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RE: COMMENTS ON THE DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL, 2018 ("TALAB 2018")

We have attached the comments from the SAIT Tax Administration Technical Work Group on the TALAB 2018.

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

Patricia Williams

Chair of the Tax Administration Technical Work Group

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TAX ADMINISTRATION LAWS AMENDMENT BILL

1. PROPOSED AMENDMENT TO SECTION 42 OF THE TAX ADMINISTRATION ACT, 2011 (TAA)

1.1 Proposed amendment

1.1.1 The amendment in question is: "*Section 42 of the Tax Administration Act, 2011, is hereby amended by the substitution for subsection (1) of the following subsection:*"

"(1) A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with an audit engagement letter and, thereafter, a report indicating the stage of completion of the audit."

1.1.2 The Memorandum on the Objects of Tax Administration Laws Amendment Bill, 2018 (TALAB) states, in relation to the proposed amendment to section 42 of the TAA:

"The proposed amendment aims to ensure that taxpayer be notified at the start of an audit as part of efforts to keep all parties informed."

1.2 Problem identified: wording inconsistent

1.2.1 The term "*audit engagement letter*" is inconsistent with the other provisions of the TAA. In this respect, section 226(2) of the TAA uses the term "*notice of commencement of an audit*".

1.3 Recommendation

1.3.1 We would recommend that the term "*notice of commencement of an audit*" is used in section 42 of the TAA, to align this to section 226 of the TAA, for the sake of consistency, clarity and avoidance of unintended confusion.

1.4 Problem identified: form and manner not statutorily defined

1.4.1 The proposed wording provides for the notification of audit to be done in the form and manner prescribed by the Commissioner by public notice. A critical result is that the legislation itself does not specify the timeframe within which the taxpayer must be given notification.

1.5 Recommendation

1.5.1 We propose that the legislation itself should clearly indicate the time period within which the taxpayer must be given notification of an audit.

1.6 Problem identified:

1.6.1 We have previously made submissions to National Treasury and SARS regarding the notification requirements of section 42 of the TAA, on the basis that these should be interpreted as applying to all SARS actions that may result in an assessment, including what SARS categorizes as a "verification". In this respect, it is critical to note that section 3 of the Promotion of Administrative Justice Act requires that any administrative body gives a person "*adequate notice of the nature and purpose of the proposed administrative action*" and "*a reasonable opportunity to make representations*". It accordingly makes sense that section 42 is interpreted as applying to "verifications", so that SARS officials (and taxpayers) both understand the correct position in law, with reference to the tax legislation itself, and without having to be aware of administrative justice laws.

1.6.2 Firstly, it is important to note that, if indeed the law is passed as currently proposed, the absence of a notification of audit, would not justify the failure of SARS to issue a "letter of findings" and give a taxpayer a chance to respond, even for a "verification", because of the administrative justice laws.

1.6.3 However, the notification of verification is of equal importance to taxpayers to a notification of audit, as regards the status of a taxpayer's entitlement to refunds in terms of section 190 of the TAA as well as for purposes of VDP. In this respect, SARS need not authorize a refund until such time that a verification, inspection or audit of the refund has been finalized. This general rule does not apply where security in a form acceptable to a senior SARS official has been provided by the taxpayer.

1.6.4 Accordingly, just as a taxpayer needs to know when it is being audited, a taxpayer needs to know when a refund is being verified, to be aware that SARS is in fact not acting unlawfully in withholding refunds (and so to prevent unnecessary disputes in this respect, with these wasting the resources of both SARS and the taxpayer), and to know when it is necessary to arrange for the provision of security when a refund is needed while it is still subject to verification.

1.7 Recommendation

1.7.1 We suggest that the requirement for notification of audit in section 42 is extended to apply equally to verification (or inspection) processes, to address the taxpayer's need to know that a refund is being lawfully delayed.

1.7.2 We furthermore suggest that the balance of the requirements of section 42 are explicitly stated to apply to verifications in the same manner as they do for audits, in order to address the potential for frequent contravention of administrative justice laws.

