

14 MAY 2020

# TAX & EXCHANGE CONTROL ALERT

## IN THIS ISSUE >

### High Court sets aside notice by SARS to debit a taxpayer's bank account

In the recent case of *SIP Project Managers (Pty) Ltd v The Commissioner for the South African Revenue Service* (Case Number 11521/2020) (as yet unreported), the High Court set aside a notice by the South African Revenue Service (SARS) to a bank to debit a taxpayer's bank account in terms of section 179 of the Tax Administration Act 28 of 2011 (TAA), and ordered SARS to repay the amount to the taxpayer.

FOR MORE INSIGHT INTO OUR  
EXPERTISE AND SERVICES

CLICK HERE 

## High Court sets aside notice by SARS to debit a taxpayer's bank account

The taxpayer received notice from its bank that the bank had received a notice from SARS in terms of section 179 of the TAA, requiring the bank to debit the taxpayer's account with the amount due under the additional assessment.

In the recent case of *SIP Project Managers (Pty) Ltd v The Commissioner for the South African Revenue Service* (Case Number 11521/2020) (as yet unreported), the High Court set aside a notice by the South African Revenue Service (SARS) to a bank to debit a taxpayer's bank account in terms of section 179 of the Tax Administration Act 28 of 2011 (TAA), and ordered SARS to repay the amount to the taxpayer.

### Factual background

The facts of the matter were briefly as follows:

- During June 2019, SARS issued an assessment to the taxpayer in terms of which the taxpayer was to receive a refund.
- SARS subsequently conducted a verification and requested certain additional documents from the taxpayer, which documents were never furnished.
- As a result, SARS issued an additional assessment to the taxpayer on 9 October 2019, which effectively resulted in the previous assessment being reversed, and the taxpayer owing an amount of R1,233,231.00 to SARS. The date for payment of the amount was reflected on the additional assessment as 30 September 2019.
- On or about 6 February 2020, the taxpayer received notice from its bank that the bank had received a notice from SARS in terms of section 179 of the TAA, requiring the bank to debit the taxpayer's bank account with the amount due under the additional assessment.
- The taxpayer, via its accountant, then for the first time became aware of the additional assessment on its e-filing profile.
- However, no letter of demand could be found on the taxpayer's e-filing profile in respect of the amount owed in terms of the additional assessment.
- The taxpayer forthwith lodged an objection against the additional assessment and a request for suspension of the obligation to make payment pending finalisation of the objection.
- However, the bank had in the meantime debited that taxpayer's bank account as per the notice issued by SARS.
- When the taxpayer contacted SARS, it was informed that three letters of demand were previously sent to the taxpayer before the notice was given to the bank, and that the letters were posted to the taxpayer's e-filing profile. However, on further contact with SARS via its call centre, the taxpayer was informed that there were no letters of demand on the taxpayer's e-filing profile.
- The taxpayer maintained that it never previously received the letters of demand and that they could not be found on its e-filing profile.
- The taxpayer subsequently demanded repayment from SARS, but after not receiving any reply from SARS, the taxpayer applied to the High Court for relief.

## High Court sets aside notice by SARS to debit a taxpayer's bank account

...continued

Section 179(5) provides that a third-party notice may only be issued after delivery to the taxpayer of a final demand for payment, which must be delivered at least 10 business days before the issue of the notice.

### Section 179 of the TAA

Section 179(1) of the TAA provides as follows –

*"A senior SARS official may authorise the issue of a notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt."*

This section effectively allows SARS to collect outstanding tax debts by requiring any debtor of a taxpayer, on notice, to make payment to SARS and not the taxpayer. In practice, such notices are often issued by SARS to a taxpayer's bank or employer.

Section 179(5) provides that a third-party notice may only be issued after delivery to the taxpayer of a final demand for payment, which must be delivered at least 10 business days before the issue of the notice.

### Decision

The High Court highlighted the following –

- The taxpayer produced a screenshot of its e-filing profile showing that there were no letters of demand.
- The taxpayer also averred in its papers that an official from the call centre confirmed that there were no letters of demand on its e-filing profile.
- SARS was therefore required to counter by showing that a letter of demand was posted to the taxpayer's e-filing profile.
- SARS, in its papers, at best established that letters of demand were actually generated.
- However, it is not sufficient by itself that a letter of demand was actually generated by SARS. Section 179(5) of the TAA requires delivery of such letter of demand to the taxpayer, whether physically or electronically.
- SARS failed to establish such delivery, and specifically that a letter of demand was posted to the taxpayer's e-filing profile.

CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.



