Dear Madam

SAICA COMMENTS: THE RIGHT OF TAXPAYERS OR THEIR REPRESENTATIVES TO ATTEND SARS INTERNAL COMMITTEE MEETINGS

We refer to the meeting held on 4th May 2009. Set out below please find the SAICA National Tax Committee’s submission on the issues discussed during this meeting.

1) DO TAXPAYERS / TAXPAYER’S REPRESENTATIVES HAVE A RIGHT TO ATTEND SARS INTERNAL COMMITTEE MEETINGS?

Taxpayers have the right to just administrative action in accordance with section 33 of the Constitution of the Republic of South Africa Act, 108 of 1996. Section 33 provides that every taxpayer has a right to administrative action that is lawful, reasonable and procedurally fair. The Promotion of the Administrative Justice Act, Act 3 of 2000 (“PAJA”) was enacted to give effect to section 33 (3) of the Constitution.

Section 3 of PAJA prescribes the requirements for administrative action to be procedurally fair. It is accepted that under section 3(3) of PAJA the administrator, which in this case would be the Commissioner: SARS, may give a person affected by a decision an opportunity to:

- obtain assistance and, in seriously complex cases, legal representation;
- present and dispute information and arguments; and
- appear in person.

It would appear therefore that the Commissioner: SARS may be entitled to decline a taxpayer’s request to appear at an internal SARS committee meeting. However, the Commissioner: SARS will then have to show that there are sufficient procedures in
place to ensure that the procedures whereby, e.g. interest, additional tax and penalties are imposed are procedurally fair.

The following are reasons why we believe taxpayers should be allowed to attend internal meetings:

a) To ensure fairness and clarification of the facts from both sides (removes bias).

b) This will save time at objection and appeal stage.

c) Misunderstanding/misinterpretations can be avoided.

d) SARS has monetary targets set by the Minister of Finance. These may result in bias.

e) The number of matters referred to court will be greatly reduced.

f) Taxpayers should have an opportunity to dispute the Commissioner’s information and arguments. PAJA does not compel the Commissioner to grant the taxpayer an opportunity to contest the information on which he relies but by not doing so indicates that the procedure followed may be unfair.

g) The decision to impose a maximum penalty under the Income Tax or VAT Act may have dire financial consequences for a taxpayer.

h) By attending the meetings, the taxpayer will have a better understanding of why the Commissioner is seeking to impose additional tax or penalties. A letter to the taxpayer cannot convey the same degree of understanding.

i) Likewise, the Commissioner will gain a better understanding of the taxpayer’s demeanour and reasons for his or her conduct.

j) To allow the taxpayer to attend the meeting would ensure that the procedure adopted in imposing interest or penalties is, and is perceived as procedurally fair, as required by PAJA.

2) AT WHAT STAGE SHOULD THE ATTENDANCE BE ACCOMMODATED?

a) As a minimum, SARS should allow a taxpayer to appear at the Penalty and Interest Committee meeting where SARS decides whether to levy additional tax on the taxpayer. We propose that this practically be tested within the LBC environment before expanding to other areas.
b) At the stage, SARS would have issued a letter of intention to assess and the taxpayer would have written a response letter.

c) All the facts can be tabled here.

d) The fact that taxpayers can be present at the assessment stage gives the committee more opportunity to make an objective decision and informed decision.

3) ADMINISTRATION OF ATTENDANCE AT MEETINGS.

a) An open discussion is better than formal presentations as long as the Committee is given adequate documentation (that is, letter of intention to assess and the taxpayer response).

b) The purpose of the taxpayer’s attendance should be to:

- agree the facts,
- discuss any difference in interpretation of the law (brief).

c) The Committee should have full authority to decide when they have heard enough facts to make a decision.

d) It will be prudent for SARS representatives to deliberate privately but their decision needs to be minuted and those minutes provided to taxpayers and their representatives in case the matter is referred to court.

e) Section 33 of the constitution read together with the provisions of PAJA requires that reasonable prior notice be given to taxpayers and taxpayers should therefore be afforded reasonable advance notice of penalty and interest Committee meetings. It is our understanding that SARS regards a period of two weeks as reasonable where SARS requires information from a taxpayer subjected to an audit. Taxpayers should be afforded a period of two weeks within which to prepare for an appearance at the penalty and interest Committee meeting where additional tax is being considered.

f) We propose that there should be a time limit allocated for the taxpayers presentation at the committee meeting, failing which will result in very few matters will be finalised at the penalty and interest Committee meetings where additional taxes are being considered.

Please do not hesitate to contact me should you wish to discuss the above.
Yours faithfully

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