

South African Voluntary Disclosure Program

The Finance Minister, Pravin Gordham, announced in the budget speech earlier this year that SARS would implement a voluntary disclosure program.

The voluntary disclosure program would apply to all taxes (including employees' tax) and will run for 12 months from 1 November 2010 to 31 October 2011. The purpose of the VDP is to give taxpayers the opportunity to regularise their tax affairs (Tax VDP) and/or regularise any contraventions of the Exchange Control Regulations, 1961 (Regulations) (Excon VDP).

Defaulting taxpayers who are unaware of any pending or current investigation into their tax affairs may consider relief under the program, if they make a complete disclosure of a default that would trigger additional tax or penalty/interest charges. Defaulting taxpayers, in certain limited circumstances, may also consider using the voluntary disclosure program in situations when a current investigation is taking place.

The voluntary disclosure program will provide qualifying taxpayers with certain benefits ranging from amnesty from any criminal prosecution, to a waiver of additional taxes, penalties (other than administrative penalties) and interest of up to 100 percent, arising from a previous default which must have occurred prior to 17 February 2010.

The VDP is a window of opportunity for any South African residents (i.e., individual/sole proprietor/partnership/deceased estate(s)/insolvent estate(s)/South African trust(s)/former South African residents/company/close corporation) to regularise their exchange control affairs, and provide SARS and SARB with details of foreign assets and/or structures (of whatever nature excluding bearer instruments) individuals and/or corporate entities to disclose and regularise their tax and/or exchange control affairs.

The VDP is an internationally accepted mechanism to broaden compliance with tax and exchange control requirements. It flows from the efforts around the globe to end bank secrecy and recognises the greater access to information enjoyed by SARS both domestically and internationally.

South African residents who have contravened the Regulations, are assured that where a full disclosure is made in the prescribed manner and administrative relief is granted by FinSurv, no further action against the South African resident involved in such contraventions will be taken or initiated by FinSurv.

HOW DOES A VDP AFFECT ME ?

General Information

If you currently have tax defaults or if have contravened the Regulations and choose not to make use of the VDP, then the law will take its course. This could mean that SARS will apply various sanctions, including the payment of outstanding taxes, penalties and interest, and criminal prosecution. FinSurv could apply various sanctions, including the attachment of assets, blocking of funds, interest being charged and/or criminal prosecution.

In the event that you have previously made a disclosure under the 2003 amnesty, then you can apply again under the current VDP?

HOW CAN OSIRIS HELP ?

We at Osiris can play an important role in ensuring the success of a tax VDP or Excon VDP by assisting clients to make use of the VDP. We will however need to establish and verify clients' identities and keeping of records in terms of FICA. Our obligation to report suspicious or unusual transactions **does not** arise where clients are assisted in regularising their affairs by making use of the VDP in connection with income and/or foreign assets that were derived from legitimate sources.

ANONYMITY

Osiris can on behalf of an applicant first obtain an indication of the possible relief that may be granted, by submitting an application that does not reveal any identifying information. Based on this, SARS may then issue a non-binding opinion indicating whether or not the applicant would qualify for any relief and, if so, to what extent. However this non-binding opinion is conditional upon the factual disclosure made, and can only be used as a guideline.

SARS can only then commit to the final granting of any relief in the case of an anonymous application, after the identity of the applicant has been disclosed, so that all the facts of the disclosure (more specifically establishing whether there was a pending audit or investigation) have been verified. The anonymous applicant may decide not to proceed with the application for relief. Such applicants, however, remain at risk of SARS independently identifying any defaults, leading to the normal course of events to unfold, which may include penalties, additional taxes and interest charges, in addition to the criminal law taking its course.

The APPLICATION PROCESS

Applicants must complete an application form for relief under the Tax VDP or Excon VDP. Regarding an anonymous disclosure, the applicant or a duly authorised representative (OSIRIS) may engage with SARS. In order to support the application, the following information must be submitted:-

- The name, address (including email), telephone number, identity number, company or trust registration number, and any identification tax number assigned by SARS to the applicant (if applicable)
- The address of the applicant's authorised representative, including telephone and fax numbers (if applicable)
- The tax year(s), reporting period(s) or tax period(s) involved in the disclosure
- Amount of the disclosure (if applicable)
- Tax type(s)
- Type of return(s) involved (IT type return, VAT, etc.)
- Type of omission or default (understatement of tax; overstatement of refund or any other

non-compliance resulting in outstanding tax)

- Reason for the omission or other non-compliance resulting in outstanding tax
- Primary business activity
- An explanation of how the applicant considers that the requirements have been met.

In order to assist you with some of the terminology we have highlighted below some of the key issues in the event that either a tax VDP or Excon VDP may be suitable to your circumstances :-

1. What is meant by a tax default?

A tax default means

- the submission of inaccurate or incomplete information to the Commissioner;
- the failure to submit information; or
- assumptions presented to SARS about one's tax liability, where such submission, non-submission, or assumptions resulted in
 - (a) the applicant not being assessed for the correct amount of tax;
 - (b) the correct amount of tax not being paid by the taxpayer; or
 - (c) an incorrect refund being made by the Commissioner.

2. Who may apply for relief under the Tax VDP?

Any person may apply, whether in a personal, representative, withholding or other capacity, for defaults prior to 17 February 2010.

3. What tax types are covered under the Tax VDP?

All types of tax administered by SARS are included under the VDP. Some of these are:

Income tax, pay as you earn (PAYE) (employee's tax), value-added tax (VAT), diesel refunds, customs duties, excise duties and levies, donations tax, estate duty, mineral and petroleum resource royalties, royalties, secondary tax on companies (STC), stamp duty, securities transfer tax (STT), transfer duty, turnover tax and uncertified securities tax (UST).

