PROFESSIONAL
TAXTALK
South Africa's Leading Tax Journal
Issue 92 January/February 2022

Closing in on TAX EVASION AND CORRUPTION

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R25 • incl VAT

4h30mins CPD in this issue

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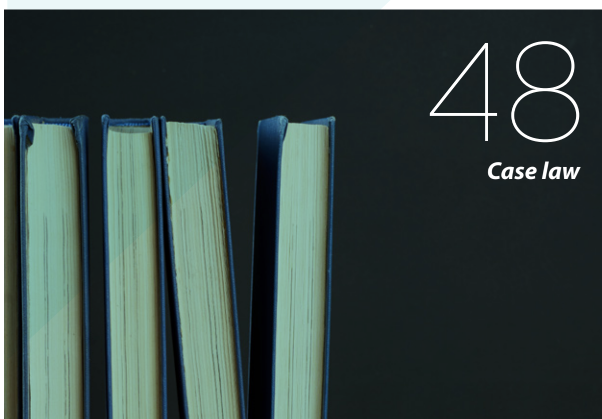

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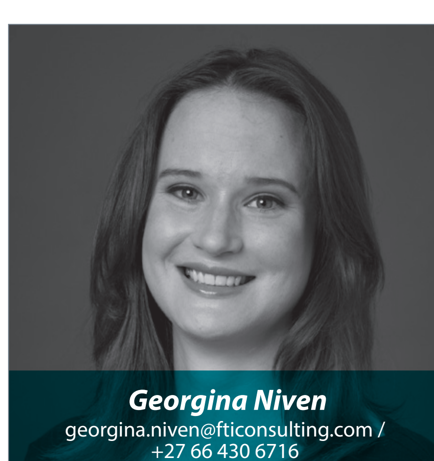

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THE CASE FOR LIFESTYLE AUDITS

▶ **JUDGE DENNIS DAVIS**, Retired Judge, President of the Competition Appeal Court and Hon Prof of Law at Wits, UWC and UCT

This article looks at the depth of tax avoidance and non-compliance. The article details statistics that show that many high earners are not giving SARS what is due to it.

According to the income tax collection data provided by the South African Revenue Service (SARS) at the 2021 Budget Review Trilogy, there are approximately 6 000 taxpayers who return a taxable income of more than R5 million per year. Drive on any urban highway, particularly connected to the leafy suburbs of Cape Town and Johannesburg, and one is confronted by numerous luxury motor vehicles. The reader is invited to count how many Ferraris, Porsches, Maseratis or Lamborghinis they see on any one journey.

This simple exercise will reveal that the figure of roughly 6 000 taxpayers returning taxable income over R5 million a year is severely underestimated. Accept that dividend tax is levied at a concessional rate of 20% and that many taxpayers may well have enjoyed capital gains for which they are taxed at a lower rate. Nonetheless, the sheer scale of opulent motor vehicles together with vast houses with rolling lawns, which characterise all of the leafy suburbs to which I have referred, indicate that there is a gaping hole between that which is returned as taxable income and that which is used to finance the lavish lifestyle that characterises the pattern of a small but significant section of the South African population.

In addition, there is the notorious fact of an aggressive illicit market particularly related to cigarettes, alcohol and textiles which adds to the tax gap to which I have referred. In addition, there are significant numbers of South African residents in the country (for tax purposes) who have set up offshore structures which, notwithstanding that the trust beneficiaries or the shareholders of the offshore company are reflected as non-residents, are in effect controlled by the South African resident taxpayer whose assets have found their way into these offshore structures.

If further proof is required for this phenomenon, the reader is invited to examine the reports of the various disclosures known as the Panama Papers, the Paradise Papers, and most recently the Pandora Papers. According to reports, approximately 1 700 South African names appeared in the initial Panama Papers. A number of those who appeared in this disclosure will have legal reasons for holding assets in an offshore structure. But the evidence does not extend legality to all 1 700 cases. In turn, this supports the argument that there are numerous South Africans who have control of offshore assets which have not been disclosed to SARS and which have thus not been made subject to any amnesty application.

"According to reports, approximately 1 700 South African names appeared in the initial Panama Papers"

There is further important context for the case of lifestyle audits. South Africa has finally received the first of the Zondo Commission reports. Numerous individuals are named in the first report as well as, at least, one banking institution which is a matter of grave concern. It follows from these findings that, unsurprisingly, a range of rent seekers have feasted on public resources for nefarious purposes. It can safely be assumed that the ill-gotten gains to which Justice Zondo refers were not reflected in a tax return and hence none of these amounts have been subjected to tax.

In addition, all these developments take place within the context of one of the most unequal societies in the world. Against the backdrop of the unseemly level of global inequality; Thomas Piketty's *Capital in the Twenty First Century* requires a reading. To combat widening inequality, Piketty called for a much higher marginal income tax rate for the wealthy and a global wealth tax. He contended that a wealth tax was required because wealth, in his view, was the fundamental source of income inequality. Without taxing wealth, income inequality cannot be reduced because of the ability of the wealthy to hide the fruits thereof.

Leave aside the economic debate about higher marginal rates of tax in South Africa. The imposition of a wealth tax continues to be debated within the South African context. That a significant amount of wealth has been secreted from the gaze of SARS either by way of blatant tax evasion, fraudulent disclosure of income tax returns or more sophisticated structures surely triggers the Piketty argument. One cannot sustain a democratic society in South Africa where the law is abused in an egregious fashion to benefit the few at the expense of the vast majority of the population.

It is within this context that lifestyle audits should be conducted. In the first place, lifestyle audits of every implicated person who appears in one or other of the Zondo reports should be subjected to a rigorous tax audit. Instead of spending significant further resources in the establishment of another anti-corruption unit, albeit independent, it would be preferrable to capacitate SARS with additional resources so that the age old Al Capone strategy of using the tax system to hold criminal elements accountable to law could be employed to great effect. By adding capacity to SARS, its recent upward tendency after the Tom Moyane destruction can only be accelerated. It will allow specialist audits to be conducted on every implicated person so that the benefits received from State Capture can be subjected to full tax compliance which, in turn, would not exclude that criminal charges should be laid.

"SARS needs to be able to conduct a systematic roll out of lifestyle audits, which means engaging in a comparative exercise in which a taxpayer's legitimate income is measured against his or her lifestyle"

In short, SARS needs to be able to conduct a systematic roll out of lifestyle audits, which means engaging in a comparative exercise in which a taxpayer's legitimate income is measured against his or her lifestyle. If the audit reveals a clear disjuncture between a person's financial affairs as disclosed to SARS and his or her lifestyle and spending pattern, there can be little doubt that there is a heightened risk that this particular person has sources of income that have not been disclosed and is, therefore, a tax evader. Even on a preliminary small-scale audit of owners of large motor cars or properties, a level of discrepancy has been found; hence, the need for a comprehensive roll out of lifestyle audits.

The tax gap concerning high net worth individuals will also require significant further co-operation between the South African Reserve Bank, the Financial Intelligence Centre, the commercial banks and SARS to determine the nature of flows of income in and out of the country. In addition, greater use will be required for the automatic exchange of information system particularly where SARS can initiate a request for information targeting offshore structures which are controlled, whether by a letter of wishes or other similar instrument, by a South African taxpayer, no matter the protestation of the taxpayer to the contrary that the discretionary beneficiaries are children living offshore.

In dealing with lifestyle audits and therefore the veracity of tax returns, the focus will inevitably fall not only on this cohort of taxpayers but on their advisors. Tax advisors, whether accountants, lawyers or financial advisors, who knowingly assist taxpayers in not disclosing offshore structures in which their clients control or facilitate, whether by way of sophisticated or crude forms of tax evasion, should be held to account. The overall objective must be to close the tax gap which, in turn, will ensure that the revenue which the fiscus is entitled to receive is collected. Those collections must then be employed to ensure a better life for all.

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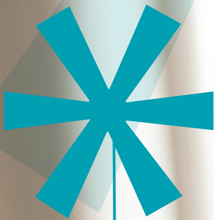

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THE CLASH BETWEEN TAX TRANSPARENCY AND CONFIDENTIALITY

▶ **DARIO MILO,** Partner at Webber Wentzel

Does the public's right to know outweigh confidentiality? This article looks at former President Jacob Zuma's case of getting access to his tax records from 2010 to 2018.

Confidentiality of tax information is often seen as a fundamental pillar of our tax laws. This confidentiality is given effect in two pieces of legislation – the Tax Administration Act 28 of 2011 (TAA) and the Promotion of Access to Information Act 2 of 2000 (PAIA). While there are crafted and narrow exceptions to the confidentiality rule, the relevant provisions in these acts create an absolute prohibition on the disclosure of tax information by the media to members of the public. 'Taxpayer information' is defined in the TAA as "any information provided by a taxpayer or obtained by SARS in respect of the taxpayer". It includes a person's tax returns.

The issue is whether this absolute prohibition on disclosure of taxpayer information is constitutionally defensible.

On 16 November 2021, the Pretoria High Court (per Davis J) handed down a judgment, ruling that this absolute prohibition on disclosure was not defensible.

The facts were that Financial Mail approached SARS with a request under PAIA for access to former President Jacob Zuma's tax records from 2010 to 2018. What triggered this request was the publication of the book *The President's Keepers*, where the journalist Jacques Pauw published various allegations relating to President Zuma's tax affairs, including that he did not submit tax returns for the first seven years of his presidency, owed millions of rands in tax for the fringe benefits related to the security upgrades at state expense to his Nkandla residence, and had received a salary from a Durban security company for the first few months of his presidency.

Against this context, the Financial Mail asked for President Zuma's tax records under PAIA. SARS was legally obliged to refuse the request – section 35(1) of PAIA states that a public body – here SARS – must refuse to provide information to a requester if the record requested "contain(s) information which was obtained or is held by SARS to enforce legislation concerning the collection of revenue" – which includes President Zuma's tax records. SARS also relied on section 69(1) of the TAA, which states that a current or former SARS official "may not disclose taxpayer information to a person who is not a SARS official".

After an internal appeal to SARS was similarly refused, the Financial Mail – joined in their quest by amaBhungane – brought a court application challenging the relevant provisions of PAIA and the TAA. The argument was that the ground of refusal under PAIA based on taxpayer information should be subject to a public interest override. This override is already catered for in section 46 of PAIA, which states in the relevant part that, despite a ground of refusal in PAIA, the record requested must be disclosed if its disclosure "would reveal evidence of a substantial contravention of or failure to comply with the law" and "the public interest in the disclosure of the record outweighs the harm contemplated".

Now, the only category of information under PAIA to which the public interest override does not apply is taxpayer information. Even information relating to national security or legally privileged information, for instance, must be disclosed by a public body if the public interest override applies – but not taxpayer information.

Thus, the remedy which Financial Mail and amaBhungane sought was a simple one: PAIA should be declared to be unconstitutional because the public interest override should apply to taxpayer information and – the mirror image – the TAA is unconstitutional because it does not permit disclosure of taxpayer information to a successful requester under PAIA.

In the High Court, Judge Norman Davis recognised that there was a tension between the competing rights of taxpayer privacy and the right of access to information. But the Court stated that it was not a universal truth that without taxpayer secrecy, tax administration cannot function properly; further, taxpayer compliance is not necessarily inextricably linked to the promise of confidentiality.

"There is no direct or factual evidence," said the Court and taxpayers in South Africa should rather disclose their affairs because of the secrecy provisions as opposed to the coercion of the penalties and sanctions which follow upon non-disclosure.

Judge Davis emphasised that what the Financial Mail and amaBhungane sought was not to overturn the principle of tax confidentiality but to make that principle subject to the same public interest override that applies to other information. This is a 'less restrictive means' in the language of the limitations clause of the Constitution as opposed to the blanket ban on access to taxpayer information.

The Court also held that previous Constitutional Court cases provided authority for the proposition that blanket rules of secrecy or confidentiality will rarely survive in our constitutional scheme. In *Mail and Guardian Media Ltd vs Chipu NO* 2013 (6) SA 367 (CC), the Court held that absolute confidentiality that applied to refugee appeals was not constitutionally acceptable. In *Johncom Media Investments Ltd vs M and Others* 2009 (4) SA 7 (CC), the absolute prohibition in legislation against the publication of details of divorce cases was also struck down. Judge Davis, therefore, held that the blanket prohibitions on the disclosure of taxpayer information to the public in PAIA and the TAA were unconstitutional and gave parliament two years to remedy the defect. In the interim, the Court read the public interest override into the legislation.

"Now, the only category of information under PAIA to which the public interest override does not apply is taxpayer information"

On the facts relating to access to President Zuma's tax records, Judge Davis set aside SARS' decisions to refuse access to the records and ordered that they should be made available within 10 days.

Because all declarations of unconstitutionality must be confirmed by the Constitutional Court, the High Court also referred the relevant orders to the Constitutional Court. For its part, SARS has also sought to appeal to the Constitutional Court the ruling that it must make President Zuma's tax records available. The battle now shifts to the Constitutional Court which has not yet indicated when it will set down the case for hearing.

What is clear is that the case raises issues of critical importance to our democracy – transparency in the tax context and the balance with taxpayer confidentiality. The Constitutional Court hearing is eagerly awaited.

The practical challenge of PROSECUTING TAX CRIMES

JEAN DU TOIT, Head of Tax Technical **& DARREN BRITZ**,
Head of Legal Tax Consulting at Tax Consulting SA

This article goes into detail on the types of tax corruption or tax crimes in South Africa and how they are investigated and possibly prosecuted.

In recent times, South Africans have seen innumerable reports in the public domain of apparent fraud, corruption and looting. These accounts are revealed by the media, investigative journalists and, of course, the seemingly endless commissions of inquiry funded by the taxpayer. Despite arguably handing the National Prosecuting Authority (NPA) the smoking gun, the number of arrests we have seen are paltry.

Some argue that these crimes are too complex to prosecute, and we will wait years before we see any progress. Some have suggested that our apparent lack of progress on this score can be resolved by adopting what is known as the Al Capone strategy. The strategy lends its name from notorious gangster, Al Capone. Prosecutors found it impossible to obtain hard evidence to prosecute Capone for more serious crimes; so they decided to pursue an 'easier' conviction for tax evasion. The strategy paid off.

The reasoning is that the Al Capone strategy simply requires one or two provable facts; if you received the money in a brown envelope, it does not matter why or how you received it. The question is simply if you disclosed it to the revenue authority. And if you have not, so the theory goes, we have a slam dunk case of tax evasion. So, arguably, if we want to see some bang for our buck, the NPA should simply look to prosecute those named in the commissions of inquiry for tax evasion. But is it that simple?

Tax offences

In South Africa, tax crimes are catered for under statute. Generally, the tax acts make distinction between non-compliance offences and tax evasion. While there are specific sections in the tax acts that deal with specific tax offences, the TAA contains two sections which deal with such offences in general. Section 234 of

the TAA deals with non-compliance offences or minor tax offences, while section 235 caters for tax evasion.

