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New year, new beginnings..

I trust you had a relaxed festive season and are ready to face the challenges that 2013 will bring.

In the tax calendar, this year promises to be the year of accelerating the implementation of the Tax Administration Act, and this issue is all about just that. This year, each issue of TaxTalk will focus on a specific theme, and this month we dedicate the entire magazine to some of the pertinent changes brought about in the tax administration arena. The provisions in tax administration are vast and interlinked with other pieces of legislation, including the Promotion of Administrative Justice Act, the Promotion of Access to Information Act and, in addition, the Constitution of our country. Our pre-eminent tax experts contributed on pressing and important provisions, such as administrative justice, the new penalty regime and SARS’s extended information gathering powers and taxpayers’ rights.

It’s also a privilege to announce that ownership of TaxTalk now vests with the SA Institute of Tax Practitioners, effective 1 November 2012. The editorial team is confident that together with the shared knowledge and expertise of both teams, including the appointment of an editorial board of tax experts, the magazine will go to greater heights. We will also unveil a new look and feel when a special issue dedicated to the 2013 National Budget is introduced on 1 March. The new TaxTalk is designed for thought leadership debate on tax but will also introduce a lifestyle and recruitment section, and a section on the profiling of tax experts.

Tax students at universities will also receive a bi-annual version of TaxTalk. Student at the National Tax Student Conference to be hosted at Sun City, sponsored by PwC, E&Y, Deloitte, KPMG and Fasset.

Tax season 2013 will commence on 1 July, including the requirement for tax practitioners to be registered with a recognised controlling body. TaxTalk will feature the regulation of the tax profession in March/April issue and Tax Season in July/August. That being said, I end with: Eish! Although SARS managed to take the eish out of tax-eish-ion compliance…2013 is certainly going to be a big-eish year for tax administration are vast and interlinked with other pieces of legislation, including the Promotion of Administrative Justice Act, the Promotion of Access to Information Act and, in addition, the Constitution of our country. Our pre-eminent tax experts contributed on pressing and important provisions, such as administrative justice, the new penalty regime and SARS’s extended information gathering powers and taxpayers’ rights.

That being said, I end with: Eish! Although SARS managed to take the eish out of tax-eish-ion compliance…2013 is certainly going to be a big-eish year for tax professionals and taxpayers.

Till next time.

Liz Jones | Chief Editor

“Nobody can go back and start a new beginning, but anyone can start today and make a new ending.”

- Maria Robinson
PERMANENT VOLUNTARY DISCLOSURE PROGRAMME:

the cake without the icing

“In the event that the applicant fails to disclose material facts from the application, SARS may withdraw the relief granted...”

With the promulgation of the Tax Administration Act, No 28 of 2011, which subsequently took effect on 1 October 2011 in terms of the Taxation Laws Second Amendment Act, No 8 of 2010. The new voluntary disclosure programme, however, does not make provision for the following relief:

• Interest payable on the late payment of the relevant tax.
• Exchange control violations.
• Penalties for the late submission of returns or payment thereof; however, the taxpayer may still seek relief under other provisions of the Act in terms of which the specific penalties were charged.
• Customs and excise violations.

From this it is clear that the relief offered in terms of the new programme is by far not as friendly as the relief offered in terms of the old programme. It’s as if the Commissioner is offering the taxpayer some cake without the icing, but this certainly is better than no cake at all.

SECTION 255 OF THE TAA

To apply for this relief, a default must have taken place. A default is defined as: “The submission of inaccurate or incomplete information or adoption of a tax position which has resulted in an incorrect assessment being issued.

This assessment should then have the effect of the incorrect tax being paid to SARS, or an incorrect refund made by SARS.”

“From this it is clear that the relief offered in terms of the new programme is by far not as friendly as the relief offered in terms of the old programme. It’s as if the Commissioner is offering the taxpayer some cake without the icing, but this certainly is better than no cake at all.”

SECTION 227 OF THE TAA

For purposes of section 227 of the Act, an agreement must be entered into between SARS and the taxpayer in a format as prescribed by the Commissioner. This agreement must contain details of the default, the amount payable in terms of the agreement, as well as undertakings by the taxpayer for purposes of paying the debt.

In the event that the applicant fails to disclose material facts from the application, SARS may withdraw the relief granted in terms of the programme as the application is not considered valid for purposes of section 227 of the Act.

The application will not be considered if the taxpayer is aware of a pending audit or investigation or in the event that an audit or investigation is in process.

The law does state that a senior SARS official, after having considered the circumstances of the audit or investigation, may allow for the application to be accepted in terms of the Act.

For purposes of making this decision, the official will take into account whether the default would necessarily have been detected in the normal cause of the audit or investigation. The decision made by the official should be in the interest of good management of the tax system and best use of SARS’s resources.

A successful voluntary disclosure applicant will enjoy the following relief:

• No understatement penalty will be charged provided that the applicant has not been grossly negligent or intentionally evaded tax.
• Administrative non-compliance penalties chargeable under part 15 of the TAA or any other tax act will not be charged if the taxpayers application for the programme is successful. Please note that penalties charged for late submission or payment of a return are excluded.

Once agreement is reached between SARS and the taxpayer, should an assessment be issued which should give effect to the agreement. This assessment is not subject to objection or appeal.

A taxpayer may apply for a non-binding private opinion with regard to one’s eligibility for the programme, as could be applied for under the previous programme.
The tax implications of transactions or events often play a significant role in business decisions and taxpayers are required to assume a stance or a view on an issue, despite the risk that the tax authorities may disagree with those views. Significant uncertainties, such as the potential penalties that could stem from such a view or position taken, may however restrict business activities unnecessarily if this risk cannot be managed. This article considers the impact of the introduction of the understatement penalty regime in the Tax Administration Act (TAA) on a taxpayer's ability to manage its exposure to understatement penalties.

Additional tax: limited rights to taxpayers

Prior to the enactment of the TAA, section 76 of the Income Tax Act imposed additional tax when, among others, a taxpayer made an incorrect statement in any return which resulted or would, if accepted, have resulted in the assessment of normal tax at an amount which is less than the tax properly chargeable. An incorrect statement included any statement that SARS deemed did not reflect the correct interpretation and application of the provisions of the Income Tax Act.

A similar additional tax liability was triggered by any omission of something that ought to have been included in a tax return, which in terms of section 76(5) included the impermissible deduction, set off, disregarding or exclusion of an amount in determining a taxpayer's taxable income.

This additional tax was determined as an amount equal to twice the difference between the tax that should have been payable had it not been for the incorrect statement or omission and the tax actually paid. A taxpayer who adopted a tax position that SARS did not agree with could therefore have been exposed to a potential 200% penalty in addition to its tax liability.

Unless the omission or incorrect statement stemmed from an intention to evade tax, the Commissioner had the discretion to remit the additional tax or part thereof as he thought fit. In practice, the Commissioner’s discretion was based on the recommendations of a penalty committee.

The rights of taxpayers under the new regime

From 1 October 2012, section 76 of the Income Tax Act has been repealed and understatement penalties in respect of any taxes covered by the TAA are now imposed in terms of Chapter 16 of the TAA. Similarly to section 76 of the Income Tax Act, these penalties are imposed when the fiscus is prejudiced due to default in rendering a return, an omission from a return or an incorrect statement in a return. Such an understatement penalty is calculated as the shortfall, which refers to the shortfall in tax paid as a result of the action that prejudiced SARS, multiplied by the highest applicable penalty rate from the table in section 223 of the TAA.

The table in section 223 provides different rates for the understatement penalty, depending on the behaviour of the taxpayer and the circumstances under which the behaviour occurred. The use of this table provides the taxpayer with a much clearer picture of what to expect when it comes to exposure to penalties resulting from different behaviours.

When dealing with exposure to taxation, there is little doubt that it is preferable to be proactive about managing your potential liability, rather than to try to fix a tax-related problem once it has surfaced.
The relevant behaviours listed in section 223, in order of increasing severity as far as the penalty rate is concerned, are: (i) substantial understatement; (ii) reasonable care not taken in completing return; (iii) no reasonable grounds for tax position taken; (iv) gross negligence and lastly (v) intentional tax evasion. It is important to note that section 102(2) of the TAA places the burden of proving the facts on which SARS based the imposition on an understatement penalty upon SARS. It is therefore suggested that the penalty rate table in section 223 should enable a taxpayer to be in a position to manage its exposure to the risk of penalties to a large extent by implementing certain processes and actions, which could make it extremely difficult for SARS to discharge the burden of proof imposed by section 102(2).

Unfortunately, it may be a matter for the courts to consider whether SARS has successfully discharged its onus before the penalty is waived. It would nevertheless be in a taxpayer’s best interest to implement measures to manage this exposure and attempt to make it unattainable for SARS to discharge this onus. The position of the taxpayer in the case of each of the behaviours is briefly considered next.

Intentional tax evasion

Intentional tax evasion will exist if a taxpayer willfully fails to comply with the requirements of a tax law in order not to pay the tax that they are legally obliged to pay. There is no apparent process or action that can, or for that matter should, provide respite from penalties for intentional tax evaders.

Intentional tax evasion can be distinguished from a misapplication of complex legislation or tax planning by the willful intention to evade tax in a manner that does not stroke with the requirements of the relevant legislation. It is submitted that a taxpayer can protect themselves from being classified into this category of behaviour by documenting reasons or arguments for taking a specific tax position or undertaking an action with reference to the requirements of the relevant legislation as evidence of tax planning within the boundaries of the law as opposed to tax evasion.

Gross negligence

In the Short Guide to the TAA published by SARS, gross negligence is described as doing (or not doing) something in a way that suggests complete or high level disregard for the consequences. Although the term ‘gross negligence’ is not capable of precise definition, cases arising from areas of law other than taxation provide some guidance on its meaning. In the case of S v Van Zyl it was held that it is non-consciousness of risk-taking that distinguishes gross negligence from ordinary negligence. A person’s conduct in relation to a risk that a person is conscious of could however depart so radically from the standard of the reasonable person that it can amount to gross negligence.

In the case of taxation, a taxpayer is likely to be aware of the risk of not complying with the requirements of the relevant tax legislation. It was suggested in Transnet Limited v The owners of the MV Stella Tingas and the MV Atlantica that where considering gross negligence in relation to a person consciously taking a risk, the conduct in question must involve a departure from the standard of the reasonable person to such an extent that it may be categorised as extreme; complete obtuseness of mind must be demonstrated.

A person merely failing to take care that people usually undertake in similar circumstances, may be negligent, but not grossly negligent.

Based on this brief discussion of the meaning of gross negligence, it is submitted...
that it would be unlikely that a taxpayer can be said to be grossly negligent, if it implements processes with built-in controls that take into account the tax consequences to deal with transactions or events.

This may be particularly relevant in the case of regular day-to-day activities; for example, a process checking that invoices captured comply with the requirements of the VAT Act to deduct input tax. For less frequent or once-off events, such as structuring deals or transactions, the risk of being grossly negligent as to the tax consequences should to a large extent be manageable by documenting reasons or arguments for taking positions and showing that those tax consequences have been considered (i.e. not complete obtuseness of mind in relation to the tax implications of the event).

