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ANNUAL RETURNS LODGING OF FINANCIAL STATEMENTS

The Companies and Intellectual Property Commission (CIPC) have advised that new requirements with regards lodging of annual returns will come into effect from 1 April 2012.

Companies and Close Corporations that are required to have their annual financial statements audited in terms of the Companies Act, 2008 No 71 of 2008, must file a copy of the latest approved audited annual financial statements on the date that it files the annual return with the Companies and Intellectual Property Commission.

Companies and Close Corporations that are not required to have their annual financial statements audited in terms of the Companies Act, 2008 No 71 of 2008 but may have opted for a voluntary audit may file a copy of its audited annual financial statements together with its annual return or if the company or close corporation does not elect to file a copy of its audited annual financial statements the company must then file a financial accountability supplement.

Companies and Close Corporations that are required to have their annual financial statements reviewed in terms of the Companies Act, 2008 No 71 of 2008 may file a copy of its reviewed annual financial statements together with its annual return or if the company or close corporation does not elect to file a copy of its reviewed annual financial statements the company must then file a financial accountability supplement.

Companies and Close Corporations that are not required to have their annual financial statements reviewed nor audit in terms of the Companies Act, 2008 No 71 of 2008 will need to file a financial accountability supplement with the annual return.

The financial accountability supplement will be generated on line when completing the annual return. The CIPC will review a sample of the financial accountability supplement, audited annual financial statements or independently reviewed financial statements that have been filed, with the objective of monitoring compliance with financial record keeping and financial reporting standards.

CONVERTING TO THE NEW MEMORANDUM OF INCORPORATION

A company's current Memorandum and Articles of Association became the new Memorandum of Corporation by operation of law on 01 May 2011.

Companies have a period of two years starting from 01 May 2011 to bring their Memorandum of Incorporation in line with the Companies Act, 2008 No 71 of 2008 (the Act).

During the period of two years immediately following 01 May 2011, if there is a conflict between the Act and a provision of the Memorandum of Incorporation the Memorandum of Incorporation will prevail (with certain exceptions).

If the Memorandum of Incorporation is not aligned with the Act within the 2 year period, every provision that is in conflict or inconsistent with the act will be void, in other words after the 2 year period, the Act will prevail.

Although the Act stipulates that certain companies may be exempt from having an annual audit, companies will still require a statutory audit if it is stipulated in the current Memorandum and Articles of Association. It is therefore important for companies to consider adopting a new Memorandum of Incorporation as soon as possible.

Companies are also advised to consider their shareholder agreements when converting the Memorandum and Articles of Association to the new Memorandum of Incorporation. After the period of two years the Memorandum of Incorporation will preside over the shareholder agreement. It may therefore be necessary to draw up a new shareholder agreement to bring this in line with the requirements of the ACT and the Memorandum of Incorporation.

VAT REFUND DELAYED? TRACK IT WITH THE NEW VAT DASHBOARD!

Taxpayers have experienced frustration in recent times waiting for VAT refunds. As most small businesses are always strapped for cash flow, the delays in refunds have been a considerable source of worry. The South African Revenue Service (SARS) have recognised this and have introduced (in late September) a dashboard whereby you can track the status of your VAT refund. The dashboard has been backdated to March 2011 and if you are on eFiling it works as follows:

- Log on to eFiling and click on "Returns" in the top menu
- In the left hand menu selection choose VAT Maintenance and then click on the Refund Dashboard
- The Refund Dashboard will display the following information for each transaction:
  - Period
  - Amount of the submitted return
  - Description of the issue that may be affecting the payment of your refund
  - A colour-coded indicator that at a glance indicates the status of your transaction:
    - Red – You need to take action, such as submit supporting documents
    - Amber – SARS is in progress with an action e.g. completing an audit
    - Green – No outstanding issue, or issue resolved

This tool will allow you to track where exactly your VAT refund is. The really good news is that - if there are no queries on your return and SARS do not refund you within 21 days of its submission - SARS will pay you interest in the period from the 21 days to the date of your refund.

If you aren't registered for eFiling

If you are not on eFiling then phone SARS on 0800 00 SARS (7277) or go to www.sarsefiling.co.za.

