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BELASTINGBEHANDELING VAN FOOTJIES

John Jones, Korporatiewe Belasting- en Ouditvennoot by RSM Betty & Dickson (Johannesburg)

Die behandeling van footjies wat werknemers van klante ontvang vir dienste gelewer was vanuit 'n werkgewer se perspektief nog altyd moeilik om te hanteer. 'n Werkgewer het ingevolge die Inkomstebelastingwet, No. 58 van 1962 ("die Wet") 'n verpligting om werknemersbelasting af te trek van vergoeding soos gedefinieer in die Vierde Skedule van die Wet. Daar is reeds 'n paar jaar lank 'n debat daaroor of footjies aan hierdie definisie voldoen.

Die Suid-Afrikaanse Inkomstediens het 'n Bindende Klasbeslissing: BCR 027 uitgereik wat, in die geval van sekere omstandighede, 'n mate van duidelikheid gee oor die behandeling van footjies vir doeleindes van werknemers-belasting.

Die beslissing handel spesifiek oor die vraag of footjies wat werknemers van tevrede klante ontvang, wat deur 'n werkgewer in veilige bewaring gehou word en daarna aan werknemers oorbetaal word, "vergoeding" sal uitmaak soos gedefinieer in die Wet.

Die aansoekers om die beslissing was in 'n hoëkontant-hanteringsomgewing werksaam en wou 'n footjie-beleid binne die organisasie implementeer aangesien hulle gevoel het dat werknemers wat footjies gedurende hul werksure ontvang, 'n sekuriteitsrisiko vir die organisasie inhou.

Die footjiebeleid het voorgestel dat werknemers glad nie op footjies geregtig is nie en ook nie mag ver wag om footjies as deel van hul dienslewering aan die organisasie te ontvang nie.

Footjies wat ontvang is, sou verklaar en aan die organisasie oorhandig word wanneer dit ontvang word. Dit sou dan op 'n veilige plek bewaar word en aan die einde van die maand tesame met die werknemer se normale salaris ten volle in die werknemer se bankrekening oorbetaal word sonder dat 'n gedeelte deur die werkgewer behou word. Footjies sou ook nie deel vorm van die berekening vir die voorsorgfonds, mediese hulpskema of enige ander voordeel nie.

Die beslissing deur SAID was dat die oordrag van footjies van die werkgewer na die werknemers se bankrekening nie 'n betaling van "vergoeding" soos gedefinieer uitmaak nie en dus nie aan werknemersbelasting onderhewig is nie.

Dit is egter belangrik om daarop te let dat footjies "bruto inkomste" vir belastingdoeleindes is en tydens die indien van hul jaarlikse opgawes deur werknemers verklaar moet word. Die beslissing stel werkgewers bloot vry van die verpligting om werknemersbelasting af te trek, maar die werknemer het steeds 'n verpligting om sodanige inkomste vir normale belastingdoeleindes te verklaar.

Committed Integrity

KING III AND THE SME

By Gary Kemp Audit Manager at RSM Betty and Dickson (Durban)

In contrast to the King I and II codes, King III effective from 1 March 2010 applies to all entities regardless of the manner and form of incorporation or establishment and whether in the public, private or non-profit sectors. The principles have been drafted so that every entity can apply them and, in doing so, achieve good governance. In South Africa, all companies listed on the JSE have to comply with King III. There is no legal requirement for SMEs to comply with King III and as such, many prefer not to do so. King III is an “apply or explain” approach to corporate governance rather than an “apply or else” approach. This lenient stance has not encouraged SMEs to openly embrace King III. They see it as an unnecessary cost and burden on the business, an area that does not add to the bottom line. A number of the sections in King III are rather onerous for an SME, however there are also sections that can benefit all businesses, irrespective of the size.

With the introduction of the new Companies Act, 2008, the responsibilities and accountability of directors have increased substantially. In terms of Section 76 (3) of the Companies Act a director must:

- act in good faith
- act in the best interest of the company
- act with the degree of care, skill and experience that is expected of a similar person in like circumstances.

