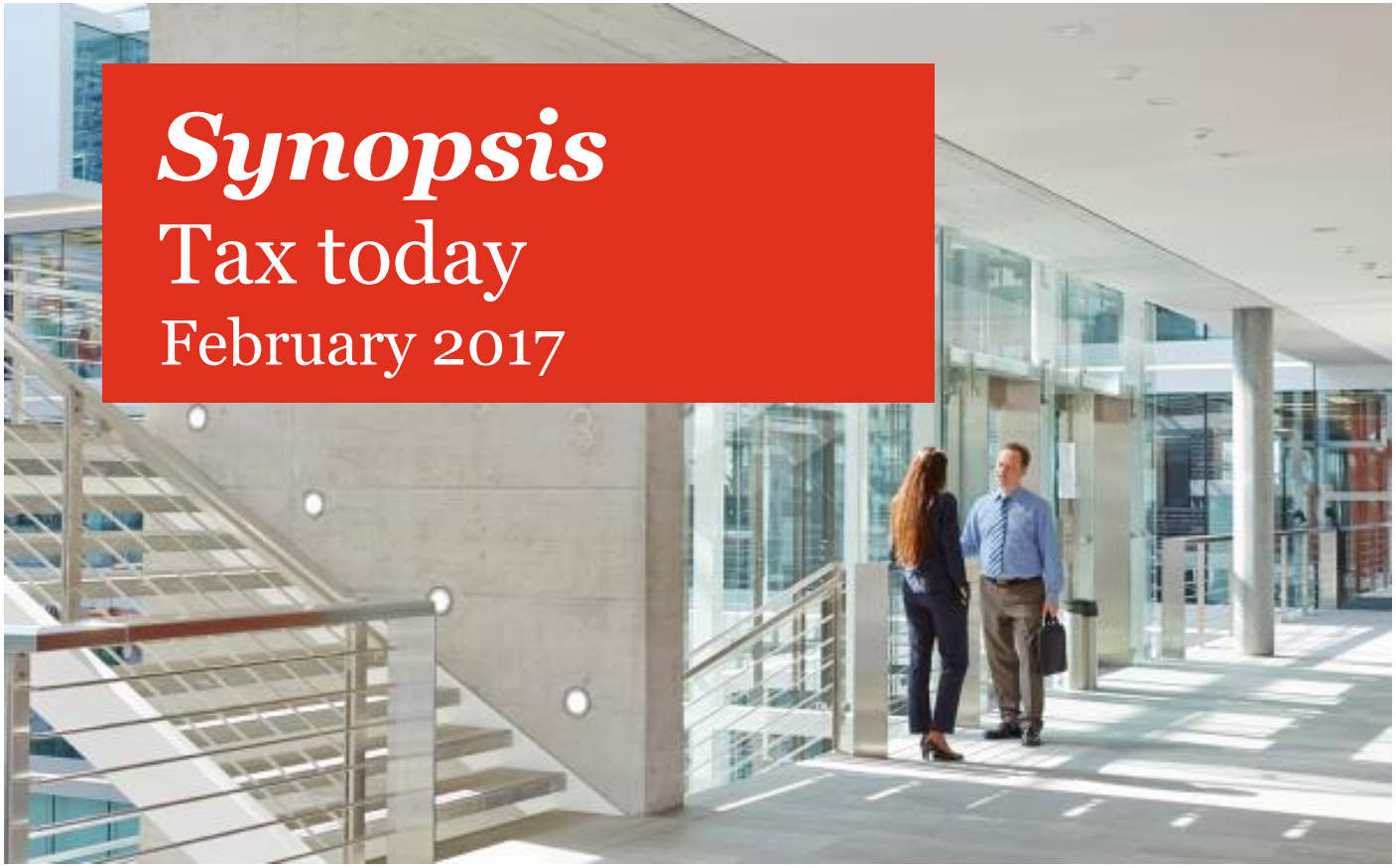

Synopsis

Tax today

February 2017

A monthly journal, published by PwC South Africa, that gives informed commentary on current developments in the tax arena, both locally and internationally.

Through analysis of and comment on new laws and judicial decisions of interest, Synopsis *helps executives to identify developments and trends in tax law and revenue practice that may affect their business.*

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Avoiding permanent establishment status

One of the principal tasks that was assigned to the working group that investigated base erosion and profit shifting within the OECD was to examine the ease with which recognition of a permanent establishment might be avoided. The Multilateral Convention (MLC) embodies the measures intended to address shortcomings in the existing double taxation agreements network.

The general thrust of double taxation agreements in relation to the taxation of business profits has consistently been that the source country can only tax the business profits of a resident of a treaty counterparty if those profits were derived through a permanent establishment (PE) of that foreign resident in the source country.

A double taxation agreement (DTA) that is based on the OECD Model Tax Convention on Income and Capital (Model Convention) contains an article that defines what constitutes a PE. There are two principal categories of PE:

- A physical PE, which is a fixed place of business or operations in the source country from which the non-resident person carries on business activities; and
- An agency PE, where a person within the source country acts on behalf of the non-resident person and concludes business contracts to which that non-resident person is legally bound.

In each instance, there are exceptions or limitations to the general description of the PE requirement. The major concern that was expressed was that the exceptions provided fertile ground for persons anxious to avoid recognition of a PE and the attendant taxation consequences attached to such a recognition.

