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In this Issue

FEBRUARY 2012

IS EXCHANGE CONTROL OVER FOR INDIVIDUALS?

The new limits.....

Following the Medium Term Budget Speech by Pravin Gordhan in October 2011, the Treasury published revised exchange control amounts which grouped the annual amounts individuals can take off-shore to R5 million per annum. This consolidates the investment allowance (R4 million per annum) and the travel, holiday, alimony allowances etc (R1 million per annum for all other categories) into an annual allowance which does not require exchange control approval.

.....and a massive new concession

Tucked into this statement was the following:

"Furthermore, in order to eliminate the bias against residents compared to non-residents, the SARB (South African Reserve Bank) will consider investments by residents (and estates) for applications in

(South African Reserve Bank) will consider investments by residents (and estates) for applications in excess of the R5 million allowance, subject to strict criteria related to appropriate disclosure requirements (on foreign assets and income), tax compliance and market conditions."

Firstly, what does this mean? You are now allowed to take out unlimited amounts subject to full disclosure, tax clearance and "market conditions" (this last point needs to be clarified by the Reserve Bank).

This is a massive concession - if you have substantial assets and wish to globalise your balance sheet, you can now do so and remain in South Africa. Prior to this, the only way for you to move your assets off-shore was to emigrate - often a difficult decision to make and a stressful and time-consuming exercise. This meant the country lost your skills and whatever income you made as you would now be taxed under a different jurisdiction. The government is cutting its losses by keeping your skills and revenue base in South Africa. It is also another signal that exchange control is being phased out - globalisation has virtually made it redundant.

The other question is why so little fanfare for this concession? Clearly, this benefits the rich and super-wealthy and the government which is committed to improving conditions for the poor, doesn't want to attract attention to this concession, however commonsensical it is.

Take advice if you want to pursue this option.

SUGGESTED READING FOR ACCOUNTANTS: See the article "Clarity needed on new forex rules" on Business Day's website, and National Treasury's "Further information on investment and prudential regulatory announcements in 2011 MTBPS" on its website.

BUSINESS RESCUE: ARE PERSONAL SURETYSHIPS ENFORCEABLE?

In terms of the new Companies Act, creditors' rights are curtailed during **business rescue** proceedings. For example, all legal proceedings and recovery of debts are automatically suspended in terms of section 133(1) of the Companies Act. Section 133(2) extends this protection to sureties and/or guarantees issued by the company - a creditor holding such a surety or guarantee can only enforce it against the company with the court's permission.

A surety sued

These provisions were recently tested in a Western Cape High Court Case. The circumstances of this were that a bank sought to enforce a surety given by an individual over a company's debts. The company was insolvent and had begun proceedings to put itself under business rescue.

The Court decides

The individual who gave the surety offered three arguments why his suretyship could not be enforced: -

1. Whilst section 133(2) only speaks of sureties or guarantees issued by the company (and not those issued by an individual or third party), section 133(2), it was argued, implicitly includes sureties given by individuals as it should be read with section 133(1) which places a moratorium on the company's debts.

   The judge however ruled that the wording of section 133(2) is "is so explicit that it is impossible to avoid its plain meaning. It refers to a surety by the company and to its enforcement by another person against the company."

   Thus, the judge ruled in favour of the bank.

2. In terms of section 133(1), a moratorium had been placed on the company's debts and this, it was argued, should include the individual's surety as effectively it was part of the company's debt.

   In deciding on this argument, the judge stated that who the moratorium applied to depended on whether it is in personam (applicable to the company only - " a personal privilege or benefit in favour of the company") or whether it is in rem (it is attached to the debt itself) in which latter case the surety would have protection. For in rem to apply, the debt must be "invalid, extinguished or discharged". As this is clearly not the case, the judge again found in favour of the bank.

3. The last defence was that there was likely to be a compromise or reduction of the company's debt which - it was argued - would similarly reduce the surety's liability. The judge, whilst prepared to assume ("without so deciding") that a compromise or reduction of the company's liability would indeed reduce the claim against the surety, commented that it was "pure conjecture" whether such a compromise or reduction would actually take place. Even if it did, the creditor had a right to recover in full from the surety unless and until the company's liability was in fact reduced. Once again the judge found in favour of the bank.

Creditors and sureties - the lessons learned

So what are the lessons learnt?

- **Sureties** - if you are asked to give a surety or guarantee for a company, think carefully about how confident you are that the business will not run into financial difficulty. Should this happen, you are very vulnerable giving a surety or guarantee as the above case shows. Take advice in doubt.

- **Creditors** - if you hold a surety, don't hold back in enforcing it, if the business runs into difficulties. You may get a lesser (or nil amount) in the event of a compromise or reduction of the debt - to be safe, you need to recover from the surety before that happens.

SUGGESTED READING FOR ACCOUNTANTS: See the article "Court Rules on Suretyships and Business Rescue" on Edward Nathan Sonnenberg's website. The judgement in *Investec Bank Ltd v Bruyns* can be accessed from this article.

