

16 March 2015

Ms C. Smit
Legal & Policy
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BY E-MAIL: CSMIT@SARS.GOV.ZA

Dear Ms Smit

RE: COMPLAINTS AGAINST OWNERS OF COMPANIES AND CLOSE CORPORATIONS NOT REGISTERED AS TAX PRACTITIONERS

Thank you for the opportunity to provide commentary on the process of lodging complaints in terms of section 241 of the Tax Administration Act (No. 28 of 2011) ("TAA").

Set out below, is the consolidated commentary developed from internal review of Chapter 18 of the TAA by the South African Institute of Tax Professionals' ("SAIT") Investigative Committee. SAIT's Investigative Committee takes pride in ensuring that action is taken against tax practitioners acting negligently and placing the reputation of the profession in disrepute, hence the importance and urgency of this submission.

Please note that all references to sections below refer to sections of the TAA.

1 BACKGROUND

Section 240(1) requires "every natural person" (emphasis added) to register with SARS and a recognized controlling body ("RCB") if the circumstances in paragraph (a) or (b) are present. Section 240(2)(a) – (d) then provides an exemption from registration if the natural person's duties are such that it complies with one of the said paragraphs. Most notably section 240(2)(d)(ii) provides an exemption for:

"a person who only—

(d) provides the advice or completes or assists in completing a return—

(ii) under the supervision of a registered tax practitioner who has assigned or approved the assignment of those functions to the person."

The exemption provided under section 240(2)(d)(ii) is made subject to section 240(2A) that will hold the registered tax practitioner accountable for the actions of the person making use of the

exemption for the purpose of a complaint to a recognized controlling body in terms of section 241(2). The logic behind this exemption is explained as follows in the Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2013 at paragraph 2.81 (where the word “direct” in section 240(2)(d)(ii) was deleted by section 81(1)(a) of the Tax Administration Laws Amendment Act (No. 39 of 2013) (“TLAA”) and section 240(2A) was inserted by section 81(1)(b) of the TLAA):

“Furthermore, under the current wording persons who are under the direct supervision of a person who is a registered tax practitioner need not register as tax practitioners. However, the result of this according to the industry is that “intermediate managers” between trainees or articled clerks, for example, and a partner or director must also register as tax practitioners. The exclusion from registration for subordinates must, however, be balanced against the need to ensure that a registered tax practitioner is accountable for the actions of a subordinate.

In view of the arguable adverse practical implications of the “direct supervision” requirement, an amendment to replace it with the concept of acceptance of accountability by the tax practitioner assigning the completion of returns or tax advisory functions to a person or persons, is proposed. This will regard the partner or director who is a registered tax practitioner and who assigned or approved the assignment of the functions to e.g. the intermediate manager and the trainees or articled clerks, as accountable for the actions of the person or persons in performing the functions, for purposes of complaints by taxpayers or SARS to the relevant recognised controlling body.” (emphasis added)

If read in context, it is submitted that the intention of the legislature was to provide for a top down system of registration where the professional person at the top is registered and assumes ultimate responsibility for their conduct and that of his employees working under his supervision. The premise is that, if the person trades through the auspices of a legal entity, such as a company or close corporation, members or directors, as professional persons, would be registered as tax practitioners with an RCB.

Section 241(2) allows SARS to lodge a complaint with an RCB if “a registered tax practitioner” is believed to have performed one of the functions listed in paragraphs (a) to (f). It should be noted that only a natural person is obliged to register as a tax practitioner in terms of section 240 read with the definition of “registered tax practitioner” in section 1. The logic behind the registration of natural persons and the amendments introduced by the TLAA is understood because SARS and RCBs are required to take action against the specific individual who is at fault, rather than attempting to pursue a juristic person.

It is, however, submitted that there may still be instances in which neither SARS, nor RCBs have any recourse against persons who employ tax practitioners who are currently placing the reputation of the profession in disrepute. This is due to the fact that the reference to “natural person” in section 240 is creating a loophole for abuse of the system.

2 PRACTICAL EXAMPLE

A person sets up a close corporation or a company that provides tax services to the public. Since the close corporation or company is not a natural person, no registration in terms of section 240 is required. The member or director ensures that he or she does not personally provide any advice to the public or assists the public with submitting returns. He or she is therefore not liable to register in terms of section 240. The close corporation or company then employs tax practitioners to provide tax services to the public on behalf of it and these tax practitioners are duly registered in terms of section 240. These registered tax practitioners do not have any say or influence whatsoever in the management or conduct of the close corporation or company. The shareholder or member, as the case may be, is then at liberty to provide orders to the registered tax practitioners as to how they should conduct the business of the company or close corporation. The shareholder or member can also, through the company or close corporation, conduct unethical practices that place the reputation of the tax profession in disrepute. The relationship can be graphically illustrated as follows:

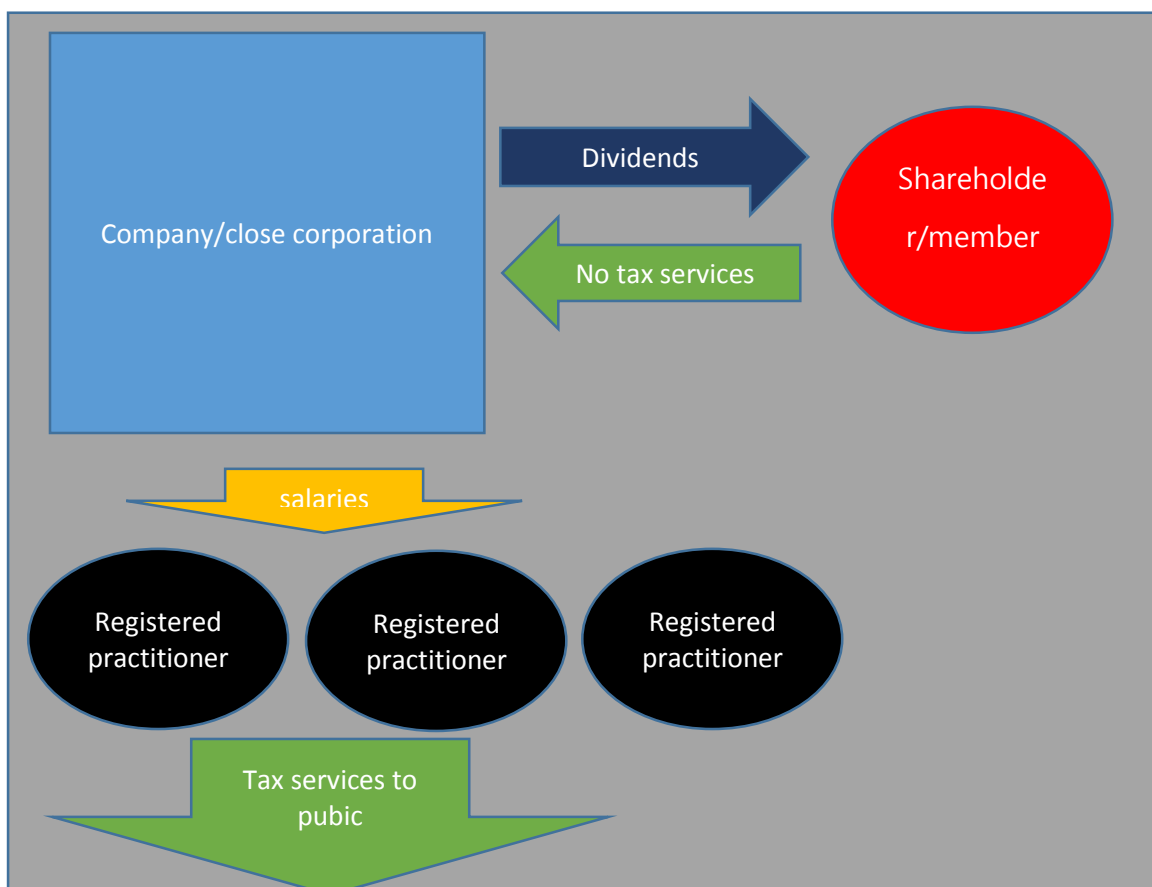


Figure 1: typical structure made use of to prevent registration in terms of section 240

It is submitted that no investigative action can be taken against either the shareholder of the company or member of the close corporation in terms of section 241(1) or (2). The public would be forced to make use of section 22 of the Companies Act (No. 71 of 2008) and complain to the Companies and Intellectual Property Commission should it be that the company is trading recklessly. It is uncertain whether a comparable provision exists in the Close Corporations Act (No. 69 of 1984).

From the complaints received from public, the company or close corporation would unilaterally increase the monthly debit order charged to the public for its compliance services. It was furthermore found that debit orders were processed even though no services whatsoever were rendered to the public. From the information investigated, it would seem as if the registered tax practitioners working for these firms did not commit a possible offence in terms of section 241(1) or (2) and that the shareholder/director/member of the company or close corporation is the responsible party.

This brings us to the problem statements stipulated in 3 and 4 below.

3 SCOPE OF SECTION 241(1)

Even though section 241(1) would allow SARS to lodge a complaint with a “controlling body” if a “person” (which by default includes a juristic person) is believed to be guilty of one of the offences listed in paragraphs (a) to (d), it is unclear whether it would include offences committed by a company through its directors/shareholders or through the members of a close corporation who are not registered in terms of section 240.

It is understood that section 241(1) was aimed at other professionals in for example the health industry who fraudulently assist taxpayers with declaring false disabilities on ITR-DDs. Section 241(1) then enables SARS to report these professionals to their respective controlling bodies.

Recommendation: Clarity should be provided through an interpretation note as to the exact scope of section 241(1) and whether this may lead to disciplinary action being instituted against the directors/shareholders of a company or members of a close corporation who are not registered in terms of section 240, who may have committed of an offence in terms of section 241(2) had they been registered.

4 SCOPE OF SECTION 241(2)

Section 241(2) allows SARS to lodge a complaint with a “recognized controlling body” if a “registered tax practitioner” is believed to have committed one of the offences listed in paragraphs (a) to (f). As stated above, a “registered tax practitioner” is defined in section 1 as “...a person registered in terms of section 240” which in turn only requires a natural person to register.

In this instance, section 241(2) would provide SARS and RCBs with no jurisdiction to pursue an investigation against the directors/shareholders/members in the example above who are not registered.

Recommendation: It is submitted that should section 241(1) not cover the instance where a non-registered tax practitioner commits an offence as illustrated in 2 above that section 241(2) should be amended to cover such a situation. This will ensure that the reputation of the whole profession is kept intact.

Please do not hesitate to contact us should you require any further information.

Yours sincerely,

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