DLA CLIFFE DEKKER HOFMEYR

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TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS ALERT

A CLOSER LOOK AT TAX-BREAKS THAT MAY IMPACT SOFTWARE DEVELOPERS

Recent amendments to s11D of the Income Tax Act 58 of 1962 (Act) signify wholesale changes in the way research and development (R&D) activities will be interpreted going forward. Until 31 March 2012, taxpayers are allowed to claim a deduction of 150% for qualifying R&D costs relating to the discovery of novel, practical and non-obvious information, subject to certain compliance requirements being met. With effect from 1 April 2012 (or such later date as may be published in a Government Gazette) taxpayers will only be able to claim a 100% deduction for R&D activities undertaken, unless the taxpayer applies to and receives approval from the Minister of Science and Technology before the R&D is undertaken, in order to qualify for an additional 50% deduction.

In light of these amendments and those to the formalised definition of R&D activities, software developers will have to carefully consider whether their development of computer programmes fall within the revised definition.

Section 11D of the Act defines the type of activities that will fall within the ambit of "research and development" as, among others, the "systematic, investigative or systematic experimental activities of which the result is uncertain" for developing computer programmes or knowledge essential to use of computer programmes.

Software developers who wish to rely on the deduction under s11D of the Act will have to ensure that the computer programme developed is innovative. The criteria to assess whether any software development undertaken is sufficiently innovative will be a factual question based on the functionality, operability, improvement in performance, quality and reliability of such software.

The amendment to s11D of the Act allows a software developer to get an initial tax deduction or allowance of 100% for costs incurred in developing innovative computer programmes or updating existing computer programmes, provided that the computer programme developed is a separately identifiable R&D activity undertaken in South Africa and that the costs were incurred in the production of income and in the carrying on of any trade.

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In order to qualify for the additional 50% deduction, a software developer (that is a company) must receive approval from the Minister of Science and Technology and incur the expenditure relating to R&D on or after the date of receipt of the application by the Department of Science and Technology.

It will also be necessary for the Department of Science and Technology to approve any deduction for expenditure that a taxpayer incurs to fund R&D activities, including the commissioning of software development. All entities that are funding innovative software development must consider submitting an application to the Department of Science and Technology for this additional 50% deduction. Although the amendments to s11D of the Act are welcome, they appear to have placed an additional compliance burden on taxpayers wishing to claim a deduction. The determination as to whether an application must be made for the additional 50% deduction will have to be weighed up against the potential costs involved.

Ruaan van Eeden (Director, Tax practice), Tayyibah Suliman and Mukelo Ngobese

THE GENERAL INTELLIGENCE LAWS AMENDMENT BILL: BIG "GILA" IS WATCHING

The General Intelligence Laws Amendment Bill (GILA), published in the Government Gazette late in 2011, has raised a few eyebrows as the Department of State Security tries to consolidate the various State security structures and amalgamate various State security agencies into a monolithic regime.

The restructuring of National Intelligence agencies has played a headline role in South Africa, culminating in the Presidential reform that abolished the National Intelligence Agency and the South African Secret Service, and subsequently replaced these agencies with a government departmental structure dubbed as the State Security Agency (SSA). It is important to remember that the post-apartheid intelligence structure focused on balancing power between two bodies with the aim of allaying fears of a single intelligence unit that could compromise an individual's constitutional right to privacy.

The SSA then ran various fragmented structures of national security service agencies and bodies and the efficiency levels of these bodies were ultimately negatively affected due to duplication in various other constitutive pieces of legislation.

GILA now seeks to amend the National Strategic Intelligence Act 39 of 1994 (NSIA), to enable any State department to request the South African National Academy of Intelligence to establish a 'vetting field work unit' to assist National Intelligence structures such as the South African Police Service and National Defence Force in gathering information. There have been concerns expressed that these provisions can be used to appoint the 'vetting field work unit' such as the National Communications Centre (NCC). The NCC has notoriously operated as the South African unregulated eyes and ears with the extensive technical capabilities in intercepting and analysing large volumes voice and internet traffic, including individual phones and emails.

