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Submission File

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South African Revenue Service
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Dear Sir/Madam

SARS DRAFT LIST OF QUALIFYING PHYSICAL IMPAIRMENT AND DISABILITY EXPENDITURE

1. On behalf of the South African Institute of Chartered Accountants (SAICA), we herewith provide our response to SARS' queries in its email dated, 14 May 2019, regarding our comments submitted on 5 November 2018, in respect of SARS' draft list of qualifying physical impairment and disability expenditure (the draft list).
2. As always, we thank SARS for the ongoing opportunity to provide constructive comments on draft documentation and guidance. SAICA believes that a collaborative approach is best suited in seeking actual solutions to complex challenges.
3. For ease of reference, we have included our initial comments, SARS' queries and our response thereto. Should you wish to clarify any of the comments, please do not hesitate to contact us.

Yours sincerely

Somaya Khaki

Pieter Faber

PROJECT DIRECTOR: TAX

SENIOR EXECUTIVE: TAX



ADDITIONAL GENERAL MATTER

Constitutionality of CSARS power to prescribe the List of Qualifying Physical Impairment and Disability Expenditure

1. Before addressing the specific queries raised by SARS, the following general comment is made.
2. SARS indicates that the list of qualifying disability expenditure is an "interpretation of the tax provisions governing these expenses within the wording of the legislation and tax policy intention." This statement is unfortunately patently incorrect.
3. Paragraph (c) of the definition of "Qualifying Medical Expenditure" in section 6B to the ITA is explicit that it is expenditure "prescribed" by the Commissioner.
4. It is actually secondary legislation arising from a power delegated to the Commissioner to prescribe what expenditure qualifies as disability expenditure. The result is that the Commissioner is given the power to decide what disability expenditure qualifies for the medical tax credit. This power is entirely unfettered, save for the requirement that the expenditure must be necessarily attached to the disability.
5. The Commissioner has therefore been given the delegated power to provide relief from taxation.
6. It is submitted that this delegated power is unconstitutional and invalid (and so is the list of qualifying expenditure prescribed in terms of this delegated power) having regard to the judgment in the case of *South African Reserve Bank and Another v Shuttleworth and Another* (CCT194/14, CCT199/14) [2015] ZACC 17. Only Parliament, may, in terms of the Constitution, levy taxes.
7. At para 42 the judgment states:

*"A blissful starting point would be to affirm that the power to tax residents is an incident of, and subservient to, representative democracy. The manner and the extent to which national taxes are raised and appropriated must yield to the democratic will as expressed in law. It is the people, through their duly elected representatives, who decide on the taxes that residents must bear. An executive government may not impose a tax burden or appropriate public money without due and express consent of elected public representatives. That authority, and indeed duty, is solely within the remit of the Legislature. This accords with this Court's decision in *Fedsure*, as well as the Canadian Supreme Court decision in *Eurig Estate*. Both cases hold that the primary object of the limits on how to raise national taxes or appropriate revenue, as our Constitution does in relation to a money Bill, is to ensure that there is "no taxation without representation". It is plain that in our jurisdiction a decision or law that purports to impose a tax will be invalid to the extent of its inconsistency with the limits imposed by the Constitution or other law."*



8. The court at [40] also reaffirms that it is not only legislation that levies a tax in the narrow sense that is the subject of Constitutional prohibition to the Executive and the court states:

A Bill before the National Assembly is a money Bill if it imposes “national taxes, levies, duties or surcharges”.⁴⁹ However, the term “money Bill” covers more than just the raising of taxes, levies, duties or surcharges. It includes a Bill that appropriates money,⁵⁰ or that abolishes, reduces or grants exemptions from taxes,⁵¹ or that authorises direct charges against the National Revenue Fund.

