

Business Law & Tax Review

TAX BITES

Submit tax returns timeously to avoid penalties



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Commissioner will be phasing in administrative penalties on non-compliant persons from November 21

HISTORICALLY, the Income Tax Act, 1962 contained various provisions whereby the Commissioner: South African Revenue Service could impose penalties on taxpayers for non-compliance with the provisions of the act.

Those provisions have now been repealed and were replaced with a composite provision, contained in section 75B of the act. Section 75B contains a new framework whereby the commissioner will impose administrative penalties in the event of non-compliance by taxpayers with their tax obligations. The president issued the required proclamation in Government Gazette No 31763 on December 31 2008, specifying that the date on which section 15(1) of the Taxation Laws Second Amendment Act, of 2008 takes effect, shall be December 31 2008.

Furthermore, the minister issued the regulations required under section 75B of the act in Government Gazette No 31764 on December 31 2008. The administrative penalties contained in the regulations took effect in the main on January 1.

Previously, there was a concern that the penalties imposed for non-compliance were not imposed consistently on different taxpayers and also that different receiver of revenue offices treated similar taxpayers differently.

The regulations impose two types of penalties, namely, the "fixed amount penalty" and the "percentage based penalty".

Where a taxpayer fails to submit a tax return timeously, the commissioner is entitled to impose a fixed amount penalty. The regulations set out the table setting out the level of penalty that will be imposed, depending on the taxpayer's assessed loss or taxable income for the preceding year.

The table specifying the range of penalties that may be levied is set out

Assessed loss or taxable income for preceding year	Penalty
Assessed loss	R250
R0-R250 000	R250
R250 001-R500 000	R500
R500 001-R1 000 000	R1 000
R1 000 001-R5 000 000	R2 000
R5 000 001-R10 000 000	R4 000
R10 000 001-R50 000 000	R8 000
Above R50 000 000	R16 000

in the graphic:

Under the regulations issued pursuant to section 75B of the act, the amount of the penalty set out in the table will increase automatically by the same amount for each month or part thereof that the taxpayer fails to remedy their non-compliance within 30 days after the date of the delivery of the penalty assessment. Where SARS is in possession of the taxpayer's current address and is able to deliver the penalty assessment, the regulations allow for the penalty to be imposed for each month that the taxpayer remains in default, limited to 35 months after the date of delivery of the penalty assessment.

Therefore, the penalty that may be levied by SARS will range from an amount of R250 for being in default for one month, up to a total of 36 times the amount of the penalty referred to above. In the case of a taxpayer reflecting taxable income for the preceding year amounting to R250 001 to R500 000, the penalty could range from R500 to R18 000, depending on when the taxpayer remedies the default. In the case of a company with a taxable income in excess of R50m, the administrative penalty could range from R16 000 to an amount of R576 000 if the default is not remedied within 36 months.

Where SARS is not in the possession of the current address of the taxpayer and is unable to deliver the penalty assessment, the administrative penalty is limited to 47 months after the date of the non-

compliance, with the result that the administrative penalty could amount to a total of R768 000 in the case of a taxpayer with a taxable income in excess of R50m.

Those companies that are listed on the JSE as defined in paragraph 1 of the eighth schedule to the act, or a company whose gross receipts or accruals for the preceding year exceeds R100m, or a company that forms part of a "group of companies" as defined in section 1, shall be treated as falling into the same category of taxpayers with a taxable income between R10m and R50m.

If the commissioner is unaware of the taxable income derived by the taxpayer, he is authorised to impose an administrative penalty or may estimate the amount of taxable income of that taxpayer for the preceding year based on available information, and impose a penalty in accordance with the applicable item contained in the table set out above.

On October 14, the commissioner issued a media release advising the phasing in of the imposition of administrative penalties on non-compliant taxpayers, with effect from November 21.

SARS has indicated that where taxpayers fail to pay the penalty imposed for the late submission of the tax return, it will approach those taxpayers' employers or other persons in control of the taxpayer's funds under section 99 of the act. That section allows SARS to appoint a taxpayer's employer or any other

person controlling funds of the taxpayer, as the taxpayer's agent and to direct that such person pays the funds held for the taxpayer to SARS instead of to the taxpayer.

SARS may not invoke collection steps relating to the penalty amount from the period commencing on the day that it receives a request from the taxpayer requesting remittance of the penalty and ending 30 days after notice has been given of the commissioner's decision.

This concession will not apply where SARS has reason to believe the taxpayer will dissipate assets in an attempt to escape payment of the penalty, or that fraud is involved in the non-compliance by the taxpayer.

If the taxpayer can satisfy SARS that exceptional circumstances exist, as envisaged in paragraph 11(2) of the regulations, SARS will consider remitting the penalty imposed. The regulations define "exceptional circumstances" as the following:

- A natural or human-made disaster.
- A serious illness or accident.
- Serious emotional or mental distress.

Should SARS not agree to remit the penalty imposed once requested to do so by a taxpayer, the taxpayer retains the right to lodge an objection and appeal against the assessment.

The administrative penalties that SARS may now impose are far more onerous than what were previously levied. Taxpayers do retain the right to object and appeal against penalty assessments issued by SARS and no doubt the disputes between taxpayers will increase once the new penalties are imposed by SARS.

Where taxpayers are in arrears with their income tax returns, it is important that they obtain the necessary information and submit those returns as quickly as possible in an attempt to meet the deadline of November 20.

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