The MLC therefore contains articles the purpose of which is to enable signatories to elect to apply overriding provisions that reduce the ease with which exceptions or limitations on the definitions may apply. In the event that South Africa is a signatory to the MLC and elects that the provisions of the articles may apply in DTAs to which South Africa is a party, the landscape for the conduct of business in South Africa by non-residents will alter.

Three articles in the MLC are discussed, namely articles 12, 13 and 14.

Article 12 – Strengthening the agency PE

General purpose

The purpose of the agency PE principle is encapsulated in the following extract from Article 5.5 of the Model Convention:

... where a person ... is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise ...

In effect, the Model Convention seeks to establish that a PE will be created if an employee or agent within the source country has, and habitually exercises, a right to conclude contracts on behalf of a non-resident.

This principle could be applied for the purposes of avoidance simply by denying the employee/agent any right to bind the non-resident under a contract. However, this did not stop the employee/agent from negotiating the significant contractual issues, including the subject matter and scope of the proposed agreement and the price, after which the non-resident would procure that the agreement was signed by a representative in their country of residence.

Article 12 seeks to broaden the concept of 'concluding contracts'. It does so in paragraph 1 by way of the following statement:

... where a person is acting in a Contracting Jurisdiction ... on behalf of an enterprise and, in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are:

a) in the name of the enterprise; or

b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use; or

c) for the provision of services by that enterprise,

that enterprise shall be deemed to have a permanent establishment in that Contracting Jurisdiction in respect of any activities which that person undertakes for the enterprise ...

This extends the focus to take account of the role of the employee/agent in relation to the formal conclusion of the contract as well as the negotiation process. If the employee/agent does not formally conclude the contract, the secondary question is whether the formal conclusion takes place as a result of the employee/agent's negotiations *without material modification*. In that event, the activities of the employee/agent may create a PE.

Independent agent exception

The Model Convention contains a saving to the agency principle, which is found in Article 5.6:

An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

Concern was expressed at the ease with which the exception might be invoked. There has always been an element of interpretation to be applied in determining whether a person has independent status. The term may refer to ownership connections or it may refer to financial dependency on the business of a particular person, for example.

Paragraph 2 of Article 13 seeks to address this issue:

Paragraph 1 shall not apply where the person acting in a Contracting Jurisdiction to a Covered Tax Agreement on behalf of an enterprise of the other Contracting Jurisdiction carries on business in the first-mentioned Contracting Jurisdiction as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.

The concept of independence is now identified by reference to the extent to which the agent relies on the principal and the existence of a close relationship.

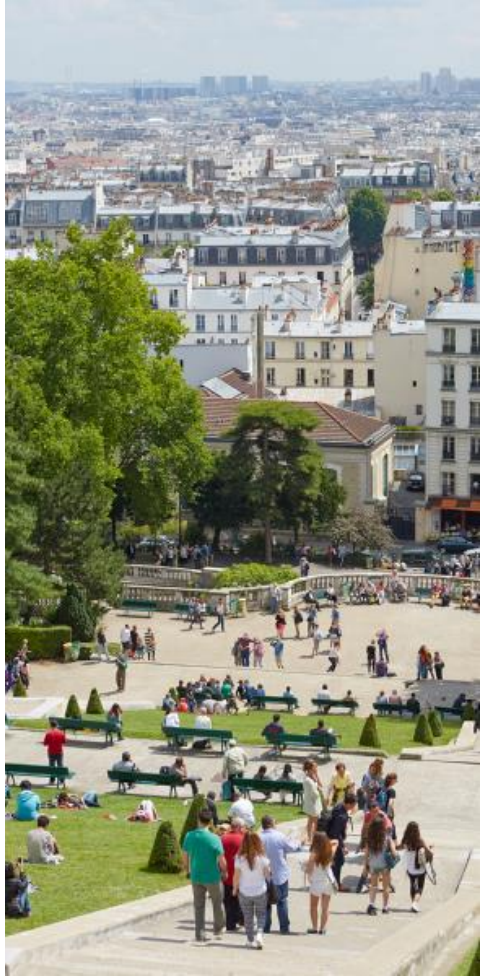
Interpretative guidance is found in Article 15 of the MLC:

... a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.

The litmus test is therefore found in the concept of *close relationship*. If the parties are factually not closely connected, financial dependency on the business of the principal as the sole or main agency of the agent is apparently not a factor. Unless it is established that the agent is 'closely related' to the principal based on direct or indirect ownership, paragraph 2 of Article 12 will exclude the existence of a permanent establishment. The degree of business dependence will assume relevance only if the agent is closely related to the principal.

These will be important issues if South Africa elects for paragraphs 1 and 2 of Article 12 to apply to a DTA, and much will hinge on whether it also elects to adopt Article 15 to govern interpretation of Article 12.

Article 13 – Bolstering the physical PE



In Article 5.4 of the Model Convention, provision is made to exclude physical locations that are apparently a PE where the nature of the activities carried on within the location is such that they are not regarded as income generating. Thus Article 5.4 states:

Notwithstanding the preceding provisions of this Article, the term 'permanent establishment' shall be deemed not to include:

(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e) of this paragraph, provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

Thus custodial and display activities or the operation of a buying office were excluded from the scope of a PE, as were activities that were regarded as being of a preparatory or auxiliary character.

