
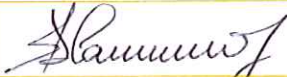




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PRACTICE NOTE NO DT- IT 015/14

PRACTISE NOTE ON THE RECOVERY OF TAX IN CASES OF DEFAULT

In exercise of the powers conferred by section 68*bis* of the Income Tax Order 1975, as amended, the Commissioner General hereby issues the following notice.

CITATION AND COMMENCEMENT

This notice may be cited as Practice Note No. DT-IT 015/14 on the appointment of agent for collection.

SECTION

Section 49 and 59B of the Income Tax Order as amended as well as section 45 of the VAT Act.

PURPOSE

The purpose is to outline the procedure in instances where there is need to appoint an agent for collection in cases of default.

DEFINITIONS

For purposes of this Practice note, the following terms shall, unless the context otherwise indicates, be defined as follows;

"Agent"- the person who has been appointed by the Commissioner General as such, for purposes of collection of tax due from a defaulter.

"Defaulter"- the person who has failed to pay tax on the date due or who is in default.

"Receiver"- means a person who, with respect to an asset in Swaziland, is-

- a. a liquidator of a company; or
- b. a receiver appointed out of court or by a court; or
- c. a trustee for a bankrupt person; or
- d. a mortgagee in possession of property ; or
- e. an executor of a deceased estate; or
- f. any other person conducting the business of a person legally incapacitated; or
- g. Any person who may hold or holds money on behalf of a tax defaulter.

THE LAW

A. INCOME TAX

Commissioner General's power to appoint agents in terms of Section 49

1. The Commissioner General has power to appoint ANY person to be an agent where any other person has failed to pay tax which he/she owes and is due by him.
2. The other person is an agent of the defaulter. This appointed person shall be an agent only for purposes of the Income Tax Order and is therefore under a legal obligation to deduct and remit to the Commissioner General any tax due from any money;
 - a. which is due or may become due to the defaulter which is or may be in his possession;
 - b. which the agent holds or may subsequently hold for or on account of the defaulter;
 - c. which the agent has authority to pay to the defaulter and it's from a third party.

Obligations of the Agent

3. The agent is required to:

- a. remit such money to the Commissioner General within fifteen (15) days of the date of the SRA appointing him to be an agent.
- b. If fifteen (15) days **ELAPSES** and he has not yet received any money on behalf of the defaulter, the agent is then under an obligation to pay the money to SRA within fifteen days of the date on which the money becomes due or available to him for or on account of the defaulter.
- c. The agent is also under an obligation to pay the exact amount of money which was specified in the declaration designating him to be an agent.
- d. If the amount received by the agent is less than the amount specified in the notice, the agent has to remit the whole amount of the money he has received or which he holds or which is available.
- e. If the agent, after receiving the notice rendering him to be an agent removes any of the money relating to the notice, he shall be personally liable *protanto* (in part) for the tax due by such person. This however does not in any way reduce the liability of the taxpayer who is in default and he is still liable under the Income Tax Order to the tax due by him.

Prosecution

If all the other means to collect the tax outstanding has failed, the SRA may then prosecute the taxpayer in order to recover the tax due.

Issuance of a directive to withhold tax in certain cases of non-compliance (S59B)

1. Where the Commissioner General detects that there is non-compliance with the obligations imposed by the Income Tax Order by any person or a certain category of persons, he may issue out a directive to any person, or a directive of a general nature to all persons to withhold 10% tax from any money which: -

- a. Is due or may become due to the person or persons liable to taxation;
- b. The person or persons hold or may subsequently hold for or on account of the person or persons liable to taxation; or
- c. The person or persons has authority from some other person to pay to the person or persons liable to taxation,

2. The person affected by such a directive may make an application to the Commissioner General where he considers the amount deducted to be excessive and if the Commissioner General is satisfied that the tax directed to be deducted is excessive in relation to the tax likely to be charged upon assessment, the Commissioner General may:-

- a. Vary the amount; or,
- b. Cancel the directive and accept such security for payment as appears to him to be reasonable.

3. Where the Commissioner General has issued a directive of a general nature:

- a. A person who has regularly complied with the obligations imposed on him by the order may make an application for exemption to the Commissioner General. If the person satisfies the Commissioner General on such application that he has regularly complied with the obligations imposed on such person under the Order, a certificate of exemption may be issued to such person.
- b. Any person who fails to deduct tax where a directive has been issued shall be personally liable to pay the Commissioner General the tax which he should have deducted as if it were tax due and payable by him. This is in addition to any penalty for which he or she may be liable under section 66 of the Order.

Obligations of the Withholder

1. Every person who has deducted any tax under such directive must:

- a. Furnish to such person whom tax has been deducted a certificate showing the amount of the tax deducted;
 - b. Remit to the Commissioner General the amount of tax deducted within fifteen days of the date on which the directive was given to him by SRA. If on such date no money is due from him or is held by him for or on account of, the person owing tax, then he shall remit the tax within fifteen days of the date on which such money becomes due to or available for or on account of that person;
 - c. Every person making any payment on which such a directive applies must maintain a record showing in relation to each year of assessment-
 - i. The amounts deducted, in respect of which a directive has been given; and
 - ii. The amounts of tax deducted under such directive,
2. Such record shall be kept for a period of at least five years for examination by the Commissioner General as and when required.
3. The deduction of tax under this directive shall not relieve the person liable to taxation from the obligation to deliver a return for the assessment of the tax or any return as provided under section 33 or from any other obligation imposed by this Order.

