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29 October 2021

To: The South African Revenue Service
Lehae La SARS
299 Bronkhorst Street
PRETORIA
0181

Attention: Adele Collins
Via email: acollins@sars.gov.za

RE: RESPONSE TO CALL FOR COMMENT ON THE DRAFT INTERPRETATION NOTE ON SECTION 93 OF THE TAA

Dear Adele,

Kindly see below the comments from the SAIT Tax Administration and Dispute Management Work Group (**the WG**) on the draft interpretation note relating to section 93(1)(d) of the Tax Administration Act, No. 28 of 2011 (the TAA), (hereinafter referred to as (**the draft IN**).

1. POLICY PERSPECTIVE

1.1. Introduction

In order to improve risk management and cost-effective revenue collection, revenue authorities all over the world are increasing their use of electronic software and system in the reporting and assessment of taxes.

For example, the Organisation for Economic Co-operation and Development (**OECD**) introduced a self-assessment tool on 23 December 2019 to help revenue tax administrations tackle tax debt and to *reduce administrative burdens*. (*our emphasis*).

In South Africa, R 3 billion was pledged to the South African Revenue Service (**SARS**) in the 2021 Budget Speech to be used to support its digitalisation strategy (part of its core strategy).

The Fourth Industrial Revolution (4IR) also affects taxpayers, and private and public sector taxpayers are increasingly making use of electronic systems to manage their day-to-day transaction that give rise to tax.

In light of the above, we highlight the following:

Typical example of decision-making in a transaction that leads to a tax liability:

Decision-making process:
(1) Employer policy and process documents on employee remuneration, including the taxability of the fringe benefit being provided.
(2) Standard configuration of the payroll system according to the SARS Business Requirement Specification (BRS).
(3) Employer configuration of the payroll system according to the employer remuneration policy (e.g. does this fringe benefit trigger SDL and UIL).
(4) Input of information by the payroll manager of the financial data into the correct category on the payroll according to the process document so as to report the amount in the correct field.
(5) Signing off by the Public Officer of the EMP201 and the EMP 501 as true and complete tax return.

Outcome:
(1) Employee has an income tax liability on a specific fringe benefit; and
(2) Employer has a liability for employees' tax, skills development levy (SDL), and the unemployment insurance levy (UIL).

The interaction between different decisions (policy, data input, system configuration, etc.), that are made over a period of time, should in theory lead to the correct financial data being reported to the revenue service for assessment.

However, if there is a mismatch in the interaction between the different decisions, or if one of the applications of a decision is in error, them the outcome will be incorrect. E.g. The policy and system configuration, and financial data input is 100% correct, from March 2022 to June 2022. However, in July 2022, the payroll manager inputs the fringe benefit into the incorrect employee's profile. The result is that the EMP201 is incorrect.

It follows that the more digital tax reporting takes place, the more opportunity would exist for *bona fide* inadvertent errors, to occur. This is not due to ill intent (i.e. *mala fide* errors), but purely a factor of the use of digital mechanisms to manage and report transactions that have tax reporting consequences.

In the interest of cost-effective tax administration and collection and cost-effective tax compliance, all stakeholders would benefit from a remedy which is easy, feasible and fair to efficiently and effectively resolve reporting (application) errors made by taxpayers without ill-intent.

1.2. Current remedy: Section 93 of the TAA

Section 93 of the TAA, is currently the only remedy currently to request a reduced assessment, other than objecting to your own mistake (which is usually a long drawn out and human resource intensive process)[1].

It follows from the increased use of digitalised financial data management and reporting, that *bona fide* inadvertent errors will similarly increase. Whereas the current model is built on the same person that analysed the legislation, applying same to the transaction at hand, completing the tax return, and signing same off, various different actors and systems are involved in the modern-day version of tax return preparation.

The appropriate remedy should cost-effectively, and with appropriate risk management allow a revenue service and the affected taxpayer to correct *bona fide* inadvertent errors.

The question is whether, in the context of the current draft IN, section 93 of the TAA allows the required outcome based on expected volumes for both SARS and the taxpayer?

With reference to the Draft Explanatory Memorandum on the Draft Tax Administration Bill, 2009 (**the DEM**), it was submitted by the legislature that the first object of the Draft Tax Administration Bill (**the TAB**) was to generally provide a "*single body of law that outlines … rights and remedies … to achieve a balance between the rights and obligations of both SARS and taxpayers in a transparent relationship …*"[2]

When one considers section 93 of the TAA and the success rate we see in practice of requests submitted, it does not seem to align with the initial general object of the TAA and as such and considering mutual transparency as set out in the DEM, it appears that section 93 of the TAA may not be fit for purpose to achieve what the *fiscus* sets out to achieve in the first instance.