PAIA MANUALS: BREATHING SPACE FOR SMALL BUSINESSES

"The more delay'd, delighted. Be content" (Shakespeare)

On December 30th, the Minister of Justice issued a government notice giving small businesses an additional four years to submit their manuals in terms of PAIA. The new date for these exempted businesses is 31 December 2015.

Who's off the hook, and who isn't?

Businesses **not** exempted are:

1. All public entities
2. Public companies
3. Private companies, listed in the schedule below, with more than 50 employees or turnover greater than specified in the listed schedule. Close corporations are included in the private company definition.

Annual Turnover Threshold by Business Sector	
Business Sector	**Annual Turnover Threshold**
Agriculture	R 2 million
Construction	R 5 million
Community, Special and Personal Services	R 5 million
Catering, Accommodation and other Trade	R 5 million
Mining and Quarrying	R 7 million
Manufacturing	R 10 million
Electricity, Gas and Water	R 10 million

Electricity, Gas and Water	R 10 million
Transport, Storage and Communications	R 10 million
Finance and Business Services	R 10 million
Retail and Motor Trade and Repair Services	R 15 million
Wholesale Trade, Commercial Agents and Allied Services	R 25 million

(Note - if the table above does not display correctly, please see the "online version" - link above, under masthead)

Thus, all sole practitioners, partnerships, trusts and companies which fall out of the listed schedule have four more years to complete their manuals. Effectively, this means more than 85% of businesses now have to submit their manuals only by December 31 2015.

An obvious question is why the extension, especially when the Act was promulgated in 2000. The Minister's spokesperson gave two reasons for this. The first is that the Ministry of Justice did not expect the backlash shown by smaller businesses such as sole practitioners who were struggling to find the time and money to complete their manuals. The second is that it is evident the Justice Ministry lacks the resources to follow up to ensure that all businesses have submitted manuals. As a starting point, the Ministry will be liaising with the Companies and Intellectual Property Commission (the body controlling registration of companies) to begin compiling a data base.

With all these delays and extensions, should we take this piece of legislation seriously? The aim of the Act is to enable citizens to access information (in the public or private sectors) required by them to exercise and protect their constitutional rights. As it flows directly from the Constitution, we should give time and consideration to making it work. A contrary argument is that there is very little information in small businesses that the public would need to access. Elsewhere in the world a minimum turnover is set before requiring the compiling of manuals.

Remember also that the Act is in existence and though the obligation to lodge manuals has been delayed for some businesses, they are still required to be able to respond to requests for information.

Finally, if you didn't submit a manual by December 31 and are not on the exemption list, it would be prudent to submit your manual now. Don't delay - there are substantial penalties for failure to comply!

SUGGESTED READING FOR ACCOUNTANTS: See the article "Info relief for small firms" on the Times Live website, and the South African Human Rights Commission's website has full "Guidance Notes" (including a link to the relevant Government Notice) on its website.

FINANCE 101: LEAVE PAY - THE POTENTIAL TIME BOMB ON YOUR BALANCE SHEET

The large corporate companies have focused extensively on leave pay over the past few years - Price Waterhouse Coopers (PWC) do an annual survey on it. Why is this attention given to leave pay? There are two main reasons:

- Employees used to be able to accumulate leave. If their leave entitlement was 20 days per annum and they only took 10 days, then these accumulated 10 days became a liability for the company. This built up until these companies began to realise they were carrying increasingly larger liabilities. Not only is losing staff disruptive to work flows but it became a potential strain on cash flow as the company has to pay an employee his or her accumulated leave when they terminate their employment. It was not unusual for companies to be carrying the equivalent of three months worth of salaries in their leave pay provision.

- There is no doubt that business has become faster, more competitive and more stressful. It has thus become more important that staff use their leave to rest and relax, so they can be more productive at work.

New trends in annual leave

What are the trends shown by the PWC report?

- The minimum annual leave laid down by the Basic Conditions of Employment Act is 15 working days, whilst usually annual leave increases based on the number of years of service

- Senior management usually get 20 working days leave per annum whilst top management get 30 working days get 30 working days

- Most companies now (88%) limit the amount of leave that can be accumulated. This is the major reason for bringing the leave pay provision on the balance sheet down to more manageable levels. Thus, a policy of "use it or lose it" has become common

  A" use it or lose it" policy dovetails with solving the two major leave issues - the increasing leave pay provision and the necessity for staff to get a good annual rest.

- Finally, few companies actually allow employees to be paid out for leave not taken unless the employee terminates his/her employment. This limits a company's cash exposure and ensures that staff does take leave.

The risk: what you should do

It's a good exercise to benchmark these trends against your business. Make sure you are not accumulating a hidden time bomb and your staff are not getting stale. Finally, if some members of your staff never take leave, this could be an indicator that there may be malfeasance or that some form of abuse is happening.

SUGGESTED READING FOR ACCOUNTANTS: See the article "Accumulation of leave has major cost implications for SA companies" on the PWC website.

YOUR TAX DEADLINES FOR FEBRUARY

Provisional taxpayers need to do their provisional returns by February 29. Please don't forget to complete the estimated turnover for the year.

Have a great February - and don't forget ♥ Valentine's Day ♥ on the 14th!