9. Secondary legislation that prescribes tax deductible expenditure would therefore also be legislation of a “money bill” subject to section 77 of the Constitution and which the Executive must excuse itself to allow the legislative authority of the Legislator.
10. Plainly, section 6B, insofar as it relates to the prescription of what constitutes disability expenditure, is unconstitutional and invalid.

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| <ol style="list-style-type: none">11. <u>Submission</u>: It is submitted that this matter be addressed legislatively by National Treasury in the current year to bring section 6B back within the ambit of Parliament. However, as Parliament is unlikely to amend the legislation retroactively, SARS should be cautious of straying too far into policy and ensure that the list, as currently relevant to enable the deduction, is sufficiently extensive to, at a minimum, meet the policy objective. |
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RESPONSE TO SPECIFIC MATTERS

Aids and other devices

SAICA Submission

Section E – Aids and other devices

4. The current list of qualifying physical impairment and disability expenditure includes the cost of: Air conditioner, heater, fan, air filter, cleaner, or purifier and environment control system (computerised or electronic) to prevent hypothermia or hyperthermia for a person with spinal cord injury or as required by a person with epilepsy.
5. The SARS draft list proposes that this be removed as qualifying expenditure.
6. It is unclear as to the reason for removing this item from the list, specifically in relation to the environmental control system which would enable a paraplegic or quadriplegic to control certain aspects of his/her environment – including lights, air-conditioning, alarms etc.
7. Submission: We submit that costs related to an environment control system should be retained as a qualifying expense, even if costs for the other items are removed from the list or reduced in terms of the value that may be claimed.
8. Alternatively, it would be helpful if SARS could explain why this cost should be removed so that other costs can be measured against the principle.

SARS response

Scrapping of air conditioner – accepted, the benefit will be restated; however, it will be limited to 50% of the cost.

SAICA response:

12. SARS extension is noted and we thank SARS for providing some concession in this regard.



Services

SAICA Submission

Section F – Services

Note-taking services, including real-time captioning (point 4)

9. In addition to persons with a physical disability who are unable to write for themselves, those with learning disabilities also require a scribe who would actually write down their answers in tests and exams.
10. Submission: The list should include scribe services (writing on behalf of the disabled person) in addition to note-taking services.

SARS response

Scribe services – Noted. Please advise how does this operate in practice?

SAICA response:

13. Submission: Educational concessions for learning disabilities (for example, ADHD, dyslexia, etc.) have to be applied for and approved through a rigorous process, which includes an educational assessment by an educational psychologist and evaluation.
14. Concessions may include, amongst others, a reader, a scribe, a prompter, extra time, a separate venue, etc. These concessions usually come with associated additional costs which need to be paid for.
15. It is submitted that all expenditure associated with an approved learning concessions should constitute disability expenditure, with the rigorous approval process acting as the control.
16. Further info may be found here:
<https://www.childpsych.co.za/educational-psychologist-services/concession-accommodation-assessments/>
<https://brightsparkz.co.za/everything-about-exam-concessions/>
<http://www.edpsychologist.co.za/services/assessments/concession-assessments-ieb-gde>



Special education needs schools mainly for learners with disabilities

SAICA Submission:

Special education needs schools mainly for learners with disabilities (point 7)

11. The reality is that there is a huge shortage of public special education needs schools and many parents are therefore forced to send children with disabilities to a private special education needs school if they have any hope of integrating into the mainstream educational system.
12. In terms of the current list of qualifying physical impairment and disability expenditure, no distinction is drawn between private and public special education needs schools and both are compared to fee-paying public schools to determine the amount of the qualifying expenditure.
13. The proposed change will significantly disadvantage such parents and, in many cases, make the use of a private special schools unaffordable. Ultimately, this will discriminate against children with disabilities who cannot find a place in a public special school within a reasonable distance of their homes.

