TAX & EXCHANGE CONTROL

ALERT

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INCORPORATING
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KENYA

The Voluntary Unclaimed Financial Assets Disclosure Programme: The waiver of penalties and the tax angle

The Unclaimed Financial Assets Act of 2011 (Act) provides for the reporting and dealing with unclaimed financial assets and establishes the Unclaimed Financial Assets Authority (Authority).

The Act defines unclaimed assets as assets that have been presumed abandoned and have become unclaimed assets under the provisions of the Act, assets that have been transferred to the Authority as unclaimed assets under the Act, and assets that have been deemed under any other law to be unclaimed assets and payable to the Authority, including all income, dividends and interest, but excluding any lawful charges. The Act further defines a holder as any entity that holds assets on behalf of an owner or that is in possession of assets belonging to another.

The Act provides an obligation on a person holding unclaimed assets to make a report concerning the assets to the Authority, and at the time of filing the report to pay, deliver to, or hold to the order of the Authority such assets.

PENALTIES AND WAIVER

The Act imposes penalties on a person who fails to pay or deliver unclaimed assets within the time prescribed by the Act. Such a person shall pay to the Authority interest at the current monthly rate of one percentage point above the adjusted prime rate per annum per month on the assets or value of the assets from the date the assets should have been paid or delivered.

The Finance Act of 2022 (Finance Act) amended the Act by providing that these penalties shall be directly recovered as civil debts and, in total, not exceed the value of the assets found to be reportable and deliverable. Additionally, The Finance Act also amended the Act by introducing a waiver by the Authority (with the approval of the Cabinet Secretary) of the penalties and fines where:

- the waiver is intended to facilitate the holder of the asset disclosing and delivering the undeclared asset to the Authority;

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- in the opinion of the Authority there are justifiable reasons to do so; or
- it is in the public interest to do so.

Further, the Act was amended to establish the Voluntary Unclaimed Financial Assets Disclosure Programme, which only applies to assets held up to 30 June 2022. The programme is for a period of 12 months from 1 July 2022. The purpose of establishing this programme is to grant relief of the penalties and interest in unclaimed assets where the holder discloses, reports or delivers the assets to the Authority in accordance with the Act.

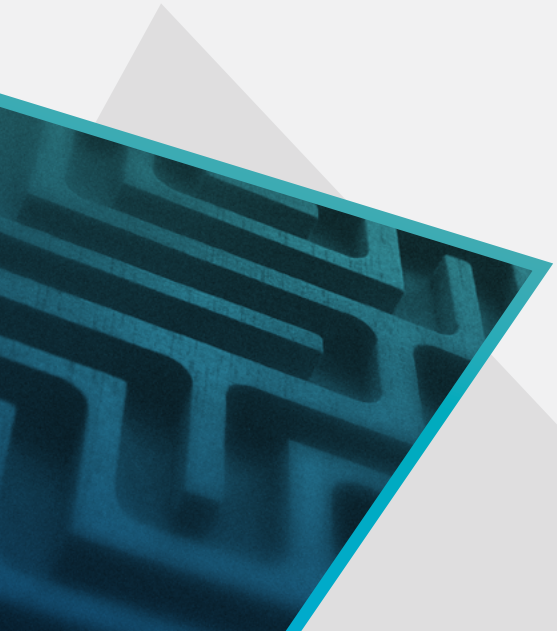
COMPARATIVE ANALYSIS WITH THE US EQUIVALENT OF THE VOLUNTARY DISCLOSURE PROGRAMME

Certain states in the US offer similar voluntary disclosure agreement programmes to encourage holders to comply with their unclaimed property reporting obligations. Under new Wisconsin state laws, all businesses, organisations and government units holding unclaimed property in Wisconsin are given the opportunity to apply for an Unclaimed Property Voluntary Disclosure Agreement (VDA) with the Wisconsin Department of Revenue without late filing fees or penalties. As with Kenya's programme, the VDA has been provided for a set period from 1 February 2022 to 28 February 2023.

The state of Wisconsin has the following conditions for holders to qualify for its voluntary disclosure programme:

- They must have unclaimed property to report from any of the five most recent reporting periods.
- They must have not been audited for unclaimed property since 1 July 2016, or received a notice of an upcoming audit.
- They must not have a balance due on their unclaimed property holder account.

Other states such as Delaware, New York, Florida, Georgia, Ohio, Virginia and California also offer formal disclosure or compliance programmes.



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All in all, holders should embrace and take part in the Voluntary Unclaimed Financial Assets Disclosure Programme as it benefits them to achieve compliance with their unclaimed assets reporting obligations while avoiding the imposition of penalties and fines that might apply in an audit. Finally, participation in a voluntary disclosure agreement programme may assist holders in proactively managing and maintaining their compliance with the Act going forward.

