PriceWaterhouseCoopers (PwC)

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National Treasury

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cc : *awicomb@parliament.gov.za*

Dear Adele

Representations on the (draft) Employment Tax Incentive Bill 2013

We present herewith PricewaterhouseCoopers' written submissions on the above-mentioned Bill.

Our submissions include a combination of representations, ranging from serious concerns about the impact or effect of certain provisions to simple clarification-suggestions for potentially ambiguous provisions. We have deliberately tried to keep the discussion of our submissions as concise as possible, which does mean that you might require further clarification. In this respect, you are more than welcome to contact us in this regard.

As always, PwC thanks National Treasury for the ongoing opportunity to participate in the development of the SA tax law.

Yours sincerely

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Attached:
- Detailed submissions (37 pages)

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DETAILED SUBMISSIONS

DRAFT EMPLOYMENT TAX INCENTIVE BILL

General Comments

Policy on target group

1. The simplicity of the incentive is commendable and welcomed, though it does raise the question whether the targeted group as stated in the policy document will benefit as intended, namely unemployed and unskilled workers, as there is no limitation to previously unemployed persons, no minimum employment period within which a skill can be transferred and no requirement to skill. However we do agree that complicating the requirements for the scheme would rather ensure exclusion of this target group rather than guarantying their exclusive inclusion and uptake into employment.

2. Submission: In our opinion the proposed simplistic requirements should be retained.

3. Going forward, the explanatory memorandum does note that when the reimbursement phase of the incentive is rolled out it will include the informal sector.

4. It is unclear how the informal sector can benefit from an incentive which requires some form of registration with SARS with such registration immediately making that business part of the formal sector.

5. Should it be envisaged that this will entice the informal sector to become part of the formal sector, then this would be welcomed, however such incorporation will in our opinion not be successful if tax amnesty is not provided in conjunction to make it viable for the informal sector to regularize its affairs.

6. Submission: The next reimbursement phase should consider including a tax amnesty where the informal sector is to be incorporated.

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Sliding scale of incentive

7. The use of a sliding scale for the incentive as a matter of policy, not only unnecessarily complicates the incentive but may also incentivize the wrong behavior in our opinion, namely paying lower wages for new young employees, notwithstanding that the whole targeted salary band is below the tax threshold. It seems unclear why in principle an employer paying someone R5,500 would receive an incentive of only R250 whereas someone paying between R2,000-R4,000 would receive a R1,000 incentive, notwithstanding the fact that these employees may potentially be doing the same work.

8. It also makes the incentive less attractive in respect of semi-skilled workers who cannot reasonably be acquired at minimum wage amounts.

9. Submission: The monthly incentive should be the same throughout the targeted salary band with apportionment only applying to periods less than a full month.

Specific Comments

Ministerial regulations too vague

10. Section 3(c)(iii) provides for the Minister to prescribe conditions by regulation that employers will have to meet in order to receive the allowance.

11. It however does not provide any timing as to notification and public consultation with affected employers where such regulations are issued or amended after the incentive has been implemented.

12. Submission: The section should provide for a notification period prior to any regulation prescribed becoming effective as well as a consultation period to allow affected employers to make representations on any regulations that affect their rights.

13. The section is also vague as to the specific matters that these regulations may prescribe which in effect leads to legislation by regulation and creating an uncertain environment for this incentive.

14. Currently it merely states that the Minister may state qualifying conditions for a specific trade without stating what those conditions involve or pertain to.

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15. Submission: The section should specify the types of conditions that the Minister may prescribe by regulations and the conditions that must be satisfied before a justifiable discriminatory condition is imposed on a specific trade.

"Monthly remuneration"

16. Paragraph (b) of the definition of "monthly remuneration" requires that the employer "gross up" the remuneration paid where an employee is not employed for an entire month.

17. However it does not deal with when the employer employs an employ for the entire month but on a 5/8ths day or for a 3-day week? In our opinion the remuneration in this case represents the capacity made available for the full month and should therefore not be subject to the gross-up.

18. Submission: It should be clarified whether employees who are not employed full time are also subject to the "gross-up" deeming provision in paragraph (b) of the definition of "monthly remuneration?

