3 December 2021

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RE: ANNEXURE C PROPOSALS FOR BUDGET 2021: TAX ADMINISTRATION

We have attached the Annexure C Proposals from the Tax Administration Technical Work Group which covers both the notes made on the draft response document dated 10 November 2021 (Part A) as well as additional submissions (Part B).

We appreciate the opportunity to participate in the process and would welcome further dialogue.

Please do not hesitate to contact us should you need further information.

Yours sincerely

E Rossato

Elle-Sarah Rossato
Chair of the Tax Administration Technical Work Group

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PART A – SUBMISSIONS IN RESPECT OF LEGISLATIVE PROPOSALS

1. ESTIMATED ASSESSMENTS IN TERMS OF SECTION 95(1)(c) - ESTIMATED VERSUS ADDITIONAL ASSESSMENT

[Applicable provisions: Sections 95 of the TA Act]

1.1. **The legal nature of the problem**

1.1.1. Section 95(1)(c) allows SARS to raise an estimated assessment in consequence of a taxpayer's failure to provide information when such information has been requested at least twice. Section 95(5) does not make it plain when an assessment is an estimated assessment raised in terms of section 95(1)(c).

1.2. **Factual description**

1.2.1. It often happens in practice that, after the taxpayer filed a tax return, SARS requests relevant material from the taxpayer twice and the taxpayer does not respond.

1.2.2. The assessment raised by SARS in these situations are often labelled "additional assessment" and the ground for the additional assessment is stated as "onus of proof not discharged".

1.2.3. Such assessment could arguably constitute an estimated assessment in terms of section 95(1)(c) [especially given the stated intention in previous explanatory memoranda that the aim of the amendment is to remove the audit function from the dispute function]. However, absent a clear indication as to whether the assessment constitutes an estimated assessment it could equally be argued that the assessment is an additional assessment which is not an estimated assessment and that would fall subject to objection and appeal like any other assessment which is not an estimated assessment. In fact, it could be argued that absent an explanation in the grounds for the assessment to the effect that the assessment constitutes an estimated assessment (which is in any event required in terms of section 96(2)), the assessment is not an estimated assessment.

1.2.4. This gives rise to difficulties with taxpayers in these scenarios, not being completely satisfied regarding the nature of the assessment (i.e., whether it is estimated or additional), submitting both an objection and a request for a reduced assessment in terms of section 93(1)(f)/95(6).

1.3. **Persons/businesses impacted**

1.3.1. All taxpayers in respect of whom SARS raises an assessment following at least two requests from SARS for relevant material and in respect of which the taxpayer has not responded.

1.4. **Proposal**

1.4.1. It is proposed that clarity is required in terms of when an assessment constitutes an estimated assessment in terms of section 95(1)(c) and when not especially in circumstances where the assessment is issued following at least two requests by SARS for information.

1.4.2. It is submitted that this could be achieved by either making it clear in section 95(5) that the objection exclusion only applies where the notice of assessment clearly calls itself an "estimated assessment. This will avoid

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disputes between taxpayers and SARS as to whether the assessment in question is estimated and when not and thereby give clarity as to the procedure to be followed by the taxpayer.

1.4.3. In addition, it is pointed out that SARS' e-filing system should be updated accordingly to clearly reflect an "estimated assessment" issued to the taxpayer.

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PART B: ADDITIONAL COMMENTS - SUGGESTED AMENDMENTS

2. REDUCED ASSESSMENTS IN TERMS OF SECTION 93(1)(a) – TIME PERIODS

[Applicable provisions: Sections 93(1)(a) of the TA Act]

2.1. The legal nature of the problem

2.1.1. Section 93(1)(a) provides the mechanism under which SARS acts to reduce an assessment following a successful dispute by the taxpayer. Section 93(1)(a) does not provide a time period within which SARS must act to reduce an assessment in terms of section 93(1)(a).

2.2. Factual description

2.2.1. It often happens in practice that, following a successful dispute by the taxpayer, SARS takes several months to issue the reduced assessment (even following an order of the Tax Court).

2.3. Persons/business impacted

2.3.1. All taxpayers who enter into a dispute with SARS.

2.4. Proposal

2.4.1. It is proposed that time periods be provided in section 93(1)(a) within which SARS must issue the reduced assessment following a dispute under chapter 9.

2.4.2. In this regard we draw your attention to the time periods provided in rules 23(3) and 24(3) of the tax court rules and suggest that the 45-day period referred to therein be maintained as the time period for reduction of assessments under section 93(1)(a). In short, it is proposed to align section 93(1) with rules 23(3) and 24(3).

