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Call for comment file

14 November 2008

South African Revenue Service
Private Bag X923
PRETORIA
0001

BY E-MAIL: policycomments@sars.gov.za

Dear Sir / Madam

CALL FOR COMMENT: SECOND DRAFT REGULATIONS ISSUED UNDER SECTION 75B OF THE INCOME TAX ACT 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

1.1 In our initial submission dated 29 August 2008, we made the following points inter alia:

- The mere concept of giving SARS the responsibility to levy and collect penalties to our mind is wrong.

- 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.

  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.

  We stand by these statements and have noted with disappointment that they have not been addressed in the second draft regulations.

1.2 These regulations place an extreme burden on commerce and industry in terms of compliance and minor administrative errors will result in the same penalties as serious
2. Specific comments:

2.1 Paragraph 4(b) deals with *inter alia* the failure to inform the Commissioner of a change in address. Paragraph 4(i) deals with failure by an employer to notify SARS of a change of address or the fact of having ceased to be an employer as and when required under the Act. The first part of par 4(i) dealing with the change of address will be covered by par 4(b) and we do not see why it needs to be repeated specifically in relation to employers.

2.2 In terms of regulation 4(c), failure to appoint a public officer and keep such an office constantly filled is included as ‘non-compliance’. While a public officer is regarded as a ‘representative taxpayer’ it is not a requirement of the Income Tax Act to appoint one and keep such an office filled. The failure to do so should, therefore, not comprise an instance of non-compliance. In particular, the non-compliance that is being defined is in effect non-compliance in terms of other existing legislation such as the Companies Act and any penalties in this regard should be levied in terms of such legislation. Section 101(4) of the Act provides for a default public officer that the Commissioner may designate, in the form of the managing director, director, secretary of other officer of that taxpayer. It follows that, in our opinion, a taxpayer will always have a public officer, even if by default. If the concern is to ensure that a representative taxpayer is available for service, why have the other categories of representative taxpayer not been included?

2.3 Paragraph 4(f) lists as a non-compliance subject to penalties in paragraph (3), "failure to reply to or answer a question put to a person as and when required under the Act". It has previously transpired that questions are not directed to the public officer of a company and that the person receiving the question is not aware of the seriousness of the matter as income tax falls outside the scope of their work.

2.4 In addition, some SARS offices provide seven days to respond to requests for information. We suggest that this sub-paragraph is reworded to ‘failure by the public officer to reply to or answer a question put to the public officer (a person) as and when required under the Act, within a period of 21 working days or a longer period approved by the Commissioner’.

2.5 In paragraph 5 the penalty based on the assessed loss or taxable income for preceding year. There could be significant differences from year to year and we believe that the penalty should relate to the taxable income for the relevant year of assessment, i.e. the year in which the non-compliance was committed.

2.6 We understand that SARS wants to impose penalties that would make a difference based on a taxpayers’ ability to pay, hence the scale for penalties based on taxable income. However, we do not believe that it is fair to levy a penalty for not changing administrative details based on taxable income. In effect it implies that a company with a taxable income of R100,000 is committing a less serious offence than a
company with a taxable income of R 1 million when both companies fail to change their addresses.

2.7 The penalty for failure to register as an employer should not be determined with reference to taxable income. It should rather relate to remuneration paid.

2.8 Listed companies and companies forming part of the same group of companies are being discriminated against. These companies automatically fall in category (vii), irrespective of the amount of taxable income earned.

2.9 There may be valid reasons for not being able to rectify the non-compliance within 30 days. We recommend par 5(2) grants the Commissioner the discretion to increase the 30-day period.

2.10 In terms of paragraph 5(3), certain entities may incur a penalty for non-compliance in terms of paragraph 4 of the regulations even if they are in an assessed loss position, which does not seem equitable.

2.11 In terms of paragraph 5(4)(b) the Commissioner can estimate the taxable income of a person in a tax year where this is unknown (i.e. in order to determine the amount of the penalty payable) based on available information. This seems to be a very wide power and no guidelines are provided for exactly how the estimate should be reached, which could lead to an abuse of power.

