TAX & EXCHANGE CONTROL

ALERT

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FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

IN THIS ISSUE

Stricter rules for CRS compliance

On 9 October 2020, the South African Minister of Finance published updated regulations (2020 Regulations) to align with the OECD's Standard for Automatic Exchange of Financial Account Information in Tax Matters (CRS). The 2020 Regulations repeal the regulations published in Government Gazette No. 39767 on 2 March 2016 (2016 Regulations) and have generally been in force since 1 June 2021, except for paragraph B of section XI which is intended to take effect from 1 March 2023.

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Stricter rules for CRS compliance

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Although the 2016 Regulations were repealed, much of the content in the 2020 Regulations remains the same, with the notable changes being:

1. The new section on commentaries on the CRS, to be followed when interpreting the regulations.
2. The exception to the requirement that, with respect to new individual accounts or new entity accounts, a reporting financial institution (RFI) must obtain a self-certification upon opening an account. In terms of the update, a 90-day period of compliance is allowed where:
    - a self-certification is obtained when opening the account, but cannot be validated because it is a subsequent process undertaken by the RFI's back-office function; or
    - in exceptional cases, where it is not possible to obtain a self-certification on the first day of the account opening process due to the requirements of the business of the RFI.
3. The insertion of the new paragraph B under section X, which permits an RFI to suspend transactions or close a financial account where the account holder or controlling person fails to provide a self-certification within 90 days from the date on which it is required.
4. The new section on mandatory disclosure rules, set to come into effect from 1 March 2023 will require an "*Intermediary*" or the user of a "*CRS Avoidance Arrangement*" or "*Opaque Offshore Structure*" to disclose to the South African Revenue Service certain information set out in the regulations, if certain requirements are met. These rules essentially place a reporting obligation on persons involved in setting up structures that result in the avoidance of CRS legislation or make it difficult to determine the identity of the beneficial owners of the structure. Briefly, for the purposes of these rules, the 2020 Regulations define:
    - "*CRS Avoidance Arrangement*" as any arrangement designed to circumvent or which is marketed as, or has the effect of, circumventing CRS legislation or exploiting an absence thereof through various ways described in the 2020 Regulations.

Stricter rules for CRS compliance

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- *"Intermediary"* as any person who is responsible for the design or marketing of a *"CRS Avoidance Arrangement"* or *"Opaque Offshore Structure"* and any person that provides relevant services in respect of that arrangement or structure where that person can reasonably be expected to know that the arrangement or structure constitutes a *"CRS Avoidance Arrangement"* or *"Opaque Offshore Structure"*.
- *"Opaque Offshore Structure"* as a passive offshore vehicle that is held through an opaque structure which is designed to allow a natural person to be a beneficial owner of that passive offshore vehicle, in a manner that makes it difficult to determine who the beneficial owner is or which creates the appearance that such person is not a beneficial owner.

There are instances in which an *"Intermediary"* or user will not be obliged to disclose any information. In particular, they are not required to disclose confidential information that is protected under professional secrecy rules set out in domestic law.

Considering that CRS is constantly evolving, it is important to keep abreast of the developments as authorities in the international tax society seek to improve international tax compliance.

URSULA DIALE-ALI

To see or not to see: Taxpayer confidentiality in the High Court

Following the High Court's decision regarding the disclosure of former President Jacob Zuma's tax returns (see our Tax & Exchange Control Alert of 18 November 2021), the confidentiality (or possible lack thereof) of taxpayer information has entered the public mind.

Recently, a second case dealing with this confidentiality came before the Eastern Cape Division of the High Court (Grahamstown) in *Structured Mezzanine Investments (Pty) Ltd and Another v Commissioner, South African Revenue Services* (Case No 1824/2021) (as yet unreported) (*SMI v SARS*). Although appearing to further erode the confidentiality of taxpayer information under section 69 of the Tax Administration Act 28 of 2011 (TAA), on careful reading this case is not cause for taxpayer concern.

FACTS

The South African Revenue Service (SARS) requested information from Structured Mezzanine Investments (SMI) in terms of section 46 of the TAA, specifically certain loan agreements that SMI had concluded. SMI failed to comply with this request, resulting in SARS launching an application in the High Court (main application) to compel SMI to provide the information requested, which in SARS' view constituted *"relevant material"* as contemplated in section 46 of the TAA.

In response, the applicants (SMI and the second applicant) launched an interlocutory application to the main application. The interlocutory application alleged, *inter alia*, that SARS disclosed confidential taxpayer information in the founding papers of the main application, including information regarding SMI's tax audits. In the interlocutory application the applicants requested, amongst other things, that the High Court order the main application to be heard *in camera* and the court file sealed. The remaining relief sought in the interlocutory application was not in issue before the High Court.

