TAX FLASH

Pension Pinch:

When SARS comes knocking for your nest egg

The South African retirement fund dispensation has been in the news recently for several reasons: we had the implementation of the two-pot retirement system on 1 September, which for the first time allowed individuals to withdraw a limited portion of their retirement savings every year from their so-called savings pot. Recent media reports have indicated that individuals have withdrawn a total of approximately R35 billion from their savings pots so far. Furthermore, the Financial Sector Conduct Authority (FSCA) has indicated its intention to investigate the high transaction fees charged for withdrawals by certain fund administrators. In addition, the FSCA has indicated that according to reports received from several pension funds, more than R5.2 billion in pension fund contributions have not been paid over by employers on behalf of their employees.

Considering this, it is apt to consider the recent High Court judgment in *Piet v Commissioner for the South African Revenue Service* (3090/2023) [2024] ZAECQBHC 51 (27 August 2024), where the taxpayer requested that funds paid to SARS from his retirement savings to settle a tax debt, be repaid.

SARS' power to collect tax

The South African Revenue Service (SARS) wields significant powers under the Tax Administration Act, 28 of 2011 (TAA) to ensure the efficient collection of taxes. This is evident from the specific provisions contained in the TAA that empower SARS to collect or recover tax debts owed by a taxpayer from third parties. These provisions extend SARS' reach beyond the taxpayer themselves, allowing SARS to recover outstanding amounts from individuals or entities with a connection to the taxpayer.

One of the most impactful provisions, which is also the focal point of this article, is section 179 of the TAA, which allows SARS to appoint a third party to satisfy a taxpayer's 'outstanding tax debt', by paying money held on behalf of or money owed to the taxpayer, including pensions, directly to SARS.

Before we discuss section 179 and the High Court's finding in *Piet,* we set out the facts to provide some necessary context.

Facts

The taxpayer, Sizakele Crosby Piet, sought the repayment of R145,934.99, which was paid by the Allan Gray Retirement Fund (Allan Gray) to SARS on 28 August 2023 in terms of a notice received by Allan Gray under section 179(1) of the TAA, without the taxpayer's knowledge.

The debt in question arose from an additional assessment raised against the taxpayer for the 2015 year of assessment. From the judgment it appears that the taxpayer's objection against the additional assessment was unsuccessful.

The taxpayer contested the section 179 notice on the following three bases:

- The section 179 notice was not written by a senior SARS official as required by legislation, but rather that it was *'a product of artificial intelligence'* and thus null and void.
- There was non-compliance with section 179 (4).
- There was non-compliance with section 179(5).

SARS on the other hand argued the following:

- It had the authority under section 179 of the TAA to appoint a third party, such as Allan Gray, to pay the taxpayer's outstanding tax debt from funds held on behalf of the taxpayer, including pensions.
- Various demands were issued to the applicant for the unpaid tax debt in accordance with section 179(5) of the TAA, and the applicant was given clear notice to settle his debt.

The Law

Section 179(1) of the TAA states the following:

'A senior SARS official may authorise the issue of a notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt'. (own emphasis)

Section 179(2) provides an opportunity for the third party receiving the notice to inform SARS of any inability to comply with the notice, whereas section 179(3) provides for the personal liability of the third party should it part with the money contrary to the notice.

In terms of section 179(4), SARS may, *'on request by a party affected by the notice'*, amend the notice to extend the period over which the tax debt must be paid to SARS to allow the taxpayer to pay basic living expenses.

Section 179(5) protects the taxpayer by requiring SARS to issue a final demand to the tax debtor (taxpayer) at least 10 business days before sending the 179(1) notice. This final demand must outline the steps SARS may take to recover the tax debt if it remains unpaid, as well as the debt relief options available to the taxpayer. In the case of a natural person, the demand must inform the taxpayer that they may apply to SARS for a reduction in the amount due within five business days of receiving the demand, based on their and their dependants' basic living expenses.

Section 179(6) provides that the issue of a final demand is not required if SARS is satisfied that to do so would *'prejudice the collection of a tax debt'*.

Judgment

The court's judgement in terms of section 179 of the TAA was based mainly on whether SARS complied with the requirements in section 179(5).

Although not a contested point between the parties, the court pointed out that SARS is, in terms of section 179(1), entitled to issue a notice to a third party (Allan Gray) who holds money on behalf of a taxpayer, requiring Allan Gray to pay that money to SARS to satisfy the taxpayer's tax debt.

Regarding the taxpayer's claim that the section 179 notice was not authored by a senior SARS official as mandated by legislation but was instead *'a product of artificial intelligence'* and therefore invalid, the court ruled that, under section 179(2), Allan Gray had the opportunity to raise any concerns about the notice or its contents. Had Allan Gray raised such concerns, the appropriate SARS official could have amended the notice as deemed necessary under the circumstances. The court thus held that it is not the taxpayer who has the standing to challenge the validity of the section 179 notice, but rather the third party to whom the notice was issued.

