

**FEEDBACK SUMMARY
1 JULY 2021**

GENERAL

SAICA attends various discussions and meetings on behalf of members with National Treasury (“NT”), South African Revenue Service (“SARS”), the Office of the Tax Ombud (the OTO) and other stakeholders (internal and external). These meetings represent an opportunity for stakeholders to obtain further information on any tax matter from the public and discussions and views expressed do not represent policy or decisions. Furthermore, these discussions do not represent an undertaking by SARS, NT or other stakeholders, but merely statements of their understanding or how they perceive or anticipate a particular matter to be addressed.

The below Feedback Summary should be seen in the above context as merely attempts to inform SAICA members of the discussions and of any proposals that were made during such discussions.

**SARS VOLUNTARY DISCLOSURE UNIT MEETING
24 JUNE 2021**

SARS Voluntary Disclosure Unit (SARS VDU) met with SAICA and the Banking Association of South Africa to continue the discussions that first commenced last year regarding challenges noted with respect to the voluntary disclosure programme.

The purpose of the meeting was to provide an update on matters outstanding since the last discussion and new issues that were raised.

For insight into the prior discussions, please see the [Feedback Summary](#) – SARS/BASA/ SAICA VDP Workshops: October 2020.

Turnaround times on completion of VDP applications

- SARS VDU noted that the majority of the pre-April 2020 applications have been dealt with, with only 10% of these yet to be finalised.
- Many of the pre-April 2020 applications awaiting finalisation are delayed due to SARS waiting for documents from taxpayers/tax practitioners. Approximately 95% of these are offshore related matters, in respect of individual taxpayers.
- The turnaround time has improved – with 59% of applications received since January 2021 being finalised within 31 days of receipt – provided that all documentation has been submitted timeously. SARS VDU noted that to ensure better turnaround time, required documentation must be submitted with the application and if SARS does not respond within a reasonable time, the tax practitioner may follow up directly with the VDU.
- It was noted that the revised SARS Service Charter will provide timelines taking into account proposals made by stakeholders and SARS will endeavor to adhere to these provided applications are full and complete and documentation submitted on time.
- Concerns were raised that there is a perception by taxpayers and tax practitioners that a large percentage of applications are rejected. SARS advised that there is in fact only a small percentage of cases which are rejected, usually on the basis that it does not fulfil the requirements of being 'voluntary'. Even where disclosure is not full and complete, instead of rejecting the application, SARS engages with the person who made the application to resolve the issues and finalise the VDP.

Unintended errors

- In previous meetings, concerns were raised that unintended system calculation errors are treated like cases where a taxpayer intended to avoid tax.
- SARS VDU noted that the VDP mechanism is equipped to deal with unintended errors and system calculation errors and that the majority of such cases are dealt with in accordance with the behaviour agreed upon between the applicant and SARS.
- Where multiple periods require adjustment, for example for VAT purposes, errors identified may require adjustment of 60 returns in relation to a 5 year period, SARS does consider alternatives. In some instances SARS has allowed for the adjustment fewer returns – say, 5 returns instead of 60 over an agreed period.

Progress on publishing of VDP Guide

- SARS is working on the VDP Guide which will seek to clarify the many practical matters raised by stakeholders.
- Whilst SARS is unable to provide a timeline as to when the guide will be published for comment, it did note that the draft guide has gone through rigorous internal reviews and there is ongoing engagement internally to ensure that all concerns noted are adequately addressed.

Supporting information to verify facts

- As noted above, taxpayers must comply with documentary requirements for the particular application as delays in submitting information and supporting documents delays finalization of applications.
- Concerns were raised that some of the information requested is unrelated to the non-compliance disclosed.
- SARS noted that where the applicant is of the view that information requests are unnecessary or irrelevant to the application, these specific cases must be escalated and will be investigated. However, based on experience by the SARS VDU staff, there are many instances where information perceived to be irrelevant or unnecessary to the applicant, is in fact necessary to finalise the application.
- It is only where full and complete information is submitted that the disclosure is considered valid.