CONTEXT

Before discussing the court's decision, it is helpful to set out the provisions referred to and discussed in the judgment.

Section 46(1) of the TAA states the following:

> *"SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires."*

Following this, the relevant parts of section 67 of the TAA state that:

- There is a general prohibition against disclosure of taxpayer information, which means any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information.
- A person who receives information under sections 68, 69, 70 or 71 must preserve the secrecy of the information and may only disclose the information to another person if the disclosure is necessary to perform the functions specified in those sections.

To see or not to see: Taxpayer confidentiality in the High Court

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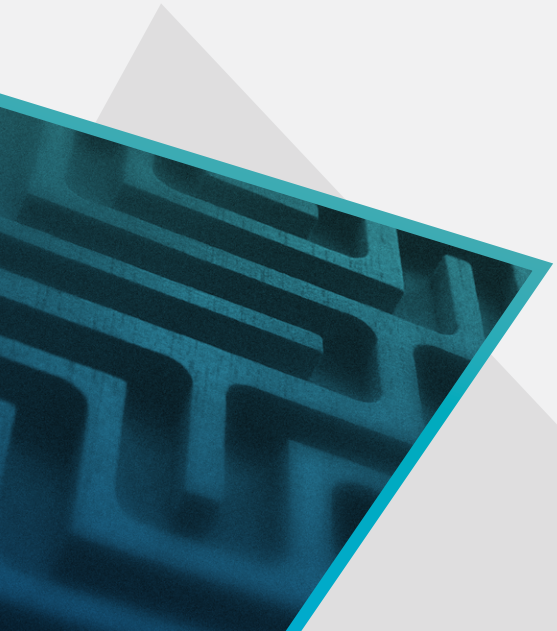

The relevant portion of section 69 of the TAA provides that:

"(1) *A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official.*

(2) *Subsection (1) does not prohibit the disclosure of taxpayer information by a person who is a current or former SARS official*:

(a) *in the course of performance of duties under a tax Act or customs and excise legislation such as*:

(i) *to the South African Police Service or the National Prosecuting Authority, if the information relates to, and constitutes material information for the proving of, a tax offence;*

(ii) *as a witness in civil or criminal proceedings under a tax Act; or*

(iii) *the taxpayer information necessary to enable a person to provide such information as may be required by SARS from that person;*

(b) *under any other Act which expressly provides for the disclosure of the information despite the provisions in this chapter;*

(c) *by order of a High Court; or*

(d) *if the information is public information.*"

Linked to this, section 124(1) of the TAA provides that "*the tax court sittings for purposes of hearing an appeal under section 107 are not public*".

Finally, section 32 of the Superior Courts Act 10 of 2013 (Superior Courts Act) provides that:

"Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court."

ARGUMENTS

In short, the applicants argued that the founding papers of the main application made references to taxpayer information that was confidential under sections 67 and 69 of the TAA. Its arguments on the papers were summarised by the court as follows:

- The provisions of the TAA on confidential taxpayer information were implicated in SARS' application and SARS had breached its statutory duty to preserve the secrecy of such information, which it may not disclose in terms of sections 67 and 69 of the TAA.
- Proper parties within SARS would not have authorised this application or would have ensured that the matter be heard *in camera* and court papers kept confidential.

To see or not to see: Taxpayer confidentiality in the High Court

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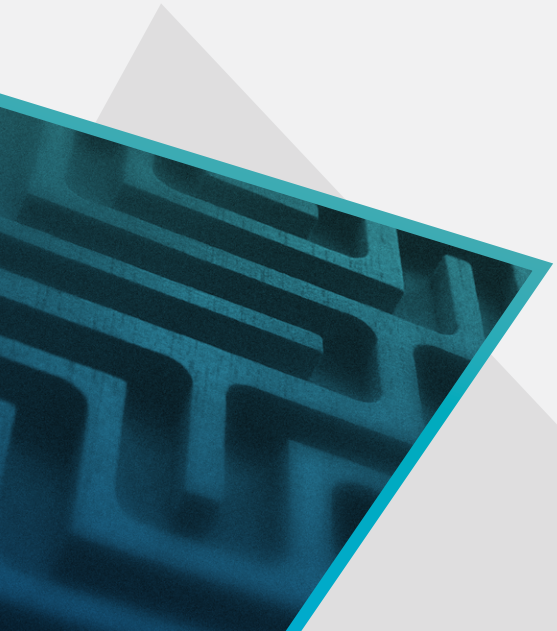

- The making public of information by refusing to agree to an *in camera* hearing is not relevant to a SARS official's duties under a tax act and there is nothing in a tax act necessitating the public disclosure of confidential taxpayer information.
- Public confidence in SARS is eroded by the disclosure of taxpayer information.
- The prevailing practice directive in the Gauteng Tax Court is for all matters to be heard *in camera* so as to comply with the secrecy provisions.
- In any event, there was a disproportionate degree of disclosure to the public of the relevant taxpayer's information.

