

Business Law & Tax Review

Havens need to comply

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cial tax incentives to attract foreign investment yet are not branded tax havens. Therefore, the fact that a jurisdiction has elected a low tax rate is not in itself a problem. It only becomes one when that country refuses to exchange information with other relevant tax authorities.

Organisations such as Action Aid which have partly blamed tax havens for the recent financial crisis are misinformed. Jeffrey Owens, director of the OECD's Centre on Tax Policy and Administration, recently said these allegations are incorrect.

Using SA as an example, it is simply not possible for a South African-based

company merely to divert income or profits to a convenient tax haven and avoid paying any South African tax on these profits. SA has a multitude of tax rules which will effectively result in the country taxing such offshore income.

In the rare circumstances where such profits which have been diverted to a tax haven are not subject to South African tax this is due to properly considered tax exemptions which are contained in and form part of South African tax law.

The current focus should therefore be on ensuring that such tax havens provide the necessary information regarding the amount and source of income which is paid to companies or individuals located in such tax havens.

When resignation becomes dismissal

Recent case highlights need to document all dealings in writing

FELICIA VAN ROOI
Eversheds

IT IS generally accepted that when an employee hands in a letter of resignation, that letter brings the employment relationship to an end and the employee has no further claim against the employer.

The Labour Relations Act has introduced into our law the concept of constructive dismissal. Constructive dismissal means that an employee can claim that he or she was unfairly dismissed if the employee can prove that: (1) the resignation was not voluntary; and (2) that the resignation was because the employer made it impossible for the employee to continue to work under the circumstances.

This type of resignation can be due to a once-off incident or because of a series of incidents. An example of a once-off incident could be an assault of the employee by his or her employer.

When resignation takes place because of a series of events the employee will have to prove that he or she has exhausted all internal processes prior to submitting the letter of resignation. This will include lodging a formal grievance by using the company's grievance procedure or lodging informal complaints. It has been accepted that constructive dismissal is difficult to prove in the labour court and at the Commission for Conciliation, Mediation and Arbitration (CCMA).

In the recent case of *Murray vs Minister of Defence*, the Supreme Court of Appeal found that the concept of constructive dismissal as developed



by the Labour Relations Act and the labour courts also forms part of the common law contract of employment.

Murray was employed by the South African National Defence Force (SANDF) and was excluded from the Labour Relations Act. Murray was em-

ployed as the head of the military police in Simonstown. After 1992 a conflict arose between himself and his subordinates which led to two court hearings being held against him. He was cleared by both court hearings.

During this time the SANDF embarked on a restructuring exercise which resulted in Murray's position as head of the military police station being downgraded. An officer of a junior rank to Mr Murray was appointed to this position.

The SANDF offered Murray a senior position in Pretoria which he rejected. He resigned seven months after this position was offered to him. The SANDF did not explain the details of this position to Murray nor did he enquire about the details of the position. The appeal court found that, taking into account the employment conditions of Murray since 1992, there was a duty on the SANDF to explain the details of the position to Murray. It found Murray's resignation amounted to a constructive dismissal.

The appeal court seems to have shifted the onus of proof that all internal remedies have been exhausted by the employee from the employer. It places a duty on the employer to prove that it has persuaded the employee that the employment relationship has not broken down.

It is important for employers to respond to employees' complaints in writing and if they consider offering or transferring an employee to explain the details of the position in writing in order to avoid being faced with a claim for constructive dismissal.

