Dear Madam

CALL FOR COMMENT: REGULATIONS ISSUED UNDER SECTION 75B OF THE INCOME TAX ACT NO. 58 OF 1962, PRESCRIBING ADMINISTRATIVE PENALTIES IN RESPECT OF NON-COMPLIANCE

We refer to the call for comment on the above-mentioned document. Set out below please find the SAICA National Tax Committee’s submission regarding the policy comments contained therein.

1. General Comment

The concept of giving SARS the responsibility to levy and collect penalties to our mind is wrong. In terms of the South African Revenue Services Act, No. 34 of 1997 (Section 3 - Objectives) the objectives of SARS are the efficient and effective:

(a) collection of revenue; and
(b) control over the import, export, manufacture, movement, storage or use of certain goods.

SARS is bound by section 195 of the Constitution in the way they do this.

We do not believe that penalties amount to the collection of revenue. The imposition of penalties should be administered by a third party, such as the courts.

Section 75B (and paragraph 2 of the Regulations) requires that the following principles apply:

- impartial,
- consistent and proportionate to the seriousness.
SARS as an interested party cannot be considered to be impartial as the offences impact on their main objective of revenue collection, hence the suggestion of a third party to impose the penalties.

SARS currently uses the courts to penalise taxpayers for non-compliance by summoning them for a return or information. We do not believe that SARS should be in a position to impose penalties that are at least 10 times higher than those imposed by the courts without such penalties being approved by a court.

2. Definitions

2.1 Whilst the Act provides that SARS may impose a penalty, paragraph 1 uses the word ‘must’. We believe that the word to be used in paragraph 1 should be ‘may’.

3. Penalty for non-compliance

3.1 Paragraph 3b:
This could give rise to potential abuse of the penalty process. SARS can claim that they have not received a return or a notice of a change of address. Such incidents occur on a regular basis in practice.

3.2 Paragraph 3c and d:
There is duplication of the information that is required in both instances.

3.3 Paragraph 3e:
This paragraph fails to provide a definition of a reasonable effort to reply or reasonable time frame of reply.

3.4 Paragraph 3f:
We seek clarity of the word “attend”, as used in context.

3.5 Paragraph 3i:
More clarity should be provided as to what constitutes a failure on the part of the employer. We suggest that the word ‘deliberate’ or similar should be added. Circumstances are likely to arise where an employer inadvertently fails to provide such information e.g. an employer does not supply the information of an employee because he thinks that the employee is an independent contractor. In such instances, it would be unfortunate if an employer was penalised for such an error.

Another example is a company that has 5000 employees or more, one non-disclosure of an insignificant part could bring about a hefty penalty.

3.6 Paragraph 3j:
We recommend that it should be a requirement that SARS must send out an IRP 6 and give reasonable time for a reply before they can invoke this provision.

3.7 Paragraph k:
The penalty should only be imposed where there is a duty on the taxpayer to comply, therefore the words “procedural or administrative action” should be removed. There is a reference to paragraph 27 of the Fourth Schedule. In the Draft Revenue Laws Second Amendment Bill 2008 (clause 14(1)) the proposal is to repeal Para 27.
3.8 Paragraph 3(2) (a)
“Eighth” is spelt incorrectly.

4. **Table A: Amount of penalty**

4.1 The penalties in respect of dormant companies are excessive. Currently the courts impose a R500 fine for failure to submit a return. If the company is in an assessed loss position or is dormant, there is little or no risk of loss to the fiscus. If the purpose of the draft regulation is to impose a penalty that is proportionate to the seriousness of the matter, there should therefore be no penalty or a small penalty. R 11,500 is considered excessive.

4.2 According to the table, taxable income of R300,000 will give rise to a R1,000 penalty and R40,000,000 will give rise to a R4,000 penalty. This is clearly unfair, and we suggest that the table should be revisited.

In addition, companies that have taxable income of over R1 billion profit are likely to be unfazed by the maximum penalty of R180 000. The legislation seems unfair to small business.

4.3 The penalties do not take into account the seriousness of the offence. We believe that the penalties should not be influenced by SARS’ main objective which is to collect revenue. If there is no loss to the fiscus (such as the example of the assessed loss) the penalty seems harsh.

4.4 It also is unfair to keep record of previous offences and to base the penalty on that. A taxpayer that hands in overdue tax returns for a number of years should really receive one penalty only and not a penalty for each year, which then differs for each year as well.