VDP for foreign assets where the issue is the source of funds and not just the income that the assets generated

- It was noted that taxpayers are said to be receiving SARS letters about foreign funds, with the invitation to make a VDP application. The question was raised as to whether or not SARS' knowledge of the foreign bank accounts (which initiated the letter) is considered knowledge of 'non-compliance' by the taxpayer and therefore the VDP route is not available if that taxpayer is non-compliant and would like to remedy this.
- SARS noted that at the point in time that SARS issues the letter, it would not necessarily be aware of specific non-compliance and is merely advising taxpayers of awareness of the foreign bank account/s – i.e. SARS does not necessarily investigate prior to issuing the correspondence. Therefore, if a taxpayer responds by applying to the VDU to make voluntary disclosure in respect of these foreign accounts, such disclosure may still be considered voluntary. However, SARS did caution that taxpayers and tax practitioners must also refer to recent case law in this regard.
- It was further noted that if the taxpayer first responds to the letter advising SARS of non-compliance, without making the VDP application, then SARS will be aware of such non-compliance and any disclosure to the VDU thereafter, will not be seen as 'voluntary'. The same would apply if a ruling application has been made prior to the VDP application related to the same matter. It would seem that the more prudent option would be to make the VDP application prior to any other engagement with SARS that may render such application as not being 'voluntary'.
- Concerns were raised regarding the fact that there are many older cases, in respect of which the special voluntary disclosure programme was not used and there is a lack of information in terms of the related seed capital. Taxpayers may be hesitant to commence the VDP process as there is a fear that SARS may request information that is not easily available and may reject the application on the basis that information provided is not full and complete.
- It was suggested that SARS consider alternatives for such cases to encourage taxpayers to initiate the voluntary disclosure process. SARS agreed that it will explore options, but noted that it has become easier to gain access to information due to the exchange of information

agreements and whilst it may take time to secure such information, SARS will assist where possible.

- SARS further noted that whilst full disclosure of material facts related to non-disclosed funding of foreign investments and income is always required, where such information is not available, SARS VDU will consider the facts and may consider 'reasonable estimates' which must be mutually agreed on between SARS and the taxpayer. Each case will be dealt with on its merits based on the relevant facts.
- As noted earlier, the SARS VDU does not turn away cases where there is incomplete information and will instead work with applicants to finalise such cases. There is also an acknowledgement that during the process, the *quantum* of the liability may change based on additional information that may be secured as the case progresses. However, applicants must also accept that this will contribute to delays in finalisation of individual cases.
- SARS will further consider the discussion points on this topic and will endeavour to provide more guidance in the VDP guide.

Clarity on submission of returns in respect of late registrations

- In previous engagements, SARS noted that for the VDP process, it will only accept returns related to late registrations within 21 business days of registration. If such returns are not submitted within that time, the SARS system automatically flags these as outstanding and the returns therefore do not qualify for the VDP process. SAICA raised concerns that there have been no clear communication to taxpayers and tax practitioners in this regard and that formal clarification was required as this is a common query.
- SARS confirmed that its policy on outstanding returns has not changed – i.e. new registrations subject to 'default' requirements qualify as being voluntary as opposed to outstanding returns of registered taxpayers.
- In terms of the process, the SARS VDU advised that taxpayers may address this in one of two ways:
 - Taxpayer (or tax practitioner) may approach the SARS VDU as part of the registration process and will be guided on the process to be followed and the timelines from registration to application; or
 - The taxpayer may register via the normal SARS channels and submit the VDP application for the outstanding returns within 21 business days of that registration.
- SARS will ensure that this is addressed in its VDP FAQ guide.

Treatment of capital losses dating back more than 3 years from the date of submission

- This issue has recently arisen in a number of ongoing VDP applications where SARS is taking the view that capital losses dating back more than 3 years, will not be taken into account in concluding a VDP agreement, even if the overall effect is that the taxpayer is liable for additional capital gains tax in multiple years – i.e. a net liability after set-off of the capital losses. Only capital gains declared dating back more than 3 years are taken into account.

- SARS noted that capital losses are not considered defaults and do not result in understatement. Furthermore, SARS reiterated that the VDP may not override the provisions of section 93 of the TAA regarding reduced assessments and section 99, insofar as prescription is concerned.
- This approach by SARS was challenged on the basis that in other respects SARS insists on full and complete disclosure and adjustments are made in respect of years going beyond prescription – I.e. there is no consistency in treatment.
- It was argued that the issue was not in respect of those circumstances where the capital loss will result in an overall loss carried forward, but rather where there will remain a liability, but such liability would be reduced by the capital loss not previously disclosed.
- It was further argued where there has been non-disclosure, prescription would not apply and furthermore, section 232 of the TAA provides that if a voluntary disclosure agreement has been concluded in terms of section 230, 'SARS may, despite anything to the contrary contained in a tax Act, issue an assessment or make a determination for purposes of giving effect to the agreement'.
- SARS maintained the view that capital losses dating back beyond 3 years from the VDP application will be disregarded, but the SARS VDU did welcome further engagement on this topic and its final views will be set out in the VDP guide, when published.