Dear Nomfanelo and Adele,

RE: CALL FOR COMMENTS ON DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL 2014.

We refer to the call for comments on the above-mentioned document. Set out below please find the SAICA National Tax Committee’s submission. Our comments are arranged such that they follow the sequence of the draft Bill. In our comments we will use “DTALAB” when we refer to the draft Tax Administration Laws Amendment Bill, 2014.

GENERAL COMMENT

We have deliberately tried to keep the discussion of our submissions as concise as possible, which does mean that you might require further clarification. In this respect, you are more than welcome to contact us in this regard.

As always, we thank National Treasury and SARS for the on-going opportunity to participate in the development of the SA tax law.
CLAUSE BY CLAUSE SUBMISSIONS

Clause 1: Amendment of section 3 of the Income Tax Act

Problem statement
Subsection (4) of section 3 lists the decisions by the Commissioner that are subject to objection and appeal. The proposed amendment omits paragraphs 20(1)(a) and (2), 20A(1) and (2) from the existing enactment in item (e).

Paragraph 20(2) of the Fourth Schedule to the Income Tax Act is not repealed (which we welcome) and the exercise of the Commissioner's discretion in this regard should be subject to objection and appeal in terms of section 3 of the Income Tax Act. To limit the discretion of the Commissioner to remit paragraph 20 underestimation penalties to the 'exceptional circumstances' contained in Chapter 15 of the TAA is unreasonable, given the multiplicity of legitimate circumstances that may in practice give rise to an underestimation. This is because paragraph 20 has its own procedure for remittance of such penalties. The deletion would result in the review of such a penalty not being subject to any internal remedy.

Submission
The decision to remit a penalty in terms of paragraph 20(2) should continue to be subject to objection and repeal. Paragraph 20(2) should not be omitted from section 3(4).

Clause 3: / Section 64K of the of the Income Tax Act

Problem statement
The wording of section 64K(1)(d) is ambiguous in that as it is currently worded it suggests that it is only if a dividend is exempt from the dividends tax that a dividends tax return need be submitted. Unfortunately the wording of the proposed amendment reinforces this ambiguity.

Section 64K(1)(d) contains duplication in that both sub-paragraphs (i) and (ii) contain a requirement for the person paying a dividend to submit a return, although the requirements differ to some extent. This is likely to lead to confusion.
Submission
The provision should simply impose a reporting obligation on a person paying a dividend or a person that receives a dividend that is exempt in terms of Section 64F or Section 64FA.

Clause 4: Inserting section 64MA in the Income Tax Act

Problem statement
Section 64MA deals with refunds to companies and is therefore more closely related to section 64L. Section 64M relates to refunds to regulated intermediaries.

Submission
We suggest that the proposed section 64MA be renumbered to section 64LA.

Problem statement
The language used is a little loose in that it provides that the tax paid is refundable if the declaration and written undertaking is subsequently obtained by the company. The implication is that all the tax paid may be refundable notwithstanding that only a portion is not subject to the tax.

Submission
The provision should utilise wording similar to that adopted in section 64L, “so much of that amount as would not have been payable …”

Problem statement
Section 64L(2) only allows a company to claim a refund of dividends tax overpaid by way of set off against other dividends tax withheld in the first year of receiving the declaration. Only then can a refund be claimed from SARS. This is impractical in many cases as it may be clear that no dividends tax will be withheld in the ensuing year, e.g. in a situation where the only shareholder is exempted from the dividends tax.

In such a scenario, the company should be able to claim the refund from SARS on receipt of the declaration. Alternatively, the company should be allowed to set off the dividends tax refund against other taxes payable to SARS, e.g. normal tax, VAT or employees’ tax.
Submission
Companies should be able to claim a refund of dividends tax on receipt of a declaration where it is likely that no dividends tax will be withheld within the ensuing year.

Problem statement
In 2013, the dividends tax rate for oil and gas companies was reduced to nil with retrospective effect. However, the dividends tax provisions do not make provision for any refund process in this regard.

