
GENERAL NOTICE

NOTICE 1044 OF 2006

SOUTH AFRICAN REVENUE SERVICE

DRAFT REGULATIONS ISSUED UNDER SECTION 91A OF THE INCOME TAX ACT, 1962 (ACT NO. 58 OF 1962), PRESCRIBING THE CIRCUMSTANCES UNDER WHICH THE COMMISSIONER MAY WRITE-OFF OR WAIVE ANY AMOUNT OF TAX, DUTY, LEVY, CHARGE, INTEREST, PENALTY OR OTHER AMOUNT

By virtue of section 91A of the Income Tax Act, 1962, I, Trevor Andrew Manuel, Minister of Finance, hereby publish for public comment the draft regulations set out in the Schedule hereto, prescribing the circumstances under which the Commissioner for the South African Revenue Service may write-off or waive, in whole or in part, any amount of tax, duty, levy, charge, interest, penalty or other amount payable by a person in terms of any Act administered by the Commissioner where that write-off or waiver would be to the best advantage of the State.

Comments on the draft regulations must be furnished on or before **Friday, 25 August 2006**.

Comments must be submitted to:

Ms. Adèle Collins

E-mail: acollins@sars.gov.za

Fax No.: (012) 422-4035

Postal Address: SARS: Legal and Policy Division
Private Bag X923
Pretoria
0001

T. A. MANUEL

MINISTER OF FINANCE

SCHEDULE

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Part 1
General provisions

Definitions

1. For purposes of these regulations, any word or expression to which a meaning has been assigned in any Act administered by the Commissioner must, unless the context otherwise indicates, bear the meaning so assigned, and—

“tax debt” means any tax, duty, levy, charge, additional tax, interest, penalty or other amount properly chargeable and payable by a debtor in terms of any Act administered by the Commissioner;

“waive” means to relinquish a portion of a tax debt by agreement with a debtor in terms of which—

- (a) the debtor undertakes to pay an amount (whether as a single payment or in instalments) which is less than the full amount of the tax debt due by that debtor in full satisfaction of that tax debt; and
- (b) the Commissioner undertakes not to pursue the recovery of the remaining portion of that tax debt on the condition that the debtor complies with the undertaking contemplated in paragraph (a) and any further conditions as may be imposed by the Commissioner; and

“write-off” means the decision not to pursue recovery of a tax debt either in whole or in part.

Purpose

2. (1) The basic principle in law is that it is the duty of the Commissioner to assess and collect all tax debts according to the laws administered by or assigned to the Commissioner and not to forego any such tax debts.

(2) Circumstances may, however, require that the strictness and rigidity of the basic principle be tempered where it would be to the best advantage of the State.

(3) The purpose of these regulations is to prescribe the circumstances under which the basic rule may be tempered and where the Commissioner may take a decision to write-off a tax debt on a temporary or permanent basis.

Application of regulations

3. These regulations apply only in respect of a tax debt owed by a debtor where the liability to pay that tax debt is not disputed by the debtor.

Part 2

Temporary write-off of tax debt

Temporary write-off of tax debt

4. (1) The Commissioner may temporarily write-off an amount of tax debt if the Commissioner is satisfied that the tax debt is uneconomical to pursue as contemplated in paragraph 5 at that time.

(2) A decision by the Commissioner to temporarily write-off an amount of tax debt does not absolve the debtor from the liability of that tax debt.

(3) If the Commissioner at any stage pursues the collection of any amount of tax debt which was temporarily written-off under this paragraph, the Commissioner must determine interest for the period from the date that the tax debt was so written-off to the date of payment at the interest rate applicable during the period that the tax debt was outstanding.

Tax debts uneconomical to pursue

5. (1) A tax debt is uneconomical to pursue if the Commissioner is satisfied that the total cost of recovery of that tax debt will in all likelihood exceed the recoverable amount of the outstanding tax debt.

