CAUTION
Turbulent Tax Year Ahead
Ruaan van Eeden on the Biggest Challenges of 2017

Post-mortem
2016 Tax Changes Reviewed

BITTER SWEET
Sugar Tax on a Granular Level

SARS “Rogue Unit”
Adrian Lackay Speaks Out
OUR DAYS ARE UNPREDICTABLE, BUT THANKS TO OUR TAX PRACTITIONER OUR TAXES AREN’T.

Every day SAIT tax practitioners turn the ordinary into the extraordinary by helping South Africans submit their tax returns easily, honestly and on time.
THE TEAM AT SAIT WISHES OUR MEMBERS A WONDERFUL AND RELAXING HOLIDAY SEASON.

Enjoy the break after a busy and rewarding 2016.

5 Steps to a Clutter-Free 2017

We interviewed the Head of Tax at Geneva Management Group, Ruaan van Eeden, who speaks to us about his career and reflects on the ever-changing tax landscape.

Profile: Refilwe Matenche

Career advice to your younger self

The best tax websites

Interview with Adrian Lackay on the SARS “Rogue Unit” book

How to create a clutter-free 2017

Matthew Lester on bad Apple decisions
EDITOR’S LETTER

Changes to the Tax(Talk) Landscape

I am delighted to step into the role of Editor for TaxTalk magazine, and look forward to getting to know you and your community. Since graduating from university a decade ago, I have been immersed in the various facets of an ever-changing publishing industry. I am ready and eager to take on this new, exciting challenge where I intend to bring a fresh perspective to this — South Africa’s leading tax publication.

Similarly, the past year has seen a number of changes to the tax landscape. In this issue, we cut to the core of the most important changes that took place in 2016. To keep you in the loop, our esteemed panel of contributors has conveniently summarised alterations to the VAT, tax administration, transfer pricing and SARS spaces.

This issue also offers a glimpse of what lies ahead in 2017. We not only look at expected developments, but also review the technical tax aspects of perhaps the most controversial new tax measure – the so called “sugar tax.”

As we look back on what has been an eventful 2016 tax year, we wish you, your friends and family a restful, healthy and happy festive season. Let us all hope for a prosperous tax year in 2017.

Tania Wolson
Editor
There are two guarantees in life

**DEATH**

and **TAXES**

WE CAN HELP YOU WITH THE ONE

Part of our TaxWare suite of products, the Individual Tax Module manages the entire process of completing and submitting (ITR12s):

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In this issue we look at the latest court rulings as well as pertinent questions that kept our Technical Department busy. We speak to Michiel Els about his new position at Deloitte and reveal the winners of the EY Young Tax Professional competition.
This issue covers tax return myths. Do you have an interesting tax fact or two to share? Send them to editor@thesait.org.za

More FAQs as well as the latest tax news and updates can be found at your tax portal www.SAIT.org.za

Q:
Will a taxpayer add the sick leave days he spent in South Africa to qualify for the section 10(1)(o)(i) exemption of the Income Tax Act? What is the correct interpretation of this s10(1)(o)(i)?

My client is a South African resident but he works for an Angolan company where he is a crew member on an Angolan ship. In past tax years, he had met the requirements of the s10(1)(o)(i) exemption. For the 2017 tax year he might not be able to reach the stipulated period outside the Republic because he was sick and had to undergo an operation. The ship has lost its contract, but s10(1)(o)(i) states that if such person was outside the Republic for a period exceeding 183 full days in aggregate during the year of assessment, remuneration derived by such person as an officer or crew member of a ship will be exempt from income tax. Weekends, public holidays, vacations and sick leave spent outside the Republic are considered to be part of the 183-day period of service or contractual period. Where a person, who has already complied with the exemption requirements of s10(1)(o)(i) in a year of assessment, spends vacation leave or sick leave in South Africa during the same year of assessment, the remuneration received by the person during the period of leave will continue to be exempt from tax in terms of s10(1)(o)(i).

Does this mean that he will qualify for exemption, even though he did not meet the 183 full days and 60 continuous days outside the Republic, because he took sick leave and he meets other requirements, or does he need to stay outside the country to qualify for exemption? What will happen if he stays outside the country when the employment terminates?

A:
As a first comment, we need to point out that s10(1)(o)(i), which applies (among others) to “any person as an officer or crew member of a ship,” does not have a 60-day requirement. It applies “if such person was outside the Republic for a period or periods exceeding 183 full days in aggregate during the year of assessment.”

In terms of the current practice outlined in SARS’ Draft Interpretation Note No. 34 (Issue 2), “… sick leave spent outside the Republic is considered to be part of the 183-day period of service or contractual period.” Take note that because Note No. 34 was issued as a draft, it may be finalised during the year so you may want to check to make sure that the practice generally prevailing did not change in the final version (the draft for instance refers to calendar days).

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Is the remuneration received by the person during the period of leave will continue to be exempt from tax in terms of s10(1)(o)(i)." The remuneration will be exempt to the extent that it is attributable to the number of vacation or sick leave days credited to the employee in respect of and during the period of service outside South Africa under a vacation or sick leave scheme operated by the employer. The point is that the person must then have met the 183-days-outside-the-RSA requirement. The sick days leave spent in the RSA will not count towards this. The

TAX TALK
Did you know that restaurant tips paid to a waiter constitute amounts received for services rendered? This is counted as taxable income.

MONEY MADE OVER THE INTERNET IS NOT TAX FREE
Contrary to popular belief, money made from a trade conducted over the internet must be included as part of an individual’s gross income.

How young is too young?
The question often arises as to whether there is a minimum age for paying tax. The legal employment age is 15 years old, so if you work for older and earn more than R75 000 per year, this is taxable income.

Fur baby dependants
As sad as it may be for some, pets cannot be claimed as dependants on a tax return.

SAME SEX, SAME RULES

Some same-sex couples who have married continue to file their returns using the “single” status. This is incorrect. The definition of “spouse” in the Income Tax Act includes same-sex partners.

AUDITING ANYTIME, ANYWHERE
It is a myth to think that once a refund is received, an audit can no longer take place. SARS may trigger an audit at any time to investigate any concerns it may have.

Adapted from BDO South Africa’s press release on the top 10 tax myths dispelled.

Adapted from BDO South Africa’s press release on the top 10 tax myths dispelled.
May a taxpayer claim for his father's monthly nursing home costs as a medical expense? The taxpayer's father is a direct family member. As such, may the taxpayer claim medical expenses paid on behalf of his father? Does a nursing home qualify as an allowable medical deduction?

A: For purposes of the guidance that follows, we accept that the issue is whether the client qualifies for the additional medical expenses tax credit (section 6B of the Income Tax Act), as the ability to make a deduction is no longer possible.

The first issue that is relevant, then, is the definition of “dependant” found in section 6B(1), which states: “... a ‘dependant’ means…(c) any other member of a person’s family in respect of whom he or she is liable for family care and support.” In the Explanatory Memorandum issued when this section was introduced into the Act, the following example was given:

“Facts: A single taxpayer under 65 years of age, and not disabled, incurs medical expenses on behalf of his or her mother. This taxpayer is liable for family care and support in respect of his or her mother.

Result: The taxpayer will be able to add the expenditure incurred in respect of his or her mother to his own medical expenditures.”

Section 6B therefore does not use the term “immediate family” that was used in the repealed section 18.

The next issue is that the expenses must be “qualifying medical expenses” as defined in section 6B(1) of the Income Tax Act as:

(a) any amounts (other than amounts recoverable by a person or his or her spouse) which were paid by the person during the year of assessment to any duly registered—

(i) medical practitioner, dentist, optometrist, homeopath, naturopath, osteopath, herbalist, physiotherapist, chiropractor or orthopedist for professional services rendered or medicines supplied to the person or any dependant of the person;

(ii) nursing home or hospital or any duly registered or enrolled nurse, midwife or nursing assistant for or to any nursing agency in respect of the services of such a nurse, midwife or nursing assistant in respect of the illness or confinement of the person or any dependant of the person; or

(iii) pharmacist for medicines supplied on the prescription of any person mentioned in subparagraph (i) for the person or any dependant of the person.

Q: My client bought a residential property in 2009. As his income was too low to qualify for a home loan, the estate agent suggested that his parents become part owners of the townhouse, which was then approved by the bank. My client lived in this unit until mid-2013, after which he moved to another city and rented the apartment out. There was a small rental profit which I declared on my client’s 2014 and 2015 tax returns. The parents did not share any income or expense, as they had no interest in the townhouse, apart from helping their son to obtain the home loan in 2009.

The unit has been sold for a capital profit of R100 000. The parents did not want any of this profit either, even though they are part legal owners. How do I treat the capital gain? Will my client be liable to declare only one-third of the capital gain or can he declare the full amount of R100 000 which he kept? The mutual feeling between parents and son is that the parents had to have had the benefit.

A: Please remember that the service offered by SAIT, in terms of answering members’ queries, is limited to guidance only and no opinion will be provided.

The issue here is whether the parents held an interest in the primary residence. As defined in paragraph 44 of the Eighth Schedule, “an interest” means: “(a) any real or statutory right; or “(b) a right of use or occupation.”

We accept that when you say the parents are part owners of the townhouse they are so registered on the title deed (the Deeds Registries Act).

Paragraph 45D(1) is relevant in this instance. It states that “where more than one natural person or special trust jointly holds an interest in a primary residence at the same time, the amount to be disregarded in terms of subparagraph (1) must be apportioned in relation to each interest so held.”

The SARS view is found in paragraph 11.2.2 of their CGT guide. Note that the last sentence (before the example) in that paragraph is relevant to our comment above – the sister had to ordinarily reside in the house. It confirms that the interests of persons who do not reside in the residence as their primary residence are not taken into account. Based on the above, the primary residence exclusion may be available to the client.

To the extent that the house was used for trade purposes (the deriving of rental), the primary residence exclusion does not apply. The capital gain will then be treated as being derived by the three persons (essentially as partners). The parents will have to meet the onus of proof that they did not own the asset (partly) to not have the capital gain (or portion).

Q: SARS has raised an additional assessment (VAT217) and disallowed my client’s input VAT in total, due to the fact that small requests on the audit were never responded to. The SARS’ queries were never loaded on eFiling and, to date, were not received by the client or myself. Are the adjustment and imposed penalties valid?

A: The law requires SARS, when they review a return, to request documents from the client. SARS will normally send the letters by email (not by post) if the vendor uses the eFiling system. We are aware that the request for supporting documents is often missed by the vendor.

There are a number of grounds on which SARS can disallow a deduction of input tax, such as the fact that the supporting documents, required under section 16(2), were not held by the vendor when the return was submitted or it was not a valid tax invoice (section 204). However, from the information provided, we accept that this was not the case.

In this instance it may well be that SARS, after having not received a response to their request for supporting documents, assumed that the vendor did not hold the documents. You indicate that an additional assessment (VAT217) was issued. You will then find the grounds on the assessment (VAT217) and, if not, you should request reasons for the assessment. The grounds will probably be as we indicated above. SARS would not be wrong in issuing additional assessments and levying the penalties.

The vendor can argue that the matter was not dealt with in an administratively fair manner, but that would involve a review request. As there is an assessment, it would be better to object to the assessment. If the period to object has lapsed, a condonation would be required.
A summary of a recent tax court case involving a motor vehicle dispute.

**VAT 1345: RTCC v SARS**

**Issue**
Whether the Appellant qualified for an input deduction in respect of a motor vehicle that was acquired for purposes of making taxable supplies.

**Facts**
The Appellant is a VAT-registered close corporation in the courier industry. After an audit, SARS discovered that the Appellant claimed input tax for the acquisition of a 2007 Mercedes Benz 115 CDI Crew Cab motor vehicle (“the motor vehicle”). SARS disallowed the input tax for the acquisition of a 2007 Mercedes Benz 115 CDI Crew Cab motor vehicle (“the motor vehicle”). SARS disallowed the input tax on the basis that the motor vehicle was not mainly constructed for the carriage of passengers.

**Ruling**
The taxpayer argued that the motor vehicle was not mainly constructed for the purpose of making taxable supplies. Furthermore, the taxpayer contended that the motor vehicle was mainly constructed for the purpose of carriage of passengers.

**Take away**
To determine if a vehicle is a motor car and whether an input tax credit lies in respect of same is an objective enquiry. While the vehicle may indeed be used for the making of taxable supplies, the question is first and foremost whether or not the vehicle was constructed mainly or wholly for the purpose of carriage of passengers. The court accordingly focused on the manner in which the motor vehicle was constructed in arriving at its decision and found that the motor vehicle was mainly constructed for the carriage of passengers.

**Appeal dismissed.**

**Core reasoning**
To determine if a vehicle is a motor car and whether an input tax credit lies in respect of same is an objective enquiry. While the vehicle may indeed be used for the making of taxable supplies, the question is first and foremost whether or not the vehicle was constructed mainly or wholly for the purpose of carriage of passengers. The court accordingly focused on the manner in which the motor vehicle was constructed in arriving at its decision and found that the motor vehicle was mainly constructed for the carriage of passengers.

The taxpayer argued that the motor vehicle was not mainly constructed for the purpose of the carriage of passengers and in addition, was used for the purpose of making taxable supplies.

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Recent binding private rulings summarised:

Binding Private Ruling 243: Determination of a subcontracting agreement and implementing of a toll manufacturing arrangement

**Issue**
The Applicant is a company incorporated in and a resident of South Africa, and the Co-applicant is a wholly-owned and resident subsidiary of the Applicant. The parties intend to change their current subcontracting agreement to a toll manufacturing agreement, and would like to know if such an adjustment would have capital gains tax implications.

**Facts**
The Applicant is contracted to sell Product A to Company X. The Applicant, however, has only the raw materials with which to make Product A. The Co-applicant is subcontracted by the Applicant to manufacture Product A. In the terms of the subcontracting agreement, the Co-applicant takes ownership of the raw materials, produces Product A, and is then permitted to supply and deliver Product A to Company X.

The Applicant intends to change its memorandum of agreement (MOA) to a toll manufacturing arrangement instead of subcontracting its rights under the MOA. The Applicant will thus continue to supply the Co-applicant with raw materials for processing, however, ownership of the raw materials will not pass to the Co-applicant. In this way, the Applicant will sell the manufactured Product A directly to various third party buyers, including Company X. The Applicant will undertake all the business functions, such as the marketing and distribution, previously performed by the Co-applicant.

The Co-applicant will continue to manufacture Product A for the Applicant in terms of the toll manufacturing arrangement, in accordance with the Applicant’s specifications. Ownership of the raw material will remain with the Applicant, and the Co-applicant will charge a fee for the services rendered to the Applicant.

**Outcome**
The proposed transaction described above, wherein the subcontracting agreement including the concomitant supplies plan between the Applicant and the Co-applicant is terminated and replaced by the implementation of the toll manufacturing arrangement, will not constitute a disposal of an asset as contemplated in the Eighth Schedule. The proposed transaction will not give rise to a capital gains tax liability for the Applicant.

**Binding Class Ruling 054: Employer-provided accommodation**

**Issue**
Whether vacant stands acquired by employees from employers constitute “immovable property” for purposes of par 5(9A) of the Seventh Schedule to the Income Tax Act, resulting in no value being placed on the fringe benefit.

**Facts**
The Applicant is a mining company which is required to comply with certain obligations imposed by the Mineral and Petroleum Resources Development Act, 2002 (the MPRD), as well as the Broad-based Socio-economic Empowerment Charter for the South African Mining and Minerals Industry (the Mining Charter), in order to improve its employees’ housing standards.

The Applicant wishes to sell vacant stands to its qualifying, permanent employees and these employees are, in turn, required to erect a house on the stand within a prescribed period of time and for their own cost.

