



## Tax Alert



February 2019

# Voluntary disclosure relief and understatement penalties for failure to submit tax returns

Many taxpayers applying for relief under the South African Revenue Service's ("SARS") Voluntary Disclosure Programme ("VDP"), have had their applications rejected where the "default" constituted the non-submission of tax returns.

Based on discussions with SARS' VDP Unit, we were informed that it is policy that where a registered taxpayer fails to submit tax returns required to be submitted, an application for relief under the VDP will be declined on the basis that SARS is aware of the default. As a result, SARS does not consider the disclosure to be "voluntary". This view applies even if the taxpayer failed to submit returns for a number of tax periods and SARS never sent out reminders or issued estimated assessments.

However, where a taxpayer is liable to be registered but failed to do so timeously, and subsequently registers with retrospective effect, SARS' VDP Unit's policy is that should the taxpayer apply for VDP relief, the disclosure will be considered to be voluntary, provided the VDP is submitted within reasonable time after registration has been affected. In this regard SARS considers 'reasonable time' to be a period that does not exceed four weeks from the date of registration. Consequently, VDP applications of this nature are likely to be declined if submitted after the said four week period.

Thus, until a taxpayer successfully challenges the SARS VDP Unit's view in a competent court, the failure of registered taxpayers to submit a return precludes them from obtaining VDP relief on the basis that the submission is not "voluntary".

### Latest Amendment to section 222 of the Tax Administration Act No 28 of 2011 (the TAA)

On 17 January 2019 the Tax Administration Laws Amendments Act was promulgated. Amongst others, section 222(4) was amended to add sub-paragraph (b), which clarifies the amount of the so-called 'shortfall' on which understatement percentage penalties are to be imposed, in the event of the non-submission of a tax return. Section 222(3) deals with the calculation of the shortfall and effectively provides, *inter alia*, that the shortfall is the difference between:

- (a) the tax declared on the return as being payable or refund claimed on the tax return; and
- (b) the tax duly payable by the taxpayer or the refund duly claimable, as the case may be.

The specific wording used in the section that makes reference to (a) above reads: tax that would have been payable/refundable "... if the 'understatement' were accepted". The interpretation of this wording was challenged in ITC 13725, in circumstances where the understatement results from the failure to submit a return.

The court held in ITC 13725 that:

*"The word 'accepted' in the context of section 222(3)(a) means the circumstance that SARS proceeds upon the assumption that there has been no 'understatement' as defined. It 'accepts' as correct the apparent position, whether that involves a mis-stated return or the absence of one altogether. Once the understatement is discovered and acted upon, the resultant tax position must be compared to the one which would have obtained if the 'understatement' (as defined) had not been acted upon. In the case of a return not rendered when it is due, the shortfall on which the penalty is charged is the difference between the tax found due and the position which would have obtained if SARS had not realised and acted upon the fact that the taxpayer failed to render a return at all: i.e. zero tax position."*

In essence, the amendment seeks to provide clarity on the correct interpretation of the section, as held in the said case, by now specifically providing in section 222(4)(b) that the value of (a), as referred to above, is deemed to be nil, in the event where the 'understatement' is the failure to submit a return. The amendment therefore has no bearing on the effect, i.e. the so-called difference remains the full amount of tax actually due by the taxpayer.

KPMG's Tax and Legal team are highly skilled in assisting clients with obtaining whatever relief is available to taxpayers, thereby mitigating their financial exposure. The services we provide to our clients are, amongst others, assessing our client's risk position, determining the quantum of risk, advising on the most effective procedures to remedy the position, preparation and submission of tax returns, requesting the remittance of penalties and/or interest, assisting with settlements etc. and assisting in resolving any disputes with SARS throughout the process.

**For more information or assistance please contact:**



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