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Via e-mail policycomments@sars.gov.za

South African Revenue Service
Nieuw Muckleneuk
Pretoria
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Dear Sirs

COMMENT ON THE DRAFT TAX ADMINISTRATION BILL, 2010

INTRODUCTION AND PRELIMINARY

1. In the SARS note accompanying the release of the above Bill for comment, SARS disclosed that it had submitted the previous draft of the Bill to external constitutional law experts for review. SARS implies that the current draft of the Bill complies with the advice received and opinions expressed by the constitutional law experts it selected to advise it. The Law Society South Africa (LSSA) has requested SARS to make the legal opinions on which it relies for its contentions available to the LSSA for consideration. It is regretted that SARS has refused to do so. The LSSA none the less persists in its request.
2. The SARS contention is that the opinions sought and obtained by it in order to secure constitutional compliance of the Bill are confidential and subject to privilege. The LSSA regrets that it does not agree with this view. It contends that SARS is obliged to make the opinions available to all interested parties and that the LSSA is without doubt one of such interested parties. There should be a commonality of purpose between SARS and the LSSA in ensuring compatibility between the Constitution and the provisions of the proposed Bill. SARS is again invited to make the opinions available to the LSSA and to ensure an open and transparent discussion on those provisions of the Bill which challenge the values enshrined in the Constitution.

The Law Society of South Africa brings together the Black Lawyers Association, the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces and the National Association of Democratic Lawyers in representing the attorneys' profession in South Africa.

3. The LSSA specifically wishes to record its concerns regarding the following issues:
 - 3.1. As was the case with the previous draft, the Bill still contains provisions which *in the opinion of the LSSA are grossly invasive of the constitutional rights of individuals at the instance of SARS officials with a direct and personal financial interest in the outcome of investigations and the produce of their powers.* In the view of the LSSA, some of the proposed provisions could not plausibly have received the unequivocal endorsement of any recognised expert in constitutional law. While the LSSA commends the efforts of SARS in seeking expert advice on the formulation of the executive powers it seeks, it remains concerned that SARS refuses to share the opinions received by it with interested parties.
 - 3.2. It is noted that many of the LSSA's comments on previous drafts of the Bill, in spite of support from other representative bodies, have not resulted in amendments to the current draft. It is regretted that the SARS officials processing the TAB were generally unreceptive to comments and dismissive of all criticism from the representatives of the invited bodies, including the LSSA.

ISSUES OF PRINCIPLE AND POLICY

4. Before dealing with the specific provisions of the Bill we propose to deal with general issues of principle and policy. As a general observation it needs to be stated that SARS has, in promoting the extraordinary powers it seeks in terms of this Bill, not even attempted to justify its quest.
5. It is not appropriate that SARS should be promoting a Bill in which absolute powers inimical to constitutional values are sought. All SARS officials should intentionally and in pursuit of good conscience, strive to enhance the values and principles enshrined in the Constitution. Section 195 of the Constitution requires this of SARS. Section 4(2) of the South African Revenue Service Act, 1997 requires this of all SARS officials. Some of the provisions of the TAB are profoundly disturbing, whether or not they are constitutionally justified.
6. It is considered that SARS should make a full disclosure of the direct financial interest which SARS officials have in the outcome of the executive powers conferred upon them in terms of the Bill. Measured by any modern theory of government, the thought that an executive functionary should have a direct financial interest in the exercise of an executive power is an aberration. SARS officials are now incentivised on the basis of amounts collected and not on the basis of executive powers judiciously exercised. The system creates an irreconcilable conflict between the personal interests of the functionary concerned and the common good in the interests of which the power is presumably conferred.

7. There is nothing in the Bill which addresses the indiscriminate exercise by SARS officials of the powers conferred on them. While taxpayers are exposed at the mercy of junior officials to the severest of penalties, even for the most innocent oversight, SARS officials are free to decree with impunity in matters in which they all have a direct financial interest. Some process should be made available to an aggrieved taxpayer to institute a complaint against SARS officials abusing the powers conferred on them in terms of the Bill. Naturally, we would support a process which is not managed as an internal, private and confidential SARS process. The need to impose some discipline on SARS officials has, in the view of some of our members, become self-evident.

