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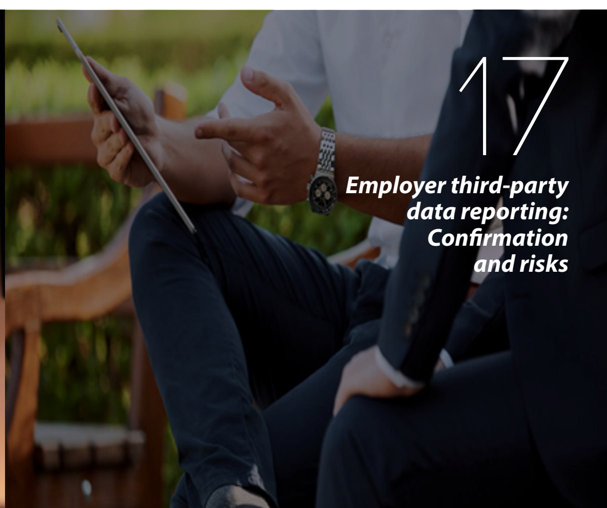

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Tell us what you think. Questions and suggestions can be sent to mmaseko@thesait.org.za

FINDUS

Postal address
PO Box 712
Menlyn Retail Park
0063

Editorial head office
Summit Place Business Park
Building 3, Ground Floor
221 Garsfontein Road, Menlyn
Pretoria
South Africa
0081

Advertising sales
Muzikayise Mike Maseko
mmaseko@thesait.org.za

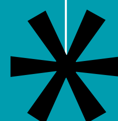
THETEAM

Editor
Muzikayise Mike Maseko

Supporting Editor
Dr Annamarie Mostert

Editorial Advisors
Keith Engel
Yolisa Dyasi

Design, Layout and Cover Illustration
Neo Wilma Makaleng



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GUEST CONTRIBUTORS

Adrian Modikwe

adrian.modikwe@thesait.org.za

Adrian is the Legal and Compliance Officer at the South African Institute of Taxation and is skilled in regulatory compliance, ethics & anti-corruption, legal drafting, research, and interpretation, as well as various facets of tax law, corporate law, human rights/ constitutional law, labour law, and dispute resolution.

Allan Wang'ang'a

awang'ang'a@vivaafricallp.com

Allan works as a Tax Consultant at Viva Africa Consulting Limited, specialising in tax advisory work for various business ventures including advice on corporate reorganisations, business acquisitions and disposals, mergers and acquisitions and offshore tax planning. Allan holds an LLB at Strathmore University and has recently completed an LLM at the University of Johannesburg.

Annelie Giles

agiles@ensafrica.com

Annelie Giles is an Executive at ENS in the Tax practice. She is a chartered accountant and specialises in value-added tax (VAT) consulting.Annelie focuses on assisting corporate clients with legislative interpretations and providing practical solutions on complex VAT matters across various industries, including issues concerning cross-border transactions, group reorganisations and the non-profit sector.

Cecile Diedricks

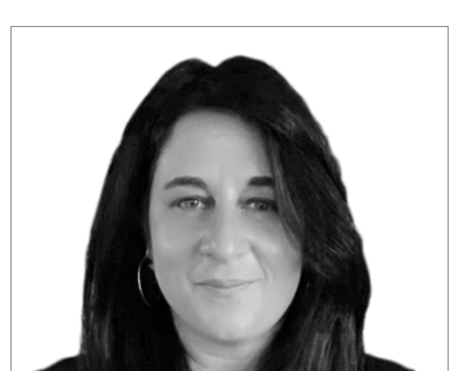
info@ttfconsultants.co.za

Cecile holds a Higher Certificate in taxation (RAU). She has 22 years of experience as a SARS employee specialising in employees tax including the processing of the EMP501/201s and interpretation of the EMPSA, SARS operations and processes. She has extensive knowledge of all SARS systems and tax type accounts.

Hopolang Mollo

hmollo@unicustax.co.za

Hopolang is a Tax Consultant at Unicus Tax Specialists SA with a BCom Honours (in Taxation) degree from the University of Cape Town. Her enthusiasm and dedication to understating the complexities of the tax industry are honing, much to her belief, an asset in the industry.



Caron Shamley

carons@vatit.com

Caron, Managing Director of VAT IT Reclaim - Emerging Markets (South Africa, Middle East and Australia) brings nearly two decades of expertise to the table. Her specialisation lies in foreign VAT reclaim, a niche she has honed over her 19-year tenure in the VAT reclaim industry. Caron's leadership extends to both sales and service, where she consistently devises effective strategies to maximize client refunds.

Kulani Dhumazi

kulani@kcapitalsa.co.za

Kulani is a Master Tax Practitioner (SA) and holds a BComHons, LLB, H Dip Tax Law and specialises in tax administration with a strong interest in business rescue and restructuring.

Nico Theron

ntheron@unicustax.co.za

Nico is the Managing Director at Unicus Tax Specialists SA. He specialises in income tax and VAT. He holds the following qualifications: BCom Law (cum laude); LLM (Tax Law); BCom Honours Taxation and MCom Taxation (SA and International Tax).

Nirvasha Singh

nirvasha.singh@webberwentzel.com

Nirvasha has more than 13 years' experience in tax related matters and four years of litigation experience. Nirvasha has provided technical advice to clients in respect of salary structuring, Public Benefit Organisation Trust Deeds, the development of PAYE Tax Strategies and has been involved in major tax litigation matters between the South African Revenue Service and companies in the oil and gas and mining sectors.

Nyasha Musviba

nyasha@sataxguide.co.za

Nyasha is founder and Tax Director at SA Tax Guide, specialising in income tax for companies and individuals, international tax, transfer pricing, VAT and employee taxes. He holds an LLB and an MCom in Taxation.

Phia van der Spuy

phia@trusteeze.co.za

Phia is CEO and co-founder of Trusteeze. She is a Chartered Accountant with a Master's degree in local and International Tax and specialises in trusts and estate planning.

Yolisa Dyasi

taxqueries@thesait.org.za

Yolisa is Tax Technical Specialist: Operations and Tax Administration at the South African Institute of Taxation. Her experience in the tax landscape spans over 6 years, which she has acquired from the South African Revenue Service and the Office of the Tax Ombud, where she specialised in tax administration and SARS operations.

Zakiyah Dockrat

zakiyah.dockrat@webberwentzel.com

Zakiyah is a Trainee Attorney at Webber Wentzel, awaiting her admission hearing. She completed her contract of articles in 2023 and has chosen to specialise in tax. She focuses on tax dispute resolution, and corporate tax matters involving value-added tax.

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Understanding registered representatives under the SA Tax Administration Act in light of the filing season

▶ **KULANI DHUMAZI,** Independent Tax Practitioner

The duty of registered representatives is one of the most critical aspects of compliance under South Africa's complex tax law.

The Tax Administration Act No. 28 of 2011 (TAA), a South African tax law cornerstone, establishes the statutes governing tax administration and procedure. As we enter another hectic filing season, understanding the role and value of registered agents is critical to ensure compliance and efficiency in dealings with the South African Revenue Service (SARS). Registered representatives play a crucial role in assisting taxpayers with their obligations and navigating the complexities of the tax system. By working with a registered agent, taxpayers can ensure that their tax affairs are in order and avoid potential penalties or audits from SARS.

Historically, a registered representative arose to facilitate tax administration for individuals unable to manage their affairs, non-residents or entities such as trusts, corporations or deceased estates. SARS authorises registered representatives to act on behalf of taxpayers in dealings with the tax authority, providing expertise and guidance in tax matters. This relationship helps to streamline communication and ensure compliance with tax laws and regulations. The need for taxpayers to maintain compliance with filing requirements and the ever-increasing complexity of tax laws drove this evolution. The role has since matured

due to the introduction of the TAA, which sought to crystallise and formalise the duties and obligations of registered representatives. Registered representatives assist taxpayers with their tax obligations, especially in complex situations such as deceased estates. Their expertise helps them navigate the intricate tax laws and ensure proper compliance. Formalising their duties through the TAA has further solidified their importance in the tax system.

Whereas it is a requirement for everyone conducting economic activity in South Africa to register as a taxpayer, appointing a registered representative involves additional responsibilities. A taxpayer, whether an individual or an entity, remains solely responsible for their tax affairs. However, a registered representative acts on behalf of another taxpayer, managing their tax matters with SARS. This delegation of duty underscores the need for the representative to perform diligently, as they are held accountable for any act required by the taxpayer under the tax law. It is therefore crucial for taxpayers to take an active role in selecting a registered representative who is knowledgeable and trustworthy, thereby ensuring compliance with tax laws. Additionally, taxpayers should regularly review and monitor the actions of their registered representatives to avoid any potential issues or discrepancies.

"As ambassadors of compliance and efficiency, registered representatives not only ensure that taxpayers fulfil their obligations but also instil trust in a system that is heavily reliant on the integrity and expertise of its intermediaries"

Often, confusion arises concerning whether a registered representative must also be a registered tax practitioner. Whereas registered representatives are authorised to act on behalf of taxpayers in certain tax matters, they may have different expertise or qualifications than registered tax practitioners. Taxpayers must clarify the roles and responsibilities of their representatives to ensure proper handling of their tax affairs. Although registered tax practitioners are well versed in tax laws and skilled in dealing with SARS, not all registered representatives are registered tax practitioners. Taxpayers need to verify the credentials of their representatives before entrusting them with their tax affairs. This can help prevent misunderstandings or issues arising from a lack of expertise in tax matters. The TAA has distinct requirements for registered representatives and imposes certain obligations and qualifications to ensure competency and adherence to tax legislation. Nevertheless, registered tax practitioners often become registered representatives by virtue of their expertise, providing invaluable support to those less familiar with tax intricacies.

The connection between taxpayers (or their representatives) and SARS is critical to South Africa's efficient tax system operation. Registered representatives serve as a conduit for taxpayers to contact SARS by sending information and making submissions on their behalf. This is especially important during the filing season when large amounts of data and numerous transactions require precision and timeliness. Registered representatives ensure that the information presented to SARS is accurate and verifiable by limiting the possibility of disputes and misunderstandings that could cause processing delays or noncompliance penalties. By acting as a liaison between taxpayers and SARS, registered representatives play a crucial role in maintaining the integrity of the tax system in South Africa.

Regarding execution, the TAA establishes the technical framework that governs the mandate of registered representatives. This system requires an entity that cannot act in its capacity, such as a firm, to appoint a natural person as its registered representative. This mandate contains precise rules for such representatives' identification, appointment and obligations, which bind them to the notion of responsible taxpayer participation. By establishing clear criteria, the TAA promotes a streamlined, open and accountable tax administrative procedure that strengthens the fiscal system's integrity. This framework also ensures that registered representatives are held responsible for their actions and adhere to ethical standards in their interactions with tax authorities. The TAA aims to maintain transparency and efficiency in tax administration processes.

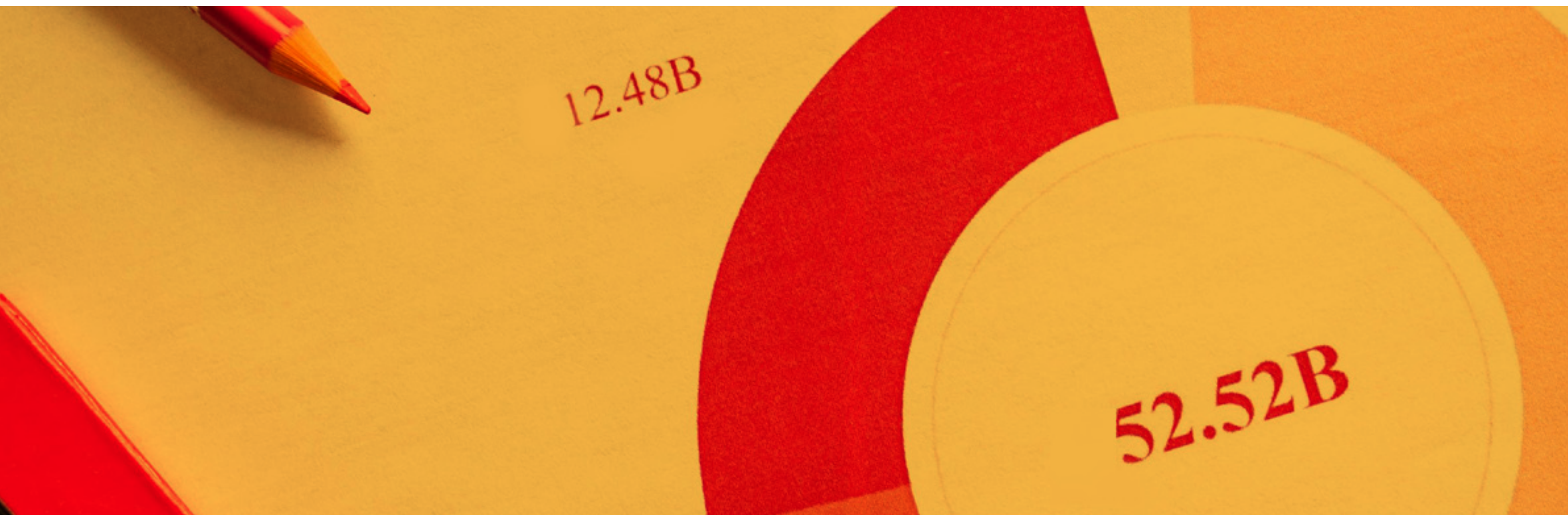
The filing season in South Africa can be a demanding and tense period for taxpayers. However, the services of a registered representative can provide a significant sense of relief. These professionals are not only well versed in the latest legislative requirements and procedural updates but also have the agility to respond promptly to SARS requests. They can efficiently manage tax submissions by ensuring that taxpayer statements are accurate, claims are valid and any potential audits proceed without a hitch.

Moreover, registered representatives often possess strategic tax planning insights that can greatly benefit taxpayers. Their specialised knowledge allows them to optimise tax arrangements and capitalise on exemptions and deductions that might otherwise go unnoticed. This expertise is particularly crucial during the filing season, as it can significantly reduce the risk of errors or omissions, which could be financially and reputationally costly.

In conclusion, the Tax Administration Act No. 28 of 2011's definition of the tax administration arena in South Africa necessitates careful manoeuvring. Registered representatives are essential to keep the tax system running smoothly, particularly during the filing season.

As ambassadors of compliance and efficiency, registered representatives not only ensure that taxpayers fulfil their obligations but also instil trust in a system that is heavily reliant on the integrity and expertise of its intermediaries. Registered representatives are responsible for accurately interpreting and applying tax laws, providing guidance to taxpayers and representing them in dealings with tax authorities. Their expertise and professionalism are essential to maintain the tax system's integrity and to promote voluntary compliance among taxpayers.

The filing season is generally a measure of the effectiveness of the tax administration structure and a test of the TAA's defined roles and responsibilities. Registered representatives are essential in this ecosystem; they allow strong and dependable communication between taxpayers and SARS. As a result, any taxpayer hoping to navigate South Africa's complicated tax landscape successfully must first grasp their function, the statutory requirements that underpin it and the importance of their services during the filing season.



REVENUE AUGMENTATION:

Low-hanging fruit!

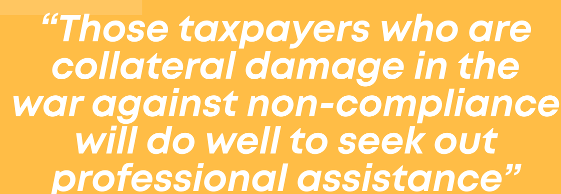
NICO THERON, Managing Director at Unicus Tax Specialists SA

In an apparent effort to win the war against non-compliance, it appears SARS has taken to augmenting taxpayer's revenue. While this is perhaps not new, it certainly seems to be taking place on a larger scale than in the past. Stated differently, it seems more and more taxpayers are being asked to explain deposits in their bank accounts.

Revenue augmentation is a process of comparing what a taxpayer has declared as revenue in their tax return to the amounts actually deposited into the taxpayer's bank accounts. If the taxpayer has declared in their tax return, say, R1 million but the deposits in a taxpayer's various bank accounts suggest revenue of R10 million, SARS will require the taxpayer to explain why SARS ought not to raise an additional assessment to tax the difference of R9 million, which represents, according to SARS, undeclared revenue.

Whereas this seems like a pretty straightforward thing for a taxpayer to explain, the reality is that, quite simply, it is not. For SARS to raise these assessments, all they need to do is to look at the deposits, do a quick math calculation and, 'bob's your uncle'. It appears to be a quick and simple process.

Taxpayers, on the contrary, cannot simply respond by stating that, for instance, *"those deposits are all loans"* and *"those deposits are all inter-account transfers"* or that *"considering the movement in the loan balance on my company's AFS, those deposits can only be loan repayments"* or *"your calculation is wrong"*.



You see, tax law places the burden of proof on taxpayers. For the taxpayer to explain why SARS ought not to tax things like inter-account transfers and loan repayments, etc. The taxpayer is often told to reconcile amounts on a line-by-line basis and explain, with evidence on a line-by-line basis, why a particular deposit does not stand to be included in that taxpayer's gross income. Can they do that? Well, they appear to be very fond of the High Court judgement *CSARS v M,* (A5036/2023) [2023] ZAGPJHC (6 July 2023), which says they can—differences in facts are 'mos' not something that ought to be considered on a case-by-case basis.

To try to explain why this is low-hanging fruit, let me try putting this in context. For SARS to augment a taxpayer's revenue (i.e. to compare deposits to what was declared) by proposing an often preposterous assessment cannot, we think, take more than a couple of hours (you see, they have data showing total deposits across all accounts). For the taxpayer to fend off that assessment often takes weeks (fact dependent) of data crunching and evidence collection. Not going through this extensive line-by-line exercise is most likely going to end up in SARS collecting or trying to collect the amount assessed, despite these assessments often but, to be fair, not always, being ultimately incorrect.