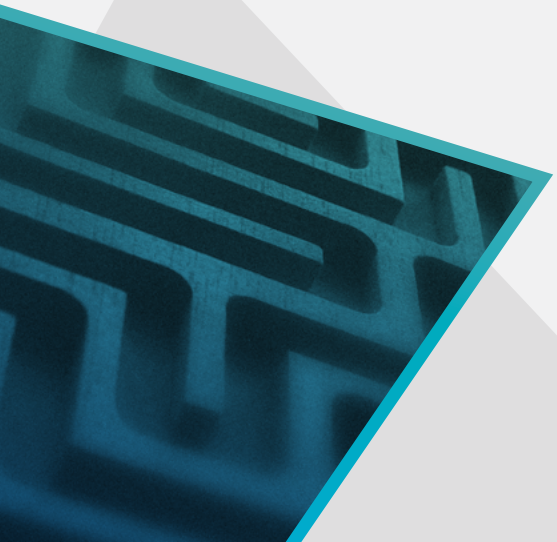
THE TAX ANGLE ON REPORTING UNCLAIMED ASSETS

Reporting unclaimed financial assets to the Authority can help taxpayers to clean up their books by getting rid of unclaimed payables when reporting and delivering them to the Authority.

Costs incurred in conducting a self-assessment on reportable unclaimed assets are deductible for tax purposes, however, fines and penalties incurred after failing to report unclaimed assets are not tax-deductible expenses. It is therefore important for taxpayers to take advantage of the programme because the penalties and fines can be waived.

Taxpayers can also explore tracing the owners of the unclaimed financial assets and getting express approval from them to forego the assets. Even though this is highly unlikely, in such a scenario, the taxpayer will be expected to recognise the foregone financial asset as a gain and account for corporate income tax.

JOAN KAMAU AND ALEX KANYI



SOUTH AFRICA

Settlements and seizures in tax disputes: A recent judgment

In the context of tax dispute resolution, most disputes are intended to be dealt with by the Tax Court, a creature of statute with its jurisdiction and powers defined by the Tax Administration Act 28 of 2011 (TAA), read with the dispute resolution rules published under section 103 of the TAA.

However, disputes involving the interpretation of settlement agreements and search and seizure provisions in the TAA do not fall within the Tax Court's jurisdiction and are heard by the High Court, such as in the matter of *Wingate-Pearse v The Commissioner for the South African Revenue Service* (54038/20) [2022] ZAGPPHC 732, decided on 30 September 2022.

In this matter, the High Court had to consider, amongst others, two things:

- the interpretation of a settlement agreement concluded between Mr Wingate-Pearse (taxpayer) and the respondent (the South African Revenue Service [SARS]) in 2009; and
- whether the taxpayer had made out a case for the return and delivery of material and goods seized during a 2005 search and seizure operation carried out by SARS.

FACTS

In 2009, the taxpayer brought an urgent application to interdict SARS from enforcing the pay-now-argue-later principle.

The urgent application was settled in terms of a settlement agreement (2009 Agreement), which stated that the taxpayer would do certain things, pending his tax appeal against assessments raised by SARS. This included payment of an amount of approximately R336,000 to SARS (settlement amount), the cession *in securitatem debiti* of certain shareholdings, and tendering security in the form of immovable properties to SARS.

A further settlement agreement was concluded between SARS and the taxpayer in 2020 (2020 Agreement), which stated that the taxpayer had to pay an amount of R3 million in full and final settlement of the taxpayer's outstanding payment obligations. The 2020 Agreement also required SARS to release anything held as security, once the amount of R3 million had been paid.

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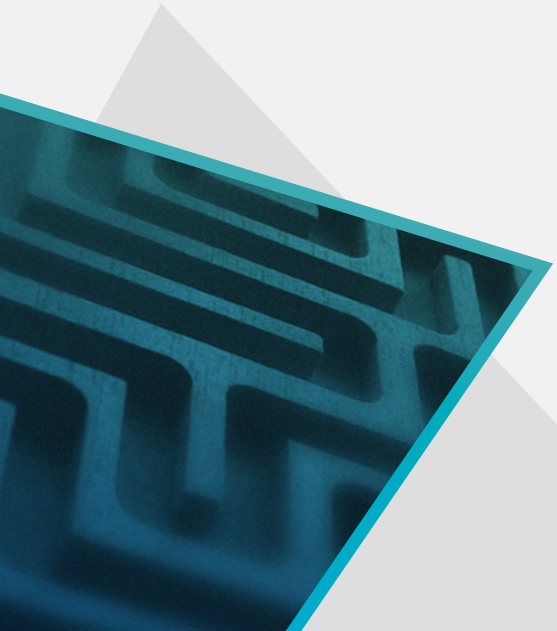

The taxpayer argued that the settlement amount constituted security, which had to be released to him in terms of the 2020 Agreement.