**Outcome**
The stands are deemed to constitute “immovable property”, as envisaged in paragraph 5(9A). No value will, therefore, be placed on the stand if the requirements identified in paragraph 5(9A) are complied with, namely:

- The remuneration proxy of the employee does not exceed R450 000; and
- The employee is a not a connected person in relation to the employer (Applicant).

This ruling determines the time of accrual for the purposes of “gross income” and time of supply for VAT purposes in relation to a guarantee policy for security issued to the Master of the High Court by a liquidator.

The Applicant is a short-term insurer specialising in the field of providing security to the Master for the due compliance by liquidators of their statutory obligations in terms of the Insolvency Act and the Administration of Estates Act. The Applicant provides security in the form of security bonds on behalf of the Liquidators for the proper performance of their duties.

Once the Applicant has issued a security bond, the Applicant provides the Liquidator with a notice. This notice confirms the existence of the guarantee policy as well as the manner in which any premium is to be calculated. The Applicant is at risk from the date the bond is issued.

Should the Liquidator fail to perform its duties the amount of resulting loss or damage shall then be accepted as prima facie proof of that failure and of the extent of the loss or damage. These damages will then be claimed using the bond pay-out.

In relation to the free residue of an estate, the premium will accrue to the Applicant when it is ascertained that there are sufficient funds in the estate to pay the Applicant’s costs. In relation to a sale of property subject to security (a special mortgage, landlord’s legal hypothec, pledge, or right of retention), the premiums will accrue on the date that the proceeds on the sale of secured assets are received, as provided for in the bond pay-out. Time of supply for VAT purposes. Time of supply will be the time payment is received.
Many taxpayers and practitioners are unaware that the delay in refunds can be due to many reasons, including outstanding returns, outstanding money owing to SARS or simply because the taxpayer’s banking details are reflecting as invalid on the SARS system.

Before you haul a heavy-duty chain down to your local SARS office and threaten to secure yourself to their front door until your refund is released, here are three quick ways to make sure the payment delay is not coming from your side.

1. Confirm your bank details

Remember that any submission via the SARS Income Tax Return on eFiling triggers an update on SARS’ systems. Sometimes, changes to banking details on your ITR12 may trigger a verification procedure that necessitates a visit of the SARS office with relevant documentation in order to confirm the legitimacy of those changes.

A quick way to check if your banking details are valid is to view your SARS Registered Details on eFiling. You are also able to submit amended banking details using the same function.

If all else fails, phone the SARS National Call Centre (0800 00 SARS) and confirm which details they have on their side. The agent will not be able to read the information to you, but he or she can indicate whether the details are valid or not.

2. Check for outstanding returns

A refund could be held back due to outstanding tax returns on your profile. Sometimes, taxpayers are under the impression that a return has been submitted, only to discover at a later stage that it is still reflecting as “saved” (not “filed”) on their eFiling profile.

Make use of the My Compliance Profile (MCP) function on eFiling to view any outstanding returns that might be delaying a payment. To be extra certain, request a statement of account and view the notes at the end of the statement. Any returns that are still required should reflect there.

3. Check if you owe SARS money

It is possible that there is an amount owing to SARS that is causing your refund to be withheld. In most cases, SARS will apply debit equalisation and set the outstanding amount off against your current refund.

One of the possible reasons for an amount owing is that of administrative penalties, raised as a result of outstanding or late tax returns. If your refund has been unusually delayed, request an Admin Penalty Statement – just to be safe. You can also check the My Compliance Profile to see if there is any amount owing.

Remember that you can also use the Compliance Dashboard to “challenge” anything you might not agree with.

Bear in mind that this is only a handful of possible reasons as to why a refund will be delayed. Refunds are dealt with in detail in Chapter 13 of the Tax Administration Act.
EY celebrates excellent, young tax professionals; Michiel Els joins Deloitte and SAIT hosts the Annual Transfer Pricing Summit.

Going places

Michiel Els recently joined Deloitte as head of transfer pricing dispute resolution. We spoke to him about his new position and the state of the transfer pricing environment.

Is it an interesting time to be in this space?

I think we have only touched the tip of the iceberg in relation to transfer pricing in South Africa. With the new notice that was released on 28 October 2016, making it compulsory to submit transfer pricing documents, we are hoping that companies will be getting their affairs up to date in order to meet the requirements as set out in the new notice.

Further, with the attention that Africa is receiving in relation to illicit financial flows out of the continent, we expect to see a lot more disputes coming our way.

What is the nature of your new role and will it differ from your previous position?

One of my roles at Deloitte is managing the transfer pricing disputes and controversy service offering. We have noticed that SARS is being more aggressive in relation to assessments and disputes. In addition, I have found that auditing practices are usually the first port of call for taxpayers. Hence, we have structured our market offerings for the South African practice.

We at Deloitte are fortunate to have developed various web-based programmes for our clients. This will enable governments to identify companies not adhering to the arm’s-length principle. We expect this, together with the introduction of compulsory documentation for local entities, which includes the local file, master file, and country-by-country reports, to change the current landscape as we know it.

What changes/challenges do you foresee for your firm in the future?

We foresee the introduction of compulsory documentation for local entities, which includes the local file, master file, and country-by-country reports as the biggest challenges for our clients. In addition, we also expect SARS to make use of and obtain information from other governments through the exchange of the information programme. This, in turn, will provide SARS with the “bigger picture” regarding multinational companies’ supply chain. This may ultimately result in more disputes which are larger than before.

We at Deloitte are fortunate to have developed various web-based programmes for assisting our clients to prepare the necessary documentation, which in turn will help them save time and costs for preparing such documentation. We see this as one of our key market offerings for the South African practice.

EY Young Tax Practitioner of the Year winners announced

On 21 October 2016, Kari Frenzel, a student from the University of Pretoria, won the South African component of the 2016 EY Young Tax Professional of the Year competition.

Newenkezwe Radebe and Keletso Sekgothe, both from University of Johannesburg, placed second and third respectively. The three will represent South Africa in the international leg of the competition.

“The idea behind the competition is to identify the top young, aspiring tax professionals around the country and expose them to tax outside the academic space,” says Maagan Damons, the graduate recruitment lead at EY.

Damons explains that, on the day of the competition, students were divided into groups and presented with a case study. Each student had to individually present an answer to a panel of judges. Six shortlisted students then took part in the second session where they were presented in front of a panel consisting of EY leadership and external academics.

The winners will now go to Amsterdam where they will compete against other national winners. The winner of the international competition will go on a 30-day, around-the-world business trip, including visits to key EY tax centres.

The annual competition is open to students who are studying towards a degree up to Master’s level in any field. Participants must be younger than 28 on the day the international final takes place, and must have less than 18 months of work experience.

SAIT hosts annual Transfer Pricing Conference

SAIT hosted the 5th Annual Africa Transfer Pricing Summit on 21 and 22 November 2016. The summit was held at a time when the transfer pricing landscape is rapidly changing due to the intra-country sharing of information and increasing focus on base erosion and profit shifting (BEPS).

Speakers included local and international experts in the field from leading firms as well as from government. Attendees included
Ruan van Eeden speaks to us about his career, transfer pricing and how the age of tax generalists may be ending. We also review the latest changes in the tax administration and VAT environments.
How Tax is Evolving: Through the Eyes of Ruaan van Eeden

As we reflect on the ever-changing tax landscape and the future trends that 2017 holds, we tap into the sharp mind of Ruaan van Eeden, Head of Tax at Geneva Management Group, regarding the state of the industry and his own endeavours.

Q: You currently head up the tax division of the Geneva Management Group. Your company’s areas of expertise include cross-border tax, exchange control, Voluntary Disclosure Programme/Special Voluntary Disclosure Programme (VDP/SVDP) disclosures and transfer pricing. These areas have received a lot of government and media attention in recent years. Is it an exciting time to be working in this space?

A: The reason I chose the tax consulting profession is because of its ever-changing and fast-paced nature. This forces you to think outside the box in terms of finding solutions for clients, advising on complex areas of tax law and having intellectual debates with your peers on a difference of interpretation.

There is certainly never a dull moment in the tax space as it currently stands. The tax profession is also viewed differently by students as a career. Those who are not overwhelmed by the sheer volume of information one has to digest, and who understand that hard graft is needed, will find it immensely rewarding over the long term.

Over the last few years, tax has certainly been in the media spotlight with the tax strategies of high-profile multinational companies being brought into the public eye, unlike any other period in history. The result is somewhat subjective, but nonetheless it has created public debate around the issue of tax morality versus only paying what is legally due.

Any tax professional currently dealing within the cross border space (both tax and exchange control) or tax controversy will have a busy practice for the foreseeable future. As a side note, a well-known tax professor once stated that the decision to specialise in corporate tax is based on being either stupid or crazy – I am still not sure which one I am leaning towards, but I am grateful to be in the tax profession.

Q: What do you see as the tax industry’s three biggest challenges in the coming five years?

A: Although there are a myriad of challenges facing the tax industry from a compliance and advisory perspective, I would rate the single biggest challenge as keeping up to date with ever-changing tax laws. Tax professionals — both in-house and external — are facing a barrage of domestic and international tax amendments, over and above getting to grips with new and complex compliance and reporting requirements.

Revenue authorities will also be obtaining information quicker under the impending automatic exchange of information and by way of advance reporting of certain transactions under domestic law, which means tax professionals and organisations would be required to manage their data in an efficient, transparent and readily available way.

In my view, the challenges facing the tax industry in the next five years may prompt a migration to true specialisation for younger tax professionals and working in tax technical silos, which could possibly mean the end of an era of tax generalists as we currently know them in the legal sector specifically.

Q: You seem to have enjoyed a successful and relatively fast rise up the career ladder. What do attribute this success to?

A: My personal view is that the measure of success, especially in the tax industry, may be somewhat subjective. Tax, with its various sub-disciplines, is an inherently difficult area of law to practice in — never mind successfully. I’ve learned over the years that one can never be
A: I cannot realistically see government raising the VAT rate above 14 per cent at this stage, although still relatively low by international standards, given that it is a potential political fireball and would affect the poor — because of its regressive nature.

Q: Do you believe that the terms offered by SVPD will be enticing enough to encourage a significant number of people to normalise their tax affairs?

A: My view is that the SVPD is enticing if only due to the fact that being caught out subsequent to its expiry period will result in a much worse situation, such as potentially stalling down the barrel of 200 per cent understatement penalties, 40 per cent exchange control levies and perhaps criminal prosecution. That in itself makes the SVPD look like a relatively affordable way of coming clean. In practice, I’ve seen most cases being a combination of the permanent VDP and the SVPD, with potential applicants finding the 40 per cent inclusion rate for tax the most difficult pill to swallow.

Q: If government decides to raise more revenue in order to support public spending, which areas do you believe will be focused on when it comes to increasing taxes?

A: Although no specifics were made available, there is a sense of inevitability in the undertone of the 2016 medium-term budget speech, indicating either an increase in corporate tax or introducing various tax arbitrage in line with base erosion and profit shifting (BEPS) and limiting tax relief for higher income earners.

Q: Are the most significant issues facing large companies during the next few years in terms of tax?

A: In my view, I foresee large companies in South Africa being under greater scrutiny from a transfer pricing perspective, as well as a significant uptick in tax controversy. This will necessitate greater investment in tax-related information technology management and data flow to justify tax positions taken domestically and abroad.

Q: What does concern me is that there appears to be inconsistency in the way certain SARS offices and auditors apply and adhere to the provisions of the Tax Administration Act. Taxpayers and advisors want consistency which, in my view, will also result in smoother and efficient audits. With the move to a complete tax system of self-assessment and, in so-doing increasing SARS’ audit and enforcement capacity, one hopes it coincides with proper training.

A: You have become something of an expert on tax matters concerning renewable energy. What is your view on the current tax regime concerning renewables?

A: You began your career at SARS before joining a corporate. Did working for SARS give you a unique perspective into how the tax system works?

Q: I have been lucky to have worked closely with independent power producers in the renewable energy space during my time at Cliffe Dekker Hofmeyr, allowing me to get to grips with both the technical aspects of the various technologies and understanding the application of the accelerated capital allowance under section 12B of the Income Tax Act.

Q: I realised that section 12B is not necessarily straightforward and requires a large degree of interpretation, especially on the question of where the production of electricity actually begins in the process, which resulted in interesting tax rulings from SARS. There is no doubt that tax policy can be improved upon?

A: I can guide them through every step of the way, not only from a tax perspective, but also from a tax administration side.

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APPLE DOESN’T FALL FAR FROM THE Transfer Pricing Tree

NISHANA GOSAI, Baker & McKenzie

In light of the European Commission’s high profile decision regarding Apple’s taxes, we surveyed South Africa’s transfer pricing landscape.

The recent coverage concerning Apple’s tax woes in Ireland set off yet another tremor in the tax world. The claim that has been made is that Apple has to “pay” an approximate €13 billion in tax. Worse yet is the fact that this was not the doing of the tax authority but rather the findings of the European Commission (the Commission).

In summary, the Commission took issue with an advance pricing agreement (APA) granted to Apple by the Irish tax authorities. This agreement stipulated the profits to be attributed to Apple’s permanent establishment in Ireland. This resulted in Apple having an effective tax rate of 0.005 per cent in Ireland. The Commission found that this establishment in Ireland. This resulted in Apple having an effective tax rate of 0.005 per cent in Ireland. The Commission found that this establishment in Ireland.

In June 2015, the Commission also released its action plan for fair and effective corporate taxation within the EU. Key actions include a framework to ensure effective taxation where profits are generated rather than transferred.

At the heart of all the controversy is one recurring issue — that of transfer pricing. The report identified transfer pricing practices as one of the contributors to financial outflows within the commercial component. While it is debatable whether transfer pricing is “illicit”, the key takeaway is that transfer pricing is regarded as a culprit to be dealt with. The report goes on to highlight trade mispricing, intangibles, intra-group loans and management fees as being part of abusive transfer pricing practices. The following extracts from the report are quite telling.

“While it is debatable whether transfer pricing is “illicit”, the key takeaway is that transfer pricing is regarded as a culprit to be dealt with.”

The Apple case has surfaced as a symptom of a larger trend

Against the backdrop of the G20/OECD Base Erosion and Profit Shifting Project (BEPS Project), which prompted greater scrutiny into the tax affairs of major multinationals, many countries are moving towards tax transformation.

The Apple case as a symptom of a larger trend

The Commission itself has implemented significant measures towards what it views as “fair taxation” and greater transparency within the EU, such as the automatic exchange of information on tax rulings. This legislation is designed to enhance transparency and act as a deterrent from using tax rulings as a tax abuse tool.

In June 2015, the Commission also released its action plan for fair and effective corporate taxation within the EU. Key actions include a framework to ensure effective taxation where profits are generated and a strategy to re-launch the Common Consolidated Corporate Tax Base, for which a fresh proposal is expected at the end of this year.

In addition, the Commission launched a further package of initiatives on 27 January this year to combat corporate tax avoidance within the EU.

The focus on tax and transfer pricing also has a continental focus.

Shifting Project (BEPS Project), which prompted greater scrutiny into the tax affairs of major multinationals, many countries are moving towards tax transformation.

For example, the Commission announced its intention to initiate a tax review to assess South Africa’s tax policy framework and its role in supporting the objectives of inclusive growth, employment, development and fiscal sustainability. A nine-member committee known as the Davis Tax Committee (DTC) was inaugurated, and the Committee’s terms of reference were announced in July 2015. Since then, a number of tax reform proposals have been tabled by the DTC.

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“We found evidence that abusive transfer pricing was occurring on a substantial scale in Africa.”

