Comments on the second batch of the draft Taxation Laws Amendment Bill, 2014 related to Personal Tax & Savings

17 August 2014

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KPMG Comments on the draft TLAB 2014 - Batch 2 - Personal Tax & SavingsPersonal Tax & Savings

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Retirement reform - defined benefit funds and contributions

1. Application of changes to defined contribution funds (DC funds)

It remains unclear whether the proposed amendments are intended to affect DC funds as well as defined benefit (DB) and hybrid funds (being a retirement fund with a DB element other than an approved risk benefit only). In particular, whether DC funds are also required to submit contribution certificates to an employer, specifically with reference to the tax treatment of an approved risk benefit. We would appreciate it if National Treasury (NT) could clarify our initial understanding that the intention is to solely direct the proposed amendments to DB and hybrid funds.

2. Definition of 'underpin component'

From our point of view, the definition of 'underpin component' is circular and may lead to interpretational difficulty. An 'underpin component' is a benefit where the value is the greater of the amount of a DC component or a DB component other than a risk benefit. However, a 'defined contribution component' is a benefit other than a 'defined contribution component' or 'underpin component' of a fund. The same logic applies to the 'defined benefit component' definition.

3. Calculation of the value of the fringe benefit in respect of a DB or hybrid fund

Employees' tax is applied monthly but are annualised in respect of marginal tax rates etc. The calculation seems to envisage annual figures whilst 'C' seems to refer to the employee's monthly contribution. It is suggested that the way in which the calculation must be annualised be prescribed by way of regulation or alternatively through an Interpretation Note issued by SARS.

4. Contributions to foreign funds

From the current Legislation it seems that employer contributions to foreign retirement funds (unapproved) for the benefit of employees may be viewed as taxable remuneration (paragraph (c) of "gross income"). Without a deduction available in respect of the contributions, the net take home pay of (mostly) non-residents working in South Africa on a temporary bases will decrease substantially. Furthermore, as a result of tax equalisation agreements, or an employer gross-up treatment of the tax, the cost of doing business for entities in South Africa will increase. It proposed that the matter be reviewed to place foreign retirement funds with similar rules to approved South African funds on a similar footing.

Contingent liability policies

5. Effective date of the proposed amendment

According to the proposed amendment to section 11(w) in the TLAB, the proviso to 11(w)(ii)(cc) will be deleted from 1 March 2015. The effective date, together with the Explanatory Memorandum creates the impression that contingent liability policies could qualify as 'keyperson policies' prior to this date. However, we understand that National Treasury communicated the contrary (supported by SARS) to the Association of Investment and Savings South Africa (ASISA) as early as March 2012. By not making the effective date 1 March 2012 (when the relevant changes were made to section 11(w)), a mismatch will occur.

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Either a policy is a keyperson policy with the necessary election (deductible premiums and taxable receipts) or the policy does not qualify (no deduction for premiums and no taxable receipts) – there is no half-way house. We suggest that there is room to argue that the proposed amendment is a confirmation of National Treasury's intention and the current SARS interpretation and should at no point be viewed as tacit approval for the treatment of contingent liability policies as supposed 'keyperson policies'.

The retirement fund accrual date

6. Transfers of benefits to alternate retirement vehicles

In order to allow retired persons to preserve their benefits until they wish to exercise their election, it is suggested that preservation funds be allowed to accept transfers related to retirement. This should alleviate the administrative burden on funds that prefer not to continue to house paid-up retirement benefits for retired members.

Tax-free investments

7. Penalty

Where a taxpayer contributes in excess of the prevailing annual and lifetime contribution limit in any year, a penalty of 40 per cent will be levied by SARS on the excess contributions. There is not sufficient clarity in the legislation as to the timing of the penalty, i.e. will it become effective after every Rand contributed in excess of the limits, or is there an opportunity for the taxpayer to withdraw any excessive contributions before the end of the year of assessment?

If the contribution is excessive, and the investor would be willing to pay the penalty, they can defer such penalty until the following November (or January if the person is a provisional taxpayer). In essence, there is an opportunity to defer the penalty for 9-11 months, while enjoying the tax-free income, as it would not, as the legislation stands, be required to be included in the provisional return of a taxpayer.

8. R30 000 annual cap

There is no facility for older taxpayers to move their lifetime savings in the few working years they have left to save, due to the R30 000 limit. For instance, a taxpayer of 60 years old only has a few years left to work and save, but will not be able to move any existing investments at a rate of more than R30 000 per year. If the taxpayer retires at 63, he would have only been able to move R90 000 into tax-free savings, even though he should qualify for a lifetime limit of R500 000. The administrative consequences of having to move R30 000 at a time instead of one-off may work against uptake amongst older taxpayers.

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Company car benefit

9. Alignment

According to the Explanatory Memorandum, the draft legislation aligns the determined value for all company cars, regardless of how they are acquired. However, according to our understanding, the insertion of the phrase “in any other case, the retail market value of such motor vehicle at the time when the employer first obtained the vehicle or right of use thereof or manufactured the vehicle” in subparagraph (1)*(c)* has created a problem in that, where a car is purchased under a finance lease, the “cash value” as contemplated in section 1 of the Value-Added Tax Act is still the determined value.

Employer-provided rental accommodation

10. Amendment

According to the Explanatory Memorandum, the draft legislation intends to use the market value (which would be the cost to the employer) in the case of employer-provided accommodation which is rented by the employer from an unconnected third party. However, according to the draft proposal, the fringe benefit must be calculated at the lower of the amount of the expenditure incurred in respect of that accommodation by that employer (i.e. not necessarily only pertaining to the actual rental value) or the proxy calculation. It is proposed that the type of ‘expenditure’ referred to, be clarified.

Employment tax incentive

11. Qualifying employees

In order to ensure that an employer does not lose a claiming month (24 possible claiming months) in respect of an otherwise qualifying employee when the employee earns exactly R6 000 (value of incentive = R0), the following can be inserted: Negative - “An employee is not a qualifying employee if the monthly remuneration of that employee is equal to or greater than an amount of R6 000.”; or positive - “receives remuneration in an amount of less than R6 000.” The current phrasing of “R6 000 or less” does not resolve the problem as it still allows an employee earning exactly R6 000 to qualify.

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