

THIRD PARTY APPOINTMENTS BY SARS UNDER THE TAX ADMINISTRATION ACT

On 14 October 2009, the Commissioner of SARS delivered a public address regarding the introduction of administrative penalties for the purpose of policing non-compliance. Referring to debt collection tools, the Commissioner stated: "The first tool we will use is the agent appointment...". Although the agent appointment mechanism was previously understood to be a 'last-resort' option, it is becoming clear that, going forward, SARS will increasingly apply same.

Prior to the enactment of the Tax Administration Act, No 28 of 2011 (TAA), so-called 'agent appointments' were made under s99 of the Income Tax Act, No 58 of 1961 (ITA), alternatively s47 of the VAT Act, 1991. Section 99, since repealed, provided that:

"The Commissioner may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent he has been declared to be."

Section 179 of the TAA has now replaced s99 of the ITA as well as its equivalent in the VAT Act. Section 179 took effect on 1 October 2012 and deals with the obligations of a third party required by SARS to pay money to it in satisfaction of the taxpayer's tax debts. It provides that:

"A senior SARS official may by notice to a person who holds or owes or will hold or owe any money, including pension, salary, wage, or other remuneration, for or to a taxpayer, require the person to pay the money to SARS in satisfaction of the taxpayer's tax debt."

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Section 179 no longer refers to the concept 'agent' – according to the SARS Guide on the TAA the term 'agent' was considered unnecessarily confusing. Section 179 simply states that SARS can require a third party to make payment to it in satisfaction of the taxpayer's tax debt. In practice the s179 collection mechanism is activated through an electronic notice (titled "Assessed tax – Third Party Appointment") issued to the third party. The notice is accompanied by a statement (almost in spreadsheet format) reflecting, among other things, the indebted taxpayer's details, a start and end date, the amount due to SARS and the total amount required to be paid over to SARS by the third party.

Section 179(1) reads "A senior SARS official may by notice..." From what we have seen there is nothing in the electronic "Third Party Appointment" notice to suggest that it had been considered and issued by a senior SARS official. The document merely indicates that it was issued on behalf of the Commissioner. The term "senior SARS official" is defined in s1 of the TAA as a SARS official referred to in s6(3). Section 6(3) provides that the powers and duties required to be exercised by a senior SARS official 'must be exercised' by either the Commissioner, a SARS official who has specific written authority from the Commissioner or a SARS official occupying a post designated by the Commissioner

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for this purpose. The SARS Guide on the TAA indicates that "only a senior SARS official who is authorised to do so by the Commissioner may perform one or more of the more serious powers or functions". The issuing of a s179 notice is listed as such. The question is whether an electronic "Third Party Appointment" notice as currently used by SARS really complies with the above-mentioned provisions of the TAA? For example, a third party appointee has no means of establishing whether a senior SARS has indeed acted in terms of s179 taking into account that said notice nowhere refers to any senior SARS official whatsoever.

The TAA has introduced significant changes compared to the previous s99 ITA / s47 VAT Act agent appointment regimes.

These include:

- Under s179 the third party appointee's obligation to pay money to SARS covers money that it "holds or owes or will hold or owe .. for or to the taxpayer". The use of the future tense indicates that SARS could apply s179 with regard to money not yet in the possession of the appointee, but which might be received in future. For example, a bank could potentially be notified under s179 to pay over money from a fixed deposit coming to maturity. Section 179 can therefore operate prospectively.
- Under s99 of the ITA and s47 of the VAT Act the appointed agent had to comply and could not disclose to the taxpayer that it was obliged to pay SARS the money it held – this was to prevent the taxpayer from moving funds having gotten wind of SARS's intentions. Section 179(3) is along the same lines. It provides that the third party "must pay the money in accordance with the notice". Should the third party part with the money contrary to the notice, the result is personal liability for the money that should have been paid to SARS.
- Where the third party is unable to comply with the notice, s179(2) requires that the senior SARS official must be advised of the reasons for the inability. The senior SARS official "... may withdraw or amend the notice as is appropriate under the circumstances." It has already been indicated that the electronic notice used by SARS reflects no particulars relating to the senior SARS official that purportedly issued same. It merely gives details relating to a SARS contact centre (eg SARS Alberton). It will consequently be very difficult for a third party appointee to engage the responsible senior SARS official for purposes of s179(2).

