DLA CLIFFE DEKKER HOFMEYR

NOVEMBER 2009

TAX ALERT

NEW PENALTY REGIME - TAXPAYERS BEWARE!

The coming of November 2009 brings more than just the deadline of the 2009 tax season for most South Africans on the 20th. It also heralds the coming into effect of the regulations issued by the Commissioner of the South African Revenue Service (SARS) under section 75B of the Income Tax Act regarding the imposition of penalties for tax non-compliance. The regulations were gazetted on 31 December 2008, and will be phased in over a period beginning on 23 November 2009. There is very little to celebrate here.

The regulations see the imposition of an automatic penalty for certain instances of non-compliance. These instances, listed in section 4 of the regulations, include amongst others:

- failure to register as a taxpayer;
- failure to inform SARS of a change in address;
- failure by a company to appoint a public officer;
- failure to appoint a place for service or delivery of notices and documents;
- failure to keep the office of public officer filled, or to notify SARS of a change in public officer;
- failure to submit a return as required;
- failure to provide details of an employee; and
- failure by an employer to provide a monthly declaration of employees' tax as required by the Income Tax Act.

IN THIS ISSUE

A review of tax developments in November

New penalty regime - taxpayers beware!

Tax administration bill

Tax note: Environmental levies to be imposed

Changes to the PAYE process for employers in 2010

Open sesame - the relaxation of South Africa's exchange control

Papa, don't leave me a loan

The regulations introduce a table of a fixed amount penalty. The penalty depends on the level of the taxpayer's taxable income for the previous year. The table is as follows:

Item	Assessed Loss or Taxable Income for Preceding Year	Penalty
(i)	Assessed Loss	R250
(ii)	R0 - R250,000	R250
(iii)	R250,001 - R500,000	R500
(iv)	R500,001 - R1,000,000	R1,000
(v)	R1,000,001 - R5,000,000	R2,000
(vi)	R5,000,001 - R10,000,000	R4,000
(vii)	R10,000,001 - R50,000,000	R8,000
(vii)	Above R50,000,000	R16,000

In terms of the regulations, the penalty imposed according to the above table will increase automatically by the same amount for each month, or part thereof, that the taxpayer fails to remedy the non-compliance.

The regulations further state that:

- a company listed on a registered stock exchange,
- a company whose gross receipts or accruals for the preceding year exceed R500 million, or
- a company that forms part of the same group as either of the above companies are deemed to fall into category (vii). These companies would therefore be liable for a penalty of R8,000 notwithstanding the fact that in some instances the company did not earn a taxable income between R10 million and R50 million in the previous year.

This will impose a particularly heavy financial burden for groups and for companies listed on the stock exchange.

In addition to the fixed amount penalty, section 6 of the regulations permit SARS to impose a further penalty of 10% of the amount of any unpaid employees' or provisional tax, or employees' tax withheld in the event of a late submission of an employees' tax return. Interestingly, this additional penalty came into effect as from 31 December 2008.

The regulations do, however, provide for some relief. Section 10 of the regulations allow the taxpayer to apply for the remittance of the penalty where:

- the duration of non-compliance is less than seven days;
- it is the first incidence of non-compliance; or
- the penalty imposed is less than R2,000.

Such application for remittance is subject to SARS being satisfied that reasonable circumstances existed for the non-compliance, and that the non-compliance has since been remedied.

The stakes for a failure to keep one's tax affairs in order have just been raised considerably. We suggest that the legislative climate justifies keeping one's friends close and one's tax practitioner closer!

Justin Liebenberg, Director, Tax
Afton Appollis, Associate, Tax

TAX ADMINISTRATION BILL

On 30 October 2009 SARS published the first draft of the proposed Tax Administration Bill (the TAB).

According to SARS, the TAB aims to provide a single body of law that outlines common procedures, rights and remedies and to achieve a balance between the rights and obligations of both SARS and taxpayers in a transparent relationship. The constitutional rights of taxpayers are said to be taken into account by the TAB but it does not seek to re-codify them, since all legislation - including the TAB - must be read together with the Constitution.

