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.
Transfer Pricing Adjustments: Too Many Layers of Tax?

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.

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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:

- A built-in tax calculator means you can get rid of the separate spreadsheet solutions you are running that contain the various calculations and formulas.
- Save time by submitting your individual tax returns in bulk directly to eFiling.
- Easily manages and track the status of your eFiling submissions.
- Eliminates manual processes and built-in validation ensures your accuracy.

Ed Liptak, Independent Tax Consultant • Ed is an independent tax consultant. He specialises in mergers and acquisitions and tax avoidance matters, including the application of GAAR and the "substance over doctrine" principle. Ed holds a Juris Doctor degree.

EdLiptak24@gmail.com

Elle-Sarah Rossato, KPMG • Elle-Sarah is an associate director at KPMG. She specialises in tax dispute resolution and controversy. Previously, Elle-Sarah worked for SARS for 13 years specialising in litigation, dispute resolution and auditing of taxpayers. She is an admitted attorney and holds a Master’s in tax and an MBA from the Gordon Institute of Business Science.

Elle-Sarah.Rossato@kpmg.co.za

Marina Bornman, University of Johannesburg • Marina is a lecturer at the University of Johannesburg’s Department of Accountancy. In 2015, she won the Norton Rose Fulbright award for the best doctoral tax thesis.

mbornman@uj.ac.za

Nishana Gosai, Baker & McKenzie • Nishana is a partner at Baker & McKenzie where she specialises in transfer pricing. Previously, Nishana worked at SARS where she represented the revenue service at the UN Panel of Experts on Transfer Pricing.

nishana.gosai@bakermckenzie.com

Patricia Williams, Bowmans • Patricia is a tax partner at Bowmans. Her areas of expertise include tax dispute resolution and tax structuring. Patricia is a chartered accountant, an admitted attorney and holds an MBA from the Gordon Institute of Business Science.

patricia.williams@bowmanslaw.com

Pieter van der Zwan, North West University • Pieter is an associate professor at North West University and works as a tax advisor. His areas of expertise include the international financial reporting standards and tax dispute resolution.

pieter@pvdz.co.za

Pieter Marais, Deloitte • Pieter is an indirect tax specialist at Deloitte. Previously, Pieter worked for SARS for more than 25 years as a national specialist in excise. He holds an MBA degree from the University of Bath in the United Kingdom.

pmarais@deloitte.co.za

Victor Terblanche, VAT IT South Africa • Victor is the managing director of VAT IT South Africa. He specialises in VAT, in which he has more than 20 years of experience. Victor holds an H-Dip in international tax from Rand Afrikans University.

victort@vatitsa.co.za

 comes to you度 tax indaba and see how we can help you by automating and simplifying your tax processes
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.
Review.

TIPS ARE TAXED
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 are 15 or older and earn more than R75,000 per year, time to pay up.

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.

TAXABLE BENEFITS COME IN MANY FORMS
Taxable benefits do not only refer to cash benefits. Shopping vouchers and other non-cash awards granted by an employer constitute taxable benefits.

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 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).

Where a person, who has already complied with the exemption requirements of s10(1)(o)(i) in a year of assessment, spends 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).” However, “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.

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

SAIT TECHNICAL
A selection of relevant queries recently dealt with by SAIT’s Technical Team.
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 medical expenses on behalf of his father? Does a nursing home qualify as an allowable medical expense? The taxpayer's father is a direct family member.

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 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 dwelling as a 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).

A: No. Paragraph 45(2) 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.”

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).

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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).
A summary of a recent tax court case involving a motor vehicle dispute.

**Facts**

The Appellant is a VAT-registered close corporation in the courier industry. After an audit, SARS discovered that the Appellant claimed an input tax for the acquisition of a 2007 Mercedes Benz 115 CDI Crew Cab motor vehicle ("the motor vehicle"). SARS disallowed the input tax. The Appellant argued that the motor vehicle was not 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.

**Ruling**

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 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.

**Take away**

To determine if the prohibition on claiming input tax credits in respect of a motor car applies, the purpose for which the vehicle is used is irrelevant.
Recent binding private rulings summarised.

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.

