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TAX AND EXCHANGE CONTROL ALERT

IN THIS **ISSUE**

CDH
CLIFFE DEKKER HOFMEYR

SOME CLARITY FROM SARS ON THE TAXATION OF NON-EXECUTIVE DIRECTORS

In the 2016 Budget, the Minister of Finance indicated that the matter of Non-Execs earnings would be properly investigated.

Companies must not withhold employees' tax (PAYE) on amounts paid to Non-Execs.

The South African Revenue Service (SARS) recently issued two Binding General Rulings, numbers 40 and 41 dated 10 February 2017 (Rulings) on the way that non-executive directors (Non-Execs) should account for tax on their earnings as directors.

In the 2016 Budget, the Minister of Finance indicated that the matter of Non-Execs earnings would be properly investigated.

SARS considers Non-Execs to be directors who are not involved in the daily management or operations of a company, but simply attend, provide objective judgment and vote at board meetings.

SARS accepts that the nature of the duties of Non-Execs mean that they are not common law employees; instead they are independent contractors because the company exercises no control or supervision over the Non-Execs in respect of the manner in which they perform their duties or their hours of work.

The Rulings determine the following:

- Companies must not withhold employees' tax (PAYE) on amounts paid to Non-Execs.
- Non-Execs may claim deductions against their income for certain expenses which they incur and which are not allowed for ordinary employees, for example, travelling costs and home study expenses, provided they meet the requirements of the Income Tax Act, No 58 of 1962 (Act) in this regard.

A Non-Exec is deemed to carry on an enterprise for value-added tax (VAT) purposes. So, a Non-Exec who receives director's fees in excess of R1 million in any 12-month period must register for VAT, and must charge VAT on the fees. And Non-Execs may voluntarily register for VAT and charge VAT if their fees have exceeded R50,000 in the preceding 12-month period. Non-Execs who account for VAT would then be able to claim an input tax deduction on certain taxable supplies made to them, provided they comply with the provisions of the Value-Added Tax Act, No 89 of 1991.

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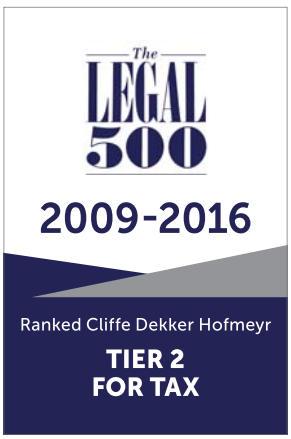
Non-Execs must still account for income tax on their fees themselves and must register for provisional tax.

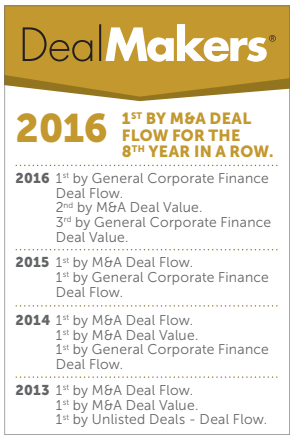
The following should be noted:

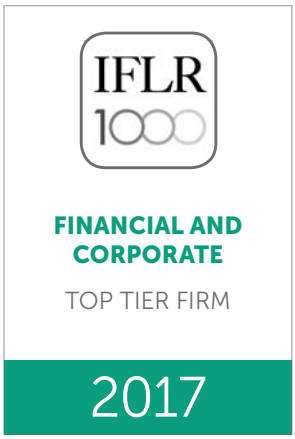
- The Ruling relating to income tax does not apply to Non-Execs who are not tax residents in South Africa. However, the Ruling relating to VAT applies whether the Non-Exec is an ordinary resident of South Africa or not.
- Non-Execs must still account for income tax on their fees themselves and must register for provisional tax.
- Section 8C of the Act imposes tax in certain cases in relation to shares and other instruments acquired by a director by virtue of his or her office as such. For example, Non-Execs could participate in a share incentive scheme operated by the company. Under the Fourth Schedule to the Act, the companies have an obligation to withhold PAYE on the schemes when the tax is triggered. It appears that, by virtue of the Rulings, companies would not need to withhold PAYE in those cases.
- The Rulings only apply from 1 June 2017. However, it is possible that SARS will take a pragmatic approach when considering the manner in which companies have dealt with Non-Execs in the period before that date.

The clarity provided by SARS on this matter should be welcomed. However, the Rulings will likely impose an additional compliance and administration burden on companies, Non-Execs and SARS.

