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Mr. Allan Wicomb
Committee Secretary
Standing Committee on Finance
3rd Floor
90 Plein Street
Cape Town
8000

BY E-MAIL: awicomb@parliament.gov.za

Dear Sir

CALL FOR COMMENT: DRAFT TAX ADMINISTRATION BILL

We refer to the call for comment on the above-mentioned document. Set out below please find the SAICA National Tax Committee's submission comments regarding the Draft Tax Administration Bill ("TAB").

GENERAL PRINCIPLE OF TAX ADMINISTRATION

The following comment found on a statement of the principles of tax administration of the State of California Franchise Tax Board, is in our view, relevant:

"*Administration should be both reasonable and vigorous. It should be conducted with as little delay as possible and with great courtesy and considerateness. It should never try to overreach, and should be reasonable within the bounds of the law and sound administration. It should, however, be vigorous in requiring compliance with law and it should be relentless in its attack on unreal tax devices and fraud*"

TAX ADMINISTRATION ISSUES NOT DEALT WITH IN THE TAB
Whilst the administrative process regarding submission of returns, information required, payment of any taxes and objections and appeals are dealt with, no provision is made for the process and procedures to be followed by taxpayers where SARS fails to adhere to the provisions of any of the tax Acts administered by it where those provisions do not relate to returns, requests for information, payment of taxes and objections and appeals.

For example, section 88 of the Income Tax Act, No. 58 of 1962 ("the Income Tax Act"), the pay now argue later provisions, provides that a taxpayer is entitled to interest on any

payments of taxes made in terms of section 88. The current Income Tax Act does not contain any guidance or provisions which determine the administrative process the taxpayer needs to take in the event that SARS do not pay interest on any such amounts paid. Should the taxpayer issue summons on SARS and the Minister of Finance or write a letter of demand, approach a court to get a judgement against SARS? The objection and appeal route is not available as any refund of the tax paid is not due to an assessment incorrectly issued by SARS.

The TAB must include procedures which taxpayers can follow to compel SARS to adhere to the provisions of any Act administered by SARS where those procedures do not relate to assessments issued by rather the non-performance by SARS of provisions of any of these "non-assessment related provisions" contained in the Acts.

A further matter not addressed in the TAB is the right of SARS to the working papers of Registered Auditors (RA's) as well as the procedures to be followed by SARS to obtain access to working papers of RA's. While it is appreciated that SARS has engaged with stakeholders in this regard to reach an "informal agreement", the matter would perhaps be better addressed as it is in the United Kingdom by including the detail of the rights of SARS to access the RA's workings papers and the procedures to follow in the TAB.

CHAPTER 1- Definitions

Definition of senior SARS official
The term "**senior SARS official**" is defined in clause 1 of the TAB as a SARS official referred to in clause 6(3). It is submitted that the definition of senior SARS official as described in clause 6(3) is too broad and should be more clearly defined, given the wide powers and discretion granted to a senior SARS official.

It is suggested that a minimum competency level be stipulated in the Act for a person to qualify as senior SARS official, including a time and qualification minimum (e.g. a minimum period of 5 years in a position within the tax advisory profession or the employ of SARS, and a postgraduate qualification in Tax) and that the competencies and names of senior SARS officials be published on the SARS website and, that any official not so listed, would not constitute a senior SARS official, as defined.

CHAPTER 2 – General administration provisions

Part F – Powers and duties of the Tax Ombud

Clause 15 – Office of the Tax Ombud
The appointment of a Tax Ombud is welcomed. The funding of this office which will be from the SARS budget would affect the independence of the Ombud even if just perceived. The funding of the office should come from National Treasury directly.

Practically, it makes sense for the Tax Ombud to be located within the SARS structure, failing which you would need to create special provisions dealing with the treatment of confidential information and section 4 of the Income Tax Act. In principle, therefore, we are not against the Tax Ombud being housed in the SARS structure, as is the case in a number of countries around the world. What is more important is that the annual report of the Tax Ombud should not be submitted only to the Minister of Finance, but should be placed in Parliament with some Parliamentary process to deal with that report and the issues identified therein.