In drafting of the TAB, attention was given to reviewing the current administrative provisions of the various tax acts administered by SARS, excluding the Customs and Excise Act, and matching these provisions across taxes as far as possible. A comparative evaluation of the tax administration laws of other countries was also conducted and the assistance of international tax experts and local constitutional experts was procured.

Some of the significant provisions of the TAB include:

- The introduction of a framework for the single registration of taxpayers for all tax types.

Continued over page

- The power to conduct a search and seizure without a warrant if such warrant cannot be obtained in time to prevent the imminent removal or destruction of records.
- The insertion of a number of provisions to deal with the securing of the collection of taxes that would otherwise be in jeopardy due to the actions of a taxpayer, including the right to issue an assessment in advance of the date it would normally be issued and to seize a taxpayer's assets for up to 24 hours while a court is approached to prevent the dissipation of the assets.
- The replacement of the discretionary system of imposing additional tax of up to 200% to penalise non-compliance with a system imposing penalties based on specific behaviours and factors. The onus to prove the grounds for the imposition of additional tax is placed on SARS.

Public comments must be submitted to SARS before the deadline of 26 February 2010.

Leon Rood, Senior Associate, Tax

TAX NOTE: ENVIRONMENTAL LEVIES TO BE IMPOSED

An amendment to schedule 1 part 3 of the Customs and Excise Act 91 of 1964 (the Customs and Excise Act) sees the insertion of section C which provides for an environmental levy to be imposed on 'electric filament bulbs' listed under tariff headings 8539.21, 8539.22, 8539.29, at a rate of R3.00 (three rand) per bulb. The levy shall be applicable from 1 November 2009, and is imposed on both locally manufactured and imported items. All duties payable in terms of section C is in addition to any other duties or levies imposed by schedule 1.

Amendments to rules 54F.01 to 54F.11 of the Rules to the Customs and Excise Act have been effected and are now applicable to the items listed under section C of schedule 3.

The new draft Customs Control Bill and the draft Customs Duty Bill have been released for public comment as part of the wider redraft of the current Customs and Excise Act. Commentary on the respective bills must be made before 26 February 2010.

Freek van Rooyen, Director, Tax
Mohamed Hassam, Candidate Attorney, Tax

CHANGES TO THE PAYE PROCESS FOR EMPLOYERS IN 2010

During July/August of this year, SARS published a draft document on proposed PAYE amendments for 2010, inviting employers and practitioners to comment on the proposals. SARS also engaged with large employers and payroll organisations before releasing the final PAYE 2010 Specification document on 1 September 2009.

The document details a number of changes which will impact mainly employers and tax practitioners when the 2010 PAYE reconciliation process begins in April next year. These changes continue to build on the modernisation programme which SARS launched two years ago in order to transform the income tax process from being largely paper-based and labour-intensive to becoming increasingly automated and electronic.

From April next year, the IRP5 form will be changing. It will be mandatory for employers to submit certain demographic information on their employees to SARS via their payroll system. This includes:

- Addresses in a defined format;
- Compulsory banking details;
- Compulsory tax reference number; and
- Compulsory ID number for SA citizens, and passport number in other cases.

Payroll systems will therefore have to be updated in the next few months to include these demographic fields. SARS will empower employers who use e@syFile to register their employees if they don't have a tax reference number. If the employee does provide a tax reference number, the employer can then verify this with SARS.

Additional changes to the PAYE process next year include the rationalisation of existing PAYE, SDL and UIF codes to simplify the reconciliation process.

Mariette Cruywagen, Senior Associate, Tax

OPEN SESAME - THE RELAXATION OF SOUTH AFRICA'S EXCHANGE CONTROL

The uncertainty regarding the way in which the new Finance Minister would go with exchange control has finally ended when the South African Medium Term Budget was tabled in Parliament on 27 October 2009. The message is clear that government has finally fulfilled its long-held promise of relaxing the strict exchange control provisions which for many had been the cause of countless headaches.

