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September 2019

#### Be Ready For SARS Employee Audits

*“Forewarned is forearmed”  
(Wise old saying)*

SARS is having trouble meeting its revenue targets and this is clearly putting enormous pressure on the South African



economy. Further economic deterioration in the economy will probably result in a downgrade to junk status by Moodys. This will mean that all three of the major ratings agencies will have consigned our economy to junk status which means further currency weakness and probably a recession.



Most of the tax paid in South Africa is paid by individuals and it is logical that SARS will focus on maximizing its revenue with this segment of taxpayers. Thus, one can expect more auditing by SARS of employees' tax returns.

### ***Implications for employees***

Any SARS queries will be initially directed at employees who will have to justify what they have claimed. Most employees will go back to their employer and say, for example, 'there is this query on my car allowance and how should I respond?'

It would make sense for employers to ask all employees to run SARS' questions through the employer so that SARS receive a consistent answer (employees may have their own tax adviser to help the employee respond to the query, but the adviser may not understand how the employer's tax administration works).

### ***Implications for employers***

If SARS are not satisfied with the responses to their queries, they may start to look at how the employer administers its employee tax obligations.

SARS places a substantial onus on employers to collect tax and to pay it over to the Revenue authorities. This involves a knowledge of taxes like:

- Remuneration and benefits paid to:
  - expatriate employees
  - local employees
  - executives and directors
- Retirement benefits for employees, executives and directors
- Payments to labour brokers and independent contractors
- Share incentive schemes
- Cash book payments
- Gifts, prizes, awards and gift vouchers
- Loans to employees
- Company cars
- Travel allowances and reimbursements
- The Employment Tax Incentive (ETI).

These taxes are all different and require an understanding of tax legislation and the administrative systems required to process and collect the taxes.

In making their enquiries of the employer, SARS will most likely look to get an understanding of the employer's systems and if dissatisfied with the response may audit the employer.

An audit can take up to one year to complete and apart from the stress of the audit there will be penalties, interest plus tax due where SARS finds the tax has been incorrectly calculated. SARS can also go back several years when they find errors, and this can become a costly exercise. **At the moment, SARS appears to be homing in for the most part on the ETI, labour brokers, company cars and travel allowances – perhaps therefore pay particular attention to these taxes.**

So, it is a prudent idea to frequently test how robust your systems are and how well you understand the tax laws. SARS often tweaks the law and issues interpretation notes on how businesses should levy and pay over tax.

**Having an independent viewpoint can be invaluable when testing your systems – make use of your accountant to help you as apart from being at arm's length he or she has the skill and experience to assist in this important exercise.**

## Communicate with Candour – the “Oracle of Omaha” Speaks

*“The CEO who misleads others in public may eventually mislead himself in private”  
(Warren Buffett)*

Companies that are sustainable in the long term are honest with themselves and with all the businesses’ stakeholders.



### ***The starting point is candour***

If you are open and honest in your dealings with people you will gain their trust and once you have this people will follow you. The word “candid” comes from the Latin candeo which means to illuminate – the candid person is not afraid to shine a light on and confront the problems facing the business.

### ***Make this a key aspect of your leadership***

Train yourself to show candour in all your dealings. Doing this will mean you will deliver a consistent and increasingly trustworthy message to the company’s stakeholders. You will also find that your staff will follow this example which in turn will result in a tightly focused business. In the long term this will make the company more sustainable and profitable.

### ***It works! The Candour Analytics Survey***

In the United States one consultancy has attracted a lot of attention by drawing up and publishing such a survey. It has developed a model that measures the various communications issued by the company along with financial numbers and looks at a company from several angles:

- Capital Stewardship;
- Strategy;
- Accountability;
- Vision;
- Leadership;
- Stakeholder Relationships; and
- Candour.

This model looks at the clarity of the communication and gives negative marks to what it considers “FOG” (Fact deficient, obfuscating, generalities). What is interesting about the Candour Analytics Survey is that **the higher corporations score in this survey, the more they outperform the market** – the top 25% Candour-ranked companies outperformed the S&P Index nearly threefold in 2017-2018 (29.7% versus the 11% return of the S&P Index).

As the consultancy says, candour is a proxy for trustworthiness.

### ***Does it have credibility?***

One of the biggest fans of this survey is Warren Buffett who has now made candour one of his key principles and as he stated in a communication to his shareholders: “... We will be candid in our reporting to you, emphasizing the pluses and minuses important in appraising business value. Our guideline is to tell you the business facts that we would want to know if our positions were reversed. We owe you no less.”

