

draft customs control bill and draft customs duty bill released for public comment

by virusha subban



Introduction

On 30 October 2009 two draft Customs Bills ("the Draft Bills") were released by the South African Revenue Service ("SARS") for comment. The Bills signify a milestone in the Customs modernisation agenda which seeks to overhaul the existing Customs

legislative framework consisting of the Customs and Excise Act 91 of 1964 ("the Customs Act"); the Rules to the Customs Act and the Schedules thereto.

The Customs Duty Bill and the Customs Control Bill were the first bills to be released. They will be followed by a Customs Excise Bill sometime next year. The Rules, which will cover the procedural aspects of customs compliance, will also be re-written. The Schedules will be re-enacted in substantially the same format as the existing schedules bar a few changes. Until the enactment of the Excise Bill, the Customs Act will continue to remain in force as regards all excise matters.

The Customs Act comprises of 122 sections as compared to the draft Bills which together comprise of 1086 sections.

Objectives of the two Draft Bills

The existing Customs Act has come under some criticism as being out of sync with technological advancement and is not geared to facilitate the customs modernisation agenda. One of the aims of the re-write is to strike a delicate balance between trade facilitation; regional integration and customs control.

SARS' aim with the Draft Bills is to make customs procedures efficient; transparent and predictable for traders.

The Draft Bills have been benchmarked against similar legislation of Australia; Canada and New Zealand. International experts were consulted in the policy development phase.

An initial draft customs bill was released by SARS Legal and Policy Division on 11 December 2007. The Minister of Finance approved limited circulation of this first on a confidential basis. Edward Nathan Sonnenbergs ("ENS") Tax Department was part of the consultative process and provided comments at that stage.

At the media briefing held at SARS Megawatt Park on the 30th of October, SARS General Manager and Head of Customs: Gene Ravele stated that the Customs modernisation agenda is centred around stakeholder engagement. Certain trusted and preferred stakeholders will reap the benefits of improved service delivery. Ideally SARS hopes to move towards an environment where no supporting documents will be required for clearance and goods stopped for inspection by SARS will eventually be based on risk profiling.

The value proposition behind the overhaul of the existing legislation is manifold:

- cutting the cost of compliance;
- effective collection of revenue;
- facilitation of other legislative implementation;
- emphasis on electronic communication with SARS;
- expeditious release procedures; and
- simpler declarations.

The Customs Duty Bill

The Customs Duty Bill ("the Duty Bill") contains the charging sections. It comprises of three main themes:

- the imposition of duty;
- the assessment of duty; and
- the payment and collection of duty.

It is noteworthy that new terminology such as "tax assessment" and "advance ruling" has been included in the Draft Bills which aligns the general thrust of the customs legislation with that of the other tax legislation administered by the Commissioner.

Highlighted proposals

The main principle underlying customs declaration remains the same which is that it is a self assessment system which is subject to verification by SARS.

Currently, with the exception of the proposed Diamond Export Levy, there is no export duty payable in South Africa. The Duty Bill has introduced the mechanisms and framework for the imposition of export duties. Should export duties be introduced this will have a significant impact on export driven industries. However, the Explanatory Memorandum to the Duty Bill points out that the inclusion in the Bill of a provision for export duties does not mean that such duties are intended to be introduced in the future.

Provision is now made for the payment of compound interest by SARS on duties refunded. The Customs Act does not currently contain such a provision.

Presently, the period of liability for duty is two years from the date of acceptance of a bill of entry by SARS. This two year prescriptive period has been increased to "three years from date of assessment". This is intended to bring the Customs legislation in line with the other tax legislation administered by the Commissioner.

Tariff determinations may be published at the Commissioner's discretion. Presently there is no such provision.

Specific provision is now made for the use of forward exchange contracts to allow importers to use the fixed conversion rate provided that the invoice reflects the number and the date of the contract as well as the rate used. Fixed rates of exchange are not permissible in related party transactions.

