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TAX SPECIAL



COMING TAX LIABILITY LAWS

At this moment, the Parliament of Aruba is discussing the new State Ordinances on tax and social security premium liabilities, as well as on the collection methods. Although the laws have not yet been passed by the Parliament, WTS feels that it is important that you are informed on the highlights of these new State Ordinances, since these may have considerable implications for your business operations. In this “What’s up – tax special”, we will elaborate on the following items:

1	<i>Extension taxes for which liability exists</i>
2	<i>Different forms of liability</i>
2.1	<i>For management</i>
2.2	<i>For contractors</i>
2.3	<i>For hired employees</i>
2.4	<i>For non-legal entities, permanent establishments and dissolved entities</i>
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3	<i>Transitional regulation for tax liabilities</i>
4	<i>Procedure for being held liable</i>
5	<i>Recovery of the amounts for which one has been held liable</i>
6	<i>Collection of taxes</i>

1 Extension of taxes for which liability exists

On introduction of the new State Ordinances, individuals can be held liable for wage tax, corporate income tax, room tax, property transfer tax, gift and inheritance tax, land tax, dividend withholding tax, turnover tax (BBO) and social security premiums (AOV, AWW and AZV) of third parties. Furthermore, an individual may also be held liable for interest and penalties related to the above mentioned taxes and premiums, provided that the individual can be held liable for the payment of these taxes and premiums (see 2.1 hereafter).

2 Different forms of tax liability

Under the current tax laws, a director of a company can only be held liable for wage tax and corporate income tax owed by the company he is the director of. Liability for other taxes and social security premiums is not regulated in the tax laws which are applicable at this moment. With the introduction of the new State Ordinances, directors’ liability will be extended and new liabilities will be introduced for certain situations.

2.1 Liability of (the) Director(s)

All directors on a Board of Directors can be held liable for all above-mentioned taxes, premiums, interest and penalties. The term “director”, in addition to denoting a current director of a company also includes:

- a) Former members of boards of directors, insofar as the tax or premium liability originated during their tenure.
- b) Any individual who is or was in a position to direct the business of the company and can be believed to have done so, with the exception of a court appointed receiver or administrator.

Should the board of directors be composed of one or more legal entities, the individual(s) ultimately taking part therein (all the way up the chain) will be held responsible.

In the event that the entity is not able to meet its tax and premium payment obligations, the company should notify the tax collector thereof in writing within 15 days from the due date of the payment of those taxes. This notification should include an explanation of the reasons for non-compliance, while the tax collector may request additional information and documentation (if required).

The Minister may impose additional conditions regarding the contents of the notification, the documents to be submitted as well as the period in which this needs to be done. If the company notified the tax collector within the stipulated period and in the prescribed manner, the director(s) can only be held liable for the taxes and premiums in the event that, during the five years prior to the notification, he was (they were) guilty of mismanagement.

If the company fails to timely notify the tax collector, as meant before, mismanagement (“*onbehoorlijk bestuur*”) is presumed. The tax collector then has the authority to collect the outstanding taxes and premiums using the collection methods of the Code of civil procedure and the special collection methods open to him. The possibility to make use of the methods of the code of civil procedure will be introduced with the new ordinances.

Please take into account that should a director be held liable for the taxes and/or premiums owed by a company he is or was the director of and he cannot pay same, any voluntary transaction by him aiming to decrease his wealth in order to avoid paying the sum owed as per the third party liability law, can be nullified by the tax collector. Also note that a director’s liability only extends to the taxes and premiums owed by the entity he is the director of itself, not to the taxes and premiums the entity has been held liable for as director of another company, based on the following paragraphs.

2.2 Liability for contractors

The Aruba tax authorities are of the opinion that a considerable amount in taxes cannot be collected under the current tax laws, especially in the event of subcontracting of work. For this reason a liability for the wage tax and social security premium debt of a contractor’s subcontractors (“contractors’ liability”) will be introduced. A contractor is defined as:

- a) Any person or entity who/ which agrees to execute a specific tangible work for payment of an agreed price by the person commissioning the work, but not via an employment agreement.
- b) The subcontractor if he subcontracts part(s) of the tangible work subcontracted to him;
- c) Every subcontractor who subcontracts part of the work subcontracted to him to another person.
- d) An independent builder. The independent builder is defined as an individual or entity who/ which, outside of an employment relationship, executes a specific tangible work without an order for same, in the ordinary course of his/her business. If the independent builder has the work done for him by another person, this person, according to the explanatory notes to the ordinance, is a subcontractor. The example the explanatory notes to the ordinance provides is that of a utility company that regularly builds parts of its own distribution network. If this utility company were to hire a person to execute the work, this person would be a subcontractor to the utility company, which will be regarded as an independent builder. However, if the utility company never built a distribution network itself, hiring a person to do so implies that it is not an independent builder but commissions the specific work (and thus cannot be held liable).

