

79.16. The taxpayer then also received further trivial amounts which can be attributed to a refund from the City of Johannesburg, refund from the Road Accident Fund in respect of an undertaking and refunds from client's for disbursements incurred by the taxpayer.

80. To the extent that the taxpayer cannot recall the nature of the receipt, these amounts are negligible, amounting to R99 131.11 or 0.008% of the total claims by SARS which are allegedly underdeclared. This cannot, however, be attributed to fraud by the taxpayer in any manner whatsoever. It is not possible, or reasonable, for a taxpayer to recall every amount in the circumstances.

Lisa Bobroff

Tax Year	Description	Amount
2010	L Bobroff Receipts	R763 425.00
Total	R763 425.00	

81. SARS have propositioned that an amount of R763 425.00 shall be deemed to be income in the hands of the taxpayer.¹¹ SARS states that:

"SARS intends including in the taxpayer's income in the 2010 year of assessment the two cheques deposited in Ms LB Bobroff's FNB Smart Account in respect of "referral fees" charged by RBP to the two clients, PG McKenzie and JE de la Guerre"

82. The taxpayer denies that these amounts form part of his gross income or that they were received by him. On the contrary, SARS have tried to tax this amount twice, firstly in RBP Incorporated and now in the taxpayer's hands.

83. The taxpayer denies that these amounts form part of his gross income or that they were received by him. In the finalisation of audit letter for RBP Incorporated, SARS acknowledge that these amounts were debited to the loan account of the taxpayer with RBP Incorporated, thus removing the deductible expense for the practice. SARS, again, acknowledge this treatment in the finalisation of audit letter for his wife, although still assert that the amount will form part of the 'gross income' of the taxpayer.¹²

¹¹ See paragraphs 66 – 69.

¹² Paragraph 75

84. In the finalisation of audit letter for RBP Incorporated dated 09 July 2015, specifically paragraph 1.3.4.2.8, SARS raised estimated assessments on the 2010 to 2012 years. In terms of SARS' letter and annexure B2, SARS refer to "Income not declared (Leakage)". In this schedule, the amount for McKenzie in the sum of R376 912.20 and De La Guerre in the sum of R386 513.80 are included into the taxable income of RBP Incorporated.
85. At paragraph 68 of the letter of audit findings for this taxpayer, SARS, however, confirm that:
- "68. The two cheques referred to above were debited to the taxpayer's loan account in the books of RBP. SARS intends including the above-mentioned amounts in the taxpayer's income in the 2010 year of assessment for the following reasons
- 68.1 the two amounts referred to above were charged to the clients, PG McKenzie and JE de la Guerre, on their statements of account as referral fees but not accounted for in the general ledger of RBP, except to debit the taxpayer's loan account, i.e., as company drawings. By charging these two payments to the clients as "referral fees", when no referral had taken place, resulted in the client's eventual award received from the Road Accident Fund being unlawfully reduced."*
86. In essence, SARS have therefore sought to include these amounts into the gross income of the taxpayer, in circumstances wherein (i) it was already taxed in the hands of RBP Incorporated and (ii) the amount was admittedly debited to the taxpayer's loan account. This amounts to double taxation, which is unconscionable.
87. The juxtaposition by SARS in the finalisation of audit letter for RBP Incorporated and his wife, against the current letter of audit findings is puzzling. Either the amount is not a deductible expense for RBP Incorporated and thus allocated to the loan account of the taxpayer, alternatively, the amount constitutes the income of the taxpayer (which we obviously deny) and RBP Incorporated should have been given the benefit of the deduction.
88. SARS, however, took a different view and taxed the amount in the hands of RBP Incorporated directly, thereby ruling out the view that the amounts were also taxable in the hands of the taxpayer. This is clear from annexure B2 to the finalisation of audit letter for RBP Incorporated.

89. In any event, SARS do not formulate the legal or factual basis upon which they now intend to recharacterize the nature of the receipts to form part of his 'gross income' as opposed to being drawings from his loan account. The taxpayer reserves his rights in this regard.
90. The taxpayer accordingly disputes that the inclusion of this amount into his gross income.

Foreign Rental Income

91. SARS have proposed including an amount of R11 845.00 in the 2014 year of assessment in relation to foreign rental income.
92. The Double Taxation Agreement between South Africa and Australia, Article 6(1) provides that:
 - (1) *Income from real property may be taxed in the Contracting State in which the real property is situated.*
 - ...
 - (3) *The provisions of paragraph 1 shall apply to income derived from the direct use, letting or use in any other form of real property.*
93. SARS, therefore, do not have the right to tax any profits on rental income from properties situated outside of the Republic. The right to tax any amounts is for the contracting state in which the property is situated.
94. Further, and if SARS has the right to tax this amount, which is denied, the taxpayer submits that the amount was not (i) intentionally underdeclared as the taxpayer's submissions were prepared by his erstwhile accountant who he reasonably believed at the time to possess the necessary skill and knowledge to submit accurate returns and (ii) does not amount to a misrepresentation or material non-disclosure.
95. The taxpayer accordingly refutes SARS' attempts to include this amount into his taxable income.