Issue
The Applicant is a company incorporated and resident in 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 arrangement, 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 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) between the Applicant and the Co-applicant is terminated and replaced by the implementation of the toll manufacturing arrangement, which 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.

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The Applicant wishes to sell vacant stands to its qualifying, permanent employees. The employees are not connected persons in relation to the Applicant. The Employee is not a connected person in relation to the Applicant. The remuneration proxy of the employee does not exceed R250 000 in relation to the year of assessment during which the immovable property is so acquired; and

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Issue
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.

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Outcome
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 by the Insolvency Act, and if the proceeds are sufficient to cover the costs of security. The notice does not constitute an "invoice" for VAT purposes. Time of supply will be the time payment is received.

Issue
The directions determined 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.

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Ask any tax practitioner, and they will tell you that the number one issue they deal with on a daily basis is retrieving refunds from SARS. Here at SAIT, we come across this type of query via the Tax Helpline every day and, while it is easy to point fingers, SARS is not always entirely to blame.

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 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 debt 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. He 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 becoming more assertive in relation to assessments and disputes, to change the current landscape as we know it.

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.

You have previously mentioned that companies should be aware of how various governments are changing their policies and legislation. With the end of the commodities boom, do you believe that the African transfer pricing landscape has changed significantly?

Transfer pricing in Africa remains a hot topic as various countries have now introduced transfer pricing legislation. However, due to the economic downturn experienced over the last couple of years, we have seen multinationals becoming more aggressive when it comes to charging fees, such as management fees, etc., in order to remain cash positive.

It is our understanding that African governments will also, in the near future, introduce tools such as a transfer pricing risk assessment tool. This will enable governments to identify companies not adhering to the arm’s-length principle. We expect this, together with the introduction of transfer pricing legislation and government’s enforcement of assessments and disputes, to change the current landscape as we know it.

What changes/challenges do you foresee for your firm in the transfer pricing space in 2017 and beyond?

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. Nokwenkwe Radaba and Kaletsu Selgothe, 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 Meagan 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 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 SAIT members, representatives from the African Tax Administration Forum and large tax firms.
Ruaan 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.

It appears that the challenge would be for the tax professional to stay relevant at the highest level and ensure that sound tax risk management processes are in place that will allow organisations to adapt quickly.

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...
I cannot realistically see government raising the WIT 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. The easy targets will always be on government’s radar, being the fuel levy and sin taxes, but I am of the view that targeted provisions will be introduced in the 2018 legislative cycle to limit the ability of the wealthy to defer taxes (such as the first salvo fired at trusts under the controversial section 7C), potential measures to limit cross-border tax arbitrage in line with base erosion and profit shifting (BEPS) and limiting tax relief for higher income earners.

My concern relates to the proposed carbon tax and sugar tax, and the way in which they are respectively couched, being disincentives for end users that will assist in combating climate change and health-related issues, but in reality are pure revenue generators for government under a different guise.

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 staring 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.

I still hold the view that an inclusion rate, of say 25 per cent for income tax, would have been more palatable and easier to sell to potential applicants. Despite the onerous terms, my view is that the SVPD will be a resounding success for SARS and SARB and a more plausible way of shoring up government revenue in the short-term, with the impending Common Reporting Standards as the catalyst.

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

A: In my view, larger companies in South Africa are still 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.

Companies that are ahead of the curve in terms of tax data management and readiness will be best placed to deal with the post BEPS era we are moving into, where the world is getting smaller and scrutiny more intense.

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: Although no specifics were made available, there is a sense of inevitability in the undertaking of the 2016 medium-term budget speech, indicating either an increase in corporate tax or introducing various wealth tax measures (as proposed by the Davis Tax Committee), or both. The minister himself referred to the fact that there will have to be a trade-off and that measures implemented must ultimately be for the benefit of South Africa as a whole and not a select few.

