

25 November 2024

To: The National Treasury

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The South African Revenue Service

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Via email: National Treasury (2025AnnexCProp@treasury.gov.za); and
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**RE: ANNEXURE C PROPOSALS: SAIT TAX ADMINISTRATION AND DISPUTE
MANAGEMENT TECHNICAL WORK GROUP**

Dear Colleagues,

We attach the Annexure C proposals from the SAIT Tax Administration and Dispute Management Technical Work Group (the WG), as it pertains to technical proposals for possible inclusion in Annexure C of the 2025 Budget Review.

We value the opportunity to participate in the legislative process and would welcome further engagement where appropriate. Please do not hesitate to contact us should you need further information.

Yours sincerely

SAIT Tax Administration and Dispute Management Technical Work Group

Disclaimer

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Unless otherwise indicated, all references to sections of the Tax Administration Act, No. 28 of 2011 (the TAA)

1. Proposed legislative amendments: section 49G and section 50G of the Income Tax Act No. 58 of 1962

1.1. Background

- 1.1.1. There is currently a substantial difference between claiming refunds for Royalty Withholding Tax ("RWT") and Interest Withholding Tax ("IWT") and the refund mechanism for Dividend Tax ("DT") as provided for in the applicable sections of the Income Tax Act No 58 of 1962 ("the Act").
- 1.1.2. However, while DT is not legislatively referred to as a 'withholding tax on dividends' the mechanism for its payment to SARS is similar to that of the RWT and the IWT. In the case of all three of these taxes there is an amount of tax to be withheld from the gross payment to be made to the recipient, i.e. the recipient of the payment receives the amount due less the relevant tax with the tax paid to the South African Revenue Service ("SARS"). We therefore submit that the naming of the taxes are merely semantics.
- 1.1.3. The sections of the Act dealing with these taxes also have, amongst others, the following similar provisions:
 - The recipient or beneficial owner of the payment (royalty, interest or dividend) is subject to the tax, it is therefore a tax levied on that person;
 - The recipient qualifies for a reduction or exemption from the relevant tax which mainly requires the recipient to have provided the person making the payment with a written declaration, in the form required by SARS, that it is exempt from the payment or qualifies for a lower rate of tax. In the case of all three taxes this declaration must be provided by the recipient to the person making payment by the date of payment of the amount for the exemption or lower tax rate to be applied.
 - In the event that the person making payment of the amount does not have possession of the written declaration at the date of payment of the amount the relevant tax must be withheld at the legislated tax rate and be paid to SARS.
 - The various sections deal with the refund of the tax within 3 years from payment to SARS if the written declaration is subsequently put into place.

1.2. The legal nature of the problem

- 1.2.1. The fact that the overpaid tax is refundable is however where the similarities between the RWT, IWT and DT refund process ends.
- 1.2.2. Section 49G dealing with the refund of RWT and section 50G dealing with the refund of IWT have similar provisions that specifically provides that the tax proved to be overpaid is refundable *by SARS to the recipient of the amount of the royalty or interest*. No specific refund mechanism is outlined in the legislation which suggests that the recipient of these amounts must approach SARS with a request



to refund the taxes previously paid to SARS.

1.2.3. Section 64L(2) sets out the refund mechanism for DT:

- The DT must be refunded by the *company that paid the dividend* from DT That will be paid within 1 year from the date that the DT was overpaid; or
- To the extent that the amount refundable cannot be refunded from this future DT the refunds must be made *by the company that paid the dividend* from an amount that *it* recovers from SARS in terms of section 64L(3).

1.2.4. Now consider that many DT refunds will be made in respect of DT overpaid for non-resident beneficial owners of dividends. The refund of DT will however be *made by the resident company that paid the dividend*, either from future DT or from an amount recovered by that resident company from SARS. The DT refund is therefore not directly refunded by SARS to the non-resident.

1.2.5. Bearing in mind that the RWT and IWT applies to royalties and interest payments to foreign persons (non-residents) the refund mechanisms in section 49G and section 50G requires an amount to be refunded by SARS *directly to a non-resident*.

1.2.6. While the refunds for DT and that of RWT and IWT will largely result from the same reason (the declaration required to rely on the reduced tax treaty rate was not available at the time) we submit that there should be no reason why the refund mechanisms should be so different for IWT and RWT.