While these broad categories come with varying degrees of difficulty in terms of prosecution, it is critical to stress that transgressions under both sections constitute criminal offences, which may come with up to two- or five-years imprisonment, depending onwhich section applies.

This means the first hurdle in obtaining convictions in these cases is the state's burden and standard of proof. The state has the burden to prove the presence of all the elements of the crime and it must do so beyond a reasonable doubt to validate a conviction. To put this into context, in the ordinary course, under our tax system, a taxpayer bears the burden to prove to SARS, on a balance of probabilities, why the adopted tax position should be accepted.

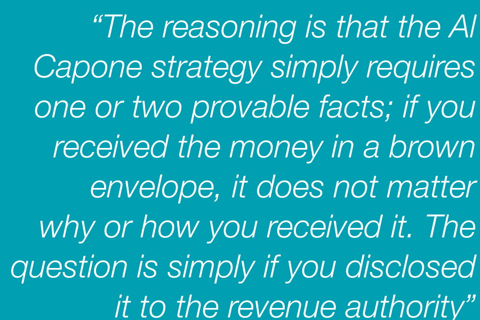
The weight of the state's burden becomes clear when considering the operation of the criminal provisions of the TAA.

Minor tax offences

Section 234 of the TAA deals with general non-compliance; the section criminalises behaviour where the taxpayer for example fails to submit a return, update their registered details, retain records as required, comply with notices or disclose material facts.

Proving factually that the taxpayer committed these offences is comparatively simple. If the taxpayer did not file a return when they were required to do so, it is an easily ascertainable objective fact.

The complexity comes in where the taxpayer's state of mind in committing the offence must be determined. On this score, the provision effectively comprises two levels of offences, which were created by an amendment that took effect on 1 March 2020. Before the amendment, the taxpayer would be guilty of these offences if they 'wilfully and without just cause' committed any of the acts listed under the section. In other words, the taxpayer must have acted somewhat deliberately in flouting their obligations. After the amendment, taxpayers can be found guilty of certain offences where they acted



"The reasoning is that the Al Capone strategy simply requires one or two provable facts; if you received the money in a brown envelope, it does not matter why or how you received it. The question is simply if you disclosed it to the revenue authority"

'wilfully or negligently'. This means deliberate behaviour is no longer required and National Treasury and the NPA are on record that this amendment is directed at making it easier to obtain convictions for minor tax offences. And one can see why.

It is a challenge for the state to prove beyond a reasonable doubt that the taxpayer acted deliberately. If the taxpayer could cast doubt on whether they knew they should have, for example, submitted a return, then the state has a problem. If the state only needs to establish negligence, which is now the case for most minor tax offences, it makes a conviction more achievable. The state must then establish that the taxpayer did not submit a return and that they should reasonably have known of and fulfilled their obligation to do so. In fact, we have now seen summonses being issued for these types of offences, particularly for failure to submit returns. Arguably, the change comes because the NPA now believes they can obtain a conviction.

Tax evasion

The position is more complex where one seeks to pursue a taxpayer under section 235, which deals with cases where the taxpayer makes false statements on returns, maintains false records or commits fraud.

The difficulty for the state again lies in the taxpayer's state of mind when committing these acts. A precursor to section 235 is that the taxpayer must act with intent to evade or assist another person to evade tax or obtain an undue refund. In other words, the burden goes further than proving the taxpayer acted deliberately; the state must prove beyond a reasonable doubt that the act was committed with the purpose of evading tax.

The challenge here must be underscored. The fact that the result of the act was that the taxpayer evaded tax is not sufficient. The subjective mindset of the taxpayer is an element of the crime that must be proven beyond any doubt.

The other issue we have not yet addressed is that, on top of the state's burden of proof, tax evasion cases can be inherently complex. They often involve overly complex structures, which should ideally be unravelled

by someone who understands the intricacies of tax law. Under any criminal justice system, these factors present considerable difficulty. Under our criminal justice system, some would say it is an all but insurmountable challenge, which brings us to our biggest practical challenge.

The National Prosecuting Authority

Where there is an alleged case of tax evasion, a senior SARS official may lay a complaint with the South African Police Service (SAPS) or the NPA. The NPA derives its mandate and power from the Constitution. Section 179(1) states that "[t]here is a single national prosecuting authority in the Republic"; subsection (2) provides that the NPA "has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings".

These powers are enacted and regulated in terms of the National Prosecuting Authority Act 32 of 1998.

The crux is that SARS will not pursue the charge; the matter must ultimately be driven by the NPA, as prescribed by the Constitution. The difficulties faced by the NPA are no secret. The NPA's apparent lack of action on high profile commercial crimes formed the subject of many recent headlines. Questions on the state of the institution became even more pressing in light of the premature resignation of the Head of the Investigating Directorate, Hermione Cronje.

The reasons for the poor performance of the organisation are manifold, but it is largely attributed to elements of state capture and a general lack of capacity and skills.

The bottom line is that the NPA creates a bottleneck that contributes to the lack of convictions for tax crimes. We say 'contributes' because other factors have a hand in this too; undoubtedly, SARS' lack of resources should not be discounted.

"If the state only needs to establish negligence, which is now the case for most minor tax offences, it makes a conviction more achievable"

That being said, there is a sentiment that the NPA presents the biggest problem, which is why stakeholders, including former judge Dennis Davis, have proposed that SARS should be given prosecuting powers. This makes sense given the constraints at the NPA and particularly because the expertise to prosecute these crimes sits within SARS. The reality is, however, that this solution would require an amendment to the Constitution and for the Legislature to create a framework that will enable SARS to serve this function. This will not happen overnight.

Concluding remarks

The idea that our state capture worries can be resolved by focussing on tax crimes has merit. But it is not as simple as some proponents of the Al Capone strategy will have us believe. The subject matter of tax law remains inherently complex, and the criminal justice system is stacked against the state. Eliminating the NPA as the middleman, so to speak, and handing over the reigns to SARS may be a long-term option, but this solution will require more patience from the public.

In the interim, SARS and the NPA should use the amendment to section 234 of the TAA to score some easy victories in the fight against tax delinquency. Criminal convictions, of any kind, will do a world of good to boost SARS' deterrence factor and with it the morality of the tax base.

KEY GOVERNMENT CRIME FIGHTERS

▶ **CHAD THOMAS,** CEO of IRS Forensic Investigations

This article focuses on the key Government corruption and crime fighters and takes a look at the commissions formed to combat these crimes. Have any shocking findings led to arrest and/or persecution?

South Africa was shocked at the news that Advocate Hermione Cronje would leave the Investigating Directorate before her contract had ended.

This unit, a component of the NPA, had been established specifically to investigate and prosecute crimes linked to State Capture. More importantly, suspects, both natural and juristic that would be and were identified in terms of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State (better known as the Zondo Commission or State Capture Commission) will be prosecuted. (For ease of reference, the Commission of Inquiry will be referred to as the State Capture Commission in this article.) The State Capture Commission is a public inquiry established in January 2018 by former President Jacob Zuma following the release of the previous Public Protector's, Thuli Madonsela's, report into State Capture titled the *State of Capture*, Public Protector Report 6 of 2016/17. According to the NPA's website, the purpose of the Investigating Directorate was defined as:

> *"Empowered to investigate common law and statutory offences. These can include commercial crimes such as fraud, forgery, uttering, and theft. Statutory offences related to legislation covered by the Prevention of Organised Crime Act, the Public Finance Management Act, and the Municipal Management Act fall under the mandate of the IDU. Offences involving dishonesty referred by the Financial Intelligence Centre would be investigated by the IDU as well.*
>
> *When commissions and public enquiry committees identify suspected offences, unlawful activity, or criminal behaviour, the specialist IDU investigators are tasked with investigating. These investigations are often high profile, serious or complex and require the experienced and skilled IDU investigators to build a clear and prosecutable case."*

President Cyril Ramaphosa established the Investigating Directorate in terms of a proclamation by Government Gazette in Proc. 20 GG 42383 of 4 April 2019. The Investigating Directorate was established in the office of the National Director of Public Prosecution, in terms of section 7(1) of the NPA Act 32 of 1998.

According to the NPA's website, the independent Directorate was established "as an instrument in the fight against corruption".

To date, we have not seen many prosecutions from the Investigating Directorate. This could simply be because the Investigating Directorate was waiting for the report to be published by the State Capture Commission, the first part of which was handed to President Ramaphosa and released to the public on 4

January 2022, with the second part of the report handed over in 1 February 2022, and the final part of the report to be handed over at the end of February 2022. Another possible reason why the Investigating Directorate could be seen as ineffective to date could be that the Investigating Directorate is waiting for capacitation in terms of the provision of experienced investigators and prosecutors from the ranks of those that were employed at the State Capture Commission. However, there is some controversy surrounding the fact that the initial budget for the Investigating Unit was deemed by many to be wholly insufficient and that the ex-head of the Investigating Directorate, Advocate Hermione Cronje, was not in a position to employ those with the required skill set to investigate the complexity of the intricate schemes engineered by the architects of State Capture due to budget constraints and, potentially, due to some form of political interference.

With the release of part one of the report of the State Capture Commission, which makes several recommendations in respect of prosecutions and clawing back the misappropriated funds from the State coffers, one can only be hopeful that the Investigating Directorate now has the capacity, resources and willpower to begin the arduous task of prosecuting those implicated in State Capture. The appointment of a new head of the Investigating Directorate should happen as soon as possible; although, the sceptical among us could view this position as somewhat of a poisoned chalice. What is for certain is that, once the Investigating Directorate does gather momentum in investigating and prosecuting those implicated in State Capture, we cannot allow the Investigating Directorate to suffer the same fate as the Directorate Special Operations, better known as the 'Scorpions', and see political interference end the work of this young unit on which so much hope is pinned.

One of the recommendations that came out of the first parts of the report from the State Capture Commission was the establishment of 'a single, multi-functional, properly resourced and independent anti-corruption authority with a mandate to confront the abuses inherent in the present system'. That authority could be called the Anti-Corruption Authority or Agency of South Africa (Acasa) and could be modelled along the lines of the Competition Commission.[1] (Part 1 of State Capture Commission Report and News24.)

"President Cyril Ramaphosa established the Investigating Directorate in terms of a proclamation by Government Gazette in Proc. 20 GG 42383 of 4 April 2019"

This, in essence, sounds much like the previously established Anti-Corruption Task Team (ACTT) (which, although in existence, was sometimes somewhat of an informal collection of multiple law enforcement agencies), except for the part about 'independent' which would suggest that the State Capture Commission wants to see the establishment of a body free of political interference along the lines of a Chapter 9 organisation. The report suggests, "The agency or authority, like the Competition Commission structure, must include specialised departments with particular mandates but which collectively represent a comprehensive response to the challenges which arise".

I am of the opinion that the establishment of such an organisation is unnecessary and that the ACTT should be properly formalised, capacitated and have the Investigating Directorate as the lead investigation and prosecuting agency at the helm of the ACTT with support from other well-established crime fighting and intelligence gathering units, such as the Asset Forfeiture Unit and the Financial Intelligence Centre; with the addition of members from the Directorate of Priority Crime Investigation components of Crimes Against the State, Serious Economic Offences Unit, Serious Commercial Crimes Investigation Unit, Serious Corruption Investigation Unit; and prosecutorial support from the NPA's Specialised Commercial Crimes Unit. SARS, the South African Reserve Bank and the Companies and Intellectual Properties Commission should also be represented.

The most important aspect of the Investigating Directorate is that it should not be staffed by members seconded from other law enforcement agencies and the NPA. Also, the ACTT should not be the primary agency; rather the ACTT should be a multi-disciplinary support mechanism to the Investigating Directorate. Funds must be made available to the Investigating Directorate for the correct staffing and the provision of proper facilities. It needs to create its own unique identity and have access to whatever resources are needed. The Investigating Directorate has the opportunity to put the sting back in prosecutions and become the leading agency in South Africa in the prosecution of crimes that have directly impacted the public purse.

1 (Part 1 of State Capture Commission Report and News24.)

LIFESTYLE AUDITING IN THE PUBLIC SECTOR

▸ **GEORGINA NIVEN,** Consultant at FTI Consulting South Africa (Pty) Ltd

This article attempts to explain the status of the law on lifestyle audits and offers some suggestions on how lifestyle audits could be effectively implemented in the public sector.

Introduction

The introduction of lifestyle auditing as an anti-corruption tool within the public sector has gained steady momentum since President Cyril Ramaphosa took office in 2018. Lifestyle auditing is the process of comparing a person's lifestyle to his or her known income. Where this exercise identifies unexplained wealth, there is a heightened risk that the person is deriving income from illegal or compromised sources, such as fraud, bribery or collusion.

It is not difficult to see why this is a useful anti-corruption tactic. The central assumption is that wealth derived will be spent, meaning lifestyle auditing can work backwards from unusual wealth indicators (e.g. a luxury vehicle) to identify whether the wealth's source is legitimate.

The status of the law on lifestyle audits

The introduction of lifestyle auditing in the public sector has been driven by the Department of Public Service and Administration (DPSA). In its official publication, *the Public Servant*, the DPSA indicated that the Director-General of the DPSA approved a strategy and framework for the implementation of lifestyle audits in 2020. In Volume 17 of its quarterly bulletin, Pulse of the Public Service, the Public Service Commission (PSC) reported that lifestyle audits became compulsory for all national and provincial departments in April 2021. In Volume 18 of Pulse of the Public Service, the PSC indicated that lifestyle audits in the public service would commence in February 2022.

To assist departments, the DPSA issued the Guide to Implement Lifestyle Audits in *the Public Service,* June 2021 (the Lifestyle Audit Guide/the Guide). The Guide is designed to provide clarity on the roles and responsibilities of all those involved in lifestyle auditing and describe the lifestyle auditing methodology.

The exact basis upon which the DPSA has made lifestyle auditing compulsory remains somewhat unclear, as we identified no law, regulation or directive mandating lifestyle auditing in Government departments. However, the DPSA has indicated in the Lifestyle Audit Guide that the introduction of the mechanism is informed by the Public Service Act 103 of 1994 (PSA) and its accompanying regulations, the Public Service Regulations 2016 (PSRs). To illustrate: Regulation 22(a) of the PSRs requires that Heads of Department (HoDs) must analyse ethics and corruption risks within their department as part of the department's risk management system. Regulation 22(b) of the PSRs requires that HoDs must develop and implement an ethics management strategy that prevents and deters unethical conduct and acts of corruption.

The DPSA appears to have taken the view that lifestyle auditing, as a respected means of preventing and detecting risks of fraud and corruption, must be part of any department's risk and ethical management strategies. One would imagine that any failure to properly implement lifestyle auditing could be construed as a failure to adhere to the terms of the PSRs, which attracts disciplinary measures under section 16A of the PSA. It is unclear whether the DPSA has taken this stance based on the documents available to the public.

