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Ms N. Mpotulo
The National Treasury
240 Vermuelen Street
PRETORIA
0001

Ms A. Collins
Legal & Policy
The South African Revenue Service
Lehae La SARS
PRETORIA
8000

BY E-MAIL: nomfanelo.mpotulo@treasury.gov.za / acollins@sars.gov.za

Dear Ms. Nomfanelo and Ms. Collins

RE: CALL FOR COMMENT: DRAFT TAXATION LAWS AMENDMENT BILL ('TLAB')

Thank you for the opportunity to contribute commentary and assist in developing the Taxation Laws Amendment Bill, 2013.

Set out below, is the consolidated commentary on the TLAB that **affects individuals only** developed from both an internal review of the provisions as well as from consultations with members, stakeholders and industry. The commentary reflects the collective view of members, stakeholders and industry role players consulted with.

1 BURSARIES OR SCHOLARSHIPS TO EMPLOYEE RELATIVES (Clause 28(1)(u))

Problem statement:
In terms of the 2013 Global IT Report by the World Economic Forum report the quality of SA's educational system is ranked 140th out of 144 countries. Even Lesotho and Swaziland have a higher quality of education. Thus any measure to assist individuals to become educated should be embraced. However, it appears from the changes to the taxation of bursaries and scholars that not enough is being done by our Government. The limit of R200 000 for qualifying employees is welcomed, but it is our opinion that this is not high enough.

The R30 000 introduced in respect of further education (greater than NQF level 4) is also welcomed. However, this limit is considered inadequate taking into account the costs of further education, especially since books, accommodation and transport in order to attend classes are generally also needed by students.

An employer reimbursing an employee on completion of his/her studies does not constitute a scholarship or bursary and does not qualify for the s10(1)(q) exemption. The reason for this treatment is not clear as there is no financial/economic difference between paying an amount upfront and reimbursing an employee on completion of his/her studies.

Furthermore, agreeing to pay for the study expenses once completed can be seen as an incentive to pass and is no different to a bursary that is provided before the employee commences his/her studies or that might be needed should the employee fail and be required to repay the employer.

Proposed solution / recommendation:

Studies have established that spending on education is an investment with a return and thus we propose the following:

1. Increase R200 000 limit for qualifying employees' remuneration to R500 000.
2. Increase R30 000 limit for the exemption of further education to R45 000.
3. Reimbursement by an employer of a qualifying employees studies only after he/she has completed his studies should also qualify as a bona fide bursary. A proviso could be included requiring that the employee must have entered into the agreement before the commencement of the studies and that he/she must have also been in the employment of the employer at that stage.
4. Although not specifically related to a bursary or scholarship, the provision of education linked with the creation of jobs should be sufficient to consider providing an employer with a deduction for an internship as for a learnership as set out in section 12H.

2 INSURANCE POLICY ALIGNMENT (Clause 28(1)(h), 62(1)(e), 135)

Problem statement:
The payment of a disability insurance policy (income protection) by an employer on behalf of an employee is currently deductible although the employee is taxed on the fringe benefit, which leaves the employee in a tax neutral position.

Changing the tax position, will have a negative cash-flow implication to employees. This may result in employees placing remuneration pressure on employers, especially at the lower end of the remuneration spectrum or by younger employees, who seem to value cash remuneration higher than retirement or risk benefits. Accordingly, employers might elect to make membership of such policies voluntary, which could leave the employees, who need such insurance most, uncovered.

Proposed solution / recommendation:
The status quo should be retained.

3 ROLLOVER OF EXCESS DEDUCTIBLE DONATIONS

Problem statement:
This change is most welcome. The only concern raised is that it appears, based on the proviso to section 18A(1)(c)(B), that a taxpayer making more than one donation during a year of assessment might not be able to roll over a donation that that was not subject to the 10% deduction limit in full as the proviso refers to "a portion of a donation".