3. SUSPENSION OF PAYMENT AND SECTION 93(1)(e) REQUESTS

[Applicable provisions: Sections 93(1)(e) and section 164 of the TA Act]

3.1. The legal nature of the problem

3.1.1. Section 93(1)(e) allows SARS to issue a reduced assessment if the assessment was, *inter alia*, based on a processing error by SARS.

3.1.2. Section 164 allows taxpayers to request suspension of payment pending an objection and appeal.

3.1.3. Section 164 is not available in respect of reduced assessment requests under section 93(1)(e) since it does not qualify as a dispute under Chapter 9 of the TA Act.

3.2. Factual description

3.2.1. It is submitted that holding a taxpayer liable for payment of tax in respect of an assessment that is incorrect because of a processing error by SARS is untenable, and the issuing of the reduced assessment is not subject to the timelines as contained in Chapter 9 of the TA Act.

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3.2.2. The taxpayer has no alternative but to make payment and wait on the outcome of the application and then wait a further period for a refund to be paid. This is prejudicial to the taxpayer, especially when faced with financial constraints in operating their businesses.

3.3. **Persons/business impacted**

3.3.1. All taxpayers where SARS has made an incorrect assessment based on processing errors by SARS.

3.4. **Proposal**

3.4.1. It is proposed that the scope of section 164 be broadened to allow taxpayers to rely on it in respect of reduced assessment requests under section 93(1)(e).

3.4.2. It is accepted that broadening the scope of section 164 to all requests for reduced assessments also be available in respect of section 93(1)(e) requests opens the door for abuse. However, section 164 already has mechanisms available to curb any such opportunity for abuse and there will be no loss to the *fiscus* if the reduced application fails since the outstanding debt is payable to SARS with interest.

4. REDUCED ASSESSMENTS UNDER SECTION 93 OF THE TA ACT – CLARIFICATION ON THE MEANING OF "READILY APPARENT UNDISPUTED ERROR"

[Applicable provision: Section 93(1)(d) of the TA Act]

4.1. **Reason for the introduction of the provision into the TA Act**

4.1.1. The previous wording of the TA Act stated that SARS may issue a reduced assessment if satisfied that an assessment contains an "undisputed error" by SARS or the taxpayer.

4.1.2. According to the Memorandum on the Objects of TALA Bill of 2011. The previous wording of the TA Act stated that SARS may issue a reduced assessment if satisfied that an assessment contains an undisputed error by SARS or the taxpayer. If read in line with Section 99 of the TA Act, the reduced assessment could be made within five years of the date of the original assessment in the case of VAT, which is a self-assessment tax, and within three years of the date of the original assessment in the case of income tax.

4.1.3. Since then, SARS and National Treasury accepted that the three-year period would be retained, and that SARS would attempt to mitigate the risks presented by older requests for correction through its risk management systems. The insertion of the phrase "readily apparent" in addition to the requirement that the error be "undisputed" was purportedly to ensure that "substantive issues are properly challenged through the objection and appeal system".

4.2. **Detailed factual description/ The legal nature of the problem**

4.2.1. Section 93 of the TA Act was amended by the Tax Administration Laws Amendment Act, 2015, to provide that SARS may only issue a reduced assessment if SARS is satisfied that there is a (currently undefined) "readily apparent" undisputed error in the assessment.

4.2.2. In practice, it appears that taxpayers are severely negatively impacted by this amendment. What is "readily apparent" to one person may not be so to another. There is also no consistency from SARS in dealing

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with requests for a reduced assessment and it would seem that SARS appears to interpret the words "readily apparent" to mean "effortlessly obvious" (which it is submitted is not the legal test).

4.2.3. The SARS Dispute Resolution Guide – Issue 2 (2020) is also by no means helpful as it effectively states that the taxpayer can apply for section 93 reduced assessment, where typically two scenarios are present:

4.2.3.1. Mistake by taxpayer – here an example is given of a taxpayer forgetting to claim a retirement fund contribution in his tax return, and SARS suggests that the taxpayer makes use of the Request for Correction ("**RFC**") process; or

4.2.3.2. Mistake by SARS – here an example is given of a processing error of the double inclusion of an amount of income by SARS, which could be fixed by SARS voluntarily if SARS discovers this, alternatively that the taxpayer can follow the RFC process.

4.2.4. In other words, the SARS Guide indicates that taxpayers can request a reduced assessment where they have made an error, however no guidance is given concerning the "readily apparent" requirement.

4.2.5. We do note that an Interpretation Note (IN) on section 93 has been issued by SARS and some clarification is contained in the IN in this regard. Whilst this is a welcomed development, the TA Act itself requires amendment. The interpretation and application of section 93 has become much more complicated with the inclusion of the wording "readily apparent" undisputed error which now causes much confusion to taxpayers as well as SARS officials (as one internal governance committee does not necessarily regard "readily apparent" in a similar manner as another committee in a different region), which naturally causes discrimination between taxpayers. In addition, in some cases, it defeats the purpose of its introduction as it no longer allows taxpayers a less formal mechanism to request corrections to their returns and so reduced assessments.