The result is that every shareholder would have to go through the arduous process of claiming a refund in terms of section 190 of the Taxation Laws Amendment Act.

Submission
A refund process for dividends paid out of oil and gas profits as a result of the reduction in the tax rate should be introduced.

Clause 7: Paragraph 18 of the Fourth Schedule to the Income Tax Act

Problem statement
Paragraph 18 of the Fourth Schedule provides for an exemption from the payment of provisional tax. The proposed deletion of exemption available to individuals over the age of 65 with a taxable income aligns of the treatment of natural persons (whether or not under the age of 65 years). It has the result that those pensioners only earning interest, foreign dividends and rental will now have to pay provisional tax if their taxable income exceeds the tax threshold.

Submission
Pensioners find it difficult to cope with the requirements of the provisional tax system and therefore should continue to enjoy the exemption contained in paragraph 18(1)(d).

Clause 8: Paragraph 19 of the Fourth Schedule to the Income Tax Act

Problem statement
The proviso to subparagraph (1)(e)(ii) of paragraph 19 deals with the instance where SARS issued the provisional taxpayer with a return for the payment of provisional tax. It allows the taxpayer to elect to use as ‘the latest preceding year of assessment’ indicated on the return for purposes of the basic amount. The basic amount is necessary for the limit it sets for the estimate of the first payment and when penalties are considered.
We don’t agree with the explanation in the Explanatory Memorandum that taxpayers can “argue that the 14 day rule cannot be applied.” The reason for the deletion of the proviso is on our view not correct. Surely when a taxpayer requests the provisional tax return (IRP6) on the efiling system, the return is issued by SARS (as required by the proviso) and the argument that the 14 day can’t be applied is invalid.

Submission
The proviso, in essence the election available to the taxpayer, should be retained in its current form. It proves certainty for the taxpayer and allows for a more recent year of assessment to be used when the penalties are determined.

Clause 9: Paragraph 20 of the Fourth Schedule to the Income Tax Act

Problem statement
In terms of the current wording, of paragraph 20 of the Fourth Schedule, a penalty for the underestimation of provisional tax is determined without taking into account any rebate that the taxpayer may be entitled to. This results, for instance, in a taxpayer that underestimated his or her income, but still has a taxable income of less than the threshold being subjected to the penalty where no tax is due. Other taxpayers are being penalised on an amount in excess of the tax on the amount underestimated.

We welcome the amendment that proposes to take “into account any amount of a rebate deductible” for the purposes of the penalty. The provision refers to an amount of a rebate deductible from normal tax payable in terms of the Act.

Submission
It should be brought in line with the rebate provisions to distinguish it from deductions in determining taxable income.

Clause 10: Repeal of paragraph 20A of the Fourth Schedule to Income Tax Act

Problem statement
Our comment to clause 1 (section 3 of the Income Tax Act) is also relevant here. The repeal of paragraph 20A(2) removes the grounds of objection for a late submission on the grounds that there was no intention to evade or postpone the payment of provisional tax.
Submission
It is submitted that the Commissioner must still be able to remit a penalty levied for the failure to submit a provisional return on the basis that there was no intent to evade or postpone the payment of provisional tax. Paragraph 20(2) should be extended to include this and this should be subject to objection and appeal.

Clause 26: Section 27 of the Value-Added Tax Act

Problem statement
The proposal is to delete “Category F” as a tax period. Vendors who fall within this category will now have to move to a new category, either Category A or Category B. In terms of the DTALAB it is proposed that the amendment will apply to tax periods commencing on or after date of promulgation. This may be unfair to such taxpayers and a longer notice period should be granted.

Submission
It is submitted that the effective date should be postponed to a later date in 2015.

Clause 30: Section 45 of the Value-Added Tax Act

Problem statement
After the proposed amendment SARS would not have to pay interest to vendor until the vendor has submitted in writing to SARS bank account particulars. It seems irrational why the provision should be retained in the circumstances where the taxpayer fails to provide bank account details. It is clearly aimed at instances where the vendor changed bank account details (it can’t apply in all cases as SARS already has the bank detail).

