



20 November deadline: avoid penalties

In our June 2009 issue, we reported on the new system of administrative penalties that was gazetted on 31 December 2008.

Until now, the South African Revenue Service (SARS) has not sought to impose such penalties. However, SARS has indicated that such penalties will come into effect from 23 November 2009 and will be enforced.

In a communication to Tax Practitioners, SARS stated: "SARS delayed the effective implementation of the new penalties to allow sufficient time for taxpayers to rectify any non-compliance and for SARS to develop its own systems to automatically detect non-compliant taxpayers, calculate applicable penalties and issue penalty notices to such taxpayers."

The effect is that individual taxpayers whose income tax returns for all years of assessment up to and including the 2009 year of assessment are not submitted by 20 November 2009 will be liable to such administrative penalties. The administrative penalties are severe and recur for each month or part thereof that an income tax return remains outstanding.

The penalties range from R250 per month for taxpayers with an annual taxable income of up to R250 000 to

R16 000 per month for taxpayers with an annual taxable income exceeding R50 million.

The penalty will be imposed for each month the return remains outstanding, up to 36 months. Anyone whose income tax return is outstanding is urged to pay urgent attention to rectify the position on or before 20 November 2009.

The implementation of the administrative penalties is only the first phase in the introduction of new administrative penalties. As previously reported, provision is also made for penalties to be imposed in relation to other areas of non-compliance such as failure to register as a taxpayer, failure to inform SARS of change of address, failure to submit VAT returns, employees' tax returns, etc.

With the implementation of the administrative penalties comes some relief. Provisional taxpayers whose tax returns for all years of assessment up to and including 2008 are up to date and who submit their income tax returns by way of the e-Filing system have been granted an effective extension of time to 28 February 2010 to submit their 2009 income tax returns. There is, however, a sting in the tail to this concession – any assessed tax due will need to be paid within seven calendar days of the assessment.

Bernard Sacks

Changes to taxation of lump sum withdrawals

If you are thinking about prematurely withdrawing some of your retirement funds in order to take that holiday you always wanted, redecorate your home or purchase another vehicle, **beware!** The recent legislative amendments in respect of lump sum benefits will make you think twice before taking early withdrawals.

Lump sums received as a result of resignation or withdrawal prior to retirement, from any retirement fund, also known as **withdrawal benefits**, are taxed differently to lump sums received as a result of retirement from a retirement fund or death, known as **retirement benefits**.

Since 1 October 2007, retirement benefits have been taxed according to a sliding scale table. In terms of recent amendments, a separate table has been introduced to calculate the tax payable on withdrawal benefits received from a retirement fund, which previously were subject to tax at a taxpayer's average tax rate. In a bid to promote retirement saving, withdrawal benefits are to be taxed at higher rates than retirement benefits. Both tables are to be applied on a cumulative basis. As a result of the move to the cumulative basis, all withdrawal and retirement benefits will be added together, potentially increasing the marginal rates applicable to each benefit accrued. The tables will be applicable to lump sums received or accrued on or after 1 March 2009.

The implications are twofold. Should you wish to withdraw a portion of your funds prior to retirement, you will face higher tax rates than those you would have faced at retirement. Additionally, your withdrawals negatively affect the tax rate applied to your retirement benefits, due to the cumulative basis of the new retirement benefit tables.

The example following in the next column, serves to illustrate the effect of the amendment.

Person A: Changes his employer and withdraws from Fund 1 receiving a withdrawal benefit of R600 000. Tax payable:	R103 950
Joins Fund 2 with a new employer and later retires receiving a retirement benefit of R100 000. Tax payable:	R27 000
Total taxes paid on the R700 000 of benefits received	R130 950
Person B: Retires from Fund, receiving retirement benefit of R700 000. Tax payable:	R81 000

The amendments have, however, brought some relief. National Treasury has acknowledged the reality of job losses and financial strains facing individuals. Lump sums received by or accrued to a person on or after 1 March 2009 in consequence of the involuntary termination of their employment, will be taxed more leniently using the retirement benefit tables as opposed to the withdrawal benefit tables. The termination must be due either to the employer ceasing to exist, a general reduction of staff or a reduction of staff of a particular class.

