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South African Revenue Service  
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Dear SARS

## COMMENTS ON THE DRAFT GUIDE TO THE VOLUNTARY DISCLOSURE PROGRAMME

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 Guide to the Voluntary Disclosure Programme (VDP). The VDP is intended to enhance tax compliance, good management of the tax system and the best use of the SARS resources. The VDP is intended to encourage taxpayers to voluntarily disclose tax defaults. This draft guide provides general guidance on the VDP.

We set out below our comments on the Draft Guide below.

## COMMENTS

### Paragraph 1 - Introduction

1. On page 2, the Draft Guide attempts to justify a strict interpretation of the VDP provisions by making reference to the *Western Platinum Ltd v C: SARS* case. This case upheld a strict interpretation of the provisions which dealt with deductions and afforded class privileges to farmers and miners (i.e. taxpayers favoured by the fiscus).
2. SARS have cited the relevant authority as if it was stated as an outright rule which it was not.
3. The following statement by the Judge in the original case (*Ernst v CIR*) is of importance and seems to have been overlooked by SARS: *"To this extent farmers are, as a class, placed in a favourable position but there is no justification in the paragraph for extending this exception. Craies on Statute Law, p. 109, says: "The Courts, in dealing with taxing Acts, will not presume in favour of any special privilege of exemption from taxation. Said LORD YOUNG in Hogg v. Parochial Board of Auchtermuchty (7 Rettie 986): 'I think it proper to say that, in dubio, I should deem it the duty of the Court to reject any construction of a modern statute which implied the extension of a class privilege of exemption from taxation, provided the language reasonably admitted of another interpretation.'"*



4. The passage above cited with approval by the honourable justices creates a rebuttable presumption of “*provided the language reasonably admitted of another interpretation*”.
  5. To extend this principle to the VDP provisions seems a stretch too far as the whole purpose of the VDP provisions are to encourage taxpayers to voluntarily disclose defaults. Thus, such a strict interpretation defeats the “apparent purpose” of the VDP and also runs contrary to the purposive approach to interpretation adopted by the Supreme Court of Appeal in the seminal case of *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13. That is, the context in interpreting the legislation is of cardinal importance.
6. Submission: The reference to the Western Platinum case appears to be misplaced and should be reconsidered taking into account the rationale for introducing a VDP.

### **Paragraph 2 – Applying for VDP relief**

7. On page 2, the Draft Guide states that for a disclosure to be voluntary, SARS must not be aware of the default.
8. Submission: It is submitted that a disclosure should still qualify as voluntary if only the VDP Unit within SARS has become aware of a default prior to the formal submission of a VDP application. For example, if a taxpayer approached the VDP Unit with regard to submitting the VDP01 form on eFiling. In such a case the disclosure would clearly still be voluntary.
  9. The final Guide should confirm SARS’s view on this issue and whether “Chinese walls” are maintained between the VDP Unit and other units within SARS (also see comment under Paragraph 7 below).

### **Paragraph 2.1 – Definition of “default”**

10. On page 4, under the “*Understatement*” paragraph, the Draft Guide states that the understatement must result in the imposition of an understatement penalty under Chapter 16 of the Tax Administration Act (TAA).
  11. However, section 227(d) of the TAA states that the disclosure must involve a behaviour referred to in column 2 of the understatement penalty percentage table in section 223 of the TAA, not that the disclosure must necessarily result in the imposition of an understatement penalty.
  12. An example of where an understatement penalty should not be imposed but a VDP application could still be possible is, for example, a bona fide inadvertent error.
13. Submission: The Draft Guide should be updated taking the provisions of section 227(d) into account.