How lifestyle audits can best be implemented

As indicated above, the method by which lifestyle auditing is to be implemented is described in the DPSA's Lifestyle Audit Guide. The Guide envisions a three-tiered process, comprising lifestyle reviews, lifestyle investigations and lifestyle audits. A lifestyle review is the simplest intervention and involves building a profile of the employee based on the employee's assets, income, expenses and liabilities. It aims to identify any red flags which should be referred to in a lifestyle investigation. An investigation

appears to be a more intensive version of the lifestyle review. A lifestyle audit, according to the Guide, involves "the assistance of an auditor to identify assets that could clarify the unexplained wealth".

At this stage, it is unclear whether the DPSA's proposed strategy will be the most effective means of establishing lifestyle audits as the norm. One does not know the impact that lifestyle auditing will have, what challenges investigators will face, what difficulties departments will encounter, which legal consequences may arise and what Government will be able to furnish in terms of resources.

Nevertheless, there are several factors that, if present, are likely to support the successful rollout of the lifestyle auditing system.

Factor 1: Adequate access to information

A crucial aspect of any lifestyle audit is the recovery of adequate information on a person's assets, liabilities, income and expenses. It is very difficult to construct a comprehensive view of a person's financial profile. Much of the information is inherently confidential and cannot be recovered non-consensually without, for example, a subpoena.

Information gaps can distort an investigator's findings and have a considerable impact on the resulting recommendations. This carries several risks. Where investigators are consistently under-informed, they may recommend no further action where action is required or recommend further action where it is unwarranted. The former scenario risks undermining the process by failing to deliver on its core purpose. The latter scenario risks recruiting additional resource-intensive interventions without cause and may expose employees to an invasive and needless investigation.

Public sector lifestyle auditing will be significantly more effective if investigators are permitted a measure of access to as much information as possible in otherwise opaque areas. These include tax and banking records, trust data, indications of offshore assets and records of insurance policies. The degree to which cross-organisational knowledge-sharing is possible in the context of public sector investigations should be carefully considered and whichever arrangements can be made should be made.

"Public sector lifestyle auditing will be significantly more effective if investigators are permitted a measure of access to as much information as possible in otherwise opaque areas"

Factor 2: Strategic approach to employee disclosures

The Lifestyle Audit Guide already specifies that the initial stage of the lifestyle audit (i.e. lifestyle reviewing) involves obtaining 'a snapshot into certain aspects of the life of an employee'. Part of the review includes checking disclosures on the state's eDisclosure system; although it must be noted that not all employees are necessarily obliged to make annual disclosures. This obligation, which is permitted under Regulations 18 and 19 of the PSRs, rests on designated employees defined in the Directive on Other Categories of Employees Designated to Disclose their Financial Interests, 2019 (the Directive).

Nevertheless, the key takeaway in respect of this is that financial disclosures, although very useful, should be treated with circumspection. The primary reason is obvious: Employees who are deriving illicit income are very unlikely to declare it and may use the disclosure to present a seemingly reasonable financial profile. Furthermore, disclosures can cause a type of 'tunnel vision'. Investigators may become fixated on verification at the expense of forming an objective view on the subject. A practical suggestion in this regard is that investigators should first attempt to build an independent view of the person's profile and then look at the disclosure afterwards to ascertain further investigative leads and areas to explore.

Factor 3: Adequate protection for investigators

It is important to ensure adequate measures are put in place to protect investigators. This concern has become more pressing in light of attacks and assassinations of whistle-blowers and investigators in South Africa, with examples including the late Babita Deokaran (assassinated in connection with an alleged criminal syndicate at the Department of Health) and the late Lt-Col Leroy Bruwer (responsible for investigating high-profile rhino poaching cases). If investigators are placed at risk, it is certain to undermine the effectiveness of the process.

Factor 4: Respect for the presumption of innocence

According to the Guide, conducting such lifestyle audits will be informed, in part, by a whistle-blowing/tip-off system regarding an employee's lifestyle. It is easy to see how this could go wrong. Employees hoping to undermine, discredit or intimidate another employee may use the complaint function to expose that individual to unwarranted scrutiny. Needless to say, lifestyle auditing will not work if it becomes weaponised or exploited as an outlet for employees' jealousy, rivalry or dislike.

As such, all public sector staff (but investigators and ethics officers in particular) should be made aware that employees subjected to the process are presumed innocent. In other words, the parties involved in the investigation must assume from the outset that the employee's wealth is legitimate.

Regan van Rooy

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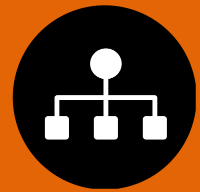

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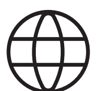
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How SARS leverages third-party data to track tax avoiders

JACQUES VAN WYK, CEO at JGL Forensic Services

This article delves into how SARS is now improving its ways of acquiring information on those who might be filing false reports.

Social media has long been a rich source of information for recruiters looking to find additional material to flesh out a hopeful candidate's bland or sanitised CV.

More recently, we have seen several high-profile incidents where it has been a treasure trove of evidential 'dirt' – historical posts and tweets have seen more than one sportsman or other well-known personality hauled over the coals for their questionable comments. And now it is set to become a happy hunting ground for investigators from SARS looking for evidence of individuals living lifestyles beyond their officially declared means.

Last year, legal tax expert Jean-Louis Nel warned high net worth individuals that splashing evidence of their wealth on their Facebook or other social media accounts could see them issued a one-way ticket to jail. A prime example of this was SARS' preservation order against luxury car-loving businessman, Thabiso Hamilton Ndlovu.

Thanks to recent amendments to section 234 of the Tax Administration Act 28 of 2011, it is easier than ever for SARS to conduct lifestyle audits via social media. If they suspect you might be living a lifestyle not in line with your officially declared earnings, they have the right to ask you to explain the apparent discrepancies.

The burden of proof then falls squarely on the shoulders of the taxpayer. In the case of Mr Ndlovu, red flags were waved at SARS when he flaunted his newly acquired luxury vehicles (valued at over R10 million) on his social media profiles. His ability to afford these vehicles clashed with the information supplied on his tax return. This triggered an investigation into his tax affairs that ultimately led to the matter being taken to court.

“Thanks to third-party data – which is readily available to SARS, courtesy of our love of social media, our addiction to all things online and a general impatience when it comes to reading terms and conditions – our spending habits are easy for SARS to track and analyse”

Decrypting cryptocurrency

Similar fates await those cryptocurrency traders who simply cannot resist boasting about their gains on social media. In fact, how to accurately tax crypto assets was one of the key items addressed at the 2021 South African Institute of Taxation (SAIT) Tax Indaba.

When it comes to finding evidence of taxation non-compliance, crypto assets complicate traditional investigation processes, such as lifestyle audits. Because it exists in a borderless, digital world, cryptocurrency is a headache for conventional tax jurisdictions, which are usually limited to federal or state governments. This makes issuing penalties more difficult.

I am completely in favour of crypto taxation, but until SARS uses relevant data and sets the necessary examples, people will continue to ignore its warnings. A tougher line, with active tracking and persecution of purposefully non-compliant individuals, would, I am convinced, nudge them to re-evaluate their position on the matter. Keith Engel, Chief Executive Officer at SAIT, says, “SARS is committed to getting third-party data from the more prominent crypto trading platforms. While SARS is getting this done, people think they can continue to get away with it, but they will get caught two or three years down the line”.

“If those individuals didn’t report the income, SARS can go back forever. When they get you, they will want the tax, plus interest and penalties. Then you’re really in trouble”, Engel added.

The devil is in the data

Of course, it is not just social media that can prove to be the undoing of those who willfully try to avoid meeting their full tax obligations. Information about our spending habits is, literally, everywhere. And while it is true that our modern, data-rich environment makes it easy to manipulate the facts to hide unethical practices, the flip side is that it is also easier than ever to track just about anything.

Thanks to third-party data – which is readily available to SARS, courtesy of our love of social media, our addiction to all things online and a general impatience when it comes to reading terms and conditions – our spending habits are easy for SARS to track and analyse.

They can view anything – from that new yacht you have moored in the Seychelles to your credit card transactions and foreign investments. How? They have access to the registers of the owners of aircraft and yachts and to the deeds registry so they can highlight multiple property ownership. They can dig deep into information stored by your medical aid providers, retirement funds, banks, the companies register, the national register of motor vehicles, and the national population register. They can even access information about your personal offshore transactions thanks to mutual information-sharing agreements with over 87 countries across the globe, in terms of the Common Reporting Standard.

So, if you have smugly been thinking SARS is just another state-owned dinosaur with no hope of ever having the smarts to mine all the data about you that is ‘out there,’ think again.

Digital transformation

Of course, having access to all this information is one thing; knowing what to do with it is another.

Once again, this is not an issue that should leave any tax-dodgers feeling safe. In the past few months, SARS has gone on a massive

▶ and intensive recruitment drive, aimed primarily at hiring data scientists to help them accurately analyse the abundance of third-party data at their disposal.

There is also an initiative to recruit veteran forensic auditors who have the skills to interrogate the data. This, says former SARS Acting Commissioner Mark Kingon, is a laudable step.

SARS is also investing millions in modernising and digitising its processes. In the SARS annual report, released towards the end of 2021, it stated that it had thoroughly reviewed its methodologies to better detect risk and highlight cases of non-compliance.
"SARS has significantly expanded the scope of detection, beyond data obtained through declarations, as well as the traditional third-party data received which enabled the pre-filling of PIT returns, as well as auto assessments," said the report.

In addition, examples of such data sources include historical data on compliance behaviour as well as data regarding financial flows and assets held both locally and abroad.

SARS also stated it has implemented several machine learning models that leverage multiple asset and income stream data sources to detect both non-declaration and under-declaration.

Much of this information is already being put to good use in the form of auto assessments.
An auto-assessment is the simulated outcome of the data obtained from third parties. SARS Commissioner Edward Kieswetter said that to date 83.2% of standard taxpayers (3.4 million people) have already received auto-assessments. All they must then do is click accept or edit.

"The effectiveness of this system is indicated by the fact that R1.55 trillion was collected via eFiling," he said.

Advice for taxpayers

So, what can taxpayers do if they have so far been a little economical with their tax declarations?

If you suspect (or know) that you have not been fully compliant, the best course of action is to immediately disclose all your earnings. If necessary, you can seek relief through the Voluntary Disclosure Programme (VDP).

But this has to be done before SARS decides to audit your lifestyle using third-party data. Once notification of a possible audit has been received, the VDP is no longer an option.

But is all this effort simply to put more money in Government's coffers? Some would say that all this does is line greedy pockets even more thickly, with little discernible benefit for the man on the street.

A hard-core clamp down on tax evasion is a powerful weapon in the ongoing fight against corruption in our country.

Mr Kingon confirmed that, so far, SARS has handed over 500 cases of tax avoidance or evasion to the NPA for prosecution – this includes cases identified from the Zondo Commission.

Tax evasion is a natural by-product of corruption – if you steal state funds, you are hardly likely to declare your ill-gotten gains to SARS. As well as bringing in more revenue, investigating the tax side of corrupt activities often then leads to convictions for the activities themselves. It is something we in the industry like to refer to as the Al Capone strategy.

"SARS is committed to getting third-party data from the more prominent crypto trading platforms. While SARS is getting this done, people think they can continue to get away with it, but they will get caught two or three years down the line"

Naturally, as with any tool used in the fight against corruption, third-party data must be used in strict accordance with its governance framework when choosing which taxpayers to target. Anything else will simply further erode levels of taxpayer morality. To quote Mr Kingon, "SARS must reek of integrity, even when it comes to delinquent taxpayers".

And thanks to amendments to the Income Tax Act, the definition of a delinquent taxpayer has been expanded to include not just intentional evasion, but also negligent non- compliance. This gives SARS more authority than ever before to identify, find and prosecute all those who do not pay every cent of tax they owe. It is a stark warning to everyone – do the right thing and pay your taxes. Because SARS is coming for you.

THE NEVER-ENDING SAGA OF VAT FRAUD

▶ **VICTOR TERBLANCHE,** Managing Director at VAT IT SA and SAIT VAT Chairman Committee

The Managing Director of VAT IT SA takes us through VAT fraud in South Africa and the impact on SARS, including legislative amendments and how SARS is combatting VAT fraud.

VAT fraud remains a major concern for SARS. Fraud does not only impact the national fiscus but also the livelihood of all South Africans. SARS has imposed certain legislative and administrative rules to prevent fraud (such as rules relating to substantiating documents) and has intermittently sought to control VAT fraud through limiting VAT registrations, blocking or delaying refunds, and more frequent verification and audit engagements. This article explores the current concerns about VAT refunds and whether the current methods are hitting the mark.

> *"Due to the common occurrence of VAT fraud, SARS is sometimes obliged to take drastic measures to combat this crime. These measures may take the form of administrative policies or legislative amendments"*

What is VAT fraud?

VAT fraud is a type of tax evasion whereby a taxpayer intentionally and willfully obtains undue refunds from SARS or reduces its liability outside the parameters prescribed within the legislation.

Tax fraud is a serious crime and manifests in many forms. Here are some key examples:

- Collecting VAT from clients but not declaring the income on returns.
- Declaring fictitious expenses or zero-rated sales on returns to reduce the tax payable or to obtain an undue refund.
- Charging and collecting VAT from clients without being registered.
- Not responding truthfully to verifications and audits conducted by SARS and thereby obtaining an undue VAT benefit.
- Creating, amending or falsifying documents (both sales and expenses) in an attempt to pay less tax or obtain undue (fraudulent) refunds.
- Not registering for VAT to do so when compelled in terms of the law to evade paying their dues.

Fraudsters are constantly developing new schemes to steal money from the fiscus. National Treasury together with SARS must monitor and remedy these situations by introducing either supplementary legislation or administrative policies.

How does VAT fraud occur?

Even though most taxpayers are honest and file compliant VAT returns, fraud is widespread and common. Combatting fraud is a real challenge.

VAT fraud sometimes occurs in the simplest ways. For example, a vendor may request a cash payment from a client and not declare the sale in a return. However, VAT fraud can also occur on a larger scale where fake companies are registered for VAT, and fraudulent refunds are claimed. Unfortunately, there were instances recorded where this occurred with the assistance of corrupt SARS officials, which makes it a greater challenge for SARS to combat.

There are also instances where tax practitioners are involved in tax fraud without the knowledge of their clients. For example, a client's bank details are changed by the tax practitioner to channel undue refunds for their benefit.

What is SARS doing to combat VAT fraud?

Due to the common occurrence of VAT fraud, SARS is sometimes obliged to take drastic measures to combat this crime. These measures may take the form of administrative policies or legislative amendments.

Administrative policies

Administrative policies include the ease of reporting fraudulent transactions through the SARS website whereby anyone can report suspicious activities. The online form is easy to complete and requires basic information to be submitted to report criminal activity.

Report a tax crime | SARS (sars.gov.za)

Other channels are also available to report suspicious activity in a state department or state-owned entity, where the person reporting the crime does not want to engage the state-owned entity directly.

For example, a SARS official is suspected of being involved in criminal activity and the person wishing to report the crime does not want to engage with SARS directly.

