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Assosiaat Algemene Rekenmeester (SA • Associate General Accountant (SA)
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Belastingpraktisyn • Tax practitioner
38 Akasia Street George East 6529 • ✉ 4529 George East 6539 • Tel: 044 871 5067 • Fax: 044 871 5082

WITH COMPLIMENTS

e-mail : jgmt@jgmt.co.za

AGA(SA) ASSOCIATE GENERAL ACCOUNTANTS SOUTH AFRICA

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Thank you for your support in 2012.

Have a Wonderful Festive Season, and a Happy and Prosperous 2013!

B-BBEE: TWO THINGS WORTH KNOWING

B-BBEE (Broad Based Black Economic Empowerment) has been with us for quite some time. The process of including the previously disadvantaged into the economy has not been without controversy but the reality is that it will not be going away any time soon.

1. **Exempted Micro Enterprises: B-BBEE Certificates can be issued for you by your Independent Reviewer, Auditor or Accounting Officer**

    EMEs (Exempted Micro Enterprises) are enterprises with annual turnover of R5 million or less (possibly increasing to R10 million shortly – see below). Some sectors' codes have prescribed different turnover thresholds to qualify as an EME – for example, the Tourism Sector Code is R2.5 million or less while the Construction Sector is set at R1.5 million or less.

    EMEs automatically qualify as B-BBEE level 4 contributors and thus have B-BBEE procurement recognition level of 100%. Those EMEs that are more than 50% black owned can get promoted to a level 3 contributor status.

    A recent joint notice issued by SAICA (South African Institute of Chartered Accountants) and the Department of Trade and Industry, confirmed that chartered accountants, auditors or any person that qualifies to act as an accounting officer may issue a certificate confirming your business qualifies as an EME.

    Thus, if you are a business that qualifies as an EME, it will be both time efficient and cost-effective to use your independent reviewer, auditor or accounting officer for your certificate.

2. **What we can expect in the future**

    Minister of Trade and Industry, Rob Davies, has asked for comment on proposed changes to the B-BBEE Codes of Good Practice.

    The number of elements in the scorecard will be reduced from seven to five – employment equity would be joined with management control whilst preferential procurement and enterprise development would also merge and be called enterprise and supplier development. Ownership, skills development and socio-economic development would remain as the other three elements. The stated aim of these intended amendments is to broaden the base of black participation in the economy. It is worth looking at the consequences that some of these proposed codes may have on your business.

    a. The qualifying turnover

    This is scheduled to change. For EMEs, the proposed threshold would increase from R5 million to R10 million. This will take pressure off businesses with turnover from R5 million to R10 million as they are spared doing the B-BBEE scorecard and they can obtain exemption certificates as in 1 above. QSEs' (Qualifying Small Enterprises) turnover threshold increases from R10 million to R50 million versus R5 million to R35 million in terms of the current code.

b. Procurement

One avenue open to businesses to bolster their B-BBEE points is to buy from B-BBEE accredited suppliers. In fact many of these businesses have pressurised their suppliers to get B-BBEE certification which has considerably increased the number of B-BBEE compliant businesses.

The new codes propose that B-BBEE procurement points can only be claimed from value adding suppliers – defined as "entities whose profit before tax added to their salary costs is to exceed 25% of their turnover". *In essence, the codes are favouring businesses with high labour content*. A survey estimates that around 30% of businesses will be value adding. Many of the 70% who will not be value adding will have no incentive to remain B-BBEE compliant as their customers cannot get B-BBEE points from buying from them.

Not only will entities lose B-BBEE points if they cannot buy from value adding suppliers but non-compliance with this element could result in the measured entities' B-BBEE status level being discounted by two levels.

c. Ownership

This element is given priority in the suggested codes. Under the current codes, businesses can make up points in other elements if they do not meet the ownership criteria. In terms of the proposed codes, businesses' B-BBEE contributor status will drop two levels if they fail to get 40% compliance in this element. Groups, such as multi-nationals will face some very difficult decisions and it could potentially affect investment in South Africa.

d. QSEs

In terms of the current codes, QSEs can choose the best four of the seven elements when having their B-BBEE compliance measured. The proposed codes require QSEs to comply with *all five* elements. This will make the process more difficult for QSEs.

As opposed to larger entities which stand to drop two contributor levels when they do not meet compliance targets in priority elements, QSEs will only drop one level.

The proposed codes have some adverse consequences for many enterprises and, if the changes are important to you, it is worth lobbying Government to alter the codes before they come into effect.

MEMORANDUM OF INCORPORATION (MOI): THE 30 APRIL DEADLINE IS APPROACHING!

One of the transitional arrangements of the 2008 Companies Act (the Act) was that businesses had two years to migrate from their constitutional documents ('Memorandum and Articles of Association' for a company) to the new MOI. If you haven't yet completed this exercise, there are good reasons why you should now consider your MOI without delay: -

- The Act differs from the previous Companies Act and understanding these differences and the impact they may have on your business is a time consuming exercise
- During the two year transitional period your Memorandum and Articles of Association will take precedence over the Act (subject to certain transactions such as a take-over or duties of directors) but from 1 May 2013, if parts of your Memorandum and Articles of Association conflict with

the Act, these parts will be void.

How will the MOI affect my business?

