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TAX AND EXCHANGE CONTROL ALERT

IN THIS **ISSUE**

SECTION 73 OF THE VAT ACT: THE SERIOUS CONSEQUENCES OF UNLAWFUL TAX AVOIDANCE

When disputing a tax debt, especially one involving the complex issue of unlawful tax avoidance, taxpayers should always exercise great caution. This sentiment is echoed by the recent judgment in *Dale v Aeronastic Properties Ltd (Commissioner for the South African Revenue Service and Others Intervening)* (9297/2016) [2016] ZAWCHC 160 (25 October 2016).

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SECTION 73 OF THE VAT ACT: THE SERIOUS CONSEQUENCES OF UNLAWFUL TAX AVOIDANCE

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SARS had rejected Aeronastic's claim as it had concluded that the transaction between Summer Days and Aeronastic was a scheme to obtain an undue tax benefit in terms of s73 of the VAT Act.

Background

During November 2009, SARS issued an assessment against Aeronastic relating to its claim for input tax in terms of the Value-Added Tax Act, No 89 of 1991 (VAT Act). The assessment disallowed Aeronastic's claim in the amount of R14 million which resulted in it being liable for an amount of R28 million to SARS. After SARS took judgment against Aeronastic for an outstanding tax debt of almost R48 million in March 2011, pursuant to s40(2)(a) of the VAT Act, it applied for the liquidation of Aeronastic on 24 May 2013, on the basis that it was factually and commercially insolvent. On 28 August 2013, Aeronastic appealed against the assessment to the Tax Court, which dismissed the appeal on the strength of an agreement entered into between Aeronastic and SARS. In November 2013, a close corporation of which the applicant, Dale, is the sole member, applied to place Aeronastic under business rescue, which application was dismissed in February 2014. In August 2014, Aeronastic was placed under final liquidation and its subsequent appeals against the liquidation order were rejected by the Supreme Court of Appeal and the Constitutional Court. The applicant then brought the present business rescue application on 31 May 2016.

The dispute between Aeronastic and SARS

The judgment setting out the reasons for granting the liquidation order in August 2014 was handed down in October 2014 and provides some insight into the circumstances giving rise to the dispute between Aeronastic and SARS. In February 2009, Aeronastic purchased helicopters, helicopter components and spares from a company called Summer Days Trading 709 (Pty) Ltd and claimed input tax in the amount of R14 million. However, SARS had rejected Aeronastic's claim as it had concluded that the transaction between Summer Days and Aeronastic was a scheme to obtain an undue tax benefit in terms of s73 of the VAT Act. In the matter involving the granting of the liquidation order, Aeronastic argued that while the debt relied upon by SARS was presently owed, it would fall away once the order of the Tax Court had been rescinded, the appeal was reheard and it was found

SECTION 73 OF THE VAT ACT: THE SERIOUS CONSEQUENCES OF UNLAWFUL TAX AVOIDANCE

CONTINUED

The court stated that s73 creates a reverse onus, which constituted a "significant hurdle" that Aeronastic needed to overcome.

that SARS had incorrectly applied s73 of the VAT Act. In developing its case, Aeronastic largely relied on a tax opinion it had received, in which it was advised that SARS had misapplied s73 of the VAT Act. In the reasons for granting the liquidation order, the court held that SARS was correct in contending that the objection to its assessment had been finalised, and that there was no application to review the Tax Court's order, which had been granted by agreement, and in which Aeronastic had been represented by counsel.

Importantly, the court remarked in the present matter that the tax opinion that Aeronastic relied upon, did not properly appreciate the implications and consequences of s73 of the VAT Act. Furthermore, it stated that s73 creates a reverse onus, which constituted a "significant hurdle" that Aeronastic needed to overcome. The court concluded that the tax dispute was not an issue that it could adjudicate on as it was clear that it had been settled.

Section 73 of the VAT Act

Section 73 of the VAT Act is an anti-avoidance provision, similar to the GAAR provisions in s80A of the Income Tax Act, No 58 of 1962 (Act). In *Mpande Foodliner CC v Commissioner for the South African Revenue Service and Others* 2000 (4) SA 1048 (T), the court stated that there are four requirements that need to be met before s73 can be invoked by SARS:

- whether a scheme has been entered into or carried out;
- which has the effect of granting a tax benefit to any person;
- by means or in a manner not normally employed for *bona fide* business purposes, other than obtaining of a tax benefit, or it has created rights or obligations that would not normally be created between persons dealing at arm's length; and
- it was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit.

Section 73(3) of the VAT Act states that a decision by SARS under s73 is subject to objection and appeal. The section further states that if it is proved in proceedings concerning the scheme, that it does or would result in a tax benefit, there is a rebuttable presumption that it was entered into solely or mainly for the purpose of obtaining a tax benefit.

Practical importance of the judgment

Section 73 of the VAT Act is a fairly complex provision and is a powerful weapon at SARS's disposal. Although the remark was only *obiter*, it is noteworthy that the court described the reverse onus of s73(3) as a significant hurdle which had to be overcome in the circumstances. One would hope, however, that such a finding would not give SARS licence to apply s73 as and when it pleased. From the taxpayer's perspective, the judgment should serve as a caution to take an assessment based on s73 seriously and to obtain expert advice in responding thereto.

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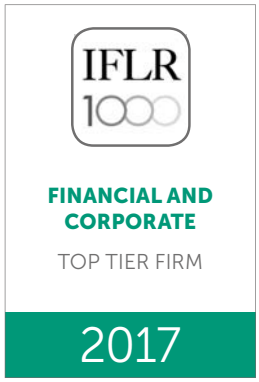
SECTION 73 OF THE VAT ACT: THE SERIOUS CONSEQUENCES OF UNLAWFUL TAX AVOIDANCE

CONTINUED

From the taxpayer's perspective, the judgment should serve as a caution to take an assessment based on s73 seriously and to obtain expert advice in responding thereto.

Taxpayers must always keep in mind the time periods within which objections and appeals must be lodged, which are laid down in the Tax Administration Act, No 28 of 2011 (TAA) and in the dispute resolution rules. A taxpayer confronted by an assessment in terms of s73 of the VAT Act should also bear in mind that, under certain circumstances, it can make use of s164 of the TAA and apply to SARS to suspend payment of the tax debt in terms of the assessment. In terms of s164, SARS may not take any recovery proceedings within less than 10 business days after it has notified the taxpayer of its decision to grant or reject the application, unless SARS has a reasonable belief that the person might dissipate their assets.

Louis Botha



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