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In this Issue

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CELL PHONES AND COMPUTERS: WHAT'S THE BEST WAY TO USE THEM AND MINIMISE TAX AND ADMINISTRATION?

Technology has been the great enabler in recent times – cell phones and computers have transformed the way we live and work. They are one of the highest contributors to productivity in the economy, so how do we maximise them to ensure we get the maximum benefit out of them without incurring administrative costs or tax to our business or staff?

Your three options – and the one to choose

There are three ways we can use them:

First option

Your employee owns the device and claims back expenditure incurred in the course of carrying out his/her trade. The disadvantages of this are:

- You should agree to the use of this, preferably in writing should there be a SARS query
- The reimbursable expenses must be substantiated e.g. the submission of a cell phone account
- It must be clear to SARS that expenses claimed are in the production of income

The disadvantages of this are it is clearly an administrative burden on the company and your employee has to bear some cost.

Second option

Your employee gets a cell phone and computer allowance.

- This will be taxable in the hands of your employee less the amount he/she can demonstrate is used as part of his/her job.

As with the case above, there will be a similar administrative load on both the company and your employee.

Third option

Your company owns the asset and allows your employee the use of the asset.

- SARS in 2008, as part of the amendments made to tax legislation, stated that provided the cell phone or computer was "mainly" used in the production of income, the taxable fringe benefit would be shown at zero value i.e. there would be no tax in the hands of the employee. There has been debate about what "mainly" means. In a recent draft note issued by SARS, this has been clarified to be *more than 50%.*
- The aim of this is to simplify administration by the company and employee and reduce the tax burden on the employee (the company can claim the tax deductions). This is a forward thinking move by SARS. Once it has been shown that certain of your employees (or class/es of employees) use these devices more than 50% for business, there is no tax consideration for employees, nor additional administration for your company or employees.
- The only other consideration is whether your employee will suffer economic loss because he/she doesn't own the asset. In the case of cell phones or computers there is no loss to your employee as these are assets that lose market value very quickly due to the pace of technological change.

The bottom line

In summary, provided the "more than 50%" requirement is met, it makes sense for your company to own the cell phone or computer. It reduces administration and tax burdens for both you and your employees.

THE NEW MOI (MEMORANDUM OF INCORPORATION): WHAT IT IS, AND WHAT YOU SHOULD DO

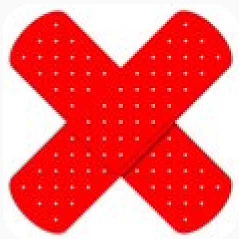
The new Companies Act requires all companies to amend their existing memorandum and articles of association – now called a "Memorandum of Incorporation" (MOI) – to comply with the new Act. This has to be done by May 1 2013. The MOI must be sent to the Companies and Intellectual Property Commission (CIPC) accompanied by a special resolution approving the MOI.

In the interim your existing articles and memorandum are regarded by the Companies Act as your "deemed" MOI. Your company is therefore still bound by them. Check whether your company is one of the many formed under the old Companies Act which used the standard "Table B" Articles of Association – if so this could be costly to you as:

- In terms of the new Companies Act, certain companies will not require an audit but Table B states that the company shall appoint an auditor – rather give your company the flexibility to choose audit or not according to your requirements.
- Most companies are not required to have an Annual General Meeting (AGM), but once again Table B prescribes that an AGM shall be held.
- Restrictions are placed on the sale of shares in Table B which may not be appropriate today.

For this reason, it is worth examining your current articles and memorandum to see if these restrictions are currently placed on you. If so, this is a good time to ask us for an opinion on issuing a new MOI - as we have seen the issues are not simple and expert advice is required.

THE CPA AND YOUR PROTECTION FROM HARM IN MEDICAL MATTERS



As we all know the medical field is one of the most regulated industries. This is for obvious reasons to ensure we take the correct medication or procedure. What is interesting is that the major pieces of legislation (the Medical Schemes Act and the Medical Related Substances Act) have, as part of their main objectives, the protection of the consumer. The CPA (Consumer Protection Act) is all about protecting the rights of the consumer and a transaction within the ambit of medical law will clearly fall within the ambit of a transaction covered by the CPA. So which one is paramount?