(2) In determining whether the cost of recovery is likely to exceed the amount recovered as contemplated in subparagraph (1), the Commissioner must have regard to—

- (a) the amount of the tax debt;
- (b) the length of time that the tax debt has been outstanding;
- (c) the steps taken to date to recover the tax debt and the costs involved in those steps, including steps taken to locate or trace a debtor;
- (d) the likely costs of continuing action to recover the tax debt and the anticipated return from that action, including any likely recovery of costs that may be awarded to the Commissioner; and
- (e) any legal opinion obtained from counsel (if any) with regard to the recovery of the tax debt.

(3) The total cost of recovery of a tax debt will in all likelihood exceed the recoverable amount of the outstanding tax debt—

- (a) if further action to recover the tax debt is not appropriate through—
 - (i) the issue of a garnishee order;
 - (ii) the appointment of an agent of the debtor in terms of any Act administered by the Commissioner;
 - (iii) sequestration or liquidation of the debtor; or
 - (iv) an agreement to accept payment of the debt by instalments;
- (b) and if the Commissioner is satisfied that the debtor does not have any assets which can be utilised to reduce the tax debt and—
 - (i) a warrant of execution issued against the debtor has resulted in a *nulla bona* return and it is not possible or the Commissioner does not intend to pursue the sequestration or liquidation of the debtor;
 - (ii) a notification has been received from a trustee or administrator confirming that the debtor's estate does not have sufficient assets to satisfy the liability;
 - (iii) the debtor is deceased and there are no assets to be distributed from the estate; or
 - (iv) in the case of a company, it has ceased operations and it is not likely that—

- (aa) any assets not legally disposed of prior to liquidation or deregistration will be recovered by the liquidator; or
- (bb) any action will be successfully initiated against the directors or other persons acting in the management of that company in their personal capacity.

Circumstances where not appropriate to write-off tax debt

6. Notwithstanding paragraph 4, the Commissioner may not write-off any tax debt if—

- (a) the action on the part of the debtor relating to the tax debt constitutes intentional tax evasion or fraud;
- (b) the debtor is a company or trust and the directors or persons acting in the management of the debtor—
 - (i) have been involved in fraud or intentional tax evasion; or
 - (ii) have a past history of being involved in failed companies or trusts; andthe Commissioner has not first explored action against or recovery from the personal assets of those directors or persons; or
- (c) the tax debt constitutes a type of tax the non-payment of which would negatively impact on the rights or benefits of other persons which are determined with reference to the payment of the tax involved.

Procedure for writing-off tax debt

7. Before deciding to write-off any tax debt, the Commissioner must—

- (a) determine whether there are any other tax debts owing to the Commissioner by the debtor;
- (b) reconcile all amounts owed by and to the debtor, including penalties, interest and costs;
- (c) obtain a breakdown of the tax debt and the periods to which the outstanding amounts relate;

- (d) document the history of the recovery process and the reasons for deciding to write-off the tax debt.

Part 3

Permanent write-off of tax debt

Permanent write-off of tax debt

8. The Commissioner may permanently write-off an amount of tax debt—
- (a) to the extent that the Commissioner is satisfied that the tax debt is irrecoverable at law as contemplated in Part 4; or
- (b) if the Commissioner waived a tax debt in terms of Part 5.

Part 4

Irrecoverable at law

Tax debts irrecoverable at law

9. A tax debt is irrecoverable at law if—
- (a) it cannot be recovered by action and judgment of the court; or
- (b) it is owed by a debtor that has been liquidated or sequestrated and it represents the balance outstanding—
- (i) after notice was given by the liquidator or trustee that no further dividend is to be paid or a final dividend has been paid to the creditors of the estate; or
- (ii) following the termination of a composition, compromise or arrangement with the debtor's creditors which has been sanctioned by the Court,
- and, if the debtor is a company, the Commissioner is not entitled to recover the tax debt by way of action from the personal assets of any director of that company or persons acting in the management of the company.

