DLA CLIFFE DEKKER HOFMEYR

TAX ALERT

25 October 2013

SARS AND YOUR BANK ACCOUNT

On 29 February 2012, the South African Revenue Service (SARS) issued a notice in Government Gazette No 35090 (Notice No 173) relating to the liability of certain institutions, most notably banks, to furnish SARS with financial information about taxpayers.

The notice was issued in terms of s69 of the Income Tax Act, No 58 of 1962, which section has been superseded by s26 of the Tax Administration Act, No 28 of 2011 (TAA).

In terms of the notice, banks are obliged to furnish financial information to SARS relating to the period 1 March 2012 to 28 February 2013, being the 2013 tax year for taxpayers who are natural persons.

Since natural person taxpayers are currently submitting their returns for the 2013 tax year, it means that SARS will, for the first time, have such financial information available for purposes of verifying information submitted in returns, or for other auditing purposes.

The specific information that banks will by now have had to report to SARS in terms of the notice, for both natural and juristic person taxpayers, includes:

- Names, Surname, date of birth/Registered name if juristic person
- Address, identity number/registration number if juristic person, tax number
- Bank account number and dates account was opened/closed
- Closing balance of account at end of period
- Interest accrued
- Monthly totals of all credits and debits to the account
- FICA status of the taxpayer

The said information has to be reported to SARS in electronic format.

Assuming that all banks have complied with the notice, SARS will by now have an enormous electronic database of financial information about taxpayers in respect of the 2013 tax year.

Perhaps one of the most striking pieces of information that banks have to report to SARS, is the monthly credit and debit totals on taxpayers' bank accounts (one step short of handing over a detailed statement).

It is however not entirely certain how SARS will be able to use all this information in a meaningful manner. At first glance one might assume that SARS will compare the aggregate credit totals of a taxpayer's bank accounts for a relevant period, with the income that the taxpayer has declared in his/her/its return, and that if there is a mismatch, the taxpayer will be seen as having under-declared his/her/its income.

However, on further consideration, it is quite evident that the aggregate credit totals of a taxpayer's bank accounts for a period will not necessarily equate to that taxpayer's gross income for the period, as defined in section 1 of the Income Tax Act No 58 of 1962.

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Amounts reflected in credit totals could for instance be capital in nature, double counted, or held in trust for another. For example:

- Where a taxpayer has multiple accounts, receives money in one account (salary) and transfers an amount to another account (savings account), the same amount will be reflected in the credit totals of both accounts, and sufficient information will not be available in SARS's database to match the corresponding debit amount (only totals are reported).
- Where a taxpayer sells a capital asset (car or other business assets – assuming no recoupment) the amount reflected in the credit total will actually be capital in nature.
- Where a taxpayer receives money from a spouse to settle household expenses, the amount reflected in the taxpayer's credit total will arguably be an amount to be disbursed on behalf of another (the spouse).
- Even where a taxpayer receives a refund from SARS, the amount will arguably be capital in nature, and the credit total will be inaccurate for purposes of determining gross income.

For purposes of the 2014 tax year, a similar notice was published in terms of section 26 of the TAA (Government Gazette No 36346, Notice No 260, 5 April 2013). This notice requires banks to submit similar information in accordance with SARS's IT3 data submission specification.

In addition to the above, s179 of the TAA gives SARS sweeping powers to instruct a taxpayer's bank to transfer funds from that taxpayer's account to SARS in circumstances where there is an alleged tax debt owed to SARS (whether disputed or not). A taxpayer, whether a salaried natural person or a large corporate conducting business, may very well find itself with an empty bank account on any given day.

In light of the above, it will not be surprising to find that some taxpayers may be tempted to revert to a system of keeping their cash under the mattress, as opposed to handing it over to their banker.

Heinrich Louw

TAXPAYER, CHOOSE YOUR WEAPON – CAREFULLY

The Pretoria Tax Court made an interesting ruling in *Income Tax Case No 1866 75 SATC 268.*

Section 32(1) of the Value-Added Tax Act, No 89 of 1991 (VAT Act) states that the following decisions of the South African Revenue Service (SARS) are subject to objection and appeal, namely:

- In terms of s23(7) of the VAT Act notifying that person of SARS's refusal to register that person in terms of the VAT Act.
- In terms of s24(6) or (7) of the VAT Act notifying a person of SARS's decision to cancel, or refusal to cancel of his registration in terms of the VAT Act.
- Refusing to approve a method for determining the ratio contemplated in s17(1) of the VAT Act.
- In terms of s50A(3) or (4) of the VAT Act.