THE OBLIGATION TO PAY: CLAUSE 164

8. The suggested amendment to the provisions governing the taxpayer's obligation to pay the amount assessed remains unacceptable. It is now suggested that it should be left to a 'senior SARS official' to direct that the obligation to pay pending an objection should be suspended. Of course, the senior SARS official concerned might be the very official who authorised the issue of the (revised or additional) assessment in the first place and he or she is most unlikely to be inclined to exercise the discretion objectively and judiciously.
9. We submit that the amendment sought by SARS should, for the reasons previously submitted, not be supported. We remain of the view that they are impracticable and likely to result in frequent litigation between SARS and those taxpayers with the financial ability to resist injudicious demands from SARS officials for immediate payment. Our members report frequent demands from SARS officials for immediate payment by reputable and compliant taxpayers of assessment which are demonstrably incorrect.
10. We submit that the following amendments would be appropriate:
 - 10.1. The senior SARS official required to make the decision to suspend payment should be expressed to be one which has no financial interest in the collection which is the subject of the decision. If we are all going to share in the spoils, what motivation do I have as your senior SARS official to postpone the obligation to pay?
 - 10.2. When the taxpayer is called upon to file the request contemplated in clause 164(2) of the Bill, how will it identify the official to whom the application has to be made?
 - 10.3. In communicating the decision in response to a request in terms of clause 164(2) the taxpayer should be informed of the name and location of the senior official who made the decision. The official should also at the same time provide written reasons for the decision. How must a taxpayer respond within five business days to a decision of a SARS official if no reasons are furnished for the decision and the identity of the official who made the decision is not known?

- 10.4. The five business day period provided for in clause 164(3) means invariably that the taxpayer aggrieved by the decision must launch an application to the High Court for appropriate relief on an urgent basis. This is in most cases likely to be inconvenient to SARS and to the taxpayer. This period should be extended to at least ten business days. It gives the taxpayer accepting the SARS decision a reasonable period to arrange the payment. It also gives the taxpayer not accepting the SARS decision, and the SARS officials concerned, a reasonable period to consider the appropriate litigation.
- 10.5. We remain concerned that the considerations which have to be considered by the senior SARS official in terms of clause 164 (4) are one-sided and oppressive. It surely cannot be intended that there should be an immediate payment of a significant amount in relation to which the taxpayer is unable to provide any security but which the senior SARS official considers to be claimed from the taxpayer on unsustainable grounds? The clause does not permit the SARS official concerned to take account of the merits of the SARS claim. He might be convinced that the SARS claim is unsustainable. He should be allowed to take this into account as a relevant factor.
- 10.6. We mention in passing that the definition of a 'senior SARS official' in section 1 of the Bill should refer to 'section 6(3)' and not 'section 6(4)'.

CIVIL PROCEEDINGS AGAINST SARS

11. In terms of s 11 of the Bill no person may institute civil proceedings against SARS or defend civil proceedings instituted by SARS unless authorised by the Commissioner. We submit that the section is either unintentionally ambiguous or unconstitutional and unjustified. It might perhaps be intended to provide that any person purporting to act on behalf of SARS or the Commissioner in instituting or defending civil proceedings must be appropriately authorised to do so. It would be stating the obvious but if that is all that it intended, an appropriate amendment is required. The present wording permits the more ominous interpretation that SARS may not be sued without its consent.
12. It is not clear whether the objection and appeal procedure and appeals by the Commissioner from the Tax Court are to be included in the concept of civil proceedings.
13. Conceptually the wording of the provision is also unclear. Civil proceedings to which the Commissioner or SARS is a party, either as plaintiff or defendant, are proceedings which are instituted or defended by the Commissioner or SARS and not by a person authorised by SARS. Corporate entities, and statutory entities such as SARS, need to be represented in such proceedings by authorised individuals. Should the intention be that the Commissioner or SARS must in all such proceedings be represented by authorised individuals it would be stating the obvious, but it would then need to be stated clearly.

