Dear Catinka

SUBMISSION: DRAFT FATCA PUBLIC NOTICE ISSUED IN TERMS OF SECTION 210(2)

1. Please find below the SAICA Tax Administration sub-committee’s (a sub-committee of SAICA’s National Tax Committee) response to the request for comments on the draft FATCA Public notice issued in terms of section 210(2) of the Tax Administration Act 28 of 2011 (“TAA”).

Implementation date

2. The draft notice imposes a serious consequence on the actions of taxpayers in very complex circumstances, which includes very onerous and extensive administrative obligations imposed upon them.

3. However, notwithstanding this complexity, CSARS has proposed using the comments procedure as envisaged in section 4(1)(b) of the Promotion of Administrative Justice Act, 2000 and not a public inquiry and comments procedure per section 4(1)(c) which would have been more appropriate and administratively fair in the current instance.

4. In addition, a mere two weeks’ notice has been given to comment on the draft notice.

5. We are of the view that this urgency was driven by a misguided understanding that such penalty regime is necessary to give effect to the Intergovernmental Agreement (“IGA”) reporting as ending on 30 June 2015, the latter which has no such requirement.

6. In light of the fact that the IGA proposes a transitional period to correct data, it is submitted that the penalty as proposed in its current form should be reconsidered.
until after a proper consultation process has been engaged upon with the relevant affected institutions.

Penalty - General

7. It is submitted that the penalty regime, as proposed, is inappropriate as the fixed amount penalties were not envisaged for this kind of reporting.

8. It is further submitted that a new penalty regime dealing with not only reporting penalties under FACTA, but future similar OECD country reporting requirements in compliance with the Common Reporting Standard (‘CRS’), should be inserted into the TAA.

9. This could be achieved by a legislative amendment in the current TALAB 2015 which would result in an appropriate penalty regime before the end of the current calendar year.

10. This would also give SARS and the legislature an opportunity to consider an appropriate penalty regime for the withholding tax reporting regime, which itself is in dire need of proper consultation.

11. This further supports our view that the current proposal is premature and should be deferred until after proper public consultation has been undertaken by CSARS.

Penalty scope

No distinction in seriousness

12. Firstly, the fixed amount penalties include offences which are minor and major with no differential in penalty.

13. This results in the penalty being totally disassociated with the administrative non-compliance which for example could merely have been for the oversight of minor personal details.

Duplication and double jeopardy

14. The proposed penalty regime also seems to be duplicating transgressions for a single non-compliance act. For example a return with errors will be a transgression under 2.1., 2.4 and 2.5 or 2.6, depending on the facts.

15. Does this result in three penalties or only a single penalty? Per sections 210 & 211 of the TAA, read with the proposed draft schedule, it would seem that each incidence as listed in paragraph 2 of the Schedule would attract a penalty separately even if there was only a single transgression, namely an incomplete return.
Each account or various accounts

16. It is also unclear whether a penalty will be triggered by each account’s on-compliance as an incidence, which it seems to do, rather than a penalty in respect of a single return which is incomplete or erroneous in respect of multiple accounts.

17. It should be expressly stated that the non-compliance event is the return in section 26 of the TAA, as an administrative penalty cannot and should not be levied on each account. That would be akin to for example levying a penalty on each of not providing a contact number and not updating your address rather than a single penalty for not updating your personal particulars.

Types of non-compliance

18. It is submitted that the current penalty regime incidences are ill considered and should only apply to late submission of information as minor non-compliance and wilful non-compliance or wilful refusal to remediate as major non-compliance.

19. This seems to be more appropriately reflected in the contents of the IGA and what it wants to achieve.

20. This distinction should then be represented by a suitable penalty table.

Quantum

21. The penalties per the section 211 table are imposed on the financial reporting institution’s income. This is totally disproportional.

22. For example, the bank has only one US account holder of say R500 000, how does this relate to the banks income of more than R50 million on which the fixed amount penalty is based?

23. This penalty table was designed to penalise a taxpayer’s administrative non-compliance in respect of its own affairs and not for non-reporting of personal details of a non-resident client to a foreign government.

24. Any penalty table implemented for reporting should reflect the seriousness of the taxpayer’s transgression and possible harm to the fiscus.

25. This problem would also be rectified if the penalty was limited to the two instances as proposed.

Transitional matters

26. There are also various transitional matters that are unclear.
Pre-existing account errors

27. The IGA allows for pre-existing accounts to be reviewed up and until 30 June 2016. Yet the penalty regime makes no provision for this as even the IGA contemplates that the pre-existing information may be incomplete and likely to contain errors.

28. This directly contradicts the IGA in imposing penalties for the interim period whereas the IGA merely imposes an obligation to re-determine the status of the account.

29. This also supports our view that the current penalty regime is premature and should only apply after 30 June 2016, should it be applied to matters other than late submission or wilful non-compliance.

Timing of non-compliance

30. It is also unclear when a taxpayer will be non-compliant, i.e. from the date of the notice or the date of the action.

31. If the former, then even with the proposed date the penalty cannot apply to submissions done prior to the notice.

32. If the latter, it would be retrospectively applying the penalty to non-compliance that did not exist when the return was submitted.

Penalty notice

33. To date, SARS has been issuing the penalty assessments as notices with income tax assessments as provided for in section 214 of the TAA.

34. As these penalties do not deal with the taxpayers own tax affairs, it is unclear how the penalty notice will be issued and what detail it will contain to ensure administrative fair procedure i.e. that the taxpayer is aware of why the penalty was levied.

35. This is especially relevant if SARS persists with the current list of incidences for which the penalty is proposed.

Yours faithfully

Dr Beric Croome
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