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TAX & EXCHANGE CONTROL **ALERT**

IN THIS **ISSUE**

21-day lockdown to flatten the curve and impact of COVID-19 – Tax relief measures announced

On Monday 23 March 2020, President Cyril Ramaphosa (President), following other countries around the world took the drastic step of placing South Africa in lockdown for a period of 21 days as from midnight, Thursday 26 March 2020. This is in order to try and contain the spread of the Coronavirus (COVID-19).

COVID-19 VAT relief measures: Extension of time to export goods

On 26 March 2020, the South African Revenue Service (SARS) issued Binding General Ruling 52 (BGR 52) in which it provides some relief to exporters who are negatively impacted by the COVID-19 pandemic and the measures implemented by President Ramaphosa in this regard.

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21-day lockdown to flatten the curve and impact of COVID-19 – Tax relief measures announced

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On Monday 23 March 2020, President Cyril Ramaphosa (President), following other countries around the world took the drastic step of placing South Africa in lockdown for a period of 21 days as from midnight, Thursday 26 March 2020. This is in order to try and contain the spread of the Coronavirus (COVID-19). The lockdown is likely to have a debilitating effect on most sectors of the economy, including most businesses and their employees.

To alleviate the impact of the lockdown on businesses, the President announced the introduction of a number of economic measures, including tax relief measures. In our Tax and Exchange Control Alert of 20 March 2020, we discussed how COVID-19 may affect the tax obligations of South African taxpayers, specifically from a PAYE and VAT perspective. In this Alert, we discuss the tax measures that will be introduced in order to protect businesses and vulnerable employees during the lockdown and after it has been lifted. While the South African government has published a raft of regulations regarding the rules applicable during the lockdown period to various industries, at the time of writing, the regulations or official notices setting out the tax relief measures had not yet been published.

Our article is therefore based on the President's announcement regarding tax relief measures and on the details that may be contained in the regulations or official notices to be published, considering the provisions in our tax legislation, mainly the Income Tax Act 58 of 1962 (Act).

Potential beneficiaries of the proposed tax relief measures announced by the President

The lockdown announced by the President, will no doubt have an impact on the ability of taxpayers to comply with their tax obligations. In view of the difficulties that they will face, the President announced that tax compliant businesses with a turnover of less than R50 million will be allowed to *"…delay 20% of their pay-as-you-earn liabilities over the next four months and a portion of their provisional corporate income tax payments without penalties or interest over the next six months."* As the announcement does not make mention of businesses trading as sole proprietorships who are also provisional taxpayers, it is not clear whether only companies will benefit from this measure. Hopefully some clarity will be provided when the relevant regulations or notices are published.

Aside from the question of whether only companies will benefit from the relief proposed or whether sole proprietorships who are also provisional taxpayers will be included, there is also the question as to exactly which companies will benefit. The announcement states that the proposed measures will benefit "*tax compliant businesses with a turnover of less than R50 million…*" The phrase "*turnover*", is generally not used in the Act. Where the Act differentiates between taxpayers, including companies, it generally refers to the "*gross income*" of such entities to determine whether they fall into a

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21-day lockdown to flatten the curve and impact of COVID-19 – Tax relief measures announced*...continued*

In terms of section 12E(4), one of the requirements for a business to be a small business corporation, as defined, is that its gross income for a year of assessment must not exceed an amount equal to R20 million.

certain category or not. For example, the Act defines "*small medium or micro enterprises (SMMEs)*" as a person that qualifies as:

- a micro business as defined in paragraph 1 of the Sixth Schedule to the Act; or
- any person that is a small business corporation as defined in section 12E(4) of the Act.

In terms of section 12E(4), one of the requirements for a business to be a small business corporation, as defined, is that its gross income for a year of assessment must not exceed an amount equal to R20 million. In terms of the Sixth Schedule to the Act, a micro business is defined in paragraph 1 of the Sixth Schedule to the Act as a natural person or company with a "*qualifying turnover*" for the year of assessment that does not exceed R1 million. "*Qualifying turnover*" means the total receipts from carrying on business activities, excluding any amount of a capital nature and any amount exempt from normal tax in terms section 10(1)(zK) or section 12P of the Act. It is possible that the definition of "*qualifying turnover*" in the Sixth Schedule will be used, but it remains to be seen.

Finally, it is proposed that "*tax compliant*" business will benefit. Who will be a "*tax compliant*" business? It is possible that this will be determined with reference to section 256 of the Tax Administration Act 28 of 2011, dealing with the tax compliance status (TCS) of taxpayers.

