

A decorative graphic in the top left corner consisting of several overlapping, stylized arrow shapes pointing to the right. The arrows are in shades of grey and red.

## Legal update

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### Legal Update: Tax Administration Laws Amendment Act 39 of 2013

The Tax Administration Laws Amendment Act (“the Act”) was promulgated on 16 January 2014. The Act amends the Transfer Duty Act, Income Tax Act, Customs and Excise Act, Value-added Tax Act, Skills Development Levies Act, Unemployment Insurance Contributions Act, Securities Transfer Tax Act, Mineral and Petroleum Resources Royalty Act, Mineral and Petroleum Resources Royalty (Administration) Act and Tax Administration Act.

This Legal Update highlights some of the amendments to the various tax Acts.

Unless otherwise indicated, the changes to the Tax Administration Act No.28 of 2011 are deemed to have come into operation on 1 October 2012. Other amendments effected by this Act came into operation on the date of promulgation, which was 16 January 2014.

#### 1. Transfer Duty Act

The Commissioner has the power to determine the liability of any party entering into a transaction that results in an undue tax benefit (section 20B(1)). The Act has now been amended to provide that any decision by the Commissioner is subject to the dispute resolution procedures set out in Chapter 9 of the Tax Administration Act.

#### 2. Income Tax Act

The following amendments have been made:

- The Commissioner has discretion to extend the period to qualify for the exemption in respect of debt waivers in anticipation of liquidation or deregistration, as he had before.
- The definition of “return” has been amended to ensure consistency between the Income Tax Act and the other Tax Acts, so as to only use the defined term of “return” where mention is made of any document that forms the basis of an assessment to be submitted to SARS.
- The date of submission of returns for purposes of dividends tax has been clarified. The amendment also provides for returns to be submitted by persons that receive exempt dividends as specified.
- SITE has been made obsolete by the increased tax threshold. The tax threshold for 2014 (with regard to persons under 65 years) is R67 111 and the SITE threshold is R60 000. Taxpayers below R60 000 are not liable for SITE and PAYE. The amendment deletes the age verification requirement.

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- As a result of the pre-population of IRP5 certificates in individuals' tax returns, the withholding of tax certificates to directors is no longer required. This provision was deleted.
- The employer now has the option to deliver a tax certificate to an employee in various ways, including electronically.
- The amendment clarifies that all lump sums are excluded from PAYE withholding.

### 3. Customs and Excise Act

The following amendments have been made:

- The amendment curbs the power of officers to search premises by specifying that an officer may only enter premises on the authority of a warrant except in the following circumstances:
  - Premises licensed or registered in terms of the Customs and Excise Act, business premises of licensed or registered persons, premises that are part of a port, airport, railway station or land border post, and premises entered with the consent of the owner or person in physical control of the premises;
  - Warrantless entry to premises is allowed in circumstances where an officer believes that a warrant would have been issued if applied for, but that the delay in obtaining one is likely to defeat the purpose for which entry is sought.
- Requirements are provided for the conduct of officers when they enter and search premises.
- The amendment also sets out the requirements for obtaining a warrant.
- Clarifies SARS officers' powers relating to criminal investigations.
- Provides for Customs Controlled Areas in industrial development zones. Operators and enterprises could import goods under rebate of duty and exempt from value-added tax. The operator must comply with legislation regulating Special Economic Zones.

### 4. Mineral and Petroleum Resource Royalty (Administration) Act 2008

- As the payment of royalties in terms of the Royalties Act is a deductible expense for normal income tax purposes, the finalisation of the income tax return is dependent upon the annual royalty return. The amendment aligns the dates of submission of the two returns, i.e. 12 months after financial year end.

### 5. Tax Administration Act 2011 ("the TAA")

The following amendments have been made:

- The insertion of the definition of "outstanding tax debt" and amendment to the definition of "tax debt" clarify what is regarded as a "tax debt" and what is an "outstanding tax debt" recoverable under the TAA.
  - A "tax debt" is an amount of tax due or payable in terms of a Tax Act as set out in section 169(1) of the TAA, e.g. a tax debt may be payable but not due in a situation where a tax debt is disputed, but remains payable pursuant to the pay-now-argue-later rule.
  - A disputed tax debt will only be "due" if a tax court or higher court finally determines the dispute in favour of SARS.