“We took note of existing estimates, which assess commercial activities as accounting for 65 per cent of IFFs, criminal activities for 30 per cent and corruption for around 5 per cent…”

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From a South African point of view, SARS follows a letter-of-the-law approach to tax audits and assessments, and the preservation of taxpayer affairs is still sacrosanct. Despite calls from parliament and civil society to publicly name and shame those multinationals involved in transfer mispricing, SARS has, to date, remained steadfast in upholding its oath of secrecy. Furthermore, while there is genuine concern that countries will embark on unilateral measures to tackle transfer pricing and BEPS, there are no indications that South Africa will deviate from its stated country commitments in the BEPS Project.

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Legislative changes have been implemented for filing the country-by-country reports followed by some notable amendments to the Tax Administration Act (TAA), and ongoing expansion of the corporate tax return framework to improve and widen the disclosure requirements for transfer pricing and other BEPS-related transactions.

A need for more information was also pointed out in the BEPS Project report titled Transfer Pricing Analysis Depends on Access to Relevant Information. The report suggests that access to extra information will enable tax authorities to better scrutinise transfer pricing. Government's acknowledgement of need is reflected in the following amendments to the TAA:

1. Amendment to section 42A to clarify which requirements to comply with for those taxpayers who fail to submit relevant information to SARS on the basis of legal professional privilege. There is now a process to be followed for effective resolution of the issue.
2. Amendment to section 46, with respect to access to foreign based information. In the event that a multinational taxpayer asserts it is unable to produce such information there are now measures, under certain circumstances, that can prohibit the submission of such information at a later stage.
3. Amendment to section 47 to clarify who may be interviewed or called upon to provide information on a taxpayer/company/entity under audit. It is important to note in this amendment that the existing requirement, in terms of section 49 of the TAA, allows SARS to request such persons to be interviewed under oath or solemn declaration.
4. Amendment to section 89 to extend the current three-year prescription period by a further three years in instances where an audit or investigation relates to either transfer pricing, the application of substance over form, the general anti-avoidance rule or the taxation of hybrid entities or hybrid instruments. In addition to the above amendments, in December 2015, SARS released a Draft Record Keeping Notice in terms of section 29 of the TAA. This notice requires persons specified in the schedule to keep and retain the records, books of account or documents as prescribed in the schedule. These requirements are specific to transfer pricing and, following two rounds of public comment in May 2016 and August 2016, have now been finalised, effective 1 October 2016. These new requirements are mandatory and are separate to the master file and local file requirements of the BEPS Action 10. To date, it was not a statutory requirement for taxpayers to maintain specific transfer pricing policy documentation but rather a recommendation. In the wake of these new developments, multinational taxpayers would be well advised to ensure that their current documentation and records are compliant with the impending new requirements.

The report suggests that access to extra information will enable tax authorities to better scrutinise transfer pricing. There is now a process to be followed for effective resolution of the issue.

Further your career with FPSA®

Within a few years the designation of Fiduciary Practitioner of South Africa (FPSA®) will be the yardstick in the fiduciary industry. Much as CFP® is the yardstick among financial planners. FPSA has been working hard at raising professional fiduciary standards. Our members are subject to the FISA Code of Ethics and a Continuing Professional Development (CPD) programme. Anybody dealing regularly with estate planning, wills, deceased estates, trusts, and beneficiary funds should be a FPSA member. This includes attorneys, accountants and financial planners in addition to trust company employees.

Can you afford NOT TO BE A MEMBER?

The issue of tax is no longer confined to tax departments, historically regarded as an administrative back office compliance function. It has gained worldwide recognition at the highest levels where presidents, senate/parliament committees, civil society and ordinary citizens are discussing tax to the point where CEOs of large corporations are being called to account for their corporate tax practices. There is a definite global shift in tax sentiment and for those at the helm it is becoming increasingly tough terrain to navigate.

Where to from here?

Within retaining enhanced observer status at the OECD and adoption of the arm’s length standard, South Africa still remains one of the few countries that does not have any safe harbours or an APA regime for transfer pricing. This is a clear indication that South Africa has followed its own trajectory. For multinationals wanting certainty, it would appear that the path of least resistance would be robust pricing policies, supported by commercially sound agreements together with legislatively compliant records and documentation.

The latest Draft King IV Report on Corporate Governance for South Africa 2016 reinforces the enhanced focus on matters of taxation with the following:

“Tax has become a complex matter with various dimensions.”

“Recent public reaction to organisations shifting profits for tax purposes to jurisdictions other than where they have their customer base and operational activities has shown that the due payments of taxes is now linked to corporate citizenship and reputation. It is no longer acceptable to have overly aggressive tax strategies and to exploit mismatches between the tax regimes of various jurisdictions, even if these actions are legal.”
Many foreign-owned entities in South Africa enjoy substantial support and backing from their parent companies and owners. The connected person relationship between the South African entity and its foreign shareholder(s) may give rise to transfer pricing adjustments in respect of transactions between those entities. This article considers a specific scenario relating to funding provided by a foreign shareholder, which many of the South African entities in this type of a relationship may face.

An overview of the transfer pricing requirements

Section 31 of the Income Tax Act (the Act) governs transfer pricing in South Africa. In brief, section 31(2) requires a taxpayer to make a transfer pricing adjustment in determining its taxable income if a transaction was entered into between two taxpayers who are connected persons in relation to each other and where, among others, one is a South African tax resident and the other not. An adjustment is, however, only required if one of these persons derives a tax benefit from the fact that any term or condition of that transaction is different from any term or condition that would have existed had those persons been independent persons dealing at arm’s length. In the context of debt funding, a transfer pricing adjustment may be triggered in the hands of the borrowing South African entity if the amount of interest incurred in relation to the funding advanced by the foreign shareholder is considered excessive based on either the rate of interest or the level of debt. The latter is commonly referred to as thin capitalisation. A deduction of interest incurred in respect of the excessive debt amount would reduce the tax liability of the South African entity to an amount lower than it would have been had an external person provided the funding (not in the form of interest-bearing debt, given the risk involved and balance sheet position of the South African entity). Practically, section 31(2) results in a portion of the deduction of interest incurred being disallowed as a deduction in the hands of the borrower when calculating its taxable income. This is referred to as the primary adjustment.

A further transfer pricing related adjustment is required in terms of section 31(3). In the context of a company making a transfer pricing adjustment, since 1 January 2015, the amount of the adjustment is deemed to be a dividend consisting of a distribution of an asset in specie declared and paid by that resident to that other party to the affected transaction. This adjustment is based on the reasoning that where value flows out of South Africa as a result of a transaction that requires a transfer pricing adjustment, this may effectively be a hidden value distribution, which if distributed by way of a dividend would have attracted dividends tax.

This deemed dividend attracts dividends tax at 15 per cent and SARS indicates in its Comprehensive Guide to Dividends Tax that, based on views expressed in the judgement of Volkswagen of South Africa (Pty) Ltd v C: SARS 70 SATC 195, dividends tax payable by a company on a dividend in specie or a deemed that dividends in specie is a tax similar to STC and therefore falls outside the ambit of the dividends article of a tax treaty. The importance of this statement is that the rate of 15 per cent on the deemed dividend cannot be reduced in terms of the dividend article of a treaty.

An overview of withholding taxes on interest

Interest on debt funding from a foreign shareholder that does not have a presence in South Africa should be exempt from normal tax in South Africa in the hands of the foreign shareholder in terms of section 10(1)(h). However, this interest paid to a foreign person will be subject to the withholding tax on interest at a rate of 15 per cent in terms of section 50B. Section 50E(3) allows for a reduction in the withholding tax rate based on relief contained in double tax agreements entered into by South Africa. Many of the double tax agreements entered into by South Africa provide for the withholding tax rate on interest payments to be reduced. However, some of the double tax agreements contain a provision similar to the one below that is contained in interest article in the OECD Model Tax Convention:

“Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount.

In such cases, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention”

The interest subject to the transfer pricing adjustment referred to above may therefore not qualify for the double tax agreement relief available in respect of interest, for the same reasons that a transfer pricing requirement is necessary, in other words it being different from what persons not having the special relationship would have incurred, and still attract withholding tax at 15 per cent.

The problem where transfer pricing and withholding taxes on interest overlap

Where a South African entity owned by a foreign shareholder incurs interest on levels of debt funding by the shareholder that are considered excessive, the following tax implications would arise:

- As the interest is paid (or becomes payable) on a monthly, quarterly or annual basis, these amounts represent interest paid to a foreign person and would therefore be subject to the withholding tax in terms of section 50B. If this interest differs from the interest that would have been agreed to in the absence of the special relationship between the South African entity and its foreign shareholder, it is a reduced rate of withholding in terms of the treaty may not necessarily be applied.
- For income tax purposes, the deduction of this interest would be disallowed in terms of the primary adjustment required by section 31(2). This will result in a higher taxable income of the South African entity, which will be subject to income tax at 28 per cent.
- The above primary adjustment requires a secondary adjustment that triggers a dividend tax liability at 15 per cent on this amount, without the possibility of a reduced rate if the view in the SARS Guide is followed.

The effect can be illustrated by the following example:

ForeignCo holds 70 per cent of the shares of SACo. A minority shareholder holds the remaining 30 per cent of the issued shares of SACo. To keep the illustration simple, assume SACo has a cash and taxable profit of R1 000,000. In this example, funds generated using funds advanced by ForeignCo, a portion of which is viewed as excessive as SACo would not have been able to obtain that level of debt funding from any third party Fund. Assuming that the interest on this excessive portion of the debt amounts to R1 000,000, the total tax effect of the above implications (Scenario 3) compared to, firstly, the effect of normal interest incurred on debt without a transfer pricing adjustment (Scenario 1) and, secondly, to dividend treatment
THREE DIFFERENT TREATMENTS OF PROFIT MADE DUE TO FUNDS ADVANCED BY A FOREIGN HOLDING COMPANY WHICH WERE DEEMED EXCESSIVE

<table>
<thead>
<tr>
<th>SCENARIO 1: IF NO TRANSFER PRICING ADJUSTMENT WAS REQUIRED (NORMAL INTEREST TREATMENT)</th>
<th>SCENARIO 2: IF THE EXCESSIVE INTEREST WAS TREATED SIMILARLY TO EQUITY AND THE INTEREST ON THIS VIEWED AS A DIVIDEND</th>
<th>SCENARIO 3: IF TRANSFER PRICING ADJUSTMENTS WERE MADE UNDER SECTION 31</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cash profit/taxable income before deduction of excessive interest</td>
<td>R2.5 million</td>
<td>R2.5 million</td>
</tr>
<tr>
<td>Deduction for payment of amount viewed as return on excessive debt</td>
<td>(R1 million)</td>
<td>-</td>
</tr>
<tr>
<td>Cash profit/taxable income</td>
<td>R1.5 million</td>
<td>R2.5 million</td>
</tr>
<tr>
<td>Normal tax @ 28%</td>
<td>R420 000</td>
<td>R700 000</td>
</tr>
<tr>
<td>Dividends tax @ 15%</td>
<td>R150 000</td>
<td>R150 000</td>
</tr>
<tr>
<td>Withholding tax on interest @ 15%</td>
<td>R150 000</td>
<td>-</td>
</tr>
<tr>
<td>Total tax effect</td>
<td>R570 000</td>
<td>R850 000</td>
</tr>
</tbody>
</table>

(Scenario 2) can be illustrated as per the table on the following page.

As illustrated in the table, the overall South African tax effect for the group of the current treatment of the excessive interest paid (Scenario 3) is greater than that of normal interest paid (without a transfer pricing adjustment) (Scenario 1). This is arguably correct as the transfer pricing adjustment recognises the fact that this interest expenditure does not necessarily have the characteristics of interest as a third party would not have advanced this funding as debt. However, it is concerning that the current treatment (Scenario 3) also results in a greater tax effect for the group than what would have been the case had the excessive debt been equity funding and the interest on this a dividend (Scenario 2). It is questionable whether this outcome is what was intended by the legislature or rather an oversight and unintended effect. This statement is made in light of the fact that the funds advanced to the South African entity ultimately still represent funds extracted from South Africa.

A possible solution

A transfer pricing adjustment should aim to adjust the tax effect of an arrangement between persons not dealing at arm’s length to that which would have existed had it not been for this relationship. Where an interest deduction is denied under section 31(2) in respect of debt that is not connected third party would not have advanced to the borrower the group should be placed in the position that it would have been in had it not been for this relationship. Where an alternative to the above would be to exclude any amount that was subject to a primary transfer pricing adjustment under section 31(2), that has also been subject to a withholding tax, from the scope of section 31(3). This approach is possibly more practical than the first proposal, but perhaps not as theoretically sound as the type of withholding tax may not necessarily aligned with the substance of the payment through which the value is extracted from South Africa.

From a taxpayer perspective, given the current legislation, the only foreseeable solution would be to structure one’s affairs in such a manner that a transfer pricing adjustment is not necessary under section 31(2). This may, however, be easier said than done in scenarios where business considerations drive the nature of the transaction, for example, if a South African subsidiary requires funding from a foreign parent but cannot dilute interests of minority shareholders, such as BEE shareholders, through the issue of more shares or equity instruments to the foreign parent that therefore funds it by way of debt, which may at some point be viewed as excessive.

It is submitted that the concern can be addressed in one of two ways:

• It can firstly be prevented by exempting the payment in respect of which the deduction that would be disallowed under section 31(2) from the relevant withholding tax. This alternative may possibly pose some practical challenges as it may not yet be clear at the time of payment, when the obligation to withhold tax arises, whether and to what extent the deduction will be disallowed under section 31(2) or not.

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Why We Choose to Comply

"Voluntarily tax compliant" is a term often used by tax authorities worldwide to describe the majority of their taxpayers. SARS recognises that most South Africans are voluntarily tax compliant, and regards the positive attitude to compliance by South African taxpayers as one of its strengths. Governments realise the importance of having a willing taxpayer base and many tax authorities use a compliance model to engage with taxpayers using different strategies to encourage compliance. These strategies range from enforcement strategies, to strategies of assisting taxpayers to comply.

Although it is widely recognised in literature that the majority of taxpayers are voluntarily compliant, it appears that tax authorities place more emphasis on how they can enforce compliance rather than how they can acknowledge those who are voluntarily compliant.

Recently, new research suggests that there are three different types of reasons or motivations that taxpayers have for being compliant, namely: enforced, voluntary and committed motivation.

Taxpayers holding an enforced motivation only pay taxes when they fear audits and fines, and likely have negative attitudes and feelings towards paying taxes. Taxpayers holding a voluntary motivation to pay taxes respect the tax law, and believe in the need to reciprocate and see the tax authority as a service provider that should assist taxpayers to comply with the law. Committed motivation, on the other hand, is an intrinsic desire to be tax compliant characterised by taxpayers’ commitment to the tax system and a belief by taxpayers that they actively contribute to society’s well-being.

The concept of voluntary compliance is not well defined in the literature and is commonly used in the sense of "compliance in the absence of an external enforcement action." By conducting an in-depth review of the literature from a socio-economic viewpoint, the thesis aims to provide a detailed understanding of the concept and to define the principles underpinning voluntary tax compliance. The definition subsequently derived at for voluntary tax compliance is:

Voluntary tax compliance is the acceptance of one’s or her tax obligations by a taxpayer as a duty or moral commitment, in the absence of any enforcement actions directed towards the taxpayer by the tax collection agency. This behaviour is encouraged by the intrinsic willingness of the individual to co-operate, based on strong personal ethics and internalised social norms such as cooperation and trust.