Article 13 of the MLC provides two options to a contracting state:

- Option A in substance limits the exceptions from applying unless each of the activities undertaken or the combination of activities is of a preparatory or auxiliary nature.
- Option B envisages that the contracting state in question is comfortable with the exceptions as specified in the option. In this case it is expected that the contracting states will strengthen their PE rules by the adoption of Article 14 of the MLC.

The explanatory document that accompanied the issue of the MLC text explained that many countries were satisfied with the scope of the provisions of Article 5.4 of the Model Convention. For this reason, Article 13 was drafted to provide an election to signatories. Thus a signatory may first determine whether it wishes Article 13 to apply to a DTA and, having so decided, then elect the form of the modification that should apply.

Whichever option may be elected, both provide that the exceptions may not apply in combination in respect of a single location unless the overall nature of the combined activities is preparatory or auxiliary.

Paragraph 4 of Article 13 states that a PE may be created in the following circumstances:

- Where a non-resident carries on activities from a single place in a host jurisdiction and one of the activities qualifies as a PE but the other does not;
- Where a non-resident carries on activities in a host jurisdiction from two different places and one of the places is a PE and the other is not;
- Where two closely related non-residents carry on activities from a single place in a host jurisdiction and one of the activities qualifies as a PE but the other does not; or
- Where two closely related non-residents carry on activities in a host jurisdiction from two different places and one of the places is a PE and the other is not.

In any of these circumstances, the combined activities may be treated as creating a PE in respect of each location or activity if the activities constitute complementary functions that are part of a cohesive business operation.

Article 5.3 of the Model Convention deals with the position in relation to construction or assembly projects:

A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.

Article 14 – Splitting of contracts

The *de minimis* period for which a project should endure is frequently a matter of negotiation, and the length of the period that is agreed may vary from one DTA to another. Further, the activities carried on at the site may be limited to only the actual construction or assembly activities, or extended to include consultancy or supervisory services in connection with the project. The PE requirement will vary between different DTAs.

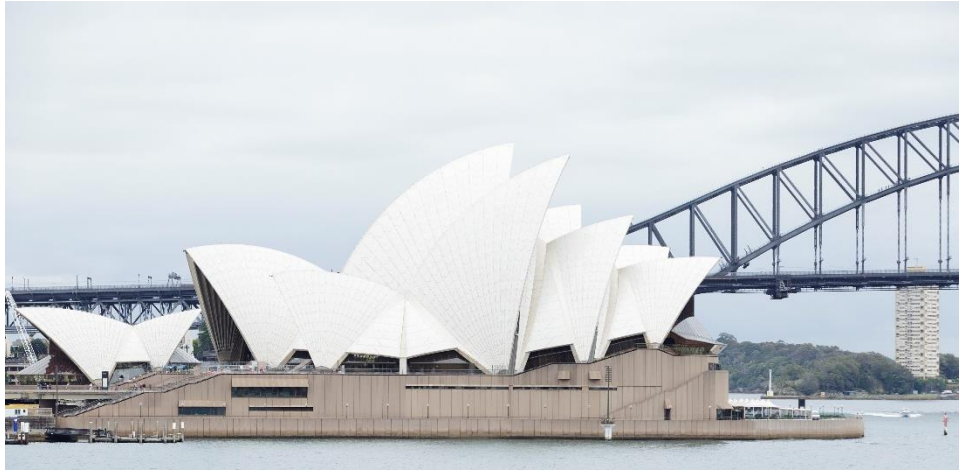
Article 14 of the MLC is concerned with the structuring of construction or assembly activities into modules or discrete elements, none of which will exceed the *de minimis* period. It therefore proposes to address the issue in the following manner:

For the sole purpose of determining whether the period (or periods) referred to in a provision of a Covered Tax Agreement that stipulates a period (or periods) of time after which specific projects or activities shall constitute a permanent establishment has been exceeded:

a) where an enterprise of a Contracting Jurisdiction carries on activities in the other Contracting Jurisdiction at a place that constitutes a building site, construction project, installation project or other specific project identified in the relevant provision of the Covered Tax Agreement, or carries on supervisory or consultancy activities in connection with such a place, in the case of a provision of a Covered Tax Agreement that refers to such activities, and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30 days without exceeding the period or periods referred to in the relevant provision of the Covered Tax Agreement; and

b) where connected activities are carried on in that other Contracting Jurisdiction at (or, where the relevant provision of the Covered Tax Agreement applies to supervisory or consultancy activities, in connection with) the same building site, construction or installation project, or other place identified in the relevant provision of the Covered Tax Agreement during different periods of time, each exceeding 30 days, by one or more enterprises closely related to the first-mentioned enterprise,

these different periods of time shall be added to the aggregate period of time during which the first-mentioned enterprise has carried on activities at that building site, construction or installation project, or other place identified in the relevant provision of the Covered Tax Agreement.



The takeaway

The implementation of the MLC will present challenges not only for non-residents who carry on business activities in South Africa but also for South African enterprises that carry on operations in other countries. The precise principles applicable to the determination of whether a permanent establishment will be created will change when the MLC comes into effect. The nature and extent of the changes will be contingent on elections made by signatory states as to whether and to what extent articles 12, 13 and 14 of the MLC will apply to particular DTAs, and it would be advisable for persons with external operations to consider carefully the implications that the proposed changes to DTAs may hold for those operations.

