2019 Draft Taxation Laws Amendment Bill

Submission
September 2019

Dear Allen and Arico

Representations on the (draft) Tax Laws Amendment Bill, 2019 ("TLAB 19")

We present herewith our written submissions on the above-mentioned draft 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. You are more than welcome to contact us in this regard.

As always, we thank SARS and National Treasury for the on-going opportunity to participate in the development of the SA tax law.

Yours sincerely

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Attached:

- Detailed submissions

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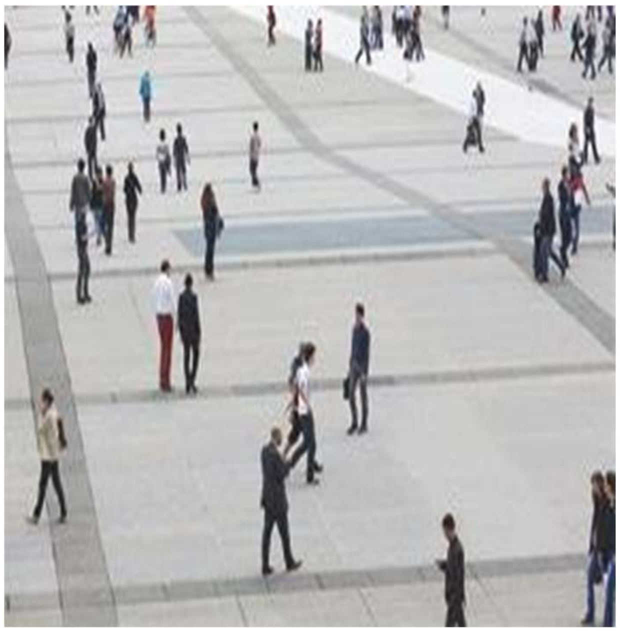

1:*INCOME TAX*

INDIVIDUALS, SAVINGS AND EMPLOYMENT

PwC

Comment	Recommendation
The manner in which the new definition of "variable remuneration" is drafted does not seem to clearly address the policy intent expressed in the EM and may result in certain amounts to which section 7B currently applies no longer being covered by that section. Based on the proposed wording, variable remuneration will only arise in two circumstances: 1. Where the remuneration cannot be determined prior to the entitlement to payment **and** the identity of the employee to whom the amount is payable cannot be determined prior to entitlement to payment **and** that remuneration differs from month to month; or 2. Where the remuneration is payable only after approval and the employee becomes entitled to payment of that amount in the month following approval. Insofar as the first circumstance is concerned, bonuses and leave pay would arguably not fall within the definition. This is because all three requirements must be met and in most cases the employee could be readily identified. Similarly, in the second circumstance, if the employee becomes entitled to payment in the same month as approval (or two month after), the remuneration in question would not be caught. It must also be considered that "entitlement to payment" simply means accrued when regard is had to the case law on this topic. So, for example, accrual and entitlement to payment would usually take place upon approval. As such, the use of that term is not appropriate in section 7B.	A more nuanced and careful consideration of the structure and wording of the definition is required to create certainty and ensure that it aligns with the policy intent.

INCOME TAX ACT:
Section 7B

1.2 Aligning the effective date of tax neutral transfers between retirement funds with effective date of all retirement reforms

Comment	Recommendation
The proposed amendment to paragraph 6(1)*(a)* of the Second Schedule has a retrospective effective date of 1 March 2019. By changing the effective date retrospectively, this potentially places any taxpayer that has, in good faith, made use of the favourable tax treatment for a provident fund in a non-compliant tax position retrospectively.	The effective date should be prospective (i.e. should be effective from 1 March 2020).

INCOME TAX ACT:
Paragraph 6(1)*(a)* of the Second Schedule

1.3 Exemption relating to annuities from a provident or provident preservation fund

Comment	Recommendation
The proposed effective date of 1 March 2020 does not allow for the deductibility of non-deductible contributions prior to that date. Taxpayers who are members of provident funds and provident preservation funds with compulsory annuitisation are therefore currently not afforded the same treatment as other retirement fund members, and must wait another six months for the amendment to be enacted.	The amendment should be made retrospectively to 1 March 2019 so that members of provident funds with compulsory annuitisation are put in the most fair tax position immediately.

INCOME TAX ACT:
Section 10C

1.4 Tax treatment of payments to former members of closed funds

Comment	Recommendation
No comments.	

INCOME TAX ACT:
Paragraph 2D of the Second Schedule

1.5 Reviewing the tax treatment of surviving spouse pensions

Comment	Recommendation
No comments.	

INCOME TAX ACT:
Paragraph 2 of the Fourth Schedule

2:*INCOME TAX*

BUSINESS (GENERAL)

2.1 Addressing abusive arrangements aimed at avoiding the anti-dividend stripping provisions

	Comment	Recommendation
	There is some uncertainty arising from the use of the term "effective interest", specifically where the target company has multiple classes of shares (which could include preference shares with debt-like features). Such difficulties relate, for example, to how the reduction in effective interest should be measured (i.e. whether this relates to a reduction in market value of the shareholding, whether this must be determined on an aggregated basis (or per class of shares), or whether voting rights or rights of control should be taken into account).	Consideration should be given to more clearly defining what is meant by a reduction of the effective interest of the shareholder company in the target company. In any event, it is submitted that this provision should not apply to the issue of non-equity shares as it is only a dilution through the issue of equity shares which presents a concern from a policy perspective.
INCOME TAX ACT: Section 22B and Paragraph 43A of the Eighth Schedule	The proposed rules are overly broad in their application. Any new share issue, no matter how small, would reduce the effective interest of an existing shareholder in the target company, potentially triggering the rules even where there is absolutely no link between the share issue and the relevant dividend.	Consideration <u>must</u> be given to limiting the overly broad application of the proposed rules. This could be done by: - Making use of a *de minimis* rule (i.e. where the effective interest is not substantial, there will be no deemed disposal for the purposes of the rules); and/or - requiring a link between the dividend and the share issue; and/or - requiring that the share issue result in a change in control of the target company.

