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Office of the Tax Ombud  
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BY E-MAIL: Office@taxombud.gov.za

Dear Sir

**SAICA COMMENTS ON REVIEW CONDUCTED IN TERMS OF SECTION 16(1)(b) OF THE TAX ADMINISTRATION ACT NO 28 OF 2011 ON THE FLUIDITY OF THE PAY AS YOU EARN (PAYE) STATEMENTS OF ACCOUNTS (EMPSA)**

1. The South African Institute of Chartered Accountants (SAICA) sets out our comments and submissions to the Office of the Tax Ombud (OTO) on the issues experienced by our members regarding the fluidity of Pay-As-You-Earn (PAYE) Statement of Account (EMPSA) with the South African Revenue Service (SARS) in **Annexure A**.
2. This submission represents mostly a collation of our member's experiences as to challenges faced in automatic and manual journal entries being passed through EMPSA during the course of the last year. Many of the matters have arisen over many years and represent a conflation of old practice, new laws and systems.
3. The survey confirms that SARS account maintenance, especially for PAYE but not limited thereto, has become an increasing and costly burden for taxpayers.
4. SAICA will continue to communicate and collaborate with the OTO and SARS to address the challenges identified, including sharing these results with SARS.
5. We would like to thank the OTO for the opportunity to participate in this review in seeking to make our tax administration system more efficient and effective.

Should you wish to clarify any of the matters discussed, please do not hesitate to contact us.

Yours sincerely

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## ANNEXURE A

### A. BACKGROUND

1. The OTO recently indicated that it intends conducting a systemic matter review, subsequent to recognised controlling bodies (RCBs) concerns expressed over the journal entries being passed without explanations on taxpayers EMPSA and the incorrect allocations of payments made by SARS on taxpayers EMPSA's.
2. To enable such review, the OTO has sought, and obtained, the approval of the Minister of Finance (the Minister) in terms of section 16(1)(b) of the Tax Administration Act No 28 of 2011 (TAA) to review as a systemic and emerging issue relating to a service matter or the application of the provisions of the TAA or procedural or administrative provisions of a tax Act, the alleged fluidity of the EMPsAs.
3. Following such approval, the OTO on 16 October 2018 invited stakeholders and RCB's to make formal submissions in respect of the fluidity of the EMPsA. The OTO also requested practical examples where possible to substantiate the formal submissions.
4. SAICA has in its efforts to collaborate on making the tax system more effective and efficient sought to clarify what the trends of the challenges are, rather than assuming that individual complaints by themselves.

### B. OVERVIEW OF SAICA PAYE UNEXPLAINED JOURNAL SURVEY

5. As a point of departure, it is noted that members have experienced this challenge of unexplained journals for many years and SAICA has consistently been raising this concern with SARS at the National Stakeholders Operational meetings, though it remains unresolved. This item has been consistently documented as a **top tax operational matter** since **April 2015**.
6. The SAICA PAYE Journal Survey (survey) results dealt with a number of specific issues and concerns based on survey results received from **779 responses**, mostly SAICA members, over the period of 1 November – 23 November 2018. The purpose of the survey was not only to confirm whether the extent of the member frustrations with **unexplained PAYE journals** were perceptions or reality, but also what specific aspects were driving such frustrations.
7. Qualitatively (data to sufficiently describe the phenomenon of interest), the sample, given a total population of 35 000 (our total SA based membership), provides a 96.7% confidence level that the margin of error is less than 3.3%.
8. As to **coverage**, responses were received from **all nine provinces** with 39% from Gauteng.
9. The respondents to the survey were **60% tax practitioners (TP) and 40% members in business (MIB)**.
10. In respect of TP respondents 74% had less than **100 clients** and 36% had more than 100 clients, with 96% of the TP respondents rendering PAYE services.



