WELCOME
TAX INDABA 2016

INTERESTING THINGS ABOUT INTEREST AND PERSISTENT PROBLEMS WITH PENALTIES

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INTERESTING THINGS ABOUT INTEREST

• Where are we with the new interest provisions?
  o Which TAA provisions have been switched on?
• Is SARS secretly compounding interest?
  o Looking carefully at your statement of account
• Interest on underpayment of provisional tax
  o Can it be waived?
• Interest on understatement penalties
  o Some good news
• The date on which assessments are amended
  o Watch out for the interest implications
• Interest on refunds
  o Don’t believe everything you read
• What are your remedies?
PERSISTENT PROBLEMS WITH PENALTIES

• How are penalties imposed?
  o Has anyone seen an actual penalty assessment?

• How are you supposed to object to a penalty?
  o Request remittance vs objection

• On what bases can penalties be waived?
  o What should you argue?
WHERE ARE WE WITH THE NEW INTEREST PROVISIONS?

• Section 271 of the TAA read with Schedule 1 repealed administrative provisions in the Income Tax Act and the VAT Act – except insofar is those provisions relate to interest.
  o "..., except any provision that amends or repeals a provision of a tax Act relating to interest under that tax Act, to the extent of that amendment or repeal – to be proclaimed with effect from a date to be determined by the President by proclamation in the Gazette."

• Section 272 the commencement date of the TAA is 1 October 2012
  o "except ss.187(2), (3)(a) – (e) and (4), 188(2) and (3) and 189(5); and any provision of Schedule 1 that amends or repeals a provision of a tax Act relating to interest under that tax Act ..."

• So there are (bits of) sections in the TAA dealing with interest that were effective 1 October 2012.

• But the interest rules in existing Acts still survive
SURVIVING INTEREST PROVISIONS

• Section 89(2) **Income Tax Act**
  o If taxpayer fails to pay **tax** in full within the period for payment
  o interest shall be paid at the **prescribed rate**
    • rate is fixed by Minister
    • from the 1st day of the second month following rate amendment
    • interest on overpayment of provisional tax and PAYE is 4% lower
  o on the outstanding balance of such **tax**
    • simple interest – only on the tax
  o for each **completed** month during which a portion of the tax remains unpaid
    • the month is reckoned from the date for payment of the tax
    • interest is added at end of each month
  o "**unless the Commissioner having regard to the circumstances of the case grants an extension of such period and otherwise directs**"
SURVIVING INTEREST PROVISIONS

• Section 39 of the VAT Act
  o If tax is paid by the end of the month when it is due – no interest
  o If tax is paid on 1st of month following month in which tax was due (or thereafter) - interest runs
  o interest on the said amount of tax
    • simple interest
  o at the prescribed rate
    • same definition as the Income Tax Act
    • no equivalent to interest refunds being lower.
  o for each month or part of month that tax is not paid
    • interest added at beginning of each month it is not paid
  o Interest can be remitted if tax was paid late "due to circumstances beyond the control of the person"
    • This is not defined – ordinary meaning
SURVIVING INTEREST PROVISIONS

• Section 89bis(2) – late provisional tax or PAYE
  o If payment of the tax is late
  o Interest shall be levied at the prescribed rate
  o "on so much of such amount as remains unpaid" (i.e. not compound)
  o Interest runs from the end of the relevant period (i.e. not from the 1st not the 7th of the month)
  o for period for which the amount remains unpaid
  o "unless the Commissioner having regard to the circumstances of the case otherwise directs"
  • broader discretion than section 89(2)
SURVIVING INTEREST PROVISIONS

• Section 89\textit{quat}(2) – \textit{underpayment of provisional tax}
  o If normal tax exceeds credit amount
  o "\textit{Normal tax}" includes
    • section 76 additional tax
    • paragraph 20 penalties
    • paragraph 20A penalties
  o \textit{Credit amount} includes
    • provisional tax paid
    • PAYE withheld
      • Even if PAYE was not paid – interest then falls on employer
  o At the \textit{prescribed rate}
  o From the \textit{effective date}
    • February year end – 7 months after the last date of such year
    • Other year end – 6 months
GENERAL INTEREST RULES – SECTION 187

