

Taxpayer's Rights In Respect Of A Suspension Of Payment Of Tax

Author: Mareli Treurnicht

Any taxpayer who wishes to object to or appeal against an assessment issued by the South African Revenue Service ("SARS") must be aware that their obligation to pay any tax under that assessment is not automatically suspended by virtue of the submission of the objection or appeal itself. Any taxpayer who wishes for an objection or appeal to first be concluded before paying the tax due under an assessment would have to lodge a separate request for suspension of payment of tax in terms of section 164 of the Tax Administration Act No. 28 of 2011 ("the TAA").

Section 164 provides that a taxpayer should request a senior SARS official to suspend the payment of tax or a portion of the tax due under an assessment if such taxpayer intends to dispute or disputes his liability to pay the tax. Under section 88 of the Income Tax Act No. 58 of 1962 ("ITA") the Commissioner for SARS could grant a request to suspend the payment of tax. This section has now been repealed and replaced with section 164 of the TAA, thereby authorising senior SARS officials to grant such requests. As with section 88 of the ITA, the taxpayer will be required to motivate and satisfy certain criteria in order for the request to be granted in terms of section 164 of the TAA, and great care should be taken in ensuring that the taxpayer complies with section 164 and properly motivates his or her request. The senior SARS official has a discretion whether or not to grant the request and will make his or her decision by having regard to the following criteria as set out in section 164(3):

- the compliance history of the taxpayer;
- the amount of tax involved;
- the risk of dissipation of assets by the taxpayer concerned during the period of suspension;
- whether the taxpayer is able to provide adequate security for the payment of the amount involved;
- whether payment of the amount involved would result in irreparable hardship to the taxpayer;
- whether sequestration or liquidation proceedings are imminent;
- whether fraud is involved in the origin of the dispute; or
- whether the taxpayer has failed to furnish information requested under this Act for purposes of a decision under this section.

The TAA provides that a senior SARS official may deny a request for suspension of payment of tax or revoke a decision to suspend payment of tax with immediate effect if he or she is satisfied that:

- an objection or appeal lodged is frivolous or vexatious;
- by submitting an objection or appeal the taxpayer is “employing dilatory tactics”;
- on further consideration of the abovementioned criteria the request should not have been granted; or
- there is a material change in any of the factors referred to in the criteria upon which the decision to grant the request to suspend the payment of tax was based.

Section 164 of the TAA further introduced a new provision which states that, where a suspension of payment of tax was granted, it will be revoked with immediate effect should no objection be lodged or the objection is disallowed and no appeal is lodged, or an appeal to the tax board or court is unsuccessful and no further appeal is noted.

However, the TAA further introduced a new grace period within which SARS may not commence debt-recovery proceedings against a taxpayer should a request for suspension of payment of tax be revoked or denied. Section 164(6) of the TAA reads as follows:

“(6) During the period commencing on the day that SARS receives a request for suspension under subsection (2); or a suspension is revoked under subsection (5), and ending 10 business days after notice of SARS’ decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.”

Section 164(6) accordingly seeks to protect a taxpayer for a short period after a request for suspension of payment of tax has been denied or revoked, as SARS may not apply for judgment to be taken against a taxpayer or proceed with the attaching of or executing against the taxpayer’s property during that period. Should SARS accordingly take any further steps against the taxpayer during that period, this would constitute a contravention of section 164(6) of the TAA and the taxpayer would be well within his or her rights to launch an application against SARS for the rescission of the judgment or an order interdicting SARS from proceeding with execution against the taxpayer’s property and even applying for damages and special cost orders against SARS.

Lastly, there remains the option of taking SARS’ decision to proceed with debt-recovery proceedings against the taxpayer’s property on review for violating section 33 of the Constitution of the Republic of South Africa, 1996, which contains the right to just administrative action, which

provides that:

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by the administrative action has the right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must-
 - Provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - Impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - Promote an efficient administration.”

Section 33 should be read in conjunction with the Promotion of Administrative Justice Act No. 3 of 2000. It should, however, be noted that litigation proceedings are expensive and that it may often not be worth the time and money spent when compared to the amount of tax involved. Every case should accordingly be considered on its own merits