4.3. **Nature of the businesses/ persons impacted**

4.3.1. All taxpayers (whether natural or juristic persons) can potentially be impacted by the lack of clarity in this regard.

4.4. **Proposal**

4.4.1. We note that the draft IN on section 93 has been published, however, section 93 of the TA Act, itself, should be amended to afford greater clarity/guidance to taxpayers and SARS, to ensure proper utilisation of the section, as well as to ensure that the intention of the legislature is effectively practiced, as follows:

4.4.1.1. "Readily apparent" should either be replaced or properly defined in the TA Act; or "readily apparent" should be deleted from section 93 of the TA Act.

4.4.2. In addition, the meaning of "undisputed" poses a challenge as SARS' view is often that section 93 is abused in an instance where the taxpayer should in fact have objected (since there is no time limit to request a reduced assessment).

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5. KEEPING THE TAXPAYER INFORMED – LEGISLATION INADEQUATE TO COMPLY WITH ADMINISTRATIVE JUSTICE PROVISIONS

[Applicable provision: Section 42 of the TA Act]

5.1. **The legal nature of the problem**

5.1.1. It is trite that section 42(2)(b) echoes and gives effect to the principles of procedural fairness enshrined in section 33 of the Constitution.

5.1.2. The duties placed on SARS in terms of section 42 to issue notice of commencement of an audit, to keep the taxpayer informed during the audit, to provide the document referred to in section 42(2)(b) and to allow the taxpayer an opportunity to respond thereto before raising an assessment applies only in relation to an audit. It does not apply to a verification.

5.2. **Factual description**

5.2.1. Not imposing the section 42(2)(b) obligations on SARS in relation to verifications seems baseless as a verification, in many instances, has the same effect on the taxpayer as an audit and, like an audit, may result in an additional assessment. Whilst it may be true that these section 42 obligations apply to SARS in any event in terms of PAJA and the Constitution when SARS is conducting a verification, that is no reason not to extend the scope of section 42 to verifications. If the Constitution and PAJA alone were enough to protect taxpayers, then the obligations placed on SARS under section 42 in relation to an audit would also not be required yet as specifically provided for in section 42.

5.3. **Persons/business impacted**

5.3.1. All taxpayers in respect of which SARS conducts verifications.

5.4. **Proposal**

5.4.1. It is proposed that section 42(2)(b) should be amended to apply in relation to, at least, verifications insofar as grounds of assessments are concerned.

6. PROBLEMS WITH VOLUNTARY DISCLOSURE PROGRAMME (VDP) PROVISIONS

[Applicable provisions: Sections 225-233 of the TA Act]

6.1. **Reason for the introduction of the provisions into the TA Act**

6.1.1. According to the Memorandum on the Objects of the Tax Administration Bill 2011, the main purpose of such a framework was to enhance voluntary compliance and was in the interest of the good management of the tax system and the best use of SARS' resources.

6.1.2. The voluntary disclosure programme ("**VDP**") thus serves an important policy objective, which is to bring more taxpayers, assets and income into the South African tax net. It is important to note that the VDP is not a tax amnesty, in that there is no relief from the actual underlying taxes. There is also no relief from

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interest payable on the relevant taxes or relief from an exchange control perspective. The only relief is in relation to certain penalties that could potentially otherwise apply.

6.1.3. However, in practice there are various technical/practical issues with the VDP tax provisions. This is highly problematic within the current context, since uncertainty or perceived inequity in relation to the VDP has the result that taxpayers are disinclined to apply for VDP. Given these risks, taxpayers frequently rather adopt a "catch me if you can" approach.

6.1.4. We note that VDP was discussed during the Annexure C workshops held in 2017, at which time SARS arranged a subsequent meeting in January 2018 to discuss these issues. Whereas SARS expressed the view that the vast majority of taxpayer concerns could be resolved by means of an operational guide / standard operating procedure document, there has been no such document published to date. In addition, we note that more recently, SARS has conducted their own research project into the VDP regime with the aim of gauging taxpayers' experiences associated with the VDP, however, we are unaware of the outcome of such research project.

6.2. **Period of disclosure for VDP**

6.2.1. **Detailed factual description/ The legal nature of the problem**

6.2.1.1. There is currently no limitation of period in relation to a disclosure in terms of the VDP. In contrast, section 29 of the TA Act requires that a taxpayer should ordinarily retain tax related records for a period of five years from the date of submission of the relevant tax return (or five years from the date of the end of the relevant tax period, where no return was required to be submitted).