Your rights – getting stronger

In terms of the principles of how to determine which piece of legislation is paramount if the laws conflict, there are two general principles:

1. Whichever has stronger rights will trump the other legislation. That the CPA puts the onus on the health care industry as opposed to the claimant is a big plus for the CPA. Under current medical legislation, the consumer must prove the health care industry is at fault - *the CPA reverses that in your favour*.

2. New legislation normally takes precedence over older legislation. As the CPA came into effect in 2011 and the health care legislation was promulgated in 1998 and 1965, this would seem to give CPA a head start.

For example……

One good example where the laws may conflict is in regard to those leaflets included when you buy any scheduled medicine. They give the ingredients in your medication, side effects, contra indications etc. This is never easy to read or understand and would thus seem contrary to the CPA, which is specific that such leaflets must be in plain language and easy to understand.

Obviously, there are other factors to take into account and complexities which will probably be decided by the courts. One or other statutory bodies (on either the medical or CPA side) may apply to the Ministry of Trade and Industry for their regulations to be paramount.

Where people may prefer CPA is in the grey areas where medical legislation is not so pervasive and clear cut, such as medical devices.

In summary, the consumer enjoys substantial rights and protection under the umbrella of medical matters and it appears that the CPA will enhance these rights. It will be interesting to monitor how events will unfold over the next several years.

YOUR TAX DEADLINES FOR MAY

Remember to lodge your annual EMP501 “Employer Reconciliation Declaration” returns for the period 1 March 2011 to 29 February 2012 by 31 May. Late submissions risk heavy penalties so don't delay.

FINANCE 101: WHY ARE WE STIFLING SMALL BUSINESS?

“But economic recovery must be earned. And it will be earned by entrepreneurs and it will be earned by small businesses” (John Huntsman).

It is recognised globally that one of the biggest contributors to growth and jobs are small businesses. Entrepreneurs are the creators of these small businesses.

Revolution! Entrepreneurs in China and Nigeria

Clem Sunter recently raised two examples of this. In the small villages and towns of China there has been an “entrepreneurial revolution”. A similar phenomenon has happened in Nigeria where there has been a mushrooming of small businesses which is underpinning the rapid growth of a middle class in Nigeria. We have been cynical of Nigeria for a long time but *the reality is that the Nigerian economy is almost certain to overtake South Africa in the next few years*. The growth in small businesses has been one of the most significant contributors to this.

What do the small towns of China and Nigeria have in common? An unregulated market. Some of us may frown at what appears to be an economic free for all, but these are the conditions in which entrepreneurs thrive.

Why not South Africa?

In contrast to this, South Africa has become almost as regulated – i.e. bound up in red tape - as many first world economies. Consider this:

- Our taxation systems have considerably improved compliance but at a cost. Small businesses are bogged down by frequent PAYE reconciliations, VAT queries and the threat by SARS to audit any potential anomalies. That’s quite apart from all the other forms and returns you need to fill in for all the “hidden” taxes like UIF, SDL, Compensation Fund, etc. The last two years have seen real tax increases as income tax relief has lagged inflation and there have been substantial increases in the fuel levy, capital gains tax and dividend tax.
- Government is more inclined to see the State as the engine to create

growth and jobs. Its model is a development State which sees the government actively intervening in the economy. Thus, SAA, Eskom and the railways are owned by the government. Most of these businesses have not been successfully managed and they suck up increasing resources (hence tax increases) which leave less resources for small business.

- Labour legislation doesn't encourage small businesses to employ staff as they face potential crippling downtime from labour courts, labour legislation and one of the less productive labour forces in the world.
- Entrepreneurs have very little access to capital markets as there are few institutions prepared to back entrepreneurs.
- Almost all businesses start as small entrepreneurial entities. Research shows it is virtually impossible to forecast which businesses will thrive. Luck and circumstances have a lot to do with it. It follows that by encouraging large numbers of small businesses we will end up with some large multinational companies which will employ large numbers of people and generate growth in the economy e.g. S.A.Breweries.

Where to now?

Perhaps instead of pushing more regulations, enforcing compliance and taking resources from the private sector, government's focus should rather be on looking to de-regulate the economy at the small business level?

Whilst Nigerian and Chinese entrepreneurs think of how to expand, their South African counterparts, hemmed in by bureaucracy and regulation, are probably thinking how to minimise the impact of red tape and taxation.

One set of entrepreneurs is moving ahead and the other set is forced to think and act defensively. That's got to change!

Have a really great May!