Clause 16 – Mandate of Tax Ombud

The taxpayer must first exhaust available complaints resolution mechanisms before the Tax Ombud can review a request. The Tax Ombud can also not review any matter that is subject to objection and appeal. The decisions of the Tax Ombud are also not binding on SARS or the taxpayer. Quite frequently the problem is that SARS officials simply ignore taxpayers when they are trying to use available complaints resolution mechanisms or that SARS takes months to exercise its discretion. SARS does not respond to objections and appeals within the prescribed time periods, and there is really very little that a taxpayer can do except to bring an application to Court under rule 26 of the Regulations issued under section 107A of the Income Tax Act. This is costly and it is submitted that what is required is a cheaper method by which a taxpayer can compel SARS to comply with the provisions of the Act.

We recommend that the Tax Ombud be empowered to compel SARS to comply with the procedural provisions of the tax Acts – including the procedural aspects of objections and appeals - otherwise this office will have the same limitations as the current SARS Service Monitoring Office ("SSMO").

It appears that the SSMO in its current form will be maintained, which means that the whole complaints resolution process is extended by the introduction of the Tax Ombud, as the taxpayer will first have to approach the SSMO before approaching the Tax Ombud. Consideration should be given to remove the SSMO which will enable to taxpayer to directly approach the Tax Ombud, which will shorten the whole complaint resolution process. In addition, as suggested above, the powers of the Tax Ombud should be increased where SARS does not respond, even where SARS refuse to respond to request made by the Tax Ombud.

Clause 16(2)(f), in our opinion, does not go far enough. It mandates the Tax Ombud to identify and review systemic and emerging issues related to service matters or the application of the provisions of this Act that impact negatively on taxpayers but does not say what the Ombud must do with this information. There is in terms of clause 19 and 20 no responsibility on the Ombud to report on these issues. We recommend that the shortcomings in clause 16(2)(f) be addressed.

In addition, the Tax Ombud should have the power to direct that SARS suspends collection procedures where there has been an abuse of power or where SARS has issued an incorrect assessment to a taxpayer. This is similar to the power conferred on the Taxpayer Advocate, housed within the Internal Revenue Service ("**IRS**") in the United States of America

("**USA**"). In that country, the Taxpayer Advocate may issue so-called "taxpayer assistance orders", which affords relief to taxpayers where the IRS has acted badly.

It would also be preferable, if the Tax Ombud could award nominal amounts to taxpayers, as is done in some other countries as recompense for the aggravation and wasted costs incurred in dealing with SARS, particularly where SARS has failed to act in compliance with its obligations under the SARS Act and the Constitution of the Republic of South Africa, Act 108 of 1996 ("**the Constitution**").

CHAPTER 3 - Registration

Clause 22(4) - Registration requirements
Clause 22(4) states that where a taxpayer has applied for registration, but has not submitted all particulars and documents as required by SARS, such person will be regarded as not having applied for registration. In our view, this provision is too wide and is open to abuse, since an application for registration may be rejected on fickle grounds. In order to encourage the registration of taxpayers this process should be as simple and streamlined as possible.

An application for registration should only be rejected should the information provided not be sufficient to identify the taxpayer or the period from which registration is to be effective. The TAB endows SARS with adequate powers to enable it to request and to obtain all other peripheral information from taxpayers.

CHAPTER 4 - Returns and Records

Clause 25(3) - Submission of return
A taxpayer or that taxpayer's authorised representative is required to sign a return submitted on behalf of that taxpayer. This should not pose a problem when submitting returns manually. However, when submitting returns via e-filing the system does not require/allow for a signature to be added before submission.

It is proposed that the TAB defines the term "electronic signature" for electronic communication purposes.

Clause 32(a) - Retention period in the case of audit, objection and appeal
Notwithstanding the 5 year period prescribed in clause 29(3), taxpayers are required to keep records until such time as an audit is concluded if those records were relevant to such audit. This may create an undue burden to retain records beyond the requisite period, especially, since SARS may extend prescription in the case of alleged fraud, misrepresentation, or non-disclosure of material facts.

It is proposed that taxpayers be required to retain records for a period of 5 years from the date of the assessment of a return (as opposed to the date of submission of the return), unless that taxpayer has been given notice by SARS that the assessment will be the subject of an audit.

