Publication: Business Report (The Star incl Pretoria News)

Date: Friday, March 08, 2024

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Sars' Trust and Tax Compliance webinar is educating trustees

TRUSTS TO TRUST

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ON FEBRUARY 29, 2024, the South African Revenue Service (Sars) conducted a "Trust and Tax Compliance" webinar, where they discussed the four pillars of compliance as they relate to trusts – registration, filing, declaration, and payment.

In this webinar, they emphasised the focus of Sars on trusts, which all have to register as taxpayers and who have to submit tax returns, including annual tax returns and potentially provisional tax returns.

Obligation to register as a taxpayer

Mention was made of the increase in trust registrations from 4 000 in 2021 to 7 500 in 2023. And 47% of newly registered trusts in 2023 were timeously registered as taxpayers with Sars, which is an improvement. Even though there was an increase, still only about 380 000 trusts are registered with Sars to date, leaving an estimated 60% to 65% of trusts unregistered.

Sars indicated that they would use third-party data to register existing, unregistered trusts. This is a warning to trustees who have not yet registered trusts as taxpayers.

Sars also indicated that they would soon register trusts as taxpayers simultaneously with their registrations with the Master of the High Court, similar to new company registrations with the Companies and Intellectual Property Commission (CIPC).

Filing of trust tax returns

It was noted that there was a lag in the 2023 tax submissions compared to the previous year. Given the much more complicated trust tax return (which for a non-complicated trust can take up to 45 minutes to complete) as well as the magnitude of information to be provided with the tax return (such as "beneficial owner" information) and the requirement to upload additional documents with the trust tax return (including minutes of meetings, resolutions, and trust organogram), the delayed submission is understandable.

Often tax practitioners do not have the information handy to submit proper tax returns. This may add a material additional cost to trusts to go back and forth in an attempt to comply. It was highlighted that even though all trusts (including so-called "dormant trusts") have to submit trust tax returns, Sars made provision for "passive trusts", which were compared to dormant companies where no economic activity takes place, with zero assets and liabilities.

Sars uses the term "passive" instead of "dormant" as a trust can never be dormant, because the Master of the High Court, Sars, and the trust deed require ongoing compliance, such as bank accounts, meetings, tax returns, etc. "Passive trusts" therefore specifically exclude trusts that do not actively trade, such as trusts holding a private residence, a holiday home, or a passive investment, as Sars is after information in these trusts, such as loans made by estate planners to trusts to acquire these assets.

Therefore, even though so-called dormant trusts also have to submit annual tax returns, a shorter, less cumbersome version is provided.

The status of a trust as a potential provisional taxpayer was discussed. It was made clear that a trust is only obliged to submit provisional tax returns if it qualifies as a provisional taxpayer. No longer is any taxpayer automatically a provisional taxpayer. It therefore depends on whether the trust (as taxpayer of last resort) will be left at the end of February of any year with any taxable amounts. If so, then it qualifies as a provisional taxpayer and has to submit provisional tax returns – one in August and another in February.

As it may turn out that the trust may qualify as a provisional taxpayer in one year, but not in the next, it may have consequences that few are aware of – it impacts the date on which the annual trust tax return is to be submitted. Therefore, if a trust is taxable on one cent by the end of February, it can submit its annual tax return the following January, together with other provisional taxpayers.

If, however, after the application of the tax "attribution rules" to donors and funders and the making of distributions to beneficiaries, the trust is left with zero taxable amounts, then it does not qualify as a provisional taxpayer, and has to submit its annual tax return a couple of months earlier (around October of that year, 8 months after year-end), at the same time as other non-provisional taxpayers.

With all the time pressure that practitioners and trustees experience, it may make sense to leave even a small taxable amount in the trust to "buy time" to submit the trust's tax return.

Note that it is in any event not wise for trustees to distribute all income and capital gains to beneficiaries just to pay no tax in the trust for that tax year. Often in this haste, tax practitioners and trustees forget to apply the tax "attribution rules" to donors and funders first. If trustees (often guided by their accountants/tax practitioners) get it wrong and the trust qualified as a provisional taxpayer, the trust may be levied penalties and interest as a result of non-submission of provisional tax returns on time.

Alternatively, if trustees get it wrong and the trust did not qualify as a provisional taxpayer, the trust may be levied penalties and interest for the late submission of the trust's annual tax return. This is a fine balancing act where (all) the trustees and the accountant/tax practitioner should work closely together, which is not the case in many instances.

Declarations/tax returns

It was emphasised that income distributions to non-resident beneficiaries are to be taxed in the trust from March 1, 2024. This should be taken into consideration in the determination of whether a trust qualifies as a provisional taxpayer for that tax year.

Sars emphasised their role as "secondary" data collector of "beneficial ownership" information. It was explained that Sars has better data collection capability than the Master of the High Court, as they traditionally served as a "post box".

It was noted that it might change in the future, so hopefully, the government can work towards a central repository of "beneficial owner" information where trustees update it once, and all authorities have access thereto.

Currently, this results in a huge extra burden (and delay) as a duplication of information provision is expected, and what is worse, even though real-time/up-to-date information is required to be submitted to the Master of the High Court, tax practitioners have to reconcile back to who the "beneficial owners" were as at February in the year they submit the tax return for.

Trustees were reminded that Sars follows the definition of "beneficial owner" as instructed by the FATE.

Different from the Master's requirements, trustees must also submit information on "donors" to Sars.

This is a tricky tax concept and includes anyone who made a physical donation to the trust in that tax year, as well as anyone who made a "deemed donation" such as a loan to the trust at non-arm's-length terms.

The importance of keeping trust information in real-time or up-to-date to remain tax compliant was emphasised.

As an example, it will be almost impossible to meet the deemed Donations Tax payment obligation (in terms of Section 7C), literally a month after (end of March each year) the trust's tax year-end (end of February each year).

It was explained that payment of Donations Tax can be made through e-filing. However, currently, the "Declaration by donor/donee" (IT 144) form has to be submitted manually at a Sars branch, which causes huge frustration.

It was noted that Sars is busy modernising that process, so hopefully soon these declarations can be made through e-filing.

Fines for late submission of annual tax returns

Sars warned that administrative penalties for late submission of trust tax returns would be introduced from September 2024 (note that late submission penalties are already applied to other taxpayer types).

Trustees were urged to bring their tax affairs up to date before September 2024 to avoid penalties (this includes the so-called "dormant trusts").

Dispute resolution

Up to now, trusts have been excluded from the modernisation of the Sars dispute resolution mechanism and had to manually resolve disputes.

This manual mechanism will be replaced with an automated case management system on e-filing (similar to other taxpayers, who were already included in the modernisation process) from April 2024.

Conclusion

It is advised that trustees should be much more closely involved in the accounting and tax for the trust on an ongoing basis, as they would be ultimately responsible for the trust's taxes, penalties, and interest.

Trustees' lack of up-to-date information may also result in other taxpayers, such as "donors" and beneficiaries, getting into trouble with Sars.

It is clear that trust administration and compliance have become more complex and demanding, and the only way compliance can be achieved at all times, is to get into the discipline to keep all trust data up-to-date/real-time and for everybody involved with a trust to have access to and work on a central repository of information.

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