



TAX ALERT

SECTION 12H - LEARNERSHIP DEDUCTIONS

Since its introduction in 2002, section 12H of the Income Tax Act, dealing with deductions in respect of learnership agreements, has undergone various changes culminating in a complete overhaul by way of Taxation Laws Amendment Act 17 of 2009 (the Amendment Act).

The latest version of section 12H, effective from the commencement of years of assessment ending on or after 1 January 2010, has been designed to make calculating the deduction simpler by providing qualifying employers with a R30,000 commencement allowance on entering into a registered learnership agreement (R50,000 for a disabled learner) and, on '*successful completion*' of that agreement, a R30,000 completion allowance (R50,000 for a disabled learner). The new section 12H has essentially done away with the previous remuneration based method for calculating the deduction.

However, the most significant change to section 12H has resulted in the completion allowance only becoming claimable on '*successful*' completion of a registered learnership agreement. The previous version of section 12H, as far as it relates to the claiming of a completion allowance, relied purely on the completion of a registered learnership agreement, which was essentially a time based test and not '*successful completion*', which connotes some degree of finality. The time based method under the previous section 12H would have allowed an employer to deduct a completion allowance after say, two years, which would have been at the end of the original learnership period, with no corresponding obligation on the learner to obtain any formal qualification.

As is so often the case with tax, the addition or deletion of a word or phrase could have far reaching implications on the interpretation of a particular section. Having regard to the general interpretation of statutes, one must ascribe a different meaning to the phrase '*successfully completed*' as it is deemed not to have the same meaning as the word 'completed' as used in its original format.

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In other words, by adding the reference '*successful*', it is deemed that the legislature intended something else than merely the completion of a learnership agreement. The reference to '*successfully completed*' is therefore not a loose term, but serves a purpose in connoting the achievement of a specific deliverable, eg the obtaining of a qualification. The question that remains is whether it is within SARS' power or that of the relevant Sector Education and Training Authority (SETA) to decide whether a learnership agreement has been '*successfully completed*'.

The concept of '*successful completion*' is curiously contained and discussed in Issues 2 and 3 of Interpretation Note 20 (IN20), but not in Issue 1. Although Issue 3 of IN20 was issued post the promulgation date of the Amendment Act it only deals with the previous version of section 12H, stating that it will be updated in due course taking into consideration the recent amendments. SARS states the following in IN20 (Issues 2 and 3): "A learnership agreement is considered '*completed*' when confirmation is provided by the SETA, with which the learnership agreement is registered, that the learnership has been *successfully completed according to its required standards or the standards of a professional body.*" (own emphasis)

SARS' attempt in Issues 2 and 3 of IN20 to clarify the meaning of '*completed*' within a section 12H context was not supported by wording of that specific section prior to promulgation of the Amendment Act. In any event, the interpretation placed on '*completed*' would have no binding effect as Interpretation Notes do not constitute legislation and cannot create law, meaning taxpayers are not bound to an Interpretation Note, but can question its interpretation in a court of law.

Should one consider the structure of the Skills Development Act 97 of 1998, it is appreciated that interpretive authority is to a large extent conferred upon a specific SETA. In other words, it is for the SETA to indicate whether or not a learnership agreement is to be registered and whether it is '*successfully completed*'. Employers seeking to claim deductions under section 12H would need to engage with their specific SETA's as there appears to be no uniform rule for '*successful completion*' having regard to the various industries in which learnership agreements are concluded.

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HOW NOT TO LOSE A LOSS

SARS published Interpretation Note No 33 on 30 June 2010. The Interpretation Note deals with assessed losses of corporate taxpayers. In particular, it deals with the circumstances in which corporates may forfeit assessed losses.

The Interpretation Note does not constitute law. But it does give taxpayers an idea of the approach that SARS takes in relation to the issue. It is also a good additional source for research on the topic.

The position of SARS can be summarised as follows:

- A corporate taxpayer can only carry forward an assessed loss if it meets two requirements. First, it must carry on a trade in the current tax year. Second, the taxpayer must earn income from a trade.
- As to the trade requirement, although the term 'trade' is widely defined in section 1 the Income Tax Act, No 58 of 1962 (the Act), SARS adopts a strict, objective approach when considering whether or not a taxpayer is carrying on a trade. The taxpayer must not only have an intention to trade or undertake some preparatory steps. Also, where the taxpayer is being wound up, it must not simply realise assets or collect debts; it must show that it actively pursues a trade.
- Regarding income requirement, it is instructive to note that SARS will allow a taxpayer to carry forward an assessed loss if it has earned income as defined in the Act, ie gross income less exempt income, in the tax year. So, SARS will not require that a taxpayer have taxable income, ie pre-tax profit as was required in a leading Appeal Court case. Also, SARS accepts that the income may arise from any trade, ie not only from the trade carried on by the taxpayer in previous tax years.

Generally, the Interpretation Note shows a pragmatic approach on the part of SARS. But corporates, particularly those who are dormant or are being wound up, must ensure that they build up sufficient evidence that they are carrying on a trade so that they are able to carry forward assessed losses for the future.

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