Section 256 of the TAA provides that the TCS of a taxpayer may only be indicated as compliant if the taxpayer:

- is registered for tax as required by the TAA;
- does not have any outstanding tax debt, excluding a tax debt as contemplated in section 167 (a debt being paid in instalments) or section 204 (a compromised tax debt) or a debt that has been suspended pending an objection or appeal or a debt that may not be recovered during the period in which a taxpayer has requested a suspension of a tax debt or a debt that does not exceed R100 or any higher amount as the Commissioner may determine;
- does not have any outstanding tax returns, unless an arrangement with SARS has been made for the submission of the return.

The TCS function on eFiling makes provision for the confirmation of one's TCS for different purposes. It is possible that the taxpayer needs to be have a confirmed TCS reflecting it being in "*good standing*".

Relief from provisional tax

Companies will benefit differently, depending on when their respective years of assessment come to an end. In terms of the Act provisional taxpayers, including companies, must make provisional tax payments twice a year, in 6-month intervals. For instance, a company whose tax year of assessment ends on 31 March, must pay provisional tax before the end of

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The tax measures announced by the President will hopefully be effective in assisting businesses and employees that may be in distress as a result of COVID-19 and the effect of the lockdown.

March and September annually. Assuming that the tax relief measure applies for the next six months as proposed, all companies, irrespective of the end of their year of assessment, will benefit from the measure in respect of at least one of their provisional tax payments. As a result, the measure will potentially provide relief from underestimation penalties and late payment penalties, that may be imposed in terms of the Fourth Schedule to the ITA. It will also likely provide relief from the imposition of interest in terms of section 89*quat* of the Act.

Relief from Pay-as-you-earn (PAYE)

As stated above, the President announced that tax compliant businesses with a turnover of less than R50 Million will be allowed to delay 20% of their employees' tax obligation over the next four months without penalties or interest. This would mean employers receiving relief from the late payment penalties for PAYE that may be imposed in terms of the Fourth Schedule to the Act read with the TAA, which we discussed in our Alert of 20 March 2020 in greater detail. It is also likely that no interest will be imposed as a result of the 20% "*underpayment*", in terms of section 89*bis* of the Act read with the TAA, as discussed in greater detail, in our Alert of 20 March 2020.

Employment tax incentive

The employment tax incentive (ETI) is an incentive introduced by the Employment Tax Incentive Act 26 of 2013 (ETI Act), aimed at encouraging employers to employ young employees between the ages of 18 and 29, as well as employees of any age in special economic zones and industries indicated by the Minister of Finance. The benefit for employers is that the incentive enables eligible employers to reduce the amount of employees' tax due by them by the incentive amount claimed while leaving the wage received by the employee unaffected.

The President announced two measures in relation to the ETI. Firstly, a tax subsidy of up to R500 per month for the next four months will be provided for private sector employees earning below R6,500 under the ETI. Secondly, SARS will be accelerating the payment of ETI reimbursements from twice a year to monthly for compliant employers.

Observation

The tax measures announced by the President will hopefully be effective in assisting businesses and employees that may be in distress as a result of COVID-19 and the effect of the lockdown. Hopefully, the regulations published will provide clarity on exactly which taxpayers will qualify for the relief provided and the extent of the relief.

CDH will keep our readers informed of any developments in this regard.

Aubrey Mazibuko and Louis Botha

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COVID-19 VAT relief measures: Extension of time to export goods

BGR 52 (26 March 2020) extends the time period within which exporters are required to export goods from South Africa to quality for VAT at the zero rate.

On 26 March 2020, the South African Revenue Service (SARS) issued Binding General Ruling 52 (BGR 52) in which it provides some relief to exporters who are negatively impacted by the COVID-19 pandemic and the measures implemented by President Ramaphosa in this regard. BGR 52 extends the time period within which exporters are required to export goods from South Africa to qualify for VAT at the rate of zero per cent.

Where a vendor exports movable goods from South Africa, the exports qualify for VAT at the rate of zero per cent. The Value Added Tax Act 89 of 1991 (VAT Act) draws a distinction between direct exports and indirect exports.

Direct exports are exports where the supplying vendor consigns or delivers the goods at an address in an export country and the supplying vendor is responsible for the transportation of the goods to the foreign destination. Indirect exports are exports where the foreign purchaser takes possession of the goods in South Africa, and the foreign purchaser exports the goods from South Africa to a foreign destination.