14. We believe that the statement in paragraph 2.1 to the effect that the understatement will be calculated by considering the total tax for all of the periods involved and in paragraph 2.5 to the effect that a VDP application relating to more than one tax period will be considered on the net position of the default over these tax periods for purposes is not correct.
15. At the bottom of page 4 it is stated that “A shortfall is calculated on the difference between the correct amount of tax and the tax that was reported in a tax period.”
16. This is also how the underestimation penalty is applied, i.e. referring to section 222 (1): “In the event of an ‘understatement’ by a taxpayer, the taxpayer must pay, in addition to the ‘tax’ payable for the relevant tax period, the understatement penalty.”
17. If the taxpayer has a refund of R10 million in year one and a liability of R10 million in year two we believe the correct procedure would be to apply for a VDP in relation to year two and a request for correction under section 93. The interpretation in the draft VDP guide leads to an untenable situation where an understatement penalty will be levied pertaining to year two and the taxpayer left without a remedy to avoid that and this is even in circumstances where the fiscus was not prejudiced apart from an interest element.
18. Submission: The above concerns should be clarified in the final Guide.
19. On the top of page 5, it is also stated that “A VDP applicant with a default that has implications for more than one tax type must submit one application. A VDP applicant with more than one default that are not related must submit separate applications for each default.”
20. The Draft Guide does not address whether one application can be made for all tax years in respect of the same default. An example of this is where an error was detected on a system and it crosses several tax years.
21. Submission: Although we are aware that SARS does consider the implications for several years in relation to the same default in order to reach agreement, the Draft Guide should expand the comment on page 5 to explicitly state that one application can be done for several tax years/periods in respect to the same default
22. At the bottom of page 5, the Draft Guide states that “A reportable arrangement that was not disclosed is subject to a non-disclosure penalty under section 212. Such non-disclosure does not qualify as a default for VDP purposes as there was no understatement involved.”
23. It is our understanding that this is SARS’ view because the requirement of section 227(b) of the TAA has not been met, that is, the disclosure does not “involve a ‘default’ which has not occurred within five years of the disclosure of a similar ‘default...”. So because the definition of ‘default’ requires there to be an ‘understatement’, SARS’ view is that the non-



disclosure of reportable arrangements, which does not necessarily result in an understatement (although see discussion below), would not qualify for a VDP.

24. It must be mentioned that certain categories of reportable arrangements are specifically aimed at identifying impermissible avoidance arrangements. Since an 'impermissible avoidance arrangement' is specifically included in the definition of an 'understatement', the failure to disclose a reportable arrangement of a transaction which turns out to be an 'impermissible avoidance arrangement' involves a default resulting in an understatement, thus qualifying for a VDP.
  25. Furthermore, given the purpose of the reportable arrangement regime, which is to alert SARS to potential tax avoidance, there would be many instances in which the non-disclosure of a reportable arrangement would involve a default resulting in an understatement, for example, where a taxpayer failed to submit a return required under a tax Act (i.e. committed an 'understatement') pertaining to information which also forms the subject matter of an undisclosed reportable arrangement. In such a case, the disclosure by the taxpayer would clearly involve a default resulting in an understatement.
  26. It must also be noted that the meaning of an "administrative non-compliance penalty" in section 208 of Chapter 15 of the TAA, in respect of which SARS must grant 100% relief in terms of section 229(c) of the TAA, specifically includes the penalties contained in section 212 of the TAA for the non-disclosure of reportable arrangements.
  27. If it was National Treasury's intention to exclude the reportable arrangement penalties from VDP relief, it could easily have specified this in section 229(c), as it did in relation to penalties for the late submission of a return.
  28. Not providing VDP relief for the non-disclosure of reportable arrangements appears to go against the purpose of the VDP provisions as it may deter taxpayers from voluntarily disclosing defaults for fear of the substantial penalties that may arise on the non-disclosure of reportable arrangements.
29. Submission: It is proposed that VDP applications involving reportable arrangement penalties be evaluated on a case-by-case basis to determine whether the requirements of a valid VDP are met.

## **Paragraph 2.2 – Persons that may apply for VDP relief**

30. This section of the Draft Guide details the persons who may apply for VDP relief, whether in a personal, representative, withholding or other capacity. It also deals with representative taxpayers under the Income Tax Act (ITA), a representative employer under the Fourth Schedule to the ITA or a representative vendor for VAT purposes.
31. The Draft Guide does, however, not specifically deal with withholding taxes and whether they are subject to a VDP and if so, who may submit the VDP application regarding these taxes, that is, is it the withholding agent or the recipient of the income, or both.