Ben Strauss







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BETTER LATE THAN NEVER? A TAX COURT DECISION AND RECENT LEGISLATIVE AMENDMENTS REGARDING THE LODGING OF OBJECTIONS

Section 104(5) stated at the time that the period for objection must not be extended for a period exceeding 21 business days, unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection.

Submitting a late objection to an assessment issued by the South African Revenue Service (SARS) can have serious consequences. On 13 May 2016, the Tax Court handed down judgment in *AB CC v The Commissioner for the South African Revenue Service* (Case No. 13635) (as yet unreported), which deals with the late filing of an objection by AB CC, the taxpayer, against assessments issued by SARS for the 2008 to 2011 years of assessment in respect of employees' tax (PAYE).

The taxpayer argued that because his auditors only became aware of SARS's letter of assessment (LoA) dated 18 September 2012, on 4 December 2012, exceptional circumstances existed which caused the delay in lodging the objection.

Facts and issue to be determined

The taxpayer filed a notice of objection on 7 March 2013 which was outside the 30-day period allowed in terms of the rules promulgated in terms of the Tax Administration Act, No 28 of 2011 (TAA) (Rules). The assessment was already issued on 18 September 2012. SARS issued a notice of invalid objection as the objection was lodged late and no reasonable grounds were provided for the delay. The taxpayer then brought an appeal and the court had to decide whether SARS should have condoned the late filing of the objection to the assessment.

The relevant legal provisions at the time of the decision

At the time of the decision, s104(4) of the TAA stated that a senior SARS official may only extend the 30-day period in the Rules if reasonable grounds exist for the delay in lodging the objection. Section 104(5) stated at the time that the period for objection must not be extended for a period exceeding 21 business days, unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection.

Evidence and judgment

The taxpayer argued that because his auditors only became aware of SARS's letter of assessment (LoA) dated 18 September 2012, on 4 December 2012, exceptional circumstances existed which caused the delay in lodging the objection. The reasons for the auditors becoming aware of the assessments late were detailed by witnesses who testified on behalf of the taxpayer.

Mr K, a manager at the taxpayer's accounting and auditing firm (Company Y), was involved in handling the taxpayer's account, but moved to a different department within Company Y and handed the account to Mr L. Mr K stated that he did not receive the email addressed and sent to him on 28 September 2012 due to technology challenges and only became aware of the LoA regarding PAYE during November 2012. Although the technology challenges he referred to were confirmed by the testimony of Mr J, the person responsible for hosting Company Y's server, Mr K also admitted that he did not inform Mr L of the LoA when he became aware of it.

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The court held that the taxpayer did not prove that there were exceptional circumstances that gave rise to the delay in lodging the objection and dismissed the appeal.

Mr L testified that he was a team leader within Company Y. He handled, among other things, Secondary Tax on Companies (STC) and PAYE findings by SARS against the taxpayer from 1 November 2012. He only became aware of the PAYE LoA on 8 December 2012 after he had a meeting with SARS regarding the taxpayer's STC objection on 5 December 2012. He initially testified that subsequent to becoming aware of the LoA on 8 December 2012, he believed that the process was ongoing from 12 November 2012 and that he was seeking information from SARS's employees in order to lodge an objection. During cross-examination he testified that the information he was looking for related to VAT and STC. Based on this evidence, the court found that the information he sought had no bearing on the PAYE objection and could not have prohibited him from lodging the objection at least during December 2012. One of his excuses for not doing so was that he had to go on holiday.

The court held that Mr L could have applied for an extension to file the objection once he became aware of the LoA. Mr L's evidence suggested that he was unaware of the consequences of failing to lodge an objection within the prescribed period, which is not what one would have expected from an experienced tax practitioner such as Mr L. The court noted that they could have been more careful and expressed surprise at the fact that Mr L had to be guided on the process for lodging an objection, which was evident from email correspondence he sent to SARS on 20 February 2013 and which caused unreasonable delays.

The court considered the evidence of Mr M, a member of the taxpayer, who conceded under cross-examination that when he received the PAYE notices of assessment in 2012, he did no more than hand the notices to his representatives. Finally, the court accepted the evidence of Ms S, an employee of the entity that handles SARS's mailing system who testified that the assessments in question were dispatched to the taxpayer's email address on 22 September 2012.

Based on the evidence given and on s153(3) of the TAA which states that "a taxpayer is not relieved from any liability, responsibility or duty imposed under a tax Act by reason of the fact that the taxpayer's representative failed to perform such responsibilities or duties", the court held that the taxpayer did not prove that there were exceptional circumstances that gave rise to the delay in lodging the objection and dismissed the appeal.

