

Taxpayers cannot use SARS to fund a business

THE global economic slowdown could have a spin-off effect on South African taxpayers.

The Commissioner of the South African Revenue Service (SARS) has a legal obligation to administer the tax laws in the country and to collect taxes for the government of the day to fund the government's statutory duties, such as health, safety, defence and so forth. The government's financial year ends on March 31 of each year and the commissioner must collect the budgeted revenue to allow the government to achieve its stated objectives. With the decline in economic activity it will probably become more difficult for the commissioner to exceed the budgeted revenue. This may require the government to borrow on a larger scale than previously.

During the 2007 to 2008 financial year revenue was budgeted at R544,6bn and this was revised to R558bn. Actual revenue collected amounted to R559,8bn. This amounted to a 15,2% excess of revenue collected over the original estimate. For the 2008 to 2009 financial year the treasury budgeted for revenue of R625,4bn and revised this to R626,5bn. Actual revenue collected to September 2008 was reported as amounting to R285,4bn in the 2008 medium-term budget policy statement released on October 21 last year.

The commissioner will be under pressure to collect the revised budgeted revenue of R626,5bn. Taxpayers will face greater levels of enforcement from the commis-



sioner, particularly as March 31 approaches, to meet the steep revenue estimate. Thus, taxpayers should be prepared for more intense tax audits that will be finalised more quickly so that assessments can be raised and the tax collected in a shorter timeframe than before.

When the commissioner issues an assessment the tax must be paid by the second date as reflected on the assessment. Where the taxpayer wishes to dispute the assessment an objection can be lodged against that assessment. Under the pay-now, argue-later rule, taxpayers can be compelled to pay the tax first and then dispute the assessment under the rules governing objections and appeals. The Constitutional Court upheld the constitutional validity of the rule in *Metcash Trading Ltd v the Commissioner, SARS and the Minister of Finance* in the Constitutional Court in 2001.

Where businesses are placed under financial pressure because

of a slowdown in turnover, and customers take longer to pay, the temptation not to pay employees' tax (PAYE) and value-added tax (VAT) to the commissioner timeously must be resisted. The business holds these funds on behalf of the state and the tax laws contain onerous provisions that the commissioner can and does use to ensure that the tax is paid.

In certain cases those directors and shareholder actively involved in the financial affairs of the business can be held personally liable when PAYE and VAT are not paid to the commissioner.

Taxpayers cannot ignore the due date of assessments received and hope that the tax will go away. When a taxpayer fails to pay assessed income tax in time and ignores reminders for payment the commissioner can appoint the taxpayer's bank as the taxpayer's agent under section 99 of the Income Tax Act without informing the taxpayer thereof. Once the commissioner appoints a bank as an agent the bank is legally compelled to pay to the commissioner any funds held by the bank for that taxpayer. If the bank fails to comply with the notice of appointment issued by the commissioner the bank can be held personally liable to the commissioner for an amount equal to the funds held in the taxpayer's account.

A question that arises is when the taxpayer has no funds in the bank account but has an overdraft facility with a bank and whether the commissioner can insist that

the bank pays the remaining balance of the overdraft facility to the commissioner in settlement of the tax due. Section 99 of the act refers to funds held by the agent and it is submitted that an overdraft facility cannot by any stretch of the imagination amount to funds held by the bank for the taxpayer. In such a case the bank should inform the commissioner that it does not hold any funds for the designated taxpayer. However, should the taxpayer's bank account later reflect a favourable balance the commissioner may become entitled to that by relying on section 99 of the act.

Section 47 of the Value-Added Tax (VAT) Act of 1991 contains a similar provision to section 99 of the Income Tax Act. Under section 47 the commissioner may direct that the taxpayer's customers pay any amounts due to the taxpayer to the commissioner and not to the taxpayer. The sections allowing the commissioner to appoint other persons as the agent of the taxpayer does not require that the commissioner inform the taxpayer of such action first. In *Hindry v Nedcor Bank Ltd and Another*, the high court held that section 99 of the act was constitutionally valid. The court also decided that the fact that the commissioner was not required to inform the taxpayer of the impending collection action did not violate the taxpayer's right to administrative justice.

The commissioner can, under section 91 of the act, file a state-

ment of the tax and interest due by the taxpayer with the clerk or registrar of any court. The effect of filing such a statement is that legal proceedings may be taken thereon as if it were a civil judgment given in that court. The commissioner can only file a statement once an assessment has been issued to the taxpayer, according to the decision of *Singh v Commissioner* for SARS.

Taxpayers cannot in any circumstance use the commissioner as a source of funding their business. When the taxpayer has been subjected to an audit and receives additional assessments, legal advice should be sought to establish the validity of those assessments. At the same time the taxpayer cannot ignore the due date of the additional assessments issued by the commissioner, as SARS can appoint banks and other parties as the agent of the taxpayer to ensure that the tax is paid. When a statement is filed at a court the business has a judgment against it and will need to settle the tax due to neutralise that judgment. When it can be shown that the underlying assessments giving rise to tax in dispute were incorrectly issued the taxpayer can approach the court to rescind the judgment.

In the current economic climate it is expected that the volume of tax disputes will increase as the commissioner faces pressure to meet the steep revenue budget.

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