Also of concern is the proposed amendment to the NSIA, which provides that the collection and analysis is performed in 'accordance with the intelligence priorities of the Republic'. The broad nature of this provision may be subject to abuse similar to the abuses in the previous political dispensation, where intelligence 'priorities' were often classified as a broad justification for ulterior motives.

GILA also amends the Intelligence Services Act 65 of 2002 that carves out the duties and functions of the South African National Academy of Intelligence. This agency is required to collect and analyse so-called 'foreign signals intelligence' subject to further regulations by the relevant Minister.

The wide umbrella term of what constitutes 'foreign signal intelligence' includes the interception of electromagnetic, acoustic and other signals, as well as cross-communication emanating from outside South Africa. This would include the interception of modern social networking sites such as Facebook and Twitter. The most significant concern when GILA comes into force is whether it will ultimately be possible to intercept 'foreign signal intelligence' without a warrant obtained from a court. If these communications are monitored by vetting field work units with the technological capability like the NCC without any due process being followed to obtain the necessary warrants, serious consideration will have to be given as to whether GILA can be considered to justifiably limit an individual's constitutional right to privacy.

Tayyibah Suliman and Kellie-Kirsty Hennessy

TELECOMMUNICATIONS AND BROADCASTING UPDATE

December 2011 was a remarkably busy end to the year for telecommunications and broadcasting in 2011. It has been an equally busy start to 2012.

Both the Minister of Communications and the Independent Communications Authority of South Africa (ICASA) have gazetted a number of notices in recent months. Proposed amendments to legislation and invitations to apply for new licences have the potential to change the industry landscape.

High Demand Spectrum

Most noteworthy of the notices published are those published by both the Minister and ICASA on high demand radio frequency spectrum. ICASA published a notice in December 2011 calling for representations on its draft spectrum assignment plan for the combined licensing of the 800MHz and 2.6 GHz bands. Comments were due on 29 February 2012.

Prior to making submissions on ICASA's draft spectrum assignment plan, many operators questioned the need to respond to ICASA's notice as the Minister was still consulting on high demand spectrum having published a further consultation document on the matter on 1 February 2012.

ICASA did not acquiesce to calls from the industry to postpone its consultation process on high demand spectrum and 20 operators filed substantial representations on the proposed band plan. Most of these representations, particularly those from the major mobile cellular operators, were harshly critical of ICASA's band plan, which is seen by the operators as being arbitrary and a recipe for failure.

Much to the frustration and ire of the industry, ICASA, on 5 March 2011, announced that it was postponing licensing until "further notice" to ensure that the Minister's policy direction on high-demand spectrum, once finalised, could be taken into consideration. Operators had until last Wednesday to file submissions on ICASA's proposed frequency allocation and allocation plan.

Budget 2012: estimates of national expenditure

According to the Budget 2012, the Minister has now set March 2013 as a deadline for the tabling of another Electronic Communications Act Amendment Bill. Apparently the proposed amendments will clarify the role and strengthen the powers of ICASA, improve turn-around times, deal with policy on ownership and control, revise the role of the Minister and ICASA in respect of spectrum management, refine licensing issues and improve competition provisions. The Bill is to be released for public comment during the first quarter of 2012.

Also to be tabled in parliament by March 2013 are amendments to the Independent Communications Authority of South Africa Act and the Post and Telecommunications-Related Matters Amendment Bill.

Like the Electronic Communications Act Amendment Bill introduced in November 2011 and withdrawn shortly thereafter, the 2010 Independent Communications Authority of South Africa Amendment Bill suffered from a number of proposed provisions that would constrain the independence of the regulator. Hopefully the new Bills will not seek to infringe on ICASA's constitutionally protected independence.

The 2012 budget documents have also set March 2012 as the deadline by which a draft broadcasting policy should be available for public comment.

End User Subscriber Service Charter Reporting Format

In order to give context to the reporting requirements under the Minimum Standards for End-User and Subscriber Service Charters Regulations published in 2009, ICASA has now prescribed the format to be used when reporting.

All compliance reports due after 30 January 2012 must now be submitted in the new format. Compliance reports are due every six months calculated from the first month after financial year end.