CHAPTER 5

General
Throughout this chapter, reference is made to "person" or "another person". These terms are not defined for purposes of this Part or for purposes of the TAB in clause 1. The relevant clauses where reference is made to "person" or "another person" are:

Clause 40 - Selection for inspection, verification or audit
"*SARS may select a **person** for inspection, verification or audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis*".

Clause 41 - Authorisation for SARS official to conduct audit or criminal Investigation
"*(3) If the official does not produce the authorisation as required under subsection (2), a member of the public is entitled to assume that the **person** is not a SARS official so authorised*".

Part A – General rules for inspection, verification, audit and criminal investigation

Clause 41 - Authorisation of SARS official to conduct audit or criminal investigations
Clause 41 requires SARS officials to produce written authorisation before they may exercise powers or duties under a tax Act in person. We suggest that merely producing authorisation is insufficient: the taxpayer must also be afforded an opportunity to verify the authorisation produced (e.g. the opportunity to telephone SARS and confirm the identity and authority of the relevant SARS official). This may assist in preventing persons from impersonating SARS officials in order to gain access to a taxpayer's premises and preventing overzealous SARS officials from acting *ultra vires*.

We recommend this clause be amended by incorporating within it the entitlement of the taxpayer to have the authority produced by the SARS official verified.

Clause 42 – Keeping taxpayer informed
Clause 42 deals with a taxpayer's right to be kept informed during an audit. The clause however does not provide the taxpayer with any remedy should these rights be infringed or if the audit is not concluded within a reasonable period. We recommend that this clause be expanded in order to provide:

- remedies for a taxpayer where SARS breaches its obligations; and
- afford taxpayers the right to have the audit concluded within a reasonable period and that guidelines are provided as to what will be deemed reasonable.

Clause 42(2) provides for certain actions to be taken by SARS "upon conclusion of the audit". What procedures will be in place to ensure that the fact that the audit has been concluded is communicated to the person concerned? Certain time restrictions are placed on SARS to

communicate with the person "upon conclusion of the audit". What remedies are available to a person if those time limits are not adhered to by SARS?

Clause 42(2)(b) makes provision for "*further period that may be required based on the complexities of the audit*". How is this period determined and what are the criteria to classify audit "*complexities*".

Clause 42(3) also makes provisions for extension of periods based on the "*complexities of the audit*". As per above, what will be criteria to determine the "*complexities of the audit*"?

It is our view that the provisions of clause 42(5) limits a person's right to administrative justice and gives SARS the right to unilaterally ignore due process and fast-track the result of an audit. This is dangerous and enables overzealous SARS officials to ignore due process. A suitable remedy to enable a person to claim compensation from SARS should be given in circumstances where the application of this section is found to be unreasonable. We further fail to see how the application of the provisions of clause 42(1) and 42(2) can impede or prejudice the purpose, progress or outcome of an audit.

Clause 43 - Referral for criminal investigation

The term "Serious tax offence", as referred to in clause 43(2), is too widely defined in clause 1. It refers to a "tax offence for which a person may be liable on conviction to a fine…" The term "fine" is not defined and could refer to even small fines of R100. We question whether the term "serious tax offence" was intended to apply to minor offences for which only a small fine is payable. We recommend that the definition of "serious tax offence" in clause 1 be amended to refer to fines greater than a stated *de minimus* amount, which is to be determined with reason.

Clause 43(2) provides that "*(A)ny relevant material gathered during an audit after the referral, must be kept separate from the criminal investigation and must not be used in any criminal proceedings instituted in respect of the offence*". How does SARS propose this be monitored?

Clause 44 – Conduct of criminal investigation

Clause 44(3) provides that "*Relevant information obtained during a criminal investigation may be used for purposes of audit as well as in subsequent civil and criminal proceedings*". We are of the view that this is too broad and should be restricted to "*subsequent **related** civil and criminal proceedings*".

Part B - Inspection, request for relevant material, audit and criminal investigation

Clause 46 – Request for relevant material

This provision empowers SARS to require from any person to submit relevant material in relation to a taxpayer, whether the taxpayer is identified by name or is otherwise "objectively

identifiable". We consider that the term "objectively identifiable" is too vague. The term "objectively identifiable" should be defined.

