

PAY OR NOT TO PAY

By Johan Kotze

To pay or not to pay, is the constant battle between tax authorities and taxpayers, and this is especially the case when a tax authority and a taxpayer are in dispute as to the amount of tax.

The Income Tax Act determines that income tax shall be paid on such a day as may be notified by SARS, which would be by way of an assessment.

This sounds fine if it is a normal assessment and SARS and the taxpayer are basically in agreement as to the application of the relevant provisions of the taxing act on agreed facts. It is here where the problem occurs, because often SARS and the taxpayer cannot agree as to the relevant facts in a matter and also not as to the application of the relevant provision.

This difference in opinion may lead to a disputed assessment in terms of which SARS demand payment of an amount of tax based on their interpretation of the facts and / or the law applicable thereto. The taxpayer, who disagrees with the assessment, can object to SARS' assessment.

A question often asked in this circumstance is should the taxpayer pay or not pay the tax in question?

SARS has always maintained that an objection to an assessment does not defer the liability to pay the tax. There was actually no specific provision in the Income Tax Act that says an objection did or did not defer the liability.

The only provision in the Income Tax Act, section 88 (before being amended in 2009) provides that the obligation to pay tax is not suspended by an appeal or pending the decision of a court. Section 88 also provides that SARS' right to receive and recover any tax shall not be suspended by any appeal or pending the decision of a court. Interestingly, SARS had discretion whether to allow the taxpayer's obligation to be suspended.

So, as SARS was going on merrily collecting taxes whilst matters were under objection, along came the decision of in the case of *Singh v the Commissioner for South African Revenue Service* (65 SATC 203). This exact matter was dealt with, albeit in the context of Value-Added Tax, but equally applicable to income tax. Justice Olivier held that pending the finalization of the objection the amount in dispute is neither due, because it is not immediately claimable; and the

obligation to pay the tax is therefore suspended pending the finalisation of the objection procedures.

Section 88 of the Act has been amended in 2009. The new section deals with objections and appeals, and that the obligation to pay any tax shall not be suspended by an objection or an appeal.

Section 88 then immediately provides that SARS may be asked to suspend the obligation to pay the tax where the liability to pay is under dispute.

SARS may suspend the payment having regard to a number of factors, for example the taxpayer's compliance history, the amount involved, hardship, whether there is a capital flight risk, fraud.

SARS may deny the request, or may even withdraw an earlier decision to suspend the payment, if for example the objection or appeal is frivolous or vexatious, the taxpayer is delaying matters or SARS reconsiders the grounds on which the deferral was granted.

SARS' denial to grant the deferral is in itself not subject to objection. A taxpayer would then have to take normal administrative legal routes.

This deferral process shall only come into operation on a date still to be determined by the Minister of Finance and shall apply to all amounts payable to the SARS on that date. Where payments were already suspended on that date, that suspension will lapse on the earlier of the expiry date thereof or six months from after date.

The factors which SARS will take into account to allow the deferral, to deny it or to revoke it, are subjective. For instance, in the compliance history of a taxpayer there may have been a few late submissions, in terms of which the taxpayer was already penalized, so how can the taxpayer now again be penalized? What does the amount involved indicate? How does SARS decide an objection is frivolous, vexatious or a delaying tactic?

One just hopes that this same organization who likes to be a law unto themselves, despises court decisions going against them, and cannot wait to amend legislation to counter court decisions, will be fair when considering taxpayer's deferral applications.

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