• Applies to **tax debts and refunds**
• Triggered if the tax debt is not paid in full by the effective date
• What is the **effective date**?
  • The date in s187(3) – (5); or
  • The date from which interest is otherwise calculated under a tax Act
• Effective date in TAA
  o Understatement penalties – effective date of understated tax*
  o Incorrectly paid refunds – date of payment of refund
  o Jeopardy assessments – date for payment in the assessment
• Effective date elsewhere
  o Income tax – date of assessment?
  o Provisional tax – effective date as defined
  o PAYE – 7th of the following month?
  o VAT – 25th or last business day of the month?
GENERAL INTEREST RULES – SECTION 187, 188 AND 189

• **Not switched on yet:**
  - 187(2) daily calculation of interest compounded monthly*
  - 187(3)(a) – (e) effective date for income tax, estate duty and penalties
  - 187(4) – effective date of additional assessment / revised assessment*

• **Period** over which interest is charged is determined by section 188
  - from the effective date of the tax to date of payment
  - unless otherwise determined in a tax Act
  - Not switched on yet
    • for provisional tax
    • for refunds

• The **rate** at which interest is charged is determined by section 189
  - Prescribed rate
  - Determined by the Minister
  - Other parts not switched on but have similar effect to current provisions
GENERAL INTEREST RULES – SECTION 187 - WAIVER

• If interest is payable as a result of circumstances beyond the taxpayer's control
  o Senior SARS official has a discretion to waive interest
  o unless prohibited in a tax Act
• "Beyond the taxpayer's control"
  o natural or human made disaster
  o Civil disturbance or disruption in service
  o serious illness or accident
• SARS may not waive interest
  o after 3 years from date of assessment (assessment by SARS)
  o after 5 years from date of assessment (self assessment)
IS SARS COMPOUNDING INTEREST?

• Section 187(2) not yet switched on:
  o On the daily balance owing
  o Compounded monthly
  o Commissioner may prescribe by public notice from which date

• Currently interest is charged under the surviving provisions on tax
  o except 89quat interest (includes tax and section 76 and paras 20 and 20A)
  o So simple interest still prevails

• Statement of account

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<th>Date</th>
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<td>-500.00</td>
<td>1,600.00</td>
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INTEREST ON UNDERPAYMENT OF PROVISIONAL TAX

• Commissioner can waive if "circumstances beyond the control of the taxpayer"
  ○ This is not the same as the circumstances in section 187(7)
  ○ Can waive in whole or in part
  ○ Years of assessment ending from 1 November 2010
• Years of assessment ending before 1 November 2010
  ○ Where the taxpayer on reasonable grounds contended that an amount is either not part of its income or is deductible
  ○ Taxpayers who acted on advice had reasonable grounds
• First time provisional taxpayer
  ○ Natural person
  ○ SARS can waive "if the circumstances warrant such action"
• Any decision of the Commissioner under section (3) or (3A) is subject to objection and appeal
INTEREST ON UNDERSTATEMENT PENALTIES

- Section 89\textit{quat}: "Normal Tax" does not include understatement penalties
- Section 187(3)(f) the effective date for an understatement penalty is the effective date of the tax understated
- Can be waived if circumstances out of taxpayer's control
  - As defined in 187(7)
  - Not broader concept in section 89\textit{quat}
- Section 270(6E)
  - Until all the interest provisions in TAA come into operation
  - "\textit{accrual and payment}" of interest on understatement penalties must be calculated in the manner in which interest on additional tax is calculated
  - If the tax was understated before 1 October 2012, the effective date in 187(3)(f) is 1 October 2012
- Section 270(6F) – when interest provisions are switched on – interest on understatement penalties will be imposed i.t.o Chapter 12
THE DATE ON WHICH ASSESSMENTS ARE REVERSED