### **C. EXECUTIVE SUMMARY OF FINDINGS**

11. A **legislative obligation** is imposed on SARS to properly maintain taxpayer accounts for the various tax types and it is therefore not just a service delivery challenge. Section 165(1) of the Tax Administration Act No 28 of 2011 (TAA) provides that SARS must “maintain” a taxpayer’s account. It is therefore critical that **SARS “maintain” taxpayers’ accounts** by keeping accurate transactional data as listed in section 165(3) of the TAA and inform taxpayers as to why changes, they did not initiate, have occurred, including passing of journals by SARS.
12. Overall, the survey was persuasive in that it confirmed the frustrations experienced by taxpayers in respect of SARS passing **unexplained journals** in the EMPSA’s account, including specifically journals clearing out of tax credits, allocating payments incorrectly and raising of interest and levying of penalties on these journals.
13. Based on our study, **unexplained journals** seem to be numerical changes made by SARS to the taxpayers account which have either no description or there is no proper legal explanation as to why it was done or how.
14. The survey confirmed that this is quite a **widespread** SARS practice and that the number of journals per period and regularity of the journals were **predominant features** of the problem experienced.
15. The **general lack of communication** by SARS in this regard has also raised much concern and also arguably raises questions of the legality of the practice where liabilities are created and whether SARS is meeting its legal obligation to manage the taxpayer account. There also seemed to be no indication as to how these journals were being authorised by SARS, whether manual or system generated.
16. Though it is accepted that accounting changes may invariably have to be made to the taxpayer account, their seemed to be **no managerial or specific SARS channels** dedicated to identify and manage when problems are invariably encountered with these journals, creating much frustration and cost. On further enquiry many members commented that the call centre and branches were often willing, but unable to assist in resolving enquiries on unexplained journals.
17. The observation is that the challenges seem **mostly system driven**, given the perceived automatic journals being passed throughout the EMPSA and the considerable volumes thereof, amending all historic transactions relating to specific tax types and tax periods.
18. However, as members are unable to distinguish manual from automatic journals as it is not indicated on the relevant accounts, this finding is not conclusive.
19. It is concluded that in addition to any OTO findings and recommendations, much **engagement is required between SARS and taxpayers** in trying to identify and address the reasons and challenges on unexplained journals and finding a much **better communication and information** structure between SARS and taxpayers on the matter.



## **D. SPECIFIC SURVEY FINDINGS AND CONCLUSIONS**

### **Prevalence and frequency of journal entries passed on EMPsAs**

#### Findings

20. The **prevalence** of this concern was posed to TP's and MIB though in different contexts.
21. In respect of the prevalence of **unexplained journals** to the PAYE account, **84% of TP's** confirmed that a material number of taxpayer clients were affected (i.e. more than 25% of total clients) and **53% of MIB** experienced journal discrepancies.
22. Such journal entries seem to be both automated through SARS' system and manually inputted by SARS employees. The automatically generated journals may indicate a systemic SARS problem, whereas the manual journals could be indicative of management and/or training challenges.
23. The **frequency** of how often the EMPsA changes was also high and was posed to all respondents.
24. The majority of respondents (55%) indicated at least monthly changes are made to EMPsA due to unexplained journals.
25. The 19% whom selected "Other" specifically noted in the comment box provided that the EMPsA changes happen "*unexpectedly*", "*inconsistently*", "*randomly*", "*ad hoc*", "*frequently*", "*regularly*".
26. As to how quickly after submission of the EMP201 this occurred, **26% of the respondents** indicated that it usually occurred within **7 days or less** from the date of submission of the EMP201.
27. In respect of the **volume of journals**, comments included "more than **20 journals a month**" and one example provided had journals running **7 pages** for a single period.

### **Assessment by journal**

#### Findings

28. In the survey, the impact of the **journals** was in many instances akin to **an assessment**.
29. Comments noted that descriptions included "*recon assessment*", "*additional assessment*", "*payment recon*", "*journal set off*" and "*debt equalisation*". However, from the open text comments "*payment journal*" seems to be the most used description.
30. A total of **15% of the respondents** to the survey noted that **credit balances** are cleared with a journal entry description of "**additional assessment**", without an accompanying letter of assessment.

#### Legal concerns

31. We express much concern over this practice of assessment by journal.



32. Section 1 of the TAA defines “assessment” as the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS. A “penalty assessment” which is defined in section 208 of the TAA is an assessment in respect of a penalty only or a tax and a penalty which are assessed at the same time.
33. Section 96 and 97 of the TAA impose an obligation on SARS to issue a “notice of assessment” for any assessment raised and must keep a record of the assessment and the required particulars. Section 96(1)(a) to (g) with section 96(2)(a) (i.e. grounds of assessment where assessment not based on return) also not being complied with.
34. It is submitted that a mere journal on the taxpayer SARS account cannot be regarded as compliance with the law in regards to the issuing of an assessment and/or penalty assessment.

