Ref: #771519

Submission File

29 October 2021

South African Revenue Service
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BY E-MAIL: policycomments@sars.gov.za

Dear SARS

COMMENTS ON THE DRAFT INTERPRETATION NOTE ON REDUCED ASSESSMENTS: MEANING OF "READILY APPARENT UNDISPUTED ERROR"

The National Tax Committee, on behalf of the South African Institute of Chartered Accountants (SAICA), welcomes the opportunity to make a submission to the South African Revenue Service (SARS) on the draft Interpretation Note (IN) that provides guidance on the interpretation and application of section 93(1)(d) of the Tax Administration Act (TAA) with specific focus on the phrase "readily apparent undisputed error".

We set out below our comments in this regard.

COMMENTS

Preamble

1. On page 2, the preamble sets out the meaning of various words used in the draft IN. The last bullet point reads as follows: "*any other word or expression bears the meaning ascribed to it in the TA Act*."

2. Submission: The need for this last bullet is questionable.

Background

3. The draft IN deals with undisputed errors that may occur on an assessment by SARS or by the taxpayer on a tax return.

4. Submission: For completeness sake, the draft IN should mention that taxpayers can in many instances make an electronic correction to a tax return filed through efiling to correct these errors.

5. Reference could be made to the "Request for Correction" page on SARS' website providing more details to taxpayers on the alternative processes available when they

realise that they have made an error when completing their return, allowing the taxpayer to correct a previously submitted return/declaration.

6. On page 2, the following is stated: "*If an original assessment has not been issued, SARS may request a taxpayer to submit an amended return to correct an undisputed error made in the prior return*."

7. Submission: In practice, an assessment is issued by SARS before requesting the taxpayer to amend a return. Thus, there is no "prior return" - it is prior to SARS issuing an assessment that section 25(5) refers to.

Section 4.1 – Reduced assessments (section 93)

8. On page 3, it states that SARS may make a reduced assessment under section 93 in the following circumstances:

    - A taxpayer that successfully disputes an assessment under dispute resolution process under Chapter 9……

9. Submission: The word 'disputes' should be 'disputed' and a 'the' should be inserted after …under (under the dispute resolution process).

10. Reference is made to section 93(1)(e)(ii) which involves a processing error by SARS. It is unclear what SARS regards as a "processing error".

11. Submission: Guidance is needed on what would be regarded as a "processing error by SARS". This should be clarified by means of examples. As we understand it, an assessed loss balance carried forward from the prior year that is simply not included on an assessment would be such an example.

Section 4.2 – Remedy under section 93(1)(d)

12. On page 4, it states that there is no prescribed form that a taxpayer must use to submit a request under section 93(1)(d), however, the request must be in writing and supported by the necessary documentary evidence where applicable. SARS must consider a taxpayer's written request under section 93(1)(d).

13. Submission: SARS should explain how this request is to be made - i.e. by email to SARS at contactus@sars.gov.za or pcc@sars.gov.za or is there another email address to be used? Furthermore, SARS should provide taxpayers with an indication of how many days SARS will take to consider a taxpayer's request under section 93(1)(d) as the Act is silent on this matter.

14. It is also stated that if SARS rejects the request, no reduced assessment will be made. Instead, the taxpayer will be advised by letter or notice of the decision taken not to make a reduced assessment under section 93(1)(d).

15. Submission: SARS should include reasons for the rejection in the letter or notice.

Section 4.2.1 – SARS "may" make a reduced assessment

16. On page 4, the following is stated: "*The ordinary meaning of the words "may" and "if, are respectively defined in Lexico Dictionaries as - …..*".

17. Submission: The inverted commas are not closed after the word "if".

18. At the bottom of page 4 it states that "*Section 93(1)(d) does not imply that SARS "must" reduce an assessment, as it may still be dependent on the taxpayer satisfying any other requirement contained in a Tax Act."*

19. Submission: It is unclear what other requirements contained in a Tax Act are being referred to here because if both parties agree that it is undisputed and an error, then SARS should really make the reduced assessment.

