



HARD LABOUR NEEDED AT THE DEPARTMENT OF LABOUR

The Return of Earnings (ROE) for the Compensation for Occupational Injuries and Diseases Act (COIDA) has been causing problems for accounting firms and their clients. COIDA falls under the Department of Labour (DOL).

These problems are critical - for many firms, being in good standing is critical to them as without a letter from the DOL to this effect, people are turned away from mines or construction sites and thus cannot do their work. In addition, they may not be able to secure tenders.

Where did it begin? The discounts and the amnesty

Last year the DOL introduced an online facility for companies to complete their ROE. This was done as the department was struggling to assess all ROE returns. Despite the online version being introduced, the DOL still did not assess all 2012 returns. In designing the new online version, all businesses were assigned new reference numbers.

This year the DOL decided to incentivise businesses to use the online facility and offered -

- A 10% discount if your return was submitted by 30 April and payment was made within 30 days after the assessment,
- A 5% discount if your return was in by 30 April and you paid within 60 days after the assessment,
- A 2% discount if your return was in by 30 April and you paid within 90 days after the assessment.

These incentives have been granted for the 2012/13 financial year.

In addition, the DOL announced an amnesty for all businesses **registered with the department** but who had not completed ROEs in the past four years - these also had to be completed by 30 April.

Bear in mind that the returns had to be in by 30 April or businesses faced penalties, interest and no letters of good standing if you have not submitted your ROE form and paid the invoice.

What happened? An "offer you can't refuse"

All in all, it was a classic "offer you can't refuse" and particularly because of the amnesty and discount incentive, there was a surge in online ROEs. This put strain on the system and there was frequent downtime on the website, resulting in businesses not being able to submit their ROEs on time.

Some examples of the issues faced are -

- As noted above, reference numbers were changed with the introduction of the new online system and many clients were not aware of this,
- Employers' 2012 manual submissions were not always recognised by the online system. When they submitted the 2013 ROE they were charged and assessed twice (once for the 2012 year), and are now battling to claim the additional assessment back from the DOL,
- Other clients who had manually submitted in 2012 were never assessed and when the system forced them to update the 2012 information they were charged penalties for filing late, although they did file last year in time,
- For those who stayed on the manual system, April was the time of the postal strike and thus many manual returns missed the 30 April deadline as the clients received the forms late,
- Throw into this widespread confusion about the discounts as a result of which many companies deducted the applicable discount when making their payment. However, the process for the deduction or repayment of the discount has not been finalised by the DOL and the DOL system is showing these companies as short paid.

Despite all of the above, the DOL did not give businesses more time to complete their ROEs and thus in the above cases, these entities face penalties and interest costs, and cannot obtain a letter of good standing. SAICA (the South African Institute of Chartered Accountants) has also requested extensions for the filing period and has submitted documents to the DOL setting out problems that members are experiencing.

This is not the only Compensation Fund department that is experiencing systems and organisation performance issues. We must just hope that the ongoing efforts of SAICA and other role-players bring about a speedy resolution.

EMPLOYERS: THE POLYGRAPH - HOW MUCH RELIANCE CAN YOU PLACE ON IT?

Labour is highly regulated in South Africa and making mistakes can be a costly exercise. Thus, it is important we get our hiring, promoting and firing correct. Employers have resorted to a variety of techniques to assist them in their decision-making. One of these techniques is the lie detector test using a polygraph.

Our courts have pronounced on the use of lie detector tests and a recent Labour Court case highlights the importance of not relying exclusively on the lie detector.



The polygraph has its place but it needs to be one part of a battery of assessment tools to confirm an opinion or to prove wrongdoing.

The risks of getting this wrong are high!

Apart from the time wasted in preparing for and appearing at hearings, the cost to employers can be high, especially for small businesses. In the case in question, not only were there legal costs incurred but the Court directed the employer to retrospectively pay the two employees the higher managerial salaries they would have earned had they been promoted.

In the case in question, two employees argued that they were denied promotion as a result of failing lie detector tests (to which they had - as is necessary - consented). They were working for a municipality and when a managerial and a supervisory post respectively became available, they applied for these positions. Whilst other criteria were used in compiling a short list of candidates, including qualifications and work experience, these two candidates failed a polygraph test and did not get the positions.

