

Remission of penalties following a VDP

TAX NEWSLETTER | JUNE 2021



In February 2021, the High Court¹ sought to review and determine whether SARS has a statutory duty to consider a taxpayer's request for remission of interest notwithstanding a voluntary disclosure programme (VDP) agreement having been concluded between the taxpayer and SARS.

Facts

The Applicant is Medtronic International Trading S.A.R.L. During the course of June 2004 and May 2017, the Applicant's accountant embezzled an amount of R537,236,176.00 from the Applicant by submitting false VAT returns to SARS and concealing the embezzlement by seeking reimbursements from SARS.

The Applicant suffered a substantial loss as a result of the accountant's conduct and became liable for penalties in respect of the understatement of VAT, late payment and interest. To this end, the Applicant applied to SARS for VDP relief in terms of section 225 and 233 of the Tax Administration Act, 28 of 2011 (TA Act).

During the VDP discussions, the Applicant sought the waiver of interest and the VDP unit responded by stating that SARS was prepared to waive all understatement and administrative non-compliance penalties, but it did not have the authority to waive the interest arising from the underpayment of the VAT.

¹ Case citation: *Medtronic International Trading S.A.R.L. v CSARS ZAGPPHC (33400/2019)*

PKF South Africa Inc. is a member firm of the PKF International Limited family of legally independent firms and does not accept any responsibility or liability for the actions or inactions of any individual member or correspondent firm or firms.

"PKF" and the PKF logo are registered trademarks used by PKF International and member firms of the PKF International Network. They may not be used by anyone other than a duly licenced member firm of the Network.

Two VDP agreements were concluded between the parties, and it was agreed that the Applicant was liable for the payment of the capital VAT amount of R286,464,756.62 and interest of R171,205,356.12. The Applicant subsequently settled this liability.

Following the conclusion of the VDP agreements, the Applicant lodged a request for remission of interest to SARS under the contention that SARS was entitled to waive interest in terms of section 39(7)(a) of the Value-Added Tax Act, 89 of 1991 (VAT Act) read together with SARS' Interpretation Note 61 (IN61). SARS deemed the request not valid viewing the request as an attempt to renege the VDP agreements. The Applicant objected SARS' decision and the objection was subsequently disallowed on the basis that the Applicant had VDP Agreements in place with SARS and as such, section 39(7)(a) of the VAT Act could not be applicable.

The Applicant then approached the High Court seeking the review of SARS' decisions in terms sections 6(2)(d), 6(2)(e)(iii), 6(2)(f)(ii), 6(2)(g) and 6(3) of the Promotion of Administration of Justice Act 3 of 2000 (PAJA), alternatively on the principle of legality, the common law and section 33 of the Constitution of the Republic of South Africa.

Issue

The issue is whether SARS may consider a request for remission of interest in terms of section 39(7)(a) of the VAT Act, notwithstanding a VDP agreement being entered into as contemplated by section 230 of the TA Act.

Judgment

The relevant law used in this judgment were section 39(7)(a) of the VAT Act, sections 187(6), 229, 230 and 232 of the TA Act and SARS' IN 61 dated 29 March 2011.

The crux of the judgment comes down to the interpretation of section 39(7)(a) of the VAT Act and to an extent, section 187(6) of the TA Act.

Section 39(7)(a) of the VAT Act deals with the remission of interest sought in relation to the VAT Act and states that SARS may remit interest if it is satisfied that the taxpayer failed to make payment of tax within a prescribed period due to circumstances beyond the taxpayer's control.

Similarly, section 187(6) of the TA Act states that where the taxpayer is liable for interest under subsection 187(1) as a result of circumstances beyond the taxpayer's control, a senior SARS official may remit so much of the interest as is attributable to the circumstances, unless prohibited by a tax Act.

The definition of 'circumstances beyond a taxpayer's control' is elaborated in IN61 as "those that are external, unforeseeable, unavoidable or in the nature of an emergency, such as an accident, disaster or illness which resulted in the person being unable to make payment of VAT due".

Following an explanation of the remission of interest provisions above, the court sought to elaborate on VDP agreements and the correlation between the two.

The VDP agreements are governed by sections 225 - 233, Part B of Chapter 16 of the TA Act. At the outset it is recorded that the TA Act should prevail should a conflict arise between the terms of the VDP agreement and the TA Act.

It is not contested that two VDP agreements were concluded between the parties in terms of section 230 of the TA Act. Section 230 of the TA Act provides that where a voluntary disclosure application and relief has been granted under section 229 of the TA Act, a written agreement must be in place between SARS and the qualifying person who is liable for the outstanding tax debt.

PKF South Africa Inc. is a member firm of the PKF International Limited family of legally independent firms and does not accept any responsibility or liability for the actions or inactions of any individual member or correspondent firm or firms.

"PKF" and the PKF logo are registered trademarks used by PKF International and member firms of the PKF International Network. They may not be used by anyone other than a duly licenced member firm of the Network.

The relief granted to the taxpayer in terms of section 229 of the TA Act is at the discretion of SARS and includes immunity from prosecution in respect of the relevant tax offense and a reduction or waiver of understatement penalties or certain other penalties that would have been payable.

SARS has a further discretion to either issue an assessment or make a determination to give effect to the VDP Agreement in terms of section 232 of the TA Act where said decision is not subject to an objection or appeal. However, these sections do not make reference to remissions or whether they are permitted under the circumstances. The court goes on to say that because the TA Act makes no reference to remissions, it is not legislated and cannot be interpreted therefrom. If it were indeed the intention of legislature to prevent a remission from being sought in situations where a VDP agreement was in place, the legislature would have specifically set this out in the relevant regulating provisions.

SARS was of the view that the provisions of the relevant sections in respect of a VDP agreement did not apply to interest and as such, did not consider the Applicant's request for remission of interest. Conspicuously, the court held that there was no decision taken by SARS to review.

The court thereafter turned to the crux of the review which revolves around whether a request for remission in terms of section 39(7)(a) of the VAT Act is legally competent subsequent to entering into a VDP agreement. The court held that the Applicant was successful in demonstrating that SARS' decisions were pertinently swayed by errors in law.

The court held further that SARS' decision to refuse the Applicant's request for remission, alternatively SARS' decision to refuse to withdraw the former decision shall be reviewed and set aside in terms of PAJA, alternatively the principle of legality, and remitted back to SARS for reconsideration. SARS was ordered to consider, adjudicate and decide on the Applicant's request for remission of interest in terms of section 39(7)(a) of the VAT Act, with said decision being in alignment with the declaratory relief set out aforesaid.

Author:

Sorubi Soobben

Tax Consultant

sorubi.soobben@pkf.co.za