DLA CLIFFE DEKKER HOFMEYR

10 FEBRUARY 2012

TAX
ALERT

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CLAIMING DEDUCTIONS AGAINST TRAVEL ALLOWANCES AND VEHICLE FRINGE BENEFITS

It's nearly the end of another individual tax year and it will soon be the start of 2012's filing season. The usual deduction suspects will be confronting taxpayers, such as medical aid (which is due for an overhaul), retirement annuities, pensions and travel allowance deductions. In 2012, a new member joins the vehicle deduction section in relation to company car fringe benefits.

This article focuses on deductions relating to travel allowances and company car fringe benefits and highlights certain aspects of deducibility of travel expenses and new challenges facing those with company cars. To recap, the taxation regime relating to travel allowances and company cars went through a significant overhaul phase which essentially sought to align the tax treatment of various vehicle benefits. Travel allowances took a particular blow over the last few years with the increased percentages subject to PAYE (currently 80%), introduction of compulsory logbooks and removal of the deemed kilometre system of claiming deductions. Company cars followed suit with an increase in the determined value upon which an employee suffers fringe benefit tax, the obligation to retain logbooks and requiring a deduction to be claimed on the employee's tax return to reduce the fringe benefit value.

The aforementioned changes to travel allowances and company cars effectively resulted in a larger upfront PAYE collection for SARS and delaying the deduction/relief process until such time that an individual tax return is submitted. The onus is ever more increasing on individuals to be on top of their game in making sure that SARS only receives what it is due by law, nothing more and nothing less. It is therefore important to relook and understand the deduction options available to employees in receipt of travel allowances and those receiving the use of company cars.

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Travel allowance deductions

An individual in receipt of a travel allowance (code 3701) or a reimbursement travel allowance (code 3702), essentially has a choice of two methods to claim a deduction against that travel allowance on assessment – actual cost method or deemed cost method. Both methods require a logbook detailing business distances travelled during the year of assessment with the actual cost method further requiring details of actual business expenditure satisfactory to SARS.

With regard to the deemed cost method, an individual may claim a deduction based on the annual gazetted rates per kilometre in respect of fixed, fuel and maintenance costs depending on the cost of his/her vehicle. Fuel and maintenance costs are self-explanatory, but what about fixed costs? Although not specifically spelled out in Government Gazette 34047 of 25 February 2011, that deals with the annual fixing of rates per kilometre for motor vehicles, fixed cost is intended to cover depreciation, interest, insurance, licence and registration fees. The cumulative rate per kilometre, taking into account fixed, fuel and maintenance costs would then be multiplied by actual business distance covered in calculating a travel deduction.

An individual may also claim on the actual cost method provided accurate records were kept of qualifying expenditure in addition to maintaining a logbook. The actual cost method contemplates costs relating to fuel and oil, maintenance and repairs, insurance and licence fees, wear and tear or lease payments and the mysterious "other" as a separate line item in the ITR12 individual tax return. Perhaps the gap to claim business related toll fees?

Company car deductions

In a departure from the tax treatment up to 28 February 2011, it is incumbent on an individual to claim a deduction for the 2012 year of assessment in order to reduce the taxable value attaching to the use of a company car. There are a few ways to go about reducing the fringe benefit value of a company car on assessment.

The first option is to use the actual business distance travelled as a basis – in this scenario the individual must maintain a logbook to substantiate business distances travelled, where a deduction will be allowed against the fringe benefit based on the ratio that business kilometres bears to total kilometres.

The second option available is where the individual bears the full cost of licencing, insurance and maintenance without any reimbursement by the employer, then a deduction will be allowed against the fringe benefit based on the ratio that business kilometres bears to total kilometres.

An individual may also reduce the fringe benefit value further (in addition to options one or two) where he/she bears the full cost of fuel without any reimbursement. The fuel cost reduction is based on the gazetted rate per kilometre as applicable to fuel from time to time. No deduction under the company car regime is however allowed based on the deemed fixed, maintenance and fuel cost scale as gazetted annually. It must be stressed that where the individual does not bear the full cost or is reimbursed any part of the abovementioned costs, then no reduction of the fringe benefit is available.

