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Submission File

31 May 2021

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

Dear SARS

COMMENTS ON THE LIST OF QUALIFYING PHYSICAL IMPAIRMENT AND DISABILITY EXPENDITURE

1. We herewith take an opportunity to present our comments on behalf of the South African Institute of Chartered Accountants (SAICA) on the SARS document "List of Qualifying Physical Impairment and Disability Expenditure" distributed for public comment on 21 May 2021 and which provides proposed amendments to certain items considered allowable as a tax credit in terms of section 6B of the Income Tax Act.
2. We take special note that this subject matter is very emotive and has received much public attention¹ with a petition garnering 11 600 signatures in less than 10 days. Such emotion can, however, blind people to facts and also create emotional reactions from all parties. We are, however, confident that SARS will not succumb to such and will be able to assess the facts for what they are while having a degree of empathy required for this matter.

COMMENTS

Undoing the damage of the March 2020 amendments

3. In October 2018 SARS proposed significant changes to the list of qualifying expenditure. In our comments submitted on 7 November 2018, we raised concerns with the approach taken by SARS given that the proposals would be inequitable as to school fees and still did not provide proper coverage for various disabilities.
4. SARS responded to our submission on the basis that all children require schooling and that there would be inequity between children with disabilities and those who do not have disabilities on a fiscal policy basis.
5. It is ironic that the fight by civil society to enable children with disabilities to obtain numerous forms of education including basic education and their focus on basic education as a

¹ [Petition · Scrapping of tax credits for public and private schools for children with disabilities · Change.org](#)



Constitutional right² to raise the level of debate and intervention by government, would be used against them from a fiscal point of view.

6. SARS in its response to SAICA conceded to the lack of information from the Department of Education (DBE) in addressing resourcing and costs splits but disown our concerns on the basis that “*..the fact that Government might not be making the required provision of schools, that responsibility does not shift to the tax space*”. It would unfortunately seem that it is not a DBE problem or government problem either, despite the National Development Plan 2030 directing that “persons with disabilities must have enhanced access to quality education and employment. Efforts to ensure relevant and accessible skills development programmes for people with disabilities, coupled with equal opportunities for their productive and gainful employment, must be prioritised.”.
7. The approach by SARS and government in general is misguided. DBE’s future strategy to “disabled mainstreaming” in ordinary schools seems to draw as much criticism³ and leaves much to be desired. Notwithstanding all the consultations, the government seems to still not understand the needs of the sector as it requires listening and not just hearing society.
8. We request that SARS do not make the same mistake in respect of the most vulnerable people in society.
9. Firstly, SARS’ focus on trying to separate the cost of basic education from disability is good in theory but misplaced in practice as children don’t attend special needs schools to just learn basic education with a little assistance. That education, they would probably be able to get in schools that don’t cater for children with disabilities which is what the DBE also seemed to misunderstand in their attempts to integrate children with disabilities.
10. Special needs schools are specifically created to enable children with disabilities to learn how to the best possible degree integrate into society and be as independent as they can. Some will unfortunately never achieve this.
11. Learning how to read without sight for years, relearning how to use a fork to eat or trying to teach your body to do tasks without the limbs you had is what special needs schools are about. Sport for disabled is not just to enhance a talent of a learner, it provides an opportunity to enhance the mental strength of a learner that they can achieve more than what they thought, notwithstanding the extremeness of their disabilities. Coping mentally with the challenges and daily struggles of trying to achieve this independence and also how the world does not see you as “normal” is a necessary part of this “basic education” SARS is trying to define.
12. SAICA engaged numerous parents and even special needs schools to further our understanding of the above and we understand SARS to have done the same.

