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Non-resident employers to register with SARS and withhold employees' tax

In the Draft Tax Administration Laws Amendment Bill, 2023 released by National Treasury on 31 July 2023, which has been circulated for comments, it is proposed that the distinction between resident and non-resident employers be removed.

The proposed amendment seeks to treat resident and non-resident employers equally from an employees' tax (**PAYE**) perspective and aims to ensure alignment with the employer's obligations in relation to skills development levies and unemployment insurance fund contributions. The obligation to deduct employees' tax will also be widened to include all representative employers (previously this was limited to representative employers of non-resident employers).

What does this mean for non-resident employers?

Currently, in the case of a non-resident employer, the obligation to withhold PAYE only arises if the company has a representative employer in South Africa. A representative employer is defined as any agent (who resides in South Africa) of such employer, having the authority to pay remuneration. Thus, a representative employer only exists if that person, who resides in South Africa, has the authority to pay remuneration to the employee on behalf of the non-resident employer. In many cases, non-resident employers would not have a representative employer in South Africa and, therefore, no PAYE withholding obligation arose. Despite this, the non-resident employer had an obligation to pay Skills Development Levies (**SDL**) and Unemployment Insurance Fund contributions (**UIF**). Paying SDL to SARS requires an employer registration whereas UIF must be paid via South African Revenue Service (**SARS**) (if the employer is registered with SARS) or directly to the Fund (if the employer is not registered with SARS). A SARS employer registration for non-resident employers with no obligation to withhold PAYE, has been the practical challenge to date (refer below).

With the proposed amendment to the legislation (which is subject to comments and therefore may change), any non-resident employer (whether it has a representative employer or not) who pays or is liable to pay remuneration to any employee, must register as an employer with the SARS and deduct PAYE from remuneration paid to that employee, in respect of the employees' liability for normal tax. A normal tax liability will arise for an individual, if the individual earns annual taxable income exceeding the tax threshold (R95 750 in respect of the 2024 South African tax year).

Should the legislation be promulgated in its current form, non-resident employers would have to comply with local payroll compliance obligations, which include the submission of monthly payroll tax returns with payments and issuing annual employees' tax certificates by the relevant deadlines. Non-compliance or late payments will result in the employer being subject to a 10% penalty as well as interest.

Practical considerations

Employer registration

Currently, in order to register as an “employer” with SARS, an employer will require, among others,

- a Companies and Intellectual Property Commission (CIPC) registration number;
- a SARS income tax registration number; and
- a South African bank account.

Many non-resident employers with employees in South Africa may not have been registered as an “external company” with the CIPC, although required to do so within 20 business days of being a party to an employment agreement within South Africa. Consequently, they may also not have a SARS income tax registration number (which is automatically assigned by CIPC upon registration), unless they registered for income tax directly with SARS. In addition, a non-resident employer may not have a local bank account, which may be challenging to obtain without a local representative.

Based on the above, in our view, the SARS employer registration requirements for non-resident employers would need to be streamlined and simplified to ensure ease of compliance.

Foreign tax credits

Further to the above, at first glance, it may appear that the legislation is focussed on non-resident employers with employees working in South Africa, however, the legislation would be equally applicable to non-resident employers with South African tax resident employees working outside South Africa.

In the latter instance, the South African tax residents working outside South Africa may have a tax liability in South Africa in respect of their employment income (amongst others), especially if it exceeds the R1.25 million foreign remuneration exemption. Due to the fact that the employee works in another jurisdiction, foreign taxes may be payable on the remuneration in the host location (resulting in double taxation). In these circumstances, the non-resident employer may then need to submit an application to SARS requesting approval to withhold PAYE at an effective tax rate that takes into account the foreign tax paid. This would, therefore, be a further point requiring clarification.

Provisional taxpayers

With the potential payroll reporting obligation on non-resident employers, the definition of a provisional taxpayer would need to be revised to exclude taxpayers who earn remuneration from a foreign employer, as this would result in undue tax administration for individual taxpayers.

Key points to note

The proposed amendment seems to be aligned with the SARS Vision 2024 which has the objective of collecting taxes from individuals on a real-time monthly basis and will fundamentally alter the process governing the submission of individuals’ income tax returns.

Whilst the obligation to withhold employees’ tax rests on the employer, the income tax liability remains that of the employee. Where no PAYE has been withheld and/or paid over to SARS and no provisional tax payments were made, in addition to the employer penalty and interest, the employee may also be penalised by SARS.

KPMG will be making submissions to National Treasury by 31 August 2023. In the interim, non-resident employers with employees in South Africa or those who employ South African tax residents to work outside South Africa, should note this imminent requirement for payroll withholding and ensure that they are ready to comply should the legislation become effective on date of promulgation (anticipated to be around January 2024).

Engaging a reputable service provider to manage payroll compliance in South Africa would be highly recommended.

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