

SARS challenges the basic amount even for first provisional payments

Properly managing cash flows in times of fiscal shortfall

The recent surge in SARS requests for justification of first provisional tax estimates is set to increase even further. But SARS is technically within its rights.

Whilst most taxpayers have become accustomed to SARS's historic acceptance of the "basic amount" as a basis for the first provisional tax estimate, taxpayers are now being caught off guard by the increased application of the notorious "para 19(3)". Paragraph 19(3) of the Income Tax Act's 4th Schedule permits SARS to request that a taxpayer justifies their income estimate, and even permits SARS to reject the taxpayer's estimate and impose instead its (SARS's) own estimate. Whilst para 19(3) applications have never been uncommon in respect of second (i.e. year-end) estimates, they were relatively unheard of in the context of first (i.e. mid-year) estimates.

However, PwC Tax confirms that there is nothing in the legislation to prevent SARS from applying para 19(3) to first provisional estimates. It is unlikely that we can challenge SARS's decision to focus more attention on these estimates.

In recent communications from SARS officials, they confirm their view that the following principles apply in respect of first provisional tax estimates:

- Estimates should be based on total taxable income.
- The estimate of the total taxable income should be done on the basis of the information and contingencies relevant at the time of undertaking the estimate.
- The "basic amount" should really only be used if it in any event approximates the total taxable income estimated for the year. Technically, the basic amount should not per se be assumed to be



acceptable as an estimate of taxable income for the purposes of the first provisional payment.

- The purpose of the para 19(3) requests is not to punish or burden taxpayers, but to ensure that taxpayers do not underestimate their taxable income. (Under-estimation would prevent SARS from collecting the cash flows they are entitled to).

Whilst the incidence of SARS challenges has been increasing steadily over the past few months, tax practitioners are expecting an even greater onslaught during August —when taxpayers with February year-ends will be filing their first payments for the 2011 tax year.

Taxpayers are thus reminded that the "default" position for provisional tax payments is that they are required to undertake an actual estimation calculation of expected

taxable income for the year. The technical position as regards the “basic amount” has always been that it cannot override the “default” estimation obligation. Rather, the basic amount is relevant only:

- as a lower limit beneath which estimates automatically require SARS consent; and
- as a basis for potential penalty calculations.

Whilst it must be conceded that, technically, the “basic amount” has never constituted an estimate amount in its own right, there is no doubt that taxpayers and tax practitioners have become used to treating it as an acceptable “default” estimate (mostly because SARS always accepted it). On the other hand, some commentators will argue that —given the ongoing improvement in SARS’s efficiency over the past few years— it was inevitable that provisional tax estimates would eventually be another target of tighter enforcement. Naturally, the ongoing pressure on fiscal collections will also be seen as contributory.

In conclusion, although it seems clear that many taxpayers will continue to base their first provisional tax payments on the “basic amount”, and although it seems likely that SARS will in many cases continue to accept these estimates, the warning to taxpayers is clear. SARS do have the right to challenge these estimates and taxpayers should not be surprised if they receive request-for-justification letters from SARS. Taxpayers must then be prepared to support their estimated

income figures and to also (possibly) have to pay in additional provisional tax if SARS concludes that the taxpayer’s estimate was too low.

That said, taxpayers are also encouraged to consult their advisors to ensure that SARS do not overstep the constitutional bounds of administrative justice in the way that additional information and/or tax payments are demanded from taxpayers.

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