14. Furthermore, by benchmarking the excess based on the closest public school, parents who happen to live close to higher fee schools or are forced to send their children to lower cost public special needs schools will get no subsidy.
15. The use of a threshold that is delinked from variables such as income, where you live or where your child goes to school is more in alignment with the policy principles applied to the medical scheme regime.
16. It is accepted that the fiscus cannot fund the full amount of private or public tuition and can only share in the burden, though the comparative cannot just be public fee paying schools (not specialising in special needs learners).
17. Submission: it is submitted that the current position of not distinguishing between private and public special education needs schools for purposes of determining qualifying expenditure should remain in the interim – i.e. we propose the wording: *School fees in respect of a public or private special education needs school in excess of the fees that would ordinarily be payable if the person attended the closest fee-paying public school (not specialising in learners with special education needs) to where they live*
18. We acknowledge the fact that it may not be feasible for the fiscus to continue subsidising the entire amount of 'excess fees' and therefore further submit that SARS introduce a fixed amount deduction threshold as an alternative proposal as replacement for the 'excess fees' regime. This threshold should be determined after performing research to ascertain the average premium for both public and private schools versus special education needs public and private schools.
19. In performing such a study, we submit that it would be important to consider the fact that making a comparison between the fees of the selected special education needs school to the closest special education needs school in the area of residence, is discriminatory on the basis that there is a huge discrepancy in schools based on the area in which they serve. For example, a public special education needs school in Umlazi (being the only special education needs school in the area and catering only for intellectually impaired students) charges R800 per annum in school fees, whereas a public special education needs school in Phoenix charges close to R21 000 per annum. In contrast, one of the private special education needs schools in Durban charges R75 000 and may serve the needs of students that public schools are unable to serve.
20. By introducing a fixed deduction threshold based on the median premium cost for private and public special needs schools and that considers the lack of public special needs schools which forces taxpayers to use private institutions, it will result in taxpayers with children in both public and private special needs education benefiting from this state subsidy and ensure that the subsidy is not disproportionately utilised by taxpayers with children in private special needs schools.
21. Further to the above, it has become increasingly common to send children with learning disabilities, not to a special education needs school mainly for learners with

disabilities, but to schools that offer a different approach to mainstream schools in the form of teaching methods, individual pupil attention and smaller classes.

22. While such schools are not specifically for learners with disabilities, they often meet the needs of such learners better than schools mainly for learners with disabilities.
23. Parents sending their children to these schools will therefore be disadvantaged as compared to those who send their children to the special education needs schools.
24. The availability of the financial subsidy should be determined in relation to the disabled child and the extent of his or her special needs being attended to at such school to ensure such child is accommodated and integrated within society, rather than a label attached to the relevant school.

25. Submission: Provision should be made for the inclusion of such schools in the list. Some examples may be found here:
https://www.jozikids.co.za/johannesburg/schools/alternative_schools/.

SARS response

- **Comparative study of school fees in order to introduce a fixed amount deduction threshold** – The departing point on the school's fees is that every child, whether with a disability or not, needs to go to school. Therefore, to give relief on full school fees will be unfair to parents of those children who do not have a disability. The focus in the List is to allow expenses that are in consequence of any physical impairment or disability.

School fees are a requirement for both persons with disability and without disability, and these expenses are thus not incurred directly in consequence of any physical impairment or disability, but for purposes of education. It is for this reason that only the amounts paid in respect of the disability, will be considered for deduction (such as the cost of a school assistant for persons with disability, if not part of the school fees; and the amount in excess of the fees that would ordinarily be payable if the person attended the closest fee-paying school).

Likewise, SARS approach therefore seek to determine the school fees that have been incurred as a consequence of disability, hence the relief is limited to school fees in excess of what would have been paid if the child attended the closest fee-paying mainstream public or private school.

SARS will welcome and explore suggestions on a more reasonable and simpler way of determining the excess school fees as consequence of disability. The approach of allowing full school fees will not be accepted. SARS has also considered setting a limit (e.g. average school fees for public schools and for private schools). However, we cannot find information that will assist to determine this objectively. We contacted both Dept. of Education and Stats SA and there is no such information available.