20. As it is stated that SARS "may" reduce an assessment only if it is satisfied that the requirements of section 93(1)(d) have been fully met, it is hoped that SARS will indeed exercise its corresponding duty of issuing a reduced assessment when all the requirements are met, as stipulated by Judges Gorven and Van Rooyen.

Paragraph 4.2.2 – SARS must be satisfied

21. On page 5, the definition of "satisfy" is provided. The Act, however, refers to "satisfied*".*

22. Submission: As the word used in section 93(1)(d) is "satisfied", its meaning should be provided in the draft IN and is defined as "Contented; pleased." (Lexico Dictionaries, UK English).

23. The following could also be included in the draft IN: Judge Swain, in GB Mining v Commissioner: SARS (903/2012) [2014] ZASCA 29 (28 March 2014), said the following: "*To discharge this burden of proof the taxpayer must place information before the Commissioner to substantiate the error relied upon. The taxpayer accordingly bears the onus of satisfying the Commissioner that the information furnished is incorrect and that a reduction in the assessment is justified. In order to do this, additional evidence would have to be placed before the Commissioner."*

24. Although the taxpayer will, before the section 9 review is undertaken, ask SARS for reasons for their decision, the draft IN should state that SARS will, when it is not satisfied, provide (by way of notice) the taxpayer with the reasons why it is not satisfied.

Paragraph 4.2.3(a) – Meaning of the phrase "readily apparent undisputed error"

25. On page 6, the draft IN also states the following: "*At first glance at the request, SARS must be able to easily determine that there is an undisputed error. The presence of any doubt will disqualify the taxpayer's request for a reduced assessment under section*

93(1)(d). Therefore, it may be said that the error must be an obvious mistake which is unquestionable. If SARS cannot make this determination from merely looking at the return or assessment, the error cannot be said to be readily apparent although there might well be an error."

26. And in this context the draft IN quotes the following definition of "readily apparent": "*without hesitation or reluctance; willingly"; and "clearly visible or understood*".

27. This is an over-simplification of the process and is clearly at odds with what happens in practice as there is no prescribed mechanism other than making the application and attaching all the supporting documentation which describes the error properly.

28. We fail to see how anybody, by merely looking at a return or an assessment, will be able to see an error.

29. Submission: It is submitted that in all cases, the taxpayer will be required to provide additional motivation and proof explaining the error. This proof would include the Annual Financial Statements or other necessary information submitted as supporting documents to the return or requested to be submitted for consideration in determining if it is an error under section 93(1)(d).

30. If the error is not clearly understood based on the additional information provided, then arguably it is not readily apparent.

31. Consideration should also be given to SARS system errors, such as for instance where taxpayers are assessed incorrectly due to a system glitch (for instance, where an entity is taxed at a rate of 28% instead of the SEZ rate of 15% due to the logic questions in the ITR14 being incorrectly configured). A further example is various undisputed SARS system failures thus prevent taxpayers from complying timeously with a SARS request for verification of VAT returns submitted.

32. In both of these situations, taxpayers have to spend many hours trying to rectify these situations and ultimately have to submit an objection which can take months to resolve, not to mention the costs involved in this process.

33. Submission: It cannot be that these system errors are not regarded as readily apparent undisputed errors. It can be proved to be readily apparent and undisputed because there is a full audit trail of, for example, telephone calls made and emails sent to and from SARS.

34. We question why a taxpayer should have to go through the objection process where there is a SARS systems failure which is clearly an error.

Example 1 – "Readily apparent"

35. On page 7, an example is provided of a SARS official who, while assisting a taxpayer to complete his return, captures an incorrect amount of out-of-pocket medical expenses (R500) compared to the amount on the supporting medical tax certificate (R50 000).

According to the draft IN, the clerical error is readily apparent as it is clearly visible from the supporting documentation.

36. This statement is at odds with that made on page 6 where it states that "*If SARS cannot make this determination from merely looking at the return or assessment, the error cannot be said to be readily apparent although there might well be an error*." The out-of-pocket medical expenses is not always on the medical certificate and the error would not be clearly visible from the return or assessment so in terms of SARS' view in the draft IN, how can this be readily apparent unless SARS can see it or it has been uploaded?

