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TAX & EXCHANGE CONTROL ALERT

IN THIS **ISSUE**

TAX RETURNS: WHEN DOES PRESCRIPTION COMMENCE TO RUN?

Section 99 of the Tax Administration Act, No 28 of 2011 (TAA) deals with the period of limitations for issuing assessments. More specifically, s99(1)(b) provides that, in the case of a "self-assessment" for which a return is required, the South African Revenue Service (SARS) may not issue an additional or reduced assessment after five years from the date of assessment of the original assessment. The phrase "date of assessment" is defined in s1 of the TAA as the date that the return is submitted, if a return is required, in the case of self-assessment by the taxpayer.

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Stated differently, a self-assessment is any return in which the amount of tax due appears on the return, such as returns submitted for value-added tax, provisional tax, dividends tax, secondary tax on companies (STC), transfer duty etc.

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In the case of *CSARS v Char-Trade* (776/2017) ZASCA 89 delivered by the Supreme Court of Appeal (SCA) on 31 May 2018, the SCA was requested to determine whether an assessment issued for STC in respect of a dividend cycle ending in February 2007, which was levied in terms of s64B and s64C of the Income Tax Act, No 58 of 1962 (Act), had prescribed in terms of s99 of the TAA.

The relevant facts, decision of the court *a quo*, key issue for consideration and decision of the SCA are summarised below.

Facts

During the period of 2007 to 2011, Char-Trade 117 CC t/a Ace-Packaging (Respondent) advanced various loans to related close corporations and companies within its group of companies. In terms of the Respondent's annual financial statements, such loans were unsecured, bore interest "at current rates" and had no fixed terms of repayment.

Pursuant to an audit by SARS of the Respondent's tax affairs, SARS held that the Respondent had advanced interest-free loans or loans to related close corporations and companies. SARS contended that since the loans bore interest at a rate less than the official rate of interest, such loans constituted deemed dividends and were subject to STC in terms of s64C(4)(d) of the Act.

Who's Who Legal

Emil Brincker has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory and Who's Who Legal: Corporate Tax – Controversy for 2017.

Mark Linington has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory for 2017.

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On 17 June 2014, the Respondent introduced a new and additional defence that the assessment for 2007 had prescribed in terms of s99 of the TAA and "fell to be set aside in its entirety".

At the relevant time, s64C(2) of the Act provided that, subject to the provisions of s64C(4), any loan advanced by a company to a shareholder or a connected person in relation to that shareholder, shall be deemed to be a dividend declared by such company and STC shall be payable thereon. In terms of s64B(7), the company was required to submit a return for the STC.

On 9 November 2012, SARS issued assessments for STC for the 2007 to 2011 cycles, which assessments the Respondent objected to on 12 December 2012. The Respondent's basis for the objection centred around its submission that the loans were made to independent companies that were not "connected persons" for tax purposes. SARS disallowed the objection and on 11 April 2013, the Respondent lodged an appeal where it conceded that the loans were advanced to "connected persons" however, such loans bore interest at a rate that was not less than the official rate of interest.

It is interesting to note that on 17 June 2014, the Respondent introduced a new and additional defence that the assessment for 2007 had prescribed in terms of s99 of the TAA and "fell to be set aside in its entirety". It was common cause between the parties that the Respondent had never submitted any return in respect of the dividend cycle ending in 2007. In addition, no payment of STC had been made by the Respondent with reference to the dividend cycle ending 2007.

Decision of court *a quo*

The Tax Court found that the Respondent's dividend cycle coincided with its financial year end. Accordingly, the STC return and payment in respect of the loans advanced by the Respondent should have been submitted and paid by 31 March 2007. The Tax Court concluded that as the 2007 assessment was raised on 9 November 2012, more than five years after the return and payment were deemed to be due, the assessment had indeed prescribed.

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The SCA held that prescription had not commenced to run as it could only have commenced in the event that the Respondent filed a return for STC which it failed to do.

Key issue for consideration

The SCA was requested to determine whether SARS was prohibited by s99(1)(b) of the TAA from issuing an assessment for STC in respect of the dividend cycle that ended in 2007. This would be the case if five years had lapsed since the date of assessment of the original assessment.

Decision of the SCA

The SCA found that the intended effect of s99(1)(b) of the TAA, read with the definition of "date of assessment" in s1 of the Act, "is that prescription cannot commence to run against CSARS until such time as a return has been submitted by the taxpayer. It is by submitting a return that the taxpayer informs CSARS about a dividend, including a deemed dividend, and that STC is payable thereon."

The SCA stated that prescription in respect of the 2007 dividend cycle could only have commenced once the Respondent had filed a return for STC, which return would have constituted the original assessment.

As the Respondent had failed to submit the STC return, there was no original assessment from which assessment date the five-year period could have run.

Having regard to the above, the SCA held that prescription had not commenced to run as it could only have commenced in the event that the Respondent filed a return for STC which it failed to do. It was found that the court *a quo* erred when it held that prescription commenced in March 2007.

Conclusion

It is evident that in the case of a self-assessment where a return is required, prescription will commence to run from the date that such return is submitted to SARS. What is clear from this decision is that it is crucial for taxpayers to be aware of the periods of limitations for the issuing of assessments by SARS, relevant to all the forms of taxes.

Gigi Nyanin

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Gerhard Badenhorst ranked by CHAMBERS GLOBAL 2014 - 2018 in Band 1: Tax: Indirect Tax.

Emil Brincker ranked by CHAMBERS GLOBAL 2003 - 2018 in Band 1: Tax.

Mark Linington ranked by CHAMBERS GLOBAL 2017- 2018 in Band 1: Tax: Consultants.

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