1.2.7. Moreso, the practicality of this refund mechanism is in question. This refund would require the non-resident making application to SARS that would not have the non-resident on tax register as the non-resident is not liable to register for income tax in South Africa. The non-resident would most likely also not have a South African bank account to which SARS will pay the RWT or IWT refundable. We submit that this refund application process may be prolonged due to these types of administrative delays.

1.3. Proposal

1.3.1. We respectfully request that the refund mechanism for RWT and IWT be reconsidered and be made similar to that of DT:

- The RWT or IWT be refunded by the person making the royalty or interest payment from future RWT or IWT payable within 12 months; or
- Where this will not be the case be refundable by that person from an amount recovered by that person from SARS.

1.3.2. In this manner the non-resident will not have the practical problem of engaging with SARS for the refund, and the risk of administrative delays are avoided as the refund can be facilitated through the engagement of the person who made the royalty or interest payment, and who will be a South African taxpayer already registered with SARS. We submit that there is no additional risk to the fiscus of the RWT and IWT refund mechanism being the same as that of DT.

2. Clarification that section 98 of the TAA operates post prescription



2.1. Background

- 2.1.1. Prior to Act No. 23 of 2015, section 99(2)(d)(iii) of the Tax Administration Act, 28 of 2011 ("the TAA") used to refer to section 98(2) assessments. This reference was deleted with the deletion of section 98(1)(d) and the insertion of section 93(1)(d), (e) and 99(2)(e). Presumably, the logic was that the reference to section 98 in section 99(2) was no longer required because section 99(2)(d)(iii), after amendment by Act 23 of 2015, made reference to 93(1)(d) and 99(2)(e) referred to 93(1)(e) and section 93(1)(e) and (d) was to replace section 98(1)(d).

2.2. The legal nature of the problem

- 2.2.1. However, Act 23 of 2015 did not repeal the whole of section 98, only section 98(1)(d). There seems to be no reasons why withdrawals contemplated in section 98(1)(a), (b) and (c) should not be possible after prescription as it was before the 2015 amendments.

2.3. Proposal

- 2.3.1. It is proposed that section 99 of the TAA be updated to clarify that withdrawals under section 98 is possible after prescription.

3. Suspension of Payment – interpretation of section 164(3)

3.1. Background

- 3.1.1. In terms of section 164(1) of the TAA, a taxpayer's obligation to pay tax is not suspended merely by an objection, an appeal, or pending the decision of a court. However, section 164(2) provides relief to a taxpayer by suspending the payment of tax, or a portion thereof, due under an assessment after the consideration of various factors listed in section 164(3).
- 3.1.2. The section 164(3) factors include:
- (a) whether the recovery of the disputed tax will be in jeopardy or a risk of dissipation of assets;
 - (b) the compliance history of the taxpayer;
 - (c) whether fraud is involved in the origin of the dispute;
 - (d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the *fiscus*; or
 - (e) whether the taxpayer has tendered adequate security for the disputed tax and accepting it is in the interest of SARS or the *fiscus* (own emphasis).
- 3.1.3. There is considerable uncertainty about the relative weight or importance that should be given to each factor. The TAA also does not provide any guidance on how SARS should balance these factors.
- 3.1.4. In practice, when evaluating a suspension of payment request, SARS frequently requires taxpayers to make partial payment of the disputed amount, concluding that this constitutes "adequate security" in respect of the disputed tax debt.
- 3.1.5. We contend that the legislation is not intended to operate in this manner, and that the practice of requesting part payment of the disputed amount subverts the purpose of the legislation and undermines its role in maintaining the fairness of the tax system and promoting voluntary compliance and tax morale.



3.2. A detailed factual description

3.2.1. Section 164 of the TAA stipulates that a taxpayer needs to 'pay now, argue later'. If the 'pay now, argue later' rule did not exist, unscrupulous taxpayers would be incentivized to employ dilatory tactics and initiate frivolous and vexatious disputes in order to delay payment of a disputed amount.

3.2.2. In *Capstone 556 (Pty) Ltd v Commissioner for the South African Revenue Service*,¹ the court held that:

"The considerations underpinning the 'pay now, argue later' concept include the public interest in obtaining full and speedy settlement of tax debts and the need to limit the ability of recalcitrant taxpayers to use objection and appeal procedures strategically to defer payment of their taxes."

3.2.3. Thus, the efficient recovery of assets is necessary to prevent recalcitrant taxpayers from making use of the objection and appeal provisions of the TAA in order to defer their tax liability.

