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TAX ALERT

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CDH

CLIFFE DEKKER HOFMEYR

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Too often, upon the conclusion of investigations or reviews, SARS threatens exorbitant understatement penalties for seemingly innocuous and easily resolvable queries. A good example is the classic turnover/expenditure reconciliation process which could produce, in certain instances, horrendous results for a taxpayer where the calculations are devoid of commercial logic. By its very nature, a turnover/expenditure reconciliation is a first-level enquiry and only serves the purpose of testing reasonability between amounts declared by a taxpayer in its VAT201 returns and the amounts reflected in that same taxpayer's annual financial statements. Unreconciled differences are often taken as gospel, resulting in either income tax or Value-Added Tax (VAT) assessments, coupled with the imposition of understatement penalties (in some cases, as far as accusing a taxpayer of intentional tax evasion).

In examining the onus of proof requirement, s102(1) of the TAA has the effect of placing the onus to deal with and explain the unreconciled differences upon the taxpayer, no matter how ridiculous the result of the first-level enquiry from SARS' side might be. Explaining the unreconciled differences would generally not be of concern, as SARS may not have taken account of various factors, such as overlapping tax periods or the adoption of certain accounting policies for recognising revenue and expenditure. To the extent that unreconciled differences do, however, remain in SARS' favour, the issue of severe understatement penalties still remains. But should understatement penalties even feature in a scenario such as this?

A not too uncommon scenario arises in SARS' findings letters, to the effect that unreconciled differences are regarded as intentional tax evasion, which brings with it potential understatement penalties of 150% for a 'standard case', under s223 of the TAA. Taxpayers are then essentially forced to provide reasons to SARS so as to avoid the imposition of the 150% understatement penalty, without SARS having first provided any shred of evidence that intentional tax evasion actually exists. This results in a serious misapplication of the TAA and a reversal of the onus from SARS back to the taxpayer.

Proving 'intentional tax evasion' in a simple turnover/expenditure reconciliation context would be extremely difficult for SARS, to say the least. As stated above, a turnover/expenditure reconciliation exercise is a first level enquiry, without having regard to any actual source documentation (such as tax invoices) making up the various transactions of a taxpayer.

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THE ONUS OF PROOF RULE FOR THE IMPOSITION OF UNDERSTATEMENT PENALTIES

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Once the test of reasonability is complete, it is only actual source documentation, coupled with a host of other factors that could remotely bring into play 'intentional tax evasion'.

A first level enquiry, forming the basis of a findings letter (for example), should provide the taxpayer an opportunity to review the stated findings and provide evidence to SARS to the extent that an error has been made in the calculations. A first level enquiry cannot constitute a basis for accusing a taxpayer of 'intentional tax evasion' where SARS has failed to discharge its onus of proof under s102(2) of the TAA.

In understanding the behaviour of 'intentional tax evasion' as contemplated in s223 of the TAA regard must be had to SARS' Short Guide to the Tax Administration Act (Guide), which clearly states, at page 81, "to evade tax includes actions that are intended to reduce or extinguish the amount that should be paid, or which inflate the amount of a refund that is correctly refundable to the taxpayer" and goes on further to state that the "most important factor is that the taxpayer must have acted with intent to evade tax. Intention is a wilful act, that exists when a person's conduct is meant to disobey or wholly disregard a known legal obligation, and knowledge of illegality is crucial".

A first level turnover/expenditure reconciliation enquiry by SARS can never, in our view, establish any intent to evade tax as it is merely a test of reasonability. Once the test of reasonability is complete, it is only actual source documentation, coupled with a host of other factors that could remotely bring into play 'intentional tax evasion'. Taxpayers should not merely provide reasons to defend an 'intentional tax evasion' allegation where no credible evidence has been put forward by SARS to discharge its (frankly difficult) onus pertaining to the imposition of understatement penalties under s102(2) of the TAA.

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CARBON TAX IN SOUTH AFRICA

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After having been the subject of various discussion papers since 2011, the introduction of a carbon tax in South Africa is becoming a reality with the release of the Draft Carbon Tax Bill (Draft Bill) earlier this month.

It has been clear since at least 2013 that South Africa would opt for a carbon tax in order to price carbon, as opposed to an emissions trading scheme. The Draft Bill now sets out the mechanics of the carbon tax.

Essentially, the carbon tax will be levied in respect of the greenhouse gasses (GHGs) that result from:

- the combustion of fossil fuels;
- fugitive emissions in respect of commodities, fuel or technology; and
- industrial processes and product use.

In other words, not only emissions from the combustion of fossil fuels will be taxed, but emissions from certain industrial or mining processes and activities will also fall into the carbon tax net. Emission factors will be used in order to calculate the resultant mass of GHGs.

The base carbon tax rate will be R120 per ton of GHGs emitted (or the carbon dioxide equivalent thereof).

Persons who conduct activities which will be listed in a notice published by the Minister of Environmental Affairs will be liable to account for carbon tax. However, certain sectors such as the agricultural, forestry and waste sectors will be excluded.

In addition, certain thresholds will apply, and at least in respect of stationary emissions, only entities with a thermal capacity of 10MW or more will be subject to carbon tax for the time being. For non-stationary emissions, the carbon tax will effectively be included in the specific fuel tax.

The Draft Bill makes provision for a number of allowances that will reduce an entity's carbon tax liability.

In respect of the combustion of fossil fuels, an entity will generally receive a 60% allowance of the total percentage of GHG emissions for the period, depending on the relevant sector. This is in addition to the fact that 'sequestrated' emissions will also reduce the entity's liability, essentially being carbon collected or trapped in a carbon reservoir.

Allowances are also available for:

- fugitive emissions and industrial processes, depending on the sector;
- trade exposed sectors, up to 10%;
- entities who have implemented additional measures to curb emissions, an allowance of up to 5%;
- companies who participate in the carbon budget system, an allowance of 5%; and
- offsets as prescribed by the relevant minister.

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CARBON TAX IN SOUTH AFRICA

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Percentages and the limitations are to be reviewed after 2020 in order to phase in the effect of carbon tax.

A limitation of 95% will apply to allowances. Percentages and the limitations are to be reviewed after 2020 in order to phase in the effect of carbon tax.

Administration of the carbon tax will largely lie with the South African Revenue Service (SARS), working together with the Department of Environmental Affairs and the Department of Energy in order to establish mechanisms for monitoring, reporting and verifying emissions.

However, the system will largely constitute a self-assessment process, whereby taxpayers will be responsible for measuring their own emissions and calculating their tax liability.

Cliffe Dekker Hofmeyr will be involved in making submissions on the Draft Bill.

Heinrich Louw

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1st in M&A Deal Flow, 1st in M&A Deal Value, 1st in Unlisted Deals - Deal Flow.
2012
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