#### Operational concerns

35. To further frustrate matters, though these journal assessments are highly questionable in law, SARS compels taxpayers to use the formal dispute process to resolve the matter as if they are valid assessments.
36. The dilemma with not having received a legal SARS assessment creates significant uncertainty around the correct timelines to be followed for such disputes and also around the appropriate process to follow to request remittance or lodge an objection.
37. It also puts the taxpayer in the invidious position of having to defend the compliance with timeline formalities of the dispute submitted on the basis of lateness, with SARS commonly using the date of the journal as the “date of assessment”.

#### Reconciling and allocation of Payments within the EMPSA

##### Findings

38. The EMPSA (i.e. statement of accounts) as provided for in section 165 of the TAA are impacted by administrative credits, journal entries, reversals, reallocations and submitted returns reflecting as outstanding.
39. Each SARS payment form is pre-populated with a **unique payment reference number (PRN)**, enabling the taxpayer to match actual payments made to SARS. However, if SARS process various journals within the EMPSA, the **PRN is lost** (as it is replaced with zeros) which was confirmed by 63% of the respondents.
40. The SARS system therefore makes it extremely difficult or impossible for taxpayers to reconcile their payments, as actual payments cannot be matched to specific tax periods and tax types.
41. In relation to **timing of allocations**, section 165(3)(e) of the TAA provides that the taxpayer’s account must record details for all tax periods of tax payments made by or on behalf of the taxpayer. However, 83% of the respondents in the survey confirmed that **SARS levies additional interest** prior to allocating payments that have been made by such taxpayers.



42. Effectively it would seem SARS is using a suspense account (unallocated payments) to charge interest on a tax type basis when in fact on a payment basis there is no liability though the OTO would have to enquire and confirm this from SARS.
43. It is submitted that taxpayers are prejudiced when proper allocation of their payments are not done by SARS timeously. It is SARS' duty to ensure that taxpayers' accounts are maintained, as provided for in section 165(1) of the TAA. This would include the proper and timeous allocation of payments made by taxpayers.
44. Though we accept the enormity of the task of allocating payments to so many different tax types, the law in section 166 of the TAA allows SARS to do so and there should be no instance where amounts paid lie unallocated yet a debt to SARS is accruing interest.
45. In practice, taxpayers are experiencing that SARS re-allocate payments originally made after the fact for skills development levy (SDL) and unemployment insurance fund (UIF) in order to net off PAYE reconciling items resulting from journal entries being passed in the EMPSA. This results in penalties and interest being levied/raised on the SDL and UIF shortfalls that are being fictitiously created by the journals.
46. 70% of the respondents in the survey confirmed that they have experienced the aforementioned, either themselves within their business or via a tax client's payroll, within the last year.

#### Legal concerns

47. Section 166(1) of the TAA provides that SARS may allocate payment made in terms of a tax Act against an amount of penalty, interest or the oldest amount of an outstanding tax debt at the time of the payment.
48. Hence, SARS may only re-allocate a payment made by the taxpayer on the date that the payment is received and provided there is an older outstanding tax debt, penalty or interest at that specific time when payment is made.
49. The SARS External Guide to Managing your SARS Employer Account states that:

*“Due to the FIFO payment allocation rule, a L000000 PRN payment may be allocated to an older transaction year since the employer may not have realised that older outstanding balances exist. The employer therefore has to identify to which outstanding balance the payment was allocated. The employer can view the current allocation history online or at the nearest SARS branch. Thereafter, the employer can request the specific tax periods and outstanding balance amounts he/she would like to have paid.” (own emphasis)*

#### EMPSA refund reversal and set-off

##### Findings

50. The survey confirmed the prevalence of the SARS practice to **“clear out”** or nullify tax refunds lying in favour of the taxpayer on the SARS account through the use of journals.



51. At least **60%** of the respondents experienced this within the last year.
52. Only 7% of respondents were notified with **93%** of those respondents experiencing such **clear out of a tax credit without any SARS notification.**
53. Furthermore 66% of the respondents' noted that no description or a vague general description is provided when the tax credit on the EMPSA is cleared out. Such "adjustments" are therefore difficult to trace and even more challenging to resolve/clear.

#### Legal concerns

54. It is submitted that the clearing out of tax credits results in refunds being cancelled by journal, without any assessment process in law being followed and therefore the legality of assessment by mere journal is highly questionable.
55. In our view a journal should only be a consequence of recording or correcting another lawful process such as an issued additional assessment, lawfully raised penalty/interest or taxpayer instructed or SARS communicated allocation on the taxpayer account.

