

# DRAFT MEMORANDUM ON THE OBJECTS OF THE TAX ADMINISTRATION BILL, 2010

## Index

<b>1. PURPOSE OF BILL</b> .....	2
<b>2. OBJECTS OF BILL</b> .....	2
<b>2.1. General</b> .....	2
<b>2.2. Summary of proposed changes to current law and purpose thereof</b> .....	3
<b>2.2.1. Chapter 1: Definitions</b> .....	3
<b>2.2.2. Chapter 2: General Administration Provisions</b> .....	5
<b>2.2.3. Chapter 3: Registration</b> .....	9
<b>2.2.4. Chapter 4: Returns and Records</b> .....	10
<b>2.2.5. Chapter 5: Information Gathering</b> .....	11
<b>2.2.6. Chapter 6: Confidentiality of Information</b> .....	14
<b>2.2.7. Chapter 7: Advance Rulings</b> .....	19
<b>2.2.8. Chapter 8: Assessments</b> .....	19
<b>2.2.9. Chapter 9: Dispute Resolution</b> .....	22
<b>2.2.10. Chapter 10: Tax Liability and Payment</b> .....	24
<b>2.2.11. Chapter 11: Recovery of Tax</b> .....	26
<b>2.2.12. Chapter 12: Interest</b> .....	27
<b>2.2.13. Chapter 13: Refunds</b> .....	28
<b>2.2.14. Chapter 14: Write off or Waiver of Tax Debts</b> .....	28
<b>2.2.15. Chapter 15: Penalties</b> .....	28
<b>2.2.16. Chapter 16: Additional Tax</b> .....	29
<b>2.2.17. Chapter 17: Criminal Offences</b> .....	30
<b>2.2.18. Chapter 18: Reporting of Unprofessional Conduct</b> .....	30
<b>2.2.19. Chapter 19: General Provisions</b> .....	30
<b>2.2.20. Chapter 20: Transitional Provisions</b> .....	30
<b>3. CONSULTATION</b> .....	31
<b>4. CONSTITUTIONAL IMPLICATIONS</b> .....	31
<b>5. IMPLICATIONS FOR VULNERABLE GROUPS</b> .....	32
<b>6. IMPLICATIONS FOR PROVINCES</b> .....	32
<b>7. FINANCIAL IMPLICATIONS FOR STATE</b> .....	32
<b>8. PARLIAMENTARY PROCEDURE</b> .....	32

## **1. PURPOSE OF BILL**

The Bill consolidates, as detailed in paragraph 2 below, the common administrative provisions of the Transfer Duty Act, 1949 (Act No. 40 of 1949), Estate Duty Act, 1955 (Act No. 45 of 1955), Income Tax Act, 1962 (Act No. 58 of 1962), Stamp Duties Act, 1968 (Act No. 77 of 1968), Value-Added Tax Act, 1991 (Act No. 89 of 1991), Skills Development Levies Act, 1999 (Act No. 9 of 1999), the Unemployment Insurance Contributions Act, 2002 (Act No. 4 of 2002), Diamond Export Levy (Administration) Act, 2007 (Act No. 14 of 2007), Securities Transfer Tax Administration Act, 2007 (Act No. 26 of 2007) and the Mineral and Petroleum Resources Royalty (Administration) Act, 2008 (Act No. 29 of 2008).

## **2. OBJECTS OF BILL**

### **2.1. General**

The drafting of the Tax Administration Bill (the “TAB”) was announced in the 2005 Budget Review as a project to incorporate into one piece of legislation certain generic administrative provisions, which are currently duplicated in the different tax Acts.

The scope of the project has since been extended so that it can now be seen as a preliminary step to the re-write of the Income Tax Act, 1962. It will assist in dividing the work of the re-write into more manageable parts, since the administrative part of the Income Tax Act comprises about 25% of the Act.

Generally, the TAB seeks to provide a single body of law that outlines common procedures, rights and remedies and to achieve a balance between the rights and obligations of both SARS and taxpayers in a transparent relationship.

The drafting of the TAB focused on reviewing the current administrative provisions of the tax Acts administered by SARS, excluding the Customs and Excise Act, 1964, and harmonising these provisions across the legislation to the extent possible. It excludes the Customs and Excise Act, 1964, since that Act operates in a somewhat different context and is the subject of a separate rewrite process.

The TAB takes account of the constitutional rights of taxpayers, but does not seek to re-codify them, because all legislation, including the TAB, must be read together with the provisions of the Constitution. Particularly the right to administrative justice as well as the application of the fairness requirements are very fact and context specific. Codifying these rights in respect of every administrative action by SARS will be an almost impossible task and may only serve to unnecessarily limit or modify them.

Apart from consolidating and harmonising existing provisions, the TAB seeks to provide a foundation for further modernisation of the administration of the tax Acts and to close certain gaps identified by the review and experts that were involved.

In drafting the TAB, due regard was given to the following principles of international best practice in tax administration:

- (a) Equity and fairness to ensure that the tax system is fair and also perceived to be fair, which should in turn enhance compliance.

- (b) Certainty and simplicity so that tax administration is not seen as arbitrary but transparent, clear and as simple as the complexity of the system allows.
- (c) Efficiency, where compliance and administration costs are kept to a minimum and payment of tax is as easy as possible.
- (d) Effectiveness, so that the right amount of tax is collected, active or passive non-compliance is kept to a minimum, and the system remains flexible and dynamic to keep pace with technological and commercial development.

The TAB also extends SARS' powers, for example its information gathering, assessment and collection powers. The purpose of the TAB in this regard is the extension of powers to more effectively target tax evaders, who demonstrate certain behaviour, but not ordinarily compliant taxpayers.

The layout of the TAB largely follows the administrative life cycle of a taxpayer, commonly referred to as a step-by-step approach. This is reflected in the Chapter headings. As stated above, the TAB seeks to provide a foundation for further modernisation of the administration of the tax Acts and to close certain deficiencies in the current tax law.

## **2.2. Summary of proposed changes to current law and purpose thereof**

### **2.2.1. Chapter 1: Definitions**

#### **Interpretation**

Terms used in the TAB which are defined in the tax Acts retain their defined meaning in the TAB, unless the context in which they are used in the TAB indicates otherwise, or if they are specifically defined in the TAB. Terms defined in the TAB apply to tax Acts unless the context in the tax Act indicates otherwise, or if they are specifically defined in the relevant tax Act.

#### **New definitions**

- 2.2.1.1. The term "**assessment**" is defined to ensure that it includes both the determination of the amount of a tax liability by way of self-assessment by the taxpayer *and* assessment by SARS. It includes any decision which in terms of a tax Act (including the TAB) is subject to objection and appeal.
- 2.2.1.2. "**Biometric information**", which may be required by SARS for registration, means specified biological data but also caters for the inclusion, by way of regulation, of other, less intrusive biological data that may become available in the future. It is not envisaged that this will include, for example, DNA data as this is generally regarded as more intrusive.
- 2.2.1.3. The term "**date of assessment**" is defined to refer to the date of the issue of an assessment by SARS or date of the submission of a return which constitutes a self-assessment. In turn, the term "**due date**" is defined to refer only to the last date for payment of tax, and not to the submission or issue of a document.

- 2.2.1.4. The definition of the term “**effective date**” is important as this determines the date from which interest due to or payable by SARS accrues. Interest is generally determined from this date until the date of actual payment.
- 2.2.1.5. For purposes of the TAB “**income tax**” means normal tax referred to in section 5 of the Income Tax Act, 1962, but excludes provisional tax and employees' tax. This distinction is particularly relevant for the purposes of the definition of “tax period”, the effective date for the payment of interest determined under Chapter 12 and the determination of the amount of an administrative penalty under Chapter 15 in respect of an exempt person.
- 2.2.1.6. The definition of “**official publication**”, which means a binding general ruling, interpretation note, practice note, or public notice issued by a senior SARS official or the Commissioner, is particularly relevant for purposes of what constitutes a “**practice generally prevailing**” under clause 5 and what constitutes exceptional circumstances that may warrant the remittance of an administrative penalty in Chapter 15, and the extension of the time periods that govern disputes.
- 2.2.1.7. The concept of an “**original assessment**”, i.e. the first assessment in respect of a tax period, is now a defined term that relates to a specific type of assessment, in the same way as “**additional assessment**” and “**reduced assessment**” are individually defined. The term “estimated assessment” previously used in tax Acts, is replaced by the concept of an original, reduced or additional assessment based on an estimation.
- 2.2.1.8. The term “**relevant material**” is important for information gathering under Chapter 5 and means any information, document, or thing that is foreseeably relevant for tax risk assessment, assessing tax, collecting tax, or showing non-compliance with an obligation under a tax Act or showing that a tax offence was committed.

The standard of foreseeable relevance, which is *inter alia* regarded by the OECD as the standard in the context of specifying the information that should be exchanged between countries, is intended to provide for the procurement of information in tax matters to the widest possible extent and, at the same time, to clarify that revenue authorities are not at liberty to engage in “fishing expeditions” or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. This is a narrower term than “may be relevant”, which is the standard used in some tax jurisdictions.

