2016 TAXATION LAWS AMENDMENT BILL & TAX ADMINISTRATION LAWS AMENDMENT BILL

Select Committee on Finance

Presenters: National Treasury and SARS | 30 November 2016

national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

Consultation process

- The 2016 Draft Taxation Laws Amendment Bill (TLAB) and 2016 Draft Tax Administration Laws Amendment Bill (TALAB) were published for public comment on 8 July 2016.
- National Treasury and SARS briefed the Standing Committee on Finance (SCoF) on the draft bills on 24 August 2016.
- On 14 September 2016, the SCoF held public hearings on the bills.
- On 21 September 2016, National Treasury and SARS presented a draft document to the SCoF containing a summary of responses to comments received on the bills.
- A second batch of the 2016 Draft TLAB (second batch) containing changes to the Learnership Tax Incentive and Employment Tax incentive was published for public comment on 25 September 2016.
- National Treasury and SARS briefed the SCoF on the second batch on 11 October 2016.
- The 2016 TLAB and TALAB were tabled by the Minister in Parliament on 26 October 2016.
- On 9 November 2016, the SCoF held public hearings on the second batch .
- On 15 November 2016, a draft document containing a summary of responses to comments received on the second batch was presented to the SCoF.
- The SCoF voted on the TLAB and TALAB on 24 November 2016.
- The 2016 TLAB and TALAB were debated in Parliament on 29 November 2016.

TLAB: Contents

- The TLAB contains the more comprehensive tax amendments announced by the Minister in the Budget.
- The key issues contained in the TLAB include the following:
  - Employment Tax Incentive (ETI)
  - Learnership Tax Incentive (LTI)
  - Aligning tax charging provisions that enable the Minister of Finance to change the tax rates on all tax acts
  - Introducing measures to prevent tax avoidance through the use of trusts
  - Addressing the circumvention of rules dealing with employee based share incentive schemes
  - Addressing double non-taxation arising from cross border hybrid debt instruments
  - Tax treatment of long term insurers due to the introduction of SAM
  - Providing relief for mining companies spending on infrastructure for the benefit of mining communities
  - Employer provided bursaries for employees or their relatives

Employment Tax Incentive

- The ETI was introduced in January 2014.
- The main aim of the ETI is to increase the overall employment and the level of job experience for the youth.
- The ETI operates as a cost sharing arrangement between government and the employer.
- Government shares the cost of employment of eligible workers aged between 18 and 29 that earn above the minimum wage, between R1000 and R6000 per month, through a credit against employees tax to be paid over by the employer to SARS.
- Following the review, the proposed amendments to the ETI were included in the second batch, and the main amendments were as follows:
  - Extension of the ETI to 28 February 2019
  - Introduction of an annual cap of R20 million on the claim allowed to each employer
  - Administration and legislative changes of the definitional sections to clarify the value of claims and restriction of back dated claims and roll overs

Employment Tax Incentive

- Subsequent to the tabling of the TLAB on 26 October 2016, and in light of the public hearings on ETI and LTI held on 9 November 2016, the Minister of Finance proposed amendments to the TLAB in his letter to the SCoF dated 21 November 2016.
- The amendments include:
  - The removal of the proposed R20 million cap on the amount an employer may claim per annum using the ETI from 1 March 2017
  - A technical correction to adjust the effective date for the change to the definition of “remuneration” and the date of a related amendment in the ETI from 1 October 2016 to 1 March 2017

Learnership Tax Incentive

- The LTI was introduced in 2002 to encourage skills development.
- The LTI operates by providing additional tax deductions for an employer in respect of formal SETA registered training programmes.
- The value of the incentive is the deduction of R30 000 on the commencement of a learnership agreement between an employer and an employee (plus R30 000 for every year successfully completed) and another R30 000 upon completion of the studies or training. These values increase by R20 000 if the learner is a person with disability.
- Following the review, the second batch proposed a more focused targeting of the LTI by prioritising agreements with learners who have basic to intermediate skills levels and qualifications (NQF levels 1-6) related agreements to receive a larger deduction.
- This policy proposal is in line with achieving the NDP goal of producing 30 000 artisans annually.

Aligning tax charging provisions that enable the Minister of Finance to change the tax rates in all the tax Acts

- The 2016 Draft TLAB contains a proposed amendment that seeks to align the tax charging provisions that will enable the Minister of Finance to change (whether it is for purposes of an increase or decrease) the tax rates in all the tax acts administered by SARS.