If something were to go wrong in the company, it will now be easier for the courts to prosecute the directors. One of the first and crucial aspects the courts will probably consider is the governance of the company and the relevant best practice in this regard. In terms of best practice, the courts will look to King III as the benchmark. Compliance with King III will send a strong message to the courts that the director did perform his/her duties in terms of Section 76 of the Companies Act.

At first glance, King III does appear daunting to the average SME because of the mention of audit committees, risk committees and independent non-executive directors. This appears to be overkill for the average SME. However, as mentioned, King III is an “apply or explain” set of standards. This means that all SMEs can be fully compliant with King III if the directors have been through each section in detail and have come to a knowledgeable decision that the specific section is just not practical for the business to implement. SMEs should by way of explanation make a positive statement about how the principles have been applied or have not been applied.

In conclusion, SMEs may not have external stakeholders in the form of public shareholders but they still have a duty to their stakeholders whether it is their employees, suppliers, customers or even the community in which they operate and should be managed in the best possible way and the benchmark for this will be to apply King III.

Sources : King Code of Governance For South Africa, 2009

Companies Act, 2008

For more information please visit: www.rsmbettyanddickson.co.za



INSOLVENSIEREG

Ben de Groot Attorneys

Vandeesmaand kyk ons na een van die eerste sake wat ons kon vind oor die nuwe proses van besigheidsredding wat ingevolge die nuwe Maatskappywet wat op 1 Mei 2011 in werking getree het, geïmplementeer is.

Ter agtergrond, besigheidsredding is 'n proses vir die beskerming van 'n besigheid wanneer dit kontantvloei-probleme ondervind en daar 'n moontlikheid is dat die besigheid, met beskerming, homself na beter finansiële omstandighede kan bedryf. Gedurende die tydperk wat 'n besigheid onder besigheidsredding staan, kan krediteure nie regstappe daarteen instel nie.

Die saak van Swart v Beagles Run Investments 25 (Pty) Ltd is op 'n dringende basis in die laaste week van Mei 2011 in die Noord-Gautengse Hoër Hof in Pretoria aangehoor.

Die feite was dat Swart die alleenaandeelhouer en direkteur was van Beagles Run Investments 25 (Pty) Ltd, 'n maatskappy wat sake gedoen het as 'n bevrachter en handelaar in wilde diere. As sodanig het dit 'n aantal vliegtuie besit. Weens verskeie faktore het die maatskappy in 'n situasie beland waar dit nie sy finansiële verpligtinge kon nakom nie. Drie krediteure het in die saak tussenbeide getree. Twee was gekant teen die verligting waarom aansoek gedoen is en een het dit ondersteun. Swart het aangevoer dat as die maatskappy onder besigheidsredding geplaas sou word, dit sou kon handel dryf tot 'n posisie waarin dit al sy krediteure sou kon betaal, terwyl daar sonder sodanige beskerming geen redelike vooruitsig was dat die maatskappy sy skuld sou kon vereffen nie. Die opponerende krediteure het aangevoer dat dit bloot nog 'n manier was waarop Swart probeer het om betaling van geld wat deur die maatskappy aan hulle verskuldig was, te vertraag.

Die hof het begin deur die betrokke bepalings van die Wet te ontleed en die vereistes vir besigheidsredding genoem, synde:

- die maatskappy verkeer in finansiële nood;
- die maatskappy het versuim om betalings te doen ten opsigte van diensverwante aangeleenthede; of
- dit is geregverdig en billik om dit te doen; en
- daar moet 'n redelike vooruitsig wees dat die maatskappy gered kan word.