The principles underpinning voluntary tax compliant behaviour are:

- Personal norms: as guided by ethics, morality, personal values and beliefs.
- Social norms: including perceptions of being treated fairly by tax authorities and not to be automatically suspected of cheating, perceived ease of communication, friendly and respectful treatment, degree of support from tax authorities, and provision and quality of information by tax authorities; and
- A climate of high trust between taxpayer and tax authority: characterised by high legitimacy and high tax knowledge, and perceptions of fairness of the tax system.

The study looked at the typical strategies used by tax authorities to encourage voluntary tax compliance. Strategies could be classified as:

- Tax-force-orientated: where authorities make it easy for taxpayers to fulfill their tax obligations;
- Norm-orientated: directed to appeal to the conscience and commitment of the individual; and
- Power-orientated: visibility of powers of credible enforcement.

By analysing strategies from tax authorities worldwide, the thesis made suggestions for building a voluntary tax climate. The analysis suggested that the building of a voluntary tax climate rests in the first instance on the orientation of the tax authority towards the taxpayers, and taxpayers’ experience of the orientation. Importantly, tax authorities should be aware that all interactions with taxpayers shape their perceptions and experience of the tax office, which in turn shape social norms. Secondly, the importance of education-based strategies (in the form of knowledge transfer as well as the shaping of norms) was evident in the South African context. It is suggested that tax education should be expanded, especially to younger taxpayers and even children, where norms are not yet deeply rooted. Finally, the internal capabilities of a tax administration should not be an obstacle to those taxpayers who want to comply; instead, systems, procedures and staff should be supportive of a voluntary tax climate.

Lastly, the thesis investigated the strategy of rewarding tax compliance. In some countries such as South Korea, Sri Lanka, Mauritius, Kenya, Pakistan and Singapore, to name a few, such practices exist.

In the case of South Korea, the National Tax Service of Korea adopted a system to recognise and benefit "exemplary taxpayers" (individuals and businesses). Benefits to exemplary taxpayers include suspension of tax audits for at least three years, reduced loan interest rate from major banks in Korea, discount on train fares and medical expenses, and the use of VIP windows at airports.

A conceptual analysis was performed in the thesis to define the concept of a reward for tax compliance ("tax reward" in short). A tax reward was defined as an incentive motivated by the aim of showing appreciation and recognition for voluntary tax compliant behaviour. The strategy with a tax reward should comprise awarding a token of a tangible or intangible nature to eligible taxpayers, which is then perceived as satisfying and of value by the recipient.

The research applied an interdisciplinary approach in seeking to define a tax reward. Many principles were identified for the use of rewards to encourage intrinsically motivated behaviour from the disciplines of marketing, human resource management, economics and psychology. Important principles for reward strategies are: recognition of compliance, appreciation and strengthening of autonomy. In order for awards to be effective in building a voluntary tax climate, the accompanying message and purpose of the reward, as communicated by the authority granting the reward, are also important. Rewards should further recognise what is important for taxpayers and should not be in conflict with their values.

The final aim of the thesis was to elicit the opinions of small business owners in the Ehlanzeni region of South Africa, on the use of rewards to encourage tax compliance. A paper-based questionnaire presenting two scenarios of possible reward strategies was administered face-to-face to 180 small business owners in the real estate and construction industries. The main findings are that the majority of taxpayers are in favour of a strategy of rewards and believe that rewards can be used by tax authorities to express appreciation and recognition of taxpayers’ contribution to the economy.

It is, however, acknowledged that strategies of rewards present their own problems such as abuse and corruption, high cost and an extra administrative burden for tax authorities, opposition from some taxpayers and perceptions of unfairness. If they are to be used in the South African tax environment, additional research and careful planning will be required.

The extensive review of the nature of voluntary tax compliance highlighted the fact that voluntary tax compliance is intrinsically motivated and should be recognised as such by tax authorities. The importance of acknowledging taxpayers’ own motivation for being tax compliant is also stressed.

The thesis recognises that there is no simple innovation that will provide a “quick fix” solution to the problem of tax compliance, and that a variety of strategies is necessary.

Voluntary tax compliance, although intrinsically driven, is not an isolated act and requires the support and recognition of society and authorities. As the Minister of Finance Pravin Gordhan stated in the SARS Compliance Programme (2012): “Compliance is a shared national priority in which we all have a stake. All sections of society must work together in achieving a moral society with integrity, honesty and equality as its core values.”

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A review of four of the most serious issues facing taxpayers as well as what to expect in 2017.

The problem

The top issue identified in the 2014/15 Tax Ombud report relates to patent errors on an assessment, where the objection process was no longer available. This was due to the expiry of the relevant time periods for objection, and where either withdrawal of assessment (in terms of section 98 of the TAA) or a request for reduced assessment (in terms of section 93 of the TAA) was required. At the time, although these legal avenues were available to taxpayers, SARS had failed to properly inform taxpayers of the processes they should follow in order to resolve the problems.

Unfortunately, in response to this problem being identified, SARS took steps to amend the TAA in order to significantly curtail the application of the relevant sections. Going forward this means that, in most instances, there will be no legal avenue available to taxpayers. In this respect:

- The TAA is readily apparent, with the subjective reasons for a taxpayer's delay in noticing a readily apparent error. This is actionable in terms of PAJA.

However, where the taxpayer in a return. This section was amended by the Tax Administration Laws Amendment Act with effect from 8 January 2016. The new Section 98(1)(b) provides for a person not authorised by the taxpayer, where this resulted in a processing error by SARS or a return fraudulently submitted by the taxpayer in a return, a request for a reduced assessment (even after the “prescription period”) where there was an undisputed factual error by the taxpayer in a return, a processing error by SARS or a return fraudulently submitted by a person not authorised by the taxpayer, where this resulted in an unintended tax debt, the recovery of which would produce an anomalous or inequitable result. This section was deleted by the Tax Administration Laws Amendment Act with effect from 8 January 2016.

What can you do about it?

The fact that the normal 30-business-day period for objecting to an assessment has passed, does not mean that you are definitely out of time to object. At any time within the “prescription period”, one can object to an assessment and apply for condonation of the late objection on the grounds of “exceptional circumstances”. These would be circumstances that are unusual, special or simply different that resulted in the delay in noticing the problem and objecting to the incorrect assessment. There is a fair amount of case law detailing what “exceptional circumstances” means in the context of bail applications. In addition, where the taxpayer can show that the merits are very important, and that the stronger the merits, the more lenient a court would be in condoning a late objection or appeal.

Even for requests in terms of section 93 or 98 of the TAA, where these aspects are not subject to objection and appeal to the tax board/tax court in terms of the TAA, all law and all SARS decisions are subject to the Constitution and the Promotion of Administrative Justice Act (PAJA). This means that you still have rights that can be enforced.

If you already requested a withdrawal of assessment or reduced assessment prior to 8 January 2016, SARS is obliged to apply the law as it stood at the time when the request was submitted, and not the law as it stood when SARS reached its decision. If SARS has denied your request based on the application of the incorrect law, this falls within the scope of administrative action that can be reviewed by the High Court in terms of PAJA. You can apply to the High Court for an order that SARS’ decision must be set aside, and that SARS must consider the matter afresh, based on the law as it stood on the date when your request was submitted.

If you only submitted a request for a reduced assessment or on or after 8 January 2016, SARS is obliged to apply the law as it stood at the time when the request was submitted, and not the law as it stood when SARS reached its decision. If SARS makes a mistake in its application of the law, this can be reviewed by the High Court in terms of PAJA.

Aspects of SARS’ interpretation that can be challenged in this respect, include the following:

- Where SARS interprets “readily apparent” to mean that the error must be “effortlessly obvious”. One can argue that SARS’ narrow interpretation of “readily apparent” is administrative action that can be reviewed by the High Court in terms of PAJA.

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In terms of section 195 of the Constitution, SARS must promote the efficient, economic and effective use of resources. This means that SARS must not waste its own or the taxpayer's resources. By implication, SARS should adopt a normal audit methodology that minimises the number of individual documents necessary, in a similar manner to how statutory auditors would conduct an audit. Taxpayers should co-operate with SARS to find the best ways for SARS to achieve its objective of auditing relevant items, while not placing an undue burden on the taxpayer.

Increased litigation against SARS

Taxpayers are becoming more willing to enforce their rights against SARS, including litigation where appropriate. In tighter economic conditions, taxpayers are less willing to pay taxes that they feel were incorrectly assessed by SARS, merely to preserve the relationship with SARS. There has also been an increased willingness of courts to make costs orders against public bodies, including SARS, over the last few years. This includes potentially holding public servants personally liable for costs when they have acted unreasonably or with a serious degree of negligence.

This trend towards increased litigation and potential personal liability should be anticipated to continue over the next few years.

Increased mandate for the Tax Ombud

The Tax Administration Laws Amendment Act will extend the mandate and independence of the Tax Ombud. While these changes are welcomed, various recommendations were made for greater powers to be granted to the Tax Ombud.

For example, tax practitioners have called for the Tax Ombud to have the power to issue binding "taxpayer assistance orders", in a similar manner to those in the United States. In contrast, the actual changes will not provide for any binding effect, although SARS (or the taxpayer) would only have to provide reasons for failure to accept the Tax Ombud's recommendation. It remains to be seen whether the requirement to provide reasons will significantly change SARS' approach to resolving complaints.

Given the trend in other countries, it should be anticipated that these would be further extensions to the Tax Ombud's powers and duties over the next few years.

Increasingly punitive tax legislation and strict application of legislation

Tax legislation has been drafted increasingly punitively. For example, to impose penalties and interest more broadly with very limited options for remittance, and restricting — procedural grounds — the opportunities for taxpayers to have incorrect assessments reduced to reflect the correct application of tax acts. In a similar vein, SARS has become stricter in enforcing the technical legal requirements of tax acts. For example, SARS used to routinely concede late objections and appeals, whereas currently SARS strictly applies the requirement for exceptional circumstances.

With the heavy collections targets placed on SARS, tax administration is becoming an extra revenue source, and one can anticipate that the current trends towards punitive tax legislation and strict application of technical provisions will continue into the future. This means that taxpayers will need to ensure strict compliance with all technical and procedural aspects of a matter to prevent the loss of substantive rights.

TOP 10 MOST SERIOUS ISSUES ENCOUNTERED BY TAXPAYERS

<table>
<thead>
<tr>
<th>ISSUE</th>
<th>RANKING</th>
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<tbody>
<tr>
<td>Delay in payment of refunds</td>
<td>1</td>
</tr>
<tr>
<td>Failure by SARS to update banking details</td>
<td>2</td>
</tr>
<tr>
<td>Incorrect allocation of payments received by SARS</td>
<td>3</td>
</tr>
<tr>
<td>Delays in issuing tax clearance certificates</td>
<td>4</td>
</tr>
<tr>
<td>Taxpayers being affected by employer's non-compliance with legislation relating to R1PS certificates</td>
<td>5</td>
</tr>
<tr>
<td>Inconsistency by SARS in providing taxpayers with timelines for finalisation of audit/verifications</td>
<td>6</td>
</tr>
<tr>
<td>Victims of identity theft being held liable for tax debts (Hijacking a victim's profile came in at 15)</td>
<td>7</td>
</tr>
<tr>
<td>Non-adherence by SARS to dispute resolution turnaround times</td>
<td>8</td>
</tr>
<tr>
<td>Failure by SARS to respond to requests for reasons for assessments raised</td>
<td>9</td>
</tr>
<tr>
<td>SARS' failure to take information at its disposal into account</td>
<td>10</td>
</tr>
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TAX ADMINISTRATION LANDSCAPE 2017 AND BEYOND: ANTICIPATED CHANGES

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Given the trend in other countries, it should be anticipated that these would be further extensions to the Tax Ombud's powers and duties over the next few years.
Introduction: Revenue targets and collecting the money

This year, SARS barely exceeded its revenue target by collecting R1.07 trillion in a severely constrained and depreciated economy. The Minister of Finance raised the bar even higher to a revenue target of R1.75 trillion. In light of seriously low growth in GDP and overall depressed economic conditions, potential labour unrests and uncertain political conditions, it seems an almost impossible feat. So how will the SARS Commissioner Tom Moyane and the team at SARS steer the ship to meet the target?

Ideally, it would seem that there should be a continued focus on increasing the tax base, increasing tax compliance, eradicating fraud and implementing more severe enforcement actions on the illicit or non-compliant economy instead of over-burdening the already over-taxed compliant taxpayers. However, in reality, taxpayers — who are mostly compliant — are currently experiencing not only tried-and-tested revenue initiatives, but also more novel ones, such as:

- Renewed and targeted tax audits with a focus on research and development, transfer pricing (BEPS) and high net individual audits;
- Appointing independent collection agencies (call centres);
- Debt management strategies, such as debiting bank accounts (via third party appointments like banks, in terms of Section 179 of the Tax Administration Act [TAA]);
- Implementing the “pay now argue later” rule (section 164 of the Fourth Schedule Income Tax Act 58 of 1962);
- Calling for additional provisional payments (paragraph 19(3) of the Tax Administration Act 115 of 1976); and
- Increasing compliance via targeted audits and enforcement activities;
- Increasing administrative penalties;
- Making use of third party data to cross reference and validate information supplied;
- Developing specialised skills; and
- Managing relationships with organised labour in a proactive and professional manner.

What is SARS’ plan for dealing with the risks posed by revenue collection pressure?

The above approach seems pragmatic and proactive but in the medium-term budget policy statement, Treasury stated that revenue collection for 2016/17 is expected to be R22.8 billion less than announced in the annual budget. Accordingly, a more innovative, “out of the box” approach will be required:

- SARS will apply more pressure to realise its 2017 revenue target to not only appease Treasury in its efforts to run the country, but also to provide credence to Moyane’s restructuring plan.
- SARS’ weaknesses (as stated in its strategic plan) are real and involve being under-staffed and under-skilled with the inability to distinguish between disrupted and undisputed debt and very little

What is SARS’ plan for meeting revenue target?

The SARS Strategic Plan 2016/17-2020/21 mentions its values as fairness, accountability, integrity, respect, transparency, trust and honesty. These are noble values indeed, but are we seeing SARS aspire to these values or are we experiencing these at the coalface?

A quick barometer is to check with the Office of the Tax Ombud, an institution of mostly last resort for the frustrated taxpayer. According to the Tax Ombud Annual Report 2015/16, they received 5,904 contacts, of which only 961 were acceptable complaints. Criteria for acceptable complaints include falling within their mandate and having exhausted all internal SARS complaint structures. This begs a further question: what are the majority of complaints based on?

According to the report, it would seem that 40 per cent were focused on assessment (IT, VAT, PRVE), 17.5 per cent on dispute resolution, 14.6 per cent on unlocking refunds. In addition, the Ombud mentions that during its three years of existence it has been calling for SARS to issue a service charter or bill of taxpayer rights.

In the strategic plan, SARS states that the revenue target is met with a little more than 6.8 million taxpayers from a population of a little over 53 million. They also mention that electronic volumes (i.e., filed via eFiling) have increased by 13 times from last year, which emphasises the fact that SARS greatly relies on technology to increase compliance levels.

SARS included an elaborate SWOT analysis of its business wherein they mention the following as being regarded as weaknesses and threats to the organisation:

Weaknesses debt management (collections)

- Distinguishing between collectable and disputed debt;
- Appropriate action of old debt;
- Capacity and prioritisation; and
- Insufficient automation.

Threats: internal and external

- Illicit economy;
- Poor public perception of service delivery and corruption;
- Tax evasion and avoidance;
- Poorly performing economies in the global environment; and
- Unrealistic demands from organised labour.

