TAX

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SARS'S POWER TO REQUEST RELEVANT MATERIAL

Section 46(1) of the Tax Administration Act, No 28 of 2011 (TAA) gives the South African Revenue Service (SARS) the power, for purposes of the administration of a tax act in relation to a taxpayer, to request a taxpayer *or another person*, within a reasonable period, to submit relevant material (whether orally or in writing) to SARS. This subsection applies to taxpayers whether identified by name or objectively identifiable. Subsection (2) gives a senior SARS official the authority to request relevant material in respect of taxpayers in an objectively identifiable class of taxpayers.

Section 46 often creates difficulties for the 'other persons' referred to in this section, such as banks, who may be the recipients of requests for relevant material from SARS in respect of their own clients, being the taxpayers in question. Banks owe a duty to their clients not to disclose information concerning their clients' affairs, which duty is qualified. The English case of *Tournier v National Provincial and Union Bank of England* 1924 1 KB 461 laid down the principle that a banker may disclose information regarding his client's affairs where, *inter alia*, the disclosure is under compulsion of the law. Section 234 of the TAA provides that a person who wilfully and without just cause:

- refuses or neglects to furnish, produce or make available any information, document or thing;
- fails to comply with a directive or instruction issued by SARS to the person under a tax act;
- fails or neglects to disclose to SARS any material facts which should have been disclosed under the TAA or to notify SARS of anything which the person is required to notify SARS under a tax act; or
- obstructs or hinders a SARS official in the discharge of the official's duties,

is guilty of an offence and, upon conviction, is subject to a fine or imprisonment for a period not exceeding two years.

Section 46(3) of the TAA limits any request for relevant material from a person other than the taxpayer to relevant information related to the records maintained or that should reasonably be maintained by the person in relation to the taxpayer. In this regard, SARS cannot request banks to provide it with material which the banks are not required or cannot reasonably be required to maintain. Section 46(6) further requires these requests to refer to the relevant material with reasonable specificity.

However, whereas banks could previously have refused to provide SARS with material requested in terms of s46 of the TALAA on the basis that the bank did not consider the material to be relevant, the Tax Administration Laws Amendment Act No 44 of 2014 (TALAA) has now amended the definition of "relevant material" in the TAA to mean "any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act…" (our emphasis). It is therefore no longer within a bank's discretion to decide whether material is relevant.

The Explanatory Memorandum to the TALAA states that the reason for this amendment is to *"prevent protracted disputes around entitlement of information and the consequent waste of resources… the term foreseeable relevance does not imply that taxpayers may unilaterally decide relevance and refuse to provide access thereto, which is what is happening in practice".*

The Explanatory Memorandum states that the test for what is foreseeably relevant should have a low threshold, and that the following considerations should be applied:

- whether, at the time of the request, there is a reasonable possibility that the material is relevant to the purpose for which it is sought;
- whether the material, once provided, actually proves to be relevant is immaterial;
- a request may not be declined in cases where a definite determination of the relevance of the material requested for an ongoing audit or investigation can only be made following receipt of the material;
- there need not be a clear and certain connection between the material requested and the purpose for which it is requested, but a rational possibility that the material will be relevant to the purpose; and
- the approach is to first produce the material and allow a definite determination to occur later.

Businesses, and banks in particular, are therefore urged to take note of these new amendments to the TAA, particularly in light of the criminal offences created by s234 of the TAA.

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DRAFT RULING ON THE TERMINATION OF STC CREDITS AND THE EFFECT ON DIVIDENDS DECLARED BUT PAID ON OR AFTER 1 APRIL 2015

The South African Revenue Service (SARS) recently issued a draft Binding General Ruling (BGR) that seeks to address the tax position regarding the availability of the secondary tax on companies (STC) credits where dividends are declared before 1 April 2015, but paid on or after that date.

By way of background, STC was a tax on the company declaring a dividend. However, with the introduction of the dividends tax regime, effective from 1 April 2012, the tax liability was shifted from the company declaring the dividend (not being a dividend *in specie*) to the beneficial owner of the dividend. In terms of s64E(1) of the Income Tax Act, No 58 of 1962 (Act), dividends tax must be levied at the rate of 15% of the amount of any dividend paid.

Under the STC regime, companies effectively paid STC on the amount by which the dividends it declared exceeded the amount of dividends that accrued to it during a dividend cycle. To the extent that the dividends accrued to it exceeded the amount of dividends declared by it as at the effective date of dividends tax, companies were given an STC credit that would temporarily reduce any dividends tax liability. Section 64J(1) of the Act stipulates that a dividend paid by a company is not subject to dividends tax to the extent that the dividend does not exceed the STC credit of the company and the company has, by the date of payment, notified the person to whom the dividend is paid of the amount by which the dividend reduces the STC credit of the company. Accordingly, the purpose of s64J(1) of the Act is to prevent the double taxation of profits of the company that were previously subject to STC in the distributing company.

It should be noted that in terms of s64J(5) of the Act, the STC credit of a company is deemed to be nil on or after the third anniversary of the effective date, being 1 April 2015. Accordingly the STC credit of a company should be applied against a dividend paid by a company before 1 April 2015.

Having regard to the wording of s64E(1) read with s64J(1) of the Act, the issue that arises is whether the STC credit of a company can only be applied against a dividend paid by that company before 1 April 2015, or whether the wording of the aforementioned sections can be interpreted broadly so as to include the application of the STC credit against a dividend declared by a company before 1 April 2015 but only paid on or after that date.

In this regard, it is important to note that the wording in both s64E(1) and s64J(1) of the Act refer to a dividend 'paid' by a company. Section 64E(2) of the Act provides that for purposes of a listed company, a dividend must, to the extent that the dividend does not consist of the distribution of an asset *in specie*, be deemed to be paid on the date that the dividend is paid. A dividend declared by a listed company that consists of the distribution of an asset *in specie*, must be deemed to be paid on the earlier of the date on which the dividend is paid or becomes due and payable. A dividend declared by an unlisted company must be deemed to be paid on the earlier of the date on which the dividend is paid or becomes due and payable.

In light of the above, SARS ruled that the STC credit of a company must be applied against any dividend paid by that company before 1 April 2015, if all the requirements of s64J(1) are met. The STC credit of a company cannot be applied against a dividend declared by it before 1 April 2015 but which is only paid on or after 1 April 2015.

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