

SARS APPOINTING RETIREMENT FUNDS AS TAX AGENTS

Many retirement funds ('funds') are currently receiving tax agency appointment letters from the South African Revenue Service (SARS). These letters are requesting these funds to deduct the outstanding tax from its members' pension (and may presumably include withdrawal benefits) and to pay it over to SARS.

Such appointments create a dilemma for these funds, because the fund, the administrator and / or the trustees have to balance their fiduciary responsibilities towards the member with the obligation of being appointed as a tax agent.

These letters should, from 1 October 2012, have been provided in terms of section 179 of the Tax Administration Act, and prior thereto in terms of section 99 of the Income Tax Act. Many letters, presumably only shortly after the Tax Administration Act was promulgated, were erroneously issued in terms of the Income Tax Act. Any appointments made in terms of the latter should be questioned by the fund as to the legal validity of such appointments which have been made erroneously.

SARS has wide ranging powers to collect outstanding tax, and the most effective strategy being used is to appoint a tax agent to collect tax on its behalf.

Section 99 of the Income Tax Act allowed SARS to declare any person to be an agent of a taxpayer and thereafter compelling such agent to pay the taxpayer's outstanding tax from moneys, including pension and other remuneration, which may be held by the agent.

Many funds and their administrators were not aware that section 99 had certain limitations. In particular, an agent was required to ensure that it was able to legally comply with the requirements of the appointment. An agent was also entitled to question the correctness of the tax agency appointments. For example where the agent exceeded the ambit of section 99, the court held that the agent, i.e. a bank or an employer, had to return the money to its client or employee.

Although SARS attempted to explain the procedures in the agency letters which it issued, it still had numerous shortcomings, such as mistakes, duplications, etc. These letters would normally also inform the fund that if for any reason the fund could not act as an agent, that it should *immediately* provide SARS with the reasons for such inability. This would not be a reasonable request, as a fund could not be expected to reply *immediately*, and should have been given a reasonable period within which to

consider the appointment before providing reasons if it wished to decline the appointment.

The new Tax Administration Act provides for a much needed balanced approach, and it is important for funds to understand their rights and obligations should they be appointed. It is also important that the funds' inform their members', through the normal member communication channels, of a tax agency appointment and the consequence it may have.

The new section 179 of the Tax Administration Act gives SARS the same power, but with greater circumspection, as it had with the old section 99.

Funds should, as part of their fiduciary responsibilities, ensure that the following features of the new section 179 of the Tax Administration Act, has been complied with when an agency appointment is received:

- Only a senior SARS official may appoint a fund to be the agent of its member. A senior SARS official is a SARS official with specific written authority from the Commissioner or a SARS official occupying a post designated by the Commissioner.
- The appointment can only be in relation to moneys which the fund holds or owes, or will hold or will owe, to the member.
- The fund has to advise the member of such appointment, and should give the member an opportunity to confirm the correctness of the appointment.
- If the fund is unable to comply with the appointment it has to advise the senior SARS official and provide the reason for such inability.
- SARS may, on request, allow the agent to deduct an amount over a period and not as an once off payment, to allow the member and/or his or her dependant a *basic living expense*. There is no indication in the Tax Administration Act what the *basic living expense* is and it is likely to be determined on a case to case basis.

It follows that if a fund, or where applicable its administrator, fails to ensure that section 179's features are considered and applied, and if challenged by a member following a deduction, may have to return the funds to the member. The fund will then have to attempt to recover the funds from SARS at its own costs.

The rights and obligations of the fund and the administrator, when SARS issues these agency appointments, may have to be dealt with in the service level agreement. It is recommended that the roles of the various parties are properly set

out in the service level agreement in this regard, to ensure that provision is made should an agency appointment be made by SARS.

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