37. Submission: This example again points to the fact that supporting documentation to a return is necessary in order to be able to determine whether a readily apparent error has been made. The draft IN should thus take this situation into account and also explain that if there is such an error, the taxpayer can do a request for correction without going through the section 93(1)(d) process.

38. An example of a 'readily apparent' error that could be considered in the draft IN is where a taxpayer has filed its tax return applying an interpretation of the law or in line with a SARS ruling or SARS practice which is then overridden by a court judgment. In that case, the application of the law should be clear from the court judgment and if the incorrect treatment by the taxpayer is easily ascertainable from the return disclosures, then the taxpayer should be able to do a section 93 request despite no objection having been lodged.

39. Given the same facts in Example 1 but provided the SARS official had not entered the incorrect amount but rather by mistake omitted the out-of-pocket medical tax expenses entirely, SARS's view, as confirmed later in the draft IN (see comment on paragraph 4.2.3(c) below), is that this would not constitute an "error".

40. Submission: Treating these two sets of circumstances differently seems contrary to the purpose of section 93(1)(d) and should be reconsidered.

Paragraph 4.2.3(b) – "Undisputed"

41. The draft IN on page 7 says that the error must not need a high degree of verification. If information which will prove an undisputed error is already available on the SARS e-filing system, it is submitted that that this would not require a high degree of verification by a SARS official as all it requires is for someone to look at the system together with the application and to listen to the recorded calls available which are indicated by the case number provided by taxpayers.

42. Submission: More clarity is required on what would constitute a "high degree of verification" as mentioned in the draft IN. There is also nothing in the Act that limits SARS' process to confirm the error to a simple verification.

43. As mentioned previously, it is submitted that one has to look beyond the actual assessment or the tax return in order to find an error, it is not possible any other way to ensure that the error is a readily apparent undisputed error.

Example 2 – An "undisputed" error by the taxpayer in a return

44. On page 8, an example of an error was provided where the taxpayer should have shown the amount of a capital gain as an amount which should have been disregarded as the asset sold qualified as a personal use asset.

45. Submission: This could arguably call for a legal interpretation but the proof that the taxpayer would probably have to provide includes the taxpayer's intention, at acquisition and thereafter - relevant to the taxpayer's burden of proof.

46. Another example that could be incorporated in the draft IN is when SARS adds back amounts on an assessment (for example legal fees) which have already been added back in the tax computation on the return. One should be able to do a section 93(1)(d) request in this situation without having to go through the whole objection process.

47. In the example contained in the draft IN, the taxpayer's request is rejected because the taxpayer did not provide documentary proof to substantiate the claim. (This once again highlights the need for additional supporting documentation to be submitted to prove an error is readily apparent and undisputed). The example then continues and states that SARS will notify the taxpayer accordingly.

48. The problem is that the Act doesn't allow for the request to be dealt with as an invalid request and the taxpayer is not allowed to resubmit the required documents neither can SARS ask for further supporting documents to consider the request.

49. Submission: A taxpayer should be allowed to submit the necessary documentation should he/she not have submitted these or have submitted insufficient information in the first instance.

50. Situations do occur where SARS issues an original (or additional) assessment which differs from the return submitted by the taxpayer, with no grounds (or inadequate grounds) provided. In terms of section 96(2)(a) of the TAA, SARS is required to (must) provide these grounds.

51. Submission: The draft IN should also address this situation by stating that SARS can deal with such situations by invoking section 93(1)(d)(i) and saving the taxpayer from having to lodge an objection in this regard.

Paragraph 4.2.3(c) – "Error"

52. On page 8, the following definition of "error" is cited in the draft IN: *"a mistake, the state or condition of being wrong in conduct or judgement"*. Clearly something can be wrong

due to an omission as well as a commission (i.e. an error could occur because of things one has failed to do as well as things one has done).