Provision is made for advance binding tax rulings for tariff, value and origin for future imports. If granted, such rulings will be valid for 3 years from the date of issue of the ruling.

The Duty Bill also makes provision for a fine of R1 million or three times the value of the duty, whichever is the greater or 10 years imprisonment or both in the event of a conviction for fraudulent evasion of duty.

Specific anti-avoidance provisions have been included – a 'scheme' is defined to include any transaction, operation, scheme or understanding. The wording of the proposed anti-avoidance provisions is similar to the anti-avoidance provisions contained in the Income Tax Act 58 of 1962.

The Customs Control Bill

The Customs Control Bill ("the Control Bill") will serve as the platform for the implementation of the Duty Bill and other laws that regulate the charging of taxes with regard to the movement of goods into and out of South Africa.

This Bill is primarily concerned with the control over goods and is centred on the movement of goods through the value chain in a logical and predictable manner.

Some of the primary aspects are covered by the Control Bill are as follows:

- control over the places of entry and exit;
- advance reporting of imports and exports;
- registration and licensing;
- clearance and release procedures;
- accreditation;
- the movement of goods in and out of terminals;
- the processing of travellers and crew;
- enforcement and dispute resolution; and
- collection of debt;
- advance tax rulings; and

- the handling of goods imported via the postal service etc.

Highlighted proposals

One may either clear goods for 'home use' in which case the goods will be regarded as being in 'free circulation' and out of Customs control, albeit duty and VAT paid, or, goods may be cleared for one of 12 customs procedures in which case the goods will still be regarded as being subject to Customs control.

The provision for an 'export tax' will include the proposed Diamond Export Levy.

Entry and exit may only be through designated places of entry or exit to prevent the actual aircraft, vessel or railway carriage (together with goods onboard) from being regarded as cleared for home use.

The tax consequence of not entering or exiting through a designated place of entry or exit is that the mode of transport and goods may be seized; duty and VAT will be payable and criminal proceedings could be instituted by SARS.

The period for clearance of imported goods has been reduced from 7 days to 3 days from date of arrival.

Special provision has been made for, for example, inward processing procedures including procedures for record keeping; stock taking and identification measures, and transfer of ownership of goods under inward processing procedures.

All premises or warehouses and terminals must be licensed, including cross border pipelines; all carriers and cross border transmission lines.

Conclusion

It is vital for affected parties to consider the Draft Bills carefully prior to submission of comments. Comments must be submitted to SARS by 26 February 2010. After the public consultative process, any amendments will be effected prior to submission of the Draft Bills to Parliament's Portfolio Committee for deliberation.

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sars releases the draft tax administration bill

by dr beric croome



Background

In the 2005 Budget Review, it was indicated that SARS was in the process of drafting a Tax Administration Bill ("draft TAB"), which was intended to be released during the latter part of 2005. The purpose of the draft TAB was to incorporate, into one piece of

legislation, certain generic administrative provisions which are contained in the various fiscal statutes of the country. These provisions include, for example, the gathering of information powers, objection and appeal procedures, rules regulating secrecy and the collection and payment of tax.

Overview

On Friday, 30 October 2009, the Minister of Finance, Mr P Gordhan and the Commissioner for the South African Revenue Service, Mr O Magashula, released the draft TAB for public comment at a briefing held at SARS Megawatt Park.

The draft TAB comprises 123 pages, containing 254 draft clauses. The public have now been invited to comment on the draft TAB and have until 26 February 2010 in which to do so. Once SARS has evaluated the public comments, the draft TAB will proceed through the parliamentary process and the public will, again, be entitled to submit comments to the Standing Committee on Finance, when that committee considers the draft TAB. SARS anticipates that the draft TAB will be enacted during the latter part of 2010 and will replace various administrative provisions scattered around the various fiscal statutes of the country.

