

**The second draft regulations** to be issued in terms of section 75B of the Income Tax Act, 1962, are hereby released for public comment.

It would be appreciated if comments on the draft legislation could be furnished by **14 November 2008**. Due to time constraints, it will not be possible to respond individually to comments received. All comments will however be fully considered.

Comments must be submitted to:

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## GOVERNMENT NOTICE

### SOUTH AFRICAN REVENUE SERVICE

No. 1160

31 October 2008

#### REGULATIONS ISSUED UNDER SECTION 75B OF THE INCOME TAX ACT 58 OF 1962, PRESCRIBING ADMINISTRATIVE PENALTIES IN RESPECT OF NON-COMPLIANCE

By virtue of section 75B of the Income Tax Act, 1962, I, Trevor Andrew Manuel, Minister of Finance, hereby prescribe in the Schedule hereto:

- (i) the administrative penalties the Commissioner may impose;
- (ii) the procedures to be followed by the Commissioner in imposing a penalty;
- (iii) the procedures to obtain relief available to a person in respect of whom a penalty has been imposed;
- (iv) under what circumstances the Commissioner may remit a penalty imposed; and
- (v) ancillary or incidental matters necessary to achieve an effective penalty regime.

**T. A. MANUEL**  
**MINISTER OF FINANCE**

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*Part I - General***1 Definitions**

For purposes of these regulations, unless the context otherwise indicates, a word or expression to which a meaning has been assigned in the Income Tax Act, 1962, has the meaning so assigned, and—

**'administrative penalty'** or **'penalty'** means a penalty imposed by the Commissioner in accordance with these regulations;

**'Commissioner'** means the Commissioner for the South African Revenue Service;

**'first incidence'** means an incidence of non-compliance by a person where no penalty assessment under these regulations was issued during the preceding 36 months, whether involving an incidence of non-compliance of the same or a different kind, and for purposes of this definition a penalty assessment that was fully remitted under paragraph 11 must be disregarded;

**'official publication'** means a binding public ruling, interpretation note, practice note or media release issued by the Office of the Commissioner;

**'penalty assessment'** means a determination by the Commissioner that a penalty is due under these regulations;

**'preceding year'** means the year of assessment immediately prior to the year of assessment during which a penalty is assessed;

**'remittance request'** means a request for remittance of a penalty submitted in accordance with paragraph 8; and

**'the Act'** means the Income Tax Act, 1962 (Act No. 58 of 1962).

## **2 Purpose**

The purpose of these Regulations is to ensure—

- (a) the widest possible compliance with the provisions of the Act and the effective administration of the tax system; and
- (b) that any penalty is imposed impartially, consistently and proportionately to the seriousness of the non-compliance.

*Part II - Fixed Amount Penalty***3 Basis for fixed amount penalty imposition**

If the Commissioner is satisfied that the factual basis for any non-compliance by a person described in paragraph 4 exists, excluding the non-compliance described in paragraph 6, the Commissioner must impose the appropriate penalty in accordance with the Table in paragraph 5.

**4 Non-compliance subject to fixed amount penalty**

Non-compliance for purposes of paragraph 3 is—

- (a) failure to register as a taxpayer or otherwise register as and when required under the Act;
- (b) failure to inform the Commissioner of a change in address or other details as and when required under the Act;
- (c) failure by a company to appoint a public officer, appoint a place for service or delivery of notices, keep the office of public officer constantly filled, maintain a place for the service or delivery of notices, or to notify the Commissioner of any change of public officer or of the place for the service or delivery of notices as and when required by the Act or by the Commissioner in terms of the Act;
- (d) failure to submit a return or other related documents or information as and when required under the Act;
- (e) failure to furnish, produce or make available information, documents or things as and when required under the Act;
- (f) failure to reply to or answer a question put to a person as and when required under the Act;
- (g) failure to attend and give evidence as and when required under the Act;
- (h) failure by a person to apply to the Commissioner for registration as an employer as and when required under the Act;
- (i) failure by an employer to notify SARS of a change of address or the fact of having ceased to be an employer as and when required under the Act;

- (j) failure by an employer to submit a monthly declaration of employees' tax as and when required under the Act;
- (k) failure by an employer to provide details of an employee or deliver to an employee or former employee any employees' tax certificate as and when required under the Act;
- (l) delivery by an employer of an employees' tax certificate in contravention of the requirement that the employer must first render an employees' tax return as and when required under the Act;
- (m) failure by a provisional taxpayer, who is liable for the payment of normal tax in respect of an amount of taxable income derived by the provisional taxpayer during a year of assessment, to submit an estimate of taxable income as and when required under the Act; or
- (n) any other non-compliance with an obligation imposed under the Act, other than those penalised under section 80S, paragraph 5(5) of the Fourth Schedule or paragraph 17(4) of the Seventh Schedule to the Act.