53. The draft IN then continues to say (page 8): "*A distinction must be drawn between an "error" and an "omission". The word "omission" means the action of excluding or leaving out someone or something, either deliberately or accidentally. It is clear from the dictionary meaning that an omission of information by a taxpayer in a return, does not fall within the ambit of an "error" for purposes of section 93(1)(d)*."

54. The draft IN claims that an omission of information by a taxpayer in a return does not constitute an "error" for purposes of section 93(1)(d). This is an overly narrow interpretation of the word "error" and is not warranted by the words used in the section.

55. Submission: When a taxpayer accidentally omits something from a tax return, it is a mistake. "Mistake" is included in the definition of "error" accepted by SARS.

56. Since the purpose of section 93 is to provide an easier, less burdensome method of disclosing errors, a taxpayer should be allowed to correct an error of omission of income from his or her tax return without having to go the VDP route. This will certainly assist with the collection of income for the fiscus.

57. Allowing errors of omission to also be considered under section 93(1)(d) will not open the section to abuse as an error would still need to be readily apparent and undisputed before a reduced assessment can be made.

58. It also states on page 8, that: "*It is important to note that an error by a taxpayer is limited to an error in a return and not in the accounting or tax records that are used to complete the return. An error in the accounting or tax records would require more than just a simple verification to confirm the error, therefore would not qualify under section 93(1)(d) as the error cannot be said to be readily apparent*."

59. Submission: It is submitted that the draft IN is limiting the application of section 93(1)(d) beyond what is practical. Accounting errors impacting a tax return do occur in practice and in compliance with accounting standards, the error must be identified in the Annual Financial Statements (AFS) and the financial results must be restated to correct the error. Often the error is discussed in the report of the external auditor.

60. An example of this would be the restatement of prior year figures in a set of AFS that directly impact the taxable income of the taxpayer. The adjustment is easily verifiable by SARS based on the notes or external auditors report contained in the AFS.

61. It is therefore submitted that just by looking at the auditor's report and the restated AFS, SARS can be satisfied of the error through a simple verification process.

Example 4 – A "readily apparent undisputed error"

62. On page 10, an example is provided of an incorrect amount reflected on a section 18A receipt issued by a PBO. The taxpayer, having submitted his return reflecting the incorrect amount, requests a reduced assessment after the PBO reissues the receipt reflecting the correct amount. According to the draft IN, the request under section 93(1)(d) will be rejected as the error was in the receipt issued by the PBO and not in the return.

63. Submission: It should be appreciated that in this example there are two errors - the original error in the receipt issued by the PBO which led to the subsequent error in the return completed by the taxpayer.

64. Based on the reissued receipt obtained from the PBO, the error in the return should be readily apparent and undisputed, therefore qualifying for relief under section 93(1)(d) as the taxpayer has no way of fixing this if the error was only picked up after 30 days after the assessment.

65. Additional examples of readily apparent undisputed errors that could be included in the draft IN are:

** A section 6quat tax credit claimed in a tax return that was not included in an assessment;*

** SARS not crediting a taxpayer with interest in respect of the overpayment of, for instance, provisional tax in terms of section 89quat(4);*

** A donation incorrectly calculated by the SARS e-filing system in the context of a REIT. Section 25BB(2A)(c) provides that a donation deduction is determined before a "qualifying distribution" deduction, however, the efiling system does not calculate it this way, resulting in an incorrect assessment being raised.*

Paragraph 4.3 – "Period of limitations for issuance of assessments under s93(1)(d)"

66. On page 10, it is stated that in terms of section 99(2)(d), the prescription period in section 99(1) does not apply if SARS "becomes aware" of an error prior to the relevant period.

67. It is accepted that SARS will become aware of an error on receipt of a request for a reduced assessment. However, there may well be other ways in which SARS becomes aware of an error.

68. Submission: Further guidance is needed on the ways in which SARS will accept that it has become aware of an error prior to the relevant period.