6.2.1.2. This period is extended in terms of section 32 of the TA Act, where there is an audit, investigation, objection or appeal. Whereas the burden of proof in tax matters is ordinarily on taxpayers, the taxpayer is not obliged to retain documents past the record retention period, and accordingly ordinarily SARS cannot assess a taxpayer to tax in relation to these earlier periods (where tax records may have supported the taxpayer's tax submissions, but the taxpayer has lawfully no longer retained these records).

6.2.1.3. As a result of the record retention period, a taxpayer will often not have records relating to periods prior to the record retention period. In practice, in VDP matters, SARS has required that a taxpayer estimate its tax liability for these earlier periods, alternatively SARS has alleged that the failure to declare tax liabilities for earlier periods, results in the disclosure not being "full and complete in all material respects" as envisaged in section 227(c) of the TA Act. This is problematic in that ordinarily the record retention period would protect a taxpayer from tax liability in relation to these earlier periods, and the taxpayer does not have appropriate records to defend itself.

6.2.1.4. It should be noted that, in the first voluntary disclosure program (that ran from 2010 to 31 October 2011), there was a limitation of five years in relation to the period for disclosure. In current practice, the meaning of "full and complete" is applied inconsistently at the SARS VDP unit. In some cases SARS officials have requested that certain applicants make the disclosures going 10 years back, even if the applicant can reasonably pinpoint the date of default. In other cases, SARS accepts the date of the default without any questions.

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6.2.1.5. There are also technical legal issues in relation to VDP extending back to multiple past periods. For example, the normal period of limitation for issuing assessments is 3 years from assessment for income tax matters and five years for VAT matters. For SARS to assess prior to these periods, exceptional circumstances such as fraud, misrepresentation or non-disclosure would need to be present. It would accordingly be the exception rather than the rule for SARS to be able to issue any tax assessments for these earlier periods. In the circumstances, it appears unfair and unreasonable to require taxpayers to disclose and pay taxes in relation to these earlier periods, or face rejection of their VDP application.

6.2.1.6. Given these perceived inequities or risks, taxpayers frequently decide not to make VDP disclosures regarding tax positions arguably incorrectly adopted in earlier periods, and rather simply "fix this going forward". This significantly negatively impacts the uptake of the VDP. This is arguably opposite to one of the main purposes of the VDP which is to enhance voluntary compliance.

6.2.2. **Nature of the business/ persons impacted**

6.2.2.1. The taxpayers[1] impacted by the lack of clarity in this regard can be either:

6.2.2.1.1. non-compliant taxpayers who wish to come forward and regularise their defaults; or

6.2.2.1.2. Compliant taxpayers of good standing who have in good faith discovered an error resulting in a default, which they now wish to regularise.

6.2.3. **Proposal**

6.2.3.1. The period for disclosure of information and documentation relating to a VDP should be limited to the record retention period in section 29 read with 32 of the TA Act and aligned with the five-year limitation rule in the first voluntary disclosure program (that ran from 2010 to 31 October 2011).

6.3. **No objection and appeal process for rejections of VDP applications**

6.3.1. **Detailed factual description/ The legal nature of the problem**

6.3.1.1. The SARS VDP Unit may reject an application for VDP relief if it is of the view that the requirements in sections 226 and 227 of the TA Act are not met.

6.3.1.2. Such decisions by the VDP Unit are not currently subject to objection or appeal under Chapter 9. The remedy for a taxpayer in these circumstances, who disagrees with such a decision must take the matter on judicial review to the High Court. Because of the cost and delay involved in such a process, few taxpayers are willing or able to do so.

6.3.1.3. Many practitioners believe that certain decisions by the VDP Unit incorrectly narrow the qualification criteria for VDP. With the inability to access the normal objection and appeal process

[1] Note: Due to the complexity of the VDP regime, our feedback is that mostly high net worth taxpayers or medium to large corporate taxpayers are making use of the provision as they can afford tax practitioners. This coupled with the other notes on VDP is resulting in massive losses of revenue to the fiscus.

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in relation to rejections of VDP applications, taxpayers are disinclined to "risk" a VDP application in various circumstances. Once again, this defeats the main purpose of the VDP regime which is, *inter alia*, aimed at encouraging/ enhancing voluntary compliance (see also note 1 on previous page).

6.3.2. **Nature of the business/ persons impacted**

6.3.2.1. This provision affects taxpayers whose VDP applications have been rejected on the basis that it does not meet a requirement/s for a valid VDP. This is unfair, as certain aspects of the current VDP legislation are unclear and open to different interpretations by the taxpayer and by SARS. If a complaint taxpayer identifies an error which they voluntarily seek to regularize with the VDP Unit and their interpretation of "full and complete" disclosure differs from SARS' interpretation resulting in the rejection of the VDP, the complaint taxpayer will potentially only be left with the costly remedy of approaching the High Court in a review application. This is unduly harsh.