Risk assessment, as reflected in clause 44, is one of the premises of SARS’ audit selection process and involves assessing the risk profile of taxpayers (“risk assessment”) and then allocating resources in accordance with the risk profiles (“risk-led resource allocation”) which should result in more targeted audits. Risk assessment also assists in addressing emerging tax risks in real-time, which should enable SARS to provide tax certainty to taxpayers sooner, quicker guidance on tax matters and reduce the need for protracted forensic audits (typically some years after targeted transactions occurred). Risk-driven processes should also limit disputes and reduce the incidence of tax underpayments and additional tax or administrative penalties. Obtaining real-time “**relevant information**” from taxpayers is key to effective risk management of taxpayers.

- 2.2.1.9. “**Return**” is defined to include both the submission of a prescribed form to SARS for purposes of self-assessment *and* for assessment by SARS.
- 2.2.1.10. “**Self-assessment**”, in turn, is defined as a determination of the amount of tax payable under a tax Act by a taxpayer and submitting a return which incorporates the determination or, if no return is required, the act of making payment of the tax. Throughout the TAB, provision is made for the transition to a full self-assessment system, which system can be described as follows:
- (a) Self-assessment is a mechanism applied as part of a tax collection system.
  - (b) Under self-assessment, the taxpayer is required to report the basis of assessment (e.g. taxable income), to submit a calculation of the tax due and, usually, to simultaneously pay any outstanding tax due as calculated by the taxpayer.
  - (c) The role of SARS would be to check that the taxpayer has correctly disclosed the income and has claimed no exemptions, deductions or allowances to which it is not entitled, and otherwise to ensure that the correct amount of tax is paid.
  - (d) It contrasts with the role of SARS in a system where it is responsible for establishing the tax due, normally by means of an assessment, and demanding payment within a prescribed period.
- 2.2.1.11. The term “**serious tax offence**” means a tax offence for which a person may be liable on conviction to a fine or to imprisonment for a period exceeding two years, and is relevant for purposes of the referral of an audit for separate criminal investigation under clause 48.
- 2.2.1.12. “**Tax**” for purposes of the administration of the TAB is widely defined as a tax, duty, levy, royalty, fee, charge, contribution, additional tax, penalty, interest and any other moneys imposed under a tax Act. This wide definition is to ensure the application of the TAB across taxes.
- 2.2.1.13. The term “**taxable event**” means an occurrence which affects or may affect the liability of a person to tax, and is important to determine the “**tax period**” for purposes of transaction based taxes, as well as the meaning of administration of a tax Act in clause 3(2) in that context.
- 2.2.1.14. A “**tax Act**” is an important definition in the TAB, as it serves to include the Tax Administration Act, an Act and a portion of an Act administered by the Commissioner, but excludes the Customs and Excise Act, 1964.

## **2.2.2. Chapter 2: General Administration Provisions**

### **New provisions**

- 2.2.2.1. *Purpose of the Tax Administration Act:* Clause 2 describes the purpose of the Tax Administration Act, which essentially is to provide for the effective and efficient collection of tax, the alignment of the administration provisions of tax Acts and the consolidation thereof into one piece of legislation, the Tax Administration Act, to the extent practically possible. Administrative requirements and procedures for purposes

of the performance of any duty, power or obligation or the exercise of any right in terms of a tax Act are, to the extent not regulated in a tax Act, now regulated by the TAB. Administrative provisions that are very specific to a tax Act or the relevant tax type remain in that Act.

- 2.2.2.2. *Administration of tax Acts*: Clause 3 determines that SARS is responsible for the administration of this Act under the control or direction of the Commissioner, and describes the ambit of administration of the tax Acts (which includes the Tax Administration Act). As mentioned, it is unnecessary to include references to the constitutional provisions and obligations that guide the exercising of administrative authority within the TAB.
- 2.2.2.3. *Application of the Tax Administration Act*: In terms of clause 4, the TAB applies to every person who is liable to comply with a provision of a tax Act (whether personally or on behalf of another person).
- 2.2.2.4. *Practice generally prevailing*: In terms of clause 5 the sources of SARS' "binding" practices will be official publications i.e. a general ruling, interpretation note, practice note, or public notice issued by a senior SARS official or the Commissioner. Taxpayers are often unsure of the existence of a practice generally prevailing as a result of reliance on publications such as the "Income Tax Practice Manual" published by LexisNexis™, "hear-say", media releases or published articles, operational practices or procedures and guides. None of these reflect the application or interpretation of a tax act that is binding on and generally applied by the whole of SARS or ever intended to be. Clause 5 makes it clear that the only sources of SARS' "binding" practices will be official publications i.e. a general ruling, interpretation note, practice note, or public notice issued by a senior SARS official or the Commissioner.

This concept is used in the TAB in the context of both defining and limiting SARS' power to issue an additional or reduced assessment (clause 99) and placing limitations upon taxpayers in claiming refunds (clause 190(3)(a)), to the practice generally prevailing on which an assessment or overpayment giving rise to a refund was based at the time of the assessment or "overpayment". Also, and where the grounds of objection are based on a change in the practice generally prevailing which applied on the date of the disputed assessment, the period for objection may not be extended (clause 104(5)(c)).

- 2.2.2.5. *Limitation of administrative powers*: Clause 6 provides that the exercise of any power or obligation under a tax Act by a SARS official, including whatever may be fairly regarded as incidental to or consequential to such powers or obligations, must be related to and within the ambit of the purpose and ambit of the administration of the tax Acts.

Generally in a tax administration Act the administration provisions place the day to day administration of the tax laws in the hands of a statutory body (SARS) or a specific office holder (the Commissioner). In terms of current law, unless a power is specifically assigned to the Commissioner personally, any SARS official acting under the direction, supervision and control of the Commissioner may exercise the powers, duties and obligations under the tax Acts. To ensure the reservation of more serious

powers for the Commissioner or senior SARS officials, the TAB departs from this common approach by dividing the “Administration of the Act” into three tiers. In terms of the new “three tier decision making levels” powers, duties or functions may be exercised by:

- (a) The Commissioner personally, where powers are assigned to him personally, unless he delegates such powers.
- (b) A senior SARS official authorised by the Commissioner to exercise more serious and impactful powers or functions.
- (c) SARS officials in general.

This new approach is aligned with what happens in practice.

2.2.2.6. *Further limitations on SARS’ powers:* The TAB imposes limitations on the powers of SARS officials in administering tax to further counteract abuse. These include:

- (a) *Conflict of interest provisions* (clause 7): These provisions, for example, prohibit a SARS official from becoming involved in the administration of a tax Act matter relating to a person with whom the official has or had, in the previous three years, a personal, family, social, business, employment or financial relationship. The provisions will be supplemented by more specific internal policy guidelines
- (b) *Identity Cards* (clause 8): This provision compels a SARS official to carry a SARS identification card, which card must be shown whenever the official exercises a power or duty in person
- (c) *Withdrawal or amendment of decision* (clause 9): The withdrawal or amendment of a decision made by a SARS official is largely similar to the current law provisions, except that a taxpayer must first be notified of the intention to withdraw or amend a decision if this would adversely affect the taxpayer’s rights, and to be afforded the opportunity to submit reasons why the decision, notice or communication should not be amended or withdrawn
- (d) *Delegations* (clause 10): A SARS official acting under a delegation must be so delegated in writing with the mandate or authority specified.

2.2.2.7. *Authority to act in Legal Proceedings* (clauses 11 and 12): These provisions place limitations on SARS as to who may deal with and the manner in which legal proceedings to which the Commissioner or SARS is a party must be dealt with (for example, the laying of criminal charges). Clause 12 deals with who has the right of appearance on behalf of the Commissioner in proceedings before the tax court or higher courts.

2.2.2.8. *Powers and duties of the Minister:* Clause 13 provides that the Minister may delegate his or her powers, except for the power to appoint the Tax Ombud and to issue regulations, to the Deputy-Minister and the Director-General. The Director-General may in turn delegate the powers and duties delegated to him or her by the Minister to a person under the control, direction, or supervision of the Director-General.

- 2.2.2.9. *Establishment of Office of Tax Ombud*: Clauses 15 to 21 establishes the office of the Tax Ombud, the creation of which was foreshadowed in 2003 at the launch of the current tax dispute resolution process and SARS Service Monitoring Office (the “SSMO”).

The steps in the tax dispute resolution process of objection, alternative dispute resolution, appeal to the tax board, in simple cases, or the tax court, in more complex cases, and finally access to the normal court system serve as a check on SARS’ powers to assess tax. The SSMO was intended as the first step in the creation of a mechanism to serve as a check on SARS’ administrative powers by addressing SARS’ failures to follow procedures or respect taxpayer’s rights. It was not, however, intended to be the last step. As the then Minister of Finance noted at the launch of the SSMO: “Once SARS’ processes and procedures have improved sufficiently, the next important step that will be taken in emulating international standards will entail an important role for an Ombud.” An independent Tax Ombud will fill a gap in the mechanism that currently exists between SARS’ internal processes and access to the normal court system.

Public comments on the first draft TAB confirmed the commentators’ desire for the establishment of a separate and independent Tax Ombud’s Office. The Tax Ombud’s office should, it was proposed, provide accessible and affordable remedies for taxpayers affected by non-adherence to procedures or failure to respect taxpayers’ rights.