SARS has described the purpose of the draft TAB as providing a single statute that will contain common procedures, rights and remedies and to achieve a balance between the rights and obligations of both SARS and taxpayers in the tax system. When drafting the TAB, SARS has consulted with senior counsel to ensure that the provisions of the draft TAB comply with the Bill of Rights contained in the Constitution of the Republic of South Africa, Act 108 of 1996, as amended ("the Constitution").

When drafting the TAB, SARS sought to simplify the language used in the legislation, whilst not discarding the impact of judicial precedent on the principles contained in the draft TAB. SARS indicated some years ago that it was intended to re-write the Income Tax Act, Act 58 of 1962, as amended ("the Act") and that project was derailed by virtue of the introduction of the residence basis of taxation in 2000 and the introduction of capital gains tax in 2001. The release of the draft TAB can be seen as part of the process of re-writing the Act in order to simplify the language used in the statute.

SARS indicated that it was assisted by international tax experts from the International Monetary Fund and local constitutional experts in drafting the TAB and also sought advice from various SARS stakeholders and conducted a closed workshop with external tax experts, academics and SARS staff during May 2009. The Edward Nathan Sonnenbergs Inc.'s tax department was requested to participate in this process and supplied comments to SARS on the draft TAB at the closed workshop. When drafting the TAB, SARS took account of international best practice and evaluated tax administration laws of various other countries comprising Australia, New Zealand, United Kingdom, Canada, United States of America and Botswana. The draft TAB also seeks to ensure that, in future, taxpayers will be required to register only once with SARS, regardless of the number of taxes for which they are liable. The primary purpose of the draft TAB is to harmonise the administrative provisions in one statute, which are currently contained in different statutes. In drafting the TAB, SARS reviewed certain discretionary powers conferred on SARS and sought to introduce objective criteria, which must be utilised in exercising discretions granted to the Commissioner and his officers.

The draft TAB comprises 20 main chapters and seeks to administer the processes that a taxpayer will experience in their dealings with SARS. Thus, the draft TAB follows the various processes that a taxpayer will experience in dealing with SARS by commencing with general provisions and the registration of taxpayers, the issuing of assessments to taxpayers and the recovery of tax and also deals with the reporting of unprofessional conduct and transitional provisions. The TAB has been drafted in a way that the sections are shorter than what are currently contained in the Act, and uses less formalistic language. The draft TAB creates a framework whereby a single registration for taxpayers becomes possible, regardless of the number of taxes for which the taxpayer is required to register. The draft TAB also seeks to extend the gathering of third party information to enhance the pre-population of tax returns supplied by SARS to taxpayers for completion. Importantly, the draft TAB reserves the exercise of more serious powers for senior SARS officials only.

Purpose of the draft Bill

Currently, SARS does not inform a taxpayer as to the status of an audit conducted on their affairs, which is contrary to the practice adopted by revenue authorities in other open and democratic societies. The draft TAB proposes introducing the requirement that SARS informs taxpayers monthly as to the progress made on the audit undertaken on their affairs, as well as a notice of final conclusion of the audit, including a letter of findings to which a taxpayer may respond before an assessment is issued.

Currently, taxpayers do not know if they may be subjected to criminal prosecution as a result of an audit conducted by SARS. The draft TAB seeks to segregate routine audits conducted by SARS from criminal investigations to ensure that the rights of taxpayers who are suspects in a criminal investigation, are properly protected.

Currently, under section 74D of the Act, SARS must procure a warrant from a Judge of the High Court to conduct a search of the taxpayer's premises and to seize records from those premises. The draft TAB proposes introducing a power whereby SARS may conduct a search and seizure operation, without a warrant being issued where such warrant cannot be obtained in time to prevent the imminent removal or destruction of records. The draft TAB requires that a senior SARS official must decide if reasonable grounds exist to conduct a search and seizure operation without a warrant. It remains to be seen if this provision meets the requirements of the Constitution. On the face of it, it would appear that this provision may constitute an unlawful violation of the taxpayer's right to privacy contained in section 14 of the Constitution. It would be preferable if SARS were to conduct a search and seizure operation without a warrant, that the documents so seized are retained by the Registrar of the court, pending a decision by the court to grant confirmation that the documents be seized by SARS.