So, whilst we frequently grumble at SARS, we should also recognise that they are making efforts to improve their service delivery.

BEWARE THE TAX ASSESSMENT MASQUERADING AS A LETTER!

A formal tax assessment comes in the form of an IT 34 which assesses how much you owe SARS (or if you're lucky how much SARS owes you!). If you aren't happy with this assessment you have 30 days to object. After this period, the assessment is binding on you.

A case recently decided by the Supreme Court of Appeal found that a letter from SARS was deemed to be an assessment. In this case SARS wrote to the taxpayer indicating that SARS intended to re-assess taxes over a four year period and that revised assessments (IT34s) would be issued shortly. No revised assessments were issued and the taxpayer lodged an objection to the SARS letter, contending that the letter was an assessment.

The judgment finds that the SARS letter "purports to be a determination as envisaged by the definition: it calls itself a revised assessment ......and it purported to make an adjustment under a heading 'Revised assessment'. It is apparent from these features that the letter records a determination".

It is important you carefully read any correspondence from SARS when the letter refers to assessments. The letter could (as we have seen above) constitute an assessment - in which case you have 30 days to lodge an objection or you will forfeit the right to contest the assessment.

MEDICAL AID DEDUCTIONS VERSUS THE NEW TAX CREDITS – WILL YOU PAY MORE TAX, OR LESS?

The Tax Laws Amendment Bill (due to be promulgated shortly) will change the way medical expenses are allowable for income tax purposes. The amendments will take effect from 1 March 2012.

The current system

The current system allows the principal member a deduction of R720, plus R720 for the next member and R440 per person for any remaining members. In addition, if your medical expenses exceed 7.5% of your taxable income, this excess is also deductible.

If you are over 65 all medical expenses are deductible. This applies to people with disabilities as well.

The new system

The new system moves away from deductions taxpayers can currently claim to a tax credit. What does this mean?

Let's say a person earns R150,000 per annum and is married with two children. He is on a medical aid.

	Current System	New System March 2012
	Monthly	*Monthly*
Income	R12,500	R12,500
Deductions	R2,320	Nil
Taxable Income	R10,180	R12,500
Tax at 18%	R1,832	R2,250
Rebate	R896	R896
Tax Credit	Nil	R720
Tax Payable	**R936**	**R634**

The taxpayer saves R302 per month in tax under the new system. Why is this so? Tax deductions at the taxpayer's rate of tax (18%) reduce the tax payable by R418, whereas under the new structure, tax payable is reduced by the tax credit (R720). As the taxpayer's income rises, so the benefit of the rebate decreases. Looking at the table below, the benefit decreases up to R325,000 (on an annual basis) of taxable income and a taxpayer will pay more tax as taxable income rises above R325,000.

Taxable Income	Tax Rate
R0-R150,000	18%
R150,000-R235,000	25%
R235,000 R325,000	30%
R325,000-R455,000	35%
R455,000-R580,000	38%
R580,000 -	40%

Thus, the tax credit has been introduced as a fairness measure. Lower income earners benefit and higher income earners pay more tax. The tax credits have been pitched at roughly 30% of the current deductions. The tax credits are R216 for the principal member and first dependant (versus R720 deduction) and R144 (versus R440 deduction) for each subsequent member.

What happens to the secondary deduction when medical expenses exceed 7.5% of taxable income? This will remain in place and thus the new dispensation from March 1 2012 is a hybrid of the current system.

Taxpayers over 65 years

If a taxpayer is over 65 years, there is no change and all expenses will still be deductible.

Disabled taxpayers

Disabled taxpayers (or taxpayers with disabled dependants) may still claim all medical expenses.

The changes in a nutshell

The proposed changes are fairly complex but can be summarized as follows:

- If you are over 65, there is no change
- Lower income earners will benefit and higher income earners will pay more tax
- For disabled tax payers there is no change.

IS EXCHANGE CONTROL OVER FOR INDIVIDUALS?

The new limits.....

Following the Medium Term Budget Speech by Pravin Gordhan in October 2011, the Treasury published revised exchange control amounts which grouped the annual amounts individuals can take off-shore to R5 million per annum. This consolidates the investment allowance (R4 million per annum) and the travel, holiday, alimony allowances etc (R1 million per annum for all other categories) into an annual allowance which does not require exchange control approval.