This clause seems to have a very wide application and could be construed to be a "fishing expedition" or "witch-hunt" clause.

Clause 46(1) states that the taxpayer can be "identified by name or otherwise objectively identifiable". A legal process which based on an otherwise objective method to determine the identification of a subject is not acceptable and may cause considerable harm to the party concerned, especially if there is a case of "mistaken identity".

Clause 46(1) further provides that "another person" may be required to submit relevant material.

- How is that "another person" determined and what remedies are in place for the affected taxpayer in the event that the "another person" provides incorrect relevant information to SARS, other than common law remedies?
- The situation if such "another person" is not in a position to provide the relevant material also needs to be clarified.

Clause 46(4) states that the relevant material has to be submitted "at the place and within the time specified in the notice". We have the following concerns with this provision:

- How and where will "the place" be determined?
- The term "within the time specified" is not defined. There should be a minimum time limit specified. Also note that the current 7 – 14 days given in respect of certain requests are generally not reasonable under some circumstances.
- What is meant by the phrase "notice"?

Clause 46(6) provides that the "*relevant material required by SARS under this section must be referred to in the request with reasonable certainty*". Please clarify if there is a difference between a "*request*" and a "*notice*"? What is meant by the term "*with reasonable certainty*"? What remedies are available to a person if the request is too broad?

Clause 47 – Production of relevant material in person

This section empowers senior SARS officials to compel any person to appear in person before SARS by notice at any time and place designated by SARS in the notice. We submit that this power is too wide and open to abuse. A SARS official may abuse it by giving such person insufficient notice and/or compelling him/her to attend outside of normal working hours, thereby causing undue hardship. Further, information may be requested during such an interview, which may incriminate the interviewee. In order to limit the potential abuse of these provisions, we suggest that the word "reasonable" precede the word "notice" in clause 47(1). Moreover, we recommend that the time designated for the interview should be within normal working hours and that this be embodied in the legislation. Lastly, the legislation

should provide that an interviewee may be accompanied by an attorney or other legal representative so as to safeguard his or her rights during the interview.

Clause 47(1) provides that a person, whether or not chargeable to tax, may receive a notice to attend in person at the time and place designated in the notice for the purpose of being interviewed concerning the tax affairs of the person or another person. These powers should be limited to situation where reasonable grounds to conduct such interview exist. Further, as is the situation in clause 46, reference is made to the "notice", which is undefined. Also, the situation of

- the "another person" is unclear in the event that that "another person" do not have the information required; or
- the "person" suffers damages – reputational or otherwise – where the "another person" provides incorrect information to SARS.

Clause 47(3) provides that the "relevant material required by SARS under subsection (2) must be referred to in the request with reasonable certainty". Please clarify if there is a difference between a "request" and a "notice"? What is meant by the term "with reasonable certainty"? What remedies are available to a person if the request is too broad?

Other practical considerations include:

- Proximity of the SARS office to the residence or place of work of the "person" or "another person";
- Costs associated with complying with this provision, such as costs to travel to SARS office, etc.

Clause 49 – Assistance during field audit or criminal investigation

Clause 49(1)(a) requires that "appropriate facilities, to the extent that such facilities are available" will be made available. What comprises "appropriate facilities" and what is the procedure if appropriate facilities are not available?

Further, what is considered "reasonable assistance" as regards the submission of "relevant material as required" (clause 49(1)(c))?

Will the person be advised of the right to recover the photocopying charges as provided for in section 49(3)?

Part C – Inquiries

General

It is not clear what the legal status of the "*inquiry*" is, i.e. is it akin to a court of law, and if so, which level of the judiciary?

Clause 52 – Inquiry proceedings

It is also unclear what is meant by the "conduct of the inquiry"? It would appear that the correct term to be used is the "scope of the inquiry".

It is not clear whether or not the "legal representative" only needs to be a lawyer or whether or not the "legal representative" needs to be an advocate.

Clause 53 – Notice to appear
The practical considerations as regards section 53(1) include

- Proximity of the SARS office to the residence or place of work of the "*person*" or "*another person*";
- Costs associated with complying with this provision, such as costs to travel to SARS office, etc.

