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DIRECTORS' LIABILITIES: NO ROOM FOR DELINQUENT DIRECTORS IN THE NEW COMPANIES ACT

In previous issues, we have spoken about the increased liabilities placed on directors by the new Companies Act (the Act). The Act is a balancing piece of legislation and allows increased directors' powers compared to the 1973 Companies Act. With this increased power there comes an increase in responsibility and a consequent increase in liabilities for directors.

One of the increased liability provisions is section 162 of the Act – the "delinquency" provision. The effect of this section is that directors may be barred for life from being a director (this includes holding a senior management position with "general executive control" in the company) or for up to seven years or, in the case of a lesser offence, placed on "probation" for a period of time. The director may also face civil claims and potential criminal liability.

Section 162 states that a director may be declared delinquent, or placed on probation, if that person is a director or was a director within 2 years of the application to a court.

The delinquency danger, and grounds for declaration

Actions that warrant being declared delinquent include:

1. Acting as a director when disqualified by the Act or by the Close Corporations Act
2. Grossly abusing the position of a director
3. Acting in a grossly negligent manner or with intent to harm the company (this includes a subsidiary of the company)
4. Acting in a manner which shows "wilful misconduct" or a "breach of trust"
5. The Act also provides that a director may be declared delinquent if he/she (or "another person" – presumably likely to be someone known to the director) "gains an advantage" from knowledge obtained as a director rather than the company or a subsidiary benefitting from this knowledge.

Who can apply to the Court to declare a director delinquent?

A fellow director, senior employee, registered trade union or any other body representing employees may apply to the court to declare a director delinquent or on probation. In addition, if a director repeatedly ignores a compliance notice, a "state organ" may also apply under section 162.

Clearly, this should concentrate the minds of directors. More than ever before, you need not only to act in a prudent manner, but also to be able to show that you have exercised your mind in relation to any decision you make or participate in making.

The negative aspect of such sections of the Act is they tend to scare away non-executive directors who are very important in checking on the actions of executive directors. Unfortunately, the Act does not differentiate the liabilities of executive and non-executive director. In a country where skills are short, this is a disappointing consequence of the Act.

PENALTIES UNDER THE NEW TAX ADMINISTRATION ACT – A MOVE TOWARDS TRANSPARENCY

The new Tax Administration Act ("TAA") has been promulgated and will come into operation within (according to SARS) the next three months or so.

One of the areas of frustration for taxpayers has been the provision in the Income Tax Act which allowed the Commissioner to levy penalties on taxpayers of up to 200% at his discretion. The TAA seeks to redress this by introducing criteria for the Commissioner to levy penalties. Of importance, is the onus is on the Commissioner to justify penalties levied. This is a commendable effort by SARS to improve transparency in their dealings with taxpayers.

The "understatement" penalties

Let's examine one of these penalties – **the understatement penalty.**

An "understatement" means:

a. A default in rendering a return; or
b. An omission from a return; or
c. An incorrect statement in a return; or
d. If no return is required, the failure to pay the correct amount of 'tax'.

If any of these situations arise, the taxpayer pays the tax owed plus a penalty which is based on two considerations – a) the taxpayer's behaviour at the time of the default and b) how the taxpayer behaved after SARS detected the understatement.

These considerations are shown in the table below:

"Understatement Penalty Percentage Table"				
	Penalty to be Levied			
Behaviour	Standard Case	If obstructive or a 'repeat case'	Voluntary disclosure after notification of audit	Voluntary disclosure before notification of audit
'Substantial understatement'	25%	50%	5%	0%
Reasonable care not taken in completing return	50%	75%	25%	0%
No reasonable grounds for 'tax position' taken	75%	100%	35%	0%
Gross negligence	100%	125%	50%	5%
Intentional tax evasion	150%	200%	75%	10%

(Note: If the table above does not display correctly, please see the "online version" - link above the compliments slip)

Column 1 ("Behaviour") covers the first consideration and the remaining columns cover the second consideration. As you can see SARS are trying to apply objective criteria when considering the amount of penalty to levy on the taxpayer. Whilst this is commendable the only behaviour defined is "substantial understatement" (the greater of R1,000,000 or 5% of tax liability) and none of the others are defined. So the Commissioner still has widespread discretion.