No reasonable grounds for tax position taken

A tax position is defined in section 221 of the TAA to deduct input tax. For less frequent or once-off events, such as structuring deals or transactions, the risk of being grossly negligent as to the tax consequences should to a large extent be manageable by documenting reasons or arguments for taking positions and showing that those tax consequences have been considered (i.e. not complete obtuseness of mind in relation to the tax implications of the event).

The involvement of a tax specialist may enhance the position of the taxpayer as to the reasonableness of these grounds, especially where the views or assumption deals with a more complex matter.

Reasonable care not taken in completing return

The TAA does not define what is meant by the phrase “reasonable care”. The guide to the TAA indicates that SARS interprets this phrase to mean that a taxpayer is required to take the degree of care that a reasonable, ordinary person in the circumstances of the taxpayer would take to fulfil their tax obligations. SARS acknowledges that reasonable care does not necessarily mean perfection.

The United Kingdom imposes a penalty for careless inaccuracies in a return. The relevant tax law defines careless as a failure to take reasonable care. As the wording and context is similar to that in the TAA, views on that provision may be helpful in interpreting the meaning of “reasonable care” in section 223 of the TAA.

Some of the examples of failures to take reasonable care provided by HMRC in the CH81145 guide suggest that a failure to implement adequate and appropriate processes, controls and procedures to ensure that tax returns are completed accurately may constitute a failure to take reasonable care. It is therefore submitted that it should be possible to mitigate the risk of a penalty resulting from not taking reasonable care in completing a return to a large extent by implementing, and being able to demonstrate that certain controls over the processes that generate the information used in the return and to complete the tax return.

Substantial understatement

Based on the discussion of these four behaviours, it appears as if it should be possible for a taxpayer to manage and substantially reduce its exposure to penalties resulting from these behaviours. The last behaviour, a substantial understatement, is defined as a case where the prejudice to the fiscus exceeds the greater of 5% of the tax properly chargeable for the relevant period or R1 million. As this behaviour is based on the quantity of the understatement, as opposed to an actual behaviour, there would have been very little a taxpayer could do to manage this risk if it was not for section 223(3) of the TAA.

Section 223(3), however, states that the Commissioner must remit an understatement penalty for substantial understatement if he is satisfied that the taxpayer made full disclosure of the arrangement that prejudiced the fiscus when the return was due.

Section 223(3) further requires that the taxpayer must be in possession of a tax opinion written by a registered tax practitioner that was issued by no later than the date on which the return was due, that took full account of the specific facts and circumstances (including all the steps in a transaction where the general anti-avoidance rules or substance over form doctrine is involved) and that confirms that the taxpayer’s position is more likely than not to be upheld if the matter were to proceed to court. This provision clearly provides taxpayers with a procedural mechanism that it can implement to ensure that it is not exposed to a penalty associated with substantial understatement.

This discussion suggests that the understatement penalty system in Chapter 15 of the TAA offers taxpayers the opportunity to manage their exposure to understatement penalties. It is further submitted that it should be possible to implement measures to address the first four behaviours that can result in understatement penalties.

If these measures are implemented in combination with the procedural mechanism for remittance of substantial understatement penalties in section 223(3) of the TAA, a taxpayer should theoretically be able to manage its exposure to understatement penalties to such an extent that it may no longer be exposed to those penalties. It is of critical importance that taxpayers, especially larger corporate taxpayers, take time to consider their strategy and implement a policy to manage their exposure to understatement penalties.

*Similar additional taxes were imposed in terms of other tax laws, such as section 60 of the VAT Act which imposed additional tax but only in instances where there was an intention to evade tax.*

*Government RSA (Department of Industry) v Fibre Spinners and Weavers (Pty) Ltd 1977 (2) 324(D & CLD)*

*1996 (1) SA 553 (A)*

*C.S.A.R. v Adlington & Co. 1906 75 964 at 973*
Third party appointments by SARS under the Tax Administration Act

On 14 October 2009, the Commissioner of SARS delivered a public address regarding the introduction of administrative penalties for the purpose of policing non-compliance.

Referring to debt collection tools, the Commissioner stated: “The first tool we will use is the agent appointment.” Although the agent appointment mechanism was previously understood to be a last-resort option, it is becoming clear that, going forward, SARS will increasingly apply same.

Prior to the enactment of the Tax Administration Act, No 28 of 2011 (TAA), so-called ‘agent appointments’ were made under s99 of the Income Tax Act, No 58 of 1961 (ITA), alternatively s47 of the VAT Act, 1991. Section 99, since repealed, provided that:

“The Commissioner may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared as agent shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent he has been declared to be.”

Section 179 of the TAA has now replaced s99 of the ITA as well as its equivalent in the VAT Act. Section 179 took effect on 1 October 2012 and deals with the
Section 179 no longer refers to the concept ‘agent’ – according to the SARS Guide on the TAA, the term ‘agent’ was considered unnecessarily confusing. Section 179 simply states that SARS can require a third party to make payment to it in satisfaction of the taxpayer’s tax debt. In practice, the s179 collection mechanism is activated through an electronic notice (titled ‘Assessed Tax – Third Party Appointment’) issued to the third party.

The notice is accompanied by a statement (almost in spreadsheet format) reflecting, among other things, the indebted taxpayer’s details, a start and end date, the amount due to SARS, and the total amount required to be paid over to SARS by the third party.

Section 179(1) reads: “A senior SARS official may by notice to a third party...”. From what we have seen there is nothing in the electronic Third Party Appointment notice to suggest that it had been considered and issued by a senior SARS official.

The document merely indicated that it was issued on behalf of the Commissioner. The term ‘senior SARS official’ is defined in s1 of the TAA as a SARS official referred to in s6(3). Section 6(3) contains a provision that the powers and duties required to be exercised by a senior SARS official ‘must be exercised’ by either the Commissioner, a SARS official who has specific written authority from the Commissioner or a SARS official occupying a post designated by the Commissioner for this purpose. The SARS Guide on the TAA indicates that ‘only a senior SARS official who is authorised to do so by the Commissioner may perform one or more of the more serious powers or functions’. The issuing of a s179 notice is listed as such.

The question is whether an electronic Third Party Appointment notice as currently used by SARS really complies with the above-mentioned provisions of the TAA. For example, a third party appointee has no means of establishing whether a senior SARS official has indeed acted in terms of s179, taking into account that said notice nowhere refers to any senior SARS official whatsoever.

The TAA has introduced significant changes compared to the previous S39 ITA/S47 VAT Act Appointment Regimes. These include:

Under s179, the third party appointee’s obligation to pay money to SARS covers money that it ‘holds or owes or will hold or owe... for or to the taxpayer’. The use of the future tense indicates that SARS could apply s179 with regard to money not yet in the possession of the appointee, but which might be received in future. For example, a bank could potentially be notified under s179 to pay over money from a fixed deposit coming to maturity. Section 179 can therefore operate prospectively.

Under s99 of the ITA and s47 of the VAT Act, the appointed agent had to comply and could not disclose to the taxpayer that it was obliged to pay SARS the money it held – this was to prevent the taxpayer from moving funds having won goods of SARS’ intentions. Section 179(3) is along the same lines. It provides that the third party “must pay the money in accordance with the notice”. Should the third party part with the money contrary to the notice, the result is personal liability for the money that should have been paid to SARS.

Where the third party is unable to comply with the notice, s179(2) requires that the senior SARS official must be advised of the reasons for the inability. The senior SARS official “...may withdraw or amend the notice as is appropriate under the circumstances”.

It has already been indicated that the electronic notice used by SARS reflects no particulars relating to the senior SARS official that purportedly issued same. It is worth mentioning that the electronic notice used by SARS really complies with the TAA in the future tense indicates that SARS could apply s179 with regard to money not yet in the possession of the appointee, but which might be received in future. For example, a bank could potentially be notified under s179 to pay over money from a fixed deposit coming to maturity. Section 179 can therefore operate prospectively.

The interest is to note that both the Australian Tax Office and the Canadian Revenue Agency have percentage limits on the amount of taxpayer money that may be attached via an agent appointment. These limits are between 25% and 30% of the money held by the third party. Unfortunately, the TAA does not specify anything in this regard.

The s179 collection mechanism is sometimes referred to by SARS as a garnishee order (e.g. on the SARS website). A true garnishee order refers to the attachment of a debt owed to the taxpayer by a third party (who becomes known as the garnishee), and the debt is usually attached as a one-off arrangement. The debt is then paid by the third party, to the creditor in payment of the debtor’s obligation. The s179 third party appointment differs from a true garnishee order in the following respects:

To obtain a garnishee order a court order is a prerequisite. A third party appointment under s179 requires no court order.

Where the garnishee is disqualified with the garnishee order being issued he could approach the court for redress. A third party appointed under s179 is legally obliged to transfer funds held in favour of the taxpayer to SARS, otherwise such agent could face personal liability for the outstanding amount (see above).

Whereas the debtor can beforehand contest the issuing of a garnishee order, this is impossible with regard to s179 since the taxpayer will often be obvious that SARS intends making a third party appointment. On application for a garnishee order, the court could examine the debtor’s financial position and vary, or set aside, the order accordingly. The s179 third party appointment process does not provide for such an examination – effectively there is no audit alternative of the impaired taxpayer. There is only an ex post facto examination of affordability under s179(4) of the TAA (see above).

Lastly, s37(1) of the Pension Fund Act, No 24 of 1956 provides that a pension fund benefit may not be liable for attachment, including attachment by garnishee order. Section 179 of the TAA specifically empowers SARS require a third party appointee to pay to SARS any money, including pension, salary, wage or other remuneration.

We understand that banks are being inundated with s179 third party appointments. The expectation is that this collection mechanism could also be used increasingly in relation to insurers (policy proceeds), estate agents and conveyancing attorneys (proceeds from property transfers), the JSE (dividends receivable) and so on. A taxpayer expecting money should tread carefully.

Section 179 requires no court order. A third party appointee to pay to SARS any money, including pension, salary, wage or other remuneration. We understand that banks are being inundated with s179 third party appointments. The expectation is that this collection mechanism could also be used increasingly in relation to insurers (policy proceeds), estate agents and conveyancing attorneys (proceeds from property transfers), the JSE (dividends receivable) and so on. A taxpayer expecting money should tread carefully.
he TAA provides that, once the new interest rules take effect, interest will be compounded on a monthly basis, both in respect of interest payable by a taxpayer on the late payment of tax, and also in respect of refunds payable by SARS to taxpayers.

The TAA was enacted to regulate the administrative provisions of all tax acts administered by the Commissioner: SARS. In preparing the legislation, the Commissioner consulted extensively, seeking input on the legislation, with a view to ensuring that its provisions comply with the Bill of Rights contained in the Constitution of the Republic of South Africa, Act 108 of 1996, as amended.