To further illustrate why this is low-hanging fruit, let us consider procedural law for a second. These assessments are often, but not always, a particular type of assessment called an 'estimated assessment'. You see, taxpayers cannot object to these particular types of estimated assessments. This also means they cannot, in law, request reasons for the assessment nor can they, in law, ask for payment of the often-overstated assessments to be suspended pending a challenge against these assessments. Rather, the taxpayer must ultimately explain on a line-by-line basis why each deposit is not taxable. Going through this tedious exercise is almost unavoidable.

In short, then, taxpayers who find themselves in these positions will truly experience and understand what it means when it is said that the balance of power favours the revenue authority.

Now, keen readers and some other people will be quick to point out that this process is typically followed in cases where the taxpayer is not compliant, i.e. has failed to submit a tax return or because the taxpayer was not cooperating with SARS, i.e. the taxpayer has not responded to at least two requests for relevant material from SARS. They would, of course, be right. The sentiment then seemingly being that if you have failed to file a tax return or have failed to send SARS relevant material, then you must 'mos maar' face the full might and fury of the revenue collector—after all, being in this position is the taxpayer's own doing.

Whether there is truth or value to this sentiment (whether from a moral or legal perspective) is not something we are going to attempt to answer here, save to ask two simple questions:

- Is it reasonable to raise a tax bill on the basis that it is inherently most likely incorrect and, most likely, grossly overstated and leave it to the taxpayer to prove SARS wrong in due course?
- Does a taxpayer's punishment for non-compliance include paying tax on non-existent income?

I recall a High Court judgment where the taxpayer was a motor company, presumably based in the Pretoria East region, which suggested that SARS must have proper grounds for raising an assessment despite the burden of proof being on the taxpayer. Further, tax law allows for several forms of punishment of non-compliant taxpayers, none of which (to our knowledge) include raising assessments on non-existent income.

This process of revenue augmentation probably does a stellar job of winning the war against serious instances of non-compliance. This is fantastic. Perhaps, however, a more targeted approach and selection criteria could be employed as opposed to what seems to be a large-scale rollout of a process to collect low-hanging fruit.

In the meantime, those taxpayers who are collateral damage in the war against non-compliance will do well to seek out professional assistance. You see, it is only after you have gone through the tedious exercise of discharging your onus or proof that it will be clear you are collateral damage and not, in fact, the enemy.

DIGITAL FRAUD AND eFILING PROFILE HIJACKING

15 minutes CPD

▶ **YOLISA DYASI,** Tax Technical Specialist: Operations and Tax Administration at SAIT

With the increase in the use of technology, comes the increase in the risk of data breaches and digital fraud. The South African tax system and specifically the South African Revenue Service (SARS) is not immune to these risks.

In 2019, SARS Commissioner, Mr Edward Kieswetter, made it his sole mission to create a digital and smart SARS using technology and artificial intelligence. To SARS' credit, this has been largely achieved as SARS is considered one of the most technologically advanced revenue services in the world. Unfortunately, between 2021 and 2024, SARS has seen unprecedented levels of digital fraud and users have been left feeling the brunt of the eFiling profile hijackings.

In February of this year, eFiling users and, more specifically, tax practitioners, started noticing an upward trend of eFiling profile breaches and in some instances, complete hijackings of their eFiling profiles. These breaches became more prevalent in March and April 2024, with at least 10 eFiling breaches reported per week. By any standards, this would be alarming for any institution dealing with sensitive taxpayer information.

That said, SARS is by no means the only institution that has been struggling with such breaches. In March 2024, the Companies and Intellectual Property Commission (CIPC) suffered the same fate when its systems were hacked and several companies were hijacked through the change in directorships. It is believed that this breach aided some of the eFiling profile hijackings which took place in March 2024. But how exactly did these two breaches go together? Well, several distinct modus operandi could be identified when analysing the eFiling profile hijacking cases reported to the South African Institute of Taxation (SAIT), with the next one being more elaborate and sophisticated than the one before.

- The registered representative is an integral part of obtaining access to an eFiling profile. The registered representative is the custodian of the eFiling profile and bears the right to authorise the transfer of an eFiling profile from one user to another. In most cases, the appointed registered representative would be one of the directors registered with the CIPC. The change in directorship at the CIPC therefore allowed fraudsters to change the registered representative details at SARS with the newly 'updated' director details at CIPC. From there, fraudulently transferring the eFiling profile would be a walk in the park.

- In some cases, although the registered representative would remain unchanged, a fraudulent SIM swap would be performed to obtain the cell phone number required to receive a One-Time-Pin (OTP). Once the SIM swap was done, the eFiling profile username could be obtained and password changes with an OTP authorisation.

- Although less sophisticated, fraudsters would create new eFiling profiles for individuals and create 'shared access' to gain access to individual eFiling profiles. This would allow them to submit fraudulent income tax returns with fictious refunds without the appointed tax practitioner suspecting any wrongdoing. Banking details would also be changed on the system to receive these fictious refunds.

Despite SARS creating a dedicated channel to report such incidences of digital fraud, this has done very little to deter the fraudsters from their mission. The trust from the tax practitioner community and members of the public seems to dwindle daily with SARS seen as doing little to actively investigate and resolve the digital fraud cases reported. Even though SARS has categorically denied that any SARS employees are involved in the submission of tax returns and change of banking details to obtain the refunds, many still wonder whether some of these breaches could be the result of an inside job. Unfortunately, the defensive and denialist approach has done very little to boost the public's confidence in SARS.

Secondary to the eFiling profile hijacking is the aftermath and the work which needs to be done to get the profile back to the rightful owners, correcting the fraudulent returns and recovering the fictitious refunds. Tax practitioners often find themselves in an endless battle, fighting tooth and nail to get any feedback from SARS on the ongoing fraud cases. It is noteworthy to mention that 9 out of 10 times, the debt collection steps continue against the taxpayer without any consideration of the background and ongoing fraud investigation. Reports have been received of cases dating back to 2021 which still have not been resolved, while penalties and interest continue to accrue against the taxpayer.

As a natural response to the eFiling profile hijackings, SARS recently announced several measures to be put in place to curb the risk of future breaches and payment of fraudulent refunds:

1. SARS successfully coded its systems to automatically place stoppers on the accounts the moment a digital fraud case is reported. This means that regardless of a banking detail change, unless the cyber-crimes task team (CCTT) have authorised the lifting of the stopper, no refunds will be released from those accounts.

2. SARS also implemented a multifactor authentication option on eFiling. Existing eFiling users can enable the multifactor authentication which would require both a password and either an OTP or authorisation via the SARS Mobile App. All new eFiling registrations will automatically have multifactor authentication set.

3. SARS restricted the tax practitioner's ability to update security details on behalf of their clients, even if they are in possession of a valid power of attorney. The argument being that only the rightful owners of eFiling profiles will be allowed to change these details and retain absolute control over the eFiling profiles.

"It is no secret that the majority of the fraudulent refunds were paid into bank accounts active with only two institutions. One would assume that SARS would directly engage those institutions to track down and prosecute those individuals"

4. SARS also started restricting taxpayers from registering an eFiling profile if their contact details (emails and cell phone numbers) were already linked as security details to another eFiling profile. This action by tax practitioner was recently classified by SARS as fraud as a single natural person could not possibly be the custodian of more than one eFiling profile. Tax practitioners unfortunately got the short end of the stick in this regard, as many of them were locked out of their profiles on 31 May 2024 because of this implementation.

While SARS tries to play catch-up on the fraudsters, much can be said about the apparent lack of collaboration with other financial institutions to get the matter under control. It is no secret that the majority of the fraudulent refunds were paid into bank accounts active with only two institutions. One would assume that SARS would directly engage those institutions to track down and prosecute those individuals. This is yet to be seen.

Digital fraud is a constant cat-and-mouse game between institutions and fraudsters, with fraudsters already looking for the next way to beat the system. It remains to be seen whether SARS will move from a defensive to an offensive mode anytime soon.

VAT AND REFUNDS: Are they getting better?

▶ **ANNELIE GILES,** Executive at ENS

South Africa follows an input-credit method of value-added tax (VAT) accounting, which allows a VAT registered vendor to claim VAT on expenses that have been incurred in the course or furtherance of its taxable enterprise. The difficulty is that there is no prescribed time period within which the South African Revenue Service (SARS) is required to pay out a VAT refund.

While there are many reasons why VAT refunds are not paid out immediately, in practice, certain themes repeatedly emerge as causing the delayed payment of refunds to vendors. Some of these themes are explored in further detail in this article.

Audit or verification of refunds

Section 190(2) of the Tax Administration Act No. 28 of 2011 (TAA) preserves SARS' right to first verify a refund before the refund is paid out. SARS will usually inform a vendor at the start of a verification or audit that, if it has a refund due, it will be paid only after the verification or audit is complete and the refund validations are passed. It has long been an issue of contention between SARS and vendors whether SARS may withhold refunds that are not the subject of the particular verification or audit. Recent experience seems to suggest that SARS no longer places general 'stoppers' on vendors' VAT profiles, which prevent the payment of any new refund claims while SARS is auditing selected historic refund claims and that the use thereof is reserved for instances where it is justifiably warranted.

There also seems to be a general acceptance among vendors that a refund may be delayed pending the finalisation of a standard verification request (commonly regarded as a 'desk' audit, as opposed to an in-depth field audit). However, SARS has recently revised its standard VAT verification request letter, which now requires vendors to submit a substantial amount of information to SARS as listed in the letter. Vendors are usually afforded 21 business days from the date of the letter to respond but may request an extension where more time is needed.

While some aspects of the verification letter are specific to each VAT return, such as schedules and documentation supporting the declarations made in that return, other aspects are more generic, yet administratively onerous, for example, the requirement to provide detailed explanations of the nature of the business, terms of payment with customers/suppliers and financing arrangements. Vendors are also required to submit extensive financial information to SARS as requested in the letter, such as VAT control accounts for input tax and output tax, debtors and creditors ledger accounts, trial balance accounts, as well as bank statements for the selected tax period of all enterprise bank accounts. For small to medium-sized vendors, this may still be achievable within the standard 21 business day period, however, it is unclear how financial institutions such as banks and insurance companies or other large businesses with multiple divisions and product lines, are to comply with these requests within a reasonable timeframe; all the while, their VAT refund payments are placed on hold until the conclusion of the verification process.

What is more concerning is the sheer amount of information requested by SARS as this bears hallmarks of a typical SARS audit or request for relevant material under section 46 of the TAA. SARS recently confirmed that the estimated assessment functionality under section 95(1)(c) of the TAA has now been implemented for VAT. Therefore, if not carefully considered, a vendor's response to a standard verification request could lead to an estimated assessment being raised by SARS. This will also apply where a vendor has not provided all relevant material requested by SARS during the VAT verification process.

"If, following the finalisation of the verification or audit, it is concluded that the refunds were not properly payable, SARS may recover the refunds (plus interest) from the vendor"

- An estimated assessment becomes final and is not subject to objection and appeal, if the vendor does not submit the required relevant material within 40 business days from the date of the estimated assessment (or an extended period approved by SARS) as contemplated in section 95(6) of the TAA, read with section 100(1)(a)(i). Therefore, it is unavoidable for vendors to provide the requested information to SARS even if the new standard verification letter requests the same voluminous information from a vendor on more than one occasion.

Outstanding debt

SARS is increasingly taking debt collection steps against vendors by applying outstanding VAT refunds against outstanding tax debts within the set-off mechanism provided for by section 191 of the TAA.

Section 190(3) of the TAA provides that SARS must authorise the payment of a refund before the finalisation of the verification or audit (or investigation, inspection and even criminal investigation) if security in a form acceptable to a senior SARS official is provided by the taxpayer. Generally, SARS requires vendors to tender security in the form of a bank guarantee for the full amount of the outstanding VAT refunds sought to be released. If, following the finalisation of the verification or audit, it is concluded that the refunds were not properly payable, SARS may recover the refunds (plus interest) from the vendor in terms of section 190(5) of the TAA.

The issue becomes more complicated where there is an active tax dispute with SARS and the vendor's suspension of payment request regarding the disputed assessment was rejected. Even though security may be tendered to suspend the payment of a disputed assessment, SARS will often proceed to set off the tax debts (debt equalisation) against a vendor's outstanding VAT refunds on unrelated tax periods in terms of section 164(1) of the TAA (commonly referred to as the 'pay now, argue later' rule). In some instances, vendors may only realise for the first time that SARS has performed a set-off when they attempt to follow up on the payment of their outstanding VAT refunds or when they notice debt-equalisation entries on their SARS VAT statements of account and find that the VAT refunds were absorbed by the disputed assessments.

Verification of bank details

Another reoccurring theme is a request by SARS for a vendor to verify its banking details shortly after a VAT refund becomes due and payable, notwithstanding that the vendor has previously provided its banking details to SARS when it first registered for VAT. While there certainly is appreciation for the need to ensure that SARS has the most up-to-date banking details on record, the documentation required to verify banking details and the process involved often resemble that of an original VAT registration application and can be time consuming.

The issue is compounded for non-resident suppliers of electronic services given that these vendors do not have any physical presence in South Africa. Electronic service providers are not required to have South African bank accounts yet, in practice, SARS is not willing to make refund payments to foreign bank accounts and instead advises these vendors to offset their refunds against future VAT returns that are in a net payable position. This approach leads to various practical challenges. Firstly, the timing of any such set-off is not within the electronic service provider's control and can lead to late payment penalties and interest being imposed on the VAT payable return; secondly, it is unclear which SARS branch office(s) and/or SARS agent(s) are to be approached to arrange for such set-off to be performed at the relevant time or what the process entails; and thirdly, prescription of VAT refund claims could apply if not timeously paid out due to invalid banking details.

Even though there are no tax legislative impediments in this regard, there does not appear to be a straightforward solution. In addition, the VAT119i indemnity form, which ordinarily allows VAT refunds to be paid out into a group company's South African bank account in certain instances, does not seem to provide the necessary comfort to SARS in this regard. Even so, it is not clear on what basis the South African group company would be able to remit the refunds, once received from SARS, to the non-resident electronic service provider without due regard to potential exchange control implications and related requirements.

Where to from here?

While one would like to buy into the general sense that progress is being made to ensure the timeous payment of VAT refunds, the reasons for delays have not fundamentally changed. The danger of not addressing these delays is that vendors may ultimately seek means to ensure that they are not in a refund position.

EMPLOYER THIRD-PARTY DATA REPORTING: CONFIRMATION AND RISKS

▶ **CECILE DIEDRICKS,** Consultant at SAIT

The IRP5/IT3(a) has traditionally been the only source document needed to prove the deduction and payment of Pay as You Earn (PAYE) by an employer on behalf of their employee.

It has a long-standing tradition of being the only reliable source document that SARS has used for many years; the employee/taxpayer's failure to produce the said IRP5 would result in the PAYE credit not being allowed on assessment. This has always been a very bitter pill to swallow for those employees found to be without an IRP5 at the end of the tax year, as SARS would not allow the PAYE credit where an IRP5 could not be produced.

Over the years, SARS began to strengthen the PAYE systems and processes to the point that the IRP5s were prepopulating on the ITR12 when it was generated. SARS would use a complex algorithm to match an IRP5 to a specific taxpayer's ITR12 return by matching based either on the ID or tax reference number. As the systems progressed further and the reliability of this process started to increase, SARS decided to lock the IRP5 containers so that no changes to the IRP5 on the ITR12 were allowed, thereby forcing all changes back onto the employer. This was a logical and wise move by SARS, as this then forced the data integrity of the IRP5 to increase and made the employer more conscious of what needed to be placed on the IRP5. However, it was a little frustrating to the tax community as they were now dependent on the employer to issue the IRP5 correctly and to make any adjustments timeously. By forcing the changes to the IRP5 back onto the employer, SARS wanted the employer to be aware of the impact the IRP5 had on the whole tax system; if the IRP5 was incorrect, then the income tax return of the taxpayer was also incorrect.

It also made sense to fix an IRP5 in the PAYE system because updating an IRP5 might impact the whole recon submission (EMP501). Allowing changes to the IRP5 under the income tax system meant that the underlying data was never amended and the PAYE system was not balancing. This also had an impact on the PAYE risk engines and auditing processes, as the data upon which SARS would be basing their risk rules did not have a high level of integrity.

Trends and fluctuations in the PAYE system could not be monitored proficiently and a high risk of fraudulent activity was inevitable. Ultimately, what was a frustrating move for the taxpayer was a wise move for the tax system.

This model is still not without flaws and SARS' continued efforts to increase the integrity of the IRP5 and the PAYE deduction system have caused quite a few frustrations to the tax community. The latest update to this IRP5 vs ITR12 system has taken the frustrations to new levels.

Disallowing the PAYE tax credit due to 'delinquent' employers

As stated, the IRP5 was the chief source document used to verify the deduction of PAYE during the income tax assessment process. This has always been taken for granted, as the whole PAYE system was based on the issuing and management of the IRP5.

However, this assumption recently started to prove wrong. SARS started disallowing the PAYE credit in spite of the fact that a valid IRP5 was prepopulated on the ITR12. There seemed to be no errors in the data when compared to the physical IRP5 issued by the employer, yet SARS was not allowing the PAYE credit; instead, it was issuing an assessment, which made the PAYE payable again. This obviously caused an uproar in the tax community as SARS was, in effect, asking twice for PAYE.

Upon further investigation into this matter, it was found that SARS was, in fact, disallowing the PAYE due to a default on the employer's part. SARS started classifying employers as 'delinquent employers', where it was found that the employer was non-compliant as per the 'My Compliance Profile' in the tax compliance status systems. All of this then boiled down to the employee being penalised for a default on the employer's side, which did not make sense as the employer did deduct the PAYE and the employee did receive a valid IRP5. In effect, this process rendered the IRP5 useless as the PAYE credit now depended not only on a valid IRP5 but also on the compliance status of the employer. In fact, the compliance status of the employer was taking precedence over the IRP5 issued and the PAYE was deducted as per that IRP5, which was being disallowed.

