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The South African Revenue Service  
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BY EMAIL: policycomments@sars.gov.za

RE: COMMENT ON DRAFT BINDING GENERAL RULING ON SECTION 7E

The Draft Binding General Ruling, relating to the transitional rules for the taxation of interest payable by SARS under section 7E, refers. We will refer in this document to the draft binding general ruling as the ‘Draft BGR’.

The Institutes would like to comment on the Draft BGR. Please find our comments below:

The purpose of section 7E:

It is appropriate to start our comments with the purpose of section 7E first.

Section 7E, of the Income Tax Act, changes the time of accrual of interest payable by SARS.

It deems any amount of interest to which a person becomes entitled (that is payable by SARS in terms of a tax Act) to accrue to that person on the date on which that amount is paid (by SARS) to that person (the taxpayer).

See also the comments relating to this in the background information below.

The obligation to pay interest on refunds:

Under section 190(1), of the Tax Administration Act, SARS must pay a refund if a person is entitled to a refund, including interest thereon under section 188(3)(a), of—

(a) an amount properly refundable under a tax Act and if so reflected in an assessment; or
(b) the amount erroneously paid in respect of an assessment in excess of the amount payable in terms of the assessment.

Comments relating to the “Purpose of the Draft BGR”:

The purpose of the Draft BGR is to set out transitional rules. The transitional rules are required because of the effective date of section 7E. In terms of section 11(2), of Act No. 17 of 2017, the Taxation Laws Amendment Act, 2017, the insertion of section 7E comes into operation on 1 March 2018 and applies to amounts of interest paid by SARS on or after that date.
The transitional issue arises because the taxpayer may have become entitled to interest, payable by SARS in terms of a tax Act, before 1 March 2018, but the payment, by SARS, will only be made after 1 March 2018. This entitlement, will be an accrual in the year of assessment that ends on the last day of February 2018, or earlier. This is because section 7E did not apply in that year of assessment due to the fact that SARS didn’t pay the amount on or before 28 February 2018.

But, where the taxpayer is a company, its year of assessment (financial year), as approved by SARS, may not end on the last day of February. If we take, for example, a company, the financial year of which ends on 30 June, the position may well be that the accrual period, in respect of the interest payable by SARS, ended during the year of assessment ending 30 June 2018. Let’s say that the company was assessed, in respect of its 2017 year of assessment, on 31 December 2017, but that the refund has not yet been made by SARS. SARS accounts for the interest, and the taxpayer gets the information relating to the interest accrual, from the statement of account. It is reflected as "Monthly interest on overpayment of prov tax - section 89quat(4) 6.0". In this instance there will then also be a double inclusion of the interest – the period from the effective date until date of payment after 1 March 2018. In other words, not only in respect of a prior year of assessment.

**Suggestion:**

The wording in the second bullet should be change to the following:

... in the current or in a prior year of assessment ...

**Comment relating to the background information provided in paragraph 2, and the discussion in paragraph 3, of the Draft BGR**

The information provided in the first paragraph of paragraph 2 seems to be superfluous.

It is stated in this paragraph that section 7E “was introduced to address complications in taxing interest that accrued in a prior year of assessment.” The reason for section 7E, as provided in the Explanatory Memorandum, is to “addresses current complications in taxing that interest or interest that is adjusted for previous tax years from SARS”. It is accepted that the words “that interest” here refers to “that interest payable by SARS”.

The real problem, in our view, arises where interest that accrued to a taxpayer is subsequently adjusted by SARS. This happens in one of the following instances:

- The first instance:
  - In terms of section 187(1), of the Tax Administration Act, if a “… refund payable by SARS is not paid in full by the effective date, interest accrues, and is payable, on the amount of the outstanding balance of the … refund …”
    - The taxpayer could in this instance, prior to the introduction of section 7E, calculate the amount of interest. This particularly true where the refund relates to a refund of value-added tax. In most instances however, the
taxpayer obtained the amount of the interest from the SARS statement of account (as was indicated above).

- The draft ruling, with the adjustment as suggested above, addresses the duplication of the accounting for the interest in this instance.

- The second instance:
  - In terms of section 164(7), of the same Act, where “an assessment … is altered in accordance with … an objection or appeal”, et cetera, the amounts paid in excess must be refunded with interest. Such an alteration would result in a retrospective adjustment of the interest that previously accrued (or was paid to the taxpayer). The interest that accrues as a result of this adjustment may be in respect of the period prior to 1 March 2018.
  - In this instance it is unlikely that the taxpayer would have accrued for the interest before the assessment is made.
  - But where the assessment was amended prior to 1 March 2018 and the interest that accrued to the taxpayer was not refunded before 1 March 2018, a double inclusion may be possible.

- The third instance:
  - The amount of the refund may also be adjusted following a review by SARS or a request for a correction by the taxpayer (in terms of section 93 of the Act). Similarly, here it would result in a retrospective adjustment of the interest that previously accrued or was paid to the taxpayer.

We agree with statement that “there is a necessary implication against double taxation in a statute”, and the view held “that section 7E should not be interpreted as applying to interest that accrued during years of assessment ending before 1 March 2018.” This statement is made in the second paragraph of paragraph 2 and is then duplicated here.

It is stated, in paragraph 3 of the Draft BGR that a “taxpayer that did not account for interest that accrued before 1 March 2018 and which was paid by SARS on or after that date must declare such interest in the year of assessment in which it is paid. SARS will not seek to assess such interest on an accrual basis in earlier years of assessment.” This statement is relevant to the last two instances, the second and the third, mentioned above.

We submit that the issue is not that SARS will not assess this interest in earlier accrual periods, or years of assessment, but rather that it should not be required of the taxpayer to account for this interest on an accrual basis. If it is not declared as interest that accrued during the taxpayer, it will not be assessed to tax.

It is suggested that this statement be made part of the ruling. It may then read as follows:

“A taxpayer is not required to declare interest, that the taxpayer became entitled to prior to 1 March 2018 and that is payable by SARS, as interest that accrued to the taxpayer in prior years of assessment or that accrued prior to 1 March 2018.”
This would prevent the interest of being included again when it is paid by SARS. It will also result in SARS not assessing “such interest on an accrual basis in earlier years of assessment”.

In many of the above instances, and in particular in the third instance, the amount of interest that accrued, and may have been paid by the taxpayer, will be increased. Where the amount of interest, as calculated by SARS when the original assessment, was refunded, no double inclusion will arise. A double inclusion will however result if no refund was made by SARS. The draft ruling, with the adjustment as suggested above, addresses the duplication of the accounting for the interest in this instance.

Comment relating to footnote 5 (and the last paragraph in paragraph 2 of the Draft BGR):

Footnote 5 reads as follows:

“When SARS sets off any outstanding tax debt against an amount that is refundable including any interest thereon, such interest will be regarded as paid on the date of set-off and the taxpayer must account for such interest under section 7E accordingly.”

SARS is entitled to do the set-off in terms of section 191(1) of the Tax Administration Act and it reads as follows:

If a taxpayer has an outstanding tax debt, an amount that is refundable under section 190, including interest thereon under section 188(3)(a), must be treated as a payment by the taxpayer that is recorded in the taxpayer’s account under section 165, to the extent of the amount outstanding, and any remaining amount must be set off against any outstanding debt under customs and excise legislation.

This does not actually say that the refund was made by SARS, but we agree with the statement in footnote 5. It is suggested that the footnote be moved up to the main text in paragraph 2. It is not necessary to make this part of the actual ruling.

Please feel free to contact us should you have any questions with regard to any of the above.

Yours faithfully,

Piet Nel