Clause 54 – Powers of presiding officer
See comment made under "General" above under Part C.

Clause 55 – Witness fees
See comment made under "General" above under Part C.

Clause 56 – Confidentiality of proceedings
The provisions of the Bill of Rights must be adhered to with specific reference to the provisions that "*(E)vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice*".

Clause 57 – Incriminating evidence
"Incriminating evidence – 57(1) a person may not refuse to answer a question during and inquiry on the grounds that it may incriminate the person." Is this not against the person's constitutional right to remain silent?

(Constitution of the Republic of South Africa 1996 Chapter 2 - Bill of Rights 35. Arrested, detained and accused persons)
1) Everyone who is arrested for allegedly committing an offence has the right:
a) to remain silent;
b) to be informed promptly :
i) of the right to remain silent; and
ii) of the consequences of not remaining silent;
c) ***not to be compelled to make any confession or admission that could be used in evidence against that person****,*

Clause 57(1) provides that a "*person may not refuse to answer a question during an inquiry on the grounds that it may incriminate the person*". This is in direct contravention of the Bill or Rights which provides in section 35(3) that "*(E)very accused person has a right to a fair trial, which includes the right*", amongst others, "*to be presumed innocent, to remain silent,*

and not to testify during the proceedings" and "*not to be compelled to give self-incriminating evidence*".

Part D – Search and Seizure

Clause 59 – Application for warrant
Search without a warrant goes against a person's constitutional right to privacy.

(Constitution of the Republic of South Africa 1996 Chapter 2 - Bill of Rights 14. Privacy)
1) Everyone has the right to privacy, which includes the right not to have:
a) their person or home searched;
b) their property searched;
c) their possessions seized; or
d) the privacy of their communications infringed.

Clause 59(1) provide that an application for a warrant to enter "*a premises*" if relevant information is kept may be authorized. Would these "*premises*" include the premises of auditors of the person?

Clause 60 – Issuance of a warrant
The provisions of this clause seems very wide as it suggests that a warrant may be applied for without any effort made on the part of SARS to obtain the relevant material or information by way of "non-confrontational" means. Surely this type of action should be limited to extreme situations or where all other avenues to obtain the relevant material or information have been exhausted.

Clause 60(2) provides that "(A) warrant issued … must as far as reasonable contain the following information…" The term "information" in this instance clearly refers to the general meaning and not the term as defined in clause 1. Consideration should be given to substitute the term with a synonym of "information".

Clause 61 – Carrying out search
Clause 61(3) gives far-reaching powers to the "*official*" as regards the seizure of relevant material as well as any computer which may contain relevant material which may be retained "*for as long as is necessary to copy the information required*". No provision is made to protect a person against an abusive SARS official nor are there any provisions which would hold SARS officials/SARS liable for negligent, gross negligent or malignant behaviour.

In addition, no provision is made for compensation should it be found that the seizure of relevant material was unwarranted and caused financial and other losses for the person affected by the unwarranted actions of SARS.

Clause 62 – Search of premises not identified in warrant

All the other provisions of this Chapter make provision that the search of any premises has to be executed by a "SARS official" where as this clause provides that "SARS may enter the premises". This provision needs to be amended to be provide that a "SARS official may enter the premises".

Further, as noted above, no provision is made to protect a person against an abusive SARS official nor are there any provisions which would hold SARS officials/SARS liable for negligent, gross negligent or malignant behaviour.

In addition, no provision is made for compensation should it be found that the seizure of relevant material was unwarranted and caused financial and other losses for the person affected by the unwarranted actions of SARS.

Clause 63 – Search without a warrant

Clause 63 appears to confer greater powers on SARS than what is generally conferred on the police. Whilst the police are required to obtain warrants to search and seize documents, it is not clear why SARS officials should be exempted from this requirement. One of the requirements of clause 63(1)(b)(ii) is that the official must, on reasonable grounds, be satisfied that if SARS were to apply for a warrant, a search warrant would in fact be issued. We are uncertain as to how a SARS official will be able to determine whether the search warrant would be issued, without actually applying to a judge for the warrant. We recommend that the requirements of clause 63(1)(b) should be clarified and be made less subjective. In particular clause 63(1)(b)(ii) should be altered and set out objectively what SARS official need take into account when applying the powers conferred by this provision.