THE RIGHT OF APPEARANCE IN THE HIGH COURT

14. Section 12(3) provides that the Commissioner may confer the Right of Appearance in the High Court on any SARS official 'with at least three years' experience in the tax court' where the official concerned represents SARS or the Commissioner. The LSSA cannot support this provision. The following comments are presented:
 - 14.1. Since time immemorial the right of appearance in the High Court has been reserved for those persons qualified for admission as officers of the court. The reason is that persons burdened with the privilege of representing others in a court of law have important duties to each other and to the court. The rules governing appearances are strict and designed to ensure the highest standards of integrity of the court's officers.
 - 14.2. All the professions regulating court appearances require members, even those with distinguished academic qualifications, to pass examinations aimed to ensure knowledge of the relevant professional, procedural and ethical rules. Qualifying professional persons are presented to the High Court for formal admission and the taking of the prescribed oath or affirmation only after fulfilling the requirements of the relevant professional body.
 - 14.3. It is considered that to allow the Commissioner, an administrative functionary, to grant the Right of Appearance in the courts of the country to persons who do not qualify for such a right in terms of the Court's rules, would be an unjustified and impermissible interference at the instance of the executive arm of government in the functions of the judiciary. It diminishes the standing of the judiciary and undermines its independence.
 - 14.4. It is in any event suggested that the requirement of 'at least three years' experience in the tax court' is far too vague to qualify as a criterion for admission. Does it mean that the aggregate of the court days actually spent sitting in the tax court representing the Commissioner must be at least 1095? If not, how is the three years to be measured? And how is the Court to be placed in the position of monitoring compliance with such an obscure qualification for the right of appearance? What disciplinary process will apply to complaints of unprofessional conduct against such persons? What jurisdiction will have the court have over these civil servants who are statutorily permitted to appear but who are not officers of the court?
15. The section also empowers persons employed by SARS and who are admitted as advocates or attorneys to represent SARS in legal proceedings. The professional rules governing advocates and attorneys do not permit such a person to appear in court on behalf of his or her employer. The basis of this rule is not the financial interest of the professions but is to be founded in the rules of ethics. It is admittedly not an inflexible rule as the High Court may, in the exercise of its inherent jurisdiction to regulate its own proceedings, grant leave for an employed attorney or advocate to represent his or her employer in proceedings before the Court. Such leave is rarely granted and it

remains impermissible for an admitted attorney or advocate to appear for his or her full-time employer without the leave of the court.

16. An employed person appearing in court for his or her employer is placed in an impossible position of conflict between his or her duties to the court and the opponent, on the one hand, and his or her duties to the employer, on the other hand. The conflict of duty becomes far more acute when the employee is a civil servant with the right of appearance conferred by statute. It becomes even more severe when the employee is a civil servant with a direct and personal financial interest, in the form of financial incentives based on collection targets, in the outcome of the litigation.
17. The LSSA views these proposals as a direct and material interference in the judicial process. It is concerned and disappointed that the views of the Ministry of Justice, the organised legal professions, the President of the High Court and the Chief Justice have not been solicited before their adoption in the draft Bill. The LSSA wishes to record its strongest possible objection to these proposals. SARS has not advanced any justification for these proposals and we submit that there are none. We submit that it is essential and appropriate that the Minister of Justice, the Chief Justice and the organised legal professions be informed urgently of the proposals initiated by SARS.

PRIVILEGE

18. The TAB deals inadequately with the right of the taxpayer to claim privilege in respect of legal opinions and other confidential documents in the possession of the taxpayer. The Bill entitles SARS to demand the production of any document, information and thing that is 'foreseeably relevant' to one or more of the matters listed in the definition of 'relevant material'. This would include documents such as legal opinions, advice on evidence in proceedings before the Tax Court or even a criminal court, communications between attorney and counsel and between attorney and client. It might even include, if taken literally, witness statements taken in preparation of the hearing of the taxpayer's appeal by the Tax Court. Documents of this nature are 'foreseeably relevant' in litigious proceedings.
19. All relevant material must be disclosed at the request of a SARS official and failure to do so is a criminal offence. The first objection to this type of provision is that it is too widely stated. The only relevant material should be the documents specifically requested by SARS. The second objection is that it requires the taxpayer to disclose documents which might be privileged and to which SARS is under common law rules not even entitled. One suggestion, which by itself does not remedy the cause of the complaint, is that SARS should only be entitled to documents and information required for the purposes of the Act. That is the present position.
20. Legal professional privilege is only mentioned in the context of the search and seizure procedures in part D of the Bill. [64]. That section provides for any dispute with regard to documents claimed to be privileged to be referred to an attorney briefed by SARS. It is unconstitutional, if only because it unjustifiably denies the taxpayer the right enshrined in section 34 of the Constitution. A dispute with SARS with regard to whether a particular document is privileged is a dispute in the nature of those

contemplated in section 34 of the Constitution. The taxpayer has the right to have that dispute determined in a public hearing before a court. The suggestion that the dispute should eventually be resolved by a judge or a magistrate acting extra crucially does not cure the complaint. The following observations are relevant:

- 20.1. There is no provision in the legislation or the Rules governing the High Court or the Magistrate's Courts for the engagement of a judge or magistrate by a taxpayer or a SARS official in the manner here contemplated. A judge or magistrate cannot be called upon by an administrative functionary or a taxpayer to perform a function for which no procedure is prescribed.
 - 20.2. The Constitution requires access to a court or an independent tribunal. A judge or magistrate called to resolve a dispute of the nature and in the manner here contemplated is not sitting as a court or an independent tribunal. The question might well be asked whether a judge or magistrate performing such a task at the behest of the Executive is fulfilling a judicial function at all.
 - 20.3. No procedure is prescribed in the Bill for the selection and appointment of the judge or magistrate, for the procedure to be applied in the proceedings before the judge or magistrate once appointed or for the powers of the judge or magistrate to regulate the proceedings. In short, access to the judge or magistrate for the purposes stated is not available and the provision has to be reconsidered.
21. We commend the position in New Zealand for special consideration. The whole question of privilege and the disclosure of opinions [tax advice documents] are dealt with in ss20 to 20G in the Tax Administration Act, 1994. Privilege is recognised and there is no obligation on any person to disclose a tax advice document, a concept which is comprehensively defined. Fair provision is made for the resolution of any dispute between the Commissioner and the "information holder", who would often not be the taxpayer itself, by means of an application to court.

EXCLUSION OF HIGH COURT JURISDICTION

22. The LSSA cannot support the exclusion of the jurisdiction of the High Court to the extent now contemplated in clause 105 of the Bill. It notes the proposed exclusion of the High Court's jurisdiction in a Bill promoted by SARS with grave concern. The following comments are presented:
- 22.1. In the *Metcash* case, the Constitutional Court was at pains to point out that the provisions of the VAT Act did not operate to exclude the taxpayer's access to the High Court in cases where there are appropriate grounds for the review of the Commissioner's decision in relation to an assessment. Kriegler J famously said that the provisions of the VAT Act did not exclude the judicial review of the Commissioner's decisions in the ordinary course and left intact these avenues of relief. The Commissioner had to be able to justify his decisions as rational and just administrative actions and the jurisdiction of the superior court

to review his decision in appropriate cases was not ousted. We submit that the position under the Income Tax Act is currently the same.

- 22.2. We have once again to record disappointment and concern that in a Bill promoted by SARS it is sought to exclude the jurisdiction of the High Court even in the limited extent to which it was recognised by the Constitutional Court in the Metcash case.
- 22.3. The SARS proposal in clause 105 of the Bill will render the opportunity for protest against an assessment which is clearly wrong illusory and inadequate. It is an ousting of the jurisdiction of the High Court in breach of the principle entrenched in section 36 of the Constitution. This is so because the taxpayer does not have access to the Tax Court other than through the offices of the Registrar of the Tax Court, an employee of SARS. There is no procedure for urgent applications in the Tax Court and dates for the sitting of that court have to be arranged by the Commissioner in consultation with the Judge-President concerned. Moreover the majority of the members of the Tax Court are appointed by the Commissioner.
- 22.4. It is submitted, in any event, that the Tax Court does not have power to review the decisions of the Commissioner and his officials. This is a jurisdiction constitutionally reserved for the High Court and Parliament cannot competently confer powers of judicial review on a tribunal such as the Tax Court.