- The issue of "affordability" is covered in s179(4). It provides that SARS may, on request by the person affected by the notice, amend the notice to extend the period over which the debt must be paid to SARS. This is to allow the taxpayer to pay his basic living expenses and those of his / her dependents. In the "Roadshow Questions and Answers" on the SARS website it is stated that a third party has no discretion to unilaterally determine what instalments are suitable. The taxpayer affected by a third party appointment should therefore contact SARS to discuss the payment arrangements. A third party appointee should therefore not become involved with 'affordability' issues when approached by a taxpayer whose money is subject to a s179 notice. The third party appointee cannot resist the issue of a s179 notice and ss179(4) only allows the taxpayer to approach SARS on the basis of 'affordability'. It is interesting to note that both the Australian Tax Office and the Canadian Revenue Agency have percentage limits on the amount of taxpayer money that may be attached via an agent appointment. These limits are between 25% and 30% of the moneys held by the third party. Unfortunately, the TAA does not specify anything in this regard.

The s179 collection mechanism is sometimes referred to by SARS as a garnishee order (eg on the SARS website). A true garnishee order refers to the attachment of a debt owed to the taxpayer/debtor by a third party (who becomes known as the garnishee), and the debt is usually attached as a once-off arrangement. The debt is then paid by the third party, to the creditor in payment of the debtor's obligation. The s179 third party appointment differs from a true garnishee order in the following respects:

- To obtain a garnishee order a court order is a prerequisite. A third party appointment under s179 requires no court order.
- Where the garnishee is dissatisfied with the garnishee order being issued he could approach the court for redress. A third party appointed under s179 is legally obliged to transfer funds held in favour of the taxpayer to SARS, otherwise such agent could face personal liability for the outstanding amount (see above). Whereas the debtor can beforehand contest the issuing of a garnishee order this is impossible with regard to s179 since the taxpayer will often be oblivious that SARS intends making a third party appointment.

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- On application for a garnishee order, the court could examine the debtor's financial position and vary, or set-aside, the order accordingly. The s179 third party appointment process does not provide for such an examination — effectively there is no *audi alterem* chance for the impacted taxpayer. There is only an *ex post facto* examination of affordability under s179(4) of the TAA (see above).
- Lastly, s37(1) of the Pension Fund Act, No 24 of 1956 provides that a pension fund benefit may not be liable for attachment, including attachment by garnishee order. Section 179 of the TAA specifically empowers SARS require a third party appointee to pay to SARS "any money, including pension, salary, wage, or other remuneration".

We understand that banks are being inundated with s179 third party appointments.

The expectation is that this collection mechanism could also be used increasingly in relation to insurers (policy proceeds), estate agents and conveyancing attorneys (proceeds from property transfers), the JSE (dividends receivable) and so on.

A taxpayer expecting money coming his / her way should tread carefully.

Johan van der Walt and Danielle le Roux

THE COMPLEXITIES OF THE ENGLISH TAX SYSTEM

There was an interesting article in *The Telegraph* on 30 October 2012 by Allister Heath.

The article was considering the increasing complexities in their English tax system and the consequential increase in compliance costs. The article was based on the fact that Tolley's Tax Guide had now reached 11,520 pages, more than double the number of pages in the 1997 Edition. Mr Heath says that this is thanks to Labour's obsession with micro managing the economy but that instead of this being reduced under the Coalition Government as promised by Mr Osborne, ever more pages had been added to the book. He goes on to report that the Institute of Economic Affairs found that the annual operating costs of the British tax system are more than £11 billion. Membership of the Chartered Institute of Taxation had grown 52% between 1996 and 2010. He also gives the statistics that Tolley's Guide for Corporation Tax is now 1,897 pages long, for Income Tax 1,801 pages and for Capital Gains Tax 1,463 pages. He says that the work on Inheritance Tax is 958 pages long and that it would take the world's fastest speaker 10 hours to read aloud. Mr Heath says that it is not just complexity that is crippling taxpayers: the rules keep changing which makes planning impossible. The latest Finance Act in England ran to 670 pages, after 404 pages in 2011.

To quote Mr Heath "Complexity and lack of transparency are spendthrift politicians' best friends: they allow them to pile layer upon layer of oppressive levies on baffled taxpayers, and to blame the cost on others such as oil companies. This undermines legitimacy: people are unable to understand their relative position and believe they are being unfairly singled out. The public does not fully appreciate the amount they are paying and thus the price of Public Services, so they are more likely to call for ever higher spending, regardless of affordability".

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