

What's in an assessment? SARS now knows ... to its cost

By Johan Kotze

Submitting of tax returns and being assessed are probably the two most important income tax administrative events.

It is consequently important for a taxpayer to know if and when he is assessed.

In the normal course of events, a taxpayer would not have need for concern, because he will submit a return and SARS will produce a document headed 'Notice of Assessment' and 'ITA 34' or 'IT 34'.

A taxpayer should then take heed of the date of the notice, the due date and the second date. A taxpayer should pay tax, if so assessed, by the second date – otherwise interest will accrue from the first date.

The first date is also important from a dispute and prescription perspective, because a taxpayer has an automatic right of objection within 30 days of the first date, and an assessment prescribes three years from the first date.

'Assessment' is defined in the Income Tax Act as 'the determination by the Commissioner, by way of a notice of assessment ...—

- (a) of an amount upon which any tax leviable under this Act is chargeable; or
- (b) of the amount of any such tax.'

Section 77(5) provides that SARS shall, in the notice of assessment, advise that the taxpayer may object to the assessment.

This all seems straightforward, were it not for a bizarre phenomenon in a recent case involving a taxpayer who is a party to a public private partnership (PPP) with the Government of South Africa.

The taxpayer was concerned that certain finance charges it incurred to raise debt to meet its PPP obligation had been treated incorrectly. It was only going to claim these finance charges as and when they were paid but, on advice from its tax advisor, it realised that it was suppose to have amortised the finance charges over the life of the debt.

The taxpayer was further informed that it was supposed to have started claiming the amortised finance charges from its 2002 year of assessment. The 2002 year had already been assessed but, fortunately, had not yet prescribed, as it fell within the three year period before prescription kicked in.

The taxpayer immediately drafted a request to SARS to reduce the assessment based on the advice it had received.

SARS did not agree with the request to reduce the assessment, but upon its own investigation decided to revise the assessment following a host of adjustments.

After some deliberation between the taxpayer and SARS, the latter wrote to the taxpayer under the heading: 'Income Tax: Revised Assessment'. The letter contained a detailed tax calculation, which reflected a 2002 tax loss. The letter stated: 'Tax assessments will be issued in due course' and 'if you are not in agreement with the assessment you have a right to lodge an objection'.

Shortly thereafter, the original 2002 assessment prescribed, along with the three year prescription period, and SARS then refused to issue an IT 34.

Judge RD Claassen had to consider and rule on whether or not the 2002 year of assessment was part of the main dispute; in effect, , whether SARS's letter actually amounted to an assessment prior to the prescription.

The question was not straightforward, since the answer hinged on whether or not SARS's 'Revised Assessment' letter amounted to an assessment as defined in the Income Tax Act.

The Act requires a 'determination ... by way of a notice of assessment', but does not define the terms 'determination' or 'notice'. Be that as it may, SARS had clearly demonstrated its determination in the 'Revised assessment' letter.

The issue was complicated by the letter's undertaking that 'a tax assessment will be issued in due course'. It was not a 'notice of assessment'. And SARS had advised that if not in agreement with the 'assessment' the taxpayer could object.

Note the interplay between the terms 'assessment' as defined, 'notice of assessment', 'revised assessment' and 'tax assessment'.

SARS argued that the letter did not set out the amount of tax payable, as required by the definition of 'assessment'. Hence prescription was applicable.

The Judge disagreed. After pointing out that the 2002 year had resulted in a tax loss, he maintained that the letter amounted to a 'determination' and that SARS had indeed assessed the 2002 fiscal year.

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