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In 2010, 35% of software used in South Africa was “pirated” – either it is downloaded illegally or a counterfeit copy of the software is purchased. The commercial value of this is in excess of R4 billion. It also puts businesses at risk as they are more likely to be exposed to viruses, have no recourse to the owners of the software in the event of it breaking down and take on the risk of

being caught by increasingly vigilant owners of software.

Being in possession of pirated or counterfeit software is an offence in terms of the Copyright Act and/or the Counterfeit Goods Act. In addition, software vendors, such as Microsoft, will levy their own penalties when they find their software has been pirated. Apart from breaking the law, businesses are risking their reputations if they are caught. As it takes much hard work to build up a reputation, risking losing your good name by using pirated software makes no sense at all.

#### ***A new legal route to attack piracy***

The 2008 Companies Act (“the Act”) offers software owners a new, potentially cost-effective and quick avenue of attack against software piracy. The Act provides that a company must not carry on its business -

1. Recklessly,
2. With gross negligence,
3. With intent to defraud any person, or
4. For any fraudulent purpose.

If the CIPC (Companies and Intellectual Property Commission) has grounds to believe that the above provisions have been breached, it may issue a notice to the relevant business giving it 20 business days to show that it is in fact not in breach, failing which the CIPC can issue a notice to the business requiring it to cease trading.

This is a devastating outcome for any business. So it is easy to imagine a software owner finding out that a company is illegally using its software and taking this to the CIPC.

#### ***Directors: your personal liability risk***

The Act makes directors personally liable for damages, losses or costs incurred by the business due to the director failing to meet his/her fiduciary duties (e.g. knowingly causing damage to the company) or not exercising the requisite due care and skill required of the director.

In the case of pirated software, directors (and this includes alternate directors and those senior managers deemed by the Act to be directors for this purpose) are clearly exposed in this regard to incurring substantial costs and, of course, potential criminal charges under the Copyright Act and the Counterfeit Goods Act.

#### ***Be Aware!***

Software piracy is pervasive in South Africa and the consequences are severe for both the business and its directors personally if they are caught. The Act makes it easier to crack down on software piracy.

**Make sure your business does not have any pirated software.**

**PROVISIONAL TAXPAYERS - NEW RULES APPLY AND PENALTIES WILL BE AUTOMATICALLY IMPOSED!**



Provisional taxpayers will know that they need to submit their second provisional tax payment by February 28. New (and proposed – not yet enacted) laws have changed the rules governing provisional taxes, and have codified penalties for underestimating provisional tax.

### ***Estimating your provisional tax***

Remember that different rules apply according to whether your taxable income exceeds R1m or not -

- ***Taxable income up to R1 million***

If your finally assessed taxable income is under R1 million, your provisional estimate on February 28 must be equal to the lesser of either -

- The “**basic amount**”\* or
- 90% of the actual assessed amount.

\* The “**basic amount**” is taxable income calculated as per your last tax assessment less capital gains and any lump sum payments in that year – in other words last year’s taxable income adjusted for one-off amounts.

- ***Taxable income greater than R1 million***

There is no “basic amount” and your provisional estimate must be 80% of the final tax assessed.

### ***Changes to provisional tax rules – the good news***

1. When estimating your provisional tax you will no longer need to include lump sum receipts from retirement funding, lump sum withdrawals from retirement funding or lump sums from severance payments.

This will prevent penalties on underestimation of provisional tax due to not taking such one-off payments into account.

2. The penalty based on the underestimation of the second provisional payment will now take into account all taxes paid (including the first provisional payment and any employee taxes) as at February 28. Previously, the penalty was based on the underestimation of the taxable income shown in the second provisional return.

### ***Penalties – the bad news***

An **automatic** penalty of 20% of the underestimated amount will be levied by SARS. The days of trying to convince SARS officials that there were valid reasons for underestimating your provisional tax are gone.

### ***Plan your provisional payment and get professional advice!***

Thus, while it will be easier to estimate provisional tax, the 20% underestimation penalty will automatically kick in. The Commissioner may waive the penalty if you can convince SARS that your provisional tax was “seriously calculated” and not deliberately or negligently understated taking into account factors available at the time you made your payment. However, you are now arguing from a position of weakness as the penalty must be paid upfront – the Commissioner will have your money and convincing SARS to refund the penalty will no doubt be a time-consuming and potentially costly exercise.

So, take time to ensure that your provisional payment is accurate enough to avoid penalties. *This is a time where it is worth speaking to your accountant.*

Lastly, don’t forget if you have made capital gains in the tax year, these must be included in your provisional estimate.

## CIPC (COMPANIES AND INTELLECTUAL PROPERTY COMMISSION) ISSUES NEW DEREGISTRATION GUIDELINES



Deregistration is the process whereby a dormant company or close corporation is brought to a legal end. If one of your businesses is dormant, consider following the guidelines for voluntary deregistration – at least it puts the business out of existence and gives peace of mind that it is now behind

you.

Deregistration can be either compulsory or voluntary –

- The CIPC will, after notice, deregister a business that fails to file annual returns for two years, or
- An entity may voluntarily file for deregistration if it has stopped trading and has no assets or insufficient assets to warrant liquidation.

### ***The Process***

If an entity wishes to file for deregistration it needs to write to the CIPC on its business letterhead (a third party must use its own letterhead), signed by all “active” directors and stating that the business is dormant and its assets cannot justify liquidation. If the application is from a third party, the letter needs to have documentary proof of the above. Tax clearance (or written confirmation from SARS that there is no tax owing) must be attached and the tax number is to be shown plus the signatures and certified ID copies of all directors (or any third party making the application).

The CIPC will check to see if annual returns are up to date and if so will decline any third party applications.

If there are any errors, the application will be returned and must be filled in as per CIPC requirements.

If it is successful, an “in deregistration process” notice is issued.

The entity or any third party (such as a creditor) may object to a deregistration application or notice. If deregistration is due to not completing annual returns then bringing them up to date will stop the deregistration process. If for any other reason, certified copies of the IDs of those opposing the deregistration must accompany the objection.

Once CIPC have completed all the administration, a “final deregistered” notice is issued and the entity no longer legally exists.

The books and documents of the business may be disposed of in such way as CIPC directs.

### ***The consequences of deregistration***

The entity ceases to exist as a legal entity but the debts of the business are not expunged, merely rendered unenforceable against the entity. Thus sureties remain liable under their suretyships. Directors, “prescribed officers” (certain senior managers with substantial powers) and shareholders who may have become personally liable for any company debt “in respect of any act or omission that took place before the company was removed from the register” remain liable. Moreover the name/s of the entity will become available for use and any interested party may then acquire the name.

**YOUR CHANCE TO INFLUENCE THE 2013 BUDGET!**



If you would like to submit tips to the Minister of Finance as he prepares the budget go to the National Treasury website <http://www.treasury.gov.za/> and click on "Budget Tips" to access the online form. You never know – he may use it!

#### **EMP201 SUBMISSION TROUBLES?**

If you are experiencing trouble with your EMP201 on eFiling in Flash mode switch to the Adobe version.

#### **YOUR TAX DEADLINES FOR FEBRUARY**

28 February – Due date for second provisional income tax returns and payments (individual and company taxpayers with February year-end). Be careful of penalties here – see "Provisional Taxpayers – New Rules, New Penalties" above.

***Have a great February – and don't forget ♥ Valentine's Day ♥ on the 14<sup>th</sup>!***

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