The introduction of a Tax Ombud is, therefore, proposed in view of the fact that:

- (a) The creation of an independent and effective recourse for taxpayers would be in line with the objective of the TAB to achieve a balance between SARS’ powers and duties and taxpayer obligations, remedies and rights.
- (b) It would be in line with international best practice, particularly the framework of the Canadian “Taxpayer Ombudsman” and the UK “Revenue Adjudicator”.
- (c) It would also be consistent with what the Constitutional Court has had to say on the valuable role played by effective internal remedies, namely that although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.

To ensure the necessary independence from SARS, the Minister of Finance must appoint the Tax Ombud and determine his or her terms of office. In line with the Canadian Taxpayer Ombudsman model, SARS employees will be seconded to Ombud’s office after consultation with the Tax Ombud.

The mandate of the Tax Ombud will be to review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS, generally only after the taxpayer has exhausted the available complaints resolution mechanisms within SARS. In particular, the Tax Ombud must identify and review systemic and emerging issues related to service matters or the application of the provisions of this Act that impact negatively

on taxpayers. The Tax Ombud will have review and mediatory powers and report directly to the Minister of Finance.

### **2.2.3. Chapter 3: Registration**

#### **New provisions**

2.2.3.1. *Registration requirements and sanctions for all taxes* (clause 22): A person obliged to apply or who may voluntarily apply for registration under a tax Act must do so in accordance with this clause

The TAB, in clause 22(2)(b), in pursuit of creating a single view of a taxpayer in SARS' systems provides a framework for the single registration for all taxes by taxpayers. In this regard:

- (a) Single registration may be effected using a single form.
- (b) In the absence of a specific period for registration in a tax Act, a registration period of 21 "business days" applies across taxes from the date that a taxpayer becomes liable or entitled to register under a tax Act.

A person who fails to provide all particulars and documents required for a specific registration will be regarded as not having applied for registration until those particulars and documents are provided.

Biometric information (which may include fingerprints; facial recognition; vocal recognition and iris or retina recognition) may be required for registration essentially to ensure proper identification and counteracting identity theft and fraud. The main advantages of biometrics over standard identification and validation systems are:

- (a) Biometric traits cannot be lost or forgotten (while identity documents and passwords can).
- (b) Biometric traits are difficult to copy (while passwords and reference numbers, once disclosed, are not).
- (c) Biometrics require the person being authenticated to be present at the time and point of authentication.

Furthermore, in view of the highly private nature of biometric information, additional protection in the context of the disclosure thereof is afforded in the confidentiality of information Chapter to the extent that not even a High Court may order the disclosure thereof. It may, however, be disclosed for purposes of criminal prosecution.

2.2.3.2. *Communication of change in registered particulars* (clause 23): The provision of updated information, such as any change in postal, physical or electronic address, representative taxpayer, banking particulars used for transactions with SARS and electronic addresses used for communication with SARS, is required under this clause. The Commissioner may also prescribe additional information required for registration by public notice, and specific notifications may still be required in a tax Act, for example section 25 of the Value-Added Tax Act, 1991.

- 2.2.3.3. *Taxpayer reference number (clause 24)*: SARS may allocate a taxpayer reference number in respect of one or more taxes to each person already registered under a tax Act or Chapter 3. The use of a taxpayer reference number allocated by SARS is compulsory in all correspondence with SARS. This is aimed at ensuring more efficient processing of taxpayer communication, particularly once a single registration number for all taxes is implemented.

#### **2.2.4. Chapter 4: Returns and Records**

In this Chapter more generic return provisions have been drafted to cater for future modernisation of the tax system, for example a full self-assessment system.

##### **New provisions**

- 2.2.4.1. *Submission of return (clause 25)*: If the obligation to submit a return is imposed in a tax Act, the taxpayer must do so in accordance with the requirements of the TAB. Specific returns required under current law, for example returns by companies, will now be regulated under this general clause and the specific information required will be set out in the prescribed form.

Under this clause, SARS may also request or allow a person, prior to the issue of an original assessment, to submit an amended return to correct an undisputed error in a return. This will typically apply in the eFiling environment as a measure to avoid the issue of an incorrect assessment, pursuant to *bona fide* errors made in the return, which once an assessment had been issued can then only be rectified through more standard processes.

- 2.2.4.2. *Third Party Returns (clause 26)*: The concept of listing specific types of information required from third parties in tax legislation (e.g. interest returns by banks or certain returns required from companies) is replaced by a duty on third parties to automatically submit returns of information as may be prescribed by the Commissioner when called on to do so by way of a public notice. The notice will prescribe the type of information and the frequency of submission.
- 2.2.4.3. *Other returns required (clause 27)*: SARS may require a person to submit further or more detailed returns regarding any matter for which a return is required or prescribed by a tax Act, for example returns relating to income from controlled foreign companies or certain representative vendors.
- 2.2.4.4. *Statement concerning account (clause 28)*: If a taxpayer submits financial statements or accounts prepared by another person in support of the taxpayer's submitted return, SARS may require a certificate or statement as to the extent of the examination and verification of the correctness of the transactions, receipts, accruals, payments, or debits reflected in the financial statements. This is not a requirement for audited financial statements, but the certificate or statement allow SARS to evaluate the degree of reliance that may be placed on the financial statements and potentially avoid further verification or audit by SARS.
- 2.2.4.5. *Record retention (clauses 29 - 33)*: The TAB imposes a general record requirement, i.e. records that enable a person to demonstrate to the satisfaction of SARS that the

requirements of a tax Act have been observed, but specific records may still be required under a tax Act, for example section 55 of the Value-Added Tax Act, 1991.

Records must be kept in their original form or a form generally prescribed by the Commissioner. A senior SARS official may, upon request by a specific taxpayer, authorise the retention of information contained in records or documents by that taxpayer in a different but acceptable form.

Regarding the manner of keeping records, a new requirement that records must be kept in an orderly fashion and in a safe place, is added. This is to ensure the orderly and safe retention of the records and efficient access thereto by SARS, for purposes of an inspection or audit, during the required five year period (subject to the qualification that a person who lodged an objection or appeal against an assessment must retain the relevant records until the assessment becomes final). To ensure that records are kept in the correct form, provision is made that SARS may inspect the records for this purpose, in addition to an examination, audit or investigation under Chapter 5.

If the information is not in one of the official languages of the Republic, a senior SARS official may require a translation by the taxpayer, a sworn translator or other person approved by the official.

- 2.2.4.6. *Reportable arrangements*: No significant changes were made to the reportable arrangements provisions, except for moving the penalty provision to Chapter 15 and the introduction of a criminal offence for the wilful failure to report an arrangement without just cause.

### **2.2.5. Chapter 5: Information Gathering**

SARS' information gathering powers are substantially supplemented or extended by the TAB. This is essentially to address the problem that too many requests for information by SARS result in protracted debates as to SARS' entitlement to certain information. This is contrary to the internationally established principle that a revenue agency's resources or energy should not be wasted on disputes over whether or not it is entitled to have access to a particular item of information, but should rather be focused on ensuring that all taxpayers pay the correct amount of tax on time based on timely available information. However, taxpayer's rights are amplified and made more explicit to counterbalance SARS' new information gathering powers.

#### **New provisions**

*SARS' new powers:*

- 2.2.5.1. *Inspections (clause 40)*: SARS may, without prior notice, arrive at and inspect a premises to determine the identity of the person occupying the premises, whether the person occupying the premises is conducting a trade or an enterprise and is duly registered for tax. These inspections will typically be used for tax base broadening purposes or verification, for example, of the existence of an enterprise for purposes of VAT registration.
- 2.2.5.2. *Requests for information (clause 41(1))*: The ambit of such requests by SARS is extended to identifiable taxpayers. This includes, for example, where a taxable event

demonstrates that a taxpayer exists, but SARS does not have such person's name or other details.

- 2.2.5.3. *Classes of taxpayers (clause 41(2))*: Information procurement from third parties in respect of identified classes of taxpayers, for example taxpayers involved in certain types of potential tax avoidance structures, is now specifically included.
- 2.2.5.4. *Informal examination at a SARS office (clause 42)*: SARS may require a person to attend a meeting at a SARS office for purposes of being interviewed regarding the taxpayer's own or another person's tax affairs. The aim of the meeting is to clarify issues of concern to SARS to render further examinations or an audit unnecessary. The interview cannot be used to conduct a criminal investigation.
- 2.2.5.5. *Audits (clauses 43 – 45)*: These provisions are largely aligned with current law, except for specifying the audit selection basis.
- 2.2.5.6. *Search and seizure (clause 63)*: SARS may under certain circumstances conduct a search without a warrant. This power may only be invoked if a *senior SARS official* on reasonable grounds is satisfied that:
- (a) There may be an imminent removal or destruction of relevant material likely to be found on the premises;
  - (b) If SARS applies for a search warrant under the relevant empowering clause of the TAB, a search warrant will be issued; *and*
  - (c) The delay in obtaining a warrant will defeat the object of the search and seizure.

This power is consistent with that found in other legislation in South Africa and has been reviewed and approved by the courts in that context. It should *inter alia* assist in tax base broadening and addressing the reality that tax evaders who, upon approach by SARS, waste no time in destroying all records and evidence of their fraudulent activities and details of income derived.