In response, SARS argued that the applicants had failed to show any statutory provision mandating tax proceedings in the High Court being held in camera. Beyond this, SARS disagreed with the allegations made by the applicants and argued that the applicants had failed to show why a departure from the High Court norm of open justice was necessary in the circumstances.

DECISION

On the papers before it, the court found that the only taxpayer information disclosed in the founding affidavit of the main application was in the form of an affidavit previously deposed to in a liquidation application, and an article published by the Mail & Guardian. Both of these pieces of taxpayer information were already in the public domain and thus fell into one of the exceptions listed in section 69(2) of the TAA. Any other taxpayer confidential information referred to in the founding affidavit is not referred to in any detail. Further, the court found that gathering taxpayer information in terms of section 46 of the TAA constitutes SARS' performance of its duties, which falls into another of the exceptions listed in section 69(2). Leading from this, the court commented that the information SARS sought from SMI in terms of its section 46 request would be confidential taxpayer information protected by section 69(1).

Additionally, the court observed that section 124 of the TAA, which mandates the sittings of the Tax Court to be *in camera*, does not apply to the High Court. Rather, it found that the Tax Court is a creature of statue and falls subject to the provisions of the TAA, while for the High Court the hearing of cases in open court is constitutionally protected and the applicants had to rely on section 32 of the Superior Courts Act to support their application and explain why this was a "*special case*", which they did not do. The court went further and said that even if this section was relied upon, there were no special circumstances to justify a deviation in terms of this section.

To see or not to see: Taxpayer confidentiality in the High Court

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Therefore, the court decided that the TAA does not provide for the confidentiality of taxpayer information in respect of High Court proceedings. As such, it decided that the main application would be held in open court and that the court file would not be sealed.

COMMENT

The significance of this judgment is that it clarifies the difference between hearings in the Tax Court and hearings in the High Court, specifically with regard to confidentiality. The judgment does not seem to suggest that in all circumstances a High Court hearing involving a taxpayer and SARS will have to be heard in open court. Rather, it emphasises that confidentiality only automatically applies to hearings in the Tax Court under section 124 of the TAA, but in the High Court, an *in camera* hearing can only take place where the request is justified under section 32 of the Superior Courts Act.

While this judgment and the one involving former President Zuma's tax affairs (*Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others*) both engage the principle of taxpayer confidentiality, they are quite different. I*n Arena Holdings*, parts of sections 67 and 69 of the TAA are constitutionally challenged in that they don't allow for the disclosure of taxpayer information pursuant to an application under the Promotion of Access to Information Act 2 of 2000. Later this year, the Constitutional Court will consider confirming the High Court's decision in that case on unconstitutionality while at the same time considering SARS' appeal against the High Court's finding of unconstitutionality. It remains to be seen whether the Constitutional Court's judgment will have any bearing on the issue of taxpayer confidentiality and its application in High Court proceedings, such as those in *SMI v SARS*.

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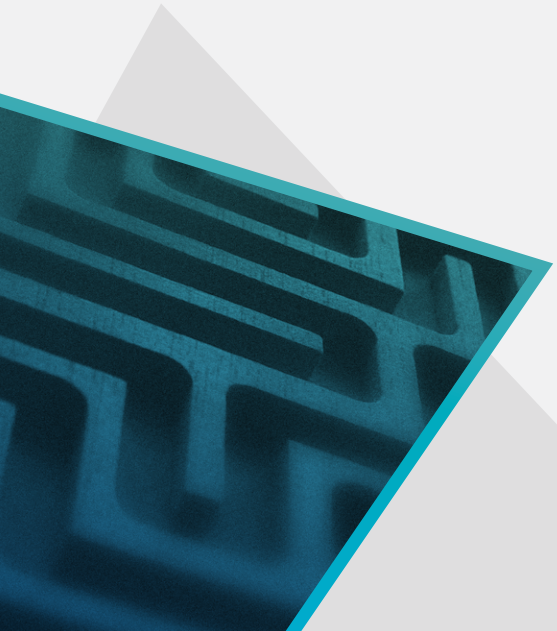
LOUIS BOTHA



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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.

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