

31 August 2024

To: The National Treasury

240 Madiba Street
PRETORIA
0001

The South African Revenue Service

Lehae La SARS
299 Bronkhorst Street
Nieuw Muckleneuk
Pretoria
0181

Via email: National Treasury (2024AnnexCProp@treasury.gov.za)
SARS (acollins@sars.gov.za)

RE: DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL, 2024: TAX ADMINISTRATION

Dear Colleagues,

We attach the comments from the SAIT Tax Administration and Dispute Resolution Technical Work Group (**the WG**) on the proposals contained in the draft Tax Administration Laws Amendment Bill, 2024 (DTALAB), as it pertains to tax administration and related matters.

We value the opportunity to participate in the legislative process and welcome further engagement where appropriate.

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

Yours sincerely,

SAIT Tax Administration and Dispute Resolution Technical Workgroup

Disclaimer

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All references to the legislation are to the Tax Administration Act, No. 28 of 2011 (the TAA) and the proposals contained in the draft Tax Administration Laws Amendment Bill, 2024 (DTALAB)

1. Appearance of a natural person on behalf of the taxpayer in the Tax Court

[Applicable provisions: Amendment of section 12 of the TAA - Paragraph (c): Addition of subsection (3)]

1.1. Proposed amendment

1.1.1. The addition of subsection (3) enables a natural person, other than a legal practitioner duly admitted and enrolled in terms of the Legal Practice Act, 2014, to appear on behalf of the taxpayer in the tax court, if the president of the tax court is satisfied that the person is a fit and proper person to appear on the taxpayer's behalf in tax court proceedings.

1.2. WG response

1.2.1. Although not identified as such in the *Memorandum on the Objects of the Tax Administration Act Laws Amendment Bill, 2024 ("Memo on Objects")*, we understand that the proposed amendment arises from and seeks to give effect to the finding in the Western Cape division of the High Court matter of *Poulter vs Commissioner for the South African Revenue Service* Case no. A88/2023 (2 April 2024), wherein the Western Cape division of the High Court held that the Tax Court is not a court of law, but rather functions as an administrative tribunal. The judgment then proceeded to find that the taxpayer's father in that present instance was entitled to represent her in the Tax Court., which effectively enables any other lay person to represent another in the Tax Court.

1.2.2. We are of the view that although the proposed amendment enables a natural person to appear on behalf of the taxpayer in the tax court, the proposed amendment falls short, in that it albeit right of appearance is granted, this is only to the extent that the president of the Tax Court is satisfied that the person is a fit and proper person to appear on the taxpayer's behalf.

1.2.3. This proposed amendment raises further cardinal questions such as:

1.2.3.1. Will the Tax Court apply the "fit and proper" criteria in as stringent a manner as that which is applied in the context of enrolled legal representatives as required under the Legal Practice Act, 2014?

1.2.3.2. Will the determination of fit and proper be carried out on the natural person each time they appear before the Tax Court, or will a once off determination apply for all appearances by the natural person (in the event that he/ she represents multiple taxpayers)?

1.2.3.3. Is any natural person – even one with no tax knowledge, or as in the *Poulter* judgment one who is a convicted fraudster and vexatious litigant, entitled to appear before the Presiding Judge in the Tax Court?

1.2.3.4. If any natural person may appear, what disciplinary sanctions apply in the event of unethical or dishonest conduct before the Tax Court?

1.2.3.5. As officers of the court, legal representatives have certain obligations in dealing with court and are expected to be ethical in their conduct – will the same



expectation be placed upon the natural person? If so, on what basis?