*Part 5**Waiver of tax debt***Waiver of tax debt**

10. The Commissioner may waive a portion of a tax debt upon written request by a debtor, which complies with the requirements of paragraph 11, if the purpose of that waiver is to secure the highest net return from the recovery of that tax debt taking into account considerations of good management of the tax system and administrative efficiency.

Request by debtor for waiver

11. (1) A request by a debtor for a tax debt to be waived by the Commissioner must be signed by the debtor and be supported by a detailed statement of—

- (a) all assets and liabilities of the debtor (whether in the Republic or any other country) reflecting the current market value thereof;
- (b) all amounts received by or accrued to and expenditure incurred by the debtor during the 12 months immediately preceding the request;
- (c) all interests in real or personal property or funds which have been disposed of in the preceding three years, or such longer period as the Commissioner deems appropriate;
- (d) the value of all property or funds so disposed of, the consideration received or accrued, the identity of the person who acquired the property and the relationship between the debtor and the person who acquired the property (if any);
- (e) the debtor's possible future interests in any property or funds, whether certain or contingent or subject to the exercise of a discretionary power by any other person;
- (f) all property and funds over which the debtor, either alone or with other persons, has any direct or indirect power of appointment or disposal, whether as trustee or otherwise;
- (g) details of any entities which are controlled by the debtor, either alone or together with other persons; and

- (h) the debtor's present sources and level of income and the anticipated sources and level of income for the foreseeable future, with an outline of the debtor's financial plans for the future.
- (2) The request must set out the debtor's reasons for seeking a waiver and must be accompanied by evidence supporting the debtor's claims for not being able to make payment of the full amount of that tax debt.

Consideration of request to waive tax debt

12. (1) In considering a request for a waiver, the Commissioner must have regard to the extent that the waiver may result in—

- (a) savings in the costs of collection;
- (b) collection at an earlier date than would otherwise be the case without the waiver;
- (c) collection of a greater sum than would otherwise have been recovered; and
- (d) the abandonment by the debtor of some claim or right arising under any Act administered by the Commissioner that has a monetary value, including any right to carry forward any assessed loss or assessed capital loss.

(2) In determining the position without the waiver, the Commissioner must have regard to—

- (a) the value of the debtor's present property;
- (b) future prospects of the debtor, including any arrangements which have been implemented or are proposed which may have the effect of diverting income or property that may otherwise accrue to the debtor or any connected person in relation to the debtor;
- (c) past transactions of the debtor; and
- (d) the position of any connected person in relation to the debtor.

Circumstances where not appropriate to waive tax debt

13. Notwithstanding paragraph 10, the Commissioner may not waive any amount of tax debt if—

- (a) the amount payable by the debtor in terms of the agreement to waive will be less than the total net assets of the debtor which can be applied to reduce the tax debt;
- (b) the waiver will prejudice other creditors (unless the affected creditors consent to the waiver) or where other creditors will be placed in a position of advantage relative to the Commissioner;
- (c) any other creditor intends to take or has initiated formal recovery proceedings;
- (d) the tax affairs of the debtor (other than the outstanding tax debt) are not up to date;
- (e) the only reason to support the request to waive is the debtor's claim of hardship in paying the tax debt;
- (f) the purpose of the decision to waive is—
 - (i) to assist a debtor who has become overcommitted;
 - (ii) to save a business from failure or closure, regardless of whether or not a large number of people depend on the business for employment or the activities of the business serves a national interest;
 - (iii) to alleviate harsh or unfair operation of a tax law in particular circumstances;
 - (iv) to avoid hardship, including the need to sell a home or business;
or
 - (v) to further a charitable objective or creating a benevolent public image for the Commissioner;
- (f) the debtor's payment history generally has been very poor;
- (g) there will be no benefit for the Commissioner in the waiver other than collecting an amount equal to the return that would flow from the sequestration or liquidation of the debtor;
- (h) it may reflect adversely on taxpayer compliance;