Na ontleding van die stukke, het die hof bevind dat Swart nie oop kaarte met die hof gespeel het nie, aangesien daar sekere onverklaarde teenstrydighede tussen die gelyste bates en laste was wat, selfs op grond van sy eie weergawe, getoon het dat die maatskappy hopeloos insolvent was met 'n tekort tussen bates en laste in die omgewing van R80 miljoen! Verder is sekere van die maatskappybates (vliegtuie) deur een van die krediteure gehou en hulle kon dus nie gebruik word om inkomste te genereer nie, terwyl al die inkomste wat gegeneer word vroeër aan 'n ander krediteur gesedeer is. Derhalwe, selfs al sou die maatskappy toegelaat word om handel te dryf, sou dit geen inkomste genereer om sy finansiële posisie te normaliseer nie. Die hof het beslis dat Swart inderdaad onder roekelose omstandighede handel gedryf het, wat 'n baie ernstige bevinding was om te maak, aangesien dit daartoe kon lei dat Swart persoonlik aanspreeklik gehou word vir die skuld van die maatskappy.

Gevolglik het die hof bevind dat besigheidreddingsreëlings nie gepas was nie en dat die verligting nie toegestaan behoort te word nie. Dienooreenkomstig het die hof die aansoek met koste van die hand gewys.

Hierdie saak moet verwelkom word, aangesien dit 'n eerste aanduiding gee van hoe die howe hierdie tipes aansoeke sal oorweeg. Dit lyk asof dit vir 'n maatskappy nie genoeg sal wees om bloot hof toe te gaan en om beskerming te vra nie – 'n behoorlike saak sal daarvoor uitgemaak moet word. Die hof het ook 'n baie belangrike punt gemaak dat wanneer die belange van die maatskappy en die belange van die krediteure teen mekaar opgeweeg word, die belange van die krediteure die meeste gewig moet dra.

As jy dus jou maatskappy onder besigheidsredding wil plaas, maak seker dat 'n behoorlike saak daarvoor uitgemaak kan word. En as jy 'n krediteur is van 'n maatskappy wat homself onder besigheidsredding wil plaas – dit is moontlik om die aansoek suksesvol teen te staan.

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CORPORATE LESSONS FROM THE UK

The new Companies Act has far-reaching consequences for directors and officers of companies, specifically as far as their duties and responsibilities are concerned. The new act essentially codifies existing common-law principles but it does have the potential to extend the personal liability of directors.

These provisions are by no means clear and we will have to wait for case law for clarification. A few recent articles from the UK based *Accountancy* magazine provided examples of issues that may be under scrutiny in South Africa also. Although the principles in English law are not the same as in South Africa, the reports make for interesting and thought provoking reading:

Who is a director?

Before a director can be held accountable as a director the first step would probably be to establish whether such a person was actually a director. In English law there are essentially three categories of persons who could be directors of a company:

- “De jure” directors are people who have been appointed as directors in terms of the legal and internal requirements, including filing with the Companies House (CIPC in South Africa).
- “De facto” directors are persons who have not been validly appointed as directors but still act as such. Each case has to be considered on its own merits but, generally, a director is someone who undertook functions that could properly only be discharged by a director, on an equal footing with other directors and not as a subordinate.
- “Shadow directors” are the people who instruct other directors to act in a specific manner.

The recent case of *The Liquidator of Mumtaz Properties Ltd v Saeed Ahmed* confirmed that shadow directors also owe certain fiduciary duties to their companies, and it was even recommended that shadow directors should err on the side of caution and assume they are subject to the same duties as any other director.

Directors may be unaware that, even without a formal appointment or even a title, they can still be held liable as directors of a company.

Is an e-mail a binding contract?

A recent (UK) Court of Appeal case, *Nicholas Prestige Homes Ltd v Neal*, focused on an e-mail that was sent to a seller advising the seller of certain contractual terms and conditions. The seller replied, also by e-mail, saying: “Hi Mark, that’s fine, look forward to viewings. Sally.”

The seller later argued that she had not completely read the e-mail and its attachments and that she never intended to conclude an agreement on those terms and conditions. The court held that the e-mails between the parties became a binding contract when Sally sent her initial response to Mark.

