BAKER TILLY
MORRISON MURRAY
Auditors, Accountants & Business Advisers

Accounting Matters

Vol. 3 Issue 1
February 2013

MEMORANDUM OF INCORPORATION (MOI): THE 30 APRIL DEADLINE IS APPROACHING!

One of the transitional arrangements of the 2008 Companies Act (the Act) was that businesses had two years to migrate from their constitutional documents ('Memorandum and Articles of Association' for a company) to the new MOI. If you haven't yet completed this exercise, there are good reasons why you should now consider your MOI without delay:

- The Act differs from the previous Companies Act and understanding these differences and the impact they may have on your business is a time consuming exercise
- During the two year transitional period your Memorandum and Articles of Association will take precedence over the Act (subject to certain transactions such as a take-over or duties of directors) but from 1 May 2013, if parts of your Memorandum and Articles of Association conflict with the Act, these parts will be void.

How will the MOI affect my business?

It depends on the complexity of your business – for example owner-managed entities may well be able to use the default MOI in the Act, but even in simple operations you should have your accountant review your MOI and Shareholder's Agreement as any provisions in them that conflict with the Act will have no legal force after 30 April. Finally, check your old Memorandum and Articles of Association to see if any specific clauses were inserted. If so and if they are still relevant you may choose to include them in your MOI (provided they do not clash with the Act).

As you can see, even with a simple business there is quite a bit to think about.

If your business has more layers in it – for example, you may have directors or managers running the business – there is more to consider. Alterable provisions come into play and there are more than forty of them in the Act. These may be curbed or removed by the owners of the business when drafting the MOI. Typically, alterable provisions give wide powers to directors to, for example, issue shares or take on business debt. The old Act gave extensive powers to the owners of the business whereas the new Act gives widespread powers to directors and/or senior managers and it is up to the owners to accept these powers or restrict them when doing the MOI.

Take advice!

There are other issues to take into account, so it is worth getting expert advice – there is plenty at stake.

Remember the deadline for completing your MOI is looming. As an extra incentive if you miss the deadline of 30 April, you will have to pay the Companies and Intellectual Property Commission (CIPC) a fee when submitting your MOI – there is no CIPC charge until then.

DIRECTORS AND SHAREHOLDERS: CAN YOU MEET VIA SKYPE OR EMAIL?

The Companies Act of 2008 ("the Act") requires that directors live in an era of transparency and accountability, and they can face severe consequences if they cannot show they have applied their minds when situations go awry. Thus, it is important they have a record of how they reached the decisions they made. At the same time, most senior staff have extensive travel commitments and it can frequently be difficult to get all the directors together in one place for a meeting.

The Act makes provision for this. Directors may hold meetings using electronic communication – in other words they could use Skype or any other such technology to hold a meeting. As long as they can all communicate concurrently without an intermediary, the meeting is as if they were all in one room.
Moreover, if an urgent situation arises and it is not possible to hold a full director's meeting, an electronic communication can be held. Thus, directors could pass a resolution by email or make a decision by similar means.

The requirements

Obviously, there are some hurdles to cross. Notice must be given of such meetings – it is worth ensuring you comply with the requirements of notice for meetings. The Electronic Communications and Transactions Act must be complied with – emails, for example, must be identifiable as coming from the relevant director, they must be stored so they can be proven not to be altered, and they must be retrievable. Such meetings cannot be prohibited by the Memorandum of Incorporation (the MOI). As most companies are now in the process of converting their current constitutional documents to the MOI, it is worth ensuring that this is allowed in the MOI.

Similarly, shareholders may make use of electronic communications at their meetings, subject to fulfilling statutory requirements – more or less the same as directors' meetings. In fact, for public companies, the Act requires that the meeting be "reasonably accessible within South Africa for electronic participation by shareholders".

Technology can be used to ensure correct communications and transparent decision-making in a business. It is worth seeing how you can apply these principles to your business.