Submission
Section 45(2) should be repealed in its entirety.

Clause 32: Section 30 of the South African Revenue Service Act

Problem statement
The prohibition on the use of the name in section 30(1)(a) perhaps goes too far. Persons should not be prohibited from referring to SARS!
Submission
The prohibition should be limited to the use of the logo or designs.

AMENDMENTS TO THE TAX ADMINISTRATION ACT

General comment
We again emphasize our concern at the lack of separation of powers between legislator and administrator as regards the TAA. SARS drafts, implements and administers this powerful piece of legislation and there appear to be limited checks and balances in place to prevent abuse of powers.

Once SARS faces resistance from taxpayers who are fully entitled to understand the basis on which SARS assesses them, or requests information from them, SARS immediately amends the legislation to prevent taxpayers from asking questions. This is confirmed in the Explanatory Memorandum. This is concerning from an administrative justice and constitutional perspective.

A number of the amendments attempt to allow SARS to unilaterally determine relevance and non-compliance without due engagement with the taxpayer who is entitled to protect and enforce his/her constitutional rights.

Clause 34: Amending section 1 of the TAA

“International tax agreement”

Problem statement
The amendment to the definition of an “international tax agreement” is in our view ultra vires. SARS is purporting to grant itself legislative authority. International tax agreements should be entered into between governments and not between revenue authorities. The purpose of the TAA is to provide SARS with the powers it requires in order to administer the
tax Acts and not to create responsibilities outside of what is provided for within the underlying tax Acts.

This amendment purports to provide SARS with the power to enter into international tax agreements with other revenue authorities, force compliance by taxpayers via the TAA and thereby bypass Parliamentary oversight and the provisions of section 108 of the Act and section 44 of the Constitution, which clearly provides that the legislative authority rests with Parliament and not with the administrator.

In our view this also violates the separation of powers doctrine as SARS is attempting to give legislative standing to its own powers which is rightly the domain of Parliament. If the international tax agreements do not follow due process and become part of a tax Act (usually via section 108 of the Act) the TAA should not be able to enforce them.

**Solution**
The definition of an “international tax agreement” should not be amended, as the existing requirement that it be entered into in terms of a tax Act provides for the requisite checks and balances to be in place before such an agreement forms part of our domestic law and as a result able to be administered under the TAA.

**“Relevant material”**

**Problem statement**
The amendment to the definition of “relevant material” introduces subjectivity into the determination of relevance by allowing SARS to rely on its own opinion and per the Explanatory Memorandum prevent the taxpayer from “unilaterally” deciding whether something is relevant. Instead the amendment allows SARS to subjectively “unilaterally” determine the relevance of a requested item.
Relevance should be determined with reasonable objectivity and based on the facts of the matter. The taxpayer should always have the right to establish the relevance of the requested information and “because SARS said so” is not a valid objective response.

In this regard we refer to R v Katz 1946 AD 71 where the Court referenced Stephens Digest of the Law of Evidence

“Relevant means that any two facts to which it is applied are so related to each other that according to the common course of events one, either taken by itself, or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other.” In Cape Metropolitan Council v Graham 2001 1 SA 1197 (SCA) par 7, even though a delictual matter, the court indicated that foreseeability depends on the “consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations.”

In other words, the question is whether a reasonable person would also foresee the information as being relevant and related to the administration of the tax Act under which SARS is acting, should such relevant person been placed in SARS’ position. The test is therefore objective.

Additional concerns surrounding the principle of legality arise with amendments such as these, where the administrator is the legislator as well as the administrator.

Further concerns around the amendments to section 256 which propose to allow SARS to withhold a compliance certificate if the taxpayer has not provided SARS with requested relevant material exacerbate this problem. The taxpayer is then held hostage to provide information that it truly believes is not relevant and is disputing with SARS in order to be able to carry on conducting its business.
**Solution**

The determination of relevance is an objective process and insertion of the words “in the opinion of SARS” renders it a unilateral decision with severe consequences that flow from the non-provision of the requested information. Such decisions will not promote the constitutional principle of fair and just administrative action.