- It makes provision for the rates announced by the Minister of Finance in the annual Budget to apply from the effective date announced by the Minister subject to Parliament passing the legislation giving effect to that announcement within 12 months of that announcement.

- The proposed amendment is similar to the provisions available in paragraph 9 of the Fourth Schedule to the Income Tax Act as well as the Customs and Excise Act.

Introducing measures to prevent tax avoidance through the use of trusts

- The proposed amendment is an anti-avoidance measure aimed at limiting the avoidance of Estate Duty and Donations Tax through the use of interest free loans to a trust.

- It has been a long standing practice of some taxpayers to use interest-free loans as a mechanism to transfer growth assets such as shares and fixed property to trusts in exchange for interest-free loans that may be subsequently waived over time.

- This effectively allows these taxpayers to transfer wealth without paying Donations Tax on the transfer of assets to the trust or alternatively avoiding Estate Duty on the growth of the assets in the trust.

Introducing measures to prevent tax avoidance through the use of trusts

- In order to address some of the concerns raised during the public comment stage, the revised TLAB contains the following:
  – It moves away from deeming the interest foregone to be income, however, the interest foregone will be treated as an ongoing, annual donation made by the lender to the trust.
  – It introduces further exemptions from the application of this new section 7C, for example:
    » Special trusts that are created solely for the benefit of minors with a disability;
    » Trusts that are public benefit organisations ;
    » Vesting trusts (in respect of which the vesting rights and contributions of the beneficiaries are clearly established);
    » Loan used by trusts to fund the acquisition of a primary residence;
    » Loans that constitute affected transactions and are subject to transfer pricing provisions;
    » Loans provided to the trust in terms of sharia compliant financing arrangement;
    » Loans that are subject to the provisions of section 64E(4) of the Act.

Addressing the circumvention of rules dealing with employee based share incentive schemes

- The proposed amendment is to prevent taxpayers from disguising high salaries through the use of restricted shares or share-based incentive schemes, which gives rise to dividends instead of salaries.

- The amendment is intended to stop abuse. Some schemes are created to avoid normal income tax by passing income to employees as dividends. This effectively allows employees to pay tax at a lower dividend tax rate of 15% instead of their marginal tax rates, e.g. 41%.

- In order to address some of the concerns raised during the public comment stage, the revised TLAB proposes that targeted measures that deal adequately with schemes where restricted shares held by employees are liquidated in return for an amount qualifying as dividend be introduced.

Addressing double non-taxation arising from cross border hybrid debt instruments

- In 2013, specific legislation dealing with hybrid-debt instruments and interest charged under these instruments was introduced in the Income Tax Act which predate but are in line with the G20/OECD BEPS project.
- These anti-avoidance measures operate to reclassify interest as dividends with the aim to prevent the artificial generation of interest deductions by a borrower of a debt instrument (referred to as the issuer) if the debt instrument exhibits equity features or the dividend is not determined with reference to an interest rate or the time value of money.
- However, parties to transactions involving non-resident issuers of debt instruments are intentionally including equity features in their debt instruments as a mechanism of taking advantage of the re-classification feature of these anti-avoidance rules knowing very well that the interest denial will not apply to the non-resident issuer.
- To stop this arbitrage, it is proposed that the scope of the current anti-avoidance measures should be limited to instances where the South African rules can deny an interest deduction for the issuer of a hybrid-debt instrument.

Tax treatment of long term insurers due to the introduction of SAM

- In order to cater for the tax treatment of the long-term insurance industry as result of the introduction of the **SAM** Framework and the new Insurance Act, the following amendments are proposed:
  - alignment of definition of "*value of liabilities*" three policyholder funds and risk policy fund.
  - new definition of "*adjusted IFRS value*" applicable to three policyholder funds and risk policy fund.
  - transitional rules: phasing-in amount and period of phasing-in.
  - anti-avoidance measures for calculating the phasing-in amount

- On 9 November 2016, the SAM Tax Task Group made representation to the SCoF. National Treasury, SARS and the FSB met with industry representatives on 14 November 2016 to discuss the matters raised by the industry in their submission. Given that these provisions are driven by the regulatory requirements determined by the FSB, the Treasury, SARS and the FSB agreed with industry representatives on the need to continue to engage over whether technical corrections are required in the 2017 tax bills, given the complexity of the SAM reforms and the coming Insurance Bill.