6.3.3. **Proposal**

6.3.3.1. Decisions concerning qualification for VDP relief in terms of Part B of Chapter 16 of the TA Act should be subject to objection and appeal. We set out below reasons why, in our view, the objection and appeal process should be available to taxpayers (rather than a High Court review process).

6.3.3.2. Justice prohibitively costs

6.3.3.2.1. For larger taxpayers, an appeal to Tax Court or review in the High Court may well be similarly affordable. However, the situation is dramatically different for "smaller" taxpayers.

6.3.3.2.2. In relation to smaller disputes, taxpayers following the objection and appeal process would have their matter heard by the tax board. This involves fewer formalities and lower cost, making justice more financially accessible for "smaller" taxpayers.

6.3.3.2.3. This is a real concern in relation to all potential disputes, where taxpayers are obliged to follow the High Court review process, regardless of their financial resources and the size of their dispute.

6.3.3.3. ADR process

6.3.3.3.1. The Alternative Dispute Resolution process has been implemented as part of the normal objection and appeal process. This appears to be fulfilling an important function, in reducing the need for costly litigation, and helping the parties reach a mutually agreeable conclusion.

6.3.3.3.2. This process can be anticipated to have a similar beneficial impact on disputes regarding the availability of VDP. However, ADR does not form part of the High Court review process and is therefore currently unavailable for taxpayers who dispute SARS' rejection of their VDP application.

6.3.3.3.3. Whereas it is possible that similar positive resolution could be achieved in a less formal manner, when requesting SARS to review their decision, the ADR mechanism is already set

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up with skilled and experienced staff and known processes. In the circumstances, it appears most appropriate to utilise these existing channels, as part of the objection and appeal process.

6.3.3.4. Taxpayer secrecy

6.3.3.4.1. In an objection and appeal process, the taxpayer maintains secrecy. In contrast, in a High Court review process, the taxpayer is exposed to commercial and reputational risks in relation to their private taxpayer information becoming public.

6.3.3.4.2. The risk of the VDP application being rejected (which would have the impact of penalties being imposed), combined with the commercial and reputational risks associated with challenging this rejection of the VDP application by means of a public court process, is a material disincentive to taxpayers. This can, in certain instances, result in taxpayers adopting a "find me first" attitude to past tax non-compliance.

6.3.3.5. It is submitted that this amendment should apply retrospectively, so that applications incorrectly rejected in recent times can be reconsidered.

6.4. **Lack of clarity on the meaning of "Notice" of an audit**

6.4.1. **Detailed factual description/ The legal nature of the problem**

6.4.1.1. According to the Explanatory Memorandum on the Tax Administration Laws Amendment Bill, 2016, this amendment inserted a requirement that a person seeking voluntary disclosure relief must be given notice of the commencement of an audit or criminal investigation into the affairs of the person as opposed to the requirement that the person has become aware of a pending audit or criminal investigation or that the audit or criminal investigation has commenced. The proposed amendment was aimed at clarifying the application of the section.

6.4.1.2. Practically, it appears that SARS' interpretation regarding what constitutes "notice" involves an element of subjectivity. As a result, taxpayers are disinclined to "risk" a VDP application in various circumstances.

6.4.2. **Nature of the business/ persons impacted**

6.4.2.1. In practice it appears that there are differing views as to what constitutes notice of audit, for example:

6.4.2.1.1. whether an IT14SD which is a supplementary declaration requested from the taxpayer by SARS is regarded as being part of SARS' audit process; or

6.4.2.1.2. if a taxpayer has been given notice of an audit, whether or not the default would not otherwise have been detected during the audit.

6.4.3. **Proposal**

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6.4.3.1. A potential solution would be for SARS to specifically indicate that the "notice" (in whichever form it may be), is in fact a 'notice' for purposes of section 226(2) of the TA Act, which then creates an objective determination and eliminates uncertainty for taxpayers considering a VDP application.

6.4.3.2. We propose a cross-reference in section 226 to section 42 of the TA Act to ensure certainty and consistency.

6.4.3.3. In addition, we propose that a definition of "audit" be included in the TA Act so as to clarify the confusion created in practice due to the lack of clarity in respect of this term.

6.5. **"Voluntary" nature of VDP application**

6.5.1. **Detailed factual description/ The legal nature of the problem**

6.5.1.1. One of the requirements for valid voluntary disclosure in terms of section 227 of the TA Act is that the disclosure must "be voluntary".

6.5.1.2. The classification of a disclosure as "voluntary" involves substantial subjectivity, which creates uncertainty and reduces the uptake of the VDP. Practically, it appears that SARS' interpretation regarding what constitutes "voluntary" disclosure is such that VDP applications are quite broadly rejected.