19. Furthermore, if the person is part-time employed by two different unconnected employers (i.e. he or she works half-day at two unconnected employers or full and half-day, for example a secretary who works full-time during the day and is a restaurant receptionist at night), can both employers claim the employment tax incentive for the same person, assuming that the remuneration (grossed-up or not) does not exceed the qualification limits?

20. Submission: Part-time employees and employees with multiple employment should also be considered and addressed.

"Remuneration"

21. "Remuneration" is defined in section 1(2) as the same as the definition in paragraph 1 of the Fourth Schedule to the Income Tax Act.

22. The explanatory memorandum confirms that this was used to make it an expansive definition to include benefits and ad hoc amounts such as bonuses etc.

23. However this expansive definition seems prohibitive as not only will it on the current sliding scale reduce the incentive for many employers, it will also prevent many employees from not being qualifying anymore.

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24. Especially with employer medical contributions currently and retirement fund contributions in future also constituting "remuneration", the R6,000 threshold can be easily breached for employees earning cash salary that are much less than the tax threshold, due to the high cost of these benefits in South Africa. Furthermore these employees seldom exceed the tax threshold as a medical tax credit applies and a deduction will apply against retirement contributions. The same principle will also currently still apply in relation to income protector policies.

25. It should also be considered that many of these benefits are not elective by the employer as they would be bound by collective labour agreements to provide these benefits to all employees.

26. Submission: It is our opinion that "remuneration" as defined in the Fourth Schedule artificially increases the "monthly remuneration" and will exclude many target employees. It is our opinion that cash remuneration or at least the balance of remuneration in paragraph 4 of the Fourth Schedule represents a better benchmark. Alternatively an additional qualifying criteria should be added, namely if the "monthly remuneration" exceeds R6,000 but no employees' tax is payable, then the employee should still qualify.

Definition of "employee"

27. The proposed definition includes both full-time and part-time employees, though it is unclear whether this was intended.

28. Submission: If it is intended that the definition of "employee" in section 1 will include part-time employees, this should be clarified in the explanatory memorandum clause and how this relates to the policy regarding sustainable employment?

Minimum wage

29. In section 4(1), reference is made to *"... in accordance with the minimum wage in terms of that determination or agreement"*. Presumably, this should read *"... in accordance with **at least** the minimum wage ..."* as is the case in section 4(2).

30. As it currently is drafted it would result in the absurdity that if an employer pays above the minimum wage, such employer would be precluded from claiming the incentive.

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Tax compliance requirement

31. Section 8(1) proposes to prevent the employer from claiming the credit if, on the last day of the month, the employer has a tax debt or has returns outstanding.

32. Though section 9(2) provides for a 6-month roll over and catch-up of the amount suspended, it does not deal with the practicalities regarding taxpayers being aware of a tax debt or return outstanding.

33. For example if SARS raises a tax debt for the month past or as a result of, for example, account maintenance issues where SARS has misallocated a payment or a notes a historical return outstanding as a result of, for example, SARS having failed to capture a return or reconciliation submission, how will the taxpayer be aware of this at month end? Thus non-compliance, and in effect understatement of the employees tax liability is retrospective.

34. Furthermore, this compliance applies across 21 Tax Acts administered by the Commissioner of SARS so it is unclear how employers will practically confirm compliance each month.

35. The proposal creates the same unacceptable risks as it currently applicable to the diesel rebate and VAT system, namely the rejection of the customs rebate leads to a multitude of penalty and tax charges in terms of VAT.

36. In the current instance this injurious action is compounded in that you may still ultimately qualify for the incentive in future periods once the debt or compliance is settled, but would have incurred substantial penalty and interest charges for the historical periods.

37. In this regard the legislation should either provide a reasonable measure of compliance verification or the whole incentive should be reimbursive based, otherwise it directly impacts on the employers employees' tax obligations where the non-compliance with section 8 is practically impossible and may actually be applied historically by SARS.

38. Submission: The compliance requirement should be limited to employees' tax with a SARS statement of account on month end being sufficient prima facie statement of compliance.

39. Alternatively, SARS should be compelled to take into consideration the roll forward excess once claimable for the determination of any penalty or interest in terms of a tax act. For example if the employer is prevented from having claiming the allowance for three months because of an amount of Securities Transfer Tax being payable in those periods, SARS should be prevented from levying any penalty or interest on the underpaid employees' tax for those

months without taking into consideration the roll forward excess allowance in month 4 in respect of those periods.

