

SARS expects ongoing compliance for trusts

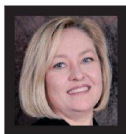
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At the recent South African Institute of Taxation (Sait) Tax Indaba, trusts were on the agenda again. In conversation, the message of the South African Revenue Service (Sars) was loud and clear – new measures they have put in place are aimed at giving SARS the assurance that trusts are run as separate entities (such as companies) on a real-time basis and not on an ad hoc basis in an attempt to prove compliance.

The fact that a trust is “taxpayer of last resort” (with other taxpayers such as funders/donors and beneficiaries potentially being taxed on trust income and capital gains and not the trust) resulted in tax practitioners historically leaving trusts for last (and often forgotten) in the queue of tax returns to be submitted for a client. This will no longer be possible, given Sars’s focus on trusts. All trustees have to do is to demonstrate that they are doing what they are supposed to do in terms of the law (including the Trust Property Control Act). As an example, trustees are expected to act with the necessary “care, diligence and skill” in terms of Section 9(1) of the Trust Property Control Act, which is an onerous provision. Historically, often trustees and trust service providers produced trust-related documents (such as financial statements, resolutions, minutes of meetings, and so forth) in retrospect, pretending they have been done on an ongoing basis.

A trust is a taxpayer

Only about 380 000 of about 1 million trusts registered with the Master of



TRUSTWORTHY

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the High Court are currently registered with Sars. Section 1 of the Income Tax Act defines a trust as “any trust fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a deed of trust or by agreement or under the will of a deceased person”. With the focus on “administered”, no wonder Sars is pushing for compliance. On July 29, 2021 they presented a webinar called “Trust and Tax obligations”, where they highlighted nine objectives. One of them was that they would make non-compliance hard and costly. The recent changes introduced in the tax return are evidence that they expect trusts to be compliant. Another objective was that they would modernise their systems. Sars’s good systems were confirmed at the Tax Indaba, comparatively to other countries.

On September 28, 2022, Sars issued

a media release titled “Sars sharpens its focus on trusts”, where they indicated that, “in line with its strategic objectives of providing clarity and certainty to enable taxpayers to comply with their legal obligations as required by law, an interim online registration platform is available to assist and enable trusts to register with Sars”.

The paperwork provides evidence that a trust is compliant. As a result of recent changes, the tax practitioner now has to upload a list of information to Sars with the trust tax return. This includes the latest trust deed. Letters of Authority, resolutions, minutes of the trustee meetings, and so forth. After concerns were raised that it was not necessary to submit all resolutions and minutes since this would be time-consuming and might not necessarily be relevant to Sars, and that the guide might not contain sufficient guidance as to what “minutes” were required in this regard, Sars issued guidance in August 2023 that “all minutes, excluding those dealing with internal trustee governance arrangements and/or administrative matters, must be submitted”.

So, basically all transaction-related proof. A comment was made at the Tax Indaba that Sars might use technology to establish when a resolution and minutes were in fact created, so be mindful of backdating supporting evidence to be submitted. Rather have systems in place to facilitate real-time administration of the trust, with documents to be submitted serving as an audit trail for transactions in the trust.

The question is (from a tax perspective) who is responsible for the paperwork in a trust – the trustee, the trust service provider, or maybe the tax practitioner who is now made the final checker, balancer verifier of trust compliance? Often the tax practitioner is last in line with no involvement in the day-to-day administration of the trust. Add tight submission deadlines, then you have a really stressed person who may even miss deadlines for late submission due to incomplete information. They may not even have time to confirm the information to be submitted to the trustees. Some tax practitioners may blindly use what has been provided to them and literally throw it over the Sars ‘wall’ and hope for the best. Will Sars come after anyone and if so, who will they go after? Sars requires the appointment (by resolution) of a main trustee, a representative taxpayer and then there is the tax practitioner. It is not clear what Sars envisages with these appointments.

In a recent communication, Sars often refers to representative taxpayers and then puts in brackets behind it, “trustee/s”, so it seems like all trustees are on the hook and not only the representative trustee nominated (or even the main trustee) and recorded with Sars. Then, the trust tax return makes provision for the representative taxpayer’s declaration:

- “I declare that:*
- I am the duly appointed Representative of the trust.
 - The information furnished in this return is to the best of my knowledge both true and correct.

- I have disclosed the gross amounts of all income received and/or accrued to this trust during the period covered by this return.

- I have the necessary financial records and supporting schedules to support all declarations on this return, which I will retain for audit purposes.”

Often the tax practitioner completes the tax return on e-filing and it is not physically signed by the representative trustee. The so-called “representative trustee” (or other trustees) may not even have sight of the tax return before it is submitted. This poses a huge risk for the trustees, as they will remain liable. It may therefore be good practice for the tax practitioner to have the tax return (with all the additional new information that has to be provided to Sars) signed off by the trustees before it is submitted with the tax return on e-filing. Good practice would be to regulate the roles and responsibilities in the tax practitioner’s engagement letter.

Even though many believe that Sars set the standard of the level of trust compliance required, it should be remembered that the court agreed that a trust is “run by resolution”. All Sars requires is the submission of supporting evidence of transactions done in the trust.

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