² <https://static.pmg.org.za/170530report.pdf>

³ <https://www.saide.org.za/resources/Library/DoE%20-%20Incl%20Ed%20Guidelines%20Full%20Service%20Schools%20June%202005.pdf> ; <https://pmg.org.za/committee-meeting/24505/> ; <https://static.pmg.org.za/170530report.pdf>



13. It would become clear that parents and schools are divided on the new SARS proposal as it would positively impact some and negatively impact others for both parents and teachers.
14. However, what they all are in agreement of is that the March 2020 amendments created much inequity and strife and that solutions should not be considered before repealing those amendments.
15. SARS' new proposals have in fact created division in the sector by harnessing the desperation of both the parents and the schools who rely on parent funding, many who lost it in the March 2020 amendments. It has become an each for their own narrative which the sector cannot afford. This clouds and skews engagement with the sector as they try to cater facts and views to their current position and not what the policy and position should be. We are, however, confident that if SARS removes the sword over their heads of the March 2020 amendments that a much more factual and positive engagement would result for both SARS and this sector.

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| <ol style="list-style-type: none">16. <u>Submission:</u> SAICA submits that the both the current proposals and more particularly those enacted in March 2020 cause more harm than good.17. SAICA does not question SARS' fiscal concerns of equity or even limited abuse, though neither SAICA, nor civil society, nor this industry can constructively give input where SARS does not disclose the facts of these matters.18. SAICA has noted SARS' engagement with industry with undertakings to improve practices and policy over time. Though we agree that SARS and the fiscus do have a role to play in enhancing the lives of the most vulnerable, we disagree that SARS should be doing this while holding a sword over this sectors' proverbial heads.19. It is submitted that the March 2020 amendments be withdrawn and that the pre-March 2020 status quo be reinstated whilst SARS together with civil society and this industry collaborate and formulate a solution that is equitable and addresses concerns on both sides.20. We firmly believe that when dealing with the most vulnerable persons in society, SARS should as a matter of Constitutional principle err on the side of benefit to them and not to that of government and strict fiscal policy. |
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Timeframe to comment

21. The draft document was released for public comment on Friday 21 May 2021. The closing date for comments was stipulated as 31 May 2021. Generally, the public is provided with at least one to two months to comment on documents of this nature.
22. We do understand from SARS that certain directly affected taxpayers (those that claimed a medical tax credit of this nature in the prior year) were informed of these changes on 22 May 2021 – effectively giving them 10 calendar days to comment.
23. However, it is evident from the SARS correspondence to SAICA that taxpayers that would be making use of the tax credits for the first time in the 2021 tax year would not have been included in SARS' 'notification of change' process. Thus, there may be affected taxpayers



that may be unaware of the proposed changes and not have sufficient opportunity to comment.

24. Although SARS stated that they have consulted with the special needs schools on the proposed changes – which is clearly necessary as an unreasonable additional administrative burden will be placed on them due to the proposed changes – these schools are not the ones directly impacted and may not have understood the full implications of the proposed changes.
25. Considering the far-reaching implications of the proposed changes and the public-interest nature thereof (see discussions below), it is of concern, that such a short time period was provided for comments. Hence SAICA requested extension for the submission of comments, however, this request was denied by SARS with the reason being provided that SARS was attempting to finalise this process before the start of the 2021 Filing Season.
26. We are aware that certain parents and schools would in fact benefit from the proposals hence their desire to make the changes retrospective and before tax filing season begins. However, on the same basis, many who will lose out or have reductions in the tax allowance would be equally opposed to the changes, especially a retrospective one.
27. Perhaps another reason for this rushed process is that SARS wanted to prevent perceived abuse of the provisions as they currently stand and thus prevent further leakage from the system. This was one of the reasons provided in the explanatory note issued by SARS in 2018 when further changes to the list of qualifying expenditure were proposed:

“Explanatory Note

The *Draft list of qualifying physical impairment or disability expenditure* is reviewed regularly to improve it (add qualifying expenditure where necessary and clarify certain expenditure) and to curb any abuse that may have been detected.”

