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Dear National Treasury and Ms Collins

**COMMENTS ON THE DRAFT DISASTER MANAGEMENT TAX RELIEF
ADMINISTRATION BILL 2020**

1. We herewith take an opportunity to present our comments on behalf of the South African Institute of Chartered Accountants' (SAICA) National Tax Committee on the draft Disaster Management Tax Relief Administration Bill 2020 (Draft Bill) published by National Treasury on 1 April 2020.
2. We once again thank the National Treasury and 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, especially in these very difficult economic times.

COMMENTS

General

3. As a point of departure, we express great concern that SARS' approach to this global disaster, and especially the lockdown limitations, has fundamentally been 'business as usual'.
4. Expecting taxpayers and the tax profession, who are not essential services, to continue to comply under the threat of sanction when they may have no access to the accounting documents and financial records of their clients is most concerning.
5. We expect, given the current SARS approach, that both non-compliance and disputes as a result of inability to comply with the 'business as usual' approach will significantly increase in the coming months. This will be an absolute waste of money and productive time, in a time when the economy will be facing its most difficult period since the dawn of our democracy.

6. Submission: It is submitted that tax administrative relief be aligned to the reality of the disaster and its impact, which both the OECD and other countries having clearly indicated as including general deferments to all taxpayers, especially where lockdowns have applied.
7. In order to remain tax compliant, many businesses, specifically SMMEs, rely on their accountants and tax practitioners. To ensure that this service continues and businesses are not unfairly subjected to penalties and interest imposed by SARS, we suggest that “accounting and tax services” be regarded as an essential service, similar to payroll services.

Definition of ‘qualifying taxpayer’

8. One of the criteria to be a ‘qualifying taxpayer’ is that the person must be a company, trust, partnership or individual that is a taxpayer as defined in section 151 of the Tax Administration Act that conducts a trade.
9. Public Benefit Organisations (PBOs) approved in terms of section 30 of the Income Tax Act are effectively excluded from this definition as most of them do not conduct a trade. As many of these PBOs are not excluded from withholding employees’ tax from their employees, they will not be entitled to the employees’ tax relief provided in terms of the Draft Bill.

10. Submission: As PBOs play a significant role in our society and have been affected dramatically by the COVID-19 lockdown (and will be affected for many months thereafter as they may no longer receive donations that they previously relied upon), we submit that the definition of ‘qualifying taxpayer’ should be amended to include PBOs as mentioned above.

11. One of the other requirements to be a ‘qualifying taxpayer’ is that the gross income of the taxpayer must be R50 million or less during the year of assessment ending on or after 1 April 2020 but before 1 April 2021.
12. The forward extension of relief by allowing taxpayers to qualify in terms of future turnover is welcomed.
13. However, there are many practical challenges with including future requirements with historical relief, especially given that gross income will significantly drop but is a guestimate as to by how much. This leaves taxpayers with a conundrum – Should they take a chance that their estimates for the future are correct (R50 million or less), but if wrong and they utilised the relief provided, they will be severely sanctioned? In this regard it should be noted that the provisions of the Tax Administration Act that grant relief from the imposition of penalties for non-compliance have strict requirements, which many taxpayers would not meet in the above circumstances.
14. Thus the determination of ‘qualifying taxpayer’ is problematic as taxpayers may not know whether or not they will be under the R50 million limit at the time they will be applying and relying on the relief measures available.

15. Submission: One solution to this problem would be to provide that the taxpayers with two options to choose from to determine if they qualify for the relief measures. These options are as follows:

16. Their gross income from the latest year of assessment that ended prior to 1 April 2020 is R50 million or less; or

17. Their gross income for the year of assessment ending on or after 1 April 2020 but before 1 April 2021 is R50 million or less.

18. However, to simplify matters and to ensure that taxpayers are certain of what relief measures they qualify for (and are thus not exposed to potential underpayment of tax, penalties and interest), the taxpayers' gross income from the latest year of assessment that ended prior to 1 April 2020 should be the only option provided to determine if they qualify for the relief measures.