How do I report fraud or corruption in a state department or state-owned entity? | South African Government (www.gov.za)

SARS conducts regular verifications and audits to ensure that taxpayers are correctly declaring their VAT liabilities. Even though this is an effective way to identify potential fraud, it can sometimes be frustrating and time consuming and can result in financial hardship for compliant taxpayers as South Africa does not currently have legislation in place to enforce specific turnaround times for the conclusion of these investigations.

The SARS eFiling platform is also designed to identify risk when a return is submitted and may flag suspicious declarations for verifications or audits. Together with the technology used by SARS Customs and Excise, fraudulent import and export transactions can be easier identified and investigated. Electronic technology is contributing greatly to the eradication of tax fraud and will certainly play a major role in the future.

Generally, tax practitioners are obliged to be registered with SARS and be a member of a qualifying controlling body that regulates the profession. Unethical tax practitioners can be reported to SARS or their respective controlling bodies. This ensures that all tax practitioners are held accountable and possess the necessary skills and expertise to handle the tax affairs of their clients.

The TAA also makes specific provision for criminal offences in chapter 17, which may result in a fine or imprisonment. Prosecution under this section is not limited to the taxpayer but also includes any person who intentionally evades or assists another person to evade tax. Only a senior SARS official may lay a complaint with the South African Police Service or the National Prosecuting Authority for evasion of tax and obtaining undue refunds by fraud or theft.

SARS has been very successful in combatting fraud and the following examples are evidence that not only are taxpayers prosecuted but also SARS officials and tax practitioners:

- Businessman gets five-year jail term for VAT fraud | SARS (sars.gov.za)
- SARS warns about fraudulent refund scams | SARS (sars.gov.za)
- SARS concerned as another tax practitioner sentenced for VAT non-compliance | SARS (sars.gov.za)
- Long arm of the law nabs fraudsters after eight years on the run | SARS (sars.gov.za)
- VAT fraudster sentenced to 15 years imprisonment | SARS (sars.gov.za)
- KwaZulu-Natal VAT vendor imprisoned for seven years for VAT fraud | SARS (sars.gov.za)
- The arrest of SARS officials for alleged corruption | SARS (sars.gov.za)

Legislative amendments

It is often necessary for National Treasury and SARS to amend legislation to combat fraud. The most recent example of a legislative intervention is a proposed amendment to the VAT Act of 1991 to curb fraudulent activities in the supply of second-hand goods in the gold industry. A Domestic Reverse Charge Mechanism (DRCM) was proposed to curb VAT fraud schemes in terms of section 74 of the VAT Act. The policy objective of the DRCM is an anti-abuse measure aimed at removing the opportunity for fraudulent vendors to re-characterise gold and goods containing gold, which historically resulted in large amounts of VAT refunds being fraudulently extracted from the fiscus.

2021100601 Draft em on draft regulations on domestic reverse charge on valuable metals.pdf (treasury.gov.za)

Various amendments to section 16 of the VAT Act have also been promulgated in the last five years to ensure that documentary requirements are clearly defined to avoid situations where taxpayers are claiming input tax deductions that cannot be substantiated. To this effect, SARS issued Interpretation Note 92 which provides a detailed listing of the specific source documents required for certain transactions, for example, insurance indemnity payments made by insurers, input tax deductions relating to betting transactions and input tax deductions in respect of second-hand goods.

LAPD-IntR-IN-2016-06-IN92-Documentary-Proof-Prescribed-by-the-Commissioner.pdf (sars.gov.za)

SARS also issued Interpretation Note 30 to explain the requirements that need to be adhered to where movable goods are exported. A zero-rated sale often results in a taxpayer receiving refunds from SARS as they are generally still entitled to claim input tax deductions that relate to their enterprise activities. This is often a target for fraudsters to obtain undue VAT refunds. This Interpretation Note provides clarity in respect of both the qualifying criteria for a zero-rated export together with the documentary proof required to substantiate the export.

Tax fraudsters sentenced in high court | SARS (sars.gov.za)

Balancing the impact of fraud with delaying compliant VAT refunds

The office of the Tax Ombud released its eighth anniversary report in October 2021 in which the top 10 most common complaints by taxpayers against SARS were noted: *Fair Play 22 Anniversary edition.pdf (taxombud.gov.za).*

At least seven of the 10 complaints related to potential cash flow implications for taxpayers either: as a result of refunds not being paid timeously; unwarranted stoppers placed on refunds; refunds being recalled after payment; bank details having to be verified before releasing refunds; over deducting payments from bank accounts; not receiving outcomes of objections; or SARS not finalising disputes within the legal time frame.

It is evident that there is a huge impact on taxpayers if they operate within the framework of the law and are jeopardised by not receiving their refunds. Vendors, irrespective of the size of their operations, are dependent on cash flow to ensure their overheads can be covered, especially in the trying economic climate we are experiencing globally. A delayed VAT refund may result in the collapse of many businesses.

Multiple factors result in VAT refunds for taxpayers, for example, decrease in sales, zero-rated sales, seasonal fluctuations of stock purchases and sales, acquisition of assets and capital expansion. Many of these variants occur at specific time intervals which can in some instances be pre-empted by SARS by monitoring a taxpayer's VAT returns. For example, a taxpayer who makes only zero-rated supplies will be in a VAT refund position every time a return is submitted.

Even though SARS has made progress in expediting VAT refunds, taxpayers are still subjected to verifications by SARS whenever a return for a refund is submitted. As this is a cash outflow for the fiscus, it is imperative that utmost care must be taken to avoid unscrupulous fraudsters from obtaining refunds; but it must also be balanced not to jeopardise the existence of businesses conducted by honest taxpayers.

What exasperates the situation is the lack of legislation to compel SARS to release a refund within a given time frame. This sometimes results in SARS holding back refunds that are not subject to verification or not releasing refunds that have already been verified. Even though the VAT Act makes provision for SARS to pay interest on delayed refunds after 21 days of submitting a return, in practice, this is often not paid, and the taxpayer must then submit a written request for interest.

The current provisions in the VAT Act makes it more challenging for a taxpayer to receive interest on delayed refunds as there are various requirements before interest can be paid, for example, a return is incomplete or defective, outstanding returns for other taxes administered by SARS and not furnishing bank details. These requirements are not aligned with other taxes administered by SARS and therefore place an additional burden on VAT vendors. Amendments have been drafted to align the VAT Act with the TAA, however is still to be promulgated. This will even the playing field for VAT vendors and at least compel SARS to automate interest calculations on delayed refunds which should result in improved turnaround times to release refunds.

Fraud remains a big problem for all South Africans, and it can only be combatted if everyone takes responsibility to fight this crime.

UNCOLLECTED PAYROLL TAXES – CAN WE REALLY ALLOW THIS FAILURE TO CONTINUE

▶ **DUMISA SIHAWU**, Head of Global Employer Services at BDO

Does the public fully know the importance of tax or what it is used for? In this article, we look at the ripple effect of not paying taxes. We discuss in detail the importance of PAYE to the state and why companies and individual taxpayers must comply.

It is a fact that the collection of taxes is the most critical function of a state. Without taxes, countries would be plunged into debt and unable to provide basic services to their citizens. Therefore, the timeous, effective and efficient collection of taxes is not negotiable.

However, regardless of the above, we have seen several times where taxes, especially PAYE which is withheld from employees by employers, have not been paid over to SARS. This includes not only the private sector but also some State-Owned Entities (SOEs) as well as other organs of the state. This cannot be an acceptable practice and it is imperative for SARS as well as National Treasury (by means of tightening legislation) to institute measures to put a stop to it.

Importance of PAYE to the state

Former Minister Mboweni estimated that, in the 2021 financial year, SARS would collect an amount of R1.2 trillion. Of this estimate, Personal Income Tax, which is mostly collected via the PAYE system, accounts for approximately 39% of the collections as reported by SARS on 1 April 2021. This means PAYE is the majority contributor to South Africa's tax collection.

As a result, focus and measures need to be put in place to ensure that employers fulfil their obligation of withholding PAYE and timely paying it over to SARS as mandated by law.

The reasons for the failure to pay over PAYE by employers

Over the past year, I have seen various employers not paying over PAYE to SARS, either timely or in full. This puts a lot of pressure on the tax collections for SARS.

"As a result, focus and measures need to be put in place to ensure that employers fulfil their obligation of withholding PAYE and timely paying it over to SARS as mandated by law"

In some instances, the employer withholds the PAYE from the employees, say on the fifteenth of the month when the employees are paid their salaries. This PAYE withheld would then be kept in the normal company bank account and used for the day-to-day running of the company's business because it is only due on the seventh of the following month. However, the risk of this is that the revenue expected by these employers from their day-to-day running may not be received on time to make the payment to SARS.

Case in point, a recent High Court decision (*PERI Formwork Scaffolding Engineering (Pty) Ltd vs CSARS* (a67/2020) ZAWCHC) dealt with exactly this matter. The employer withheld PAYE and did not keep it in a separate account, instead using it for their day-to-day business. They had relied on revenue to be received from a customer to make the PAYE payment. Unfortunately, this was not the case and they had to request funds from group companies and an overdraft to make the payment which resulted in late payment of the PAYE amount.

Other times, when employers are experiencing hardships, they also tend to use this PAYE amount to pay creditors to meet their repayment obligation which means they may pay late or not be able to pay the PAYE due to SARS.

These are just some of the problems facings SARS when it comes to employers paying over the PAYE withheld to SARS. Employers are meant to be an agent for SARS to withhold this PAYE from employees' earnings and pay this over to SARS.

What are the measures to put in place to ensure compliance?

PAYE is a self-assessment type of tax, meaning that SARS has no visibility as to whether the amount submitted in a monthly return and paid over to SARS is indeed correct. The reason being is that each employee has a different tax rate and therefore it would be an administrative nightmare for SARS to try and police the calculation of PAYE.

Yet, there are two means I can suggest for SARS to ensure compliance and timely payment of PAYE:

1. Similar to the income tax return, SARS can request that the employer submit a monthly payroll report summary to support the PAYE amount included in their monthly tax returns.
2. Where an employer is registered and a return is not submitted, in terms of the Tax Administration Act, they should issue a timely (monthly, if necessary) estimate PAYE assessment based on an average using a period of three to six months, whichever is deemed to be fair and based on the size of the organisation.

Conclusion

I have also noted that unlike some 10 years ago where SARS used to issue a detailed questionnaire every five years to an employer to conduct a risk assessment of whether they need to audit the employer or not, this has since disappeared. We understand this may no longer be possible, taking into account the number of employers and possible staffing challenges SARS may be facing. Yet, it may be prudent that SARS requests employers to provide an independent PAYE review report detailing the methodology followed as well as the findings and what measures were taken to rectify any areas of non-compliance.

Tax avoidance versus evasion – WHO GOES TO JAIL?

▶ **SUZANNE SMIT,** Fiduciary and Tax Consultant at Fidelis Vox (Pty) Ltd

Remember in school when you got half a mark for an answer in an exam or test? The answer was not completely correct but neither was it incorrect. People prefer to be either right or wrong, but in between is a precarious place to be, with uncertainty hinging on it.

In the Organisation for Economic Co-operation and Development's (OECD's) glossary of terms, (tax) avoidance[1] is "difficult to define but … generally used to describe the arrangement of a taxpayer's affairs that is intended to reduce his tax liability and that although the arrangement could be strictly legal it is usually in contradiction with the intent of the law it purports to follow".

Similarly, (tax) evasion is, "generally used to mean *illegal arrangements* where liability to tax is hidden or ignored, i.e. the taxpayer pays less tax than he/she is legally obligated to pay by hiding income or information from the tax authorities".

In addition to tax avoidance and tax evasion, tax jurisdictions also apply general anti-avoidance rules (GAAR) adopted into domestic tax laws to ensure that arrangements or transactions entered into are not in contradiction with the intent of the law.

Between tax evasion and tax avoidance, may I do tax planning?

Taxpayers may do tax planning but not for the sole purpose of avoiding tax, and it applies to corporate and individual taxpayers alike. Governments provide for tax incentives to stimulate economic growth and attract specific investments based on economic policies and objectives.

1 https://www.oecd.org/ctp/glossaryoftaxterms (Date of access: 18 January 2022)

As an example, South Africa has been providing for Research and Development (R&D) tax incentives since 2006 in terms of section 11d of the Income Tax Act 58 of 1962 (the Act) to encourage South African companies to invest in scientific or technological R&D. Similarly, section 12J of the Act was introduced in 2008 to motivate venture capital companies with specific tax incentives when investing in start-up companies.

The latter incentive, however, ended at the end of June 2021. Unfortunately, this was one example whereby certain taxpayers applied aggressive tax planning which went against the intention of the specific incentive.

This does not mean that taxpayers may not arrange their affairs effectively, while ensuring that fair taxes are paid. Tax planning should, however, be based on black-letter law, taking the specific explanatory memorandum, SARS publications and available case law into account. Although SARS publications, such as interpretation notes and guides are not promulgated into law, it communicates how SARS views a specific section. Other SARS publications, such as Binding Private Rulings, should also be considered; and, although it is only binding on the specific taxpayer and transaction, it serves the same purpose.

When doing tax planning, black-letter law, tax residency, commercial rationale and the taxpayer's financials are vital elements to consider together with substance over form. The latter means that whatever the planning consists of should be commensurate with the intended business and/or intended purpose. This

"Taxpayers may do tax planning, but not for the sole purpose of avoiding tax, and it applies to corporate and individual taxpayers alike"

should also then translate into the financials and essentially the taxpayer's tax return.

For example, should a company be set up offshore for offshore business interests, the expenses, staffing, assets and operations of the offshore company should be proportionate to the actual business being conducted. It cannot serve as a smokescreen to conceal income received. Even more so, when international tax planning is considered, one should ensure that the specific jurisdiction's tax laws, the specific double-tax agreement (DTA) and best practices and guidance per the OECD should be followed.

The days of taxpayers wanting to conceal income in the setup of offshore entities are long gone. With the exchange of information between tax authorities in terms of the Common Reporting Standard (CRS) and the United States' Foreign Account Tax Compliance Act (FATCA), which is facilitated by financial institutions, transparency is top of mind when it comes to tax planning. In addition to CRS and FATCA, financial institutions globally apply stringent anti-money laundering and Know-Your-Client (KYC) measures. Blacklisted entities not applying CRS, FATCA, AML and KYC should be avoided at all costs if sound tax planning is considered.

What about GAAR?

Ultimately, when tax planning is done, certain taxes could be legally avoided. Aggressive tax planning, however, resulting in harmful tax practices is not advised.

The IMF[2] states that the fundamental purpose of GAAR is to "stamp out unacceptable tax avoidance practices".

GAAR is applied by tax authorities worldwide via its domestic tax legislation. South Africa's GAAR primarily intends to avoid impermissible tax avoidance and is promulgated in sections 80A to 80L in the Act. Section 80A specifically states that "an avoidance arrangement is an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit".

