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THEFT: CAN YOU CLAIM A TAX DEDUCTION AND/OR A LOSS?

"…..although three quarters of South African businesses have fallen victim to some form of commercial crime, only 20% of these incidents are reported to the police" (FA News report 2009)

It's bad enough when someone steals or embezzles from your business and you often can't bear to go through all the hoops of investigating the loss and laying charges. Many businesses also hesitate to report crime because they worry about public perception – it's often considered safer just to sweep a crime under the carpet.

However, if you want to claim a deduction and/or a loss for tax purposes, note that SARS intend putting a considerable onus on you to prove the expenditure or loss. You may find it difficult to explain a failure to report the theft to the police.

When can you claim a deduction and/or a loss for tax?

A number of requirements need to be met before SARS will allow a claim, namely that -

- It was actually incurred when carrying on a trade,
- It was in the production of income,
- It is not of a capital nature (except in respect of an asset, in which case the scrapping procedures in the Act will apply), and
- It is claimed in respect of the year in which it is incurred – this could be important as you may only become aware of a theft some time after it occurred. You must object and if successful then request a reduced assessment for the year in question, and in terms of tax law, any claim must be made within three years of the date when SARS issued your assessment for that year.

In addition, the loss will be reduced by any personal element (e.g. if your business is broken into and some of your own possessions are stolen) and naturally the loss and expenditure cannot be recoverable in terms of an insurance claim.

It gets tougher

In determining if a loss and/or expenditure is "in the production of income", our courts have held that expenditure must be "closely connected" to the business. In substantiating this connectedness, there needs to be an *inherent risk* of theft or embezzlement in your business. Courts have generally held that theft committed by junior staff is an inherent risk but if a director or co-owner embezzles funds this becomes increasingly difficult to accept as an inherent risk of the business.

These cases are old cases and one would like to see how courts will approach this today – especially the extent to which they would regard cyber crime as being an "inherent business risk".

Should this happen to you, speak to an expert before embarking on the process of claiming a deduction or loss for tax purposes.

And tougher

In terms of the Tax Administration Act of 2011, the "burden of proof" in proving an entitlement to claim a deduction lies with the taxpayer. In terms of proving a fraud, the taxpayer needs to be able to quantify the expenditure and loss incurred and SARS will expect substantiation such as -

- A police docket reference number,
- A charge sheet issued by a court,

- A detailed report such as a forensic investigation by a qualified person (the good news here is that your forensic and legal expenses are generally claimable),
- Etc.

Prevention is the best solution!

As Benjamin Franklin put it "*An ounce of prevention is worth a pound of cure*" and it is important for you to have strong internal controls which would make it very difficult for fraud to occur. In the unfortunate case of it occurring, good internal controls should enable you to quantify the loss and expenditure in question.

USE ONLY A REGISTERED TAX PRACTITIONER BECAUSE .....

By 1 July 2013, all "tax practitioners" are required by the Tax Administration Act (TAA) both to register with (or fall under the jurisdiction of) a "recognised controlling body" and to register with SARS. Failure to do so is a criminal offence.

As a business owner it is in your interest to ensure, if you make use of a tax practitioner, that he or she is correctly registered. There is no legal onus on you to do so but, for example, you don't want to have SARS investigating your tax affairs because they discover that your tax adviser is operating illegally.

What is a "Tax Practitioner"?

This is broadly defined as any person who gives advice to another person on any tax Act or a person who helps to complete or completes any type of tax return for another person.

The main exclusions to this are where the person -

- Is an employee of the other person,
- Does not charge for the services rendered,
- Gives advice in anticipation of tax litigation, or
- Renders tax services but they are incidental to another service performed for the person.

Practitioners falling outside these exclusions will need to register with a recognised controlling body and with SARS by 1 July.

What is a "Recognised Controlling Body"?

It is a body recognised by SARS that requires its members to -

- Have minimum qualifications and experience
- Undergo on-going professional training
- Be subject to a disciplinary code
- Have a code of conduct and code of ethics

SARS recognises chartered accountants, auditors, attorneys and advocates who belong to their respective "controlling bodies", SAICA (the South African Institute of Chartered Accountants) being one such body granted recognition.

Why regulate Tax Practitioners?

