

## TAX BITES

# Due date change likely to affect many taxpayers



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Moving goal posts on assessments catch experts and taxpayers alike off guard

**T**AXPAYERS are, under the provisions of the Income Tax Act, Act, 1962, required to submit income tax returns to the South African Revenue Service (SARS) annually.

Once SARS has received the tax return from a taxpayer, it will be processed and an assessment will be issued to the taxpayer. The notice of assessment issued to the taxpayer, will reflect the taxable income and tax payable or refundable, together with any interest or additional tax or penalties that may have been imposed.

The notice, that is, Form IT34, issued by SARS will usually reflect three different dates thereon. It will usually contain the reference to a date on which the IT34 was processed on the SARS system.

What is of more importance to taxpayers is the reference to the "due date" and the "second date" contained on the notice. The "due date" is usually the first day of a month. Section 1 of the act contains a definition of "date of assessment" as follows:

"The date specified in the notice of such assessment as the due date or, where a due date is not so specified, the date of such notice;"

Under section 107A, the finance minister in consultation with the justice minister was required to promulgate rules governing objections and appeals. From a review of those rules, it is clear that taxpayers are required to lodge an objection against an assessment within 30 business days of the date of assessment, or due date.

Where, however, the taxpayer believes that SARS has failed to supply adequate written reasons for the decisions, as set out in the assessment, the taxpayer may request reasons for that assessment within 30 days.

Therefore, the due date of the assessment notice issued to the taxpayer is critical in triggering the objection process. It is also important in ascertaining whether the assessment has been issued in conformity with the rules governing

the finality of assessments under section 79 of the act. In principle, assuming that the taxpayer has made full and proper disclosure in the tax return submitted to SARS, an assessment becomes final and binding after the elapse of three years from the date of issue of the assessment issued to the taxpayer.

So, where, for example, SARS has issued an assessment to the taxpayer for the 2005 tax year, with a due date of March 1 2006, SARS would have been entitled to amend that assessment prior to February 28 2009. Where, however, SARS issues an assessment with a due date of March 1 2009 or later, the taxpayer would be entitled to challenge the lawfulness of that assessment on the basis that it has been issued in contravention of section 79. Where SARS can show that the taxpayer has not supplied a full and proper tax return, the taxpayer will not succeed in arguing that the assessment has become final and binding.

In addition, a taxpayer is precluded from applying for a refund beyond a period of three years after the date on which an assessment was issued, under the provisions contained in section 102.

The assessment notice will also contain a reference to the so-called "second date", which is the date by which the taxpayer must pay any amount reflected as payable to SARS. Typically, the second date is the last day of a month, unless that falls on a weekend or public holiday when it is the immediately preceding last working day of the month.

Where a taxpayer fails to pay any tax due to SARS by the second date of the assessment, interest will become payable by the taxpayer under the provisions contained in section 89(2).

It is important to note that where the tax is not paid by the second date, interest, at the prescribed rate, currently at 15% a year, will be payable from the due date specified on the notice. With effect from May 1, the prescribed rate of interest will be reduced to an amount of 13,5% a year.

Therefore, taxpayers are usually afforded an interest-free period of 30 days from the due date until the second date of the assessment within which to effect payment.

However, should the taxpayer not settle the tax due by the due date, interest is levied from the due date contained on the assessment.

Where SARS issues so-called "local or urgent assessments", it was common to issue those assessments with the due date the same date as the second date. This had the result that the interest-free period typically granted to a taxpayer was eliminated. SARS would issue such assessments in investigation or fraud-type cases, where it was concerned that the taxpayer would get rid of assets prior to the date on which the tax would normally become payable.

Unfortunately, the act does not define the second date contained on the notice as is the case with the due date dealt with above.

Recently, the question of the due date contained on assessments was discussed by tax practitioners in light of the fact that SARS chose to issue a significant number of 2008 assessments to taxpayers with a second date of March 20 2009.

It was, therefore, something of a surprise to tax practitioners and taxpayers to start receiving notices reflecting a due date other than the last working day of the month.

On March 5, SARS issued a notice explaining the payment dates for income tax assessments, confirming that the second date of March 20 was correct and that income tax assessments, reflecting tax payable, had to be paid by that date.

SARS indicated that in granting additional time for the submission of income tax returns through eFiling, which were originally due on January 23 and later extended to February 5 at the request of tax practitioners, SARS was mindful of the fact that the later submission date would result in a due date for payment of assessed tax on the

final date of its financial year.

It was indicated in the notice that taxpayers are usually granted a period of at least six weeks in those cases where assessments are finalised before the 15th of the month in which to pay the assessed tax. Where assessments are finalised after the 15th of the month, taxpayers are given until the end of the second month — or up to 10 weeks — within which to pay the tax.

SARS advised that when granting additional time for the submission of income tax returns for 2008, it was decided to grant a period of two months for the payment of assessed tax after the original filing date of January 23 to March 20, which allowed, in its opinion, ample time for payment without putting undue pressure on finalisation of its year-end.

It is regrettable that SARS did not announce, at the time that the extension was granted to taxpayers, that the payment date for 2008 assessments would be moved.

It is unfortunate that the legislation does not itself, define the due date of assessments and it is recommended that the Income Tax Act should be amended to clarify the position.

Furthermore, it must be pointed out that taxpayers are entitled to just administrative action under the provisions of section 33 of the Constitution, and it is highly questionable whether SARS's decision to move the due date to March 20 and advised taxpayers thereof only on March 5, complied with the constitutional imperative of just administrative action.

Some taxpayers will be in for a nasty surprise in that they will become liable for interest with effect from March 1 until the tax was actually paid, where the tax was paid after March 20.

It is important for taxpayers to remember the relevance of the various dates contained on the assessment and the resultant legal consequences.

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