It is furthermore mentioned that emerging markets, including Sub-Saharan Africa, grew at the slowest pace in 2015 since the 2008/9 financial crisis. That, together with cyclical problems, appreciation of the US dollar and heightened risk aversion, culminated in the International Monetary Fund revising the global growth forecasts to 3.4 per cent (from 3.6 per cent) for 2016 and 3.6 per cent (from 3.9 per cent) for 2017.

Coupled with the fact that South Africa is one of the early adopters of automatic exchange of information, country-by-country reporting and common reporting standards means that taxpayers will have few places to hide their assets in the upcoming years, as the first batch of information will begin to flow between revenue authorities at the end of May 2017. It should be noted that the special voluntary disclosure window for taxpayers with assets abroad is open from 1 October 2016 to 30 June 2017 in parallel with the already enshrined Voluntary Disclosure Programme (Chapter 16, Part B of the Tax Amendment Act) for taxpayers who wish to regularise any defaults.

What is SARS’ plan for dealing with the risks posed by revenue collection pressure?

The following suggestions were made:

- Expanding its footprint via mobile tax units;
- Increasing compliance via targeted audits and enforcement activities;
- Increasing administrative penalties;
- Making use of third party data to cross reference and validate information supplied;
- Developing specialised skills; and
- Managing relationships with organised labour in a proactive and professional manner.

What type of tax collection approach does this translate into?

The above approach seems pragmatic and proactive but in the medium-term budget policy statement, Treasury stated that revenue collection for 2016/17 is expected to be R22.8 billion less than announced in the annual budget. Accordingly, a more innovative, “out of the box” approach will be required:

- SARS will apply more pressure to realise its 2017 revenue target to not only appease Treasury in its efforts to run the country, but also to provide credence to Moyane’s restructuring plan.
- SARS’ weaknesses (as stated in its strategic plan) are real and involve being under-staffed and under-skilled with the inability to distinguish between disrupted and undisputed debt and very little
TAX ADMINISTRATION

It is becoming increasingly difficult to understand the money withdrawn from the taxpayer’s bank account. Alternatively, suspending the payment of the taxes is not an easy process and requires professional expertise and knowledge to manage the process. The TAA also makes matters more confusing for taxpayers when dealing with audits. For instance, citing different types of assessments that can be raised by SARS, such as estimated assessments, additional assessment and even agreed assessments, and more particularly who bears the onus to prove what.

Understatement penalty is the new and improved section 76 of the Income Tax Act, which meant the penalty was almost always set at 200 per cent until the Supreme Court of Appeal in the C:SARS vs NW K [2011] [SCA] matter called the imposition of 200 per cent “severe and out of proportion to the wrong committed”. The new reformed model, adopted from Australia, is enshrined in Chapter 16 under sections 221-224 of the TAA with a reverse onus provision (section 102 of TAA). This means SARS has to prove that the behaviour of the taxpayer meets the penalty.

When the assessment is finally raised there are different methods, requirements and processes for how and when a taxpayer can settle or even compromise with SARS, dependent on the situation. Turning to the VDP applications, SARS tends to interpret the legislation in their own way and often rejects applications on the basis that an audit is in process, or where registered taxpayers declare a default in tax periods where no return was lodged citing that the application is not regarded as “voluntary”. Finally, be aware of the elusive personal liability enforcement tool which SARS can use with regard to an entity’s tax debts that are due and payable by, for instance, a financial manager or shareholder of a company (sections 180-184 of the TAA). Also note section 185 of the TAA, where assistance can be rendered by foreign revenue agencies to either collect or even preserve taxpayers’ assets. In short, seek advice on how to plan, manage and resolve your tax affairs and perhaps take heed to the words of author, poet and civil rights activist Maya Angelou, who wrote: “The continued increased pressure on the economy, realising in depleted growth. Labour unrest and ultimately slow growth, will leave SARS relentless to drive revenue initiatives and targeted audits on certain sectors of the economy perceived to be high income generators. SARS will, in the last couple of months leading up to March 2017, redirect all staff focus to debt management, even if it means collecting the money before it is due or applying the “pay now argue later” rule. What other challenges could interacting with SARS pose to taxpayers?

• The difficulty remains communication and doing business with SARS. This is exacerbated by the fact that most correspondence is issued by the service manager (the programme behind eFiling) with no reference to a person (and in some instances no reference to the relevant section of the TAA and calling a SARS call centre operator seems to be an exercise in futility). SARS continues to cite “increased ease and fairness of doing business with SARS” as an objective, but taxpayers are experiencing the complete opposite. Accordingly, if you are unfamiliar with the organisation, its various divisions and how they interact and work on a daily basis, it makes dealing with SARS, even when achieving mundane tasks such as amending your public officer details, an almost impossible task.
• It is becoming increasingly difficult to navigate the minefield of dispute resolution and debt management. For instance, it can be tough for a company to manage the audit or dispute process while also keeping an eye on the debt management division. This division demands money be paid before the dispute is resolved. We have experienced instances where a suspension of payment (section 164(3) of the TAA) was lodged with SARS, ignored by debt management, and money withdrawn from the taxpayer’s account.
• It is not easy to understand the processes that SARS has to follow. This is especially true for the procedural, legislative and governance requirements that must be met before commencing an audit, during the audit, when issuing the assessments, and when demanding payment and/or appointing a third party to satisfy tax debts (withdrawals from a taxpayer’s bank account). Alternatively, suspending the payment of the taxes is not an easy process and requires professional expertise and knowledge to manage the process. The TAA also makes matters more confusing for taxpayers when dealing with audits. For instance, citing different types of assessments that can be raised by SARS, such as estimated assessments, additional assessment and even agreed assessments, and more particularly who bears the onus to prove what.
• Understatement penalty is the new and improved section 76 of the Income Tax Act, which meant the penalty was almost always set at 200 per cent until the Supreme Court of Appeal in the C:SARS vs NW K [2011] [SCA] matter called the imposition of 200 per cent “severe and out of proportion to the wrong committed”. The new reformed model, adopted from Australia, is enshrined in Chapter 16 under sections 221-224 of the TAA with a reverse onus provision (section 102 of TAA). This means SARS has to prove that the behaviour of the taxpayer meets the penalty.
• When the assessment is finally raised there are different methods, requirements and processes for how and when a taxpayer can settle or even compromise with SARS, dependent on the situation. Turning to the VDP applications, SARS tends to interpret the legislation in their own way and often rejects applications on the basis that an audit is in process, or where registered taxpayers declare a default in tax periods where no return was lodged citing that the application is not regarded as “voluntary”.
• Finally, be aware of the elusive personal liability enforcement tool which SARS can use with regard to an entity’s tax debts that are due and payable by, for instance, a financial manager or shareholder of a company (sections 180-184 of the TAA). Also note section 185 of the TAA, where assistance can be rendered by foreign revenue agencies to either collect or even preserve taxpayers’ assets. In short, seek advice on how to plan, manage and resolve your tax affairs and perhaps take heed to the words of author, poet and civil rights activist Maya Angelou, who wrote:
The Tax Ombud released its annual report for the 2015/16 year on 8 October 2016. Of the 2 153 complaints received, 503 (44 per cent) were rejected. When one is already struggling with some aspect of a matter with SARS, the last thing one needs is to face further obstacles when complaining to the Tax Ombud. To address these obstacles, we have put together some tips and pointers on how to get your matter dealt with.

Some 354 (37.7 per cent) of the complaints sent to the Tax Ombud were rejected on the basis that the SARS internal resolution process had not been exhausted. It therefore appears that there is significant uncertainty regarding the correct SARS internal dispute resolution process. This is the process that should ordinarily be followed before one can complain to the Tax Ombud. This process, as well as the “compelling circumstances” that can allow you to skip this process, are described below.

In addition, 581 (61.9 per cent) of the complaints submitted to the Tax Ombud are rejected. Follow this guide to successfully lodge a complaint with the office.

**TAX OMBUD COMPLAINTS PROCEDURE:**

**GET YOUR MATTER DEALT WITH**

**TAX TALK**

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**SARS COMPLAINTS PROCEDURE TO BE FOLLOWED BEFORE GOING TO THE TAX OMBUD**

**Step one**

Phone the call centre or go into your local branch to discuss your complaint and get a case number. You will need this case number in order to continue with the complaints process. Give the call centre / local branch a reasonable time to attempt to resolve your complaint (typically a minimum of seven business days, or else your complaint in the next step would be rejected).

**Step two**

Submit your complaint to the SARS Complaints Management Office. This can be done by phone (0860 12 12 16), in person at your nearest SARS branch, or via eFiling. There is a step-by-step SARS Guide to the Complaints Functionality on eFiling, available on the SARS website, to guide you through this process. If you have not exhausted the SARS internal complaints process, for example, saying that to the best of your knowledge and belief, your issue is a systemic issue, and explaining what hardship is caused to you by further delaying the matter by going through the SARS complaints process. If there have already been substantial delays regarding the matter, you would explain these so that the Tax Ombud could conclude that following the SARS complaints process would in all likelihood not result in an appropriate result within a reasonable period of time.

If you properly explain your reasons in the relevant section of the Tax Ombud complaints form, the Tax Ombud may decide to accept your complaint, without you first having to go through the SARS complaints process.

**LIMITATION OF AUTHORITY OF THE TAX OMBUD**

Certain types of problems with SARS cannot be dealt with by the Tax Ombud, because of limitation of authority. In this respect, the Tax Ombud may not review:

- • Legislation or tax policy – to address these issues, you can send your tips to the Finance Minister ahead of the National Budget Speech each year. Make submissions to National Treasury for changes to the law (as opposed to only the interpretation thereof by SARS); and
- • A matter subject to objection and appeal, or a Tax Court matter – matters subject to objection and appeal must be dealt with by the Tax Board or Tax Court, so you will get to be heard by an independent tribunal that is capable of making a binding decision. That is better than a mere “recommendation” by the Tax Ombud.

For these matters, you could make use of these alternative suggestions, and avoid wasting time on a Tax Ombud complaint for matters where the Tax Ombud cannot help.

In the complaints form for the Tax Ombud, there is a section which states: “If you have not exhausted the SARS internal complaints process, please motivate why the Office of the Tax Ombud (OTO) should handle your complaint i.e explain your compelling circumstance.”

This is where you need to explain the reasons for not following the SARS complaints process, for example, saying that to the best of your knowledge and belief, your issue is a systemic issue, and explaining what hardship is caused to you by further delaying the matter by going through the SARS complaints process. If there have already been substantial delays regarding the matter, you would explain these so that the Tax Ombud could conclude that following the SARS complaints process would in all likelihood not result in an appropriate result within a reasonable period of time.

**SARS policy or practice generally prevailing**

- • If more appropriate, submissions could be made to National Treasury for changes to the law (as opposed to only the interpretation thereof by SARS); and
- • A matter subject to objection and appeal, or a Tax Court matter – matters subject to objection and appeal must be dealt with by the Tax Board or Tax Court, so you will get to be heard by an independent tribunal that is capable of making a binding decision. That is better than a mere “recommendation” by the Tax Ombud.

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**COMPPELLING CIRCUMSTANCES FOR NOT FOLLOWING SARS COMPLAINTS PROCESS**

If there are compelling circumstances for not following the complaints resolution mechanisms of SARS, the Tax Ombud may accept the complaint even though the SARS complaints process was not followed. The Tax Ombud must determine whether there are compelling circumstances, considering factors such as whether:

- • The request raises systemic issues;
- • Exhausting the SARS complaints process would cause undue hardship to the taxpayer; or
- • Exhausting the SARS complaints process is unlikely to produce a result within a reasonable period of time.

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Every year there is renewed speculation that the VAT rate will increase. But, as seen in previous years, the government kept the rate at 14 per cent for the 2016/2017 tax year. Earlier this year, however, National Treasury did propose VAT law amendments which clarify the Minister of Finance Pravin Gordhan’s authority to announce changes in the VAT rate in the annual budget. In terms of the 2016 Draft Taxation Laws Amendment Bill, a change in the VAT rate may be announced in the annual budget and will apply for a period of 12 months from that date unless Parliament passes legislation giving effect to that announcement within that period of 12 months.

This move has yet again prompted speculation of a VAT rate increase in the 2017/2018 tax year. Gordhan recently indicated in his medium-term budget policy statement that government intends to raise an additional R13 billion in taxes during the 2017/2018 tax year, but did not elaborate on the details. He also stated that tax increases will not hurt the poor, which may mean that the VAT rate will not be increased.

However, VAT remains an effective means of tax collection and may be the best alternative, as concluded by the Davis Tax Committee.

SARS audits and delayed VAT refunds make taxpayers’ lives difficult.

This year, professional bodies have been inundated with complaints from taxpayers regarding delayed VAT refunds. SARS is known to delay VAT refunds, seemingly for no apparent reason. In addition, taxpayers are sometimes audited up to three times in respect of the same tax period. SARS recently released a letter in which it attributes these delays to fraud management.

Any tax system which pays refunds is open to abuse and fraud. It is therefore imperative that SARS ensures the validity of the VAT refund claims to protect the fiscus and the people of South Africa. However, this should be done in an equitable manner by keeping the tax compliance cost of the taxpayer and the fiscus to a minimum.

The following complaints regarding VAT refunds are often voiced:

- VAT refunds generally result in taxpayers being selected for audit.
- Taxpayers are then required to upload supporting documents onto eFiling. If, after having complied with audit instructions, taxpayers enquire about delays, SARS may immediately resubmit the same period for audit. This results in the taxpayer having to re-submit the same documents. Should the taxpayer make further enquiries, SARS often escalates the matter further and a third audit is sometimes initiated with where additional documents are requested.
- When SARS refunds a taxpayer more than 21 business days after the taxpayer has submitted a return, SARS is required to pay interest. However, this does not always happen. This necessitates that the taxpayer lodge a written application to SARS, which often goes unanswered.
- SARS sometimes sends electronic audit verification letters where they request input and output tax schedules and documentary proof. However, taxpayers generally only upload the tax reports and samples of the largest input tax claims for audit. This is due to the eFiling platform’s upload restrictions and the sheer volume of transactions in question. SARS often disallows and assesses the rest of the input claims. This decision is justified on the basis of “burden of proof not discharged”. The taxpayer then has to engage SARS, and the costly objection and appeals process adds to the cost of taxpayer compliance.
- Vendors who mainly export goods or services are generally in a permanent VAT refund position, yet these vendors are often subjected to monthly VAT audits. This is also true for industries subject to sales fluctuations and seasonality.
- Taxpayers are unable to directly engage SARS’ audit team and are required to log calls through SARS’ call centre.
- Before releasing VAT refunds, the taxpayer is often requested to verify banking details even though the details were verified by SARS when the taxpayer initially registered for VAT.

These complaints would best be dealt with through dialogue between SARS and the tax community. The following recommendations could assist in streamlining the process, decreasing delays, and reducing SARS and taxpayers’ time input and compliance costs:

- Taxpayers must ensure that the correct audit information and supporting documents are uploaded as soon as a letter of verification is issued by SARS.
- SARS can investigate the duplication of audits for the same tax periods and potentially rectify it by revisiting the automated system parameters.
- SARS should, within parameters, reduce the regularity with which it audits net-exporters of goods and services.
- Taxpayers need to ensure that when they are audited they upload samples of the required documentary proof to substantiate exports.
- SARS should pay interest on delayed VAT refunds in accordance with the law and not only after receiving a written request, within parameters of course. Should SARS not pay interest on delayed refunds, it should provide written reasons as per the Promotion of Administrative Justice Act (PAJA).
- Taxpayers need to ensure that they respond timeously to audits and keep all their taxes and payments up to date.
- If SARS is of the view that a sample of invoices is not acceptable to discharge the burden of proof, then their audit verification letters should contain more detail of what is required.
- SARS should establish clear and open communication channels with taxpayers or their representatives to ensure that frivolous assessments are not raised. The Tax Administration Act (TAA) requires SARS to communicate its intention to raise assessments so that taxpayers are given an opportunity to respond.
- SARS should verify banking details directly with financial institutions and/or when applications for VAT registration are received.

