

DEDUCT 3% TAX FROM MOBILISATION FEES: By Jonathan Hore

Should the payer of a construction contract mobilisation fee deduct the 3% withholding tax? If so, would that still apply if the contractor would only render the construction services in a subsequent year? And does a mobilisation fee fit within the definition of an amount paid in respect of construction contracts? Oooh, yes; these are the real questions that you face when you start talking to people in construction about mobilisation fees and the 3% tax.

There is no uniform practice in industry on this issue; some deduct the 3% whilst some don't. I will try to unravel the technical and practical aspects of this matter. Throughout this article, words importing the masculine shall be deemed to include the feminine.

WHAT IS THE 3% TAX?

By way of introduction, the Income Tax Act requires any person who makes payments in excess of P 5 000 in respect of construction contracts to deduct a 3% withholding tax from any such payments. The 3% should be paid to BURS not later than the 15th day of the month following that of payment of the amount due to the payee. This applies to both resident as well as non-resident contractors. The Income Tax Act does not define what is regarded as construction. However, it is commonly accepted that construction results in an immovable building such as a house, office block and warehouse. Construction also includes the construction of dams, roads, bridges and sewerage works.

But one should not deduct the 3% tax if they are making payments in respect of contracts exclusively for architectural design, engineering and related professional services. This means that if a contractor is granted a job to do architectural designs only, the 3% does not apply to them. This also applies to those who just do quality control, i.e. they will not construct but ensure that the construction works are up to required standards. Further, no 3% tax is deductible if one is making payments not exceeding P2m in respect of a construction contract being executed by someone who is registered with the PPADB under classes A, B and OC.

WHAT IS A MOBILISATION FEE?

Persons involved in construction usually request what is called a mobilisation fee, i.e. they would need to do preparatory works such as setting-up housing for staff, buying material and related works. The mobilisation fee is usually requested before the actual construction works begin.

So, you could have a contractor requesting for a mobilisation fee in 2018 when they will only commence actual construction in 2019. But some request for a mobilisation in the same year when the actual construction works commence. The big question would then be whether the payer of the mobilisation fee should deduct the 3% tax in such cases. But maybe in order for us to determine whether the 3% is deductible, let's get a little bit technical regarding the basis of deducting withholding taxes such as the 3% tax.

BASIS OF WITHHOLDING TAX

The 3% is one of a number of taxes that are deducted at source by a payer before payments are made to a payee and are commonly referred to as withholding taxes (WHTs). In terms of the Income Tax Act, withholding taxes are triggered by payment and not accrual. In other words, a payer of an amount subject to a WHT does not have any liability to deduct a WHT until they pay the moneys due to the payee (contractor). Therefore, once

payment is done, the WHT kicks in. This principle is consistent in both sections 56 and 57 which levy WHTs. Of course, I am aware that PAYE is another WHT but I chose to leave it so as to focus on the other smaller ones.

IS THERE 3%WHT ON MOBILISATION FEE?

Before we answer that question, our first port of call should be the establishment of whether the contract involved is a construction contract. As soon as we establish that it truly is, then the next task would be to establish why the payer will be paying the mobilisation fee. The payment of mobilisation fees is usually a condition of construction contracts, which clearly points to the fact that the mobilisation fee payment is made in respect of a construction contract. Now, that then makes the matter at hand easy.

Every payer of a mobilisation fee should deduct the 3% WHT as the WHT is triggered by payment. But what if the services will be provided 2 years from the date of payment of the mobilisation fee? That aspect is immaterial in the case of deducting the tax. The 3% WHT kicks in on payment; period.

Well folks, I hope that was insightful. As Yours Truly says goodbye, remember to pay to Caesar what belongs to him.