- 1.2.3.6. Will the natural person be expected to apply deference to the Court, specifically the sitting judge presiding over the hearing in the Tax Court, and comply with Court etiquette as legal representatives do?
- 1.2.4. This proposed amendment raises further considerations that are not catered for in the amendment's current wording.
- 1.2.4.1. Although the Tax Court may not be classified as a court of law, it has been held on numerous occasions, and even at the level of the SCA, to be a court. Additionally, the Uniform Rules of Court, in conjunction with the Tax Court Rules in terms of section 103 of the TAA, and the common law rules relating to evidence apply to proceedings in the Tax Court.
- 1.2.4.2. Currently, legal representatives in the Tax Court are required to run a trial which includes the introduction and leading of evidence, and cross-examining witnesses. There also discovery processes, the, drafting of heads of argument and arguing the case at the conclusion of the trial. These are all actions which a natural person, not versed in court proceedings and decorum, may not fully comprehend and be able to effectively carry out. This amounts to an inequality in arms as SARS will be represented by either a senior SARS official, who is an admitted and enrolled legal practitioner, or counsel.
- 1.2.4.3. Additionally, where the judge of the Tax Court had initially found a person to be fit and proper, prior to the commencement of proceedings but, upon commencement of proceedings in the Tax Court, finds that such person is not, in fact, fit and proper, can that same sitting President of the Tax Court review the decision or are they *functus officio*?

1.3. Proposal

- 1.3.1. The ambit of the proposed amendment is too wide.
- 1.3.2. Whilst the subsequent implementation of practical procedures or standard operating procedures should be managed by SARS within their jurisdiction, we propose that a clear definition of 'fit and proper' be provided, which should be aligned with the Legal Practice Act, 2014 and the legal practice code
- 1.3.3. We further propose that the natural person who may appear be registered with a professional body, or at a minimum be a registered tax practitioner with a recognised controlling body.
- 1.3.4. We further propose that SARS considers amplifying the Tax Court Rules to deal with the practical arrangements related to an application by a representative to be deemed a "fit and proper" person.

2. Taxation and recovery of fees and costs resulting from the appearance of SARS officials in court proceedings

[Applicable provisions: Amendment of section 12 of the TAA - Paragraph (c): Addition of subsection (4)]

2.1. Proposed amendment

- 2.1.1. The proposed amendment provides that where a legally qualified and admitted senior SARS official appeared on behalf of SARS or the Commissioner in any proceedings, fees and costs may be taxed and recovered in the same manner as if such functions had been performed by a legal practitioner in private practice, as is the case for the State Attorney.

2.2. WG response

- 2.2.1. Aligning cost awards with prescribed court fees is a reasonable approach aimed at standardising the taxation of costs. However, the practical implementation of this amendment raises several issues, particularly concerning SARS's internal processes.
- 2.2.2. Effective taxation of costs requires that meticulous time and cost records be kept. Given that SARS officials may not traditionally operate in a fee-driven environment, there could be challenges in adapting to this requirement. In our experience problems have arisen when SARS has sought to recover costs due to the above manner of operation. The absence of detailed time records could also lead to disputes over the accuracy and fairness of cost claims, particularly if taxpayers challenge the basis of SARS's claims
- 2.2.3. The requirement to maintain detailed time records may also impact the litigation process. Assuming that SARS officials may need to adjust their workflow and record-keeping practices, this could arguably introduce delays or inefficiencies in the litigation process. There is a risk that these administrative burdens could detract from the primary focus of tax litigation, which is the fair and efficient resolution of disputes.
- 2.2.4. Additionally, while it is clear that the entirety of this proposed amendment is aimed at enhancing accessibility of the Tax Court for a broader range of representatives, it is also important to consider the cost implications thereof.

2.3. Proposal

- 2.3.1. To give effect to this draft proposed amendment, without overstepping, we recommend that such a provision come into effect on a date to be determined by the Minister by Notice in the Government Gazette.

3. Production of relevant material in person

[Applicable provisions: Amendment of section 47 of the TAA]