19. The inclusion of partnerships in the definition of 'qualifying taxpayer' is problematic, since for income tax purposes a partnership is not a separate taxpayer. It would seem that one must therefore determine whether a partnership is a 'qualifying taxpayer' by aggregating the gross income of each partner, regardless of whether that gross income arose from the small business or not. For example, a partner may be a partner in a number of small businesses.

20. Submission: It is submitted that only the gross income of a partner insofar as that gross income is derived from a small business should be included when determining the R50 million limit.

21. The wording 'does not include more than 10 per cent income derived from interest, dividends, foreign dividends, rental from letting fixed property and any remuneration received from an employer' (emphasis added) in the definition of 'qualifying taxpayer' leads to confusion. The term 'income' is defined to exclude exempt amounts and it is not clear whether this was envisaged, since the definition uses the term 'gross income' rather than 'income' in determining the limit of R50 million.

22. Submission: If 'income' was indeed intended, this should be clarified in the Explanatory Memorandum. We assume that it is meant to be 'gross income' rather than 'income' otherwise dividends, which are usually exempt, could be unlimited without disqualifying a taxpayer.

23. If 'gross income' was the intention of the legislator, then it is our view that the 10% threshold is too low and should be increased to 20%. In terms of SARS's own practice, the term 'substantially the whole' allows for a 15% leeway. A taxpayer should not be disqualified if 'substantially the whole' of its gross income was from permissible sources. The 20% threshold would also align with other similar sections in the Income Tax Act, for example, the definition of a 'small business corporation' in section 12E, in which a Small Business Corporation as defined, is allowed investment and personal service receipts and accruals up to 20% of its total receipts and accruals.

24. It is also presumably intended, but unclear, that the 10 per cent limit should apply to the aggregate of interest, dividends, foreign dividends etc. This should be clarified in the final legislation.

25. We acknowledge and support the need to support Small, Micro and Medium Enterprises (SMMEs) during this very challenging economic period, but the impact of the COVID-19 pandemic has also created significant hardship for large companies. Many countries such as Germany, United States of America, United Kingdom etc. have introduced tax relief measures for all business to alleviate the hardships faced by them and to prevent large scale job losses.

26. In South Africa, large businesses employ the majority of the country's workforce and these businesses have also been severely affected by the COVID-19 pandemic and many jobs within these businesses are also in jeopardy. The failure of large businesses would not only have a catastrophic effect on the economy, but also on unemployment levels in South Africa.

27. Submission: Although it is acknowledged that larger businesses generally, but not always, have access to capital markets and credit, the impact of the Corona virus will not be limited to SMMEs but will have a much broader impact. Liquidity for larger businesses is under severe pressure and without any relief offered to them, their survival will depend on drastic cash-flow preservation measures which could include retrenchments, non-payment of smaller suppliers and other similar measures which would have a knock-on effect throughout the economy and which would add more pressure on SMMEs, partially undermining any relief offered to the SMMEs.

28. In a crisis situation, it is imperative to know what your desired outcomes are. In this case the outcome must surely be the preservation of jobs and the support of those entities that will be best placed to rebuild the economy. These two criteria will not necessarily lead one to supporting only SMMEs.

29. As a minimum, consideration should be given to extending the deferral of the employees' tax and provisional tax relief measures to large businesses. It is therefore proposed that the "qualifying taxpayer" definition be extended by an insertion to sub-paragraph (b)(i) which will include all companies impacted by the National State of Disaster.

30. An alternative to the above proposal is to include a large business as a "qualifying taxpayer" provided that partial/full shut down of its operations was required.

31. Many employers will be swamped with applications from their employees for interest free or low-interest loans in order for the employees to survive. Should employers decide to provide these loans at below the official rate of interest, then the employer will be required to withhold employees' tax on these loans.