3.2.4. However, in recognition of the potentially severe consequences which the 'pay now, argue later' rule can have on *inter alia* a taxpayer's financial position and the solvency and sustainability of its business, section 164 seeks to introduce a regime that brings relief to compliant taxpayers who intend to bring a *bona fide* dispute against the liability imposed by SARS.

3.2.5. In order to ameliorate the negative consequence of the 'pay now, argue later' rule for taxpayers who have genuine and meritorious disputes and are generally compliant, the TAA affords the Commissioner (or a senior SARS official exercising delegated authority) a discretion to suspend the taxpayer's obligation to make payment of the disputed amount until after the dispute has been finalised.

3.2.6. The exercise of this discretion is governed by the evaluation of the factors set out in section 164(3) of the TAA. These factors must be considered holistically against the unique facts and circumstances of each dispute.² The SARS decision to suspend or not suspend payment constitutes 'administrative action' as contemplated in section 33 of the Constitution and the Promotion of Administrative Justice Act (**PAJA**).³ The decision must therefore be lawful, reasonable and procedurally fair in the circumstances.

3.2.7. Arguably, the purpose of the inclusion of "adequate security" tendered by a taxpayer as a factor to be considered for suspension is to ensure that SARS will not be prejudiced if the taxpayer is unsuccessful in the dispute, and will be able to recover the full disputed tax liability swiftly and without significant additional cost, time and effort.

3.2.8. However, the factors listed in section 164(3) have been inconsistently applied by SARS, especially in relation to the requirement for "adequate security".⁴

3.2.9. A trend can be discerned in the development of SARS' approach to the evaluation of the security requirement contained in section 164(3)(e) in recent years:

3.2.9.1. Previously, SARS has accepted that where the taxpayer can satisfactorily

¹ 2011 6 SA 65 (WCC).

² Croome & Olivier 2nd Ed 362.

³ *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* (CCT3/00) [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) (24 November 2000) at para 42.

⁴ Section 164(3)(e) of the TAA.



- demonstrate that there is no risk of dissipation of assets, there are no allegations or suspicions of fraud, the taxpayer's tax affairs are in order, the taxpayer has a good compliance track record, and the taxpayer is a large entity and/or part of a corporate group which would easily be able to settle the disputed tax debt if the taxpayer is unsuccessful in the dispute, a suspension of the entire disputed is warranted without the taxpayer being required to provide any security.
- 3.2.9.2. Previously, SARS would only require security for the disputed debt in matters where, for example, the quantum in dispute is so significant relative to the size of the taxpayer's business that SARS' ability to collect the disputed amount is in doubt. To this end, SARS has accepted various forms of real security, such as a bank guarantee, a guarantee issued by a holding company, a cession of loan accounts, and a pledge of shares equivalent to the quantum in dispute.
- 3.2.10. The common thread of the above-mentioned forms of security is that the taxpayer is not required to effect payment of any portion of the disputed tax. Since the object of security is to provide protection to SARS in the event that the taxpayer is unable to ultimately pay the disputed tax, a bank guarantee fulfils this purpose effectively.
- 3.2.11. More recently, there has been a change in approach. SARS now generally requires all taxpayers to pay some or all of the disputed tax as a form of security, which SARS considers "adequate". Further, SARS has refused to accept the tender of bank guarantees and parent guarantees as a form of "adequate security".
- 3.2.12. This does not accord with the purpose of section 164 of the TAA:
- 3.2.12.1. The purpose of section 164 is to strike a balance between SARS' interests (fulfillment of SARS' revenue collection mandate) and the interests of compliant, honest and reputable taxpayers who have a legitimate and *bona fide* basis to dispute the additional liability assessed by SARS. Section 164 and in particular, section 164(3)(e) is not intended to be an additional revenue collection mechanism.
- 3.2.12.2. The factors set out in section 164(3) must be read together, as the factors informing the exercise of an administrative discretion, which must be done in a manner that is procedurally fair, reasonable, and lawful. It is evident that the section 164(3) factors are aimed at establishing the taxpayer's *bona fides* and guarding against the possibility of SARS being subjected to vexatious litigation and/or a scenario in which SARS is unable to ultimately recover the disputed tax.
- 3.2.12.3. A *bona fide* dispute between SARS and a generally compliant taxpayer should therefore not warrant any form of security being necessary. In situations where SARS has genuine concerns regarding subsequent recovery of the disputed debt, security in the form of a bank or parent guarantee (enabling SARS to easily collect the entire disputed amount if ultimately successful in the dispute) should be sufficient.
- 3.2.13. Suspension of payment as an exception to the 'pay-now-argue-later' principle balances the extensive collection powers afforded to SARS against taxpayers' rights to fair, reasonable and lawful administrative action, ensuring that the tax system is not unduly harsh or prejudicial towards taxpayers:
- 3.2.13.1. The section 164(3) factors protect SARS in the performance of its functions by ensuring that suspension is only granted to those taxpayers who are generally

