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TAX AND EXCHANGE CONTROL ALERT

IN THIS **ISSUE**

OUT WITH THE OLD AND IN WITH THE NEW: AN INTEREST(ING) CASE ABOUT SECTION 39 OF THE VAT ACT

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THE TEST CASE MECHANISM: A POTENTIAL WEAPON TO WARD OFF MULTIPLE ATTACKS FROM SARS?

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The new s39(7) came into force and stated that SARS could remit the interest, in whole or in part, if it was satisfied that the failure to pay the VAT in the prescribed period "was due to circumstances beyond the control" of the taxpayer.

Facts

During December 2009, the taxpayer, ABC (Pty) Ltd, concluded a purchase and sale agreement with Company D, in terms of which Company D paid US $3,950,000 for certain of the taxpayer's assets, excluding VAT. No VAT was levied on the transaction as Company D believed that the transaction qualified for VAT at the zero-rate. Thus the taxpayer did not pay any VAT to SARS. Later, both companies accepted that VAT was payable on the transaction and on 9 November 2012, the taxpayer paid VAT to SARS. SARS then imposed a 10% penalty and levied interest due to the late payment in terms of s39(1) of the Value-Added Tax Act, No 89 of 1991 (Act). The interest was calculated from 1 April 2010 to 9 November 2012. The taxpayer requested that the penalty and interest be remitted in terms of s39(7), but SARS remitted only the penalty and not the interest. After the taxpayer's objection to SARS's decision was unsuccessful, it launched an appeal.

Judgment

Section 39(7) of the Act was amended on 1 April 2010. The coincidental timing of the amendment gave rise to two questions for the court to decide:

- Whether the "old" or "new" s39(7) applied to the levying and remission of interest?
- Depending on the answer to the first question, whether the taxpayer's appeal should be allowed or not?

Prior to 1 April 2010, s39(7) stated that SARS could remit the interest payable in terms of s39(1), if it was satisfied that the failure to pay VAT within the prescribed period did "not result in any financial loss (including any loss of interest) to the State" or if the taxpayer "did not benefit financially (taking interest into account) by not making such payment" within the prescribed period. On 1 April 2010, the new s39(7) came into force and stated that SARS could remit the interest, in whole or in part, if it was satisfied that the failure to pay the VAT in the prescribed period "was due to circumstances beyond the control" of the taxpayer.

The taxpayer's arguments can be summarised as follows:

- As VAT was payable by 25 March 2010, penalties and interest should be assessed from this date, but that it was SARS's practice to only charge interest from the first day of the month after the month in which payment was due. Therefore, interest notionally started running on the first day after 25 March 2010.

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The new s39(7) came into operation on 1 April 2010 and applied to interest imposed on or after that date, the taxpayer's application had to be considered in light of the new s39(7).

- SARS should have based its decision on the law as it stood at the time the VAT was payable, ie 25 March 2010 and not as it stood on or after 1 April 2010.
- In the alternative, the taxpayer argued that if the court held that the new s39(7) was applicable, interest could only be imposed for VAT periods after 1 April 2010. As the next payment date was 25 June 2010, the new s39(7) could only apply from 1 July 2010 and thus the old s39(7) applied to the taxpayer.

The arguments advanced by SARS were as follows:

- In terms of s39(2) of the Taxation Laws Amendment Act, 2009, the new s39(7) of the Act came into operation on 1 April 2010 and applied to interest imposed in terms of s39(1)(a)(ii) of the Act, after that date.
- In terms of s39(1)(a)(ii), interest could only be imposed on or after the first day of the month following 25 March 2010, ie 1 April 2010, which was also when the new s39(7) came into effect.
- The legislature intended to deal differently with penalties for late payment and interest in terms of s39 - the penalty could be imposed immediately upon late payment, ie 26 March 2010 in this case, but the interest could only be imposed from the first day of the next month, ie 1 April 2010.
- The date from which interest runs is not regulated by a SARS practice directive, but specifically by s39(1)(a)(ii), which fixed the date as 1 April 2010 and which was coincidentally the date on which the new s39(7) came into effect.

The court held that in essence, "the legislature provided the taxpayer with what may be viewed as an indulgence not to have to pay interest for the period between the date upon which the VAT was paid and the end of that month. Thereafter the taxpayer is required to pay interest", which "is triggered by the non-payment of VAT, and continues on a monthly basis until the VAT is paid". It held that SARS's argument was thus correct and as the new s39(7) came into operation on 1 April 2010 and applied to interest imposed on or after that date, the taxpayer's application had to be considered in light of the new s39(7).

Finding

The court found that the new s39(7) should be applied to consider whether the interest imposed in terms of s39(1)(a)(ii) should be imposed. It accepted the taxpayer's argument that the matter should be remitted to SARS as the taxpayer did not have an opportunity to consider and respond to SARS's assessment in terms of the new s39(7). This is because such a finding "is least prejudicial to the taxpayer". The court also held that each party had to pay its own costs.

