GOVERNMENT NOTICE
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SOUTH AFRICAN REVENUE SERVICE

No. 316 **13 April 2007**

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 COMPROMISE 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 the regulations set out in the Schedule hereto, prescribing the circumstances under which the commissioner for the South African Revenue Service may write off or compromise, 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 compromise would be to the best advantage of the State.

T. A. MANUEL
MINISTER OF FINANCE

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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—

"asset" includes—

(a) property of whatever nature, whether movable or immovable, corporeal or incorporeal; and

(b) a right or interest of whatever nature to or in such property;

"Companies Act" means the Companies Act No. 61 of 1973;

"compromise" means an agreement entered into between the Commissioner and 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;

"*tax* debt" means any tax, duty, levy, charge, additional tax, interest, penalty or other amount due by a debtor in terms of any Act administered by the Commissioner; and

"write off means to reverse 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 forgo 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 anticipated amount to be recovered in respect of the outstanding tax debt.

(2) In determining whether the cost of recovery is likely to exceed the anticipated amount to be 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 invoived 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;

(e) the financial position of the debtor, including that debtor's assets and liabilities, cash flow and possible future income streams of that debtor; and

(f) any other information available with regard to the recoverability of the tax debt.

Part 3

Permanent write-off of tax debt

Permanent write-off of tax debt

6. (1) The Commissioner may permanently write off an amount of tax debt:-

(a) to the extent that the Commissioner is satisfied, at that time, that the tax debt is irrecoverable at law as contemplated in paragraph 7; or

(b) if the Commissioner compromised a tax debt in terms of Part 5.

(2) The Commissioner must notify the debtor, in writing, of any amount of tax debt permanently written off.

Irrecoverable at law

Tax debts irrecoverable at law

7. (1) Subject to subsection (2), a tax debt is irrecoverable at law if—

(a) it cannot be recovered by action and judgment of a 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 compromise or arrangement as contemplated in section 311 of the Companies Act, with the debtor's creditors, which has been sanctioned by a court.

(2) A tax debt is not irrecoverable at law if the debtor is a company or a trust and the Commissioner has not first explored action against or recovery from the personal assets of any director, shareholder, trustee or persons acting in the management of that debtor.

*Part **4***

Procedures for write-off

Procedure for writing off a tax debt on a temporary or permanent basis

8. (1) 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; and

(d) document the history of the recovery process and the reasons for deciding to write-off the tax debt on a temporary or permanent basis.

(2) In deciding whether to support an offer of compromise made to creditors in terms of section **311** of the Companies Act the Commissioner must, in addition to considering the information as contemplated in section **312** of that Act, consider the provisions of paragraph 9, 10(1) and 11 ***mutatis mutandis.***

Part 5

Compromise of tax debt

Compromise of tax debt

9. The Commissioner may compromise a portion of a tax debt upon written request by a debtor, which complies with the requirements of paragraph **10,** if the purpose of that compromise 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 compromise

10. (1) A request by a debtor for a tax debt to be compromised by the Commissioner must be signed by the debtor and be supported by a detailed statement setting out—

(a) all assets and liabilities of the debtor reflecting the current market value of those assets;

(b) all amounts received by or accrued to and expenditure incurred by the debtor during the **12** months immediately preceding the request;

(c) all assets which have been disposed of in the preceding three years, or such longer period as the Commissioner deems appropriate;

(d) the value of all assets so disposed of, the consideration received or accrued, the identity of the person who acquired the assets and the relationship between the debtor and the person who acquired the assets (if any);

(e) the debtor's future interests in any assets, whether certain or contingent or subject to the exercise of a discretionary power by any other person;

(f) all assets 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 connected persons in relation to that debtor;

(h) the debtor's present sources and level of income and the anticipated sources and level of income for the next three years, with an outline of the debtor's financial plans for the future; and

(i) the debtor's reasons for seeking a compromise.

(2) The request must be accompanied by the evidence supporting the debtor's claims for not being able to make payment of the full amount of that tax debt.

(3) The debtor must warrant that the information provided in the application is accurate and complete.

(4) The Commissioner may require that the application be supplemented by such further information as may be required.

Consideration of request to compromise tax debt

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

(a) savings in the costs of collection;

(b) collection at an earlier date than would otherwise be the case without the compromise;

(c) collection of a greater sum than would otherwise have been recovered; and

(d) the abandonment by the debtor of some claim or right, that has a monetary value, arising under any Act administered by the Commissioner, including any right to carry forward any assessed loss or assessed capital loss.

(2) In determining the position without the compromise, the Commissioner must have regard to –

(a) the value of the debtor's present assets;

(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 assets that may otherwise accrue to or be acquired by 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 compromise tax debt

12. Notwithstanding paragraph **9,** the Commissioner may not compromise any amount of tax debt if—

(a) the amount payable by the debtor in terms of the agreement to compromise will be less than the market value of the total assets of the debtor, which can be applied to reduce the tax debt, after deducting the liabilities of that debtor other than the tax debt;

(b) the compromise will prejudice other creditors (unless the affected creditors consent to the compromise) or where other creditors will be placed in a position of advantage relative to the Commissioner;

(c) any other creditor has communicated its intention to initiate or has initiated liquidation or sequestration 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 compromise is the debtor's claim of hardship in paying the tax debt, including the need to sell a home or business;

(f) the purpose of the decision to compromise 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 serve a national interest;

(iii) to alleviate harsh or unfair operation of a tax law in particular circumstances; or

(v) to further a charitable objective or to create a benevolent public image for the Commissioner;

(g) there will be no benefit for the Commissioner in the compromise other than collecting an amount equal to the return that would flow from the sequestration or liquidation of the debtor;

(h) it may adversely affect broader taxpayer compliance;

(i) the debtor within the period of five years immediately before the request for the compromise was—

(i) a party to an earlier agreement with the Commissioner to compromise an amount of tax debt;

(ii) sequestrated or liquidated; or

(iii) a party to a compromise or arrangement with the debtor's creditors, as contemplated in section 311 of the Companies Act, which was sanctioned by the Court;

(j) the debtor is a company or a trust and any director, trustee or person acting in the management of the debtor—

(i) has been involved in fraud or tax evasion; or

(ii) has 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, trustees or persons.

Procedure for compromise of tax debt

13. (1) If the Commissioner compromises 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; and

(c) all other conditions subject to which the tax debt is compromised 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.

Commissioner not bound by compromise

14. The Commissioner will not be bound by the compromise if—

(a) the debtor failed to make full disclosure of all material facts to which the compromise relates;

b) the debtor supplied any materially incorrect information to which the compromise relates;

(c) the debtor fails to comply with any provision or condition contained in the agreement contemplated in paragraph 13; or

(d) 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 13.

Part 6

Records and reporting

Records of tax debts written off or compromised

15. (1) The Commissioner must maintain a register of all tax debts written off or compromised 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 compromised and the periods to which the tax debts relate; and

(c) the reason for writing off or compromising the tax debt.

Reporting by Commissioner of tax debts written-off or compromised

16. (1) The amount of tax debts written off or compromised 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 compromised 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;

(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 compromised, 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.

Exercise of power to write off or compromise

Exercise of power to write off or compromise tax debt

17. The power to write off or compromise 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

18. The Commissioner or relevant delegated official may not exercise any power to write off or compromise 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.