18 August 2017

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RE: COMMENTS ON THE DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL, 2017 ("TALAB 2017")

We have attached the comments from the SAIT Tax Administration Technical Work Group on the TALAB 2017. We appreciate the opportunity to participate in the process and would welcome further dialogue.

Many of these comments relate to Annexure C submissions for the 2017 Budget that were made in November 2016. No formal response has been received in relation to these proposals. In the circumstances, we remain of the view that these issues should be addressed in TALAB 2017 or as soon as possible. We are therefore using this submission as an opportunity to reiterate these recurring matters of administrative law. Please advise if there will be other future opportunities to fully engage on administrative tax issues. These additional issues are contained in the Annexure.

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

Yours sincerely

Patricia Williams

Chair of the Tax Administration Technical Work Group

TALAB 2017 SUBMISSIONS -TAX ADMINISTRATION ACT

1. General

1.1 On 19 July 2017, TALAB 2017 was published for public comment.

1.2 On behalf of our members, we set out our submissions below, as these pertain to specific sections of the Tax Administration Act, 2011 (TAA).

1.3 We repeat in the attached Annexure some of our significant Annexure C submissions for Budget 2017 which have not been responded to by Treasury/SARS.

2. Proposed Amendment to Section 9 of the TAA

2.1 The Draft Memorandum on the Objects of TALAB 2017 states, in relation to the proposed amendment to section 9 of the TAA:

"Decisions by SARS are generally subject to the internal remedy in section 9 of the Tax Administration Act, in terms of which specified SARS officials may reconsider the decisions. Decisions that are given effect to in an assessment or notice of assessment are however excluded, since assessments generally have the separate remedy of objection and appeal. As a result of the public comment process on the 2016 legislation, a situation has been identified where a decision given effect to in a notice of assessment is not subject to objection and appeal. It is therefore proposed that such a decision be subject to the remedy under section 9. This will afford the taxpayer an internal remedy before exercising the external remedy of a review application to the High Court under PAJA." (emphasis added)

2.2 We are unaware of this internal remedy in section 9 of the TAA, and how to practically take advantage of it. We were unable to find descriptions and processes in relation to this internal remedy, on the SARS website, for example on the page "Dispute Resolution Process".

2.3 In the circumstances, it is submitted that, in order to properly achieve the purpose of the relevant amendment, as well as the apparent purpose of section 9 of the TAA more generally, details of this internal remedy should either be legislated or fully set out in some other formal publication, to enable taxpayers to make use of the relevant remedy.

ANNEXURE – ISSUES NOT ADDRESSED IN THE BILL

1. Denial of Request for Suspension of Payment in Terms of Section 164 of the TAA: Alternative Legal Recourse Requested

Background

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 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).

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.

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.

1.3 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.

1.4 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.

1.5 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.

Recommendation

1.6 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:

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.

1.7 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:

(a) 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

(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 disputed tax.

2. Pay Now, Argue Later Rule in Section 164 of the TAA – Application Beyond Chapter 9 of the TAA

Background

2.1 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 Chapter 9. Chapter 9 includes the objection and appeal process.

2.2 However, in various instances, the remedy in relation to a disputed tax debt is not an 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, 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.

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

Recommendation

2.4 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. 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.

3. The Voluntary Disclosure Programme Provisions

Problem: no objection and appeal process for rejections of application for VDP

3.1 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.

3.2 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.

3.3 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. Many practitioners believe that certain decisions by the VDP Unit to incorrectly narrow the qualification criteria run contrary to this policy.

Problem: Denial of objection and appeal process for erroneous assessments in relation to VDP

3.4 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.

3.5 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.

3.6 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).

3.7 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.

3.8 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."

3.9 Reference is made to section 232 of the TAA.

3.10 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.

3.11 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:

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.

3.12 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."

3.13 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.

3.14 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.

3.15 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.

3.16 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.

Recommendation

3.17 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 2017, so that applications incorrectly rejected in recent times can be reconsidered.

3.18 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.

4. Reduced Assessments Under Section 93 of the TAA

Background

4.1 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.

4.2 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 reduced assessments 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.

4.3 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.

4.4 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'.

4.5 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 30 business days if reasonable grounds exist for the delay in lodging the objection

- resulting in a maximum of 60 business 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.

4.6 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.

4.7 It is important to be aware of the fact that errors in a previous tax filing would typically be identified during the course of a subsequent audit or tax filing. Typically, then, for income tax, any problematic prior submission would be identified at the earliest approximately one year later, during completion of the subsequent income tax return. The objection process and timelines are therefore insufficient to address the real practical issues that taxpayers experience. It appears unfair and unreasonable that SARS is still able to audit and assess a taxpayer as long as three or more years after the tax return submission, to correct underpayments of taxes, but that a taxpayer is not able to correct overpayments of taxes identified during the very next tax return filing process.

Recommendation

4.8 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. The requirement that the error is "undisputed" already ensures that only items that SARS agrees were incorrect are corrected in terms of section 93.

5. Issuing of Letter of Audit Findings – Should Apply in Relation to All Additional Assessments

5.1 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.

5.2 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.

5.3 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, 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.

Recommendation

5.4 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.

5.5 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.

6. Notification of Audit for VDP Purposes

Background

6.1 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'.

Recommendation

6.2 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.

6.3 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.