3.1. Proposed amendment

- 3.1.1. SARS may require a person to attend the offices of SARS to be interviewed by a SARS official concerning the tax affairs of a person. This would be the case where the interview is intended to clarify issues of concern to SARS that would render further verification or audit unnecessary or to expedite a current verification or audit. The proposed amendment aims to expand the provision to also include instances where a taxpayer is subject to recovery proceedings for an outstanding tax debt or has

applied for debt relief, to also resolve or expedite these proceedings

3.2. WG response

- 3.2.1. In our experience, section 47 is utilised in the audit and verification processes, often in situations where taxpayers may not fully disclose information or documentation as required by SARS.
- 3.2.2. Section 47 commonly leads to a formal inquiry or interview between SARS and the taxpayer, where the taxpayer is requested to present the necessary documentation. The proposed amendment seeks to extend the ambit of this section to the recovery of outstanding tax debts or to resolve or expedite these debt recovery proceedings.
- 3.2.3. While the policy rationale may be to facilitate more effective tax administration, the expansion of this provision may have potentially overreaching consequences, such as:
 - 3.2.3.1. Taxpayers being compelled to attend multiple interviews, even when such interviews may not materially advance the resolution of the tax matter. The conflation between the verification and debt recovery proceedings could potentially place an undue burden on taxpayers.
 - 3.2.3.2. Taxpayers might be less willing to engage with SARS if they fear that doing so could lead to invasive interviews or other coercive measures relating to debt management and recovery.

3.3. Request

- 3.3.1. As the *Memo on Objects* is brief in respect of this amendment, we request clarity regarding the policy rationale for this transition of section 47 shifting from a tool primarily focused on audits and verification to one which now also includes debt management and debt recovery.

4. General prohibition of disclosure

[Applicable provisions: Amendment of section 67 and 69]

4.1. Government proposal

- 4.1.1. In *Arena Holdings (Pty) Limited t/a Financial Mail and Others v South African Revenue Service and Others* [2023] ZACC 13, the Constitutional Court made findings regarding the constitutional invalidity of certain provisions of the Promotion of Access to Information Act, 2000, as well as the Tax Administration Act. The court ordered that Parliament considers measures to address their constitutional validity and, in the meantime, the court ordered a “read-in” to the relevant provisions of the Promotion of Access to Information Act, and those of the Tax Administration Act. The proposed amendment aims to address these measures and affect the necessary amendments to the affected legislation.

4.2. WG response

- 4.2.1. We welcome this proposed amendment.

5. Original assessments

[Tax Administration Act, 2011: Amendment of section 91]

5.1. Government proposal

5.1.1. Concerns have been raised that the current legislative framework only covers certain types of original assessments by implication. The proposed amendments aim to further clarify the legislative framework in order to address this concern, in particular in the context of “auto-assessments”.

5.2. WG response

5.2.1. Section 19 of the DTALAB deals with proposed amendments to section 91 of the of the TAA. . Section 19(c) of the DTALAB proposes the following addition to section 91 of the TAA (our emphasis):

“(4) If a tax Act or the Commissioner does not require the taxpayer to submit a return, SARS may make an original assessment based on an estimate under section 95 of the Act.”.

5.2.2. We submit that reference to “under section 95 of the Act” creates uncertainty whether such an assessment will be regarded as:

- (a) an original assessment as ordinarily envisaged by section 91 of the TAA, subject to the dispute provisions in section 104 and section 107 of the TAA which usually govern objections and appeals, or
- (b) an estimated assessment as envisaged by section 95 of the TAA (which per section 95(1) includes an original assessment based on an estimate), subject to the more limited dispute provisions in section 95(5) - (6) of the TAA which specifically govern objections and appeals to certain estimated assessments.

5.2.3. The uncertainty specifically impacts how such an assessment may be challenged by an aggrieved taxpayer and is contrary to the stated aim of the proposed amendment in the Memo on Objects, which is “to clarify the legislative framework”.

5.2.4. Based on the wording and the placement of the proposed addition of a subsection to section 91 rather than to section 95 of the TAA, it appears that the intention is for such an assessment to be regarded as an ordinary original assessment rather than a section 95 estimated assessment, which should therefore be subject to the dispute provisions in section 104 and section 107 of the TAA that usually govern objections and appeals.

5.3. Proposal

5.3.1. In order to clarify that position we propose the following addition after section 19(c):

“...under section 95 of the Act. Provided that the assessment will be deemed to be an original assessment that will be subject to objection and appeal under section 104 and section 107 of the Act notwithstanding anything contained to the contrary in section 95 of the Act.”