However, on the premise that section 93 of the TAA is the only current option, we submit our comments below to the draft IN as requested by SARS.

[1] In terms of Chapter 9 of the TAA
[2] Clause 2.1. of the DEM dated 30 October 2009

2. LEGISLATIVE INTERPRETATION: ADDRESSING THE DRAFT INTERPRETATION NOTE

2.1. General comments

Statutes must be interpreted purposively, in context, and as much as possible in a manner consistent with the constitution.[3] The sections of the TAA must be considered or interpreted holistically, "*taking the scheme of the TAA as a whole*"[4],and should not be interpreted in isolation with no regard to the TAA entire.

The draft IN to section 93(1)(d) deals solely with: "*REDUCED ASSESSMENTS: MEANING OF "READILY APPARENT UNDISPUTED ERROR".* It appears that, in general, SARS has taken a narrow approach to the interpretation of this section and does not take into account the purpose of the TAA or the context within which section 93(1)(d) appears in relation to the rest of the section.

The purpose of the TAA is: *"**To provide for the effective and efficient collection of tax**".* Section 152 of the TAA provides that: *"**Person chargeable to tax.**—A person chargeable to tax is a person upon whom the liability for tax due under a tax Act is imposed and who is personally liable for the tax"* (own emphasis). Finally, section 169 of the TAA determines that a debt due to SARS is: *"An amount of tax due or payable in terms of a tax Act is a tax debt due to SARS for the benefit of the National Revenue Fund."*

The general impression created by the draft IN is that SARS is seeking to interpret the relief created by the Legislature in section 93(1)(d) so narrowly that it constitutes an arbitrary limitation to a taxpayer's right to request a correction in the case of an error in a return or assessment. In reality, a taxpayer will only be able to qualify if more tax than what is due was declared to SARS.

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[3] *Cool Ideas 1186 CC v Hubbard and Another 2014* (4) SA 474 (CC).

[4] *Rappa Resources (Pty) Ltd and Another V CSARS* [2020] ZAGPPHC (5 November 2020) at paragraph 51. Also see *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012).

However, the original commentary in the EM on the Objects of the Tax Administration Bill, 2011 reads as follows (p. 191):

> *"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 than an understatement was purely erroneous, the taxpayer will need to object against the disputed assessment"*

In various subsequent discussions with SARS and National Treasury, the rationale for the introduction of section 93 was confirmed / elaborated on, i.e. that section 93 is intended to facilitate the quick and easy correction of an assessment where there was some sort of obvious processing error (an amount being typed incorrectly), as opposed to the objection (Chapter 9) process, which is intended to deal with disputes relating to the interpretation and application of the law (e.g. decisions, whether a taxpayer was entitled to an amount or not).

To limit the relief created in section 93(1)(d) to exclude instances where an amount was omitted from a return or only to instances where the error is obvious from looking only at the return or assessment, is unjustified and encroaches on the principle that tax collection should be balanced against a taxpayer's rights. In addition, the logical outcome of this narrow view of the relief as contained under section 93 is a resultant increase in the number of disputes, i.e. objections submitted by taxpayers, which will place the already over-burdened Chapter 9 dispute resolution system under further strain, impacting on SARS' ability to execute its obligations expeditiously and within the dispute timelines provided for in the TAA.

We now proceed to comment on specific paragraphs of the draft IN.

2.2. Specific comments

2.2.1. Ad paragraph 4.2

The wording in this section raises the question of whether or not SARS can (or perhaps should) request additional material and/or explanations from the taxpayer, where such additional material/explanations could clarify the taxpayer's request for a reduced assessment, before making a decision.

2.2.2. Ad paragraph 4.2.1

We request an explanation of what 'other' requirements are referred to that may prevent SARS from issuing a reduced assessment when all the requirements of section 93(1)(d) have been met.

2.2.3. Ad paragraph 4.2.2

The Guide does not provide any clarity as to when SARS will be "*satisfied*" that the section 93 criteria exist, in such a way that taxpayers will be able to (i) understand when they may qualify for relief in terms of section 93 of the TAA and (ii) how to frame a request in such a way that the relevant jurisdictional facts are clearly communicated to SARS.