Proposed solution / recommendation:
To ensure that all excess donations, regardless of whether they constitute a portion of a donation or a full donation qualify for the roll over treatment we suggested that the proviso be reworded as follows:

"Provided that any amount being a donation or a portion thereof made as contemplated in subsection (1) and…"

4 RETIRMENT SAVINGS – CONTRIBUTIONS (Clause 32(1)(j), 32(1)(k), 32(1)(l), 129(1)(b))

4.1 Monetary limit on retirement fund deduction

Problem statement:
The R350 000 limit on the annual retirement fund deduction is considered to be fair, however, this amount was proposed some years back and no adjustment has been made for inflation in the intervening period.

Proposed solution / recommendation:
The R350 000 limit should be increased annually with inflation and should thus be set at a starting amount of R500 000 considering that it would only be effective from 1 March 2015.

4.2 Base used to calculate retirement fund deduction

Problem statement:
The use of the greater of "remuneration" or "taxable income" when calculating the percentage limit of retirement fund contributions (27,5%) could be discriminatory towards individuals with assessed losses, who do not earn remuneration, or to sole traders who have a low taxable income (for example an entrepreneur who contributes, say, R20 000 per month to a fund but in a particular year he has a large deduction due to a fire in his premises that destroys his trading stock, resulting in his taxable income being reduced to a very low amount). Furthermore, the taxable income of a sole proprietor may vary year on year (more than compared to an employee) and this could adversely influence the deductions that he/she would be entitled to claim for tax purposes.

The problem could be solved if the taxpayer was allowed to carry the disallowed portion forward to the following year of assessment but this is not permitted: instead the disallowed portion will be recognised only when the person withdraws from or retires from the fund (or dies) and the disallowed contributions will then be part of the tax-free portion of the lump sum.

Proposed solution / recommendation:
The percentage limit for employees can remain as is proposed. However, this limit should be calculated on the higher of "remuneration" or "income" as defined. This will thus be protective of sole proprietors and ensure that persons with assessed losses, but no remuneration, will also be able to quality for the deduction.

4.3 Employer deduction for fund contributions (Section 11(*l*)) (Clause 32)

Problem statement:
The proposed amendment to section 11(*l*) deletes the reference to "benefit fund" and proposes to allow an employer to deduct contributions to a pension, provident or retirement annuity fund only. Contributions to a medical aid fund would thus be excluded by the amendment.

A further concern is that companies with a year-end other than February would need to perform two different calculations in the same year of assessment in respect of these contributions as this section comes into operation on 1 March 2015 and applies in respect of amounts contributed on or after this date.

Proposed solution / recommendation:
Reference to "benefit fund" as defined should be retained and contributions by an employer in respect of retirement annuity funds for the benefit of its employees added to section 11(*l*).

To ease the administrative burden for employers, it is proposed that the amendment only becomes applicable from years of assessment commencing on or after 1 March 2015.

5 FRINGE BENEFIT VALUATION – DEFINED BENEFIT FUND (Clause 136)

Problem statement:
Various sets of information are needed from a valuator to determine the taxable value of the benefit of an employer contribution to a defined benefit retirement fund. It is unfortunate that the costs of obtaining this valuator will ultimately be borne by the members of the fund, reducing their potential savings.

Proposed solution / recommendation:
To avoid the undue complexity and administrative burden placed on the fund (and ultimately the members of the fund), it is suggested that an alternative to using the complex formula in determining the value of the fringe benefit would be to simply allow the value of the employer contribution to be equal to the amount to be included in the taxable income of the employee. Furthermore, consideration should be given to deferring these proposals until the true extent of the risk of the current tax treatment is established as it is our understanding that there are very limited number of these funds still around (outside of funds established by law, such as the Government Pension Fund).

Problem statement:
Employer contributions to defined benefit funds will be valued based on a formula. However, employee contributions to such funds will, for deduction purposes, be included as the actual amount contributed. This seems to be anomalous.

Proposed solution / recommendation:
Employee and employer contributions to defined benefit funds should be valued on the same basis.