However, there are a number of provisions in the VAT Act, in addition to those listed in s32(1) of the VAT Act, that give SARS discretionary powers.

For example, for purposes of the VAT Act, a valid tax invoice, containing certain prescribed details, must be produced. However, s20(7) of the VAT Act provides that, where SARS is satisfied that there are sufficient records available to establish the particulars of any supply, and that it would be impractical to require that a full tax invoice be issued, it may, subject to such conditions as it may consider necessary, dispense with some of the prescribed details or with the need to issue a tax invoice, or give permission that the particulars of a tax invoice be furnished in another manner.

In the case under discussion, SARS raised the preliminary point that the Tax Court did not have jurisdiction to deal with an appeal against the decision by SARS taken under s20(7) of the VAT Act, as the provision is not listed in s32(1) of the VAT Act, and accordingly is not subject to objection and appeal. The Pretoria Tax Court upheld SARS's point. It determined that the correct procedure to challenge a decision of SARS which is not subject to objection and appeal in terms of s32(1) of the VAT Act, is a review application in the High Court; and the Tax Court does not have the power to hear review applications.

However, although it is not entirely clear from the judgment, it appears as if the taxpayer appealed against *an assessment* for VAT raised by SARS, and relied on the provisions of s20(7) of the VAT Act in disputing that assessment. In terms of s33(1) of the VAT Act (which has since been repealed) an appeal against an assessment does lie to the Tax Court.

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The Tax Administration Act, No 28 of 2011 (TAA) now sets out the procedure that taxpayers must follow to lodge an objection or appeal in respect of the VAT Act (and other tax legislation).

Section 104(1) of the TAA states that a taxpayer who is aggrieved by an assessment may object to the assessment. Section 104(2) of the TAA states that a taxpayer may, in the same manner as an assessment, object or appeal against, amongst other things, "any…decision that may be objected to or appealed against under [the VAT Act, among other legislation]."

Section 105 of the TAA is headed "Forum for dispute of assessment or decision" and states that a taxpayer may not dispute an assessment or decision in any court or other proceedings, except as provided for in Chapter 9 of the TAA or by application for review to the High Court.

Section 107 of the TAA states that, if SARS disallows an objection in whole or in part, then the taxpayer may appeal to the Tax Court (or the tax board, if the amount in dispute is relatively small). In terms of section 117 of the TAA, the Tax Court has jurisdiction over tax appeals lodged in terms of section 107 of the TAA.

To return again to the provisions of the VAT Act. The authors of De Koker, AP and others, *VAT in South Africa*, LexisNexis, at paragraph 19.9 suggest "that taxpayers are entitled to proceed by way of objection and appeal against the exercise of a discretion, where the right of objection and appeal is neither specifically excluded nor specifically granted by the [VAT Act]." Unfortunately, no authority is provided for this proposition and it would appear to conflict with the law as laid down by the Pretoria Tax Court in the case under discussion.

However, there may be another angle to the matter. Consider the following example. A taxpayer objects and appeals against *an assessment* raised by SARS. The taxpayer's objection and appeal is based on the fact that SARS should, in terms of s20(7) of the VAT Act, have accepted a tax invoice that omitted certain non-material details. In that case, the taxpayer would not be objecting against *a decision* but against *an assessment*; and, arguably, the taxpayer would not need to apply for a review to the High Court, but would be able to follow the procedure set out in the TAA.

The matter would be different if, say, the taxpayer asked SARS to accept a document as a tax invoice in terms of s20(7) of the VAT Act and, prior to raising an assessment, SARS determines on spurious grounds that it is not satisfied as contemplated in that provision. In that case, the taxpayer would probably, in the light of the provisions of s32(1) of the VAT Act, as read with the provisions of s104(2) of the TAA and the judgment under discussion, be obliged to apply to the High Court for a review of SARS's actions.

What is apparent is that a taxpayer must be very careful when considering the procedure and forum she must use to dispute a decision of SARS.

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