

TAX

Changes to facilitate joint audits by SARS in the pipeline

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Cross-border transactions

As a result of globalisation and the digitalisation of the economy, the number of South African taxpayers who engage in cross-border transactions and tax planning is on the rise. The South African Revenue Service (“SARS”) is forever on the lookout for ways in which it can limit or counter cross-border tax avoidance to protect South Africa’s tax base.

During the 2022 Budget Speech, the Minister of Finance announced that National Treasury intends to introduce rules to enable SARS to conduct “joint audits” with foreign tax administrations. The aim is to improve the exchange of information to enhance co-operation between foreign governments in collecting tax to counter cross-border tax avoidance.

This article considers the exchange of information and reciprocal assistance measures in place under domestic and international tax law. We further explore possible amendments that could be expected to align our domestic framework for joint audits with international best practice.

Mutual Assistance Measures in place under domestic law

South Africa’s domestic legislation is limited to the exchange of information and reciprocal assistance provided for in international tax agreements, to enable SARS or its foreign counterparts to conduct unilateral tax investigations.

SARS is obliged to, upon request, co-operate with a foreign tax authority in respect of the exchange of information and/or the recovery of taxes if the foreign jurisdiction has concluded a double tax treaty or other form of international tax agreement with South Africa.

Although these measures currently enable SARS and foreign tax authorities to exchange information, only SARS officials are empowered to conduct unilateral tax investigations or audits in South Africa, once the information has been obtained from a foreign tax administration. There is no regulatory framework in place which enables SARS and a foreign tax administration to work together to conduct a joint audit into the tax affairs of South African taxpayers.

Joint Audits

According to the Organisation for Economic Co-operation and Development’s (“OECD”) *“Joint Audit 2019 Report – enhancing tax co-operation and improving tax certainty”*, a joint audit is understood as:

“two or more tax administrations joining together to examine an issue(s)/transaction(s) of one or more related taxable persons (both legal entities and individuals) with cross-border business activities, perhaps including cross-border transactions involving related affiliated companies organised in the participating jurisdictions, and in which the tax administrations have a common or complementary interest, while proceeding in a pre-agreed and co-ordinated manner guaranteeing a high level of integration in the process and including the presence of officials from the other tax administration where the tax administrations jointly engage with

the taxpayer, enabling the taxpayer to share information with them jointly and having Competent Authority representatives from each tax administration for the exchange of information included in each team”.

The OECD's Joint Audit Report proposes recommendations in respect of a legal framework for joint audits in terms of a jurisdiction's domestic laws. Even though South Africa is not a member of the OECD, it actively participates in the various OECD initiatives and adheres to several OECD instruments in respect of cross-border transactions.

The recommendations in the OECD's Joint Audit Report would be a good starting point to expand South Africa's legal framework to enable joint audits in accordance with international best practices.

Considering the above, we briefly consider some of the key recommendations highlighted in the OECD's Joint Audit Report.

Case selection criteria: Clear guidance on the domestic case selection criteria for joint audits should be provided. It would not be appropriate to conduct joint audits in respect of all cross-border matters. The legislation should define the criteria that a case should meet to be suggested for a joint audit.

Reaction to joint audit requests: The legislation should provide for a procedure in terms of which joint audit requests are effectively communicated to all parties, especially in relation to the time periods of, and the reasons for, any decision taken by the tax authorities. The OECD recommends that a request for a joint audit may be declined if the requesting tax authority has not exhausted all domestic means of obtaining the required information.

Involvement of the taxpayer: The taxpayer must be involved in the joint audit process, and must be notified of a pending joint audit, the selection criteria applied, any face-to-face meetings, requests for information and the timeframes for providing information.

Taxpayers should receive regular progress reports and must have the right to be informed of the outcome of the joint audit. They should be given an opportunity to make representations before the joint audit is finalised.

Preparation for the audit process: Criteria for the composition of the joint audit team should be set. According to the OECD the team should at least consist of an assigned responsible joint audit co-ordinator acting as a single point of contact, a designated person to secure the exchange of information and audit team members from all participating tax jurisdictions (including subject matter experts if necessary).

Initial joint audit meetings must take place between the tax authorities to prepare a joint audit plan.

Conducting the audit: The tax officials involved in the joint audit must be authorised to issue collective requests for information. Foreign tax officials should be authorised to effectively participate within South Africa in the investigations or audits in conjunction with SARS officials.

In this sense clear provision should be made in respect of which activities may only be carried out by SARS officials, and which activities may also be carried out by foreign tax officials who form part of the audit team.

Completion of audit: Upon completion of a joint audit a final audit meeting should be arranged between the participating tax authorities and taxpayers. All aspects of the joint audit should be discussed at such meeting before the finalisation of a joint audit report, which should be shared with all interested parties.

Conclusion

Although the Minister of Finance, during his 2022 Budget Speech, announced that National Treasury intends to expand the domestic legal framework to enable SARS to participate in joint audits, no such amendments were proposed in the 2022 draft tax bills which were published on 29 July 2022.

With the rising number of South African taxpayers engaging in cross-border transactions, we expect that appropriate rules will eventually be introduced in future legislative cycles and when they are so introduced, they will most likely be in accordance with the OECD's recommendations.



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