	Comment	Recommendation
INCOME TAX ACT: Section 22B and Paragraph 43A of the Eighth Schedule	There are most often commercial reasons, unrelated to tax avoidance, for the issue of shares (as opposed to the disposal of shares) as a means of altering the interests of shareholders in a company. If it is accepted the commercial outcome or outcomes that are achieved from the dilution of a shareholder's interest in a company as a result of the issue of additional shares could not have been achieved had the dilution been the result of a disposal, it is probably that the dilution (i.e. resulting from a share issue) was not effected for purposes of tax avoidance. There is a clear difference between (1) share issuances that are effected in circumstances where the commercial outcome would have been the same had there been a share disposal; and (2) share issuances that are effected because the commercial circumstances dictate that a share disposal would not achieve the desired commercial objectives. The first category of share issuances is, and should be, of concern. However, transactions falling under the second category are underpinned by commercial reasons, and there should be less of a concern with such share issuances.	It is accepted that it may be difficult to draft rules that differentiate between issuances that are effected for commercial reasons and those that are effected in order to circumvent the application of the anti-dividend stripping rules. However, it must also be accepted that essentially deeming a share issuance to be a disposal for the purposes of the anti-dividend stripping rules will result in the rules being of extremely (and overly) broad application. There <u>must</u>, therefore, of necessity be <u>some</u> limitation on the breadth of application of the rules. It is a dividend that results in value being stripped out of the shares. The mischief arises when that dividend is funded (directly or indirectly) by the issue of shares. It therefore goes without saying that the rule should be limited to share issues that directly or indirectly fund a dividend.

	Comment	Recommendation
INCOME TAX ACT: Section 22B and Paragraph 43A of the Eighth Schedule	The proposed rules do not make allowance for situations in which a share issue in the target company to a new shareholder is accompanied by the issue of debt by the target company to an existing shareholder, such that the economic interest of the existing shareholder in the target company remains unchanged notwithstanding the dividend and share issue. For example, a company declares a dividend on loan account to the existing shareholder in order to reduce the value of the shares and then issues shares for a nominal amount to a BEE shareholder. This is a common mechanism used to facilitate the empowerment of a company. In such circumstances, there is a change in the capital structure of the target company, but no divestment of the value of the economic interest of the existing shareholder in the target company. In addition, there is no mischief as the dividend is not funded from the issue of shares, but is funded from the company's own resources which are subjected to tax.	The proposed rules should apply only where the effective (or economic) interest of the existing shareholder in the target company is reduced (as opposed to applying, as per the draft, where the effective interest in the shares of the target company is reduced).

	Comment	Recommendation
	It is not entirely clear whether the proposed rules will apply in respect of extraordinary dividends that are paid in the course or as part of a deferral transaction. It cannot, for example, be the intention that a transaction involving a legitimate section 46 unbundling transaction (where the 15% threshold is easily met) and a completely unrelated legitimate share issue within 18 months be caught by the proposal.	Technically, the proposed paragraph 43(3A) will apply irrespective of whether the relevant extraordinary dividend was paid in the course of or as part of a deferral transaction. It is suggested that clarity be provided as to whether this is the intention, especially given the extremely broad application of the proposal that all issuances essentially be treated as disposals for purposes of the anti-dividend stripping rules.
	The draft Bill includes some textual corrections to the provisions which have nothing to do with closing this loophole. However, the proposed effective date for all the amendments is the same. This effective date is nonsensical in the context of the textual corrections.	A different effective date should be inserted for the technical corrections.
INCOME TAX ACT: Section 22B and Paragraph 43A of the Eighth Schedule		

INCOME TAX ACT:
Section 24BA

Comment	Recommendation
The proposed amendments only cater for situations in which the market value of the asset exceeds the market value of the share (i.e. situations proscribed by subsection (3)*(a)* of section 24BA). It is not clear why the proposed amendment does not cater for situations in which the market value of the shares issued exceeds the market value of the asset (i.e. situations proscribed by subsection (3)*(b)* of section 24BA). This could arise be reason of, for example, a deferred tax asset relating to an asset transferred in terms of section 42 and where recognition is given for the tax benefit associated with the asset in addition to its stand-alone market value.	Provision should be made for situations in which the market value of the shares issued exceeds the market value of the asset by reason of a deferred tax asset.
Recognition is given only for value differences arising as a result of deferred tax. However, value differences could also arise where there is no deferred tax involved. This is because IAS 12 provides that deferred tax is not recognised on the initial recognition of an asset in a transaction which is not a business combination, and at the time of the transaction, affects neither accounting profit nor taxable profit.	The reference to deferred tax is misplaced. Rather, the provision should refer to differences in value arising due to differences between the market value of the asset and the tax value thereof (base cost).

2.3 Clarification of the interaction of the value-shifting rules and the deemed expenditure incurral rules for assets acquired in exchange for the issue of shares

Comment	Recommendation
No comments.	

INCOME TAX ACT:
Sections 24BA and 40CA of the Act

2.4 – Clarifying the exclusion from claiming interest deductions for debt financed acquisitions for start-up business

Comment	Recommendation
The proposed amendments to section 24O are deemed to have come into operation on 1 January 2019, and apply in respect of years of assessment ending on or after that date. Whilst it is acknowledged that the purpose of the proposed amendment is to clarify the existing policy position, the proposed effective date will mean that the amendments are already effective for many taxpayers with years of assessment that have already ended, and that the proposed amendments have retrospective effect (e.g. if a taxpayer has a year of assessment ending on 31 March 2019, the amendments could apply for a year of assessment commencing on 1 April 2018 and ending on 31 March 2019. This is undesirable.	The retrospective effective date should be made prospective. In this regard, it is suggested that the proposed amendments, at a minimum, be applicable for years of assessment ending on or after 1 August 2019 (i.e. after publication of the proposed amendments).