- (i) the debtor within the period of five years immediately before the request for the waiver was—
 - (i) a party to an earlier agreement with the Commissioner to waive an amount of tax debt;
 - (ii) insolvent; or
 - (iii) a party to a composition, compromise or arrangement with the debtor's creditors which was sanctioned by the Court.
- (j) the debtor is a company or a trust and the directors or persons acting in the management of the debtor—
 - (i) have been involved in fraud or intentional tax evasion; or
 - (ii) have a past history of being involved in failed companies or trusts;and the Commissioner has not first explored action against or recovery from the personal assets of those directors or persons.

Procedure for waiving tax debt

14. (1) If the Commissioner waives a tax debt, the Commissioner and debtor must sign an agreement setting out—

- (a) the amount payable by the debtor in full satisfaction of the debt;
- (b) the undertaking by the Commissioner not to pursue recovery of the balance of the tax debt;
- (c) all other conditions subject to which the tax debt is waived by the Commissioner, which may include a requirement that the debtor must comply with subsequent obligations imposed in terms of any Act administered by the Commissioner.

(2) All material relied upon by the Commissioner in agreeing to waive a tax debt must be annexed to the agreement and the agreement must contain a warranty by the debtor concerning the accuracy and completeness of the material supplied.

Commissioner not bound to waiver

15. The Commissioner will not be bound by the waiver if—
- (a) the debtor failed to make full disclosure of all information to which the waiver relates;
 - b) the debtor supplied any incorrect information to which the waiver relates;
 - (b) the debtor fails to comply with any provision or condition contained in the agreement contemplated in paragraph 14; or
 - (c) the debtor is liquidated or his or her estate is sequestrated before that debtor has fully complied with all conditions contained in the agreement as contemplated in paragraph 14.

Use of information provided in request for waiver

16. The Commissioner may use any information provided by a debtor in the request for a waiver for purposes of evaluating the risks inherent in waiving that tax debt and in consideration of what recovery action to take on that tax debt.

*Part 6**Records and reporting***Records of tax debts written off or waived**

17. (1) The Commissioner must maintain a register of all tax debts written-off or waived in terms of these regulations.
- (2) The register contemplated in subparagraph (1) must contain—
- (a) the details of the debtor, including name, address and tax reference numbers;
 - (b) the amount of the tax debt written-off or waived and the periods to which the tax debts relate; and
 - (c) the reason for writing-off or waiving the tax debt.

Reporting by Commissioner of tax debts written-off or waived

(1) The amount of tax debts written-off or waived during any financial year must be disclosed in the annual financial statements of the South African Revenue Service relating to administered revenue for that year.

(2) The Commissioner must on an annual basis provide to the Auditor-General and to the Minister of Finance a summary of all tax debts which were written-off or waived in whole or in part during the period covered by that summary, which must—

- (a) be in such format which, subject to section 4(1)(b) of the Income Tax Act, 1962, does not disclose the identity of the debtor concerned; and
- (b) be submitted at such time as may be agreed between the Commissioner and the Auditor-General or Minister of Finance, as the case may be; and
- (c) contain details of the number of tax debts written-off or waived, the amount of revenue forgone and the estimated amount of savings in costs of recovery, which must be reflected in respect of main classes of taxpayers or sections of the public.

*Part 7**Exercise of power to write-off or waive***Exercise of power to write-off or waive tax debt**

19. The power to write-off or waive any amount of tax debt in terms of these regulations may be exercised by the Commissioner personally or by any official delegated by the Commissioner for that purpose.

No relationship between debtor and Commissioner or delegated official

20. The Commissioner or relevant delegated official may not exercise any power to write-off or waive any tax debt, if he or she has, or at any stage had a personal, family, social, business, professional, employment or financial relationship with the debtor concerned.