2. PROPOSED AMENDMENT TO SECTIONS 221 AND 222 OF THE TAA

2.1 Proposed amendment

2.1.1 The amendment in question is: "*Section 221 of the Tax Administration Act, 2011, is hereby amended by the substitution in the definition of 'understatement' for paragraph (a) of the following paragraph:"*

"(a) ***[a default in rendering****]failure to submit a return as required under a tax Act or by the Commissioner;*".

2.1.2 Consequential amendments are also proposed to provide for specific deemed "shortfall" amounts, in the case of failure to submit a return.

2.2 Problem identified: wording inconsistent

2.2.1 The alternative proposed in section 222(4)(b) of the TAA still refers to "*a default in rendering a return*", although this wording is proposed to be replaced in section 221 with "*failure to submit a return…".*

2.3 Recommendation

2.3.1 We propose that the wording in section 222(4)(b) of the TAA uses the term "*failure to submit a return…"*, in order to achieve consistency with section 221 of the TAA (as amended).

2.4 Problem: Failure to submit a return versus late submission

2.4.1 Conceptually, we are concerned about the differentiation between failure to submit a return, and late submission of a return.

2.4.2 The TAA already provides for administrative non-compliance penalties for late submission of various tax returns, in terms of Chapter 15 of the TAA.

2.4.3 Patently, unless and until a return is submitted, the taxpayer has failed to submit the return. However, the moral blameworthiness of not submitting a return at all (which appears to be more in line with intentional tax evasion as a result of not declaring any relevant income) differs drastically from the moral blameworthiness of a taxpayer having practical or administrative difficulties as a result of which a return is filed late (perhaps a few days, or perhaps a few months, late). For this reason, the penalties for late submission of a return in the TAA have been designed to be less severe than understatement penalties.

2.4.4 We are concerned that the currently proposed wording could be used as the basis to immediately penalize taxpayers for any late submissions, however "minor" or low in moral blameworthiness.

2.5 Recommendation

2.5.1 We propose that there should be a specified time period or process, before a late submission will be considered a "failure to submit a return" as envisaged in the understatement penalty regime. For example, in the case of a taxpayer already registered for the relevant tax, this could be a requirement that SARS has already imposed the fixed amount administrative non-compliance penalty for the late submission, and that this default has continued unrectified for a minimum period of 3 months thereafter.

3. PROPOSED AMENDMENT TO PARAGRAPH 1(B) OF THE FOURTH SCHEDULE TO THE INCOME TAX ACT

3.1 Proposed amendment

3.1.1 Paragraph 1 of the Fourth Schedule to the Income Tax Act is proposed to be amended, to change the registration requirement for provisional taxpayers to refer to "*taxable income*" instead of "*income*". According to the Memorandum on the Objects of the TALAB, this is to require provisional tax registration for taxpayers in relation to capital gains only (who have no income other than remuneration, but who have a capital gain).

3.1.2 states, in relation to the proposed amendment to paragraph 1(b):

> *"The opening words of paragraph (a) of the definition of "provisional taxpayer" provide that any person who derives any income by way of any remuneration from an unregistered employer and an amount that does not constitute remuneration or an allowance, is automatically a provisional taxpayer. "Income" means income as defined in section 1 of the Act. Capital gains are a direct inclusion in taxable income, and are not included in income. Thus, if a person who receives remuneration from a registered employer (a salaried employee who is not a provisional taxpayer for any other reason) realises a capital gain, the person is not a provisional taxpayer with regards to those gains. This creates an exception for these taxpayers to the general rule that taxes should be paid during the year of assessment and not left to final assessment. For example, a capital gain made when an asset is disposed of on 11 March 2018, would only be disclosed to SARS when the 2019 tax return is filed on 15 September 2019, therefore more than a year and a half later. This could create problems for collecting any debt arising from that gain. The proposed amendment aims to address this issue."*

3.2 Problem

3.2.1 Registering as a provisional taxpayer, and being subject to the provisional tax system, is a process that unsophisticated taxpayers find confusing and difficult. Given that the proposed amendment deals only with fairly minor timing differences (since the tax would in any event be paid on assessment) in relation to an unsophisticated taxpayer category only, it appears that this would be overly burdensome on these taxpayers, and not result in the effective, efficient and economic use of resources. It would also give rise to potential practical challenges in that taxpayers would

have to register and then deregister, as provisional taxpayers, because of the irregularity of capital gains.

