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Dear Basil

VOLUNTARY DISCLOSURE PROGRAMME (VDP): CHALLENGES

1. SAICA is aware that SARS is in the process of restructuring the VDP unit (VDU) in efforts to improve the service provided by this unit, including the turn-around times. As SAICA members have raised the following challenges with the National Tax Committee and the Tax Administration Act Subcommittee, we would like to document such challenges with a view to engaging further with the SARS Head of the VDU to discuss our challenges and partner with SARS to improve the efficiency of the VDU.
2. With the establishment of the VDU, the sole purpose was to increase voluntary compliance *"in the interest of enhanced tax compliance, good management of the tax system and the best use of the SARS resources."* Voluntary compliance is still high on the agenda of the SARS Commissioner.
3. Even though SARS, in a recent interview with Moneyweb, confirmed that *"The VDP aims to encourage taxpayers to come forward on a voluntary basis to regularise their tax affairs with SARS"*, taxpayers find it extremely onerous to apply for a VDP. The perception is that most of the applications are met with suspicion and the VDU seemingly actively seeks justification to decline an application. Most of the applications are as a result of unintentional practical errors and would, in most instances, not have been discovered during a SARS audit.
4. SAICA is of the view that unless the current challenges are resolved, more errors will be swept under proverbial rugs to the detriment of the fiscus in an already dire economic environment.
5. VDP assessments can be a substantial source of revenue with little effort by SARS. Despite the view that the process should be seamless and effective, there are a number of challenges which make it administratively and financially onerous on taxpayers.



COMPLETION TIME TO FINALISE VDP APPLICATIONS

6. From the inception of the VDU, the turnaround time to finalise an application has been slow. However, since the introduction of the Special VDP about three years ago, there have been unacceptable delays in the processing of VDP applications.
7. The average time for the VDU to start working on a VDP application appears to be within 9 to 12 months after the application has been submitted. Estimated turnaround time reflected on the SARS website is '201 business days'.
8. Interest that accrues due to the significant delays sometimes negates the savings from penalty relief under the VDP.
9. We agree that taxpayers should ensure that the applications are complete and that any additional information requested is provided within a reasonable period. However, in our view, it is unreasonable to allow only 5 – 7 working days within which taxpayers must submit comprehensive information which is compounded by the fact that SARS allowed months to pass before it attended to the application.
10. Given the significant delay in SARS reverting, it will take time for taxpayers and/or tax practitioners to go back to the relevant files and extract the information required and this should be a consideration in the time allowed by SARS for the taxpayer to submit the additional information requested.
11. It seems that a significant contributor to the delay may be due to insufficient resources within SARS' VDP Unit.
12. There are also delays due to the extent of detail requested by the VDU before finalising a case and it is not clear why there has been a change in approach in that much more scrutiny is applied, as compared to the past, in the consideration of any VDP application.

13. Submission: We propose that SARS take steps to actively clear the backlog of VDP applications to finalise these within at least 60 days of submission.
14. Further, reasonable timelines of at least 21 days should be allowed to applicants when additional information is requested by SARS especially where there is a significant time lapse between application and SARS' response thereto.

VDP ASSESSMENTS BEING ISSUED BEFORE THE VDP AGREEMENT IS SIGNED

15. In terms of section 232(1) of the Tax Administration Act, 2011 (the TAA), SARS may only raise an assessment once "a voluntary disclosure agreement" has been concluded. It appears that the VDU may not, in terms of the law, issue assessments before the conclusion of the VDP agreement.
16. However, there are instances where the VDU issues assessments relating to the defaults declared before the VDP agreement is signed.



17. When there is a dispute between the applicant and the VDU and the VDP agreement is not signed, the VDP assessments issued are still reflected on the SARS' system. The amount due per this 'assessment' results in interest and in addition, SARS levies the very penalties in respect of which the applicant applied for VDP relief.

18. Submission: In accordance with section 232(1) of the TAA, the VDU should only issue assessments once the VDP agreement has been signed.

LACK OF CONSISTENCY AND INADEQUATE GUIDANCE

19. The basis for SARS' policy decisions and interpretation as to what constitutes a "voluntary" application are sometimes unclear and, in some instances, inconsistent. Some examples include the below:

- Outstanding tax returns are not considered suitable for the purposes of "voluntary" disclosure, as SARS is of the view that it would have known about the non-submission (i.e. the system would have flagged it) and the disclosure is therefore not "voluntary".
- The request for a taxpayer to submit an IT14SD is seen as constituting an "audit" and therefore disqualifying one from making a VDP application. However, for application of other aspects of the TAA, the IT14SD process is seen as a "verification" rather than "audit" process.
- Whilst in many instances, the VDU rejects VDP applications relating to the regularisation of affairs following voluntary registration for VAT (an issue which we elaborate on further down), there are instances where such VDP applications are considered if it is submitted within one month of the voluntary registration.

20. Submission: It is proposed that SARS issue a VDP policy document or guidance to be updated as and when there are changes in legislation, policy and/or interpretation.

21. SARS must take steps to educate taxpayers and relevant SARS staff and periodically review applications made and the outcome thereof, to ensure that application of the policy and/or interpretation is consistent.

