27 SEPTEMBER 2019

TAX & EXCHANGE CONTROL **ALERT**

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The provision of safe transport by employers to prevent gender-based violence – considering the tax consequences

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The provision of safe transport by employers to prevent gender-based violence – considering the tax consequences

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Many South Africans have taken a stand against the surge of violent crimes perpetrated by men against women over recent weeks and have expressed their outrage through protest action. This outcry against gender-based violence in South Africa has been echoed worldwide, with many nations standing in solidarity with the women of South Africa.

After the release of the latest crime statistics depicting an increase in the number of women killed each day, as well as the number of reported rape cases being at its highest in four years, thousands took to the streets of Sandton in the #SandtonShutdown march outside the Johannesburg Stock Exchange in an attempt to raise their concerns regarding gender based violence (GBV). This march followed the protest march held in Cape Town outside the World Economic Forum (WEF) during which President Cyril Ramaphosa addressed protesters outside Parliament.

One of the demands made by the participants of the #SandtonShutdown was the provision of secure transport by employers for female employees who are required to travel after dark before or after their shifts. The provision of secure transportation by employers may have tax implications for the employees to the extent that the transportation service provided constitutes a taxable fringe benefit in the hands of the employees.

Legal position

The Seventh Schedule to the Income Tax Act 58 of 1962 (Act) makes provision for the taxation of benefits received by taxpayers by virtue of their employment (Seventh Schedule). In considering the tax consequences arising from the provision of transportation services, one must consider paragraphs 2 and 10 of the Seventh Schedule along with the Fourth Schedule to the Act (Fourth Schedule).

Paragraph 2(e) of the Seventh Schedule states that a taxable benefit is deemed to have been granted by an employer to an employee if any service has, at the expense of the employer, been rendered to the employee (whether by the employer or some other person) for his or her private or domestic purposes. The expenses incurred in the transportation of employees between their homes and their place of work (and *vice versa*) as demanded by the GBV movement are considered expenses that are domestic or private in nature. As such, where an employer bears the expenses associated with the transportation of its employees between their homes and the workplace, a taxable benefit may arise in the hands of the employees.

Paragraph 10 of the Seventh Schedule deals with the provision of free or cheap services by an employer. With regards to the value to be ascribed to the provision of such services, paragraph 10(2)(b)

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The provision of safe transport by employers to prevent gender-based violence – considering the tax consequences...*continued*

The no-value provision in paragraph 10(2)(b) of the Seventh Schedule will only apply in very specific circumstances.

states that no value will be attributed to any transport services rendered by an employer to its employees for the conveyance of such employees from their homes to the place of their employment and *vice versa*. If the value attributed to the transport services is nil, the value of the taxable benefit will be nil and no employees' tax will be payable in terms of the Fourth Schedule to the Act as a result of the provision of transport services to employees in terms of this provision. The employee will not pay income tax as a result of receiving the transport service under these circumstances.

In terms of paragraph 2(e) of the Seventh Schedule, a taxable benefit arises from the provision of transportation services by either an employer, or any other person. However, paragraph 10(2)(b) only ascribes no value to those services rendered by an employer. This distinction gave rise to uncertainty regarding the application of the no-value provision contained in paragraph 10(2)(b) in those scenarios where the employer does not provide the transport service directly but contracts another person to provide the service to employees.

In order to clarify this issue, the South African Revenue Service (SARS) issued Interpretation Note 111 (IN 111) and Binding General Ruling 50 (BGR 50). These publications provide that transport services rendered by an employer to its employees in general for the conveyance of such employees between their homes and their place of employment, will fall within the no-value provisions of paragraph 10(2)(b), to the extent that –

1. The transport service is rendered directly by the employer; or
2. Where the transport service is not rendered directly by the employer (in that it is outsourced to a specific transport service provider), the employer makes it clear in the conditions under which the transport service is provided, that –
   a. the transport service is provided exclusively to employees on the basis of predetermined routes or conditions;
   b. the employees cannot in any manner request such transport service from the service provider on an *ad hoc* basis; and
   c. the contract for providing the transport service is between the employer and the transport service provider, and the employee is not a party to the contract.

It is apparent that the no-value provision in paragraph 10(2)(b) of the Seventh Schedule will only apply in very specific circumstances. If the provision of transport services between home and work is not structured so that it complies with paragraph 10(2)(b) read with BGR 50 and IN 111, employees receiving transport services will be taxed on the value of the transportation services provided, less any consideration paid by the employees in respect thereof (if any). Such a taxable benefit will be subject to employees' tax and the employer will be liable to withhold employees' tax for each employee on the value of the benefit derived each month. Income tax consequences will arise in the hands of the employees concerned.

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It may be beneficial for such an employer to consider redirecting its funds to create and implement a secure transportation scheme for its employees that complies with the no-value provision in paragraph 10(2)(b) of the Seventh Schedule.

Comment

It is commonplace for employers to provide their employees with tickets or money for use on the various modes of public transportation in order to enable them to travel between their homes and their place of work. However, this practice has not only proven to be unsafe for many female employees who are exposed to the risk of violence whilst traveling, but also has the burdensome consequence of requiring employers to withhold, and pay over to SARS, employees' tax on the value of the money or ticket (as the case may be) given to their employees.

To the extent that an employer follows this practice, it may be beneficial for such an employer to consider redirecting its funds to create and implement a secure transportation scheme for its employees that complies with the no-value provision in paragraph 10(2)(b) of the Seventh Schedule. While the scheme may have to be carefully constructed in order to comply with the requirements set out in paragraph 10(2)(b) read with IN 111 and BGR 50, employees will have the benefit of receiving safe, non-taxable transportation services and the employer will be relieved of its burden to withhold and pay employees' tax in respect of the transportation services provided.

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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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