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Submission File

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South African Revenue Service
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BY E-MAIL: policycomments@sars.gov.za

Dear SARS

COMMENTS ON THE SARS DRAFT INTERPRETATION NOTE ON THE CONSEQUENCES OF AN EMPLOYER'S FAILURE TO DEDUCT OR WITHHOLD EMPLOYEES' TAX

1. The South African Institute of Chartered Accountants ("SAICA") welcomes the opportunity to make a submission to the South African Revenue Service ("SARS") on the draft Interpretation Note ("the draft IN") on the consequences of an employer's failure to deduct or withhold employees' tax.
2. We set out below our specific comments in this regard.

COMMENTS

Tax directive: Page 6 – paragraph 4.4.1 – consequences for the employer

3. The following is noted on page 6 of the draft IN:

"...Should the employer wish to recover the debt from the employee's future remuneration, all that the employer requires is the directive from SARS".

4. Generally, a tax directive is required to instruct an employer on the amount of tax to withhold from a particular payment made to an employee.
5. However, in this case, the tax directive is in respect of an employer's debt recovery from an employee. An employer is better placed to understand the employee's financial position; particularly from an affordability point of view.

6. Submission: Considering that this is a new type of directive, we propose that the application for such directive is developed taking into consideration the affordability of the employee. The application should therefore be developed posing the questions that would allow SARS to determine a fair amount and period of the employees' tax withholding.

Employees' tax certificate: Page 7 – paragraph 4.4.2 – consequences for the employee

7. Page 7 of the draft IN reads as follows:

“Although an employees’ tax certificate is prima facie proof of the employees’ tax so deducted or withheld, paragraph 5(4) provides that, until the employee has repaid the amount due under paragraph 5(3) to the employer, the employee is not entitled to an employees’ tax certificate. Only amounts of employees’ tax that were actually deducted or withheld from the employee’s remuneration may be offset against the employee’s income tax liability. If an employer fails to deduct or withhold employees’ tax as required, no tax will have actually been deducted or withheld by the employer. The employee will not be in possession of an employees’ tax certificate, and also will not be able to prove that any employees’ tax was actually deducted or withheld. The employee will therefore not be able to claim any employees’ tax credit on assessment and will be liable to SARS for any shortfall in taxes due.

[own emphasis]

8. The above implies that where an employer did not deduct PAYE from an employee’s remuneration in respect of certain months, but subsequently paid the PAYE to SARS in settlement of its personal liability, then the employee will not be entitled to receive an employees’ tax certificate (“IRP5”). Consequently, the employee will not be able to claim any PAYE credit on assessment, even in respect of the months in which PAYE was actually deducted and paid to SARS by his employer.
9. The paragraph reads as if the employee will have zero PAYE credit to claim in respect of his assessed tax liability as he will not have an IRP5 because he has not yet refunded the employer the relevant amount of PAYE as laid out in paragraph 5(3) of the Fourth Schedule.

Entitlement to employees’ tax certificate

10. Notwithstanding SARS’ view that the employee will not be entitled to an IRP5, from a practical point of view, he/she will still ‘receive it’ in the sense that the IRP5 will be prepopulated on his/her annual income tax return (“ITR12”) by virtue of the fact the employer would have adhered to the EMP501 reconciliation process.
11. Once the IRP5 has been prepopulated on his return, the employee will therefore still be able to submit his return.