32. Submission: No employees' tax should be payable on these interest free or low-interest loans provided during 1 April 2020 to 31 July 2020, subject to an employee income threshold.

Deferral of employees' tax

33. The relief measures are only available to taxpayers that are tax compliant. Many compliant taxpayers might become non-compliant due to various factors resulting from the COVID-19 lockdown period (such as cash flow constraints etc.) raised in this submission as well as in our submission on the draft Disaster Management Tax Relief Bill.

34. It should be noted that many businesses will not just suffer liquidity deferrals but actual loss of income and thus permanent reduced liquidity. Furthermore, we have already started seeing the effect that businesses retain cash for their operations and seek, or self-impose, deferrals for payments of creditors. This impacts small and large businesses equally.

35. Submission: It is recommended that the requirement for compliance be measured before the lockdown period and should not be affected by involuntary non-compliance that may arise in the lockdown period due to circumstances that are beyond the taxpayer's control.

36. Should this not be accepted, then clarity would be appreciated on how non-compliance in one month, and rectification in the next month for instance, is to be treated in terms of the relief provisions.

37. It appears from SARS' Frequently Asked Questions that the full employees' tax liability withheld or deducted from remuneration must be declared. Only 80% of the employees' tax liability, however, will need to be paid by the relevant due dates if the taxpayer is a qualifying taxpayer. SARS will then defer the 20% employees' tax liability and not impose/charge any penalties and interest on this deferred amount.

38. Submission: It is advisable that the EMP201 forms should be amended to cater for the deferred employees' tax payments and it should be indicated as such on the form as it is uncertain how SARS will know if the person is a qualifying taxpayer or not. The SARS system may automatically impose penalties/interest on the deemed late payment of such short/underpayment of employees' tax which would jeopardise the taxpayer's ability to qualify for these relief measures in the first instance as it will no longer hold the status as 'tax compliant'.

Deferral of provisional tax

39. The relief provisions allow interim payments to be deferred and these deferred payments will be due and payable by the micro business by the date of payment as specified in a notice of assessment. It is uncertain what this date is and considering that the assessment of turnover tax returns is a manual process, there is a possibility of an error occurring and a shorter period being allowed for payment than what is currently being proposed for provisional taxpayers – that is, six/seven months after year end.

40. Submission: It would be appreciated if clarity is provided on the deferral date in the notice of assessment for micro businesses is and what will be done to ensure that these businesses are not prejudiced by a shorter time period than what provisional taxpayers are entitled to.

41. Section 3(3) of the Draft Bill states that ‘no penalty in terms of paragraphs 20 and 27 of the Fourth Schedule will be levied...’ (our underlining).

42. Submission: The ‘and’ should be an ‘or’..

43. It appears from SARS’ Frequently Asked Questions that the IRP6 and TT01 and TT02 forms will not cater for these proposed relief measures but that the full estimated taxable income must be shown, but only 15% or 65% must be paid.

44. Submission: The IRP6 forms should be amended to specifically cater for the payment of tax based on lower estimates as it is uncertain how SARS will know if the person is a qualifying taxpayer or not. The SARS system may automatically impose penalties/interest on the deemed late payment of such short/underpayment of provisional tax which would jeopardise the taxpayer’s ability to qualify for these relief measures in the first instance as it will no longer hold the status as ‘tax compliant’.

Extension of time periods – TAA and Customs & Excise (C&E)

45. The Bill provides for the 21-day national lockdown period to be regarded as *dies non* (that is, these days will not be counted for purpose of calculating the respective time periods).

46. However, this rule will apply to only certain time period provisions contained in the Tax Administration Act. In addition, if the other section in the Customs & Excise Act provides the Commissioner with a discretion to extend the time periods, that section applies and not the proposed section. Taxpayers will therefore have to carefully consider the provisions in the Draft Bill to ensure that they apply the extended time periods in respect of the correct provisions to avoid incurring penalties and interest.