The draft TAB also deals with the question of legal professional privilege and how documents which may be protected by the privilege should be dealt with. Unfortunately, the draft TAB does not address the inequality arising between tax advice supplied by an accountant versus tax advice supplied by an attorney or advocate. It is contended that there is no justification for distinguishing between persons supplying advice on the tax laws of South Africa, purely by virtue of the training that that person has undertaken as a legal advisor or as an accountant.

The draft TAB also places an obligation on SARS to issue a statement of the grounds for an assessment, where the assessment issued to the taxpayer does not agree to the tax return submitted by the taxpayer to SARS. This requirement complies with the taxpayer's right to administrative justice contained in section 33 of the Constitution and expanded upon in the Promotion of Administrative Justice Act No. 3 of 2000.

The draft TAB also introduces the concept of so-called "jeopardy assessments" where SARS will be empowered to issue assessments in advance of the date that it would normally be issued and to seize a taxpayer's assets for up to 24 hours, while a court is approached to prevent the dissipation of assets by the taxpayer.

Currently, the judgments of the Tax Court are only published where the President of the Tax Court decides that they should be published for general information. The draft TAB proposes that all judgments of the Tax Court should, in future, be published so long as the identity of the taxpayer is protected, thereby ensuring that taxpayers and SARS are placed on an equal footing with respect to knowledge of the judgments of the Tax Court. The previous system whereby only certain judgments were reported was, probably, invalid under the right to equality contained in the Constitution.

The draft TAB also creates a framework to support the modernisation of SARS' accounting system within which a single taxpayer account, with a rolling balance may be created, and to facilitate instalment payment arrangements to be approved by SARS. The draft TAB also deals with the imposition of interest so that the imposition of interest may be uniformly applied across the various taxes payable by taxpayers and will provide that interest may be calculated on a compound basis.

Historically, SARS was obliged to consider the imposition of the 200% additional tax where a taxpayer was in default in their tax affairs and then consider mitigating factors, justifying the reduction of the additional tax from 200% to a lesser amount. It has now been proposed that a new system of penalties be introduced, taking account of the taxpayer's specific behaviour and factors in determining the quantum of penalties to be levied on the taxpayer. Other countries have rules in place whereby the penalties are increased, taking account of the taxpayer's particular behaviour, circumstances and facts. Where the taxpayer assists SARS prior to the commencement of an audit, the additional tax that will be imposed will be far less than what would be the case if the taxpayer only discloses omissions to SARS after the commencement of an audit or where the taxpayer is obstructive or is a repeat offender. The decision to stratify the imposition of additional tax, depending upon the taxpayer's behaviour, is to be supported.

The draft TAB creates a three-tiered decision-making framework to ensure that the more serious decisions are taken by more senior and experienced SARS officials. The draft TAB also contains provisions dealing with the limitation of powers of SARS' officials, addressing potential conflicts of interest and also regulating the issuing of identity cards to be used by SARS officials in identifying themselves to members of the public. The Bill contains proposals whereby a senior SARS official may request information for purposes of revenue analysis

or estimation. The current provisions conferring SARS' powers to gather information contained in sections 74, 74A to 74D do not confer such power on SARS as SARS is required to call for information for purposes of issuing assessments to taxpayers and not for estimating revenue.

The draft TAB also creates a framework for biometrical information that may be required from taxpayers for registration purposes, particularly in order to counter-act VAT fraud.