6 PROVIDENT FUND POST-RETIREMENT ANNUITY ALIGNMENT (Clause 128, 118)

Problem statement:
No mention is made in the amendments of the treatment of persons resigning. This would seem to leave the current situation where there is a disincentive to withdrawing from a fund as the person would lose out on some/all of the R315000 tax-free portion on retirement. The new compulsory annuitisation rule now ensures that up to one third of a provident fund payout on retirement may be taken in the form of a lump sum. A person wanting to take all of the amount out as an annuity would lose out on the R315 000 "tax-free" lump sum benefit and the annuity would be fully taxable. This to a certain extent incentivizes individuals to take the one third lump sum instead of taking it all out as an annuity which is contrary to Government's push to have individuals save their retirement money.
A further concern is that if the amounts per the retirement table are not changed regularly to keep up with inflation, these provisions would have less effect each year.

Proposed solution / recommendation:
A person who chooses to take their full retirement benefit in the form of an annuity rather than taking portion as a lump-sum should not be prejudiced by losing out on the R315000 exemption. In this regard, consideration should be given to allowing the R315000 to be used against annuities from funds, similar to the way section 10C will allow non-deductible contributions to be taken as an exemption against a purchased annuity
The loss of the R315 000 tax-free element of the lump sum from retirement should be considered and in some manner catered for, especially for those not utilizing funds to provide for their retirement.
The amounts per the retirement table should be changed annually in line with inflation or alternatively these limits should be increased annually in the Rates and Monetary Amounts and Amendment of Revenue Laws Act.

7 EMPLOYER PROVIDED ACCOMMODATION – LOW-COST HOUSING

Problem statement:
The "remuneration factor" definition poses some problems in the calculation of the proposed R200 000 limit or the annualisation calculation where the employee was not in the employment of the employer for the entire preceding year of assessment. These problems arise when for instance an existing employee received a large single payment in a previous year (that will most likely not be received again in any following year – eg. a "golden hallo" payment) or when a new employee receives an upfront payment for certain expenses to be incurred during the year such as the payment of annual school fees or relocation costs that cannot be exempted from tax under section 10(1)(nB). These expenses should theoretically be spread throughout the year and should not result in an inflated annualized amount.

Proposed solution / recommendation:
The definition of "remuneration factor" should exclude these extra ordinary items in much the same manner as the "basic amount" for provisional tax purposes provides for the exclusion of lump sum payments and capital gains.

Problem statement:

The cost of the immovable property that is acquired by the employee may not exceed R350 000 for the employer. The amendment only refers to the "cost of the immovable property to the employer" and it does not provide clarity on how this cost should be calculated/valued.

It is mentioned in the explanatory memorandum that the R350 000 was based on information obtained from various industries, and this value applies whether the employer acquired or developed the property. In this regard, should mining accommodation be used as an example, the costs that would have been incurred by the employer in prior years, would be lower than the current value of the properties around the mining town. Thus, if for instance the employer had to purchase a property in the current year in order to transfer to an employee this value would be higher than the properties it developed (if such properties are also to be transferred to employees) although the economic value to the respective employees would be the same for properties equal in nature.

Where, for example, mines have come to the end of their productive life, the market value of could also be lower than the cost to the employer.

Thus uncertainty exists as to whether:
- the R350 000 is sufficient considering the cost of land and building costs today
- the cost referred to means original cost or current cost (market value)
- the R350 000 refers to the building only or to the land and buildings.

It is also uncertain as to why relief is not given should the employer decide to loan the employee money to buy/build their own house – assuming this is permissible in terms of the Financial Advisors Intermediary Act.

Proposed solution / recommendation:
Clarity should be provided on what value is ascribed to the term "cost to the employer" of the immovable property. In addition, it should be considered that a discretion to adjust the cost to a value that is fair and reasonable (taking into account, say, the true economic value of a property) be included in the legislation.

Also, an alternative means of assisting employees to purchase immovable property should be considered – such as a loan with an exemption of subsidized interest.

8 REMOVAL OF DIVIDENT CHARACTER OVERLAP (Clause 7(q))

8.1 Technical amendment

Problem statement:
The amendment to the gross income definition in clause 7(q) does not make it clear by when the determination of when an equity instrument has not vested is to be made.

Proposed solution / recommendation:
It is suggested that the words 'by the date of the receipt or accrual of that dividend' should be inserted immediately after the reference to '8C(3)'.