- **Date of the assessment** is the date on which the assessment was issued
- Under the old rules it was **due date** –
  - an additional assessment had a new due date and
  - a reduced assessment had the same due date as the original assessment
- SARS raises an additional assessment on 1/2/2015
- The taxpayer objects and the objection is upheld
- SARS reduces the assessment but on the statement of account, the reduced assessment is raised on 1/2/2016
- The interest on the account will therefore not be waived unless date of reduced assessment is changed
- Something for the CMO or Tax Ombud
- New section 187(4) provides that the effective date of an additional or reduced assessment is the **same as the date of the original assessment**
  - interest on additional assessments will run from date of original assessment
INTEREST ON REFUNDS

• Section 187 applies to refunds as well
• Section 188(3) which provides that the period is from the effective date or date excess is received to date of payment – not switched on yet.
• Section 164(7) – in a dispute the interest is paid from the date the excess was received to the date of the refund (at the prescribed rate).
• Overpayment of provisional tax – section 89quat(4) still regulates interest (at the prescribed rate less 4%) – from the effective date to the date the interest is refunded
• VAT refunds section 45 –
  • at the prescribed rate
  • 21 days after the return was received interest starts running
  • return incomplete in a material respect
  • if any tax returns are outstanding
  • SARS not able to get access to information in 21 day period
  • SARS not notified of bank account details
WHAT ARE YOUR REMEDIES?

- If SARS refuses to pay interest
- Request correction of account (get reference number)
- Then escalate to CMA
- Then the Tax Ombud
- Mandamus – cost order
PROCEDURAL ISSUES RELATING TO PENALTIES

• Section 214 Procedure for imposing a fixed amount or percentage based penalty:
  o The procedure is peremptory no matter what SARS tells you!
  o Must state:
    • the non compliance
    • the duration of the non-compliance
    • the amount of the penalty
    • the date for payment of the penalty
    • the automatic increase of the penalty
    • procedures for remitting the penalty

• Section 215 Procedure to request remittance*
  o Before the date for payment in the penalty assessment
  o Must state
    • Circumstances that prevented taxpayer from complying
    • Any supporting documents required by SARS
GROUNDS FOR REMITTANCE

• Grounds in a tax Act
  o Underestimation penalty (Para 20(2) Fourth Schedule): seriously calculated and not deliberate or negligent
  o Non-submission penalty (Para 20(2C) Fourth Schedule): not due to intent to evade tax or negligence

• Failure to register
  o If person goes to SARS voluntarily; and
  o the person submitted all returns required under a tax Act

• Percentage based penalties
  o First incidence – no penalty assessment for 36 months or less than R2000; and
  o reasonable grounds for non-compliance; and
  o non-compliance has been remedied
GROUNDS FOR REMITTANCE

• Exceptional circumstances – for any type of penalty (except understatement penalties)
  o natural or human made disaster
  o civil disturbance or disruption of services
  o serious illness or accident
  o serious emotional or mental distress
  o actions by SARS
    • capturing errors
    • processing delay
    • incorrect information in public notice / media
    • delay in providing information to a person
    • SARS did not give sufficient time for an information request response
  o serious financial hardship
    • individual: lack of basic living requirements
    • business: continuity or employment in jeopardy
  o other circumstances of analogous seriousness
PROCEDURES

• **Request remittance** in terms of section 215
  - in the period or extended period allowed
  - "in the prescribed form and manner"

• **Obligation to pay** penalty is suspended
  - from receipt of remittance request; to
  - 21 business days after SARS' decision not to remit
  - unless
    - there is a risk of dissipation of assets
    - fraud was involved in the case

• If SARS does not remit – then only do you **object** in terms of section 220

• **Understatement penalties** are specifically excluded
  - must object
  - no discretion for waiver
  - can only argue no 'understatement' or bona fide inadvertent error or wrong category
THANK YOU