No provision is made to protect a person against an abusive SARS official nor are there any provisions which would hold SARS officials/SARS liable for negligent, gross negligent or malignant behaviour.

In addition, no provision is made for compensation should it be found that the seizure of relevant material was unwarranted and caused financial and other losses for the person affected by the unwarranted actions of SARS.

Further, it is not clear why this clause is required as warrants can be issued within hours provided proper grounds for the warrant exists.

At minimum we suggest, that SARS should be entitled to seize documents where approved by a SARS senior official, but that they be placed in the custody of the court and that the court, if it is possible, sanction the seizure after the event.

We refer to the cases of *Mistry v Interim Medical and Dental Council of South Africa* (1998 (4) SA 1127 C) and *Park-Ross v Director: Office for Serious Economic Offences* (1995 (2) SA 148 C), which cases held that the search of premises and seizure of documents, without a warrant, was invalid under the provisions of the Constitution.

Clause 64 – Legal professional privilege
The professional privilege should be extended to include that of auditors, i.e. it should not be restricted to the legal professional only. In addition, how will the services of "an attorney independent from both parties" be obtained? Who will pay for the services?

"Legal professional privilege 64(4)(b) – claim of privilege by way of proceedings in camera" – does this not defeat legal privilege if legal privilege exists? Will the proceeding be recorded and if so who will have access to the recorded information. The recorded information should remain part and parcel of the legal professional privilege, even if an independent attorney is appointed. Great attention should be given to these provisions to create balance of rights.

Refer to the attached submission made to SARS on legal professional privilege to be extended to accountants.

During the workshop, we discussed the possibility of amending the definition of "information" contained in clause 1 of the TAB, such that that definition excludes specifically opinions prepared on tax matters. It is, therefore, suggested that at a minimum the definition of "information" contained in clause 1 of the TAB contains an exclusion along the following lines:

> "Excludes opinions prepared by any person who is registered with a professional body which is entitled to institute disciplinary action against its members for violating its rules of ethics, or a professional body which is regulated by statue, on any tax Act."

Clause 66 – Application for return of seized relevant material
What is the purpose of section 66(4)?

CHAPTER 6 – Confidentiality of information

Clause 68 – SARS confidential information and disclosure
Just as a former SARS official may not disclose any SARS information to anyone outside of SARS, similarly a former employee of a taxpayer, may not disclose information to SARS. At present only SARS has a right to this secrecy clause. Should a taxpayer's employee be employed by SARS after leaving the taxpayer's employ, SARS may not use privileged information to build its case upon. This is a conflict of interest.

Finally we agree that an independent ombudsman must be appointed to act between the taxpayer and SARS on issues relating to ethics. Currently there is no real recourse for taxpayers should a SARS official act unethical or not comply with the Act. This issue needs to be clarified.

CHAPTER 9 – Dispute resolution

Part B – Objection and appeal

Clause 104 – Objection against assessment or decision
The exceptional circumstances referred to in clause 104(5)(a) should include complex matters and the extension of the period for objection may not be unreasonably denied in these circumstances.

Clause 106 – Decision on objection
Clause 106(2) should provide for a maximum period of 30 days to alter the assessment to reflect the fact that an objection has been allowed as well as a 30 day period for the refund of any taxes overpaid by the taxpayer as a consequence of the allowance of the objection.

Provision should also be made for the automatic allowance of an objection if SARS fails to respond within a 30 day period or such period as agreed with the taxpayer.

Part D – Tax Court

Section 83 of the Income Tax Act – Appeals to tax court against assessments / Clause 118 – Constitution of tax court
Section 83(4) of the Income Tax Act provides that the tax court will consist of a judge, an **accountant** and a representative of the commercial community. Section 83 is also the basis on which appeals are lodged under the other fiscal Acts. We therefore, emphasise the word "accountant" advisedly.

Clause 118(1)(b) of the TAB, however, refers to a **registered accountant**. This would, at a stroke, disqualify a large number of CA(SA)s on the panels around the country, including most of the tax specialists. We would assume that most of the panel members are CA(SA)s but very few would be registered with IRBA - why would they be? The only reason one would be registered, for example, is to be able to perform the non-attest function of auditor. Under the TAB as it presently stands, most CA(SA)s will be disqualified from being on the tax court panel. There is a serious unintended consequence to clause 118(1)(b), one that deserves urgent intervention.