Essentially, two issues must be identified:

- Were activities carried on by the non-resident at the site in connection with a specific project during one or more periods that exceeded 30 days in aggregate but did not exceed the relevant *de minimis* period?
- Were connected activities carried on at that site (or, where the DTA includes supervisory or consulting activities in connection with a specific project, such activities) by persons who are closely related to the non-resident, and was any single activity carried on for a period of time that exceeded 30 days?

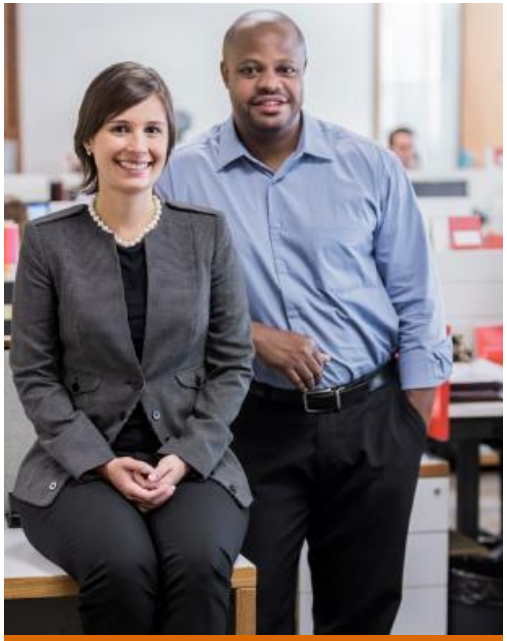
Where any activity is identified as meeting these requirements of the inquiry, then the time spent in relation to that activity must be added to the aggregate period of time during which the non-resident carried on activities at that site.

This provision raises questions:

- Is it relevant that the activities are concurrent with other activities or whether the activities are consecutive? It is submitted that the activities referred to must be undertaken at a time when the non-resident is not carrying out other activities at the site – without this requirement, overlapping periods will be double-counted.
- To what extent do activities of a preparatory or auxiliary nature fall within the scope of the PE? In many projects, it may be necessary for the contractor to take measurements or conduct preliminary surveys which will inform its design or engineering decisions. If these are of a preparatory or auxiliary nature, it is submitted that the activities are not drawn into the PE net by reason that they are activities in connection with a construction site. The overriding exclusion afforded under Article 5.4 of the Model Convention to activities of a preparatory or auxiliary nature should not be disturbed.
- What criteria are applied to determine whether activities are connected? The Model Convention refers to supervisory activities in connection with the construction site or project. It is submitted that the interpretation has to be considered in light of paragraph 4 of Article 13, and that the activities should be regarded as complementary functions that are part of a cohesive business operation.

If a state is a signatory to the MLC, Article 14 will apply automatically unless the signatory elects that it shall not apply to a specific DTA or DTAs. Alternatively, a signatory may elect to exclude its application in relation to the exploration for or exploitation of natural resources.

The newly announced imposition of VAT on non-executive directors' fees



On 10 February 2017, SARS issued two binding general rulings regarding the taxation of fees paid by a company to its non-executive directors. The first ruling conceded that employees' tax (PAYE) is not deductible from such fees; the second ruled that such fees are subject to VAT.

The rulings were followed by an explanatory media release on 14 February 2017, as follows:

'The South African Revenue Service has confirmed the interpretation of the VAT law that requires non-executive directors (NEDs) of companies to register for and charge VAT in respect of any directors' fees earned for services rendered as a non-executive director.

Two binding general rulings – BGR no.s 40 and 41 – issued on 10 February 2017 confirmed the interpretation as of 1 June 2017.

The value of the fees must, however, exceed the compulsory VAT registration threshold of R1 million in any 12-month consecutive period, but NEDs can voluntarily register for VAT as well.

Previously, NEDs were subject to employees' tax (PAYE) because the directors' fees received for services rendered were considered to be remuneration. However, due to amendments made in 2007 to the exclusions to the definition of 'remuneration' in the Fourth Schedule to the Income Tax Act No. 58 of 1962 (the Act), there was uncertainty as to whether the amounts payable to an NED were subject to the deduction of PAYE.

After consultation, review and application of the law, it has now been confirmed that an NED is regarded as an 'independent contractor', and any directors' fees paid or payable to an NED for services rendered in that capacity are not regarded as remuneration.

NEDs receiving directors' fees exceeding the compulsory registration threshold are required to register as VAT vendors from 1 June 2017. However, NEDs will not be required to account for VAT in respect of directors' fees received prior to this date, provided such NED was subject to PAYE.'

Executive and non-executive directors

The Companies Act, 2008 (Act No. 71 of 2008) draws no distinction between *executive* and *non-executive* directors; nor does the Value-Added Tax Act 1991 (Act No. 89 of 1991) provide any definition of either term.

In the absence of accepted definitions in this regard, Binding General Ruling 40 (Income Tax) of 10 February 2017 states that –

'For purposes of this BGR, SARS considers a non-executive director to be a director who is not involved in the daily management or operations of a company, but simply attends, provides objective judgment and votes at board meetings.'

The distinction between executive and non-executive directors has, however, been recognised by the courts, both in South Africa and overseas; see, for example, the discussion in *Howard v Herrigel* 1991 (2) SA 660 (A).

