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## GOVERNMENT NOTICE GOEWERMENTSKENNISGEWING

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### SOUTH AFRICAN REVENUE SERVICE SUID-AFRIKAANSE INKOMSTEDIENS

No. 1404

31 December 2008

#### REGULATIONS ISSUED UNDER SECTION 75B OF THE INCOME TAX ACT, 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 an assessment in respect of —

- (i) a penalty only; or
- (ii) tax and a penalty which are assessed at the same time;

**'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 any non-compliance described in paragraph 6, the Commissioner may 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 of 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 and documents, keep the office of public officer 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 under 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 or give evidence as and when required under the Act;
- (h) 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;

- (i) failure by an employer to submit a monthly declaration of employees' tax as and when required under the Act;
- (j) failure by an employer to provide details of an employee;
- (k) failure to deliver an employees' tax certificate to one or more employee or former employee 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 may 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 – R1 000 000	R1 000
(v)	R1 000 001 – R5 000 000	R2 000
(vi)	R5 000 001 – R10 000 000	R4 000
(vii)	R10 000 001 – R50 000 000	R8 000
(viii)	Above R50 000 000	R16 000

(2) The amount of the penalty in column 3 will increase automatically by the same amount for each month, or part thereof, that the person fails to remedy the non-compliance within 30 days after—

- (a) the date of the delivery of the penalty assessment, where SARS is in possession of the current address of the person and is able to deliver the assessment, but limited to 35 months after the date of delivery;
- (b) the date of the non-compliance where SARS is not in possession of the current address of the person and is unable to deliver the penalty assessment, but limited to 47 months after the date of non-compliance.

(3) The following persons, except those falling under item (viii) of the Table or those that did not trade during the year of assessment, 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 exceed 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 subparagraph (a), (b) or (c) exists, the Commissioner may, 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 per cent 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 its 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 a penalty 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) A penalty is due upon assessment and must be paid on or before the due date stated in the notice of the penalty assessment.

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

## **8 Procedures for requesting remittance**

(1) A person who is aggrieved by a penalty assessment may, on or before the due date for payment in the penalty assessment, 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) a description of 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 30 days after notice has been given of the Commissioner's decision, no collection steps relating to the penalty amount may be taken unless the Commissioner has a reasonable belief that there is —



- (a) a risk of dissipation of assets by the person concerned; or
- (b) fraud involved in the origin of the non-compliance or the grounds for remittance.

(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 10 or 11, and that reasonable circumstances exist for the late receipt of the remittance request; or
- (b) a circumstance described in paragraph 12(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 or to notify the Commissioner of a change of address as and when required under the Act, the Commissioner may remit the penalty in whole or in part if—

- (a) the failure to —
  - (i) register was discovered because the person approached SARS voluntarily; or
  - (ii) notify SARS of a change of address was remedied by the person before SARS became aware of the changed address; 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) a first incidence of non-compliance described in paragraph 4 or 6;
- (b) an incidence of non-compliance described in paragraph 4 where the duration of the non-compliance is less than 7 days; or

- (c) an incidence of non-compliance described in paragraph 6 involving an amount of less than R2 000 or where the duration of the non-compliance is less than 7 days,

the Commissioner may, in respect of a penalty imposed under paragraph 5 or 6, remit the penalty, or a portion thereof where appropriate, 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 an altered assessment accordingly.

## **13 Objection and appeal**

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

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

(2) Where the Commissioner disallows an objection against a decision described in subparagraph (1), a person may lodge an appeal against the disallowance of the objection.

### *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 90 days after these regulations came into effect, or such longer period as the Commissioner may prescribe in the *Gazette*.

(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.

## **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 Act, 2008, will come into operation.