Part F – Settlement of disputes

General
Whilst settlements of disputes may be a cost-effective way to deal with disputes between taxpayers and SARS, the consequential decrease in case law has resulted in a loss of significant judgements which serve to clarify the law as it stands and therefore improve the interpretation of the various tax acts as they stand.

Clause 142 – Definitions
Clause 142 defines the term “dispute” to mean a disagreement which arises pursuant to the issue of an assessment. In our view, this definition is too narrow, since disputes often arise at

the audit stage or even earlier, should the taxpayer approach SARS in circumstances which would otherwise be appropriate for settlement.

We recommend that the words: “which arises pursuant to the issue of an assessment” be omitted from the definition of the term “dispute”.

Clause 145 – Circumstances in which settlement is inappropriate
What is the remedy for a taxpayer who disagrees with SARS on this issue?

Clause 147 – Procedure for settlement
This clause should provide for a time limit for the finalisation of settlement agreements and provide for a suitable remedy for a taxpayer where SARS fails to do so.

CHAPTER 10 - Tax liability and payment

Clause 164 - Payment of tax pending objection and appeal
Clause 164 affords discretion to a senior SARS official to suspend payment of tax pending objection and appeal, based on specified criteria. However, clause 164 (5) provides that the senior SARS official may deny a request in terms of sub-clause (2).

Given the fact that some of the criteria in subsections (4) and (5) are subjective, we recommend that the SARS official’s decision be made subject to objection and appeal.

CHAPTER 11 – Recovery of tax

Part A – General

Clause 171 – Period of limitation on collection of debts

The period of 15 years should be changed to 5 years. Document retention is only required for 5 years. Taxpayers are currently experiencing great difficulties in obtaining tax clearance certificates as a result of debts arising “out of the past”.

We recommend that the period of 15 years should be changed to 5 to align with the document retention period.

CHAPTER 12 - Interest

Clause 187(2) - General interest rules
Clause 187(2) provides that interest payable under a tax Act is calculated on the daily balance owing and compounded monthly. In our view, such a calculation is too complicated to apply to the general public. Further, this may prove to be too burdensome for taxpayers.

Clause 187(2) further provides that: *"...the Commissioner may prescribe by public notice when this method... will apply..."*. In our view, should the new method be applied, the Commissioner has to inform the general public of this change, and the current wording provides the Commissioner with discretion as to whether to inform the general public or not.

We propose that simple interest continues to apply. Further, we recommend that the word "may" be substituted with the word "shall" in the following clause: "*...and the Commissioner may prescribe by public notice when this method... will apply...*"

Clause 187(6) - General interest rules
In our view, the circumstances described in clause 187(6) under which a senior SARS official may exercise his/her discretion to waive interest is unfairly restrictive.

There is a cross -reference error in clause 187(6) in that it should read *"...circumstances referred to in subsection (5) are..."*, but in fact refers back to itself.

These circumstances should be expanded to include instances where a taxpayer assumed a reasonable tax position (i.e. assumption as to whether an amount is taxable (or the rate at which it is taxable), or deductible, or whether an amount qualifies as a tax credit) without any intention to avoid or delay payment of tax.

The cross-reference is to be corrected so that it correctly refers to subsection (5).

CHAPTER 13 - Refunds

Clause 190(2) - Refunds of excess payments
There is no stipulated period of time during which SARS is to finalise any verification, inspection or audit. Consequently, a very long period of time may potentially elapse before taxpayers receive refunds legitimately due to them.
It is proposed that any verification, inspection or audit should be finalised by SARS within a stipulated period of time, unless specified extenuating circumstances apply.

Clause 190(4) - Refunds of excess payments
Clause 190(4) provides that a taxpayer's right to claim a refund will prescribe after a stated period of time. This prescription period should not apply where the amount of the refund is under dispute.

Where the amount of the refund is under dispute, the prescription should only commence once the dispute has been resolved.