"The difficult part is proving that such PAYE amounts were withheld by their employer and paid over to SARS"

This 'new' process was strongly condemned by the tax community and rightly so, as the IRP5 was traditionally the only criterium used to determine the validity of a PAYE credit. Through rigorous debate between SARS and various tax controlling bodies, SARS then decided to allow taxpayers the chance to prove the validity of the PAYE credit by confirming their employer/employee relationship. With this amendment to the process in mind, SARS began to raise verification audits on these taxpayers, allowing them to provide certain documentation to prove their employment status instead of just disallowing the PAYE credit. Once these documents were submitted through the verification audit process (in some instances an objection was necessary), an auditor would decide on whether to allow the PAYE credit or not. This decision would be based on the employer's compliance history and whether the employer did, in fact, pay this amount over to SARS. If there were any payments outstanding, this would make the process harder to prove.

SARS is of the opinion that the PAYE must have actually been paid by the employer before a PAYE credit could be allowed. While this notion is correct (it just makes sense that if you are allowing a tax credit on one hand, there should be a payment of such tax credit on the other hand), the balance that SARS is trying to reach impacts the employee/taxpayer the most. The employee has genuinely paid this PAYE (and this is reflected in their pay), and being told to pay this amount again is seriously unjust. There are debt collection steps and proper tax management systems in place within the PAYE regime to effectively manage the employer's compliance; why choose a method that impacts the employee greatly and is something beyond their control?

Nevertheless, SARS has implemented this process and is managing it as part of the income tax assessment process. However, SARS is not doing enough to manage the employer. Some employers refuse to update the IRP5s or are uncooperative. It is an offence to issue an incorrect IRP5 or to withhold PAYE and not pay it over to SARS, but these provisions are not enforced on the employer by SARS. The employee then solely bears the burden of proving the payment of this PAYE credit.

The suggested solution to this dilemma is to provide SARS with the documentation that is requested under the verification audit or if no audit is raised, one ought to lodge an objection to the disallowance of the PAYE credit after the assessment is processed.

The documentation that SARS normally requests is as follows:

- Employment contract/letter of employment from the employer with the entity letterhead stating the following:
  - Physical address of the entity;
  - Contact number of Human Resources to confirm employment; and
  - PAYE Reference Number of the entity where the employee is employed.
- IRP5/IT3(a) employee income tax certificates in respect of remuneration income and lump sums from your employer/ pension fund or provident fund or retirement fund;
- Three months' bank statement showing the salary transfer; and
- Salary slips for the 12-month period or less if employment is less than a year.

The best solution would obviously be for the employer to maintain their compliance status; in practice, this is not always the case.

No IRP5 issued

The other IRP5 issue that has recently been on the rise is when the employer does not even issue the employee with an IRP5. This is not a new practice; however, instances where this is happening seem to occur more often.

SARS has published the process that needs to be followed when submitting the ITR12 on their website: https://www.sars.gov.za/faq/i-dont-see-my-irp5-on-my-return/

These ITR12s should be submitted via the SARS branch office by booking a virtual appointment. It should not be submitted on eFiling. They also stipulate which documents need to be provided.

You will be required to provide the following documentation:

- All payslips issued by the employer for the year of assessment in question;
- Bank statements to show the transfer of salary into your account from the employer and, if applicable, a copy of a service contract;
- Name and contact details of the employer; and
- Physical address of the employer.

The difficult part is not capturing the return but what happens afterwards, meaning how the return will be processed. (Will the PAYE credit as reflected on the payslips be allowed or not?)

Ultimately, the liability for withholding employees' tax is with the employer in terms of part II of the 4th Schedule to the Income Tax Act. Where the employer did not withhold employees' tax from the employee, the employee may be held jointly liable (with the employer) for the payment of the employees' taxes. Provided that the employer, therefore, deducted or withheld such amounts from the employee, the employer must issue a tax certificate, notwithstanding the fact that the employer has failed to pay those amounts to SARS.

The difficult part is proving that such PAYE amounts were withheld by their employer and paid over to SARS. This can only be provided in the form of payslips, service contracts, etc. Therefore, where SARS suspects that the employer has failed in their duty to withhold or pay over the PAYE, SARS is allowed to disallow the credit on the payslip and the employee will need to prove the deduction of this PAYE.

If this amount (the PAYE) was not paid over to SARS, then SARS has the right not to allow the credit. This means that the taxpayer will become liable for these taxes on assessment. From a practical standpoint, it is difficult to get SARS to allow the credit if the amount has not been paid by the employer (as reflected on the employer's PAYE account). In some instances, SARS does allow the credit up to a breakeven point (meaning they make the assessment a nil assessment). It all depends on whether you can convince SARS to allow this credit or not.

What we mostly find in practice, though, is that the PAYE is not allowed and the taxpayer has to pay this amount on assessment. This amount should also be recoverable from the employer because if they have deducted the PAYE and did not pay this amount over to SARS, the employer owes this amount to the employee.

Conclusion

SARS' heavy reliance on third-party data to prepopulate the ITR12 will only get greater as time goes by and the burden placed on the employer to maintain their PAYE records and payments will become even more crucial. The integrity of the underlying data must increase if SARS is to achieve their vision within the automated assessment process. But, as it stands, this burden of the PAYE system is being borne by the employee and not the employer, which is where it should be focused. More emphasis should be placed on auditing the employer and holding the employer liable for not paying over the PAYE as it should be in terms of the Income Tax Act. The employee is left to scramble on their own to prove a deduction of PAYE that they do not have control over, nor does the Act give them the authority to hold the employer liable. Without proper systems in place to govern the employer, the employee is left alone in their frustrating fight with SARS over the deduction of PAYE. This should be something that SARS focuses on in the near future, especially if they want to rely solely on the submission of third-party data.

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UPDATE

TRUSTS DATA MODERNISATION

▶ **PHIA VAN DER SPY,** CEO and Co-Founder at Trusteeze

2024 will be an interesting year (to say the least!) for filing the various trust tax returns. A million-odd individual boards of trustees are becoming third-party data providers to the South African Revenue Service (SARS) for the first time, similar to the banks, medical schemes, fund administrators, etc. Moreover, SARS is looking to introduce administrative penalties for the late submission of trust tax returns, while tax practitioners are finding it increasingly challenging to submit annual trust tax returns due to onerous new requirements relating to the submission of supporting documents.

During interactions with SARS for the implementation of the new IT3(t) (discussed below), several surprised faces were noticed when SARS mentioned during these sessions that the aim is for them to move to a 'real-time' requirement for trust data over time. This requires a new approach to how trusts are to be managed in South Africa as, on average, trusts' annual tax returns are still seven years late, which reflects the lack of proper trust administration.

During the 2023 SAIT Tax Indaba, the message of SARS was loud and clear—new measures they have put in place are aimed at assuring SARS that trusts are run as separate entities (such as companies) on a real-time basis and not on an ad-hoc basis. Often, trustees do not manage trusts as separate, active entities throughout the year. Also, most accountants have traditionally not charged for trust services, including trusteeship, accounting and taxation, to retain their clients for whom they provided other billable services. Given the current onerous trust requirements, continuing these services for free makes no business sense. According to feedback from various tax practitioners, it now takes more than 45 minutes to submit an annual tax return for an inactive trust.

Still, just more than a third of trusts are registered as taxpayers as required by law

When we look at the statistics, it is clear that trusts have been neglected. On 29 February 2024, SARS conducted a 'Trust and Tax Compliance' webinar where they discussed the four pillars of compliance relating to trusts, namely registration, filing, declaration and payment. In this webinar, they emphasised the focus of SARS on trusts, which all have to register as taxpayers and submit tax returns, including annual and potentially provisional tax returns. Although there was an improvement with 47% of newly registered trusts in 2023 being timeously registered as taxpayers with SARS, the overall picture is still concerning. Only about 380,000 trusts are registered with SARS, leaving an estimated 60% to 65% of trusts unregistered. SARS indicated that third-party data would be used to register existing, unregistered trusts. This is a warning to trustees who have not yet registered trusts as taxpayers. SARS indicated that they would soon register trusts as taxpayers simultaneously with their registrations with the Master of the High Court, similar to new company registrations with the Companies and Intellectual Property Commission (CIPC).

"Incorrect reporting of income and capital gains to SARS may result in penalties and interest being applied by SARS and SARS is looking into keeping trustees personally liable"

SARS has specifically warned trustees since 2021

SARS presented a webinar (the second one of a series, which indicates SARS' focus on trusts) on 29 July 2021 called Trust and Tax Obligations, wherein they made it clear that there would be a significant focus on trust tax compliance. They highlighted nine strategic objectives, including the following:

- Objective 1—Clarity and certainty for trustees: Trustees will have little excuse to make incorrect declarations to SARS. SARS would provide guides, clarity notes, interpretation notes and guidance on their website. Since then, SARS has published a number of trust-specific guidance.
- Objective 2—Make it easy to comply with obligations: This included registering trusts as taxpayers. On 28 September 2022, SARS issued a media release titled *SARS sharpens its focus on Trusts*, where they indicated that "*In line with its strategic objectives of providing clarity and certainty to enable taxpayers to comply with their legal obligations as required by law, an interim online registration platform (SOQS) is available to assist and enable Trusts to register with SARS*". Before that, registering trusts as taxpayers was a cumbersome, manual process.
- Objective 3—Make non-compliance hard and costly: SARS recognised that many trusts are non-compliant. SARS encouraged taxpayers to engage in voluntary compliance with their voluntary compliance programme. SARS then warned that if someone is not doing the right thing and uses SARS' services correctly, SARS will get to a point where they can identify those who are not complying. SARS will use every aspect available to them to enforce the law. It was emphasised that SARS' journey is to collect taxes due to it. This was a significant warning signal to trustees to proactively get their affairs in order before SARS knocked on their doors with their relevant intelligence and information at hand.
- Objective 4—Strong workforce: SARS noted its drive to develop a high-performing, diverse, agile, engaged and involved workforce. SARS would recruit (and subsequently have) the correct calibre of employees and train relevant staff to develop expertise in auditing trusts and providing advice at the service centres. SARS confirmed its drive to empower employees to deal appropriately with trusts.
- Objective 5—Expand use of data: SARS was gearing up to use data within its comprehensive knowledge management framework. Over the years, SARS has built strong networks and integrated data points, which would assist with access to all relevant information without relying on trustees to disclose it to them. They would interface with the Master of the High Court, financial institutions and other entities to collect data. SARS would be able to ensure that income that flows through a trust would be taxed in the correct persons' (the funder/donor, beneficiary, or trust – in that order) hands through the proper use of data. The subsequent introduction of the IT3(t) submission (discussed below) has undoubtedly ticked this box.

- Objective 6—Modernise systems: SARS strives to provide digital and streamlined online trust services. They acknowledged that they could improve their online services. One can now change selected sensitive details, such as bank details and name/surname or registered name in the cases of companies and trusts, on eFiling. This should go a long way toward assisting trustees in remaining compliant.
- Objective 7—Work with stakeholders: SARS is committed to improving its system by working with its stakeholders, including the Master of the High Court, the Department of Justice, tax practitioners and those administering trusts.
- Objective 8—Build public trust and confidence in the tax administration system: SARS acknowledged that trust is an important aspect of ensuring it will become a smart and modern SARS that acts with unquestionable integrity and is trusted and admired.

Paperwork, paperwork, paperwork. . .

SARS admitted in a webinar held in February 2024 that there was a lag in submitting the 2023 trust tax returns. No wonder, as SARS introduced a requirement for trustees to upload a list of information on Efiling with the trust tax return. This includes the latest trust deed, Letters of Authority, resolutions, minutes of the trustee meetings and so forth. After concerns were raised that it is not necessary to submit all resolutions and minutes since this will be time-consuming and may not necessarily be relevant to SARS and that insufficient guidance was provided as to what 'minutes' are required in this regard, SARS issued guidance in August 2023 that "*[a]ll minutes, excluding those dealing with internal trustee governance arrangements and administrative matters, must be submitted*". So, basically, all transaction-related proof needs to be submitted. The paperwork provides evidence that a trust is compliant. Therefore, even though many believe that SARS set the standard of the level of trust compliance required, it should be remembered that the court agreed that a trust is run by 'resolution'. All SARS requires is the submission of supporting evidence of transactions done in the trust. A comment was made at the 2023 Tax Indaba that SARS may use technology to establish when a resolution and minutes were, in fact, created, so, be mindful of backdating supporting evidence to be submitted. Trust documents need to be complete, accurate and kept up to date in a real-time fashion. To perform this function manually, possibly relying on others to provide you with the same will be a time-consuming, costly and risky approach.

The question is (from a tax perspective), who is responsible for the paperwork in a trust – the trustee, the trust service provider or maybe the tax practitioner who is now made the final verifier of trust compliance? The tax practitioner is often last in line without involvement in the trust's day-to-day administration. Add tight submission deadlines; then you have a really stressed person who may even miss submission deadlines due to incomplete information. They may not even have time to confirm the information to be submitted with the trustees. Some tax practitioners may blindly use what has been provided to them and literally throw it over the SARS 'wall' and hope for the best. Will SARS come after anyone and, if so, who will they go after? SARS requires the appointment (by resolution) of a main trustee, a representative taxpayer (it is not clear what SARS envisages with these appointments). And then there is the tax practitioner. In recent communication, SARS often refers to representative taxpayers and then puts in brackets behind it "(trustee/s)", so it seems like all trustees are on the hook and not only the representative trustee nominated (or even the main trustee) and recorded with SARS. Then, the trust tax return makes provision for the representative taxpayer's declaration:

> *"I declare that:*
> - *I am the duly appointed Representative of the trust*
> - *The information furnished in this return is, to the best of my knowledge, both true and correct*
> - *I have disclosed the gross amounts of all income received and/or accrued to this trust during the period covered by this return*
> - *I have the necessary financial records and supporting schedules to support all declarations on this return, which I will retain for audit purposes."*

Often, the tax practitioner completes the tax return on e-filing and the representative trustee does not physically sign it. The 'so-called' representative taxpayer (or other trustees) may not even see the tax return before it is submitted. This poses a considerable risk for the trustees, who will remain liable. It may, therefore, be good practice for the tax practitioner to have the tax return (with all the additional new information that has to be provided to SARS) signed off by the board of trustees before it is submitted on e-filing. Good practice would be to regulate the roles and responsibilities in the tax practitioner's engagement letter.

Trust form changes in 2023

SARS introduced material changes for the 2023 tax year submissions for trusts, including the requirement to submit paperwork as discussed above. Additional questions were added to the Income Tax Return Wizard to determine if amounts were deemed to have accrued to a donor/funder in terms of Section 7 during the relevant year of assessment. Donors or funders (where deeming provisions of Section 7 apply) must declare trust income and capital gains attributed to them.

'Beneficial owners' and those who may gain financially from the trust's proceeds must also be reported. SARS regards itself as a 'secondary collector' of beneficial ownership information; it was not originally designated as one of the government bodies to collect such data in terms of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022.

Even though SARS acknowledged the difficulty of completing a trust tax return and now allows for a slightly shorter tax return for 'passive trusts', it refuses to refer to any trust as a 'dormant' trust (similar to a dormant company). It is (correctly) of the view that a trust (unlike other entities) requires ongoing action of trustees, which needs to be demonstrated.

Be mindful of SARS auto-assessments

Since 1 July 2023, SARS has implemented an auto-assessment process for taxpayers with less complicated tax affairs. Third-party data providers such as employers, medical schemes, banks, retirement annuity funds (and soon trustees under the IT3(t) as discussed below) already provide SARS with information, which it uses to prepopulate tax returns. Basically, if you agree with your auto-assessment and it is complete, then there is no need to 'accept' the assessment. Note, however, that no attributed amounts and trust distributions are currently automatically reflected in tax returns. It may not even be used to prepopulate others' tax returns any time soon, as it is envisaged that the submission date will remain September each year for IT3(t)'s. SARS may reopen affected taxpayers' returns once the IT3(t)'s are submitted. SARS communicated that even though IT3(t) data will not be used to prepopulate relevant taxpayers' tax returns, "*as is practice, with new third-party data returns, SARS will use this IT3(t) data for testing and risk identification purposes*". The donors/funders and beneficiaries remain responsible for ensuring their tax returns reflect amounts attributed or distributed to them. This is sometimes challenging, as trustees do not always communicate the amounts as they should, leaving the donors/funders and beneficiaries compromised. If they need to add missing information or are, for another reason, not in agreement with the auto-assessment, they will have until 21 October 2024 to correct their tax return. If an auto-assessment has been issued after 21 October 2024, they will be given 40 business days after the date of the notice of the assessment to correct their tax return. If a taxpayer has amended their tax return, they may possibly be selected for verification or, where appropriate, for audit. Therefore, they must have supporting documents for any changes to their auto-assessment. If donors/funders and beneficiaries have not corrected their tax returns with amounts attributed or distributed to them during the tax year, it may result in SARS paying refunds which were not due. SARS may then levy penalties and interest on such undeclared amounts when they get to know them from submitted IT3(t)'s.

Where does the new IT3(t) fit in?

From this year (Gazetted 30 June 2023), with the first applicable tax year being March 2023 to February 2024, income and/or capital gains attributed to donors/funders and distributions made to beneficiaries (income net of expenditure, capital gains and capital amounts) have to be reported to SARS by the trustees on IT3(t)'s. The IT3(t)'s have to be submitted by trustees by 30 September 2024 and it was indicated that this may remain the submission date for future years. IT3(t)'s must be submitted by all trusts, excluding Collective Investment Schemes and Employment Share Incentive Scheme Trusts. SARS made the following submission channels available: eFiling, HTTPS, and Connect Direct. Trustees and tax practitioners must assess which channel will be practical. Those who have not started the process may be caught off guard when they realise too late the extent of information required to submit the IT3(t).