The court further determined that Allan Gray's failure to question or raise concerns about the notice, coupled with its payment of the money to SARS — which the court described as being done *'seemingly without difficulty'* — is a matter that should not concern SARS. Allan Gray was required, in terms of section 179(3), to pay the money in accordance with the notice.

In respect of the taxpayer's argument that SARS did not comply with section 179(4) of the TAA in that the taxpayer was not afforded an opportunity to request SARS to amend to notice, the court held that, while the applicant is affected by the notice, its recourse in terms of section 179 appears to be limited. It can request SARS to amend the notice to extend the period over which the amounts are to be paid to SARS, as contemplated in section 179(4).

The court determined that for a taxpayer to avail themselves of the remedy provided under section 179(4), it is a prerequisite that the third party notifies the taxpayer of the notice. Without such notification, the taxpayer would be unaware that the third party has received the notice, and consequently, would not have the knowledge required to request that SARS amend the notice.

The court found that SARS had issued the necessary final demand(s) to the taxpayer before appointing Allan Gray as a third party to pay the tax debt as required by section 179(5). The court held that the final demand correctly included the prescribed details and in each instance the taxpayer *'was put on clear and unequivocal terms to settle his debt'*.

The court furthermore pointed out that it is the third party's obligation to inform the taxpayer, in this case its member, of a notice prior to making payment to SARS. If the third party failed to inform the taxpayer, this cannot be attributed as a fault on the part of SARS.

Interestingly, the taxpayer also argued that if section 179 of the TAA is read with certain provisions of the Pension Funds Act, 24 of 1956, SARS' conduct was unconstitutional in that it infringed the taxpayer's right of access to social security, which is constitutionally protected. The court also rejected this argument.

Ultimately, the court rejected the taxpayer's application as SARS complied with section 179 of the TAA.

Conclusion

There are several interesting and important issues that arise from this judgment, of which we would like to highlight the following:

While there are several cases dealing with non-compliance by SARS of section 179, in particular the final demand requirement in section 179(5) of the TAA (read with section 179(1), this appears to be one of the first instances where the court considered other parts of section 179. The High Court has ruled in favour of taxpayers in the context of non-compliance with

section 179(5) on several occasions, including in the cases of *WPD Fleetmas CC v CSARS and Another* (31339/20) [2020] ZAGPPHC (19 August 2020) and *SIP Project Managers (Pty) Ltd v Commissioner for the South African Revenue Service* (11521/2020) [2020] ZAGPPHC (29 April 2020).

The court's judgment in *Piet* appears to suggest that in terms of section 179(4) a taxpayer should be notified by a third-party (in the case Allan Gray) of the fact that SARS has issued the notice, before the funds are paid over to SARS. The challenge however is that in terms of section 179(3), a third party receiving a section 179 notice is required to *'pay the money in accordance with the notice'* and *'is personally liable for the money'* if it parts with the money contrary to the notice. If a third party notifies the taxpayer of the notice issued to it, there is the risk that the taxpayer may proceed to withdraw its funds, to avoid funds being paid to SARS under the notice. While this risk is remote in the pension fund context, where there are several administrative checks that would have to take place before one can withdraw from the fund, this is a genuine risk where the notice is issued to a bank in which some of the taxpayer's funds are held. If a taxpayer withdrew its funds from its bank account prior to the funds being paid over to SARS, the bank would potentially be personally liable to SARS for the money that was supposed to be paid over in terms of the notice.

Practically, if a final demand is correctly issued and communicated to the taxpayer, the taxpayer will have had an opportunity to decide how to respond to the threat of losing funds held by a third party and prevent this from happening. The taxpayer has at least 10 business days to respond and prevent a third-party notice from being issued and losing funds if SARS complies with the final demand requirement. As such, section 179(4) and the phrase *"person affected by the notice"* should arguably have been interpreted differently. If one follows the court's interpretation, the third party is at risk of non-compliance with the notice and the taxpayer will also get a second bite at the cherry so to speak.

It is of course crucial that a taxpayer is not unfairly prejudiced as it has real life consequences for the taxpayer, such as Mr Piet, who even represented himself in these court proceedings. Finding out years after the fact that one's pension has been reduced, without one's knowledge, to pay a tax debt, is not something that one would want to happen to any taxpayer.

While we acknowledge the court's finding in favour of SARS and it appears that SARS complied with the requirements of section 179 in the current instance, it is unclear from the judgment how a third party, such as a bank or pension fund, could practically give notice to the taxpayer of the impending loss of funds to SARS, while avoiding the risk of non-compliance under section 179(3).

Disclaimer

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