6.5.1.3. In addition, in the recent case of *Purveyors South Africa Mine Services (Pty) Ltd v Commissioner for the South African Revenue Service* (61689/2019) [2020] ZAGPPHC 409 (25 August 2020), the court did not adequately elaborate on the meaning of "voluntary". Furthermore, the Judge dismissed the taxpayer's application for leave to appeal (with costs and without reasons) despite marking the original judgment as reportable and of interest to other judges.

6.5.1.4. It appears that the lack of clarity in this regard makes taxpayers disinclined to "risk" a VDP application in various circumstances.

6.5.2. **Nature of the business/ persons impacted**

6.5.2.1. SARS has been known to consider a VDP application as not being voluntary, if the taxpayer has received a request for relevant material in terms of section 46 of the TA Act (even where there has been no audit notification, in other words there is no actual audit underway).

6.5.2.2. Similarly, SARS has been known to consider a VDP application as not being voluntary, if it involves a period where a tax return is outstanding or even lately that an IT14SD has been issued and where the taxpayer has already been notified that the relevant tax return is outstanding, or even where a taxpayer approached a SARS official to clarify a tax position.

6.5.3. **Proposal**

6.5.3.1. The recent rejections of VDP applications are against the spirit of the VDP programme and it impacts tax morale negatively. Instead of encouraging taxpayers to regulate their tax affairs, they are deterred from doing so and eventually SARS would not have the full picture of taxpayers' affairs.

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6.5.3.2. Currently, the criteria of "voluntary" is very subjective and based on whether the VDP controller believes that the application meets the requirement or not. It is proposed that the requirement that the disclosure be voluntary be defined with reference to the lack of notification of audit, so that the only criterion in this respect is the lack of notification of audit (established as an objective standard as set out above). This will create an objective determination and eliminate uncertainty for taxpayers.

6.6. **The VDP must not "result in a refund"**

6.6.1. **Detailed factual description/ The legal nature of the problem**

6.6.1.1. One of the requirements for valid voluntary disclosure is that the disclosure must "not result in a refund due by SARS".

6.6.1.2. A tax position adopted erroneously, or other errors could affect multiple tax periods. This could potentially result in reductions of tax liability in certain periods and increases in tax liability for other periods.

6.6.1.3. Because of the periodic nature of tax, it could then be argued that the default results in a refund in relation to a particular tax period, such that the VDP application is rejected (either as a whole, or as regards that period only).

6.6.1.4. In practice, SARS has been known to instruct taxpayers to apply for VDP only in relation to periods where the "default" results in increased tax liabilities, and to submit a request for correction or objection in relation to the periods where the "default" results in reduced tax liabilities.

6.6.1.5. However, there are significant challenges associated with taxpayers attempting to have their tax assessments revised to correct overpaid taxes. There is accordingly a real risk to the taxpayer that they may be obliged to make payment of the underpaid taxes in one period, only to have the claim for overpaid taxes in another period rejected in the other period. In these types of situations, taxpayers are strongly disincentivized to make any disclosure whatsoever to SARS, and the more common response is for taxpayers to decide to "let sleeping dogs lie".

6.6.2. **Nature of the business/ persons impacted**

6.6.2.1. This provision impacts taxpayers who, for example, made an error that affects multiple tax periods, and which could potentially result in reductions of tax liability in certain periods and increases in tax liability for other periods.

6.6.3. **Proposal**

6.6.3.1. Where the same issue results in an "understatement" in certain tax periods, and overpaid taxes in other tax periods, SARS should be authorized to accept the VDP application and process all relevant revised assessments so that only the net underpaid taxes are considered and forms part of the VDP agreement and ultimately paid to SARS.

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6.6.3.2. In this respect, section 227(e) of the TAA should be amended to refer to "not resulting in a refund on a net basis" across all relevant affected tax periods; alternatively, "refund" should be better clarified under Section 225 of the TAA.

6.7. **VDP and prescription rules**

[Applicable provisions: section 99 of the TA Act, sections 225 to 234 of the TA Act]

6.7.1. **Detailed factual description/ The legal nature of the problem**

6.7.1.1. The VDP draft guide that was published recently (October 2021) indicates SARS's approach to years of assessment where there was a non-disclosure of information but does not result in tax chargeable for the particular year of assessment. SARS's view is that section 99 of the TA Act does not override the Voluntary Disclosure provisions.

6.7.1.2. Upon reading the legislation it seems to be a fair assumption to make if an application is submitted for a year in question that does not result in tax payable, and it is the only year for which a VDP application has been made.

