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TAX & EXCHANGE CONTROL ALERT

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WIN FOR THE EMPLOYER: JUDGMENT ON THE EMPLOYMENT TAX INCENTIVE ACT

In the recent case of *ABC (Pty) Ltd v The Commissioner for the South African Revenue Service* (Case No 14426) (as yet unreported), the Tax Court was required to decide whether ABC (Pty) Ltd (Taxpayer) could claim the employment tax incentive (ETI) in terms of the Employment Tax Incentive Act, No 26 of 2013 (Act) in respect of certain periods. In deciding the matter, the court not only considered the provisions of the Act, but also considered and applied various principles of South African labour law.

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After the Taxpayer raised an objection, SARS allowed the ETI claim only in respect of those employees who were members of the Union.

Facts

The Taxpayer conducted its business in the wholesale and retail industry, to which industry a sectoral determination (SD) was applicable. The SD prescribed the minimum wages for employees in the sector and was published in January of each year. The terms of the SD were applicable from 1 February until 31 January of the next year.

On 24 August 2012, the Taxpayer concluded a three-year collective agreement with a trade union (Union) representing approximately 30% of the Taxpayer's employees. In terms of the agreement, negotiated wage increases were paid effective from 1 May of each year. The agreement also provided that those amounts due to employees in terms of the SD wage adjustments would be paid in a lump sum in arrears on 1 May of every year. The Taxpayer treated unionised and non-unionised employees alike and paid all annual wage increases with effect from 1 May of each year, in addition to the backpay in terms of the SD (backdated to 1 February of that year).

During 2014 and 2015, the Taxpayer sought to claim the ETI in respect of qualifying employees. However, the Commissioner for the South African Revenue Service (SARS) disallowed the ETI claims for the months February, March and April in the relevant years on the basis that the qualifying employees were paid less than the minimum amount stipulated in the SD during those months. After the Taxpayer raised an objection, SARS allowed the ETI claim only in respect of those employees who were members of the Union. In addition, SARS disallowed the ETI claims for those employees who had taken unpaid leave, which claims had been based on the pro-rata wages paid to the employees for the days worked.

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SARS accepted that the wage increase prescribed by the SD could be paid retrospectively to members of the Union by virtue of the collective agreement.

Judgment

The Tax Court explained that the ETI is a tax incentive provided to employers in order to encourage job creation for employees younger than 30 years of age. The incentive is received by the employer by withholding a portion of the employees' tax payable by the employer or being reimbursed an amount as set out in s10(2) of the Act. In terms of s4(1) of the Act, an employer may not claim the ETI in respect of an employee for a specific month if the wage paid to that employee in respect of that month is less than the amount payable by virtue of a wage regulating measure applicable to that employer.

The Tax Court held that both the SD and the collective agreement entered into between the Taxpayer and the Union are wage regulating measures. As the collective agreement was not concluded in a bargaining council, it could not be formally extended to non-parties to the bargaining council in terms of s32 of the Labour Relations Act 66 of 1995 (LRA). However, the Tax Court found that there is no provision that prohibits the extension of such an agreement to non-unionised employees where such extension is voluntary.

The Taxpayer contended that it had elected to extend the agreement (without any objection by the employees) and treat all employees in a similar fashion in order to avoid labour relations chaos and to achieve commercial efficiency. The Tax Court accepted this contention and agreed that different treatment among unionised and non-unionised employees would create a risk of workplace conflict.

During the proceedings, SARS accepted that the wage increase prescribed by the SD could be paid retrospectively to members of the Union by virtue of the collective agreement. The Tax Court also stated that although the Act does not make provision for a retrospective application of the payment of a minimum wage, it is apparent that retrospective payment of wages was expressly contemplated by the Act, as an accrued right to remuneration is a right to remuneration which is not paid but is payable.

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The Tax Court also held that the ETI is applicable to employees who have not worked a full calendar month where their remuneration, had they worked for a full month, fell within the prescribed minimum wage threshold.

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Furthermore, the Tax Court held that, given the voluntary extension of the collective agreement by the Taxpayer and SARS's acknowledgment that the ETI may be determined retrospectively, the Taxpayer was entitled to claim the ETI in respect of all employees for the months of February, March and April 2014 and 2015.

Regarding the ETI claims for employees who had taken unpaid leave, the Tax Court also held that the ETI is applicable to employees who have not worked a full calendar month where their remuneration, had they worked for a full month, fell within the prescribed minimum wage threshold. The Tax Court held that from the definition of "monthly remuneration" in s1(1) of the Act and the provisions of s7(5) of the Act, it is apparent that the Act expressly contemplates that an employer may employ a qualifying employee for part of a month and that the calculation of an employee's notional monthly remuneration, had he or she worked a full month, is necessary to determine whether the employee is a "qualifying employee in respect of a month" in terms of s2(2) of the Act. In such a case, the ETI is claimed on a pro-rata basis of the days actually worked.

The Tax Court therefore upheld the appeal and set aside the additional assessments issued by SARS against the Taxpayer for the January 2014 to February 2015 periods, as well as the penalties and interest that were imposed.

Louis Botha and Louise Kotze

Who's Who Legal

Emil Brincker has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory & Controversy for 2018.

Mark Linington has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory for 2018.

Ludwig Smith has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory for 2018.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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