INCOME TAX ACT:
Section 24O

2.4 Clarifying the exclusion from claiming interest deductions for debt financed acquisitions for start-up business

Comment	Recommendation
The amendment to the definition of "acquisition transaction" refers to "an operating company that is continuously carrying on a business on the date of acquisition". The term "continuously carrying on a business" is very broad, and is subject to subjective interpretation.	If the policy intent is to ensure that taxpayers do not use the special interest deduction for start-ups, then what is meant by the term "continuously carrying on a business" should be clarified by providing an appropriate explanation in the EM or, possibly, by requiring in the legislation that, in order to be regarded as "continuously carrying on a business", certain objective *indiciae* must be present (e.g. the operating company must have carried on a trade for a certain minimum time period (e.g. three months)).
The amendment to the definition of "acquisition transaction" refers to "an operating company that is continuously carrying on a business on the date of acquisition". However, the definition of an "operating company" requires a company to derive income from a business carried on continuously. The repetition of this requirement in the definition of an "acquisition transaction" is therefore superfluous and may lead to confusion. Furthermore, the provision arguably does not address the scenario where the company becomes an operating company on the date of acquisition.	The definition of an "acquisition transaction" should simply refer to a company that is an operating company prior to the date of acquisition.

INCOME TAX ACT:
Section 24O

2.5 Amending the special interest deduction rules in respect of share acquisitions funded by debt to allow for deductions after an unbundling transaction

	Comment	Recommendation
	From the EM, it appears that the policy intent is that, where an operating company is acquired indirectly by way of acquiring a controlling group company in relation to that operating company and the indirect interest in the operating company is converted to a direct interest, the interest deduction that was allowed in respect of borrowings incurred to acquire the indirect interest should still be allowed (notwithstanding that the interest in the operating company is now held directly). The proposed amendment, however, only provides for the continuation of the interest deduction where the change from an indirect to a direct shareholding in an operating company takes place as a result of an unbundling transaction.	The proposal should not be limited to changes from indirect to direct shareholding as a result of unbundling transactions, and the interest deduction should continue to be allowed irrespective of how the change from an indirect to a direct shareholding takes place.
INCOME TAX ACT: Section 24O	There are, however, a number of ways (other than by way of an unbundling transaction) in which an indirect shareholding in an operating company may be converted to a direct shareholding (e.g. by way of a liquidation distribution or other corporate reorganisation transaction).	

2.5 Amending the special interest deduction rules in respect of share acquisitions funded by debt to allow for deductions after an unbundling transaction

Comment	Recommendation
The proposed amendment only provides for the continuation of the interest deduction where there is a change from an indirect to a direct shareholding in an operating company. However, it may happen that an indirect shareholding in an operating company is transferred to the acquiring company rather than a direct shareholding. Take for example the scenario where CoA acquires 100% of CoB which holds 100% of CoC (a holding company) which holds 75% of CoD (an operating company) and CoB distributes the shares in CoC to CoA. As currently drafted, the provision will not apply as CoA does not acquire the shares in the operating company.	The provision should apply to both the acquisition of an operating company and a controlling group company in relation to an operating company.

INCOME TAX ACT:
Section 24O

2.6 Clarifying the tax treatment of transfer of interest-bearing instruments in terms of corporate reorganisations

	Comment	Recommendation
INCOME TAX ACT: Sections 24J and 41	The proposed changes betray a lack of understanding of what the true concerns are. The following example illustrates the problem (ignoring the proposed amendment). CoA and CoB enter into a s45 intra-group transaction in terms of which an interest-bearing bond with a face value of R100 and a tax cost/initial amount of R90 held by CoA (as the holder contemplated in s24J) as a capital asset is transferred to CoB for a consideration equal to its face value. The simplified tax implications are as follows: CoA CoA is subject to income tax over the term of the bond on both the interest and the discount of the purchase price of the bond to face value. On disposal of the bond, CoA has an adjusted gain (being the remaining unamortised discount) in the absence of s45, but for CGT purposes is deemed to have disposed of the bond for its cost of R90, resulting in there being no capital gain.	The proposed amendment to s41 should be withdrawn and specific rules inserted into ss42, 44, 45 and 47 to provide for the rollover of initial amounts and adjusted initial amounts for instruments disposed of in terms of those provisions.

	Comment	Recommendation
INCOME TAX ACT: Sections 24J and 41	<u>CoB</u> CoB is deemed to have acquired the bond at a cost of R90 for CGT purposes in terms of s45. However, for purposes of s24J its initial amount is R100, being the transfer price as defined. The result is that the original discount in the hands of CoA which would have been taxed as interest, will now be taxed as a capital gain in the hands of CoB when realised. The result is that the non-applicability of the reorg rules can result in amounts that would be treated as income being treated as capital. The opposite is also true. If the bond in the above example had been acquired by CoB for R80 instead of R90 it would have resulted in an additional R10 of interest income for CoB over the remaining term. In other words, the non-applicability of the reorg rules to the core provisions of s24J can result in anomalies. This has been our concern. The proposed amendment does not remedy this. In our example, it would simply result in CoA having a capital gain (subject to the wording actually achieving this). This does not remedy the fact that income has effectively been converted into capital.	

2.6 Clarifying the tax treatment of transfer of interest-bearing instruments in terms of corporate reorganisations

Comment	Recommendation
The proposed wording in s41, in any event, arguably does not achieve what it intends to. The mere existence of an adjusted gain or loss does not result in such amount being subject to tax. S24J(4) merely regulates the timing of the accrual or incurral of such a gain or loss respectively. The tax implications thereof flow from ordinary income tax and CGT principles, which are relieved by the reorg rules.	The wording should be explicit in its treatment of adjusted gain and losses.