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| <ol style="list-style-type: none">28. <u>Submission:</u> If this is indeed the case, we would appreciate more details on the nature of this abuse so that we can appropriately comment on whether the proposed changes are appropriate in the context of the abuse. For example, if the abuse stems from fraudulent activities, then a policy response is not the appropriate response and an administrative response would be more appropriate.29. However, if the perceived abuse relates to the extent of the claims for school fees (the overall Rand value of the claims being allowed as a tax credit), then this is a policy issue and would require further discussions with the National Treasury. These discussions would also have to consider the constitutional right of all physical impaired/disabled (hereafter referred to as ‘special needs persons’) to receive the best possible “education” available for their physical or mental health development (Section 29 of the Bill of Rights) whilst ensuring that the child’s best interests are kept in mind in every matter concerning them (Section 28(2) of the Constitution).30. In both scenarios, further time would be needed to comment appropriately. |
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31. An alternative reason for the rushed amendments could be because SARS has realised that the amendments made to section 6B, which became effective from 1 March 2020 (2021 tax year) would adversely affect many taxpayers with special needs children. This is because from 1 March 2020, taxpayers can only claim the following qualifying expenses:

- school assistant, if not part of the school fees;
- school fees in respect of a private special education needs school, limited to the amount in excess of the fees that would ordinarily be payable if the person attended the closest fee-paying private school (not specialising in learners with special education needs) to where they live; and
- school fees in respect of a public special education needs school, limited to the amount 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.

32. Before 1 March 2020, no distinction was drawn between private and public special education needs schools and both were compared to fee-paying public schools to determine the amount of the qualifying expenditure.

33. The 1 March 2020 changes have thus severely negatively affected many taxpayers and will result in many of them not being able to claim any qualifying expense in respect of their special education needs school fees because they live in an area where the closest fee-paying public/private school (not specialising in learners with special education needs) charges a higher cost they are currently paying (see example in paragraph 55 below).

34. The proposed changes, if adopted retrospectively (from 1 March 2020) could thus potentially rectify this concern for certain of these taxpayers as the costs of the remedial interventions in consequence of the disability would be regarded as qualifying expenses.

35. Submission: The above seems all speculation and conjecture but emphasizes the lack of transparency as to why SARS is following the approach it has been.

36. Should the above be one of the reasons for the proposed changes, it is submitted that these changes are merely putting a plaster on a bigger problem as certain other taxpayers, should the changes be made retrospective, would be disadvantaged by the changes (their qualifying medical expenses will now be reduced by the portion of the school fees that were previously allowed as a qualifying expense). These affected taxpayers would not have had the opportunity to manage their affairs to cater for the additional financial burden (many of whom are already under severe financial pressure).

37. These taxpayers would also have an additional administrative burden placed on them in ensuring that the schools provide the correct information split according to the various different components as now required in order for them to claim the allowable tax credit (albeit a reduced amount in comparison to prior years).

38. We again submit that the pre-1 March 2020 list of qualifying expenses should be re-instated for the 2021 tax year and further time should be allowed for more robust public consultations

with all stakeholders, including civil society organisations representing the interests of the disabled/physically impaired.

39. The focus of the proposed changes would also need further in-depth discussions as currently the focus is on those with learning disabilities, but those with physical disabilities, eg. the deaf and blind are potentially also significantly impacted.
40. The types of different institutions (eg. those not specifically designated as special schools in the traditional sense but which have been established with the objective of meeting the needs of those with different educational needs) also provide services to both the disabled and non-disabled. For example, teaching in much smaller classes or one-on-one teaching or non-traditional ways of teaching. These alternatives should also be considered in these discussions.
41. In addition to the above, many children are, as a last resort, home schooled due to severe sensory, communication, intellectual or mental limitations. There are many expenses that arise from such a need as a home-schooling parent of this nature doesn't have the luxury of spreading the 'educational/remedial/physical' costs over the rest of the children in the class. The implications of this also need more in-depth analysis and discussions.
42. Added to the list of discussion points would be the requirement for support of school placement earlier than primary school years (under the age of five years) and the need for the critical teacher/pupil ratios required to provide quality education for learners with disabilities. Special needs classes must be small if every child is to have intensive support from a highly skilled, specialised educator.
43. It is evident that there are many burning issues requiring further engagement and more time should be allowed for this, yet we recognise that practical solutions to these issues are needed urgently.

