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Settling with Sars - revisiting some practical perspectives

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Can there be a settlement with Sars if an objection was raised out of time? What are the advantages of reaching a settlement? What are the costs of not resolving a dispute? Our article aims to provide enlightenment.

Under the right circumstances, negotiating a settlement with Sars can save a taxpayer a lot of proverbial blood, sweat and tears – not to mention money, or the angst inevitably instilled in its victims by the litigious process.

Less visceral considerations are also likely to be crucial: what will investors think should they come to read about senior management's inability to deal with tax liabilities in a reported judgment? What might this imply about other less conspicuous aspects of how the taxpayer's financial affairs are being managed?

Reaching a successful settlement with Sars is a taxpayer's only hope of finding the litigant's holy grail: the make-it-all-go-away-button. So, unless the taxpayer is very certain indeed about its prospects in court, settlement should always be included in strategic planning when a court battle with Sars appears on the horizon.

It is therefore useful to brush up on the requirements that must be met before Sars and the taxpayer may validly commence settlement negotiations.

Disputes and prospects of settlement in terms of the Tax Administration Act

Chapter 9 of the Tax Administration Act deals with dispute resolution and covers everything from the objection and appeal stage through the various forums of the tax board, tax court and appeal courts, culminating in Part F which contains the legislative framework for the settlement of disputes.

A dispute is defined in section 142 as “a disagreement on the interpretation of either the relevant facts involved or the law applicable thereto, or both the facts and the law, which arises pursuant to the issue of an assessment or the making of a ‘decision’”.

To “settle” means “to resolve a ‘dispute’ by compromising a disputed liability, otherwise than by way of either SARS or the person concerned accepting the other party’s interpretation of the facts or the law applicable to those facts or of both the facts and the law, and ‘settlement’ must be construed accordingly”.

Dispute resolution gives Sars a case of motion sickness

Christopher Renwick 24 Jul 2018

The fact that a dispute is a threshold requirement for a settlement gives rise to the first issue often encountered by taxpayers, namely, Sars’ approach to objections that have been filed late (see in this regard Interpretation Note 15 Issue 5).

In terms of the Act, an objection must be submitted within 30 business days of the impugned assessment (or other decision). Where this is not done, provision is made for the taxpayer to request an extension of the period within which to lodge the objection, provided that reasonable grounds can be demonstrated to explain the failure to lodge timeously. A senior Sars official may not, however, grant an extension in excess of a further 30 days unless exceptional circumstances are found to exist.

In practice, where objections are filed far outside the range of these time periods – as they sometimes are months afterwards – Sars tends to adopt the position that the objection is too late to be viable and that no valid dispute has therefore arisen.

This leads directly to the taxpayer’s next disappointment: Sars deems itself unable to consider settlement as no settlement can take place in the absence of a dispute.

In our view, this approach is unjustifiable for two main reasons:

- “dispute” is defined with reference to the existence of a disagreement, not the filing of an objection
- section 104 of the Act (on strength of which all such condonation decisions are made by Sars) says nothing about certain objections being too late for consideration.

As mentioned above, the only qualification (contained in section 105) is that the extension may not be for a period exceeding another 30 days unless exceptional circumstances are present.

The fact that the Act makes provision for the existence of exceptional circumstances surely leaves the door open for the *bona fide* tardy taxpayer. This argument is fortified by section 93(2) of the Act which provides that Sars may reduce an assessment despite the fact that no objection has been lodged or appeal noted.

Bearing in mind, however, the dire consequences and additional battles that the late submission of objections is likely to precipitate, taxpayers should guard against such eventuality at all costs.

Once an objection has been filed and accepted as valid, sections 145 and 146 of the Act describe the circumstances under which settlement will be inappropriate or appropriate, respectively.

According to section 145, settlement will be inappropriate where:

1. The circumstances envisaged in section 146 do not exist and –

    1.1 intentional tax evasion/fraud has been perpetrated;
    1.2 settlement would be contrary to the law of a practice generally prevailing in the absence of exceptional circumstances to justify a departure therefrom; or
    1.3 the taxpayer has failed to comply with the provisions of a tax Act, and such non-compliance is serious in nature;

2. It is in the public interest to have judicial clarification of the issue and the case is appropriate for this purpose; or
3. The pursuit of the matter through the courts will significantly promote taxpayer compliance with a tax Act and the case is suitable for this purpose.