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: Improvement in tax policy for the renewable sector is only as good as government’s appetite to stimulate that sector of the economy. Procurement Programme (REIPPP Programme) will be expanded to only as good as government’s appetite to stimulate that sector of the economy, providing an interesting tax rulings from SARS. There is no certainty in the undertone of the 2016 medium-term budget speech, indicating either an increase in corporate tax or introducing various wealth tax measures (as proposed by the Davis Tax Committee), or both. The minister himself referred to the fact that there will have to be a trade-off and that measures implemented must ultimately be for the benefit of South Africa as a whole and not a select few.
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 0.06 per cent in Ireland. The Commission found that this constituted “state aid”, and hence conferred an unfair advantage to Apple. Accordingly, the Commission ruled that there be restitution by Belgium to at least 35 multinationals, mainly from the European Union to at least 35 multinationals, many countries are moving towards tax transformation.

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 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 and throughout the world. As a direct result, member states have already agreed to tackle the most prevalent loopholes in national laws that allow tax avoidance to take place, and to extend their automatic exchange of information to country-by-country reporting of tax-related financial information of multinationals. A proposal is also on the table to make some of this information public.

At the heart of all the controversy is one recurring issue — that of transfer pricing — often touted as the most challenging and significant tax risk facing multinationals. So prominent is this that out of the 15 action points in the BEPS Project, four were dedicated to transfer pricing while an additional three contained elements relating to transfer pricing.

South Africa’s BEPS initiatives

South Africa was one of the few African countries to participate in the BEPS Project. However, even before this, transfer pricing and tax transformation had been high on the country’s agenda. In February 2013, South Africa’s Minister of Finance Pravin Gordhan announced government’s 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.

The focus on tax and transfer pricing also has a continental focus. In 2011, the African Union (AU) and the United Nations Economic Commission for Africa (UNECA) brought together various ministers of finance, planning and economic development. They identified illicit capital outflows as an obstacle to development efforts on the continent. From this meeting the High-Level Panel on Illicit Financial Flows from Africa, chaired by former President Thabo Mbeki, emerged. It investigated the causes of capital outflows from the continent and proposed possible solutions. Work commenced in 2012, and on 31 January 2015 the panel tabled its final report.

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:

“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…”

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.

The report surmised three components as giving rise to financial outflows, namely:

- Commercial
- Criminal
- Corrupt

The tax risk facing multinationals, many countries are moving towards tax transformation. 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 0.06 per cent in Ireland. The Commission found that this constituted “state aid”, and hence conferred an unfair advantage to Apple. Accordingly, the Commission ruled that there be restitution by Belgium to at least 35 multinationals, mainly from the European Union to at least 35 multinationals, many countries are moving towards tax transformation.

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The laws they are a-changing

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:

- Amendment to section 42A to clarify which requirements to comply with for those taxpayers who fail to indicate 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.
- 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.
- 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.
- 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 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.

- 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.

Where to from here?

While 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.

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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 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 those 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 being commonly referred to as thin capitalisation, a transfer pricing adjustment may be triggered in the hands of the borrowing South African entity.

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. This adjustment is based on the reasoning that 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 judgment of Kok region of South Africa (Phy) 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 payee 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 payee and the beneficial owner or between such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, 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”

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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.
- In income tax purposes, the deduction of this interest would be disallowed in terms of the primary adjustment required by section 31(2). This would 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:

ForeiCo 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 500 000. The Group has generated funding from external third parties, which is then used to fund its operations. ForeiCo funds the dividend to SACo on a quarterly or annual basis, these amounts represent interest on levels of debt funding by the shareholder that are considered excessive, the following tax implications would arise:

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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 represents funds which would have existed had it not been for this relationship. Where an unconnected third party would not have advanced to the borrower, the group should be placed in the position that it would have been in had an external person would have been able to finance this. 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 an unconnected third party would not have advanced to the borrower, the group should be placed in the position that it would have been had this funding been equity as this is what an external person would have been able to finance this. A possible solution

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This type of anomaly will arguably arise on any payment made, which was subject to a withholding tax, but in respect of which the deduction is subsequently denied under section 31. A similar problem may therefore exist in relation to royalties paid to a foreign connected person where section 31 denies or partially denies a deduction of the royalties by the payer, but the royalties were subject to the royalty withholding tax.

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.
- 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.
"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 complianc: namely; enforced, voluntary and committed motivation. 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.

The concept of voluntary compliance is 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 underlying voluntary tax compliance. The definition subsequently derived for voluntary tax compliance is: voluntary tax compliance is the acceptance of the tax 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 behavior is encouraged by the intrinsic willingness of the individual to co-operate, based on strong personal ethics and internalised social norms such as co-operation and trust.