47. Submission: As is done in the Customs and Excise Act, the bill should not only specifically list instances where the *dies non* rule will apply (e.g. relating to dispute resolution), but should also list those circumstances where it will not apply (e.g. submission of tax returns or the provision of relevant information) in order to assist taxpayers in understanding the different time periods applicable to each of their obligations.

48. An area in which no relief has been provided, is in respect of a number of employees who are claiming the exemption afforded by section 10(1)(o) in relation to their remuneration. These employees are grounded in South Africa due to the travel bans that have resulted from COVID-19, during the national lockdown. As a result, they are not permitted to return to the country where they are based. The days that the employees are grounded in South Africa may disqualify them from claiming the section 10(1)(o) exemptions. Days spent in South Africa may also disqualify them from relief under a double tax treaty

49. Submission: The period of the national lockdown should not be counted in determining an employee’s compliance with the requirements of section 10(1)(o)(i) or (ii) as well as double tax treaties, where applicable. The same principle applies to the interest exemption section 10(1)(h) and the physical presence test for determining whether or not a natural person is a ‘resident’.



50. The Explanatory Memorandum to the Draft Bill states that the purpose of the Draft Bill is to “provide individuals and businesses impacted by COVID-19 with additional time to comply with selected tax obligations or due dates that are affected by or fall within the lockdown period but does not extend to return filing or payments.” (our emphasis)
51. Most other countries across the globe have provided for deferred time periods to submit tax returns and make payments. This has not been the case in South Africa, with SARS arguing that it is business as usual and operations continue as normal at SARS, with taxpayers required to make appointments should they wish to visit a branch.
52. However, in reality we have noted certain SARS branches have been closed and taxpayers trying to make appointments at certain SARS branches can only get appointments after the lockdown period. Tax practitioners that assist many taxpayers, especially SMMEs, are not able to perform their functions as usual because of lack of access to some information as a result of lockdown and because “accounting services” (other than payroll) have not been designated as “essential services” in terms of Government Gazette No 43319.
53. In addition to the above, the *dies non* rule in relation to the Tax Administration Act appears to allow a deferral of time mainly in respect of the rights and obligations of SARS (field audits, warrant of search and seizure, rulings, periods of limitation for the issuance of assessments and finality of assessments/decisions). For taxpayers, the only deferments are in relation to the requirement to attend an interview, to appear at an inquiry and in respect of the application of the dispute resolution rules.
54. Submission: Various South African public and private institutions (for example those governed by the Public Finance Management Act, CIPC, JSE etc.) have been given an extension of time from complying with certain submission, reporting and payment deadlines due to the Corona virus.
55. It is therefore submitted that the *dies non* rule should, as a minimum, be extended to apply to the submission of all tax returns by South African taxpayers.
56. The current COVID-19 crisis does not warrant the extension of prescription, if the time periods for the filing of returns and associated payments, as well as any time periods for the submission of information by taxpayers as requested by SARS, have not been extended.
57. In the absence of the above proposals being accepted, it is recommended that the COVID-19 pandemic be declared an “exceptional circumstance” as envisaged in section 218 of the Tax Administration Act. This will save a large amount of time and money for both the taxpayer and SARS not having to argue the merits of numerous cases relating to penalty remissions etc.
58. Should this not be accepted, then the following days would also need to be considered as *dies non*: Chapter 5 information gathering periods, audits that had already commenced and information that cannot be accessed and the submission of the donations tax return (that was due on 31 March for section 7C donations).

59. Relief for various SARS compliance activities, forcing taxpayers/tax practitioners to go into a SARS branch, should be catered for on e-filing. For instance, tax practitioners should be given the functionality on e-filing to allow them to register individuals for income tax, the RAV01 should be sufficient to do a bank verification and confirm a taxpayers' identity, and accepting emails or similar means of communication from taxpayers as sufficient evidence that they have appointed a tax practitioner to act on their behalf or that documents are original.