4.5 Excessive and severe penalties often have the opposite effect to what they are meant to achieve. If penalties are too excessive they can force taxpayers to avoid paying them through illegal means because they cannot afford to pay them.

4.6 These penalties seem to be imposed for each return. Clearly the matters involved are so diverse that one table does not suit all situations.

4.7 These administrative penalties are in addition to other penalties, such as the late submission of the new EMP501’s and this may lead to a double penalties.

5. **Procedure for imposing penalty**

5.1 Section 75B (2) (b) requires that the regulations prescribe the procedure to be followed. We do not believe that paragraph 4 (or the rest of the regulations) achieve this. Paragraph 4 refers to the “notice of the assessment” and therefore implies that the penalty was already levied. We would like to suggest the following procedure:

- SARS identifies that there is non-compliance
- They then inform the taxpayer that they believe there is non-compliance and that they intend to proceed with the levying of the administrative penalty.
5.2 In the context of the answering of questions, paragraph 3 merely refers to failure, and does not indicate that the failure is after a reasonable time. In practice we find the following problems:

- Correspondence from SARS takes time before reaching the taxpayer and often it is sent to the wrong address.
- Taxpayers’ responses are frequently lost and the intended recipient who requested the information never receives the information.

We propose that SARS should only impose a penalty under these circumstances if they can prove that they followed proper administrative procedure and that they have sufficient procedures in place that ensure that the response from the taxpayer is dealt with timeously. Only thereafter can SARS then proceed with the notice of the penalty.

6. Remittance of penalty

6.1 Paragraph 6(ii)
The person needs to have filed five years tax returns. What happens if the taxpayer has only recently become a taxpayer for the first time?

6.2 The procedures to obtain relief is also not adequate, it leaves it to SARS’s discretion. Surely, if one knows that the non-compliance will qualify for the relief measures (such as where a non-registered person approached SARS), the penalty should in the first place not have been imposed.

7. Multiple instances of non-compliance.

7.1 We firmly believe that SARS should be held partly accountable if they do not act against a taxpayer for a number of years. Taxpayers should at least be granted the comfort that if they miss the deadline, they will receive notification to this effect from SARS.

7.2 We do not believe that it is fair to impose a penalty and then to keep track thereof for purposes of imposing a stiffer penalty for a subsequent offence. Once a taxpayer has been punished, their next offence must be judged on its own merits.

7.3 Paragraph 7
There appears to be no time period for the Commissioner to remit the penalty. This should be addressed in the regulations so that these refunds do not remain outstanding for lengthy periods of time.

8. Other

It would be useful to have an indication of what is included in section 75B (3) (e).

Conclusion

Most tax returns of any complexity (including virtually all businesses in South Africa) are completed on behalf of taxpayers by the tax practitioner profession. The proposed and substantially increased penalties will therefore amount in practice to a tax on that profession.
The work of tax practitioners has been made more complex by the following factors:

1. The introduction of a new filing system has resulted in tax practitioners having to spend a lot of time trying to familiarise themselves with the new system.

2. Technical problems with the new filing system mean lot of practitioners have experienced huge losses of data while working with the e@syfile software setting them backward by weeks’ sometime months.

3. The volume of tax changes which have to be absorbed by the profession has not reduced in recent years. In fact, with the latest Draft Revenue Laws Amendment Bills 2008, practitioners will have even more changes to contend with in the coming year.

4. Employers have still not received acknowledgement from SARS as to whether their PAYE reconciliations have been received or, more importantly, accepted so that they can issue IRP5 certificates to their employees. This means that although a full six months has gone by after the end of the tax year, practitioners have not yet been able to complete or submit one tax return for this tax year. The implication for practitioners is that the usual volume of returns which were previously done over a period of twelve months or more, now have to be competed in half that period.

Taking all the above factors into account, we consider the introduction of substantially increased penalties at this stage as totally inappropriate. Their introduction should be delayed until problems with the new filing system have been resolved and the volume of annual tax changes has stabilised. Most firms have a backlog due the new tax returns process, previous year’s amnesty issues and the technical problems with e@syfile.

It would be hugely beneficial to all concerned if SARS were to delay the implementation of the new regulations.

Please do not hesitate to contact me should you require further information.

Yours faithfully

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The South African Institute of Chartered Accountants