In relation to the seized goods, the taxpayer argued that these must be returned to him in terms of section 66 of the TAA.

JUDGMENT

The settlement amount

While the taxpayer raised various arguments as to why the settlement amount should be seen as security, SARS made arguments as to why it constituted payment of a tax debt. A key issue the court had to consider was how the 2009 Agreement and 2020 Agreement should be interpreted and specifically, whether extrinsic evidence could be relied upon to interpret the agreements. SARS argued that the interpretation of whether the settlement amount constituted security or payment of a tax debt should be determined by considering extrinsic evidence, namely the surrounding circumstances and documents which preceded both the 2009 and 2020 settlements. The specific extrinsic evidence SARS asked the court to consider was correspondence between the parties pursuant to the launching of the urgent application, as part of the settlement negotiations pertaining to the 2009 proceedings.

The High Court rejected the argument that extrinsic evidence is always impermissible, in terms of the well-known parol evidence rule. Its decision was based on the approach set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), which principles were also applied in more recent judgments handed down by the Supreme Court of Appeal and Constitutional Court. As the approach in *Endumeni* required that the text, context and purpose of a document must be considered holistically, the High Court held that it could be taken into account to the extent that it would contextualise the clause in the 2009 Agreement dealing with the settlement amount.

Ultimately, the court considered correspondence between the parties, pleadings filed by the taxpayer in the 2009 urgent application, pleadings filed by the taxpayer in a 2015 review application brought against SARS, portions of the judgment in the 2015 review application, and a 2019 judgment involving the taxpayer and SARS. As these documents referred to the 2009 settlement amount as a payment or interim payment, the High Court drew the inference that the settlement amount could not have been intended as security, considering the extrinsic evidence and both parties' arguments. Therefore, the High Court decided that the settlement amount was a payment towards outstanding tax debt.

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Seizure of goods

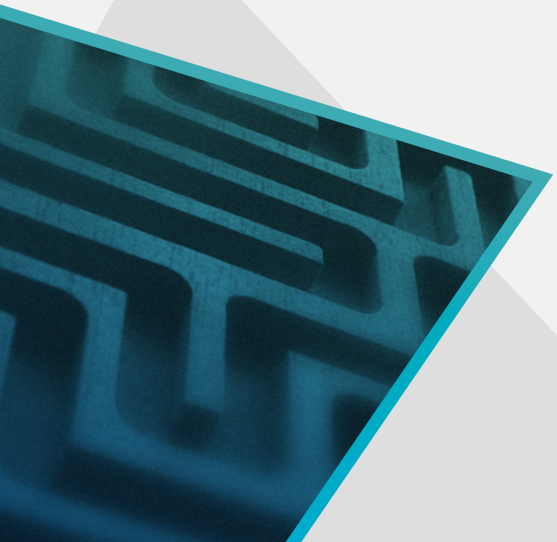
In relation to the seizure of goods, the taxpayer sought an order in terms of section 66 of the TAA for the return of the goods. However, based on the parties' pleadings, the court noted that there were material disputes of fact and decided that the matter had to be referred to oral evidence.

COMMENT

The judgment illustrates that when it comes to interpretation of documents in a tax dispute context, the general principles of interpretation will also apply. Readers must also keep in mind that in the tax context, settlements can arise in different ways. In terms of Part F of the TAA, where there is an ongoing tax dispute arising from a taxpayer's objection against a SARS assessment or decision, there are certain factors that need to be considered to determine whether a dispute is appropriate for settlement. Only if it is appropriate, can the dispute be settled. For example, the TAA notes that settlement may be appropriate in cases where it is a cost-effective way to promote tax compliance with a tax Act by the taxpayer concerned or a group of taxpayers. The settlement provisions in Part F of the TAA only apply where there is a factual or legal interpretation dispute arising from a SARS decision or assessment.

In other words, a dispute about the pay-now-argue-later rule (as it existed when the 2009 Agreement was concluded in the case under discussion) or about suspending the obligation to pay an amount in dispute under section 164 of the TAA, cannot be settled in terms of Part F of the TAA and a different framework would apply to the settlement. For example, the parties can conclude a settlement agreement and have it made an order of court.

LOUIS BOTHA



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BBBEE STATUS: LEVEL ONE 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.

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