**“Return”**

**Problem Statement**

The Explanatory Memorandum states that the extension of the definition of “return” is to allow SARS to gather the information required under an international tax agreement however, the amendment is too broad in its application.

The words “or incorporates relevant material requested by SARS” would then arguably include all letters whereby a taxpayer or a third party provides SARS with information under section 46 of the TAA and the remaining references to returns throughout the TAA do not align with this extended definition. There is no prescribed form for section 46 requests, there is no Government Gazette publication of due dates for section 46 requests etc.

**Solution**

We propose that the amendment be worded more accurately to reflect that a request for information for the purposes of compliance with an international tax agreement will be regarded as a return. There will be a prescribed form and due dates declared by public notice which will be consistent with the existing use of the word “return” throughout the rest of the TAA.

Section 26 already requires that third party data be submitted in a “return”.

**Clause 35: Section 3 of the TAA**

**International Agreement**
Problem statement
The existing section uses the term “international agreement” which is not a defined term. The defined term is an “international tax agreement.” It is not clear whether the omission of the word “tax” was an oversight in the initial drafting process or whether section 3 applies in respect of a different category of international agreements.

Solution
We would suggest the insertion of the word “tax.”

Spontaneous exchange of information

Problem statement
The use of the word “spontaneously” seems inappropriate in tax legislation as it implies that no forethought or consideration has been made prior to the decision to share the information with another revenue authority in terms of an international tax agreement. We understand that certain international tax agreements will provide for ad hoc exchanges of information (i.e. not obligate or require that a formal request be made) and if the agreement so allows, SARS should be able to act accordingly. We do however object to the word “spontaneously” given the somewhat nonchalant connotations of the word.

Further the insertion of the words preceding subsections (a), (b) and (c) does not make sense as the exchange of information on a “voluntary” basis can only apply to subsection (a).

Solution
Given that any exchange of information will need to be governed by an international tax agreement and the parameters set out in the agreements will govern what information can be sent, we would suggest that the word “voluntarily” is better suited to meet the objective.

We further suggest that the wording be inserted into subsection (a) as opposed to the opening words as SARS will not be able to “spontaneously/voluntarily” collect debts for other revenue
authorities (subsection (b)) as this is strictly governed by section 185 which requires a request by the foreign authority, and also cannot “spontaneously/voluntarily” serve documents without the foreign revenue authority requesting such assistance (subsection (c)).

The use of the word ‘spontaneously’ is considered inappropriate in a statute as it implies impulsiveness.

**Submission**: the word ‘spontaneously’ should be replaced with ‘unilaterally’.

**Clause 37: Section 34 of the TAA**

There is little rationale to the extension of the definition of a tax benefit to tax evasion. While we deduce that the amendment is to address the concern that the proposed reportable arrangement relating to cross-border service fees would not be valid without such an extension, we submit that the reportable arrangement mechanism is not an appropriate tool to address tax evasion.

Any tax evader (who would be the participant and would have the reporting obligation) is not going to report that they are evading tax. As such, the extension of a tax benefit to tax evasion will have little or no effect.

**Submission**: the proposed extension of a tax benefit to tax evasion should be scrapped.

**Clause 38: Section 35 of the TAA: classification of arrangements as ‘reportable’**

This wording of the proposal creates a conflict between subsections 35(1) and (2) arrangements. The wording of both subsections would commence: ‘An ‘arrangement’ is a ‘reportable arrangement’ if…’ The subsections should be combined into one subsection specifying when an arrangement is considered reportable.
(The proposed wording of subsection 35(2) implies that it is only once the Commissioner has exercised his discretionary power to be satisfied that a person is a ‘participant’ in an ‘arrangement’ that the ‘arrangement’ will become a ‘reportable arrangement’.