Individuals are therefore advised to tread carefully in claiming deductions in respect of travel allowances and company cars, especially the latter, as this may have its own unique practical difficulties on assessment.

Ruaan van Eeden

TANNENBAUM AGAIN: WHEN IS A TRUST MERELY SOMEONE'S "ALTER EGO"?

The concept of a "trust" originated in English law and has been called "*the most distinctive and creative achievement of English jurisprudence.*" Because of its flexibility, the trust is an oft-used tax and estate planning tool.

The English "trust" concept originated during the 12th and 13th century Crusades. English land ownership was still a feudal system. A Crusader leaving England would grant ownership of his estate to a trusted acquaintance with the understanding that his land would be restored to him on his return. The King's Courts regarded the Crusader's land as belonging to the trustee who had no obligation to return same. The returning Crusader could, however, petition the King who referred such disputes to the Lord Chancellor. The Lord Chancellor decided matters according to his conscience and so developed the notion of "equity." Over time, the Lord Chancellor's court continuously recognised the returning Crusaders' claims. The principle developed that the legal owner (the trustee) only held the land for the benefit of the original owner (the beneficiary) until his return, at which stage the trustee then had to return the land. The term "use of land" was coined and eventually developed into the trust concept.

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Fast-forward a couple of centuries.

Recently, the South Gauteng High Court (Saldulker J and Mayat J) in *Rees & others v Harris & others [2011] JOL 28014 (GSJ)* had to deal with the question of whether a trust was merely the alter ego of one Dean Rees. Rees allegedly acted in collaboration with Barry Tannenbaum in running a fraudulent Ponzi scheme.

Over some years, Harris and trusts affiliated to him had invested more than R80 million with Rees. Now disgruntled, Harris stated in Court that the Aljebami Trust had been misused by Rees as his alter ego, because:

- The Trust was a family trust with Rees and his wife at its helm as trustees.
- Rees was the founder of the trust and he and his family were the beneficiaries.
- Rees controlled all the Trust's assets.
- The decision-making in regard to the Trust vested primarily with Rees.

Saldulker J had to decide whether the Trust's assets could effectively be taken to be Rees' own assets. [Mayat J concurred.]

The Rees case is not a tax case, but it does contain a handy analysis of the circumstances under which a trust could potentially be stripped of the facade of a separate legal personality.

Saldulker J started off by referring to legal precedent laying down the following general principles:

- The fundamental attribute of corporate personality (ie separate legal existence) can only be retracted when the level of mismanagement of the corporation's affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest.
- To disregard the "separateness" of a company from its shareholders (ie the piercing of the corporate veil), is something exceptional.
- Each case has to be decided on its own facts.

The Judge quoted extensively from the judgment by Cameron JA in *Land & Agricultural Development of South Africa v Parker & others 2005 (2) SA 77 (SCA)*, and sounded this warning:

"*Thus, in appropriate circumstances, the veneer of a trust can be pierced in the same way as the corporate veil of a company. Consequently, where the trustees of a trust clearly do not treat the trust as a separate entity, and where special circumstances exist to show there has been an abuse of the trust entity by the trustee, the veneer must be pierced. It follows that if a legitimately established trust is used or misused in an improper fashion by its trustees to perpetrate deceit, and / or fraud, the natural person behind the trust veneer must be held personally liable. In these circumstances, if it is demonstrated that a trustee who has de facto control of the trust assets effectively acquired and owned such assets for his own benefit only, such assets can in appropriate circumstances be considered to be those of the said trustee.*"

Ultimately the Judge held that "*...there is nothing to suggest on a balance of probabilities, that the assets of the Aljebami Trust were in fact the assets of Rees in his personal capacity.*" The burden of proof had not been discharged, since "*... the onus was on Harris to establish on a balance of probabilities that Rees (exclusively of his wife) controlled the Aljebami Trust to such an extent that the assets of the trust were effectively Rees's own.*" This required irrefutable primary facts rather than the vague and unsubstantiated inferences and generalisations contained in Harris's affidavits.

Saldulker J contrasted the facts before him with those of *Badenhorst v Badenhorst 2006 (2) SA 255 (SCA)*. In last-mentioned case Badenhorst had full control of the trust assets and had used the trust as vehicle for his business activities.

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