Tax & Legal Flash

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Prescription: How far can SARS go?

Generally for income tax purposes, after the expiration of a three-year period from the date of an original assessment, SARS may only issue additional assessments where it has been established that there is fraud, misrepresentation or non-disclosure of material facts in the tax return for relevant tax year of assessment under consideration.

Introduction

In the recent Supreme Court of Appeal ("**SCA**") judgment of *The Commissioner for The South African Revenue Service (*the "**Commissioner**") *v Spur Group (Pty) Ltd* ("**Spur**") (Case no 320/20) [2021] ZASCA 145 (15 October 2021) (the "***Spur Case***"), the SCA was called upon to, *inter alia*, decide on whether SARS was precluded from raising additional assessments in respect of the taxpayer's 2005 to 2009 years of assessment on the grounds that those years of assessment had prescribed in terms of section 99 of the Tax Administration Act, No. 28 of 2011 ("**TAA**").

Briefly, the facts of the *Spur Case* insofar as it related to prescription were that Spur had answered "No" to pertinent questions which should have been answered as "Yes" in the income tax return. In addition, Spur also failed to

separately disclose certain items in the relevant fields provided for in the income tax return, limiting SARS' ability to flag potential tax risks in relation to the returns through its risk identification processes upon submission of the returns. These disclosure errors resulted in the Commissioner not being able to correctly assess Spur to tax within the three-year period after the original assessments had been issued in respect of the 2005 to 2009 years of assessment, respectively. Consequently, the court found these errors to constitute a deliberate misrepresentation and a non-disclosure of material facts, sufficient enough to displace the protection afforded by prescription.

Furthermore, the court dismissed Spur's arguments that SARS had all the relevant and correct information which was contained in the financial statements that were submitted together with the relevant tax returns. In this regard, the court held that the fact that an auditor or assessor could have determined from the supporting documentation that there was a misrepresentation did not mean that there was no misrepresentation in the first place (in the tax return).

What does this mean for taxpayers?

Given that the *Spur Case* judgment constitutes a binding precedent, taxpayers and tax advisors alike can expect SARS to focus a lot more on income tax return disclosure errors to argue that prescription does not apply for purposes of issuing additional assessments. The effects of this could also potentially extend to and impact the manner in which sale of business transaction agreements are drafted (i.e. such as the purchase price consideration or indemnity clauses) where incorrect tax return disclosures as well as understatements have been identified through the concomitant due diligence review procedures.

A key take away from the abovementioned judgment is that submitting a tax return is not about simply ticking the compliance box that the tax return has been submitted (as perceived by many) but requires detailed technical expertise to ensure that the tax return has been meticulously completed. If completed incorrectly and the errors result in the Commissioner not being able to correctly assess a taxpayer to tax, as evidenced in the *Spur Case*, a taxpayer will not have the protection of prescription as contemplated in terms of section 99 of the TAA. Accordingly, this could potentially result in substantial tax liabilities as well as interest and penalties in the future.

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