The principles underlying voluntary tax compliant behavior 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: characterized 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:
- Service-oriented: where authorities make it easy for taxpayers to fulfill their tax obligations;
- Norm-oriented: directed to appeal to the conscience and commitment of the individual; and
- Power-oriented: 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 this 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 recognize 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 South Africa. A tax reward was defined as an incentive administered by a tax authority in a form of showing appreciation and recognition for taxpayers’ voluntary compliant behaviour. In order for a tax reward 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 recognize 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 Ekurhuleni 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 acknowledged 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 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 Finance Programme (2012): “Compliance and a culture of integrity are 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.”
A review of four of the most serious issues facing taxpayers as well as what to expect in 2017.

TAX ADMINISTRATION LANDSCAPE 2016: PRACTICAL CHALLENGES EXPERIENCED BY TAXPAYERS OVER THE LAST YEAR

As a backdrop to the practical challenges experienced by taxpayers, one must consider the economic situation within South Africa as it relates to tax. At the 2016 Tax Indaba, Michael Sachs of National Treasury said that while South Africa's historical growth rate used to track the world average, our current growth rate alarmingly has been diverging from the world average over the last few years. In fact, South Africa's growth has been falling further behind the global average, and it is now below the growth rate of both developing and advanced economies. Sachs highlighted that the tax burden in South Africa is now higher than it was during the commodities boom, and that this tax buoyancy is unlikely to be sustainable. In August 2016, Commissioner of SARS Tom Moyane reported that there was a R4.5 billion shortfall in tax collections in the first quarter of the 2017 financial year. These circumstances place pressure on National Treasury and SARS to secure further and alternative sources of tax revenue.

In these circumstances, it is unsurprising that the practical challenges experienced by taxpayers outlined in the Tax Ombud reports primarily relate to aspects like delayed refunds, inaccurate over-collections, inability to have assessments reduced, and general non-performance by SARS in relation to any “service” other than collecting more taxes from taxpayers. Another key challenge experienced by taxpayers — which cannot easily become the subject of a complaint to the Tax Ombud — is the significant increase in audits and queries. The Tax Ombud Annual Report 2015/16 includes a table that lists the most serious issues encountered by taxpayers during that period. The previous 2014/2015 report also identified pertinent issues. This article will provide commentary on some of the most serious issues from the last two Ombud’s reports, as well as the challenge faced by taxpayers in relation to an increase in audits and queries.

1. Inability to have patent errors on assessments corrected

The problem

The top issue identified in the 2014/2015 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 Tax Administration Act [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:

- Section 93 of the TAA used to allow for a reduced assessment by SARS, within the normal so-called “prescription period”, where SARS was satisfied that there was an error in the assessment as a result of an undisputed error by SARS or the taxpayer in a return. This section was amended by the Tax Administration Laws Amendment Act with effect from 8 January 2016, to refer to a “readily apparent undisputed error”. Since this amendment, SARS appears to be adopting an extremely narrow interpretation of “readily apparent” in order to deny taxpayers the right to have their incorrect assessments reduced on procedural grounds.
- Section 98(1)(b) of the TAA used to provide for a withdrawal of 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 objection 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, unusual 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, the Tax Administration Laws Amendment Act [PAJA] envisaged in 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’ decision is materially influenced by an error of law as envisaged in PAJA. The more correct legal interpretation would be any error which is easily ascertainable, or which is accepted by both parties as constituting an error.
- If SARS finds that an error is not “readily apparent” because it took the taxpayer some time to identify this, in this instance, SARS is confusing the objective fact of whether or not an error is readily apparent, with the subjective reasons for a taxpayer not noticing a readily apparent error. This is actionable in terms of PAJA.
- In certain instances, SARS may wish to perform an audit or verification in order to determine if what was claimed to be an error was in fact an error. However, this cannot legally impact on whether or not the error was readily apparent. Action is
This essentially includes the category “failure by SARS to update banking details”. This was identified as resulting in delayed refunds to the actual taxpayer, sometimes because the refund is incorrectly paid to the wrong bank account. This issue ranked first in the 2015/2016 report. Whereas the purpose of identifying serious and systemic issues in the Tax Ombud report appears to be so that these issues can be addressed, the following:

1. Non-adherence by SARS to dispute resolution turnaround times
   Failure by SARS to respond to requests for reasons for assessments raised
   SARS’ failure to take information at its disposal into account

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 condone 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.