Critically, the Court found that the municipality “committed an unfair labour practice relating to promotion in relying exclusively on the result of a polygraph test to determine the honesty of the candidates” (author's underlining).

There have been frequent cases involving fraud (normally a dismissible offence) and the use of polygraphs. The courts have held that “polygraph testing has not been scientifically shown to be a reliable, accurate and valid means of detecting deception” and therefore it cannot be used exclusively to determine an employee's innocence or guilt. It can however be used to help substantiate a case and the same principle applies in questions of suitability for promotion.

The bottom line

As the Court put it: “...the exclusive reliance on the polygraph test results to eliminate candidates for appointment on the basis of their deceitful character, in the absence of any other information placing a question mark over their integrity is unfair.”

So be careful - only use a polygraph to bolster your case, not to prove it.

THEFT: CAN YOU CLAIM A TAX DEDUCTION AND/OR A LOSS?

“...although three quarters of South African businesses have fallen victim to some form of commercial crime, only 20% of these incidents are reported to the police” (FA News report 2009)

It's bad enough when someone steals or embezzles from your business and you often can't bear to go through all the hoops of investigating the loss and laying charges. Many businesses also hesitate to report crime because they worry about public perception - it's often considered safer just to sweep a crime under the carpet.

However, if you want to claim a deduction and/or a loss for tax purposes, note that SARS intend putting a considerable onus on you to prove the expenditure or loss. You may find it difficult to explain a failure to report the theft to the police.

When can you claim a deduction and/or a loss for tax?

A number of requirements need to be met before SARS will allow a claim, namely that -

- It was actually incurred when carrying on a trade,
- It was in the production of income,
- It is not of a capital nature (except in respect of an asset, in which case the scrapping procedures in the Act will apply), and
- It is claimed in respect of the year in which it is incurred - this could be important as you may only become aware of a theft some time after it occurred. You must object and if successful then request a reduced assessment for the year in question, and in terms of tax law, any claim must be made within three years of the date when SARS issued your assessment for that year.

In addition, the loss will be reduced by any personal element (e.g. if your business is broken into and some of your own possessions are stolen) and naturally the loss and expenditure cannot be recoverable in terms of an insurance claim.

It gets tougher

In determining if a loss and/or expenditure is “in the production of income”, our courts have held that expenditure must be “closely connected” to the business. In substantiating this connectedness, there needs to be an inherent risk of theft or embezzlement in your business. Courts have generally held that theft committed by junior staff is an inherent risk but if a director or co-owner embezzles funds this becomes increasingly difficult to accept as an inherent risk of the business.

These cases are old cases and one would like to see how courts will approach this today - especially the extent to which they would regard cyber crime as being an “inherent business risk”.



Should this happen to you, speak to an expert before embarking on the process of claiming a deduction or loss for tax purposes.

And tougher

In terms of the Tax Administration Act of 2011, the “burden of proof” in proving an entitlement to claim a deduction lies with the taxpayer. In terms of proving a fraud, the taxpayer needs to be able to quantify the expenditure and loss incurred and SARS will expect substantiation such as -

- A police docket reference number,
- A charge sheet issued by a court,
- A detailed report such as a forensic investigation by a qualified person (the good news here is that your forensic and legal expenses are generally claimable),
- Etc.

Prevention is the best solution!

As Benjamin Franklin put it “An ounce of prevention is worth a pound of cure” and it is important for you to have strong internal controls which would make it very difficult for fraud to occur. In the unfortunate case of it occurring, good internal controls should enable you to quantify the loss and expenditure in question.

USE ONLY A REGISTERED TAX PRACTITIONER BECAUSE

By 1 July 2013, all “tax practitioners” are required by the Tax Administration Act (TAA) both to register with (or fall under the jurisdiction of) a “recognised controlling body” and to register with SARS. Failure to do so is a criminal offence.

As a business owner it is in your interest to ensure, if you make use of a tax practitioner, that he or she is correctly registered. There is no legal onus on you to do so but, for example, you don't want to have SARS investigating your tax affairs because they discover that your tax adviser is operating illegally.

What is a “Tax Practitioner”?

This is broadly defined as any person who gives advice to another person on any tax Act or a person who helps to complete or completes any type of tax return for another person.