CHAPTER 15 - Administrative non-compliance penalties

Clause 212 - Reportable arrangement penalty

This clause imposes harsh penalties for failure to disclose information in respect of reportable arrangements. In our experience, it is not always easy to determine whether a transaction in fact constitutes a reportable arrangement, since many standard transactions have characteristics ascribed to reportable arrangements.

We recommend that the potential penalties for non-disclosure be determined only as a multiple of the tax benefit from the arrangement, since the imposition of fixed penalties may be unnecessarily punitive. Further, taxpayers should be able to request that such penalties be waived, if the taxpayer had reasonable grounds to form the view a transaction as not "reportable".

CHAPTER 16 – Understatement penalty

Part A – Imposition of understatement penalty

Clause 223 – Understatement penalty tax percentage table
Reference is made to a "standard case" in the table. What is meant by a "standard case"?

All voluntary disclosure before notification of an audit should be absolved from any additional tax.

CHAPTER 19 - General provisions

Clause 244 - Deadlines
Clause 244(3)(a) states that an application for extension must be submitted to SARS in the prescribed form before the deadline expires. To the best of our knowledge, no such form is available. The prescribed form must be provided.

Clause 246 - Public officers of companies
Clause 246 requires the appointment of a Public Officer. The procedure for such appointment is currently not regulated.

In practice, it will be most helpful if the Commissioner:

- provides a standardised form that must be completed in order to facilitate the appointment of a Public Officer; and
- issues a letter confirming the appointment of a Public Officer, once such appointment has been approved.
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Clause 255 - Rules for electronic communication
Clause 255(2) states that, in the case of a return or other document submitted in electronic format, SARS may accept an electronic or digital signature as a valid signature. It is unclear as to what constitutes an "electronic signature" and whether this would, for example include clicking on the 'submit' button when submitting a return via e-filing

It is proposed that the TAB defines the term "electronic signature" for electronic communication purposes.

SCHEDULE 1 – SECTION 271

Fourth Schedule to the Income Tax Act

Amendment to paragraph 19 of the Fourth Schedule
The amendment to the definition of "basic amount" and the automatic 8% per year increase is welcomed. The proposed amendment appear to solve the previous "automatic" 16% increase for the first provisional tax payment for taxpayers with a February year-end, if the taxpayer is up to date with his/her income tax returns. However if a taxpayer is for example "one-year behind" in filing his/ her tax return, there will be an automatic 24% increase to the last year of assessment, which might not be justified compared to the actual taxable income.

Also, for companies with a February year-end they might still have an "automatic" 16% uplift for the second provisional tax payment from there last assessed amount, as companies have 12 months after year-end to file their tax returns. As such, by second provisional payment date, end of February, companies might not have been assessed for their previous year's income tax return and as such would be penalized with an automatic 16% uplift to their last year of assessment, although such companies are not "behind" in filing their income tax returns.

We request that the above issues be addressed in the amendments

Amendment to paragraph 20 of the Fourth Schedule
It appears that the proposed amendment to paragraph 20 of the Fourth Schedule only effectively change to the name of the "penalty" from "additional tax" to "understatement penalty". However, the way the "understatement penalty" is calculated, appear to be exactly the same as the previous "additional tax". As such, the previous issue with the calculation of the "additional tax" has not been addressed. The issue can be best summarized as follow:

The problem with the legislation is that the under-estimate penalty is linked to the taxable income numbers without regard to the actual tax paid. Thus the penalty will apply even if the actual tax paid by the taxpayer is correct or even if it's an over-payment. Late bonus payments are probably the best example. For example, if a taxpayer who estimates taxable income at R1m and pays provisional tax to ensure that such an amount is fully taxed. "If a late bonus payment say, an extra R500,000 is received, the fact that this R500,000 might be fully taxed at 40% through the PAYE system does not save the taxpayer from the provisional tax penalty. This appears to be is grossly unfair because the full tax was in fact collected by SARS.

We therefore request that the new "understatement" penalty be amended to take into account actual tax paid.

Please do not hesitate to contact us, should you have any questions regarding the above.

Yours faithfully

Muneer Hassan CA(SA)
PROJECT DIRECTOR: TAX
The South African Institute of Chartered Accountants

cc: ftomasek@sars.gov.za
csmit@sars.gov.za