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, mainly to “preserve the relationship” with SARS. There has also been 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 submissions 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 there would be further extensions to the Tax Ombud’s powers and duties over the next few years.

TOP 10 MOST SERIOUS ISSUES ENCOUNTERED BY TAXPAYERS (AS PER THE 2015/16 TAX OMBUD ANNUAL REPORT)

<table>
<thead>
<tr>
<th>ISSUE</th>
<th>RANKING</th>
<th>2015</th>
<th>2016</th>
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<tbody>
<tr>
<td>Delay in payment of refunds</td>
<td>1</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Failure by SARS to update banking details</td>
<td>2</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Incorrect allocation of payments received by SARS</td>
<td>3</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>Delays in issuing tax clearance certificates</td>
<td>4</td>
<td>4</td>
<td>4</td>
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<tr>
<td>Taxpayers being affected by employer’s non-compliance with legislation relating to RPS certificates</td>
<td>5</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Inconsistency by SARS in providing taxpayers with timelines for finalisation of audits/verifications</td>
<td>6</td>
<td>7</td>
<td>6</td>
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<tr>
<td>Victims of identity theft being held liable for tax debts “presupposing a victim’s profile came in at 11”</td>
<td>7</td>
<td>8</td>
<td>7</td>
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<tr>
<td>Non-adherence by SARS to dispute resolution turnaround times</td>
<td>8</td>
<td>9</td>
<td>8</td>
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<tr>
<td>Failure by SARS to respond to requests for reasons for assessments raised</td>
<td>9</td>
<td>10</td>
<td>10</td>
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<td>SARS’ failure to take information at its disposal into account</td>
<td>10</td>
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**DISPUTE RESOLUTION WITH SARS: Is it only going to get tougher?**

**ELLE-SARAH ROSSATO, Associate Director: Dispute Resolution and Controversy, KPMG**

The article provides insight into the current revenue collection behaviour year at SARS and provides suggestions as to what challenges may lie ahead for taxpayers.

**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 and GDP and overall deteriorating economic conditions, potential labour unrests and under-performance (SARS) 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 broadening 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 a new novel one, such as:

- Delayed verification 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 Fourth Schedule Income Tax Act 58 of 1962); and

According to the report, it would seem that 40 per cent were focused on assessment (IT, VAT, PRYE), 17.5 per cent on dispute resolution, 24.6 per cent on collecting 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 12 times from last year, which emphasises the fact that SARS greatly relies on technology to increase compliance levels.

What is SARS’ stated plan for meeting revenue target?

The SARS Strategic Plan 2016/17-2020/21 mentions their values as: fairness, accountability, integrity, respect, transparency, trust and honesty. The SARS Strategic Plan 2016/17-2020/21 also lists their values as: fairness, accountability, integrity, respect, transparency, trust and honesty.

SARS’ weaknesses (as stated in its Strategic Plan) are real and involve being under-staffed and under-skilled with the inability to distinguish between disputed and undisputed debt and very little automation.

**Weaknesses: debt management (collections)**

- Illicit economy;
- Poor public perception of service delivery and corruption; and
- Unsatisfactory performances in the global environment; and
- Unsatisfactory performance 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.

**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 disputed and undisputed debt and very little automation.

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

**Threats: internal and external**

- Illicit economy;
- Poor public perception of service delivery and corruption; and
- Unsatisfactory performances in the global environment; and
- Unsatisfactory performance from organised labour.

**According to the report, it would seem that 40 per cent were focused on**

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**How to regularise any defaults.**

**Increased 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.**

**Managing relationships with organised labour in a proactive and professional manner.**

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- SARS’ weaknesses (as stated in its strategic plan) are real and involve being under-staffed and under-skilled with the inability to distinguish between disputed and undisputed debt and very little automation.
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 of the TAA) was lodged citing that the application is not in tax periods where no return was rendered by foreign revenue agencies or shareholders 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.

