TAX & EXCHANGE CONTROL
ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

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Death, taxes, and remote working

Given the ever-changing landscape of the past two years, the adage that nothing is certain except death and taxes is perhaps more apposite than ever. Whilst it may appear that a semblance of normality is returning, its almost as certain as death and taxes, that remote working will be a part of the next normal. South Africa's recent State of the Nation Address even made mention of a new remote working visa.

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

Death, taxes, and remote working

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In light of this, companies with 'work from home' policies should be especially mindful of potential tax exposures where 'home' is in a foreign country. We deal with some of these potential exposures in more detail below.

CORPORATE INCOME TAX

The potential for a company to fall within a foreign country's corporate income tax net as a result of employees working from home in that foreign country is generally two-fold as:

- the company may be effectively managed from, and thus become tax resident in, that foreign country; or
- the company may form a taxable presence (permanent establishment) in that foreign country with the consequence that some or all of its profits may be subject to corporate income tax there.

In the Tax & Exchange Control alert from 10 February 2022, we set out the guiding principles that, according to the South African Revenue Service (SARS), should be applied when determining where a company is effectively managed. The guidance set out by SARS is largely consistent with the guidance set out by the Organisation for Economic Co-operation and Development (OECD) in its commentary on how this term should be interpreted in the context of double tax agreements (DTAs). However, it is noted, that this commentary is based on a model DTA that is seldom followed to the letter when a DTA is formally concluded and brought into force by contracting states, or there may simply be no DTA. Furthermore, the underlying domestic legislation must be considered along with the impact (if any) of the multilateral instrument (MLI) on existing DTAs. For these reasons, it is recommended that companies that are possibly at risk of being effectively managed in a different country by virtue of employees working remotely there should consider the need to obtain specialist tax advice.

Regarding the second possible exposure outlined above, a company is generally at risk of having a permanent establishment in a foreign country if it:

- derives income from a source within that foreign country;
- has a fixed place of business there;
- is engaged in the delivery of construction/consulting services for a certain period of time in that foreign country; or
- it has a dependent agent operating there on its behalf.

A comprehensive analysis of the risks and ways in which a permanent establishment can arise under each of the categories outlined above, is beyond the scope of this article and a consideration of the domestic legislation and the impact (if any) of the MLI is again critical. There are also important carve-outs that may apply having regard to the nature and extent of the activities being conducted in the other country. However, we draw attention to the fact that allowing employees to work from home in a

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foreign country may, inadvertently, result in the company having a fixed place of business there, and it is recommended that companies consider the need for specialist tax advice where this may be the case.

PERSONAL INCOME TAX

Income earned by a South African tax resident employee working remotely in a foreign country for a South African employer might be subject to personal income tax in that country. Where there is a DTA in place between South Africa and the foreign country, then the foreign country's right to tax that employee's income will likely be determined by this DTA. Whether the South African employer has a permanent establishment in that foreign country could also be a factor in determining this right to tax.

In the absence of a DTA, the income may be taxable in both the foreign country and South Africa, though the employee may qualify for a rebate in terms of section 6quat of the Income Tax Act 58 of 1962 (ITA). It should also be considered whether and to what extent the income qualifies for exemption in South Africa. For example, the income may qualify for the partial exemption outlined in section 10(1)(o)(ii) of the ITA.

Similarly, income earned by a non-South African tax resident employee working remotely in South Africa for a foreign employer will be subject to income tax in South Africa unless a DTA precludes South Africa from taxing such income.

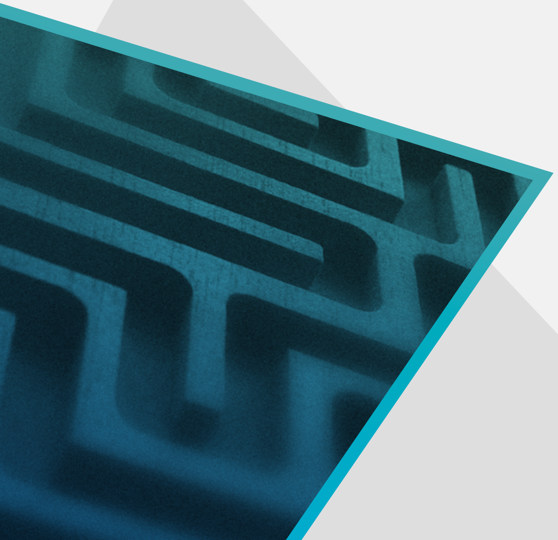
PAYROLL TAX AND SOCIAL SECURITY CONTRIBUTIONS

The obligation for an employer to register and account for payroll tax and social security contributions in a foreign country should also be considered where it has employees working from home in that foreign country. Whether or not this is indeed the case can differ vastly from one country to another, though it will generally be dependant on whether:

- the income earned by the employee is subject to tax in the foreign country;
- the employer has business premises or an office available to it in the foreign country. Here again it should be noted that if employees are expected to work from home in that foreign country then this may in and of itself result in the employer having business premises or an office available to it in the country; or
- the employer has a permanent establishment in the foreign country.

It is evident from the above that having employees work remotely in a foreign country could lead to various tax exposures and related obligations for the employer in that foreign country. It also remains to be seen how lenient or stringent revenue authorities across the globe will be particularly in those instances where the employer is entirely unaware of the fact that its employees are working remotely in a foreign country. Only time will tell.

LANCE COLLOP AND
NICHOLAS CARROLL



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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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