Public benefit organisations to face VAT consequences.

Public authorities and municipalities allocate funds to various public benefit organisations (PBOs) to provide land and housing for the benefit of the poor and needy. These funds are strictly regulated and controlled in terms of the National Housing Programme and may only be utilised for specific land and housing developments. The funding is also instrumental in creating direct and indirect employment for such communities.

“Government intends to raise an additional R13 billion in taxes for during the 2017/2018 tax year.”
During the 2016 Budget Speech it was announced that the proposed withholding of tax on service fees will no longer come into effect. Issues around this will instead be dealt with by way of provisions relating to “reportable arrangements” under the TAA.

Services rendered by a non-resident to a South African resident, or by a non-resident to a non-resident who has a permanent establishment in South Africa, must be reported to SARS by the recipient of such services.

The objective is to identify and assess the tax liability of non-resident suppliers of services in South Africa such as consultancy, construction, engineering, installation, logistical, managerial, supervisory, technical or training services. The proposed amendments will apply to all service fees that are paid or that become due and payable on or after 1 January 2017 where it “exceeds or is anticipated to exceed R10 million in aggregate and does not qualify as remuneration,” according to SARS Notice 140 published on 3 February 2016.

Even though there may, in certain circumstances, be income tax and PAYE liabilities, the VAT risk potentially outweighs that of the other taxes for non-resident suppliers. A compulsory VAT registration is required where an “enterprise” is conducted in South Africa and the turnover exceeds R1 million in any 12-month consecutive period. As a result of the non-resident supplying the services within South Africa, they may fall within the requirements of an “enterprise” as defined and will be liable to register for VAT irrespective of the duration of the project.

By making this a reportable arrangement, SARS is ensuring that non-resident suppliers of services are brought into the tax net. Non-residents will now be forced to assess their activities within the borders of South Africa to determine whether they have a tax liability and more so, a VAT liability. Non-compliance will result in substantial penalties and interest.

The year ahead holds for interesting developments in the VAT landscape and we envisage the following:

• A platform was provided by the Tax Ombud for taxpayers to raise their voices. Calls logged have increased due to the effective way in which issues are resolved. We expect to see an increase in the lodging of complaints as taxpayers become aware of their rights in terms of the VAT Act, PAJA and the TAA.
• Focus will be placed on appointing qualified tax practitioners. Taxpayers can no longer afford the risk of engaging with tax consulting services from non-registered service providers. Generally, tax professionals are not permitted to provide any VAT and/or tax consulting services for a fee if not registered with SARS as a professional body.
• Improved communication between SARS and the tax industry to ensure optimal co-operation and support within the framework of the law.

Currently, PBOs receive funding from government and do not have to pay VAT to SARS on such funds as they are zero-rated. The PBOs are also entitled to claim back all input tax relating to the project, which means that the money can be re-used to obtain its objectives. Most PBOs depend on donations from the public as government grants seldom cover the total cost of the projects.

From 1 April 2017, section 8(23) of the VAT Act will be repealed. This has an effect on those PBOs that provide national housing as they will no longer be able to zero rate their income in terms of section 11(2)(g) of the VAT Act. Therefore, PBOs will have to pay 14 per cent of their grant receipts back to SARS. This will effectively reduce the amount PBOs spend on land and housing.

PBOs will only be able to overcome this hurdle if its funding from government is supplemented to compensate for the VAT loss.

The difference between a grant allocated by government and funds paid to qualifying “welfare organisations” for services procured was further highlighted in a recent Supreme Court of Appeal (SCA) case: C:SARS v Marashi MO and Others (2016). The Red Cross is registered as a “welfare organisation” for VAT purposes and receives payments from government for the supply of aero-medical services to provincial health departments. Red Cross declared output tax at the rate of zero per cent on receipt of such payments. The SCA concluded that because the payments were made for the supply of services they did not fall within the zero rating provisions as reimbursement was not a grant payment. As a result, the Red Cross was liable to charge VAT at 14 per cent.

Welfare organisations should correctly assess whether payments received from government departments are grants to be utilised in the course of their welfare activities or whether the money paid is for the supply of services.

Higher burden of documentary proof

In the South Atlantic Jazz Festival (Pty) Ltd v Commissioner for the South African Revenue Service (2015) case, the Western Cape High Court ruled in favour of the taxpayer. The court found that a document which did not comply with the requirements of a valid “tax invoice” must be accepted as sufficient proof in terms of section 16(2)(b) of the VAT Act. In this case, the taxpayer was unable to obtain a compliant document from its suppliers and proceeded to include a claim for an input tax deduction based on a written sponsorship agreement.

Following the outcome of this case, section 16(6)(g) was introduced to the act together with Binding General Ruling No. 36 (BGR 36). In future, taxpayers will have to make a formal ruling application to SARS requesting approval of an input tax deduction where the document does not fall within the prescribed form envisaged in section 16(2)(a) to (f) of the act.

Such an application is an extremely onerous process for the taxpayer as a ruling will only be considered by SARS if all taxes and returns which the taxpayer is registered for are up to date. The turnaround time for obtaining the ruling will therefore have a cash flow implication for the applicant as the vendor will not receive the input tax deduction which the taxpayer is registered for are up to date. The turnaround as a ruling will only be considered by SARS if all taxes and returns are up to date. Such an application is an extremely onerous process for the taxpayer as the vendor will not receive the input tax deduction unless approved by SARS.

The course is designed to empower course participants with applied working and practical knowledge of the fundamentals of taxation that will secure the course participant the license to practice as a registered tax practitioner with SARS and a professional membership with the South African Institute of Tax Professionals. This course will benefit beginners as well as practitioners who need to update their knowledge on the fundamentals of taxation to meet the minimum qualification criteria of SARS. The course covers the entire field of taxation (including value-added tax), excluding certain specialised areas and will enable the course participant to calculate the tax of individuals including farmers, partnerships, sole traders as well as the taxation of companies, close corporations and trusts.
The youth wage subsidy will probably be renewed for a further two years, but is it creating jobs or has government invested in a political solution rather than an economic one?

If you are a young person in South Africa, there is a good chance that you currently do not have a job. Over five million or 42 per cent of those under 30 are unemployed. If you come from a poor community and you received limited education, the chances that you are one of those five million just got higher. Your prospects may also worsen; studies show that the longer a person remains unemployed, the more likely they are to never find a job.

Youth unemployment is one of South Africa’s worst ailments. Due to its correlations with social unrest, crime and extreme poverty, it is not hyperbolic to think of it as a potentially terminal ailment. Government — which has a constitutional duty to “improve the quality of life of all citizens and free the potential of each person” — is obliged to find a treatment.

In 2006, Treasury and Harvard University’s Center for International Development convened a panel of experts who suggested the idea of creating a youth wage subsidy to tackle this problem. After much political arguing, in January 2014 the youth wage subsidy, officially known as the Employment Tax Incentive (ETI) was implemented. It is set to expire at the end of 2016, unless an amendment bill — extending it for two more years — is passed.

A study conducted by academics at UCT looked at Quarterly Labour Force Survey data from before the ETI came into effect, and from 2014 once it had been implemented. The researchers used a mathematical model to establish if the ETI was leading firms to hire more young people. They found that the ETI was not causing firms to increase the amount of young people they hire. It was also not leading to job losses for older workers. In the short run, it seemed to be having no significant effect at all.

How certain could the authors be of these results? Was it possible that perhaps with the ETI being in its first year, there was not enough data to draw accurate conclusions? “We can never be sure, that’s how statistics works,” said Professor Vimal Ranchhod, one of the authors of the study. In a response to this question, “What you’re asking about is related to the statistical power of the tests. What we can be fairly confident about is that the effects of the ETI are small, even in the most optimistic scenario.”

According to this research, instead of the ETI serving as an incentive to hire more young unskilled workers, a significant amount of firms are not providing the ETI, yet still making the same hires as they would had there been no ETI.

Treasury wants the ETI to continue. On 11 October 2016, they appeared in front of Parliament’s Standing Committee on Finance and explained their proposal to extend the ETI for two more years. They referred further studies which they had commissioned. These studies are not yet in the public domain.

One of commissioned studies used econometric modelling to show that there have been significant positive impacts on employment growth of between 2.4 and 15.9 percentage points — depending on the methodology,” as per Treasury’s presentation. These effects were especially pronounced for small employers.

Another study conducted by Treasury took the form of a survey of employers. It found that 56 per cent of the 720 respondents interviewed said the ETI had a positive impact on hiring. However, Treasury also told parliamentarians that an independent study was in progress involving Professor Ranchhod. This study seems to show that the ETI has not had any economy-wide effect on employment.

Politicians questioned Treasury officials for over an hour on the proposed ETI. One question focused on a new provision in the amendment bill which would cap the amount of ETI that a single business can claim to R 20 million a year. Currently, eight firms employing around 90 000 people are claiming more than R20 million. The DA’s Robert Lens asked if this would not limit the amount of jobs a single employer could create?

"I think this comes down to whether you believe the ETI has had a positive effect or not,” responded Catherine Macleod, the chief director of modelling and forecasting at the National Treasury.

"If you believe that the ETI had a positive effect, then those 92 000 jobs created would be lost or they would not have been created. We can’t say whether or not those 92 000 people who would have been employed, would be fired, because we don’t know the dynamics of the firm. Perhaps the person that you hired has been so great, that you chose to keep them on. So there is a lot of uncertainty.” She pointed out that these large firms would still be able to claim up to the cap amount of R20 million, and so only around 13 000 jobs would no longer be supported by ETI.

The answer to this question seems to suggest that Treasury either does not believe that its own medicine is working; or they are willing to include a clause that could cause job losses into what is supposed to be a job creation bill.

Another prescription will be written

Once the parliamentarians were done questioning Treasury officials it was clear that despite their scepticism and any definitive proof that the ETI works, the incentive’s term would be extended. Parliamentarians felt that two years was seemingly too short a time to definitively determine the ETI’s effectiveness. However, as politicians they also understood that — to kill off the ETI — would be the equivalent of scoring a political own goal.

“Basically, we don’t have a choice. Giving the importance of creating jobs, our backs are against the wall. But on the other hand, we need more time,” said committee chairperson Yunus Carrim from the ANC.

“I don’t think that during this period we have an option in terms of whether to support it — we have to support it.”

“It seems that government needs to be seen to be doing something about youth unemployment even if what it is doing is may be ineffective and in some ways, experimental treatment for a serious ailment. Passing any reforms or programmes that involve labour and business is always a slow and difficult process.

The cost of the ETI from January 2014 up to March 2016 was R8.06 billion less than what government is set to spend this year on funding the Department of Home Affairs. Even if the amount spent in the next two years doubles, it is still relatively small compared to total government spending which amounts to R1.451 billion in 2016/2017 alone.

EXPERIMENTAL TREATMENT: IS THE YOUTH WAGE SUBSIDY STILL THE ANSWER?

LEIGH SCHALLER, Assistant Editor

TAX AND SOCIETY
15 MINUTES

Quackery or effective treatment?  

Answer?
THE NEW GAAR 10 YEARS ON
PART II: MISTAKES AND MISSED OPPORTUNITIES

ED LIPTAK, INDEPENDENT TAX CONSULTANT

In Part II of our special focus on GAAR, the author looks at where the act went wrong and delves into what the future may hold.

Introduction

In November this year, the new General Anti-Avoidance Rule (new GAAR) will have reached 10 years of existence. It was an ambitious project, and as Part I of this article series indicated (as seen in the September/October 2016 edition of TaxTalk), some of its goals have been achieved. The courts have made it clear that the new GAAR may be applied as an alternative or additional basis for an assessment and that it may be applied to steps in or parts of a larger arrangement. They have also made it clear that a purposive approach to the interpretation of tax statutes must be applied in all cases. While these developments may well have occurred without the new GAAR, or the lengthy public discussions that preceded it, these changes are nonetheless here to stay. It is therefore somewhat surprising that the new GAAR has largely failed in its primary mission to undermine the tax avoidance industry. It did not, however, have the possible responses to these criticisms or to counter a growing impression that they lacked faith in or did not fully understand their own legislation.

The new GAAR introduced a number of complex concepts into the Income Tax Act (ITA) that brought considerable uncertainty in their wake. Three of these concepts, in particular, quickly garnered harsh criticism: the “misuse or abuse” test; the “commercial substance” provisions; and the new specific remedies given to the Commissioner. Recent studies have shown that the mere repetition of notions in the public domain can lead, deservedly or not, to their acceptance as conventional wisdom. As discussed below, SARS and National Treasury’s conspicuous failure to address the Commissioner’s “satisfaction” language in the former section 103(1) of the ITA, instead, SARS has routinely waited until its GAAR investigations are virtually complete before issuing these notices, significantly undermining the latter purpose and, ironically, contributing to the need for an extended prescription period in cases involving the new GAAR.

Dropping the ball – in more ways than one

Perhaps the single biggest factor in undermining the potential effectiveness of the new GAAR has been SARS’ reluctance to invoke it. Indeed, SARS seemingly did not issue its first notices under section 85J until 2012, some six years after the statute was enacted.

With some justification, this has led to a widespread belief in the tax avoidance industry that SARS itself lacked faith in the legislation. These problems were compounded by the release of SARS’ Draft Comprehensive Guide to the General Anti-Avoidance Rule (the Draft Guide) in late 2010, which revealed a lack of understanding by SARS itself regarding some of the key concepts upon which the new legislation was based. In particular, its discussion of the “commercial substance” provisions at times appears to lend credence to the notion that section 80C and the new specific remedies given to the Commissioner. “Recent studies have shown that the mere repetition of notions in the public domain can lead, deservedly or not, to their acceptance as conventional wisdom. As discussed below, SARS and National Treasury’s conspicuous failure to address the Commissioner’s ‘satisfaction’ language in the former section 103(1) of the ITA, instead, SARS has routinely waited until its GAAR investigations are virtually complete before issuing these notices, significantly undermining the latter purpose and, ironically, contributing to the need for an extended prescription period in cases involving the new GAAR.”

Missed opportunities

SARS and National Treasury’s silence effectively ceded the playing field to the tax avoidance industry. It did not, however, have to be that way. While a detailed analysis of the possible responses to these criticisms

"Unfortunately, SARS and National Treasury did little or nothing for many years to respond to these criticisms or to counter a growing impression that they lacked faith in or did not fully understand their own legislation.”

Another significant problem has been SARS’ approach to section 85J. That section requires SARS to issue a notice to a taxpayer if and when the Commissioner believes that the new GAAR may be applicable to an arrangement. Its purpose was two-fold. First, it was intended to ensure that the new GAAR would not be applied “automatically” or without due consideration following the deletion of the “Commissioner’s satisfaction” language in the former section 103(1) of the ITA. Second, it was intended to provide taxpayers with an “early warning system” that would enable them to address the Commissioner’s concerns at an early stage in the proceedings and thereby avoid, in appropriate cases, the time and expense of a full-blown GAAR audit. Instead, SARS has routinely waited until its GAAR investigations are virtually complete before issuing these notices, significantly undermining the latter purpose and, ironically, contributing to the need for an extended prescription period in cases involving the new GAAR.

changed a thing and that the test in question remains a purely “subjective” one. Complexity and uncertainty
is beyond the scope of this article, a brief discussion helps to underscore some of the opportunities that were missed.