We suggest that the draft IN should contain a non-exhaustive list of the factors which SARS officials would consider when establishing this subjective satisfaction (or not, as the case may be), so that taxpayers are better equipped to understand when they would qualify for section 93 relief, and which relevant facts should be communicated to SARS for the relevant official(s) to apply their mind(s) to.

The intention is not to fetter SARS officials' discretion, but rather, to provide a useful framework within which both SARS officials and taxpayers can better understand the ambit of section 93, to promote certainty, avoid vexatious and unnecessary applications being submitted to SARS, and to provide taxpayers with a level of comfort regarding the "*reasonable grounds*" on which SARS routinely exercises this discretion.

For example, on page 8, the IN states that "*Factual undisputed errors are by their nature objective and if readily apparent, it may fall within the ambit of section 93(1)(d).*"

It would be useful to clarify:

- What is meant by the term "*factual undisputed error*" (as opposed to "*readily apparent undisputed error*");
- What is meant by the term "*objective*" (as this relates to "*factual errors*"); and
- What further evidence would be necessary for a SARS official to be "*satisfied*" of the existence of a "*readily apparent undisputed error*".

Since SARS states that an objective, readily apparent and undisputed error "***may***" fall within the ambit of section 93(1)(d) of the TAA, it would be useful to understand what further factors SARS believes are necessary to establish the subjective satisfaction required for section 93 to apply. As the section is currently worded, a "*readily apparent undisputed error*" will qualify for the relief contemplated in section 93(1), and presumably SARS proposes to clarify the meaning of "*readily apparent*" and "*undisputed*", rather than adding additional criteria for establishing the necessary satisfaction on the part of SARS?

2.2.4. Ad paragraph 4.2.3

SARS' interpretation stands in contrast to case law. In the case of ***Crookes Brothers Ltd v Commissioner for South African Revenue Service***[5]**,** the taxpayer requested a correction on the basis that the transfer pricing adjustments made by it in its return were incorrect having regard to the terms and conditions of the loan agreements applicable. SARS examined the request and carefully considered the relevant material.

SARS refused the taxpayer's request *not on the basis that the error was not readily apparent*, but on the basis that SARS disagreed with the taxpayer's interpretation of the terms and conditions of the loan agreement.

We request that clarity be provided on whether reference to the return includes the taxpayer's annual financial statements (**AFS**). It is submitted that it would be very difficult for a taxpayer to submit a request for a reduced assessment if no reliance (or at least review) is placed on the taxpayer's AFS.

In addition, SARS is seeking to insert more wording into the current legislation. As it stands, section 93(1)(d) does not limit the request to only what is visible in the return or assessment.

2.2.5. Ad example on page 7

As the return does not require the medical expense documentation to be submitted together with the return, the error will not be readily apparent from the return itself. It will only be readily apparent once SARS has sight of the supporting documentation.

In this regard, it is submitted that an error, which is in the return, must be readily apparent from the supporting documents.

[5] 80 SATC 439.

Clarity should be provided on whether SARS' view is that a readily apparent error can only be/ is always typographical error. If so, would the TAA not have explicitly stated so? In this case, should the *contra fiscum* rule not apply?

2.2.6. Ad definition of 'undisputed' on page 7

Clarity is sought on the definition of "*undisputed*" as we note that **Example 1** and **Example 4** are somewhat contradictory. We submit that in both examples, a simple verification will be required. In addition, clarity must be provided on whether a simple verification does not go beyond the return or assessment? If so, we submit that SARS is contradicting its own interpretation.

In our view, SARS' narrow interpretation of "*readily apparent undisputed error*" is not a correct interpretation of the wording of section 93(1), as it infers a meaning which is not specifically stated in the section. The section simply provides that there must be a readily apparent undisputed error by the taxpayer in the return. In **Example 4,** this would be the case as there was a *bona fide* error by the taxpayer in the return. There is no requirement that the taxpayer should have erred at the time of the completion of the return. In this regard, there is no basis for distinguishing the facts between **Example 4** and **Example 1**, i.e. where the supporting documentation is readily available for the taxpayer to prove that there was a readily apparent error by the taxpayer in the return.

SARS should refer back to the purpose of the provision, which is to allow for reduced assessments and to provide for a more expeditious and cost-effective dispute resolution process for incorrect assessments arising from obvious errors which do not involve any disagreement regarding the interpretation of the law[6] (i.e. a purely factual error). In this regard, where it is obvious that the taxpayer was over assessed, the taxpayer will not take the objection and appeal route.

The circumstances in which section 93 should be used are not conveyed clearly in this iteration of the draft IN.