- 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 17 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 100 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, depending 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 when 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:

“What you’re supposed to do when you don’t like a thing is change it. If you can’t change it, change the way you think about it. Don’t complain.”
The vast majority of the complaints submitted to the Tax Ombud are rejected. Follow this guide to successfully lodge a complaint with the office.

The Tax Ombud released its annual report for the 2015/16 year on 8 October 2016. Of the 2 153 complaints received, 938 (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 (17 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 (27 per cent) of the complaints sent to the Tax Ombud were rejected because of the limitation of authority of the Tax Ombud. These limitations are briefly highlighted below, together with some alternatives that you can use instead of complaining to the Tax Ombud.

SARS COMPLAINTS PROCESS 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 (0800 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.) SARS has publicised that your complaint should be dealt with within 21 business days.

If the matter is not successfully resolved after these processes, you are entitled to lodge a complaint with the Tax Ombud.

COMPELLING 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.

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 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:

- SAFS policy or practice generally prevailing (unless it is administrative or service related) – submissions can be made to National Treasury for changes to the law (as opposed to only the interpretation thereof by SARS);
- 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.
The never-ending speculation regarding a VAT increase

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.

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 reselect 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 booking 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 engage SARS on an audit, 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.”
time for obtaining the ruling will therefore have a cash flow implication 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 does not fall within the prescribed form envisaged in section 16(2)(a) requesting approval of an input tax deduction where the document

Following the outcome of this case, section 16(2)(g) was introduced in a recent Supreme Court of Appeal (SCA) case: C:SARS v Marshat MD 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 future, taxpayers will have to make a formal ruling application to SARS. Following the outcome of this case, the Western Cape High Court

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 and an act professional body.

improved communication between SARS and the tax industry to ensure optimal co-operation and support within the framework of the law.

Reportable arrangements for foreign services

During the 2016 Budget Speech it was announced that the proposed withholding 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 borders of South Africa to determine whether they have a tax liability irrespective of the duration of the project.

The outcome of this case, section 16(2)(g) was introduced to the act together with Binding General Ruling No. 34 (BGR 34). 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 unless approved by SARS.

The Tax Faculty

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 course is delivered through our e-learning platform. The tax Faculty lecturers may be contacted by prior appointment via telephone or in person, as well as using e-mail.

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The Taxation of Individuals

Course in Taxation

This UNISA programme is delivered by the Tax Faculty and is divided into four study guides.

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EXPERIMENTAL TREATMENT: Is the Youth Wage Subsidy Still the Answer?

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.

In a nutshell, by enacting the ETI, government agreed to fund a portion of the wages of workers aged between 18 and 30 who earn less than R6 000 per month. Each worker is subsidised for a maximum of two years. The size of the subsidy varies depending on the worker’s wage, with companies employing workers that earn between R2 000 and R4 000 a month receiving the biggest subsidy. In these instances, government funds a R1 000 of the salary per month in year one and R4 000 in year two. This funding takes the form of reduction in the amount of employees’ tax that companies need to pay SARS per qualifying worker.

One of commissioned studies used econometric modelling to show that there have been “significant positive impacts on employment growth of between 2.4 and 19.9 percentage points — depending on the methodology,” according to 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 Ranchorhod. This study seems to show that the ETI has not had any economy-wide effect on employment.

Currently, details of the studies Treasury commissioned are with The National Economic Development Labour Council (Nedlac), which has a legislative duty to consider all laws relating to labour before they make it to parliament. Once they are done considering the ETI, details of the studies will be released.

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 R20 million a year. Currently, eight firms employing around 90 000 people are claiming more than R20 million. The DA’s Robert Lees asked if this would 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 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 create 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, this 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.

“A policy of this nature always has a context. And unfortunately, you can’t divorce it from the prevailing material conditions. Because if we were to say, ‘no we are not supporting the Employer Tax Incentive’, it may not happen. But my sense is that you also don’t want to be attracting negative public attention,” said the ANC’s Dr Makhosi Khoza.

“When something like this is there, you have a responsibility to our voters to say ‘we are trying our best to create employment’. 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 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 R6.06 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.