6. Objection against assessment or decision

[Applicable provisions: Amendment of section 104: Paragraph (b) of the TAA]

6.1. Government proposal

6.1.1. The proposed amendment is aimed to improve the efficiency of the dispute resolution process, by introducing alternative dispute resolution (“ADR”) proceedings at the objection phase of the dispute. This will allow for earlier resolution of a tax dispute by way of improved engagement and exchange of documents at the objection stage of a dispute.

6.2. WG response

6.2.1. Whilst this is a welcome, commendable amendment which reflects positively on SARS and the National Treasury’s responsiveness, it is crucial that the mechanics and intended implications of the new provision are clearly defined. This will ensure that the timing and procedural aspects are well understood, and that taxpayers’ rights are protected without unintended procedural delays.

6.2.2. For example, in circumstances whereby the outcome of the ADR process at the objection stage is unfavorable to the taxpayer, we seek clarification on the subsequent procedural steps. For instance, will there be a second ADR process if the taxpayer decides to return to the objection and appeal? How would this impact the process? These and similar queries should be addressed.

6.2.3. Additionally, we have concerns related to rule amendments that align with these issues and are prepared to discuss them further.

6.2.4. We seek clarification on the phrase "by mutual agreement", as per the proposed inclusion of subsection 6. Does this imply that the mutual agreement must be reached within the three-year period which the taxpayer has to lodge an objection?

6.3. Proposal

6.3.1. We propose that clarity on the respective time periods is clearly defined and provided.

6.3.2. Additionally, we request that the current rules concerning the ADR process are updated to accommodate the expanded process. It would also be beneficial to include a clarification in the provisions to specify that if proceedings are suspended on a given day due to ongoing ADR, the proceedings will resume from point of suspension (at the point where they were left off), if the ADR is unsuccessful. This ensures that there is no ambiguity in the process.

6.3.3. In respect of the proposed addition of subsection 6, we propose that SARS change the wording from "by mutual agreement" to similar wording to that adopted in section 144 of the TAA (despite the fact that this section relates to the initiation of settlement procedure) i.e. by changing the wording to "either party to a ‘dispute’ may attempt to resolve the dispute through alternative dispute resolution under procedures specified in the 'rule' by communication with the other party".



7. Jurisdiction of tax board

[Applicable provisions: Amendment of paragraph (a) and (b) of section 109 of the TAA]

8.1. Government proposal

8.1.1. To avoid an unnecessary overflow of matters to the Tax Court and overfull court rolls, the proposed amendment to paragraph (a) aims to remove the requirement that SARS and the taxpayer must agree on a matter to be referred to the tax board, and that a matter will automatically in the first instance be heard by the tax board if the tax in dispute does not exceed the amount determined by the Minister of Finance by public notice. The matter may be referred to the Tax Court if, SARS and the taxpayer so agree that it is necessary to do so.

8.2. WG response

8.2.1. This amendment appears to be an effort to direct taxpayers toward the tax board, indicating that SARS is aiming to expedite the resolution of matters. The intention seems to be to handle cases more efficiently by shifting them to this forum.

8.2.2. To promote the utilisation of the tax board, we further propose that SARS increase the monetary threshold/jurisdiction of tax boards.

8.3. Proposal

8.3.1. Whilst we agree with expediting the resolution of tax matters, we caution that SARS should not coerce taxpayers towards the tax board – particularly in instances wherein taxpayers do not opt to do so.

8. Temporary write off of tax debt

[Applicable provisions: Amendment of section 195 of the TAA]

9.1. WG response

9.1.1. Significant issues remain with SARS's approach to business rescue and insolvency.

9.1.2. The WG has previously submitted detailed measures to address the complexities of navigating tax debt suspensions, compromises, and instalment payment arrangements during business rescue proceedings. The current amendment suggests that tax debts are automatically suspended during business rescue proceedings, but in practice, this is not the case. We are aware of instances whereby taxpayers continue to face substantial delays and difficulties as SARS enforces debt collection actions on pre-existing tax debts. This often leads to additional financial burdens and obstructing the business rescue process.

