

REPUBLIC OF SOUTH AFRICA

**VOLUNTARY DISCLOSURE
PROGRAMME AND
TAXATION LAWS
SECOND AMENDMENT BILL**

*(As introduced in the National Assembly (proposed section 75); explanatory summary
published in Government Gazette No. 33476 of 20 August 2010)
(The English text is the official text of the Bill)*

(MINISTER OF FINANCE)

[B 29—2010]

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[] Words in bold type in square brackets indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

To—

- introduce a voluntary disclosure programme;
- amend the Transfer Duty Act, 1949, so as to provide for electronic submission of returns and electronic payment of duty;
- amend the Income Tax Act, 1962, so as to amend certain provisions;
- amend the Unemployment Insurance Contributions Act, 2002, so as to effect a technical correction;
- amend the Mineral and Petroleum Resources Royalty (Administration) Act, 2008, so as to amend certain provisions; and
- provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Voluntary Disclosure Programme

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1. For the purposes of this Part, unless the context otherwise indicates, any meaning ascribed to a word or expression in a relevant tax Act must bear the meaning so ascribed, and—

“**default**” means the submission of inaccurate or incomplete information to the Commissioner, or the failure to submit information or the adoption of a tax position, where such submission, non-submission, or adoption resulted in— 10

(a) the taxpayer not being assessed for the correct amount of tax;

(b) the correct amount of tax not being paid by the taxpayer; or

(c) an incorrect refund being made by the Commissioner;

“**Income Tax Act**” means the Income Tax Act, 1962 (Act No. 58 of 1962); 15

“return” means any return, declaration, bill of entry or other document in terms of which a tax determination is made;

“**tax**” means any tax, duty, levy, penalty and additional tax imposed in terms of a tax Act;

“**tax Act**” means any legislation administered by the Commissioner; 20

“tax position” means an assumption underlying one or more aspects of a return, including whether or not—

- (a) an amount, transaction, event or item is taxable;
- (b) an amount or item is deductible for tax;
- (c) a lower rate of tax than the maximum applicable to that class of taxpayer or transaction applies; or
- (d) an amount qualifies as a reduction of tax payable.

Administration

2. (1) This Part is administered by the Commissioner.

(2) Any power granted to the Commissioner under this Part may be exercised by the Commissioner personally or any official delegated by the Commissioner for that purpose.

(3) The provisions of section 4 of the Income Tax Act, apply with the changes required by the context, to this Part.

Application for voluntary disclosure relief 15

3. (1) Any person may apply, whether in a personal, representative, withholding or other capacity, for voluntary disclosure relief unless that person is aware of—

- (a) a pending audit or investigation into the person’s affairs; or
- (b) an audit or investigation that has commenced, but has not yet been concluded.

(2) The Commissioner may direct that a person may apply for voluntary disclosure relief, despite the provisions of subsection (1), where the Commissioner is of the view, having regard to the circumstances and ambit of the audit or investigation, that—

- (a) the default in respect of which the person wishes to apply for voluntary disclosure relief would not otherwise have been detected during the audit or investigation; and
- (b) the application would be in the interest of good management of the tax system and the best use of the Commissioner’s resources.

(3) A person is deemed to be aware of a pending audit or investigation, or that the audit or investigation has commenced, if—

- (a) a representative of the person;
- (b) an officer, shareholder or member of the person, if the person is a company;
- (c) a partner in partnership with the person;
- (d) a trustee or beneficiary of the person, if the person is a trust; or
- (e) a person acting for or on behalf of or as an agent or fiduciary of the person,

has become aware of the pending audit or investigation, or that audit or investigation has commenced.

Requirements for valid voluntary disclosure

4. The requirements for a valid voluntary disclosure are that the disclosure must—

- (a) be voluntary;
- (b) involve a default;
- (c) be full and complete in all material respects;
- (d) involve the potential application of a penalty or additional tax in respect of the default;
- (e) not result in a refund due by the Commissioner;
- (f) be made in the prescribed form and manner;
- (g) be made within the period prescribed by the Commissioner by notice in the *Gazette*; and
- (h) be in respect of a default which occurred prior to 17 February 2010.

No-name voluntary disclosure

5. The Commissioner may issue a nonbinding private opinion as to a person’s eligibility for relief under this Part, if the person provides sufficient information to do so, which information need not include the identity of any party to the default.

Voluntary disclosure relief

6. Despite the provisions of any tax Act, the Commissioner must, pursuant to the making of a valid voluntary disclosure by the applicant and the conclusion of the voluntary disclosure agreement under section 7—

- (a) not pursue criminal prosecution for any statutory offence under a tax Act or a related common law offence; 5
- (b) grant 100 per cent relief in respect of any penalty and additional tax (excluding a penalty imposed in terms of regulation 5 of the regulations issued under section 75B of the Income Tax Act or in terms of a tax Act for the late submission of a return or for the late payment of tax); and 10
- (c) grant, in respect of a person described in—
 - (i) section 3(1), 100 per cent; or
 - (ii) section 3(2), 50 per cent,
 relief in respect of interest otherwise payable, up to the date of assessment described in section 9. 15

Voluntary disclosure agreement

7. (1) The granting of the relief under section 6 must be evidenced by a written agreement between the Commissioner and the applicant who is liable for the outstanding tax.