Subsequent amendments to s104 of the TAA

After the abovementioned decision was handed down, s104(5)(a) was amended and now states that a senior SARS official must not extend the period for lodging an objection by more than 30 business days, unless the senior SARS official is satisfied that exceptional circumstances exist which give rise to the delay in lodging the objection. When this section is read with s104(4), it means that the 30-day period for lodging an objection may be extended by a senior SARS official for up to 30 business days, provided reasonable grounds exist for doing so. An extension of more than 30 business days must only be granted

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The judgment discussed here should therefore be taken very seriously as an assessment issued by SARS, whether wrong or right, must be objected against timeously and the negligence of a taxpayer's tax practitioner, cannot be used by the taxpayer to justify late submission.

if exceptional circumstances are shown. The rationale for this amendment is set out in the Memorandum on the Objects of Tax Administration Laws Amendment Bill, 2016, which states that the 30-day period contained in the Rules "has been shown to be too short in practice, particularly in complex matters, resulting in a large number of applications for condonation."

Practical importance of the judgment and the amendments

It has been widely publicised that National Treasury is facing a budget shortfall and therefore it is possible that SARS, as the state entity responsible for enforcing tax legislation, will be more aggressive in collecting tax in future. The judgment discussed here should therefore be taken very seriously as an assessment issued by SARS, whether wrong or right, must be objected against timeously and the negligence of a taxpayer's tax practitioner, cannot be used by the taxpayer to justify late submission. This is the second judgment handed down in 2016 where a taxpayer was unsuccessful in proving that there were exceptional circumstances giving rise to the delay in lodging an objection. We reported on the other judgment, handed down by Satchwell J in March 2016 (Satchwell judgment), in our Tax and Exchange Control Alert of 1 April 2016 (*Section 104 of the Tax Administration Act and the meaning of exceptional circumstances – a cautionary tale*).

The amendment to s104 that came into effect on 19 February 2017 is welcomed as a taxpayer can now receive a 30 day extension, instead of a 21 day extension to submit its objection provided it can show reasonable grounds, although it can certainly be argued that the 30 day extension period in s104(5)(a) should have been increased further.

SARS Interpretation Note 15, which was not referred to in the judgment, lists the following as examples of what may constitute 'exceptional circumstances' in terms of s104(5)(a):

- a natural or human-made disaster;
- a civil disturbance or disruption in services;
- a serious illness or accident; and
- serious emotional or mental distress.

In the Satchwell judgment, it was noted that "unusual facts" could constitute exceptional circumstances. It appears, however, that the taxpayer's failure to do more than merely send the assessments to Company Y and Company Y's unjustifiable delay in attending to the matter, was what led to the outcome in this matter.

Louis Botha

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CUSTOMS AND EXCISE HIGHLIGHTS

Please note that this is not intended to be a comprehensive study or list of the amendments, changes and the like in the Customs and Excise environment, but merely selected highlights which may be of interest.

In the event that specific advice is required, kindly contact our Customs and Excise specialist, Director, Petr Erasmus.

This week's selected highlights in the Customs and Excise environment:

- National Treasury published the Discussion Document on the Review of the Diesel Fuel Tax Refund System for public comment and further consultation. This paper follows on announcements in the 2015 Budget Speech to undertake a review of the diesel refund administration to address anomalies in the system related to qualifying activities and beneficiaries. National Treasury and SARS are exploring alternative, more equitable rules and administrative procedures in consultation with affected industries.
- The diesel refund system has faced several technical administrative and legal challenges, such as:
  - shared VAT Administration;
  - lack of logbook compliance;
  - authorisation of primary production; and
  - outsourcing of operations.
- Proposed reforms include:
  - interim Diesel Refund Amendments;
  - qualifying primary production activities rather than users;
  - inclusion of contractors;
  - standalone Diesel Refund Administration System; and
  - linking qualifying activities to physical location.
- Written comments should be submitted by close of business on 15 May 2017 to:
  - National Treasury email: *dieselrefundcomments@treasury.gov.za*; or queries to *Memory.Machingambi@treasury.gov.za*; and
  - SARS email: *C&E_legislativecomments@sars.gov.za*

We remain available to assist herewith. Additional information is available upon request.

(Note: Certain portions of the above content were taken from a recent *media statement* released by National Treasury)

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 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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