



Latest Developments in the VDP space

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Overview

- Purveyors South Africa Mine Services (Pty) Ltd v Commissioner for the South African Revenue Service (61689/2019) [2020] ZAGPPHC 409 (25 August 2020);
- Medtronic International Trading SARL v Commissioner for the South African Revenue Service (33400/2019) [2021] ZAGPPHC 134 (15 February 2021)
- National Budget announcements

Purveyors

- Statutory context:
 - Section 226(2): when under audit or criminal investigation – the disclosure is regarded as not voluntary
 - Section 227 – there must be a disclosure of a default
 - Section 227(a) : requirements for a valid VDP application – the disclosure must be voluntary

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Purveyors

- The salient facts and background:
 - Taxpayer imported an airplane;
 - Taxpayer was unsure about whether VAT was payable on the importation of the airplane;
 - Taxpayer reached out to SARS for guidance on whether VAT is payable;
 - SARS (eventually) said that VAT is payable and that because it was not paid – penalties will result;

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Purveyors

- The salient facts and background:
 - The taxpayer was not under audit/criminal investigation;
 - Taxpayer subsequently applied for VDP relief;
 - SARS rejected the application because:
 - There was no disclosure;
 - The application was not brought voluntarily;
 - Taxpayer launched an application for review of SARS' decision.

Purveyors

- Three issues for determination:
 - When is an application voluntary?
 - What does “voluntary mean”?
 - What is a “disclosure”?

Purveyors

Held – When is an application voluntary

- The mere fact that a taxpayer is not under audit or criminal investigation does not mean that an application made is necessarily voluntary;
- That “voluntary” is a lone standing requirement in section 227(a).

Purveyors

Held – What does “voluntary” mean

- *“an act in accordance with the exercise of free will”. If there is an element of compulsion underpinning a particular act, it is no longer done voluntary. In the context of Part B of Chapter 16 of the TAA, a disclosure is not made voluntary where an application has been made after the taxpayer had been warned that it would be liable for penalties and interest owing from its mentioned default. It was submitted that the application was brought in fear of being penalised and with a view to avert the consequences referred to.’ (emphasis added)*

Purveyors

Held – What does “disclosure mean”

- There can be no disclosure to a person if the other already has knowledge thereof: certainly not in the present statutory context.

Purveyors

Held

- Application dismissed with cost

Purveyors

Some Questions

- On Voluntary:
 - How many applications for VDP relief is made without any element of compulsion?
 - A few examples:
 - Disgruntled employee threatens to run to SARS – VDP?
 - Advisor informs taxpayer that if tax errors are not fixed under VDP penalties will be imposed – VDP?
 - SARS publicly announces that taxpayers must VDP or face penalties? – VDP?

Purveyors

Some Questions

- Disclosure:
 - If a taxpayer approaches a SARS branch office/call centre to get some guidance (especially if, for example, identifying whether the taxpayer has done something wrong is not entirely clear in law) – disclosure?
 - What about the 2015 amendments to section 226:
 - Before: not involve a default which has previously been disclosed to SARS.
 - Now: not involve a default which has been disclosed to SARS in the last 5 years

Purveyors

Some Questions

- EM to 2015 amendment:
 - “The proposed amendment now requires that the “default” must not be a default that occurred within five years of the disclosure of a similar “default” by the applicant, thereby widening the scope of the voluntary disclosure regime” (emphasis added)
 - Example:

Purveyors

War stories (pre-2015 amendment)

- Taxpayer used an apportionment method on input tax other than turnover – no ruling in hand:
- Taxpayer VDP'd all periods in question – approved
- Taxpayer applied for an alternative apportionment method and before ruling was issued applied that alternative method – now to new periods

Purveyors

War stories (pre-2015 amendment)

- Taxpayer subsequently applied for VDP relief because new ruling had not yet been approved.
- VDP rejected: taxpayer has previously disclosed the default?
 - Different periods – apparently not relevant – the default was the use of incorrect apportionment. This had been previously disclosed to SARS under the first VDP
- If the disclosure is of the default (as an objective thing not linked to a period/year of assessment), does Purveyors judgment not make section 226(b) in its current form redundant?

Medtronics International

- Salient facts and background:
 - Taxpayer's accountant embezzled money via VAT system;
 - Result: some understatement of VAT;
 - Taxpayer applied for VDP relief;
 - Relief granted
 - Taxpayer applied for remission of interest on late payment of VAT (section 39(7) – circumstances beyond the taxpayer's control);
 - Question:
 - Can taxpayer ask for remission of interest post VDP agreement?