A contractor can be held liable for all wage tax and social security premiums of the persons the subcontractor (and subsequent subcontractors) employed to execute the specific tangible work. Penalties, however, are excluded from this liability. No contractors’ liability exists in case:

- i) The specific tangible work is executed at the place where the business of the subcontractor is established;
- ii) The execution of a specific job to be carried out by the subcontractor is part of a purchase and sale agreement between the contractor and subcontractor regarding an existing object.

A contractor's liability will not be applicable in the event that not paying the wage tax and social security premiums owed, cannot be attributed to any fault of the subcontractor and/or the contractor. This will be the case when e.g. a natural disaster were to occur on Aruba or the economic circumstances unexpectedly worsen significantly. In all other events, the contractor can be held liable!

A contractor will therefore have to take measures to mitigate this liability. A possibility may be to incorporate special clauses in the contract. Another may be created by the tax authorities themselves. The tax authorities intend to offer an "escrow" account where the contractor can deposit funds from which the wage tax and social security premiums due by the subcontractor can be paid. Unfortunately, no additional information regarding this possibility has been released as yet.

2.3 Liability for employees hired from third party employers

A new tax liability ("employee liability") is introduced for the individual or entity who/ which temporarily hires employees ("borrower") from a person having a formal employment agreement with these employees ("lender"), e.g. an employment agency, cleaning agency or security services agency. The borrower will be held jointly and severally liable for all wage tax and social security premiums owed by the lender for the employees hired by the borrower and who are under his/her supervision or management. If the borrower in turn lends out the employees hired from the lender, the new borrower will also be jointly and severally liable. Penalties assessed from the lender are excluded from this employee liability.

No employee liability exists in case the work performed by the hired employee is part of a purchase and sale agreement between the lender and borrower regarding an existing object.

Employee liability will not be applicable in the event that not paying the wage tax and social security premiums owed, cannot be attributed to any fault of the borrower and/or the lender.

The borrower will therefore have to take measures to mitigate this liability. A possibility may be to incorporate special clauses in the contract, but perhaps even the above-mentioned "escrow" account may be used.

2.4 Liability for non-legal entities, permanent establishments and dissolved entities

The following persons can be held jointly and severally liable for all taxes and premiums owed by (legal) entities:

- a) Every director of an entity, which is not a legal entity. This includes, for example, the fully liable partners of a partnership.
- b) The person in charge of a permanent establishment in Aruba of a foreign company;
- c) The permanent representative in Aruba of a foreign enterprise;
- d) The person in charge of liquidating a dissolved entity, insofar as this person is guilty of mismanagement and no more than 5 years have passed since the dissolution. An exception is the court appointed administrator.

The individuals mentioned under (a) through (c) are not liable in the event that it can be proven that not paying the wage tax and social security premiums due cannot be attributed to any fault of theirs.

2.5 Liability for foreign withholding agents and foreign contractors

The following individuals can be held jointly and severally liable for all wage tax and premiums due by foreign withholding agents and foreign contractors (whether or not these are entities or individuals):

- a) The person(s) in charge of a permanent establishment;
- b) Permanent representative on Aruba of a foreign enterprise;
- c) Person in charge of the activities performed in Aruba.

No liability exists in the event that it can be proven that not paying the wage tax and social security premiums due by the foreign withholding agent or foreign contractor cannot be attributed to any fault of theirs.

2.6 Tax liability for employees

An employee can be held liable for the wage tax and premiums not withheld from him, unless the employee notifies the tax authorities that the withholding agent has wrongfully not withheld the wage tax and/or premiums. This exception, however, only applies in case the employee notifies the tax authorities before the employee knows or could have known that the tax inspector found out or would soon find out this omission.

3 Transitional regulation for liability

The following transitional regulation will be introduced:

- If the new State Ordinances take effect and the company has not notified the tax collector in time of not being able to pay the taxes and/or premiums due, the omission is deemed to be the fault of the director(s) for not notifying the tax collector in time.
- If the new regulations take effect, contractors cannot be held liable for debts of the subcontractors of the period prior to the introduction of the new State Ordinances, if it is shown that the subcontractor's not paying the amounts owed by him cannot be attributed to the contractor (for example if the contractor paid the subcontractor the amounts due).
- If the new State Ordinances take effect, the borrower hiring the employees cannot be held liable for debts of the lender of the employees for the period prior to the introduction of the new State Ordinances, if it is shown that not paying the amounts due by the lender cannot be attributed to the borrower (for example if the one hiring the employees paid the one lending out the employees the amounts due).
- If the new State Ordinances take effect, the person in charge of a permanent establishment; the permanent representative on Aruba of a foreign enterprise, or the person in charge of the activities performed in Aruba cannot be held liable for debts of the period prior to the introduction of the new State Ordinances, if they were not to blame for not paying the wage tax and premiums.
- If one has been held liable based on the old State Ordinances, the new State Ordinances cannot be applied.
- The collection interest to be applied on late payments will take effect on the day of publication of the Ordinance in the Official Gazette.