Where the Commissioner lists an arrangement as a reportable arrangement in terms of section 35(2), the Commissioner should be required to identify the participant in the notice. This is because it is the participant that has the reporting obligation. However, it is not always possible to identify the person that is assumed to have derived the tax benefit in the subjective opinion of the Commissioner. Taxpayers should not be left to discern the state of mind of the Commissioner in exercising his discretion.

**Submission:** the notice should be required to identify the participant of any listed reportable arrangement.

**Clause 39: Section 36 of the TA A**

It is proposed that the Commissioner may list an arrangement as an excluded arrangement if it is not likely to lead to a tax benefit. The effect of this when read with the amended section 35 is that any arrangement that meets the definition of a reportable arrangement in terms of that section can never be listed as an excluded arrangement as a tax benefit is generally a prerequisite for it being a reportable arrangement in the first place. By way of illustration, the *de minimis* excluded arrangement would not be valid under the proposed amended provision as there would still be a tax benefit.

**Submission:** an excluded under section 36(4) arrangement should continue to refer to an undue tax benefit or should be amended to refer to a material or significant tax benefit.
Clause 40: Section 38 of the TA A

It is not clear if it is intended that arrangements that become reportable arrangements subsequent to the arrangement having been entered into should be reported, e.g. where a new reportable arrangement is listed by the Commissioner in terms of section 35(2). If so, this would place an onerous burden on participants in relation to arrangements which may have been concluded far in advance (and which may in fact no longer exist) and where the required information to be reported may no longer be available.

Submission: firstly, the amendments to section 37 should only operate prospectively to arrangements entered into on or after the date of promulgation of the TALAA. Secondly, the reporting obligation should not apply to any arrangement that becomes a reportable arrangement by publication of a notice referred to in section 35(2) and which was entered into prior to that date.

Clause 43: Amending section 46 of the TAA

Problem statement
The insertion of the words “in the format” in section 46 is problematic. The Explanatory Memorandum indicates that SARS is seeking to be able to tell the taxpayer in what format (i.e. electronic or printout) SARS should receive the requested information.

The words “in the format” are too broad in this case however, as it refers not only to physical format of the documents (i.e. electronic versus hard copy) but could also be interpreted to mean that SARS can give direction to the taxpayer regarding how the information must be provided and or converted (e.g. in an Excel spreadsheet) despite the manner or format in which the information is ordinarily prepared and kept by the taxpayer.

For example:
The taxpayer maintains an ERM system that provides reports in PDF which is how the taxpayer retains his reports. The insertion of the words “in the format” could be interpreted to mean that SARS can tell the taxpayer to convert his format into a format as required by SARS (i.e. Excel or tif). Forcing conversion of data from the format in which the taxpayer keeps it to the format in which SARS may request would be onerous and open to manipulation and also increase the cost of compliance to taxpayers. When data is converted there is also a risk of corruption or lost data.

**Solution**
We suggest that the wording be restricted by providing certainty to the taxpayer that SARS can only request data in a particular format if that is the format in which the taxpayer already keeps the data. The taxpayer should not be expected to create the information as it would then no longer constitute original information.

**Clause 44: Amending section 50 of the TAA**

**Problem statement**
This amendment seeks to allow another person to make application to the court on the authority of a senior SARS official to institute an inquiry. The Explanatory Memorandum explains that this is to allow for the senior SARS official not to personally appear before the judge. The revised section also does not reflect that the person appearing needs to a SARS official at all.

The institution of an inquiry is a serious matter and the delegation of this power to a SARS official or even another party entirely is concerning. While it is still the responsibility of the judicial official to ensure that the case has been properly established to justify the institution of an inquiry, there are certain instances when a taxpayer’s rights are negatively impacted to such a degree that higher degree of oversight is required by SARS hence the requirement that a senior SARS official attend.
There is no right against self-incrimination during an inquiry; as such an inquiry should only be instituted where a proper review of the grounds has taken place by an appropriately senior official.