If this is the beginning of a quantifiable process to determine penalties, then this is to be welcomed and, hopefully, the other criteria will be defined in time. As stated above, one positive outcome is that the onus is now on SARS to justify the penalty, whereas before it was at the Commissioner's discretion.

DO YOU E-MAIL YOUR INVOICES? MAKE SURE YOU DO IT LEGALLY!

We have seen in earlier newsletters that SARS is strictly enforcing compliance with all SARS related legislation. Businesses and individuals are being penalised if they are not complying with legal requirements. As email has become the standard method of communication, it is worth checking that if you email invoices to customers, you comply with SARS requirements.

The first significant piece of legislation is the Electronic Communications and Transactions Act (ECTA). From this legislation, SARS are looking to ensure that:

- The information is to stay in its original format (this is to prevent tampering with emails)
- The origin and to whom the document was sent must be identifiable. The date and time the document was sent are also to be shown
- The emails are easily accessible

In other words, SARS will want to confirm that stored emails are the equivalent of manually filed invoices. So, it is important you comply with ECTA if you send emailed invoices.

The second piece of legislation is the Value Added Tax Act. A number of stipulations are set out in this Act:

- The first requirement is that you must apply to a SARS branch office to invoice by electronic means i.e. by email.
- The business you invoice must confirm in writing that they will accept invoices via email, subject to the requirements laid down by SARS. This confirmation is to be retained by you, the supplier, for a period of five years after the last supply is invoiced electronically to that recipient.
- Tax invoices, debit notes and credit notes must display the mandatory information required for a valid tax invoice, debit note or credit note.
- The emailed document will constitute the tax invoice. Printed copies must bear an endorsement "computer generated copy tax invoice/debit note/credit note" (as appropriate). No other tax invoice, debit note or credit note may be issued unless marked as a copy of the original document
- Emailed documentation is to be kept by you for at least five years. As SARS can investigate any matter for fifteen years, it follows you should keep these records for this period.

Make sure you comply with these laws. It could be expensive to slip up on something as simple as this.

FINANCE 101: YOUR BUSINESS PLAN – A KEY INGREDIENT TO SUCCESS

Business plans can be an invaluable tool in understanding and controlling your business.

What is a business plan and who should do it?

It is a thorough formal analysis of your business model. A business plan includes, among other things, the type of business you run or plan to run, what type of products or services the business produces, the customer base by industry and geographical location, the supplier base, your pricing, the experience and skill of you and your staff, how you plan to create demand for your business, how you intend to supply your customers and how you propose to finance the business.

There is a trend to outsource business plans – just look at the web where there are many institutions offering to do your business plan. But this defeats the point of the exercise - only you and your staff really understand how the business works or should work if it is a start-up business. So it makes sense that you do the business plan of your business. There may be areas where outside expertise is required such as financial or marketing plans, but as long as they are done under your supervision, you will still have ownership of the business plan.

Finally, it is also worth remembering that a potential investor or bank will quiz you on your business plan – if you are unsure of what is in the plan, you will almost certainly lose your investor or a bank loan.

Why is it important?

A business plan is important for several reasons, such as:

- Investors and bankers will require a business plan if they are going to either invest in or lend money to your business.
- Documenting and thinking through your business model gives you key insights into how your business operates. It highlights weaknesses and strengths which you can incorporate into your business model.
- It documents a road-map for your business. You can measure how the business has performed by comparing actual results to those envisaged by the business plan. You can isolate areas where the business has fallen short and see if you stuck to your business model or did not. This analysis will enable you to strengthen your business and come up with solutions to counter weaknesses identified.

A business plan can add significant value to your business in addition to being used as a tool to raise finance.

YOUR TAX DEADLINES FOR AUGUST

For provisional taxpayers don't forget the first payment for 2013 by August 31.

Tax filing season for 2012 returns has opened. If you are due a refund, get your return in early.

Note: manual tax returns (i.e. if you don't use e-filing) are due by 28 September.