*Taxpayer's new rights and obligations:*

- 2.2.5.7. *Authority of SARS official to audit (clause 43)*: A SARS official must demonstrate his or her authority to conduct an audit, as this power may only be exercised by duly authorised officials, failing which a taxpayer may lawfully refuse to allow the audit until such official shows that this authority exists.
- 2.2.5.8. *Field audit notice (clause 45)*: The prior notice of an audit at the premises of a taxpayer must be given at least 10 business days before the audit, and the taxpayer must revert at least 5 business days before the audit if the date is not suitable. Although the notice must *inter alia* indicate the initial basis and scope of the audit, this may obviously change or extend as the audit progresses. A taxpayer may waive the right to notice, for example, if it is convenient for the taxpayer to resolve an audit issue without delay.
- 2.2.5.9. *Assistance during audit (clause 46)*: Taxpayers are now obliged to give SARS reasonable assistance during field audits and execution of search and seizure warrants.

The aim of this requirement is to ensure the effective and efficient conclusion of field audits without impediments as a result of obstructive taxpayers refusing reasonable assistance. Assistance may include actions such as answering questions or practical assistance such as providing working space and facilities. For example, if the taxpayer has a photocopier on the premises, it should be made available to SARS for use at SARS' cost. Failure to provide such reasonable assistance may constitute non-compliance for purposes of the imposition of an administrative penalty under Chapter 15 and a criminal offence under Chapter 17.

2.2.5.10. *Rights of taxpayer during audit (clause 47):*

- (a) A taxpayer is entitled to a report on the progress of an ongoing audit in the form and manner as may be prescribed by the Commissioner by public notice.
- (b) A taxpayer must receive notification of the final outcome of the audit whether conclusive or not. If conclusive, an audit findings letter must be sent to the taxpayer unless the taxpayer waives this right, for example where a taxpayer has been sufficiently informed during the audit or is aware of the audit findings.
- (c) The taxpayer may respond to the audit findings in writing and within the prescribed period before the assessment based on the audit is issued. An extension of time to respond to the audit findings may be given by SARS if reasonably required.
- (d) *Exception:* SARS need not comply with the above where the audit progress report, audit findings letter or response to the audit findings by the taxpayer may impede or prejudice the purpose, progress (e.g. prescription) or outcome of the audit. However, SARS is then required to provide the grounds of the assessment within 21 business days of the assessment or the further period that may be required based on the complexities of the audit. This does not affect the right of the taxpayer to request further reasons or to object to the assessment.

2.2.5.11. *Separation of audit and criminal investigation (clauses 48 and 49):* Audits and criminal investigations of serious tax offences by SARS are separated to ensure that the rights of taxpayers who are suspects in a criminal investigation are given proper effect to. The use of audit information in criminal proceedings may be inadmissible if a taxpayer has not been informed that he or she was also being investigated for criminal offences.

2.2.5.12. *Inquiries (clauses 50 to 58):* No significant changes to the proceedings under current law were made.

2.2.5.13. *Application for and issuance of a search and seizure warrant and the carrying out thereof (clauses 60 to 62):* No significant changes to the proceedings under current law were made, except for affording further protection of taxpayers subjected to a search and seizure, including:

- (a) A provision making explicit the duty on SARS to conduct a search with strict regard to decency and order.

- (b) A requirement that SARS must make an inventory of seized material in the form, manner and time that is reasonable under the circumstances.
- (c) If the removal of original documents or computers may prejudice the continuance of a taxpayer's business, SARS has a discretion to make and remove copies if appropriate.
- (d) A provision that a taxpayer may request SARS to pay or, if SARS declines, for a Court to order payment of the costs of physical damage caused during the conduct of a search.
- (e) If the relevant material included in a warrant is at premises not identified in the warrant, the search and seizure may only be extended to these premises if a senior SARS official has reasonable grounds to believe that the information may be removed or destroyed, that a warrant cannot be obtained in time to prevent such removal or destruction and that the time taken to obtain the warrant would defeat the object of the search and seizure.

2.2.5.14. *Protection of legal professional privilege during execution of search & seizure (clause 64)*: This clause is aimed at ensuring that assertions of legal professional privilege in respect of relevant material subject to search and seizure during the execution thereof, whether under a warrant or not, are dealt with fairly and expeditiously. The documents must be secured or sealed and handed to an independent attorney. The attorney must thereafter retain them until the determination of whether the privilege applies. Such determination is made by the attorney but if the determination is disputed by any party, the attorney must attempt to resolve the dispute through mediation, and if the attorney is not able to resolve the dispute, a judge or magistrate must determine the claim to privilege by way of proceedings *in camera*. This attorney will be briefed by SARS but is not regarded as acting on behalf of either party, and SARS will pay the initial costs of the attorney. If a dispute arises after the determination by the attorney, the costs of the mediation and court proceedings must be borne by the unsuccessful party.

Under clause 60(2)(d) the warrant must include the name of an independent attorney for purposes of clause 64 where the need to search for material over which the taxpayer may claim legal professional privilege is foreseeable. In the case of a search and seizure without a warrant SARS must procure an attorney who is a member of the panel referred to in clause 111, i.e. an attorney appointed by the Minister of Finance in consultation with the relevant Judge-President to act as chairperson of the tax board.

## **2.2.6. Chapter 6: Confidentiality of Information**

The information protection laws of most countries are based on the basic principle that personal information should not be used for purposes incompatible with the purpose for which it was collected. In South Africa a citizen's right to privacy is entrenched in a constitution that regulates the right to protection of privacy. Taxpayers have a right to expect that any information provided by them is treated in confidence and used for tax purposes only and that their affairs will not be disclosed to third parties, including other organs of state. This form of data protection is reinforced by the mandatory protection of SARS' records by section 35(1) of the Promotion of

Access to Information Act, 2000, and further underpinned by case law wherein strict requirements are laid down before a court will order disclosure of tax information.

However, in several developed jurisdictions it is recognised that it is important that tax information is available to other organs of state within proper limits. Specifically, it is recognised that in the context of law enforcement:

- (a) Where certain information is likely to be of value to a criminal investigation, it is in the public interest that tax information is available to law enforcement agencies within certain limits.
- (b) Such limited disclosure will ensure that there is a potential for information flow in two directions, i.e. between a revenue authority and law enforcement agencies and *vice-versa*.

### **New provisions**

The secrecy provisions are now aligned across taxes, are more explicit as to who is subject thereto and when disclosure is permitted. In the context of disclosure to organs of state and related agencies, disclosure for non tax administration purposes is widened.

#### *2.2.6.1. General prohibition of disclosure (clause 67):*

- (a) SARS information is distinguished from taxpayer information and different disclosure rules apply.
- (b) The provision, read with the definition of SARS official, is now specifically applicable to the Commissioner, an employee of SARS or a person contracted by SARS for purposes of the administration of a tax Act, whether formerly or currently so employed or contracted.
- (c) All SARS officials, including a person contracted by SARS, are obliged to take an oath of secrecy. Failure to take the oath before commencing duties is a statutory offence.
- (d) The general prohibition of disclosure rule is now specifically applicable to information unlawfully obtained by any person. This would apply, for example, where a current or former SARS official discloses information contrary to the secrecy provisions to the media, in which case the media would be prohibited from publishing the information.
- (e) A new exception to the general prohibition of disclosure rule is that the Commissioner may, for purposes of protecting the integrity and reputation of SARS as an organisation, disclose information to counter or rebut false allegations or information disclosed in the media or in any other public manner by a taxpayer or the taxpayer's representative. The proposed checks and balances for the exercise of this power are:
  - Only the Commissioner personally may approve such disclosure;
  - The disclosure must be for the protection of the integrity and reputation of SARS as an organisation;
  - The disclosure must be limited to taxpayer information that is necessary to rebut the false allegations;

- The false allegations must have been made by the taxpayer personally or someone authorised to do so by the taxpayer; and
- Prior notice of at least 24 hours before publication should be given to the taxpayer, which should address the concern that incorrect information is disclosed by the Commissioner.

2.2.6.2. *SARS information (clause 68)*: A new definition of SARS information is included and the disclosure of confidential SARS information is regulated and unauthorised disclosure criminalised. SARS information is information that is relevant to the administration of a tax Act that is, for example, confidential information such as internal policies, legal opinions and memorandums. The concept is narrowly defined and only information relevant to tax administration is included. The disclosure of confidential SARS information to a SARS official who is not authorised to have access to the information is also prohibited.