DIESEL REBATES: ARE THEY WORTH APPLYING FOR?

The diesel rebate or refund has been in existence for more than a decade and is claimed as part of the value added tax (VAT) process. It applies to you if you use it for your own "primary production activities" in one of the following business categories:

- Mining on land
- Forestry
- Farming
- Commercial fishing
- Coastwise shipping
- Offshore mining
- National Sea Rescue Institute
- Rail freight
- Electricity generation

In SARS' words it is "to encourage and enable primary production". Depending on your usage, the rebate at 80% of R1.58 per litre of diesel (this is for farming operations) can be substantial.

What is the catch?

For starters, there are many specific requirements to take into account and SARS applies the regulations strictly. It is definitely worth discussing this with your accountant.

The rebate is claimed as part of the VAT system, and as many of you will have experienced, SARS has been actively querying and auditing VAT returns, particularly when it comes to refunds. SARS' approach has become increasingly strident and many taxpayers get their credentials queried or are notified of potential 200% penalties. Thus, when you overlay the exacting methodology of the diesel rebate with SARS already actively querying VAT returns, it can be seen why many taxpayers are wondering if it is worth it.

Another issue that has arisen is that there have reportedly been instances where SARS have asked vendors to not deduct the refund as it is easier if SARS calculates the refund. After the calculation, SARS then pays the refund to the vendor. This is because the SARS VAT system and the Diesel refund system do not "talk" to each other.

What to do

In the case of SARS asking for vendors to allow SARS to calculate the refund, the position is clear. The refunds are governed by the Customs and Excise Act and SARS merely performs the administrative function of processing the claims. In terms of the "VAT 404 Value-Added Tax Guide for Vendors" dated 12 March 2012, Diesel refunds are to be off-set against any VAT liability or increase the amount of any refund due to you. *Thus, taxpayers should deduct the Diesel refund themselves.*

Readers are no doubt like the vast majority of taxpayers – you are law-abiding and pay your taxes. As the rebate can have a positive effect on your cash flow, this is worth pursuing. As mentioned above, it makes sense to make use of your accountant or tax specialist, especially because, as seen above, SARS do not always get it right.

Your accountants or tax advisers will have better access to SARS, know their way around the process and be familiar with handling the queries SARS will probably throw at you.

CIPC (COMPANIES AND INTELLECTUAL PROPERTY COMMISSION) ISSUES NEW DEREGISTRATION GUIDELINES

Deregistration is the process whereby a dormant company or close corporation is brought to a legal end. If one of your businesses is dormant, consider following the guidelines for voluntary deregistration – at least it puts the business out of existence and gives peace of mind that it is now behind you.

Deregistration can be either compulsory or voluntary –

- The CIPC will, after notice, deregister a business that fails to file annual returns for two years, or
- An entity may voluntarily file for deregistration if it has stopped trading and has no assets or insufficient assets to warrant liquidation.

The Process

If an entity wishes to file for deregistration it needs to write to the CIPC on its business letterhead (a third party must use its own letterhead), signed by all "active" directors and stating that the business is dormant and its assets cannot justify liquidation. If the application is from a third party, the letter needs to have documentary proof of the above. Tax clearance (or written confirmation from SARS that there is no tax owing) must be attached and the tax number is to be shown plus the signatures and certified ID copies of all directors (or any third party making the application).
The CIPC will check to see if annual returns are up to date and if so will decline any third party applications.

If there are any errors, the application will be returned and must be filled in as per CIPC requirements.

If it is successful, an "in deregistration process" notice is issued.

The entity or any third party (such as a creditor) may object to a deregistration application or notice. If deregistration is due to not completing annual returns then bringing them up to date will stop the deregistration process. If for any other reason, certified copies of the IDs of those opposing the deregistration must accompany the objection.

Once CIPC have completed all the administration, a "final deregistered" notice is issued and the entity no longer legally exists.

The books and documents of the business may be disposed of in such way as CIPC directs.

