



Debt remedies and understatement penalties

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Outline

- The principle of “pay first argue later” is well entrenched in tax folklore and case law. The aim of this session is to outline what rights taxpayers actually have when dealing with SARS with respect to outstanding amounts.
 - How do objections and appeals impact debt collection?
 - What does “pay now argue later” actually mean?
 - What are my options when I owe SARS?
 - Under what circumstances may SARS issue third party appointments?
 - Legal recourse if SARS has instituted debt collection processes



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Debt remedies and understatement



Where to look for additional information

- <http://www.sars.gov.za/ClientSegments/Individuals/What-If-Not-Agree/Pages/default.aspx>
- <https://www.sars.gov.za/ClientSegments/Individuals/How-Pay/Pages/Owing-SARS-Money.aspx>
- Short Guide to the Tax Administration Act, available on the SARS website.

Fundamental concept

- Your right to object to an assessment is fundamentally separated from SARS's right to collect.
- Any tax is due the second the assessment is issued or the law deems it to be due.
- Collection and objection run in parallel.

Tax Liability, Payment & Recovery

- Chapters 10 & 11
- Sections 151 to 186

- Interest is defined and charged per Chapter 12

- Chapter 14 – Write off or compromise of tax debts

Definitions

- “Outstanding tax debt” means tax debt not paid by the day referred to in s162. s162 allows the Commissioner to set the payment date either by public notice or as specified by a Act. (Think PAYE being 7 days after the end of the month)
- “Tax debt” is any amount referred to in s169(1). This is any amount of tax due or payable in terms of a tax Act.

Definition of taxpayer (S151)

- A person chargeable to tax pr with a tax offence
 - A person upon whom the liability for tax due under a tax Act is imposed & is personally liable
- A representative taxpayer
 - A person who is responsible for paying the tax liability of another person as an agent
- A withholding agent
 - A person who under the tax Act must withhold an amount of tax and pay it to SARS
 - NB: Taxpayers are not absolved of any liability because the representative didn't do it/is liable for the tax

Definition of taxpayer (S151) - cont

- A responsible 3rd party
 - A person who becomes otherwise liable for the tax liability of another person other than as a representative or withholding agent
- A person who is subject to the request to provide assistance under an international tax agreement

Who is liable?

- Taxpayer – first port of call
- Representative taxpayer
 - With respect to:
 - Income they're entitled to
 - Money over which they have management or control
 - Transactions they have concluded
 - Becomes liable for the amount of taxes specified in the Act
 - But can claim allowances, set off etc of the taxpayer
 - SARS can issue an assessment for such taxes against the representative taxpayer

Who is liable?

- (S159) A responsible 3rd party – while the tax remains unpaid, the 3rd party is personally responsible
- Withholding agent (s 156)
 - Agent is liable for:
 - Taxes withheld and not paid to SARS
 - Amounts which should have been withheld but haven't been
 - Any payment by the withholding agents counts as a payment towards the taxpayers debt

Who is liable?

- (S160) Any other taxpayer that is not the primary person who pays the tax
 - Is entitled to recover the amount paid
 - From the person on whose behalf the tax was paid/withheld out of that persons assets in their possession
- The taxpayer cannot recover taxes paid from the withholding agent or responsible third party. Must approach SARS.

Payment of tax (S161)

- A SSO may require security from a taxpayer to secure the collection of tax by SARS from the following taxpayers
 - Rep taxpayer, withholding agent or responsible 3rd party who was previously held liable in the taxpayers personal capacity
 - Has been convicted of an tax offence
 - Has frequently failed to pay amounts due
 - Has frequently failed to carry out other obligations = non compliance under the tax Acts
 - Is under the management or control of any of the above persons
- If security required, SARS must give written notice with all the details.
- Any cash security required and not paid by due date is treated as a tax debt.

What else can they do?

- Section 163 Preservation orders
 - Short version? If a SSO considers you a debt risk, they can get a court order to freeze your assets.
 - In fact, they can seize your assets before the order is even granted as long as they lodge the documents with the Court 24 hours after the seizure of assets.