3.3 Recommendation

3.3.1 We propose that this amendment is not necessary, as the potential loss to the fiscus of a few months' interest does not appear to justify the impact on taxpayers, being extra complexity and administrative burden associated with the provisional tax system as well as having to deregister again thereafter.

4. PROPOSED AMENDMENT TO SECTION 44 OF THE VAT ACT

4.1 Proposed amendment

4.1.1 The amendment in question is: "*Section 44 of the Value-Added Tax Act, 1991, is hereby amended by the addition after subsection (10) of the following subsection:"*

"(11)(a) A refund of the amount erroneously paid as contemplated in section 190(1)(b) of the Tax Administration Act may only be made by the Commissioner where the claim for the refund of such erroneous payment is received by the Commissioner within five years after the date the erroneous payment was made.

(b) A claim for a refund under paragraph (a) shall be deemed not to have been received where the vendor has not furnished the Commissioner in writing with the particulars of the enterprise's banking account as contemplated in subsection (3)(d) prior to or together with the claim."

4.2 Problem identified

4.2.1 In certain circumstances, it may be impossible for a taxpayer to open a South African bank account. For example, South African banks may refuse to open bank accounts for entities where one or more of the shareholders are from a country which is affected by sanctions, or where this is otherwise considered risky.

4.2.2 Where a taxpayer has not provided SARS with its banking account details, there are already punitive consequences in that the taxpayer is not entitled to interest on the relevant refund.

4.2.3 To deny the taxpayer its refund entitlement entirely, owing to an inability to provide South African bank account details within a set period, is unfairly punitive.

4.3 Recommendation

4.3.1 We suggest that the proposed section 44(11)(b) is deleted.

5. PROPOSED AMENDMENT TO SECTION 51 OF THE VALUE ADDED TAX ACT, 1991 (VAT ACT)

5.1 Proposed amendment

5.1.1 Section 51 of the VAT Act is proposed to be amended, to give rise to joint and several liability for members of a joint venture.

5.2 Problem identified

5.2.1 Joint ventures are set up for a specific purpose. In many instances, the parties specifically do not intend to create a partnership, for example because they specifically do not want the other party to be able to bind them. If, however, they are jointly and severally liable for VAT, this undermines this separate liability.

5.2.2 In addition, there are statutory exceptions in section 51 of the VAT Act to the joint and several liability for partners, as regards limited partnerships. However, the proposed amendment does not provide for equivalent exception from joint and several liability for joint ventures. This is quite critical because it may be that the parties specifically elected to enter into a joint venture rather than a partnership because they are competitors, who could not be partners because of their conflicts of interest, but who can enter into a joint venture in relation to a specific project or aspect. This may mean that they are barred from opting for the limited partnership model.

5.2.3 A further problematic aspect is that there is no definition of "joint venture" in the VAT Act. This could potentially result in it being argued that an incorporated joint venture is subject to the proposed rules. This could result in "*piercing of the corporate veil*", without the necessary legal requirements having been met, which it is submitted is unfair and unreasonable.

5.3 Recommendation

5.3.1 We do not favour this proposed amendment, and our preference would be for this not to be made.

5.3.2 If indeed National Treasury considers this amendment necessary, having considered these submissions, then:

5.3.2.1 Joint venture should be defined, and this should make it clear that the provisions do not apply to incorporated joint ventures.

5.3.2.2 Exclusions should be available, on a similar basis as are available for limited partnerships.