## 5 Fixed Amount Penalty Table

(1) For purposes of the non-compliance described in paragraph 4, the Commissioner must impose a penalty in accordance with the following Table—

**Table A: Fixed Amount Penalty**

<b>1 Item</b>	<b>2 Assessed loss or taxable income for preceding year</b>	<b>3 Penalty</b>
(i)	Assessed loss	R250
(ii)	R0 – R250 000	R250
(iii)	R250 001 – R500 000	R500
(iv)	R500 001 – R1000 000	R1 000
(v)	R100 000 1 – R5 000 000	R2 000
(vi)	R500 000 1 – R10 000 000	R4 000
(vii)	R10 000 001 – R50 000 000	R8 000
(viii)	Above R50 000 000	R16 000

(2) Where a person fails to remedy the relevant non-compliance within a period of 30 days from the date that the non-compliance occurred, the amount of the penalty in column 3, will after the period increase automatically by the same amount for each month, limited to 35 months, or part thereof, that the person fails to remedy the non-compliance.

(3) The following persons, except those falling under item (viii) of the Fixed Amount Penalty Table, irrespective of whether they are in an assessed loss position or not, are treated as falling under item (vii) of the Table:

- (a) a company listed on a recognised stock exchange as described in paragraph 1 of the Eighth Schedule to the Act;
- (b) a company whose gross receipts or accruals for the preceding year exceeds R500 million; or
- (c) a company that forms part of a group of companies as defined in section 1 of the Act which group includes a company described in item (a) or (b) .

(4) The Commissioner may, except in the case of persons described in items (a) to (c) of subparagraph (3), where the taxable income of the relevant person for the preceding year is unknown or that person was not a taxpayer in that year—

- (a) impose a penalty in accordance with item (ii) of column 1 of the Table; or
- (b) estimate the amount of taxable income of the relevant person for the preceding year based on available information and impose a penalty in accordance with the applicable item in column 1 of the Table.

(5) Where, upon determining the actual taxable income of the person in respect of whom a penalty was imposed in terms of subparagraph (4), it appears that such person falls within another item in column 1 of the Table, the penalty must be adjusted in accordance with the applicable item in column 1.

### *Part III - Percentage Based Penalty*

## **6 Percentage based penalty for non-compliance**

If the Commissioner is satisfied that the factual basis for any non-compliance described in this subparagraph exists, the Commissioner must, in addition to any other penalty, interest or charge for which the person may be liable under these regulations or the Act, impose a penalty equal to ten percent of the:

- (a) amount of employees' tax that an employer fails to pay as and when required under the Act;

- (b) total amount of employees' tax deducted or withheld, or that should have been deducted or withheld, by an employer from the remuneration of employees, where the employer fails to submit an employees' tax return as and when required under the Act; or
- (c) amount of provisional tax that a provisional taxpayer fails to pay as and when required under the Act.

#### *Part IV – Procedures*

### **7 Procedures for imposing penalty**

(1) A penalty imposed under paragraph 5 or 6 is imposed by way of an assessment, and where a penalty assessment is made, the Commissioner must give notice of the assessment in the format as he or she may decide to the person, including the following:

- (a) the non-compliance in respect of which the penalty is assessed and its duration;
- (b) the amount of the penalty assessed;
- (c) the due date for paying the penalty;
- (d) the automatic increase of the penalty; and
- (e) a summary of procedures for requesting remittance of the penalty.

(2) Where a penalty is assessed at the same time as an assessment of tax, the notice of penalty assessment and notice of assessment of tax may be combined in a single document.

(3) Subject to subparagraph (4), a penalty is due upon assessment and must be paid —

- (a) on or before the due date stated in the notice of the penalty assessment;
- (b) where the penalty assessment is made together with an assessment of tax, on or before the due date stated in the notice of the assessment for tax.



(4) Where the amount of the penalty assessment has been automatically increased in accordance with paragraph 5(2), the person will from time to time be notified of the total amount of the penalty payable in a notice, in the format prescribed by the Commissioner, reflecting the amount due.

(5) To the extent not otherwise provided for in these regulations, procedures for assessment, objection, payment, and recovery of tax, and other provisions of a procedural nature relating to tax, apply to penalties assessed under these regulations.