12. Submission: The draft IN should provide guidance on how this matter is to be addressed.

Correct interpretation of paragraph 5(4)

13. Paragraph 5(4) of the Fourth Schedule reads as follows:

*“Until such time as an employee pays to his employer any amount which is due to the employer in terms of sub-paragraph (3), such employee shall not be entitled to receive from the employer an employees’ tax certificate **in respect of that amount**”*

[own emphasis]

14. The actual rendering of paragraph 5(4) implies that the employee will still receive an IRP5. However, that IRP5 will not include the amount of employees' tax which the employer paid to SARS, but has not yet recovered from the employee.
15. That IRP5 will, however, include all PAYE amounts deducted from his remuneration by his employer and paid to SARS during the year of assessment.
16. It is submitted that a proper interpretation of paragraph 5(4), by way of example, is that where an employer:
 - deducted PAYE from an employee's remuneration for 11 months in a tax year,
 - but did not deduct PAYE for the 12th month,
 - subsequently pays SARS the PAYE for the 12th month (in settlement of its personal liability), and
 - has still not recovered that PAYE from the employee by the end of the tax year,
 then the employee will still receive an IRP5, but such IRP5 will only show 11 months' worth of PAYE deducted.
17. What is not clear, however, is whether the correct interpretation of paragraph 5(4) in this example provides that such IRP5 should have 11 months' worth of remuneration (to match the 11 months' worth of PAYE) or whether the IRP5 should have 12 months' worth of remuneration, but 11 months' worth of PAYE.

18. Submission: The draft IN should provide clarity in this regard.
19. SARS should also clarify the correct interpretation of paragraph 5(4); viz that the employee will still receive an employee tax certificate, however that tax certificate will exclude the PAYE amount which the employee has not yet paid back to his employer.
20. This clarification can include SARS inserting the actual wording contained in para 5(4) to paragraph 4.4.2 of the draft IN, such that it reads as follows:
21. *"Although an employees' tax certificate is prima facie proof of the employees' tax so deducted or withheld, paragraph 5(4) provides that, until the employee has repaid the amount due under paragraph 5(3) to the employer, the employee is not entitled to an employees' tax certificate **[in respect of that amount]**".*

22. Assuming that the proper interpretation of paragraph 5(4) is that the IRP5 for a particular tax year must exclude the PAYE which an employer has not yet recovered from the employee, the effect on an employee is that when he submits his ITR12 based on such an IRP5, he will have an assessed tax liability equivalent to the PAYE which he still owes the employer.
23. If he pays the assessed tax liability to SARS, then SARS will essentially have received the same PAYE amount twice (i.e. once from the employer's settlement of his personal liability



due to previously not deducting the PAYE and the second time from the employee paying SARS his assessed tax upon filing his ITR12).

Resubmission of EMP501 reconciliations

24. Upon the employee's settlement of his PAYE debt with the employer, the Interpretation Note is not clear on whether the employer should:

- withdraw the 'original IRP5' in its entirety and then re-submit the relevant EMP501, thereby issuing an updated IRP5 which includes the PAYE recovered from the employee, or
- leave the original IRP5 as is but issue an 'additional IRP5' for the PAYE that was subsequently recovered from the employee, as well as the remuneration to which such PAYE relates.

25. Assuming SARS requires that the employer issue the employee with an 'additional IRP5', it is not clear whether that IRP5 should be issued in respect of:

- the tax year during which the employee refunded the employer of the PAYE, or
- the prior tax year when the employee actually earned the remuneration in respect of which PAYE was not yet deducted.

26. Submission: To address the above, it is submitted that SARS should consider creating an 'indicator' on an IRP5, which the employer can activate on the EMP501 reconciliation. The indicator would indicate to SARS not to prepopulate the ITR12 of an employee who has not yet repaid his PAYE debt to his employer.

27. Once the PAYE is repaid by the employee, the employer would then release the indicator, and the IRP5 would then pre-populated onto the employee's ITR12, thereby allowing him to submit the ITR12, whilst also allowing for the employer's EMP501 assessment to be issued.

28. This will eliminate the need for an employer to have to resubmit an EMP501 in an effort to re-issue an employee's updated IRP5; thus avoiding unexpected PAYE liabilities for the employer, challenges with its SARS PAYE Statement of Account and its Tax Compliance Status.

Yours sincerely

SAICA Employees Tax Committee

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The South African Institute of Chartered Accountants