SARS is of the view that there are too many unqualified tax advisers who do not have the knowledge and experience to give good advice to their clients. This means SARS has to spend unnecessary time unravelling this advice which in turn results in penalties and interest for taxpayers. Making tax practitioners join a “recognised controlling body” will bring accountability and professionalism to the tax advice industry.

By way of analogy, in recent years financial advisers had to take an exam to prove they could meet the necessary standard. This reduced the number of financial advisers by 65% and brought higher standards to the industry.

The only downside is that some experienced tax advisers who have no qualifications will be forced out of the industry.

FINANCE 101: RETIREMENT PART I - ARE YOU READY?

Our retirement is the most significant investment we will make. Yet statistics show that South Africa has one of the lowest saving rates in the world which means that most of us do not plan properly for our retirement.

Over the next few months we will look at retirement savings and examine such topics as how to plan, how much will you need, what products are out there, and whether we should use consultants to assist us with our retirement funding.

Why do we need a retirement plan?

Over the last few decades, retirement funding has changed drastically from our employer providing for our retirement to you and I having to plan our own retirement. In addition, life expectancy has increased which places more urgency on the need to provide sufficient income for probably at least two decades. Just think of it like this - you are effectively going on a twenty years or more holiday and you need to ensure you will have enough income for this period.

The earlier we plan the better

The power of compounding is well known and often written about. Thus, the earlier we begin to provide for our retirement, the better off we will be – for example, a 15% return on savings and investment means our savings double every five years. **If we do this for 30 years versus 15 years, our savings will be eight times greater**. Clearly, there is always the risk of a financial meltdown just as we are about to retire but this is something outside of our control.

We have to save – there is no other way. If you are serious about planning for your retirement, then you have to make a commitment to save.

The starting point – “Where are we now?”

A personal balance sheet will tell you what you are worth today. An example would be –

PERSONAL BALANCE SHEET

	Description	Value
	ASSETS	
	Property	2 000 000
	Motor vehicle	350 000
	Investments	
	Shares	160 000
	Savings account	20 000
	Value of business	500 000
	Bank account	25 000
	Other	
	Owed to you	10 000
A	**Total Assets**	**3 065 000**
	AMOUNTS OWED	
	Bonds	1 200 000
	Hire Purchase	200 000
	Other short term borrowing	150 000
B	**Total Owing**	**1 550 000**
A - B	**Net worth**	**1 515 000**

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

All of the above would be done at **market values** i.e. "what can I get for these assets today?"

So what does this tell us? Our net worth is positive which is good. We can presume that our house and motor vehicle will be able to buy us a retirement house and run-around motor car. The important point is the worth of the business, shares and the beginnings of a savings account.

Next we should do a similar exercise on our earnings and expenses. How much of this goes into retirement? And how much can we put into additional retirement funding?

Next month we will look at "How much do we need to retire?"

TAX CORNER

What are Third Parties telling SARS about you?

The 2011 Tax Administration Act indicated that SARS would be looking to third parties, such as banks, medical aids etc, for information to verify your tax submissions. Now they have gazetted what they actually require from these third parties.

These third parties have to make six-monthly submissions to SARS in electronic format (smaller returns of twenty records or less may be submitted manually at a SARS office) which will enable SARS to build data per taxpayer, and that data will be used to check the information you have disclosed in your tax return and to pre-populate your tax returns.

This third party information includes, among other things, rental income, disposal and buying of shares, interest and dividend income, purchase of retirement funding, medical aid contributions and insurance pay outs on death.

It will be even more important that we organise the information needed for our tax returns as SARS will know much of it anyway and the penalties for understatement are severe.

The New Company Tax Return (ITR14)

From May 3 all corporates (companies, close corporations, share blocks, body corporates, micro businesses and small business) will be required to use the new ITR14 form.

The form is customised to your type of business (body corporate, micro business etc) once you have answered the initial questions. Red arrows will indicate which fields to complete. The form can be saved at any time and you can work on it until you complete the ITR14 and it is ready for submission. In addition, all requests for corrections (RFCs) can be done via eFiling or at a SARS branch.

This form cannot be posted to SARS – it must be done via eFiling or completed at a branch. This is done to improve accuracy and efficiency.

There will be additional schedules to complete depending on your type of business.

The form is intended to make your submission and SARS' assessment smoother, more accurate and more efficient.

IRP5s

June is the month for getting any outstanding IRP5s out as SARS' tax season starts on July 1.

Have a Great June!