

Five points to consider when SARS owes you a refund

It's been a tough year. For taxpayers expecting long-outstanding refunds from the South African Revenue Service ("SARS"), even more so.

Earlier this year, SARS relished the fact that it had paid [ZAR2.4 billion](#) in refunds to taxpayers. It acknowledged that these refunds were "a major cash injection into the economy at a very critical period". But SARS has generally been slow to refund amounts of excess payments due to taxpayers. The Tax Ombud, for instance, reported that in the 2018/2019 financial year, [24.43%](#) of all complaints received by its office had related to delayed refunds – the second highest number of complaints.

The serious delays often experienced by taxpayers in this regard have been the subject of a systemic investigation by the Tax Ombud, too. But it seems that this frustrating practice will persist for as long as the current pressure on the fiscus prevails. Fortunately, taxpayers are not without legal recourse when a refund is due by SARS.

In this ENSight, we consider five important considerations to take into account when SARS owes a refund.

SARS "must" pay a refund when a taxpayer is entitled to it

Section 190(1) of the Tax Administration Act, 2011 ("TAA") determines that SARS "**must**" pay a refund, together with interest on that amount, to any taxpayer who is entitled to it. This provision extends to refunds of *inter alia*: income tax, value-added tax ("**VAT**"), mineral royalties, or pay-as-you-earn. Enforcing this right, as a first step, would typically require the taxpayer to request a refund from SARS in respect of the amounts that are due.

That being said, the right afforded to taxpayers is subject to certain further provisions of section 190.

SARS has the right to conduct an audit before paying a refund

Section 190(2) contains a potential hurdle for taxpayers waiting on a refund to be paid. This section provides SARS is not required to pay a refund until such time as a "verification, inspection or audit" in respect of that refund has been finalised in terms of Chapter 5 of the TAA. In other words, the sub-section preserves SARS's right to **launch and finalise an audit of the refund** (as opposed to, for example, a general VAT or mineral royalty audit) before paying a cent to the taxpayer. So, arguably, SARS cannot use the defence that it is busy with a general tax audit and therefore refuse to make the refund. However, each case must be considered on the relevant facts at hand.

The recent matter of *Rappa Resources (Pty) Ltd v C:SARS* illustrates the potential headaches of this section. In this matter, Rappa alleged that it was owed a substantial amount of refunds. On the other hand, SARS argued that the amounts were still under audit and that no refunds could be paid. But, by the time of the judgment, the audit in respect of the March 2020 VAT return had not yet been completed. The High Court cautioned that "SARS cannot be allowed

an indefinite time to complete an audit” and, accordingly, the court directed SARS to conclude the audits by 11 December 2020, and by no later.

The take-away is that a taxpayer who is subjected to a protracted audit may approach the court, in principle, for an order (or a so-called *mandamus*) directing SARS to conclude its audit by a certain date. The court will, of course, consider various factors before granting such order.

SARS “must” pay a refund if the taxpayer tenders security

Section 190(3) provides that SARS “**must**” pay a refund – even before the finalisation of an audit – if the taxpayer has tendered security “in a form acceptable to a Senior SARS official”. In the *Rappa* case, the court confirmed that a taxpayer is not required to tender security for the whole amount of the refund. If the taxpayer, for instance, provides security for 50% of the refund, then SARS must concomitantly pay 50% of that refund.

A refund can prescribe

It’s important to keep in mind that section 190(4) contains prescription provisions. This section provides that a refund that stems from an erroneous overpayment of taxes will be forfeited to the State, unless a refund is made:

- in the case of an assessment by SARS (such as income tax), within three years of certain dates; and
- in the case of a self-assessment (such as VAT and mineral royalties), within five years from certain dates.

Accordingly, taxpayers who are owed refunds should ensure that they enforce their rights without any delay. Crucially, a refund that has prescribed will not be recoverable from SARS.

Outstanding taxes (and returns) could impact on the payment of refunds

Lastly, taxpayers must take note that, in terms of section 191 of the TAA, SARS may allocate a refund against certain other outstanding taxes. For instance, SARS may set-off a VAT refund against outstanding income tax. Very often, the result of this provision is that SARS will not pay any amount of a refund if there are outstanding returns recorded on the taxpayer’s account.

Taxpayers should engage with SARS in respect of any refunds due. However, if they are left in the dark or subjected to bureaucratic stonewalling, taxpayers will not be without any recourse; a taxpayer who is aggrieved by SARS’ inaction may, in principle, approach the High Court to compel SARS to pay the refunds that are due. In reaching a decision, the court will invariably consider all of the provisions discussed above and the applicable factual matrix.

Whatever the course of action, taxpayers should seek professional tax advice on the available remedies, the use and timing of such remedies, and most importantly, the overall strategy, so as not to be tripped up by some administrative or procedural issues.

Andries Myburgh

Tax | Executive

amyburgh@ENSafrica.com

+27 83 289 3907

Simon Weber

Tax | Associate

sweber@ENSafrica.com

+27 66 269 4671