TAX OMBUD

The TAA creates the legal framework for the creation of the tax ombud in South Africa. SARS has indicated that the tax ombud will follow the model adopted by the United Kingdom in creating a tax adjudicator’s office, and the tax ombud’s office in Canada. The legislation provides that the staff of the office of the tax ombud must be employed in terms of the SARS Act, and will be seconded to the office of the tax ombud from SARS. The TAA requires that the ombud be appointed within one year from 1 October 2012. The Minister of Finance has indicated that it was intended to appoint a tax ombud before the end of 2012.

The mandate of the ombud is to review and address complaints by a taxpayer regarding a service or a procedural administrative matter. The ombud must review a complaint lodged by a taxpayer and resolve it either through mediation and conciliation, and must act independently in resolving taxpayers’ complaints. The creation of the position is to be supported in that it creates a mechanism for complaints to be dealt with by a formalised procedure, despite the fact that it may be located within the SARS structure.

Section 17 of the TAA makes it clear that the tax ombud may not review legislation or tax policy, or SARS policy or practice generally prevailing, or deal with any matter subject to objection and appeal under a fiscal statute, or any decision which is before the Tax Court. In those overseas countries where tax ombud offices have been created, the resolution of legal disputes falls outside of the jurisdiction of the tax ombud and, in this respect, South Africa is adhering to the international norm.

The TAA provides that once the tax ombud receives an issue falling within its mandate, it may determine how the review of the taxpayer’s complaint is to be conducted, and whether a review should be terminated before completion of the matter.

Currently, where taxpayers encounter administrative difficulties with SARS, it is necessary to raise the matter first with the official dealing with the taxpayer’s affairs and failing resolution at that level, to refer the matter to the branch manager of the Receiver of Revenue office in question. Only once that procedure has failed to resolve the matter, may it be escalated to the SARS service monitoring office. Section 18 of the TAA requires that the taxpayer exhaust available complaints resolution mechanisms in SARS before resorting to the ombud, unless there are compelling circumstances not to do so and this follows international practice.

It is provided that the tax ombud may entertain a request for assistance without exhausting SARS internal complaints procedures where the matter raises systemic issues or exhausting the complaints resolution mechanism will cause undue hardship to the taxpayer, or exhausting the SARS procedures is unlikely to produce a result within a period of time, which the tax ombud considers reasonable.

The ombud has a duty to submit reports to Parliament on an annual basis, and to identify those issues which are causing problems for taxpayers, and it is hoped that this will ultimately enhance tax administration in South Africa and reduce the administrative burden faced by taxpayers.

CRIMINAL INVESTIGATIONS

The TAA seeks to ensure that taxpayers’ rights are protected where a taxpayer faces a criminal investigation. The Act requires that audits and criminal investigations are separated, ensuring that the rights of an accused under the Constitution are protected. This was previously not properly dealt with under the provisions of the Income Tax Act or other fiscal statutes.

SEARCH WITHOUT A WARRANT

One power contained in the Act that has attracted much comment is SARS’ power to conduct a search-and-seizure operation without a warrant to protect documents from imminent destruction by taxpayers.
It is appropriate to point out that 17 other organs a similar power to conduct searches in exceptional circumstances, but there is intended that the search of premises is authorised to do so by a warrant issued by a court in terms of section 74D of the Income Tax Act.

Previously, SARS could search a taxpayer’s premises and seize documents only when a criminal investigation. Unfortunately, the provisions of the Voluntary Disclosure Programme contained in the TAA are not as attractive as that contained in the Voluntary Disclosure Programme and Taxations Laws Second Amendment Act, No 8 of 2010. This is by virtue of the fact that, under the TAA, taxpayers will remain liable for interest due to SARS, and, depending on their particular circumstances, may remain liable to an understatement penalty ranging from 5 to 10%.

OBJECTIONS TO ASSESSMENT

The TAA amends the time frame within which taxpayers need to object to an assessment. Previously, a taxpayer was required to submit an objection within 30 days after the date of the assessment, which was defined in the Income Tax Act as the due date of the assessment. This was typically a date some time after the date on which the assessment was issued. Under the TAA, the objection must now be lodged within 30 days of the date of issue of the assessment, which generally means that an objection must be lodged earlier than what would have been the case under the Income Tax Act.

TAX CLEARANCE CERTIFICATES

The Income Tax Act previously contained no procedure dealing with the issue of tax clearance certificates applied for by taxpayers. The TAA now contains specific provisions regulating the manner in which tax clearance certificates may be applied for and issued by the Commissioner. The TAA requires that SARS must issue or decline to issue the tax clearance certificate within 21 business days from the date that the application is properly filed. Unfortunately, it would appear that, historically, SARS did not issue tax clearance certificates promptly, and it is hoped that the new statutory provisions in the TAA will be complied with.

The TAA contains many provisions with which taxpayers are familiar, but also refines and modifies a number of provisions which were contained in the various fiscal statutes and introduces various new provisions. It is important that taxpayers and SARS officials are aware of the provisions of the TAA so as to ensure that the provisions of the TAA are complied with. In drafting the TAA, the Commissioner was sensitive to the rights of taxpayers and sought to ensure that the TAA does not infringe on the rights of taxpayers.

Certain of the provisions contained in the TAA referred to here do enhance the protection of taxpayers’ rights by way of new provisions which were not found in the other tax acts. It remains to be seen, though, whether the Commissioner is geared to providing taxpayers with regular feedback on the status of audits, and to deal properly with the other provisions contained in the TAA.

Previously, SARS could search a taxpayer’s premises and seize documents only when authorised to do so by a warrant issued by a court in terms of section 74D of the Income Tax Act.

Section 63 of the TAA provides that a senior SARS official may, without a warrant, exercise the powers contained in section 61 of the TAA, which regulates the search of premises and seizure of documents. It is intended that the search of premises without a warrant should take place only in exceptional circumstances, but there is always the concern that the power may be abused.

It is appropriate to point out that 17 other statutes in South Africa confer on state organs a similar power to conduct search and seizure operations without a warrant. It remains to be seen if this part of the TAA will face a Constitutional challenge at some point.

SARS AUDITS AND FEEDBACK

Previously, taxpayers experienced frustration in dealing with SARS, in that a letter of inquiry would be received from SARS and the taxpayer would submit a response. Sometimes many months and, in some cases even years, would pass before the taxpayer received any indication from SARS as to whether the inquiry or audit was completed or, alternatively, what adjustments were to be made to the taxpayer’s assessments.

Fortunately, the TAA contains a provision whereby SARS must advise a taxpayer as to the status or progress of an audit conducted on their affairs. There was, previously, no such provision under the other fiscal statutes. In accordance with section 42(1) of the TAA, the Commissioner was required to release a public notice setting out the details and processes relating to the manner in which taxpayers should be kept informed of audits conducted by SARS.

Under Rule 2 of the public notice, dealing with keeping taxpayers informed, a SARS official responsible for an audit instituted before but not completed by the commencement date of the TAA, or instituted on or after 1 October 2012, must provide the taxpayer subject to audit with a report indicating the stage of completion of the audit.

Where the audit started before the commencement date of the TAA, the Commissioner must provide feedback within 90 days of the TAA’s commencement and within 90 day intervals thereafter. Where SARS instituted an audit on or after 1 October 2012, the report must be submitted within 90 days of the start of the audit, and within 90 day intervals thereafter until the audit is concluded by SARS.

The Commissioner is required to advise the taxpayer as to the current scope of the audit, the stage of completion of the audit and relevant material still outstanding from the taxpayer.

It is hoped that the Commissioner: SARS will adhere to this requirement, thereby alleviating the frustration that occurred in the past, that taxpayers subject to an audit would hear nothing from SARS for a long period of time and then suddenly be requested to supply additional information within a very short period of time.

Previously, the Commissioner would also not advise a taxpayer as to when an audit had been completed, particularly, when no adjustments were made in the calculation of the taxpayer’s taxable income. Since the commencement of the TAA, it would appear that SARS is now advising taxpayers that an audit has been completed and that no adjustments are being made in the calculation of taxable income.

GROUNDs OF ASSESSMENT

Where the audit identifies amounts which SARS wishes to subject to tax, it is necessary for SARS to advise the taxpayer and furnish the grounds or reasons for the assessment issued to the taxpayer. The Commissioner is required to submit this information within 21 business days of the assessment being issued to the taxpayer. Previously, the taxpayer had a right to request reasons for assessments issued by SARS, but no provision was contained in the Income Tax Act compelling SARS to issue reasons within a specified period after the issue of an assessment. The TAA therefore improves the position for taxpayers in this regard.

VOLUNTARY DISCLOSURE PROGRAMME

The TAA also contains a permanent voluntary disclosure programme whereby taxpayers may approach the Commissioner to rectify previous defaults under any fiscal legislation, other than customs and excise. If taxpayers have failed to comply with their obligations under the fiscal laws of the country, they are, therefore, entitled to rectify those defaults under the framework contained in the TAA.
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- SARS correspondence is automatically linked to the data entry source allowing for easy access and reference.
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SARS & fair administrative action: Quo vadis?

From inception, South Africa's income tax legislation recognised a taxpayer's right to dispute with the tax authorities the correctness of an income tax assessment. That is, of course, a right that derives from the rule of law itself, for tax is levied in terms of legislation and is not imposed at the whim of the revenue authorities.

The revolution in our legal system that was wrought by the interim and final Constitution had a profound impact on taxpayers' rights in South Africa. For the first time, the validity of legislation — including tax legislation — and the conduct of the tax authorities in applying that legislation could be challenged as being contrary to the constitutional bill of rights.

From that time onward, tax administration has had to take account, not only of a taxpayer's right to challenge the revenue authority's assessments to tax on the merits, by way of objection and appeal against an assessment, but also of taxpayers' rights to challenge the validity of legislative provisions and the conduct of officials of the revenue authorities as an organ of state.

No less significant has been the fiscal dimension of a taxpayer's constitutional right to administrative action that is lawful, reasonable and procedurally fair as first articulated in skeletal form in section 33(1) and (2) of the Constitution and the right of any person whose rights have been adversely affected by administrative action to be given written reasons for such action.

As the Supreme Court of Appeal observed in Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smitt NO and (2000) ZACC 12, 2001 (1) SA 545 (CC):

“All statutes must be interpreted through the prism of the Bill of Rights”, and this is as true of fiscal legislation as of all other legislation.

The constitutional right to procedurally fair administrative action was given detailed expression in dedicated legislation, namely, the Promotion of Administrative Justice Act 3 of 2000, as was foreshadowed and indeed promised in the Constitution itself.

Taxpayer's rights to administrative justice, as expressed in the Promotion of Administrative Justice Act, are proving a significant counterweight to SARS's draconian powers, not merely to issue assessments to tax, but to require that the amount assessed be paid forthwith, even where liability is disputed by the taxpayer.