.....and a massive new concession

Tucked into this statement was the following:

"Furthermore, in order to eliminate the bias against residents compared to non-residents, the SARB (South African Reserve Bank) will consider investments by residents (and estates) for applications in excess of the R5 million allowance, subject to strict criteria related to appropriate disclosure requirements (on foreign assets and income), tax compliance and market conditions."

Firstly, what does this mean? You are now allowed to take out unlimited amounts subject to full disclosure, tax clearance and "market conditions" (this last point needs to be clarified by the Reserve Bank).

This is a massive concession – if you have substantial assets and wish to globalise your balance sheet, you can now do so and remain in South Africa.

Prior to this, the only way you to move your assets off-shore was to emigrate – often a difficult decision to make and a stressful and time-consuming exercise. This meant the country lost your skills and whatever income you made as you would now be taxed under a different jurisdiction. The government is cutting its losses by keeping your skills and revenue base in South Africa. It is also another signal that exchange control is being phased out – globalisation has virtually made it redundant.

The other question is why so little fanfare for this concession? Clearly, this benefits the rich and super-wealthy and the government which is committed to improving conditions for the poor, doesn't want to attract attention to this concession, however commonsensical it is.

Take advice if you want to pursue this option.

BUSINESS RESCUE: ARE PERSONAL SURETYSHIPS ENFORCEABLE?

In terms of the new Companies Act, creditors' rights are curtailed during business rescue proceedings. For example, all legal proceedings and recovery of debts are automatically suspended in terms of section 133(1) of the Companies Act. Section 133(2) extends this protection to sureties and/or guarantees issued by the company – a creditor holding such a surety or guarantee can only enforce it against the company with the court's permission.

A surety sued

These provisions were recently tested in a Western Cape High Court Case. The circumstances of this were that a bank sought to enforce a surety given by an individual over a company's debts. The company was insolvent and had begun proceedings to put itself under business rescue.

The Court decides

The individual who gave the surety offered three arguments why his suretyship could not be enforced: -

1. Whilst section 133(2) only speaks of sureties or guarantees issued by the company (and not those issued by an individual or third party), section 133(2), it was argued, implicitly includes sureties given by individuals as it should be read with section 133(1) which places a moratorium on the company's debts.

   The judge however ruled that the wording of section 133(2) is "is so explicit that it is impossible to avoid its plain meaning. It refers to a surety by the company and to its enforcement by another person against the company."

Thus, the judge ruled in favour of the bank.

2. In terms of section 133(1), a moratorium had been placed on the company's debts and this, it was argued, should include the individual's surety as effectively it was part of the company's debt.
   In deciding on this argument, the judge stated that who the moratorium applied to depended on whether it is in personam (applicable to the company only – "a personal privilege or benefit in favour of the company") or whether it is in rem (it is attached to the debt itself) in which latter case the surety would have protection. For in rem to apply, the debt must be "invalid, extinguished or discharged". As this is clearly not the case, the judge again found in favour of the bank.

3. The last defence was that there was likely to be a compromise or reduction of the company's debt which - it was argued - would similarly reduce the surety's liability. The judge, whilst prepared to assume ("without so deciding") that a compromise or reduction of the company's liability would indeed reduce the claim against the surety, commented that it was "pure conjecture" whether such a compromise or reduction would actually take place. Even if it did, the creditor had a right to recover in full from the surety unless and until the company's liability was in fact reduced.

Once again the judge found in favour of the bank.

Creditors and sureties – the lessons learned

So what are the lessons learnt?

Sureties - if you are asked to give a surety or guarantee for a company, think carefully about how confident you are that the business will not run into financial difficulty. Should this happen, you are very vulnerable giving a surety or guarantee as the above case shows. Take advice in doubt.

Creditors - if you hold a surety, don't hold back in enforcing it, if the business runs into difficulties. You may get a lesser (or nil amount) in the event of a compromise or reduction of the debt – to be safe, you need to recover from the surety before that happens.

