

# Finally, new SARS regulations will see the light of day



## Beric Croome

SARS will be empowered to seize a taxpayer's assets for up to 24 hours while the court is approached

**D**URING 2005 it was indicated that the South African Revenue Service (SARS) was in the process of drafting a Tax Administration Bill, which was intended to be released during the latter part of 2005.

The purpose of the draft bill was to incorporate into one piece of legislation certain generic administrative provisions in the various tax laws of the country. These include, for example, the information-gathering powers of SARS, objection and appeal procedures, rules regulating to secrecy and the collection and payment of tax.

During October 2009 Finance Minister Pravin Gordhan and the SARS Commissioner, Oupa Magashula, released the draft Tax Administration Bill for public comment by February 26. It is possible that the draft bill will be enacted during the latter part of this year, or early next year.

SARS has described the purpose of the draft bill as providing a single statute that will contain common procedures, rights and remedies, and to achieve a balance between the rights and obligations of both SARS and taxpayers in the tax system. It was intended some years ago that the Income Tax Act, 1962, would be rewritten but unfortunately that project was derailed by the introduction of the residence basis of taxation and capital gains tax.

The release of the draft Tax Administration Bill has been identified as part of the process of re-

writing the act in order to simplify the language used in the statute.

The draft bill consists of 20 main chapters and seeks to administer the processes that a taxpayer will experience in dealings with SARS.

The draft bill creates the legal framework whereby a single registration for taxpayers becomes possible, regardless of the number of taxes for which the taxpayer is required to register. It also seeks to stratify the manner in which powers should be exercised by SARS officials, reserving the most serious powers for the commissioner personally, with the second category reserved for senior SARS officials.

At present taxpayers do not know if they may be subjected to criminal prosecution as a result of an audit carried out by SARS. The proposed legislation seeks to segregate routine audits conducted by SARS from criminal investigations to ensure that the rights of taxpayers who are suspects in a criminal investigation, are properly protected.

Section 74D of the Income Tax Act currently requires SARS to procure a warrant from a judge of the high court to conduct a search of a taxpayer's premises and to seize records. The draft Tax Administration Bill proposes introducing a power whereby SARS may conduct a search and seizure operation without a warrant being issued, where such warrant cannot be obtained in time to prevent the imminent removal or destruction of records. A senior SARS official must decide if reasonable grounds exist to follow this course of action. It is

questionable whether this power, in its present form, would stand up to constitutional scrutiny.

The bill also deals with the question of legal professional privilege and which documents may be protected by that privilege. Unfortunately, the bill does not address the inequality arising between tax advice supplied by an accountant versus that supplied by an attorney or an advocate. It is contended that there is no justification for distinguishing between persons supplying advice on the tax laws purely by virtue of the nature of the training that the person has undertaken.

The bill also introduces the concept of a so-called jeopardy assessment, whereby SARS will be empowered to issue assessments in advance of the date that it would normally be issued and to seize a taxpayer's assets for up to 24 hours, while the court is approached to prevent the dissipation of assets by the taxpayer.

Where a taxpayer fails to comply with tax obligations SARS may impose additional tax of up to 200%. SARS is then required to determine whether mitigating factors exist justifying the reduction of the additional tax to a lesser amount.

The draft bill contains a proposal that a new system of determining additional tax be introduced, taking account of the taxpayer's specific behaviour and factors in determining the amount of additional tax to be levied. Other jurisdictions have rules in place whereby additional tax is increased, taking account of the

taxpayer's behaviour. Where the taxpayer assists SARS before an audit begins, the additional tax that will be imposed will be far less than if the taxpayer only discloses omissions to SARS after the commencement of an audit or where the taxpayer is obstructive or is a repeat offender.

Currently, where taxpayers are aggrieved with the manner in which SARS has dealt with their affairs they are required to complain to the local SARS branch office and, failing resolution at that level, to escalate the complaint to the branch manager of that office. Should the taxpayer fail to resolve the matter satisfactorily at that level, the taxpayer may lodge a complaint with the SARS service monitoring office.

It is unfortunate that the SARS service monitoring office is an integral part of SARS and is not independent. It would be far preferable if the draft bill created an independent tax ombudsman to address taxpayer's complaints and grievances.

Internationally, tax ombudsmen have been effective in resolving taxpayer's complaints as they are, typically, independent of the revenue authority and answerable directly to the country's parliament.

The bill seeks to introduce a number of positive measures for taxpayers but, unfortunately, does not address the lack of a cost-effective remedy for taxpayers that may be abused by SARS or where taxpayers incur unnecessary costs as a result of SARS inefficiencies. ■

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