6.7.1.3. In cases where multiple years are concerned though it does pose a problem in that any year which may be affected by a prior year adjustment that results in a tax chargeable will not be subject to prescription rules on the basis of non-disclosure but the subsequent year where the prior year adjustment would result in less tax chargeable would be subject to the limitation periods because such non-disclosure does not result in an amount chargeable to tax. SARS has already taken this approach in a VDP application submitted over multiple years to determine a tax liability without taking into account the years of assessment where taxes should have been reduced due to prior year adjustments. This would happen in cases dealing with foreign gains and losses and adjustments which are timing differences or where assessed losses carried forward to subsequent years of assessment require adjustment.

6.7.1.4. This approach appears to be prejudicial to the taxpayer and would deter a taxpayer from making disclosure under the VDP, especially since the legislation does not cater for an override of the limitation provisions contained in section 99 of the TA Act. Whilst SARS should be placed in the position it would have been, the section should not result in prejudice to a taxpayer that does come forward on a voluntary basis to be prejudiced for being forthcoming, especially in cases where the non-disclosure was not done intentionally and only identified in later years.

6.7.2. **Proposal**

6.7.2.1. It is proposed that the legislation be amended so that the VDP provisions override the limitations provision contained in section 99 or to amend section 99 of the TA Act to make it not applicable to years of assessment that are considered under the VDP programme as valid voluntary disclosure applications.

7. CLARIFY CORRECT APPLICATION OF SECTION 195 OF THE TAA / PROVIDE ALTERNATIVE PROVISIONS FOR THE ISSUING OF A TCC FOR TAXPAYERS UNDER BUSINESS RESCUE

[Applicable provision: section 195 of the TAA]

7.1. **Legal and factual nature of the problem**

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7.1.1. Section 195 of the TAA confers powers on a senior SARS official to temporarily write off a part of a tax debt where they are satisfied that the tax debt is uneconomical to pursue as envisioned in section 196 of the TAA.

7.1.2. Furthermore, in terms of section 195(1)(b) of the TAA, a senior is empowered to temporarily write off an amount of a tax debt whilst a debtor is subject to business rescue proceedings as envisioned in section 132 of the Companies Act 71 of 2008.

7.1.3. In circumstances where taxpayers are under care and maintenance (in business rescue) and there is an outstanding tax debt owed to SARS (which is often the case for financially distressed businesses), section 256 of the TAA requires SARS to revoke the taxpayer's compliance status until the criteria set out in section 256 (which includes that there should be no outstanding tax returns and no outstanding tax debts).

7.1.4. Tax compliance status can be restored by addressing and resolving the noncompliance i.e. submitting outstanding returns and either settling the tax debt, or entering into a compromise or instalment payment arrangement with SARS.

7.1.5. However, in the context of business rescue, it may be several weeks or even months before a financially distressed business is able to rectify historical noncompliance as contemplated in section 256 of the TAA.

7.1.6. Examples include instances where:

7.1.6.1. It takes several weeks (or months) for a SARS Committee to adjudicate and issue a decision in respect of compromise or instalment payment / deferral proposals;

7.1.6.2. The Taxpayer has been the subject of mismanagement, fraud, or theft such that its financial affairs are in disarray (e.g. no management accounts or financial statements were prepared for extended periods, tax returns were never submitted, etc.) and the business rescue practitioner may require several weeks or months to reconstruct the financial records to a point where historical noncompliance can be rectified.

7.1.7. In these circumstances, distressed businesses may be forced into liquidation, to the extent that they are unable to trade or claim payment of amounts due to them without a TCC (i.e. contemplating a similar situation to that in *Red Ant Security Relocation and Eviction Services (Pty) Ltd v Commissioner for The South African Revenue Services* 80 SATC 431, where 96% of the taxpayer's revenue was derived from government contracts which could not be executed without a TCC)

7.1.8. Although SARS expresses the view that section 195 may not be used in respect of determinations of tax compliance for purposes of section 256 of the TAA, there is nothing overt in the legislation that suggests that this is the only reasonable interpretation and application of this provision (i.e. that the section could not be used for purposes of suspending a tax debt, without compromising the overall claim SARS has against the taxpayer, while the taxpayer is in business rescue).

7.1.9. Alternatively, we request that National Treasury and SARS enact legislation or regulations that enable SARS officials to temporarily suspend the tax debt of a taxpayer in business rescue, to avoid situations where taxpayers cannot trade out of business rescue and must be liquidated due to their inability to secure a TCC within a reasonable period of time.

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7.2. **Nature of the businesses / persons impacted**

7.2.1. It is not in the best interests of SARS and the *fiscus* or the national economy for businesses in business rescue to be liquidated, where business rescue and rehabilitation is a viable option:

7.2.2. SARS' alleged inability to issue a TCC in circumstances where financially distressed companies are unable to settle the full amount of a tax debt owed while they are noncompliant effectively defeats the purpose of the business rescue provisions, which could not have been the intention behind the relevant legislative provisions.

