



TAX ALERT

28 September 2012

INTEREST ON UNPAID TAXES UNDER THE TAX ADMINISTRATION ACT

The Tax Administration Act, No 28 of 2011 (TAA) introduces a new interest regime where as the levying of interest on unpaid taxes is concerned.

The relevant provisions are contained in chapter 12 of the TAA, only part of which will come into operation on 1 October 2012, with the balance of the provisions coming into effect at a later stage. In this regard, it is understood that SARS's accounting system, specifically devised for the implementation of the new interest regime, will not be fully functional by the general commencement date of the TAA, being 1 October 2012.

Generally, in terms of s187 of the TAA, if a tax debt is not paid in full by the 'effective date', interest will accrue on the outstanding balance of the tax debt at the prescribed rate for the period from the effective date to the date that the tax is paid.

The term 'effective date' bears a specific meaning, depending on the nature of the tax. Where income tax for any year of assessment is concerned, the effective date is defined as the date falling seven months after the last day of that year if the taxpayer has a year of assessment ending on the last day of February, and six months after the last day of that year in any other case. With regard to the calculation of interest in relation to estate duty, the effective date is the earlier of the date of assessment or 12 months after the date of death.

In the case of any other taxes, the effective date is the date by which the tax for the tax period is due and payable under any tax Act. For example, in terms of s3(1) of the Transfer Duty Act, No 40 of 1949, transfer duty is payable within six months of the date of acquisition of the immovable property and interest will therefore be charged from the day after the six month period if such duty is not paid.

It is also noted that the effective date in relation to

- a fixed amount penalty, is the date of assessment of the penalty

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- **Interest on unpaid taxes under the Tax Administration Act**
- **New penalty provisions under the Tax Administration Act: administrative non-compliance penalties**

- a percentage based penalty, is the date by which the tax for the tax period should have been paid
- an understatement penalty, is the effective date for the tax understated.

The term 'effective date' also bears a specific meaning depending on the type of assessment raised. In relation to an additional assessment or reduced assessment, it means the effective date in relation to the tax payable under the original assessment. In respect of a jeopardy assessment, the effective date is the date for payment specified in the jeopardy assessment.

Insofar as where an amount refundable by SARS is concerned, interest will, unless otherwise provided in any tax Act, accrue from the later of the effective date or the date that the excess was received by SARS to the date the refunded tax is paid. In other words, if the overpayment giving rise to the refund only occurred after the effective date, interest will be calculated from the 'out-of-pocket' date and not the earlier effective date.

Where a refund is offset against an existing tax liability of the taxpayer, the date on which the offset is effected is considered to be the date of payment by SARS of the refund, unless any tax Act provides otherwise.

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Regarding the first payment of provisional tax, interest is imposed from the effective date for the first payment of provisional tax until the earlier of the date on which payment is made or the effective date for the second payment of provisional tax. In relation to the second payment of provisional tax, interest will run from the effective date for the second payment of provisional tax until the earlier of the date on which payment is made or the effective date for income tax for the relevant year of assessment (ie seven or six months after the last day of the tax year).

For the most part, interest is levied at the prescribed rate, which is the rate as determined by the Minister of Finance from time to time by notice in the Government Gazette. Any new rate will come into operation of the first day of the second month following the month in which the new rate becomes effective for purposes of the Public Finance Management Act, No 1 of 1999. However, in relation to interest payable in respect of refunds on assessment of provisional tax and employee's tax, the rate payable by SARS is calculated at four percentage points below the prescribed rate. To the extent that different rates of interest apply in respect of a tax debt as a result of a change of the prescribed rate, the different rates will need to be applied in relation to the respective portions of the tax period.

On the upside, taxpayers are afforded a measure of relief in that the TAA provides for interest to be remitted in circumstances where a senior official of SARS is satisfied that the interest is payable as a result of circumstances beyond the taxpayer's control. However, these circumstances are expressly limited to a natural or human-made disaster, a civil disturbance or disruption in services, or a serious illness or accident. Further, the designated SARS senior official is only empowered to direct that so much of the interest that is attributable to such circumstances is not payable by the taxpayer. This discretion is also limited to the extent that the SARS official is not prohibited from remitting the interest in terms of any tax Act.

It should be appreciated that from the date prescribed by SARS by public notice any interest payable will be calculated on the daily balance owing and will be compounded monthly. According to SARS, this will introduce the commercially acceptable method of calculating interest across all tax types and gives effect to the principle that interest is compensation for the loss of use of money.