INCOME TAX ACT:
Sections 24J and 41

2.7 Clarifying the tax treatment of transfer of exchange items interest bearing instruments in terms of the corporate rules

INCOME TAX ACT:
Sections 24I and 41

Comment	Recommendation
Far from the reorg rules not being clear insofar as exchange items are concerned, it is abundantly clear that they do not provide for any rollover relief. This is because the relief afforded by the reorg rules is extremely specific. Relief is only provided for capital assets insofar as CGT is concerned. Relief is only provided for trading stock insofar as the relevant provisions applying to trading stock are concerned (gross income, general deductions and s22). Relief is only provided for allowance assets insofar as the recoupment and deduction of allowances is concerned.	As the law stands, the proposed exclusion of s24I from the reorg rules is superfluous and should be withdrawn.
The fact that no relief is provided by the reorg rules insofar as s24I is concerned is problematic and undermines the principle that reorgs should be tax neutral. Assume the following scenario CoA owns 100% of FCo and is owed $1000 by FCo. The debt owing by FCo to CoA is subject to s24I(10A) such that the exchange differences have been deferred. CoA transfers the shares and loan account in FCo to CoB in terms of s45 as part of a group reorg. While the transfer of the shares is subject to reorg relief, the transfer of the loan results in a realisation of the exchange item for purposes of s24I(10A) and an exchange gain or loss which is taken into account for income tax purposes.	Rather than proving that the reorg rules do not override s24I, ss42, 44, 45 and 47 should be amended to specifically provide for the rollover of exchange differences on debts that are subject to s24I(10A).

2.8 - Harmonising the timing of degrouping charge provisions for intra-group transaction and controlled foreign companies

Comment	Recommendation
As per the EM, the issue appears to be a misalignment in the timing rules for the determination of the net income of a CFC in terms of sections 9D, 9H and 45. The EM, however, makes no mention of whether there could be any similar issues in the context of other corporate reorganisation transactions (e.g. asset-for-share transactions as contemplated in section 42).	It should be considered whether corresponding amendments are required in the context of other corporate reorganisation transactions.
The effective date of the proposed amendments does not correspond with that indicated in the EM.	The effective date of the amendments should be clarified in the Bill and the EM.

INCOME TAX ACT:
Sections 9D, 9H and 45

2.9 Amending the corporate reorganisation rules to cater for company deregistration by operation of law

Comment	Recommendation
The EM indicates an effective date of 1 January 2020 while the draft Bill contains no stipulated effective date. It is considered that the approach in the draft Bill is the correct approach.	The effective date in the EM should be aligned with that in the draft Bill.

INCOME TAX ACT:
Section 41

3:INCOME TAX

BUSINESS (FINANCIAL INSTITUTIONS AND PRODUCTS)

PwC

3.1 Clarification of the definition of rental income in a REIT tax regime in respect of foreign exchange differences

	Comment	Recommendation
	The EM, under the heading "reasons for change", states that "unrealised exchange gains or losses arising from the … FECs of a REIT or controlled company are *in terms of paragraph (n) of the definition of gross income in section 1* and in section 24I(3) of the Act taken into account in determining the taxable income of such REIT or such controlled company" (italics added). This is not correct: exchange gains and losses in respect of an FEC are not included in taxable income in terms of paragraph *(n)* of the definition of gross income. That paragraph makes provision for amounts that are not dealt with in gross income but that are required to be included in the income of a taxpayer in terms of any other provision of the Act. In other words, exchange gains constitute gross income in terms of paragraph *(n)* because section 24I(3) includes them in income.	To prevent confusion, the EM should be amended to reflect the correct position.
INCOME TAX ACT: Section 25BB	Unrealised foreign exchange gains are effectively brought to account for tax purposes on an accrual basis. This, however, does not align with the conduit principle underlying the REIT regime. More specifically, because unrealised exchange gains are not matched by a cash receipt, a REIT would not be able to make a "qualifying distribution" in respect of a foreign exchange gain (that would have accrued and therefore been taxed). Due to this mismatch of the taxing and cash flow events, a REIT may find itself in a taxable position, which is contrary to the purpose of the REIT regime.	The inclusion of foreign exchange gains in taxable income in terms of section 24I(3) should be deferred until realisation for REITs and controlled companies.

3.1 Clarification of the definition of rental income in a REIT tax regime in respect of foreign exchange differences

Comment	Recommendation
It is not clear why the inclusion of exchange differences in rental income is limited to exchange items hedging other items of rental income. For example, it is possible that debt could be raised in foreign currency to fund property in respect of which rental income is generated. Any exchange differences in respect thereof would be included in income or deductible as the case may be. Furthermore, such debt may also be hedged by exchange items which themselves also give rise to exchange differences.	The inclusion of exchange differences in rental income should be extended to **all** exchange differences of a REIT which directly or indirectly relate to REIT activities.
The proposed effective date in the EM is years of assessment commencing on or after 1 January 2020. However, the draft Bill contains no specific effective date. The effective date proposed in the EM is problematic as it would effectively extend the period for which any affected REIT would potentially not have qualifying distributions.	The draft Bill should specify an effective date that, at worst, applies for years of assessment ending on or after 1 January 2019.

INCOME TAX ACT:
Section 25BB

3.1 Clarification of the definition of rental income in a REIT tax regime in respect of foreign exchange differences

Comment	Recommendation
The deduction of exchange losses in determining rental income is misplaced. This is because only exchange gains are included in gross income. Exchange losses don't reduce gross income, they reduce taxable income. This can be illustrated with a simple example. Assume that a REIT has rental income from immovable property of R1000 and an exchange loss from a hedge of that rental income of R300. The gross income of the REIT is R1000 and the rental income as per the proposed amended definition would be R700. The result is that only 70% of the gross income of the REIT consists of rental income and the REIT would not have a qualifying distribution.	Exchange losses should not be deducted in determining rental income.