Prescription on collection of tax (S171)

- Proceedings for the recovery of tax can not be **initiated** after the expiration of 15 years
 - Previously 30 years
- From the date of
 - the assessment of tax, or
 - A decision giving rise to a tax liability (Per S104(2))
- Becomes final (S100(1))

Pay now argue later (general principle)

- Need to make full payment when the tax is due
 - Even if amount is subject to appeal/objection
 - Unless have an agreed instalment payment scheme per S167
 - Can be when receive notice of assessment
 - SSO may authorise an ex parte application to High Court for a preservation of assets order
 - Can request that a SSO suspend payment until after a dispute/appeal
- SARS can ask/require (with Notice) that a person who holds assets/remuneration etc for taxpayer, to pay SARS instead to settle debt

Practically?

- As soon as you have an assessment, start planning your payment. Realistically will be these options:
 - Pay immediately
 - Suspension
 - Instalment plan
 - Compromise
 - Write off

Payment of tax pending appeal

- S164
- SSO has power, otherwise pay now argue later
- SSO must consider
 - Compliance history of taxpayer
 - The risk of dissipation of assets during suspension period
 - Can the taxpayer provide adequate security?
 - Would the amount involved result in irreparable financial hardship to the taxpayer?
 - Was fraud involved?

S164 cont

- If the payment was suspended and
 - No objections is lodged, and objection is disallowed or court action is lost. The suspension is revoked with immediate effect.
- Granted suspension may be revoked with immediate effect
 - Objection or appeal deemed frivolous
 - Taxpayer employs dilatory tactics
 - They change their mind
 - Material change in any facts
- Recovery proceedings cannot begin
 - Date suspension request is received/suspension is revoked
 - 10 business days after SARS has issued notice of decision

Instalment payment agreements (S168)

- SSO has the right to enter into such agreement only if:
 - The taxpayer suffers from
 - A deficiency of assets/liquidity
 - Which is reasonably certain to be remedied in the future
 - The taxpayer anticipates
 - Income or other receipts
 - Which can be used to satisfy the tax debt **OR**
 - Prospects of immediate collection activity are poor/uneconomical but likely to improve
 - Collection activity would be harsh in the particular case
 - And the deferral/instalments is unlikely to prejudice tax collection
- The taxpayer may provide security which the official requests

Other considerations

- SARS has the right to revoke the agreement if payments aren't made
- SARS has the right to change the agreement if:
 - They believe collection is in jeopardy
 - The information submitted was materially incorrect
 - The financial position of the taxpayer has changed

COVID process?

- Larger businesses (with gross income of **more than R100 million**) that are incapable of making payment due to the COVID-19 disaster, may apply to defer tax payments without incurring penalties by emailing us on COVID19IPAaboveR100m@sars.gov.za. Note the requirements below.
- Similarly, businesses with gross income of **less than R100 million** can apply for an additional deferral of payments without incurring penalties by emailing us on COVID19IPAbelowR100m@sars.gov.za. Note the requirements below.

Notes

- SARS has created these dedicated mailboxes for instalment payment arrangements (IPA) on Covid-19 relief requests only.
- Any mails received in these mailboxes that are not related to Covid-19 relief instalment payment requests, will be deleted without confirmation of receipt thereof.
- These email addresses are for Covid-19 requests where the taxpayer has historic non-compliance which make them not to qualify for the relief.
- Requests must be made per entity and not at group level.

Criteria

- A taxpayer must have serious financial hardship which must be attributable to the effects of the COVID-19 disaster;
- The effects must be substantial and material;
- The taxpayer must prove to SARS that an IPA is required because of impact of COVID-19 only and if taxpayer succeeds, then the remittance of penalty will be considered.

Documentation required

- A letter requesting deferred arrangements, stating the reasons for the request and the specific tax periods.
- Latest Annual Financial statements and latest management accounts.
- A list of debtors and creditors.

