

# TAX ALERT

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### **NEW REPORTABLE ARRANGEMENT: NON-RESIDENT SERVICE PROVIDERS**

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# BUDGET ANALYSIS

## HOT OFF THE PRESS

*Together this formidable team will take you through the various proposals and the current status of the South African economy.*

*Please contact Harriet Tarantino at [harriet.tarantino@cdhlegal.com](mailto:harriet.tarantino@cdhlegal.com) or +27 11 562 1062 to book your seat.*

The Budget Speech to be delivered by the Honourable Minister of Finance Mr Pravin Gordhan on 24 February 2016 will probably be the most important Budget Speech since 1994.

The CDH Tax Team will be presenting an analysis of the most important elements of the Budget Speech and proposed tax amendments that very same afternoon in Johannesburg. A presentation will also be held in Cape Town.

The analysis will be done in conjunction with Mr Johan Holtzhausen, Managing Director of PSG Capital.

Together this formidable team will take you through the various proposals and the current status of the South African economy.

#### DETAILS:

##### JOHANNESBURG:

24 February 2016, 17:00 for 17:30, CDH Offices

##### CAPE TOWN:

25 February 2016, 8:00 for 8:30, CDH Offices

Please contact Harriet Tarantino at [harriet.tarantino@cdhlegal.com](mailto:harriet.tarantino@cdhlegal.com) or +27 11 562 1062 to book your seat. Please note that limited space is available and that seats will be allocated on a first-come-first-serve basis.



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# NEW REPORTABLE ARRANGEMENT: NON-RESIDENT SERVICE PROVIDERS

*The inclusion of such arrangements as reportable arrangements appears to be largely aimed at non-resident service providers who physically provide services in South Africa to residents (or permanent establishments of non-residents) via individual non-residents sent to South Africa.*

*In practice, the risk for SARS is that such non-resident service providers could fail to register as taxpayers in South Africa (whether as a permanent establishment or not), and not declare their income that is taxable in South Africa.*

The South African Revenue Service (SARS) published notice No 140 in the Government Gazette (No 39650) on 3 February 2016, in terms of s35(2) of the Tax Administration Act, No 28 of 2011 (TAA). Among other things, the notice lists an additional reportable arrangement that was not included in previous notices.

The following arrangement is now a reportable arrangement:

An arrangement for the rendering of consultancy, construction, engineering, installation, logistical, managerial, supervisory, technical or training services to a:

- South African resident; or
- a non-resident having a permanent establishment in South Africa,

and in terms of which arrangement:

- a non-resident was, is, or is anticipated to be physically present in South Africa in connection with or for purposes of rendering the services (not being an employee, agent or representative of the person to whom the services are rendered); and
- the expenditure incurred or to be incurred in respect of the services exceeds or is anticipated to exceed R10 million, and does not qualify as 'remuneration' for employees' tax purposes.

The inclusion of such arrangements as reportable arrangements appears to be largely aimed at non-resident service providers who physically provide services in South Africa to residents (or permanent establishments of non-residents) via individual non-residents sent to South Africa.

For example, a foreign consulting firm could send their employees to South Africa to actually render the relevant consulting services in South Africa. Also, a multinational corporation having a resident subsidiary (or a permanent establishment) in South Africa, could arrange for a foreign group company to provide services to the resident subsidiary (or permanent establishment) by sending non-resident employees or agents to South Africa (eg managers or experts).

Generally, a non-resident service provider would be liable to account for income tax in South Africa in respect of all income derived from a South African source. Where an international tax treaty applies, the non-resident would generally be liable to account for income tax in South Africa only to the extent that it has created a permanent establishment in South Africa and the relevant income is attributable to such permanent establishment.

Where a non-resident service provider sends non-resident employees or agents to South Africa in connection with or for purposes of rendering services to South African residents (or permanent establishments of non-residents in South Africa), the relevant income derived by the non-resident service provider is very likely to be taxable in South Africa.

In practice, the risk for SARS is that such non-resident service providers could fail

# NEW REPORTABLE ARRANGEMENT: NON-RESIDENT SERVICE PROVIDERS

CONTINUED

*With the inclusion of the additional reportable arrangement as a detection mechanism, SARS seems to put extra pressure on non-resident service providers to declare their South African income.*



to register as taxpayers in South Africa (whether as a permanent establishment or not), and not declare their income that is taxable in South Africa. The *fiscus* may then be compromised as the local recipient of the services would likely claim a tax deduction for the expenditure incurred.

The non-resident service provider could potentially also become liable to register for value-added tax in South Africa to the extent that it conducts an enterprise in South Africa and makes taxable supplies of services.

Where such non-resident service providers maintain a light footprint in South Africa, SARS may find it difficult to enforce compliance. With the inclusion of the additional reportable arrangement as a detection mechanism, SARS seems to put extra pressure on non-resident service providers to declare their South African income.

The question that arises is whether the reporting obligation is limited to the non-resident service provider, or whether it extends to the local recipient of the services, as failure to report a reportable arrangement can result in harsh penalties.

In terms of s37 of the TAA, any 'participant' is obliged to report the relevant arrangement. Subparagraph (c) of the definition of 'participant' specifically

includes "any other person who is party to an 'arrangement' listed in a public notice referred to in s35(2)".

It therefore seems that South African residents (or non-residents having a South African permanent establishment) who conclude contracts with non-resident service providers for the provision of services, would very likely have to report the arrangement where the non-resident service provider will be sending non-resident employees, agents or representatives to South Africa in relation to the services, and the monetary threshold of R10 million non-remuneration income is to be exceeded.

The withholding tax on service fees provided for in s51A-s51H of the Income Tax Act, No 58 of 1962 is expected to commence on 1 January 2017. In this regard the local recipient of services will generally have to withhold 15% of the fee payable to the non-resident service provider (subject to the application of a relevant international tax treaty). It is possible that once the withholding tax commences, the reporting obligation could be revised as the local recipient paying for the services will be obliged to withhold tax (even though it is a separate tax from income tax).

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*Heinrich Louw*

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