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Attorneys

Doing Business in South Africa

INTRODUCTION

If a foreign company wishes to establish a branch or external company in South Africa, registration is required as an “external company”. This is accomplished in much the same way as for a domestic company. A certified copy of the memorandum and articles (or their equivalent) of the foreign company, authenticated by a South African diplomatic representative or in certain circumstances notarised by a registered notary, must be filed with the Companies and Intellectual Property Registration Office. An external company is in most respects subject to the same regulations as a South African company. Registration also takes about four to six weeks and costs about R5 000 (excluding VAT and disbursements).

External Company

Instead of operating through a South African subsidiary, a foreign company may operate through a branch in South Africa. A company incorporated outside South Africa that establishes a place of business in South Africa is classified as an “external company”. The definition of an external company has been extended to deem a foreign company which acquires immovable property in South Africa to have established a place of business in South Africa. An “external company” is obliged to register with the Companies and Intellectual Property Registration Office (CIPRO) and must comply with the provisions of the Companies Act, including the submission of statutory returns and the filing of annual financial statements for its entire operations (and not only its South African operations) with CIPRO, where they are open to public scrutiny. Exemption from the obligation to file those accounts can be applied for and is fairly readily granted.

The “external” company is required to appoint a South African resident who is authorised to accept notices served on the company. Once registered, the “external” company will effectively be treated under South African law like a South African incorporated company.

2 The requirements, obstacles and restrictions, time, documentation and structure for setting up a representation office in South Africa.

Every external company shall within twenty-one days after the establishment of a place of business in the Republic lodge with the Registrar, in the prescribed manner—

- (a) a certified copy of the memorandum of the company, and if the said memorandum is not in one of the official languages of the Republic, a certified translation thereof in one of those languages;
- (b) a notice of the registered office and postal address of the company;
- (c) the consent of and the name and address of the auditor of the company in the Republic;
- (d) a notice of the financial year of the company;
- (e) a list in the prescribed form containing particulars—
 - (i) in respect of each director, his full forenames and surname and any former forenames and surname, his nationality, his occupation, his residential, business and postal addresses and the date of appointment (distinguishing between directors resident in the Republic and non-resident directors);
 - (ii) in respect of the local manager and in respect of the secretary, his full forenames and surname, his nationality, his occupation, his residential, business and postal addresses, the date of appointment, and in the case of any local manager or secretary being a corporate body, its registered office;
 - (iii) the name and address of the auditor of the company in the Republic;
- (f) a notice of the name and address of the person authorized by the company to accept service on behalf of the company.

Upon the registration of the memorandum of an external company the external company shall be a body corporate in the Republic subject to the applicable provisions of the Companies Act.

Further administrative duties

- (1) Every external company shall—
 - (a) conspicuously exhibit outside all its places of business in the Republic the name of the company and the foreign country in which the company is incorporated; and
 - (b) have the name of the company and of the foreign country in which the company is incorporated, as well as the registration number mentioned in legible characters in all bill-heads and letterheads and in all notices, advertisements and other official publications of the company,

3 Can an off shore company (or representative office) open a bank account in South Africa and what type of bank account that can be?

The External Company (registered in South Africa) as well as the off shore company is entitled to open a banking account. Opening an account requires the usual “know your client” requirements of the Financial Intelligence Centre Act and more or less conforms to international standards and requirements to combat money laundering.

The bank accounts can be both savings and current (cheque) accounts.

(b) Are there are any restrictions on the transfer of funds or of revenues earned in South Africa?

Capital invested in South Africa may be freely returned, as can capital and revenue, for example dividends and branch profits.

Restrictions do exist with regard to local borrowings by foreign held companies but these are not onerous.

An "external company" is subject to a tax of 35% on taxable income derived from a source within South Africa. External companies are exempt from Secondary Tax on Companies

Withholding Tax

Royalties

A withholding tax of 12% on gross royalties is levied and is payable by the South African entity which is liable for the royalty, on behalf of the non-resident. Relief may however be provided in terms of double tax treaties.

Dividends, Interest and Branch Profits

Dividends payable to non-residents are not taxable, either by a withholding tax on the company or in the hands of the recipient.

Local Dividends payable to residents are not taxable.

Remittances of branch profits are not subject to withholding tax.

Capital Gains Tax (CGT)

Capital gains tax was introduced with effect from 1 October 2001 on the disposal of assets on or after 1 October 2001. Those liable for the tax are -

- South African residents on worldwide assets;
- Non South African residents in respect of immovable property in South Africa (including immovable property held through a company) or assets of a branch or agency in South Africa.

The tax is triggered by the disposal or deemed disposal of a capital asset on or after 1 October 2001. A capital gain or loss is the difference between the "base cost" (as defined) of an affected capital asset and the consideration realised or deemed to be realised on the disposal or deemed disposal of such asset. A portion of the "net capital gain" will be included in the taxpayer's gross income for income tax purposes. Capital losses may be deducted against capital gains or carried forward to future years of assessment, but are not available for set-off against revenue income.

The portion of the gain (or inclusion rate) that will be taxable will be 25% for a natural person, special trusts and an insurer's individual policyholder fund and 50% for all other taxpayers like a company, close corporation or business or family trust. For example if a company makes a gain of R100, 50% thereof (i.e. R50) must be included in its gross income for income tax purposes and taxed at the corporate rate of 30%. The effective rate of CGT is accordingly –

$$\text{Inclusion rate (50\%)} \times \text{statutory rate (30\%)} = \text{effective rate (15\%)}$$

Certain assets are however exempt. These include a primary owner occupied residence (up to R1 million of the capital gain), assets owned by institutions exempt from normal taxation (like Government departments), lump sum benefits of most superannuation and life assurance

policies (excluding "second-hand policies), private motor vehicles, gambling proceeds, small business assets and personal belongings and effects.

CGT liability will not arise with regard to -

- transactions eligible for rollover relief (e.g. company formations, share for share transactions, intra-group transactions, amalgamations, unbundling of companies, etc.);
 - transfers of property from a deceased estate;
 - transfers between spouses;
 - transactions subject to income tax
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