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Dear Gert

SAICA SUBMISSION: TAX OMBUD'S DRAFT COMPENDIUM OF TAXPAYER RIGHTS, ENTITLEMENTS AND OBLIGATIONS

1. We note the Office of the Tax Ombud's efforts – via the Draft Compendium of Taxpayer Rights, Entitlements and Obligations (the draft Compendium) – in trying to ensure that taxpayers have an understanding of their rights and obligations in terms of the Tax Administration Act, 2011 (the TAA) and the service they are entitled to from SARS.
2. Following engagement with our committee structures, we have set out below comments and proposals that may serve to improve the Compendium and we are happy to engage with the Tax Ombud in this regard.

GENERAL

Purpose of the draft compendium

3. As per the related media release issued on 2 February 2022, The Tax Ombud, Judge Ngoepe is quoted as saying:

"The Compendium of Taxpayer Rights, Entitlement and Obligations is not a replacement of the taxpayer Bill of Rights – which I still believe is necessary – but a step in the right direction; it will help millions of taxpayers understand what their rights are as guaranteed in the Constitution and legislation, in what their obligations are. Regrettably, our country does not have an enforceable Taxpayer Bill of Rights as is the case in other countries. However, taxpayers' rights and obligations are contained in various documents and pieces of legislation, including the Constitution and the Tax Administration Act. The challenge is



that these documents are technical and often difficult to understand. The Compendium is a summary of these rights and obligations; it can easily be used as a reference tool to guide a person towards the information they need."

4. At the outset, one of the main concerns with the draft Compendium, is a factor specifically highlighted by the Tax Ombud at page 2 that is, *"This is not an enforceable "Bill of Rights" but merely a compilation of principles that are contained in various documents, including the Constitution, tax legislation and other government documents."*
5. Within that context, it would appear that the Compendium could potentially encourage SARS to live up to more of its obligations, and/or help the taxpayer understand what they should be entitled to expect, so that the taxpayer can ask SARS for this, or complain to the Tax Ombud if the taxpayer's rights are contravened.
6. Whilst we believe that the draft Compendium may go some way to achieving the purpose as noted above, we are concerned in terms of the level of detail provided therein. We do not believe that it is sufficiently detailed to assist the ordinary taxpayer with enforcement of their rights.
7. The draft Compendium in its current form appears to set out aspects of the relevant provisions in the TAA in a theoretical manner and in our view, lacks sufficient detail and practical examples of how to apply and/or enforce taxpayer rights.

8. Submission: As a starting point, it may be useful to include a flow diagram or 'lifecycle' of the process of fulfilling one's tax obligations and the related rights and responsibilities of both the taxpayer and SARS – including, *inter alia*:

- gathering and validation of data to prepare a tax return;
- preparation and submission of return or review of auto assessment;
- raising of assessments by SARS;
- liability to pay and timelines in respect of payment of taxes;
- rights to refunds as well as timelines which SARS are to comply with and steps to take if payment is delayed;
- response to SARS' requests for documentation, if any;
- action that may be taken if SARS raises an additional assessment;
- more detail regarding the dispute rules and remedies available if the dispute rules are not complied with.

Note: the above is not expected to be a comprehensive list but examples of what could be included in an illustration of the recommended flow diagram, which could serve to simplify the process for the ordinary 'man on the street' taxpayer.

9. It is important to note that it is not just the TAA or other tax Acts that provide for taxpayer rights. There appears to be no reference to taxpayer rights as provided for in other legislation. For example, the Promotion of Administrative Justice Act, 2000 (the PAJA) and the Constitution of South Africa. Exclusion of the PAJA and limited reference to the



Constitution in the draft Compendium may create the impression that the rights referred to in this draft Compendium is the full extent of the rights available.

10. This is a real risk given that at the outset, this Compendium sets itself out to be a 'compilation of principles that are contained in various documents, including the Constitution, tax legislation and other government documents', but in our view, mainly deals with rights in terms of the TAA.

11. Submission: Reference should be made to specific rights in terms of PAJA and more detail regarding the rights available in terms of the Constitution.

12. The draft Compendium provides very high-level information as to the rights of taxpayers without providing any practical guidance or examples as to how to enforce these rights.

13. Submission: The Compendium should include practical guidance regarding the steps to be taken to enforce a taxpayer's rights or alternatively, reference to the SARS guidance in this regard.

Financial barriers to enforcement create disparity in real rights

14. We have noted that the draft Compendium does not address how a taxpayer would enforce the rights referenced and we hope that this will be addressed by expanding the guidance in this regard.

15. However, we are also aware that such enforcement comes at a price and most taxpayers would not have the necessary funds to enforce their rights or may be of the view that the cost may outweigh the benefit and would therefore opt not to enforce their rights.

16. In our view, the financial burden should not be a barrier to enforcement of the relevant rights as this effectively creates a disparity and inequality between those who can afford to take legal action and those who can't – the right is effectively undermined if it is not accessible to all.

17. Submission: The Compendium should acknowledge the above concern and we respectfully request the Office of the Tax Ombud to seek mechanisms to enable the enforcement of taxpayers' rights for all taxpayers. For instance, consideration could be given to a form of legal aid/assistance which will assist taxpayers with limited financial means to properly enforce the rights available to them.

18. Please see below for more detail regarding specific sections of the draft Compendium that we believe would be useful to expand upon.