32. Submission: It is requested that the Guide address whether the VDP is in SARS's view available for withholding taxes, including whether in SARS's view the withholding agent or the recipient of the income, or both, may submit such an application.

### **Paragraph 2.3 – Disqualification of person subject to audit or criminal investigation**

33. We appreciate the distinction made on page 8 between an audit and a verification. However, in practice, it seems this distinction is not always appreciated by all VDP evaluators as in some cases the evaluators regarded these as "operations audits" and applications are rejected on this basis resulting in a further administrative burden for the taxpayer having to dispute this decision.

34. Submission: All SARS VDP evaluators should be trained to understand that a verification is not an audit for the purposes of section 226(2).

### **Example 2 – Verification prior to submission of VDP application**

35. Example 2 on page 11 explains that if Company A became aware of a default in the 2020 year of assessment as a result of the verification process on the 2019 year of assessment, the disclosure will not be regarded as voluntary for purposes of section 227(a).

36. We are of the opinion that is stated too widely. It can be applicable if it is a similar default arguably, but if Company A, merely because of the verification request pertaining to 2019 as a matter of procedure just revisits all disclosers in the 2019 return and through that process identifies a different error than the one queried, we would argue that disclosing that newly identified error would still lead to a voluntary disclosure. We believe the issue is properly addressed in Example 4 in paragraph 2.4.2.

37. Submission: The Guide should be expanded to include the above scenario.

38. A related issue falling under the "voluntary" as well as the "not being subject to an audit" requirement, is the question whether, if one type of tax is being audited and co-incidentally a total unrelated error is found pertaining to another type of tax, whether the audit will exclude a VDP pertaining to other taxes.

39. Submission: We propose that this be addressed in the final Guide and it be indicated that that would not be the case.

40. The example clearly highlights that a verification should not prevent a taxpayer from seeking VDP relief. However, in practice the VDP Unit places VDP applications on hold while verifications are ongoing as we understand that the verification "locks" the system.

41. Submission: These practical issues need to be investigated and remedied.

## Paragraph 2.4 – Requirements for a valid voluntary disclosure

42. On page 12, the Draft Guide in relation to the requirements of a VDP, states that “the VDP application must...” and then lists the requirements such as “involve a behaviour referred to in column 2 of the understatement penalty table.

43. Submission: The wording in section 227 of the TAA should rather be used in this sentence so as to avoid any confusion. Thus, the words “*VDP application*” in this phrase should be replaced by the word “*disclosure*”.

### Example 4 – Disclosure considered “voluntary” under section 227(a)

44. On page 15, an example is provided of a disclosure considered to be “voluntary” under section 227(a). This example refers to a company being issued with a verification notice by SARS for the 2019 year of assessment. The taxpayer applied for a VDP in respect of the 2020 year and the example concludes that as the 2020 year of assessment was not the year being verified and the default would not have been detected during the 2019 verification process, the disclosure meets the requirements of it to be “voluntary”.

45. This example creates the impression that a verification may disqualify a VDP.

46. Submission: This example is incorrect and should be amended to correctly reflect the terms of the relevant provisions of the TAA - specifically section 226(2) which only refers to an audit or criminal investigation, not to a verification.

### Paragraph 2.4.2 – Failure to register for tax type resulting in a default

47. On page 13, the Purveyors case in the Tax Court (2020 JDR 1830 (GP), 83 SATC 176) is referred to.

48. Submission: The Purveyors SCA judgment which was handed down on 7 December 2021 should be referred to rather than the Tax Court case.

49. In the last paragraph on page 15, it states the following: “A taxpayer whose default consists of failing to register for a tax type may involve the VDP Unit for guidance before commencing with the registration process. If a liability for tax is triggered by the registration for the tax type, the taxpayer can apply for voluntary disclosure relief. This application must be submitted within a reasonable timeframe from the date after which the taxpayer has registered for the applicable tax type. In general, the VDP Unit allows a timeframe of 21 business days.”

