

# Voluntary Disclosure Programme (VDP): Requirement of “voluntary”

“There is no voluntary disclosure by a taxpayer of the information or facts of which SARS was already aware of: court held in Purveyers case”

Due to the outbreak of the Covid-19, the government of the Republic of South Africa (SA) placed the country in a very strict and hard lock-down in an attempt to curb the spread of the Covid-19 infections. The lock-down caused cash flow challenges for a sizeable number of the companies as there were no or less trading activities taking place during the lock-down period. Many companies faced or are still facing the challenges which are causing inability to meet obligations which include but not limited to paying employees, compliance with statutory obligations (i.e. paying taxes) etc. Despite the tax relief measures that have been implemented by National Treasury to assist in alleviating cash flow burden, some taxpayers still find it hard, if not impossible, to comply with tax obligations as set out in the tax legislations.

In order to regularise their tax affairs, a significant number of taxpayers will have no choice but to apply to the South African Revenue Service (“SARS”) for Voluntary Disclosure Programme (“VDP”). The main purpose of the VDP is to encourage taxpayers to come forward on a voluntary basis to regularise their tax affairs with SARS and avoid the imposition of understatement penalties and other administrative penalties (and in certain circumstances, criminal prosecutions).

The VDP applies to all taxes administered by SARS with the exception of custom and excise duties. Before a VDP application can be considered valid, requirements as set out in section 227 of the Tax Administration Act No. of 2011, as amended (“the TAA”) must all be met.

The requirements for a valid voluntary disclosure are following:

- The disclosure must be **voluntary**
- It must involve a default which has not previously been disclosed by the applicant or representative of the applicant
- It must be full and complete in all material aspects
- It must involve the potential imposition of an understatement penalty in respect of the default
- It must not result in a refund due by SARS
- It must be made in the prescribed form and manner.

Of important note is the first requirement that states that for the VDP to be valid the disclosure must be voluntary. The word “voluntary” is not defined in the TAA and thus its ordinary meaning must be considered. One would have assumed that this requirement would be easy for one to comply with. The requirement of “voluntary” is proving to be significant as it was evidenced in Purveyors South Africa Mine Services (Pty) Ltd v CSARS<sup>1</sup> (Purveyors case).

<sup>1</sup> (61689/2019) [2020] ZAGPPHC 409 [25 August 2020]





### The pertinent facts of Purveyors case are as follows:

- Purveyors South Africa Mine Services (Pty) Ltd (Purveyors) imported the aircraft into SA during 2015 which it then used to transport goods and personnel to other countries in Africa.
- Purveyors became liable for the payment of import VAT in respect of the importation of the aircraft. It failed to pay the import to SARS.
- During the latter part of 2016, Purveyors engaged certain representatives of SARS to obtain a view on the VAT liability on the importation of the aircraft. In doing so, certain facts relating to the importation transaction were disclosed to SARS representatives.
- Following the SARS engagement, Purveyors was advised that the aircraft should have been declared in SA and that the VAT thereon should have been paid. It was further advised that the penalties will be triggered for failure to pay VAT.
- A year later, Purveyors applied to SARS for Voluntary disclosure relief in terms of section 226 of the TAA.
- SARS declined to grant the relief on the basis that the requirements of section 227 have not been met. Of relevance is the requirement of 'voluntary'.



### Legal issue

At issue was whether Purveyors met the requirement of 'voluntary' in respect of its VDP application submitted to SARS. Purveyors contended that it did meet the requirement of 'voluntary' on the basis that the VDP application was submitted prior to it being notified by SARS of an audit or investigation into its affairs despite the prior knowledge by SARS of the default (failure to pay import VAT).

SARS contended that the requirement of 'voluntary' relates to disclosure of the information or facts of which SARS had been unaware of.



### Court decision

The court agreed with SARS that the VDP application was not voluntary on the basis that there was no disclosure by Purveyors of the information or facts of which SARS was not already aware of. Consequently, the case was decided against Purveyors.

As it is evident from above, for VDP application to be valid the disclosure must be voluntary. What can be deduced from Purveyors case is that the disclosure must be of information or facts which SARS was not already aware of. Although it is not yet known at this stage whether Purveyors will appeal the High Court decision, there is important lesson to be drawn from Purveyors case. It was unwise of Purveyors to seek tax advice from SARS which resulted in it disclosing certain information outside of the formal VDP processes. In this regard, it is therefore imperative that taxpayers seek tax advice from the appropriate source as there are implications as Purveyors had subsequently discovered.

For any assistance with VDP application please do not hesitate to contact us.

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