- Clarifies that there must be a connection between material requested by SARS and the administration of the Tax Act for purposes of which the material is required.
- Clarifies that a return by the taxpayer only constitutes one basis on which an assessment by SARS is based, and not the only basis.
- Under the common law, a *delegation* is a unilateral act that does not require the written acceptance of the person so delegated. The delegation becomes effective when signed by the delegating person. The amendment aligns section 10 with the common law approach.
- Seeks to avoid unnecessary and costly litigation by stipulating that no legal proceedings may be instituted in the High Court against the Commissioner unless the applicant has given the Commissioner written notice of at least one week of the applicant's intention to institute legal proceedings. The notice of legal proceedings must be served at the address specified by the Commissioner by public notice. This provision allows for the possibility of matters or complaints being settled without costly and protracted legal action.
- Affords the Commissioner the power to require returns other than those specifically referred to in a Tax Act.
- Allows SARS to disclose such information to the taxpayer in the performance of its duties without having to obtain the prior consent of the relevant third parties.
- Relates to information on which the taxpayer's assessment is based. This information forms part of the reasons that SARS should provide to justify the assessment and must be given to the taxpayer as a matter of course. The taxpayer should not have to pay for copies of this information.
- Allows for the withdrawal of assessments in certain circumstances.
- Provides that a senior SARS official may agree with the taxpayer to the amount of tax properly chargeable for the relevant tax period and subsequently issue a revised original, additional or reduced assessment pursuant to such agreement, which assessment would then not be subject to objection and appeal.
- Extends the grounds on which an assessment should be made as an exception to include assessments made pursuant to a withdrawal.
- Enables the Commissioner to prescribe the form of documents required under the dispute resolution rules.
- Affords the tax court jurisdiction to hear and decide procedural matters instituted under the dispute resolution rules. It also clarifies the difference between interlocutory applications and applications in a procedural matter.

A tax court comprises a judge or acting judge of the High Court, an accountant selected from a panel of members and a representative of the commercial community selected from a panel. The Act previously required that where a matter relates to the business of mining, the representative of the commercial community will be a registered mining engineer. This requirement has been amended to allow for an engineer with experience in mining to represent the mining community.

- Enables the president of the tax court to sit alone to deal with interlocutory and procedural matters instituted under the dispute resolution rules.

- Protects a third party compelled to pay amounts owed to or held on behalf of a tax debtor to SARS, from recovery actions by the tax debtor.
- Clarifies that “tax debt” is an “outstanding tax debt” in respect of which SARS may initiate recovery proceedings.
- Clarifies the main purpose of a preservation order, namely to deal with both the situation where a taxpayer subject to, for example, an audit, takes steps to transfer assets to avoid payment of the tax properly chargeable, and where the taxpayer takes such steps once there is a quantified tax liability. If the audit is not completed and the tax debt not yet quantified, a senior SARS official on reasonable grounds must be satisfied that tax may be due or payable.
- Provides that the disputed amount under an assessment may be partially suspended, rather than an all or nothing approach.
- Clarifies that recovery proceedings may only be instituted in respect of an “outstanding tax debt”.
- Clarifies that a separate application by SARS is not required before it may institute recovery proceedings under this section in respect of a disputed tax debt for which no suspension was requested or exists.
- Clarifies that a refund may only be set off against a tax debt if no suspension request of the debt is pending or if no suspension exists.
- Provisions with regards to understatements
  - Clarifies that the tax period is relevant to calculating the shortfall under sections 222(3) and (4) and not whether there is prejudice to SARS or the fiscus as referred to in the definition of “understatement”.
  - Clarifies when an “understatement” does not result in a penalty by excluding bona fide inadvertent errors.
  - The purpose of the amendment is to avoid an unnecessarily onerous penalty. If more than one understatement is made in a return, the applicable behavioural category in respect of each understatement must be separately or individually determined. The amendment clarifies that the higher percentage for gross negligence would apply in respect of understatements where there is more than one.
  - Reduces the applicable percentages of the penalty in the case of “substantial understatements”, “reasonable care not taken” or “no reasonable grounds for tax position taken” to align them with comparative tax jurisdictions. The percentages for gross negligence or intentional tax evasion remain the same.
  - Clarifies that for purposes of a remittance request for a “substantial understatement penalty”, the opinion in issue must have been given by a tax practitioner that is independent from the taxpayer. Opinions by e.g. in-house tax practitioners, do not qualify.
  - Clarifies that if an understatement penalty cannot be imposed, additional tax may be imposed.
  - The understatement penalty scheme includes a “substantial understatement penalty” which is strictly imposed if the shortfall resulting from an understatement amounts to the greater of 5% of

the amount of tax properly chargeable or refundable, or R1 000 000. The TAA provides for the remittance of these penalties if certain requirements are met.