4 Procedure for being held liable

Before an individual or entity can be held liable, the tax collector will have to issue a decision ("*beschikking*"). The decision must include (i) the amount for which one is held liable, (ii) the grounds for the liability, and (iii) the period within which the amount one is held liable for must be paid. The period is, in principle, two months.

Against the decision an objection can be filed based on the General State Ordinance on Taxes, if not filing the return or not meeting the administrative obligation cannot be attributed to the one being held liable. This objection can also include the amount of the assessment for which one is held liable, even if the objection period against this assessment has already lapsed, unless any court has irrevocably decided on the facts that formed the basis for the assessment.

In the event the one held liable (a) does not (or not in time) file an objection against being held liable, or (b) does not pay the amount due within the stipulated period, or (c) the amount listed in the decision is collectable immediately, the tax collector will serve a writ.

The one held liable can file a protest (“*verzet*”) against the writ. This protest may, however, not include either the fact that the decision was not received nor the grounds that could have been used when filing an objection against the decision.

Should one have been held liable, and have paid the tax, and the assessment is reduced, the refund will be paid out to the individual or entity to whom the assessment was issued. The tax collector may, after approval by the individual or entity to whom the assessment was issued, also pay out the refund to the one held liable.

5 Recovery of the amounts for which one has been held liable

It is possible to (try to) recover the taxes for which one has been held liable. The liability recovery is very complicated and depends on the circumstances of the case. We will therefore not elaborate further. The general rule is, however, that in the event more than one individual or entity can be held jointly and severally liable, but only one has actually been held liable and this individual or entity paid the amount due, this individual or entity is entitled to recover (part of) the amount paid as per the liability from the other persons who were also jointly and severally liable, but only insofar as the individual or entity that owed the tax or premiums, does not have (sufficient) funds to recover the amount paid as per the liability from. The one held liable will therefore first have to try to recover the amounts paid from the individual or entity that owed the taxes or premiums.

6 Collection of taxes

Together with the introduction of the extended tax liability, the tax collector will also be granted more possibilities to collect the taxes by the new ordinances. Without elaborating in detail, the following items in the new State Ordinance are of interest:

- The tax collector can choose between the collection of taxes based on the tax law or civil procedure.
- The so-called “*conservatoir beslag*”, interlocutory attachment, is therefore a new possibility for the tax collector.
- If an amount of taxes or premiums due is not paid in time, the tax collector will send a reminder. The reminding costs amount to AWG 10 (before: AWG 1).
- Not paying the amount of taxes or premiums due in time, implies that collection interest will be owed from the due date until the amount is actually paid. The rate of this interest is set as the legal interest as of January 1, 2009 and will remain 6% single interest per year during 2008.
- The tax collector may grant an extension of the term to pay the tax owed. The tax collector does not have an obligation to provide an extension of the period for the payment.
- An assessment is immediately collectable – e.g. via a writ – in the event that:
 - The taxpayer has filed for or is declared bankrupt(cy).
 - The tax collector shows reasonable cause that the taxpayer might get rid of the goods in his/her possession so that the tax may not be collected.
 - The taxpayer intends to leave Aruba, unless the taxpayer provides security on behalf of the tax collector.
 - The taxpayer is not a resident of Aruba and a reasonable doubt regarding the collectability exists.
 - Aruba has garnished the assets of the taxpayer and these assets would have served as security for payment.
 - The assets of the taxpayer are sold because of a garnishment executed by a third party.
 - The taxpayer is held liable for another individual’s or entity’s taxes or premiums.

- The tax collector may offset tax or premium refunds with tax and premium debts of a taxpayer, even if the payment of the debt is not yet due. A preliminary assessment raised during the year regarding the same year may, however, only be collected in monthly installments.
- The tax collector has five years from the due date to collect the taxes (and use his rights to offset them against a taxpayer's credits). This period is extended by the period for which the taxpayer was granted an extension of the payment term, the tax payer is involved in a legal procedure against the collection, the tax payer has been granted a moratorium of payments ("*surseance van betaling*"), the taxpayer is bankrupt or is not a resident of Aruba.

7 Finally

In the above we have highlighted the new State Ordinances regarding the liability for taxes and premiums, as well as the collection of taxes. The laws are very complex and the outcome of being held liable will have to be determined on a per case basis. It is certain, however, that every entrepreneur on Aruba will – in one form or another – be affected by these new State Ordinances. Please note that no action should be taken on the basis of information contained in this memorandum prior to consulting your tax advisor.

The team of **WTS** can assist you with any questions you may have with respect to these new laws. You may reach us by e-mail at the following addresses:



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