GMS Flash Alert

2023-218 | November 20, 2023

South Africa – Proposals for Non-Resident Employers with a PE in South Africa

Following stakeholder engagement and comments submitted by regulatory bodies and tax practitioners in South Africa in respect of the Draft Tax Administration Laws Amendment Bill, 2023 (TALAB) issued on 31 July 2023, the revised TALAB was released by National Treasury on 1 November 2023.[1] In the revised version of the TALAB, the proposed amendment in relation to non-resident employers' obligations to withhold employees' tax has been narrowed to only apply to those non-resident employers that conduct business through a permanent establishment (PE) in South Africa.

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).

Further to our report in *GMS Flash Alert* 2023-159 (August 8, 2023), KPMG in South Africa provides below an update to the most recent proposed legislative amendments on the requirements for non-resident employers to withhold employees' tax.

WHY THIS MATTERS

The proposed rules will introduce new obligations for non-resident employers that conduct business through a PE in South Africa. This will entail some planning and adjustments with respect to systems and processes, which may include engaging an external payroll service provider, and additional time spent on compliance matters. Moreover, there will be additional levies to be paid (Skills Development Levies and Unemployment Insurance Fund contributions) thus adding to said employers' costs.

Further Details on New Proposals for Non-resident Employers with a PE in South Africa

From January 2024 (anticipated date of promulgation of the proposed legislation) all non-resident employers with a PE in South Africa must be registered as an employer with the South African Revenue Service (SARS) and deduct employees' tax (PAYE) from remuneration paid to their employees. The obligation to withhold PAYE arises when the employee has a liability for normal tax, which occurs if the individual earns annual taxable income exceeding the tax threshold (ZAR 95,750 in respect of the 2024 South African tax year).

In addition to PAYE withholding, non-resident employers with a PE in South Africa will have an obligation to pay Skills Development Levies (SDL) and make Unemployment Insurance Fund (UIF) contributions to SARS.

KPMG INSIGHTS

Non-resident employers without a PE in South Africa would not be required to withhold PAYE. However, as noted in our *GMS Flash Alert* issued in August 2023, the practicalities surrounding SDL and UIF contributions in the case of non-resident employers who are not required to withhold PAYE remains a challenge.

Non-resident Employers with Representative Employers and No PE

Where a non-resident employer without a PE in South Africa has a representative employer in South Africa, the obligation to withhold PAYE falls on the representative employer. A representative employer, in the case of a non-resident 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.

Once Legislation Is Promulgated

Once the legislation is promulgated, non-resident employers with a PE in South Africa or their representative must comply with local payroll compliance obligations, which include the submission of monthly payroll tax returns with payments to SARS 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-percent penalty as well as interest.

What Is a Permanent Establishment?

From the proposed amendment, the definition of a PE is central in ascertaining whether a non-resident employer will have a PAYE withholding obligation.

In South African domestic income tax legislation a PE means a PE as defined from time to time in Article 5 of the Model Tax Convention on Income and on Capital of the Organisation for Economic Co-operation and Development (OECD MTC). The OECD MTC defines a PE to mean "a fixed place of business through which the business of an enterprise is wholly or partly carried on." A PE may also be deemed to exist where the employees (or other dependant agents) have the authority to conclude contracts in the name of the employer, whilst physically present in South Africa. However, certain activities do not give rise to a PE, even if these requirements have been met.

KPMG INSIGHTS

The determination as to whether a PE will be created is fact specific and complex and it needs to be assessed on a case-by-case basis to conclude whether the activities of a non-resident's employees are more likely than not to create a PE of the employer in South Africa. Consultation with an experienced tax professional in this regard is critical and highly recommended.

Action Steps for Non-resident Employers

Registration as an external company in South Africa

Non-resident employers that are a party to an employment contract within South Africa must register as an "external company" with the Companies and Intellectual Property Commission (CIPC). By law, this registration is required within 20 business days of being a party to an employment agreement within South Africa. This registration is not dependent on whether the non-resident employer has a PE in South Africa.

Assessment of whether a PE has been established in South Africa

In cases of uncertainty as to whether an employees' tax withholding obligation exists, an assessment should be made to conclude whether a non-resident employer has a PE in South Africa.

Employer registration with SARS and payroll administration

Where a PE has been created in South Africa, the non-resident employer should register as an "employer" with SARS and administer a South African payroll monthly.

In addition to the CIPC registration number issued upon registration as an external company, a SARS income tax registration number will automatically be assigned by CIPC. To finalise employer registration with SARS, the non-resident employer must open a South African bank account. A local representative would be required for CIPC registration and bank account opening.

KPMG INSIGHTS

Non-resident employers with a PE in South Africa should note this imminent requirement for payroll withholding and make sure that they are ready to comply should the legislation become effective during January 2024.

Engaging a reputable service provider to assist with CIPC registration, PE assessment or to manage payroll compliance in South Africa would be highly recommended.

For further information or assistance, KPMG in South Africa can help (see the Contacts section).

FOOTNOTE:

1 See proposed amendment to Paragraph 2 of the Fourth Schedule to the Income Tax Act, 1962 as contained in the Draft Tax Administration Laws Amendment Bill, 2023 by clicking here.

RELATED RESOURCE:

This article is excerpted, with permission, from "Non-resident Employers with a PE in South Africa to register with SARS and withhold employees tax," in *Tax & Legal Alert* (November 2023), a publication of the KPMG International member firm in South Africa.

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ZAR 1 = EUR 0.04967
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