Extension of time periods - Withholding tax on dividends

60. The extension of time only applies to section 64G (dividends), that is, the withholding tax on cash dividends from companies. There are other tax types that need revised or renewed declarations with effect from 1 July 2020.

61. Submission: The extension by 3 months to 1 October 2020 should also apply to the withholding tax on royalties, withholding tax on interest, dividends tax declarations in respect of dividends *in specie*, dividends tax declarations held by companies and dividends tax declarations held by intermediaries (i.e. the dates referred to in sections 3(2), 4(2), 6(2), 7(2) and 8(2) of the Act No. 33 of 2019).

Essential service relief

62. Many individuals are currently putting their health and that of their families at risk by being in the 'front-line' in the fight against COVID-19 without any form of compensation.

63. Submission: In recognition for the services performed by these individuals, the remuneration earned by them during this period should be treated as a qualifying donation in terms of section 18A. Essentially, this will allow these employees to claim a 10% deduction against his or her taxable income.

64. The provisions of section 5(10) of the Income Tax Act could also be extended to all employees of businesses which qualify as essential services. A qualifying employer will thus have the flexibility to structure payments to its employees as 'special remuneration'. This will ensure that the amount paid is not added to the monthly remuneration which is annualised in order to calculate the employees' tax. This will result in a direct cash-flow increase for the individual, but ultimately the correct amount of employees' tax is still paid to SARS.

65. The 'payroll giving' provisions of paragraph 2(4)(f) of the Fourth Schedule to the ITA should be amended to allow for a deduction of 10% (or higher percentage) in calculating the employees' tax to be withheld. This will have the effect of an immediate cash-flow benefit for such employees.

Home office relief

66. Section 23(b) prohibits the deduction of expenses relating to a home office, unless the home office is specifically equipped for purposes of the taxpayer's trade and regularly and exclusively used for the trade. In the case of remuneration earners, a further requirement is that the duties must be mainly performed in the home office or, in the case of a person



whose remuneration is derived mainly from commission, his duties must be mainly performed otherwise than in an office provided by his employer.

67. Submission: Due to the national lockdown, employees in most sectors have been forced to work from home. A relaxation of the strict requirements of this provision should be considered (for at least the lockdown period), since employees generally have no choice but to work from their homes during this period and may incur various costs in doing so. Furthermore, relief should be provided from the pro-rata capital gains tax that will arise on the subsequent sale of the house due to the section 23(b) claims that were allowed for this period.

68. **VAT relief**

69. VAT relief has not been provided to any business – large or small. Many SMEs are having to make the decision whether to pay salaries to continue trading or to pay their VAT liability to SARS.

70. Furthermore, due to the lockdown restrictions, many VAT vendors cannot provide their accountants and tax practitioners with the necessary documentation in order for them to accurately calculate their VAT liability for March which is payable by 25 (manual) /30 (efiling) April 2020. On the other hand, many tax practitioners and/or their staff cannot access their necessary systems from home due to information technology security concerns at the homes of the individuals.

71. As a result of the above, many vendors will be relying on section 38 of the VAT Act to make a 'provisional' payment. This process appears to require SARS to agree to and accept the payment of a 'deposit' of the amount outstanding which will place a huge administrative burden on SARS staff and delay the application of this section.

72. Submission: It is strongly recommended that the submission of VAT returns and payment of VAT be deferred for 3 months without levying interest or penalties.

73. Should this relief not be provided, many VAT vendors will rely on section 38 of the VAT Act to make their 'provisional' VAT payments. However, clarity is required on the process to obtain the approval from the Commissioner – that is, is there an application form for this or must an email be sent, and if so, to whom at SARS? In addition, clarity on the process to be followed in submitting the return on e-filing and how any subsequent adjustment to the return and the payment of the amount outstanding would function in practice is also required so as to avoid any penalties and interest from being levied by SARS. This is critical, not only to ensure compliance but also to ensure that taxpayers are entitled to access the COVID-19 relief measures provided by National Treasury.