Is a non-executive director deemed, by a legal fiction, to be an employee by virtue of the statutory criteria laid down in the Fourth Schedule to the Income Tax Act?

There has been a long-standing debate about whether a NED's remuneration should be subject to PAYE on the basis that (although he is clearly not an *employee* in terms of common law criteria) he or she is *artificially deemed* to be an employee in terms of the criteria laid down in the Fourth Schedule to the Income Tax Act on the basis that they are subject, in some rather loose sense, to *control and supervision* by the company as envisaged in this Schedule.

Binding General Ruling 40 of 10 February 2017 now resolves that long-standing controversy. It rejects the argument that a NED is subject to control and supervision, and consequently rules that a NED's earnings are not subject to PAYE – but adds that such a director may voluntarily request that employees' tax be deducted from their director's fees.

This does not, however, resolve the issue as to whether or not amounts paid to NEDs (which constitute payments as consideration for services rendered) could be regarded as 'remuneration' (and therefore subject to employees' tax on this basis).

The basis for this ruling is that a non-executive director performs his or her duties as such as an independent contractor who is carrying on an enterprise and as such falls within the charging provisions of the VAT Act.

In this regard, the BGR briefly discusses the 'statutory tests' in paragraph (ii) of the exclusions to the definition of 'remuneration' in the Fourth Schedule to the ITA. Generally speaking, in order for an amount paid to a person as consideration for services rendered to be regarded as remuneration, these tests require (1) performance by the person at the premises of the employer of the services (i.e. more than 50% of the services must be so performed), and (2) control and supervision by the employer over either the manner in which the duties are performed or the hours of work of the person.

The BGR concludes that the control and supervision test is not satisfied in relation to amounts paid to NEDs as consideration for their services, and that these amounts cannot therefore be regarded as remuneration.

The BGR deals briefly with the effect of the above on the prohibition of deductions by office-holders under section 23*(m)* of the Income Tax Act (NEDs are regarded as office-holders). On the basis that one of the requirements for section 23*(m)* to apply is that the office-holder must derive remuneration in respect of the office, SARS concludes that section 23*(m)* does not apply in respect of deductions claimed against fees earned by NEDs.

It must further be noted that BGR40 does not apply in respect of non-resident NEDs.

The basis for imposing VAT on the directors' fees of a non-executive director

In the second simultaneous ruling, namely Binding General Ruling (VAT) 41 issued on 10 February 2017, SARS rules that a NED (other than one who is a non-resident, unless the services are physically performed in the Republic on a continuous or regular basis or through a fixed or permanent place in the Republic) is liable for VAT on their directors' fees.

The basis for this ruling is that a NED performs his or her duties as such as an *independent contractor* who is carrying on an *enterprise* and as such falls within the charging provisions of the Value-Added Tax Act.

A NED is therefore regarded as carrying on an enterprise in the Republic and is required to register for and levy VAT in respect of any directors' fees so earned if the value of such fees exceeds the compulsory VAT registration threshold of R1 million as provided for in section 23*(1)* of the Value-Added Tax Act.

A NED may also choose to voluntarily register for VAT where the value of the fees exceeds the R50 000 voluntary registration threshold. In theory, this would mean that NEDs would, in order to determine their registration obligation, need to monitor income and review how the remuneration is split for non-executive functions versus management functions falling outside the ambit of the activities of an 'independent contractor'.

The BGR also considers the impact on non-resident NEDs. SARS regards these NEDs to be conducting an enterprise where their services are physically rendered in the Republic. Although this might be the case, it is arguable that SARS is not necessarily entitled to levy 14% on the full amount: only a portion of the fee might relate to services rendered in the Republic.

Must an independent contractor be regarded as an employee for VAT purposes?

SARS points out in BGR41 that the provisions of the VAT Act and the Fourth Schedule to the ITA must be applied independently of each other in determining liability for VAT and employees' tax, and that it would therefore be incorrect to conclude that an independent contractor must be regarded as an employee for VAT purposes merely because the contractor's income is deemed to be remuneration that is subject to employees' tax.

It is therefore entirely possible that an independent contractor could be liable for VAT and employees' tax in respect of income the contractor earns.

Despite the fact that there might not be an employees' tax liability in respect of fees earned by NEDs, BGR 41 does state that a NED may nevertheless voluntarily request that employees' tax be deducted from any fees paid to him or her.

The takeaway

Previous uncertainty relating to the treatment of income received by non-executive directors in the context of employees' tax and VAT has been cleared up by the BGRs. However, the BGRs are silent on the treatment for tax periods prior to 1 June 2017, as well as on any past registration liability for non-executive directors that have already exceeded the VAT registration threshold. It is also interesting to note that the BGRs do not provide guidance on what measures can be taken to rectify the position where employees' tax has been incorrectly deducted.

Foreign earned income exemption becomes more problematic

Employees who work outside South Africa and employers that employ them should be aware of the proposed change to the application of the exemption relating to foreign-earned income. This change was announced in the Budget last month.

Under the exemption as it currently exists, South African-resident employees who render services outside South Africa will be exempt from income tax on amounts that accrue in respect of those services. In order to qualify for the exemption, the employee must be outside South Africa for a total of 183 days (which must include a continuous period of 60 days) during any 12-month period and the services must be rendered during the period or periods of absence. Recent changes to the interpretation note now also allow earnings for incidental days of presence in South Africa to be included in the exempt amount.