Calculation of incentive

40. Section 7(3) is potentially ambiguous by referring to "*During each of the 12 months immediately following the first period of 12 months*" as this can mean 12 months in full as the required period. Similar wording as is used in section 7(2) should be used.

41. Submission: To clarify this it should read, ""*During each month of the 12 months immediately following the first period of 12 months*".

Displacement

42. Section 5 disqualifies the employer from claiming the incentive and permits SARS to impose a penalty without the matter being final as the decisions of the forums that make the determination in terms of section 5(2)(a) & (b) can still be overturned by a court and in (c) a higher court can still overturn the decision of a lower court.

43. Furthermore, once the decision is overturned there seems to be no remedy to remit the 150% penalty levied by SARS or in fact any other penalty that would have applied due to the underpayment of employees' tax.

44. It is also unclear how the amount not claimed during the period of the dispute, which could be multiple years, can be recovered as section 9 only allows a 6-month roll forward of the excess during a period of non-compliance, and if this is not the remedy whether SARS would have to refund the taxpayer for those periods, with interest.

45. Submission: If the current bodies that can make a finding are retained, then such finding should only suspend the claiming of the allowance from the date of the finding until the matter is final (thus no further right of appeal or review exists) and allow it in full in the month that it is final and in favour of the employer, thus it is not subject to section 9 and should have a similar "refund" right as in section 10, though the latter will be inoperative at inception. Furthermore SARS should only be entitled to levy penalties applying to the matter, including in relation to employees' tax and the Tax Administration Act, once the matter has been finalized, but from the date that the finding was made.

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46. Submission: Section 5(3) should state that "*Where a finding is made as described in subsection 1 the employer from the date of such finding* –". This will prevent SARS from retrospectively applying the disallowance to periods before any finding was made. To compensate as additional disincentive to employers for this behavior, it is submitted that the penalty amount be increased to 200%.

Amount of the excess

47. Section 10 provides for the employer to claim any excess at the end of the period to render a return as per paragraph 14(3)(a) of the Fourth Schedule. This paragraph seemingly refers to the bi-annual EMP501 return and not to the monthly EMP 201 returns which both seemed to be covered by the description.

48. The EMP 501 is usually submitted 2 months after the end of the relevant period.

49. Section 10(3) states that where an excess was paid then the amount of any excess must be deemed to be Rnil from the month following the month during which the excess is paid without referring to the period to which the excess relates.

50. This wording is problematic. For example, if Employer A has an excess of R10,000 on the 28 Feb 2015 for the period 1 Aug 14 to 28 Feb 15, he would submit his EMP 501 by 30 April 15. If he has an excess of R2,000 from 1 Mar 15 – 30 May 15 and SARS refunds him on the 30 May 15, then the current wording suggests that the excess for 1 Mar 15 – 30 May 15 will be deemed to be nil at the end of Jun 15.

51. Submission: Section 10(3) should be amended to make the excess amount Rnil (i.e. opening balance) for the period to which the return relates in which the excess was claimed.

Explanatory Memorandum

52. In the commentary to clause 6, it is stated that the employee must be between 18 and 30 years old. This is clearly incorrect since that would imply that someone who is 18 years and one month old or 29 and 3 months old (for example) would qualify when in fact they would not. Per the legislation, the employee would need to be 19 or older and younger than 29. The reference to 18 and 30 is therefore misleading.

53. Submission: The explanatory memorandum should be corrected to align with the legislation.

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Frequently Asked Questions

54. Question 9 refers to a situation where an employee qualified for the employment tax incentive but then moved to another employer during the two-year period. In this regard, the answer to the question makes no reference to whether the two employers in the scenario are associated institutions or not and seems to suggest that it will be a requirement for the second employer to ascertain what the first employer claimed and for how long in order to know what the second employer can claim. This is not provided for in the legislation and is also impractical as it cannot be expected that unrelated employers be required to share this sort of information. Furthermore, how would the second employer be able to verify the information that they get from the first employer to know what they can claim, assuming that the first employer provided them with any information at all.

55. Submission: This example should be corrected to align with the law that no such requirement exists and if it is intended to apply then the legislation should be amended. However as stated the latter would lead to an impractical requirement being imposed on the transferee employer.