VAT RELATED VDP MATTERS

Voluntary VAT registration

22. On voluntarily registering for VAT and then seeking to regularise past non-compliance with SARS, SARS has in many cases rejected such applications on the basis that the disclosure to SARS is not voluntary, due to the fact that once the entity was VAT registered, SARS was aware that there were outstanding VAT returns.



23. Section 225 of the TAA defines a “default” as “the submission of inaccurate or incomplete information to SARS, or the failure to submit information or the adoption of a ‘tax position’, where such submission, non-submission, or adoption resulted in an understatement.”
24. In our view, the “default” is first and foremost the failure to submit VAT registration information to SARS (i.e. the omission to register for VAT) and it is this default that is being voluntarily disclosed, not the non-submission of VAT returns. The latter is merely the consequence arising from the default (and which evidences an understatement) but is not the default itself.
25. Whilst SARS could argue that it would have known about the outstanding VAT returns, we submit that SARS would not have known whether the subsequent submission of these VAT returns would give rise to a historic VAT liability which was due to SARS. In other words, the submission of outstanding VAT returns may result in the processing of nil VAT returns or returns which result in VAT refunds due from SARS. Therefore, it is unreasonable to think that SARS, merely by virtue of knowing that the VAT returns were outstanding, were placed in a position to know that there is an immediate VAT exposure.
26. In addition, given that VAT is a self-assessment tax, without the entity voluntarily coming forward to disclose this under-declaration of VAT to SARS, it is questionable as to whether or not SARS would have found the taxpayer’s non-compliance with the VAT registration requirements had the taxpayer not approached SARS of its own volition.
27. Further, it does not appear to be fair that a taxpayer who submits a VAT return to SARS and who has intentionally tried to evade tax or is grossly negligent is more likely to qualify for voluntary disclosure relief and to pay reduced penalties as opposed to a vendor who has acted in good faith to come forward to regularise its VAT affairs with SARS. In our view, this practice is not fair and equitable.
28. Submission: We would appreciate if SARS clarifies, as a matter of policy, why it believes the submission of outstanding VAT returns as part of the first time voluntary VAT registration of a taxpayer - as a means of that taxpayer regularising its affairs - is not considered to qualify for the VDP after having given consideration to the above representations.
29. It is our understanding that the VDU seems to now follow an approach whereby it will only consider and accept a VDP application of this nature if it has been submitted within one month of VAT registration. However, we are not aware that this is a requirement of a valid VDP in terms of the TAA or in terms of the SARS External Guide for VDPs.
30. Further, this rule does not seem to appear on the SARS website and would therefore appear to be a recent internal policy applied by the VDP unit within SARS. Therefore, a taxpayer cannot be prejudiced for having not complied with a policy, which did not exist at the time.



31. Submission: Where SARS introduces a new policy with regard to VDP applications, such policy should be communicated in writing and made available on the SARS website.
32. Also, if SARS accepts a VDP application within one month of VAT registration, then it must mean that SARS accepts that the taxpayer's disclosure of under-declared VAT to SARS for past tax periods is voluntary in nature. Therefore, in our view, whether a taxpayer submits a VDP to SARS within one month or four months or even six months after VAT registration, this should not change the underlying voluntary nature.

33. In order to approach SARS under the VDP, a taxpayer necessarily first has to register for VAT. In our view, it would therefore be unfair to penalise a taxpayer for following a procedure which enables it to engage with the SARS VDP Unit, particularly in an instance where that exact procedure is also the default to be disclosed.
34. Further, the timing of when the VAT returns need to be submitted to SARS also presents a challenge as the taxpayer first requires certainty from SARS' assessment in respect of the VDP to ensure that its disclosures are accurate. If a taxpayer first submits the VAT returns to SARS and for any reason SARS' assessment differs, the taxpayer would have to correct each affected VAT return, which would be nonsensical.

35. Submission: We request that SARS clarify, in writing, why it believes our interpretation of the legislation is incorrect and allow for the opportunity to address this.

VDP applications and input VAT older than 5 years

36. Some VDP applications relate to VAT periods going back more than 5 years. In these applications, whilst output VAT is declared, the taxpayer may also seek to claim previously unclaimed input VAT where valid documentation is available at the time of the application.
37. Despite the net effect resulting in an overall VAT liability, in many instances, the VDU disallows the input VAT deduction against the output VAT on the basis that the period of limitations as set out in section 99 of the TAA, has passed.
38. This seems to disregard the definition of a "default" in section 225 of the TAA referring to an "understatement" as a result of a submission or non-submission.

39. Submission: It is our view that the "default" in question is the net understatement as a result of the VAT not declared, therefore the output VAT less the input VAT.
40. We propose that the VDU allows the offset of the input VAT against the output VAT not declared for VDP applications relating to VAT periods older than 5 years, in accordance with the definition of a "default" per section 225 of the TAA.