Above all, the criticisms of the new GAAR have been dependent upon interpretations that ignore both the context and the purpose of the provisions in question. One reason why this novel approach has now been so loudly rejected by the Supreme Court of Appeal. In this regard, it is sadly ironic that the “misuse or abuse” provision was itself intended to encourage the then “emerging trend in statutory construction” toward purposive interpretation in South Africa and elsewhere, and to emphasise its kinship with the “textual, contextual and purposive approach” recently adopted by the Canadian Supreme Court under that country’s GAAR. It is even sadder that, as discussed above, many SARS senior officials were just as uncomfortable with this approach as were the members of the tax avoidance industry.

Some common criticisms of the “commercial substance” provisions provide another illustration of the problem. A number of commentators have contended that the provisions of section 80C are somehow “at war” with each other, with subsection 80C(1) supposedly imposing an “objective” test while subsection 80C(2) adopts a “facts and circumstances” approach. (How an “objective” test can be applied in practice without resorting to the relevant facts and circumstances has rarely, if ever, been addressed.)

The “commercial substance” provisions were enacted to combat so-called tax shelter arrangements. These schemes typically provide significant tax benefits for a taxpayer, while involving little or no risk or opportunity for, at best, a de minimis pre-tax profit. In practice, they typically rely upon and are characterised by, inter alia, the use of offsetting or self-canceling elements, circular cash flows and accommodating or tax-indifferent parties. In many cases, the arrangements are composite transactions in which the legal form of the individual steps is inconsistent with or differs significantly from the economic or practical effect of the arrangement as a whole. Rather than being in conflict with each other, subsections 80C(1) and 80C(2) are complementary in subsection 80C(2) providing a “short-hand” way to identify arrangements falling within the scope of the general definition by focusing upon their common and more objective features.

This is not to say, moreover, where a prompt clarifying amendment could have quickly put the issue to bed once and for all. The courts have also made it clear that they can recognise such arrangements themselves rather than the taxpayer’s subjective purpose in entering into it or carrying it out. Not surprisingly, the tax avoidance industry has argued for the latter and has contended that the new provision in Section 80A has left the status quo ante completely unchanged.

The short answer to these contentions is that the statute was intended to achieve a balanced approach: one that would focus upon the objective provisions of the arrangement itself – a type of “reasonable bystander” test – without precluding a court from considering a particular purpose or tax avoidance arrangement itself rather than the taxpayer’s subjective purpose in entering into it or carrying it out. Not surprisingly, the tax avoidance industry has argued for the latter and has contended that the new provision in Section 80A has left the status quo ante completely unchanged.

An example from everyday life may help to illustrate this approach. The main purpose of a hammer is to drive nails. In most cases, nails are also its main but by no means only effect. Hammering also causes noise and may result in injury. In most cases, however, it is obvious that those are only incidental effects and by no means the sole or main purpose for hammering.

Similarly, the specific remedy provisions in section 80B have come under fire for supposedly granting the Commissioneer “virtually unfettered” discretion in determining the tax consequences of impermissible tax avoidance. Again, these criticisms ignore the context and purpose of the provisions in question. One of the goals of the new GAAR was to make it clear that it could be applied to steps in a transaction in recognition of the fact that promoters typically “hijack” normal business transactions in order to lend them a semblance of business purpose.

The purpose of hammering was to drive nails if the activity took place during a storm, even if it furthered a broader, ongoing plan to irk the neighbour. That plausible explanation might ultimately ring true, but the activity of hammering was not virtually unfettered, as the purpose of hammering was to drive nails if the activity took place during a storm, or whenever possible. That plausible explanation might ultimately ring true, but the activity of hammering was not virtually unfettered, as the purpose of hammering was to drive nails if the activity took place during a storm, or whenever possible. That plausible explanation might ultimately ring true, but the activity of hammering was not virtually unfettered, as the purpose of hammering was to drive nails if the activity took place during a storm, or whenever possible.

The controversies that have dogged the legislation are unlikely to be

Notwithstanding the missed opportunities discussed above, there is some reason to believe that there may be a few unpleasant surprises in store for the tax avoidance industry. Anecdotal evidence indicates that SARS has begun to issue Section 80J notices with greater frequency. The 2014 settlement between SARS and the Hudaco Group, in which the taxpayer agreed to repay the full amount of the tax benefits it received plus interest, may have also sent a message that the new GAAR is not quite as toothless as the tax avoidance industry retains its clients believe.

As discussed in Part I of this article, the courts have now taken cognisance of some of the key characteristics of tax shelter arrangements that lack commercial substance, including the presence of self-canceling elements and round-trip financing. The courts have also made it clear that they can recognise such arrangements in practice, even in cases in which income tax is not itself at issue. In Cape Empower Trust Ltd v Hatton’s Hardware Sthl (2013)23, for example, Brand JA had little trouble in recognising that the complex scheme that formed the backdrop to the dispute, by all appearances a prototype of “funnel financing masquerades”,

displayed certain features now dealt with in section 80A, “under the rubric Improper tax avoidance behavioural avoidance” and of its elaborate detail,” an ostensible debt central to the scheme “exists only on paper and even as a paper debt…was intended to be cancelled by another reciprocal debt so that the net result was nil”;

and that the scheme itself was “aimed at securing a tax advantage in the particular amount of R13.4 million.”

Conclusion

As noted at the outset, the evidence to date suggests that the new GAAR has failed in its primary mission to act as a more effective deterrent against impermissible tax avoidance. While there may be signs that rumors of the new GAAR’s终端 are premature, the controversies that have dogged the legislation are unlikely to be

14 Section 80A(2).
15 Section 80A(1).
16 Section 80B(1).
17 Section 80C(2).
18 Ibid, para 7.6 (p 38 – 39).
19 Ibid, para 7.3.
20 Section 80A(1).
21 Thumbelina test.
22 “Subjective purpose fundamentalism”
23 Cape Empower Trust Ltd v Hatton’s Hardware Sthl (2013)
24 “Purposive interpretation of tax statutes”, Integretax Newsletter, Issue 147, para 2008 (Nov/Dec 2011) (“For now it appears that the traditional ‘intention of the legislature’ approach to statutory interpretation has carried the day”)
This article looks at a few issues arising from the current sugar tax proposal. Before exploring certain practical issues relating to the possible implementation and administration of the tax.

Proposed Sugar Tax
An Analysis of the from the Sour:
Separating the Sweet

The rest of this article explores a few issues arising from the current water, pure fruit juices and milk) as well as those containing only non-

It seems that the primary objective with this preventive tax is to improve human health, not necessarily to generate revenue for the fiscus. It is proposed that this tax will contribute towards curbing the consumption of sugar and thereby address the high prevalence of non-communicable diseases (NCDs) and conditions in which sugar consumption plays a role, such as diabetes and obesity.

The norm for this tax, from a revenue collection perspective, should be ‘less is more’. Assuming optimum compliance levels, lower revenue should indicate that consumption of the targeted sugar-sweetened beverages (SSBs) has been reduced. In other words, the less public revenue this tax generates, the more effective it will be.

The current proposal would see the sugar tax implemented on 1 April 2017 as a product-specific levy on non-alcoholic beverages containing ‘added caloric’ sweeteners. Such sweeteners include sucrose, fructose, glucose and lactose as well as honey and maple syrup, but exclude unnatural sweeteners that are non-caloric.

A clear definition of what constitutes applicable products is needed. Although the National Treasury has outlined reasonably clear qualifying criteria for what constitutes an SSB, no comprehensive definition has yet been published. This shortcoming could cause confusion for potentially affected businesses, as well as for SARS which will supposedly have to administer this levy.

An interesting example is a case where a manufacturer mixes different types of pure fruit juices or such fruit juices with natural water in order to produce a specifically-flavoured or diluted fruit juice. Would such a beverage be subject to this levy? SARS may argue that because one of the fruit juices was added to the other or to the water, in terms of the criteria the final product will be taxable. However, the manufacturer may reason that because the final mixture contains only naturally occurring/intrinsic sugars and, in the case of the diluted fruit juice, that the water was added to the fruit juice, the product is not taxable based on different aspects of the same criteria.

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There is a need for a clear and comprehensive definition — in addition to qualifying criteria — of applicable products to be published as soon as possible by the National Treasury.

The rest of this article explores a few issues arising from the current sugar tax proposal.

This concern seems valid if you consider that the following steps still need to be taken by the authorities (with approximately) four months left to the implementation date:

- The National Treasury must presumably still complete its process of considering public comments which were made on the original proposals.
- Based on those comments and considerations, the final levy structure will have to be decided.
- Enabling legislation will have to be drafted, comments requested and considered, and final versions drafted and approved by parliament. The legislation must then be published/gazetted.
- In addition, governing rules will have to be drafted, comments requested and considered, and final versions drafted (which should include the official implementation date) and published by the commissioner of SARS.

After the final governing rules are published, affected entities will have to be given time to prepare their businesses, at least administratively, for all relevant compliance requirements traditionally detailed in those rules.

Such compliance-related activities by importers and local manufacturers of similar products currently entail the following:

- Preparation of premises and buildings in terms of specific physical warehouse requirements;
- Arrangements for surety with a financial institution;
- Preparation of supporting documents for licensing applications to SARS;
- Development or adaptation of enterprise resource management systems to cater for proper recording of excisable product movement and acquittal of the levy liability; and
- Education of designated personnel in general customs and excise matters, and training on specific compliance requirements.

My colleague, Sue-Maria Ferreira, a Manager at Deloitte, pointed out that “after completion of all required pre-implementation activities, SARS will be able to consider actual licensing applications from relevant entities; a process which can take months to finalise due to its complexity.”

Levy-rate and taxable quantity
It is Deloitte’s opinion that if and when this levy is implemented, a targeted levy-rate should be applied per gram of added sugar contained in a specific SSB (as opposed to a flat levy-rate per litre of SSB). An exemption should apply for SSBs containing fewer grams of added sugar than a specified threshold (as well as for SMEs which produce fewer litres of SSBs per annum (irrespective of the added-sugar content) than a specified quantity.

Deloitte, in other words, proposes that the following entity categories should be exempted from all traditional customs and excise compliance requirements, including exemption from licensing and, of course, from paying this levy:

- Importers and local manufacturers of SSBs with added-sugar content of up to or less than a specified threshold;
- Local SMEs producing up to or less than a specified volume of SSBs per annum.

Manufactures that produce SSBs which contain more added sugar than the specified threshold (excluding those produced by qualifying SMEs) will of course have to comply in full, but Deloitte proposes that the levy should be payable on all added sugar contained in those SSBs, not only on that above a “levy-free” threshold.

This exemption-threshold approach, as opposed to the proposed levy-free-threshold approach, will naturally result in the following:

- Negate all licensing and related administrative costs for qualifying entities;
- Be more effective in encouraging manufacturers to lower the added-sugar content of their products to below such exemption threshold;
- Maintain SME development; and
- Be simpler for SARS to administer.

The revenue generated needs to be suitably spent.

Based on the initially proposed levy rate and current SSB consumption levels, SARS can expect to receive at least R4 billion per annum in public revenue through this tax.

It is generally accepted (and referred to in one of the relevant National Treasury publications) that public awareness of the possible detrimental effects of excessive sugar consumption will be more effective in curbing such consumption than merely imposing a tax on only one of the high-sugar-containing product types currently available in the market.

Mere imposition of this tax may not have a significant affect on curtailing the prevalence of NCDs. However, combining that with the correct application of the revenue received through this tax might have the desired impact.

This should entail applying such revenue exclusively for specific sugar-consumption-cutting initiatives, e.g., regulation of relevant product advertising and compulsory ingredient information and warnings on labels, social- and other media campaigns and information sessions at schools and workplaces.

It is suggested that if this public revenue is not applied in this manner, this tax may be seen as merely another instrument to...
Adrian Lackay discusses his insider book on the so-called SARS "rogue unit". We find out what advice tax practitioners would give their younger selves, and we curate the web in search of the best tax blogs.
THE TAX PRACTITIONER
Who Can’t Sit Still

LEIGH SCHALLER

We caught up with Refilwe Matenche – a young, up-and-coming tax practitioner and academic – to find out why she is passionate about tax and education.

Do you think your day is busy? Refilwe Matenche is a senior lecturer at UNISA; heads up TaxOn, a boutique firm that specialises in transfer pricing and VAT; and is also busy completing her Master’s degree. Additionally, Refilwe is a motivational speaker, and recently suspended her successful foray into fashion design in order to make more time for motherhood. She spoke to us about her love for tax and education as well as overcoming the fear of failure.

You are a qualified chartered accountant (CA) which allows you to pursue a number of different career paths. Why did you choose tax?

I was good at it and it was my favourite subject at university. With tax, you are essentially dealing with the country’s economy. I see it as similar to running a business in that the government has to collect money so that it can pay expenses to make the whole system function.

I also thought it would be interesting to learn about different ways of generating revenue for the country. When thinking about tax, a lot of people believe that the government is out to get them and take their money; I see it from a different perspective. I am interested in what is the best way, from a policy perspective, to generate more revenue for a better-functioning country. It is very interesting.

You started out in the corporate world before venturing into academia. Why did you make the change?

I went into academia because I have a passion for teaching. My belief is that if the Black students at universities see someone with whom they can identify, then it gives them the added confidence to ask questions that they would otherwise be afraid to ask.

I have come to find that in most instances, these students are not familiar with basic concepts like shares; this means having to go deeper to get them to understand concepts like preferential shares or share options. The idea is to start explaining such concepts to them in a very simplistic way by using references from the environment that they are familiar with. I believe this approach can increase the throughput of students graduating from university.

My passion for teaching also inspired my research. At the moment, I am trying to figure out the issues that are preventing Black CAs from entering academia. Once pinpointed, we can design and implement suitable interventions that address these issues.

So far, what has the research indicated as possible reasons for why Black CAs are not entering academia?

The obvious one is pay. There are a lot of sacrifices which need to be made in order to get into academia, as well as factors such as “black tax”. (Ed: This is where Black professionals, some of whom are the first in their family to graduate, use a large portion of their salary to support siblings or extended family.) In most instances, when you talk to these people you find that they do want to get into academia, but they are concerned that the money will not sustain their families and empower their siblings.

After conducting various focus groups, it was interesting to note that money does not hold as much weight as I thought it would. Some of the other factors mentioned include things like confidence or the perception that students often do not really take Black lecturers seriously. Other factors include the reputation of universities, with certain respondents mentioning the Fees-Must-Fall campaign as something they were concerned about. A lot of respondents mentioned the importance of having experience, and that when applying with universities, applicants are expected to have some research experience, which is not always the case.

As a Unisa lecturer and someone who has helped to mark papers for the SAIT/Unisa Course in Taxation, what do you think of the online classroom and video lecture approach?

In my view, it makes a positive difference. Distance learning is difficult and one needs to have a lot of discipline, which is often the biggest hurdle. When you have resources such as online videos and forums, it makes it far easier to ensure that a student does not ignore their work, to know that they are not alone and that they can access those resources. These tools are becoming an essential part of distance learning.

As someone who is always taking on new challenges, you do not seem to suffer from a poverty of ambition or fear of failure. How do you get it right?

To be honest, I have not always been like this. There was a time when I was terrified of voicing my opinions and opted to keep quiet in professional and social settings. Subsequently this resulted in cases where a few of my ideas were implemented by other people. There is nothing worse than seeing something you thought of being executed by someone else, all because they had the courage to take the chance. For me, the fear of not acting on my dreams cripples me more than the fear of failure. I do not want to live another day thinking ‘what if’.

profile
Career Advice to Your 25-Year-Old Self

LEIGH SCHALLER, ASSISTANT EDITOR

Ever wish that you could go back and tell your younger self to make smarter choices? We spoke to three successful tax experts about advice that they would have given themselves at the start of their careers.