## **8 Procedure to request remittance**

(1) A person who receives a penalty assessment notice may, on or before the due date for payment, in such form or manner (including electronically) as may be prescribed by the Commissioner, request the Commissioner to remit the penalty in accordance with Part V.

(2) The remittance request must include—

- (a) the circumstances which prevented the person from complying with the relevant obligation under the Act in respect of which the penalty has been imposed; and
- (b) the supporting documents and information as may be required by the Commissioner in the prescribed form.

(3) During the period commencing on the day that the Commissioner receives the remittance request, and ending 15 days after notice has been given of the Commissioner's decision, no collection steps relating to the penalty amount may be taken.

(4) The Commissioner may extend the period described in subparagraph (1) where the Commissioner is satisfied that—

- (a) the non-compliance in issue is an incidence of non-compliance described in paragraph 9 or 10, and that reasonable circumstances exist for the late receipt of the remittance request; or
- (b) a circumstance described in paragraph 11(2) rendered the person incapable of submitting a timely request.

*Part V – Remedies***9 Remittance of penalty for failure to register**

Where a penalty is imposed on a person for a failure to register as and when required under the Act, the Commissioner may remit the penalty in whole or in part if—

- (a) the failure to register was discovered because the person approached SARS voluntarily; and
- (b) the person has filed all tax returns required by the Commissioner under the Act.

**10 Remittance of penalty for nominal or first incidence of non-compliance**

Where a penalty has been imposed in respect of —

- (a) an incidence of non-compliance involving an amount of less than R2 000 or where the duration of the non-compliance is less than 7 days; or
- (b) a first incidence of non-compliance,

the Commissioner may remit the penalty up to an amount of R2 000 where the Commissioner is satisfied that —

- (i) reasonable circumstances for the non-compliance exist; and
- (ii) the non-compliance in issue has been remedied.

**11 Remittance of penalty in exceptional circumstances**

(1) The Commissioner must, upon receipt of a remittance request, remit the penalty or where applicable a portion thereof, if the Commissioner is satisfied that one or more of the circumstances described in subparagraph (2) rendered the person on whom the penalty was imposed incapable of complying with the relevant obligation under the Act.

(2) The circumstances referred to in subparagraph (1), excluding a circumstance caused by the person applying for the remittance with the sole or main intent to obtain remittance under this paragraph, are limited to the following—

- (a) a natural or human-made disaster;
- (b) a civil disturbance or disruption in services;
- (c) a serious illness or accident;
- (d) serious emotional or mental distress;
- (e) any of the following acts by the South African Revenue Service:
  - (i) a capturing error;
  - (ii) a processing delay;
  - (iii) provision of incorrect information in an official publication issued by SARS;
  - (iv) delay in providing information to any person; or
  - (v) failure by SARS to provide sufficient time for an adequate response to a request for information by SARS;or
- (f) serious financial hardship, such as:
  - (i) in the case of an individual, lack of basic living requirements;
  - (ii) in the case of a business, an immediate danger that the continuity of business operations and the continued employment of its employees are jeopardized; or
- (g) any other circumstance of analogous seriousness.

## **12 Penalty incorrectly assessed**

If the Commissioner is satisfied that a penalty was not assessed in accordance with these regulations, the Commissioner may, within three years of the penalty assessment, issue a revised assessment accordingly.

### **13 Objection and appeal**

(1) The following decisions by the Commissioner are subject to objection and appeal—

- (a) a penalty assessment; or
- (b) a decision by the Commissioner not to remit a penalty in whole or in part.

(2) A person may not object to the decision unless the remittance remedy under these regulations has first been exhausted.

(3) In respect of an appeal against a decision by the Commissioner to disallow an objection to a decision described in subparagraph (1), the appeal, where not resolved through alternative dispute resolution or included in an appeal against a combined assessment describe in paragraph 7(2), must first be dealt with by the Tax Board in terms of section 83A of the Act.

### *Part VI – Incidental and ancillary matters*

### **14 Application of the regulations**

(1) These regulations apply to non-compliance—

- (a) on or after the date these regulations come into effect; or
- (b) resulting from a continuous failure by a person to comply with an obligation that existed on the date these regulations came into effect, in which case the date on which the non-compliance occurred will be regarded as a date 60 days after these regulations came into effect.

(2) In determining the duration of non-compliance for purposes of paragraph 5(2), non-compliance taking place before these regulations came into effect will not be taken into account.

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**15 Effective Date**

These regulations will come into effect—

- (a) except for paragraph 6, on 1 January 2009; and
  - (b) in respect of paragraph 6, upon the date on which the relevant sections of the Revenue Laws Second Amendment Bill, 2008, will come into operation.
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