



South African Institute of Professional Accountants

N Nene, MP
Chairperson: PC on Finance
Parliament of the Republic of South Africa

22 March 2006

**ANNEXURE TO THE RESPONSE ISSUED TO LAW ADMINISTRATION OF
THE SOUTH AFRICAN REVENUE SERVICES ON THE 31 JANUARY 2006
– DISCUSSION PAPER ON TAX AVOIDANCE AND SECTION 103 OF THE
INCOME TAX ACT, 1962 (ACT NO.58 OF 1962)**

**INVITATION TO COMMENT AT THE HEARING ON THE DISCUSSION
PAPER ON TAX AVOIDANCE AT THE PARLIAMENT OF THE REPUBLIC
OF SOUTH AFRICA ON THE 24TH MARCH 2006**

In addition the response submitted in regard to this subject on the 31st January 2006, the following are key point of our comments to be made at the hearing at the Parliament of the Republic of South Africa on the 24th March 2006.

1. The mindset of many taxpayers has shifted in the past years. We no longer have the board of directors making decisions to avoid taxes behind closed doors. In practice we find that directors are more concerned with ensuring compliancy. Changes such as Corporate Governance, Accounting Standards, and amendments to the Companies Act all aid this shift.
2. The Commissioner of SARS and his staff have made leaps and bounds in service delivery, collections and shifting taxpayer mindsets. Many more changes are in the pipe-line. Also, the national budget is dependant on the constant growth of tax collections to meet the budget needs. There are limitations to new taxes and increases in tax rates. This means that the pressure of collection and assessments will be great. The proposed new general anti-avoidance provision could open the door for aggressive treatment of taxpayer affairs to aid the assessment and collection needs and targets!
3. We need to ensure that we retain the balance of rights, as the taxpayer surly has the Constitutional right to plan his/her affairs to ensure that no more than required taxation is paid. The proposed new general anti

avoidance legislation is caused by a few wishing to exploit the tax legislation for their own gain, and all the taxpayers must suffer because of this!

4. New legislation means more uncertainty and complexities. It will take years of rulings being issued, issues and interpretations being addressed in court, and the taxpayer increasing its cost of compliancy. Consider the practical implementation of the proposed revised section 103 of the Income Tax Act, as it would not be easy to ensure that SARS can apply this appropriately.
5. It is the current complexity of tax legislation that requires that tax avoidance schemes follow complex structures. New legislation would probably force tax avoidance schemes to follow even more complex structures and other means of cloaking the true purposes and steps of the schemes! Our tax legislation is mainly made up of anti-avoidance provisions. The model of specific anti-avoidance works well for governing the majority of the taxpayers. Many of the resent specific tax avoidance provisions/changes together with advanced rulings, reportable transactions, registration of tax practitioners, SARS revised and ever present auditing functions have not been measured. More reliance could be placed on the shoulders of tax practitioners once regulation is in place!
6. The application of section 103 of the Income Tax Act is not always correct. There are many errors of interpretation, incorrect assessments being raised that should not be looked at as failures of section 103 of the Act. Merely the threat of section 103 makes for serious consideration by most organisations that seek to develop or implement an anti avoidance scheme or transaction.
7. The negative affect that specific court finds have on the interpretation and application of section 103 of the Income Tax Act, such as the *Conhage* case, can be minimised with small amendments to the current section 103 of the Act. Finally, with reviewing the normality of any transaction, operation or scheme in question, the so-called 'business purpose' test should be properly applied. The 'business purpose' test refers not to the purpose or intent of the taxpayer, but rather to the purpose of an assumed 'reasonable business mind'. This is a fair and balanced evaluation, if done correctly; together with possible amendment to ensure that not only the hole but also the individual elements of a scheme, operation or transaction be evaluated in this manner (setting aside the *Conhage* case findings).

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