SPECIFIC COMMENTS

The right to finality – page 9

19. The right to finality extends beyond specific provisions of a tax Act and is, in fact, embodied within the rule of law (as part of South Africa's common law), with the rule of law specifically recognised in terms of section 1(c) of the Constitution.
20. Taxpayers may have rights to finality that extend beyond merely those set out in the TAA. This is particularly important with respect to customs and excise, where so-called "prescription" is generally based on when SARS starts the audit, in that SARS can normally demand taxes for a period up to two years before the audit starts, without any statutory provisions relating to how long SARS can continue to audit the taxpayer. (Also see below for further details regarding customs and excise.)

21. Submission: The Compendium should include more detail regarding other legislation relevant in respect of the taxpayer's right to finality, to ensure that taxpayers understand the full extent of their rights.

The right to dispute assessments/decisions – page 12

22. The right to dispute assessments/decision is, in our view, deficient in detail. The draft Compendium only refers to a "decision that is subject to objection and appeal".
23. Taxpayers also have the right to dispute other decisions, ordinarily by means of a review in terms of the PAJA, but in all cases at a minimum in terms of a Constitutional legality review. It would be remiss of the Tax Ombud to exclude such rights from the final Compendium to be issued.
24. A very important right in terms of the PAJA, which is not covered in the draft Compendium, is that any administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair (section 3 of PAJA).
25. This includes that, for proposed decisions that fall into this category, SARS must ordinarily give the taxpayer adequate notice of the nature and purpose of the proposed administrative action (section 3(2)(b)(i) of PAJA), and a reasonable opportunity to make representations (section 3(2)(b)(ii)), before a final decision is made.
26. This is a right that is commonly in dispute between SARS and taxpayers, with SARS frequently acting without giving proper notice, explanation and an opportunity to make representations.

27. Submission: In finalising the Compendium, consideration should be given to encompassing all legislation providing for taxpayer rights and not just that contained in the TAA. Given the intended audience – presumably, the 'ordinary taxpayer', exclusion of such would be a huge disservice, especially if the Compendium is to be viewed as the



single, comprehensive source of knowledge in respect of 'Taxpayer Rights, Entitlements and Obligations'.

28. Furthermore, to ensure completeness of the document, based on the challenges that we are aware of that taxpayer and tax practitioner members are facing with relative frequency, more detail on the following would be useful:

- SARS' responsibilities in the process of issuing an assessment which is not fully based on a tax return filed – for example, comment and reference to sections 42 and 96 of the TAA, including, *inter alia*:
 - The fact that SARS has to provide grounds for an assessment which is not fully based on a tax return filed;
 - Reference to the PAJA and the fact that a person whose rights have been materially and adversely affected by administrative action has the right to be given written reasons for the action;
 - What is meant by adequate reasons based on case law.
- Additional detail on a taxpayer's rights in the instance of a dispute with SARS and practical steps for the ordinary taxpayer to take to enforce these rights.
- Reference to section 93 of the TAA and the ability to take certain decisions on review by SARS.
- Reference to the taxpayer's entitlement to have a decision (which is not subject to objection and appeal) to be withdrawn or amended in terms of section 9 of the TAA.

Part B – “The taxpayer’s obligations” – page 13

29. The opening paragraph notes that: 'Every South African citizen has the duty to work to the best of their ability and **is obligated** to pay the taxes imposed by law in the interest of society'.

30. We note that this is being referenced to Article 29 of the African Charter of Human and People's Rights Adopted 27 June 1981, entered into force 21 October 1986 and ratified by South Africa. We are not sure why reference is made to the citizen having a duty to work and in fact, the quote is incomplete. This may be irrelevant, but the correct quote refers to the resident having the duty 'to work to the best of his abilities **and competence**...interest of society'.

31. That said, we assume that the reference was made specifically in relation to the obligation 'to pay the taxes imposed by law in the interest of society', as the first paragraph is followed by: 'You must register as a taxpayer as and when you are liable to do so.'

32. There is also seemingly only a reference to “Every South African citizen” when it is not only citizen's who are required to register for and pay South African tax.



33. Submission: More neutral wording could be used to capture what is intended, in our view, which is that 'Every person who has an obligation to register for and pay South African tax should do so, as soon as that person is liable to do the same.'

34. Part B sets out on one page (in 8 bullet points) the obligations of a taxpayer. None of these bullet points (other than the first one) have a reference to the underlying legislation.

35. Submission: To ensure that both the rights and obligations of a taxpayer are treated similarly so as to avoid any bias on either end, we suggest that the obligations of a taxpayer should be set out in a manner similar to the rights section, whereby each bullet point is set out on a page with the relevant references inserted similar to the way the 10 rights are set out.

OTHER

Customs and excise

36. We note that the Tax Ombud does not have any jurisdiction in relation to customs and excise legislation. In the circumstances, it is understandable that the Compendium, being a document prepared by the Tax Ombud omits customs and excise tax types entirely. However, this does not mean that taxpayers do not have any rights within the customs and excise space and the omission thereof may cause confusion.

37. Submission: Taxpayer rights in respect of customs and excise must be addressed or at the very least, it should be clarified that the Compendium does not apply in the same way to customs and excise.

38. We trust that you will find the above comments to be useful and we look forward to working with the Tax Ombud to address the concerns raised.

39. Please feel free to contact us should you wish to clarify any of the above.

Yours sincerely

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