

# Taxpayer's rights on SARS audits

The Tax Administration Act, Act 28 of 2011 (the TAA) came into effect on 1 October 2012. Its promulgation brought with it many changes to not only taxpayers' rights and obligations but the reciprocal rights and obligations on the part of the South African Revenue Service (SARS) in its continuous business of revenue collection. Some of the amendments and repeals of sections previously contained in the Income Tax Act No. 58 of 1962 (the Act) have seen a welcome improvement in taxpayers' rights. One of these improvements is contained in section 42 of the TAA.

Previously, the Act contained no obligation on SARS to keep the taxpayer informed during an audit, nor did it provide for a timeline on the time period SARS could take to complete an audit. The taxpayer could thus be left in limbo and be uncertain as to when an audit may be completed. This position was clearly not conducive to good commercial nor equitable practice and if the taxpayer were to enquire with SARS for the purpose of obtaining a status update on the audit or request that such an audit be completed within a reasonable time, SARS could merely state that it was under no statutory obligation to complete the audit within a certain timeframe and that complexities in conducting the audit required extensive use of resources.

Section 42 of the TAA, however, now provides that a SARS official involved in or responsible for an audit must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a report indicating the stage of the completion of the audit. SARS issued Public Notice No. 788 on 1 October 2012 in Government Gazette No. 35733 (the Public Notice) for this purpose.

In terms of the Public Notice, a taxpayer is entitled to a status update of the audit within 90 days after commencement of the audit and within 90 day intervals thereafter. The definition of 'day' is currently an anomaly in our law, but for the sake of this note it suffices to say that 'days' indicate calendar days. The Public Notice goes on to provide the manner and form which the report should take:

"The report must include the following details as at the date of the report:

- A description of the current scope of the audit;
- The stage of completion of the audit;
- Relevant material still outstanding from the taxpayer"

This must be seen as a welcome development in South Africa's tax law as it attempts to provide the taxpayer with greater certainty and provides suggested timeframes of completion of an audit and hence allows a better opportunity to put into place contingency plans for any eventualities. It is furthermore, in line with many overseas jurisdictions. However, despite this welcome development there are questions regarding its effect and usefulness in enforcing taxpayers' rights.

Despite this new obligation on SARS to keep the taxpayer informed throughout the course of an audit, it is unfortunate that where SARS fails to abide by its legal obligations there is no sanction against SARS nor remedy for the taxpayer. In effect SARS could continue to issue such reports indefinitely, alternatively, could merely fail to issue the report as it will have no adverse effect on its ability to collect revenue in the long term.

Rule 26(5) of the Rules prescribing the procedures to be observed in lodging objections and noting appeals against assessments (the Rules) provides that where a party fails to comply with any requirement contained in the Rules, the Court

may, upon application on notice by the other party, order the defaulting party to comply with that requirement within such time as the court deems appropriate. Rule 26(6) goes on to state that where the defaulting party fails to comply with such a court order in terms of Rule 26(5), then the court may upon application on notice by either party make an order which in effect either confirms the assessment or allows the objection. This remedy therefore ensures finality and certainty and is open to utilisation by both SARS and the taxpayer. It is unfortunate that it only applies to objections and appeals and not to the situation before SARS issues an assessment.

The question therefore remains – what are the remedies available to a taxpayer where SARS does not issue the report nor finalises the audit and the timeframe involved is extensive having regard to reasonability?

One possible solution may be to approach the civil courts for the purpose of granting a *mandamus* (mandatory interdict) against the relevant SARS official to carry out his obligations in terms of section 42 of the Act. The courts, may, however, be hesitant to grant such an order as it may be difficult to prove the requirements for an interdict, which include, *inter alia*, that there is a well-grounded apprehension of irreparable harm or that an injury has actually been committed or is reasonably apprehended.

The initiation of an audit does not necessarily mean that SARS will issue additional assessments against the taxpayer, and thus it is most certainly difficult to prove irreparable harm. An exception to this is perhaps the situation where a taxpayer requires a Tax Clearance Certificate (TCC) from SARS for business and commercial purposes, but where SARS refuses to issue such a certificate as a result of the pending audit or an audit which has not been finalised. Notwithstanding the fact that in the aforementioned situation, the taxpayer may be able to prove irreparable harm, litigation in the High Court

is time and cost intensive and it seems unnecessarily burdensome taking into account the purpose of such an application.

An alternative could be to approach the High Court to take SARS on review for its failure to comply with section 33 of The Constitution of the Republic of South Africa, 1996 (the Constitution), as well as the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA). Again, the high costs of litigation involved in this process far outweigh the possible remedy the court may order. Furthermore, such applications are not financially viable for the majority of taxpayers and it could be too often a case of the taxpayer having to succumb to SARS' authority.

Unfortunately, at this stage there does not appear to be any further alternative remedies for the taxpayer or sanctions against SARS for not abiding by its legal obligations in terms of the TAA. It is always valuable to compare our position with overseas jurisdictions. However, in this instance it seems that although many foreign jurisdictions recognise the need and importance of keeping the taxpayer informed, there are neither sanctions on the revenue authorities nor reciprocal remedies for the taxpayer.

In the Irish Tax and Customs Code of Practice for Revenue Audit it states that it is in the best interests of everybody that the audit is concluded as quickly as possible and also provides that where the taxpayer has complied with all requests for information timeously, then Irish Revenue must advise of the status of the audit after the expiry of three months, and in so far as possible the estimated timeframe of completion thereof. The Code does not, however, provide for a sanction where the Irish authorities fail to adhere to these obligations.

In the Australian Tax Office (ATO)'s guidelines on the conduct of complex audits, it sets out the auditor's obligations

during the course of the audit, which includes, *inter alia*, to keep the taxpayer informed. Unfortunately there is no mention of a suitable remedy where the auditor abrogates from his obligations. The ATO, did however, recently introduce a system where it develops an 'Aged Case Report' showing all audits which have not been finalised within two years and the reasons behind the delays. This report is then forwarded to the ATO's Deputy Commissioner: Large Business and International on a regular basis, for the purpose of determining any action required to speed up resolution of the audits.

It thus appears that, although the TAA went a long way to improving taxpayers' rights and enhancing SARS administrative obligations, there are several issues which have arisen since its implementation. While it is accepted that the need for an efficiently functioning revenue authority is key for the success of the country's economy and this goes hand in hand with the powers given to SARS in the new legislation, one must not lose sight of the fact that the sanctions imposed against the taxpayer for failing to comply with certain provisions are often harsh, whereas the reciprocal sanctions imposed on SARS are often not even catered for. Nevertheless, it is vitally important for all taxpayers to know their rights in these circumstances and to seek professional assistance where issues surrounding the interaction with SARS pertaining to requests for information, audits, objections and appeals arise.

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**TAA: Section 42**

**SARS Public Notice No. 788**

**SARS Rules for Objection and Appeal: Rules 26(5) and 26(6)**

**The Constitution of the Republic of South Africa: Section 33**

**PAJA**