SARS AS CREDITOR

23. There are a number of provisions regarding the collection of taxes which seek to place SARS and its officials above the law. These provisions offend many of the rights and values enshrined in the Constitution, inter alia, section 9 [the right to equality before the law], section 10 [the right to dignity], section 12 [the right to freedom and security of the person], section 14 [the right to privacy], section 21 [freedom of movement and residence], section 22 [freedom of trade], section 25 [protection of property], section 33 [just administrative action], section 34 [access to courts], section 35 [the rights of accused persons]. The sense of injustice remains that a SARS official has the power to issue an assessment, conceivably acting under a misapprehension of law or fact, impose penalties and additional taxes, take judgment against the taxpayer without due process [172(2)] and seize that taxpayer's assets [163(2)] all without prior notice to the taxpayer and without reference to a court. In addition, a SARS official is empowered to invade the private home of a taxpayer without a warrant [62 and 63]; to instruct a police officer to assist in the invasion [61(6)] and with impunity cause such damage to property as inevitably results from an invasion of this nature. [61(8)]. On the present wording of the TAB all of this may happen without SARS being obliged to afford the taxpayer an opportunity to be heard on the correctness or otherwise of the assessment before the time. All of these extraordinary powers may be unleashed without the validity of the SARS claims having been tested.
24. We mention in this context the personal liability imposed on persons allegedly assisting in the dissipation of assets in order to obstruct the collection of a tax debt. [183]. If

there were ever to be a justification for such a provision it should at least be qualified by the requirement that a court may, on the application of SARS, declare any person liable under the provisions of this section, provided that that person was knowingly a party to the dissipation of the taxpayer's assets with the offending purpose. Thus qualified it is left to SARS to prove and for the court to rule that the person sought to be held liable for the debts of the taxpayer intentionally facilitated the dissipation of the taxpayer's assets. We are of the view that the provision in its present form is unconstitutional and unjustified.

25. We also mention Part F [186] under this heading. It deals with the situation where a SARS official suspects that the taxpayer might have foreign assets. The following comments are presented:
 - 25.1. Subsection (2) provides that the application under this section must be brought by a senior SARS official. It is more correct to provide that SARS, therein represented by a senior SARS official, is competent to launch the application.
 - 25.2. Extensive powers are conferred on the Tax Court in terms of subsection (3) and the Tax Court is here empowered to make orders in violation of the taxpayer's constitutional rights. However the Tax Court cannot pronounce on the constitutional validity of section 186(3) and is in any event not an independent tribunal. The majority of the members of the Tax Court are appointed by SARS or a SARS employee without consultation with the taxpayer.
 - 25.3. The section in our view remains open to constitutional challenge.

SARS AS TAX COLLECTOR FOR FOREIGN GOVERNMENTS

26. Part E of the TAB [186] deals with SARS as the tax collector of foreign governments. The concept of the Commissioner granting assistance to the tax authorities of other countries is not new. See section 93 of the Income Tax Act. However, in its original form the Commissioner was obliged to make submissions to the President of the Tax Court [always a Judge of the High Court] and the taxpayer was granted the right to respond to those submissions. The President of the Tax Court had to certify that he was satisfied that the taxpayer had been granted an opportunity to present its case and that the amount claimed appears to be payable in terms of a final determination under the laws of the foreign country. In other words, there was a shortened process similar to the recognition in South Africa of a final judgment granted by a foreign court. All of these procedural safeguards have now been culled. It is now suggested in the TAB that, where the foreign entity makes a statement with regard to the matters mentioned in section 185(2), that statement constitutes evidence against the taxpayer in any proceedings. [186(2)] In relation to the existence of the liability, the statement is conclusive against the taxpayer. In relation to the other matters, the burden of proof is shifted to the taxpayer.
27. The collection of taxes by a nation's tax collector is a matter of national importance. It might well require a limitation of some of the rights enshrined in the Bill of Rights.

However, there is no constitutional justification for SARS to intervene on behalf of a foreign creditor and to condemn a citizen of this country on the basis of the untested claims of a foreign tax collector, without due process. This provision entitles SARS to collect from the taxpayer, without due process, and to transmit the collected amount to the competent authority in the foreign country without even checking whether the taxpayer has been or will be granted the right to contest the claim before a court of law.

28. We have considered subsection (6) which had been added since our comments on the previous draft. We are unable to grasp the import of this provision and suggest that it be clarified. It provides that the right of the taxpayer to have the liability for the foreign tax determined in the Republic 'in accordance with the relevant tax Act' is not affected by the collection steps taken by SARS. But under what circumstances will the South African resident have the right in terms of the law of the foreign jurisdiction to have the liability determined in the Republic? The subsection appears meaningless.

Yours faithfully



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