

# **Voluntary Disclosure Programme – Some necessary considerations**

The Voluntary Disclosure Programme (VDP) has been in place for a few months and the South African Revenue Service (SARS) as well as the South African Reserve Bank (SARB) have actively promoted the legislation and encouraged taxpayers and practitioners to participate. It appears that a number of applications have been submitted.

The purpose of the VDP is to encourage applicants to disclose their “defaults” and to give them the opportunity to regularise their tax affairs in terms of the Tax VDP and/or regularise any contraventions of the Exchange Control Regulations (the Regulations) in terms of the Exchange Control VDP. The outcome of these applications, once they have been approved, is a written agreement between SARS and/or SARB and the applicant.

This article highlights some interesting points of discussion.

## **Not an amnesty but a mechanism to collect tax**

As a point of departure, it should be noted that the VDP is not an amnesty. While it may provide an applicant relief from penalties, interest, additional tax and criminal prosecution, it remains a mechanism designed to collect taxes due to the

state and the full capital amount of tax remains payable under the Tax VDP. This makes sense in light of the global financial climate, since a VDP is an internationally accepted mechanism for the collection of taxes. It is also interesting to note that the Internal Revenue Service of the United States of America (US) announced a similar initiative aimed, in particular, at non-compliant US taxpayers with unreported offshore bank accounts.

The VDP commenced in November 2010 and will come to an end on 31 October 2011. Any person may apply for VDP, whether in a personal, representative, withholding or other capacity for defaults that occurred before 17 February 2010. (To this extent, it is different from the 2003 Amnesty in terms of which individuals who facilitated the export of capital or the non-payment of tax had to apply as facilitators.) It is also worth noting that the default must have been within SARS' domain before the cut-off date, in other words, the return or declaration with the incorrect disclosure must have been submitted to SARS by 17 February 2010.

## **What is a default?**

The term "default" is widely defined in the Voluntary Disclosure Programme and Taxation Laws Second Amendment Act No. 8 of 2010 (the Act) and applies in respect of all taxes currently and previously administered by SARS, i.e. it also includes those that have been repealed.

# Implications of pending audit or investigation

A person may not apply for VDP if such person is aware of a pending audit or investigation into its affairs or if an audit or investigation has commenced, but has not yet been concluded. This is a subjective test, which means that the person must have personally been aware of such an audit or investigation. SARS does, however, have discretion to allow a person to still apply in these circumstances. Certain criteria are specified, which, in essence, require that the SARS officials would not have detected the information during the investigation themselves, and if the application would be in the interest of good management of the tax system.

Being aware of an audit does, therefore, not disqualify anyone from participating in the VDP process, but it has important financial implications. This is because, where an audit has commenced and the person is aware thereof, SARS must only waive 50% of the interest due on the capital outstanding.

SARS is also of the view that any audit or investigation that has been instituted into a person's affairs will impact a VDP application in totality – for example: should a company be subject to an investigation in relation to value-added tax, this would have a financial impact on any VDP application in respect of, for example, capital gains tax.

When submitting an application, it is therefore critical for a person to confirm that there are no outstanding tax issues with SARS, as this could very well impact on the amount finally payable to SARS pursuant to the application.

## Anonymous applications

It is possible for an applicant, who wishes to obtain an indication of the possible relief that may be granted, to submit an anonymous VDP application and SARS will, on this basis, issue a non-binding opinion indicating whether or not, and to what extent, the applicant would qualify for relief. An anonymous applicant, however, remains at risk of SARS independently identifying any defaults and instituting an investigation in the meantime. The implication of an anonymous application is, therefore, that the risks of investigation and resulting financial consequences remain until such time as a detailed and named application has been submitted.

## Importance of full and material disclosure

Should it be established, after having successfully concluded a VDP agreement, that a person failed to disclose a fact that was material for purposes of making a valid voluntary disclosure, SARS may, *inter alia*, withdraw the relief awarded in terms of the voluntary disclosure agreement. Accordingly, partial disclosure may invalidate the whole agreement. This could create a risk for the applicant should one take into account the number of Tax Information Exchange Agreements concluded (or currently under negotiation) by South Africa and other countries, and the possibility that the information that the taxpayer partially disclosed in a VDP application may be shared by South Africa with another country – possibly also exposing the applicant to foreign taxes.

## **Donors of non-resident trusts – Exchange Control VDP**

It is interesting to note that a South African exchange control resident, who is a donor of a non-resident discretionary trust, may elect that any foreign asset that was held by that trust on 28 February 2010 be deemed to be held by that resident. This seems to be a mechanism to, *inter alia*, do away with so-called “loop structures” contravening the Regulations where the trust owns e.g. South African assets.

A levy of 10 per cent of the value of the foreign asset(s) at 28 February 2010 will be payable. This levy must be paid with funds held offshore. Should offshore funds not be available, a payment from local funds will be permitted at a levy of 12 per cent.

## **What are the implications of the 2003 Amnesty?**

According to the Guide to Tax and Exchange Control VDP, 2010 issued by SARS and SARB, despite previous disclosure having been made in terms of the 2003 Amnesty, an application may be submitted for new tax and/or exchange contraventions and, if the application is successful, relief will be granted in respect of such new defaults or contraventions.

**Edward Nathan Sonnenbergs**

**Voluntary Disclosure Programme**

**Taxation Laws Second Amendment Act No. 8 of 2010**

**Exchange Control Regulations**