.1.1 The SARS VDP Unit must ordinarily reject an application for VDP relief if "*the person seeking relief has been given notice of the commencement of an audit or criminal investigation…"*.

3.5.1.2 Practically, it appears that SARS' interpretation regarding what constitutes "notice" involves an element of subjectivity. As a result, taxpayers are disinclined to "risk" a VDP application in various circumstances.

3.5.2 Recommendation:

3.5.2.1 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 then creates an objective determination and eliminates uncertainty for taxpayers.

3.6 "Voluntary" nature of VDP application

3.6.1 Problem:

3.6.1.1 One of the requirements for valid voluntary disclosure in terms of section 227 of the TAA is that the disclosure must "*be voluntary"*.

3.6.1.2 The classification of a disclosure as "voluntary" involves substantial subjectivity, which creates uncertainty and reduces the "take up" of VDP. Practically, it appears that SARS' interpretation regarding what constitutes "voluntary" disclosure is such that VDP applications are quite broadly rejected. For example, SARS has been known to consider a VDP application as not being voluntary, if the taxpayer has received a request for relevant material in terms of section 46 of the TAA (even where there has been no audit notification, in other words there is no actual audit underway). Similarly, SARS has been known to consider a VDP application as not being voluntary, if it involves a period where a tax return is outstanding and where the taxpayer has already been notified that the relevant tax return is outstanding.

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3.6.1.3 As a result, taxpayers are disinclined to "risk" a VDP application in various circumstances.

3.6.2 Recommendation:

3.6.2.1 It is proposed that the requirement that the disclosure be voluntary either be deleted, or defined with reference to the lack of notification of audit, so that the only criterion in this respect is the lack of notification of audit (established as an objective standard as set out above). This creates an objective determination and eliminates uncertainty for taxpayers.

3.7 Potential denial of objection and appeal process for erroneous assessments in relation to VDP

3.7.1 Problem:

3.7.1.1 An assessment issued or determination made to give effect to a voluntary disclosure agreement is not subject to objection and appeal in terms of section 232(2) of the TAA.

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

> "***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).*
>
> *…"* (emphasis added)

3.7.1.3 This wording implies that SARS may issue an assessment with a different amount, or potentially contrary to the principles submitted by the taxpayer during the VDP application, and the taxpayer may not object/appeal.

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3.7.1.4 The actual legislation only prevents an objection and appeal process for assessments issued to give effect to the VDP agreement (and arguably not assessments that differ from the VDP agreement, since these would not give effect to the VDP agreement). However, the inclusion of the standard wording above in a VDP agreement would appear to either waive the taxpayer's rights, or create the situation where any assessment whatsoever could be said to "give effect" to the VDP agreement, since the VDP agreement purports to give SARS a discretion concerning the amounts to assess.

3.7.1.5 This leaves the taxpayer in the position where it may be left with no rights to object or appeal if SARS issues an assessment different to the submitted VDP information. This creates a situation of risk or uncertainty, and is a barrier to the uptake of the VDP.

3.7.2 Recommendation:

3.7.2.1 The proposal would be that section 232(2) of the TAA either be deleted, or at the very least be amended to allow for a taxpayer to object and appeal where the taxpayer has grounds to believe that the assessments issued or determination made violates the targeted relief afforded in the signed VDP agreement.

4. PROBLEMS WITH THE "PAY NOW, ARGUE LATER" RULE IN SECTION 164 OF THE TAA

4.1 Introduction

4.1.1 Given the current negative South African economic climate, the high cost of living pursuant to a weak Rand, drought and inflation, coupled with steadily rising interest rates and continuing high unemployment, it has created a situation where many 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).

4.1.2 The key problems with the "pay now, argue later" rule are that this is not available in relation to all tax disputes, and there are limited legal remedies for denial of a suspension request. Within the current political and economic climate, these

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issues create a perception of unfairness, with consequent difficulty within the tax system as a whole.

4.2 Suspension not available for certain tax disputes

4.2.1 Problem:

4.2.1.1 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 the liability to pay that tax under the technical provisions of Chapter 9 (Chapter 9 includes the objection and appeal process).

4.2.1.2 However, in various instances, the taxpayer dispute process in relation to a disputed tax debt is not a "formal" 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. Taxpayers are accordingly able to enter into a dispute process in terms of one of these provisions without utilising Chapter 9. Put differently, if SARS makes a decision in relation to one of these sections, the taxpayer's legal remedy falls outside Chapter 9, but rather to take SARS' decision on review to the High Court in terms of the Promotion of Administrative Justice Act.

4.2.1.3 In these circumstances, the relevant taxes involved are also factually disputed, and the interests of justice may require a suspension. Accordingly there does not appear to be any rational basis for discrimination between taxpayers who are disputing their taxes by means of the objection and appeal process, on the one hand, and taxpayers who are disputing their taxes by means of section 93 or 98 of the TAA, on the other hand.

4.2.2 Recommendation:

4.2.2.1 We 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.

4.2.2.2 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.

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4.3 Limited legal remedies for denial of suspension request

4.3.1 Problem:

4.3.1.1 The "pay now, argue later" rule means that the payment of a tax debt is not automatically suspended if the taxpayer disputes the debt. Section 164 makes provision for the suspension of payment pending the outcome of the dispute. Without effective recourse for taxpayers, severe financial hardship can result for taxpayers if the request for suspension of payment is not granted. Smaller taxpayers with limited access to legal resources are particularly vulnerable.

4.3.1.2 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 to provide relief while finding an alternative mechanism to resolve his current position with SARS.

4.3.1.3 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 relevant factors to which the senior SARS official must have regard (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.

4.3.1.4 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

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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.

4.3.1.5 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.

4.3.1.6 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.

4.3.2 Recommendation:

4.3.2.1 We propose an amendment to section 104(2) so as to 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). While this dual process sounds unusual, this is already the case where the taxpayer takes SARS' decision on High Court review. The key advantages of the objection and appeal process being followed are that:

4.3.2.1.1 this would maintain taxpayer secrecy; and

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

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

4.3.2.2.1 Granting the taxpayer with the right to approach the Tax Ombud 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 Ombud is that the request for suspension has been denied and that the taxpayer has or intends to dispute the decision. The Tax Ombud's 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

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4.3.2.2.2 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 disputed tax.

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