However, a decade after the enactment of the legislation, some aspects of taxpayers' constitutional rights are still uncertain; other aspects have only recently been the subject of judicial decisions which may not withstand appeal to the Supreme Court of Appeal and the Constitutional Court.

This, for example, it seems from the decision in Corpclo 2290 CC t/a U-Care v Registrar of Banks (2012) ZASCA 156, handed down on 2 November 2012, that a purely investigatory action by an organ of state (such as, for example, a decision by the South African Revenue Service to audit a taxpayer) is not administrative action and consequently cannot be the subject of judicial review.

It is still unclear how a proposed decision (as envisaged in the definition of decision in section 1, and as distinct from a decision) by an organ of state, such as SARS, can be the subject of judicial review, given that the decision has not yet been made.

The correctness of the recent decision of the Western Cape High Court in Hendricks v City of Cape Town 2011 (6) SA 88 (WCC) is open to question, in holding that a notice given by a municipality to informal traders, requiring them to dismantle and then re-erect their structures on a daily basis, constituted administrative action. It is arguable that such a notice was merely antecedent to administrative action, and that this decision cannot be reconciled with that given by the same court in City of Cape Town v Bosley Properties (Pty) Ltd (2010) ZAWCHC 650.

Many categories of administrative action taken by SARS have yet to be taken on judicial review, including a decision to decline the taxpayer's request that his obligation to pay a disputed amount of tax be suspended, pending a determination of liability on appeal. The approach that the courts will take in such applications is still completely uncertain.

In short, there are many aspects of tax administration and taxpayers' rights that are still unresolved and await authoritative determination by the courts.
The new Tax Administration Act No 28 of 2011 (TAA) was promulgated with effect from 1 October 2012 and, while expected to have extended taxpayer rights, it also reaffirmed and extended the powers of the South African Revenue Services (SARS).

SARS’s objective remains the efficient and effective collection of tax revenue and the TAA is geared to assist it with meeting this objective. Taxpayers and non-compliant taxpayers can expect to face more strict enforcement action, assessment of taxes and the collection thereof. It is therefore imperative that taxpayers toe the line in administering their taxes and taking correct decisions with regard to potential contentious matters.

However, once returns are filed and assessments are raised, taxpayers must pay the taxes arising from it. SARS has always believed in the mantra of pay now argue later when it comes to tax collections, but in practice it was not always readily enforced across the board. The TAA reinforces that principle and SARS is set to follow the process as laid down.

Taxpayers who are aggrieved by assessments raised by SARS must therefore not only enter into dispute resolution process with regard to the assessment, but must also approach SARS with a formal request to suspend collecting the tax arising from the disputed assessments. Merely arguing with SARS regarding the assessment may therefore lead to the taxpayer still facing serious collection action which SARS has the right to institute despite the taxes being disputed.

A two-pronged approach is required in all these circumstances. However, merely filing a payment postponement request without confirmation that SARS has agreed to this is also not wise. It must be ensured that there is regular follow up on the progress of the collection of the taxes until such time as the confirmation of suspension has been issued by SARS.

When deciding on whether a dispute must be lodged against an assessment, care must be taken to ensure when the action for collection will commence. If such action is to commence prior to the dispute being filed, an application based on the intended dispute must be filed with SARS first.

It is not a given that SARS will postpone or suspend the collection action when a taxpayer wishes to enter into a dispute and makes the request to suspend collection. SARS will consider various factors before suspending collection action. First and foremost it will consider the taxpayer’s compliance history. This is yet another reason why taxpayers must ensure that tax filings and payments are made as and when required.

A taxpayer’s compliance history will also be taken into account, i.e. were there regular or serious transgressions in the past, did the taxpayer apply for voluntary disclosure relief or amnesty in the past or has the taxpayer been unsuccessful in various disputes in the past? Being a model taxpayer assists the taxpayers’ cases in such situations. This is not to say that taxpayers with a poor record will not be successful, but their application may require more meat to the bone.

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Another factor SARS will consider is the amount of tax in question. There is no guidance as to whether a small or large amount will receive more favourable attention but the amount of taxes may be linked back to the context and situation of the taxpayer. SARS will also consider whether it believes that there is a real risk that the assets of the taxpayer may be reduced during the period of the dispute which may jeopardise the collection of the taxes at a later stage.

SARS may require the taxpayer to provide security for the amount in question. SARS would consider whether the amount in question would provide financial hardship to the taxpayer if immediate payment is required as would be the likelihood of the liquidation or sequestration of the taxpayer. Another consideration would be whether the assessment raised by SARS contained elements of fraud or intentional tax evasion on the part of the taxpayer.

A request for suspension would be considered only if it is filed with SARS in the prescribed format and if the taxpayer is able to supply all the information called for by SARS at that time. SARS will deny requests for suspension if it believes the dispute action is frivolous and dilatory tactics and if there is a material change in the taxpayer’s position and factors upon which the application is based. The suspension of tax collection will also automatically lapse if the dispute is not lodged or SARS has ruled against the taxpayer in the relevant dispute.

Taxpayers who are issued with assessments must therefore make two decisions:

- Will the assessment be accepted – in which case the taxes must be paid;
- Will the assessment be disputed – in which case the dispute must be lodged.

Where taxpayers decide on the second option, they must ensure that they not only adhere to the rules of dispute resolution, but also that the matter of collecting the tax is also addressed to avoid potential action instituted by SARS.

“SARS will deny requests for suspension if it believes the dispute action is frivolous and dilatory tactics...”
A parting shot by Prof Daniel N. Erasmus: The Tax Administration Act, Taxpayer’s rights and SARS Audits

With the commencement of the new Tax Administration Act, issues such as prescription of assessments, the pay-now-argue-later principle, penalties, legal professional privilege and the excessive powers of SARS will remain under the spotlight and deservedly so. If anything, the TAA has highlighted the significance of taxpayers’ rights.

34 of 1997 (SARS Act); the Promotion of Administrative Justice Act 3 of 2000 (PAJA); and a decision by the Commissioner for the South African Revenue Service to exercise his powers under ss 40, 46, 47 and 48 of the Tax Administration Act 28 of 2001 by requiring taxpayers to submit, produce or make available relevant material. My thesis concludes that such a decision by the Commissioner (or SARS) constitutes administrative action as defined in s 1 of PAJA.

This conclusion is reached on the basis that such a decision will:

- have been taken by an organ of State exercising a public power or performing a public function in terms of legislation;
- involve the exercise of a discretionary power, in that it is for SARS to determine whether and in what circumstances it will require any particular taxpayer to submit, produce or make available relevant material;
- adversely affect taxpayers’ rights and has a direct, external legal effect. The fact that the power in question is preliminary and investigative, and that its exercise does not in itself determine whether any tax, penalties and interest are payable, does not detract from the conclusion that tax, penalties and interest may become payable as a result of the preliminary investigation. The decision imposes on taxpayers an obligation to do something (to submit, produce or make available relevant material) which, but for the exercise of the power, taxpayers would not in law be obliged to do: normally taxpayers would have a right to keep private and confidential information, documents and things that must now be produced or provided to a SARS official. A failure by taxpayers to comply with these requirements exposes them to criminal prosecution under s 234(d) and (i) of the Tax Administration Act. Furthermore, these powers exercised by SARS are not made specifically subject to the normal objection and appeal processes in the Tax Administration Act.

In Corisco 2920 cc v U-Care v The Registrar of Banks (795/11) (2012) 1 SASCA 156 (2 November 2012) the SCA held at para 26 that the Registrar’s decisions to investigate the appellants’ business and institute proceedings against the appellants for an interdict in terms of s 81 of the Act were not administrative actions for the purposes of PAJA as they did not (as required by the definition of administrative action in s 1 of PAJA) adversely affect the rights of the appellants or have a direct, external legal effect or have that capacity.

Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case.

Many readers who have attended my lectures and talks in the past will know that I say something different. I am not the SCA, so it is appropriate for me to justify why I say a decision to audit a taxpayer is administrative action. My views are based on my draft PhD thesis which analyses the inter-relationship in particular between ss 2, 33, 41(1), 172(1), 190(1) and 237 of the Constitution 108 of 1996; s 4(2) of the South African Revenue Service Act on any applicable codified review grounds stated in s 46(2) of PAJA.

Consequently, in order for taxpayers to satisfy themselves that their constitutional rights to lawful, reasonable and procedurally fair conduct from SARS have not been contravened, they are entitled in terms of ss 3(1)(i) and (2) of PAJA to adequate notice and to adequate reasons in terms of s 5(1) and (2) of PAJA for its decision made in terms of ss 40, 46, 47 and 48 of the Tax Administration Act on the basis that such a decision materially and adversely affects the rights of the taxpayer. Through the analysis of the inter-relationship between ss 40, 46, 47 and 48 of the Tax Administration Act, the Constitution, the SARS Act and PAJA, the thesis concludes that even if PAJA were not applicable (perhaps because the ‘administrative action’ definition may be held to be too restrictive to include a decision in terms of ss 40, 46, 47 and 48 of the Tax Administration Act), SARS would still be bound by its constitutional obligations to comply with the principle of legality, as stated by the Constitutional Court in various cases.

These important and correct observations in the thesis conclude that there is no basis for SARS to escape criminal prosecution under s 234 of the Tax Administration Act, or to exercise its powers under ss 40, 46, 47 and 48 of the Tax Administration Act to conduct or refuse to conduct an investigation or to make an assessment, or to refuse to make an assessment, or to make an assessment in the manner or to the extent or for the purposes they were conferred. In other words, not in an arbitrary or irrational manner: satisfying the juridical facts of SARS’s decision-making, that SARS has transgressed the principle of legality. Taxpayers would apply its mind properly in deciding whether and in what manner to exercise its discretion in the manner of a public power or public function in terms of empowering provisions of ss 40, 46, 47 and 48 of the Tax Administration Act, or to make available relevant material; My thesis examined the case law on SARS’s constitutional obligations to be bound by its constitutional obligations to be governed by the democratic values and principles enshrined in the Constitution, including a high standard of professional ethics, impartiality, fair and unbiased conduct; efficient, economic and effective use of resources; accountability and transparency, providing the public with timely, accessible and accurate information. In terms of ss 40, 46, 47 and 48 of the Tax Administration Act, SARS is specifically enjoined to perform its functions in the most cost-effective manner and in accordance with the values and principles mentioned in s 195 of the Constitution. Failure to adhere to these obligations will entitle taxpayers to approach the courts to conduct the decision of SARS invalid.