INCOME TAX ACT:
Section 25BB

3.2 Clarification of the interaction between corporate reorganisation rules and REITs tax regime

Comment	Recommendation
On the basis that the proposed amendment is a "technical correction" the purpose of which is to ensure that the corporate reorganisation rules are aligned with the policy underlying the rules relating to REITS, there is no reason why the effective date for the proposed amendment should be delayed. The proposed amendment should be made effective as early as possible and should not be delayed until years of assessment commencing on or after 1 January 2020. It is noted that the draft Bill, however, contains no specific effective dates for the these amendments. This requires clarification.	The proposed amendment should be made effective at least for current and future years of assessment (i.e., for example, for years of assessment ending on or after 31 July 2019), and, if not, earlier.
The proposal to exclude s25BB(5) assets from the 18 month ring-fencing rules is welcomed. However, this does not go far enough. Firstly, s47(4) also contains such a rule, but no amendments are proposed to exclude the application of this rule to s25BB(5) assets. This is notwithstanding that s47 could also apply to such assets. There is no policy rationale for the relief to not also apply in the context of s47. Secondly, s45 also contains a degrouping charge in s45(4) which simply deems there to be a capital gain without a corresponding deemed disposal of the asset in question. The result is that s25BB(5) arguably does not apply to such a degrouping charge. This is anomalous given that a capital gain from a disposal of assets contemplated in s25BB(5) would be disregarded.	S47(4) should be amended to exclude its application to s25BB(5) assets. S45(4)(b)(i) should be amended to deem the capital gain in question to arise from a disposal of the asset to ensure that s25BB(5) applies where appropriate..

INCOME TAX ACT:
Sections 25BB, 42, 44 and 45

3.3 Consequential amendments to the tax treatment of foreign reinsurance business operating a branch in South Africa

Comment	Recommendation
It is noted that the draft Bill contains no specific effective dates for the amendments, contrary to what is stated in the EM.	The draft Bill should include the effective dates for the amendments.

INCOME TAX ACT:
Sections 28 and 29A

Comment	Recommendation
It is noted that the draft Bill contains no specific effective dates for the amendments, contrary to what is stated in the EM.	The draft Bill should include the effective dates for the amendments.

INCOME TAX ACT:
Section 29A

3.5 Refinement of the phasing in of transitional rules for long-term insurers

Comment	Recommendation
It is noted that the draft Bill contains no specific effective dates for the amendments, contrary to what is stated in the EM.	The draft Bill should include the effective dates for the amendments.

INCOME TAX ACT:
Section 29A

4: *INCOME TAX*

BUSINESS INCENTIVES

Comment	Recommendation
While the policy rationale requiring a qualifying company to be a greenfields business or an expansion of an existing business is understandable, the manner in which the proposed provisions are drafted is problematic. S12R was inserted in 2013 with effect from the date that the SEZ Act came into operation (9 February 2016). Notwithstanding that the SEZ Act had not yet come into operation, a number of investments were made in SEZs in 2014 and 2015 based on the legislation as it stood at that time and on the expectation of policy stability and that the 15% tax rate would apply to such investments. The proposed new provision requiring the investment to be a new business or an expansion of an existing business give rise to the following concerns:	
• Any new business that commenced in the SEZ prior to 9 February 2016 will not be a qualifying company as it would not be commenced "on or after 9 February 2016". Nor would it qualify as an expansion.	Any commencement or expansion of a business should be measured with respect to the date that s12R was promulgated and not the date that it came into effect.

INCOME TAX ACT:
Section 12R

Comment	Recommendation
• The provision relating to new businesses requires that "the trade" was not previously carried on by "any connected person" in relation to the company. This would have the effect that if a manufacturing operation was carried on in another country by another group company and that manufacturing operation is relocated to a South African group company which sets up a new manufacturing operation located in an SEZ, it would not qualify.	The restriction should apply only if that trade was previously carried on by that company or a connected person **in the Republic**.

INCOME TAX ACT:
Section 12R

	Comment	Recommendation
	• The requirement for an expansion that the gross income must increase by 100% is impractical and does not promote certainty, a prerequisite to attracting investment. Firstly, it is not clear at what point the increase in gross income must be measured although it appears that this must be measured on an annual basis. No expansion is likely to see gross income increase in a hockey stick manner as envisaged by the provision. Rather, the increase is likely to be gradual as demand and capacity utilisation increase. Secondly, inflation would, to some extent, undermine this measure over the medium term as nominal gross income in later years is compared to nominal gross income in earlier years. Thirdly, the requirement implies that a doubling of capacity and output is required as part of the expansion. Very few expansion projects seek to double output. The result is that expansions are, in effect, likely to be largely excluded from the SEZ incentives.	It is submitted that the expansion gross income requirement is unnecessary given that para (d) of the definition of qualifying company requires that 90% of the income must be derived from trade carried on in an SEZ. At most, the proposed proviso should be retained to the extent that it provides that in an expansion the extent of production and employees outside the SEZ should not be reduced.
INCOME TAX ACT: Section 12R		

4.2 Reviewing the SEZ anti-profit shifting and anti-avoidance measures

Comment	Recommendation
As a first point, we wish to point out that the suggestion in the EM that an anti-profit shifting rule is required in terms of the harmful tax practices standards is patently wrong. Those standards are concerned with tax practices in the cross-border context where the tax practices of one country harm another country and not with profit-shifting wholly in the context of a country's own tax system. The policy concern is with respect to the shifting of profits wholly within the SA tax system from outside of a SEZ to inside a SEZ.	Any reference to harmful tax practices should be removed from the EM.
It is noted that the amendments are proposed to apply for years of assessment ending on or after 1 January 2019. However, this would still result in the SEZ incentive not applying to affected companies in earlier years, contrary to what was originally intended.	Any amendments to refine this rule should be backdated to years of assessment commencing on or after 9 February 2016, the effective date of s12R.

