

TAX BITES

Provisional taxpayers face different regulations



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New determination of the second provisional tax payment

IN VIEW of the recent changes made to the provisional tax system, by way of amendments introduced to the fourth schedule to the Income Tax Act of 1962, by the Taxation Laws Second Amendment Act of 2009, it is time to revisit the rules regulating the payment of provisional tax.

Those persons who constitute “provisional taxpayers” as defined in paragraph 1 of the fourth schedule to the act, are required to register for provisional tax purposes and submit provisional tax returns to the South African Revenue Service (SARS).

Typically, a taxpayer is required to submit a first provisional tax return within the period of six months after the commencement of their tax year. A second provisional tax return must be submitted no later than the end of the tax year in question. Taxpayers are permitted, but are not obliged to, submit a third provisional tax return, which is due no later than seven months after the end of the tax year in the case of natural persons, and other taxpayers with a year-end of February of each year.

In the case of other taxpayers, they are required to submit a return within six months of the end of the taxpayer’s financial year.

The Taxation Laws Second Amendment Act amended the definition of a “provisional taxpayer” to provide that any person who derives income other than in the form of remuneration, any company and any person who is notified by the commissioner that he or she is a provisional taxpayer, shall constitute a provisional taxpayer for purposes of the act. It must be noted that any public benefit organisation (PBO) as defined in paragraph (a) of the definition of PBO, contained in section 30(1) of the act and which has been approved by the

commissioner, as well as any recreational club contemplated in the definition of “recreational club” contained in section 30A(1), which has been approved by the commissioner, as well as any body or association contemplated in section 10(1)(e) of the act, are specifically excluded as provisional taxpayers. Notably, the definition of “provisional taxpayer” no longer includes a director of a company or a member of a close corporation.

Under the provisions of the fourth schedule to the act, provisional taxpayers must submit a first provisional tax return on or before the end of the first six months of their financial year. When submitting that return, taxpayers are entitled to rely on the so-called “basic amount”, typically the taxable income as per the latest assessment received by the taxpayer. If the taxpayer has started business, it is necessary to calculate the likely taxable income to be derived in the first six months of the tax year and to pay the provisional tax over based on that estimate.

Where the taxpayer fails to submit a provisional tax return timeously, they will be subjected to a late payment penalty of 10%, including interest at the prescribed rate, currently 10,5% a year.

The first provisional tax payment is relatively straightforward and usually does not create difficulties for taxpayers to complete. Should a taxpayer submit an estimate of income for purposes of the second provisional tax return, they stand exposed to a 20% penalty which may be levied under paragraph 20 of the fourth schedule. It is, therefore, important that the second provisional tax return is submitted timeously.

Historically, taxpayers were entitled to rely on the most recent assessment as the basis on which to

determine the taxable income for purposes of second provisional tax payments. However, last year the legislation was amended and taxpayers were required to submit an estimate which was not permitted to be less than 80% of the taxable income determined for the particular year in question. Where taxpayers did not meet this threshold, they faced the 20% underpayment penalty. As a result of representations made by professional bodies to the commissioner and National Treasury, it was decided to revisit the manner in which the second provisional tax payment should be determined.

The Taxation Laws Second Amendment Act gives effect to the amendments agreed through a consultative process between the authorities and professional bodies.

The manner in which the second provisional tax return must be completed for the year of assessment ending February 28 2010 will depend upon the level of taxable income derived by the taxpayer.

Where the taxpayer’s taxable income does not exceed R1m in 2010, the second provisional tax payment may be based on 90% of the actual taxable income for the year in question, or the basic amount, that is, typically the taxable income as reflected on the most recent assessment received by the taxpayer.

Where the taxpayer submits an estimate of taxable income which is lower than both of these amounts, SARS is compelled, under the provisions of the act, to levy additional tax equal to 20% of the difference between the amount of normal tax as calculated in respect of the provisional tax estimate, and the lesser of the tax due based on taxable income equal to the basic amount and 90% of the actual taxable income for the February 2010 tax year.

The legislature indicated by way of the memorandum on the objects of the Taxation Laws Second Amendment Bill that the purpose in distinguishing between taxpayers with taxable incomes of less than R1m and other taxpayers is the concern that less sophisticated taxpayers may not have the means to accurately determine taxable income by the end of the tax year. Therefore, these taxpayers may still rely on the last assessment issued to them in determining the amount of provisional tax payable on or before February 26 2010. The provisional tax payment due at the end of February 2010, must be paid no later than February 26 2010 because February 28 falls on a Sunday.

Insofar as taxpayers with a taxable income in excess of R1m, they must submit a provisional tax return based on 80% of the actual taxable income for the 2010 tax year. Where the taxpayer underpays provisional tax, because they did not accurately estimate income for the tax year ended February 28, a penalty equal up to 20% of the difference between the amount of normal tax as calculated in respect of the provisional tax estimate and the normal tax calculated in respect of taxable income equal to 80% of the actual taxable income for 2010 may be imposed.

Where the taxpayer can satisfy SARS that it seriously calculated the taxable income used for purposes of the second provisional tax payment, the underpayment penalty should not be imposed. Where SARS imposes the underpayment penalty under paragraph 20 of the fourth schedule, the taxpayer can lodge an objection or appeal against such a decision.

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