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Numbering Regulations

The current Numbering Plan Regulations were prescribed in 2005 in terms of the Telecommunications Act shortly before the Electronic Communications Act came into effect. Consequently, the regulations which refer to licensing categories that no longer exist, are at odds with the Electronic Communications Act.

In 2010, ICASA published a draft numbering plan and public hearings were held in August of 2010. Since then no progress has been made with the numbering plan. Now it seems that moves are afoot to finalise the numbering plan.

On 2 March 2011, ICASA published additional clauses to be included in the proposed new Numbering Plan Regulations which provide that within two years of the regulations coming into force all numbers used for machine related services must be migrated to machine related numbers in defined dedicated number ranges.

Comments are due on 18 April 2012.

A Review of the Broadcasting Regulatory Framework

The switch-over of broadcasting from analogue to digital terrestrial television is presently scheduled to take place in 2013. As a signatory to the International Telecommunication Union, South Africa has agreed to migrate all terrestrial television services to digital multiplexes in time for the analogue switch-off date of 1 June 2015. After this date, countries' television signals will not be protected against interference.

ICASA has identified the need to review the current analogue technology-based broadcasting regulatory framework and has therefore published an Issues Paper on the review of the broadcasting regulatory framework. The review and its outcome will affect all licensed broadcasting services in South Africa. The aim of the Issues Paper is to answer identified questions and ensure the introduction of a new regulatory framework that supports the development of broadcasting services in the digital area.

The Issues Paper is open to public comment until 16 March 2012.

Invitations to apply for Broadcasting service licences

ICASA has invited applications for a number of broadcasting licences:

- Applications for commercial free to air sound broadcasting licences the geographical markets of the Eastern Cape, Northern Cape and Free State Provinces (secondary markets) close 27 June 2012.
- Applications for the provision of individual commercial free to air sound broadcasting service licences for the geographic markets of Gauteng and the metropolitan areas of Cape Town and Durban (primary markets) close on 4 July 2012.
- Applications for individual commercial subscription broadcasting licences. The invitation to apply does not specify how many licences are to be awarded. Applications close on 11 July 2012.

Kathleen Rice and Kellie-Kirsty Hennessy

WHEN ELEPHANTS FIGHT…

Smartphone wars: Apple vs Nokia, Apple vs HTC, Microsoft vs Motorola, NTP vs Apple, Google, HTC, Microsoft and Motorola.

It seems that there is just no end to the patent litigation between ICT industry giants – and for good reason.

Not only has patent litigation become an effective means of raising revenue for both patent trolls and legitimate businesses but it has also become an effective means of trying to squeeze competitors.

Recently, the Financial Times reports a patent infringement claim between two industry giants in another area: social networking. Yahoo is threatening a patent infringement claim against Facebook in respect of between 10 and 20 patents. The patents are said to cover social networking, advertising and personalisation.

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Yahoo's 2004 claim against Google netted Yahoo $230 million worth of Google shares in the run-up to the Google IPO. One might be forgiven for doubting that the timing of Yahoo's claim against Facebook is simply coincidental in light of Facebook's impending IPO. One might also be forgiven for taking bets that Yahoo is going to receive substantial license fees in some form or another.

Facebook is apparently somewhat thin on patents, holding only some 56 patents and having some 410 patents pending. By comparison, in the smart phone context, the telephony component alone is estimated to be covered by in excess of 7000 patents. The probabilities suggest a multiple of that number by way of cross licenses.

The major friction point in social networking is going to be between Google and Facebook as the former leverages its not inconsiderable muscle to enter the field currently dominated by Facebook. It requires no soothsayer to predict future patent litigation between the two social networking giants.

While clashes of the Titans are likely to remain what they are, patent infringement claims will also inevitably move down the value chain and across jurisdictions in an increasingly connected world. A colleague in the United States recently pointed out that legal costs in respect of bringing or defending a patent infringement claim start at around $10 million and escalate from there. Not an attractive situation for a prospective defendant. IP rights management is almost certainly going to become an increasingly heavy burden on businesses.

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