In addition, Section 80L defines an 'arrangement' as "any transaction, operation, scheme, agreement or understanding (whether enforceable or not), including all steps therein or parts thereof". This is rather widely defined and should be carefully considered when tax planning in South Africa is done.

Conclusion

Taking tax planning and GAAR into account, the tax world has moved on from secretive entities in jurisdictions where the beneficial owner cannot point it out on a map or has not even physically been.

If the taxpayer had to write that school exam, tax evasion as an answer would have a big, red cross behind it. It is a criminal offence in South Africa; and, with the fiscus being cash-strapped, the taxpayer would need a good reason to not go to jail for it or at least be heavily penalised with interest.

Contrary to tax evasion, tax avoidance hinges on half a mark if not carefully considered. If a taxpayer wants to have peace of mind, GAAR and 'substance over form' should be applied. If the tax planning is robust and underpinned by sound reasons, then the tax authorities should have no reason to give a full mark for it, provided that the two elements are satisfied and SARS collects its fair taxes.

2 Tax Law IMF Technical Note, Volume 1, 2016 by Christophe Waerseggers and Cory Hellier

WEALTH HIDDEN OFFSHORE – WHAT TO DO?

CAOILFHIONN VAN DER WALT, Managing Partner at Regan van Rooy

A recurring global issue is the vast amounts of wealth held offshore in secret trusts, foundations or other undisclosed entities. Assuming all these efforts are illegal, the question is how easy is it for SARS to pick up this non-disclosure, and how effective has the cross-border sharing of information been? This article answers these questions and a few more you might have.

One phrase sure to send a shiver down the spine of any tax practitioner worth their salt is 'but how will SARS know?' Some taxpayers seem to think that SARS is entitled to tax whatever is in South Africa but nothing that remains offshore, no matter where the funds arose or how they were squirreled away. So, the attitude is sometimes: 'render to SARS the things that are SARS' and the rest is all mine'. The same taxpayers may then complain about the level of information requested from their offshore banks or financial advisors and the hassle of the Know-Your-Client (KYC) or Source of Funds questionnaires when they try to set up an offshore account, trust or entity, without ever considering why this information is requested and where it might go.

SARS is not Caesar, and we are no longer in ancient times. We live in a world of unfettered access to global information, in tandem with unprecedented levels of information requirements from financial service providers and crackdowns on jurisdictions who do not comply with the increased regulations and KYC requirements. Thus, anyone who thinks that 'SARS will never know' is an adequate defence for not declaring offshore income could be in for a world of pain.

At the risk stating the blooming obvious, South African residents are taxable on their worldwide income and are thus legally obliged to disclose even their international assets and income streams, and to pay tax thereon. And any undeclared tax can be subject to serious penalties (up to 400% at worst) and interest and even result in criminal sanctions. It has also never been easier for SARS or indeed for any tax authority to obtain information on taxpayers' assets and income streams globally.

Thus, our recommended policy with any tax planning is – assume SARS will know everything and plan accordingly. The financial and personal risk, in terms of penalties and interest, the underpaid tax, the huge costs, and personal hassle of a large SARS audit are too big to live with.

"Anyone who thinks that 'SARS will never know' is an adequate defence for not declaring offshore income could be in for a world of pain"

What is SARS doing?

There certainly seem to be some pots of wealth established by South African residents in offshore jurisdictions and are treated as personal piggybanks magically untouchable by any tax man. Many of these were established using post-tax South African income (so far so good) but taken offshore through a bending of the South African Reserve Bank (SARB) rules on, for example, travel allowances and then invested in foreign accounts. Again, the fact that the originating funds may have been taxed initially in South Africa does not mean that no South African tax is payable on the subsequent growth or ancillary income streams to say nothing of the implications for possible SARB infringements. For example, 'buying' people's unused travel allowances and investing the funds offshore rather than returning them to South Africa as required.

SARS is certainly trying to attack such arrangements, as we have seen in their many recent 'crackdown' announcements: their voluntary disclosure programmes; the establishment of the specialist high-tax unit; and their recent out-reach to expatriates who have tax emigrated from South Africa requesting further information.

Perhaps more nefariously, there are those who think – and the author is among them in paranoid moments – that the recent abolition of the loop structure prohibition (i.e. where now South African residents can hold South African assets via an overseas structure) is a kind of a Trojan horse for SARS to obtain information on existing offshore structures they previously knew nothing about precisely to attack them. We know that many taxpayers have rushed to implement loop structures, sometimes using their existing offshore structures (or new structures funded by them) to purchase the South African assets, and merrily disclosing the whole transaction to the SARB, as there are heavy compliance requirements for loops. In many instances, taxpayers can thus end up disclosing information to SARS on a silver platter which can then be used to raise a painful audit. Verily, when it comes to loops, we have seen that fools sometimes rush in where the wiser (if not angels) fear to tread!

So, how can SARS get information on offshore assets?

For those who think SARS have no way to identify their offshore stashes, today we discuss some of the key weapons that SARS has in its arsenal to identify offshore income or assets owned by South African residents, namely:

- Double Taxation Agreements (DTAs)
- Multilateral Mutual Administrative Assistance Conventions / Agreements (MAA)
- Bilateral Tax Information Exchange Agreements (TIEAs)
- The Common Reporting Standard (CRS)
- The Foreign Account Tax Compliance Act (FATCA) Intergovernmental Agreement

DTAs

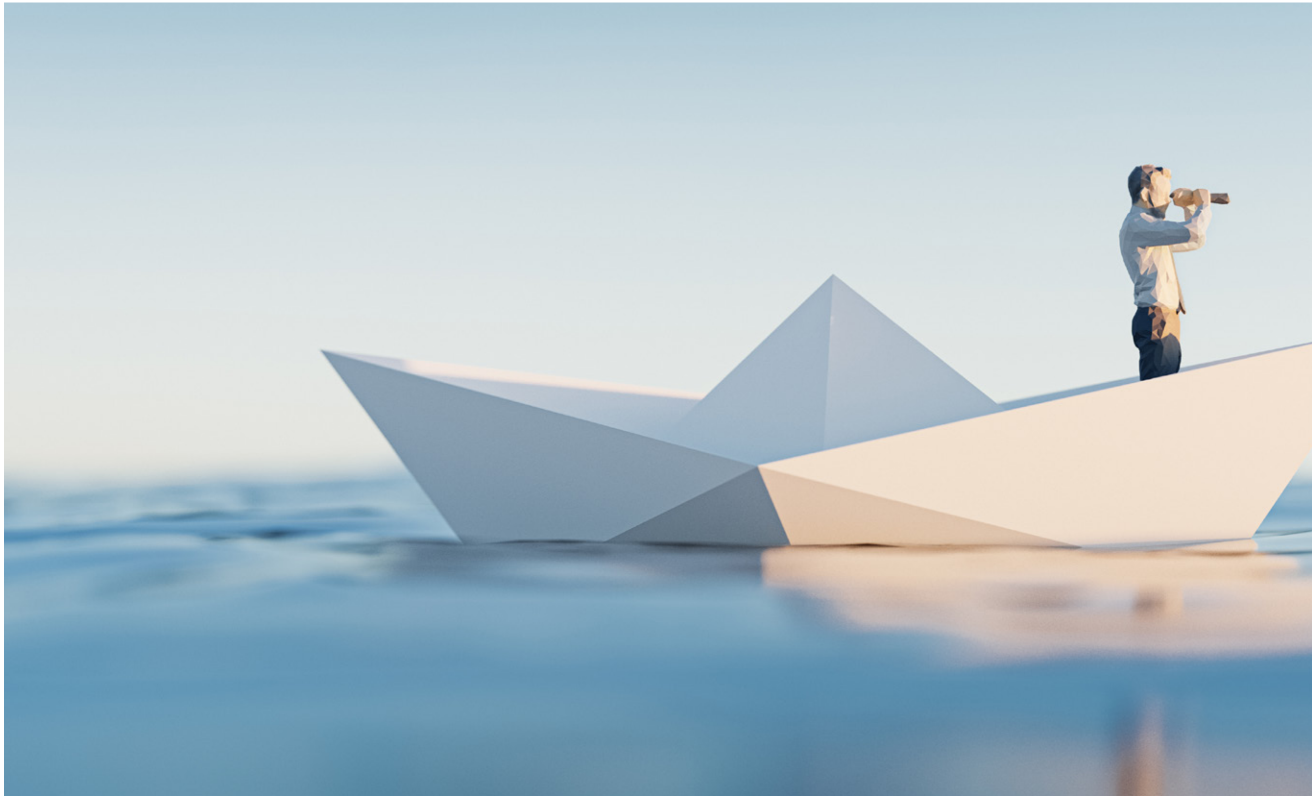
We all know a DTA is a bilateral agreement between two states, generally to mitigate against double taxation. However, most DTAs also contain an exchange of information article which provides that the tax authorities can freely share relevant information regarding a particular tax matter or taxpayer, although the Organisation for Economic Co-operation and Development (OECD) commentary is clear it cannot be used for a 'fishing expedition'. SARS now has 76 DTAs which contain this exchange of information clause; so, if a South African resident has disclosed anything to the tax man in the other country, SARS can see it.

MAA

In March 2014, the Convention on MAA came into effect for South Africa. This was developed in 1988 by the OECD and the Council of Europe to assist with international co-operation between states in relation to collection and assessment of taxes. To date, over 140 countries have signed the MAA; so, once SARS spots the underpaid tax it can use the MAA for assistance in collecting it from the other country.

TIEAs

In April 2002, the OECD developed the TIEA framework to enable jurisdictions to exchange tax information on request. To date, South Africa has over 20 TIEAs in force.



CRS

Perhaps SARS' main weapon now is the CRS, which may sound anodyne but is an immensely powerful tool with the primary purpose of combating tax evasion, which requires banks and other financial institutions to collect information on all their accounts and share this with all countries who have signed up to CRS. This is an automatic exchange of information standard (SARS does not even have to ask for information!) that was developed and approved by the OECD in July 2014 and well over 100 states have signed up to date. In essence each bank in one of these countries must annually collect very detailed information from all their accounts (including where the ultimate beneficiaries are tax resident) and share this with their government; the government then consolidates and shares the information with all the other signatories. South Africa has been a signatory since 2016, and this means that unless your money is not in a bank or other financial institution (perhaps a large mattress in Bermuda or in cryptocurrency which is a topic of discussion for another day) the chances are that SARS has information on it. It is time to remember all the annoying forms you had to fill out for your bank or investment advisor and consider how you would feel if SARS could see these.

FATCA

The US has nonetheless developed an alternative to the CRS, namely the United States of America Foreign Account Tax Compliance Act (FATCA). This is basically a way for the US to track all foreign accounts held, directly or indirectly by US tax residents to identify any tax evasion, and South Africa has been a signatory since 2014. While this is driven by the US to combat US tax evasion, South Africa has also recently joined forces with the Internal Revenue Services to prevent tax evasion in either country and significant information is shared both ways.

But will prescription not help?

Many South African tax residents place great reliance on the prescription period of three years i.e. if you have been doing something potentially naughty but more than three years have passed since the relevant tax period, then SARS can no longer query and you have a free pass. This prescription only applies where the tax return has been completed entirely and accurately. In cases where there is fraud, misrepresentation or non-disclosure, the prescription period does not apply at all.

> *"South Africa has been a signatory [of the FATCA] since 2016, and this means that unless your money is not in a bank or other financial institution the chances are that SARS has information on it"*

This position was further substantiated by the recent *CSARS vs Spur Group (Pty) Ltd* case, where the courts held that the tax returns were not completed accurately and as such SARS did not have the correct information to be able to evaluate the case and so prescription did not apply.

So, if overseas income assets have not been disclosed correctly in your returns, all previous periods are still fair game for SARS.

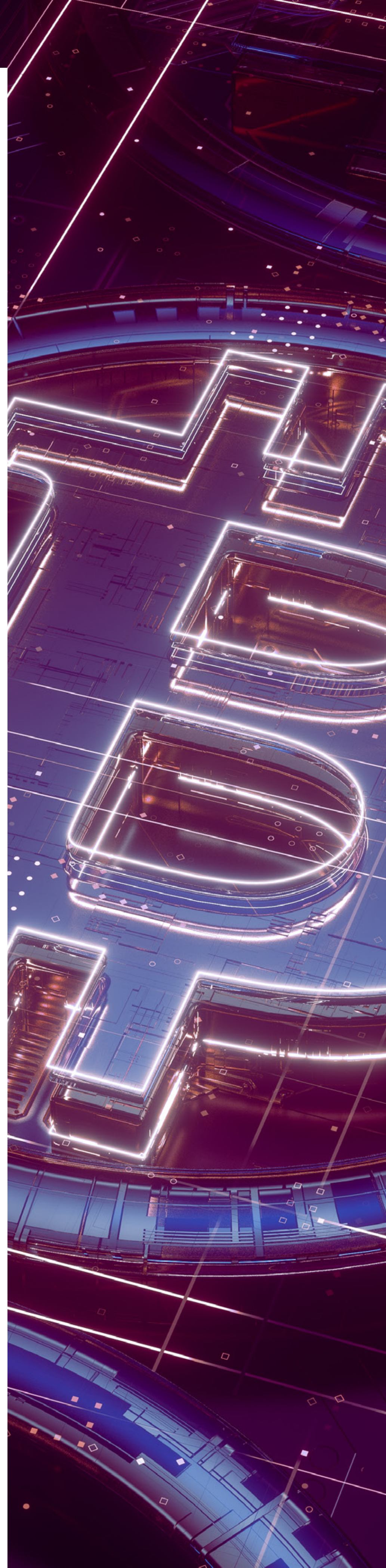
How is SARS fairing?

We all know that SARS has a resource shortage, but it also has a funds shortage; it is clearly looking at offshore wealth to close the gap. So, the limited resources are being deployed there.

SARS Commissioner Edward Kieswetter recently discussed their progress, saying that through the automatic exchange of information tools, SARS has detected over 270 taxpayers with assets in the so-called tax havens and have achieved over 70 convictions. Certainly, enough to whet the appetite! This should be a warning to taxpayers that SARS is committed to ensuring tax compliance and has multiple mechanisms in place to attack any offshore planning – essentially there is nowhere to hide from the long arms of SARS.

CRYPTO

– THE DARK MATTER FOR TAX AUTHORITIES



▸ **THOMAS LOBBAN,** Legal Manager: Cross-Border Taxation at Tax Consulting South Africa

Many small investors in crypto view this 'electronic space' as a free-for-all. This article explores the theoretical triggers for taxation and the growing risk of detection.

In scientific terms, dark matter is an enigma; it cannot be directly observed but we know it is there. The concept of dark matter has gripped scientists for years and, yet, the more they learn, the more complex it seems to become.

A little closer to home, most of us have become familiar with terms like 'crypto asset'. Generally, a crypto asset can be understood as a digital representation of value on an electronic distributed ledger, often referred to as a 'blockchain'.

Crypto assets can be developed for a specific purpose, for example, an alternative for peer-to-peer exchange. However, given their nature, they can also be exchanged for different purposes, such as trading stock or collateral in respect of a loan. There is no physical representation of crypto assets but they exist.