2.2.7. Ad example on page 8

It is submitted that SARS has the power to issue a section 46 request for relevant information in order for it to exercise any of its duties under the TAA. This includes and applies to section 93.

[6] See the Memorandum on the Objects of the Tax Administration Bill, 2011, at page 191.

2.2.8. Ad definition of 'error' on page 8

We submit that it is not 'clear' from the dictionary meaning that an "*error*" excludes an 'omission'. An "*error*" is defined in the draft IN as a "mistake / being wrong in conduct / judgement". This definition is wide enough to include an error of omission by a taxpayer.

The Cambridge Online dictionary also provides a definition for "*error of omission*", which states that it is "a mistake that consists of not doing something you should have done, or not including something such as an amount or fact that should be included"[7].

In addition, the purpose of section 93(1)(d) is to allow taxpayers to correct obvious errors on its return. In this regard, if an omission is excluded from the definition of an "error", such exclusion undermines the purpose of section 93(1)(d) and excludes taxpayer's the right to correctly and fairly amend their returns to SARS.

2.2.9. Ad paragraph 4.3

Taxpayers must ensure that the submission of the section 93 request is made before the date of prescription, or alternatively, must be able to show that SARS was aware of the error in question before the date on which the relevant year of assessment or tax period prescribes.

An example of where SARS would have been aware of a readily apparent, undisputed error in a return prior to the prescription of the relevant period, such that SARS should authorise a reduced assessment after the expiry of the limitation period (i.e. the prescription) of that tax period is as follows:

> X (Pty) Ltd is a company with a June year-end, which submits its tax returns on 30 June of each year. As a result of an audit, SARS issues an additional assessment for the 2017 year of assessment on 31 May 2021, disallowing a portion of X's bad debt allowance claimed under section 11(j), and the allowance claimed under section 24C. SARS imposes understatement penalties at the rate of 50%.
>
> The Taxpayer disputes the additional assessment and following an alternative dispute resolution (ADR) hearing, on 25 June 2022, the Taxpayer and SARS agree to settle the dispute. The Taxpayer agrees to accept the proposed adjustment of its 2017 allowance, and SARS agrees to reduce the penalty rate to 10%.

[7] https://dictionary.cambridge.org/dictionary/english/error-of-omission

These kinds of adjustments (where there is a timing difference involved in respect of a deduction or allowance claimed) will generally impact on the correctness of the assessment in the following year.

If we accept, for purposes of the example, that the impact of the disallowance of a portion of X's section 11(j) and section 24C allowances in 2017 is an overpayment of income tax in 2018, then:

- SARS would have been aware of this knock-on effect (which occurred by virtue of the additional assessment being issued) and thus, of the error in the 2018 assessment, at the time when the additional assessment was issued (in May 2021), **long before the 2018 year of assessment had prescribed**.
- In any event, since the settlement agreement was signed in June 2022, before the 2018 year of assessment had prescribed, SARS certainly would have been aware of the concomitant error before in the 2018 return before the prescription of the 2018 income tax period.

Accordingly, if the Taxpayer submits a section 93 request for a reduced assessment a week after signing the settlement agreement, on 2 July 2022, SARS should accept the request and issue a reduced assessment for 2018 (and any other subsequent tax periods impacted by these amendments). Although the section 93 request is only received by SARS after the expiry of the 3 year limitation period, SARS must have been aware of the error created by the 2017 assessment (which must be undisputed, since it arose by virtue of SARS' own adjustment, which the taxpayer accepted) before the expiry of the limitation period, and the requirements of section 93 are therefore satisfied.

This example is intended to be illustrative, rather than exhaustive.

2.2.10. Ad paragraph 4.4

Section 102 applies to Chapter 9. Section 93 is an alternative to Chapter 9. In our view, the case law relied on by SARS in the draft IN does not appear to support SARS' contentions, nor does it refer to the "*onus of proof*" as per section 102 of the TAA.

2.2.11. Ad paragraph 4.5

SARS has yet to publish any guidelines in respect of the section 9 “internal review” process. Guidelines informing taxpayers on material aspects of this remedy, such as:

- how and to whom (or to which mailbox) such a request should be submitted; and
- what the approximate service timelines are for a section 9 request; and
- the timelines and processes to be followed by taxpayers in disputing an adverse decision under section 9 of the TAA.

We request that SARS clarify these aspects in the draft IN, so that taxpayers are able to identify and utilise the correct remedy when engaging with SARS on the application of section 93 (and other similar “procedural” disputes which are not subject to objection and appeal).

End.