4. Can parties who are being audited, or are being investigated, or are the subject of an enforcement action by SARS submit an application?

SARS may accept their applications if their default would not have been detected during the audit or investigation, and the application would be in the interest of good management of the tax system and the best use of SARS resources. In these cases, however, they will need permission from the Commissioner to apply and they will be charged 50 per cent (half) of the interest that would otherwise be due.

5. What are the minimum requirements to qualify for VDP?

A defaulting taxpayer will be granted relief under the programme if the application meets the following requirements:

- The disclosure is complete in all material respects and made in the prescribed form and manner
- SARS was not aware of the default, which must have occurred prior to 17 February 2010
- A penalty or additional tax would have been imposed had SARS discovered the default in the normal course of business
- It would not result in a refund due by the Commissioner.

6. What relief is offered under the Tax VDP?

If SARS accepts that your application is a disclosure that meets the conditions set out in the legislation, it will be considered a valid disclosure. You will then be able to benefit from the following relief:

• Penalty relief

You will not be charged penalties, whether a fixed amount or a percentage-based penalty, with respect to the disclosure. Penalties for late submission of returns and late payments may, however, be charged.

• Interest relief

50 per cent interest relief for applicants who required permission from the Commissioner to apply 100 per cent interest relief for all other applicants.

• Additional tax relief

SARS will impose no additional tax.

• Criminal prosecution relief

SARS will not initiate criminal prosecution for any Tax Act offence, or related common law offences.

7. How far back will SARS go to calculate the tax outstanding in terms of the Tax VDP?

Strictly speaking, SARS should go back for as many years as the tax default has occurred. SARS, however, appreciates that record keeping and other difficulties may arise in doing so. Bearing in mind the record keeping requirements in the legislation SARS administers and the objectives of this VDP, if the default is one that involves a small proportion of the applicant's income or transactions, SARS will generally not go back further than five years in calculating the tax outstanding in terms of the Tax VDP.

If the default involves extraordinary income or transactions that occurred more than five years back, SARS will take the extraordinary income or transactions into account in calculating the tax outstanding. Thus, by way of example, if an applicant entered into an extraordinary transaction to evade tax in 2000 and invested the income in a secret offshore bank account bearing nominal interest, SARS will calculate the tax outstanding on the extraordinary transaction in 2000 and the interest income from 2005 to 2010. Where an applicant requires further guidance with regard to this question Osiris can either contact the VDP Unit on your behalf and/or make an anonymous application.

The Excon VDP Process

8.1. Who may apply under the Excon VDP?

- Individual, sole proprietor, partnership, deceased estate(s), insolvent estate(s), South African trust(s), former South African residents, companies and close corporations that have contravened the Regulations, prior to 28 February 2010; and
- South African residents who took funds offshore illegally and/or who beneficially own any unauthorised foreign assets and/or structures (of whatever nature, excluding bearer instruments) may apply to the FinSurv (VDP Division).

Note: For the purpose of determining whether a person is a resident for exchange control purposes, the nationality or citizenship of that person is irrelevant.

8.2. What are the benefits of the Excon VDP?

Under the Excon VDP successful applicants will be regarded as having regularised their exchange control affairs in respect of the declared value of all unauthorised foreign assets disclosed in their application. South African residents who have contravened the Regulations are assured that where a full disclosure is made in the prescribed manner and administrative relief is granted by FinSurv (VDP Division), no further action against the South African resident involved in such contraventions will be taken or initiated by FinSurv.

8.3. Minimum requirements to qualify for the Excon VDP

An applicant will be granted relief for VDP, if he/she/it meets the following requirements:

- The applicant must have contravened the Regulations prior to 28 February 2010
- The disclosure is complete

8.4. What relief is offered under the Excon VDP?

Applicants who are granted administrative relief in respect of unauthorised foreign assets and/or structures (of whatever nature, excluding bearer instruments) may have to pay a levy on the market value thereof.

- A levy of **10 per cent** calculated on the market value of the unauthorised foreign asset disclosed as at 28 February 2010. This levy must be paid from foreign-sourced funds.
- A levy of **12 per cent** calculated on the market value of the unauthorised foreign asset disclosed as at 28 February 2010, where no foreign funds are available.
- The amount levied in the case of an individual is reduced by R4 million of the foreign capital allowance or any remaining portion thereof, and may not be reduced by any fees or commissions.

8.5. When and where must the VDP levy be paid?

The levy must be paid within three months of the date of approval of the application,

8.6. What supporting information or documentation needs to be submitted?

The following supporting documentation must accompany the applicant's original signed application form:

- **Cash:** Declaration giving a description and the value of the money, as at 28 February 2010
- **Bank accounts, call deposits or time (term) deposits, or any other short-term foreign asset:** Original or a certified copy of a statement of account from the foreign institution concerned, as at 28 February 2010
- **Financial instruments listed on a recognised exchange, such as shares, stock, bonds or debentures:** Original or a certified copy of a statement of account and price as quoted on the exchange, as at 28 February 2010
- **Other financial instruments not listed on a recognised exchange or unlisted shares:** Valuation certificate from a foreign valuator, as at 28 February 2010
- **Fixed property:** A valuation certificate issued by a valuator, or by a sphere of government of the country where that foreign asset is located, as at 28 February 2010
- **Foreign insurance policies:** A valuation certificate from your insurer, as at 28 February 2010
- **An investment in a collective scheme, such as a unit trust:** A statement by the management company of the scheme, as at 28 February 2010
- **Intangible assets, such as a patent or copyright:** A valuation certificate by a valuator of the country where that foreign asset is located or registered, as at 28 February 2010
- **Other foreign assets:** A written declaration.