Providing relief for mining companies spending on infrastructure for the benefit of mining communities

- To be eligible for the granting of mining or production rights, the MPRDA makes it compulsory for mining companies to submit Social and Labour Plans (“SLP”).
- SLPs are aimed at assisting with the development of mining communities, which typically involves a company agreeing to build infrastructure, for example, roads, creches, schools, clinics, housing, recreational buildings, etc.
- The current tax provisions allow mining companies to deduct certain capital expenditure in equal amounts over a period of ten years, only if that capital expenditure relates directly to its employees, not the wider community.
- To further assist mining companies to meaningfully contribute toward community development it is proposed that the current incentive on capital expenditure on infrastructure development for employees be extended to cover infrastructure expenditure incurred for community development.
- To be eligible for tax deduction, the infrastructure should reflect what was agreed to between the mining company and the Department of Mineral Resources. In turn, similar to allowable capital expenditure for employees, it is proposed that the tax deduction for infrastructure expenditure be spread over a 10 year period or remaining life of the mine, whichever is the shortest.

Employer provided bursaries for employees or their relatives

- Currently, the Income Tax Act makes provision for tax exemption of all "bona fide" bursaries or scholarships granted by employers to employers or relatives of qualifying employees, subject to certain monetary limits.

- The 2016 TLAB increases the monetary limits as follows:
  - The monetary limit in respect of remuneration for qualifying employees is increased from R250 000 to R400 000.
  - Exempt bursaries or scholarships are increased from R10 000 to R15 000 for Grade R to 12, including qualifications in NQF levels 1 – 4.
  - Exempt bursaries or scholarships for NQF levels 5 – 10 are increased from R30 000 to R40 000.

TALAB: Contents

- The TALAB contains the administrative tax amendments announced by the Minister in the Budget.
- The key issues contained in the TALAB include the following:
  - Alternative documentary proof for VAT input tax claims
  - Prescription period for claiming VAT refunds
  - Mineral and petroleum royalty payments
  - Independence and effectiveness of the Tax Ombud

Value-added tax

- Alternative documentary proof
  - Vendors (suppliers) obliged to issue tax invoices in a defined form and manner which are generally aligned with commercial & accounting practice
  - Purchasers are sometimes issued with invoices that do not meet the statutory requirements or are unable to obtain invoices from suppliers
  - Purchasers cannot claim input tax deductions without proper tax invoices
  - Proposed amendment provides for a rulings process for alternative documentary proof that may be used as a last resort
- Alignment of prescription periods for refunds
  - The VAT Act provides that a person may deduct input tax in a later tax period as long as that period falls within five years from the tax period when the deduction should have been claimed
  - Clarification of time limit for the payment of refunds on late returns – no refunds may be made in respect of a return that is submitted more than five years late

Mineral and petroleum royalty payments

- The payment of mineral and petroleum resources royalties largely follows the provisional tax system in the Fourth Schedule to the Income Tax Act
- To improve payment automation, greater alignment with the Fourth Schedule is required, particularly with regard to interest and penalties
- The 2016 TALAB effects such alignment as follows:
  - Amended wording of section 5 & new section 5A more clearly reflects the steps in the process of estimate, return and payment of royalty
  - Proposed wording change to section 6 clarifies fact that there may be more than two payments if an estimate is adjusted under section 5A
  - Insertion of new section 6A for refunds in case of overpayments by taxpayer
  - Clarification of when penalty on underpayment based on underestimation will be imposed & calculation thereof
  - Interest system linked to Tax Administration Act interest system
- Proposal in draft TALAB to shorten period for final return from 12 months to 6 months after year-end not carried through after public comment

Independence and effectiveness of the Tax Ombud

- Two international models considered when Tax Ombud (TO) introduced
  - Independent ombud drawing resources from revenue administration
  - Tax function in government ombud's office (i.e. Public Protector)
- First model selected – Not UK example originally recommended by Katz Commission, closer to Canadian example adapted for South African legal and constitutional dispensation
- Following discussions with TO & Office of the Tax Ombud (OTO) CEO, several amendments to enhance TO's independence are proposed
  - Tenure of TO: Extended from three to five years
  - Staff: TO will appoint staff directly in terms of SARS Act, without secondment or consultation with Commissioner
  - OTO expenditure: Although paid from funds allocated to SARS, payments will be made in terms of budget for OTO approved by Minister
  - Mandate: In addition to reviewing systemic issues identified through taxpayer complaints, TO will review such issues at request of Minister or on own initiative with approval of Minister
  - Reasons: Taxpayers & SARS to indicate reasons if TO recommendations not accepted

THANK YOU