#### Penalties from EMPSA refund reversal and set-off

##### Findings

56. A further concern is that even when improper journals are reversed, any resultant calculated penalties and interest are not always reversed concurrently, which results in an incorrect liability statement which affects any refund due.
57. In this regard, **11%** of the respondents confirmed that a **penalty journal** is put through the EMPSA, despite the fact that **SARS incorrectly allocated the payments.**

#### Impact and cost burden to business

##### Findings

58. The above account maintenance challenges result in **significant cost to taxpayers** in managing their tax accounts properly and in extreme instances, especially in PAYE, some of these journals equate to multiple pages for a single period.
59. To meet this growing burden, **68% of MIB** respondents have a **dedicated resource** or alternatively set such function as a KPI for an internal resource to review and reconcile the EMPSA on a regular basis, due to the frequent changes thereof and the risk it creates.
60. Such system generated movements on the EMPSA can change a taxpayer's compliance status overnight, which artificially results in the creation of tax liabilities and affects the taxpayer's Tax Clearance Certificate (TCC) due to PAYE non-compliance.
61. From the survey performed it is estimated that almost **1 500 businesses** whose TCCs were **rejected are negatively impacted** in doing business, as they could not tender or in certain circumstances, actually lost a tender due to unexplained journals.



62. Members have noted historically that no communication accompanies journals passed by SARS, which in many instances equate to either assessment by journal or allocations of intent not expressed.
63. The survey found that only **1% of respondents** confirmed that **SARS always provide reasons** for the reconciling items being passed as journal entries within the EMPSA, either automatically or when a specific request for reasons/explanation is submitted to SARS.
64. This leaves mostly 99% of taxpayers with uncertainty as to why EMPSA journals have been passed through their account.
65. This lack of communication and clarification results in wasted additional cost of continuous follow up in trying to resolve the account discrepancies.

### **Employment Tax Incentive (ETI)**

66. For employee tax purposes, employers have to submit a monthly EMP201 (i.e. a payment declaration) in which the employer declares the total payment together with the allocations for PAYE, SDL, UIF and/or ETI. A unique PRN number will be pre-populated on the EMP201, and will be used to link the actual payment with the relevant EMP201 payment declaration and the EMPSA.
67. Employers are required to submit an EMP501 bi-annual declaration (i.e. interim and annual basis), which reconciles the taxes collected from employees, ETI credits claimed, the monies paid to SARS and the total tax value of employees' tax certificates, for the respective periods.
68. The survey found that **53% of the respondents** indicated that the total ETI credits claimed per the EMP501 reconciling declaration **does not equal to the total ETI credits** per the EMPSA for the same interim or annual period.
69. Furthermore **interest and penalties** may arise when the EMP201 monthly employer declaration or the EMP501 bi-annual reconciling declaration is compared with the EMPSA. If the actual ETI credits claimed against PAYE on a monthly basis per the EMP201 and/or EMP501 are reflected as too high when compared with the EMPSA, it results in the underpayment of PAYE as the PAYE had been reduced by too many ETI credits – resulting in interest and penalties.
70. Respondents to the survey that actually claim ETI credits confirmed that **such penalties and interest** is levied **63% of the time**.
71. This results in taxpayers having to incur wasted additional cost to dispute these differences and penalties in order to reconcile the EMPSA.

### **Resolving EMPSA issues**

#### **Findings**

72. The SARS Service Charter states that:



*“If you correspond with SARS we will endeavour to respond to a Tax, Customs or Excise query within 21 business days of receipt thereof.” (own emphasis)*

73. Only **11%** of the respondents indicated that they receive a response from SARS within **21 days** after requesting SARS to resolve an EMPISA issue.
74. Of even more concern is that **25% of respondents** indicated they received **no communication or response** from SARS after the taxpayer or practitioner has actioned a request to SARS to resolve the unexplained journal.

#### Operational concerns

75. Respondents noted that SARS seldom provide reasons for not adhering to their timeline, and when taxpayers follow up, the EMPISA query is logged anew (as an escalation), resetting the 21 business days again. In many other instances the EMPISA query is closed by SARS, without any resolution thereof – this is also confirmed via remarks in our survey.
76. The SARS practice of deferring these matters to branches and the dispute resolution process raises much concern as this is a considerable additional cost and time wastage. It also puts further strain on these SARS channels to resolve matters which proper should be addressed in these forums, which by SARS’ own admission, are under significant resource strain.