- Enables taxpayers who make voluntary disclosures before the commencement date of the TAA, to qualify for relief on an understatement penalty if the audit of their affairs was concluded after the commencement date.
- Allows a senior SARS official who considers an objection by the taxpayer against an understatement penalty imposed as a result of an understatement in a return before the commencement date of the TAA, to reduce the penalty if there were extenuating circumstances.
- The additional tax scheme under the VAT Act and the understatement penalty scheme differ in the sense that an understatement made in a VAT return submitted before the commencement date of the TAA only results in additional tax if there was intent to evade tax. Under the understatement penalty scheme, a penalty may also be imposed if reasonable care was not taken, no reasonable tax position existed or gross negligence existed. The amendment provides that a senior SARS official who considers an objection against an understatement penalty imposed as a result of an understatement in a VAT return, must reduce the penalty in whole if the penalty was imposed under circumstances other than the circumstances referred to in item (v) of the understatement penalty table, i.e. an intent to evade tax.

Section 235 sets out the different criminal offences relating to tax evasion. This section has been amended to specify that only a senior SARS official may lay a complaint with the SAPS or the National Prosecuting Authority.

Section 246 sets out the requirements for public officers of companies. It stipulates that the public officer must be a senior official of the company who also resides in South Africa. However, the Act has been amended to provide that if there is no senior company official residing in the country, another suitable person may be designated as the public officer. This section has been amended further to provide that if no public officer is appointed, the public officer is the director, company secretary or other officer of the company that SARS designates for that purpose.

- Aims to align the terminology used with that of the Companies Act, 2008.
- Under the additional tax legislation the amount of the penalty was subject to an open-ended discretion as a taxpayer could incur a penalty anywhere between 0 to 200%.
- Clarifies the original purpose of the exception under subsection (6), namely that additional tax may be imposed if capable of being imposed.

## 6. Impact on FundsAtWork

The changes to the Income Tax Act are part of the broader retirement reform aimed at standardising the way in which the contributions to, and benefits paid from the different types of retirement funds are treated.

Paragraph 2 of the Fourth Schedule to the Income Tax Act has been amended to include contributions to a provident fund.

This paragraph places a duty on the employer to deduct or withhold employee's tax from the remuneration paid by the employer to his employees.

Paragraph 2(4) sets out how this amount should be calculated.

Prior to the Amendment Act, this Schedule provided that the amount to be withheld must be calculated on the balance of the remuneration remaining after deducting any contribution by the employee to a pension fund, or any contribution by the employee to a retirement annuity fund where the proof of payment for such contribution has been furnished in the employer contribution or any contribution made by the employer to a retirement annuity fund.

Paragraph 2(4) has now been amended to include contributions to a provident fund and to specify that the deductions in paragraph 2(4) are subject to the maximum deduction that the employee would have been entitled to under section 11(k) having regard to the remuneration and the period for which it is payable. In future, any contributions made by an employer to an approved South African retirement fund for the benefit of an employee-member will be taxed as a fringe benefit in the hands of the member. The value of the fringe benefit for tax purposes will depend on whether the contributions are made to a defined benefit fund or a defined contribution fund. If the contributions are made to a defined contribution fund, the contribution allocable to the employee will be includible as a taxable fringe benefit for that employee as at the cash value of the contribution. If the contributions are made to a defined benefit fund, the value of the fringe benefit will be determined through a special formula.

Any contributions made by an employer for the benefit of an employee will be deemed to have been made by the employee, thereby being potentially deductible subject to percentage and monetary limits outlined below.

- Percentage limit: deductions in respect of contributions made by the member will be allowed up to 27.5 per cent on the greater of “remuneration” or “taxable income” (excluding retirement lump sums). Potential reliance on taxable income means that self-employed individuals can make deductible contributions (or that formally employed individuals can make individual contributions based on amounts above remuneration if earning income from other sources).
- Monetary limit: no member may deduct contributions in excess of an annual limit of R350 000. This limit ensures that wealthy individuals do not receive excessive deductions (vis-à-vis lower income individuals who do not have the means to contribute much to these funds).

Contributions in excess of the annual limits may be rolled over to future years where the amounts will again be deductible together with contributions made in that year, but subject to the limits applicable in that year.

Employer contributions to all approved South African retirement funds will be deductible against income under a specific deduction provision.

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