50. The Guide does not appear to address whether a VDP application would in SARS’s view still be considered voluntary if a taxpayer needs to disclose defaults to SARS in order to register for a tax type, for example where the level of taxable supplies need to be shown to obtain a VAT registration. It should be borne in mind that taxpayers who wish to apply for VDP relief have no choice but to first register and obtain an eFiling profile for the relevant tax type (refer to paragraph 2.4.7).



51. No 21 business day requirement is contained in the TAA. This condition is arbitrary and contrary to the actual requirements of a VDP contained in section 227 of the TAA. As SARS is required to implement the law rather than write it, it is not appropriate for SARS to impose a number of days requirement which goes beyond the provisions of the TAA.
52. Certain VDP applications may well take more than 21 business days to prepare, for example, where a complex transfer pricing analysis and benchmarking study is required to quantify the relevant tax liabilities. The arbitrary period of 21 business days may cause taxpayers to put off registering for a tax type until such time as they are completely ready to submit a VDP application in respect of past tax liabilities, thus causing present tax liabilities to get further and further behind while the application is being prepared. The critical question is not the time period, but rather whether the disclosure is voluntary, which could still be the case regardless of the number of days that have passed since registration.

53. Submission: It is recommended that the 21 business day period, which is not supported by the legislation, be deleted and a case-by-case approach be adopted to consider whether a particular disclosure of failure to register for a tax type was voluntary.
54. The Guide should also address whether a VDP application would in SARS's view still be considered voluntary if a taxpayer needs to disclose defaults to SARS in order to register for a tax type.

**Paragraph 2.4.3 – Involves a default which has not occurred within five years of the disclosure of a similar default**

55. On page 16, an example is provided of a similar default in relation to property transactions – that is, the non-disclosure of the sale of a property and the non-declaration of deposits received from the letting of property by a person who trades in the buying and selling of property.
56. We believe that the specific example and the application thereof is too wide. The letting and selling of properties are two completely different types of businesses and we believe that an under declaration of one type of income cannot be deemed to be similar to the under declaration of another. For instance, in the banking industry there are various forms of income and one cannot say that they are similar just due to the fact that they all fall under “banking”.

57. Submission: The Draft Guide should be amended to take the above concerns into consideration.

**Paragraph 2.4.4 – Full and complete disclosure in all material respects**

58. On page 18, the Draft Guide mentions that applicants may be requested to provide SARS with additional information within a “reasonable timeline”. The point is made that, since



the disclosure should be full and complete in all material respects, all information requested by the VDP Unit should be readily available.

59. In practice, applicants are often requested to provide additional information or documents within a week or even a few days of a VDP evaluator requesting the information. This seems unreasonable when compared to the standard SARS turnaround time of 21 business days. The fact that the disclosure needs to be full and complete in all material respects does not mean that the applicant will necessarily have all the documentation which SARS *regards as relevant* ready.
60. Furthermore, applicants may be travelling at the time that the information is requested or may be in the midst of other deadlines, making it extremely difficult to adhere to the short turnaround times often insisted on by VDP evaluators.

61. <u>Submission</u> : It is requested that these concerns be considered in the final Guide.
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#### **Example 6 – Disclosure resulting in a refund**

62. The example on page 20 is of a company that registered as a vendor for VAT purposes in May 2021 and then applied for voluntary disclosure relief also in May for the default relating to the non-submission of VAT returns for the periods January 2021 to April 2021.
63. As explained in example 3, the correction of the non-submission of returns does not qualify for VDP relief because SARS knows about the outstanding returns and therefore disclosure of it is not voluntary. However, if the default is failure to register and then the taxpayer submits its outstanding returns that should have been submitted had the taxpayer been registered – that would not be a problem as long as the taxpayer involves the VDP Unit before registering (that is, the taxpayer does not follow normal process).