As the IT3(t) data will not be used by SARS (for now) to prepopulate donors'/funders' and beneficiaries' tax returns, donors/funders and beneficiaries must ensure that the relevant income and capital gains are reflected on their respective tax returns and balance back to the relevant IT3(t)'s. This will require trustees, donors/funder, beneficiaries and tax practitioners to stay on the same page on an ongoing basis to ensure that trust income and capital gains are treated correctly. No longer can trustees delay (seven years on average) the preparation of financial records, as it may impact too many other taxpayers. Incorrect reporting of income and capital gains to SARS may result in penalties and interest being applied by SARS and SARS is looking into keeping trustees personally liable so as not to punish beneficiaries of the trusts for the wrongdoing of trustees.

Dates for 2024

Trustees and taxpayers have to take note of the following deadlines and work with the different taxpayers who may be impacted by trust income and capital gains being attributed or distributed to them. Auto-assessments will take place from 1 to 14 July 2024. Non-provisional taxpayers can submit their returns from 15 July to 21 October 2024. Provisional taxpayers can submit their returns from 15 July 2024 to 20 January 2025. 'Strangely' SARS made the trust return submission dates from 16 September 2024 to 20 January 2025, regardless of whether the trust qualified as a provisional taxpayer. Several tax practitioners believe that the later start date relates to the new IT3(t), but SARS recently communicated as follows: "*Due to competing priorities, SARS had to move out the opening date of the Trust filing season. As a result, the legislative amendments will now be implemented on 13 September 2024 and not in June/July 2024 as was originally planned. Please note that this is a once-off change to the filing season and that it is currently anticipated that, for the 2025 year of assessment, we will revert to the June/July opening date for filing. The opening date for submission of returns is thus 16 September 2024, and the 2024 return will not be available prior to this date.*"

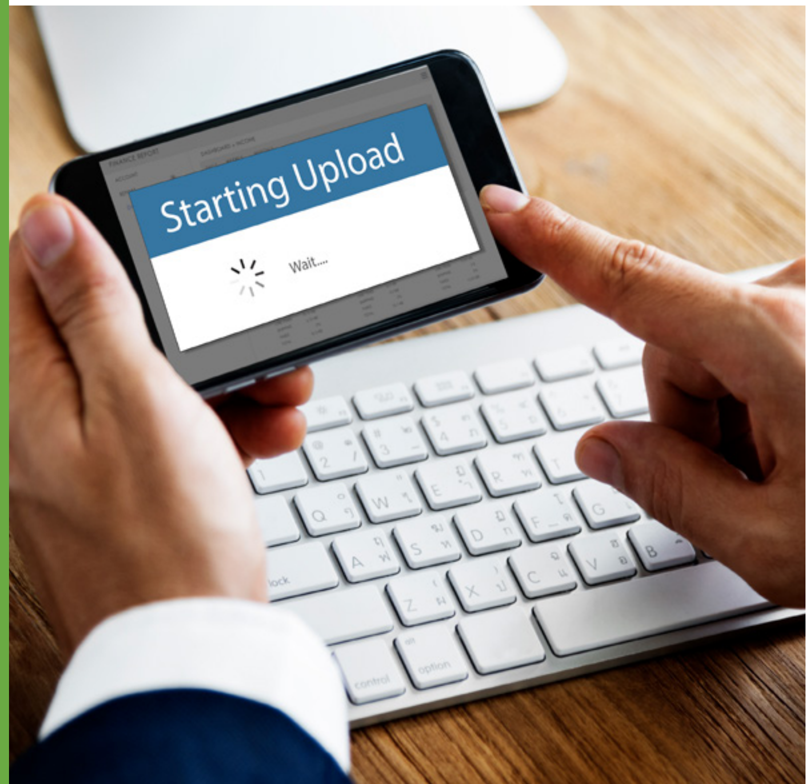
Conclusion

Trustees and tax practitioners are becoming aware that a trust is an entirely different 'animal' requiring unique treatment, without which relevant persons may be compromised and penalised.

MAYBE YOU MAY NOW LIFT THE VEIL

▶ **NICO THERON,** Managing Director at Unicus Tax Specialists SA and **HOPOLANG MOLLO,** Tax Consultant at Unicus Tax Specialists SA

Income tax season beckons and in line with what the doctor has ordered, a key consideration for individual taxpayers submitting their returns should be prescription. Indeed, there is a three-year prescription rule.



It is commonly accepted that an assessment prescribes three years from the date of its issuance in terms of section 99(1) of the Tax Administration Act No. 28 of 2011 (the TAA). However, the provisions of section 99(2) of the TAA, which are often neglected by taxpayers in making their income tax submissions, afford the Commissioner the ability to lift the proverbial veil of prescription.

This article seeks to distinguish between the two common assessment types anticipated this upcoming tax season and some aspects taxpayers should consider regarding prescription for both.

Auto-assessments

Over the past few years, the South African Revenue Service (SARS) rolled out the auto-assessment system in which assessments, without the submission of a return by the taxpayer, were automatically issued based on data collected by the authority from third parties, i.e. employers, medical aid schemes, banks and so forth. Presumably, the underlying assumption is that the data collected from third parties constitutes what the taxpayer's return, had it been made at their own submission, would comprise, i.e. that the auto-assessment would be full and complete in all material respects. Though colloquially termed 'auto-assessments', these assessments are technically estimated assessments made by SARS in terms of section 95(1)(a) of the TAA.

Accordingly, taxpayers are afforded the opportunity to revise these assessments; in the event that the auto-assessments are inaccurate or incomplete, the prescribed period for such revision this upcoming tax season is 21 October 2024, as promulgated by the Commissioner under the provisions of section 95(6) of the TAA.

Original assessments based on a taxpayer's return

The second type of assessment is the self-proclaimed mogul's misfortune—the original assessment made by SARS based on the return submitted by the taxpayer. In making the submission of the return, taxpayers need to diligently consider their streams of income, the correct tax treatment thereof, exemptions which may apply, deductions and so forth.

Prevention is said to be better than cure. What, then, can the taxpayer do when making the submission of their tax returns to reasonably ensure the prescribed period of limitation on their assessments? Ideally, engage the assistance of a registered tax professional in filing their tax return, given the complexities of tax legislation and the arguably narrow yet wide ambit under which SARS lifts such a veil.

In the absence of the option provided for, or even where it proves to be inadequate, some common mistakes made by taxpayers, which may jeopardise the expiry of the assessment, follow.

▶

Common mistakes made by taxpayers in submitting their tax returns

Failure to declare all income

Under the naïve assumption that no one person intentionally does not declare income to SARS, said failure specifically relates to resident taxpayers omitting income received or accrued in foreign jurisdictions.

Incorrectly classifying the nature of a receipt or accrual

Are the monies gross income or capital in nature?

For resident taxpayers working abroad

- Miscalculating the limitation on the section 10(1)(o)(ii) exemption provided for under the Income Tax Act No. 58 of 1962 (ITA).
- Failure to retain relevant supporting documentation such as travel diaries, leave applications, letters of employment, etc.

For taxpayers receiving a travel allowance

Failure to keep a travel logbook entirely or in the prescribed manner.

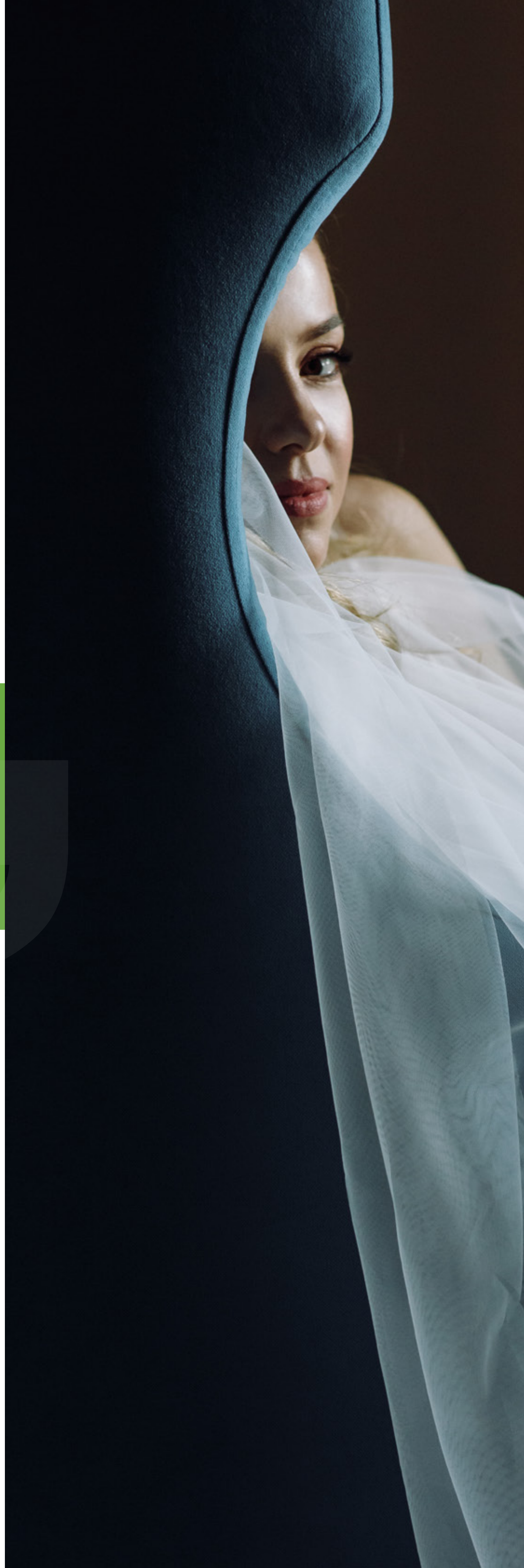
> *"The delicacy of the party bearing the onus of proof is often overlooked. Taxpayers often find themselves at the mercy of SARS, attempting to discharge the burden of proof "*

Document retention failure

- For the entrepreneurs: invoices relating to trade income and expenditure.
- For the philanthropists: section 18A certificates.
- For your hair transplant, medical invoices to claim a rebate on qualifying medical expenditure, not covered by your medical scheme, under section 6B of the ITA.

Common mistakes by taxpayers receiving auto-assessments

You will remember that the legislation provides for the taxpayer to revise an auto-assessment in the event that it is incorrect or incomplete. Taxpayers to whom auto-assessments are issued are thus liable to ensure their accuracy. SARS being unaware of your after-hours trade as a streamer, does not exonerate you from paying taxes thereon. Material disclosures not made to SARS, despite the return being issued by them at their own volition, still constitute a form of misconduct that SARS, given reasonable grounds, may eventually audit and, if necessitated by the lapsing of a three-year period, liftlift the veil of prescription.



How do the assessments differ?

The key distinction between an auto-assessment and an original assessment based on a taxpayer's submission is arguably the alleviated administrative burden on the taxpayer in the former. Beyond that, be it an auto-assessment or an original assessment based on a return submitted by the taxpayer, the income and deductions, if any, for a single taxpayer should be identical irrespective of who made the submission. Simply put, the return ought to be full and complete in all material respects.

The importance of full and complete returns

As alluded to above, the veil of prescription may be lifted in relation to original assessments, in terms of section 99(2)(a), in the event that tax was not fully charged owing to fraud, misrepresentation or non-disclosure of material facts.

It becomes worth noting that in terms of section 95(1) of the TAA, the 'auto-assessment' constitutes an original assessment.

The requisites for SARS to lift the veil of prescription, at least insofar as they relate to fraud and non-disclosure of material facts, are definitive. As far as misrepresentation goes, there is an argument to be made that it may, in some circumstances, come down to an interpretation of the law; thus, it is not an objective truth. Nonetheless, on the assumption that all the requirements are, indeed, objective truths and either one led to the incorrect assessment of tax, SARS may, after the lapsing of a period of three years, lift the veil of prescription to issue an additional assessment.

The delicacy of the party bearing the onus of proof is often overlooked. Taxpayers often find themselves at the mercy of SARS, attempting to discharge the burden of proof which at times does not rest on them. A case in point refers to instances where SARS raises an additional assessment post-prescription. In these instances, SARS carries the burden of proving the objective existence of fraud, misrepresentation and non-disclosure of material facts.

At the time SARS seeks to lift the veil of prescription, they ought to have a factual and legal basis for doing so. Realistically speaking, no objective test is available to the taxpayer to determine SARS' satisfaction of such requirements. Typically, only after the taxpayer has reached litigation, can the courts, an unbiased third-party, decide on the matter.

The nuances required to lift the veil of prescription cannot be stressed enough and any deficiencies on SARS' part to this effect can be used by taxpayers as a defence to their assessments. The assistance of an expert to this effect is always recommended.

GETTING YOUR MONEY BACK: DEALING WITH PURCHASES FROM ABROAD

▶ **CARON SHAMLEY,** Managing Director of VAT IT Reclaim - Emerging Markets

Nothing dampens the mood quite as quickly as worrying about finances when it comes to business travel and entertainment. It is a pain in the pocket and swiftly stunts business growth and opportunities.

The use of the European Union (EU) Directive 86/560/EEC, commonly referred to as the thirteenth directive, allows for companies based outside of the EU that are not registered for Value-Added Tax (VAT) in a certain country to recover VAT incurred on expenses in regions such as Europe, the United Kingdom, Japan, Canada, Australia and the Middle East.

Although VAT recovery processes are known for being complex, burdensome and challenging to manage, businesses in a competitive marketplace can no longer afford to sit back and watch significant savings and reclaim opportunities pass them by (even if they are unaware of doing so). So, what is the solution when processes become increasingly complex and budgets significantly tighter to manage? This article explores VAT reclaim on business travel and entertainment costs and how to find and manage successful recovery opportunities.

Identifying foreign VAT reclaim opportunities

Before diving into what your business can reclaim, it is critical to keep in mind that although you can rightfully claim eligible expenses as a non-resident business, the process varies on a country-specific basis. This means that what constitutes an eligible expense in one country may not be in another. In addition, each country is subject to its own local legislation (which is prone to change), VAT treatment, rates, classification, return process and deadlines. With this in mind, businesses are urged to leverage the help and guidance of experts in the foreign VAT reclamation process to ensure that they maximise their return potential while mitigating any areas of non-compliance.

However, even with the help of VAT experts in your corner, there are a few common high-value expenses that a business can self-identify and recover. Understanding their impact and reclaiming potential is the first step to elevating your business finances. However, this means knowing what to look for and holding onto those invoices. Here is a start.

Travel and entertainment expenses

One of the most significant yet overlooked VAT reclaim opportunities is VAT on Travel and Entertainment (T & E) expenses. VAT on T & E generally includes business costs related to international travel and activities related to business objectives. This includes accommodation, transportation, restaurants and entertainment costs. However, the success of the VAT refund heavily depends on a company's ability to attain and retain the correct invoices according to the foreign VAT invoicing instructions, deadlines and reporting requirements. Some countries are known for having more favourable VAT reclaim processes for non-resident businesses. Owing to this, certain countries become more popular for international business travel and entertainment. The recoverability of entertainment expenses is also known to vary depending on the country in which they are reclaimed. However, some standard recoverable costs include hospitality expenses related to business activities, such as business meals and events hosted for potential clients.

Meetings, events, conferences, conventions and trade shows

As a business grows, so does its foothold in the international market. Naturally, this often involves global networking and marketing, as well as frequently attending trade shows, meetings, events and conferences abroad. Needless to say, with a big trip comes an even bigger budget. However, up to 27% of these costs are VAT recoverable. Non-resident businesses can receive a significant portion of their annual meeting, incentives, conferences and events (MICE) spending. Recoverable costs often include VAT on event registration, marketing, attendance, transport, accommodation and sponsorship fees. Some additional international eligible expenses worth exploring include:

- Equipment purchase, rental and maintenance;
- Tooling and moulding costs;
- Marketing costs;
- Supply and install;
- Professional fees;
- Imports; and
- Inter-company charges.

Tangible benefits for your business's bottom lines
Our technology, service and expert-driven alliance have demonstrable success. The average additional recovery on T&E and supplier spend alone is between 10% and 20% in jurisdictions where reclaim is possible.

Given the universal importance of VAT, the scope for success is not limited to any specific industry. We helped an aircraft manufacturer retrieve $11.4 million and a global conglomerate successfully reclaim $4.4 million.

You do not need to know it all to reclaim it all

Fortunately, you do not need to be a VAT expert to claim back what is rightfully yours. At VAT IT, we love VAT, so you do not have to. Our experts in local and foreign VAT processes handle the entire process to ensure that nothing slips through the cracks. Our state-of-the-art technology also streamlines and optimises the administrative burden of multiple VAT processes so you can free up your finance team without compromising compliance or your refund yield.

HOW TO RESOLVE ADMINISTRATIVE ISSUES AND DISPUTES

▶ **NIRVASHA SINGH,** Partner at Webber Wentzel and **ZAKIYAH DOCKRAT,** Trainee Attorney at Webber Wentzel

Introduction: Why do I owe SARS money?

In a climate that has seen an increase in the number of verification and/or full-scope audits by the South African Revenue Service (SARS), it has become increasingly pertinent for a taxpayer to understand how to navigate the complexities involved in resolving a dispute with SARS. It is therefore necessary to not only understand your rights as a Taxpayer, but to understand the procedures to be taken to dispute an assessment.

In this article, we will consider the dispute resolution process that aggrieved taxpayers may elect to undergo, should they find themselves in disagreement with SARS' decision.

Taxpayers often find it a daunting and rather scary experience when they receive an audit from SARS which indicates that they owe a debt. Your first step as a taxpayer is to understand the nature of the assessment received. Assessments can arise from, *inter-alia*: income tax, value-added tax and employees' tax. When the assessment is received, the taxpayer must scrutinise the disclosures in the assessment. Once that has been finalised, the taxpayer is entitled to request reasons for the assessment. Like most procedural aspects, timelines to do so must be adhered to. Days in the context of SARS' dispute process refers to business days. In this regard, a taxpayer has 30 days from the date of the assessment to request reasons for the assessment from SARS. Then, SARS has 45 days from receipt of the taxpayer's request to provide such reasons. If, upon review of SARS' reasons, the taxpayer agrees with the assessment, the matter reaches finality in that the taxpayer will be liable for the debt owed to SARS in terms of the assessment.

