

OFFICE OF THE CHIEF EXECUTIVE OFFICER

25 June 2009

Mr B Viljoen
Parliament
bviljoen@parliament.gov.za

And to

Ms N Mpotulo
National Treasury
Nomfanelo.mpotulo@treasury.gov.za

Dear Sir,

**THE LAW SOCIETY OF SOUTH AFRICA (THE "LSSA"): COMMENTS ON THE
TAXATION LAWS SECOND AMENDMENT BILL, 1999.**

The LSSA has selected for comment what it considers to be the most important issue raised by the amendments proposed in the draft Bills under consideration. The fact that we have been selective in the presentation of our comments should not be interpreted as an acceptance of those of the proposed amendments on which we have not offered comment.

PAY NOW ARGUE LATER

1. The Explanatory Memorandum to the Taxation Laws Second Amendment Bill represents [at paragraph 2.14] that the purpose of the proposed amendments to s88 of the Income Tax Act and s36 of the VAT Act is, inter alia, to "*clarify that payment is not suspended due to objection.*" With respect, this is a material misrepresentation of the current position and of the fact that the

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proposed amendments result in a fundamental and unjustified denial of the taxpayer's right to the principle of *audi alteram partem*. It is submitted that such a drastic deprivation of the taxpayer's already limited constitutional rights under the "pay now argue later" provisions of the relevant Acts requires wider consultation with representative organizations. It is also submitted that the Standing Committee on Finance should alert Parliament and all relevant organs of state of the precise nature and extent of the denial of constitutional rights brought about by the proposed amendments to these sections.

2. In relation to the provisions of the VAT Act the Supreme Court of Appeal has already "clarified" the current position. It is surprising that the author of the Explanatory Memorandum should think that there is a need for further clarification. The position is that the Commissioner is obliged to "hear" the taxpayer before the obligation to pay a disputed assessment arises. The principle of *audi alteram partem* is entrenched by various provisions in the Acts which provide that the disputed assessment will become final, notwithstanding the taxpayer's appeal to the Tax Court, after the Commissioner has considered and decided upon the taxpayer's objection to the disputed assessment. Singh v Commissioner, South African Revenue Service 2003 4 SA 520 (SCA); 65 SATC 203 at [35] 218. The similar provisions in the Income Tax Act render the ruling of the Court in Singh's case applicable to a disputed assessment issued under the Income Tax Act. It is also important to note that the Constitutional Court in Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another 2001 1 SA 1109 (CC) only considered the constitutionality of the "pay now argue later" rule in circumstances where the Commissioner had already considered and disallowed the taxpayer's objection and, in addition, had refused to suspend the obligation to pay the disputed assessment.
3. The proposed amendment to these sections results in the disputed assessment becoming enforceable against the taxpayer even before the taxpayer has been granted the right to be heard on the correctness or otherwise of the disputed assessment. The formal objection to the disputed assessment is the only right granted in terms of the Acts for the taxpayer to be heard before the payment obligation arises. It is this right to be heard, before being condemned to the payment of the disputed assessment, which

the proposed amendments now seek to abolish. This is inconsistent with the values enshrined in the Constitution and, in our submission, is an unjustified limitation of the taxpayer's right to due process.

4. It is not an answer to this criticism to say, if it were to be said, that the taxpayer is given the right to request the Commissioner to suspend the obligation to pay the disputed assessment. Such a provision, at this stage when the disputed assessment is issued, creates an irreconcilable conflict between various procedural provisions of the two Acts which is not in the interest of tax administration. The taxpayer is entitled to reasons for the disputed assessment [Tax Court Rule 3] within the period prescribed in the Rules and the taxpayer is entitled to object to the disputed assessment after receipt of written reasons. In the majority of cases it is not possible for a taxpayer, before receiving the reasons for the assessment, to consider whether to object or to pay the assessment or even to formulate a proper objection to the disputed assessment. Is it intended that the Commissioner should be entitled to enforce payment even before the taxpayer has had an opportunity to request suspension of the payment obligation? Is the Commissioner obliged to suspend the payment obligation pending consideration of the taxpayer's request? What of the taxpayer who has not been given, and does not know, the reasons for the assessment? How can the taxpayer be expected to "put up an arguable case" where no reasons have been given for the disputed assessment and the period within which an objection has to be filed has not expired? We submit that these are important questions and they illustrate the procedural anomalies to which the proposed amendments give rise.
5. It has to be appreciated that the proposed amendments effectively deprive the taxpayer of any right to oppose the disputed assessment if the relevant SARS official were minded to collect immediate payment of the disputed assessment. If, upon issue of the assessment, SARS is entitled to file for judgment and launch an immediate application for the provisional sequestration of the taxpayer, the course of the dispute between the taxpayer and SARS is dictated by the trustee of the taxpayer's estate under direction of its creditors which include SARS. There is accordingly ample room for the abuse of taxpayer rights without the taxpayer ever being given a reasonable opportunity to be heard. The suggestion from the Executive that the sections

should be amended in this manner is disconcerting given the large number of assessments which are issued on a daily basis and which are plainly and incontestably incorrect. The only safeguard for such a taxpayer is the right to have its objection, properly formulated in the light of the reasons given therefor, duly considered within a reasonable time. Most comparable countries, of which Australia and New Zealand are examples, have similar safeguards. The present provisions establish a fair balance between the interests of the taxpayer and those of the *fiscus* and, in our submission, there is no need or justification for the suggested amendments.