Definition of 'learner assistant'

44. No definition of a 'learner assistant' is provided.

45. Submission: This term should be broadly defined to avoid confusion about what this term means and what it includes.

Disallowance of school fees and tutoring costs (point 7 and 9)

46. The proposed changes remove the tax credit for school fees (and the cost of additional tutoring) paid in respect of learners with disabilities or impairments as SARS is of the view that these fees are not in consequence of a disability, but in consequence of education.
47. We understand this to mean that SARS is of the view that it is possible that the school fees and the expenses incurred in respect of a disability or impairment can be clearly separated and apportioned.
48. We have already noted above why we believe this "policy of separation" to be misplaced in practice and highly theoretical.

49. Submission: Should SARS proceed with this policy of “separation of education cost”, we would appreciate clarity on what principles of apportionment SARS had in mind in this regard. For instance, what costs are regarded as pure educational costs - the costs of the principal and secretary’s salaries, gate monitoring costs? What about the salary of a teacher that is employed to teach blind children, what portion of the salary would be in relation to pure education and what part would be in relation to the disability?
50. We have noted from our engagements with schools that the SARS officials in the task group had agreed with their distinction of costs, though no principles we formulated and SARS merely noted that each regional office would have to develop these principles. This proposal will result in endless and wasteful disputes which this sector already cannot afford as it is not the SARS Task group members but other auditors that will have to formulate these SARS principles.
51. It should also be noted that all schools not just private schools would have to do this cost separation, and in many provinces, there are no private schools. Many “normal” schools struggle with basic accounting not to mentioned doing this cost split.
52. It is submitted that further guidance on this in the form of a Regulation would be needed to ensure that taxpayers follow an apportionment methodology acceptable to SARS to avoid audits and disputes that would invariably arise.
53. SARS should also make clear what interventions would be put in place should a school not be able to comply with the acceptable apportionment methodology. This is a particular concern amongst public schools as many of these schools produce poor quality financial statements which implies that recordkeeping is also not of an appropriate standard making any meaningful apportionment difficult. This is further evidenced by SAICA’s⁴ finding that in most public schools, the person who is responsible for office administration is also the same person responsible for the school’s finance administration, but most of these individuals do not have a finance background. Expecting these individuals to perform appropriate apportionments of the expenses on which the parents can rely does not seem realistic.
54. Guidance on what the remedies would be available for parents in these circumstances would also be required.
55. We reiterate that SAICA does not accept SARS’ oversimplistic view that the educational and disability costs can be separated from each other. For example, is the use of reading machines in a visually impaired classroom that of education or related to the disability and who does the school charge for this, all or some of the children separately for such use? There are many such costs that overlap that address a disability to enable education.
56. If, however, it is assumed that there is no such overlap, (which we do not believe is correct as stated above), then it must be borne in mind that the only reason certain children are at

⁴ Public schools are missing out on much needed funding due to poor state of finances:

<https://www.saica.co.za/News/NewsArticlesandPressmediareleases/tabid/695/itemid/6305/language/en-US/language/en-US/Default.aspx>

expensive private schools is because their learning disability prevented them from getting an education at their closest public school.

57. Government has made it clear that its policy is that there should be a systematic move away from using segregation according to categories of disability and that children with certain levels of need and intensities of disability can be accommodated in ordinary public schools, instead of accommodating all learners with special needs in special schools.
58. Despite progress being made in providing learners with special needs access to suitable education, see Table 15 below, the public schools are still unfortunately unable to give these children an education because they are not suitably equipped to deal with children with learning disabilities. This is evidenced by the following statement in the Department of Basic Education's Annual Performance Plan for 2021/22 Report: *"A number of children with profound intellectual disability enrolled in special care centres and schools do not always have access to quality education as the available curriculum does not always respond to their learning and developmental needs."*

Growth Area	2002	2018
Number of special schools	295	501 (447 Public, 54 Independent)
Learner enrolment in special schools	64 000	93 699
Number of full-service schools	30	848
Number of learners with disabilities in public ordinary schools	77 000	121 461
Number of children with severe to profound intellectual disability supported in special care centres	Implementation started in 2018	6 654

Source: EMIS data for 2019.