INCOME TAX ACT:
Section 12R

	Comment	Recommendation
	The proposed new rule is still problematic. Take the example of a company which manufactures a product (that was previously imported) in an SEZ and disposes of 70% of that product to a connected distribution company in SA and exports the balance of 30%. In such a scenario, 50% of the profits of the company (70% - 20%) do not qualify for the lower tax rate while the other 50% does, resulting in a net effective tax rate of 21.5% rather than 15%. This waters down the incentive dramatically and makes it less attractive from an investment perspective. This is notwithstanding that in the scenario illustrated there has been no shift of profits into the SEZ. The profits of the distribution company remain exactly what they were before when the product had to be imported in the absence of the manufacturing company in the SEZ. Rather, the manufacturing company has actually resulted in additional profits, in the form of the manufacturing profits, falling within the SA tax base. This is exactly what the incentive sets out to do!	
INCOME TAX ACT: Section 12R		

Comment	Recommendation
The concern of base erosion doesn't arise as a result of the SEZ company transacting with the connected company outside the SEZ per se. Rather, it arises only to the extent that they don't transact on arm's length terms. The remedy therefore lies in ensuring that this is the case. It can easily be done by extending the application of the transfer pricing provisions to apply to transactions between a qualifying company and any resident connected person or SA PE of a connected person.	The proposed 20% rule should be replaced by extending the transfer pricing rules to domestic transactions for qualifying companies.

INCOME TAX ACT:
Section 12R

Comment	Recommendation
We understand that there is strong opposition to the proposed cap on deductions. While we are not in a position to comment from first hand knowledge on the implications of such a cap on investments into VCCs, we understand that this could result in some difficulties for VCCs raising funds for legitimate investments into SMMEs and start-ups. We also understand the concern with respect to the potential impact on revenue collections. It is imperative that a full understanding of the venture capital funding landscape is obtained before any new policy decisions are made.	Any policy decision on the cap should be evidence-based and on a full understanding of the venture capital environment, including any unintended consequences.
As things stand, a taxpayer who makes an investment of R5 million in a VCC in a year of assessment will only get a deduction of R2.5 million. However, had that investment been made equally over two years of assessment, the taxpayer would get a deduction of the full R5 million. It is suggested that any expenditure in excess of any cap, roll over to subsequent years of assessment. This would eliminate the distortion illustrated above and mitigate the impact of the cap, while still protecting the fiscus insofar as revenue collections are concerned.	If the proposed cap is to be pursued, any expenditure in excess of the cap should be rolled over for deduction in the subsequent year of assessment.

INCOME TAX ACT:
Section 12J

Comment	Recommendation
It is further submitted that a policy concern should not arise insofar as investments by companies (certainly operating companies) are concerned. It is suggested that it is not appropriate for a cap to apply to investments by companies.	The cap should not apply to companies (or at least to operating companies).

INCOME TAX ACT:
Section 12J

4.4 Updating the employment tax incentives (ETI) to align with the national minimum wage

Comment	Recommendation
No comments.	

EMPLOYMENT TAX INCENTIVE ACT:
Section 4

4.5 Clarifying the interaction between the employment tax incentive and the SEZ provisions

Comment	Recommendation
The effective date of the proposed amendment is 1 March 2019. However, by the time the legislation is promulgated, EMP201 submissions would already have been submitted and ETI claims lodged on the basis of the legislation prior to its amendment. This could result in a short-payment of employees' tax, as well as penalties and interest.	The practical implications of the retrospective change to 1 March 2019 should be addressed.

EMPLOYMENT TAX INCENTIVE ACT:
Sections 1 and 6

5:*INCOME TAX*

INTERNATIONAL

	Comment	Recommendation
INCOME TAX ACT: Section 9D(2A) further proviso (i)*(aa)* and (ii)	It seems that the proposed level of the reduced comparable tax exemption has been set relatively arbitrarily, and we question whether the reduction is adequate. In our view, the purpose of the comparable tax exemption is: - from a *policy* perspective, to exclude the application of the CFC rules where the CFC is in a territory in which the level of taxation is generally accepted to not be "low"; and - from an *administrative* perspective, to limit the compliance burden on South African multinational groups and the SARS in scenarios where the ultimate tax liability would not justify such compliance burden. From a *policy* perspective, it has become globally acceptable that corporate tax rates of 15% and higher are not considered to be "low". For example, the current rate in the UK (which is not regarded as a tax haven) is 18%, and is likely to be reduced to 17% in the next year. It is troubling that on a simple headline tax rate comparison, UK CFCs would not qualify for the high tax exemption. If a rate of 15% is accepted as being a reasonable benchmark rate, an appropriate level for the comparable tax exemption in section 9D(2A) would be 53.5% (i.e. 15/28 = 53.5%).	The qualifying percentage in para (i)*(aa)* of the further *proviso* to s9D(2A), should be set at 53.5% (and not at 67.5%).

Comment	Recommendation
Purchases from connected persons The insertion of the words "*directly or indirectly*" in the proposed amendment to subsection (9A)*(a)*(iA) does not achieve the stated purpose. In subparagraph (iA), the critical focus of the anti-diversionary rule is on the person that the CFC *purchases* the goods or inputs from, and not on the person to which the CFC sells to. Accordingly, the words "*directly or indirectly*" should instead be inserted in the second part of subparagraph (iA) (i.e. "*… where that controlled foreign company purchased those goods or tangible intermediary inputs thereof* <u>*directly or indirectly*</u> *from one or more connected persons …*").	The wording of the proposed amendment should be refined to achieve its stated purpose.
Services to connected persons The combination of the phrase "*directly or indirectly*" with the phrase "*for the benefit of*" casts the net far too widely. The phrase "*directly or indirectly*" can be interpreted very broadly while the phrase "*for the benefit of*" is potentially vague and uncertain in the context of this provision. In addition, if the intention of the proposed amendment is to target back-to-back arrangements, it does not cater for situations in which the indirect benefits of services may be enjoyed by several parties who are not necessarily in the back-to-back structures that the proposed amendment is aimed at.	The wording of the proposed amendment should be refined to achieve its stated purpose.