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BOOK PROMOTION	
<p>DELOITTE VAT HANDBOOK 7th edition by M Silver and C Beneke</p> <p>NOW in its seventh edition, the Deloitte VAT Handbook is a comprehensive commentary on South African value-added tax.</p> <p>Widely regarded as the definitive South African VAT textbook, this compact reference guide incorporates the developments that have occurred since the publication of the sixth edition in May 2003. Based on the law as at March 2009, the seventh edition has been divided into four sections:</p> <ul style="list-style-type: none"> Parts I, II and III consist of detailed commentary on the law and practice; Part IV includes the full text of the Value-Added Tax Act 89 of 1991, as well as Regulations, Practice Notes and Interpretation Notes. <p>The handbook contains commentary on recent legislative amendments including the 2008 amendments. It also incorporates the full text of VAT Practice Notes and</p>	<p>LexisNexis®</p> <p>WIN WITH LEXISNEXIS and BUSINESS DAY</p> <p>DELOITTE VAT HANDBOOK</p> <p>To stand a chance to receive this authoritative guide free go to www.lexisnexis.co.za</p> <p>Interpretation Notes, as well as a synopsis of reported decisions of our courts dealing specifically with VAT issues — an index of these decisions is included in this edition.</p> <p>The Deloitte VAT Handbook is ideal for tax, legal and accounting practitioners, students and business and professional people who need to familiarise themselves with the practical implications of VAT.</p>

SOMETHING TO DECLARE

Be aware of your rights should your goods be seized



Virusha Subban

Proof of ownership must be proved before approaching commissioner in writing to request release of wares

IN THIS article, the second of a two-part series, I will cover what an importer's rights and obligations are should the South African Revenue Service (SARS) seize any of his goods.

As a general rule, goods may only be "seized" by SARS after detention and only once an investigation has disclosed they are liable to forfeiture under the Customs Act.

Should you wish to claim your goods that have been seized, you will have to be the owner of the goods and you will have to demonstrate "good cause". Ownership will have to be proven to the satisfaction of the commissioner. The commissioner may release the goods provided that you demonstrate good cause and pay any duty that may be payable in respect of the goods and any charges (for storage and removal) incurred by the detention and seizure of the goods.

The commissioner may also mitigate or remit any penalty incurred on good cause shown. Where two or more individuals claim ownership of the same goods, ownership must be decided by a competent court and the

commissioner will only release the goods as directed by the court.

The person from whom goods were seized or the owner or the owner's authorised agent may institute proceedings against the commissioner to claim any seized goods.

The person claiming return of the seized goods must serve a notice in writing on the commissioner, before serving any process for instituting proceedings, within 90 days from the date of seizure.

The notice must set out clearly and explicitly the cause of action, the name and place of abode of the person who will institute the proceedings and the name and address of his attorney or agent.

Thereafter, the proceedings must be instituted within 90 days from the date of the notice.

It is therefore advisable to first approach the commissioner in writing to request release of the goods "on good cause" shown. The requirement of "good cause" was considered in *Dumah v Klerksdorp Town Council 1951 4 SA 522 (T)* as (in the context of the facts of the case) any factor

circumstance that would make it just or equitable as between the parties that an execution would be stayed.

If release is refused, then only should proceedings be instituted for return of the goods.

Another option is to lodge an internal administrative appeal or to proceed with alternative dispute resolution. If an internal administrative appeal is lodged but is unsuccessful, or if the dispute is not resolved or settled, or if no proceedings are instituted, or if proceedings are instituted and the claim dismissed by way of a final judgment of a high court or a judgment by the Supreme Court of Appeal, the goods will then be automatically condemned and forfeited to the state.

Forfeiture of goods does not affect liability for unpaid duty or charge in respect of the goods.

The courts have no discretion to decide whether or not the breach of the Customs Act was serious enough to justify seizure. It has been held that "the only ground upon which the court could declare a seizure invalid, would

be if it were made illegally" (see *Vincent and Pullar Ltd v Commissioner of Customs & Excise*).

If any goods that are liable to forfeiture cannot be found, for example, the investigation discloses they should be seized but cannot be found because they have been dissipated or stolen, the commissioner may demand payment of an amount equal to the value of the goods or the export value of the goods including any unpaid duty on the goods.

The demand may be made to any person who imported, exported, manufactured, warehoused, removed or otherwise dealt with such goods contrary to the act or committed an offence under the legislation.

The person against whom the demand is made has 14 days from the date of demand to effect the payment to the commissioner. If the 14-day period lapses and no payment has been made, the amount may be recovered. It may be recovered by the placing of a lien or by means of civil action.

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