So for me as a taxpayer what's next?

- If your request for suspension or instalment plan is rejected....

Collection of tax debt from 3rd parties (S179)

- A SSO can ask employers, banks, debtors to pay tax debt of taxpayers
- If they can't comply, they need to inform SARS timeously and give reasons
- SSO may then amend/withdraw the notice as appropriate
- If the 3rd party doesn't pay, they become personally liable....
- SARS may, on request of the person receiving this notice extend the period so to allow for **basic living expenses of taxpayer**

3rd Party collection process

- SARS must send a final demand notice.
- After 10 business days SARS sends notice to taxpayer of intent to issue order.
- Taxpayer has 5 days to object
 - For individuals for basic living expenses
 - For non individuals for undue hardship

- Basic living expenses
 - S179 no limits
 - Australian Tax Office & Canadian Revenue Services
 - Between 25 and 30% max
- SARS guides refer to “garnishee”
 - Not really as no court order....

Tax Cases

- ***IT 34975/2019***

- Lack of notice is sufficient to postpone a 3rd party recovery request sent by SARS. Please note that the Courts made no findings to state that SARS had no right to get the payment, just that they had given insufficient notice. This case also highlights that SARS is willing to use the provisions of s 183 and s 184 to recover funds from persons other than the taxpayer. Please tread lightly.

Liability of financial management for tax debt (180)

- Personally liable to the extent that negligence or fraud resulted in the failure to pay the tax debt if
 - The person controls or is regularly involved in the management of the financial affairs of the taxpayer
 - And a SSO is satisfied that that person was negligent etc

Liability of shareholders for tax debt (S181)

- Applies to unlisted companies that are wound up in an involuntary liquidation without having satisfied its tax debt, including as a “derivative” taxpayer
- Shareholders are jointly & severally liable 1 year prior to the wind up to pay unpaid taxes to the extent that:
 - They have received company assets in a s/h capacity
 - Tax debts existed at that point (would have existed if Co had complied with tax Acts)
- These shareholders have all the same rights against SARS as the Co would have had.

Liability of a transferee s182

- Any connected person that takes an asset from a taxpayer for no/low consideration is liable for the outstanding debt of the taxpayer.
- Limited to the lesser of:
 - The tax debt outstanding at time of transfer
 - MV of asset less MV of consideration paid
- Only applies to assets transferred 1 year before the notice was sent by SARS to taxpayer.

- If however you knowingly abet someone in dissipating assets:
 - No timer
 - Get joint and several liability with the taxpayer

Write off or Compromise of Tax Debts

- Temporary write off (s195 – s196)
 - Uneconomical to pursue (at SARS discretion entirely, therefore no appeals or objection process)
- Permanent write off (s197 – 199)
 - Irrecoverable by law (eg: Liquidation/Business Rescue), or
 - Compromised
- Compromise (s200 – 205)
 - How do I qualify/apply?

Who to contact?

- A payment arrangement may be requested through:
- SARS eFiling:
 - To see the steps on how to make payment arrangements on eFiling, [click here](#).
 - Payment arrangement can be made once the debt is outstanding;
- The Contact Centre on 0800 00 7277;
- A SARS Branch Office; or
- A Debt Management Office

Compromise

- Request from debtor must be signed and have the following:
 - Balance sheet reflecting current fair market value
 - All amounts received by the debtor and all expenses for the past 12 months
 - All assets disposed of in the past 3 years (all details of sale, including who sold to)
 - Future interest in any assets, whether certain or contingent or subject to discretionary power
 - Assets over which the debtor has control, directly or indirectly, including trusts
 - Details of connected persons
 - Projected income and expenditure for 3 years
 - Reason for seeking compromise

Compromise

- SARS must consider
 - Savings in cost of collection
 - Would earlier collection be possible without compromise
 - Collection of greater amount than would otherwise have been recovered
 - Abandonment of some right by the debtor, such as assessed losses
 - Current value of assets
 - Past transactions
 - Position of connected persons

Compromise

- Can never be granted if:
 - Had a compromise within the last three years
 - Tax affairs are not up to date
 - Another creditor has indicated intent to start liquidation proceedings
 - Compromise will benefit/disadvantage other creditors
 - Adversely affect broader taxpayer compliance
 - In the case of a company/trust, SARS has not yet started recovery proceedings against trustees/directors
- NB: As with suspension, SARS can revoke a compromise if facts are incorrect or change materially.