Overall, the provisions contained in chapter 12 of the TAA provide a framework for the alignment of the levying of interest across all taxes. It remains to be seen by when SARS will have its systems up and ready to fully implement the new interest regime.

Andrew Seaber

NEW PENALTY PROVISIONS UNDER THE TAX ADMINISTRATION ACT: ADMINISTRATIVE NON-COMPLIANCE PENALTIES

Chapters 15, 16 and 17 of the Tax Administration Act, No 28 of 2011 (TAA), which comes into operation on 1 October 2012, contains the new penalty provisions that are at SARS's disposal in respect of taxpayers who do not comply with administrative provisions, understate taxable amounts, or commit a criminal offence by not complying with statutory obligations or evading tax.

This article deals specifically with Chapter 15 (s208 to 220) and the so-called administrative non-compliance penalties.

The purpose of Chapter 15 is quite clear as s209 of the TAA states in no uncertain terms that it is to ensure:

- the 'widest possible compliance' with tax legislation and the 'effective administration' of tax legislation; and
- that administrative non-compliance penalties are imposed 'impartially, consistently, and proportionately to the seriousness and duration of the non-compliance'.

There are essentially two types of administrative non-compliance penalties, namely fixed amount penalties and percentage based penalties.

Fixed amount penalties will apply to non-compliance with obligations imposed by any tax legislation and which obligations have been listed in a notice issued by SARS. SARS has not yet issued such a list, but SARS's "Short Guide to the Tax Administration Act" lists the following obligations that taxpayers can expect to find in the list:

- registration when required and within applicable time periods;
- submission of supporting documents;
- informing SARS of changes in address, representative taxpayer or banking details;
- filing a return on time and in the prescribed form;
- record retention;
- providing material on request and attending interviews;
- cooperation when audited or investigated;
- giving full and accurate information when requesting payment arrangements.

The fixed amount of the penalty is determined with reference to the taxpayer's taxable income for the previous tax year. Section 211 of the TAA incorporates a table that lists the amount of the penalty that corresponds with a particular taxable income bracket.

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Taxable income in previous tax year	Penalty
Assessed loss	R250
R0 to R250,000	R250
R250,001 to R500,000	R500
R500,001 to R1,000,000	R1,000
R1,000,001 to R5,000,000	R2,000
R5,000,001 to R10,000,000	R4,000
R10,000,001 to R50,000,000	R8,000
Above R50,000,000	R16,000

The penalty is essentially a monthly penalty, which means that a penalty in the relevant amount will be levied every month for as long as the non-compliance is not remedied, subject to certain limitations.

The first penalty will be levied as soon as there is non-compliance and SARS makes a penalty assessment.

If SARS has the address of the taxpayer and is able to deliver the assessment in respect of the penalty, the taxpayer will be afforded a month after the date of the assessment to remedy the non-compliance. If the non-compliance is not remedied within that month, a further penalty will be levied, and also for each month thereafter that the non-compliance persists, but limited to 35 months.

If SARS does not have the address of the taxpayer and is unable to deliver the assessment in respect of the penalty, the taxpayer will be afforded a month after the date of the non-compliance to remedy the non-compliance. If the non-compliance is not remedied within that month, a further penalty will be levied, and also for each month thereafter that the non-compliance persists, but limited to 47 months.

With reference to the penalty table, certain persons automatically fall within the R10 000 001 to R50 000 000 bracket:

- Listed companies
- A company whose gross receipts and accruals for the preceding year exceed R500 million
- A group company in a group that contains one of the aforementioned companies
- A person or entity exempt from income tax but liable to tax under any other tax legislation and whose receipts or accruals exceed R30 million

This does not apply to persons who fall within the next bracket or who did not trade during the year of assessment.

Percentage based penalties are penalties that may be levied in addition to other penalties such as the fixed amount penalties discussed above. These penalties relate to amounts of tax imposed by tax legislation, and which amounts are not paid as and when required. The specific percentage (of the amount not paid) is to be prescribed in the relevant tax legislation imposing the tax.

The procedure for imposing administrative non-compliance penalties requires SARS to make a penalty assessment, and to give notice to the taxpayer of such penalty assessment.

The penalty will be due upon the assessment and the date for payment will be stipulated on the assessment.

The TAA also provides for a mechanism whereby a person can request that a penalty that has been levied be remitted. Such a request is subject to time limitations, and will only be allowed in respect of certain circumstances.

Where SARS refuses to remit a penalty, a taxpayer may object to such a refusal, and also appeal against the disallowance of any such objection.

In a future article we will discuss the understatement penalty provisions in Chapter 16 of the TAA.

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