Matthew de Wet



Distributing Capital Gains through an intervening trust

Capital gains derived on the sale of an asset by a trust are sometimes taxed at the level of the trust (at an effective rate of 20%), and sometimes at the level of a beneficiary of the trust, where the effective rate may be as low as 10%.

If you want to attract the lower effective rate, the trustees must allocate the capital gain to a South African resident natural person. The capital gain must, moreover, be allocated by the trustees in the tax year in which it was derived by the trust.

Sometimes a trust's beneficiaries may include another trust. There are difficulties in 'shifting' the liability to capital gains to a resident natural person

beneficiary (and attracting the lower 10% effective rate) where a first trust allocates a capital gain to a second trust, with the trustees of the second trust thereafter allocating the gain ('passing the parcel') to a resident natural person beneficiary of that second trust.

The South African Revenue Service (SARS) initially recognised that where trusts played 'pass the parcel' in this fashion, the capital gain would still be taxed at the level of the ultimate natural person beneficiary, at an effective rate not exceeding 10%. SARS subsequently changed its mind, and insisted that in such cases it was the second trust that would be taxed, and at an effective rate of 20%.

Paragraph 8o(2) of the Eighth Schedule to the Income Tax Act was ambiguous in regard to just who should be taxed

(the second trust, or the ultimate natural person beneficiary) where trusts played 'pass the parcel'. SARS accordingly saw to it that section 8o(2) was amended in January 2009. The reworded paragraph 8o(2) is intended to ensure that the buck (or parcel) stops at the level of the second trust, which will have to pay tax on the capital gain at the 20% effective rate.

The moral of the story is that one should not (unless unavoidable) allocate capital gains to ultimate trust beneficiaries via an intervening trust. Ideally, the capital

gain must be allocated directly to a SA resident natural person beneficiary of the trust that originally derived the capital gain.

“... one should not allocate capital gains to ultimate trust beneficiaries via an intervening trust ...”

Dirk Kotzé



The Commissioner likes to play ball

As South Africa (SA) prepares to host the World Cup, the South African Revenue Service (SARS) has put measures in place to ensure that all foreign sportspersons participating in the event pay taxes on their activities whilst in the country.

As a norm, SA taxes non-residents on a source basis, meaning that only receipts from sources within or deemed to be within SA are subject to tax. Applying the source basis of taxation, earnings received by foreign sportspersons from activities they perform in SA are subject to tax in this country.

SARS recognised the difficulty of collecting the income tax on these earnings, due to the short period over which foreign sportspersons are present in SA. In 1995 and 2003, World Cup foreign rugby and cricket players escaped paying any form of tax on earnings for their performances during these events. However, the practical problems of collecting the taxes have been rectified and SARS will now be collecting taxes from the foreign soccer stars playing in the 2010 World Cup.

Tax legislation now places the obligation on the SA resident paying foreign sportspersons to withhold tax at a rate of 15% from amounts payable to the foreign sportspersons undertaking a “specified activity” in SA. A “specified activity” is defined as any personal activity undertaken by the foreign sportsperson that is exercised in SA, whether alone or with other people. Any SA resident failing to withhold the correct amount of tax and pay the tax withheld over to SARS timeously will find themselves personally liable for the

taxes owing. In theory, the SA resident will then need to recover the taxes paid from the foreign sportsperson.

If tax has not been withheld from amounts payable to the foreign sportsperson and SARS has not recovered the taxes owed from the SA resident, the foreign sportsperson is personally obliged to pay the withholding tax to SARS within 30 days of receiving the money.

It is interesting to note that although the SA government chose to grant certain tax concessions in respect of the supply of goods and services relevant to hosting the World Cup, it chose not to exempt foreign soccer players from the withholding tax, possibly thereby guaranteeing at least one SA winner from the tournament.

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