The application of the zero rate to the exportation of goods on a direct or indirect basis is, in terms of the provisions of section 11(3) of the VAT Act, subject to the vendor obtaining and retaining the documentary proof which is acceptable to the Commissioner. The Commissioner therefore has a discretion to determine what documentary proof he would regard as sufficient proof to substantiate the vendor's entitlement to apply the zero rate.

With regard to direct exports, the Commissioner lists the documentary proof that must be obtained and retained by the vendor to apply the zero rate in Interpretation Note 30 (IN 30), the third issue of which was published on 5 May 2014. However, the Commissioner did not only list the required documentary proof that must be obtained, but also stipulated that it is a requirement to export the goods within 90 days (subject to certain exceptions) reckoned from the date an invoice for the goods is issued, or when any payment for the supply is received, whichever date is earlier.

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IN 30 states that *"circumstances beyond the vendor's control"* would include a natural or human-made disaster, a serious illness of or accident concerning the vendor or in the case of a juristic person, a serious illness of or accident concerning the person responsible for arranging the export.

IN 30 further stipulates that the Commissioner may extend the period if the goods are not exported within 90 days due to circumstances beyond the supplying vendor's control. IN 30 states that *"circumstances beyond the vendor's control"* would include a natural or human-made disaster, a serious illness of or accident concerning the vendor or in the case of a juristic person, a serious illness of or accident concerning the person responsible for arranging the export.

Indirect exports are governed by the regulations published in Government Notice R.316 in Government Gazette 3759 of 2 May 2014 (Export Regulations). Part One of the Export Regulations provide for the foreign purchaser to claim a refund of VAT paid on the goods acquired for export from the VAT Refund Administrator (VRA) where the supplier levied VAT at the standard rate. Part Two provides for the vendor to zero rate the supply of the goods which are exported by ship or air, and in specific circumstances by road or rail. The Export Regulations prescribe the documents which must be presented to the VRA in the case of a refund claim under Part One, and the documents which must be obtained and retained by the supplying vendor where the supplying vendor opted to zero rate the supply under Part Two. The Export Regulations also require that the goods must be exported within 90 days from the date of the tax invoice in the case of a refund claim, and the refund claim must be submitted to the VRA within 90 days from the date of export. Where the supplying vendor zero rated the supply under Part Two, the goods must be exported within 90 days from the earlier date of the issue of an invoice or the time any payment of consideration is received by the vendor.

In both instances contemplated under the Export Regulations, the Commissioner may extend the 90-day period within which the goods must be exported if the delay is due to circumstances beyond the control of the foreign purchaser. The Export Regulations define the term *"circumstances beyond the control"* to include a natural or human-made disaster, a serious illness of or accident concerning the foreign purchaser or the person duly authorised to represent the foreign purchaser.

Exporters are likely to experience difficulty in meeting the prescribed time periods for exports in IN 30 and the Export Regulations as a result of the COVID-19 pandemic and the measures put in place by the President. BGR 52 stipulates that this situation is considered to be circumstances beyond the control of the vendor, qualifying purchaser, or the person duly authorised to represent the qualifying

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BGR 52 extends the prescribed time periods within which goods must be exported by three months.

purchaser, as contemplated in IN 30 and the Export Regulations respectively. BGR 52 accordingly extends the period within which the goods must be exported under direct and indirect exports by an additional three months. The period within which a refund claim must be submitted to the VRA under Part One of the Export Regulations, is also extended by an additional three months, to six months from the date of export.

BGR 52 only applies to supplies where the prescribed time periods in IN 30 and the Export Regulations have not yet been exceeded as at 26 March 2020.

In light thereof that the Commissioner considers the COVID-19 pandemic and the measures put in place by the President to be circumstances beyond the control of the vendor as contemplated in IN 30 and the Export Regulations respectively, one could argue that the same principles should equally apply to the application of sections 187(6), 187(7) and 218 of the Tax Administration Act 28 of 2011 (the TAA). Section 187(6) provides for a senior SARS official to direct that interest payable by a taxpayer as a result of circumstances beyond the taxpayer's control, is not payable by the taxpayer. Section 187(7) provides that such circumstances include a natural or human-made disaster, or a serious illness or accident. Section 218 of the TAA provides for a penalty to be remitted where a taxpayer was incapable of complying with its obligations due to, amongst others, a natural or human-made disaster, a serious illness or accident or any other circumstance of analogous seriousness.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 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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