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MoneyTalk

Small Business Tax Amnesty (The Draft Bill)

The Minister of Finance, in his Budget speech on 15 February 2006, continued the trend in prior budgets of introducing fiscal incentives to stimulate small business development. It is clear that small business has been identified as a key to promoting job creation.

Stimulatory measures announced included amendments to the preferential tax rates for income and capital gains tax and accelerated asset write-offs. He also announced that a tax amnesty for small businesses i.e. those with an annual turnover not exceeding R5million, would be introduced. The purpose and objective of the amnesty is the broadening of the tax base, allowing small businesses to normalise their tax affairs, improving a tax compliance culture and facilitation of the taxi recapitalisation program.

The Fiscus has obviously been buoyed by the impressive success of the past Tax and Exchange Control Amnesty to afford the small businesses sector a tax amnesty to allow such businesses to regularise their tax status and re-enter the main stream.

The Budget speech recorded that the first phase of the amnesty would focus on the taxi industry. However, the draft amnesty bill, which was released for comment in the first week of May, does not restrict the provision of amnesty only to that industry. The amnesty applies to any natural person, trust and any unlisted company where all the shares or members' interests on the last day of the "2005 year of assessment" were held directly by individuals. The "2005 year of assessment" is any year of assessment ending during the period 1 April 2004 to 31 March 2005.

Considering the increased efficiency and aggressiveness of the South African Revenue Service (SARS) in identifying tax defaulters and the extremely punitive provisions imposed on tax evaders, including a 200% additional tax, penalty, interest, criminal prosecution and the awesome powers available to SARS in identifying and tracking down evaders, the opportunity to apply for amnesty is one to be taken seriously. This opportunity is further enhanced by the relatively low cost of amnesty.

The bill is an initial draft for comment, unavoidably contains some flaws and the final legislation will undoubtedly differ. However, the details at this stage indicate generous concessions to motivate small businesses to apply.

The amnesty applies in respect of income tax, employees' tax, VAT, withholding tax on royalties, STC, unemployment insurance contributions and skills development levies. It does not at this stage apply to donations tax or estate duty.

An applicant who receives amnesty will not be liable for the payment of any additional tax, penalty or interest and will be immune from criminal prosecution. In the current environment where company directors are being arrested and imprisoned, this immunity must be attractive.

The tax amnesty levy is payable at a rate of 10% of the taxable income determined for the 2005 year of assessment, to the extent that the amount of taxable income was not declared to the Commissioner prior to 15 February 2006. For individuals, this 10% levy translates to a 1% effective CGT rate on capital gains.



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The amnesty levy does not take into account any STC or VAT which has not been paid, so at this stage it appears to be very generous, especially if one recalls that the past Tax and Exchange Control Amnesty did not forgive VAT transgressions.

The small business amnesty levy is based on a percentage of the 2005 year of assessment's taxable income compared to the Tax and Exchange Control Amnesty levies, which were based on a percentage of the market value of certain assets. This begs the question that under the small business amnesty if an applicant failed to disclose income, or pay over VAT, STC, PAYE etc. in a year prior to the 2005 year of assessment, say 2003 and 2004 and then stopped trading in 2005, whether any levy is payable at all?

An applicant is not eligible for amnesty if the Commissioner at any time, before the submission of the application for amnesty, delivered a notice informing that applicant of an audit, investigation or other enforcement action. The last category is rather vague and will require some clarification. The information required on application must include full disclosure of all income taxes, employees' taxes, VAT, withholding taxes, STC, UIF and skills development levies which were not declared to the Commissioner during the 2005 year of assessment. The applicant must also furnish returns in respect of each of the taxes, levies or contributions, together with a statement of all assets, cost and liabilities as at the end of the 2005 year of assessment. Where it is not possible to provide particulars of the actual amounts, the applicant may provide reasonable estimates. A separate unit within SARS will be established to process all applications on a confidential basis. An applicant, whose application for amnesty is denied, may object and appeal against that decision.

Amnesty will only apply if the applicant pays the full amount of the tax amnesty levy within twelve months from the date of approval or such longer period as the Commissioner may allow, the applicant makes full disclosure in all the tax returns for the 2005 tax year, any estimates made by the applicant are not materially incorrect (exactly what constitutes a material difference is not clear) and the applicant provides all information required to enable the Commissioner to properly evaluate whether the applicant qualifies for amnesty.

The last requirement is probably where the rub lies. It is not clear at this stage exactly what verification procedures will be applied by SARS in vetting an application. It would be, in my view, ill-advised for SARS to appear to conduct a full scale audit on the affairs of any applicant, as the credibility of the amnesty will be undermined. An amnesty is an amnesty and not a trap for potential applicants to come forward and be identified for audit. It goes without saying that a taxpayer taking advantage of this offer, which comes forward, identifies itself in good faith and then finds itself subjected to a full scale enquiry and audit, will question the wisdom of applying.

My recommendation to SARS is, unless there is a glaring flaw, applications should be accepted at face value, and applicants should be given the benefit of the doubt, rather than assuming that the information supplied is faulty.

There are areas to be addressed for example; a potential applicant approaches a consultant, who is not an attorney, to advise how best to proceed with an application and after consultation the applicant then decides not to apply. What are the FICA obligations on the part of that consultant who cannot rely on client: attorney privilege?

As the bill is amended and finalised, further updates may be published.

This article is extracted from "TAXMAIL" issued by Deneys Reitz Attorneys, article written by Ernie Lai King.

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