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COVID-19 tax relief where gross income exceeds R100 million

On 1 May 2020, National Treasury released revised drafts of the Draft Tax Management Relief Bill, 2020 and the Draft Tax Management Relief Administration Bill, 2020. These Draft Bills provide the legislative framework for the COVID-19 tax relief measures proposed by Government. The Draft Bills do not however make provision for the deferral of taxes by larger businesses.

On 21 April 2020 the President of South Africa announced that additional tax relief measures would be introduced to counter the adverse impact of the COVID-19 on the South African economy and workforce. The announcement was followed on 23 April 2020 by a National Treasury media release providing some detail on these relief measures. Included in the President's address was the announcement that "Businesses with a turnover of more than R100 million a year can apply directly to SARS on a case-by-case basis for deferrals of their tax payments" and that "No penalties for late payments will be applicable if they can show they have been materially negatively impacted in this period." The National Treasury media release stated in the context of "Case-by-case application to SARS for waiving of penalties" that "Larger businesses (with gross income of more than R100 million) that can show they are incapable of making payment due to the COVID-19 disaster, may apply directly to SARS to defer tax payments without incurring penalties".

In the absence of specific relief provisions in the Draft Bills, affected businesses would need to place reliance on the provisions of the Tax Administration Act.

For purposes of walking through the existing legislative provisions, let's assume that an affected business has a provisional tax payment due on 30 June 2020 but, as a result of the impact of the COVID-19 pandemic on its trading activities, has insufficient cash to pay the provisional tax amount. The taxpayer submits its provisional tax return timeously but does not make payment of the tax due.

Remittance of penalties

The taxpayer will be subject to a 10% penalty for late payment of provisional tax under paragraph 27 of the Fourth Schedule to the Income Tax Act (applicable to both first and second provisional tax payments). The penalty would constitute a percentage based penalty under section 213 of the Tax Administration Act. Generally, SARS has limited powers to remit such penalties. However, section 218 of the Tax Administration Act, allows for the remittance of penalties in "exceptional circumstances".

In terms of section 218, on receipt of a remittance request, SARS must remit the penalty (or applicable portion thereof), if SARS is satisfied that the taxpayer was rendered incapable of complying with the obligation as a result of a defined list of circumstances. In so far as may be relevant in relation to the COVID-19 pandemic these circumstances include:

- A natural or human-made disaster,
- A civil disturbance or disruption of services,
- Serious financial hardship such as, in the case of a business, an immediate danger to the continuity of the business operations and the continued employment of its employees are jeopardised, or
- Any other circumstances of analogous seriousness.

The procedure to request remittance of the penalty is set out in section 215 of the Tax Administration Act which will require the taxpayer to apply for remittance of the penalty which request must be accompanied by a description of the circumstances which prevented the taxpayer from complying with the obligation along with supporting documentation and information.

The taxpayer would be required to wait for SARS to levy the penalty for late payment of provisional tax before requesting remittance.

Unfortunately, the penalty regime in the Tax Administration Act does not provide any mechanism to obtain "pre-approval" for the remittance of penalties.

We suggest that it would have been preferable for the Draft Bills to provide for a limited duration pre-approval mechanism.

Interest

Provided the taxpayer is able make payment of the full amount of the estimated tax liability within six months after the end of the year of assessment, paragraph 23A of the Fourth Schedule to the Income Tax Act provides that no interest will be levied in respect of the late payment of first and / or second provisional tax.

Where the taxpayer is unable to make payment of the full amount of tax owing within six months of year end, SARS could levy interest under section 89 *quat* of the Income Tax Act. SARS is however empowered to direct that no interest be charged where the non-payment of the provisional tax is "as a result of circumstances beyond the control of the taxpayer". The taxpayer would be required to apply to SARS for such relief in relation to interest levied where the taxpayer has been unable to make payment within six months after year end.

Deferral of payment

Section 167 and 168 of the Tax Administration Act empowers SARS to enter into an agreement allowing a taxpayer to settle its "tax debt" in instalments. For purposes of these provisions, a "tax debt" refers to any amount of tax due or payable in terms of a Tax Act and could therefore be interpreted as including amounts due under the provisional tax provisions. However, provided the taxpayer is successful in its request to have penalties remitted, the deferral of payment provisions are only likely to become relevant if the taxpayer is unable to pay the outstanding taxes within six months after the end of the year of assessment and is unable to obtain a waiver of interest on the outstanding amount.

SARS is only permitted to enter into an instalment payment agreement in the following circumstances:

- The taxpayer suffers from a deficiency of assets or liquidity which is reasonably certain to be remedied in the future,
- The taxpayer anticipates income or other receipts which can be used to satisfy the tax debt,
- The prospects of immediate collection activity are poor or uneconomical but are likely to improve in the future,
- Collection activity would be harsh in the particular case and the deferral or instalment agreement is unlikely to prejudice tax collection, or
- The taxpayer provides security as may be required by SARS.

Like the penalty regime, no allowance is made for taxpayers to apply to SARS in advance for the deferral of payment.

KPMG Tax and Legal has a wide range of skills to assist taxpayers in applying to SARS for the relief discussed above.

If you have any queries, require assistance or need more information, please contact us:

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