There is strong empirical evidence that the survey is meaningful and the endorsements

it has obtained show it is well worth making Candour one of your key principles.

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## Your Shareholder Agreement versus Your Memorandum of Incorporation – There Is Only One Winner

Shareholder agreements usually form the backbone of shareholder relationships as they govern, for example, how shareholders sell their shares, how shareholder disputes are settled and the type of authority required for certain transactions.



The Companies Act makes it clear that:

- If there is any conflict between the MOI (Memorandum of Incorporation) and the shareholders' agreement, the MOI will prevail.
- Similarly, if there are any differences between the Companies Act and the shareholders' agreement, then the Companies Act will take precedence.

### *The case that tested a shareholder agreement v the MOI*

A company issued a new MOI in 2012. This MOI conflicted with the shareholders' agreement and some shareholders approached the Court to have an order granted that the shareholders' agreement governs the relationship amongst shareholders and thus supersedes the MOI. The shareholders' agreement contained a non-variation clause which stated that no changes to the agreement could be made unless all shareholders agreed in writing.

The Court refused to grant the order and said that the issuing of the new MOI was done lawfully and in line with the requirements of the Companies Act. **The shareholders' agreement so materially conflicted with the MOI that it was now effectively null and void.**

As a shareholders' agreement is fundamental to the workings of shareholders, it is important to carefully consider how the MOI will relate to the shareholders' agreement. Thus, any potential conflicts should be ironed out when drafting either a new MOI and/or a shareholders' agreement.

Take your accountant's advice when doing this to avoid extra cost, aggravation and time taken to resolve any differences which may surface when you need to enforce your shareholders' agreement.

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## Spying On Employees Is Becoming A Big Industry

***Note: As always, our employment laws being complex and the penalties for getting them wrong severe, take specific professional advice in any doubt!***



In a recent UK survey 72% of employees felt that their employers were eavesdropping on them.



Gathering information on employees is now a multibillion dollar industry and is continuing to grow as more sophisticated technology is launched.

### ***Why are employers doing this?***

A good example of how keeping tabs on employees can be beneficial is the destruction of the World Trade Centre on 11 September 2001, where many firemen died needlessly searching for people who were not in the buildings. Technology is available that pinpoints who is in an area and how long it will take to get everyone to safety.

It is also possible to determine when people enter sensitive areas or try to access confidential information.

An employer also needs to know if its staff are passing on business secrets or running down the company to friends, fellow employees and the public – damage to a firm's business reputation is one of the biggest existential risks faced by a company.

### ***Employer versus employee***

It is a balancing act as employees have a right to privacy and a right to their personal information being protected whilst as noted above the employer, in order to trade successfully, needs to be aware of potential harmful employee actions.

### ***Maintaining trust***

The most important issue is to maintain trust between employer and employee. Once this is undermined the harm to both parties can be lasting and severe.

Management need to be open with their staff if they intend to monitor them. Tell the staff what you plan to track (emails, social media, telephone conversations etc) and that any employee can request the information you have gathered and how you will use it, and destroy it once it is no longer needed. Update staff contracts and conditions of employment with these measures.

An open process with staff will help to clear up uncertainties they have and will keep the trust between you and your employees. It will also enable your business to protect itself against reputational damage from employees leaking negative information about your business.

### ***Protection of Personal Information Act (POPIA)***

POPIA awaits the announcement of a commencement date before the one year grace period starts running and among other things will allow staff to compel employers to give their staff access to all the information that the business holds on them.

Technological advances have made it feasible to intercept and analyse your employees' communications. In view of the arrival of POPIA and more importantly the relationships you have with your staff, think about this carefully, particularly as there will be harsh penalties for any material POPIA lapses.



Your third provisional payment for the 2018/2019 tax year is due on or by 30 September 2019. This payment is voluntary, and you only need to make it if you have underestimated your tax liability for the 2018/2019 year. Don't forget that making this third payment will save you penalties and interest.



Other deadlines this month are –

- 6 September – Monthly PAYE submissions and payments
- 25 September - VAT manual submissions and payments
- 27 September - Excise Duty payments
- 30 September - VAT electronic submissions and payments
- 30 September - CIT Provisional Tax Payments where applicable
- 30 September – End of second fiscal quarter.

By way of a 2018/19 Tax Season Update: By 29 July one million tax returns had been submitted and refunds of R5.5 billion had been processed. The average turnaround time for taxpayers not identified for audit was 7 days. Despite some early glitches, SARS are pleased with the responses received from taxpayers.

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