Summary process?

- Collect the required documents
- Arrange a meeting with your local debt office
- Negotiate a settlement
- Make sure to include interest and penalties!
- Sign agreement with SARS
- Pay promised amount

Some pitfalls?

- Whatever you do – stay current with tax returns.
- Asset lists MUST be complete.
- Warn family members that SARS may come asking them awkward questions...
- Have the assets available to make the payment.

Interest, Refunds & write offs

- Chapters 12 & 13

General interest rules (S187(1))

- If a tax debt or refund payable
 - Is not paid in full by the effective date
 - Interest will accrue on the outstanding balance
 - Of the tax debt or refund
- Effective date as prescribed
- Interest rate at prescribed rate (S189(1))
 - Compounded monthly
 - Calculated on daily balance and compounded monthly
 - Not current method and as yet not effective
 - Waiting for a Public Notice
 - May only apply to certain taxes

Effective dates - taxes

- Income tax
 - The date falling 7 months after the last day of that year for Feb YE
 - Otherwise 6 months after YE
- Estate Duty
 - Earlier of date of assessment or 12 months after death
- A fixed amount penalty
 - The date of payment specified in the notice of assessment of the penalty
- An increment of the penalty
 - the date of the increment

- A percentage based penalty
 - The date by which the tax period should have been paid
- An additional assessment or reduced assessment
 - The effective date in relation to the tax payable under the original assessment
- A jeopardy assessment
 - The date for payment specified in the jeopardy assessment

The effective date - other

- 1st payment of provisional tax
 - From the effective date of the 1st payment of prov tax until the earlier of
 - The date on which payment is made or
 - The effective date of the payment of the 2nd payment of prov tax
- 2nd payment of provisional tax
 - From the effective date of the 2nd payment of prov tax until the earlier of
 - The date on which payment is made or
 - The effective date for income tax for that relevant year of assessment

- Can you ask to be exempt from interest?
- S45 – a SSO may waive interest if they are satisfied that
 - Interest is payable due to circumstances outside of the taxpayers control
 - May be prohibited from waiving per a tax Act
 - May allocate a portion of the interest to the event
- Circumstances are deemed to be
 - A natural or human made disaster
 - A civil disturbance or disruption in services, or
 - A serious illness or accident

Refunds of excess payments (S190)

- A person is entitled to a refund of
 - An amount properly refundable under a tax Act and reflected in an assessment
 - The amount erroneously paid in respect of an assessment in excess of the amount payable in terms of the assessment
- Need to claim the 2nd scenario within
 - 3 years if assessment by SARS
 - 5 years if self assessment
 - From date of assessment
- R100 or less is not refundable, but carried forward – amount per Public Notice
- If a refund not granted – can object & appeal

- SARS need not authorise refund until
 - Verification, inspection, or audit of refund is complete
 - Unless security has been provided by the taxpayer
 - Then MUST authorise
 - Any other tax debts are owing, then SARS may set off the refund against that debt (this includes Customs and Excise debts)

Refunds (S188(3))

- Interest payable on refunds on assessment of
 - Provisional tax and employees tax paid
 - Rate applied by SARS is 4% points below the prescribed rate
- Unless otherwise provided
 - Calculated from later of the effective date or the date the excess was received to date tax is refunded
- If a refund is offset against a liability of the taxpayer under S191
 - The date on which the offset is effected = payment date
- Income tax and VAT Acts make provisions that suspend making refunds & interest

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