

15 OCTOBER 2020

TAX & EXCHANGE CONTROL ALERT

IN THIS ISSUE

Voluntary disclosure programme: The High Court interprets the provisions of the Tax Administration Act

The Voluntary Disclosure Programme (VDP), contained in Part B of Chapter 16 of the Tax Administration Act 28 of 2011 (TAA), was introduced to encourage non-compliant taxpayers to come forward, and provide an account of their non-compliance with a view to regularizing their tax affairs. A valid disclosure and conclusion of a voluntary disclosure agreement with SARS shields the taxpayer from criminal prosecution and provides relief from the non-compliance and understatement penalties which would ordinarily have been imposed.

Voluntary disclosure programme: The High Court interprets the provisions of the Tax Administration Act

Section 226(1) of the TAA provides that voluntary disclosure relief may be applied for by a person acting in their personal, representative, withholding or other capacity.

The Voluntary Disclosure Programme (VDP), contained in Part B of Chapter 16 of the Tax Administration Act 28 of 2011 (TAA), was introduced to encourage non-compliant taxpayers to come forward, and provide an account of their non-compliance with a view to regularizing their tax affairs. A valid disclosure and conclusion of a voluntary disclosure agreement with SARS shields the taxpayer from criminal prosecution and provides relief from the non-compliance and understatement penalties which would ordinarily have been imposed.

Section 226(1) of the TAA provides that voluntary disclosure relief may be applied for by a person acting in their personal, representative, withholding or other capacity. Section 227 prescribes the requirements for a valid disclosure, and it must:

- Be voluntary;
- Involve a "default", defined in section 225 as "the submission of inaccurate or incomplete information to SARS, or the failure to submit information or the adoption of a "tax position", where such submission, non-submission, or adoption resulted in an understatement";
- Be full and complete;
- Involve a behaviour listed in column 2 of the understatement penalty percentage table in section 223, for example "reasonable care not taken in completing return", "substantial understatement" and "intentional tax evasion";
- Not result in a refund being due by SARS; and
- Be made in the prescribed form.

The recent case of *Purveyors South Africa Mine Services (Pty) Ltd v CSARS* [2020] ZAGPPHC 409 (25 August 2020) (Purveyors Case) dealt with the interpretation of the requirements for a valid disclosure and the voluntariness thereof under sections 226 and 227 of the TAA.

Facts

The taxpayer in the Purveyors Case had during 2015 imported an aircraft into South Africa to use in its business operations. This importation attracted a liability for import VAT, but the taxpayer failed to pay the amount due.

During the latter part of 2016, the taxpayer manifested reservations about having failed to pay the VAT due and accordingly engaged with SARS representatives to obtain a view on its liability in early 2017. In this engagement the taxpayer only presented a broad overview of the facts at hand.

On 1 February 2017, SARS informed the taxpayer that VAT ought to have been paid on the importation and that penalties were to be imposed as a result of the taxpayer's default and until May 2017 from time to time engaged with the taxpayer to take steps to regularize their tax affairs.

On 4 April 2018 the taxpayer applied for voluntary disclosure relief under the VDP. This application was rejected by SARS, leading to the application to review SARS' decision to reject the application.

Judgment

The existence of a default, as defined, in the non-payment of VAT was common cause. However, the taxpayer argued that under section 226(2) of the TAA the

Voluntary disclosure programme: The High Court interprets the provisions of the Tax Administration Act...*continued*

The purpose of the VDP was held to be *"to enhance voluntary compliance in the interests of good management of the tax system and the best use of SARS's resources. It seeks to encourage taxpayers to come forward on a voluntary basis to regularize their tax affairs with SARS and thus avoid imposition of understatement penalties"*.

disclosure was voluntary, as it had not been given notice of an audit or criminal investigation, nor had such audit or investigation been concluded at the time of making the VDP application.

SARS in turn argued that section 227 of the TAA envisages a disclosure of facts or information of which SARS had not been aware. Further, as there had been an indication by SARS officials that the VAT was due and penalties would be imposed, the disclosure was not voluntary.

Fabricius J therefore held that the concepts of *"voluntary"* and *"disclosure"* would be determinative of the dispute. In order to properly interpret the provisions, the court held it necessary to first set out the context of the VDP.

The purpose was held to be *"to enhance voluntary compliance in the interests of good management of the tax system and the best use of SARS's resources. It seeks to encourage taxpayers to come forward on a voluntary basis to regularize their tax affairs with SARS and thus avoid imposition of understatement penalties"* and the *"VDP is further aimed at promoting ethical and moral conduct by incentivizing errant taxpayers to make amends in respect of any defaults by them by informing SARS of the default and of which SARS is ignorant."*

The court accepted SARS' contention that section 226(1) applies to any taxpayer, while section 226(2) only applies to taxpayers who have been issued with a notice of audit or investigation, but that the requirements of section 227 must be satisfied in either case. The court further held that the interpretation argued for by the taxpayer – that an application is always voluntary if no notice of audit or investigation has been issued – was too narrow.

Turning to the meaning of the word *"voluntary"*, Fabricius J held that in accordance with the ordinary meaning of the word it must be interpreted as meaning *"an act in accordance with the exercise of free will."* Further, that *"if there is an element of compulsion underpinning a particular act, it is no longer done voluntarily."* Thus, where a taxpayer has been warned of its liability for interest and penalties, the voluntariness of the disclosure is undermined – as was the case here.

The application was thus dismissed.

Tsanga Mukumba and Louis Botha

CDH'S COVID-19 RESOURCE HUB

Click here for more information 



OUR TEAM

For more information about our Tax & Exchange Control practice and services, please contact:



Emil Brincker
National Practice Head
Director
T +27 (0)11 562 1063
E emil.brincker@cdhlegal.com



Mark Linington
Private Equity Sector Head
Director
T +27 (0)11 562 1667
E mark.linington@cdhlegal.com



Stephan Spamer
Director
T +27 (0)11 562 1294
E stephan.spamer@cdhlegal.com



Gerhard Badenhorst
Director
T +27 (0)11 562 1870
E gerhard.badenhorst@cdhlegal.com



Ben Strauss
Director
T +27 (0)21 405 6063
E ben.strauss@cdhlegal.com



Jerome Brink
Director
T +27 (0)11 562 1484
E jerome.brink@cdhlegal.com



Louis Botha
Senior Associate
T +27 (0)11 562 1408
E louis.botha@cdhlegal.com



Petr Erasmus
Director
T +27 (0)11 562 1450
E petr.erasmus@cdhlegal.com



Keshen Govindsamy
Senior Associate
T +27 (0)11 562 1389
E keshen.govindsamy@cdhlegal.com



Dries Hoek
Director
T +27 (0)11 562 1425
E dries.hoek@cdhlegal.com



Varusha Moodaley
Senior Associate
T +27 (0)21 481 6392
E varusha.moodaley@cdhlegal.com



Heinrich Louw
Director
T +27 (0)11 562 1187
E heinrich.louw@cdhlegal.com



Louise Kotze
Associate
T +27 (0)11 562 1077
E louise.kotze@cdhlegal.com



Howmera Parak
Director
T +27 (0)11 562 1467
E howmera.parak@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

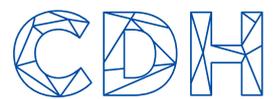
CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2020 9451/OCT



CLIFFE DEKKER HOFMEYR