B. VAT

Preferential claim to assets- Section 42

- From the date on which tax is due and payable, the Commissioner General has a preferential claim against other claimants upon the assets of the person liable to pay the tax until the tax is paid.

Power of the Commissioner General to seize goods- Section 43

- a. The Commissioner General may seize any goods in respect of which there are reasonable grounds to believe that tax is due and payable in respect of the supply or import of those goods have not been, and will not be paid.
- b. Such detained goods shall be kept in a place approved by the Commissioner General

Procedure after detention of goods

- a. Immediately after the seizure of the goods, a written statement shall be signed by the owner of the goods or the person who had custody of or control of the goods and by the Commissioner General identifying the goods stating that the goods have been seized under this section and the reasons for the seizure.
- b. The statement shall also state the quantity and quality of the goods and set out the terms for the release or disposal of the goods.
- c. The Commissioner-General is not required to serve the statement if, after making reasonable enquiries, the Commissioner-General does not have sufficient information to identify the owner of the goods or the person who had custody or control of the goods.

Return of seized goods after payment or provision of security

- a. The Commissioner-General may authorize any goods seized to be delivered to the person who signed the statement as the owner of the goods or who had custody of the goods where that person has paid, or gives security for the payment of the tax due and payable or that will become due and payable in respect of the goods.
- b. Where no such payment or security has been provided for the debt the Commissioner-General shall detain the goods seized and;
 - i. in the case of perishable goods, for a period that the Commissioner-General considers reasonable, having regard to the condition of the goods; or,
 - ii. in any other case, until the latter of-
 - a) twenty days after the seizure of the goods; or,
 - b) twenty days after the due date for payment of the tax.
- c. With respect to any balance owed if the proceeds of disposal are not sufficient to meet the costs of disposal and the value added tax due. The Commissioner

General may if a person fails to pay the tax due institute an action in a court of competent jurisdiction for the recovery of tax.

Section 44(1) Closure of business and distress proceedings

- a. Where a person liable for tax has failed to remit the amount payable by that person within the prescribed time, the Commissioner-General may lock up and seal the business premises of that person.
- b. The goods in the business premises shall be deemed to be attached and at the disposal of the Commissioner-General.
- c. The Commissioner-General may recover unpaid tax by distress proceedings against the movable and immovable property of the person liable to pay the tax.

Procedure for distress proceedings

- a. An order in writing may be issued by the Commissioner General specifying the person, against whose property the proceedings are authorized, the location of the property, and the tax liability to which the proceedings relate.
- b. The Commissioner General may require a police officer to be present while the distress is being executed.
- c. For the purposes of executing distress, an officer may at any time enter any premises described in the order authorizing the distress proceedings.
- d. The Property upon which a distress is levied other than perishable goods, shall be kept for twenty days either at the premises where the distress was levied or at such other place as the Commissioner-General may consider appropriate, at the cost of the person liable.
- e. The property distressed may be sold by public auction, or in such other manner as the Commissioner-General may direct.

Proceeds of the sale from distress

- a. The proceeds of a disposal by distress shall be applied by the auctioneer or seller first towards the cost of taking, keeping, and selling the property

distraigned upon, then towards the tax due and payable, and the remainder of the proceeds, if any, shall be given to the person liable.

- b. All costs incurred by the Commissioner-General in respect of any distress may be recovered from the person liable, as tax due under this Act.

Recovery of tax from Third Parties - S45

A person liable to pay tax who fails to pay such tax on the due date (defaults), the Commissioner General may require any of the following persons to pay the money due on the date set out in the notice, up to the amount of the tax due.

- i. A person owing or who may owe to the defaulter ;
- ii. A person holding or who may subsequently hold money for or on account of, the defaulter ; or,
- iii. A person having authority from some other person to pay money to the person defaulter.

Issuance of a Notice appointing third party

- a. In cases where tax has to be recovered by a third party, the Commissioner General will issue out a notice in writing appointing such person.
- b. The date to be specified in the notice shall be a date after the money has become due to the defaulter, or received on behalf of the defaulter.
- c. The notice shall be sent to the third party and a copy shall be forwarded to the person liable.
- d. The person making the payment pursuant to this notice is deemed to have been acting under the authority of the person liable (defaulter) and of all other persons concerned and is hereby indemnified in respect of that payment.

Duties of the Receivers- Section 46

The receiver shall do the following:

- a. A receiver shall set aside, out of the proceeds of the sale of an asset, the amount notified by the Commissioner General, or such lesser amount as is subsequently agreed on by the Commissioner General.
- b. A receiver is liable to the extent of the amount set aside for the tax of the person who owned the asset; and

- c. May pay any debt that has priority over the tax referred to in this section notwithstanding any provision of this section.
- d. A receiver is personally liable to the extent of any amount required to be set aside under this section for the tax referred to him if, and to the extent that, the receiver fails to comply with the requirements of this provision.
- e. The receiver shall in writing notify the Commissioner General within fourteen days after being appointed to the position of the receiver or taking possession of an asset in Swaziland, whichever comes first.
- f. The Commissioner General may in writing notify a receiver of the amount which appears to the Commissioner General to be sufficient to provide for any tax which is or will become payable by the person whose assets are in the possession of the receiver.
- g. A receiver shall not part with an asset in Swaziland which is held by him in his capacity without prior permission from the Commissioner General.

ISSUED BY THE COMMISSIONER GENERAL, SWAZILAND REVENUE AUTHORITY



DUMISANI E. MASILELA
COMMISSIONER GENERAL