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In this Issue

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DIRECTORS' PERSONAL LIABILITIES: IT'S NOT ALL BAD - THE "BUSINESS JUDGMENT RULE"

Much has been made of how the 2008 Companies Act increased the liabilities of directors. The argument is that as directors were given greater powers in the Act, so their liabilities should also increase. Whilst this is correct, the framers of the Act were it seems also sensitive to the fact that there is a limited pool of executive talent in South Africa and that calculated risk taking is necessary in the running of South African companies. Accordingly, they built in protections for directors, a significant one being the "business judgment rule".

What does the Act require of directors?

The Act sets a very high standard for a director who must act –

- Ethically, honestly and with due care,
- With the company's best interests in mind and,
- With the knowledge, skill, work ethic and experience expected of a director.

In addition to setting these standards, the Act makes provision for stakeholders such as unions, employees, shareholders and creditors to sue directors in their personal capacities for "loss, damages or costs" arising from any failure to act as required.

Where the "business judgment rule" fits in

The "business judgment rule" provides protection to directors who make mistaken decisions. "Twenty-twenty hindsight" court cases can be debilitating to directors and tend to make them more risk averse than the framers of the Act intended.

However, it is not as easy as just raising the rule as a defence - the Act imposes conditions for the rule to apply, namely that a director will attract no personal liability for his or her actions provided that he/she -

1. Diligently examines all the requisite information to make a decision,
2. Has no conflicts of interest and believes his/her fellow directors also have no such conflicts,
3. Makes a rational decision and believes the decision is in the best interests of the company.

In addition a director may rely on managers within the company or experts appointed by the company if there are no grounds to doubt the advice of such managers or experts.

Thus, if you have the appropriate skills and experience and apply yourself diligently to your directorial duties, you need not fear the consequences of any decisions you make. Please also note the importance of keeping a record of the work you did and how you (and your colleagues) reached a decision.

This is the balance struck between directors being able to run a business and being accountable for decisions they make.

THE PUBLIC OFFICER: A VITAL APPOINTMENT

For Companies and Close Corporations (CCs), the Public Officer “is responsible for all acts, matters, or things that the public officer’s company must do under a tax Act”.

As the Public Officer has onerous responsibilities and potential personal liabilities, it is in a company or CC’s interest to ensure they comply with SARS’ requirements.

When is the Public Officer appointed and what are his/her duties and responsibilities?

The company must appoint a Public Officer within one month of commencing business. If the position becomes vacant, a new officer is to be appointed. If the entity fails to appoint a Public Officer or appoints someone who is not satisfactory in Revenue’s eyes, SARS may appoint the Public Officer and, beware, it could be the CEO or another senior official of the business.

The company is regarded as having done everything the Public Officer does in his/her representative capacity – so it is vital that you are aware what your Public Officer is doing and that you have faith in his or her abilities.

The Public Officer –

- Ensures that all necessary registrations are done and updated when required
- Signs the returns due to Revenue – these include annual duty, income tax, PAYE, and VAT
- Generally acts for and represents the company in all tax-related matters

Public Officers and their risk of personal liability

The Public Officer is subject to penalties for “the company’s defaults” and, as a “representative taxpayer” risks further liability in terms of the Tax Administration Act. For example, Public Officers risk liability for tax due to SARS to the extent that they concluded transactions or had control of income or received income from the company. They are also personally liable if tax is due to SARS and they divert or dispose of monies or assets which could have been used to settle the tax. There are differences of opinion in legal circles as to exactly how far these risks of personal liability go, but they are real risks.

Who should the Public Officer be?

Until 2012, the Public Officer could be any person who is resident in South Africa. Thus, companies and CCs often used their independent accountant as the Public Officer. Amendments to tax law have made it mandatory that the Public Officer be a senior Company or CC official and approved by SARS. Note the Public Officer must still be a resident. The 2012 law change has no effect on existing Public Officers, but for new businesses or where changes are made that require a new Public Officer the legislation became effective in October 2012.

The Public Officer is important to your business – make sure you appoint a person who is reliable and acceptable to SARS.

DESIGN PROTECTION: PATENTS AREN’T THE ONLY IP PROTECTION OUT THERE

If you have a great idea, you immediately think "how can I protect it?" We need to look at what exactly our innovation is. If it is an original concept, such as a cure for malaria, then that is something we should patent. If however it is an enhancement of an existing product then we can protect it equally effectively by applying for design protection.

This is a potentially cheaper and quicker option than patent protection.

Please note this is a vast and complex field. It is well worth taking advice if your business takes you into this sphere.

How does it work?

A design covers the form and outside appearance of the item. A design needs to be produced by an industrial process.

Designs can be protected in two ways –

1. **Aesthetic.** These are designs which have an ornamental or aesthetic appeal solely to the naked eye. This could be the shape or surface or the colour, the pattern, the ornamentation and/or the configuration of these elements. Jewellery would be an example. You have 15 years of protection in this category. Your design needs to be original.

2. **Functional.** You can protect shapes, patterns and/or configuration necessary to the functioning of the article. A screwdriver with an ergo-dynamic handle is an example of functional design. Functional designs get protection for 10 years. These designs need to be new and not commonplace. The more unique they are, the better the legal protection.

What options are available and how does design protection compare with patent protection?

You can, in the right circumstances, cover both aesthetic and functional designs. This will involve two sets of costs should you go this route.

One other attractive feature of design protection is that the product can be on the market for six months before applying for design protection. With patents, you must file before the item is launched.

It is possible and sometimes desirable to apply for both patent and design cover. Designs are cheaper and faster to obtain versus patents. They are also simpler to enforce than patents and you are more likely to get design cover than patent cover.

WE'RE BEING PULLED AND PUSHED AROUND! SARS DISCONTINUES DEBIT PULL TRANSACTIONS

Many taxpayers use eFiling to pay amounts due to SARS. This worked on what is known as the "debit pull" method whereby taxpayers effectively authorised SARS to collect the funds from the taxpayer's bank account.

This system has some drawbacks, namely -

- Taxpayers can stop the payment,
- If there are insufficient funds in the account, the taxpayer's bank will not make the transfer to SARS,
- Taxpayers could be exposed to the risk of unauthorised transactions being processed on their bank accounts.

In the first two cases above, SARS ended up out of pocket and in the last case, being “unable to validate that the person authorising SARS to initiate the debit pull is mandated to do so”, SARS faced potential liabilities.

SARS began phasing out “debit pull” in early September. The lack of notice given by SARS has exposed taxpayers to difficulties and frustrations. Suddenly they find themselves unable to pay their on-going tax liabilities such as VAT until they have switched to the new SARS payment system, known as “credit push”.

This new system means that you or your tax practitioner will still load the payment on your eFiling profile as before, you will be given a PRN (payment request number) and an instruction is then sent to the bank; thereafter you must log onto your bank to authorise the payment (i.e. you must physically authorise this request via Internet banking).

Just beware that eFiling will not be as easy as you or your tax practitioner simply pressing a button before making payment. Allow yourself more time as the payment method switches to the new system and speak to your tax practitioner if in doubt.

There are still the alternative methods of payment to SARS – over the counter at a bank, by EFT using internet banking, or at a SARS branch (including Customs).

Finally SAICA (the South African Institute of Chartered Accountants) and the other recognised controlling bodies are lobbying SARS and the banks in an attempt to assist both tax practitioners and you the taxpayer - hopefully the credit push system will at least be streamlined.

YOUR TAX DEADLINES FOR OCTOBER

Employers – your EMP501 Employer Interim Reconciliation is due on 31 October.

Have a Great October!