59. Those that are equipped, have extensive waiting lists - there simply are not the number of schools required to support the needs of the children who require disability interventions – In April 2019, 2 352 children with disabilities were on waiting lists across the nine provinces according to the Department of Basic Education's presentation to the National Assembly⁶.
60. Certain parents have been on a waiting list to be accepted into either one of ONLY 2 special needs public schools within a 30km radius of their home for the past 14 years! It appears the average waiting list to gain access to a government school is 5 years. There is just no space available so what do parents and taxpayers do in these situations. If they don't send their children to school they are effectively breaking the law and breaking a constitutional requirement.
61. For this reason, in order to get an education or just for the child to be able to at least learn some basic functionality such as signing hunger and thirst, children with learning disabilities

⁵ <https://www.education.gov.za/Portals/0/Documents/Reports/2021-22%20APP.pdf?ver=2021-04-13-150821-063>

⁶ <https://pmg.org.za/committee-meeting/29205/>

are forced to attend more expensive private schools. The difference in the costs for some parents amounts to R60 000 to R114 000 per year. Private schools do not receive any government subsidies and are completely reliant on school fees charged to parents. Due to the need for individual attention, **class sizes are small and school fees are shared by only a couple of parents**. For example, one school has 14 students in the junior phase and 14 students in the senior phase. So the parent's costs are shared by a total of 28 parents. The **teachers** employed are **highly specialized and do not come cheap**. For example, the school mentioned above only employs 4 teachers and 2 assistants. All materials and equipment are purchased from the school fees. Due to the speciality of the **curriculum material and equipment**, these are very expensive. All these factors contribute to **extremely high school fees for parents**.

62. This is a cost purely as a result of the disability as the child cannot attend the public school as they won't accept him as they are not equipped to do so, nor can he attend a state funded special needs school as the 14 year waiting list confirms in the above example and the student numbers per class are too large for children who are in desperate need of individual attention and there not enough qualified educators in the government sector who can deal with the need for special needs education.
63. The set curriculum implemented in government institutions does not cater for all the learners with their different disabilities. The government institutions simply do not have the capacity to adjust their curriculum for all the individual needs of their students.
64. Thus, if these children did not have learning difficulties, they would have attended and completed their education at their local public school. The only reason their parents are paying higher school fees is because of their disability. The additional school fees are thus as a consequence of their disability.
65. Furthermore, a special needs school provides a far more reaching and complex service than 'just' education. The children who attend these special need schools suffer from many, if not all of the impairments, that are part of the definition of disability in one way or another. The school provides a rehabilitative function to both the children as well as the parents. Education by its very definition in an academic sense is impossible for children with such disabilities and limitations though "basic education" takes on a new meaning for children with disabilities. Part of the intellectual disabilities influences and affects how the disabled child will be educated. Being at such a school is like being in a rehabilitative centre to help with the intellectual disabilities.

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| <ol style="list-style-type: none">66. <u>Submission:</u> For reasons stated above, school fees at these institutions are primarily aimed at interventions as a result of a disability.67. The purpose of the enrolment at these schools is therefore not primarily to receive basic education in the traditional sense, but rather an attempt to get the child ready to receive an actual education as to various aspects of life and to enhance their ability physically and mentally to achieve this.68. Receiving an actual education within the special needs school system is a secondary purpose and <u>one which might even never be achieved</u> if the child does not make appropriate progress with regards to backlogs due to their disabilities. One could therefore |
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argue that these fees cannot be attributed to basic education until such time as the child is able to demonstrate its ability to receive the benefit of education in the normal sense.