VAT VDP applications relating to various VAT periods

41. Some VDP VAT applications relate to numerous VAT periods where the applicant has incorrectly accounted for VAT. The incorrect accounting error affected all VAT returns across the relevant period.
42. A potential concern exists for eligibility for a VDP where the overall result of the errors across all VAT periods combined is in a refund position i.e. that section 227(e) of the TAA disqualifies the application.
43. As all the VAT errors relate to the same related issue and the net result is an under-declaration of VAT, in our view, the net under-declaration is the “default” referred to in section 225 of the TAA.
44. It appears to be the view of the VDU, that a VDP application is invalid if the net result for all periods is a net refund and that information relating to errors in periods which are not part of the VDP application is relevant / reason to decline an application.
45. The VDP provisions in sections 225 – 233 of the TAA do not specifically refer to ‘tax periods’. Therefore, section 4(2) of the TAA needs to be considered:

“if this Act is silent with regard to the administration of a tax and it is specifically provided for in the relevant tax Act, the provisions of that tax Act apply.”

46. Based on the above, section 227(e) of the TAA must be read in the context of specific VAT periods and that it therefore does not disqualify an application for VDP relief in respect of VAT periods for which errors resulted in a net amount payable to SARS.
47. Furthermore, a ‘default’ is defined to mean “...the submission of inaccurate or incomplete information to SARS... where such submission resulted in an understatement” (Section 225 of the TAA). This means that since a vendor is required to make monthly or bi-monthly submissions, a default may be present in each period’s submission. An ‘understatement’ means “any prejudice to SARS or the fiscus as a result of -...an incorrect statement in a return...” (Section 221 of the TAA).
48. This analysis also confirms that VAT periods for which *net refunds* arose as a result of errors *do not qualify* for VDP and that the information / quantification of those refunds is therefore not relevant to the VDP process.
49. The intentions and logic behind the VDP provisions support this view. Otherwise, a vendor with a liability of R1 000 000 in Period One would be denied VDP relief if he has a net refund of R1 000 001 in Period Two, but granted full access to relief (for Period One) if the refund in Period Two is R2.00 less. In our view, this does not make sense and is not aligned with our interpretation of the law as set out above.

50. <u>Submission</u> : On the basis that VAT is a period-based tax, the provisions of the TAA should be viewed with reference to each VAT period – and not all periods collectively.



51. The VDU should allow VDP applications over multiple VAT periods, where the net result of the VAT errors relating to the same issue is an under-declaration of VAT, therefore a “default” as defined in accordance with section 225 of the TAA.

SUPPORTING INFORMATION TO VERIFY THE FACTS

52. In the past, the VDU used to accept the information disclosed in the submissions at face value and the agreement and new assessments were raised based on these submissions.

53. SARS’ remedy if the disclosure was not complete is to withdraw the relief, in which case the taxpayer faces the possibility of penalties and even criminal prosecution, which would arise if the information were subsequently audited. This is clear from the provisions of section 231 of the TAA, and it is also included as a provision of the agreement entered into.

54. The new tendency is that the VDU requests supporting documentation to verify the facts submitted and in some cases the information requested is completely unrelated to the non-compliance disclosed.

55. Section 227 of the TAA sets out the requirements of a valid voluntary disclosure and SAICA believes that there is no requirement to provide documentary proof of the information disclosed in the submission.

56. Submission: The VDU should not expand the section 227 requirements and should follow the procedures set out in sections 40 to 49 of the TAA when information of this nature is required.

CONFIDENTIALITY

57. SAICA members have experienced instances where the disclosed non-compliance results in a detailed audit query related to the specific matter. In most of these cases it would have been impossible for SARS Enforcement to identify the non-compliance unless the auditors had sight of the VDP application.

58. Submission: It is imperative that the VDU does not disclose information to the enforcement teams as it will discourage taxpayers to apply for a VDP.

INCONSISTENT OUTCOMES

59. There is frustration experienced in that a taxpayer has no level of certainty when it submits an application to the VDU. Members have experienced different outcomes of cases, even though the facts relating to the cases were similar.



60. This makes it extremely difficult to advise taxpayer clients based on previous outcomes, as the VDU's application of relief is inconsistent. It may also deter taxpayers from making voluntary declarations when more is needed to encourage such declarations.

61. Submission: There must be consistency in outcomes where similar fact patterns apply. To achieve this, it may be useful to implement oversight prior to finalisation of cases or use of an internal database that VDU staff may refer to for guidance on similar cases.

CONCLUSION

62. If one has to look at the FAQs on VDP on the SARS website, SARS notes that the purpose of the VDP is to 'enhance voluntary compliance in the interest of good management of the tax system and the best use of SARS resources' and that the VDP 'aims to encourage taxpayers to come forward on a voluntary basis to regularise their tax affairs with SARS and avoid the imposition of understatement penalties and other administrative penalties'.

63. Based on the concerns raised in this submission, it is our view that unless there is a drastic improvement to the VDP process and effectiveness of the VDU, SARS will not meet their voluntary compliance strategy and taxpayers may choose not to regularise the non-compliance. We hope that we can work with SARS to address the issues raised and thereby contribute to the success of the VDP programme.

Yours sincerely

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Chairperson: SAICA TAA Subcommittee