Medtronics International

- Court:
 - Yes because:
 - If the legislature wanted to exclude requests for remission of interests, it would have specifically said so – it does not
 - Request for remission of interest under section 39(7) of the VAT Act is possible post VDP and SARS must entertain it and make a decision

Medtronics International

Some questions

- Interest for late payment of VAT (and other taxes) is imposed by way of assessment (determination of interest under a tax act)
- Assessments are regulated under the TAA;
- If a taxpayer is requesting a remission of interest, it is requesting of SARS to reduce the determination of interest?
- Is the taxpayer not then requesting SARS to issue a reduced assessment?

Medtronics International

Some questions

- Section 93 of the TAA regulates when SARS can make a reduced assessment:
 - Following the chapter 9 process (objection and appeal process) [section 93(1)(a) and (c)]
 - Settlement [section 93(1)(b)]
 - Readily apparent undisputed error [section 93(1)(d)]
 - Processing errors etc [section 93(1)(e)]
 - Estimated assessment reduced assessment requests [section 93(1)(f) and 95(6)].

Medtronics International

Some questions

- Section 93 effectively prescribes the remedies available if the taxpayer seeks a reduced assessment.
- Under which paragraph of section 93(1) does a request for remission of interest fall?

Medtronics International

- None – therefore, under which empowering provision would SARS act to reduce the determination of interest?
 - Section 39(7) of the VAT Act?
 - Perhaps – but SARS' power under section 39(7) is to remit.
 - A decision to remit would mean nothing if SARS cannot reduce the assessment.
 - So again – under what provision would SARS act to give effect to a decision to remit interest

Medtronics International

- Surely that can only be section 93 of the TAA?
- Or: is there an inconsistency between the TAA and the VAT Act (section 4 of the TAA– VAT Act would take preference)?
 - Arguably there is no inconsistency – the TAA does not say a taxpayer cannot request remission – it simply prescribes the procedure for requesting remittance.

Medtronics International

- When viewed in this light, the taxpayer should have to request remission by way of objection so that if SARS does exercise their discretion to remit, they can reduce the assessment under section 93
- However, in the circumstances of Medtronics International (i.e. post VDP), section 232 would operate to prevent it (if my analysis is correct).
- Lastly – if an accountant in a taxpayer’s employment is the cause of the late payment of VAT – is that circumstances beyond the taxpayer’s control? (taxpayer ultimately responsible for compliance with the tax affairs)

2021 National Budget

- *“The voluntary disclosure provisions will be reviewed in 2021 to ensure that they align with SARS’ strategic objectives and the policy objectives of the programme”*
- SARS earlier in 2021 had a stakeholder meeting: Two key take away points:
 - VDP cannot override section 93 and section 99;
 - VDP applications must be submitted before a ruling application;

VDP cannot override section 93

Example

- Taxpayer seeks to disclose understated output tax over several VAT periods;
- In quantifying the understated output tax, taxpayer realises that it had underclaimed input tax in several of those periods;
- If SARS issues an assessment, taking into account the increase in input tax, then they are effectively overriding section 93 (unless they are satisfied that the underclaim is a readily apparent undisputed error – surely?)

VDP cannot override Section 93

Example

- How to deal with in practice?
 - Disclose but claim outside VDP system within 5 allowable time period?

VDP cannot override Section 99

Prescription

- Taxpayer seeks to disclose understated income in its prescribed 2017 tax return.
- Taxpayer realises it would be entitled to a section 24C claim against that hitherto undisclosed income.
- If SARS allows the 24C claim in the VDP assessment, SARS is overriding section 99.
- SARS arguably cannot take the 24C claim into account in issuing the VDP assessment.

VDP cannot override

Section 93 and Section 99 - Example

- Taxpayer seeks to disclose output tax – no returns ever filed.
- Should VDP unit allow the input over those periods?
 - No assessment which requires reduction and hence no section 93 “override”.
 - No assessment means there cannot be a section 99 “override”
- Is the failure to claim input tax a default though?

Rulings and VDP's

- Default is not certain
- Seek a ruling from SARS which will either confirm a default or not
 - Example: Ruling on zero rating
- If ruling before VDP – arguably not a disclosure and not voluntary – VDP unit likely to reject.

Rulings and VDP's

- If VDP before ruling and ruling is favourable – withdraw application?
- If VDP before ruling and VDP assessment issued before ruling (section 232).
- Bear in mind that rulings other than for VAT is unlikely to trigger a problem because they can only be made (at least binding ones) on proposed transactions.

THANK YOU

SHOULD YOU HAVE ANY QUESTIONS – YOU ARE WELCOME TO CONTACT US

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