The proposed change announced in the Budget is that an amount will only be exempt in terms of the relevant provisions if the amount is subject to tax in a country outside South Africa.

The original purpose of the exemption was to prevent the unnecessary and often onerous administration involved in claiming tax credits, and not to provide a complete exemption from tax. In light of this, the proposed change is logical.

Whilst logical, the devil will be in the detail, and the proposal gives rise to many questions.

Generally speaking, "subject to tax" requires that tax is actually levied on the income. Will it therefore be necessary to identify certain elements of the remuneration that might be tax exempt in a particular country, and then subject that to tax in South Africa? Where the tax rate in the host country is lower than in South Africa, employees might rather prefer to receive a taxable benefit in the host country than a non-taxable one which would be subject to tax in South Africa.

It might therefore be necessary to review remuneration packages of expatriate employees to determine optimum tax efficiency from a total tax perspective.

Employees working in countries which have no personal income taxes (such as, for example, certain Middle East countries) will, if the proposal is accepted, now be taxable in South Africa. Part of the attraction of working in these countries is the tax benefit, and employers will likely have to compensate employees for the loss of this benefit (where there is no tax equalisation). Depending on how the proposal takes shape, employees could potentially be better off working in a low tax jurisdiction (as opposed to a no-tax jurisdiction).

SARS will no doubt require proof that the remuneration is subject to tax. It is likely that this will be in the form of an assessment showing the amounts subject to taxation. The usual issues with non-coterminous years of assessment will likely result in significant delays in the finalisation of the South African tax year for those that claim the exemption.

South African employers that currently apply the exemption through their payroll systems will, in order to avoid possible penalties and interest for under deduction of PAYE, now need to undertake extra due diligence around applying the exemption.

It is important to note that, where there is a double tax agreement between South Africa and the host country, many out-bound assignees from South Africa break South African residence by virtue of the application of residence "tie-breaker" clauses in the relevant double tax agreement. The foreign-earned income exemption generally would not apply in these circumstances (the assignee would, in terms of the treaty, only be subject to income that is sourced in South Africa).

In circumstances where the proposed change, if implemented, would be prejudicial (whether to the employee or to the employer), employees might consider organizing their affairs in such a way that they are no longer resident in South Africa (provided that there would be no significant adverse implications arising from their ceasing to be residence, such as capital gains tax on deemed disposals of their assets as a result of cessation of residence). South Africa has double tax agreements with the United Arab Emirates, Qatar and Saudi Arabia, three countries with no personal income tax.

The takeaway

It is a misconception that the foreign-earned income exemption exists in order to absolve South African-resident employees from South African income tax when they work abroad. The primary aim of the exemption was to alleviate the administrative burdens associated with international secondments. The proposed change to the exemption will align the exemption more closely with its original purpose.

However, it is almost certain that the proposed change, if implemented, will require a fairly substantial revision of existing payroll and compliance procedures associated with the management of international secondments of South African resident employees.

SARS Watch 26 January 2017 to 23 February 2017

Legislation

22 Feb 17	Tariff Amendments – Taxation Proposals as tabled by the Minister of Finance in his Budget Review 2017	Taxation Proposals as tabled by the Minister of Finance in his Budget Review 2017 at 14:32 on 22 February 2017
22 Feb 17	Document for public comment: Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 22 Feb 17	Comments should be submitted to SARS by 27 March 2017.
15 Feb 17	Publication of the discussion document on the review of the diesel fuel tax refund system for public comment	Comments should be submitted to SARS and National Treasury by 10 May 2017.
10 Feb 17	Memorandum on the Objects of Tax Administration Laws Amendment Bill, 2016	The Bill proposes to amend the Income Tax Act, 1962, The Customs and Excise Act, 1964, the Value-Added Tax Act, 1991, the Mineral and Petroleum Resources Royalty (Administration) Act, 2008, the Tax Administration Act, 2011, the Customs Duty Act, 2014, and the Customs Control Act, 2014.
10 Feb 17	Amendment of Part 1 of Schedule No. 1, by the substitution of tariff subheadings 1701.12, 1701.13, 1701.14, 1701.91, and 1701.99 to reduce the rate of customs duty on sugar from 31.89c/kg to free of duty in terms of the existing variable tariff formula as recommended in Minute M06/2016	Notice No. R.116 published in Government Gazette No. 40611 with an implementation date of 10 February 2017.
3 Feb 17	Amended forms DA178 and DA185.4B2 as a consequence of the amendment to Rule 54F to provide for environmental levy on tyres as announced by the Minister of Finance in his budget review on 24 February 2016	Notice R.95 published in Government Gazette No. 40594 with a retrospective implementation date effective from 1 February 2017.

Case law

9 Feb 17	IT 13635	Whether the Appellant was entitled to condonation for the late filing of an objection.
9 Feb 17	IT 13935	Whether the Appellant was entitled to the deduction of an assessed loss, bad debts and other expenses.
3 Feb 17	Da Encarnaçäo NO and Another v The Commissioner for the South African Revenue Services (33302/2014) [2017] ZAGPPHC 23	Deals with the provisions of section 47(9)e of the Customs and Excise Act.