It is important to note also that, the fact that Government might not be making the required provision of schools, that responsibility does not shift to the tax space. SARS has to interpret the tax provisions governing these expenses within the wording of the legislation and tax policy intention.

SAICA response:

17. As a point of departure and as submitted above, this list is not an interpretation, but secondary legislation prescribed by the Commissioner. Such power should, until corrected, be applied to reach policy intent of the legislation and overall government policy, which includes the constitutional positive obligation to promote the rights of vulnerable persons. The comparison cannot just be that both abled and disabled persons need education equally and therefore they are entitled to similar treatment and societal benefits, as equal treatment will not achieve equality, as abled and disabled persons are not the same as to access to rights.
18. It is acknowledged and accepted that in principle it should only be additional expenditure as a result of the disability that qualifies for relief.
19. However, the point made is that the proposed amended list of qualifying expenditure changes the point of comparison for a private special needs school to a fee-paying private non-special needs school rather than to a fee-paying public non-special needs school.
20. While that comparison may be appropriate in the situation where the pupil in question would have attended a private non-special needs school, absent the disability, it is not appropriate where, out of necessity, a pupil that would have attended a public school in the alternative is forced to attend a private special needs school, because of a shortage of such public schools.
21. Many parents in this situation are forced to make huge sacrifices in this regard and it is appropriate that they are compensated accordingly, as is currently the case.
22. The distinction between private and public schools in the context of disability is arbitrary and, in many cases, would in our view, be entirely inequitable.
23. To illustrate the point, take a family (not a wealthy family) that happens to live in Hilton, has a child with a disability and, due to there being no public special needs school in the area, is forced to send the child to a private special needs school in Pietermaritzburg (not necessarily factually accurate, but merely to demonstrate the point). It so happens that the closest fee-paying private school is Hilton College, one of the most expensive schools in the country, and that the fees of the private special needs school are less than that of Hilton College. In such a situation, the family would receive no relief whatsoever, simply through force of circumstances.
24. That is an entirely unfair and inequitable outcome which can be avoided by maintaining the current position whereby private special school fees are compared to public school fees.



25. Wealthy families who would otherwise have sent a child to a private school in any event may benefit as a result. However, in meritorious circumstances such as disability, that is an acceptable price to pay to ensure that those most in need benefit.
26. Submission: While we do not advocate that the full school fees of a private or public special needs school should be allowed (although the full school fees attach to the disability), we do submit that the distinction between private and public schools is arbitrary, unfair, inequitable and without merit.
27. We note that SARS is not willing to maintain the status quo, but is willing to consider alternatives. Therefore, as per our initial submission, an alternative would be to provide for a fixed amount deduction threshold.
28. Given that SARS is currently struggling to find relevant details to assist in determining what this fixed amount threshold is, we propose retaining the current rule until SARS has completed such exercise to assist in determining the fixed amount threshold. Such a concession would no doubt go some way to re-establishing trust between taxpayers and SARS on the basis that SARS is doing its best to serve those affected by disabilities.
29. Should SARS require assistance in this regard, we can consider ways in which to assist. However, given the difficulty SARS has experienced in finding information, additional time would be required to perform this research.

Special training services for a person with a disability

SAICA Submission

26. It is noted that the following is proposed to be removed "*Special training services for a person with a disability – this category includes expenditure incurred and paid for specialised training provided to a person with a disability for rehabilitation purposes. This will include training to cope with the disability, how to use an assistive device or aid etc.*"
27. Submission: It is submitted that the above item should not be removed from the list as this kind of training is essential in order to better able that person to cope with the disability and ensure that the person does not physically regress.
28. Again it is unclear what principle informs this decision to exclude this critical service for persons with disabilities.

SARS response

Special training services for a person with a disability – to be reinstated into the List.

SAICA response:

30. Noted – we thank SARS for conceding in this regard.