Two aspects are noteworthy: firstly, the three instances in which section 145 will be triggered are listed disjunctively and the presence of any one will thus be sufficient to render settlement inappropriate under the circumstances. Secondly, serious non-compliance with a tax Act does not per se preclude settlement and will only do so if the circumstances envisaged in section 146 are additionally not found to be present.

On a more positive note, settlement will be appropriate in terms of section 146 if it is to the best advantage of the state and it is fair and equitable to both parties, having regard to –

1. Whether the settlement would be in the interest of good management of the tax system, overall fairness, and the best use of Sars' resources;
2. Sars' cost of litigation in comparison to the possible benefits with reference to the prospects of success in court;
3. Whether there are any –

    3.1 Complex factual issues in contention; or
    3.2 Evidentiary difficulties, which are sufficient to make the case problematic in outcome or unsuitable for resolution through the alternative dispute resolution procedures or the court;

4. A situation in which a participant or a group of participants in a tax avoidance arrangement has accepted Sars' position in the dispute, in which case the settlement may be negotiated in an appropriate manner required to unwind existing structures and arrangements; or
5. Whether settlement of the dispute is a cost-effective way to promote compliance with a tax Act by the person concerned or a group of taxpayers.

The circumstances which are conducive to the conclusion of a settlement agreement are therefore cast in broad terms and should, in theory at least, create ample room for successful negotiations outside of court. In practice, however, as with any settlement, much will depend on the human factor.

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Robyn Berger and Esther Geldenhuys 28 Jun 2019

Considering settlement from the taxpayer's point of view

Moving beyond the technicalities of the Tax Administration Act, there are at least three other factors which a taxpayer would do well to consider when deciding whether or not to attempt settlement in a dispute with Sars.

Confidentiality

The first consideration harks back to what was said in the introduction regarding the possible reputational damage that a taxpayer risks when litigating against Sars. Although proceedings in the tax court are confidential (the court sits *in camera* and its judgments do not name the taxpayer), it is in practice often rather easy for those in the know to deduce who was involved. Indeed, the avid reader can gain a lot of practical experience (vicariously of course) relating to the structuring and strategising of big business transactions (and big businessmen and women) by keeping a close eye on the jurisprudence of the tax court and the appeals flowing from it.

The confidentiality that the taxpayer enjoys in the tax court is moreover unique to that court and does not extend to courts of appeal (either a full bench of the High Court or the Supreme Court of Appeal).

Concerns for confidentiality may thus be a valid reason for tax managers to opt for settlement, perhaps especially so in the case of unlisted companies that are not obliged to issue cautionary SENS announcements.

Reporting contingent liabilities

The second factor worthy of consideration relates to the dictates of International Financial Reporting Standards (IFRS), which requires provisions to be raised in financial statements having regard to the prospects of success of litigious disputes. Contingent liabilities stemming from pending litigation serve to create financial uncertainty that could span years and are unwelcome additions to any financial statements.

Hidden costs

This aspect leads directly into the final, and perhaps most obvious, consideration: the inevitably high cost of litigation. This cost should not only be gauged in Rands and cents but taxpayers should be mindful of the hidden costs of human capital. Time-consuming litigation may well engage many taxpayer employees – often those most crucial to the decision-making operations of the business – and preoccupy them with non-income-generating tasks. These tasks include consulting with attorneys and counsel, preparing to enter the witness box (which is likely to exert stresses of its own) and then spending days, if not weeks, in court.

Final thought

Settlement can therefore be an attractive and effective mechanism of the dispute resolution machinery of the Tax Administration Act. Astute taxpayers should take time to consider all the disadvantageous consequences and costs of litigation carefully before marching off to court, for, to borrow from Steinbeck: “All war is a symptom of man’s failure as a thinking animal.”

ABOUT THE AUTHOR

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