Where SARS’s conduct is unlawful, unreasonable or procedurally unfair in exercising its powers in making a decision in terms of ss 40, 46, 47 and 48 of the Tax Administration Act, taxpayers must first and foremost attempt to bring a review application in terms of ss 6(1), 7(1) and 8(1) of PAJA to the High Court on the basis that the decision is administrative action as defined in PAJA. Failing that, a Rule 53 application must be submitted to the High Court on the basis that SARS has transgressed the principle of legality. Taxpayers would then have the defence of just cause in s 49 of Tax Administration Act for refusing to submit, produce or make available relevant material to SARS, escaping criminal prosecution under s 234 of the Tax Administration Act. Remember, the SCA held: regard must always be had to the facts of each case. In the case of an audit by SARS in terms of the Defence of Just Cause Act does not state in s 6(2) of PAJA. Therefore the rule in terms of s 49 of the Tax Administration Act for refusing to submit, produce or make available relevant material to SARS, escaping criminal prosecution under s 234 of the Tax Administration Act. Remember, the SCA held: regard must always be had to the facts of each case. In the case of an audit by SARS in terms of the Defence of Just Cause Act does not state in s 6(2) of PAJA. Therefore the rule in terms of s 49 of the Tax Administration Act for refusing to submit, produce or make available relevant material to SARS, escaping criminal prosecution under s 234 of the Tax Administration Act.
A taxpayer should not be blind to the fact that in a number of aspects relating to the various tax acts, SARS does bear an onus.

1. Fraud, misrepresentation or non-disclosure of material facts will probably mean that prescription can be ignored by SARS.

2. If the answer is the latter, then SARS could not satisfy that the under-assessment was due to the non-disclosure. If the fraud, etc resulted in the under-assessment of tax.

3. Thus the Commissioner still bears the onus of proving, first, that there was fraud or misrepresentation or non-disclosure of material facts; and then, secondly, that it was this fraud, etc that resulted in the under-assessment of tax.

In my view, if ITC 1856 was being decided under section 99 of the TAA, the court would have come to exactly the same conclusion.

Section 99(3)(a) clearly states that prescription can be ignored only if there was under-assessment due to fraud, etc. It is thus clear that there must be a clear causal connection between (a) the failure to assess the proper amount; and (b) the fraud, etc.

There are three lessons to be learned:

1. A taxpayer should not be blind to the fact that in a number of aspects relating to the various tax acts, SARS does bear an onus.

2. Fraud, misrepresentation or non-disclosure of material facts will probably mean that prescription can be ignored by SARS.

3. It is always necessary to ask SARS to prove (a) that there was such fraud, etc, and (b) that the fraud, etc, resulted in the under-assessment of tax.

As the court rationalised, memories fade, witnesses become unavailable and documents are lost. Thus the law seeks to achieve a balance – it allows the SARS three years to collect the tax, but it will not protect a taxpayer guilty of fraud, misrepresentation or non-disclosure of material facts (and it must be remembered that the misrepresentation need not be fraudulent or negligent – even innocent misrepresentation triggers the provision).

Prior to the introduction of the Tax Administration Act, 2011 (TAA) this issue was governed by section 79(1) of the Income Tax Act, 1962 (ITA). In a nutshell, proviso (i) to section 79(1) of the ITA precluded SARS from raising an assessment after the expiration of three years from the date of the assessment. Thus, in order to prescription, the decision stands.)

One can frame the issue slightly differently by asking the following question: even if there was, say, material non-disclosure, assuming that there had been no such non-disclosure, would SARS have assessed the taxpayer in the way that it is now seeking to do by raising the additional assessment, or would it have assessed the taxpayer in exactly the same way? If the answer is the latter, then SARS could not say that the under-assessment was due to the non-disclosure.

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Section 79 of the ITA has been repealed and the issue is now governed by section 99 of the TAA. Subsection (1)(a) states that SARS may not make an assessment three years after the date of assessment of an original assessment. Subsection (2)(a) goes on to state that subsection (1) (i.e. the prescription) does not apply to the extent that the full amount of tax chargeable was not assessed due to fraud, misrepresentation or non-disclosure of material facts.

It will be noted that the requirements are very similar to those contained in section 79 of the ITA, save that now there is no longer the requirement that the Commissioner must be satisfied. Nevertheless, it is submitted that nothing much really changes in this regard.

The purpose of this is to bring finally to the situation so that, as was stated by the Supreme Court of Appeal in C:SARS v Brummrillia Renaissance Proprietary Limited 69 SATC 205, the dispute should come to an end as this is in the public interest; and that it would be unfair to an honest taxpayer if the Commissioner were to be allowed to continue to charge the taxpayer interest which the taxpayer was assessed until the Commissioner get it right.

Accordingly it was held that the Commissioner could never have been satisfied that the failure to tax arose from the non-disclosure. (Note that, in respect of the remaining years, the taxpayer’s appeal on the merits failed. Although the taxpayer appealed the decision to the High Court, the Commissioner did not cross-appeal on the prescription aspect. Thus, in regard to prescription, the decision stands.)

Thus the Commissioner still bears the onus of proving, first, that there was fraud or misrepresentation or non-disclosure of material facts; and then, secondly, that it was this fraud, etc that resulted in the under-assessment of tax.

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Penalties

Nobody likes punishment, whether it is in the form of criticism, a slap on the wrist, a fine or some other way. In the tax context, punishment for non-compliance comes in the form of a penalty, which raises one’s blood pressure for all sorts of reasons, not least of which is the financial cost which can sometimes be quite hefty.

The Tax Administration Act, 2011 (TAA) contains a number of provisions dealing with penalties for various types of non-compliance and transgressions. These provisions are grouped into three main categories, depending on the degree of severity of the transgression.

We will discuss the administrative non-compliance penalties only as space does not allow the discussion to extend to the other two categories. I will therefore discuss understatement penalties and criminal offences in subsequent articles.

As indicated by the name, administrative non-compliance penalties (administrative penalties) are levied in terms of ss 208 to 220 of the TAA, which became effective on 1 October 2012. These penalties are levied by SARS when a person has failed to comply with certain requirements of the tax law. The administrative penalty provisions in the TAA are very similar to the penalty provisions that were introduced into the Income Tax Act by way of the regulations that were passed in 2009 but now that the TAA has become effective, the TAA provisions override the previous regulations.

The TAA allows for two types of administrative penalties: fixed amount penalties and percentage-based penalties, which apply in different circumstances and are based on specific acts of non-compliance as listed in the legislation.

The fixed amount penalties apply to an act of non-compliance as listed in a public notice issued by the Commissioner (s 210(2) of the TAA). Whereas the range of acts of non-compliance listed in the 2009 regulations included failure to register as a taxpayer, not informing SARS of any change of address, failure to submit a return, failure by an employer to submit a monthly declaration of employees’ tax and many others, SARS has decided to phase in the new penalty system more gradually and the penalty provisions are not yet applied to all these acts of non-compliance. At this stage, the Commissioner has issued one public notice relating to fixed amount penalties (refer Government Gazette No 35733 dated 1 October 2012) and this notice states that the only incidence of non-compliance subject to a fixed amount penalty in accordance with ss 210 and 211 of the TAA is — “Failure by a natural person to submit an income tax return as and when required under the Income Tax Act for years of assessment commencing on or after 1 March 2006 where that person has two or more outstanding income tax returns for such years of assessment.”

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<tr>
<th>Item</th>
<th>Assessed loss or taxable income for preceding year</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>Assessed loss</td>
<td>R250</td>
</tr>
<tr>
<td>(ii)</td>
<td>R0 – R250 000</td>
<td>R250</td>
</tr>
<tr>
<td>(iii)</td>
<td>R250 001 – R500 000</td>
<td>R500</td>
</tr>
<tr>
<td>(iv)</td>
<td>R500 001 – R1 000 000</td>
<td>R1 000</td>
</tr>
<tr>
<td>(v)</td>
<td>R1 000 001 – R5 000 000</td>
<td>R2 000</td>
</tr>
<tr>
<td>(vi)</td>
<td>R5 000 001 – R10 000 000</td>
<td>R4 000</td>
</tr>
<tr>
<td>(vii)</td>
<td>R10 000 001 – R50 000 000</td>
<td>R8 000</td>
</tr>
<tr>
<td>(viii)</td>
<td>Above R50 000 000</td>
<td>R16 000</td>
</tr>
</tbody>
</table>

The diagram illustrates the three categories and where they fit into the TAA.
Thus, the first round of administrative penalties will focus on individual taxpayers who have two or more outstanding tax returns. This is a temporary reprieve as SARS has stated that eventually, penalties will be levied for all the previously listed acts of non-compliance.

If there is an act of non-compliance, the penalty amount as determined with reference to the above table is levied by way of a penalty assessment (AP 34) which indicates a due date by which the taxpayer must remedy the non-compliance, i.e. submit the outstanding return. Failure to remedy the non-compliance by the due date will result in SARS levying the determined penalty amount on a monthly basis until such time as the non-compliance is remedied, for up to:

- Thirty-five months where SARS is in possession of the taxpayer’s current address and able to deliver the AP 34; or
- Forty-seven months if SARS does not have the person’s current address.

Another form of fixed amount penalty is the reportable arrangement (RA) penalty, which is levied on a participant to the RA who fails to disclose the information in respect of a RA. The penalty is:

- R50 000 in the case of a participant other than the promoter; or
- R100 000 in the case of the promoter. The respective amount is charged for each month that the failure continues, for up to 12 months. The penalty is doubled if the amount of anticipated tax benefit for the participant as a result of the arrangement exceeds R5 million, and is trebled if that benefit exceeds R10 million.

PERCENTAGE-BASED PENALTIES

The TAA provides that SARS must charge a percentage-based penalty when an amount of tax has not been paid by due date (s 213(1)). This provision is linked to the specific penalty provisions within the various tax acts. For example, a 10% penalty is charged on a late payment of provisional tax (para 27 of the Fourth Schedule to the Income Tax Act, which provides that the penalty is imposed under Chapter 15 of the TAA). Similarly, a 10% penalty is charged on late payment of employees’ tax (para 6 of the Fourth Schedule to the Income Tax Act, which also provides that this penalty is imposed under Chapter 15 of the TAA). Paragraph 14(6) of the Fourth Schedule to the Income Tax Act provides for a penalty to be charged if an employer submits the employees’ tax reconciliation (EMP 501) late. Concurrent with the implementation of the TAA, this provision has been amended to provide that an employer who fails to submit the return with the period specified (the date prescribed by the Commissioner by notice in the Gazette) will be charged a penalty at the rate of 1% of the total employees’ tax payable for the year, calculated for each month that the return is late. The maximum amount of the penalty will be 10%.

As with the fixed amount penalty, this penalty is levied by way of a penalty assessment (AP 34).

REMEDIES AND CORRECTIONS

The taxpayer has a right to request a reversal or correction of a penalty, but this must be done in accordance with the provisions of the TAA. This will be discussed in a subsequent article.

The message conveyed by SARS is that compliance is paramount. Non-compliance will have expensive and time-consuming consequences for the offender.

The LexisNexis Payroll Manager’s Refresher Seminar, scheduled for 21 January to 11 February 2013, is the ideal opportunity to stay on top of this critical area of your company’s operation. Our expert presenters, Rob Novicki and Ron Warren, will ensure that you are armed with all the practical knowledge you need for the new tax year.

Secure your seat today to make sure you are prepped and ready for anything at the end of the financial year.