With the increasing adoption of crypto assets in South Africa and the world at large, so too does a problem arise – the tax implications of transactions involving crypto assets (as well as SARS' position on and approach thereto) are still not commonly understood. However, these are still subject to the same tax rules that govern financial instruments as contemplated in the Income Tax Act 58 of 1962 (the Act) as well as the provisions of other tax acts.

When to consider the tax implications

In determining the correct tax treatment of crypto asset transactions, one should first have regard for the definition of 'gross income' in terms of section 1 of the Act, being "the total amount, in cash or otherwise" derived by a resident taxpayer (or from a 'source within the Republic' for a non-resident). This excludes amounts that are capital in nature. Therefore, the proceeds of a resident taxpayer from crypto asset transactions will fall into their gross income, unless capital in nature. ▸

"SARS is not turning a blind eye to crypto assets, and one should not merely hope that SARS will not take enforcement measures against a delinquent taxpayer or errant tax practitioner"

- Irrespective of whether a taxpayer has liquidated their crypto asset holdings or withdrawn any cash from a crypto asset platform, if an amount has been received by or accrued to the taxpayer, it is subject to tax. Examples include a swap of crypto assets in exchange for other crypto assets or goods/services (i.e. barter transactions), the sale of crypto assets for cash (i.e. local or foreign currency) and rewards in the form of crypto assets (such as from 'staking', 'interest' and 'mining rewards').

It is crucial, then, to consider whether the amount is capital or revenue in nature. This must be determined on a case-by-case basis and in view of the relevant case law. Per the Supreme Court of Appeal in *CIR vs Pick 'n Pay Employee Share Purchase Trust 54 SATC 271*, there is "no single infallible test of invariable application". The intention of the taxpayer must be objectively viewed against all the facts and circumstances present in each case.

Where the amount is considered to be capital in nature, in the absence of a deeming provision, tax will arise in respect of a disposal in terms of the Eighth Schedule to the Act. Conversely, a revenue amount would fall into the gross income of the taxpayer with the applicable exemptions, deductions and rebates thereafter applied.

The 'head in the sand' approach cannot work

Taxpayers and tax practitioners could find themselves ill-prepared for the exercise of ascertaining whether amounts derived from crypto asset transactions are capital or revenue in nature, and then determining the taxable income, along with the evidence-gathering steps necessary for compliance purposes. The question may be raised as to whether SARS would even know if no disclosure was made.

While one may perhaps have a certain degree of leniency from SARS where non-compliance is voluntarily rectified, this expectation cannot be had where one merely sticks their head in the sand. SARS is not turning a blind eye to crypto assets, and one should not merely hope that SARS will not take enforcement measures against a delinquent taxpayer or errant tax practitioner.

SARS has included crypto assets in the ITR12 tax return form. Certain taxpayers' returns for the 2020 year of assessment were subject to SARS verification requests for information on their crypto assets (with no disclosures relative to crypto assets made in the returns). In the 2022 tax year, SARS sent a request to South African crypto asset service providers (CASPs) for information on a number of customers in terms of section 46 of the Tax Administration Act (TAA).

SARS' scope of investigation and enforcement is not limited solely to the borders of South Africa either. The Common Reporting Standards (CRS) regulate the exchange of information between financial institutions and revenue authorities, such as SARS, worldwide. South Africa also has various tax treaties in place with other countries, which make provision for the exchange of information between revenue authorities upon request as well as assistance with the cross-border collection of tax.

Digital, largely borderless breadcrumbs can be followed by SARS in an audit, such as a bank account transfer to or from a crypto asset platform, social media posts, or Know-Your-Client information held by a platform. We have seen developments from SARS in respect of its audit methods and measures as well as an improvement of the information-gathering and enforcement mechanisms at its disposal. In short, SARS is becoming sharper.

When faced with the question of whether to declare amounts derived from crypto asset transactions to SARS, bear in mind that the consequences are real. The rate of crypto asset adoption as well as the different investment and trading options available mean that it is becoming all the more important for taxpayers and practitioners to develop a working understanding of crypto assets for tax purposes.

Can lifestyle audits and whistle-blowing finally be the Achilles' heel for tax evaders in South Africa?

▶ **CARIKA FRITZ,** Associate Professor at Wits **& MONRAY BOTHA,** Professor at University of Johannesburg

It is trite to say that tax evasion is not only a problem in South Africa but also in other countries. This article will explore how lifestyle audits can help recover some if not all revenue due to the state.

One way of obtaining information on taxpayers who fail to disclose certain sources of income is to use whistle-blowers. Whistle-blowing is an important tool in preventing and detecting improper conduct, fraud and corruption. It can also play an important role in curbing tax evasion and in encouraging transparency, accountability and high standards of good governance (Botha and Van Heerden 2014). In addition to using whistle-blowers to weed out possible tax evaders, the use of lifestyle audits can be useful in this regard as the information provided by a whistle-blower can lead to conducting lifestyle audits to curb tax evasion and hold perpetrators accountable.

Lifestyle audits

Lifestyle audits compare persons' legitimate income against their lifestyle; any discrepancies between the two signify possible alternative income (Niven 2021). As such, lifestyle audits are an accountability tool to detect and deter corruption, money laundering and tax evasion (Tax Consulting 2021).

Government has recognised the value of lifestyle audits by requesting the Anti-Corruption Task to develop a lifestyle audit framework (McIntyre-Louw and De Villiers 2020). While this framework is yet to be established, private institutions, such as KPMG, and public institutions, such as Eskom, have already conducted lifestyle audits. Furthermore, Government employees will be subject to lifestyle audits from February 2022 (Sidimba 2021).

Due to SARS' extensive information gathering powers, as contained in Chapter 5 of the TAA, SARS is ideally situated to conduct lifestyle audits (Tax Consulting 2021), which is also a way to collect low-hanging fruits (Philpot 2021). Consequently, SARS is targeting individuals whose luxury lifestyles do not correspond with their reported income (Business Tech 2021).

Protection of personal information and lifestyle audits

Despite the benefits, Government and the fiscus may reap from lifestyle audits, one may question the lawfulness of lifestyle audits when considering the Protection of Personal Information Act 4 of 2018 (POPIA). Is SARS allowed to use taxpayers' personal information to issue additional and penalty assessments and disclose this personal information to other entities? Can taxpayers or third parties refuse to provide relevant information pertaining to taxpayers based on the ground that it constitutes personal information in terms of POPIA?

Although POPIA aims to promote the protection of personal information (section 2(a) of POPIA), including financial information, using personal information is not completely prohibited as long as the processing is lawful (section 8 of POPIA). In terms of section 11(1)(c) of POPIA, SARS may use the personal information of taxpayers to comply with an obligation imposed on SARS in terms of law. This is because SARS is responsible for the administration of the TAA, which entails

"It is evident that whistle-blowers not only play a role to expose corrupt and other criminal activities, but that whistle-blowing can also play an important role in exposing those who evade paying their fair share of taxes"

obtaining full information pertaining to tax liabilities and determining the relevant tax liability (section 3 of the TAA). Accordingly, when SARS uses taxpayers' personal information to establish the correct tax liability and impose penalties, it still complies with the provisions of POPIA.

Considering further processing by SARS to other entities, section 15(3)(c) of POPIA permits further processing of personal information when it is necessary to comply with obligations in terms of the law. SARS is authorised to disclose taxpayer information to, amongst others, the SAPS and NPA, where this information is material to a tax offence (section 69(2)(a) of the TAA), or to the Financial Intelligence Centre in order to fulfil its duties and functions (section 70(3)(c) of the TAA). Thus, POPIA permits SARS to disseminate personal information of a taxpayer that can assist in detecting and prosecuting fraud and corruption.

Using a similar line of reasoning, when SARS requests taxpayers and third parties (such as a luxury car dealership) to furnish SARS with relevant material in terms of section 45 of the TAA, they would not be able to avoid such a request by relying on POPIA.

While it is clear that a third-party who is requested to provide relevant information in relation to a taxpayer is required to do so, the question arises what would happen if a third-party decides to tip off SARS or another entity about a person whose income and lifestyle are incompatible?

Whistle-blowing framework in South Africa

South Africa has various pieces of legislation and regulatory policy documents that cover corruption and whistle-blowing, such the Protected Disclosures Act 26 of 2000 that aims to encourage whistle-blowing in the workplace as well as seeks to create a culture that makes it easier to disclose information about criminal and other irregular conduct. Other pieces of legislation that broaden the whistle-blowing framework and seek to strengthen measures to prevent and combat corruption include the Constitution of the Republic of South Africa 1996, the Labour Relations Act 66 of 1995, the Companies Act 71 of 2007 as well as the Prevention and Combating of Corrupt Activities Act 12 of 2004.

It is evident that whistle-blowers not only play a role to expose corrupt and other criminal activities, but that whistle-blowing can also play an important role in exposing those who evade paying their fair share of taxes. A potential tax whistle-blower can play a vital role in guiding SARS in the right direction to curb tax evasion and can lead to SARS conducting a lifestyle audit, especially if on face value it appears that the information that the whistle-blower has provided can expose evasion habits of potential tax evaders. Such a whistle-blower can assist SARS in fulfilling its duty to collect taxes effectively.

In this context, when whistle-blowers work with SARS, protecting their identity is of utmost importance as whistle-blowers have in the past been victimised, harassed, dismissed and even killed for doing the right thing. Potential whistle-blowers might be less inclined to provide the information if their identity may be revealed to the person being accused of evading tax. The fact that the protection of the whistle-blowers is key to such a mechanism cannot be overstated.

Financial rewards for tax whistle-blowers: The way forward?

Some authors argue that, in addition to protecting the identity and anonymity of whistle-blowers, South Africa should embark upon a reward system where tax whistle-blowers could be eligible for a financial reward based on the amount of tax revenue eventually collected from tax evaders (Botha and Fritz 2019). However, it should be noted that, according to the SARS website, reporting a tax crime in South Africa is currently done without any reward. It is suggested that the possibility of providing monetary rewards should be seriously considered, as this could assist in curbing not only tax evasion but also create trust between SARS and the general public in the fight against tax-related misconduct as well as improve tax collections and raise compliance rates and could therefore strengthen SARS' powers in conducting lifestyle audits.

In this regard, Botha and Fritz (2019) propose that SARS should consider the following when contemplating a financial reward system for tax whistle-blowers:

1. Confidentiality regarding the whistle-blower's information is key.
2. The information must be previously undiscovered and be unlikely to be discovered if not for the whistle-blower.
3. The whistle-blower must have a reasonable belief that the disclosure is being made in the public interest.
4. The whistle-blower should only be eligible for a financial reward based on the amount of tax revenue eventually collected from the whistle-blowing information obtained from him or her.

Concluding remarks

It would be interesting to see whether SARS would consider the very relevant link between the information that whistle-blowers provide, the conduction of lifestyle audits and collecting the tax that is due and payable by these tax evaders. We can only hope that they strengthen this framework in future and seriously consider the role that whistle-blowers play as well as reward them when these perpetrators are held accountable.

THE EFFECTIVENESS AND ENFORCEMENT OF GLOBAL ANTI-BRIBERY LAWS

▶ **STEVEN POWELL,** Director at ENS Forensics

Ever wondered why the United Kingdom Bribery Act is considered one of the toughest anti-bribery laws in the world? This article looks at the reasons and six nonprescriptive principles that commercial organisations should strive to adhere to when adopting 'adequate procedures' to prevent bribery being committed on their behalf.

The US Foreign Corrupt Practices Act

For many years, the US was virtually the only Western country that rigorously pursued enforcement actions against companies implicated in paying bribes to foreign government officials outside of the US borders. That has dramatically changed over the past decade, during which we have witnessed a dramatic increase in the number of global regulators that are taking action against companies that secure business advantages by paying bribes. Many global authorities have followed the example set by the US by introducing their own robust extraterritorial anti-corruption laws and collaborating with global powers in bringing enforcement action against perpetrators of corrupt activities.

The UK Bribery Act

One of the most noteworthy developments in this regard was the promulgation of the UK Bribery Act of 2010 (UKBA). This legislation, which has been rigorously enforced by the serious fraud office (SFO) has formed the backbone of significant enforcement action brought by the UK government against large British companies like Rolls-Royce, with support from the US government. In 2017, BBC news reported that engineering giant Rolls-Royce was ordered to pay £671 million to settle corruption cases with the UK and US authorities. The SFO investigation identified a dozen counts of conspiracy to corrupt or failure to prevent bribery in seven countries, including Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia. Rolls-Royce was also ordered to pay $170 million (£141 million) to the US Justice Department and a further $26 million (£21.5 million) to Brazilian regulators. The firm apologised 'unreservedly' for the cases spanning nearly 25 years.[1]

At the time of its introduction, the UKBA was designed to ensure that the UK is "at the forefront of the battle against bribery".[2] The UKBA which celebrated its 10-year anniversary in June 2020 is still widely considered to have achieved this objective, with many commentators acclaiming the act as the toughest piece of anti-bribery legislation in the world.

Global enforcement actions like the Rolls-Royce case as well as the recent collaborative effort between the UK government, US authorities and French anti-corruption agency which culminated in a $4 billion settlement of an enforcement action brought by the combined authorities against Airbus demonstrate not only how international regulators are cooperating and working with each other to bring corrupt companies to book for bribery and corruption, they further send an incredibly strong deterrent message to would-be offenders; namely, pay bribes at your peril.

One of the reasons that the UKBA is considered to be one of the toughest anti-bribery laws in the world can be ascribed to the fact that section 7 of the UKBA, introduced a new commercial offence, known as the failure by a commercial organisation to prevent bribery. This was an innovative compliance initiative as it compels companies that either operate within or are associated with the UK to undertake measures to ensure that it has 'adequate procedures' to prevent corruption. This forces companies to establish anti-bribery compliance programmes.

The adequate procedures defence to a charge of failing to prevent bribery

In its guidance notes to the UKBA, the Ministry of Justice recognises the fact that no bribery prevention regime will ever be capable of preventing bribery at all times, and further that the objective of the UKBA is not to bring the full force of the criminal law to bear upon ethical commercial organisations that may experience an isolated incident of bribery.[3]

Accordingly, the UKBA provides commercial organisations with a defence, if it can show that, while bribery did take place, the commercial ▶

1 https://www.bbc.com/news/business-38644114

2 UK Ministry of Justice, Press Release, "UK clamps down on corruption with new Bribery Act"

3 https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf

organisation had taken 'adequate procedures designed to prevent persons associated with [the organisation] from undertaking such conduct'. Under the UKBA's explanatory notes, the burden of proof in this situation is on the organisation, with the standard of proof based on a balance of probabilities.

The guidelines recommend the following six nonprescriptive principles that commercial organisations should strive to adhere to when adopting adequate procedures to prevent bribery being committed on their behalf:

Principle 1: Appropriate procedures
The commercial organisation's procedures to prevent bribery by persons associated with it should be proportionate to the bribery risks it faces having with regard to the nature, scale and complexity of the commercial organisation's activities.