2.2.6.3. *Secrecy of taxpayer information and disclosure (clause 69)*: The general rule in this regard, i.e. that a person who is a current or former SARS official may not disclose taxpayer information to a person who is not a SARS official, has the following exceptions:

- (a) In the course of performance of duties under a tax Act, which includes disclosure—
  - to the South African Police Service or the National Prosecuting Authority of information relating to tax offences for purposes of the prosecution thereof;
  - as a witness in any civil or criminal proceedings under a tax Act;
  - subject to section 69(3) and (4), by order of a High Court; or
  - to an employer (as defined in the Fourth Schedule to the Income Tax Act) of an employee, but only the income tax reference number, identity number, physical or postal address of that employee and such other non-financial information in relation to that employee, as that employer may require in order to comply with its obligations in terms of a tax Act.
- (b) Disclosure under any other Act, including a tax Act, which expressly provides for the disclosure of the information notwithstanding the secrecy provisions, for example section 71(1) of the Prevention of Organised Crime Act, 2000, and sections 36 and 37 of the Financial Intelligence Centre Act, 2001.
- (c) Disclosure “by order of the High court”:
  - The current law provides that a competent Court may order disclosure of taxpayer information. This includes a Magistrate’s Court, Maintenance Court and a section 205 enquiry by a Magistrate under the Criminal Procedure Act, 1977. This power is now limited to the High Court to ensure better protection of taxpayer information.
  - An application procedure is prescribed which requires at least 15 business days notice to SARS, and the criteria which a judge must be satisfied with before granting a disclosure order.
  - In order to give effect to the secrecy provisions, the Commissioner would oppose an application for disclosure to a High Court, especially where it

appears from the outset that the criteria established in case law for such disclosure are not complied with.

- (d) Disclosure to an employer of the income tax reference number, identity number, physical or postal address of an employee and such other non-financial information as that employer may require in order to comply with its obligations in terms of a tax Act. This, *inter alia*, is aimed at ensuring the correctness of employees' tax certificates (IRP5's).

2.2.6.4. *Disclosure for non-tax administration purposes (clause 70)*: This clause generally provides for disclosure to organs of state and other institutions of information to the extent required for purposes of the performance of legislative functions under the legislation regulating such institutions.

Under current tax law the disclosure of certain information to the following entities is permitted:

- The Director-General of National Treasury;
  - The Statistician General;
  - The Board administering the National Student Financial Aid Scheme;
  - The Governor of the SARB (only information required for functions under the Exchange Control Regulations); and
- The Auditor-General, for purposes of his or her functions, has full access to SARS' records and information.

Disclosure to a Commission of Enquiry established by the President of the Republic of South Africa is now included under this clause.

In addition to disclosures and the extent thereof permitted under current law, a new legislative framework for the disclosure of financial regulatory or basic information to specified organs of state, related agencies and certain other institutions is proposed in this clause.

- (a) *Disclosure to financial regulatory agencies*: The TAB proposed the disclosure of specific information under a prescribed procedure to the following agencies:

- Financial Services Board (FSB);
- South African Reserve Bank (SARB);
- Financial Intelligence Centre (FIC); and
- National Credit Regulator (NCR).

In the case of the SARB, the information that may be disclosed would extend beyond that permitted by current tax law.

This follows the proposal in the 2010 Budget Review that the secrecy provisions of the various "regulatory and enforcement agencies under the umbrella of the Minister of Finance" be revised to allow for exchange of information within a legislative framework, a review of the taxpayer secrecy provisions was undertaken for purposes of proposing a mechanism to effect such information exchanges between SARS and other organs of state and its agencies and other institutions. This review was also necessitated by the fact that the current

legislative mechanisms for allowing disclosure of taxpayer information to such entities are disjointed and inconsistent.

The Bill proposes to consolidate the current legislative frameworks for the disclosure of taxpayer information into a single framework in the TAB setting out the general criteria for and extent of such disclosure. Essentially, it is proposed that the framework should only permit disclosure to the extent that the disclosure is—

- necessary to exercise a power or perform a function or duty under the legislation of that particular organ of state or agency; or
- relevant and appropriate to what the disclosure is intended to achieve as determined under the legislation governing the functions of the applicable organ of state or agency.

(b) *Disclosure for purposes of verification of basic information:* The accuracy of the identifying and other basic information relating to a taxpayer is essential to SARS and organs of state. Therefore, the TAB in this clause provides for the disclosure of information for purposes of the verification thereof to an organ of state or institution listed in a regulation issued by the Minister of Finance. An “institution” may include a private institution.

The information that may be disclosed is limited to the name and taxpayer reference number of a taxpayer, any identifying number assigned to a taxpayer (e.g. an identity or passport number or company registration number), the physical, postal address and other contact details of a taxpayer (e.g. telephone number and email address.), the name, address and contact details of the taxpayer’s employer; and other non-financial information as the organ of state or institution may require for purposes of the verification of the above information.

In addition, such disclosure is only permitted under the following circumstances:

- The organ of state or institution must otherwise be lawfully entitled to obtain the information; and
- The information may only be disclosed for purposes of the verification thereof.

#### 2.2.6.5. *Disclosure to SAPS or NPA of information regarding non-tax offences (clause 71):*

An application for a court order for the disclosure of information regarding specified types of serious offences may be brought by means of *ex parte* Court application by SARS, or by the South African Police Service (“SAPS”) or the National Prosecuting Authority (“NPA”).

Under current law only SARS may initiate such proceedings, but this does not adequately cater for circumstances where the SAPS or the NPA has reason to believe that such information is in the possession of SARS and wishes to apply for the disclosure thereof. As the application is *ex parte* no notice to the taxpayer concerned is required, but an application procedure as between SARS and the NPA or SAPS is prescribed which requires at least 10 business days notice to SARS by the NPA or SAPS when initiating the application.

- 2.2.6.6. *Disclosure to taxpayer of own records (clause 73)*: A taxpayer is entitled to:
- (a) Access to information which the taxpayer provided to SARS.
  - (b) A certified copy of the recorded particulars of an assessment.
  - (c) Information obtained by SARS, from third parties or other sources, provided that a request for this information is made under the Promotion of Access to Information Act, 2000 (PAIA). This would entitle SARS, where necessary, to refuse disclosure on an applicable basis of refusal listed in PAIA, for example where disclosure is premature and will prejudice the outcome of an investigation, or reveal the identity of an informant.
- 2.2.6.7. *Publication of names of offenders (clause 74)*: The information regarding a convicted tax offender which may be published, after all appeal rights have been exhausted, excludes such offender's address and may now only refer to the area of residence of the person concerned.

### **2.2.7. Chapter 7: Advance Rulings**

*Clauses 75 to 90*: The advance ruling system currently regulated in the Income Tax Act and the Value-Added Tax Act is incorporated in the TAB. The provisions establish the framework for the system and set out basic rules regarding the application process, fees, exclusions and refusals, the effect of rulings, the impact of subsequent law changes, retrospectivity and the publication of rulings. They also provide for specific rules in respect of the three primary types of rulings, i.e. binding general rulings, binding private rulings and binding class rulings.

### **2.2.8. Chapter 8: Assessments**

Generally, more generic terms regarding assessments are used to include future modernisation initiatives such as a full self-assessment system.

#### **New provisions**

- 2.2.8.1. *Original assessment (clause 91)*: The concept of an "original assessment", i.e. the first assessment in respect of a tax period, is now a defined term that relates to a specific type of assessment, similar to "reduced assessment" and "additional assessment". Generally, an assessment by SARS may be based on the return information or other information available or obtained in respect of the taxpayer.

In the context of self-assessment, the submission of a return which incorporates a determination of the amount of a tax liability constitutes an original assessment. If a tax Act requires a taxpayer to make a determination of the amount of a tax liability and no return is required, the payment of the amount of tax due is an original assessment. If no return or payment is made, SARS may issue an original assessment based on an estimation. If the taxpayer thereafter submits the return or makes the required payment, it would constitute an additional or reduced assessment, as the case may be.

- 2.2.8.2. *Additional assessment (clause 92)*: Provision is made for simplified grounds on which additional assessments may be issued to achieve alignment across taxes. A new simplified concept "prejudice to SARS or the *fiscus*" will be used as a basis for the

issue of additional assessments, for example a previous understatement of income prejudices SARS or the *fiscus* in that the correct amount of tax was not paid. This general concept is used essentially to cater for all circumstances in the tax Acts which may give rise to an additional assessment.

- 2.2.8.3. *Reduced assessment (clause 93)*: Changes were effected to current law to clarify that a reduced assessment will also be issued in the case of an undisputed error made by the taxpayer in a return, for example the omission of deductions to which the taxpayer would otherwise be entitled to. If the error is disputed, for example where SARS is not satisfied that an understatement was purely erroneous, the taxpayer will need to object against the disputed assessment.
- 2.2.8.4. *Jeopardy assessment (clause 94)*: Jeopardy assessments, also known as a “protective assessments”, are introduced and may be issued in advance of the date on which the return is normally due in order to secure the early collection of tax that would otherwise be in jeopardy or where there is some danger of tax being lost by delay. A jeopardy assessment may be issued where the taxpayer, for example, tries to place assets beyond the reach of SARS’ collection powers when an investigation into the taxpayer’s tax affairs is initiated. In addition to the power to object and appeal the assessment, an affected taxpayer may apply to a High Court for a review of the assessment on the basis that the amount thereof is excessive or that the circumstances on which SARS relied to justify a jeopardy assessment do not exist.
- 2.2.8.5. *Estimation of assessment (clause 95)*: In the TAB the concept of an “estimated assessment” is replaced with the concept of an assessment based on an “estimation”. To counteract non-, late or inadequate filing, SARS may issue an assessment on an estimation based on information readily available to it, when no, an incorrect or inadequate return is filed. Provision is still made for an agreed assessment, if a taxpayer is unable to submit an accurate return.
- 2.2.8.6. *Notice of assessment and recording of an assessment (clauses 96 and 97)*: The requirements for a valid assessment are set out. Also, the following additional information must be provided by SARS:
- (a) In the case of an estimated assessment or an assessment that is not or only partially based on a return submitted by the taxpayer, a statement of the grounds for the assessment.
  - (b) In the case of a jeopardy assessment, the grounds for believing that the tax would otherwise be in jeopardy.
- 2.2.8.7. *Withdrawal of assessment (clause 98)*: In addition to the circumstances under current law as to when assessments may be withdrawn, provision is made for the withdrawal of an assessment issued as a result of an incorrect payment allocation by SARS, which may *inter alia* occur in the case of self-assessment for which no return is required.
- 2.2.8.8. *Period of limitations for issuance of an assessment (clause 99)*: The periods of limitation for the issue of an assessment by SARS is:

- (a) In the case of an assessment by SARS, three years after the date of the original assessment.
- (b) In the case of self-assessment for which a return is required, five years after the date of the actual submission of the return by the taxpayer or, if no return is submitted, the date of the issue of the original assessment by SARS.
- (c) In the case of a tax for which no return is required, five years from the date of the actual payment of the tax. If only a portion of the tax was paid, for example under an instalment payment agreement, the period will run from the date of the last payment prior to defaulting under such an agreement.
- (d) In the case of an additional or reduced assessment, no further assessment may be issued if the assessment was issued in accordance with a practice generally prevailing.
- (e) In the case of self-assessment for which no return is required and payment is made, which constitutes an original assessment, no further assessment may be issued if the payment was made in accordance with the practice generally prevailing at the date of that payment.

The above limitation on the issue of assessments by SARS does not apply to the extent that:

- (a) The fact that the full amount of tax chargeable was not assessed was due to fraud, misrepresentation or non-disclosure of material facts.
- (b) The fact that the full amount of tax chargeable was not assessed was due to the failure to submit a return or, if no return is required, the failure to make the required payment of tax.
- (c) SARS and the taxpayer agree prior to the expiry of the limitation period that the limitations do not apply or may be extended.
- (d) An assessment must be issued to give effect to the resolution of a dispute under Chapter 9 or a final judgment. Particularly in the latter regard, if a dispute is pursued to the Supreme Court of Appeal, judgment is often given more than 3 to 5 years after the “date of assessment”, as defined in clause 1, of the original assessment.

2.2.8.9. *Finality of assessment (clause 100)*: All instances where an assessment would become final and conclusive are listed in this clause. This is done for the sake of clarity, as under current law the provisions are dispersed throughout a tax Act.

Although the finality of assessment under clause 100(1) does not prevent SARS from making an additional assessment, this will not be possible after the expiry of the limitation periods referred to in clause 99, unless the exceptions to the limitation apply, e.g. fraud, misrepresentation or non-disclosure of material facts.

In the case of an assessment that is final pursuant to a judgment by the tax court, SARS may only make an additional assessment, even within the limitation period, in respect of an amount of tax that has been dealt with in the disputed assessment, in the event of

that the fact that the full amount of tax chargeable was not assessed was due to fraud, misrepresentation, non-disclosure of material facts or the failure to submit a return or, if no return is required, the failure to make the required payment of tax. However, if the assessment became final in consequence of a judgment by a higher court, no additional assessment may be issued.

### **2.2.9. Chapter 9: Dispute Resolution**

Only specific clauses in this Chapter will be discussed, as the remainder is largely based on current law.

Of note is the potential impact of the Superior Courts Bill, 2010. This Bill provides for the current tax court, as created in terms of the Income Tax Act, 1962, to become the “Tax Matters Special Division of the High Court of South Africa”. The new Court will have jurisdiction over all disputes arising for adjudication from the legislation administered by the Commissioner: SARS, excluding criminal matters. In short, if enacted in its current form, the tax court will become a High Court. Amendments to cater for the implications of this Bill have not been incorporated in the TAB, as it is not clear when this Bill will be enacted.

#### **New provisions**

- 2.2.9.1. *Burden of proof (clause 102)*: The rule has been changed to align it across taxes, and to place the burden upon SARS in two scenarios:
- (a) Burden of proof on taxpayers: These provisions have been amended to align the general burden of proof on taxpayers across taxes.
  - (b) Burden of proof on SARS: The burden of proving whether an estimation on which an assessment is based is reasonable, and the grounds for the imposition of additional tax, is on SARS.
- 2.2.9.2. *Rules for dispute resolution (clause 103)*: The current enabling provision for these rules, i.e. section 107A of the Income Tax Act, 1962, will be deleted in the Schedule of Amendments to the TAB and new, revised rules will be issued under this clause.
- 2.2.9.3. *Objection against assessment or decision (clause 104)*: A taxpayer may object against:
- (a) Any assessment where the taxpayer is aggrieved by the assessment.
  - (b) A decision by SARS not to extend the period for objection or appeal where the taxpayer requested such extension.
  - (c) A decision not to authorise a refund under clause 190.
  - (d) Any decision that may be objected to or appealed against under a tax Act. In this regard, it should be noted such decisions in the Income Tax Act, 1962, will be included in section 3 of that Act pursuant to the amendment thereof by the Schedule of Amendments to the TAB. In the Value-Added Tax Act, 1991, these decisions will mostly be found in section 32 of that Act.
- 2.2.9.4. *Decision on objection (clause 106)*: This clause specifically provides that the notice by SARS informing a taxpayer of the disallowance or partial allowance of an objection, must state the basis for the decision and a summary of the procedures for appeal.

- 2.2.9.5. *Appointment of chairpersons (clause 111)*: This clause *inter alia* obliges a chairperson of the tax board to withdraw where there is a conflict of interest which may give rise to bias, whether on own volition or upon application by either of the parties. Such application may also be made in the event of other indications of bias.
- 2.2.9.6. *Decision of tax board (clause 114)*: The tax board is available as a more informal forum to resolve tax disputes involving tax in dispute of less than R500 000 and should be a more expeditious process than an appeal to the tax court. The tax board's decision period (60 business days) is prescribed to avoid current problems where chairpersons take, for example, up to 2 years to deliver the decision. If the chairperson fails to deliver the decision within the 60 day period, the taxpayer may require that the appeal be referred to the tax court to be considered afresh.
- 2.2.9.7. *Conflict of interests (clause 122)*: This clause *inter alia* obliges a member of the tax court to withdraw where there is a conflict of interest which may give rise to bias, whether on own volition or upon application by either of the parties. Such application may also be made in the event of other indications of bias.
- 2.2.9.8. *Sittings of tax court not public (clause 124)*: A new exception to this rule is inserted, namely that the court may direct on application by any party and under exceptional circumstances that a sitting be held in public. This was inserted as a result of the concern that a constitutional difficulty may arise if only the taxpayer concerned may request that a sitting be held in public, as this may conflict with the open justice principle.
- 2.2.9.9. *Order for costs (clause 130)*: Where a cost order is granted in favour of SARS in the tax court or a higher court, these amounts would constitute funds of SARS within the meaning of section 24 of the SARS Act. The main reason for this is that cost orders are intended to reimburse a party for its legal costs – this is not achieved if SARS uses its own money to pay for legal proceedings and the money pursuant to a costs order in favour of SARS is then paid into the National Revenue Fund.
- 2.2.9.10. *Publication of judgments (clause 132)*: All tax court judgments must be published for general information whether marked reportable or not, in a format that does not reveal the identity of the taxpayer. The reason for this is essentially to address complaints that currently only SARS has the benefit of access to unreported and unpublished judgments.
- 2.2.9.11. *Settlement of disputes (clauses 142 to 149)*: These provisions are changed to cater more clearly for the implications of and rights of SARS where the taxpayer defaults after conclusion of the settlement. The change essentially enables SARS to choose between regarding the settlement agreement as breached as a result of which the full disputed amount remains due (and the dispute must continue) or enforcing specific performance of the settled amount in which event the dispute is regarded as finalised.

It is also clarified that a settlement can only be done *after* the issue of an assessment. When the section 88A settlement procedures were introduced in 2003 in the Income Tax Act, 1962, the underlying assumption was that the settlement of disputes would only commence after the relevant assessment. This assumption is reinforced by the fact

the section 88H of Income Tax Act, 1962, provides for “a revised assessment” to give effect to a settlement i.e. section 88H is based on the assumption that the dispute would be based on an existing assessment that needs to be revised.

Operational uncertainty, however, arose after 2003 as to whether settlements may be concluded prior to assessments. Settlement procedures under the TAB are accordingly limited to post-assessment disputes which should, *inter alia*, avoid the possibility of “negotiated assessments” and ensure proper reporting of settlements to the Auditor-General and Minister of Finance.

## **2.2.10. Chapter 10: Tax Liability and Payment**

### **New provisions**

2.2.10.1. *New categories of persons liable to tax (clauses 151 to 159)*: This Chapter includes new categories of persons liable to tax in order to simplify and clarify the tax liability of different persons, and the capacity in which they may be liable for tax debts. The circumstances when a tax liability in respect of each category of person will arise both in representative capacities and personal capacities are then described. The categories are:

- (a) Persons (primary) chargeable to tax
- (b) Representative taxpayers
- (c) Withholding agents
- (d) Responsible third parties.