Comment

The court's decision to allow the taxpayer to respond to SARS's assessment in terms of the new s39(7) appears to be an application of the *contra fiscum* rule. In *Shells Annandale Farm (Pty) Ltd v Commissioner for the SARS* [2000] JOL 5948 (C), the Cape High Court stated that the *contra fiscum* rule can be invoked where a statutory provision is ambiguous as to the intention of the legislature and if such ambiguity is reasonably "implied from the wording of the legislation and such legislation implies a burden upon the subject then *that interpretation must*

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The decision in the ABC case could thus be interpreted to extend the application of the contra fiscum rule.

be adopted which is in favour of the taxpayer". The Cape High Court added that the ambiguity must be "neither contrived nor artificial and...follows a reasonable reading of the text." In the *ABC* case, it appears that the *contra fiscum* rule was applied to allow the taxpayer a second bite at the cherry, in that the assessment should be remitted to SARS, as the taxpayer did not have an opportunity to respond to the assessment in terms of the new s39(7). The decision in the *ABC* case could thus be interpreted to extend the application of the *contra fiscum* rule.

Finally, it should be noted that the levying of interest on outstanding tax will in future be regulated by s187 to s189 of the Tax Administration Act, No 28 of 2011. Only parts of these sections have come into force and taxpayers are thus advised to ensure that they seek professional advice on the legislative provisions that apply to penalties and interest due to late payment.

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THE TEST CASE MECHANISM: A POTENTIAL WEAPON TO WARD OFF MULTIPLE ATTACKS FROM SARS?

Taxpayers are being made to defend themselves in respect of a tax period before court while simultaneously objecting to and appealing against the same legal issues regarding earlier or later years of assessment.

In our Tax Alert of 19 February (SARS's investigative powers – a possible backstage pass to matters pending before court?), we raised concerns regarding whether it is procedurally fair for a taxpayer, who is engaged in a dispute before the Tax Court, to also be subjected to an audit or information request in terms of Chapter 5 of the Tax Administration Act, No 28 of 2011 (TAA) concerning essentially the same dispute.

Instead of proceeding to deal with each of the matters separately, there is a mechanism in s106(6) of the TAA from which taxpayers have yet to benefit.

A similar situation being faced by taxpayers relates to the dispute resolution procedures in Chapter 9 of the TAA, whereby taxpayers are being made to defend themselves in respect of a tax period before court while simultaneously objecting to and appealing against the same legal issues regarding earlier or later years of assessment. Again, there is more often than not an overlap of facts, law and witnesses resulting in a duplication of efforts, the potential breach of a taxpayer's right to litigation privilege and effectively a waste of resources both on the part of SARS and the taxpayer.

Instead of proceeding to deal with each of the matters separately, there is a mechanism in s106(6) of the TAA from which taxpayers have yet to benefit. Section 106(6) (the test case provision) was first introduced with the promulgation of the TAA to resolve disputes, involving substantially similar issues, of multiple taxpayers. Essentially, the provision allows a senior SARS official to designate a particular dispute as a test case that will inform how other similar disputes are to be handled.

The mechanism is one which is invoked at the discretion of a senior SARS official (as defined in the TAA). Importantly, the TAA does not expressly exclude the taxpayer from making submissions to the relevant senior SARS official directly requesting that the discretion conferred by the Commissioner, be exercised in favour of the taxpayer. To the extent that the senior SARS official denies a reasonable request, the taxpayer will have the option of challenging SARS to a review in terms the Promotion of Administrative Justice Act, No 3 of 2000.

A taxpayer wanting to make use of this provision needs to set out clear and persuasive reasons for such a request. Rule 12 of the rules promulgated in terms of s103 of the TAA sets out the process to be followed regarding the test case. Rule 12(2) stipulates that a senior SARS official, who designates the appeal or objection as a test case, must provide the taxpayer with a notice specifying the number of common issues involved in the objections or appeals that the test case is likely to determine as well as the questions of law or fact, or both law and fact. The requirements for the Rule 12(2) notice would serve as a checklist for a taxpayer wishing to submit a request to SARS.

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Where there are questions regarding the facts of a particular matter, which are common for all years of assessment in issue, the test case mechanism will go a long way in streamlining disputes.

A potential difficulty with making such a request lies in the fact that the tax acts are amended on an annual basis and thus the tax provisions in one year of assessment may be different to that in earlier or later years. However, where there are questions regarding the facts of a particular matter, which are common for all years of assessment in issue, the test case mechanism will go a long way in streamlining disputes. All that will remain to be resolved will be those questions regarding the application of tax laws.

There is an additional and unintentional benefit of requesting a test case: a determination by the Tax Court in favour of the taxpayer may cause SARS to reassess its position on a particular matter which may in turn curb SARS's appetite for further audits and information requests in respect of the same or similar issues.

To the extent that there is a clear benefit of staying proceedings, pending the outcome of an appeal before the Tax Court, it would be unreasonable for SARS not to consider a taxpayer's request for a test case.

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