In addition, the draft TAB creates a framework for self-assessment by taxpayers and enhances the powers that SARS has to call for information from third parties to enhance the pre-population of returns for completion by a natural person. Currently, SARS may, in certain instances, seek to recover unpaid VAT or employees' tax from persons involved in the financial management of the taxpayer's affairs, regardless of the circumstances giving rise to the non-payment of the tax to SARS. The draft TAB contains a clause whereby any person who is regularly involved in the management of the overall financial affairs of a taxpayer, may be personally liable for any tax debt of the taxpayer to the extent that the person's negligence or fraud resulted in the failure to pay the tax debt. The draft TAB requires that a senior SARS official must be satisfied that the non-payment of the tax debt in question, was as a result of that person's negligence or as a result of fraud. Under the current provisions of the Act, SARS is not entitled to recover income tax from persons involved in the financial affairs of a company unless it resorts to the provisions of the Companies Act No. 61 of 1973. At least the proposal contained in the draft TAB introduces the requirements of negligence and fraud, which was previously not the case.

The draft TAB seeks to regulate the issuing of tax certificates and imposes a timeframe within which SARS must deal with a taxpayer's application for a tax clearance certificate. Currently, the Act contains no particular timeframes within which SARS is required to deal with the taxpayer's application for a tax clearance certificate, and the proposal to issue or decline a tax clearance certificate within 30 days from the date of application must be welcomed.

Mr Kosie Louw, Chief Officer: Legal and Policy at the Office of the Commissioner: SARS, indicated that it is SARS' intention to provide compliant taxpayers with better service and to apply the law strictly in the case of those taxpayers who choose to evade tax in the country by utilising the powers contained in the draft TAB, facilitating stricter enforcement, assessment and collection powers that SARS will obtain under the Act. In the case of those taxpayers that are generally compliant, SARS intends to utilise less strict powers in dealing with those taxpayers.

It is unfortunate that the draft TAB does not address the concerns raised previously that legal professional privilege only applies to clients of attorneys and advocates, that is, legal advisors and does not extend that to tax practitioners generally. Furthermore, the draft TAB clearly recognises and seeks to uphold the rights of taxpayers, but does not introduce a cost-effective remedy whereby taxpayers may seek to recover wasted costs and damages from SARS as a result of abuses of power or other appropriate circumstances. If taxpayers may be subjected to the imposition of additional tax for not complying with a fiscal statute, why should SARS and its officials not be liable to pay taxpayers compensation for breaches of the fiscal laws?

Currently, where taxpayers are aggrieved with the manner in which SARS has dealt with their affairs, they are required to complain to the local SARS Branch Office and failing resolution at that level, to escalate the complaint to the Branch Manager of that office. If the taxpayer fails to resolve the matter satisfactorily at that level, the taxpayer is entitled to lodge a complaint with the SARS Service Monitoring Office ("SSMO") in an attempt to resolve a complaint of an administrative nature. The SSMO is not entitled to address objections and appeals by virtue of the fact that special rules are in place to deal with legal disputes. It would be more appropriate, were the SSMO to be extracted out of the SARS structure and to be re-constituted as a fully independent ombuds office, answerable directly to parliament. It is unfortunate that the draft TAB does not seek to address this issue, nor provide a cost-effective remedy to taxpayers that have experienced abuses, by SARS' officials, in the exercise of the powers that they have under the fiscal statutes.

Conclusion

It is important that taxpayers study the draft TAB, available on the SARS website, namely, <http://www.sars.gov.za>, and submit their comments to SARS by 26 February 2010. SARS will then evaluate the comments received from the public and amend the provisions of the draft TAB accordingly. The draft TAB will then proceed to the Cabinet for approval and the Bill will then go through the parliamentary process during which taxpayers will be entitled to comment on the draft TAB when it is debated at the relevant portfolio committee. Once the Bill has been finalised by parliament, it will be enacted, which may occur during the latter part of 2010 or early 2011.

Hopefully, the consultative process will result in a quality piece of legislation that will facilitate greater co-operation between taxpayers and SARS.

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