2.2.10.2. *Right to recovery (clause 160)*: A representative taxpayer, withholding agent and responsible third party who, as such, pays a tax is entitled to recover the amount so paid from the taxpayer on whose behalf it is paid, or to retain an equivalent amount out of money or assets of the taxpayer in that person’s possession. A taxpayer, on whose behalf an amount was withheld and paid by withholding agent under the agent’s statutory obligation to do so, may not recover the amount from the withholding agent.

2.2.10.3. *Security (clause 161)*: Under certain circumstances a taxpayer, in any of the listed situations, may be required to provide security for purposes of safeguarding the collection of tax, for example, where the taxpayer is a withholding agent who has repeatedly failed to withhold or pay the tax due. In addition, in the case of a taxpayer which is not a natural person and cannot provide the required security, any or all of the members, shareholders or trustees who controls or are involved in the management of the taxpayer may be required to enter into a contract of suretyship in respect of the taxpayer’s liability for tax which may arise from time to time. As security provided by a taxpayer under this clause is aimed at securing the recovery of tax that may, in future, be in jeopardy a decision to require security is not subject to objection and appeal, but is otherwise reviewable by, for example, requesting SARS to review the decision internally under clause 9(1)(b) or by pursuing external remedies. Security may be recovered under the recovery provisions contained in the TAB.

- 2.2.10.4. *Day, time and place for payment of tax (clause 162)*: The TAB provides for enabling provisions allowing SARS to determine the day, time and place for payment of tax. Provision is also made for an expedited due date for payment where there is a risk of dissipation of assets to evade or frustrate the collection of tax.
- 2.2.10.5. *Preservation of assets order (clause 163)*: SARS may apply for a preservation of assets order by a High Court and may, in anticipation of such order, seize assets about to be dissipated. Where SARS seizes the assets first, the order must be applied for within 24 hours of seizure. This power is also available as a conservancy measure for purposes of mutual assistance in the recovery of tax on behalf of foreign governments under clause 185.
- 2.2.10.6. *Payment of tax pending objection or appeal (clause 164)*:
- (a) Clarity is provided that the obligation to pay tax, which arises upon the issue of an assessment, is not “automatically” suspended by an objection or appeal – the obligation can only be suspended by SARS upon request by the taxpayer.
  - (b) In view of the fact that the due date for the payment of tax under an assessment is normally before the due date for lodging an objection and to cater for pre-objection requests for adequate reasons, a suspension request may be made before an objection is lodged. However, such suspension will automatically fall away if no objection is lodged. If the objection is lodged but is based on frivolous or vexatious grounds, the suspension of the obligation to pay may be revoked.
  - (c) The discretion to suspend payment or to revoke it is based on specific criteria specified in the TAB, to enable a taxpayer to understand what criteria must be met to qualify for a suspension.
  - (d) A new obligation is placed on the senior SARS official to periodically review the suspension (on a risk basis) during the dispute, and to revoke the suspension in the case of dissipation of asset risks or delaying tactics employed by the taxpayer.
  - (e) A taxpayer who pays and whose objection is upheld, is now entitled to interest from the date of payment of the disputed amount to the date such amount is refunded. This applies across all taxes.
- 2.2.10.7. *Taxpayer account and allocation of payments (clauses 165 and 166)*: A framework to support the modernisation of SARS’ accounting system is created, within which:
- (a) A single taxpayer account with a rolling balance may be created.
  - (b) Payment allocation rules may be applied, for example, the application of the first-in-first-out rule.
- 2.2.10.8. *Deferral of payment (clauses 167 and 168)*: Where a taxpayer is unable to pay a tax debt in a single amount within the prescribed payment period, provision is made for a formal instalment payment arrangement in accordance with prescribed criteria and procedures. This is essentially a debt relief mechanism but is only applicable if the

criteria to qualify for such an arrangement are met. A senior SARS official may enter into such an agreement with a taxpayer, under which the taxpayer may be allowed to pay a tax debt in a single amount after a prescribed period or in instalments. SARS may terminate an agreement if the taxpayer fails to pay an instalment or fails to otherwise comply with its terms, and payments made prior to the termination will be retained by SARS as part payment of the tax debt.

### **2.2.11. Chapter 11: Recovery of Tax**

The main purpose of this Chapter is the creation of a framework to support the modernisation of SARS' accounting system, within which:

- (a) A single taxpayer account with a "rolling balance" may be created.
- (b) New payment allocation rules may be applied, for example the application of the first-in-first-out rule.
- (c) Interest provisions may be aligned across taxes and interest due or payable may be calculated on the daily balance owing and compounded monthly.

Generally, the right to collect tax from responsible third parties is aimed at strengthening SARS' collection powers:

- (a) In respect of transactions involving the transfer of assets offshore.
- (b) Where certain events result in the limitation or frustration of the collection of tax debts by SARS.

In addition, the potential personal liability of parties involved in the financial affairs of a company should serve as encouragement to comply with the tax laws by ensuring correct and timely payment of tax.

No major changes were effected in respect of the provisions enabling SARS to assist in the collection of foreign taxes.

#### **New provisions**

2.2.11.1. *Period of limitation on collection of outstanding tax debts (clause 171)*: The current 30 year prescription period for tax according to the Prescription Act, 1969, is now prescribed in the TAB and is reduced to 15 years. This will ensure a more practical and realistic approach to SARS' debt book management and is more aligned with international best practice.

2.2.11.2. *Liability of third party appointed to satisfy tax debts (clause 179)*: Under current law, this is an "agent appointment" effected under, for example, section 99 of the Income Tax Act, 1962. The use of the term "agent" was considered unnecessary – under this clause any third party who holds or will hold assets, belonging to a taxpayer or who owes or will owe any money to the taxpayer may by notice by a senior SARS official be required to transfer the assets or pay the amounts to SARS. If that person is unable to comply with a requirement of the notice he or she must advise the senior SARS official of the reasons for not complying within the period specified in the notice.

A person receiving a notice must transfer the assets or pay the money in accordance with the notice and, if the person parts with or disposes of the assets or money contrary to the notice, the person is personally liable to the extent of the value of the assets or money.

If SARS under this recovery power requires a third party, for example an employer, to pay amounts to SARS in satisfaction of the taxpayer's tax debt, provision is made that SARS may, on request by a person affected, extend the period over which the amount must be paid to SARS to allow the taxpayer to cover his or her basic and legitimate dependant's living expenses and those of any dependants.

- 2.2.11.3. *Personal liability of person involved in financial management (clause 180):* A person who controls or is regularly involved in the management of the overall financial affairs of a taxpayer with outstanding tax debts may be held personally liable for such debts where a senior SARS official is satisfied of negligence or fraud on the part of such person in the payment of tax debts of the taxpayer. Liability is proportional to the extent that the negligence or fraud resulted in the non-payment of the tax debt.
- 2.2.11.4. *Liabilities of shareholders and liabilities of transferee (clauses 181 and 182):* Provision is made for the liability of shareholders who receive assets from a company with outstanding tax debts within one year of its winding-up, as well as the liability of transferees who are connected persons in relation to the transferor and who receive property for no or below fair market value.
- 2.2.11.5. *Liability of person assisting in dissipation of assets (clause 183):* A person assisting a taxpayer in the dissipation of assets to avoid or frustrate the collection of tax may be held jointly and severally liable with the taxpayer for the tax debt.
- 2.2.11.6. *Recovery powers against responsible third parties (clause 184):* SARS has the same powers of recovery against the property of a person referred to in Part D of Chapter 11 as SARS has against the property of the taxpayer. This means that SARS may use the recovery provisions against the property of a responsible third party to collect an amount that becomes due by a responsible third party who is personally liable
- 2.2.11.7. *Repatriation of foreign assets of taxpayer (clause 186):* Where a taxpayer has offshore assets which could be utilised to satisfy tax debts, provision is made that SARS may apply for a Court order to compel the repatriation of these assets. The Court may impose certain sanctions where the taxpayer fails to comply, for example imprisonment based on contempt of court, or the imposition of other limitations, for example requiring the taxpayer to cease trading until the taxpayer has complied with the court order.

## **2.2.12. Chapter 12: Interest**

Chapter 12 creates *inter alia* a framework to support the modernisation of SARS' accounting system regarding interest, within which interest provisions may be aligned across taxes and interest due or payable calculated on the daily balance owing and compounded monthly. Clause 272 incorporates a transitional rule that provides that until the Commissioner by public

notice determine the tax types in respect of which compounded interest applies, the current provisions will remain applicable.

The general rule is that that interest accrues from the “effective date”, as described in clause 187(4), to the date of payment.

Interest on an amount refundable under clause 190 is calculated from the later of the effective date, or the date that excess was received by SARS to the date the refunded tax is paid. In other words, if the overpayment only occurred after the effective date, interest will be calculated from such “out of pocket” date and not the earlier “effective date”. If a refund is offset under clause 191 against an existing tax debt of the taxpayer, the date on which the offset is effected is considered to be the date of payment of the refund. Exceptions to this rule may remain in some tax Acts, for example section 45 of the Value-Added Tax Act, 1991. The effective date in relation to an additional assessment or reduced assessment is the effective date in relation to the tax payable under the original assessment, as the adjusted amount was due or refundable from this date.

