New tax dispute resolution rules brings about some welcome and unwelcome changes

Author: TaxTalk

The wait is finally over! After three draft documents for public comment, numerous workshops and internal discussions, the new Dispute Resolution Rules ('the new Rules') issued in terms of section 103 of the Tax Administration Act (No. 28 of 2011) ('the TAA') has today been promulgated into law under Government Notice 550 published in *Government Gazette* No. 37819. It should be noted that the new Rules replace the Rules issued in terms of section 107A of the Income Tax Act ('the old Rules') with immediate effect. Although the new Rules are a lot more comprehensive than the old Rules, the South African Institute of Tax Professionals' ('the SAIT') technical department warns the public of some common pitfalls and welcome changes.

The new Rules shortened some of the time periods to submit documents during the dispute resolution process and taxpayers and practitioners alike are therefore advised to ensure that they familiarise themselves with all of the periods.

One of the most notable changes relates to the exchange of information before a taxpayer heads into the appeal process. According to the old Rules, when a matter went on appeal, SARS was required to deliver to the taxpayer, in writing, a statement setting out the grounds for the assessment. This statement must have contained the material facts and legal grounds on which the taxpayer's objection was disallowed. This statement was then used by the taxpayer to formulate its statement of grounds of appeal which consisted out of the grounds against which the taxpayer is appealing, the material

facts and legal grounds upon which it relies for such an appeal and to which of the facts and legal grounds in SARS' statement of grounds for the assessment it agrees to and disagrees with. These two documents then formed the issues that were fought in the appeal.

The new Rules, basically maintained the same process, with the addition that SARS, at its discretion, is afforded the opportunity to reply to the taxpayer's statement of grounds of appeal. The issues in appeal would therefore now consist out of the statement of grounds of assessment and opposing appeal issued by SARS, the statement of grounds of appeal issued by the taxpayer and, should SARS have replied to the grounds of appeal of the taxpayer, SARS' reply.

Erich Bell, Tax Technical Advisor at the SAIT welcomes this additional leg added to the formulation of the issues in appeal. 'This would go a long way in providing more clarity as to what SARS' exact point of view is on a disputed item in the appeal process' he states. Bell believes that the recent judgment handed down by the Supreme Court of Appeal in the Pretoria East Motors case reiterated the importance of SARS providing the taxpayer with appropriate grounds on which it (SARS) is opposing the items in appeal. Bell states that, in an appeal, the onus is on the taxpayer to show on a preponderance of probability that SARS' decision is wrong. This is not possible should a taxpayer not exactly know what SARS' stance is on a particular decision. Bell, however, states that only time will tell whether SARS would make use of the reply as the new Rules do not force SARS to make use of thereof.

The new Rules also require SARS to provide a taxpayer with the 'basis of its decision' on the objection as required by the TAA. Although this has always been required by the TAA, complaints were raised that adequate reasons were not always provided. Stiaan Klue, Chief Executive of the SAIT reiterates that a decision on an objection is an 'administrative action'

that affects the rights of the taxpayer for purposes of the Promotion of Administrative Justice Act ('the PAJA') and that a taxpayer should therefore be provided with adequate reasons from SARS for its decision on an objection. 'Should the basis of the assessment not be provided by SARS, taxpayers may use section 5 of the PAJA to request adequate reasons for the disallowance of the objection, and should SARS fail to provide it, institute proceedings in terms of section 6 of the PAJA for a judicial review' Klue states.

Given the fact that the whole dispute resolution process revolves around time lines which run from the 'date of delivery', it is very important that taxpayers and practitioners alike also familiarise themselves with Rule 2(2) of the new Rules. An interesting approach was adopted by the legislature in this regard, as there are two 'dates of delivery' – one for SARS and another for the taxpayer. For SARS, the date of delivery would broadly be when the document is sent or handed to a person, whilst for the taxpayer the date of delivery would be the date on which the document is received by SARS. These different sets of rules may be seen as unfair where the taxpayer elected to make use of registered post as a means for submitting and receiving documents. 'Taxpayers are therefore advised to object via eFiling where the eFiling platform allows it, to ensure that the lead time between sending and receiving documents are reduced to a minimum' Bell advises.

The new Rules applies to any act or proceeding taken, occurring or instituted before the commencement date of the new Rules but without prejudice to an action taken or proceedings conducted before the commencement date of the comparable provisions under the old Rules.

The SAIT believes that the new Rules brought about some welcome changes which would go a long way in ensuring that taxpayers are treated in an administratively fair manner when involved in dispute resolution. Whether the new Rules would

achieve their objective, would depend upon the application thereof by SARS. The SAIT has a lot of faith in SARS who has proven itself as a world-class revenue authority over and over again and the institute believes that the new Rules is definitely a step in the right direction.