

TAX

MINOR DELAY IN THE INTRODUCTION OF THE INTEREST WITHHOLDING TAX

SARS GUIDE ON THE NEW DISPUTE RESOLUTION RULES

MINOR DELAY IN THE INTRODUCTION OF THE INTEREST WITHHOLDING TAX

South Africa has been expecting the introduction of a withholding tax on interest paid to foreign persons for a number of years now. In terms of the Taxation Laws Amendment Act, No 31 of 2013 the interest withholding tax was to apply in respect of interest that is paid or became due and payable on or after 1 January 2015.

However, in terms of the revised draft Taxation Laws Amendment Bill, 2014 (TLAB), which was tabled in parliament on 15 October 2014 and is likely to be promulgated in its current form, a subtle amendment has been made to the effective date such that the interest withholding tax will only be effective from 1 March 2015.

Taxpayers are unlikely to be too concerned that the interest withholding tax has been delayed by three months. What may be concerning to taxpayers is that in the draft legislation released for public comment and other correspondence with the public there was no mention of the intention to delay the interest withholding tax. Furthermore, the amendment has been made towards the end of the TLAB which can easily be overlooked.

This is not the first time where subtle amendments have been made to the tax legislation, which have not previously been presented to the public. It is recalled that when the new anti-avoidance provisions in s24BA of the Income Tax Act, No 58 of 1962 (Act) were introduced in terms of the Taxation Laws Amendment Act, No 22 of 2012 (TLA 2012), the "value shifting arrangement" definition was to be amended such that it would no longer be applicable to

companies and only apply to trusts and partnerships. The amendment was only to be effective from 1 January 2014 as National Treasury required further time to ensure that the change did not give rise to anti-avoidance.

In the initial Draft Taxation Laws Amendment Bill, 2013 no mention was made of the potential repeal of s102 of the TLA 2012, which provision was to exclude companies from the "value shifting arrangement" provisions as part of the introduction of s24BA of the Act. However, in the final Taxation Laws Amendment Act, 2013, it was announced that the proposed amendment to the value shifting arrangements would be repealed and has been repealed with effect from 1 February 2013. As a result of this late amendment to the Act potential anomalies arose in the interpretation and application of the applicable legislation.

When the TLAB is promulgated into law it is therefore important that taxpayers and consultants carefully consider the amendments that have been made to the Act and other applicable tax legislation. There may be other subtle amendments that have been made in the TLAB, which have not previously been presented to the public.

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SARS GUIDE ON THE NEW DISPUTE RESOLUTION RULES

On 28 October 2014, the South African Revenue Service (SARS) released a guide on the rules promulgated in terms of s103 of the Tax Administration Act, No 28 of 2011 (TAA) dealing with the resolution of disputes in South Africa (Guide).

The rules, promulgated on 11 July 2014 (new Rules), replaced the rules promulgated under s107A of the Income Tax Act, No 58 of 1962 (old Rules). The new Rules prescribe the procedures to be followed in respect of objections and appeals in respect of assessments or certain administrative decisions by SARS. The new Rules also deal with procedures to be followed in respect of alternative dispute resolution and various other issues relating to the Tax Court.

In our Tax Alert dated 18 July 2014, it was noted that some of the most noteworthy departures from the old Rules were the following:

- SARS now has 45 days to provide the taxpayer with reasons for an assessment where adequate reasons were not provided. Under the old Rules, SARS was afforded 60 days;

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- SARS now has 60 days after the delivery of a taxpayer's objection to notify the taxpayer of the outcome of the objection. Under the old Rules, SARS was afforded 90 days; and
- the introduction of the notion of 'test cases'.

Having regard to the new Rules as read with the newly published Guide, the discussion below serves as a guideline to the practical interpretation and application of the new Rules.

Reasons for an assessment

S96 of the TAA provides that in the case of an assessment based on an estimation or an assessment that is not fully based on a return submitted by the taxpayer, SARS must issue a statement of grounds of assessment. The statement of grounds of assessment should generally enable the taxpayer to understand the basis of the assessment and to object thereto.

In terms of rule 6 of the new Rules, a taxpayer who is aggrieved by an assessment may request SARS to provide reasons for the assessment to enable the taxpayer to formulate an objection. The Guide specifically provides that the effect of such a request by the taxpayer is that the taxpayer need not lodge an objection until a response is received from SARS. The Guide also provides that after SARS receives such a request and it is satisfied that the reasons required to enable the taxpayer to formulate an objection have been provided, SARS must notify the taxpayer within 30 days after the delivery of the request for reasons. However, where, in the opinion of a SARS official, the reasons required to enable the taxpayer to formulate an objection have not been provided, SARS must provide such reasons within 45 days after the delivery of the request for reasons.

