

Electronic delivery of communications to taxpayers: Is SARS toeing the line?

By
Alan
Lewis

Many taxpayers would have received an sms informing them that the South African Revenue Service (SARS) has issued an assessment on them, or that it has issued some notice to them, and that they can find these documents on the e-filing system.

Unfortunately, some taxpayers became aware of such documents, which have been filed on their e-filing profiles, only when SARS informed them of that, and as a result of their failure to respond, SARS intends to take legal action against them.

Is SARS obliged to deliver documents to a taxpayer by electronic means in a particular manner?

The law

Section 252 of the Tax Administration Act 28 of 2011 (the Act) contains the following provisions:

'If a tax Act requires or authorises SARS to issue, give, send or serve a notice, document or other communication to a company, SARS is regarded as having issued, given, sent or served the communication to the company if - ... sent to the company or its public officer's last known electronic address, which includes the -

- last known e-mail address; or
- last known telefax number.'

Similar provisions, in s 251 of the Act, regulate the electronic delivery of documents, notices and other communications to taxpayers who are not companies.

The Act does not define the term 'electronic address'. The website Dictionary.com defines this term as 'the electronic mail designation for a recipient who uses that mail software' (dictionary.reference.com/browse/electronic+address, accessed 2-9-2014), while Wikipedia defines an 'email address' as 'an email box

to which email messages are delivered' (en.wikipedia.org/wiki/Email_address, accessed 2-9-2014).

In the light of these definitions, I submit that SARS' e-filing system is not an electronic address, but simply a server on which certain documents can be filed. In my opinion, this conclusion is supported by the terms of the new tax court rules, which are discussed below.

The new tax court rules

These rules, which prescribe the procedures which are to be followed in lodging an objection and appeal against an assessment, were promulgated in terms of the Act on 11 July 2014, and are effective from that date. They define 'deliver' by SARS, in terms of the rules, as follows:

"deliver" means to issue, give, send or serve a document to the address specified for this purpose under these rules, in the following manner:

(a) by SARS ... in the manner referred to in section 251 or 252 of the Act, except the use of ordinary post;

(b) by SARS, if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment, by posting it on the electronic filing page of the taxpayer or appellant ...' (my emphasis) (GN550 GG37819/11-7-2014).

Summary

It appears that ss 251 and 252 of the Act are clear: As far as electronic communications are concerned, with the exception of those particular communications which are referred to in the rules, SARS must send the particular notice or document to the taxpayer's last known e-mail address or last known telefax number.

However, if a taxpayer elects to dispute an assessment by using SARS' e-filing service, then only may SARS deliver documents and notices to that taxpayer

by posting them on that taxpayer's e-filing page.

SARS may apparently only deliver those notices and communications in this manner which follow the process of objection and appeal, after the taxpayer has delivered the notice of objection.

Both ss 251 and 252 of the Act place a legal duty on SARS to prove that it has delivered documents, notices and communications in the prescribed manner and in the absence of proof of such delivery, SARS would be hard pressed to demand that a taxpayer must comply with any such notices or communications.

For example, if SARS fails to deliver an assessment, as prescribed by the Act, it may be unable to enforce the assessment and claim payment of any assessed taxes. In handing down its decision in the matter of *Singh v Commissioner, South African Revenue Service* 2003 (4) SA 520 (SCA), the Supreme Court of Appeal confirmed that, in the absence of the taxpayer receiving notice of an assessment, SARS cannot institute legal proceedings to recover the assessed taxes (para 14 - 19).

In the light of this judgment, I submit that a taxpayer can lawfully receive notice of an assessment only if it is delivered electronically by SARS as prescribed by ss 251 and 252 of the Act.

In my opinion, neither the provisions of the Act nor the new tax court rules, authorise SARS to deliver an assessment to a taxpayer by posting it on a taxpayer's e-filing page on SARS' electronic filing service.

Alan Lewis BProc (UFS) LLB (UFS) LLM (Tax/UP) is an advocate and a tax law consultant in Johannesburg. □