- If, upon receipt of the reasons, the taxpayer is still aggrieved by the assessment, the taxpayer may follow the dispute procedure in terms of Chapter 9 of the Tax Administration Act, 2011 (TAA), read together with the rules promulgated under section 103 of the TAA (the 'Rules').

STEP: 1 Remember the 'pay now, argue later rule'

It is vital for a taxpayer to remember that even though they disagree with the assessment and intend objecting, the debt is still due and payable. So, this begs the question, 'What now?'

In simple terms, the taxpayer must apply to have the debt suspended pending the finalisation of the dispute process. The process, as contained in section 164(2) of the TAA stipulates that the taxpayer may request a senior SARS official to suspend the payment due in terms of the assessment if the taxpayer intends to dispute the outstanding tax liability. In deciding whether to grant a suspension of debt application, SARS will consider, among other things, the compliance history of the taxpayer and whether payment of the disputed amount will result in irreparable financial hardship for the taxpayer (section 164(3) of the TAA). It is vital that taxpayers apply for suspension of the debt to avoid a situation wherein payment of the disputed amount becomes due, while the taxpayer is in the middle of the dispute process with SARS. Unfortunately, even when a suspension of payment is granted, the interest will continue to accrue on the disputed amount.

STEP: 2 We object!

The taxpayer has 80 days from the date of the assessment to lodge an objection (section 104 of the TAA read with Rule 7). Upon receipt of the objection, SARS is entitled to request substantiating documents from the taxpayer within 30 days. A request from SARS for further substantiating documents is common in the dispute process and taxpayers should ensure that all relevant documentation for the dispute is in their possession. SARS must notify the taxpayer of its decision to allow or disallow the objection within 60 days after receipt of the taxpayer's objection or, if further documents were requested, within 45 days after delivery of the requested documents. SARS has the power to extend the 60-day limit by a further period, not exceeding 45 days.

If SARS allows the taxpayer's objection, the taxpayer will be notified and receive reasons for SARS' allowance, as well as the final assessment. In such cases, the dispute is then seen to have been resolved. If SARS disallows the objection, the taxpayer has the option to either pay the amount in dispute or to appeal against SARS' disallowance of the taxpayer's objection within 30 days of the notice of disallowance (Rule 10).

STEP: 3 Alternative dispute resolution versus appealing to the tax board and/or tax court

If a taxpayer wishes to appeal against SARS' decision to disallow the objection, the taxpayer may first elect to undergo an alternative dispute resolution (ADR) process before approaching the tax board or the tax court (section 107(5) and Part C of Chapter 9 of the TAA). The taxpayer must indicate in the notice of appeal, whether the taxpayer wishes to pursue ADR. SARS has 30 days from the date of the notice of appeal to inform the taxpayer whether the matter is appropriate for ADR. If the taxpayer elects not to utilise ADR but SARS is of the opinion that ADR proceedings are appropriate, SARS may inform the taxpayer of its stance; the taxpayer has 30 days from SARS' notice to agree or disagree to undergo ADR proceedings. If the ADR proceedings are successful, the taxpayer and SARS will come to an agreement or settlement and the dispute is resolved. ADR proceedings must be finalised within 90 days.

"Unlike a settlement, the taxpayer initiates a compromise if they do not dispute the assessment but cannot pay the full amount owing"

Should the taxpayer choose not to continue with the ADR proceedings or should the ADR prove unsuccessful, the taxpayer can appeal to either the tax board or to the tax court (section 107(1) of the TAA). The taxpayer must request, within 20 days of the termination of the ADR proceedings, for the appeal to be set down. If the amount in dispute is below R1 million, the taxpayer can first appeal to the tax board.

Part D of Chapter 9 of the TAA regulate the procedures of the tax board and the tax board is chaired by an advocate or attorney appointed by a panel of legal practitioners. The tax board must issue a written statement of its decision within 60 days of the hearing (section 114(2)). Should SARS or the taxpayer be dissatisfied with the tax board's decision, either party may seek referral to the tax court within 21 days of the tax board's decision (section 113(10) of the TAA). Should neither party elect to appeal to the tax court, then the decision of the tax board is final and the dispute is resolved.

If the amount in dispute is more than R1 million, then the taxpayer must appeal directly to the tax court. The tax court has jurisdiction over all tax appeals and the procedures of the tax court are governed by Part E of Chapter 9 of the TAA. The bench consists of a High Court judge or an acting judge, as well as an accountant and an individual with commercial experience. The tax court has the power to confirm SARS' decision, order that said decision is altered or refer the decision back to SARS for a further examination and assessment. Judgements published by the tax court are generally anonymous unless it is a public hearing.

STEP: 4 Appeal to the High Court and Supreme Court of Appeal

If the Taxpayer or SARS is dissatisfied with the decision of the tax court, either party may appeal to the higher courts, namely the High Court or directly to the Supreme Court of Appeal, with leave of the tax court. A decision made by the tax court may be appealed against on questions of fact and of law. Notice of appeal must be served within 21 days of the tax court's decision.

Are there any other resolutions available to taxpayers? In certain circumstances, SARS has the power to settle a dispute with a Taxpayer. While either party may initiate settlement discussions, it is within SARS' power to assess

the circumstances and decide whether it will be to the best advantage of the state to settle a dispute. Part F of Chapter 9 of the TAA regulates settlement. A settlement of the dispute is appropriate where, among other things, there is overall fairness, settlement is in the interest of good management of the tax system and where settlement proves to be cost effective for the fiscus. SARS may not opt to settle a dispute with a Taxpayer where the matter involves intentional tax evasion or fraud. The option to settle is available to the parties throughout the dispute process and once reduced to writing and signed by the parties, becomes final and remains binding on the parties.

In addition to the settlement procedure discussed above, a Taxpayer may request a **compromise** with SARS in terms of section 200 of the TAA. Unlike a settlement, the taxpayer initiates a compromise if they do not dispute the assessment but cannot pay the full amount owing. One of the most important factors to remember is that this option is only available to a Taxpayer where SARS' decision is not being disputed.

Changes to look out for

In the 2024 Budget Speech by our Minister of Finance, it was proposed that ADR proceedings would be introduced to the dispute process at the objection stage of the dispute. This proposal is welcomed, given the long and arduous nature of tax disputes, which may take months or years to resolve. By introducing an ADR process at the commencement of the dispute, taxpayers can communicate and negotiate more effectively with SARS at the outset, leading to quicker outcomes.

At this stage, these amendments are only being considered by National Treasury and are not yet available for public comment.

Conclusion

In this article, we have considered the dispute process available to taxpayers who are aggrieved by an assessment or decision taken by SARS, from the internal remedies to the litigious stage. While the dispute process against SARS proves taxing, it remains an important tool for taxpayers and honours the state's commitment to due process and fairness. SARS has shown no signs of slowing down on their collection tactics and taxpayers must be alert and aware of the remedies available to them, should they find themselves on the receiving end of an additional assessment.

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COMMON MISTAKES

WHEN FILING A TAX RETURN

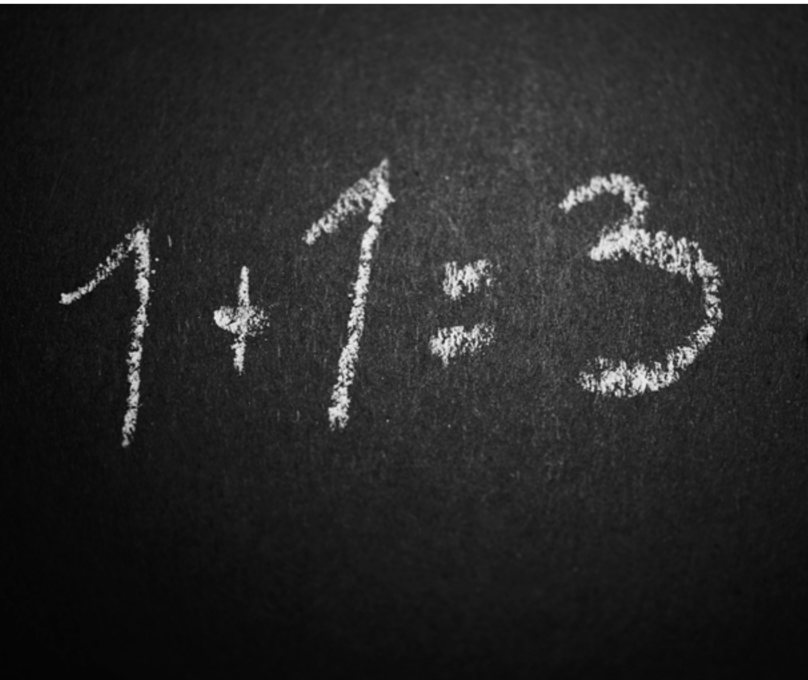
▸ **NYASHA MUSVIBA,** Tax Director at SA Tax Guide

Before submitting your ITR12, check your tax return against this list of common errors and save yourself the time and hassle of setting things right.

Completing the tax return without obtaining supporting documents

Many individuals wrongly believe that an IRP5 tax certificate is the only supporting document they need when completing the ITR12 for individual tax returns. Not only are there several other supporting documents you will probably need, depending on your tax affairs but you are also required to keep them safely in your possession for at least five years. This is in case SARS needs access to them in future.

▸



Below is a list of some of the documents you may need:

- IRP5/IT3(a) certificate from your employer (if you had more than one employer in the tax year, you need an IRP5 from each employer).
- Medical aid tax certificate as well as documents reflecting amounts claimed and those not covered by your medical aid.
- Invoices and proof of payments for qualifying medical expenses paid out of pocket and not refunded by the medical aid schemes.
- Pension and retirement annuity certificates received from the financial institutions to which contributions for retirement annuities were made.
- Proof of your banking details (see below).
- Travel logbook if you have received a travel allowance and an accurate record of all vehicle expenses during the year, including fuel, maintenance, lease and insurance costs. One must have a logbook to claim business travel deductions.
- Tax certificates which you have received in respect of investment income (local interest income, foreign interest income and foreign dividend income).
- Completed confirmation of the diagnosis of disability form (ITRDD) for taxpayers or dependants with a disability, if you want to claim disability related expenses.
- Taxpayers who receive foreign employment income must keep a schedule of days spent outside South Africa with copies of passport pages showing exit and entry into South Africa.
- Financial statements for individuals who conduct a business as a sole proprietor, if applicable.
- Information relating to capital gain transactions, if applicable.
- Documents and receipts for commission related expenditure.
- Documents to support calculation of capital gains or losses if you have sold your assets during the tax year; these include: purchase agreement when you bought the property, the sale agreement when you sold the property, valuation costs, legal fees a advertising expenses incurred when selling the propert
- All documents relating to letting of properties.
- Section 18A certificates for all qualifying donations mad to registered public benefit organisations.
- Documents to claim solar rebate for unused solar PV panels that were bought by the individual and brought into use for the first time from 1 March 2023 to 29 February 2024; these are an Electrical Certificate of Compliance, proof of ownership of the property or rent agreement, an invoice and proof of payment.
- Any other documentation relating to income you receiv or deductions you want to claim.

As proof of banking details, you need a bank statement not more than three months old, which must also be stamped by the bank. If you cannot provide a bank statement, you must provide an original letter on a letterhead from the bank, reflecting the bank account details and the date when the account was opened. The bank statement or the bank letter should clearly show the name o the bank, the name of the account holder, the type of account, th account number, the branch code and the date.

An individual who incurred medical expenses that were not covered by the medical aid can deduct an additional rebate whic reduces the normal tax payable to SARS. However, you must ensure that you have the prescription or diagnosis or that you hav received services and medicines supplied by any duly registered medical practitioner, dentist, optometrist, homoeopath, naturopa osteopath, herbalist, physiotherapist, chiropractor or orthopaedis You must also have actual proof of payment for the out-of-pocket medical expenses; medical expense invoices or statements only w not meet the requirements of SARS. (Note that a qualified medica practitioner must diagnose disability to confirm the physical disability status of a taxpayer or dependants with a disability.)

Ensure that you have all the supporting documents before you fil your tax return, including the ones prepopulated by SARS on you tax return. Should SARS require supporting documents, you must be able to provide them within the set time limits. If you fail to submit supporting documents requested by SARS, you may recei an adverse assessment and this might leave you owing money to SARS. Individuals must ensure that they have the supporting documents before they complete and submit the ITR12 tax return

Assuming you will automatically get a refund

Most people are motivated to file their tax returns when they believe that they will get a refund from SARS. On the contrary, taxpayers are required to file an ITR12 if they exceed a certain income threshold or if they have more than one employer. For 2024, it is R500 000 for employees who have received income from a single employer and have not received an allowance such as a travel, subsistence or office-bearer allowance. Employees' tax mus have been deducted by the employer in terms of the deduction tables prescribed by SARS.

Taxpayers should avoid using the services of people who guarant a refund from SARS. An even worse situation is a taxpayer who understates or overstates income in their pursuit of a refund. This a criminal offence.

Using the wrong source codes

Many adverse assessments are the result of using wrong source codes. You should take extra care when completing an ITR12 tax return because each source code has a different tax implication. For instance, certain income might be exempt from tax. However, if you use a source code for taxable income, you will be assessed for tax on this income.

If the wrong source codes are used, it will leave you with the burden of submitting a notice of objection. This process is technical in nature and, as a result, you might have to pay for the services of a tax practitioner.

Some employers issue employees with IRP5 tax certificates generated by the payroll systems instead of the ones exported from the SARS e@syFile system. However, there is a danger that the payroll system might have a discontinued source code. An IRP5 with a discontinued or incorrect source code is not a valid supporting document when submitted as part of a SARS review or audit. It is particularly important to ensure that the IRP5 tax certificate contains current source codes applicable to the 2024 filing season.

Source codes can be found on the SARS website by following this link: https://www.sars.gov.za/types-of-tax/personal-income-tax/tax-season/find-a-source-code/

Not understanding the ITR12 return fields on eFiling

Taxpayers often complain that the online ITR12 has too few fields in which to complete all the information compared to the manual ITR12 tax return. It is important to note that the ITR12 tax return is generated on eFiling when starting a return on the return wizard. To generate a correct return, you must correctly answer the applicable questions on the first page. For example, the first page will ask if a taxpayer has incurred medical expenses. If you select "no" to this question, the relevant medical expenses field will not be created.

Some common questions asked on eFiling include:

- How many certificates did you receive?
- Do you want to claim expenditure against a travel allowance? (Select 'Yes' or 'No')
- Did you receive remuneration for foreign services rendered? (Select 'Yes' or 'No')
- Were there any transactions on any tax-free accounts held by you? (Select 'Yes' or 'No')
- Do you want to claim donations made to an approved organisation? (Select 'Yes' or 'No')
- Did you make any retirement annuity fund contributions? (Select 'Yes' or 'No')

Not declaring other income received during the year of assessment

You must declare all the income received during a specific tax year on the ITR12 tax return. Employees usually declare income reflected on IRP5 tax certificates only and ignore income received from other sources such as rental income.

> ***"Many individuals wrongly believe that an IRP5 tax certificate is the only supporting document they need when completing the ITR12 for individual tax returns"***

If, in fact, you did earn other income not reflected in your IRP5 and do not declare this on the ITR12, you will be faced with a dilemma when SARS asks for bank statements as part of supporting documents. Your bank statements will show that you have received other income not declared to SARS which will issue you with an adverse assessment. The adverse consequences of such an assessment include severe penalties for understating income.

Taxpayers have a tax obligation to ensure that full and accurate disclosure is made of all their relevant information as required in the income tax return, including all income received. Misrepresentation, neglect or omission to submit a return or supplying false information is liable to penalties, additional assessments and, in some cases, criminal prosecution.

Provisional taxpayers failing to file provisional tax returns

Some taxpayers are automatically registered as provisional taxpayers. This, in turn, creates an obligation for them to file provisional tax returns as well as the final ITR12 tax return. Failing to file the provisional tax return when it becomes due will make the taxpayers liable for interest and penalties.

There is no formal registration needed to be a provisional taxpayer. A provisional taxpayer is any person who derives income other than from employment or any person who is notified by SARS that they are a provisional taxpayer.

- Directors of private companies and members of close corporations are regarded as employees. Therefore they are not automatically registered as provisional taxpayers unless they have income that falls within the scope of provisional income.

Provisional tax is a method of paying the income tax liability in advance to ensure that the taxpayer does not remain with a large tax debt on assessment. A provisional taxpayer is required to submit two provisional tax returns (IRP6) in a year of assessment based on estimated taxable income. The first return is due by 31 August and the second by 28 or 29 February. A provisional taxpayer can make an optional third provisional tax payment after the end of the tax year but before SARS issues the assessment.

Choosing to submit manually

When you are completing an ITR12 return, you should use an electronic submission through eFiling. The easiest and quickest way to file ITR12 tax returns is online by using SARS eFiling. However, you must first register for eFiling on the SARS eFiling website.

There are a number of advantages to eFiling. For instance, you are given the opportunity to save your return and file it later when you are ready to do so. You also have the opportunity to use the tax calculator function to receive a pre-assessment, which is based on your submission, before a final assessment is done. Furthermore, a return filed via eFiling makes it easier to respond to a SARS audit or verification. Submitting a return through eFiling also gives taxpayers a full history of all submissions, payments and electronic correspondence available at the click of a button. In addition, submission via eFiling saves taxpayers time as they will no longer have to wait in long queues at a SARS office when the tax filing season commences.