Guides

16 Feb 17	Tax guide for share owners (Issue 5)	This guide provides general guidance on the taxation of share owners. The guide is based on legislation as at 19 January 2017 and primarily focuses on the 2017 year of assessment, although much of the commentary will also apply to earlier years of assessment.
15 Feb 17	VAT123e – Application for Cancellation of Registration i.r.o. Enterprises – External (Form)	Application form for the cancellation of registration of a person in respect of all his enterprises.
10 Feb 17	ABC of capital gains tax (CGT) for individuals (Issue 9)	This guide provides a simple introduction to CGT at its most basic level and probably contains insufficient detail to enable you to accurately determine your liability for CGT under most practical circumstances. It should accordingly not be used as a legal reference. It applies to the 2017 year of assessment, which covers the period 1 March 2016 to 28 February 2017.
10 Feb 17	ABC of capital gains tax (CGT) for companies (Issue 7)	This guide provides a basic introduction to CGT and should not be used as a legal reference.
3 Feb 17	Special Voluntary Disclosure Programme (SVDP) Guide	The purpose of this guide is to assist individuals and companies with relevant information regarding the SVDP as proposed by the Minister of Finance in the 2016 Budget.
3 Feb 17	Voluntary Disclosure Programme (VDP) Guide	The purpose of this document is to provide guidelines in respect of the SARS VDP for tax defaults in terms of the Tax Administration Act No. 28 of 2011.
1 Feb 17	Guide on the US Foreign Account Tax Compliance Act (FATCA) (Issue 2)	This is a general guide on the application and interpretation of specific issues arising from the statutory obligations placed on South African Financial Institutions in terms of the Agreement between the Government of the Republic of South Africa and the Government of the United States of America (the Agreement). While this guide reflects SARS' interpretation of the Agreement, taxpayers who take a different view are free to avail themselves of the normal avenues for resolving such differences.

Interpretation notes

23 Feb 17	Draft IN on the meaning of 'extracted'	Comments should be submitted to SARS by 20 March 2017.
14 Feb 17	Draft IN 60 (Issue 2) – Loss on disposal of depreciable assets	Comments should be submitted to SARS by 10 April 2017.
2 Feb 17	Draft IN on the exemption from income tax: Remuneration derived by a person as an officer or crew member of a South African ship	Comments should be submitted to SARS by 24 April 2017.
16 Feb 17	In 43 (Issue 6) – Circumstances in which certain amounts received or accrued from the disposal of shares are deemed to be of a capital nature	This Note provides clarity on the interpretation and application of section 9C, which deems the amount derived from the disposal of certain shares held for a continuous period of at least three years to be of a capital nature.
6 Feb 17	IN 65 (Issue 3) – Trading stock: Inclusion in income when applied, distributed or disposed of otherwise than in the ordinary course of trade	This note provides guidance on the application and interpretation of section 22(8), which deems an amount to be included in income when trading stock is applied, distributed or disposed of in specified circumstances, otherwise than by sale at market value in the ordinary course of trade.
6 Feb 17	IN 11 (Issue 4) – Trading stock: Assets not used as trading stock	This note provides guidance on the application and interpretation of paragraph (jA) and its interaction with other provisions of the Act.
2 Feb 17	IN 34 (Issue 2) – Exemption from income tax: Remuneration derived by a person as an officer or crew member of a ship	This note provides guidance on the circumstances under which section 10(1)(o)(i) exempts the remuneration derived by a person as an officer or crew member of a ship from normal tax.
2 Feb 17	IN 16 (Issue 2) – Exemption from income tax: Foreign employment income	This note discusses the interpretation and application of the foreign employment remuneration exemption in section 10(1)(o)(ii).

Rulings

10 Feb 17	Draft BGR on treatment of transport, insurance and handling expenses	Comments should be submitted to SARS by 6 March 2017.
3 Feb 17	Draft BGR on associations: Funding requirement	Comments should be submitted to SARS by 24 March 2017.
15 Feb 17	BCR056 – Amalgamation of portfolios of declared hedge fund collective investment schemes (CIS) with registered hedge fund CISs	This ruling determines the income tax and securities transfer tax consequences resulting from the amalgamation of hedge fund portfolios that have been declared CISs with registered hedge fund CISs pursuant to a change in the law governing hedge fund portfolios.
10 Feb 17	BGR 41 – VAT treatment of non-executive directors (NEDs)	This BGR deals with the VAT treatment of the activities conducted by NEDs and clarifies whether those activities fall within the ambit of proviso (iii)(aa) or proviso (iii)(bb) to the definition of 'enterprise' in section 1(1).
10 Feb 17	BGR 40 – Remuneration paid to non-executive directors	This BGR provides clarity on the employees' tax consequences of income earned by an NED, as well as the effect those employees' tax consequences could have on the prohibition against deductions by office-holders under section 23(m).
9 Feb 17	BPR 266 – Acquisition of a business in exchange for the assumption of liabilities and the issuing of a loan note	This ruling determines the tax consequences resulting from the acquisition of a business of a company in exchange for the assumption of the liabilities of that company and the issuing of a loan note in favour of that company. It also determines the deductibility of interest on a loan incurred to finance the repayment of the loan note.
3 Feb 17	BPR 265 – Amalgamation transaction	This ruling determines the tax consequences for a company that intends to dispose of its assets in terms of an 'amalgamation transaction' as defined in section 44(1). The company holds loans and preference shares in the company that will acquire the assets.
3 Feb 17	BPR 264 – Venture capital company (VCC) shares	This ruling determines whether each share to be issued by a VCC and another company (target company) will be an 'equity share' as defined in section 1(1) and whether the target company will be a controlled group company for purposes of the definition of 'qualifying company' in section 12J(1).
3 Feb 17	BGR 9 (Issue 3) – Taxes on income and substantially similar taxes for purposes of South Africa's tax treaties	This BGR identifies the taxes administered by SARS which in its opinion constitute taxes on income or substantially similar taxes for purposes of South Africa's tax treaties.
1 Feb 17	BGR 29 (Issue 2) – Unbundling transactions: Meaning of 'as at the end of the day after that distribution'	This BGR addresses the interpretation of the words 'at the end of the day after that distribution' as used in section 46(3)(a)(v) in relation to an unbundling company listed on the JSE. It does not address consecutive unbundling transactions occurring on the same day or the determination of the market value of shares in an unlisted unbundled company.
1 Feb 17	BPR 263 – Hybrid interest	This ruling determines the income tax consequences of the entitlement to and the payment of a share in the profit of the co-applicant to the applicant in the context of a funding arrangement, as well as the re-characterisation rules contained in section 8FA.