74. Further relief in the form of permitting VAT to be accounted for on the payment basis for sole proprietors (with a turnover of more than R2.5 million), as well as SMEs would be beneficial to certain SMEs (those whose creditors are less than their debtors) as many sole proprietors and SMEs are most likely not going to receive the total amount outstanding from their debtors over the next three to four months and having to wait to claim the VAT on the bad debt will just aggravate their cash flow situation.

Carbon Tax

75. Before COVID-19, there was a delay in licensing warehouses at SARS. The COVID-19 situation and lockdown will now just aggravate this situation. To provide context to this situation, there are various requirements that need to be complied with by a taxpayer both at the Department of Environment, Forestry and Fisheries (DEFF) and then also at SARS (such as having FICA documents etc.) in order to get the license. There seems to be a delay in this process (even before the COVID-19 restrictions came into effect) as there are differences between the requirements for registration at the DEFF and SARS. For instance, the DEFF requires the holding company to register with it, whereas SARS requires the underlying subsidiary to register with it. This misalignment results in a mismatch and is challenging and time consuming to correct. This will affect the taxpayers' ability to pay their carbon tax due in July which will ultimately result in late payment of the carbon tax by many taxpayers and penalties and interest will become payable.
76. The COVID-19 implications make matters worse as accounting services are not an "essential service". We understand that provisions for the extension of time has been allowed for refunds and it is proposed that similar extensions also be provided for the payment of the carbon tax to take these concerns into account as the numbers involved are substantial.
77. Further concerns that can further motivate the extension of time for the payment is that the updated Regulations have not yet been issued and the SARS customs roadshows that would have assisted in explaining how to comply with the Carbon Tax will most likely no longer be taking place in April. There are also various defined terms that are vague/ambiguous and require clarity when it comes to the practical application of the law. All of these concerns will impact the taxpayers' ability to pay their taxes due in July.

78. <u>Submission:</u> The carbon tax should be postponed for three months until 1 October 2020.
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Limitation on the utilisation of assessed losses to reduce taxable income

79. The 2020 Budget contained tax proposals aimed at broadening the corporate income tax base by restricting the use of assessed losses carried forward. The effective date of the proposed legislation is applicable to years of assessment commencing on or after 1 January 2021.

80. <u>Submission:</u> In light of the unprecedented impact of the Covid-19 virus pandemic and the financial hardships being faced by all companies alike, it is proposed that the effective date of the proposed legislation be amended to " <i>years of assessment commencing on or after 1 January 2022</i> ". This would provide some financial relief to many companies that are likely to be in an assessed loss position post the lockdown.
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CONCLUSION

81. The SARS Commissioner has on numerous occasions stated that voluntary tax compliance is the highest leverage to reduce the tax burden on everyone. He has on numerous occasions reiterated SARS' commitment to building confidence between the South African public and SARS. He has stated that *"It is very important for us, and [we are] working hard to earn the trust of the SA public. We will continue the work of ensuring tax morality and compliance."*
82. We are concerned that SARS's approach in seeking to operate as if it is business as usual (when it is not) will undermine the above objectives.
83. Although we are grateful for the relief measures provided, we are of the view that they may be ineffective because they are mainly deferrals which will serve only to delay the cash flow burden and put the businesses under pressure down the line. Furthermore, the administrative and compliance burdens for many of the SMEs to access these relief measures will be high.
84. We therefore urge SARS to urgently address the above operational challenges and request the National Treasury to consider our legislative concerns in order to assist citizens of our country during this extremely difficult period.

Should you wish to clarify any of the above matters please do not hesitate to contact us.

Yours sincerely

David Warneke
Chairperson: National Tax Committee

Dr Sharon Smulders
Project Director: Tax Advocacy

The South African Institute of Chartered Accountants