Principle 2: Top-level commitment
Top-level management of a commercial organisation must be committed to preventing bribery and set the appropriate ethical tone from the top. The establishment of the ethical tone would include:

- Making a statement of commitment to combat corruption in all parts of the organisation's operations
- Developing a code of conduct that communicates to employees what is expected of them
- Leading by example
- Providing a safe mechanism for reporting violations
- Rewarding integrity

Principle 3: Risk assessment
Organisations should conduct a risk assessment, addressing the nature and extent of the risks relating to bribery and corruption to which it is exposed. The risk assessment should focus on identifying and addressing an organisation's vulnerabilities to internal and external corruption.

Principle 4: Due diligence
Organisations must practice due diligence to know who they are doing business with and to identify bribery risks associated with a particular business relationship. Management should exercise due diligence in seeking to prevent and detect criminal conduct by its employees and other associates. Due diligence require careful screening of prospective employees and third parties through background checks and effective monitoring of their performance.

Principle 5: Communication
Organisations must 'ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation'. Management must implement measures to ensure that its anti-corruption policies, standards and procedures are communicated effectively to all employees and, where appropriate, agents and business partners. The communication should include:

- Periodic training for appropriate employees and third parties
- Certifications from associated persons to ensure that they understand the company's anti-corruption policies, standards and procedures
- A confidential system that provides parties a means to raise concerns about bribery to provide suggestions for improving the company's anti-bribery procedures and seek advice

Principle 6: Monitoring and review
Organisations must institute monitoring and review mechanisms to ensure compliance with anti-bribery and corruption policies and procedures, identify any issues as they arise and make improvements where necessary. The monitoring and review should consist of four mechanisms:

1. Internal controls – Implement controls to monitor and review anti-bribery policies and programmes.
2. Periodic reviews – Conduct periodic reviews and reports for top-level management.
3. Identify triggers – Identify triggers for mandatory risk assessment and anti-corruption compliance programme review.
4. External verification – Use external specialists/verification entities to independently evaluate the effectiveness of anti-corruption compliance programmes.[4]

By compelling companies to establish robust compliance programmes that adhere to the above principles; the UK authorities have compelled companies to take proactive steps to mitigate corruption risks by implementing anti-bribery programmes that reduce their ability to bribe, which equates to a form of self-regulation. This process, coupled with strong penalties against companies that are found wanting, either in terms of a corrupt activity or in terms of the absence of adequate procedures, have proven to be a highly effective mechanism to tackle corruption.

4 https://www.gov.uk/government/publications/bribery-act-2010-guidance

"Organisations must institute monitoring and review mechanisms to ensure compliance with anti-bribery and corruption policies and procedures, identify any issues as they arise and make improvements where necessary"

The UK model has been adopted by other regimes. The French government promulgated a new anti-bribery law on 9 December 2017, the *Loi Sapin II pour la transparence de la vie économique* (Sapin II), which was designed to significantly strengthen and improve the French anti-corruption system.

Prior to the introduction of this new French anti-bribery law, the French government was accused of having a relaxed attitude towards corruption. In terms of the new law, however, companies with more than 500 employees operating in France and their directors are required to implement a specific French internal anti-corruption programme to fight corruption as well as trading in influence. The French anti-corruption law outlines eight clear measures companies must follow when developing their compliance programme:

1. Code of Conduct: The company must develop and implement a code of conduct.
2. Internal Whistle-Blower Mechanisms: Establish an internal whistle-blower system.
3. Risk Mapping: Develop risk cartography of the company's exposure to corruption risks.
4. Third-Party Due Diligence: Assessment of third parties (clients, intermediaries, providers, etc.) based on the risk map developed.
5. Strong Accounting Controls: Establish accounting controls to ensure that the company's books and accounts are not concealing violations, such as bribery, gifts or other dubious expenses.
6. Compliance Training Programme: Design a compliance training programme that targets CEOs, managers and employees most exposed to corruption risks.
7. Disciplinary regime: Establish disciplinary sanctions to be applied in cases where the company's code of conduct has been breached.
8. Internal Controls: Set up internal controls to evaluate and monitor the effectiveness of the company compliance programme.[5]

The driver behind many of the global anti-corruption initiatives has been the OECD. South Africa has built the OECD recommendations on reducing corruption into Regulation 43 to the South African Companies Act 71 of 2008, as amended. In terms of the regulations, South African companies have to have a Social and Ethics Committee, which must monitor the activities of the organisation to ensure good corporate citizenship as well as anti-corruption compliance.

Compliance in South Africa

South Africa has not gone quite as far as the UK or France in prescribing what is required in an anti-corruption programme; however, in November 2018, the Companies and Intellectual Commission in South Africa (CIPC) introduced a similar non-prescriptive guideline on what is expected in terms of South African compliance.

In terms of this guideline, which is very similar to the UK and French models, South African companies should adhere to the following six principles:

1. Top management commitment
2. Clear practical policies and procedures
3. Communication and training
4. Periodic reviews
5. Due diligence
6. Auditing and accounting controls

The CIPC guidance note also explains that the recommended policies and procedures and controls should be developed based on a risk assessment. In essence, the South African requirements are not too dissimilar from those of global regimes; however, what is presently lacking in South Africa is enforcement.[6]

The global regulators are leading the way in terms of enforcement and there are a lot of practices that the South African authorities should emulate. We can, however, expect significant improvements in respect of enforcement in South Africa in the not-too-distant future as the National Prosecuting Authority and the South African investigative agencies enhance existing compliance requirements, rebuild capacity and collaborate with global powers to hold perpetrators of corrupt activities accountable for their actions.

5 https://www.ganintegrity.com/portal/compliance-quick-guides/sapin-ii-compliance-guide/

6 http://www.cipc.co.za/index.php/download_file/view/62357/155/

TARGETING OUTSTANDING RETURNS

▶ **THAPEDI MAJADIBODU,** Founder and Director of Tax Counsel Consaltants

SARS has the right to investigate, charge and prosecute those who do not submit their tax returns, according to the tax legislation. This article looks at the penalties that can be imposed on those submitting late or not at all as well as the penalties for non-compliance and non-submission.

One of the fundamental purposes of our tax legislation is to ensure the effective and efficient collection of taxes by prescribing the right and obligations of taxpayers, according to section 2(b) of the TAA. Section 2(c) of the TAA further prescribes the powers and duties of persons engaged in the administration. One of the duties imposed on taxpayers is to ensure that all their tax returns are timeously submitted. This duty affects all tax types and is compulsory even if no income is realised for a particular period. This process is necessary to ensure that taxpayers remain responsible for the income they receive, or if no income is received, submit a nil return which serves as a declaration for the period in question. According to section 95(1) of the TAA, if taxpayers do not submit returns as required, SARS may submit a return on their behalf, based on an estimation. This process is necessary as it ensures that everyone pays a fair share to the fiscus.

According to 2020 Tax Statistics, of the 22 919 701 registered taxpayers for Personal Income Tax only 6 308 515 were expected to submit and 4 337 923 were assessed. For Corporate Income Tax, 2 202 759 companies were registered, 939 781 were expected to submit and only 780 460 were assessed.

Interim penalties for late submission

With effect from 1 December 2021, SARS has been empowered to levy a late submission of return penalty where one or more Personal Income Tax returns are outstanding. As a transitional measure for the first year, the one tax return or more rule will only apply to the 2021 tax return.

Duty to submit returns

Section 25(1) of the TAA provides that a person required under a tax act or by the Commissioner to submit or who voluntarily submits a return must do so:

a. In the prescribed form and manner; and
b. By the date specified in the tax act or, in its absence, by the date specified by the Commissioner in the public notice requiring the submission.

The provision under this section is peremptory with the result that taxpayers do not have an option, but are obligated to submit returns unless publicly excused to do so. The tax threshold for taxpayers presents problems as most of the taxpayers are unsure whether they should submit returns or not. Most taxpayers negligently fail to submit tax returns as their determination is premised on the monetary value. Their value of income might fall under the threshold but receiving additional income elsewhere does not constitute remuneration. They will be categorised as provisional taxpayers and the law requires them to submit returns.

The threshold increase from 2020 exacerbated this uncertainty. Most of the taxpayers earning below R500 000 might not receive it from one source and an additional source might not be remuneration. This will also trigger the need to register, submit returns and effect payment for provisional tax.

> *"Taxpayers who deliberately ignore their duty to submit returns to conceal their tax affairs must face the full might of the law"*

Consequences of non-submission

In terms of section 234(2)(d) of the TAA, any person who willfully or negligently fails to submit a return or document to SARS or issues a document to a person as required under a tax Act is guilty of an offence and is liable, upon conviction, to a fine or to imprisonment for a period not exceeding two years.

Given the complexities of taxation as demonstrated above, most of the taxpayers who are unsure as to whether they must submit returns or not will be affected adversely as their failure to submit returns might be classified as criminal conduct in line with the provision of section 234 referred to above. Tax education is therefore crucial in ensuring that taxpayers do not end up in non-compliant situations due to a lack of knowledge and face criminal prosecution. Though SARS does its best to educate taxpayers, the legal principle *ignorantia legis neminem excusat* (Latin for ignorance of the law excuses no one) still applies. Taxpayers are also advised to use the services of tax experts to avoid unforeseen tax consequences. Therefore, a lack of knowledge will not help ignorant taxpayers.

However, taxpayers who deliberately ignore their duty to submit returns to conceal their tax affairs must face the full might of the law. Normally, SARS resorts to imposing penalties and interests instead of triggering the criminal process. SARS' segmentation into divisions seems to be the main cause of this challenge. According to Chapter 17 of the TAA, the criminal investigation division is saddled with the responsibility of pursuing criminal offences. Unlike under the compliance and audit divisions, they do not have access to the information which SARS auditors gain access to when they conduct audits. Therefore, the information sharing between the audit division and criminal investigation division can be of assistance.

The above is said with full cognisance of the duty of SARS to preserve the confidentiality of the taxpayers' information, according to Chapter 6 of the TAA. It can however be argued that an auditor who alerts the criminal investigation division about a taxpayer who failed to submit returns is not disclosing any information as no information is received from the taxpayer at that juncture. The duty will only come to play once information is received from the taxpayer by a SARS official. What transpires here is the report about the status of the taxpayer's affairs as opposed to the disclosure of information.

Given the SARS divisional disjuncture, auditors are weary to carry the administrative and prosecutorial burden of becoming potential witnesses in pursuit of the matter in the other sphere of Government. This is because SARS auditors are dissuaded from following the process that does not affect that performance appraisal or career advancement. However, sharing information with a criminal investigation division and leaving it upon them to do the rest can improve the situation.

Additional legislation to address non-compliance

In terms of section 221(a) of the TAA, 'understatement' means any prejudice to SARS or the fiscus as a result of failure to submit a return required under a tax act or by the Commissioner.

The understatement penalty is payable for any event of understatement up to 200% if non-submission of the return is found to be intended to evade tax. Taxpayers who intentionally desist from filing their return with a view to hide their tax affairs might face these harsh penalties. SARS must use this effectively as deterrence for non-complaint taxpayers.

Conclusion

As demonstrated above, SARS has a myriad of solutions to the challenge of non-submission. Thus far, SARS seems not to do enough to unleash these available remedies and this discourages compliant taxpayers who feel there is selective treatment in contributing to the fiscus. SARS' compliance risk management division needs to improve its effort in ensuring that taxpayers who are not submitting their returns are strictly followed. The 2020 Tax Statistics reflect that more than 50% of the taxpayers are not submitting returns. The fact that this trend is expected by SARS is a worrying phenomenon. SARS, with its financial muscles, must devote its arsenal towards curbing this disturbing reality. Until there is equal treatment of the taxpayer community, a sense of justice and fairness will not be realised.

CASE LAW WRAP-UP

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PURVEYORS SOUTH AFRICA MINE SERVICES (PTY) LTD V COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES (PTY) LTD (135/2021) [2021] ZASCA 170 (7 DECEMBER 2021)

Issue

The issue before the Supreme Court of Appeal (SCA) in this matter was whether SARS was correct in rejecting the Purveyors South Africa Mine Services (Pty) Ltd's (the taxpayer) Voluntary Disclosure Programme (VDP) application for non-compliance with section 227 of the Tax Administration Act 28 of 2011 (TAA), more specifically on the ground that it was not made voluntarily. The narrow issue was, therefore, whether the exchange or discussions between the representatives of SARS and the officials of the taxpayer had any material bearing on the subsequent VDP application.

Facts

The taxpayer had imported an aircraft (the aircraft) into South Africa during 2015 which it then used to transport goods and personnel to other countries in Africa. The taxpayer became liable for the payment of import VAT to SARS in respect of the importation of the aircraft in 2015, which it failed to do.

During the latter part of 2016, the taxpayer manifested reservations about its failure to have paid import VAT and accordingly engaged with certain representatives of SARS to obtain a view on its liability for such tax. In doing so, it conveyed to SARS' representatives a broad overview of the facts, but no more.

Following the above engagements, the taxpayer was advised by SARS on 1 February 2017 that the aircraft should have been declared in South Africa and VAT paid thereon, but, more importantly, it was advised that penalties were applicable as a result of the failure to have paid the VAT.

The taxpayer, approximately a year later, applied to SARS for voluntary disclosure relief in terms of section 226 of the Act. SARS declined to grant relief on the basis that the taxpayer had not met the requirements of section 227 of the Act.

The taxpayer's case

The taxpayer contended that the prior information disclosed to the SARS in the process of ascertaining its tax liability was irrelevant and should not preclude it from making a valid VDP application. The taxpayer's case was that the exchanges had no formal or binding effect on the views expressed by the taxpayer. Essentially, it argued that the application must not be considered at the historical point, but crucially at the time when the application is made. In other words, prior knowledge disclosed by the taxpayer is no bar to a valid VDP application and does not affect the validity and voluntariness of the application.

As regards the interpretation of the word 'disclosure' in the section, the taxpayer contended that there was no requirement that disclosure ought to be new or something of which SARS had not been previously aware. To shore up its argument it aligned itself with the writings of S P Van Zyl & T R Carney, who opined that "'disclosure' is neither restricted in its denotation nor does its context in the Act limit its meaning to 'new' or 'secret' information explicitly".

SARS' case

SARS argued that the application did not comply with the requirements of section 227 of the Act because, on a proper construction of section 227, the taxpayer did not disclose information or facts of which SARS was unaware. It further submitted that the application was not voluntary as the

taxpayer was prompted by SARS. In essence, the application was brought because the taxpayer was warned that it will be liable for penalties and interest arising from its failure to have paid the relevant tax. SARS further contended that the Customs Officials had already gained knowledge of the default and had advised the taxpayer on 1 February 2017 that the aircraft should be declared in South Africa and VAT paid thereon. The argument advanced is that the taxpayer was prompted by the actions of SARS to submit the application.