7.2.3. The temporary write-off of a tax debt would not prejudice any of SARS' rights to subsequently recover this amount:

7.2.3.1. Firstly, a company in business rescue is only entitled to compromise pre-commencement debts, and all post-commencement tax liabilities incurred as the company proceeds to trade itself out of its insolvent position must be paid to SARS as and when these debts fall due;

7.2.3.2. Secondly, the temporary write-off would only operate for as long as the company remains in business rescue and to the extent that SARS does not authorize any further compromise of the pre-commencement liability. SARS would therefore not be prevented from recovering the balance of any remaining tax debt once business rescue proceedings have concluded and/or been terminated.

7.2.4. Liquidation typically results in smaller short term returns for SARS, as well as SARS foregoing the long-term benefit of regular VAT, PAYE, and income tax payments. These post-commencement tax debts are due and payable to SARS in the ordinary course, and by ensuring that taxpayers are able to trade while under business rescue, SARS secures an ongoing revenue stream for itself, as opposed to no further tax revenue generated upon the liquidation of the company.

7.2.5. SARS and Treasury are required to have regard to the provisions of the disaster management relief legislation and government's commitment to assisting businesses (particularly SMMEs) to survive in the context of the COVID-19 related pandemic. Although the situation set out above is almost certainly an anomaly, it is an unintended consequence of section 256 read with section 195 of the TAA, which has been reported by SAIT members as having a serious detrimental effect on businesses in practice. Where companies are forced into liquidation this typically results in the retrenchment of employees, who are themselves often socio-economically vulnerable persons. Regard should be given to the importance of supporting economic regeneration, given the significant detrimental effect which the COVID-19 pandemic has had on our economy and the unemployment rate. In terms of section 195 of the Constitution, SARS is mandated to take a development-oriented approach to tax administration and to be responsive to people's needs.

7.2.6. Where a business is capable of rehabilitation but cannot trade or collect funds due to it as a result of an outstanding tax debt affecting its tax compliance status, the taxpayer's only recourse will be to approach a competent court for relief (as has been done in a number of recent cases, including *Zikhulise Cleaning Maintenance and Transport CC v C:SARS* [2012] ZAGPPHC 91, and *Red Ant Security Relocation and Eviction Services (Pty) Ltd v Commissioner for the South African Revenue Services* 80 SATC 431, in each of which the taxpayer was successful in having its compliance status restored).

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7.2.7. It is undesirable and not in the interests of justice for taxpayers to have to seek relief from the courts, where a suitable legislative remedy arguably exists (in terms of section 195 of the TAA), or alternatively, could easily be provided for; nor is it in the best management of SARS' or taxpayers' resources in terms of SARS' section 195 Constitutional obligations.

7.3. **Proposal**

7.3.1. We contend that the use of the word "may" in section 195 of the TAA is peremptory in nature, and not merely directory. In other words, the use of the word "may" in section 195 does not mean that SARS can decide whether or not to exercise the relevant discretions. In this regard, we refer to the decision in the case of *Stroud Riley & Co Ltd v Secretary for Inland Revenue*. In that case it was held that the use of the word "may" does not mean that SARS has a discretion in the matter, but rather that SARS must first enquire into the facts, and if after such enquiry it is satisfied that the relevant jurisdictional requirements are met, that SARS is obliged to act as authorized by the relevant provisions.

7.3.2. We also highlight the following judgments referred to in the Stroud Riley case, which are equally applicable hereunder:

7.3.2.1. *MacDougall v Paterson*, where Jervis, C.J. held as follows: "*The word 'may' is merely used to confer the authority: and the authority must be exercised, if the circumstances are such as to call for its exercise*."

7.3.2.2. *Finance Facilities (Pty) Ltd v Federal Commissioner of Taxation* where, in dealing with a provision containing the word "may", it was held that "If *the Commissioner, having considered the matter, is satisfied of facts out of which the power to allow the rebate arises, he cannot nevertheless refuse to allow it*."

7.3.3. "Write off" is defined as "to reverse an outstanding tax debt, either in whole or in part".

7.3.4. We request that clarification is provided on the application of section 195 to enable it to address the issue of tax compliance status for taxpayers. Alternatively, a new section should be drafted to deal with this issue.

7.3.5. The clarification of this section or a new section must, to the extent that SARS temporarily writes off a tax debt, clearly set out that the outstanding tax debt would be suspended, i.e. there would no longer be an outstanding tax debt and allow facilitation of the compliant tax compliant status, pending finalization of the business rescue plan, and in so doing, preserve the possibility of rescue of the business.

ENDS

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