69. The simplistic approach adopted by SARS in separating education and disability costs cannot be supported by SAICA. Furthermore, it is evident that where a local public school is not equipped to educate a child with a learning disability (which is unfortunately many, if not most, of the public schools), then school fees in excess of those of a local public school are a direct consequence of the disability and should thus be allowed as a qualifying expense. Essentially, the pre-1 March 2020 position should be maintained until further in-depth consultations on these matters can be held.
70. Many parents have stated that without the tax break, they cannot afford to send their children to a private special needs school and they do not know what they would do if they didn't receive the benefit. The medical tax credit system means that only 1/3 of these additional costs that the taxpayers incur are refunded by SARS so the state is in fact saving money. The cost of providing a proper education to these children in a public state funded special needs school would be far greater than the amount SARS currently refunds the taxpayer.
71. Removing the tax credit for school fees will ultimately discriminate against children with disabilities who cannot find a place in a public special school within a reasonable distance of their homes. The question must then be posed: What other opportunities for severely disabled persons to be educated will the government offer these parents and their children?
72. One of the 54 private special needs schools has already closed its doors in 2021 due to financial reasons stemming from parents not being able to afford the school fees – the detrimental impact of COVID has also had a significant role in this. Should more parents be unable to afford these school fees due to reduced tax breaks, more schools of this nature will be forced to shut their doors leaving the disabled destitute. Without these resources, the level of special needs individuals that remain dependent on their parents and the government for survival, would be exponentially higher than it currently is, placing an even bigger burden on the State as their chances of the special needs individual becoming a contributing member of society is eradicated.
73. The ability of the State to further assist any learners at this stage are not improving either as Minister Mboweni announced in his 2021 Budget Speech that government will be reducing the expenditure on learning and culture over the next three years. He said the low compensation growth of 0.8% over the Medium Term Expenditure Framework period, combined with early retirements, will reduce the number of available teachers. This, coupled with a rising number of learners, implies larger class sizes, especially in no-fee schools, which is expected to negatively affect learning outcomes.
74. Should the current requirements in relation to school fees remain, we once again note that 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.
75. 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.

76. We acknowledge the fact that it may not be feasible for the fiscus to continue subsidizing the entire amount of 'excess fees' and therefore submit that SARS consider as an interim measure, the introduction of a fixed amount deduction threshold as an alternative proposal as replacement for the 'excess fees' regime.
77. Given that SARS is struggling to find relevant details to assist in determining what this fixed amount threshold is, we propose that the pre-1 March 2020 rules should be reinstated 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.
78. 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.
79. 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.

Tutoring costs

80. While there are clear overlaps between school fees (as discussed above) and tutoring costs, there are nuances to the linkages with disability. The need for additional lessons for someone with a learning disability is clearly far more closely connected to the disability than school fees which includes both an element causally connected to a disability and an element that is purely educational.

81. Submission: Tutoring fees should be reinstated onto the list of qualifying expenses as these are clearly the additional school fees that are incurred by virtue of the disability.

Administrative burden

82. The proposed amendments require an itemised list detailing the nature and cost of each intervention, including school fees, be specified on the invoice or on a covering letter issued by the school.

83. These changes, if implemented, will likely place undue burden on school administrative staff (who are already unduly burdened) as fees would have to be split to indicate an allocation for each specific intervention and for each specific child.

84. It is also likely that SARS staff will question the reasonableness of the allocations used by the schools, leading to possible disputes and additional costs for the school and ultimately the parents.

85. Submission: The additional administrative burden on the school will ultimately lead to an increase in school fees. This additional cost, added to the reduced tax credit now available to the parents, will culminate in many parents not being able to afford the school fees and this could lead to more special needs schools having to close down leaving special needs person stranded as discussed above.

86. As mentioned above, clear guidelines for the apportionment considered acceptable to SARS should be provided to reduce the administrative burden on the schools and ultimately the parents.

Interventions at a school in consequence of a disability

87. The draft list includes 8 interventions that would qualify for a tax credit if the expenses incurred in respect of these interventions are in consequence of a disability. These include the costs of a school nurse, psychologist/social worker, speech-language therapist, audiologist, occupational therapist, hydro therapist, physiotherapist and an amanuensis assistant.

