

Tax

Alert

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Let's talk

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COVID-19: Remission of penalties and interest

In brief

The COVID-19 pandemic and the accompanying five-week lockdown in South Africa present a number of challenges for many taxpayers. Taxpayers may find themselves in a position where, due to circumstances beyond their control, they are unable to meet various tax obligations. In the ordinary course, this would result in SARS imposing percentage-based penalties on the outstanding amount of tax, as well as the levying of interest at the prescribed rate. In certain circumstances, however, taxpayers may be able to have such penalties and interest remitted using mechanisms set out in the Tax Administration Act, 2011 (Act No. 28 of 2011) ('the TAA').

In detail

Remission of penalties

There are a number of regular payment deadlines in respect of various types of tax, including:

- bi-annual provisional tax payments; and
- monthly Value-Added Tax ('VAT') and Pay-As-You-Earn ('PAYE') payments.

In terms of section 213 of the TAA (read with the relevant Act in terms of which the applicable tax is levied), the late payment of a tax debt attracts a percentage-based penalty. In the case of late payments of VAT, provisional tax and PAYE, late payment penalties amounting to 10% of the

amount that is unpaid tax will be imposed.

Such penalties may be remitted in circumstances where:

- the penalty has been imposed in respect of a 'first incidence' of non-compliance (i.e. where no other fixed-amount or percentage-based administrative penalty has been issued during the preceding 36 months); or
- where exceptional circumstances exist, which rendered the taxpayer incapable of complying with the relevant obligation under the relevant tax Act.



'Exceptional circumstances' are defined in section 218(2) of the TAA to include, *inter alia*, natural or human-made disasters, disruptions in services, and serious financial hardship. In our view, the term 'natural disaster' in section 218(2) would likely be interpreted to include the COVID-19 pandemic, and the pandemic may also involve disruptions in services and serious financial hardship for businesses. It would, however, be key for the taxpayer to demonstrate that a clear causal connection exists between the COVID-19 pandemic and the inability to make timeous payment of the tax debt in question.

Remission of interest

Interest will continue to accrue on any outstanding tax debt, including interest that is payable in terms of an instalment payment agreement. Although penalties are remitted fairly regularly, it is typically much more difficult for a taxpayer to obtain remission of interest levied on an outstanding tax debt (because of the 'time value of money' principle).

The levying of interest is regulated by both the TAA and the Income Tax Act, 1962 (Act No. 58 of 1962) ('the ITA'). Regarding general tax obligations (as well as overdue payments of employees' tax and provisional tax), sections 89 and 89*bis* of the ITA allow SARS broad discretion to remit or reduce interest after having regard to the circumstances of the case in question. Regarding the underpayment of provisional tax, section 89*quat* of the ITA provides that interest may be remitted where SARS is satisfied that the interest payable is as a result of circumstances beyond the control of the taxpayer.

Similarly, the TAA stipulates that interest may only be remitted where the interest in question is payable as a result of circumstances beyond the taxpayer's control. Such circumstances are expressly limited to prescribed circumstances, including a natural or human-made disaster or disruption in services. Therefore, regardless of which provisions are applied, it is possible that taxpayers may be able to have interest remitted provided that they can demonstrate a sufficiently close connection between the COVID-19 pandemic and/or national lockdown and the late payment of the taxes in question.

Key takeaway

It must be pointed out that, although the COVID-19 pandemic and the national lockdown would likely constitute a 'national disaster' contemplated in section 218(2) of the TAA, this will not automatically give rise to blanket interest and tax penalty relief for taxpayers in all and any circumstances. The particular facts and circumstances of the taxpayer must be considered in light of the relevant legislative provisions in determining whether the relief is available.



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