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Tax talk

WRITE OFF OR COMPROMISE OF TAX DEBTS

1. Introduction

Tax debtors are expected to take responsibility for their tax obligations and to organise their affairs in such a way as to be able to discharge those responsibilities when required. They should give at least the same priority to tax obligations as their other responsibilities. If tax debtors cannot, or anticipate they will not be in a position to, meet their tax obligations they should contact SARS at the earliest opportunity to discuss the matter and make appropriate alternative arrangements, preferably before the due date for payment.

When deciding the most appropriate manner in which to deal with outstanding tax obligations, SARS will give considerable weight to the tax debtors' individual circumstances and its compliance history. For example, the history in lodging correct returns and documents and paying taxes on time. It may, however, occur that taxpayers cannot pay a tax debt or that it would be uneconomical to pursue a tax debt, hence the need for provisions dealing with the write-off or compromise of a tax debt.
No major changes were made to current law, except that the circumstances where it is appropriate to compromise a tax debt were made less restrictive, by removing some of the factors that disqualify the tax debtor from a compromise agreement.

2. Write off or waiver of tax debts

Tax may be written off temporarily or permanently when a debt is irrecoverable and the effort and cost pursuing it will prove ineffective or pursuing it is a legal impossibility. A temporary write off is generally merely a suspension of the recovery of a debt, and the debt may still be recoverable during the prescription period. This period, under the Act, will be 15 years from the date a tax debt comes into existence i.e. from the date of assessment of tax or the date of a decision that is subject to objection and appeal giving rise to a tax liability, becomes final i.e. when a taxpayer fails to pay tax by the due date. However, a permanent write off under Chapter 14 will be final.
Only a senior SARS official may approve a write off, and absent this approval and a notice by SARS to the tax debtor that an amount of a tax debt is written off; no amount tendered or paid by a tax debtor can constitute a full and final settlement of a tax debt.

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2.1. Temporary write off

A temporary write off is an internal decision that has no effect on a taxpayer, as the taxpayer is not absolved from liability. A temporary write off is authorised if it is uneconomical to pursue collections, for example if more time, effort and money will be spent than what the debt is worth.

2.2. Permanent write-off

A permanent write-off is made by a senior SARS official when it is an integral part of a compromise or if the tax debt is irrecoverable by law. Chapter 14 sets out all the factors that must be taken in consideration by SARS as well as the procedure that must be followed to write off a tax debt permanently.

3. Compromise of tax debts

3.1. Broad principle

The broad principle is that SARS is obliged to enforce the provisions of a tax Act to the fullest extent, to collect what is due and not forego taxes. However, the provisions relating to settlements and compromises recognise and give effect to special circumstances which might arise during disputes and in the collection environment. A senior SARS official may authorise a compromise request by a taxpayer if—

- the purpose of the compromise is to secure the highest net return from the recovery of the tax debt; and
- the compromise is consistent with considerations of good management of the tax system and administrative efficiency.

If there is no dispute of the liability but the taxpayer is unable to pay, SARS may agree to compromise and write off a portion of the tax debt. Only a senior SARS official may approve a compromise agreement, and absent this approval and a notice by SARS to a tax debtor that the compromise is approved, no amount tendered or paid by a tax debtor can constitute a full and final settlement of a tax debt.

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3.2. Broad criteria

SARS does not have unfettered power to settle or compromise and is obliged to take into consideration various factors in the procedure for compromises. The debtors' current, past and future circumstances must support a compromise and SARS must be satisfied that no other creditor will be advantaged or disadvantaged. A creditor may, however, consent to being disadvantaged.
A compromise may not be concluded if–

- a debtors' other tax affairs are not up to date;
- a debtor has entered into a compromise in the three years preceding the request for compromise;
- if other creditors intend taking insolvency proceedings against the debtor;
- a compromise will adversely affect broad taxpayer compliance.

3.3. Procedure for compromises

When entering into discussions concerning a compromise, a taxpayer is required to be open, honest and frank. SARS does not have to adhere to a compromise if material facts were not disclosed during the settlement, if facts were misrepresented, or if there was fraud. The negotiated terms are confidential, unless disclosure is authorised by agreement.
A compromise must be initiated by a taxpayer who must submit a completed application that comprises a detailed statement containing prescribed information. SARS will need a thorough disclosure of—

- the value of a debtors' present 'assets';
- future prospects and transactions;
- the monetary value of any future right a debtor will forego; and
- details of people connected to the debtor.

Before a compromise is concluded with a company or a trust SARS has to carefully consider whether another person may be personally liable.

A senior SARS official and the debtor must sign a compromise agreement setting out—

- the amount payable by the debtor in full satisfaction of the debt;
- the undertaking by SARS not to pursue recovery of the balance of the tax debt; and
- the conditions subject to which the tax debt is compromised by SARS.

The above conditions may include a requirement that the debtor must—

- comply with subsequent obligations imposed in terms of a tax Act;
- pay the tax debt in the manner prescribed by SARS; or
- give up specified existing or future tax benefits, such as carryovers of losses, deductions, credits and rebates.