INCOME TAX ACT:
Section 9D(9A)

5.2 Addressing circumvention of controlled foreign company anti-diversionary rules

Comment	Recommendation
The draft Bill contains no specific effective date contrary to what is indicated in the EM.	A specific effective date should be included in the Bill.

INCOME TAX ACT:
Section 9D(9A)

	Comment	Recommendation
INCOME TAX ACT: Section 1 definition of "permanent establishment"	It is not clear why this amendment is necessary. Before the MLI, the definition of "permanent establishment" in section 1 of the Act was, in any event, never aligned with the definitions of that term contained in South Africa's DTAs. Even though the basic framework of the various definitions of "permanent establishment" in SA's DTAs was based on the old (pre-MLI) OECD Model definition ("the old OECD definition"), there was in any event no direct alignment with the old OECD definition. Many of our DTAs had slight (or sometimes significant) deviations from the old OECD definition. Consequently, there has always been (and will always be) a "misalignment". Critically, from a policy perspective, we do not see the rationale for attempting to align what is essentially a domestic law source provision with a DTA concept. SA's reservation out of the MLI simply establishes our "two-way" DTA position. The definition in section 1 focuses solely on inbound activities by non-residents. One would have expected SA to cast the net slightly wider (as the post-2018 definition does) to catch inbound foreign investors in our domestic source rules, before giving them the opportunity to benefit from the potentially narrower DTA provisions.	The proposed amendment should be reconsidered or withdrawn.

5.3 Reviewing the definition of "permanent establishment"

Comment	Recommendation
The draft Bill contains no specific effective date contrary to what is indicated in the EM.	A specific effective date should be included in the Bill.

INCOME TAX ACT:
Section 1 definition of "permanent establishment"

5.4 Clarification of the qualifying criteria for domestic treasury management company

Comment	Recommendation
The effective date in the draft Bill does not correlate with that indicated in the EM.	The Bill and/or EM should be amended to align the stipulated effective date.

INCOME TAX ACT:
Section 1 definition of "domestic treasury management company"

INCOME TAX ACT:
Section 31 - definition of "affected transaction"

Comment

(1) "Associated enterprise" is not an OECD definition

It is inappropriate to import the concept of "*associated enterprises*" into the South African Income Tax Act. In the context of the OECD MTC, the term is not defined (as are terms such as "*resident*" or "*permanent establishment*", etc) and is better described as merely being a broad concept. The concept is described in the OECD MTC using deliberately broad, vague and ill-defined language solely to avoid restricting or overriding domestic law definitions that trigger the application of transfer pricing rules (such as the definition of "*connected person*" in the South African context). The description of an "associated person in the OECD MTC is certainly *not* intended to represent a standard or benchmark definition. Its incorporation into domestic law will create significant uncertainty as to when the transfer pricing rules are applicable.

Article 9 of the OECD MTC serves only two purposes, namely (in paragraph 1) to permit transfer pricing adjustments (profit-increases) in a Contracting State, and (in paragraph 2) to permit corresponding adjustments in the "*other State*". It is inappropriate to suggest that subparagraphs (a) and (b) of paragraph 1 are intended to create some form of definition. As suggested above, subparagraphs (a) and (b) simply ensure that domestic definitions are not disturbed.

Recommendation

The proposal to adopt the concept of "*associated enterprise*" as part of the definition of "connected person" should be withdrawn in its entirety.

Instead, the definition of "connected person" should be amended for the purposes of section 31 in order to address whatever the specific concerns of the fiscus are.

As an alternative, the introduction of a definition of "associated person" should be accompanied by detailed elaboration, thresholds and further definitions to clarify the intended ambit.

Comment

(1) "Associated enterprise" is not an OECD definition (cont)

The OECD's Commentary on Article 9 contains no discussion (at all) on sub-paragraphs (a) and (b), and only discusses transfer pricing adjustments. Compare this with the OECD's Commentaries on the definitions of, for example, "*permanent establishment*" and "*resident*". Even the OECD's Transfer Pricing Guidelines make no attempt to discuss in any detail the meaning of the term "*associated enterprise*". This term does not appear anywhere in the OECD MTC, except as a descriptor/header for Article 9, and is not even used in the body of Article 9.

Critically, the fact that very broad and unrestricted language - as discussed in more detail in our other submissions below - is used in sub-paras (a) and (b), further confirms that "associated enterprise" is not a "definition". To adopt the concept (as a critical "definition") into the South African Income Tax Act would be inappropriate.

The statement in the EM that "*both the OECD and UN use the concept of 'associated enterprises' when applying the arm's length principle*" is misleading. This creates the impression that the concept of "*associated enterprise*" is a critical definition that triggers the application of transfer pricing provisions. In fact, the term is nothing more than a placeholder: the MTC in fact does not venture into defining what relationships would trigger the application of transfer pricing rules, but rather wants to ensure that such relationships are determined and defined in accordance with domestic law.

INCOME TAX ACT:
Section 31 - definition of "affected transaction"

INCOME TAX ACT: Section 31 - definition of "affected transaction"	Comment	Recommendation
	(2) The new "definition" will require multiple further definitions, elaborations and clarifications The wide and unrestricted language in Article 9(1) incorporates many terms and concepts that will make interpretation and application the subject of uncertainty and dispute. Not only will there be uncertainty as to when section 31 applies as a substantive matter, there will also be a consequential impact on documentation compliance. For example: • **Participation** In the context of "*participates in … capital*" there is no reference to percentage. It is not clear whether this means that owning just one share in a company results in that company being "*associated*". It seems inappropriate that if a 20% shareholding is held in a company and one single other shareholder holds 80% of the shares in that company (with the result that the 20% shareholder does not have any real influence) that the 20% shareholder and the company will be "*associated*". In the context of "*the same persons participate … in the management [or] control …*", it seems inappropriate that unrelated companies be "*associated*" merely because they share a single non-executive director. There are a myriad of other anomalous (and nonsensical) examples that would arise as a result of the unlimited application of Article 9.	Should a definition of "associated enterprise" be introduced into the Income Tax Act, this should be accompanied by detailed elaboration, thresholds and further definitions to clarify the intended ambit.

