

## Business Law & Tax Review

### TAX BITES

# Court decision gives some hope to objecting taxpayers



Beric Croome

For the first time criteria are specified for the commissioner to consider in determining whether to suspend payment of all or part of the tax due pending the finalisation of the taxpayer's objection or appeal

**P**AYMENT of income tax pending an appeal — filed by a taxpayer against the disallowance of an objection to an assessment issued by the South African Revenue Service (SARS) — is regulated by section 88 of the Income Tax Act, 58 of 1962.

Its effect is that once a taxpayer has noted an appeal against the disallowance of an objection, SARS can insist on payment of the tax in dispute.

In *Metcash Trading Ltd v the Commissioner: SARS and the Minister of Finance*, the Constitutional Court was required to adjudicate on section 36 of the Value-added Tax Act, of 1991, a provision which is for all practical purposes identical to section 88. Metcash sought to argue that section 36 of the VAT Act violated taxpayers' right of access to courts contained in section 34 of the constitution.

The court upheld the validity of section 36 and confirmed also that taxpayers have an inherent right to approach a competent court for relief and therefore section 34 of the constitution had not been violated. The court also pointed out that under section 36 of the VAT Act taxpayers have the right to request that SARS agrees to the postponement of the payment of tax in dispute pending the finalisation of an appeal. The court concluded that SARS must evaluate any request for postponement of payment according to the principles of administrative justice, discharging the obligation of fulfilling taxpayers' rights to administrative justice contained in section 33 of the constitution. Neither the VAT or income tax acts prescribe the criteria that the commissioner should take into account when evaluating a taxpayer's request to postpone the payment of tax on appeal.

After the Metcash case the commissioner confirmed that he may, depending on the facts, agree to the postponement of payment of tax pending an appeal. SARS would consider whether the circumstances of the case gives rise to reasonable doubt

and would consider other relevant circumstances.

Section 88 does not currently deal with the position of tax reflected as payable on an assessment to which a taxpayer noted an objection but on which SARS has not yet made a decision. In *Singh v Commissioner: SARS*, the court indicated that SARS cannot enforce payment of tax where a taxpayer has noted an objection and SARS has not yet made a decision to allow or disallow that objection.

It is clear that, up until now, section 88 did not deal with the payment of tax from the time that an assessment was issued until SARS has disallowed the taxpayer's objection. Based on the decision in *Singh* it was arguable that taxpayers could resist SARS attempts to enforce payment of tax pending a decision on an objection.

Proposed changes in the Draft Taxation Law Second Amendment Bill, 2009 released in June, indicate that the above position is about to change.

It has been proposed that section 88 of the Income Tax Act and section 36 of the VAT Act will in future apply to all amounts of taxes reflected as due on an assessment even though the taxpayer has lodged an objection against that assessment or has filed a notice of appeal against the disallowance of an objection. It is clear that the legislature is seeking to neutralise the decision of the court in *Singh*.

However, the proposed amendments to section 88 now for the first time specify criteria that the commissioner should consider in determining whether to suspend payment of all or part of the tax due pending the finalisation of the taxpayer's objection or appeal. The specific criteria that the commissioner should take into account include:

- The compliance history of the taxpayer;
- The amount of tax involved;
- The risk of dissipation of the assets by the taxpayer concerned

during the period of suspension;

- Whether the taxpayer has an arguable case;
- Whether payment of the amount involved would result in irreparable financial hardship to the taxpayer;
- Whether fraud is involved in the origin of the dispute; or
- Whether the taxpayer failed to furnish information relating to the taxpayer's financial position or to update the previously provided financial information.

The fact that the amendments introduce criteria that must be considered must be supported as this should result in greater uniformity of treatment of taxpayers. Taxpayers will now also have a better understanding of the facts considered by SARS in determining whether or not to agree to a postponement of tax in dispute.

The proposals provide that SARS may revoke a decision to suspend the payment previously granted with immediate effect whenever they are satisfied that there is a collection risk, that sequestration or liquidation proceedings are imminent or that the taxpayer has employed delaying tactics or that it appears that the taxpayer does not have an arguable case.

A taxpayer may secure a postponement of payment but it doesn't mean that the commissioner may not revisit the matter and withdraw the decision to suspend payment. In practice, SARS regularly insists on the payment of tax even though a taxpayer has lodged an objection and no decision has yet been made on that objection despite the decision of the court in *Singh*.

A concern that arises in the current economic conditions and shortfalls in revenue collections is that SARS will insist on payment of tax in dispute despite the fact that the taxpayer may have an arguable case and can satisfy the criteria contained in the amendments. Further, concerns arise where SARS issues an assessment which is blatantly incorrect because of capturing errors or based on a misunderstanding of the provisions of the law and insists on payment in such circumstances even though the taxpayer has noted an objection against such assessment. Such conduct could constitute a violation of the taxpayers' constitutional rights.

■ Dr Beric Croome is a tax executive at Edward Nathan Sonnenbergs.

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Johannesburg +2711 269 7600  
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