Separate provision is made for interest payable in respect of the first and second payment of provisional tax in clause 188(2).

The remittance of interest discretion is retained, but limited to where interest is payable as a result of specified circumstances beyond the taxpayer’s control.

### ***2.2.13. Chapter 13: Refunds***

This Chapter caters for the payment of refunds by SARS to a taxpayer. No major changes were effected to current law, except for a provision that refunds paid into a wrong account by SARS may be collected as if they were taxes. Absent such a provision SARS, pursuant to paying amounts into incorrect accounts, will only be able to recover the amounts through protracted common law remedies such as enrichment.

Furthermore, a refund need not be authorised by SARS until such time that a verification, inspection or audit of the refund has been finalised. A taxpayer will remain entitled to interest from the later of the effective date or date that the overpayment was made, to the date of the payment of the refund by SARS after the verification, inspection or audit.

### ***2.2.14. Chapter 14: Write off or Waiver of Tax Debts***

These provisions are essentially a form of tax debt relief which may be afforded to taxpayers under certain prescribed circumstances. No major changes were made to current law, except that the circumstances where it is appropriate to compromise a tax debt were made less restrictive, by removing some of the factors that disqualify the tax debtor from a compromise agreement.

### ***2.2.15. Chapter 15: Penalties***

The administrative penalties introduced under section 75B of the Income Tax Act are included in the TAB so as to apply across taxes. These penalties essentially target non-compliance with an obligation under a tax Act that does not include elements of tax evasion. Tax evasion is addressed under the additional tax provisions.

### **New provisions**

- 2.2.15.1. Fixed amount administrative penalties may only be imposed in respect of non-compliance listed in a public notice by Commissioner, and not any non-compliance with an obligation under a tax Act. The purpose of the notice is to only target impactful or more serious non-compliance and only when SARS is operationally able to do so.
- 2.2.15.2. In terms of clause 213, percentage based penalties are imposed under the TAB if SARS is satisfied that an amount of tax that was not paid as and when required under a tax Act. SARS may impose a “penalty” equal to the percentage, *as prescribed in the relevant tax Act*, of the amount of unpaid tax. The procedures for the imposition and remittance of a percentage based penalty are regulated by the TAB.
- 2.2.15.3. The current administrative penalty of R1 million or more for failure to report a reportable arrangement has been included in this Chapter and changed to ensure that the amount of the penalty is imposed on a more proportionate basis. The basis, amount, procedure for the imposition and remittance of this penalty are, therefore, regulated by the TAB.

### **2.2.16. Chapter 16: Additional Tax**

Provision is made that the current open-ended discretion to impose additional tax of up to 200% is now limited by a new structure whereby the percentage of the additional tax will be determined by the taxpayer’s behaviour and objective criteria listed in a table. This is aimed at ensuring consistent treatment of taxpayers in comparable circumstances.

### **New provisions**

- 2.2.16.1. Additional tax under the TAB now predominantly targets serious non-compliance such as conduct that includes elements of tax evasion. Additional tax is triggered by an “understatement” as defined in clause 221, and the percentage of additional tax imposed will be based on specified behaviour. A table of additional tax percentages based on specified and defined (where required) behaviour is included.
- 2.2.16.2. The onus to prove the grounds for imposition of additional tax and the applicable percentage now rests on SARS.
- 2.2.16.3. Provision is made that administrative penalties and additional tax cannot both be imposed in respect of the same non-compliance.
- 2.2.16.4. *Voluntary Disclosure Programme (“VDP”)*: A permanent legislative framework for voluntary disclosure applicable across all tax types, excluding customs and excise, is included in this Chapter. The main purpose of such a framework would be to enhance voluntary compliance and is in the interest of the good management of the tax system and the best use of SARS' resources. The permanent framework in the TAB will not provide interest or exchange control relief but will on a permanent basis provide the following relief:
- (a) If the taxpayer has remedied all non-compliance with any obligation under a tax Act, grant 100% relief in respect of an administrative penalty that was or may be

imposed under Chapter 15, excluding a penalty imposed under that Chapter or in terms of a tax Act for the late submission of a return.

- (b) The relief in respect of any additional tax referred to in column 5 or 6 of the Additional Tax Percentage Table in clause 223.
- (c) SARS will not pursue criminal prosecution.

### **2.2.17. Chapter 17: Criminal Offences**

General statutory offences are now included in the TAB but tax type specific offences may remain in the other tax Acts. Provision is made for non-compliance offences, tax evasion and contravention of secrecy provisions. Criminal sanction under this Chapter may be pursued by SARS in addition to imposing an administrative penalty or additional tax.

#### **New provisions**

2.2.17.1. *Tax evasion “reverse onus” (clause 236(2))*: The reverse onus on a taxpayer under current law has been removed. SARS has been advised that this onus in its current form will not survive a constitutional challenge and should be replaced by a “lesser onus”, in terms of which the taxpayer will only need to prove that there is a reasonable possibility that the taxpayer was ignorant of the falsity of the fraudulent statement and that such ignorance was not due to negligence.

2.2.17.2. *Decision to lay a complaint of statutory tax evasion (clause 236(3))*: The decision to lay a complaint for tax evasion must be taken by a senior SARS official.

### **2.2.18. Chapter 18: Reporting of Unprofessional Conduct**

No major changes were effected, except that a condition has been added to the existing requirement that a person who gives tax advice must register as a tax practitioner with SARS. A person who during the five years before his application for registration has been banned or removed from a related profession or professional body for dishonesty, or convicted for a crime involving dishonesty, may not be so registered.

### **2.2.19. Chapter 19: General Provisions**

These provisions are predominantly based on current law, except for clause 255 which caters for non-material defects in procedural requirements for the issue of documents, for example assessment. Such defects do not affect the validity of the procedure provided the taxpayer concerned has effective knowledge of the fact of the notice or document and of its content.

The procedures and the requirements for the issue of a tax clearance certificate are now regulated in the TAB under this Chapter.

### **2.2.20. Chapter 20: Transitional Provisions**

These provisions are aimed at ensuring a smooth transition from current law to the Tax Administration Act, upon commencement.

### 3. CONSULTATION

The TAB involved an extensive review of the existing position in South Africa, an analysis of the international situation to establish best practice and a detailed discussion of a proposed South African model. SARS was also assisted by international tax experts from the IMF and local constitutional experts.

The drafting process involved input from internal stakeholders, and discussions were also held with the National Treasury. During March 2009 a conceptual draft TAB was submitted to the previous Minister of Finance, who also approved the holding of a closed workshop with external tax experts in May 2009.

Pursuant to the closed workshop, discussions and internal workshops, the commentary received was considered during an extensive internal review of the draft and resulted in certain changes.

A first draft of the TAB was released for public comment on 29 October 2009. Comments and input during the closed workshop were received from *inter alia* the following institutions and interested parties in the tax arena:

- SAICA (South African Institute of Chartered Accountants);
- SAIPA (South African Institute for Professional Accountants);
- BUSA (Business Unity South Africa);
- BASA (Banking Association of South Africa);
- LSSA (The Law Society of South Africa);
- SAIT (South African Institute of Tax Practitioners);
- General Council of the Bar;
- ASISA (Association for Savings and Investment in South Africa);
- Edward Nathan Sonnenbergs (Dr. Beric Croome);
- Werksmans Attorneys (Mr Ernest Mazansky);
- Cliff Dekker Inc. Attorneys (Prof Emil Brincker);
- PriceWaterhouseCoopers;
- Ernst & Young;
- Deloitte;
- KPMG;
- PAG (Payroll Authors Group).

Another external workshop was held with external stakeholders at the beginning of March 2010 after the close of the public comment cycle on 26 February 2010, which gave the commentators a further opportunity to debate substantial issues and to raise any additional concerns. All comments were duly considered and changes where considered necessary were affected to the draft Bill submitted to the State Law Advisers for pre-certification.

A workshop with the Economic Sectors, Employment and Infrastructure Development Cluster was held in August 2010, whereafter the draft TAB was submitted for Cabinet approval for the introduction thereof in Parliament, which was given at the end of September 2010.

### 4. CONSTITUTIONAL IMPLICATIONS

The TAB focuses on compliance with a number of very broad constitutional principles that should apply to each administrative rule, such as equity, fairness, and efficiency. Where fundamental rights are affected, remedial rights of taxpayers or mitigation of the impact were addressed. The

TAB was reviewed by external constitutional experts, which review was provided to the Office of the Chief State Law Adviser for consideration during the pre-certification of the TAB for submission to Cabinet.

#### **5. IMPLICATIONS FOR VULNERABLE GROUPS**

The simplification of tax administration should assist smaller taxpayers to understand and comply more easily with the tax laws, thereby reducing their compliance burden.

#### **6. IMPLICATIONS FOR PROVINCES**

None

#### **7. FINANCIAL IMPLICATIONS FOR STATE**

One of the primary objectives of the TAB is to reduce the costs of tax administration in the medium to longer term. In the short term, however, implementation cost may arise from system changes, changes to prescribed forms, staff training etc., which will be covered from existing funds in SARS' budget.

#### **8. PARLIAMENTARY PROCEDURE**

**8.1.** The State Law Advisers and SARS are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

**8.2.** The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains no provision pertaining to customary law or customs of traditional communities.