Not checking the SARS auto-assessment returns

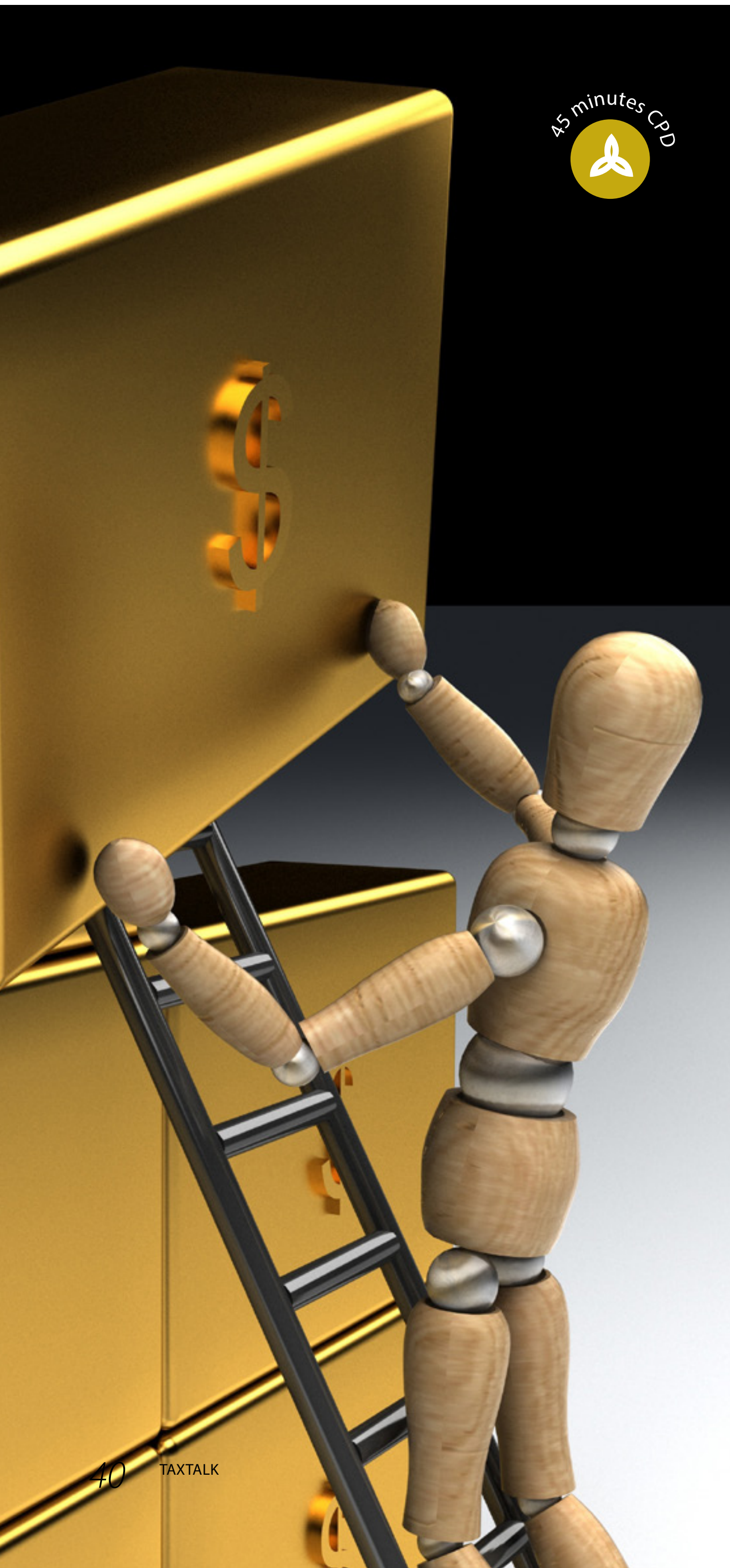
This year, SARS will again issue auto-assessments to taxpayers whose tax affairs are less complicated. SARS receives data from employers, medical schemes, banks, retirement annuity funds and other entities. SARS uses this data to calculate your personal tax assessment. Auto assessment notices will be issued from 1 July 2024 to 15 July 2024. We have noted that if the medical schemes and retirement annuity funds do not have your correct income tax number, the contributions done by the taxpayer will not be prepopulated by SARS. This has caused many taxpayers to owe SARS. You must check SARS' auto-assessments before accepting them.

The previous timeframe of 40 business days from the date of your auto-assessment within which such a return must be filed has been extended to coincide with the normal due date for non-provisional taxpayers. The due date for filing income tax returns for non-provisional taxpayers is 21 October 2024 and for provisional taxpayers is 20 January 2025. If an auto-assessment has been issued after 21 October 2024, then the 40 business days will start on the date of the notice of the assessment. Taxpayers, who amend or request corrections to be done to the auto-assessed return after the filing due date, will be issued with administrative penalties by SARS, which treats amendments or corrections to the income tax return after the due date as late filing of the tax return.

Receipts

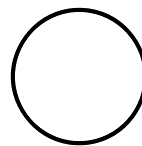
TAX PRACTITIONER COMPLIANCE:

A PUZZLE



ADRIAN MODIKWE, Legal and Compliance Officer at SAIT

The South African Revenue Service (SARS) plays a central role in promoting tax compliance and ensuring the best overall revenue collection results for the benefit of the fiscus and the public.

Optimal revenue collection rates and improved compliance attitudes require collaboration between SARS, recognised controlling bodies (RCBs) as well as individual registered Tax practitioners. These three entities form a triumvirate of the revenue collection system.

The inevitable puzzle

The questions in operationalising and addressing compliance are too many to ponder all at once and reveal unique and cascading systemic, legislative and practical quandaries within the regulatory space. Why is it so challenging to maintain compliance? And why are Tax practitioner Registration requirements considered a grudge purchase by many even at the risk of deregistration? Are there changes that can be made to the system to better understand and enhance the general outlook and apparent lack of initiative and personal ownership towards compliance among tax practitioners?

Tax compliance is a global issue and has become increasingly problematic, particularly within a diverse Republic of South Africa (RSA). Considering the diverse cultural and socio-economic standing of RSA citizens, it is inevitable that our attitudes towards tax compliance are also diverse (noting lack of knowledge regarding taxation and low prevalence of personal tax compliance as a result of ignorance, negligence or with intention as seen through cases of evasion, overstatement in returns and underreporting). Tax practitioners, with the knowledge and skills, are crucial in bridging these gaps to ensure a healthy and functional revenue collection system.

Unfavourable attitudes and behaviours towards tax compliance are inevitable in a climate of an ailing economy evidenced by high tax, interest and exchange rates, a deteriorating tax base, swelling unemployment rates, corruption and inequality. The triumvirate (SARS, RCBs, Tax practitioners) must continually evolve their processes and systems to address tax compliance and risk issues to ensure continued public trust and legitimacy of the revenue collection instrument.

New developments and increased regulation examined below reveal issues which ultimately juxtapose the integrity of the profession against an uncertain future. To evolve is to thrive. This article will briefly explore just a few key aspects of compliance in the tax profession in the South African context from a regulatory and compliance perspective.

The digital age

South Africa, like many other jurisdictions, is still emerging from the harsh socio-economic impact of the COVID-19 pandemic. Given the demands of post-pandemic-era commerce, fundamental changes in tax administration are inevitable and conceivably permanent.

In the context of the now-entrenched remote-hybrid operational models adopted across diverse business sectors (including SARS) demand greater focus on technology-based solutions. Adaptive business sustainability and stakeholder engagement strategies are central to ensure operational continuity and economic productivity. The call for technological adaptability has been critical in unlocking and improving tax compliance but it has also presented its own myriad of operational, service and engagement issues revealing itself as a double-edged sword for tax practitioners.

Nevertheless, the elephant in the room takes the form of the growing control and scrutiny of the tax profession at all levels in an unstable digital/virtual ecosystem. Generally, in terms of compliance, tax practitioners are required to:

- Register with a recognised controlling body and SARS to enter practice legally and remain in practice.
- Maintain personal and business tax compliance by:
  - Ensuring that all returns are filed and the submission of SARS-required tax compliance documents is completed timeously.
  - Making all reasonable efforts to settle any outstanding tax.
  - Ensuring proper retention and maintenance of records for accurate reporting and filing.
- Upkeep of Tax practitioner Registration requirements enforced by the RCBs through a broader scope of compliance monitoring and enforcement strategies including:
  - SARS Annual Tax practitioner Compliance Auditing and Reporting.
  - Formal screening for criminal-free status.
  - Completion of continuing professional education (CPE) hours and other training.

In recent months, tax practitioners have been deregistered by SARS in droves across all RCBs due to non-compliance. Compliance status is volatile and subject to unpredictable change based on default on any of the above-mentioned sources of non-compliance.

However, non-compliance is also founded in other aspects of practice such as reliance on unethical billing practices, the misuse of the SARS eFiling system including the unlawful retention of tax types and the comixing of a tax practitioner's personal contact details in client-taxpayer efiling profiles. In the latter instance, tax practitioners have seen their efiling access revoked as this behaviour is considered to create a risk for impersonation and other instances of dishonesty and lack of transparency. This risk mitigation measure is incited by the burgeoning complications of fraud and hacking of eFiling profiles.

Tax practice is tough work

Whether you are in the tax compliance or advisory space, or any other field involving tax and grappling with complicated tax laws, instruments and schemes, balancing the professional and moral duty to uphold the integrity and trust in the revenue collection system with shifting commercial and compliance demands, while battling SARS system/operational issues, is challenging.

Increased scrutiny of tax practitioners without proper empowerment and support in the balance from SARS may create varied business, morale and ethical dilemmas affecting compliance behaviour and managing conflicts of interest among even the most judicious tax practitioners against a backdrop of a punitive and often rigid regulatory system. Competing interests are always at play.

Competing interests: Business vs the public interest

Proceeding with examples from cases investigated by the SAIT Disciplinary Committee and keeping tax morale and ethics in mind; the taxpayer (through their appointed tax practitioner) may prefer aggressive tax filings where they believe they will not be detected and sense that the risk for audit and prosecution is negligible. How far should the taxpayer's choices on tax positions and risk impact on the tax practitioner's compliance? Or, given the many complexities and ambiguities within the legislation which can lead to accidental non-compliance, the taxpayer may show reluctance to voluntarily disclose errors made on returns without some degree of the corresponding leniency from SARS.

Likewise, it is foreseeable that tax practitioners would show a degree of resistance to functioning as veiled SARS auditors which would unavoidably lead to loss of business for failure to protect their clients' expressed or best interests where tax liability could be minimised, no matter the risk.

Of course, tax practitioners are expected to conduct themselves competently and objectively within the law as key actors in the revenue collection system. In spite of the unsurprising predisposition towards commercialism to the detriment of the public interest (i.e. SARS and the fiscus), tax practitioners must take care not to pass off facts or tax positions they know or believe to be incorrect or misleading, not to assert tax positions in a tax filing which they consider to have no sustainable basis or are highly artificial or highly contrived and seek to exploit shortcomings and ambiguities within the relevant tax legislation and operational model. Such conduct exposes the tax practitioner to potential criminal and disciplinary prosecution which includes deregistration.

Potential adverse impact of punitive regulation of tax practitioners

Creating the most ideal conditions required to promote voluntary and consistent tax compliance while improving tax morality and attitudes can be difficult. Particularly within an environment which is generally perceived to be offering inadequate technical and operational support punctuated by lack of incentive/reward in favour of heavier monitoring and punishment for non-compliance (inadvertent or intentional).

This may produce inequitable results including, *inter alia*:

- Leaving honest taxpayers in a system that dismisses safe-harbour provisions vulnerable to audit penalties without recourse.
- Haemorrhage of judicious, diligent, experienced and bona fide tax practitioners to other jurisdictions with more favourable regulatory standards.
- Loss of skilled tax practitioners to the unregulated 'ghost practitioner' market through large-scale deregistrations for minor infractions.
- Eventual failure to properly address and eliminate unregistered tax practitioners while discarding registered tax practitioners for inadvertent non-compliance.

The unique roles of the tripartite (SARS, tax practitioners and RCBs) in promoting compliance are key to ensuring Tax practitioner standards of professionalism and ethical conduct. However, it is possible that the particular focus on enforcement of primarily punitive provisions of tax law may cause more challenges than may be immediately foreseeable. That said, tax practitioners resident within any RCB and registered through SARS are reasonably expected to maintain their compliance with all applicable standards. Concessions to systematic challenges may be made, however the tax profession is not exempt from the same standards of compliance and professionalism to which other professions are subject.

To file or not to file

Ensuring that client-taxpayers provide the necessary information during filing season is a constant challenge. The discovery phase of systematisation, review and updating of client-taxpayer information is a function that remains largely manual; it is therefore very costly, time consuming and may be prone to errors where Tx practitioners fail to communicate clearly and make the necessary inquiries to ensure they meet all compliance procedures and requirements. Several Tax practitioners are investigated and prosecuted annually for unprofessional conduct and/or negligence for much of the professional undertakings and failures in this phase of client engagement.

Failure to apply proper due diligence and due care are grounds for non-compliance with professional codes and standards. tax practitioners must apply professional judgment and competence to communicate and align client expectations

and responsibilities to adverse consequences (i.e. late, incomplete, incorrect or fraudulent filings) which may lead to prosecution.

As the go-between for taxpayers and SARS, the work of a tax practitioner is complex and is rarely without complications. Complications are aggravated by continued disruptions to SARS operations and platforms which can create higher risks of human and technical errors as well as delays in filing returns. Some of the challenges tax practitioners face on an annual basis in client engagement include, *inter alia*:

- Sporadic client-taxpayer responsiveness;
- Miscommunication of expectations and mandates;
- Delayed or withheld payment for services; and
- Delivery of incorrect or incomplete information.

In a society that is not particularly tax-positive or well informed on the intricacies of tax practice, the client-taxpayer still indeed plays a central role in the proper administration of its own tax affairs. The client also ultimately determines and choses their risk profile and appetite. Unfortunately, the tax practitioners bear the brunt of the above challenges as they are responsible for encouraging healthy compliance behaviour and responsiveness within strict timeframes.

In practice, the disconnect in communication and cooperation often creates a risk- and accountability-shifting culture; on one hand, dissatisfied client-taxpayers report unprofessional or negligent conduct against tax practitioners. On the other hand, tax practitioners must ensure compliance by consistently meeting the standard of professional duty of care by which the client's best interests are paramount (within legally acceptable bounds of law in terms of permissible tax positions).

When all is said and done

A tax practitioner should always act in a way that will not bring themselves, the profession or their professional body into disrepute. This means that all the main requirements for compliance with statutory, SAIT and SARS standards must be consistently observed from the point of admission and induction.

The trade-off for belonging to a prestigious profession is safeguarding public confidence in that profession, leading by example and meeting the fit and proper person test.

- ✓ A tax practitioner's personal and business tax affairs must be up to date. Neglect of a members' own affairs raises legitimate doubts as to the standard of professional work and has the potential to bring the tax practitioner into disrepute.
- ✓ A Tax practitioner entangled in dispute with SARS regarding their personal or business tax affairs should engage another tax practitioner to represent them.
- ✓ Tax practitioners should consider whether any tax arrangements with which they might be associated on their own behalf or on behalf of a client might bring the member and the profession into disrepute and distance themselves from same accordingly.
- ✓ There are several tax practitioner Registration/Retention Criteria imposed by SARS and enforced by RCBs. These standards seek to give effect to specific provisions of Chapter 18 and Section 240 of the Tax Administration Act 28 of 2011 (as amended) and include maintenance of CPE, Criminal-free statues, tax compliance and adherence to RCB codes of ethics and conduct.

Concessionary comment on practical, systemic, technical and professional challenges in the field are acknowledged and all of these standards have been briefly treated in this article. Remaining compliant with these basic standards goes a long way to ensure that a tax practitioner avoids penalties, disciplinary action and is not exposed to prosecution and/or deregistration.

The ball remains in your court to maintain your compliance with all statutory requirements.

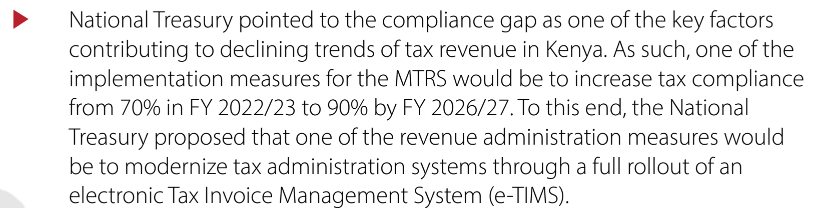
RAISING LEVELS OF TAX COMPLIANCE IN KENYA:

TAKING STOCK OF e-TIMS

▶ **ALLAN WANG'ANG'A,** Tax Consultant at Viva Africa Consulting Limited

In October 2023, National Treasury of Kenya released the Medium-Term Revenue Strategy (MRTS) or the 'Strategy' for the financial years 2024/25–2026/27, which sought to provide a framework for enhancing revenue collection over the medium term and improve the fiscal space as the Government focuses on its Bottom-Up Economic Transformation Agenda.

In the Strategy, National Treasury alluded to the International Monetary Fund's (IMF's) estimation of Kenya's potential tax revenue to gross domestic product (GDP) ratio to be 25% which is consistent with the East African Community (EAC) region's macroeconomic convergence benchmark for achievement of the EAC Monetary Union. In FY 2022/23, it was noted that Kenya's tax gap was estimated at 11.5% of GDP. Additionally, the IMF's Country Report No. 24/14 for Kenya released in January, pointed to the continuing decline in Kenya's tax revenue to GDP ratio, which fell from 15.5% in 2014 to 13.1% in 2020, with Kenya being the only EAC country (except the Democratic Republic of Congo) that experienced a protracted fall in its tax-to-GDP ratio over the last decade.



National Treasury pointed to the compliance gap as one of the key factors contributing to declining trends of tax revenue in Kenya. As such, one of the implementation measures for the MTRS would be to increase tax compliance from 70% in FY 2022/23 to 90% by FY 2026/27. To this end, the National Treasury proposed that one of the revenue administration measures would be to modernize tax administration systems through a full rollout of an electronic Tax Invoice Management System (e-TIMS).