Example 6 – After the remedy under section 9(1) is exhausted

69. On page 13 an example is provided of a taxpayer wishing to claim a reduced assessment as it claimed the incorrect amount of wear and tear. SARS was of the opinion that the request did not qualify for a reduced assessment under the section 93(1)(d).

70. Submission: The example should include the reasons why SARS is of this opinion. In this regard we refer to ITC 24674, where it was held that if a taxpayer has not claimed the "catch-up wear and tear allowance" in the relevant year of assessment, such a taxpayer may use section 93 of the TAA and submit a revised return. The judge also stipulated that an adjustment must be made to the taxpayer's income to remedy any inaccuracy in the "wear-and-tear allowance" granted in prior years, noting that tax is an annual event and an allowance must be claimed in the year of assessment in which it is incurred.

Issue not addressed in the draft IN – Timing of the conditions

71. A question that arises in relation to the draft IN is the following: At what point in time must the conditions to apply for a reduced assessment be met? That is, must the conditions be at the time of filing the return/issuing the assessment, or could it occur later?

72. For example: Assume that a trust distributes an amount to a beneficiary, and the beneficiary incudes it in his/her tax return and pays the tax due. At a later stage, SARS holds the view that the amount was not properly or legally distributed by the trust, and thus the trust should have paid the tax. SARS accordingly raises an assessment on the trust. This occurs before the beneficiary's assessment in respect of the year in which s/he was taxed on the receipt has prescribed.

73. Clearly at the time of filing the beneficiary's return there was no readily apparent undisputed error, and neither was there such an error in the assessment. There are two possible scenarios here.

74. Scenario 1: The trust immediately acknowledges its error (and the beneficiary agrees that there was this error) and accepts the assessment. Does SARS accept, knowing full well that the beneficiary had paid tax on the amount, that as soon as SARS raised the assessment on the trust there must at that point be a readily apparent undisputed error in the beneficiary's return, allowing SARS to reopen the assessment and refund the beneficiary?

75. Scenario 2: The trust disputes that assessment and it goes on appeal, and eventually the court/s find/s against the trust, but this happens after the beneficiary's assessment has prescribed. If the answer to 1 above is yes, it is clear that SARS must have been satisfied that, at the date it raised the assessment against the trust, there was a readily apparent error in the beneficiary's tax return. But at that point it was not undisputed. It only became undisputed when the appeal process for the trust was exhausted, but this was after prescription. Would SARS nevertheless still reopen the beneficiary's assessment and refund him/her?

76. Submission: Clarity on the above should be provided in the IN.

Policy Comment

77. Although the draft IN appears to be in line with the legislation to a certain degree, taking into consideration the comments above which still require addressing in the interpretation note, we submit that the legislation is also problematic. The real concern is that many of the taxpayers and tax practitioners cannot deal with the objections in the current time frame permitted (30 days from the date of assessment/receipt of the SARS notice setting out the reasons for the assessment).

78. This concern was also highlighted in the 2016 Explanatory Memorandum on the Tax Administration Laws Amendment Bill, where it was stated that a longer period for lodging an objection will be proposed which will be affected in the dispute resolution rules issued under section 103 of the TAA. The rules were, however, never amended.

79. Submission: The rules should be amended so as to afford taxpayers 60 business days to submit an objection as this would prevent the numerous requests for further extension as this period has been shown to be too short in practice, particularly in complex matters, resulting in large number of applications for condonation.

80. Furthermore, although we note that section 104(4) permits SARS to extend the period within which to submit an objection if reasonable grounds exist (the extension period being limited in terms of section 104(5)(a) to 30 days), it is submitted that it would be best if this time was also extended to either 45 or 60 days as taxpayers have no alternative remedy to address their concerns other than going to Court on this issue.

81. These proposals will accordingly be included in SAICA's Annexure C submission.

Conclusion

82. We once again thank SARS for the ongoing opportunity to provide constructive comments in this regard. SAICA continues to believe that a collaborative approach is best suited in seeking solutions to complex challenges and should you wish to clarify any of the above matters please do not hesitate to contact us.

Yours sincerely

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The South African Institute of Chartered Accountants