Exchange of information agreement

10 Feb 17	Exchange of Information – Saint Christopher (Saint KITTS) and Nevis	The International Exchange of Information Agreement will enter into force with effect from 18 February 2017.
Organisation for Economic Cooperation and Development (OECD)		
1 Feb 17	Peer review documents for assessment of BEPS minimum standards (Actions 5 and 13)	The OECD released key documents, approved by the Inclusive Framework on BEPS, which will form the basis of the peer review of Action 13 Country-by-Country Reporting and for the peer review of the Action 5 transparency framework.

PwC publications

23 Feb 17	PwC tax alert – DTA Zimbabwe	The Zimbabwe treaty was published in SA's Government Gazette on 27 January 2017, with a date of entry into force of 1 December 2016.
23 Feb 17	PwC tax alert – DTA Singapore	The Singapore treaty was published in SA's Government Gazette on 27 January 2017, with a date of entry into force of 16 December 2016.
21 Feb 17	PwC tax alert – Directors' Fees Received by Non-Executive Directors: Binding General Rulings on Employees' Tax and VAT	For some time, there has been uncertainty surrounding the tax treatment of directors' fees received by non-executive directors. On 10 February 2017, Binding General Rulings 40 and 41 ('the BGRs') were issued by SARS. These BGRs set out SARS' position on the matter.
31 Jan 17	PwC tax Alert – Transfer Pricing: South Africa issues final country-by-country reporting regulations	On 23 December 2016, South Africa (SA) issued its regulations implementing the country-by-country reporting (CbCR) standards for multinational enterprises. These regulations entrench CbCR requirements in SA's transfer pricing regime, and follow legislative changes in SA related to the OECD's Base Erosion and Profit Shifting initiative, specifically Action 13. The regulations are effective for tax years beginning on or after 1 January 2016. The first CbCRs must be filed by 31 December 2017.

Organisation for Economic Cooperation and Development (OECD)

24 Jan 17	The Platform for Collaboration on Tax Invites Comments on a Draft Toolkit Designed to Help Developing Countries Address the Lack of Comparables for Transfer Pricing Analyses	Comments should be sent by email no later than 21 February 2017 to GlobalTaxPlatform@worldbank.org.
14 Dec 16	The Impact of Tax and Benefit Systems on the Workforce Participation Incentives of Women	This paper examines the impact of tax and benefit systems on the incentives for second earners to enter formal employment. The paper highlights how various tax design features create greater participation disincentives for second earners than for primary earners or single individuals. As second earners in OECD countries are more often women, these greater disincentives create significant gender-equity concerns.
5 Dec 16	OECD publishes multilateral instrument for implementing BEPS in double tax treaties	On 24 November 2016, the OECD published the 49-page *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* and its accompanying 86-page *Explanatory Statement*.
24 Nov 16	Explanatory statement to the multilateral convention to implement tax treaty-related measures to prevent base erosion and profit shifting	The preamble describes the overall purpose of the Convention to implement tax treaty-related measures produced as part of the Final BEPS Package in a swift, co-ordinated and consistent manner across the network of existing tax treaties without the need to bilaterally renegotiate each such treaty.
22 Nov 16	Message from James Karanja, Head of Tax Inspectors Without Borders (TIWB)	The new TIWB website, which expresses the OECD's vision of sharing tax knowledge and expertise for tax administrations worldwide, is designed to engage our many stakeholders and partners on this exciting journey.

PwC publications

25 Jan 17	Promulgation of the Acts	This Tax Alert highlights the most significant changes brought about by the Acts as well as the amendments that were made to the relevant Bills by the Standing Committee of Finance during December 2016.
23 Jan 17	Tax Alert – United Arab Emirates (UAE) DTA	Tax treaty between United Arab Emirates and South Africa. This treaty took effect from 1 January 2017.
1 Dec 16	PwC Tax Alert – Multilateral Instrument (MLI)	On 24 November 2016, the OECD published the final version of the MLI – a single document to amend over 2 000 international tax treaties. The four amendment areas are hybrid mismatches, treaty abuse, avoiding permanent establishment status and dispute resolution.