(2) The agreement must be in the format prescribed by the Commissioner and must include details of— 20

- (a) the material facts of the default on which the voluntary disclosure relief is based;
- (b) the amount payable by the person, which amount must separately reflect the tax payable and the interest amount payable, if any; 25
- (c) the arrangements and dates for payment;
- (d) treatment of the issue in future years or periods; and
- (e) relevant undertakings by the parties.

Withdrawal of voluntary disclosure relief

8. (1) In the event that, subsequent to the conclusion of the voluntary disclosure agreement under section 7, it is established that the applicant failed to disclose a matter that was material for purposes of making a valid voluntary disclosure under section 4, the Commissioner may— 30

- (a) withdraw any relief granted under section 6;
- (b) regard any amount paid in terms of the voluntary disclosure agreement to constitute part payment of any further outstanding tax in respect of the relevant default; and 35
- (c) pursue prosecution for any statutory offence under a tax Act or a related common law offence.

(2) Any decision by the Commissioner under subsection (1) is subject to objection and appeal or internal review. 40

Assessment or determination to give effect to agreement

9. (1) Where a voluntary disclosure agreement has been concluded under section 7, the Commissioner may, notwithstanding anything to the contrary contained in any tax Act, issue an assessment or make a determination for purposes of giving effect to the agreement. 45

(2) Any assessment issued or determination made to give effect to an agreement under section 7 is not subject to objection and appeal or internal review.

Reporting

10. (1) The Commissioner must within 12 months after the expiry of the period prescribed under section 4(g), provide to the Auditor-General and to the Minister of Finance a summary of all voluntary disclosure agreements concluded in respect of applications received during the period. 50

- (2) The summary must—
- (a) not disclose the identity of the applicant concerned, and must be submitted at such time as may be agreed upon between the Commissioner and the Auditor-General or Minister of Finance, as the case may be; and
 - (b) contain details of the number of voluntary disclosure agreements, the amount of tax and interest assessed and the relief granted in terms of section 6(b) and (c), which must be reflected in respect of main classes of taxpayers or segments of the public.

Regulations

11. The Minister may make regulations regarding any ancillary or incidental administrative or procedural matter that is necessary to prescribe for the proper implementation or administration of this Part.

PART B

Amendment of section 3 of Act 40 of 1949, as amended by section 6 of Act 88 of 1974, section 1 of Act 99 of 1981, section 4 of Act 97 of 1993, section 10 of Act 37 of 1996, section 6 of Act 60 of 2001, section 3 of Act 74 of 2002, section 1 of Act 35 of 2007 and section 2 of Act 17 of 2009

12. (1) Section 3 of the Transfer Duty Act, 1949, is hereby amended—
- (a) by the substitution for subsection (2) of the following subsection:

“(2) Pending the completion of the declarations referred to in section [fourteen] 14, or the determination of the amount of duty payable under this Act, a deposit on account of the duty payable **[may be made manually or electronically, to the office of the South African Revenue Service to which the duty is payable in terms of subsection (3)]** must be made by way of an electronic payment.”; and
 - (b) by the substitution for subsection (3) of the following subsection:

“(3) The payment of any duty, **[and any] penalty [payable] or interest** under section 4 **[and any transfer duty and interest payable under any law repealed by this Act shall be paid, manually or electronically, to the office of the South African Revenue Service where payments are accepted, for the area in which the property in question is situated or, if the property is situated in the area of more than one office of the South African Revenue Service where payments are accepted, to any one of those offices, or, in either case, to the office of the South African Revenue Service or the area where the deeds registry in which the property is registered is situated]** must be made by way of an electronic payment.”.
- (2) Subsection (1) comes into operation on 1 January 2011 and applies to any payments made on or after that date.

Amendment of section 14 of Act 40 of 1949, as amended by section 6 of Act 88 of 1974, section 1 of Act 34 of 2004 and section 1 of Act 36 of 2007

13. (1) Section 14 of the Transfer Duty Act, 1949, is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection:

“(1) Declarations appropriate to the manner of the acquisition of property in any particular case shall, **in substance as near as possible to the wording of the forms prescribed by the Commissioner, be completed and submitted in such manner (including electronically) and at such place** be submitted electronically, in the form and manner and containing such information as may be prescribed by the Commissioner, by the parties to the transaction whereby the property has been acquired and, if the Commissioner so directs, also by the agent, auctioneer, broker or other person who acted for or on behalf of either party to the transaction or, if the property has been acquired otherwise than by way of a transaction, by the person who acquired the property.”;
 - (b) by the deletion of subsection (1A);