Dates and Venues
21 January 2013: Pretoria, CSIR International Convention Centre
22 January 2013: Johannesburg, Southern Sun OR Tambo
31 January 2013: Durban, Southern Sun Elangeni Hotel
01 February 2013: Cape Town, NH Lord Charles Hotel
04 February 2013: Cape Town, Sports Science Institute
05 February 2013: Port Alfred, The Haywards Hotel
11 February 2013: Johannesburg, Gallagher Convention Centre

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THE RIGHT TO LPP FOR TAX ADVICE

Much has recently been made of a taxpayer’s right to legal professional privilege (LPP) for tax advice provided by tax practitioners who are not lawyers. The concept and scope of LPP has been debated at length by jurists, not only in South Africa, but all over the world, with the exact origins of this rule being subject to debate. Notwithstanding these continuing debates, LPP’s role as an important part of the SA jurisprudence cannot be denied, neither in the form of litigation privilege nor legal advice privilege. The debate by tax advisers from various professions risks losing sight of the main reason for the existence of this rule, namely to protect the rights of taxpayers. After all, LPP is a right of the client and not a right of the legal adviser. Furthermore, it loses sight of the bigger picture that tax has evolved as a professional occupation in its own right and is no longer the ugly stepchild of the legal, accounting or any other profession.

This right is embodied in a principle that the taxpayer’s lack of legal knowledge is what compels him to consult with an adviser and that this communication should be considered the taxpayer’s own, thus its disclosure being akin to self-incrimination. Furthermore, taxpayers by nature are unequal in wealth and knowledge and the law should not treat one more harshly than the other due to this difference. Hence the need for professional advisers who are required to know everything the taxpayer knows to present the best case with all the relevant facts without the taxpayer fearing reprisal for such disclosure. This in essence is the purpose of LPP. Where LPP applies, it is because this public interest outweighs the competing public interest in having all relevant information available to facilitate a proceeding in court, or an investigative process.

To this extent, the SA courts have seemingly continually applied the purpose of LPP in developing the rule in SA having found that it extends to in-house legal advisers and to legal advisers employed at accounting firms, thus not following a more stringent approach as in European countries. In the latter cases where battle lines have been drawn by various professional occupations, taxpayers may be questioning in whose interest are the amicus curae parties in those cases acting: that of taxpayers or their own selfish interests of expanding or defending their turf? The arguments for and against extending LPP to all tax advisers run the real risk of degenerating into a turf war between the legal and accounting professions. We must not lose sight of the fact that the true beneficiary is the taxpayer.

If LPP is thus a fundamental right to ensure proper functioning of the legal system and thus a constitutional issue, it is inconceivable that the Constitutional Court, which has yet to pronounce on this matter, will limit the right of the taxpayer based on the profession of the person from whom the professional advice is obtained rather than measuring it against the purpose of such advice. Arguably, LPP should already be available to advice given by non-lawyer tax practitioners, but also that litigation privilege is a factor that is relevant. The Income Tax Act has always allowed taxpayers to be represented in the tax court by non-lawyer tax practitioners and this now also applies to the Tax Administration Act. This is important as the tax court is not a mere tribunal, such as the Tax Board, but the court of first instance and the court of record in tax appeals.

“We must not lose sight of the fact that the true beneficiary is the taxpayer.”

To suggest that confidential correspondence between a taxpayer and a tax practitioner representing the taxpayer in proceedings in the tax court should not be subject to the same legal privilege that would be enjoyed between a taxpayer and a lawyer in identical circumstances would raise serious constitutional questions.

INTERNATIONAL APPROACH

This debate is not unique to SA and various countries are grappling or have grappled with it in some form or another.

United States

In the United States, legal privilege is extended to communications between a taxpayer and a federally authorised tax practitioner for tax advice to the extent the communication would be considered a privileged communication between a taxpayer and an attorney. However, the statutory privilege is limited to non-criminal tax matters and does not apply to communications in connection with the promotion of tax shelters.

United Kingdom

In the United Kingdom, the revenue authority is statutorily restricted from obtaining communications between a tax adviser and taxpayer; the purpose of which is the giving of tax advice. The restriction applies only to obtaining such information from the tax adviser and not from the taxpayer.

Pieter Faber
Tax Technical Director, PwC

Kyle Mandy
Head, Tax Technical Director, PwC

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The question of whether LPP should be extended to accountants in terms of the common law is currently under consideration by the Supreme Court in a landmark case that may set a benchmark for other countries.

New Zealand

In New Zealand, a statutory privilege applies to tax advice documents in terms of the Tax Administration Act. In terms of these provisions, a person who is called upon to disclose information is not required to disclose a book or document that is a tax advice document.

Australia

Australia does not currently have a statutory privilege for tax advice provided by non-lawyers. However, the Australian Tax Office has a formal policy in place to the effect that certain documents relating to advice provided by professional accounting advisers should be confidential.

Australia is also in the process of considering a statutory privilege for tax advisers and a discussion document was issued in April 2011 in this regard. In 2007, the Australian Law Review Commission recommended that a statutory privilege should be extended to tax advice.

BALANCING ACT

Facing both the legislature and possibly the courts is a balancing act between the opposing interests of tax authorities to have full access to information which may be useful in collecting taxes and those of taxpayers to be able to obtain confidential legal advice and representation. Understandably, there are arguments against why legal privilege does not or should not exist for all tax practitioners.

Firstly, it arguably increases the scope of information to be covered by LPP which creates an impediment to the tax authorities’ right to information. This obvious impediment is the trade-off between the interests of the tax authority and the taxpayer.

A further concern is that legal practitioners have a duty to the court that overrides the duties to a client. Essentially, this duty is one to uphold the law and not to subvert it. Thus, the question arises as to whether this principle should not apply to all who may claim LPP on behalf of their clients. However, this argument is significantly weakened where the tax adviser is required to be a member of a professional body and is subject to codes of ethics and conduct and disciplinary procedures.

The right of the taxpayer to claim LPP on communications with non-lawyer tax practitioners in appropriate circumstances may be a difficult balancing act, but the exclusion of such rights seems to prejudice taxpayers more than it does the tax authority by infringing on the constitutional rights of the taxpayer and creating an uneven playing field between lawyers and other suitably qualified tax practitioners.

At the end of the day, this matter should be addressed in the interests of the taxpayer and the public at large and not in the narrow interests of those who claim to represent them in all things tax.

STORING TAX RECORDS IN THE CLOUD: WHAT ARE SARS’ REQUIREMENTS?

Taxpayers are generally required to retain records, books of account and documents needed to comply with a specific tax Act.

The Tax Administration Act, 2011 (TAA) prescribes the form in which records, books and account documents have to be kept or retained. Specifically, the TAA requires that records are kept in their original form, in an orderly fashion, and in a safe place. In the event that the records are retained in an electronic format, it must comply with the public notice issued in the Government Gazette Notice No 767 on 1 October 2012.

According to section 30(1)(b) of the TAA: ‘…records, books of account, and documents must be kept in the form, including electronic form, as may be prescribed by the Commissioner in a public notice.’

The public notice on electronic record keeping specifically requires that electronic records must be in an “acceptable electronic form”.

ACCEPTABLE ELECTRONIC FORM

Rule 3.2 of the public notice essentially introduces standards of integrity envisaged in the Electronic Communications and Transactions Act with regard to electronic record keeping. In addition, the storage of records must be in a format that SARS can readily access, read and analyse. In addition, the taxpayer should be able to provide SARS with an electronic copy of the tax records within a reasonable time.

ELECTRONIC TAX RECORDS MUST BE STORED ON A SERVER THAT IS PHYSICALLY PRESENT IN SOUTH AFRICA

The public notice, in rule 4, further specifies that the location of the electronic records must physically be in South Africa, unless a senior SARS official has agreed to another location. Before such permission will be granted, the senior SARS official must be satisfied that the electronic system used by the taxpayer will be accessible from the person’s physical address in South Africa for the duration of the period that the person is obliged to keep and retain the tax records. In addition, the locality where the records are kept may also not affect access to the electronic records.

SYSTEM DESCRIPTIONS

The taxpayer is required to keep proper system descriptions regarding the electronic system utilised. In the event that the software used by the taxpayer is commonly recognised, e.g. a popular local software system such as AccFin or Pastel, the taxpayer is not required to retain system descriptions relating thereto.

If, however, the software used by the taxpayer is not commonly recognised in South Africa, or has been adapted for the taxpayer’s particular environment, rule 5 of the public notice requires the taxpayer to keep the records.

INSPECTION BY SARS

Rule 7 places an onus on persons keeping electronic records to have the records available for inspection by SARS in terms of section 31 of the TAA at all reasonable times, and at premises physically located within the country, or accessible from local premises if permission is granted under rule 4.

Rule 8 specifically requires that the electronic records must be made available for purposes of an audit or investigation conducted by SARS in terms of section 48 of the TAA.

GENERAL REQUIREMENT

In order to comply with section 29 of the TAA, the requirements of the public notice described in this article must be adhered to throughout the period that the person is required to keep the records.

Tax practitioners should take note of the new requirements and assist clients with getting their affairs in order. Failure to retain records as required by the TAA is a criminal offence in terms of section 234(e) of the Act.
Proposed tax amendments will assist business rescue

Chapter 6 of the Companies Act No. 71 2008 (the Companies Act) introduced the concept of business rescue. At the core of the business rescue process is the business rescue plan. The Companies Act governs the general framework of the business rescue plan which must contain details and proposals in respect of the manner in which the business rescue practitioner envisages that the company will be rescued. These proposals are likely to include the extent to which the company may be released from the payment of its debts.

Once the business rescue plan is adopted, the plan is binding on both the company and its creditors. Section 154 of the Companies Act provides that once a business rescue plan is implemented, in accordance with its terms a creditor will lose the right to enforce the relevant debt or part of it to the extent that the creditor has acceded to the discharge of the debt.

The income tax consequences of any debt being reduced for less than the full consideration of the debt are the focus of this article. It is important to note that while not addressed, there are serious VAT implications of debt relief for debtors who are VAT vendors. In respect of debt on which input VAT was claimed when the debt was incurred, should the debt remain unpaid for a period exceeding 12 months, deemed output VAT will arise on the unpaid portion of the debt in the 13th month. Output VAT may also be triggered for a VAT vendor to the extent that a debt is waived.

Currently the Income Tax Act (the Act) provides that where a debtor benefits from a compromise or a waiver by a creditor in respect of some or all of a debt owed (debt relief), the tax consequences are dictated solely by whether the amounts originally advanced by the creditor were used by the debtor to fund expenditure of which a deduction or allowance was claimed by the debtor for normal tax purposes. Examples would include the debtor using borrowed funds to purchase trading stock, fund income-generating activities or to purchase a depreciable asset.

In the event of debt relief, sections 20 and 8(4)(m) of the Act require that the debtor first reduce any assessed loss, then recoup back into income any amount of the debt waived that exceeds the debtor’s assessed loss.

