Dear Sir

PROVISIONAL TAX: FURTHER COMMENTS

I refer to your letter dated 26 September 2008 in this regard. I believe it is useful at the outset to summarise the current legislative structure in the Fourth Schedule relating to the second provisional tax payment.

- Paragraphs 19(1)(a) and (b) require taxpayers to submit an estimate of the total taxable income which will be derived in respect of a year of assessment.

- Paragraph 19(2) allows the Commissioner to make an estimate if a taxpayer does not submit an estimate.

- Paragraph 19(3) allows the Commissioner to call on a taxpayer to justify an estimate and increase the estimate if dissatisfied with it.

- Paragraph 20 imposes additional tax on an estimate that falls below 90% of the actual taxable income for the year of assessment and the basic amount applicable to the estimate. The Commissioner may waive the additional tax if he is satisfied that the estimate “was not deliberately or negligently understated and was seriously calculated with due regard to the factors having a bearing thereon”. A decision not to waive the additional tax is subject to objection and appeal.

- Paragraphs 21 and 23 impose the obligation to make a provisional tax payment in respect of the estimate of total taxable income.

It is clear from the provisions of paragraph 19 that a proper estimate of taxable income by the taxpayer is envisaged. A routine has, however, been established of submitting an estimate that merely meets the minimum required to avoid the additional tax. While this is understandable, it does mean that SARS must pay careful attention to the minimum to ensure that it does not undermine the principle that a proper estimate of taxable income should be made. The use of the basic
amount undermines this principle, as it does not take into account changes in circumstances since the year of assessment that it is based on. This failing is exacerbated when the basic amount is more than a year out of date due to, for example, an extended filing period granted the taxpayer, failure to file tax returns on time, or delayed assessments due to ongoing audit or investigation.

It is against this background that the decision to propose dropping the basic amount as a component of the minimum was taken. The call for comment on the provisional tax system to which you refer is part of the ongoing interaction between the SARS Practitioners Unit and practitioners. To place it in context, it is one of 47 items in the Practitioners Issues Lists and Status Update of 16 September 2008 and reads;

| Provisional tax process | Opportunity to provide comments in respect of the provisional tax process | Practitioners are invited to provide input and comments in respect of the provisional tax process, and changes to the process, policy, system or forms that they recommend SARS should investigate. Submissions can be made until 31 October 2008. |

The proposal is an incremental change that does not impact on the overall framework of the provisional tax system. Practitioners’ comments with respect to the provisional tax process, etc. will be largely unaltered by the proposal, although they may wish to supplement their comments in this regard.

In as far as the reasons that are advanced for not being able to arrive at an accurate taxable income estimate for the year, some appear to lose sight of basic record keeping using information that is available on an ongoing basis during the course of the year. The others have been taken into account in setting the 80% minimum that is proposed.

SARS has analysed the provisional tax payments for the last three years for which data is available. After interventions to address rote reliance on the basic amount by certain large taxpayers, companies had made payments equal to 76%, 79% and 82% of provisional payments made by the second provisional payment. After taking employees’ tax into account, individual taxpayers had achieved a similar outcome.

The 80% minimum thus underpins progress that has been made with respect to more realistic second provisional payments and appears to be achievable for most taxpayers. In those cases where a proper estimate has been made on the information available and falls short of the minimum, the Commissioner’s power to waive the additional tax in terms of paragraph 20 remains. It is not clear why “With the current penalties we envisage that practitioners will be highly discouraged from doing provisional tax work for client.” As noted above the additional tax may be waived if an estimate “was not deliberately or negligently understated
and was seriously calculated with due regard to the factors having a bearing thereon”. It is surely to be expected of practitioners that they would apply this standard of care when preparing provisional tax estimates on behalf of their clients.

Under the circumstances, no change to the revised proposal with respect to the second provisional tax payment is envisaged.

Yours faithfully

for COMMISSIONER: SOUTH AFRICAN REVENUE SERVICE

cc:  Cecil Morden – National Treasury
     Keith Engel – National Treasury