Core reasoning

The Court considered section 227 of the Act which provides the requirements for a valid voluntary disclosure as follows:

> "Requirements for valid voluntary disclosure.— The requirements for a valid voluntary disclosure are that the disclosure must—
> a. be voluntary;
> b. involve a 'default' which has not occurred within five years of the disclosure of similar 'default' by the applicant or a person referred to in section 226(3);
> c. be full and complete in all material respects;
> d. involve a behaviour referred to in column 2 of the understatement penalty percentage table in section 223;
> e. not result in a refund due by SARS; and
> f. be made in the prescribed form and manner."

The words 'voluntary' and 'disclosure' in the section require that the voluntary disclosure application must measure up fully to the requirements of the section. This appears from the textual interpretation of the section. These requirements apply with equal force in South Africa. It is clear that the onus rests on the taxpayer to establish, on a balance of probabilities, that it has fully met the requirements of the section.

The language used in the section clearly indicates the legislature's intention to arm the Commissioner with extensive powers to prevent taxpayers from disclosures which are neither voluntary nor complete in all material respects. The fact that the section provides that the disclosure application must be made in the prescribed form or manner rather than obtaining ad hoc advice from SARS is a clear indication that the mischief sought to be prevented is one where a taxpayer discloses information to SARS and later makes a VDP application.

Applied to the present case, the facts show that from the outset – and well before the submission of its VDP application – the taxpayer knew that it was liable for the import VAT on the aircraft and penalties, which were not going to be waived.

First, the taxpayer was prompted by compliance action on the part of SARS which was aware of the default following interactions between SARS and the taxpayer's representatives. Second, the taxpayer itself appreciated that it was liable for fines and penalties which had to be paid before it would be tax compliant. Third, the VDP application was not motivated by any desire to come clean, but rather to avoid the payment of fines and penalties. Simply put, the taxpayer's application was not voluntary.

It is difficult to understand on what conceivable basis a taxpayer can obtain a voluntary disclosure relief in circumstances where SARS had prior knowledge of the default, regardless of the source of such prior knowledge, and had warned the taxpayer of the consequences of its default. To grant relief in these circumstances would be at odds with the purposes of the VDP – to enhance voluntary compliance with the tax system by enabling errant taxpayers to disclose defaults of which SARS is unaware and to ensure the best use of SARS' resources.

The purpose of the VDP is to incentivise taxpayers to make a clean break so that SARS can give them immunity. This can only happen if there is a full and proper disclosure of which SARS was unaware and which disclosure was not prompted by SARS.

The SCA held that upon a true analysis of the facts of the present case, the taxpayer's application does not pass the test. The application was not voluntarily made. The taxpayer, in its application, did not disclose information of which SARS was unaware.

Takeaway

When making a VDP application, it is critical to comply with the legislative requirements. As can be seen from the present case, the timing of a VDP application is of utmost importance. Engaging with SARS in respect of a potential tax liability may not be the best approach, as there can be no disclosure if SARS already has knowledge thereof and certainly not in the present statutory context. However, mere knowledge by SARS is not enough to render VDP involuntary.

The best approach for the taxpayer in this instance would most probably have been to submit an anonymous VDP application, stating that the taxpayer intends to disclose the default under a VDP application for the relief of any penalties imposed. Alternatively, the taxpayer should have requested clarification as to the correct procedure to follow, necessary to regularise the taxpayer's historic tax affairs and the possible ▶

penalty relief available to the taxpayer in terms of section 228 of the Act, read together with section 88 of the Act, and the definition of 'non-binding private ruling' provided in section 75, apply to SARS for the issuance of a non-binding private opinion.

It is critical to use specialists when making a VDP application to avoid a situation as suffered by the taxpayer in this case.

CDC (PTY) LTD V COMMISSIONER FOR SARS

(SARSTC2020/95) (19 NOVEMBER 2021)
(7255/2019) [2021] ZAWCHC 197 (21 SEPTEMBER 2021)

Issue

The issue before the Tax Court in this matter was whether CDC (Pty) Ltd (the taxpayer) had filed a notice of appeal in compliance with rule 10(2) of the Rules (the Rules) as envisaged under section 103 of the Tax Administration Act 28 of 2011 (TAA) or whether there was a valid notice of appeal.

Facts

The taxpayer had been assessed by SARS to which a notice of objection had been filed. Subsequently, SARS issued a notice of outcome wherein the objection was disallowed. The assessment pertained to the disallowance of assessed loss with a resultant R38 587 720.00 being carried forward from the 2011 year of assessment should the taxpayer be successful in its dispute.

The taxpayer delivered its Rule 56 application, whereafter the application was withdrawn due to the fact that the founding affidavit was defective, as it was not commissioned.

As the application was withdrawn on this basis, and a memorandum with grounds for appeal was submitted in its stead, SARS was led to believe that the matter had been finalised as it did not recognise the memorandum with grounds for appeal to be sufficient for purposes of a notice of appeal.

The taxpayer, two years later, lodged an additional Rule 56 application wherein the facts were identical to the initial application.

The taxpayer recorded its intention to file a Notice of Appeal to which SARS responded and requested a date on which the Notice of Appeal will be submitted. The Applicant further recorded that the Notice of Appeal will be filed in due course.

After approximately three weeks, the Applicant had still not filed its Notice of Appeal. This then prompted SARS to enquire on the lodging of the Notice of Appeal to which the Applicant advised that the Notice of Appeal would indeed be filed.

SARS presumed that the Applicant failed to deliver a valid Notice of Appeal (as envisaged by the Rules) within 30 days after the notice of disallowance was delivered.

The taxpayer's case

The taxpayer contended that SARS had failed to file their grounds of assessment following the disallowance of the assessed loss and sought relief by means of a Rule 56 application.

The taxpayer stated that documents were submitted to and accepted by SARS via the eFiling system in the form of a memorandum with its grounds for appeal.

SARS' case

SARS argued that it believed the matter to be finalised when the initial Rule 56 application was withdrawn. It further contended that, subsequently, no valid Notice of Appeal in terms of Rule 10(2) was received and, therefore, it could not deliver its grounds for assessment.

The filing of a supplementary affidavit by SARS was aimed at proving that the Applicant did not deliver its grounds for appeal in a manner that complies with the rules. SARS would subsequently suffer prejudice if the supplementary affidavit was not admitted as SARS would then not be afforded an opportunity to defend the facts of the matter. Furthermore, should the supplementary affidavit not be admitted, the prejudice would be extended to the public at large by extension as public funds would then be used to substantially reduce the tax liability of the Applicant for the years succeeding 2012.

Despite the fact that the Applicant recorded its intention to file its Notice of Appeal, SARS engaged with the Applicant and enquired on possible dates on which the Notice of Appeal would be filed and further granted the Applicant an extension for the filing thereof.

SARS further argued that the memorandum containing the Applicant's grounds for appeal was not included in the initial document bundle filed by the Applicant.

SARS was of the opinion that they could not possibly have submitted their grounds for assessment if no Notice of Appeal was received.

Outcome
The Tax Court found in favour of SARS and the application was dismissed with costs.

Core reasoning
The Court considered Rule 10(2) which states the requirements for a Notice of Appeal and provides as follows:

"A notice of appeal must –
- a. Be made in the prescribed form;
- b. If a SARS electronic filing service is used, specify an address at which the appellant will accept delivery of documents when SARS electronic filing service is no longer available for the further progress of the appeal;
- c. Specify in detail-
  - i. In respect of which grounds of objection referred to in Rule 7 the taxpayer is appealing;
  - ii. The grounds for disputing the basis of the decision to disallow the objection referred to in section 106(5); and
  - iii. Any new ground on which the taxpayer is appealing;
- d. Be signed by the taxpayer or the taxpayer duly authorized representative; and
- e. Indicate whether or not the taxpayer wishes to make use of the alternate dispute resolution procedures referred to in Part C, should the procedures under section 107(5) be available."

SARS' supplementary affidavit was admitted by the Court as there would be no prejudice suffered by the taxpayer and as failure to admit the supplementary affidavit would have resulted in substantial prejudice suffered by SARS and the public at large.

Further to the above, SARS had notified the Applicant of the prescribed Notice of Appeal form and that such form is obtainable electronically via the SARS electronic filing system. Despite being notified of same, the Applicant's Notice of Appeal was defective.

The Court held that the memorandum which sought to state the Applicant's grounds of appeal was received for the first time with the founding affidavit and furthermore that the memorandum was non-compliant with the provision of Rule 10(2).

The Court was of the opinion that the correspondence between SARS and the Applicant further highlighted the argument that the memorandum was never included in the initial application. Had the Applicant filed a valid Notice of Appeal, SARS would not have had to send a reminder.

As SARS correctly believed at all material times that the Applicant failed to deliver a valid Notice of Appeal, SARS was not in default for not filing its grounds for assessment.

Takeaway
When approaching the Tax Court for relief, it is imperative to comply with all legislative requirements.

COMMISSIONER FOR THE SARS V SAV SOUTH AFRICA (PTY) LTD *(SARSTC-IT-25117) (18 NOVEMBER 2021)*

Issue
The issue in this matter was whether the step followed by the taxpayer in launching a default judgment application constituted an irregular step in terms of Rule 30 of the Uniform Rules of Court (the Rules).

Facts
On 22 May 2019, the taxpayer lodged a Notice of Appeal against SARS' decision in respect of additional assessments assigned to its 2014, 2015 and 2016 income tax years of assessment. The prescribed period within which SARS was required to deliver a statement in terms of Rule 31 of the rules promulgated under section 103 of the Tax Administration Act 28 of 2011 (TAA) was 45 days.

In a letter dated 2 September 2020 (the taxpayer letter), the taxpayer advised SARS that it had still not received SARS' Rule 4 request for an extension to deliver its Rule 31 statement or a formal notice indicating SARS' intention to apply to the Tax Court for an order condoning its non-compliance with the rules. However, SARS did not respond to the taxpayer's letter.

The taxpayer's Rule 56(1)(a) notice calling upon SARS to remedy its default within 15 days was served on 13 October 2020. In response, SARS delivered its Rule 31 statement on 20 October 2020. Nevertheless, the taxpayer proceeded against SARS by launching an application for default judgment. SARS having launched the present application, now seeks an order setting aside the taxpayer's launching of the default judgment application as an irregular step in terms of Rule 30 of the rules.

The taxpayer's case
The taxpayer argued that the mere non-compliance by SARS to obtain an order condoning the lateness of the Rule 31 statement or to comply with the mandatory provision of Rule 4(2) meant that its Rule 31 statement was invalid.

SARS' case

SARS' contention was that, irrespective of its non-compliance with the time periods imposed by the rules relied upon by the taxpayer, the prescripts of Rule 56(1)(a) were unequivocal in that it does not require a party who has timeously remedied its default to additionally apply for condonation.

Outcome

The Court found in favour of the taxpayer and dismissed SARS' application with costs.

Core reasoning

In approaching the question of whether SARS should have done something in addition to filing the Rule 31 statement within 15 days to remedy its default, the Court relied, at the outset, on the principle established by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* that "[w]hatever the nature of the document, consideration must be given to the language used…". The Court found that this same principle applied to the interpretation of the rules on tax court procedures.

The Court determined that no uncertainty arose from interpreting the ordinary grammatical meaning of the final time limit of Rule 31. Similarly, Rule 4 provided perfect grammatical meaning as to the time extension which applied equally to all the parties.

Accordingly, the fact that the taxpayer proceeded to ask SARS to comply with Rule 56 did not amount to a waiver of SARS' compliance under Rule 4(2). Albeit *obiter dictum*, the Court also mentioned that the law is not be read to mean that certain rules are less important than others.

To this end, it was evident to the Court that SARS understood it did not comply with Rule 4(2) and simply disregarded the warning by the taxpayer. As a result, the Court held that there was no valid Rule 31 statement and therefore SARS remained in default.

Takeaway

This case demonstrates that when moving a tax dispute forward between the parties from inception up to the point of its eventual determination, the rules of court apply to both taxpayers and SARS.

BINDING RULINGS

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BINDING CLASS RULING: BCR 59

Calculation of VAT for table games of chance
(13 December 2021)

Issue

This ruling provides direction relating to the way casinos must account for VAT in respect of table games of chance.

Facts

The nature of betting transactions in the casino industry, especially the table games of chance (for example, Roulette and Poker), makes it difficult to separate bets placed by customers and winnings paid to punters. It follows that casinos experience practical difficulties in reflecting output tax under section 8(13) of the VAT Act 89 of 1991, separately from input tax deducted under section 16(3)(d).

The gaming transactions operate as follows for table games of chance:

- Table games operate with a variety of denominations of chips, for example, R100, R500 and R1 000.
- A punter wanting to play on the tables buys in with cash, a cash plaque, being a high denomination value representation obtained from the cash desk, by way of a cash withdrawal from the punter's casino card or by buying in with chips.
- Any cash, plaques or cash withdrawal slips are placed in the drop box (a sealed box attached to each table), while chips received are placed in the table's chip tray, where all chips not in play are kept.
- All bets are placed with chips, which if lost, get returned to the chip tray. All winning bets are paid out to the punter with chips from the chip tray.
- In case of a shortage of a certain denomination of chips on the table, the table obtains a 'fill' from the cash desk. The fill is documented by placing one copy of the fill slip in the drop box.
- In case of a surplus of chips in the chip tray, the table can return chips to the case desk, which is also documented by placing one copy of the 'credit slip' in the drop box.
- Due to the number of punters, the number of bets being placed and the speed of the game, all of which are essential for running a successful table operation, it is practically impossible to record each bet and pay out for a casino table game.

In practice, the table win or loss is calculated as follows:

- Drop (cash, plaques and cash withdrawal slips), plus closing float of chips in the chip tray, minus fills, plus credits.
- The result is the table win or loss which amount is relevant for accounting purposes and for determining the operator's liability for gaming tax in terms of the relevant provincial Gambling Regulations.
- The win per table is determined every 24 hours.

Based on the way table games of chance are operated as described above, it is impossible to separate bets placed by customers and winnings paid to punters by casinos.

Ruling

This ruling constitutes a BGR issued under section 89 of the Tax Administration Act 28 of 2011 insofar as it relates to a casinos account for VAT on their VAT returns in respect of table games of chance on 'gross gaming revenue' for the relevant tax period, subject to the items listed in (a) to (c):

a) Gross gaming revenue in respect of table games of chance must be included in field 1 of the VAT return, with the tax fraction applied to that amount reflected in field 4.
b) Casinos are not entitled to any deductions under section 16(3)(d) if such amount has been included in calculating the gross gaming revenue.
c) Casinos are required to maintain adequate records to enable the Commissioner to verify the validity and accuracy of the tax liability calculated and included in the VAT return as set out above, particularly the records for the purpose of audits conducted by the provincial Gaming Boards.

BUDGET REVIEW

23 & 24 FEBRUARY 2022

The Budget Review provides the ideal platform for individuals and businesses to be part of the discussion on the implications of the Budget Speech. The event will be held after the Finance Minister's Speech which will present a political and economic analysis of the 2022 Budget Speech.

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