This article appraises the use of the e-TIMS platform as a measure of tax compliance in Kenya.

Overview of e-TIMS

In 2022, the Kenya Revenue Authority (KRA) introduced the Tax Invoice Management System (TIMS) as an enhancement to the Electronic Tax Register (ETR) regime which had been in force since 2005 through the Value Added Tax (Electronic Tax Registers) Regulations, 2004. The ETR was an online cash register that kept records of all business transactions between a supplier and a purchaser. VAT-registered taxpayers were required to manually provide the invoice amount and tax rate, whereupon the ETR would generate a fiscal receipt which would be manually transmitted to the KRA tax portal.

The TIMS system is an enhancement to the initial ETR system that was introduced through the Value Added Tax (Electronic Tax Invoice) Regulations, 2020 and was rolled out with effect from 1 August 2021. TIMS is an information technology system that integrates trader systems (ETRs and ERP-billing/Invoicing systems) with the KRA tax portal to monitor the generation of electronic tax invoices and their transmission through the internet. A control unit performs the functions of tax invoices validation, encryption, signing, transmission and storage.

Communication between the control unit and the TIMS Application server at the KRA takes place over the internet. Once the invoice is successfully validated, the control unit will generate a unique invoice number for each invoice. Along with the invoice number, a quick response (QR) code is added to each invoice. As such, whereas with the old ETR system, taxpayers had to manually provide the invoice amount and the tax rate to the ETR, with TIMS, ETR and ERP billing/invoicing systems are integrated, and invoices are transferred from the ETR to the KRA tax portal on a near to real-time basis. VAT-registered taxpayers were required to obtain a compliant tax register from an approved supplier and implement TIMS within 12 months from the rollout of the Value Added Tax (Electronic Tax Invoice) Regulations, 2020.

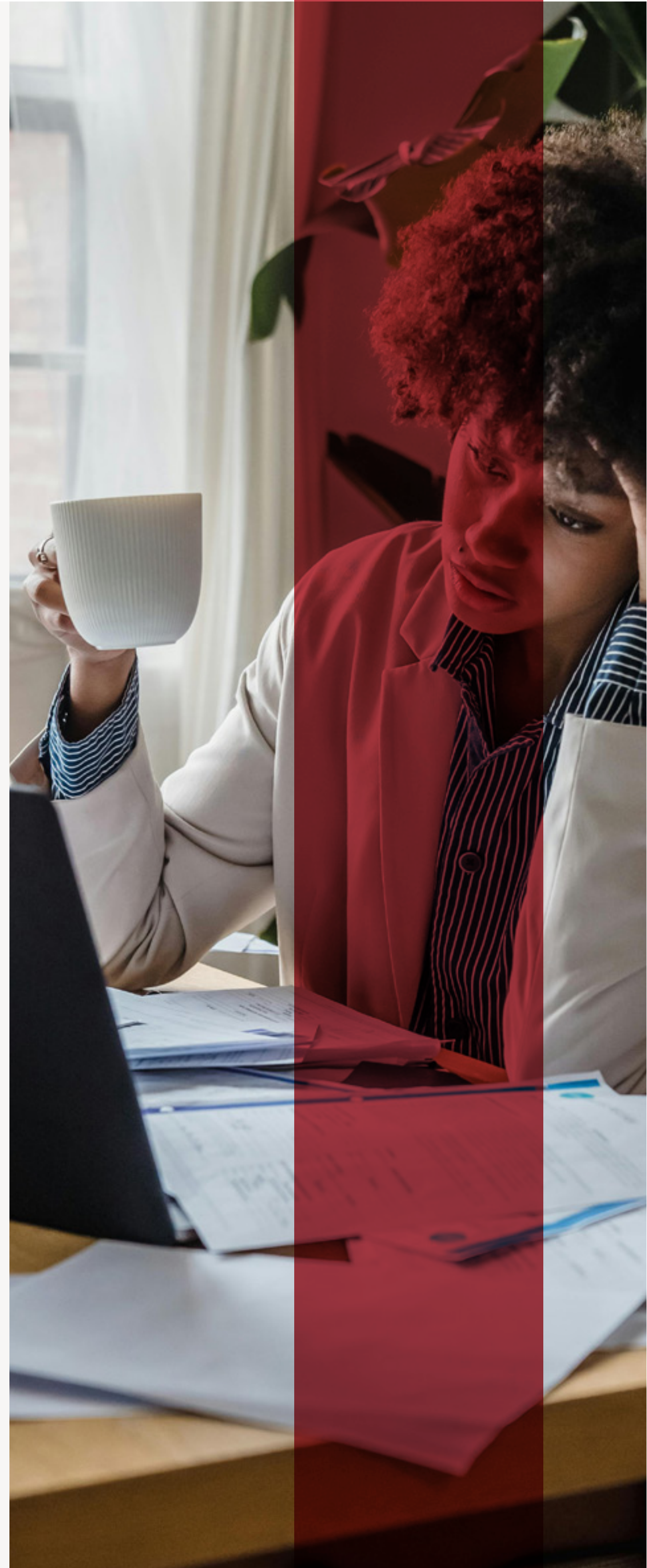
The Finance Act 2023, through an amendment in the Tax Procedures Act 2015 (the TPA), introduced a further enhancement through e-TIMS which was intended to provide taxpayers with a simple, convenient and flexible electronic invoicing option. Whereas TIMS requires the taxpayer to purchase a compliant ETR machine to ensure overall compliance, e-TIMS is a software solution that needs to be installed on the taxpayers' computers and mobile phones or can be accessed online, thereby making it more accessible to businesses. In this regard, the software options available include: (a) e-TIMS Client Software (for Windows, Android Tablet and PDA); (b) e-TIMS Mobile Application; (c) online e-TIMS; and (d) e-TIMS System to System Integration.

Whereas only VAT-registered taxpayers were required to be TIMS compliant, VAT-registered and unregistered taxpayers are now required to be TIMS/e-TIMS compliant. That said, where a VAT-registered taxpayer is TIMS compliant, there is no requirement to register for e-TIMS.

Under e-TIMS, taxpayers are required to record sales and generate invoices through the system, as well as maintain records of stock in and stock out in the system. The stock records should include all local purchases and imports. That said, the Tax Procedures (Electronic Tax Invoice) Regulations, 2024 (the TPA Regulations) allow the KRA to exempt the following persons from maintaining records of stock: (a) persons in the service sector; (b) persons not registered for VAT and with annual turnover below twenty-five (25) million shillings using a simplified system prescribed by the Commissioner; and (c) any other person using a system prescribed by the Commissioner.

Additionally, under the TPA, the electronic tax invoice may exclude emoluments, imports, investment allowances, interest, airline passenger ticketing and similar payments. The TPA Regulations also exempt the following from e-TIMS requirements: (a) fees charged by financial institutions; (b) expenses subject to withholding tax that is a final tax; (c) services provided by a non-resident person without a permanent establishment in Kenya; (d) internal accounting adjustments; and (e) any other exclusion as may be provided under section 23A of the TPA.

Taxpayers experiencing systemic challenges/breakdowns are expected to notify the KRA within 24 hours of the breakdown, after which the KRA will suggest an alternative method of recording invoices until the system resumes. Furthermore, the KRA may exempt a person from the requirements to issue electronic tax invoices through a Gazette Notice, more so where the business income in relation to a transaction is received through a payment platform recommended by the Commissioner and the information is transmitted to the Authority's system.



- Failure to comply with the regulations governing the use of e-TIMS will render the taxpayer liable to a penalty of two times the tax due. In addition, Kenya's Income Tax Act restricts the deduction of expenses for corporate income tax purposes to those supported by e-TIMS-compliant invoices unless exempted under the TPA.

Taking stock of the e-TIMS platform

The amendments to the TPA introduced through the Finance Act 2023 were to take effect on 1 January 2024. This meant that businesses that were not TIMS compliant were required to onboard the e-TIMS platform so that every transaction would be backed by an e-TIMS invoice for tax purposes. However, on 27 December 2023, the KRA extended the deadline for compliance to 31 March 2024 with a view to allowing more businesses to onboard e-TIMS.

However, it was reported that as of 31 March 2024, about 202 291 taxpayers had onboarded the e-TIMS platform against a target of 915 000, recording a mere performance rate of about 22.1%.[1] It was apparent that the e-TIMS platform proved difficult to implement, with several taxpayers expressing difficulty in using or understanding the system, lack of access to smartphones and/or computers and poor internet connectivity. This was amidst a concern, particularly among workers in the farming sector, of growing difficulty in supplying their products to purchasers who demanded the production of an e-TIMS invoice.[2]

That said, National Treasury has been keen to implement the system and went ahead to propose a penalty, through the Finance Bill, 2024, of two million Kenyan Shillings (KShs) for every month or part thereof that a taxpayer fails to onboard the e-TIMS platform. It was noted that this would be an excessive penalty, particularly given that there may be factors beyond the control of the taxpayer such as technical mishaps that would limit the taxpayer's ability to comply. For this reason, the Parliamentary Departmental Committee on Finance and National Planning proposed to have the provision deleted,[3] and the provision did not take effect after the Finance Bill 2024 was withdrawn.

In any event, it may be well worth the while for National Treasury to consider the approach to be taken towards the implementation of the electronic tax invoice in Kenya. Julians Amboko, a business journalist in Kenya, referred to the example of Peru and Chile, two countries that have successfully adopted e-invoicing systems and alluded to the time taken to launch their e-invoicing systems.[4] Chile, for instance, was one of the first countries in Latin America to implement e-invoicing. In 2001, the Internal Revenue Service (SII) introduced the e-invoicing system in the country.

It was not until 2014 that the SII published Law No. 20.727, which required different business groups to gradually adopt e-invoicing in Chile. The introduction of this obligation was a significant catalyst for the growth of electronic tax documents. By 2016, the processing of electronic invoices was reported to have surpassed 88% of the total invoices issued in Chile. In 2017, there were 561,087 registered companies and 2.5 million electronic tax invoices issued.[5]

Peru embarked on its journey towards e-invoicing in 2010 when the Peruvian tax administration introduced the Electronic Payment Receipt with an annual turnover of 150 UIT (Peruvian tax units) and has gradually made this mandatory for all businesses. In 2017, Peru's tax authorities mandated all companies with an annual turnover of 75 UIT and above to use the government e-invoicing system. The government introduced the latest requirements between April and June 2022. Companies with an annual turnover of below 23 UIT and those with between 23 UIT and 75 UIT had to start transmitting their electronic payment receipts to the Peruvian tax administration. [6]This was the last phase of the implementation of the system, and it is projected to onboard 100% of the country's companies.[7]

Conclusion

The e-TIMS platform may be justified as a means of enabling Kenya's government to widen the tax base. However, experience shows that this may require a phased approach, one that is targeted and more alive to the circumstances of its taxpayers.

[1]See https://www.businessdailyafrica.com/bd/economy/etims-lessons-kenya-can-learn-from-latin-america--4590568

[2]See https://www.businessdailyafrica.com/bd/economy/cane-farmers-face-losses-in-switch-to-etims-invoice--4581946

[3]See the Report of the Parliamentary Departmental Committee on Finance and National Planning on the Finance Bill 2024 on http://www.parliament.go.ke/report-finance-and-national-planning-finance-bill-2024

[4]See his article, 'E-TIMS: Lessons Kenya can learn from Latin America' on https://www.businessdailyafrica.com/bd/economy/etims-lessons-kenya-can-learn-from-latin-america--4590568.

[5]See https://blog.groupseres.com/en/electronic-invoicing-in-chile.

[6]See https://www.storecove.com/blog/en/e-invoicing-in-peru/?unbounce_brid=1719171369_0331173_e658a9a9377026246341a4e3bd283315

[7]See https://edicomgroup.com/blog/the-electronic-invoice-in-peru

CASE LAW WRAP-UP

▸ **BRONWIN HUMAN-RICHARDS,** bronwin@taxconsulting.co.za
JOHN PAUL FRASER, johnf@taxconsulting.co.za
MICHELLE PHILLIPS, michelleph@taxconsulting.co.za

Unitrans Holdings v CSARS
(A3094/2022) [2023] ZAGPJHC (9 January 2024)

ISSUE

The issue before the Court was whether the Tax Court was correct in finding that the relevant interest expenditure was not tax deductible, not having been incurred in the course of carrying out 'any trade' and in the production of income as provided for under section 24J(2) of the Income Tax Act ('the Act').

FACTS

Unitrans Holdings ('the taxpayer') trades as an investment and a holding company. At the relevant time, the taxpayer performed a treasury function for the Unitrans Group of Companies ('Group') and such function included the provision of loan funding, as well as cash management. The Group's cash management arrangement with Standard Bank involved its wholly owned subsidiaries, resulting in the daily balancing of the Group's bank accounts to zero.

In the event that the Group's net position resulted in an overdraft, funds would be borrowed from Standard Bank through a call loan. If the Group had a surplus cash position, the call loan would be repaid. The interest rate applied to these loans varied from 0% to approximately 8% and consistently remained lower than the interest rate at which the taxpayer obtained the funds from its affiliated companies within the Group.

In its 2011 income tax return, the taxpayer declared earnings of R34 million in interest income from its subsidiaries. Further, a deduction of R68 million was in respect of interest paid to the taxpayer's shareholder. The taxpayer also declared that during the relevant year of assessment, it had not entered into any transactions as contemplated in section 24J.

SARS raised an additional assessment in respect of the taxpayer's 2011 year of assessment, disallowing the deduction of R68 million, being the interest claimed under section 24J. SARS' reasoning was that the interest claimed as a deduction was not expenditure incurred in the course of any trade and thus, not in the production of income.

▸

The taxpayer filed an objection to the additional assessment, which was disallowed by SARS. The taxpayer appealed to the Tax Court, who found in favour of SARS.

The taxpayer proceeded to appeal that order of the Tax Court to the High Court.

THE TAXPAYER'S CASE

The taxpayer's case was that, as part of its business and trade as an investment holding company, it lent and advanced funds to its own subsidiaries, of which it was the holding company. Moreover, furthering the objects of its subsidiaries was to the taxpayer's advantage because it was the holding company.

Based on this, the taxpayer argued that the interest it paid to Standard Bank was incurred in the production of income, and therefore ranked for deduction from the income derived from carrying on any trade.

SARS' CASE

SARS disputed that the expenditure claimed by the taxpayer was closely linked to its income earning operations. The purpose of the expenditure was not to produce income but solely to further the objects of the subsidiaries. Therefore, SARS contended that the expenditure was not incurred in the production of the taxpayer's income.

OUTCOME

The Court dismissed the taxpayer's appeal with costs.

CORE REASONING

With reference to section 24J(2) of the Act, read with the definition of 'income' in section 1(1) of the Act, the Court held that interest expenditure may only be deducted if that interest was incurred in the production of income.

The purpose for which the money was borrowed is the most important factor in establishing whether the interest was incurred in the production of income. It must thus be determined, firstly, what the purpose of the loan is and secondly, whether the expenditure is causally linked to the production of income.

With reference to case law, the Court found that the interest expenditure for the 2011 year of assessment was not incurred in the production of income while the taxpayer was conducting its trade as an investment holding company. The reason for this was that the purpose of the expenditure was aimed at furthering the interests of the taxpayer's subsidiaries, as opposed to producing income. Put differently, the nature of the arrangement was that the taxpayer borrowed funds to enable its subsidiaries to improve their income-earning abilities and no interest was charged.

Ultimately, the onus was on the taxpayer to prove that it was entitled to the interest deduction and the taxpayer failed to discharge the onus.

TAKEAWAY

Where a taxpayer seeks to rely on section 24J to deduct interest expenditure, it is of utmost importance that the expenditure concerned is closely connected with the relevant income-earning operations. The courts have accepted that this determination is a question of fact.

Poulter v CSARS
(A88/2023) [2024] ZAWCHC 97 (2 April 2024)

ISSUE

The issue on appeal before the Court in this matter concerns the decision of the Tax Court to confirm the taxpayer's 'original assessment' for the 2018 year of assessment, as well as a costs order handed down by the Tax Court. The Tax Court handed down its order without hearing the taxpayer or her authorised representative ('Van der Merwe'). The Tax Court held that Van der Merwe was not a legal practitioner and was thus not entitled to appear before the Tax Court.

FACTS

The South African Revenue Service ('SARS') issued an original assessment for the 2018 year of assessment, to which the taxpayer objected. The matter proceeded to the Tax Court for determination.

The taxpayer had appointed Van der Merwe as her authorised representative, in terms of a Power of Attorney, to appear on her behalf before the Tax Court.

At the interlocutory stage of the proceedings before the Tax Court, it was held that the taxpayer was to appear on her own behalf, or to be represented by an entitled representative who had right of appearance in the High Court as an attorney or an advocate. It was further held that Van der Merwe was not entitled to appear on the taxpayer's behalf, as section 125(2) of the Tax Administration Act, No. 28 of 2011 had been repealed.

The Tax Court proceeded to make the order on appeal at the request of SARS in terms of Rule 44(7) of the Tax Court Rules, which provides that where one party fails to appear before the Tax Court, the court may decide the appeal on the request of the party that does appear.

THE TAXPAYER'S CASE

The principal points argued by the taxpayer were that the Tax Court had erred in holding that Van der Merwe, whose authority to appear on behalf of the taxpayer was granted by a Power of Attorney, was not entitled to appear before it.

Relying on section 33 of the Legal Practice Act, No. 28 of 2014 ('LPA'), Counsel for the taxpayer argued that Van der Merwe had the right to appear on behalf of the taxpayer, as long as he had no expectation of compensation for doing so.

SARS' CASE

SARS contended that the taxpayer's arguments could not succeed on appeal and that the taxpayer had been obliged to pursue her argument in judicial review proceedings challenging the order handed down by the Tax Court.

In addition, SARS also relied on section 33 of the LPA and argued that the section precluded anyone who was not, *inter alia*, an advocate or attorney from appearing before a court of law. SARS submitted that the Tax Court is a court of law.