64. <u>Submission</u> : The wording of the example should specify that the default is failure to register and then the related returns result in the outcome as explained in the example.
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#### **Paragraph 2.4.7 – Prescribed form and manner**

65. The Draft Guide states that, in addition to submission on eFiling, an applicant may visit any SARS branch (by appointment), where the VDP01 will be captured on their behalf by a SARS official and submitted on the SARS system. This statement seems contrary to what is happening in practice where the VDP Unit has in the past advised that the only way of validly submitting a VDP application is by completing a VDP01 form on eFiling.
66. It is also not clear whether such a disclosure would still be regarded as voluntary as the relevant SARS official would have become aware of the default prior the VDP application formally being submitted on the system.

67. <u>Submission</u> : It is requested that these issues be clarified in the final Guide.
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## Paragraph 6 – Objection and Appeal

68. On page 24, it states that a decision made by a SARS official to reject a VDP application is not subject to objection and appeal, however, an applicant may request a SARS official to withdraw or amend such decision.

69. Submission: The Guide should also mention that a decision made by a SARS official to reject a VDP application may be taken on review to the High Court.

70. In the recent case of *Medtronic International Trading SARL v CSARS* (33400/2019) [2021] ZAGPPHC 134 (15 February 2021) (Medtronic), the court had to determine whether SARS may consider a request for the remission of interest in terms of section 39(7)(a) of the VAT Act read together with section 187(6) of the TAA once a taxpayer has agreed to pay such interest in terms of a voluntary disclosure agreement contemplated by section 230 of the TAA.

71. The court held that if the remission requests of interest were not intended to be sought in situations where there was a VDP agreement, either by way of section 187 of the TAA or section 39(7) of the VAT Act, the legislature would have set this out succinctly in the provisions regulating the VDP agreement and procedure.

72. The court also held that the provisions of Chapter 16, Part B, sections 225 to 233 of the TAA do not prohibit a request for remission of interest in terms of section 39(7) of the VAT Act notwithstanding a VDP agreement having been entered into.

73. Submission: The omission of the wording from the TAA dealing with interest (as identified in the Medtronic case), suggests that such requests are not precluded by a VDP application.

74. We therefore request that SARS provided guidance on requests for the remission of the interest in circumstances where a VDP agreement has been concluded or is in the process of being considered.

## Paragraph 7 – Confidentiality of information

75. On page 24, the Draft Guide describes how SARS officials must keep taxpayer information confidential.

76. In practice it appears that the VDP process captures the data of the VDP application on the main system and thus the information appears to be brought to the knowledge of SARS prior to the agreement being signed.

77. In this regard, it must be noted that the taxpayer came forward voluntarily only as a consequence of the VDP and if now, SARS states that it is aware of the default, then the taxpayer is in a worse position with the highest possible rate of penalties imposed. This would appear to undermine the whole purpose of the VDP which is to encourage taxpayers to regularise their affairs.

78. Submission: The Guide should address whether and up to what point the VDP Unit treats information as confidential in relation to the rest of SARS, i.e. whether “Chinese walls” apply.
79. It should also be clarified whether information shared with the VDP Unit in terms of a formal VDP application is treated differently to information shared with the VDP Unit prior to the formal submission of a VDP application.

#### **Information not contained in the Draft Guide**

80. Although paragraph 3.1 states that the arrangements and dates for payment are one of the details that must be included in a voluntary disclosure agreement, the rules as to how the agreed payment terms for a VDP are reached do not seem to have been included in the Draft Guide.

81. Submission: The rules related to deferred payment terms should be included in the Guide. These rules should include the manner in which the payment terms should be agreed upon as well as the timing thereof and the timing of the payments that are required to be made in terms of the agreement.
82. The Draft Guide should also mention what the implications would be should a taxpayer default on these payment terms.

83. The Draft Guide also does not mention what the processes is should an agreement not be reached between a taxpayer and the VDP Unit and the taxpayer decides to withdraw the application before a formal agreement is signed.

84. Submission: The Guide must include the consequences should a taxpayer decide to withdraw its VDP application before a formal agreement is reached.

#### **Conclusion**

85. 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*