It depends on the complexity of your business – for example owner-managed entities may well be able to use the default MOI in the Act, but even in simple operations you should have your accountant review your MOI and Shareholders Agreement as any provisions in them that conflict with the Act will have no legal force after 30 April next year. Finally, check your old Memorandum and Articles of Association to see if any specific clauses were inserted. If so and if they are still relevant you may choose to include them in your MOI (provided they do not clash with the Act).

As you can see, even with a simple business there is quite a bit to think about.

If your business has more layers in it – for example, you may have directors or managers running the business - there is more to consider. Alterable provisions come into play and there are more than forty of them in the Act. These may be curbed or removed by the owners of the business when drafting the MOI. Typically, alterable provisions give wide powers to directors to, for example, issue shares or take on business debt. The old Act gave extensive powers to the owners of the business whereas the new Act gives widespread powers to directors and/or senior managers and it is up to the owners to accept these powers or restrict them when doing the MOI.

Take advice!

There are other issues to take into account, so it is worth getting expert advice – there is plenty at stake.

Remember the deadline for completing your MOI is looming. As an extra incentive if you miss the deadline of 30 April, you will have to pay the Companies and Intellectual Property Commission (CIPC) a fee when submitting your MOI – there is no CIPC charge until then.

IS YOUR STAFF BEING SWAMPED BY GARNISHEE ORDERS?

Unsecured loans have boomed in the local economy. It has been recently estimated that there are 3 million garnishee orders in South Africa and up to 15% of the labour force are affected. You will probably have processed some of these orders through your payroll system. As they are usually against your economically vulnerable staff, it is worth asking yourself some questions about garnishee orders.

What are garnishee orders?

Firstly you may come across the term “emoluments attachment order”. This in fact more correctly describes this type of order, although in practice “garnishee order” is more widely used and understood. These orders are legally the easiest recourse unsecured lenders have to get loans repaid. The main requirement to get a garnishee order from a Magistrate’s Court is evidence there is a debt owed. The garnishee order is served by the sheriff of the court on the employer of the debtor. It sets out the amount to be deducted from the employee’s salary and the number of payments needed to settle the debt. It will contain a case number, be stamped by the clerk of the court, the full name and I.D number of the employee plus the signature of the attorney applying for the garnishee order.

There is no requirement that the Court consider whether the repayments are affordable. Clearly, garnishee order procedures have loopholes which unscrupulous lenders might exploit to get repaid. An investigation on a multi-national’s payroll found instances of employees who ended up with no take home pay or had up to 12 garnishee orders against them.

What can you do?

You don't want unhappy staff members who are being driven into poverty through unsecured lending. Check that the garnishee order is valid (many are not) and check if your employee can afford the repayments. If the repayments are unaffordable, then either the lender or collection agency has not correctly vetted the amount your employee can pay, and your employee can ask the court to reduce it. Also check that the additional charges (interest, attorney costs and Court costs) are correct. If the order itself is defective and invalid, refuse to accept it, and advise the sheriff and the creditor of this and the reason for you not accepting the garnishee order – take advice in doubt here as you will be liable for any wrongful failure to effect deductions. If the garnishee order is correct then you will need to deduct the amounts shown from the employee's salary.

FINANCE 101: THE MEDIUM TERM BUDGET FRAMEWORK (MTBF): WHAT DOES IT TELL US?

Against a backdrop of global uncertainty and troubled times in South Africa, the Minister of Finance, Pravin Gordhan, presented the MTBF to Parliament on 25th October.

The MTBF was introduced to provide more transparency on Government's budgeting process. It looks three years ahead whilst the budget presented every February looks at the next twelve months. It gives citizens an invaluable insight into how the Government goes about budgeting.

This was a particularly important statement as it came just after a rating downgrade for the country, negative international perceptions of South Africa and the ongoing aftermath of the Marikana shooting.

The first priority for the Minister was thus to calm the markets. This he was able to do by demonstrating that Government is committed to fiscal discipline:

- Government expenditure will only grow in real terms by 2.9% for the next three years. To underpin this, Government has reached a three year wage agreement with public service unions.

- The budget deficit to GDP (Gross Domestic Product) will be 4.8% in 2013 and will drop to 3.1% in 2015.

- Budgets for Government departments can only grow by 2.9%. Should budget line items grow by more then offsets would have to be found in other areas.

- Total Government debt to GDP will peak at 39% in 2015. This compares to 46% when Trevor Manuel became Finance Minister in 1996. This compares very favourably to developed economies around the world and shows how well South Africa has adjusted to the global turmoil of the past several years.

That the bond market remained stable indicates the global investment community saw this as a credible budget.

Minister Gordhan went further by steering a course between stimulating the economy without significantly increasing debt. This is in contrast to Europe where strict spending cuts have curbed growth or the US where economic stimulus has bought economic growth but also a mountain of debt that now threatens this growth.

Further, he shifted the focus of the budget from consumption (salary and wage spend on civil servants) to increasing infrastructure investment (this year capital spend will be 8% of GDP versus 6.5% in 2010), continuing to invest in the "social wage" (housing, social grants and local communities) and introducing new mechanisms to ensure procurement reaches its targeted goals with substantially reduced corruption.

Will all this be achieved? There are risks such as:

- Will the wage agreements hold?
- Will the economic growth predicted be achieved (4% in 2015)?

Obviously, we all have our own opinions and beliefs, but the fact that global markets were calmed tells us they will give the Minister latitude to see if he can deliver on the three year outlook.

Until January..... and if you travel over the Festive Season – enjoy it, take care and return safely!