9.1.3. Essentially, we wish to ensure that during the formulation and voting on a business rescue plan, practitioners are not simultaneously dealing with debt enforcement actions that undermine the process. It is critical to address this issue to prevent the situation from becoming unmanageable.

9.1.4. In particular, we note that outstanding tax debts automatically trigger the

revocation of a taxpayer's tax compliance status in terms of the requirements for tax compliance status contained in section 256 of the TAA.

- 9.1.5. As has been indicated above, suspension of payment applications and/or other resolution mechanisms applicable to tax debts, such as compromise and deferral arrangements, may take several months to negotiate and approve with SARS. Insofar as a disputed tax debt forms part of the pre-commencement liability to be compromised under business rescue proceedings (which itself is often contested between SARS and the business rescue practitioner representing the taxpayer) The likelihood of insolvency is a specific factor in section 164(3) of the TAA which motivates against SARS granting suspension of payment of a disputed amount owed by a taxpayer in business rescue. SARS is also requesting payment of a percentage of the disputed amount as "adequate security" with increasing frequency in practice, when evaluating suspension of payment applications.
- 9.1.6. These factors are particularly prejudicial for distressed businesses which cannot easily set aside financial resources to pay some or all of a disputed amount upfront, even on a deferral basis. While negotiations with SARS in respect of the disputed amount are ongoing (in parallel with the business rescue process) there is currently no way for the taxpayer to address its tax compliance status, even if there are no other reasons for withdrawal, as there is an outstanding tax debt reflecting on SARS' system.
- 9.1.7. Without tax compliance status, the distressed company is placed at a significant commercial disadvantage. It is unable to tender for work from government entities, as tax compliance status is a requirement for a valid tender submission and furthermore, is unable to receive payment for work already done for government entities under contracts (although there is a National Treasury Directive mandating payment, state-owned entities do not abide by this directive in practice, and distressed businesses typically do not have the financial means to litigate and enforce compliance and payment). It should be noted that the private sector is increasingly requesting confirmation of tax compliance for new vendors and service providers and imposing similar restrictions in respect of payment for services rendered.
- 9.1.8. Ultimately, the purpose of business rescue, which is to provide distressed companies an opportunity to trade themselves out of insolvency is jeopardised if not entirely thwarted by the fact that the distressed entity is unable to receive funds owed to it or to continue trading, resulting in liquidation. This would not be the case if there was a mechanism by which SARS could suspend the operation of section 256 or otherwise reinstate tax clearance status in circumstances where a taxpayer in business rescue has an existing tax debt which it cannot settle upfront, in full.
- 9.1.9. In our view, section 195 should be applied for this purpose, to temporarily write off (without actually compromising) an existing tax debt to allow a taxpayer to reinstate its compliance status.

9.2. Proposal

- 9.2.1. Section 195 of the TAA could be used to rectify what we perceive to be an unintended yet harmful consequence of the implementation of section 256 of the

TAA. 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 had to the importance of supporting economic regeneration and promoting employment. 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.

- 9.2.2. We propose that SARS clarifies the timing of liability i.e. when can SARS recover a tax debt in respect of business rescue cases (particularly that SARS can only recover post-commencement liabilities and that pre-commencement liabilities are subject to compromise in terms of the business rescue proceedings, and we recommend that SARS clarify this in line with the *Henque 3935 CC trading as PQ Clothing Outlet (in Business Rescue) v CSARS* judgment.

9. Public officers of companies

[Applicable provisions: Amendment of section 246 of the TAA]

10.1. Government proposal

- 10.1.1. It is proposed that the one-month period within which the public officer must first be appointed be removed. A newly formed company will thus have both its directors and public officer in place on formation. Should a company fail to appoint a public officer at the time of formation, the proposed amendment provides for a default rule of senior officials of the company who will be regarded as the public officer in order of priority.

10.2. WG response

- 10.2.1. We are pleased with the amendments as they provide greater clarity for taxpayers, particularly for companies. Numerous taxpayers have expressed uncertain about the roles and responsibilities of public officers. Therefore, this change is a welcome development that should enhance understanding and improve the overall clarity for taxpayers.

End.