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When is Disclosure Voluntary for VDP Relief?

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Voluntary Disclosure Programme (VDP)

The Voluntary Disclosure Programme (VDP) is a disclosure programme that allows taxpayers to come forward on a voluntary basis to regularise their tax affairs and either reduce or avoid the imposition of understatement and other administrative penalties. The stated purpose of the VDP is to enhance voluntary compliance in the interest of good management of the tax system and the best use of SARS resources.

Section 227 of the Tax Administration Act

Section 227 of the Tax Administration Act, 2011 (TAA) sets out the requirements for an application under the VDP to be valid, with the first requirement being that the disclosure made under the application must be voluntary. The Supreme Court of Appeal (SCA) recently had cause to consider when an application is not voluntary, and thus not valid, in the case of *Purveyors South Africa Mine Services (Pty) Ltd v CSARS (2021) ZASCA 170.*

The facts of the case are not complicated and essentially involved the failure of the taxpayer to pay import VAT to SARS on the import of an aircraft. The taxpayer approached SARS informally via email and requested a meeting with SARS to "regularize the VAT that was supposed to be paid over" as they had "just received a VAT technical opinion from PWC that [they] were supposed to pay the VAT over to SARS upon the import of the aircraft".

Email correspondence between SARS and the taxpayer followed in which SARS requested information which the taxpayer duly provided.

SARS replied by advising the taxpayer that if the tax was late, penalties would be payable. A little over a year after the taxpayer first approached SARS, it submitted a formal VDP application. SARS rejected the application on the grounds that it was not voluntary and that it did not contain facts of which SARS was unaware as those facts had already been disclosed to SARS prior to the submission of the VDP application.

The Tax Court

The Tax Court agreed with SARS and the crisp issue for determination in the SCA was whether the exchange or discussions between the representatives of SARS and the taxpayer had any material bearing on the VDP application. In its analysis of the words "voluntary disclosure", the SCA referred to an analysis of the Ugandan voluntary disclosure programme, "[v]oluntary disclosure occurs when a taxpayer, unprompted and of their own volition, comes forward to disclose their tax liabilities".

Relying on a textual interpretation of section 227 of the TAA, the SCA held that the fact that the section provides that the VDP application must be made in the prescribed form or manner (ie via the forms available on eFiling) rather than obtaining ad hoc advice from SARS is a clear indication that the "mischief" sought to be prevented is where a taxpayer discloses information to SARS and then makes a VDP application.

The SCA held that "*a sensible interpretation of the [VDP] provisions, their context and purpose show that the drafters of the provisions clearly had in mind that a taxpayer who elects to inform SARS of its default runs the risk that any subsequent disclosure might not be treated as being voluntary*." Ultimately, the SCA agreed with SARS that the VDP application was not voluntary as SARS had informed the taxpayer in its prior email correspondence that penalties would be imposed, intimating that the threat of penalties induced the disclosure.

To use the words of the SCA, the disclosure was not "unprompted" even if the original, albeit informal disclosure, was unprompted. In addition, the SCA found that the taxpayer did not meet the requirements of section 227 of the TAA because SARS had prior knowledge of the default and that nothing new was disclosed in the VDP application.

The lesson to be taken from this case is that it serves no purpose to engage in informal correspondence with SARS when clear procedures exist.



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