We often view e-mail as an informal communication, but this proves that all mails and attachments should be read carefully.

Conclusion

The law in South Africa is different, but the above two cases should still serve as reminders that directors, and others, should be careful in all their actions relating to their companies.

KANTOORNUUS

Dankie aan al ons kliënte vir die ondersteuning gedurende die jaar. Ons wens u 'n veilige en geseënde Kersgety toe.

Geluk aan Francois Joubert in ons ouditafdeling wat op 26 November 2011 met Denise Erasmus getroud is. Ons vertrou daar lê vir hulle 'n lang en gelukkige huwelikslewe voor.

Johan Koen in die ouditafdeling en Maritza Trotsky in die Kleinsake afdeling het hul klerkskap voltooi en het SDK op 30 November 2011 verlaat. Sterkte word hul toegewens met hul nuwe loopbane.

Dampie du Toit (oudit) en Juan Olivier (kleinsake) voltooi hul klerkskap by SDK die einde Desember 2011 en verlaat SDK se diens om ook hul vlerke te spreid. Alle sukses word hul toegewens.

Nicolene Steyn (Bestuurder, Kleinsake) verlaat ook SDK se diens die einde Desember 2011. Ons wens haar voorspoed toe met haar nuwe loopbaan.

SDK se personeel het 'n heerlike jaareindfunksie op 8 Desember 2011 by 'n Griekse restaurant gehou. Daar is omtrent "gezorba" en borde gebreek. Almal het dit baie geniet.



IMPORTANT DATES AND NOTICES

Taxpayers (natural persons and trusts)

Annual income tax returns for individual taxpayers and trusts should be submitted to SARS by 27 January 2012.

Provisional tax 28 February 2012

The 201202 provisional tax returns for Individuals and trusts and companies with February year end is due on 28 February 2012. The estimated taxable income (including capital gains) should be 80% accurate for taxpayers with a final taxable income of R1 million or more, in order to avoid a 20% penalty on the under-estimation.

Donations and Dividends

Taxpayers are allowed to donate R100 000 free of donations tax during a tax year. Remember to donate R100 000 to your family trust before 28 February 2012.

Members of Closed Corporations or shareholders of companies should remember to declare a dividend where monies were drawn from the entities and debit loan accounts exist.



The Promotion of Access to Information Act no 2 of 2000

The Promotion of Access to Information Act No. 2 of 2000 ("the Act") came into operation on 9 March 2001.

The Head of a private body is obliged to compile a manual in accordance with section 51 and other provisions of the Act. A private body is defined in section 1 of the Act as:

1. A natural person who carries or has carried on any trade, business or profession;
2. A partnership which carries or has carried on any trade, business or profession; or
3. Any former or existing juristic person other than a public body;

The definition includes individuals, sole proprietorships, partnerships, close corporations, and most private and public companies.

The current deadline of the manual is 31st December 2011. The penalty for non-compliance is not stipulated in the Act, but it is possible that non-compliance may be an offence under section 18 of the Human Rights Commission Act (At 54 of 1994). An offence under this section carries a penalty of 6 months' imprisonment or a fine (or both).

A copy of the manual must be:

- a) Supplied to the Human Rights Commission whose address is:
Private Bag 2700, Houghton, Johannesburg, 2041. (Telephone number: 011-4848300)
- b) Available for inspection free of charge by members of the public during office hours.
- c) Supplied on request to anyone who is prepared to pay the copying charge prescribed by regulation.

Our firm is prepared to compile and submit manuals on behalf of clients at a fee of R1500.00 per manual (R1710.00 including VAT). Should you wish to make use of our services, kindly contact **Ohna van der Poll (tel. 021 970 4608) or e-mail to: taxsec@sdkca.co.za.**

Contact our office at 021 970 4600 if you need help with any of the abovementioned aspects.