The foreign capital allowance for South African resident individuals has been increased to R4 million from its previous limit of R2 million. This allowance had last been adjusted in 2006. Families would now be entitled to remit R8 million offshore. Furthermore, the annual discretionary allowance has been increased to R750,000 per annum from the previous limit of R500,000 per annum.

Another significant change has been the increase in the limit, below which Authorised Dealers (banks) may approve applications for outward foreign direct investments without reference to the South African Reserve Bank. This limit has been increased from R50 million to R500 million. Other big news is that the 180-day rule is set to be scrapped. This rule had given exporters 180 days from the date of receipt to repatriate their foreign exchange to South Africa.

Also, South Africans may now invest in Southern African Development Community countries through offshore intermediary entities without the structure being regarded as a loop structure. A further change is that the 3:1 restriction on local borrowings by non-residents is abolished. However, the 1:1 restriction remains in respect of residential properties.

More reforms are set to be announced in the Budget Speech of February 2010.

Afton Appollis, Associate, Tax

PAPA, DON'T LEAVE ME A LOAN

"Papa was a rolling stone.
Wherever he laid his hat was his home.
And when he died all he left us was alone."

You may recognise these lyrics from a song by "The Temptations". Fortunately, Papa didn't leave his son a loan. If this was the case, and Papa happened to be resident in South Africa, his son may have had a capital gains tax (CGT) liability on the death of his impecunious and itinerant father.

If a creditor reduces or discharges a debt for a consideration that is less than the amount of face value of the debt, then the debtor must account for CGT on the amount reduced or discharged (paragraph 12(5) of the Eighth Schedule to the Income Tax Act, 1962 (the Act)).

Often when people die they hold debts owing to them by their heirs. For example, where a mother may have lent an amount of money to her daughter to start a business, or a farmer may have sold his farm to his family trust on a loan account.

At the outset it is important to know that the debt is an asset in the estate of the deceased and the executor must accordingly account for the debt in the liquidation and distribution account. The debt also forms part of the estate for purposes of the calculation of estate duty.

From a CGT perspective, the manner in which a creditor deals in her will with a debt owed to her by an heir is of great importance as this may have calamitous consequences for the heir.

In ITC 1793 67 SATC 256, the testatrix had during her lifetime sold shares to a family trust on loan account. In her will she stated the following (my translation):

"I bequeath my estate as follows...Any amount which may be owing to me by [the trust] under the loan account, to [the trust]."

The High Court analysed the salient provisions of the Act and, in particular, the provisions of paragraph 12(5) of the Eighth Schedule to the Act. The Court held that the provisions do apply and that the trust was liable for CGT.

The High Court found that the drawing of the will and its coming into operation on the date of the death amounted to a discharge of the debt.

In an unreported decision of the Kimberley Tax Court (the Court), the facts were that the deceased had bequeathed the residue of her estate to a trust. At the time of her death, the trust owed the deceased an amount on loan account.

The South African Revenue Service (SARS) contended that, in terms of her will, the debt owed by the trust had been discharged for no consideration as contemplated in paragraph 12(5) of the Eighth Schedule to the Act.

The Court dismissed the contention and held that the loan account formed part of the residue of the deceased's estate. It was not her intention to bequeath the loan account as a legacy or dispose of the loan account for no consideration.

The Court then considered an interesting question, namely, whether the method employed by the executor in winding up the estate brought the award within the realm of paragraph 12(5) of the Eighth Schedule to the Act. The executor had not recovered the loan account from the trust but had simply awarded the loan account to the trust in the liquidation and distribution account.

The Court held that the determining factor is the intention of the creditor, and not the manner in which the estate is wound up.

Accordingly, the Court found that the loan account had not been reduced or discharged for no consideration and that the trust was not liable for CGT.