If Treasury is wrong it has — in terms of total spending — made a relatively cheap mistake. However, that is no solace to the five million youth who are still unemployed.
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 here to stay.

It is little wonder, then, that the tax avoidance industry has been able to convince many taxpayers it is “business as usual”. More than anything else, the industry has been largely successful in promoting the view that the new “purpose” provisions in section 80G have not changed a thing and that the test in question remains a purely “subjective” one.

Complexity and uncertainty

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 these criticisms has only contributed to that process.

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 80J 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 80J established two tests, a “presumptive” one and an “indicative” one. The Draft Guide only compounded this confusion when it subsequently stated that “the mere presence of an accommodating or tax-indifferent party in an avoidance arrangement is sufficient to render such arrangement impermissible, if the sole or main purpose of such arrangement was to derive a tax benefit”, a statement which, if taken at face value, would effectively repeat the “choice principle” in South Africa. Worse still is the Draft Guide’s discussion of the “misuse or abused” test, a discussion that has thankfully been rendered irrelevant by the Bosch judgment.

Another significant problem has been SARS’ approach to section 80J. 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.

Mised 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...
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 provision in question. This has in turn been soundly 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” towards purposive interpretation in South Africa and elsewhere,15 and to emphasize 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.16 These schemes typically provide significant tax benefits for a taxpayer, while involving little or no risk or opportunity for, at best, a minor (pre-tax) profit. In practice, they typically rely upon and are characterised by, inter alia, the use of offsetting or self-cancelling elements, circular cash flows and accommodating or tax-indifferent parties.17 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.18 Rather than being in conflict with each other, subsections 80C(1) and 80C(2) are complementary provisions, subsection 80C(2) providing a “shorthand” way to identify arrangements falling within the scope of the general definition by focusing on their common and more objective feature.19 This is one example, moreover, where a prompt clarifying amendment could have quite possibly put the issue to bed once and for all.

Similarly, the specific remedy provisions in section 80B have come under fire for supposedly granting the Commissioner “virtually unfettered” discretion in determining the tax consequences of impermissible tax avoidance industry schemes.20 Again, it is these criticisms that 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 an arrangement in recognition of the fact that promoters typically “hijack” normal business transactions in order to lend them a semblance of business purpose.21 Most inevitably, this involves the introduction of unnecessary steps and accommodating or tax-indifferent parties or the splitting of a composite transaction between connected persons.22 The enumerated remedies in clauses (a) to (i) of subsection 80B(1) seek to “match the punishment to the crime” as closely as possible and to avoid the need for the Commissioner to posit a hypothetical “normal” transaction against which the taxpayer’s arrangement must be tested, particularly in cases involving tax shelter arrangements.23

It is again ironic that the one enumerated remedy that arguably does give the Commissioner “virtually unfettered” discretion is found in clause (f) of section 80B(1). This clause authorises the Commissioner to determine a taxpayer’s liability as if the arrangement “had not been entered into or carried out in such other manner as in the circumstances of the case he [sic] deems appropriate for the prevention or avoidance of a tax benefit obtained. The language of this residual, catch-all remedy was directly taken from what had been the Commissioner’s sole remedy under former section 103(1), a provision that never engendered the type of shrill criticism that has been directed at the specific remedies in section 80B(1). Unlike the provisions of former section 103(1), moreover, clause (f) of subsection 80B(1) is and should be read as a residual remedy that should be applied if and only if the more targeted remedies in the previous clauses prove to be inadequate in the circumstances of a particular case.

One of the more vexatious issues under the new GAAR has been whether, or to what extent, the “purpose” test is now an objective one: namely, one that is concerned with the purpose of the 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 purpose provisions in Section 80G have 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 purpose of the arrangement as a type of “reasonable bystander” test —24 without precluding a court from considering a taxpayer’s subjective purpose and unique circumstances that may be relevant to that determination.

An example from everyday life may help to illustrate this approach. The main purpose of a hammer is to drive nails. In most cases, driving nails is 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 purpose for hammering.