Importantly the period for providing reasons may be extended by SARS if a SARS official is satisfied that due to exceptional circumstances, the complexity of the matter or the principle or the amount involved, additional time is required by SARS to provide reasons to the taxpayer.

Objection

Rule 9 of the new Rules further provides that when a taxpayer lodges an objection, SARS is required to notify the taxpayer of the allowance or disallowance of the objection, either in whole or in part, and the basis thereof. SARS must notify the taxpayer of its decision in writing within 60 days after delivery of the taxpayer's objection.

If however SARS requires more time to deal with the objection due to exceptional circumstances, the complexity of the matter or the principle or the amount involved, SARS may extend the initial period by a period not exceeding 45 days.

The Guide provides that if SARS fails to notify the taxpayer of the outcome of the objection within the prescribed period, the taxpayer may:

- pursue a complaint within the SARS internal administrative complaints resolution process and if unsuccessful, submit a complaint to the Tax Ombud; or
- apply for default judgment under rule 56 of the new Rules.

Exchange of pleadings

A taxpayer who lodges an appeal must deliver a notice of appeal within 30 days after SARS has delivered the notice of disallowance of the objection. In the notice of appeal, the taxpayer must specify in detail –

- which of the grounds of objection are being taken on appeal;
- the grounds for disputing SARS' basis of the decision to disallow the objection as set out in the notice of disallowance; and/or
- any new ground on which the taxpayer is appealing.

Rule 10 of the new Rules provides that a taxpayer may add new grounds when lodging a notice of appeal. However, this rule is limited by rule 10(3) which provides that a taxpayer may not appeal on a ground that constitutes a new objection

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against a part or amount of the disputed assessment not objected to in the notice of objection.

For example, a taxpayer may not object to the imposition of an understatement penalty in the same assessment, if this was not included in the notice of objection. The taxpayer may however specify a new ground explaining why the disallowed expenditure was, for example, in the production of income which was not specified in the notice of objection. The taxpayer must produce any documentation requested by SARS relating to the new ground in order to decide on the further progress of the appeal.

Following the taxpayer's notice of appeal, SARS must deliver to the taxpayer a statement of grounds of assessment and opposing appeal. Such statement would contain the consolidated grounds of assessment, the facts in the notice of appeal that are admitted to and opposed to by SARS as well as the material facts and legal grounds upon which SARS bases its assessment.

The Guide provides that SARS may include new grounds in its statement of assessment and opposing the appeal. However, SARS may not include any grounds which constitute a novation of the whole of the factual or legal basis of the disputed assessment or which require the issue of a revised assessment.

If SARS includes new grounds in the statement of grounds of assessment, the taxpayer may deliver a notice of discovery to SARS requesting any documents material to the new grounds of assessment to the extent that such documents are required by the taxpayer to formulate its grounds of appeal. The taxpayer will only need to deliver its statement of grounds of appeal following the discovery by SARS.

Following SARS' statement of grounds of assessment, the taxpayer may include a new ground to its statement of grounds of appeal, subject to the limitation in rule 10(3). SARS may similarly deliver a notice of discovery to the taxpayer requesting any documents material to the new ground of appeal. The taxpayer may then, in its reply to SARS' statement of grounds of assessment, deal with any new ground of assessment and amend its statement of grounds of appeal to deal with the grounds of assessment. If the matter has been set down for hearing, rule 45(2) makes provisions for either party to seek a postponement to deal with any new ground raised by the other party.

Test cases

S106(6) of the TAA states that if a senior SARS official considers that the determination of an objection or an appeal, whether on a question of law or question of fact or both, is likely to be determinative of all or a substantial number of issues involved in one or more other objections or appeals, the official may:

- designate that objection or appeal as a test case; and
- stay the other objections or appeals by reason of the taking of a test case on a similar objection or appeal before the tax court.

Rule 12(2) of the new Rules provides that a SARS official who designates an objection or appeal as a test case, must provide the taxpayer with a notice informing such taxpayer of the number and common issues involved in the objections or appeals that the test case is likely to be determinative of, the questions of law or fact or both, and the importance of the test case to the administration of the relevant tax Act.

In response to the notice, the taxpayer may, within 30 days of receiving the notice, oppose the decision to designate an objection or appeal as a test case or alternatively oppose the staying of an objection or appeal pending the final determination of a test case. If the objection or appeal is to be stayed, the taxpayer may request a right of participation in the test case.

A test case is heard by the tax court. In terms of s129 of the TAA, the court may confirm or order the assessment or decision to be altered, or alternatively refer the assessment or decision back to SARS for further examination and assessment.

Having regard to the above, in order to ensure that taxpayers are treated in an administratively fair manner when engaged in disputes with SARS, strict compliance with the new Rules by both SARS and the taxpayers is required.

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