

South Africa

Voluntary Disclosure Programme

What is the Voluntary Disclosure Programme?

The purpose of the Voluntary Disclosure Programme ("VDP") is to enhance voluntary tax compliance in the interest of enhanced tax compliance, good management of the tax system and the best use of South African Revenue Service ("SARS") resources. Whilst the legislation in this respect became effective from 1 October 2012 the relief provided in the section would also apply to periods prior to 1 October 2012.

The VDP aims to encourage taxpayers to come forward on a voluntary basis to regularize their tax affairs with SARS and avoid the imposition of understatement penalties and administrative penalties.

VDP relief is available in respect of all taxes administered by SARS including Value Added Tax (VAT), Income Tax, and Pay as You Earn (PAYE) (but excluding duties and levies charged in terms of the Customs and Excise Act, 1964).

This is an ongoing programme with no specified date of expiration.

Eligibility for the VDP

The following persons are eligible for participation in the VDP:

- A person, whether in a personal, representative, withholding or other capacity, may apply for voluntary disclosure relief.
- Persons who have been given notice of the commencement of an audit or criminal investigation in respect the disclosed default *may not* apply except if a senior SARS official is of the view that the default would not have been detected during the audit and it is in the interest of good management of the tax system and SARS resources. This will not stop the audit/ investigation however if the VDP application is successful SARS will not be entitled to raise any penalties in respect of the default related to the VDP application. The official will notify the taxpayer as to whether he/she is eligible to apply.

In order to participate in the VDP and to ensure the application is valid:

- 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

Examples of default include where the taxpayer:

- did not file a return;
- is guilty of a default in rendering the return;
- filed a return but omitted an item from that return; or
- filed a return in which an incorrect statement was made.

South African Income Tax legislation taxes residents on their worldwide income (assets and income with local and/or foreign sourced income) and non-residents based on income derived from a South African source. Accordingly the VDP relief will be applicable to taxes levied on income in the above respect.

How does a taxpayer participate in the VDP?

The taxpayer must be liable for taxes in South Africa and must register on the e-Filing system before he/she can apply for VDP.

All voluntary disclosures must be made on the prescribed VDP01 form. Once the e-Filing system recognizes the application, the application will be allocated to the VDP evaluator for processing.

The key features of the VDP01 form:

- Provides for information relating to the applicant, the disclosure of the default, and the reasons for the default etc. Provision is also made to attach supporting documentation where required.

At the end of the evaluation process the VDP unit will:

- where a VDP non-binding private opinion was requested, issue the opinion;
- where a VDP relief application is invalid, issue the outcome (with the reasons for the outcome);
- where a VDP relief application is positive, present a VDP agreement to the applicant for consideration and signature.

The VDP agreement is a contract between SARS and the applicant. Both SARS and the applicant are obliged to give effect to the terms of the contract.

The VDP assessment gives effect to the VDP agreement and typically includes the disclosed additional taxable income, and depending on how long ago the default occurred, interest and late payment penalties.

Interest and penalties form part of the VDP agreement as well as the assessment, both of which are final and binding.

General features of the VDP

- relief from understatement penalties (which could be up to 200% in severe cases),
- relief from administrative non-compliance penalties. The VDP does not provide relief against penalties levied for the late submission of a return,
- the VDP does not extinguish the interest that has accrued on the unpaid tax,
- the VDP does not provide relief against audits/investigation nor the principal tax liability,
- the average turnaround time per case is currently 16 working days.

Cancellation or withdrawal of the VDP application or agreement

A VDP application can be cancelled at any time by sending an email to vdp@sars.gov.za.

Breach of any material term of the VDP agreement by any of the parties to the VDP agreement can result in the cancellation of the VDP agreement. It is important that the disclosure of a default by the taxpayer is full and complete in all material respects.

If subsequent, to the conclusion of a voluntary disclosure agreement it is established that the applicant failed to disclose a matter that was material for purposes of making a valid disclosure, the Act provides for a senior SARS official to:

- Withdraw any relief that has been granted;
- Regard any amount paid in terms of the voluntary disclosure agreement to constitute part payment of any further outstanding tax in respect of the relevant default; and
- Pursue prosecution for a tax offence arising from the 'default'.

Special Voluntary Disclosure Programme ("SVDP")

The VDP is a separate initiative from the SVDP which gave non-compliant South African taxpayers an opportunity to regularize their unauthorized foreign assets and income in terms of income tax and Exchange Control contraventions. In line with the new automatic exchange of information between tax authorities, SARS will start

receiving offshore third party financial data from other tax authorities in 2017. Taxpayers who have undisclosed assets abroad had a limited window period between 1 October 2016 and 31 August 2017 to disclose their foreign assets and apply for relief.

This programme has now expired, however taxpayers can still apply for relief through the VDP albeit the relief offered by the SVDP differed from that of the VDP.

Important Notice

The information in this document has been prepared by an external consultant and is for general guidance only. The information may not be complete nor suited to your specific circumstances and therefore should not be relied upon. Given the complexity of the VDP as well as the various conditions and implications thereof, we highly recommend that taxpayers engage the assistance of an independent legal or tax counsel.