Nevertheless, one would be unlikely to conclude that the main purpose of hammering was to drive nails if the activity took place in the middle of the night beneath the window of a disliking neighbour, for example, the person could show that he or she was boarding up a window that had just broken during a terrorist storm, even if it furthered a broader, ongoing plan to inconvenience the neighbour whenever possible. That plausible explanation might ultimately ring hollow, however, if it can be shown that the storm had taken place on a Saturday morning and the person had immediately covered the window with plastic sheeting after the storm had passed later that afternoon, but had then waited until 4:00 to begin hammering away, despite the fact that all the necessary materials had been ready and waiting throughout the day. Ultimately, the question is and should be what was actually done was has reasonably considered in light of the relevant facts and circumstances.

In a similar vein, nearly six decades ago, Lord Denning of the Privy Council provided a helpful description of a approach in a discussion of the types of schemes in which income tax is not.

The courts have also made it clear that they can recognise such arrangements in the types of schemes in which income tax is not.

2. Section 80C(2).
5. Draft Scale ante note 17 at para 6.14. Amongst other things, this discussion appears in lengthy the application of the “reasonable or actual” test to the provisions of the former GAAR itself based upon the application of the so-called “objective purpose” test to the provisions of section 103(1). It is hoped that it will serve as a useful companion to the views expressed in Part I of this article and to assist in the development of the relevant principles in this connection.
6. National Income Tax Act, 1963 (Act No 58 of 1963), sec 12(1)(b) (pre-amended). It is of note that this section, one of the most important provisions in the legislation, was previously an amendment to section 103(1) and not a provision in its own right. The 2014 settlement between SARS and the Hudson Group, in which the taxpayer agreed to repay the full amount of the tax benefits it received plus interest,29 may also have sent a message that the new GAAR is not quite as toothless as the tax avoidance industry would have potential clients believe.

As discussed in Part I of this article, moreover, 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-cancelling elements and round-trip financing.30

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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 GAAR’s terminal condition has been overblown, the controversies that have dogged the legislation are unlikely to be resolved until cases under the new GAAR reach the courts or SARS and National Treasury jointly take action to correct perceived ambiguities in the legislation. Unfortunately, neither event seems likely to occur anytime soon. That said, in the interim, taxpayers may well be advised to remember that if something looks too good to be true, it probably is.
This article takes a look at which beverages will be affected by the controversial tax on sugar-sweetened beverages before exploring certain practical issues relating to the possible implementation and administration of the tax.

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, including exemption from all traditional customs and excise levy-liability; and

• Arrangements for surety with a financial institution; and
• Preparation of supporting documents (irrespective of the added-sugar content) than a specified threshold as well as for SMEs which produce fewer litres of SSBs per annum.

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.

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 R15 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.

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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 R15 billion per annum in public revenue through this tax.
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.
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.

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 sacrifice 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 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.”
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

Career Advice to Your 25-Year-Old Self

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.

Ruan van Eeden, Director of Tax at the Geneva Management Group

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.

Refilwe Malinga, 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

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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, which are complicated, and then we try and simplify it,” says Musviba.

When deciding on subject matter, Musviba says that his approach is researching a tax question to find appropriate content.

Keeping up to date with all that is happening in the fast-paced tax world can be, well — taxing. TaxTalk 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.

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.

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In Conversation WITH ROGUE CONTROVERSY

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 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.

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 65 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 public or private 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 deliberately diminished 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 unresponsive 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 instituted 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 Sipokie, who was appointed in January 2016 in 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 editorial processes and that it relied too heavily on information 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 understated. The sustained reporting and news 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.

This is not only true of the media but it applies to the judicial bodies and the public and private institutions involved in the fight against corruption, organised crime and drug smuggling.

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 us 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 clandestine and illegal operations and the like. They have every right to be heard and their families have every right to know that many of them, our former SARS colleagues, were and still are dedicated, hard-working, honest public servants who did not abandon their responsibilities to investigate corruption, organised crime syndicates, 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 successes in the fight against organised crime. They were not rogue. And I will stand to defend them for as long as I have a voice.
A n organised office makes for better productivity. The image of your office and your efficiency influence 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."

LEIGH SCHALLER, Assistant Editor

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.

5 STEPS TO A CLUTTER-FREE 2017

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.

“It is the law that His Majesty’s subjects are free, if they care, 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 quiaetus, the better it will be for all concerned. For the doctrine seems to invite 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 headquarters 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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