The capital gains tax (CGT) effect of any debt relief is regarded as a residual effect as CGT will only arise to the extent that sections 20 and 8(4)(m) do not apply. Paragraphs 20(3) and 12(5) of the eighth schedule to the Act require that debt relief in respect of capital assets will reduce the base cost of the asset if the asset is still held by the debtor at the time of the debt relief, or if the asset is no longer held by the debtor, the debtor will suffer a capital gain to the extent of the debt waived determined in accordance with the tax base of the debt outstanding.

The net effect of all these provisions is that a debtor will suffer some form of normal tax consequence as the result of the debt relief. This is counterintuitive especially in light of provisions like the business rescue regime specifically created by the Companies Act to assist businesses in financial distress.

A consequence with creditors cannot be specifically provided for as a solution in one piece of legislation only to create further liabilities for the distressed entity in another. This is made all the more absurd when it is recognised that one of the debts a debtor may have compromised or reduced are taxes owing to SARS.

While many of the tax consequences are often absorbed by any assessed tax loss the debtor may have, it must be borne in mind that preserving an assessed tax loss is in itself important in assisting a distressed debtor as the assessed tax loss will shield the debtor from paying tax should the trading activities of the debtor again start to generate the much anticipated profit.

In the Taxation Laws Amendment Bill 2012 (TLAB) and as explained in the accompanying explanatory memorandum (EM), recognition has been given to the fact that the current tax system may act as an impediment to the recovery of companies and other taxpayers in financial distress where the economic benefit of debt relief is undermined by the consequent negative tax implications.

The proposed amendments will not affect the tax consequences of any debt relief that is regarded as a donation and triggers donations tax, a bequest that may form part of an estate and trigger estate duty or that falls within the framework of remuneration and may trigger employees’ tax. The proposals are most easily understood when examining the type of debt relief.

In respect of debt previously incurred in respect of depreciable capital assets, the proposed amendments essentially reverse the existing tax consequences, making them more favourable to the debtor. Namely, the remaining base cost of the depreciable asset is reduced first by the debt waived, then only once the base cost of the depreciable asset is depleted, will the taxpayer suffer a recoupment into income of any remaining portion of the debt waived, thereby triggering the revenue tax consequence only at the last instance.

Taxpayers must be aware that in the calculation of future tax allowances that may be claimed on depreciable capital assets in respect of which a debt was waived, the allowances may not exceed the aggregate of the expenditure incurred by the taxpayer in respect of the asset less the sum of the allowances previously claimed on the asset and the amount of the debt reduced. In effect, the amount by which the remaining base cost of a depreciable asset is reduced by the waiver of a debt will not be available to the taxpayer to either claim future tax allowances against, or in calculating a capital gain or loss on the disposal of the depreciable asset.

In respect of capital debt (debt not used to finance deductible expenditure or depreciable assets; for example, debt incurred to purchase vacant land or a shareholding in a company), the debt relief will be regarded as reducing the base cost of any asset purchased with the debt, if an asset was purchased and is still held by the debtor. To the extent that the debt relieved exceeds the base cost of the asset (if relevant), the remaining debt relieved will be set off against any assessed capital losses the debtor may have (assessed capital losses resulting from the disposal of capital assets at a net capital loss that a taxpayer may carry forward to set off against current or future capital gains are not to be confused with assessed tax losses). Unlike the current legislation, no further CGT consequences will arise should the amount of the debt relieved exceed both the base cost of the asset and any assessed capital loss the debtor may have.

A further concession has been made in respect of a fully or partially waived tax debt due to SARS. A tax debt waived will no longer be regarded as debt for the purposes of the capital debt reduction provisions and will therefore not trigger a reduction of the base cost of an asset or an assessed capital loss as set out immediately above.

In respect of debt the EM calls “ordinary” debt relief (for example, debt incurred to purchase trading stock or accrued interest), the proposals favour the debtor although to a lesser degree. The debt relieved will first reduce the tax cost of any trading stock, provided the debt was originally used to acquire the trading stock and only to the extent the trading stock remains with the debtor and has a tax cost. Where the debt relieved exceeds the tax cost of any trading stock, the debt relieved will be recouped into the income.

Debtors who are in financial distress will presumable have accumulated large assessed tax losses as they continued to trade and the recoupment of an amount into the income of the debtor will in effect reduce any assessed tax loss. However, the proposed amendments seek as far as possible to ensure the reduction of an assessed tax loss occurs as a last resort and in respect of capital debt waived, will not arise at all.

The proposed amendments will apply in respect of debts reduced or cancelled on or after 1 January 2013. As capital debt waived under the proposed regime will have little to no tax impact on taxpayers, taxpayers may be tempted to write off loans made to trusts and by shareholders to companies. Taxpayers must bear in mind the donations tax consequences as well as the vulnerability of transactions entered into merely to avoid tax.
Pastel My Payroll solution in the Cloud

Payroll and HR software specialist Pastel Payroll, part of the Softline Group and Sage Group plc, has launched an online payroll solution offering businesses efficient, simple and cost-effective payroll administration.

**THE SOLUTION ALSO OFFERS LEAVE APPLICATION AND TRACKING FUNCTIONALITY.**

“There is no jargon and all that is needed to be able to make use of the software is an Internet connection,” says Pastel My Payroll Online business manager, Karen Schmikl.

Being a cloud-based application, there is no installation of software and implementation of the software is simple and hassle-free as all fields and parameters are predefined for loading and immediate use. Lists of earnings, deductions and fringe benefits are linked to the correct tax rules and payslip template selections enable unnecessary definitions to be excluded.

“One of the benefits of Software-as-a-Service (SaaS) applications is that customers no longer need to visit a website to download and install software updates manually or install CD versions. Customers can rest assured that they will always process their payroll on the latest software and legislative version.”

Companies’ payroll data is backed up daily and with the roll-over to each new payroll period. Backups are stored at alternative locations, ensuring that data can be restored at any given time.

Employee history information is available for the current year and the previous five years and all payslips issued during that period are retained.

“Simplicity and ease of use were key objectives in the software design. There is no jargon and all that is needed to be able to make use of the software is an Internet connection,” says Pastel My Payroll Online business manager, Karen Schmikl.

 Leave types are predefined, covering annual, sick, family responsibility and maternity leave. Companies can simply capture start and end dates of leave taken. Documentation such as leave application forms and sick notes can be uploaded as part of all transactions. Leave reports enable management to analyse leave patterns such as sick leave abuse and leave allocations for traditional holiday and annual shut-down periods.

The online payroll solution enables uploading of employee personal details, photographs, contact numbers and addresses and manages pension or provident fund and medical aid contributions. Tax relief for private medical aid and retirement annuity contributions are also catered for.

The Basic Conditions of Employment Act (BCEA) requires that all companies, no matter how small, must provide all employees with a formal payslip. Users can either print employees payslips or export them to Microsoft products. The payslip screen provides an on-screen summary of every employee’s financials (month by month and year to date), making input and reconciliations.

Predefined reports include company, employee and financial reports. including the EMP201 monthly SARS declaration. UIF contributions are recorded and retained within the software, eliminating the need for manual completion and submission of the UI 19 form, which can be transmitted electronically from the system.

SARS requires all companies to issue tax certificates to all employees who worked for the company during the tax year. Tax certificates can be printed from the system and a file for import into e@syFile is also created, removing the need to manually capture employee details for submission to SARS.

“The pay-as-you-go model is cost-effective from only R15 per payslip. Business owners can pay their employees anywhere, anytime.”

To test-drive this easy online payroll solution and make use of the 30-day free trial period, go to www.pastelmypayroll.co.za and enter the new era of payroll processing.

For the latest legislative news, connect with Pastel Payroll on Twitter (Payroll News) or LinkedIn.
Does your ERP system keep up with SARS requirements?

Many companies throughout South Africa have implemented enterprise resource planning systems that are capable of data reporting. Whilst most of these solutions have been preconfigured to meet the basic requirements enforced by the South African Revenue Service and built in functionality that ensures that all data captured is reflected in multiple areas and balances, they have limited capacity to verify or reconcile any differences.

W ith the introduction of the SARS IT14SD form, many companies are realising that reconciling and explaining financial differences is becoming more difficult. With an error allowance of a mere R100, companies are scrambling to find quicker, more accurate ways to complete the form. The problem then compounds itself by the different VAT intricacies that various businesses may have.

With a preconfigured system, sometimes depending on the type of business, zero-rated VAT items may in fact require VAT to be charged and then reclaimed. For example: exports are normally zero-rated, however in certain circumstances if these exports are by road or rail the company may be required to charge VAT and reclaim it in a foreign country, but how would your system know this.

As the amount of multinational companies operating in South Africa increases this simple example could be affecting many companies without them even realising it. This invisible tax can have a significant impact on the company’s cash flow and reduce overall business competitiveness. These same companies are possibly spending hundreds of thousands of Rands on external consultants every year to reconcile taxes just to be in a position to submit their annual tax returns but how will they cope with the completion of the IT14SD on a monthly basis without further eating into their profits. To date the completion of this form which looks at VAT, PAYE and Customs has only been done on request from SARS, but from 2013 it will become mandatory for all companies and close corporations to complete.

Though the use of technology it is now possible to implement exception management across the full organisation allowing companies to monitor all transactions without any direct human intervention. The utilisation of exception reporting requires that business rules, conditions and actions are defined, but the investment in time to set this up is minimal in comparison to the overall benefits that this long term solution will be able to provide. For companies who take advantage of this automated process, more time can be spent on investigating the exceptions an opposed to looking for them and therefore increasing overall efficiency.

Another plus side to the implementation of a continuous monitoring solution that takes into account various tax structures, is the increase in your company’s overall financial compliance. A completely integrated solution would be able to ensure tax compliance for income tax, VAT, service tax, PAYE, Customs and any other taxes that a company may be required to pay. By consolidating multiple systems and accessing financial data from source, companies no longer rely on reports that may have transactions missing or have been manipulated to hide abnormalities such as fraud.

COS Technology Holdings, together with global tax leader BDO, has launched a VAT Continuous Monitoring Solution to address various tax issues. Using the power of ACL, the worldwide leader in data analytics, VAT (CM) is able to ensure tax compliance for all taxes that you company may be required to pay. Simply stated it produces the IT14SD form. The problem then compounds itself by the different VAT intricacies that various businesses may have.

Audit Letter Subscription

At the recent series of Tax Administration Act, 2011 lectures by Prof D N Erasmus, he spoke about an initial engagement letter that should be sent to SARS. This is an opportunity to an annual subscription to access the wording and reasoning to such a letter. The audit letter subscription will assist tax practitioners and taxpayers at the commencement of any audit by SARS to ensure full compliance by SARS with the constitutional rights of taxpayers, and will ensure that SARS’ requirement for relevant material is foreseeably relevant, and reasonably specific. Any SARS audit selection must have a scope and purpose to ensure effective and efficient use of resources. The commencement audit letter subscription will assist you in achieving this and ensuring the audit is narrow and specific.