The concern is that these applications for inquiries will merely be rubber-stamped by a senior SARS official. The requirement for the senior SARS official to attend creates an additional “sanity-check” before such an application is launched.

Solution
We propose that the section remains in its current format.

Should this amendment be made, we would suggest that the amendment require that the authorisation/delegation be in writing whereby the senior SARS official confirms that the inquiry is necessary and justified and such authorisation/delegation must presented to the judicial officer making the order.

Clause 46: Amending section 164 of the TAA

Problem statement
The amendments to section 164 are welcomed as it is appropriate that the merits of the taxpayer’s dispute be considered. The concern is whether a subjective or objective determination of the merits will take place and by whom that determination will be made. Any subjectivity should be removed from the process to enable an objective review of the matter to take place and a substantively fair decision to be made regarding suspension.

Solution
Clarity on how the merits will be considered would be appreciated.
We would also suggest that the decision under section 164 should be subject to objection and appeal thereby giving the taxpayer a remedy other than a High Court review if they are of the opinion that rejection or revocation of the suspension is invalid.

We acknowledge that the merits of a taxpayer’s case for disputing an assessment are a relevant consideration and this is supported by section 164(5).

However, we are not convinced that the amount of tax involved is a relevant consideration. This is a double edged sword for the taxpayer. If the tax involved is relatively small from the taxpayer’s perspective, SARS could consider this to be a factor weighing against suspension of payment. However, where the tax involved is significant from the perspective of SARS, this may also be a factor weighing against the taxpayer.

**Submission:** the amount of tax involved should be removed as a factor to be considered.

The exercise of the discretion to suspend payment is not subject to objection and appeal in terms of section 104. As such, the taxpayer has no internal remedy and would have to pursue the matter by review under PAJA. In the interests of treating taxpayers fairly, all discretions exercised by SARS as part of the dispute process should be subject to objection and appeal.

**Submission:** any decision under section 164 should be subject to objection and appeal.

**Clause 47: Section 184 of the TAA**

It is noted that the effective date of this amendment is 1 October 2012. The amendment imposes additional burdens and/or impinges on vested rights of the affected persons. As such, it is arguable contrary to the rule of law and unconstitutional.

**Submission:** the amendment should take effect only from the date of promulgation.
Clause 53: Section 240 of the TAA: non-registration / deregistration of registered tax practitioners

The proposed subsection 240(4) is a contravention of the principle that a person is innocent until proven guilty and should be scrapped.

Submission: the ‘or’ in section 240(3)(a) should be deleted.

A serious tax offence should be defined by reference to the specific offences in chapter 17.

The suspension of registration of a tax practitioner where criminal proceedings have been instituted but not finalised is too onerous and may be unconstitutional. It amounts to the suspension of a tax practitioner’s source of income and can have severe financial implications in situations where the tax practitioner may ultimately be acquitted. The proposal should accordingly be withdrawn.

Clause 54: Section 240a of the TAA

The proposed amendment provides that each of the statutory recognised controlling bodies referred to in section 240A(1) must submit a list of its members, to whom the provisions of section 240(1) apply, to SARS. The intention is that SARS can then use this information to verify if these members are duly registered as tax practitioners.

Solution

It is suggested that it would be better for SARS to provide the detail of members of the body who are registered as tax practitioners to the body. The body can then confirm that the individuals are members of the body.
**Clause 55: Section 248 of the TA A**

It is noted that the effective date of this amendment is 1 October 2012. The amendment imposes additional obligations on business rescue practitioners. As such, it is arguable contrary to the rule of law and unconstitutional.

**Submission:** the amendment should take effect only from the date of promulgation.

**Clause 57: Amending section 256 of the TAA**

**Problem statement**

Section 256 of the TAA, as it currently stands, sets out clear circumstances in which a TCC would not be issued to a taxpayer, namely an outstanding tax debt or an outstanding return. This was the purpose of the TCC.

The proposed amendments seek to insert an additional reason for the refusal to confirm a taxpayer's status as "compliant". A taxpayer will only be confirmed as compliant if, in addition to there being no outstanding tax debt or return, there is no "outstanding request from SARS to provide relevant material if, in the opinion of the SARS official, there is no just cause for delay."

