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TAX BITES

Guiding companies through the double taxation maze

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Expatriates must ascertain how income derived from services rendered within SA should be taxed

WHEN a foreign company chooses to send employees to SA to render services, it is important for the foreign entity to decide how to structure their arrangements whereby those services are rendered to South African businesses.

Depending on the scale of activities, the foreign company may create a permanent establishment in SA, which will result in tax consequences for that company in SA.

Under the residence basis of taxation, residents — that is, persons who are ordinarily resident in the country or who meet the physical presence test — are liable to South African income tax on income derived from SA and any other place, and subject to tax on capital gains regardless where the asset may be located at the time of disposal. Non-residents, on the other hand, are only liable to tax on income derived from a South African source. Typically, non-residents would be liable to income tax on rents derived from letting out of immovable property located in SA and on income derived from services rendered within the country. In addition, non-residents are liable to tax on capital gains realised on the disposal of immovable property located in SA.

Where the expatriate is primarily employed in a country with which SA has entered into a double taxation agreement (DTA), it is necessary to consider the provisions of the agreement to ascertain how income derived from services rendered within SA should be taxed.

Where an expatriate is, for example, transferred from the UK to work in SA for a limited period of time, the remuneration derived by that expatriate will only be taxed in the UK so long as three criteria are complied with.

Under Article 14 of the DTA concluded between the UK and SA, remuneration derived by the UK expatriate from services rendered in SA shall be taxable only in the UK whether the expatriate is present in SA for a period not exceeding in the aggregate 183 days in any 12-month period, commencing or ending in the tax year concerned. Furthermore, the DTA requires that the remuneration is paid by or on behalf of an employer who is not a resident of SA and the remuneration is not borne by a permanent establishment that the UK employer has in SA.

Thus, where a UK resident works in SA for a period of less than six months and is paid by an employer located in the UK, the expatriate will not be subject to tax in SA and will only incur income tax in the UK. Where, however, the expatriate spends more than six months in SA, even though some of the time may be on holiday, he or she will become liable to tax in the country and is required to register for tax purposes and submit tax returns to the South African Revenue Service (SARS). In such circumstances, the income derived by the expatriate will be liable to South African income tax, but under the provisions of the DTA, the expatriate will be allowed to claim that tax as a credit against the UK tax due. As a result, double taxation should not arise. It is important that expatriates monitor the number of days spent in SA and on the basis that, should they exceed the six-month period in SA, even if certain of that time is spent on holiday, they will become liable to tax in the country.

Where a foreigner works in South Africa for a period of three to five years, any income derived in that time for services rendered in SA remains taxable in the country. This is despite the fact that the remuneration paid to the expatriate may be paid partly from SA and partly to an account held abroad. The total amount of remuneration received by that person must be declared for tax purposes in SA. If the expatriate pays tax in their home country and SA has concluded a DTA with that country, double taxation should not arise because the home country will typically allow a credit of the tax paid in SA against the domestic tax payable in the home country.

If the expatriate works in SA for a period exceeding five years and they may become resident for tax purposes with the result that all income derived by the expatriate on a worldwide basis will become taxable in the country, subject to the provisions of the DTA where the expatriate may be regarded as resident for tax purposes.

If the expatriate works in SA for a period less than six months and is paid by an employer not located in SA, and the cost of that employment is not borne by the business which the employer has in SA, the expatriate will not be liable to tax in SA where a DTA has been concluded with the expatriate's home country. As soon as the expatriate exceeds the period of six months in SA or is paid by an employer in the country, he or she must register with SARS and submit an annual income tax return. Furthermore, any employer located in SA paying the expatriate will be required to withhold and deduct employees' (PAYE) tax from amounts of remuneration paid to the expatriate.

Therefore, expatriates working in SA for periods longer than six months, even though they may be paid offshore, are required to register and submit tax returns to SARS. Failure to register and submit returns constitutes a serious offence, which could give rise to a prosecution.

Where the foreign company seconds staff to render services to South African clients, it is essential that the foreign company plans the manner in which it conducts its activities in the country. Depending upon the scale of activities and the duration thereof, it is quite possible that the foreign company will create a place of business as envisaged in the Companies Act of 1973. Furthermore, the foreign company, even though it may regard itself as not physically present in SA, may create an enterprise under the provisions of the Value-Added Tax Act of 1991.

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