

Submission File

Ref#

31 October 2018

South African Revenue Service
Private Bag X923
PRETORIA
0001

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Dear Adele

SUBMISSION ON THE DRAFT PUBLIC NOTICE ON SECTION 210 TAA PENALTY

1. We hereby submit on behalf of the South African Institute of Chartered Accountants' (SAICA's) National Tax Committee (NTC) and Tax Administration sub-committee (TAA sub-committee) our comments on the draft Regulation for Incidences of non-compliance by a person in terms of section 210(2) of the Tax Administration Act No. 28 of 2011(TAA) that are subject to a fixed amount penalty in accordance with section 210 and 211 of the TAA in response to the request for comments by the South African Revenue Service (SARS).
2. As always, we thank SARS for the ongoing opportunity to provide constructive comments in relation to draft public notices. SAICA believes that a collaborative approach is best suited in seeking actual solutions to complex challenges.
3. Should you wish to clarify any of the above matters please do not hesitate to contact us.

Single public notice of offences

4. We have noted the current SARS practice to issue separate notices of non-compliance incidences, thus adding to previous notice rather than having a consolidated notice.
5. This practice creates unnecessary complexity, creates an environment for non-compliance and adds no value or benefit to SARS in increasing voluntary taxpayer compliance.
6. By the normal operation of law, the revoking of previous regulation or notice that continues under the new notice will not result in their being a legal vacuum i.e. SARS can continue to enforce individual return non-compliance occurring before the new notice.

7. Submission: It is submitted that the draft notice should be amended to state that all previous public notices issued in terms of section 210(2) of the TAA shall be replaced by the current notice but that all penalty notices issued prior to the current notice, issued under the previous notice, remain valid.
8. Both the personal income tax return and the corporate tax return administrative penalty should then be contained in this notice so that taxpayers only have to refer to the latest notice to determine which matters are applicable to them.

Historically dormant companies

9. Concern has been expressed about the status of the requirement to submit returns in respect of companies that are listed by SARS as dormant but by Companies and Intellectual Property Commission (CIPC) as active.
10. In this regard members have noted that CIPC does not have an official “dormant” status when a company does not trade, just a deregistered status. There is thus an inherent risk that dormant companies may be seen to be non-compliant as a result.
11. They have also noted that SARS have historically issued letters to companies who are dormant, confirming that they are not required to submit tax returns for these companies. However, there has been no *de minimus* exclusion (up to 2017) in the relevant public notice since 2009 and based on this, all resident companies had to legally submit a return.
12. In this regard, no clarity exists as to whether these companies which are dormant with SARS, but not deregistered with CIPC, will also need to submit the historical Rnil returns to avoid the administrative penalty.

13. Submission: Though we accept that no clarity can necessarily be provided in the notice, we do request that SARS consider clarifying the position for those who do have SARS correspondence confirming that no tax return had to be submitted. We also request that SARS clarify its position as to whether a non-trading company will still be seen as dormant if such company remains as active on CIPC.

Retroactive penalty

14. It is accepted that though the penalty will apply to non-compliance dating back to 2009, the monthly penalty will only be calculated with reference to the effective date of the penalty notice referencing the notice i.e. monthly penalty will only apply prospectively from effective date (SARS noted 9 December 2018). This is however not expressly stated in the notice.
15. Concern is expressed on the wording of section 211(2)(b) of the TAA, namely that when SARS does not have the companies most recent address to deliver the penalty notice, the monthly penalty will apply from date of non-compliance, which may be from 2009. It may be that this is not an issue as section 210(2) states that non-compliance is failure to comply with an obligation that is imposed under a tax Act and is listed in a public notice. The concern is that it does not expressly require that these two criteria must be present on the date that the penalty is calculated from, merely on the date when the penalty is imposed.



16. Furthermore, address is not defined with section 252, addressing effective delivery rather than address and includes physical, postal and electronic address (read with section 23 of the TAA). Thus if the company is on eFiling, can SARS issue a penalty assessment to the invalid postal address (which practice seems to have increased recently) and apply section 211(2)(b) of the TAA notwithstanding that it could have effectively delivered the assessment by SARS eFiling or email?

17. Submission: It is submitted that if the penalty is imposed in terms of section 211(2)(b) of the TAA from date of historical non-compliance where a company's address may be out of date for a variety of reasons, including SARS eFiling replication errors, it would be retroactive and in our view not what was intended by the legislature.

18. In this regard we submit that the notice should expressly state that for the purposes of section 211(2)(b) of the TAA the date of non-compliance is the effective date of the notice. It is further requested that SARS clarify the address update and effective delivery concern expressed above.

Yours sincerely

Tarryn Atkinson

Pieter Faber

Chairperson: TAA subcommittee

Senior Executive: Tax

The South African Institute of Chartered Accountants