6. The factors which the Commissioner is required to have regard to in making or revoking his decision to suspend the obligation to pay are now to be listed in the Act [see the proposed s88(4) and (5) of the Income Tax Act and s36(4) and (5) of the VAT Act]. As formulated the proposed provisions give rise to the age-old interpretational difficulty of whether the listed factors are intended to be exhaustive or whether the Commissioner is also entitled to have regard to other relevant, but unlisted, factors. In our view, the Commissioner should be entitled, and indeed obliged, to have regard to all factors which may, in the circumstances of the particular case, appear to him to be relevant, including those which are listed in the section. As it happens we do not think that the factors listed in the draft legislation are the only factors which are relevant and some of the listed factors may indeed be irrelevant.
7. As an example of a factor which we consider to be irrelevant to the discretion which the Commissioner has under s88 of the Income Tax Act [and the corresponding provision in the VAT Act] is the question of “*whether the taxpayer has an arguable case*”. One must assume that once an assessment has been issued, the SARS officials responsible for the assessment did so in good faith and honestly believed the assessment to be correct. It seems to be a contradiction of that very assumption to require those officials to decide whether the taxpayer has an arguable case. One would expect SARS and all of its officials honestly to hold the view that the assessment was correctly issued and that the taxpayer has no case to argue. In all but the most blatant cases of misdirection on the part of the taxpayer, the merits of the dispute are irrelevant. It will of course be elevated to relevance if, in the circumstances of a particular case, either the Commissioner or the taxpayer detects a material misdirection on the part of the other. It is for this reason that we make the

suggestion in 6 above. One might well ask how the Commissioner will be able to consider this factor at this stage of the proceedings when the law as it is now proposed will deny the taxpayer the opportunity to put its case before it is required to pay?

8. It is not clear to us what weight ought to be attached to “*the amount of the tax involved.*” We submit that viewed in isolation the amount of tax involved is a neutral factor. The fact that it is a large amount [in itself a flexible notion] or a small amount [an equally flexible notion] should weigh in both directions. In the end the decision is one of fairness; one of prejudice and a fair balance between the interests of the taxpayer and those of the *fiscus*. In our view, neutral factors, such as the amount of money involved, should not be listed as a relevant consideration.
9. Notably absent from the list of relevant considerations is the conduct of the SARS officials involved in the issue of the assessment, the reasons for the assessment and the disallowance of the objection. These are factors which, one would hope, are taken into account by the officials charged with the exercise of the discretion conferred on the Commissioner in terms of s88 of the Act. If there is to be a list of relevant factors, the Commissioner’s reasons for the disputed assessment and his reasons for disallowing the objection thereto are directly relevant factors in evaluating the manner in which the discretion under s88 should be exercised.
10. The proposed amendments, and indeed the existing provisions, raise the question of the purpose of the “pay now argue later” rule. Ordinarily one would assume that it is designed to protect the interest of the *fiscus* in the collection of taxes reasonably [but subjectively and without due process and often erroneously] considered to be payable. Different considerations apply to the collection of administrative penalties and additional taxes levied in terms of provisions which are intended to be penal in nature. It is inappropriate that a taxpayer should be condemned to pay penalties and additional taxes without due process. We submit that whatever justification there might be in a particular case for the immediate collection of taxes suspected to be payable, there can never be justification for the enforced payment of additional taxes and penalties without due process. The proposed amendments do not, but ought to, address this distinction.

11. In the premises we submit that the draconian powers sought by SARS in terms of the proposed amendments should be rejected as unconstitutional. At the very least they should be postponed for further investigation and proper consultation with interested bodies and organs of state.

GENERAL OBSERVATION

12. In general we consider it appropriate to record, with the strongest possible sense of concern that many of the proposed amendments appear to be unjustifiably hostile to even the most compliant of taxpayers. There seems to be a tendency in this and earlier legislation to set the compliant taxpayer up for exorbitant and severe penalties for even the most innocent miscalculation. The enforcement and other powers sought by SARS officials in terms of the proposed legislation are extreme and unjustified. There appears to be little regard for the constitutionally protected rights of the taxpayer. It is as if there is an attempt to impose, through the office of the tax collection agency, a reign of terror upon all compliant and taxpaying residents with no evident attempt to bring participants in the notoriously non-compliant informal sector to account. [The minibus taxi industry is an extreme but appropriate example]. We are entirely convinced that the solution to the problem of non-compliance, to the extent that it is a problem, is not to be found in conferring even more oppressive powers on revenue officials concentrating their statutorily endowed collection prowess on the soft targets of innocent and compliant taxpayers. Many of the proposed amendments raise concerns over the apparent abandonment of those responsible for these draft Bills of their constitutional duty to promote and enhance [at least not to undermine] the values enshrined in the Constitution. Many of the proposed provisions exemplify a complete absence of any appreciation of the obligation on organs of state to protect and enhance constitutional values.
13. In our view such a state of affairs can only be remedied by continued engagement between those organizations which have a direct interest in an attempt to find an even balance between the interests of the taxpaying public and those of SARS as the revenue collection agency. The LSSA has such an

interest and will continue to engage those of similar interest in an attempt to achieve the desired balance.

Our representatives are available on short notice to discuss the above views at your convenience.

Yours faithfully

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