## Protecting the silver lining: SCA confirms no employees' tax on preferential awards paid to employees of insolvents...continued

The court effectively held that failure by SARS to comply with section 179(5) of the TAA was fatal to the notice to the bank and rendered the process unlawful.

- SARS also chose to not deal with the taxpayer's averment that a SARS official from the call centre confirmed that no letters of demand could be found on the taxpayer's e-filing profile.

Accordingly, the court accepted the taxpayer's version, and found that no letter of demand was delivered to the taxpayer as required by section 179(5) of the TAA.

The court further held that the requirement in section 179(5) of the TAA that a final demand for payment be delivered to the taxpayer at least 10 days before a notice in terms of section 179(1) of the TAA is issued, is peremptory.

On the basis of the finding that no letter of demand was delivered to the taxpayer, this peremptory requirement was not met.

The court then further had to establish whether such non-compliance was fatal to the notice issued to the bank.

In considering this issue, the court had regard to the purpose of section 179(5) of the TAA, and stated that the section was clearly introduced to limit the powers of SARS to recover tax debts by appointing third parties without advising the taxpayer.

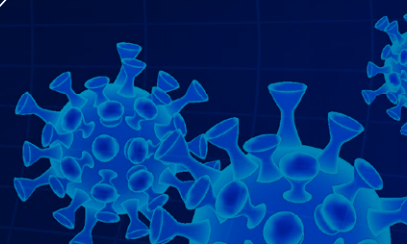
The court effectively held that failure by SARS to comply with section 179(5) of the TAA was fatal to the notice to the bank and rendered the process unlawful.

The court accordingly declared the notice issued by SARS to the bank to be null and void, and ordered SARS to repay the amount of R1,262,007.00 to the taxpayer, together with interest as from the date that the amount was debited from the taxpayer's bank account.

*Heinrich Louw and Ndzalama Dumisa*

## CDH'S COVID-19 RESOURCE HUB

Click here for more information 



## OUR TEAM

For more information about our Tax & Exchange Control practice and services, please contact:



**Emil Brincker**  
National Practice Head  
Director  
T +27 (0)11 562 1063  
E [emil.brincker@cdhlegal.com](mailto:emil.brincker@cdhlegal.com)



**Mark Linington**  
Private Equity Sector Head  
Director  
T +27 (0)11 562 1667  
E [mark.linington@cdhlegal.com](mailto:mark.linington@cdhlegal.com)



**Howmera Parak**  
Director  
T +27 (0)11 562 1467  
E [howmera.parak@cdhlegal.com](mailto:howmera.parak@cdhlegal.com)



**Gerhard Badenhorst**  
Director  
T +27 (0)11 562 1870  
E [gerhard.badenhorst@cdhlegal.com](mailto:gerhard.badenhorst@cdhlegal.com)



**Stephan Spamer**  
Director  
T +27 (0)11 562 1294  
E [stephan.spamer@cdhlegal.com](mailto:stephan.spamer@cdhlegal.com)



**Jerome Brink**  
Director  
T +27 (0)11 562 1484  
E [jerome.brink@cdhlegal.com](mailto:jerome.brink@cdhlegal.com)



**Ben Strauss**  
Director  
T +27 (0)21 405 6063  
E [ben.strauss@cdhlegal.com](mailto:ben.strauss@cdhlegal.com)



**Petr Erasmus**  
Director  
T +27 (0)11 562 1450  
E [petr.erasmus@cdhlegal.com](mailto:petr.erasmus@cdhlegal.com)



**Louis Botha**  
Senior Associate  
T +27 (0)11 562 1408  
E [louis.botha@cdhlegal.com](mailto:louis.botha@cdhlegal.com)



**Dries Hoek**  
Director  
T +27 (0)11 562 1425  
E [dries.hoek@cdhlegal.com](mailto:dries.hoek@cdhlegal.com)



**Varusha Moodaley**  
Senior Associate  
T +27 (0)21 481 6392  
E [varusha.moodaley@cdhlegal.com](mailto:varusha.moodaley@cdhlegal.com)



**Heinrich Louw**  
Director  
T +27 (0)11 562 1187  
E [heinrich.louw@cdhlegal.com](mailto:heinrich.louw@cdhlegal.com)



**Louise Kotze**  
Associate  
T +27 (0)11 562 1077  
E [louise.kotze@cdhlegal.com](mailto:louise.kotze@cdhlegal.com)

### BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E [jhb@cdhlegal.com](mailto:jhb@cdhlegal.com)

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E [ctn@cdhlegal.com](mailto:ctn@cdhlegal.com)

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E [cdhstellenbosch@cdhlegal.com](mailto:cdhstellenbosch@cdhlegal.com)

©2020 8958/MAY