The consequences of deregistration

The entity ceases to exist as a legal entity but the debts of the business are not expunged, merely rendered unenforceable against the entity. Thus sureties remain liable under their suretyships. Directors, "prescribed officers" (certain senior managers with substantial powers) and shareholders who may have become personally liable for any company debt "in respect of any act or omission that took place before the company was removed from the register" remain liable. Moreover the name/s of the entity will become available for use and any interested party may then acquire the name.

REVISED BROAD-BASED BLACK ECONOMIC EMPOWERMENT CODES OF GOOD PRACTICE

On the 05th of October 2012, Dr Rob Davies, the Minister of Trade and Industry, issued the revised broad-based black economic empowerment ("B-BBEE") Codes ("Revised Codes") for public comment.

The Revised Codes will have significant consequences for businesses and their B-BBEE Scorecards and Recognition Levels in future.

The most important changes include:

- Increased turnover threshold for Exempt Micro Enterprises from R5 million to R10 million
- Increased turnover threshold for Qualifying Small Enterprises ("QSE's") from R5 million – R35 million to R10 million – R50 million
- Increased turnover threshold for Generic or Large Enterprises from R35 million to R50 million and above
- Reducing the number of Black Economic Empowerment ("BEE") elements from 7 to 5 elements
    - o Management Control and Employment Equity are merged into one element for 15 points
    - o Preferential Procurement and Enterprise Development are merged into a new element known as Enterprise and Supplier Development for 40 points
- Ownership points are increased from 20 to 25 points with entities required to achieve a threshold of 40% on the net value targets to avoid discounting of its overall score
- QSE's no longer have the option to elect elements and are required to comply with all 5 elements

- The introduction of priority elements: ownership, skills development and supplier development which requires QSE's to comply with at least two priority elements and large entities to comply with all priority elements. Entities who do not achieve the sub-minimum criteria and thresholds will be discounted, which means that QSE's will move one level down and large entities will move two levels down.
- The increase in the Skills Development spend target from 3% to 6%
- Increase in Preferential Procurement Targets and the limitation to Value Adding Suppliers

The most significant changes which will have an immediate impact on the entity's BEE ratings are the changes in the BEE recognition levels. The proposed changes to the BEE recognition levels will make it more difficult for entities to achieve a particular B-BBEE status level as the number of points required at each level has increased fairly significantly. For example, a current level four contributor who obtained 65 points on the scorecard will drop to become a level seven contributor. The comparison of the revised B-BBEE status levels are set out below:

B-BBEE Status	Current Qualification	New Qualification	B-BBEE recognition level
Level One Contributor	100 points	100 points	135%
Level Two Contributor	85 but <100	95 but <100	125%
Level Three Contributor	75 but <85	90 but <95	110%
Level Four Contributor	65 but <75	80 but <90	100%
Level Five Contributor	55 but <65	75 but <80	80%
Level Six Contributor	45 but <55	70 but <75	60%
Level Seven Contributor	40 but <45	55 but <70	50%
Level Eight Contributor	30 but <40	40 but <55	10%
Non-Compliant Contributor	<30	<40	0%

Although the implementation of the Revised Codes is only expected to be released later this year, entities will have to consider the significant impact the proposed changes may have on their current scorecards.
Should you have any queries regarding the Revised Codes or wish to be rated prior to the release of the Revised Codes, kindly contact our B-BBEE Registered Auditor (Monique Sharpley: sharpley@bakertillymm.co.za) or B-BBEE Consultant (Malie Dand: malied@bakertillymm.co.za).

BAKER TILLY
MORRISON MURRAY

Registered Auditors
20 Westville Road, Westville, 3629
PO Box 1098, Westville 3630, South Africa
Docex 21 Westville
Tel: +27 31 267 5300 Fax: + 27 31 267 1838
E-mail: mail@bakertillymm.co.za
www.bakertillymm.co.za