TCCs or confirmation of the taxpayer’s tax compliance status plays an important role in our economy and are, almost without exception, a requirement when a person submits a tender or bid for doing business with government and with larger companies.

There are numerous scenarios that can present themselves and reflect a request for relevant material as being outstanding thereby jeopardising the taxpayer’s financial position and business continuity. For example:
• The request may have an extended due date or an agreement has been reached between the taxpayer and SARS as to when the information is due. This may reflect as outstanding on SARS systems.
• The taxpayer and SARS may be disputing the relevance of the information requested.

The proposed amendment would provide SARS a subjective basis on which to refuse a confirmation of compliance certificate. This may result in the taxpayer being forced to provide information that it may otherwise not be legally obliged to provide, in order to minimise the economic loss that will result from not being able to move funds or apply for tenders.

The legislation is not clear as to whether the request for relevant information must relate to the taxpayer itself or whether it can be in the taxpayers’ capacity as a third party. Third parties are inundated with requests for information and to apply the provision to those parties where that taxpayers’ compliance status is not in question would be inequitable.

The legislation is also not clear on whether the information requests must arise after the promulgation of the Act or whether those already in place will immediately trigger a non-compliance status for the taxpayer.

The new provision also allows SARS to alter the compliance status of the taxpayer if SARS is of the view that the taxpayer is no longer compliant. The provisions do not require SARS to notify the taxpayer and allow for remedy of the alleged non-compliance. This will seriously jeopardise many taxpayers who are reliant on TCC’s in order to operate.

It is also not clear if the new compliance certificate replaces both the certificate of good standing and the tender clearance certificate.
Solution

Subsection (c) should not be inserted as this will have a profound and immediate impact on the economy and will prevent many small and medium businesses which rely on tenders and government contracts from operating.

Clarity is required on the alteration of the certificate as they are currently valid for one year from the date of issue. This creates certainty for the taxpayer and its clients.

We understand that tax clearance certificates are being withheld for immaterial amounts of outstanding tax. SARS should not be concerned with small outstanding amounts of tax that could arise for any number of reasons. Many of these amounts go back years and SARS is unable to substantiate what they relate to. The current limit of R100 is far too low.

Submission: section 256(3)(a) should incorporate a materiality limit of R5 000.

The inclusion of outstanding requests for relevant material is a concern for a number of reasons.

Firstly, refer to our comments on the definition of relevant material. We are concerned that this provision could be used to force taxpayers into providing material which they are not obliged to provide. Taxpayers should be free to resist information requests where they have reasonable grounds for doing so without the duress of having a tax compliance certificate withheld.

Secondly, the introduction of discretion in this regard is an about turn from the position at the time of drafting of the TAA to minimise subjective discretions. Taxpayers are now left at the whim of a SARS official who decides whether or not there is just cause for not having provided it.
To our knowledge, most requests for relevant material (and the status thereof) are not recorded on any system of SARS and there is therefore no reliable way of determining the status of such requests.

Finally, there is no internal remedy available where a SARS official exercises the discretion in this regard and a taxpayer would have to take the matter on review in order to challenge the decision.

**Submission:** the inclusion of outstanding requests for relevant material should be scrapped.

**Clause 58: Section 270 of the TA A**

While we welcome the amendment to section 270(6D) to shift the remittance of understatement penalties for employees’ tax to the same considerations as apply for VAT, this does not go far enough. Additional tax on a number of other taxes also only applied in the circumstances of evasion, e.g. securities transfer tax, UIF, SDL, while additional taxes did not apply at all in the case of dividends tax and mining royalties.

**Submission:** further amendments are required to section 270(6D) to appropriately address understatement penalties on all taxes.

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

Yours faithfully

Piet Nel CA(SA)

**PROJECT DIRECTOR: TAX**

The South African Institute of Chartered Accountants (SAICA)