8.2 Owner managed businesses/partnerships

Problem statement:
The amendment has a very broad application and can thus be to the detriment of professional practices or owner managed businesses whose partners/directors regularly draw amounts from the business on loan account or via dividends which could be construed as a payment for services rendered.

Proposed solution / recommendation:
The section should be amended so as to ensure that these scenarios do not fall within the anti-avoidance provisions.

8.3 Share incentive scheme dividends received (Clauses 7(1)(q), 28(1)(o))

Problem statement:
Employees of a listed company will be taxed on the dividends that they receive from a share incentive scheme that was established for economic reasons (to align the objectives of the employees with those of the company and other shareholders). They will be taxed despite the fact that they bear a similar risk with regard to dividends as any other shareholder of that company.

Proposed solution / recommendation:
An exception to the proposed treatment should exist for bona fide pure equity share incentive schemes. It is recommended that based on the above discussion, manipulation of the dividend rights of unvested equity shares would be more difficult if the shares are widely held by persons other than the employees, than when a special class of shares have been created for the purposes of the incentive scheme. It is therefore proposed that a carve out is included from the proposed amendments for such a scheme which uses widely held shares to incentivise employees to ensure that the treatment of dividends received by these employees is similar to the treatment of those dividends in the hands of any other shareholder.

9 MINOR ERROR IN SECTION 10(1)(hB) (Clause 28(10(k))

Problem statement:
It appears an “or” has been omitted after subsection (i).

Proposed solution / recommendation:
Insert an “or” at the end of section 10(1)(hB)(i).

10 SECTION 8A REPEALED (Clause 13)

Problem statement:
Section 8A is being repealed from 1 January 2015 (years of assessment commencing on/after that date), however, there are still some options that are available under this section. This amendment will have the effect of retrospectively removing existing rights of taxpayers. The constitutionality thereof is questionable.

Proposed solution / recommendation:
The status quo should be retained.

11 SECTION 10(1)(o)(i) (Clause 28(1)(t))

Problem statement:
It appears that unless an officer or a crew member of a non-South African ship (as defined in section 12Q(1)) is covered by a DTA, this individual will only qualify for the exemption under section 10(1)(o)(ii) (183 and 60 day limits), unlike an officer or a crew member of a South African ship whose remuneration would be completely exempt irrespective of the number of days spent outside South Africa.

Proposed solution / recommendation:
The current exemption for an officer or a crew member of a non-South African ship should be retained in addition to having the new exemption for officers and crew of South African ships.

12 PARAGRAPH 11B – EMPLOYER VERIFICATION OF OVER 65 YEARS OF AGE (Clause 5)

Problem statement:
In terms of the amendment to section 11B of the Fourth Schedule in clause 5 of the Tax Administration Laws Amendment Bill, the employer must verify (previously obtain a written declaration) that the employee would be over the age of 65 on the last day of the year of assessment when determining the amount of SITE to be deducted from an employee's net remuneration. This provision appears to be applicable from 1 October 2012.

SITE is no longer in existence and thus reference to this in the section appears incorrect. Furthermore, it is uncertain with whom and to whom the employer must verify that the employee would be over the age of 65 on the last day of the year of assessment. Whether a copy of the employee's identity document would be sufficient proof of this verification also needs to be confirmed.

Proposed solution / recommendation:
This requirement seems void as the identification number of an employee should be sufficient proof of the employee's age. Should the government still insist on verification, verification in the form of a copy of the employee's identity document should be regarded as sufficient proof that the employee would be over the age of 65 on the last day of the year of assessment. This proof should be required to be kept by the employer for a period of five years.

Please do not hesitate to contact us if you have any queries in this regard.

Yours sincerely,

Prof Sharon Smulders
Head: Tax Technical Policy & Research

Cc: cecil.morden@treasury.gov.za

Cc: klouw@sars.gov.za
Cc: shenson@sars.gov.za
Cc: csmit@sars.gov.za

T: +27 86 177 7274
F: +27 86 626 0650
E: info@thesait.org.za
W: www.thesait.org.za

Riverwalk Office Park, Building A,
C/O Garsfontein & Matroosberg Roads,
Pretoria, South Africa,
0081

P.O.Box 73,
Featherbrooke,
South Africa
1746