PAIA MANUALS: BREATHING SPACE FOR SMALL BUSINESSES

"The more delay'd, delighted. Be content" (Shakespeare)

On December 30th, the Minister of Justice issued a government notice giving small businesses an additional four years to submit their manuals in terms of PAIA. The new date for these exempted businesses is 31 December 2015.

Who's off the hook, and who isn't?

Businesses not exempted are:
- All public entities
- Public companies
- Private companies, listed in the schedule below, with more than 50 employees or turnover greater than specified in the listed schedule. Close corporations are included in the private company definition.

Business Sector	Annual Turnover Threshold
Agriculture	R 2 million
Mining and Quarrying	R 7 million
Manufacturing	R 10 million
Electricity, Gas and Water	R 10 million
Construction	R 5 million
Retail and Motor Trade and Repair Services	R 15 million
Wholesale Trade, Commercial Agents and Allied Services	R 25 million
Catering, Accommodation and other Trade	R 5 million
Transport, Storage and Communications	R 10 million
Finance and Business Services	R 10 million
Community, Special and Personal Services	R 5 million

Thus, all sole practitioners, partnerships, trusts and companies which fall out of the listed schedule have four more years to complete their manuals. Effectively, this means more than 85% of businesses now have to submit their manuals only by December 31 2015.

An obvious question is why the extension, especially when the Act was promulgated in 2000. The Minister's spokesperson gave two reasons for this. The first is that the Ministry of Justice did not expect the backlash shown by smaller businesses such as sole practitioners who were struggling to find the time and money to complete their manuals. The second is that it is evident the Justice Ministry lacks the resources to follow up to ensure that all businesses have submitted manuals. As a starting point, the Ministry will be liaising with the Companies and Intellectual Property Commission (the body controlling registration of companies) to begin compiling a data base.

With all these delays and extensions, should we take this piece of legislation seriously? The aim of the Act is to enable citizens to access information (in the public or private sectors) required by them to exercise and protect their constitutional rights. As it flows directly from the Constitution, we should give time and consideration to making it work. A contrary argument is that there is very little information in small businesses that the public would need to access. Elsewhere in the world a minimum turnover is set before requiring the compiling of manuals.

Remember also that the Act is in existence and though the obligation to lodge manuals has been delayed for some businesses, they are still required to be able to respond to requests for information.

Finally, if you didn't submit a manual by December 31 and are not on the exemption list, it would be prudent to submit your manual now. Don't delay – there are substantial penalties for failure to comply!

FINANCE 101: LEAVE PAY – THE POTENTIAL TIME BOMB ON YOUR BALANCE SHEET

The large corporate companies have focused extensively on leave pay over the past few years – Price Waterhouse Coopers (PWC) do an annual survey on it. Why is this attention given to leave pay? There are two main reasons:

- Employees used to be able to accumulate leave. If their leave entitlement was 20 days per annum and they only took 10 days, then these accumulated 10 days became a liability for the company. This built up until these companies began to realise they were carrying increasingly larger liabilities. Not only is losing staff disruptive to work flows but it became a potential strain on cash flow. It was not unusual for companies to be carrying the equivalent of three months worth of salaries in their leave pay provision.

- There is no doubt that business has become faster, more competitive and more stressful. It has thus become more important that staff use their leave to rest and relax, so they can be more productive at work.

New trends in annual leave

What are the trends shown by the PWC report?

- The minimum annual leave laid down by the Basic Conditions of Employment Act is 15 working days, whilst usually annual leave increases based on the number of years of service
- Senior management usually get 20 working days leave per annum whilst top management get 30 working days
- Most companies now (88%) limit the amount of leave that can be accumulated. This is the major reason for bringing the leave pay provision on the balance sheet down to more manageable levels. Thus, a policy of "use it or lose it" has become common A" use it or lose it" policy dovetails with solving the two major leave issues – the increasing leave pay provision and the necessity for staff to get a good annual rest.
- Finally, few companies actually allow employees to be paid out for leave not taken. This limits a company's cash exposure and ensures that staff does take leave.

The risk: what you should do

It's a good exercise to benchmark these trends against your business. Make sure you are not accumulating a hidden time bomb and your staff are not getting stale. Finally, if some members of your staff never take leave, this could be an indicator that there may be malfeasance or that some form of abuse is happening.

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