- compliant and are not suspected of fraud, where there is no risk of collection actions being jeopardized (whether by the taxpayer's own conduct or concerns regarding solvency) and where there is clear prejudice to the taxpayer which outweighs the prejudice to SARS in not being able to collect the disputed debt immediately.
- 3.2.13.2. Compliant taxpayers who can demonstrate that they have a *bona fide* dispute ought to benefit from the exercise of the Commissioner's discretion in their favour, where the balance of convenience favours the taxpayer, and SARS has no reason to believe the subsequent collection of tax following finalization of the dispute would be placed in jeopardy if payment is suspended pending the outcome of the dispute.
 - 3.2.13.3. Conversely, taxpayers who are habitually noncompliant, are suspected of fraud or who engage in frivolous litigation purely for the purpose of delaying or frustrating SARS' collection actions should not be afforded the benefit of a suspension of payment and should be compelled to make immediate payment of the entire disputed amount.
 - 3.2.14. In the circumstances, SARS demanding upfront payment of some or all of the disputed amount as "security" for the disputed debt does not align with the underlying purpose and rationale of section 164 of the TAA:
 - 3.2.14.1. This conduct erodes the distinction drawn by the remaining section 164(3) factors in relation to the conduct, financial stability, and compliance history of the taxpayer by erasing the protection that ought to be afforded to compliant taxpayers with a *bona fide* dispute. Removing the distinction between how honest and dishonest taxpayers are treated undermines tax morale and voluntary compliance.
 - 3.2.14.2. This conduct arguably undermines the purpose of section 164, which is to balance SARS' collection mandate against taxpayer's rights; particularly the right to fair, reasonable and lawful administrative action. There is simply no rational reason for SARS to refuse to accept a bank guarantee or parent guarantee covering the entire disputed amount, in favour of payment of part or all of the disputed amount, in circumstances where the balance of the section 164(3) factors motivate for the exercise of the Commissioner's discretion in favour of granting a suspension of payment.
 - 3.2.14.3. The manner in which SARS applies section 164(3)(e) in practice, in the absence of clear guidelines as to what constitutes "adequate security", results in decisions which are arbitrary and irrational, and subject to judicial review. It is not in the interest of SARS and the *fiscus*, or in the best management of the tax system for SARS to implement legislation in a manner which results in unnecessary litigation.
 - 3.2.15. The current approach is also out of sync with the legislation and approach taken in comparative commonwealth tax systems:
 - 3.2.15.1. In Canada, the revenue authority generally may not institute collection proceedings until ninety days have lapsed from the date on which the taxpayer received notice of an additional assessment (subject to certain specific exceptions which allow for collection of the disputed amount).⁵ Similarly, if a taxpayer has taken a matter on appeal to the Tax Court of Canada, the collection of the disputed amount may not commence before the dispute has been either

⁵ *Income Tax Act*: sec. 225.1(2).

finalized or the taxpayer withdraws its appeal.⁶

- 3.2.15.2. In Australia, the ATO may defer the collection of a disputed tax debt within its discretion, and where taxpayers institute *bona fide* disputes, this discretion is generally exercised in the taxpayer's favour.⁷ The furnishing of security is a further factor which the ATO may take into account in exercising this discretion.
- 3.2.15.3. In other jurisdictions, such as New Zealand, the onus is on the revenue authority to prove a risk of non-payment of a tax liability before the disputed tax is payable pending a dispute. Section 128(2) of the New Zealand Tax Administration Act provides that only if the revenue authority believes there to be a noteworthy risk the disputed tax will not be paid should the taxpayer not succeed in the dispute, may the Commissioner require the disputed tax to be paid.
- 3.2.15.4. The New Zealand Tax Administration Act also makes provision for security to secure a tax obligation. The definition of security includes "a *mortgage or charge or other encumbrance over, or pledge of, an asset or right, and a guarantee or indemnity*" (own emphasis).