OUTCOME

The Court found in favour of the taxpayer and the appeal was upheld with costs. The order made by the Tax Court was set aside and the taxpayer's appeal to the Tax Court was remitted to the Tax Court for a hearing *de novo*.

CORE REASONING

The Court considered section 33 of the LPA, which provides that no person other than a practising legal practitioner may, in expectation of any fee, appear in any court of law.

This section is of a prohibitory nature and precludes those who are not legal practitioners from acting as if they were legal practitioners, irrespective of whether they do so for reward or expectation of reward.

The next issue for determination was whether the Tax Court constitutes a 'court of law' It was held that the mere fact that the Tax Court is referred to as a court by name, does not characterise it as a court of law. The dominant character of the institution's functions will determine whether it may be classified as a court of law.

The Court held that precedent and South African jurisprudence points to the Tax Court being a 'court of revision', not a 'court of law'. This means that the provisions of section 33 of the LPA do not apply, save to the extent that the legislation regulating the Tax Court might make it applicable.

It was held that the Rules and Regulations of the Tax Court are not consistent with the understanding of proceedings before a court of law; if they were, one would expect to find reference to a taxpayer's 'legal representative' rather than 'authorised representative' and the like.

TAKEAWAY

The Court's decision in this matter reveals the potential misapplication of legal representation rules and highlights that Tax Courts are not considered to be courts of law. This distinction means that authorised representatives, even those who are not legal practitioners, may represent taxpayers in the Tax Court.

Capitec Bank Limited v Commissioner, South African Revenue Service

(Case CCT 209/22) [2024] ZACC 1 (12 April 2024)

ISSUE

The issue before the Constitutional Court in this matter was whether the Supreme Court of Appeal ('SCA') was correct in its decision that the supply of loan cover by Capitec Bank Limited ('the taxpayer') to its clients for no consideration constituted an exempt supply and therefore, the taxpayer was not entitled to a deduction under section 16(3)(c) of the Value-Added Tax Act, No. 89 of 1991 ('the VAT Act'). Additionally, whether the taxpayer was entitled to apportion the deduction under section 17(1) of the VAT Act.

FACTS

The taxpayer provided free insurance cover to its loan customers, to protect against the risk of unsecured borrowers defaulting on their loans. The customers paid interest and fees on the loans advanced by the taxpayer. Value-added tax (VAT) was not charged on the interest but was charged on the fees. The taxpayer claimed input tax deductions in respect of those fees. To protect itself against the risk of customers failing to repay the loans, the taxpayer took out insurance policies.

For the November 2017 tax period, the taxpayer claimed a deduction for the tax fraction of the total amount of the fees it charged, based on section 16(3)(c) of the VAT Act. SARS disallowed the deduction, arguing that the free loan cover was not a taxable supply and raised an additional assessment.

The taxpayer objected to the additional assessment and following a disallowance of the objection by SARS, appealed to the Tax Court, which found in favour of the taxpayer. On appeal, the SCA reversed the decision of the Tax Court, asserting the loan cover was part of exempt financial services and not eligible for any deduction under section 16(3)(c). The taxpayer proceeded to appeal to the Constitutional Court.

THE TAXPAYER'S CASE

The taxpayer argued that the free loan cover was integral to its broader business of providing credit, for which it charged interest and fees. It maintained that the loan cover, despite being free, was supplied in the course of the taxable 'enterprise', entitling the taxpayer

to a full VAT deduction. The taxpayer ensured that interest and fees from borrowers covered all costs, including insurance premiums, even though the contracts explicitly stated the loan cover was provided at no charge. It was contended that the mixed nature of their supplies did not impact the taxpayer's entitlement to deductions under section 16(3)(c).

SARS' CASE

Treating the provision of credit and the activities earning fees as distinct transactions, SARS asserted that the taxpayer was primarily in the business of providing credit, not insurance. SARS contended that the loan cover was, at best, a mixed supply—partly exempt and partly taxable—requiring apportionment, which the taxpayer neither pleaded nor proved.

OUTCOME

The appeal succeeded to the extent that the orders of the Tax Court and SCA were set aside. Further, the assessment was remitted to SARS for examination and assessment.

CORE REASONING

This matter concerned three fundamental questions: (i) was the loan cover provided free of charge, (ii) is a free-of-charge supply disqualified from being a 'taxable supply', and (iii) was the loan cover supplied exclusively in the course or furtherance of an exempt activity.

With reference to the question of whether the loan cover was provided at no charge, the court found in the affirmative and could thus move on to the determination of whether a free of charge supply could still qualify as a 'taxable supply'.

In accordance with section 10(23) of the VAT Act, a supply made free of charge will still constitute a taxable supply, albeit a taxable supply with a nil value. The fact that the taxpayer thus provided the loan cover for free did not disqualify it from being a taxable supply.

Finally, the Court determined that loan cover provided by the taxpayer constituted a mixed supply, made in the course of an exempt activity of lending money for interest and its enterprise activity of lending money for fees.

With regard to the question of whether the deduction should thus be apportioned, the Court held that the provisions of 16(3)(c) of the VAT Act applies to insurance contracts supplied partly as taxable supplies. Section 72(1) of the VAT Act may aid in the apportionment calculation by allowing the Commissioner to address difficulties or anomalies in tax calculations.

TAKEAWAY

The Constitutional Court clarified that a supply for no consideration could still be considered a taxable supply if it is made in the course of furtherance of an enterprise. The judgement emphasised the need for apportionment in cases involving mixed supplies, balancing taxable and exempt activities.

Coronation Investment Management (Pty) Ltd v Commissioner, South African Revenue Service
(CCT 47/23) [2024] ZACC 11 (21 June 2024)

ISSUE

The issue on appeal before the Constitutional Court in this matter concerned whether the net income of the taxpayer's foreign subsidiary qualified for the exemption available to controlled foreign companies ('CFC') in terms of section 9D of the Income Tax Act, No. 58 of 1962 ('the Act'), during the 2012 year of assessment.

FACTS

The taxpayer was the sole owner of a subsidiary situated on the Isle of Man, which was in turn the sole owner of Coronation Global Fund Managers Limited ('CGFM'). CGFM was registered and operating in Ireland.

The investment management functions of CGFM were delegated to two investment management companies registered in South Africa and the United Kingdom, respectively.

The taxpayer excluded the net income of CGFM from its taxable income during the 2011, 2012 and 2013 years of assessment, to which SARS raised an additional assessment and included CGFM's income. The taxpayer's dispute of SARS' assessment was based on the contention that CGFM meets the foreign business establishment ('FBE') exemption.

The taxpayer appealed to the Tax Court and the Supreme Court of Appeal. Following an adverse judgement by the Supreme Court of Appeal, the taxpayer appealed to the Constitutional Court.

TAXPAYER'S CASE

The taxpayer's case centred around the licence granted to CGFM by the Central Bank of Ireland ('CBI') to operate as a 'management company' in accordance with the European Communities Regulations. The taxpayer contended that CGFM's primary functions were those of fund management.

The taxpayer argued that CGFM's business plan, which had been attached to its licence application, presented an outsource business model where CGFM would concentrate on being a product provider and that the eventual licence granted by the CBI did not approve investment management functions.

In addition, the taxpayer asserted that, since the actual performance of investment trading functions were not envisaged in CGFM's business plan, the performance of such functions could never constitute CGFM's primary functions.

SARS' CASE

SARS contended that CGFM's primary functions were that of investment management and since these functions were outsourced to the South African and United Kingdom providers, CGFM lacked economic substance and was not an FBE in terms of section 9D of the Act.

While it is permissible for a CFC to outsource locational permanence and economic substance, it must then comply with the proviso set out in subsections (aa) to (cc) of the definition of FBE in the Act, which CGFM did not do.

OUTCOME

The appeal was upheld and the order of the Supreme Court of Appeal was set aside and substituted with, "*[t]he appeal is dismissed with costs, including the costs of two counsel.*"

CORE REASONING

The enquiry centred around two questions: (i) what the business of CGFM was and (ii) what its primary operations were.

To answer the questions, the court drew a distinction between fund management and investment management. With respect to fund management, the court determined that CGFM followed the same model as most South African and Irish fund managers, whereby investment management functions were outsourced.

In terms of CGFM's business plan and its operating licence, its business constituted that of fund management and it was not entitled to engage in investment management. To determine whether fund management were CGFM's primary activities, the court held that regard must be had to the functions that CGFM actually performs.

The court based its decision on three features, namely, the licence conditions in terms of which CGFM operated, prudential considerations and the fact that the taxpayer's evidence went uncontested. Majiedt J held that the features overwhelmingly pointed to CGFM's primary operations being those of a fund manager operating in terms of a delegation business model.

TAKEAWAY

This case highlights the critical importance of understanding and accurately characterising the primary functions of a foreign subsidiary for tax purposes. The distinction between fund management and investment management was pivotal, demonstrating that the nature of a company's business model and its compliance with licensing conditions can significantly impact its tax obligations. It underscores the necessity for taxpayers to provide clear, uncontested evidence to support their claims for exemptions, such as the FBE exemption.

BINDING **RULINGS**

▶ **MICHELLE PHILLIPS,** michelleph@taxconsulting.co.za
COLLEEN KAUFMANN, colleen@taxconsulting.co.za
MICAELA PASCHINI, micaela@taxconsulting.co.za

Binding Class Ruling: BCR 088

En Commandite Partners Investing in Solar Assets (22 February 2024)

ISSUE

This Ruling determines the deductibility of expenditure to be incurred and the limitation of allowances and deductions claimed by *en commandite* partners investing in photovoltaic solar energy assets ('assets'), which assets will be owned by the *en commandite* partnerships and installed at clients' premises in terms of power purchase agreements ("PPAs").

FACTS

The Applicant proposed to establish multiple *en commandite* partnerships between itself as a general partner and investors as limited partners, for the purpose of investing in assets as contemplated in section 12B(1)(h) of the Income Tax Act, No. 58 of 1962 ('the Act'). The assets, whether new or existing installations, will generate electricity, to be sold to end users through PPAs with clients. Each partnership will focus on a specific project or group of similar projects, raising only the necessary capital from investors for those projects. Once the required capital is secured, the partnership will dissolve and will not accept further contributions, except when a new investor replaces an existing one who withdraws.

Each limited partner will sign a deed of adherence detailing their capital contribution. The limited partners or class members will have limited liability for the partnership's debts, confined to their capital contribution commitment.

The Applicant will handle the PPAs with clients, who will pay for the electricity generated. The clients will lease the premises for the solar installations to the partnership, which will own, operate, maintain and insure the generation assets. Profits generated will be distributed to class members based on their partnership interests, reflecting their respective capital contributions.

The generation assets included in the partnership arrangement encompass a wide range of solar energy equipment and infrastructure, as detailed in paragraph 5 of the Ruling.

RULING

The ruling made in connection with the proposed transaction is as follows:

a) Under section 24H(2) of the Act, each class member is deemed to carry on the trade of the partnership.

b) Under section 24H(5)(a), a class member's portion of the partnership income must be included in such class member's income in the relevant year of assessment.

c) A class member is entitled to deduct its proportionate share of the partnership's deductions and allowances allowable under the Act when determining their taxable income. Subject to section 12B(4), this will include a proportionate share of the allowances under section 12B for the assets mentioned, provided that these were not previously owned or used by the class member and that the partnership brings into use for the purpose of its trade.

d) The assets that are brought into use and used in the partnership's trade to generate electricity will meet the requirements of section 12B(1)(h)(ii) and will therefore qualify for the allowance as contemplated in section 12B(1)(h) read with section 12B(2).

e) Under section 24H(3), in any year of assessment, the total allowances and deductions that a class member can claim in connection with the trade carried on by the partnership, may not exceed the sum of the amount for which the class member may be held liable to any creditor (including their capital contribution to the partnership) and the cumulative portion of the partnership income included in the class member's income in the current and any previous years of assessment.

f) Subject to section 20A, a class member may set off an assessed loss arising from the partnership's trade against income from carrying on any other trade during the same year of assessment under section 20(1)(b). A class member who is not a company may set off an assessed loss against income otherwise than from carrying on a trade under section 20(2A)(a).

▶

The assessed loss may not be set off against any amount from a retirement fund lump sum benefit or severance benefit; and further may not be set off against any assessed loss from carrying on a trade outside of South Africa.

g) When a class member sells all or part of its interest in the partnership, they must recoup any allowances claimed under section 12B(1)(h) and account for any capital gain or loss arising from the decrease in its proportionate interest in the partnership assets on such disposal.

h) A new class member may claim section 12B(1)(h) allowances in respect of its proportionate interest in the partnership assets acquired, provided that the new class member is acquiring and bringing such assets into use for the first time.

Binding General Ruling: BPR 398

Disposal of Shares Pursuant to a Property Development Arrangement

(17 November 2023)

ISSUE

This Ruling relates to the tax consequences of a transaction involving the disposal of ordinary shares held in a property company and the subsequent redemption of newly issued capitalisation preference shares in that company.

FACTS

The Applicant is a resident company and the sole shareholder of PropCo, a resident property holding company that owns land. Neither the Applicant nor PropCo possesses the necessary development expertise to develop the land further. Therefore, the Applicant will enter into a joint venture with DevelopCo, a resident company.

This joint venture aims to install necessary infrastructure and potentially sell portions of the land to third parties.

Preference shares were issued to the Applicant, giving it a preferential right equivalent to the speculative value of the land. In exchange, the Applicant transferred control of PropCo to DevelopCo. The preference shares are structured to secure the Applicant's interests, allowing direct access to the land as collateral in case the joint venture fails and the shares cannot be redeemed.

The proposed transaction entailed the following:

- PropCo will issue preference shares to the Applicant under section 47 of the Companies Act, No. 71 of 2008, with terms which ensure that the preference shares' aggregate value matches the speculative market value of PropCo's ordinary shares.
- Subsequently, the Applicant will sell 51% of PropCo's ordinary shares to DevelopCo, with an option to reduce its stake by an additional 9% later.

RULING

The ruling was made as follows:

a) The exchange of rights for the acquisition of capitalisation shares must be disregarded for capital gains tax purposes.

b) Securities Transfer Tax (STT) applies to the market value of ordinary shares transferred to DevelopCo, with PropCo liable for STT payment, potentially recoverable from DevelopCo.

c) Dividends received by the Applicant qualify as 'dividends' under section 1(1) of the Income Tax Act, No. 58 of 1962 ('the Act').

d) The preference shares do not qualify as 'hybrid equity instruments' under section 8E(1) or 'third-party backed shares' under section 8EA(1) of the Act, and their dividends are not treated as income under these sections.

e) Once the Applicant may compel PropCo to redeem the preference shares within three years, they will qualify as 'hybrid equity instruments' under section 8E(1)(a)(ii) of the Act.

f) Dividends from preference shares, including redemption amounts, are subject to Paragraph 43A of the Eighth Schedule to the Act.

g) Preference share dividends are considered in determining if an 'extraordinary dividend' relates to disposed ordinary shares under paragraph 43A(1)(b), affecting proceeds from their disposal under paragraph 43A(2) of the Eighth Schedule to the Act.

h) Preference share dividends do not contribute to determining an 'extraordinary dividend' under paragraph 43A(1)(a) concerning preference shares.

i) STT is payable upon redemption of the preference shares.

Binding General Ruling: BPR 399

Asset-for-Share Transaction and Replacement Asset

ISSUE

This Ruling details the effects where an asset obtained through an asset-for-share transaction is disposed of almost immediately after acquisition and an election is made under paragraph 66 of the Eighth Schedule of the Income Tax Act, No. 58 of 1962 ('the Act'), for the replacement of that asset with another asset.

FACTS

The Applicant is a resident company in which 100% of the shares are held by Mr X, who conducts business as a sole proprietor throughout South Africa. Mr X owned an aircraft ('the existing aircraft'), for purposes of his business, which aircraft was in the process of being sold. Mr X intended to replace the existing aircraft with a new aircraft ('the new aircraft').

A sale agreement was entered into by Mr X for the sale of the existing aircraft. The effective date was expected to be on closing, which would be approximately 15 August 2023. Simultaneously, Mr X entered into a purchase agreement in respect of the new aircraft, which would be delivered during August 2023.

It was proposed that:

- Mr X would transfer his business to the Applicant in exchange for shares under an asset-for-share transaction in terms of section 42(1)(a) of the Act. The agreement giving effect to the transaction would be executed on 1 August 2023 and contain no suspensive conditions. The existing aircraft would be transferred to the Applicant as part of this transaction.
- The closing of the existing agreement of sale would only occur after the conclusion of the asset-for-share transaction. By that time, the deemed disposals and acquisitions as contemplated under section 42 read with paragraph 13 would have taken place. Subsequent to the asset-for-share transaction, the Applicant would be substituted as the seller in respect of the sale of the existing aircraft and the purchaser in respect of the purchase of the new aircraft.
- The Applicant would dispose of the existing aircraft and acquire the new aircraft within a period of 18 months from the date of the asset-for-share transactions. An election would be made by the Applicant to apply paragraph 66 to the disposal of the existing aircraft.

RULING

The Ruling made is as follows:

a) The requirements of paragraph 66(1) would be satisfied by the Applicant in regard to the disposal of the existing aircraft. Therefore, the Applicant may make the election under that provision.

b) An allowance under section 12C could be claimed by the Applicant in respect of the new aircraft.

c) Section 8(4)(e) would apply to the recoupment arising as a result of the disposal of the existing aircraft.

d) Paragraph 66(2) of the Eighth Schedule would apply. This means that the capital gain derived from the disposal of the existing aircraft would be disregarded when determining the Applicant's aggregate capital gain or loss. This notwithstanding, paragraph 66(4), subject to subparagraphs (5), (6) and (7) of paragraph 66 would apply to that capital gain so disregarded.

e) Section 42(7) would apply to the disposal of the existing aircraft by the Applicant but would have no adverse consequences due to the rulings in paragraphs (c) and (d) above.

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