88. Submission: The list is not comprehensive and the following therapies which are also very relevant to children in special needs schools should be included:

- * Remedial therapy
- * Reading therapy
- * Dyslexia therapy
- * Reader (person who reads the exam question to a learner)
- * Other specialised teachers etc.

Adult disabled dependents

89. It is uncertain how the proposed document will affect adult disabled dependents, where the facility is not necessarily at a school. Examples of this are:

89.1 Daily attendance at a Centre for Adults with Autism.

89.2 Severely disabled adults living in special facilities, including full board, medical care and related expenses.

89.3 Adults suffering from a mental disability resulting in the adult having to be in a facility for his/her and the family or general public's safety.

90 Submission: It should be confirmed that the tax relief for the above-mentioned expenses will not be jeopardized by the proposed amendments.

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

- 91 We highlight once again SAICA's concerns, as raised in our submission to SARS on 24 May 2019, regarding the discretion afforded to the Commissioner of SARS in relation to the list of qualifying expenses.
- 92 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.
- 93 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.
- 94 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.
- 95 The Commissioner has therefore been given the delegated power to provide relief from taxation.
- 96 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.
- 97 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."*

98 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.”

99 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.

100 Plainly, section 6B, insofar as it relates to the prescription of what constitutes disability expenditure, is unconstitutional and invalid.

101 Submission: SAICA will propose to National Treasury that legislative changes be made to ensure that section 6B is brought within the ambit of Parliament. However, as Parliament is unlikely to amend the legislation retroactively, we urge SARS to be cautious of straying too far into policy and ensure that the list, as currently relevant to enable the tax credit, is sufficiently extensive to, at a minimum, meet the policy objective.

102 We hope that SARS will support our efforts to bring this legislation within the ambit of the Constitution

CONCLUSION

103 SARS is unwittingly targeting the most vulnerable persons in our society with the follow up proposals to the March 2020 amendments and SAICA expresses its concern that the new proposals are a continuation of the 2018 process whereby the scope and extent of these qualifying expenses are being reduced, at least in respect of certain vulnerable taxpayers.

104 The amount of revenue that SARS will collect as a result of the proposed amendments will in our view be minor (the total medical tax rebate and the additional medical tax rebate have in any case been decreasing year on year according to the 2020 Tax Statistics) but the negative impact on the families involved will be significant. There are more efficient ways to increase the tax base than penalising those with disabilities and who already receive very little state support.

105 Across the world, countries are increasingly striving to assist and include disabled persons in society. Even the BBBEE and Labour Legislation in South Africa are working towards this very goal. The approach of SARS in this regard does not build public trust and credibility or promote tax compliance, being two of its key objectives in its strategic plan.

106 The amendments fail to adequately address the inequalities that are still faced by special needs persons. SAICA remains of the view that more, and not less support is required for these individuals, especially given the significant reduction in government financial support for public special needs schools over more than a decade.



- 107 SAICA does not share SARS' oversimplistic views that the education costs can be separated from the disability costs. The payment of school fees includes many costs that coincide to address a barrier, the disability, to education. Furthermore, it is submitted that SARS was effectively already disallowing the 'educational' component of the school fees before 1 March 2020 as only the additional costs over the 'mainstream' school costs were allowed as a qualifying expense – these additional costs relate directly to the costs incurred in consequence of a disability.
- 108 We note with concern the additional administrative burden SARS is seeking to impose on the schools (an invoice would need to indicate each therapy etc. for each child) and parents that could ultimately lead to further time being spent on audits and dispute resolution with regard to the proposed apportionment of expenses considered acceptable by SARS. With no clear guidance on the administrative apportionment being proposed, it exposes these schools to SARS audits and disputes.
- 109 Special needs schools are providing much needed services for children with special needs to become confident in their abilities, to become a part of society and to contribute economically to our country in the future. A service that the State does not seem to be able to sufficiently offer. In fact, by denying parents of special needs children the deduction of school fees for special needs education will directly be denying these children an opportunity to an education and the ability to function in the very society that is trying to include them.

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

Yours sincerely

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