

TAX

National Treasury sees the light regarding foreign employers

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The latest feedback received from National Treasury regarding the proposal to require foreign employers to register for employees' tax (Pay-As-You-Earn) has been significantly watered down but questions remain on the revised proposal.

In the first draft of the Tax Administration Laws Amendment Bill, 2023 ("**TALAB**") National Treasury proposed to require all non-residents who have employees working from South Africa to register for employees' tax (Pay-As-You-Earn) ("**PAYE**").

Commentators pointed out that this requirement would be administratively cumbersome and potentially unenforceable.

Accordingly, in the latest feedback that National Treasury gave to parliament's Standing Committee on Finance ("**SCoF**"), National Treasury accepted this feedback and indicated that it would water down the earlier proposal made in the TALAB to only apply to non-resident employers conducting business through a permanent establishment ("**PE**") in South Africa.

However, the concession still raises a number of questions, that were not addressed by National Treasury in response to the SCoF.

If a non-resident employs several individuals who are working remotely from their homes in South Africa, when will the non-resident employer have a PE in South Africa? Merely having an employee in South Africa who works from his or her own home does not create a PE for the non-resident employer.

The primary test for a PE is whether the non-resident employer has a fixed place of business through which the business of the employer is carried on.

The employee's home clearly cannot be a fixed place of business of the employer, as it is not free to use the employee's home for business purposes. Therefore, the amendment is unlikely capture foreign employers who employ remote workers in South Africa.

A further test for the existence of an PE is based on the activities of the employee. If an employee in South Africa habitually exercises authority on behalf of the foreign employer to conclude contracts in the name of such employer, the foreign employer is deemed to have a PE in South Africa based on the activities of the employee.

This is the case even though the employer may not have a fixed place of business in South Africa. Even if the non-resident employer has a PE based on the activities of the employee, it appears to us that SARS will face several difficulties in enforcing the withholding of PAYE.

One of the mechanisms for enforcement of a PAYE obligations is to require the appointment of a representative employer (if the employee is a company, the public officer is the representative employer), who can then be penalised for the company's defaults (through the imposition of administrative non-compliance penalties or criminal liability).

However, a representative employer in relation to a company is normally a resident director, company secretary or officer of the company. If the company does not appoint a representative employer, SARS can designate a director or other officer of the company as such.

However, if the employer has only level employees in South Africa, it is unlikely SARS will be able to designate one of the employees as the representative employer.

Short of appointing a representative employer, SARS can only enforce the collection of PAYE by attaching the non-resident employer's South African assets or enforcing collection of the PAYE from the non-resident employer's South African bank accounts.

If the non-resident employer does not have any significant assets or a bank account in South Africa, SARS cannot rely on one of the multilateral mutual administrative assistance treaties to request a foreign tax authority to collect PAYE from the non-resident employer, because these treaties do not mention PAYE as one of the covered taxes which are included in the treaty.

The final question to be answered relates to the application of the PAYE withholding requirement to specific employees. If the revised proposal is enacted, the PAYE withholding requirement will apply to resident and non-resident employees who are physically present in South Africa when performing their employment services.

However, the PAYE withholding requirement will also apply to the any expatriate employees who perform their employment outside of South Africa but have not emigrated from South Africa for tax purposes.

This could also substantial hardship to these employees if they are subject to foreign PAYE withholding rules. This will have to be addressed through the submission of a directive to SARS.

In conclusion, there is still significant uncertainty over how the requirement to withhold PAYE will be applied to, and enforced against non-resident employers with a PE in South Africa, and whether these employers will actually comply with the requirements on the TALAB is enacted.



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