2.12 Furthermore, in terms of paragraph 5(5), where the taxable income becomes known the penalty must be adjusted accordingly. In cases where the penalty was excessive, provision should be made for interest to be paid to the taxpayer in order to curb abuse by SARS of the aforementioned power.

2.13 In certain instances the non-compliance referred to in the regulations is also penalised in terms of another section of the Act. The following are examples:

- Paragraph 4(m) of the regulations refers to the failure by a provisional taxpayer to submit an estimate. However, in respect of the second provisional payment, paragraph 20A of the Fourth Schedule to the Act already imposes a penalty where the estimate is not submitted timeously.

- Paragraph 6(a) imposes a mandatory penalty of 10% of the amount of employees’ tax that an employer fails to pay as and when required under the Act. However, paragraph 6(1) of the Fourth Schedule to the Act imposes a similar penalty. We do however note that paragraph 6 was repealed in the Revenue Laws Second Amendment Bill. The 10% penalties are now contained only in the regulations. Failure to pay an amount on the required due date, and failure to submit the required return, monthly or annually, are now both listed as instances of non-compliance for which a 10% penalty can be imposed in terms of the Regulation. It follows that, in the event that an employer fails to submit a return and make payment for a particular month, effectively a penalty of 20% of the amount of due in respect of that return can be charged as a penalty; 10% for the late payment and 10% for the late submission of the return. The current provisions in the Fourth
Schedule (to be repealed) only penalises the employer for 10% of the amount of the employees’ tax due if the payment was late or not made.

Paragraph 6(2A) of the Fourth Schedule still allows for a penalty of up to 200% in the event that the employer failed to pay an amount with the intent to evade its obligation.

- Paragraph 30 of the Fourth Schedule to the Act lists instances, or acts that would be regarded, on conviction, as offences and the person that commits such an offence shall be liable to a fine or imprisonment of up to 12 months. It is unclear how the offences in the Fourth Schedule and the corresponding fine or imprisonment will be affected, if at all, by the Regulations. In addition, section 75 of the Income Tax Act also provides for penalties chargeable on default. We do not believe that either paragraph 30 of the Fourth Schedule, nor section 75 was repealed in the current Revenue Laws Amendment Bills.

Does this imply that both the penalty imposed by the draft regulations (section 75B) and the penalty imposed in terms of another section of the Act apply? This would be severe.

2.14 The regulations will come into effect on 1 January 2009. This could prejudice taxpayers who only become aware of the regulations when they become final (e.g. mid to end November 2008).

The regulations are retrospective in that they apply to continuous failure to comply with any obligation identified under the Regulations prior to 1 January 2009. In addition, we believe that it is contrary to the rule of law to impose additional penalties for historic instances of non-compliance on taxpayers, even with a 60-day period allowed for correction.

The effective date needs to give taxpayers a chance to submit all outstanding returns and information to SARS. We suggest an implementation date of 1 June 2009.

2.15 It is important to stress that the remedies allowed excludes situations where the taxpayer approaches SARS voluntarily and simultaneously remedies the instance of non-compliance. Accordingly, there seems to be no incentive for a taxpayer to approach SARS on a voluntary basis to disclose, pay and/or remedy instances of non-compliance. We believe that this will drive certain taxpayer behaviour, and is contrary to the relationship what SARS has with, for example, certain large organisations that strive to be fully compliant. In addition, this will transform SARS officials into enforcement officers. Under these Regulations, to hide instances of non-compliance, especially with an offence of an administrative nature seems to be the best offence for taxpayers. Surely that cannot be the intention of the legislation.

Conclusion

As per our previous submission, we still consider the introduction of increased penalties at this stage as inappropriate. Their introduction should be delayed until problems with the filing system have been rectified and the volume of annual tax changes has stabilised. We further note that in the case of dormant companies SARS is merely creating a book debt that will subsequently have to be written off.
Please do not hesitate to contact me should you require further information.

Yours faithfully

M. Hassan CA(SA)
PROJECT DIRECTOR: TAX
The South African Institute of Chartered Accountants