Some commentators have - in my opinion, rightly - criticised the decisions (see for instance Barry Ger's article in "De Rebus" No 488 July 2009 at page 45) while others have offered innovative suggestions for avoiding the problem (see for instance Leon Rood's article in "FinWeek" of 23 July 2009 at page 43).

My view is that testators who have loan accounts owing to them should say something along the following lines in their wills:

"I record that the Temptations Trust is indebted to me on loan account in the amount of R100,000.

I hereby direct that on my death my executor must demand repayment of the loan account from the Temptations Trust.

I hereby bequeath an amount of money equal to the amount owing to me under the loan account, to the Temptations Trust.

I hereby direct that my executor shall be entitled to apply set-off in relation to the amount due under the loan account and the amount under the bequest."

If this route is followed, on the death of the testator, the executor would need to show the loan account as an asset in the liquidation account, and show the bequest as an asset in the distribution account. However, no funds would flow as the executor would apply set-off.

Nevertheless, there would be no reduction or discharge of the loan account as it would have been settled in full.

As Leon Rood points out in his article "Tax Administration Bill" earlier in this alert, SARS is no doubt keeping its eyes open for schemes avoiding the CGT. But the methodology suggested above does not constitute avoidance and was in fact accepted by SARS in its submissions in the Kimberley Tax Court case.

Whatever the position, my advice is: Papas - and Mammas - don't leave your heirs a loan unless you've taken advice.

Ben Strauss, Director, Corporate and Commercial

You are receiving this communication because you are a valued client or friend of Cliffe Dekker Hofmeyr. To unsubscribe from this mailing list, please send an email to marketing@dlacdh.com with 'Tax Alert Unsubscribe' in the subject line. Or contact us if you have received this bulletin via a third party and wish to be added to our mailing list.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

DLA CLIFFE DEKKER HOFMEYR

CONTACT US

For advice please contact any member of our Tax team listed below.

Justin Liebenberg
Director
Regional Practice Head: Tax
Johannesburg
T +27 (0)11 290 6514
E justin.liebenberg@dlacdh.com

Freek van Rooyen
Director
Johannesburg
T +27 (0)11 286 1175
E freek.vanrooyen@dlacdh.com

Mariëtte Cruywagen
Senior Associate
Cape Town
T +27 (0)21 481 6328
E mariette.cruywagen@dlacdh.com

Emil Brincker
Director
Johannesburg
T +27 (0)11 290 7135
E emil.brincker@dlacdh.com

Ide Louw
Senior Associate
Cape Town
T +27 (0)21 481 6336
E ide.louw@dlacdh.com

Ruaan van Eeden
Senior Associate
Johannesburg
T +27 (0)11 290 7139
E ruaan.vaneeden@dlacdh.com

Natalie Napier
Director
Johannesburg
T +27 (0)11 290 7137
E natalie.napier@dlacdh.com

Leon Rood
Senior Associate
Johannesburg
T +27 (0)11 286 1285
E leon.rood@dlacdh.com

Afton Appollis
Associate
Cape Town
T +27 (0)21 481 6383
E afton.appollis@dlacdh.com

JOHANNESBURG

6 Sandown Valley Crescent
Sandown
Sandton 2196
Private Bag X40
Benmore 2010
South Africa
Dx 154 Randburg
T +27 (0)11 286 1100
F +27 (0)11 286 1264
E jhb@dlacdh.com

1 Protea Place
Sandown
Sandton 2196
Private Bag X7
Benmore 2010
South Africa
Dx 42 Johannesburg
T +27 (0)11 290 7000
F +27 (0)11 290 7300
E jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street
Cape Town 8001
PO Box 695
Cape Town 8000
South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300
F +27 (0)21 481 6388
E ctn@dlacdh.com

5th floor Protea Place
Protea Road
Claremont 7708
PO Box 23110
Claremont 7735
South Africa
Dx 5 Cape Town
T +27 (0)21 683 2621
F +27 (0)21 671 9740
E ctn@dlacdh.com

©2009. For permission to reproduce a publication, please contact our marketing team on marketing@dlacdh.com