

Business Law & Tax Review

Definitions key to labour change

Initial proposed amendment adds to compliance burden

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THE draft version of the Revenue Laws Amendment Bill, 2008 proposed far-reaching changes to the employees' tax treatment of labour brokers and entities providing personal services, including the abolition of the labour broker regime in its entirety.

Under the draft bill, the definitions of a labour broker, a personal service company and a personal service trust would have been deleted and replaced by a single definition of a "personal service provider". However, the draft personal service provider definition appeared to deal with services rendered by individuals as well as corporate entities and trusts. Since there was no proposed amendment to the definition of remuneration in respect of independent contractors, the intended application to individuals was not clear.

In the light of comments submitted to the National Treasury on the proposed amendments, the changes contained in the draft bill were then revised.

The Portfolio Committee on Finance's Response Document on the bill indicates that the proposed unification of regimes was intended to remove the duplication of deemed employee regimes, particularly the need for labour brokers obtaining the South African Revenue Service (SARS) exemption certificates for employees' (PAYE) tax withholding by employers. However, the initial proposed change actually adds to the compliance burden when overall relief was intended.

The proposed personal service provider regime will be changed to unify only the personal service company

and trust regimes. The labour broker regime will also be limited solely to individuals. This narrowing of the "labour broker" definition will eliminate most of the exemption certificates currently being requested.

Under the revised amendments contained in the Revenue Laws Amendment Act of 2008, there are two main changes to the existing regime:

Firstly, the definition of a labour broker will be retained in the Fourth Schedule to the Income Tax Act, but will apply only to individuals who are sole proprietors carrying on a labour broking business.

Secondly, the new definition of a "personal service provider", unlike the previous draft, combines the existing definitions of a personal service company and a personal service trust into one definition.

These amendments will be effective from any year of assessment commencing on or after March 1 this year.

The effect of these proposals will be that the current situation for individuals trading as sole proprietors will remain unchanged. If they are carrying on a trade as a labour broker, an IRP 30 exemption certificate will still be required, failing which employees' tax must be withheld from their fees. The proposal in the draft bill to provide an exclusion where the labour broker employs three or more full-time employees has been omitted from the enacted amendments.

Where services are rendered by a corporate entity or a trust, clients using the services of that entity or trust will no longer have to determine whether the entity is a labour broker.

This change is to be welcomed in the light of the difficulties in drawing a distinction between the provision of labour and the provision of a service. Therefore, IRP 30 exemption certificates will no longer be required for companies or trusts which are labour brokers.

However, employees' tax will have



FAIRNESS DEMANDED: Members of the SA Agent Labour Broker Workers Organisation during a protest last year against being exploited. Picture: THULI DLAMINI

to be withheld from fees paid to a "personal service provider" as defined. Accordingly, clients using the services of a corporate entity or trust will still be required to determine whether that entity or trust is a personal service provider, based on the new definition.

A personal service provider means any company or trust, where any service rendered on behalf of such company or trust, is rendered personally by any person who is a connected person in relation to such company or trust, and any one of the following three conditions is fulfilled:

- Such person would be regarded as an employee of the client if the service

was rendered by that person directly to the client, other than on behalf of the company or trust; or

- Where those duties must be performed mainly at the premises of the client, the person or the company or trust is subject to the control or supervision of the client as to the manner in which the duties are performed or are to be performed in rendering such service; or

- Where more than 80% of the income of that company or trust during the year of assessment, from services rendered, consists of or is likely to consist of amounts received directly or indirectly from any one client of the company or trust, or any associated insti-

tution as defined in the Seventh Schedule of the act.

There are two important exclusions in the personal service provider definition. A company or trust which employs three or more full-time employees who render such services (other than any employee who is a shareholder or member of the company, or a relative of a shareholder or member) will not be a personal service provider.

Secondly, a company or trust which provides a client with an affidavit stating that not more than 80% of its income during the tax year from rendering services is derived from one client, will not be a personal service provider.