SUBSCRIBE NOW

If you are interested in this Subscription service, please read the terms and conditions below and respond by saying "INTERESTED" in the SUBJECT HEADING of an email to auditletter@gmail.com. Prof. D.N.Erasmus will send you the PayPal payment link for the USD$51.50 annual subscription – please send your telephone number as requested in point 7:

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By subscribing to the Audit Letter Subscription Service you hereby agree to the following terms and conditions, in return for which you will receive the AUDIT LETTER with annotations and follow up notifications of suggested amendments and ways to handle responses from SARS:

1. An annual subscription fee of USD$50.00 (fifty dollars per year) is payable for an initial contract term ending 31 October 2013, and renewable annually thereafter. You are to please provide a telephone number so that Prof. D N Erasmus or a representative can telephone you to obtain your credit card details securely to pass the charge. Your credit card details will not be kept. PLEASE forward your telephone number to auditletter@gmail.com so that Prof. D N Erasmus can make initial contact with you about this service, answer any other questions you may have, and arrange for you to make the payment;

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7. PLEASE forward your telephone number to auditletter@gmail.com so that Prof. D N Erasmus can make initial contact with you about this service, answer any other questions you may have, and arrange for you to make payment;
The importance of TAX MANAGEMENT SYSTEMS

It's hard to believe that there are still tax practices that are not fully computerised. There are many firms like this. There is no question that they are not competitive. The problem is that accounting firms concentrate on audits and consulting and do not give the tax back office the attention it requires. This has got to change because a tax practice, especially in medium size firms, all tax practices are what I call tax-centric.

MEANINGS OF TAX-CENTRIC

Everything as far as a tax practitioner’s client is concerned revolves around income tax. Every client of an accounting practice wants to know that their tax affairs are in order. There are many different kinds of accounting practices in South Africa. Most of them in the medium to small environment are tax-centric and this means that they have a dedicated tax compliance department whose sole function is to prepare, produce and submit tax returns. The revenue generated by the tax department in these firms is not the main source of revenue of the practice. Perhaps, the auditing divisions or the consulting division of the practice generates far more revenue. However, to the client their tax affairs are the most important thing, for them personally, and for all their business interests. This is what I call tax-centric.

Should the firm slip up on the managing director’s tax return and he is penalised and has to pay interest, that group as a revenue source is suddenly at risk. Despite the fact that most of the revenue is not produced by the tax compliance department, tax compliance is uppermost in the minds of the accountant’s clients because SARS has a very active profile in the marketplace.

THE GOOD OLD DAYS ARE OVER

Compliance standards and filing of tax returns on time in South Africa is improving. This is the norm rather than the exception. We have moved into a world where there are no longer extensions. It is because of this that many practices have to build a tax-centric approach into their practice.

BACK OFFICE SYSTEMS

The back-office systems of today are sophisticated and require much more than a decent effort to set up in order to get the best out of them. A well-run system generally has a system champion and it usually shows. Essentially a tax management system is a management, a control and a client communication system all in one to make sure that all tax events in the taxpayer’s tax year are taken care of and the clients are advised accordingly.

Now with the advent of eFiling and tax preparation systems being connected to eFiling, tax systems become even more important in the accounting firm. These systems can communicate with SARS electronically and they can submit forms like provisional tax and tax returns as well as download assessments and balance of account and correspondence from SARS.

The strength of any tax management system must be to ensure that various tasks in the tax year are handled effectively and efficiently by deadline dates. For example, if a client pays his provisional tax payment just one day late, the penalty is 10 per cent. If there is an error by the tax practice in regard to any tax matter, the client may very well hold the practice responsible for penalties and interest. For taxpayers there is only one thing worse than paying tax and that is paying penalties and interest because the payment was late or calculated incorrectly. In today’s times most damages claims against accounting firms are for professional tax mistakes. By running a good electronic system, it will reduce errors and therefore claims will decrease.

RISK AVERSION

Above all, a good tax management system today must have risk aversion facilities. This means, they should have built-in procedures that reduce mistakes, e.g. on our system we use colour coding and difference reports that will tell the practitioner instantly if the provisional tax figure on eFiling differs from the figure on their systems.

It’s absolutely essential to have the correct management referring to the eFiling terms and conditions as well as limiting the damages pay-out.

The view that this is the way we have been working it for years and SARS has always given us more time has changed. It is because of this tax-centric approach that tax practices have to put a whole lot of new effort into tax preparation. We now know for sure that deadlines from SARS will never again be extended.

Some small changes in your tax practice will go a long way to reduce your risk, make profits and become efficient, thus protecting your core auditing and consulting revenue.
Financial Science & Economics

Higher Certificate in Taxation
Presented by the Department of Taxation, University of Pretoria (Recommended NQF level: 6)

16 February - 9 November 2013

BRIEF DESCRIPTION
This programme offers an opportunity for individuals with no formal education in taxation to obtain valuable knowledge of the subject. The programme will cover the general principles of the tax system in South Africa, including a basic application thereof. After successful completion of the programme, candidates may enrol for the Graduate Certificate in Advanced Taxation, also offered through Continuing Education at the University of Pretoria.

COURSE CONTENT
The course will cover basic tax principles relating to income, wealth transfer and consumption.

LEARNING OUTCOMES
After successful completion of the programme, candidates will have a thorough understanding of the general principles of the tax system in South Africa, including a basic application thereof.

ADMISSION REQUIREMENT
Grade 12

WHO SHOULD ENROL?
Anyone with no prior tax knowledge who is interested in acquiring a basic understanding and application of the South African tax system for use in the financial or public sector or an entrepreneur wanting to start his/her own business.

ASSESSMENT/CERTIFICATION
Assessment will be conducted through the completion of assignments and seven written tests during the year as well as one final examination to be written in November. In 2013 the final exam will be written on 9 November.

COURSE FEE (CE at UP IS EXEMPT FROM VAT)
R 10 000 per person (including course notes and text book)

PROGRAMME STRUCTURE AND VENUE
Option 1: Attendance in Pretoria (maximum 150 delegates)
The programme will be presented in English on the following Saturdays for 2013 (07:30 – 13:00) at the Main Campus of the University of Pretoria:
- February 16 & 23;
- March 16 & 23;
- April 20;
- May 4 & 25;
- June 1;
- July 20 & 27
- August 17 & 24;
- September 14;
- October 12 & 26

Option 2: Distance learning (anywhere in South Africa)
The 15 lectures presented in Pretoria will be recorded and each distance learning candidate will receive a DVD that will be mailed by registered mail. (Audio files of the lectures will be available on the Monday following the Saturday’s lecture.) All distance candidates MUST have internet access.

Additional support will be provided by way of interactive facilitation sessions supporting each formal lecture. These sessions will, however, only be hosted in Durban, Cape Town, Bloemfontein and Port Elizabeth (numbers permitting).

ENQUIRIES REGARDING REGISTRATION (closing date 15 January 2013)
Client Services Centre
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E-mail: info.ce@up.ac.za

ENQUIRIES REGARDING CONTENT
Ms. Theresa Hills
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Endorsed by:

The South African Institute of Tax Practitioners
Graduate Certificate in Advanced Taxation
(Previously known as the Certificate in Taxation)

Presented by the Department of Taxation, University of Pretoria
(Recommended NQF level: 7)

16 February – 9 November 2013

BRIEF DESCRIPTION
This programme offers an opportunity for individuals with basic formal education in taxation to obtain detailed knowledge of the subject. The programme will cover specific principles of the tax system in South Africa, and will be complemented with practical application in case studies. After successful completion of the programme, candidates may enrol for the Post Graduate Certificate in Advanced Taxation, offered through Continuing Education at the University of Pretoria.

COURSE CONTENT
The following topics are covered in the programme:
- Framework of the income tax system (including the capital gains tax framework)
- Gross income, residence-based taxation, specific inclusions in income and specific exemptions from income
- General deductions, specific deductions and capital allowances
- Capital gains tax
- Trading stock and share dealers
- Income tax liability of individuals, including allowances and fringe benefits
- Employees’ tax and provisional tax
- Donations tax
- Estate duty
- Retirement benefits
- Taxation of trusts
- Value added tax and transfer duty

LEARNING OUTCOMES
After successful completion of the programme, candidates will have a detailed understanding of specific principles of the tax system in South Africa and will be able to apply these principles in real life scenarios.

ADMISSION REQUIREMENTS
- Successful completion of any tax specific short course or a tax module at a tertiary institution of at least six months; or
- Three years tax experience

WHO SHOULD ENROL?
Anyone with basic tax knowledge interested in acquiring a detailed understanding and practical application of the South African tax system for use in the financial or public sector or an entrepreneur wanting to manage his/her own business.

ASSESSMENT/CERTIFICATION
Assessment will be conducted through the completion of assignments and seven written tests during the year as well as one final examination to be written in November. In 2013 the final exam will be written on 9 November.

COURSE FEE (CE at UP IS EXEMPT FROM VAT)
R11 700 per person (including course notes and text book)

PROGRAMME STRUCTURE AND VENUE
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The 2012 edition of South African tax law through a new lens. Appearing as a multi-volume publication, the 2012 edition comprises:

- Volume 1 – The Income Tax Act, the Value-Added Tax Act and the Tax Administration Act
- Volume 2 – Supplementary material to the Income Tax Act and Value-Added Tax Act
- Volume 3 – The Transfer Duty Act, the Estate Duty Act and numerous other pieces of tax legislation

All amendments in terms of the Taxation Laws Amendment Act and Taxation Laws Second Amendment Act (Acts 24 and 25 of 2011) are incorporated in the 2012 Compendium. Information relating to the coming into operation (date and additional details) of each specific provision of Acts 24 and 25 of 2011 is provided as part of the annotation in respect of the section, subsection or paragraph affected by it.

In Volume 1, Juta Law editors have consolidated the tax legislation by incorporating the ‘prelex’ (legislation in force before recent amendments come in to operation) and ‘pendlex’ (pending legislation that comes into operation after 1 April 2012). The text is clearly differentiated by the use of shading to indicate the prelex and pendlex, and effective dates have also been added into the text, further enhancing the reader’s understanding of the relevant changes. Tax practitioners are therefore able to read and interpret the changes to tax laws, and to understand the impact of future legislation.

In Volume 2, the editors have created a table of contents – arranged by section in the Act as well as numerically – in respect of each subdivision found in the volume. This will assist readers in their search for specific information. An updated and expanded Case Digest has been included in Volume 3.

Volume 3 includes:
- The Transfer Duty Act; Estate Duty Act; South African Revenue Service Act; Tax on Retirement Funds Act; Securities Transfer Tax Act; Securities Transfer Tax Administration Act; Mineral and Petroleum Resources Royalty Act; Mineral and Petroleum Resources Royalty (Administration) Act; South African Revenue Service Act; Tax on Retirement Funds Act; Demutualisation Levy Act; Numerous extracts from other pieces of tax legislation; A comprehensive case digest

Demystifying the myriad of tax legislation, this invaluable resource for tax practitioners examines the amendments to South African tax law through a new lens.

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