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Vital to note different due dates for separate tax liabilities

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Case law and the Tax Administration Act provide clear authority that income tax liabilities arise when the ITA34 assessments are issued by Sars, and for VAT and payroll tax liabilities, on the date the relevant payments and returns are due.

A previous article discussed the ranking of tax debts and observed that income tax liabilities arise on assessments, unlike VAT and payroll tax liabilities, which arise in the relevant period of supply or payroll period. This article provides the authority behind this view.

Income tax liabilities arise on assessments

In both *Caltex Oil (SA) Ltd v Secretary for Inland Revenue* and Commissioner for *Inland Revenue v Golden Dumps (Pty) Ltd*, the Appellate Division held that:

> *[I]t is only at the end of the year of assessment that it is possible, and then it is imperative, to determine the amounts received or accrued on the one hand and the expenditure actually incurred on the other during the year of assessment...*

This principle is also cited in other Supreme Court of Appeal judgments, such as the *Anglovaal Mining Ltd v Commissioner, South African Revenue Services*, *South African Revenue Service v South African Custodial Services (Pty) Ltd*, *Commissioner, South African Revenue Service v Labat Africa Ltd*, and *Commissioner, New Adventure Shelf 122 (Pty) Ltd v Commissioner, South African Revenue Services.*

In other words, it is only at the end of the year of assessment that the gross income and deductions for that year can be determined and disclosed in the ITR14 returns. Sars will issue the ITA34 assessment based on the ITR14 return submitted. The income tax liabilities arise on the date of the original assessment, which is the date when the ITA34 is issued by Sars.

Section 91 of the Tax Administration Act 28 of 2011 (TAA) creates a distinction between income tax assessments, and self-assessments which are the VAT 201 and EMP 201 returns. Section 91(1) provides for Sars to make an original assessment (i.e., the ITA34) based on the returns submitted by the taxpayer where the return (ie. the ITR14) does not contain a determination of a tax liability.

VAT and payroll tax liabilities arise on the dates payments and returns are due

Section 91(2) of the TAA provides that where a taxpayer is required to submit a return which incorporates a determination of the amount of a tax liability (i.e., the VAT 201 and EMP 201), the submission of the return is an original self-assessment of the tax liability. The VAT vendor and employer, not Sars, determine the tax liabilities when filing the VAT 201 and EMP 201 returns.

The unanimous judgement of the Constitutional Court approved the difference in *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* as follows:

> *"… The first significant point to note is that VAT, quite unlike income tax, does not give rise to a liability only once an assessment has been made. VAT is a multi-stage tax, it arises continuously. Moreover, VAT vendors/taxpayers bear the ongoing obligation to keep the requisite records, to make periodic calculations of the balance of output totals over and above deductible input totals (and any other permissible deductibles) and to pay such balances over to the fiscus. It is therefore a multi-stage system with both continuous self-assessment and predetermined periodic reporting/paying.[17] An even more important feature of VAT, particularly in contradistinction to income tax, is that vendors are in a sense involuntary tax-collectors. In principle VAT is payable on each and every sale; the VAT percentage, the details for its calculation and the timetable for periodic payment are statutorily predetermined, and it is left to the vendor to ensure that the correct periodic balance is calculated, appropriated, and paid over in respect of each tax period."*

This principle was further cited with approval in the Supreme Court of Appeal decision of *Commissioner, South African Revenue Service v Pretoria East Motors (Pty) Ltd*.

These authorities clearly confirm that VAT and payroll tax liabilities which arise from self-assessments do not arise as a result of filing, respectively, the VAT 201 and EMP 201 returns.

Late payments of VAT and payroll taxes after the due date result in penalties and interest

The due date for VAT vendors depends on the relevant category of tax period they fall under, and this could be tax periods of 12 months, six months, two months, or every month. The VAT 201 returns and VAT must normally be paid by the 25th of the month following the end of the tax period. Payments after the 25th will result in a 10% late payment penalty and interest.

VAT liabilities thus arise on the due date for payment, regardless whether the VAT returns have been submitted.

The same principle would apply for payroll tax liabilities. The EMP 201 returns must normally be filed, and the payroll tax amounts paid by the 7th of the month following the payroll month. Late payments after the 7th will result in 10% penalties and interest.

Payroll tax liabilities thus arise on the 7th of the month following the payroll month, regardless whether the EMP201 returns have been submitted.

File those returns...

The above principles from case law and the TAA highlight the difference between when income tax liabilities, and VAT and payroll tax liabilities arise. Late submissions of ITR14 income tax returns could result in income tax liabilities arising after the date of commencement of business rescue, even when the returns are for financial years before commencement. This is not the case for VAT and payroll tax liabilities. Business rescue practitioners should, as far as possible, ensure that all returns are up to date prior to the date of commencement of business rescue, especially income tax returns.

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