Dear Sir/Madam

SUBMISSION: DRAFT INTERPRETATION NOTE 1 (ISSUE 2) ON THE PROVISIONAL TAX ESTIMATES

1. Please find the SAICA National Tax Committee’s response to the request for comments on issue 2 of the draft interpretation note on the Provisional Tax Estimates as contained in the Fourth Schedule to the Income Tax Act 58 of 1962.

Obligation to submit return – clause 2

2. This clause states that the provisional tax return must be submitted even if the provisional tax payment is Rnil.

3. Paragraph 19(1)(a) states:

   “Every provisional taxpayer (other than a company) shall, during every period within which provisional tax is or may be payable by that provisional taxpayer as provided in this Part, submit to the Commissioner a return....”

4. Paragraph 19(1)(b) contains similar wording.

5. The obligation to submit a return is therefore directly connected to the obligation to pay provisional tax and we therefore cannot agree to the correctness of the statement made.

Obligation to register – clause 4.1

6. This clause confirms that a taxpayer may become liable to register during the relevant year of assessment.
7. However no examples of how this applies is given, especially as the liability in paragraph 19(1) refers provisional tax being payable in that period or may be payable.

8. It is especially in respect of “may be payable” that clarification is sought. For example if at the beginning of the year the taxpayer may have an obligation in the second period, does may be payable in relation to a period mean the taxpayer only needs to register in the second period or must the taxpayer already register in the first period?

**Calculation of provisional tax**

**Basic amount as estimate- clause 4.2**

9. It is submitted that SARS should emphasise the fact that the obligation is to estimate total taxable income and that use of the basic amount does not constitute a valid estimate.

**Basic amount as estimate- clause 4.2 and 4.3**

10. The guide notes that the estimate cannot be below the basic amount without permission from SARS. However it does not deal with when the estimate is below the basic amount (for example the taxpayer did not do the annual 8% adjustment) without permission.

11. In this instance paragraph 19(2) does not apply as the taxpayer did not fail to submit and estimate.

12. Paragraph 19(3) allows for SARS to request a justification of the estimate but it is unclear if the justification process essentially becomes a condonation process as well?

13. Furthermore, this only applies to the first provisional tax estimate. For example a taxpayer with an above R1m tax liability uses an estimate without approval below the basic amount for the first and second estimate but above 80% of actual. In respect of the first SARS could apply paragraph 19(3) but it is unclear what the consequences are in respect of the second, if any?

**Rebates- clause 4.2 examples**

14. The examples provided indicate that the rebates in section 6, 6A and 6quat should be considered when determining the amount of provisional tax payable.

15. However though we agree with this in principle it does not seem to represent the legal position.
16. The normal tax (defined in section 1 as the section 5 amount) to be paid per paragraph 17(3) and determined per the rate in paragraph 17(4) (i.e. normal tax rate per tables for section 5) does not include rebates which are deductible from the normal tax calculated in section 5 (i.e. only after the normal tax is determined).

17. In this regard the only override to this determination is contained in paragraph 17(5), however the Commissioner would have to prescribe tables that take into consideration the relevant rebates in the Income Tax Act such as section 6, 6A, 6B, 6quat and 6quin.

18. It may even be prudent to include these in the interpretation note as a binding general ruling.

19. Submissions have been made on this matter to National Treasury and in the Budget Review 2015 (pg. 141) the Minister did note that the medical rebates would be taken into consideration for provisional tax.

20. However this only addresses part of the problem and will be legislated only after the first and even some second estimates have been submitted.

**Penalties**

**Penalties: Investment capital gains**

21. A concern with the current and proposed draft guide on provisional tax relates to capital gains, especially relating to investment portfolios at investment companies.

22. The taxpayer only becomes aware of any capital gains/losses when he/she receives the relevant tax certificates (i.e. IT3(c)) from the investment company (e.g. Allan Grey, Coronation). These gains can sometimes be huge, especially when the portfolios were moved or changed during the year.

23. Thus, when the second provisional tax payment is made (28 February) the taxpayer is totally unaware of the capital gains that will be disclosed by the investment company sometime after the end of the tax year. Invariably the taxpayer will incur a 20% penalty for under estimating the taxable income.

24. Making a third or top up payment will only save on the interest and not the penalty.

25. This is unfair treatment of the taxpayer and though we acknowledge that it is primarily a problem for the legislature to address. This fact should be given as an example as to when CSARS will exercise its discretion in favour of the taxpayer per paragraph 20(2) as paragraph 24 is mostly not applicable to this scenario.
Underestimation penalty – Below threshold

26. A second aspect is the basis on which an “underestimation” penalty is calculated. This penalty is applied when the final taxable income is greater than the taxable income used in the second provisional tax return.

27. There are instances where the taxable income is under estimated but the final tax payable is in fact correct or even over paid. In these instances the taxpayer has to file an objection and invariably the penalty is waived.

28. The proposal is that the penalty be applied when the actual provisional tax paid is less than the final tax payable/assessed.

<table>
<thead>
<tr>
<th>Actual case: Taxpayer X – 2014</th>
<th>Taxable income declared on second provisional tax return</th>
<th>R31 661 – tax paid NIL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Final taxable income on IT34</td>
<td>R89 526 - tax payable NIL</td>
<td></td>
</tr>
<tr>
<td>Penalty raised for under declaration of income</td>
<td>R1 545</td>
<td></td>
</tr>
</tbody>
</table>

29. Actual tax payable by this taxpayer was actually NIL as the income is below the threshold.

30. Thus, although the taxpayer owes nothing in terms of tax, he/she is still penalised by SARS for “under declaration of taxable income”.

31. This is legally problematic as such person, as noted, may not even be legally obligated to even submit an estimate and is now subjected to penalties notwithstanding no liability to pay.

32. Again the only override to this determination is contained in paragraph 17(5), however the Commissioner would have to prescribe tables that take into consideration that no tax is payable and therefore the tax estimate should be NIL.

Yours sincerely

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The South African Institute of Chartered Accountants