3.3. Proposal

- 3.3.1. In order to clarify the meaning of "adequate security" in section 164(3)(e) of the TAA, it is submitted that section 164 or section 1 be amended by inserting a definition of "adequate security" to include no security (in appropriate instances, having regard to the facts and circumstances of each matter individually) and an appropriate guarantee or pledge securing part of all of the disputed tax debt pending finalization of the dispute.
- 3.3.2. This approach will clarify the correct application of section 164(3)(e), allow for a more uniform (procedurally fair and reasonable) approach to the implementation of section 164 by SARS, and prevent the ongoing erosion of voluntary compliance and tax morale through the use of section 164 as a revenue collection mechanism rather than a proviso or exception to the normal 'pay now argue later' rule.

4. Suspension of Payment – interpretation of the "dispute" requirement

4.1. Problem Statement / Factual Nature

- 4.1.1. In terms of section 164(1) of the TAA, a taxpayer's obligation to pay tax is not suspended merely by an objection, an appeal, or pending the decision of a court. However, section 164(2) provides relief to a taxpayer by suspending the payment of tax, or a portion thereof, due under an assessment after the consideration of various factors listed in section 164(3). Section 164(2) specifically provides for a suspension application to be submitted "*if the taxpayer intends to dispute or disputes the liability to pay that tax under Chapter 9*" (own emphasis).
- 4.1.2. Section 164(6) provides for a *de facto* suspension of all collection actions from the date on which a taxpayer submits a suspension of payment application until 10 business days after the date on which the taxpayer is notified of the refusal or alternatively, the subsequent withdrawal of its suspension application.
- 4.1.3. In practice, when SARS issues a disputed assessment, the taxpayer is given until the "due date" on the notice of additional (or original) assessment to make payment of the assessed amount. This "due date" is typically 30 days from the

⁶ Income Tax Act: sec. 225.1(3).

⁷ ATO 2015 Practice Statement Law Administration (PS LA 2011/4) – Collection and recovery of disputed debts.



date on which the assessment is issued.

- 4.1.4. This 30-day period previously aligned with the 30 business days afforded to the taxpayer to lodge an objection against an assessment in terms of section 104 of the TAA read with Rule 7 of the Rules promulgated in terms of section 103 of the TAA (**Rules**). However, the Rules were updated effective 10 March 2023, to provide for an 80-business day period for the submission of an objection.
- 4.1.5. The resultant misalignment between the suspension of payment and dispute period appears to have caused uncertainty in the manner in which SARS interprets and applies section 164 of the TAA. Specifically, in numerous cases, SARS has indicated that the Commissioner does not have the power to consider the taxpayer's suspension of payment application until such time as a "dispute" has been initiated.
- 4.1.6. Practically, this means the taxpayer must either ensure that its objection is submitted together with its suspension of payment application before the "due date" (foregoing the extended 80-day period specifically catered for in the Rules) or take the risk of SARS ignoring the suspension of payment application and commencing with collection steps notwithstanding the provisions of section 164(6).

4.2. Legal Nature

- 4.2.1. In our view, section 164(2) read with section 164(6) provides explicitly that if a taxpayer intends to dispute a tax liability, the taxpayer may apply for suspension of payment. In accordance with administrative law principles, SARS cannot decline to exercise the discretion conferred on the Commissioner by section 164 unless the requisite jurisdictional facts invoking the exercise of the discretion are not present.
- 4.2.2. To the extent that SARS is of the view that the taxpayer's intention to dispute a tax liability is only evidenced by the initiation of a dispute in terms of Chapter 9 and accordingly, that the Commissioner cannot exercise the section 164 discretion until an objection or request for reasons in terms of Rule 6 of the Rules has been submitted, an amendment is required, either to confirm that SARS must exercise the relevant discretion upon receipt of a suspension of payment application, or to align the "due date" for payment with the due date for submission of an objection (80 business days from the date of the assessment).

4.3. Proposal

- 4.3.1. To ensure that taxpayers are not unfairly deprived of the opportunity to request suspension of payment before the due date for the submission of an objection we request that SARS amends section 164 to clarify that the Commissioner may receive and consider a suspension of payment application prior to the expiry of the 80-business day period contemplated in section 104 read with Rule 7 for the submission of an objection; and prior to the submission of the objection itself.
- 4.3.2. Alternatively, we request that section 164(6) is amended so that the "*de facto*" suspension period runs from the date of an assessment until the expiry of the 80-business day period afforded to taxpayers for the submission of an objection, to ensure that taxpayers are not unduly prejudiced by the purported absence of jurisdictional factors necessary for the Commissioner to consider a suspension of payment application prior to the submission of an objection.

End.