The main exclusions to this are where the person -

- Is an employee of the other person,

- Does not charge for the services rendered,
- Gives advice in anticipation of tax litigation, or
- Renders tax services but they are incidental to another service performed for the person.

Practitioners falling outside these exclusions will need to register with a recognised controlling body and with SARS by 1 July.

What is a “Recognised Controlling Body”?

It is a body recognised by SARS that requires its members to -

- Have minimum qualifications and experience
- Undergo on-going professional training
- Be subject to a disciplinary code
- Have a code of conduct and code of ethics

SARS recognises chartered accountants, auditors, attorneys and advocates who belong to their respective “controlling bodies”, SAICA (the South African Institute of Chartered Accountants) being one such body granted recognition.

Why regulate Tax Practitioners?

SARS is of the view that there are too many unqualified tax advisers who do not have the knowledge and experience to give good advice to their clients. This means SARS has to spend unnecessary time unravelling this advice which in turn results in penalties and interest for taxpayers. Making tax practitioners join a “recognised controlling body” will bring accountability and professionalism to the tax advice industry.

By way of analogy, in recent years financial advisers had to take an exam to prove they could meet the necessary standard. This reduced the number of financial advisers by 65% and brought higher standards to the industry.

The only downside is that some experienced tax advisers who have no qualifications will be forced out of the industry.

The New Company Tax Return (ITR14)

From May 3 all corporates (companies, close corporations, share blocks, body corporates, micro businesses and small business) will be required to use the new ITR14 form.

The form is customised to your type of business (body corporate, micro business etc) once you have answered the initial questions. Red arrows will indicate which fields to complete. The form can be saved at any time and you can work on it until you complete the ITR14 and it is ready for submission. In addition, all requests for corrections (RFCs) can be done via eFiling or at a SARS branch.

This form cannot be posted to SARS - it must be done via eFiling or completed at a branch. This is done to improve accuracy and efficiency.

There will be additional schedules to complete depending on your type of business.

The form is intended to make your submission and SARS' assessment smoother, more accurate and more efficient.

SARS and Old Style Identity Numbers

If SARS have your old ID number on record then this will have to be changed by the taxpayer actually presenting themselves with ID book to SARS. This will be important when transferring property or applying for tax clearance certificates.

Learnership Allowance

The Income Tax Act makes provision for an employer to claim an allowance called a "Learnership Allowance". The aim of the allowance is to encourage employers to train their staff thereby improving skills and employment in our country.

An allowance of R30,000 is claimed annually and a further R30,000 is claimed in the year of completion of the learnership.

There are certain conditions attached to this allowance but if you think that you may qualify then please contact us. It may well be worth your while.

TAX CORNER

Remember tax season for individuals starts on July 1. Get your returns in if you are due a refund!

What are Third Parties telling SARS about you?

The 2011 Tax Administration Act indicated that SARS would be looking to third parties, such as banks, medical aids etc, for information to verify your tax submissions. Now they have gazetted what they actually require from these third parties. The group of third parties includes ESTATE AGENTS and ATTORNEYS.

These third parties have to make six-monthly submissions to SARS in electronic format (smaller returns of twenty records or less may be submitted manually at a SARS office) which will enable SARS to build data per taxpayer, and that data will be used to check the information you have disclosed in your tax return and to pre-populate your tax returns.

This third party information includes, among other things, rental income, disposal and buying of shares, interest and dividend income, purchase of retirement funding, medical aid contributions and insurance pay outs on death.

It will be even more important that we organise the information needed for our tax returns as SARS will know much of it anyway and the penalties for understatement are severe.

Reminder of our services:

- Accounting and auditing
- Internal auditing
- Company and close corporation secretarial services
- Taxation services and advice
- Acquisitions, mergers and reconstructions
- Government allowances and incentives
- Financial management
- The administration of trusts and estates
- Personnel services including payrolls
- Broad-Based Black Economic Empowerment (B-BBEE Verification and consultation)

Contact us if you require any assistance in any of the abovementioned areas.

This newsletter is a general information sheet and should not be used or relied on as legal or other professional advice. No liability can be accepted for any errors or omissions nor for any loss or damage arising from reliance upon any information herein. Always contact your professional advisor for specific and detailed advice.

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