LEIGH SCHALLER, ASSISTANT EDITOR

Ever wish that you could go back and tell your younger self to make smarter choices? We spoke to three successful tax experts about advice that they would have given themselves at the start of their careers.

RUAN VAN EEDEN, DIRECTOR OF TAX AT THE GENEVA MANAGEMENT GROUP

The power of mentorship

I was in the privileged position to have a tax mentor at a young age who guided me through what it takes to be a tax advisor who becomes indispensable to a client. My advice would be for young tax professionals to do the same; align themselves with an expert in the field who is backed with a wealth of experience.

Be in the know

Stay relevant, not only from a tax technical perspective but be aware of what is going on commercially from both a domestic and international perspective.

Ask away

Do not be afraid to ask questions. Challenge the establishment, but ensure that you have backup and research in place to defend any argument that you make. Another important factor is to know your limitations, learn from them and become the trusted advisor to your client.

THEO DE MAITE, SENIOR LECTURER AT UNISA AND OWNER OF TAXON

Do not hold grudges

You and only you have control over how you feel. If I knew this, I wouldn’t have wasted time holding grudges. This is wasted energy that can rather be used towards the attainment of your dreams.

No limits

Nothing is beyond your reach. Nothing. I used to think that certain things are reserved for a certain kind of person. I have found that this is a self-imposed limitation.

Get to know yourself

There is power in knowing yourself. Listen to yourself, forgive yourself and love yourself. The more you know yourself, the better you are at capitalising from your strengths and consciously managing your weaknesses.

ROB COOPER, DIRECTOR OF LEGISLATION AT SAGE VIP PAYROLL & HR

Use this checklist if you are unsure of where you want to go career-wise:

Environmental factors

Look for an environment that you will enjoy. You will be spending at least eight hours a day in that environment, so it is best to select an environment where you will not be miserable.

Learn as you go

You should have the basic aptitude for work in that environment, but do not worry about this too much – you can learn pretty much what you need to know.

Money matters

Pick an option, as best you can, that is likely to pay the best. Money is not everything, but all things being equal, it certainly is a good differentiator.
The website arranges different posts under different categories on the right-hand side of the webpage, making it easy for someone who is researching a tax question to find appropriate content.

When deciding on subject matter, Musviba says that his approach is to zoom in on complex, yet important topics. “We look at the major changes in the tax environment that affect people, especially matters which are complicated, and then we try and simplify it,” says Musviba.

“We also look at requests that we get from email; often they are the same requests and then we will write about it. We also look at similar requests and then we will write about it. We also look at requests that we get from email; often they are the same requests and then we try and simplify it,” says Musviba.

The new iteration aims to bring together all major tax announcements from different parts of the world, whether it be from National Treasury or the latest binding private rulings. The hope is that important tax developments will be easily located on one simple-to-navigate webpage that is free of clutter.

The website will also retrospectively host articles that appeared in the print edition of TaxTalk that analyse and explain the latest developments. Current and past issues will also be available electronically via the TaxTalk website.

“Engaging on issues of skills development and transformation is important to us,” says James. “We want to foster an employed population that is engaged. Our funding policies have been revised so that we are able to enhance employer participation and to increase participation of African Black and Coloured learners in the sector.”

With a noted under-representation of African Black people in all nine provinces and Coloured people in the Western and Northern Cape provinces, Fasset has honed in on these areas to facilitate the transformation imperative. This means that Coloured learners in the Western and Northern Cape provinces can now access Fasset’s bursary schemes, apply for grants and be funded on discretionary projects. Resultantly, Western and Northern Cape Province employers also benefit, as they can now fully utilise the grants available to them.

Fasset’s #LastingLegacy strategy strives to benefit the sector, the learner and the employer. “We have reviewed the systemic problems in the skills development system and came up with innovative solutions with the aim to ensure that both the Learner and Employer benefit in the skills pipeline,” concludes James.

To get more information about the revised interventions, please visit Fasset’s website on www.fasset.org.za or access more information.
In Conversation WITH ROGUE CO-AUTHOR ADRIAN LACKAY

LEIGH SCHALLER

Rogue: The Inside Story of SARS’s Elite Crime-busting Unit is not only the most enthralling tax book of 2016, but it is one of the best non-fiction reads of the past year. We spoke to co-author Adrian Lackay about the book and the reaction it has received.

Written by two former SARS insiders—Johann van Loggerenberg and Adrian Lackay—Rogue tells the tale of an elite SARS investigation unit headed by van Loggerenberg. The book explains how this crime-busting unit went from being a key factor in bringing down criminals, from illegal abalone poachers to Radovan Krejčíř, to being labelled as a “rogue unit” by the Sunday Times.

It not only details how allegations, such as having run a brothel and spied on President Jacob Zuma, were made and then later discredited, but also how these claims affected the lives of public servants.

We spoke to co-author Adrian Lackay about the book and its reception.

With the controversial nature of the book, was there an extra level of fact checking involved before publication?

The authors and the publishers were, and remain, very mindful of the risk of litigation arising from the publication of Rogue. Amongst the state institutions referred to in the book, we are mindful that SARS, in particular, has become a very litigious institution when matters are documented publicly that reflect on the institution’s conduct and that of its Commissioner. We also had to be mindful of the confidentiality provisions contained in tax and customs law to protect taxpayer information. These restrictions on information disclosure apply to current and former SARS officials.

In addition, as co-author, I am already defending myself against a combined defamation claim by SARS and its Commissioner who are suing me for R12 million. In view of the anticipated legal risks, the manuscript of Rogue was subjected to two comprehensive legal review processes, the first by a reputable law firm and the second by a well-respected senior counsel.

The extensive list of references serves as evidence of verifiable facts that have been properly referenced; this is something that we wanted to clearly demonstrate to readers.

Now that you are working outside of SARS, have your perceptions of the organisation changed and, if so, in what way?

What I am now observing as an outsider is the demise of a once-proud public institution.

Chapter 1 of Rogue is introduced to the reader with a written reply to a parliamentary question by the Minister of Finance Pravin Gordhan in March 2016. In it, Gordhan documents how 55 senior managers, executives, group executives, chief officers who served on the SARS executive committee, the chief operations officer Mr Barry Hore, and the SARS Deputy Commissioner Mr Ivan Pillay, had all resigned since Tom Moyane’s appointment as SARS Commissioner in October 2014.

In one way or another, all these resignations – including mine – related to the widely publicised allegations of a secret, covert “rogue unit” within SARS and the refusal by SARS, and its new leadership under Moyane, to defend the institution and its senior officials against some of the most salacious news reporting I have ever seen or experienced over a period of 11 years as the SARS spokesperson. This exodus of senior managers from SARS, as we argue in Rogue, over a period of 19 months is unprecedented in any private or public institution in our country’s history since 1994.

What concerns me most are the long-term effects on the institution and whether SARS will remain capable of delivering on its mandate of revenue collection to the fiscus. Many scarce skills and the experience of very capable SARS officials have been lost over the period in question. I am further concerned that SARS’ enforcement and investigative capabilities have been deliberatelydiminished if not completely destroyed. These functions, including the audit capability, were built over many years and required considerable investment in human capital, in systems and in operating procedures.

I know that over the years, tax practitioner industry bodies had different or opposing views on the efficacy of SARS’ audit and investigative capabilities, but under the leadership of Gordhan as SARS Commissioner, I do not think anybody can argue that SARS was an uneffective institution that didn’t listen or respond to industry concerns.

In Rogue, it seems that the media is often used as a powerful tool for political and personal agendas instead of serving as an independent watchdog. Do you believe that some of the reporting that took place with regard to the “rogue unit” is an unfortunate outlier or are there deeper systemic issues that journalists need to address in order to act with greater independence and integrity?

From October 2014, for a period of close to two years, the Sunday Times newspaper was the primary protagonist of the SARS “rogue unit” narrative. Being one of the biggest and most influential news titles in this country, somehow the Sunday Times’ team of award-winning “investigative journalists” seemed to readily have had unencumbered access to very confidential SARS information, including confidential employee information and even confidential taxpayer information, which was duly published in various editions.

We dedicate much space in the book to describe how such information was distorted to advance a particular storyline in support of the “rogue unit” narrative and how SARS either neglected or blatantly refused to challenge such reporting.

Two open questions remain: To what extent the newspaper’s reporting set the agenda for multiple “investigations” that were instigated by SARS based on the newspaper’s headlines, and to what extent such “investigations” served as justification for the newspaper’s determined “rogue unit” campaign.

On 3 April 2016, the Sunday Times, under the direction of a new Editor, Bongani Sipuka, who was appointed in January 2016 in an unprecedented fashion, effectively retracted many of the previous headlines and articles that stated as fact, amongst other things, that the “taxman’s rogue unit ran [a] brothel” and that SARS had “bugged Zuma.” The newspaper admitted to serious flaws in its journalistic processes and stressed the need for great care and caution in publishing from anonymous sources without properly verifying facts.

Towards the end of 2014, many news publications rightfully began to question the veracity of the “rogue unit” reporting by the Sunday Times, particularly after Ivan Pillay (SARS Deputy Commissioner) and Peter Richer (SARS Group Executive and Executive Committee Member) were suspended by Moyane on 5 December 2014. Both officials successfully challenged their suspensions in the Labour Court which found these to be unlawful and illegal. They were suspended again immediately after returning to work.

The importance of the media and the role it plays in our constitutional democracy cannot be underestimated. The sustained reporting and media coverage on SARS by many other media institutions over the period under review were instrumental not only for the purpose of informing the broader public but also the manner in which journalists critically evaluated the actions by SARS, which remains a very important fiscal institution and state organ.

If Rogue and our experiences as the subjects of extensive media reporting in relation to SARS can assist the media to honestly assess its own conduct, strengthen its own efforts at self-regulation and help it to identify the shortcomings in its reporting methods, I believe we would have achieved something very important.

As events continue to unfold regarding SARS, the rogue unit and the reception to your book, do you feel vindicated and that the truth is starting to emerge?

I am encouraged and deeply appreciative of the overwhelming positive public reaction to the publication of Rogue. For a very long time, many people whose careers and whose personal lives were severely and adversely affected by this “rogue unit” nonsense felt very alone and isolated. The book presented them with an opportunity to tell the story on behalf of many of them who do not have a voice or who are prevented by SARS from defending themselves publicly against the most absurd claims of running brothels, spying on taxpayers, breaking the law, and running criminals, drug smuggling and some of the most unsavoury criminal figures who saw this country as a safe haven for their illicit activities.

They did their work under difficult circumstances without the legal support and the legal protection many of their peers can rely on in traditional law enforcement agencies; yet they achieved so many...
A well-organised office makes for better productivity. The image of your office and your efficiency influences the trust that your clients have in you,” says Heidi Meyer, a professional organiser and owner of Cloud 9 Organised. We spoke to her about tips you can use when decluttering your office.

**Purge your office**

It all starts with a roll of black bags and a ruthless, unsentimental streak. “Purge your office of everything that you do not need, including broken office equipment, dusty plants and paper piles,” says Meyer.

Remember, if it is not contributing to a conducive working environment, then it is not paying the office rent.

**Sort out what is left**

Now that you have thrown away all unwanted objects in your office, you need to establish some ground rules for how you arrange what is left as well as papers and other objects that will enter the work environment in the coming year.

“Arrange the paper piles into categories,” says Meyer. “Use post-it notes as temporary labels, recycle duplicate or unwanted papers and shred sensitive documents.”

If you create a place for different types of documents then paper is less likely to get lost and random piles of paper are less likely to be created.

**Clear your desk**

Now that the office is cleaner and organised, focus on what is on your desk. “Containerise pens and pencils, and use in-boxes and paper-trays. Use dividers in your drawer,” says Meyer.

“Keep things that you frequently use or that you need for current projects at an arm’s length away,” advises Meyer. The more functional your placement of the objects on your desk is, the more likely you are to stick to that system in the future.

**Reconsider the way you file documents**

“If you pile and cannot find documents, look at other options of filing where you can file and retrieve documents quickly,” suggests Meyer. This applies to both physical and soft copies.

“Organise your digital files so that you can act quickly and access communication easily.” This involves making sure that you correctly label all files on your computer so that, by using the search function, you are able to reveal its location.

**Plan ahead**

An organised life is not achieved in an afternoon, it is a daily discipline. “Maintain the system through the year by acting on paper or digital communication as it enters your office or delegating it to someone that you trust,” says Meyer.

Applying this organisation mentality to your work ethic will also yield results. “At the end of each day clear your desk, file completed work and update your schedule,” advises Meyer. “Ensure that you are on track, so that important appointments and deadlines do not fall through the cracks. Use digital reminders to keep your clients in the loop.”

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5 STEPS TO A CLUTTER-FREE 2017

Like stress, too much clutter in an office environment can hinder productivity. In the same way that the end of the year is a great time to take a holiday and eradicate stress, a December declutter session can help you to leave those useless bits of 2016 behind.

1. **Don’t throw that away!**

   In the ecstasy of eradicating paper, don’t forget that — as a tax practitioner — you need to keep supporting documents for at least five years after the relevant return has been submitted.
In light of the recent Apple Tax case, I am stunned at the European Commission’s attack on the company. Even if Apple has won the latest round, it must be the loser in the end. Although Apple Stores Inc. has to pay a $14.6 billion, they will just price it into their products, plus a bit more for pain and suffering. So it will have little effect on the Apple share price. The same thing happened with the settlement of the tobacco cases in the USA a few years ago.

The European Commission is interfering with a sovereign state’s tax policies. They are following a dream that all member sovereign states will sit on the same page of tax policy; and that will just never happen.

The real dynamic in the matter is Brexit. Once the UK has left the EU British Foreign Secretary Boris Johnson and Chancellor Phillip Hammond will be at liberty to design tax policy to attract foreign investment at the expense of the EU. They just have to quote those famous lines of Lord President Clyde in Ayrshire Pullman Motor Services and DM Ritchie v IRC.

“...His Majesty’s subjects are free, if they can, to make their own arrangements so that their cases may fall outside the scope of the taxing acts. They incur no legal penalties, and strictly speaking, no moral censure, if, having considered the lines drawn by the legislature for the imposing of taxes, they make it their business to walk outside them.”

Even Mr Austerity himself, former Chancellor Osborne, could see this when he targeted further reductions in the UK tax rate to attract foreign investment. Osborne, despite the adverse publicity, allowed the UK tax authorities to settle for a mere £130 million in the Google tax dispute. A mere rap on the knuckles. Why? Because the UK honoured the tax law that existed at the time and left issues of equity and fairness out of the debate.

Meanwhile the French tax authorities are raiding the Google Paris offices in a manner not seen since the German occupation. They are obviously expecting a whole lot more by arguing, in substance, Google owes a whole lot more. That’s the stuff the public likes to see.

But despite what the public may think, allowing “the substance” to enter the debate creates uncertainty foreign investors just don’t like. Try Lord Tomlin’s word in Inland Revenue Commissioners v Westminster (Duke).

“The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned. For the doctrine seems to involve substituting “the uncertain and crooked cord of discretion for the golden and straight meter wand of the law.”

So post-Brexit, the UK will become a favourable tax destination with a reputation for sticking to the law. This will employ gaggles of Poms who will pay fortunes in personal tax. London will become the ultimate international headquarter company destination.

It won’t be long before the rest of the EU starts thinking, “maybe this is not such a good idea.”

A fundamental of international tax planning is that investors (particularly the USA) prefer to pay tax at home. The less tax that is paid internationally, the more that gets paid to Uncle Sam or his equivalent.

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