KPMG

GMS Flash Alert

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South Africa – Update for Non-resident Employers with a PE in South Africa

Further to our report in *GMS Flash Alert* 2023-218 (20 November 2023), KPMG in South Africa provides below an update to the most recent legislative amendments on the requirements for non-resident employers to withhold employees' tax.[1]

The timeframe for meeting new obligations was brought forward unexpectedly. As of 22 December 2023, the following foreign employers have an obligation to withhold employees' tax and remit this to the South African Revenue Service (SARS) on a monthly basis:

- all foreign employers conducting business through a permanent establishment (PE) in South Africa; and/or
- all foreign employers that have a representative employer (as defined) in South Africa.

Foreign employers or their representative *falling within the above categories*, must therefore register as an "employer" with SARS where they have employees who have a tax liability in South Africa.

WHY THIS MATTERS

For foreign employers operating in South Africa, withholding employees' tax poses both challenges and opportunities. On one hand, complying with withholding tax regulations adds an additional layer of complexity to payroll management, requiring meticulous attention to detail and adherence to statutory requirements. Failure to comply can result in penalties and legal consequences, tarnishing the reputation of the employer and potentially jeopardizing its operations in the country.

On the other hand, embracing withholding tax obligations demonstrates a commitment to compliance and good corporate citizenship. It fosters trust and credibility with employees, regulatory authorities, and the broader business community, enhancing the employer's reputation and positioning it as a responsible corporate entity.

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Context

In July 2023, National Treasury released draft legislation indicating a proposed change to the employees' tax withholding obligation that would specifically impact non-South African tax resident employers (foreign employers). After much consultation with regulatory bodies and tax practitioners over a four-month period, a revised *Tax Administration Laws Amendment Bill, 2023* (TALAB) was issued on 1 November 2023, which provided much-needed clarity on which foreign employers would be impacted by the proposed amendments.

Whilst the expectation was that the legislation would be promulgated early in January 2024, the promulgation in fact took place on 22 December 2023, and the change was effective immediately. Consequently, as of 22 December 2023, the above-noted categories of foreign employers have an obligation to withhold employees' tax and remit this to the South African Revenue Service (SARS) on a monthly basis.

What Should Foreign Employers Do?

As it stands, with the unusual and unexpected effective date of this legislative change, many foreign employers could already be non-compliant.

To navigate the intricacies of employees' tax withholding compliance in South Africa, foreign employers should seek professional tax advice to understand the laws and regulations governing withholding of employees' tax, including assessing:

- whether they have a PE or representative employer in South Africa,
- the applicable tax rates and thresholds,
- reporting obligations, and
- the consequences of non-compliance.

For more details, see our earlier report in *GMS Flash Alert* 2023-218 (20 November 2023) "South Africa – Proposals for Non-resident Employers with a PE in South Africa."

KPMG INSIGHTS

Despite this amendment to the employees' tax withholding obligation of foreign employers, as noted in our report in *GMS Flash Alert* 2023-159 (8 August 2023), there continues to be a misalignment between this PAYE withholding obligation of foreign employers and their obligation to make Unemployment Insurance Fund (UIF) contributions and pay Skills Development Levies (SDL) (South Africa's equivalent of "social security" contributions). This anomaly now remains specifically in cases where the foreign employer does not have a PE or a representative employer in South Africa.

As the legislation currently stands, all foreign employers (whether they have a PE or representative employer in South Africa or not) must contribute to UIF and SDL in respect of remuneration (as defined) paid to their employees working in South Africa. Further tax practitioner and regulatory body submissions may continue to be made to SARS in this regard.

In cases of non-compliance, to minimise or eliminate potential penalties, foreign employers should consider making use of the SARS Voluntary Disclosure Programme (VDP). The VDP process has strict criteria in order for the application to qualify, and therefore professional tax advice should once again be sought to manage this process.

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As foreign employers continue to play an integral role in South Africa's economic landscape, fulfilling withholding tax obligations remains paramount. By embracing compliance and adopting proactive measures to navigate tax regulations, foreign employers can not only mitigate risks but also potentially enhance their reputation and help foster a thriving and sustainable business environment in South Africa.

If employers have questions about how the rules apply to them and what they need to do to come into compliance, they should consult with their usual tax professional or a member of the KPMG team in South Africa (see the Contacts section).

FOOTNOTE:

1 Paragraph 2 of the Fourth Schedule to the Income Tax Act, No. 58 of 1962, as amended in terms of the *Taxation Adminstreation Laws Amendment Act*, No. 18 of 2023, per Government Gazette No. 49947 (page 26) issued on 22 December 2023.

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The information contained in this newsletter was submitted by the KPMG International member firm in South Africa.

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