Comment

(2) The new "definition" will require multiple further definitions, elaborations and clarifications (cont)

- **Control**

The concept of "*control*" is undefined and remains controversial. It is not clear whether this would be *de facto* control by human decision-makers (akin to the concept of "*effective management*") or whether it would include *de jure* control such as shareholding, voting rights and authority to appoint directors.

- **Management**

Equally, the concept of "*management*" is undefined and unclear. It is not clear whether this is intended to cover senior-level managers (e.g. directors) or mid/lower-level managers, or both.

- **Enterprise**

The concept of "*enterprise*" is foreign to South African income tax law. The extent of the overlap of the concept with the definition of "person" is unclear and uncertain. An example of the problems this could present is that section 31 relies heavily on the definition of "resident", which is defined in section 1. In order to be a "resident" as defined, one needs to be a "person", and the definition of "resident" in section 1 does not contemplate an "enterprise".

- **"Participates directly or indirectly"**

The composite phrase "*participates directly or indirectly in the management, control or capital of an enterprise*" simply exacerbates (exponentially) the vagueness of the individual components of the phrase. The phrase has no autonomous international meaning and (as noted above), even the OECD makes no attempt to expand or clarify its intended interpretation and application. It would not only be inappropriate but also irresponsible and reckless to introduce a concept into our tax law that is so fraught with vagueness and uncertainty.

INCOME TAX ACT:
Section 31 - definition of "affected transaction"

5.5 Review of the "affected transaction" definition in the arm's length transfer pricing rules

Comment	Recommendation
The EM does not provide any examples of situations in which the definition of "connected person" will not apply nor of situations in which the "associated enterprise requirement will extend the definition of "affected transaction".	Appropriate examples should be included in the EM to illustrate the effect of the proposed amendment.

INCOME TAX ACT:
Section 31 - definition of "affected transaction"

	Comment	Recommendation
	The draft Bill contains no specific effective date contrary to what is indicated in the EM.	A specific effective date should be included in the Bill.
	It is not clear what the purpose of the proposed proviso is. As indicated in the EM, para 43(1A) does not apply to a foreign currency debt. There is therefore no capital gain or loss determined under para 43(1A) in the examples used in the EM to which the proviso could possibly apply. If anything, it should simply be provided that para 43(1) applies to the assets contemplated in para 43(6A) such that any capital gain or loss is determined in the foreign currency. This would eliminate the effect of any movement in exchange rates and would result in the correct answer without reverting to s25D (provided that any capital gain or loss is adjusted for the effect of s24I(4)) - so in example 2 this would result in an initial capital loss of 40 (X$20 x 2), but reduced by the deduction under s24I(4) of 20 to give a final capital loss of 20.	The proposed amendment requires reconsideration.
INCOME TAX ACT: Section 24I and paragraph 43 of the Eighth Schedule		

6:VALUE ADDED TAX

6.1 Clarifying financial services to include the transfer of ownership of reinsurance relating to long-term reinsurance policies

Comment	Recommendation
No comments.	

VALUE ADDED TAX ACT:
Section 2(1)*(i)*

VALUE ADDED TAX ACT: Sections 8(25)	**Comment**	**Recommendation**
	It is proposed that section 8(25) be amended to include the sale and leaseback of fixed property as an exception to the proviso. It is not clear whether the purpose of the proposed amendment is to clarify existing policy or constitutes a variation of that policy. The concept of "going concern" in section 8(25) is arguably different from the term used in section 11(1)*(e)*. The term in section 8(25) makes no reference to section 11(1)*(e)* and therefore arguably takes on a different meaning.	Clarification should be provided as to whether the purpose of the proposed amendment is to clarify existing policy or to vary that policy.
	Notwithstanding the apparent intent to broaden the scope of the application of section 8(25) in the context of section 42 and 45 transactions to cover sale and leasebacks, the manner in which it has been drafted actually limits VAT relief only to sales and leasebacks. For example, where a property that is leased to a third party is transferred in terms of section 42 or 45 , it will no longer qualify for relief in terms of section 8(25). Instead of adding a new paragraph to the proviso, the provision should be drafted as an exception to paragraph (i) of the proviso.	The amendment requires redrafting to prevent it from being a further restriction of the relief.

	Comment	Recommendation
VALUE ADDED TAX ACT: Section 72	The amendment introduces a requirement that similar difficulties/anomalies/incongruities must have arisen for any other vendor/class of vendor of the same kind who make similar supplies. This will result in practical difficulties. It is proposed that before a vendor may approach SARS for a decision, it must consult with and be aware of other vendors in its industry experiencing the same difficulty/circumstances in which the same difficulty is being experienced. It is highly unlikely that a specific vendor will know or be aware of difficulties being experienced by another vendor. In addition, from a business perspective (including intellectual property confidentiality and competition law), businesses will generally not consult each other on, for example, new products to be launched when a difficulty with the application of the Act is experienced by it. In many instances, a vendor may experience difficulties which may, due to the specific manner in which the vendor operates, not affect other vendors. The proposed amendment does not promote good practice and tax administration.	The proposed requirement should be withdrawn and that, in addressing the concerns of the fiscus, further consultation be held with stakeholders.

Comment	Recommendation
The proposed amendment introduces a requirement that the decision must not reduce or increase the liability for tax, which does not take into account the transaction or circumstances as a whole.	It is recommended that the current provision remain unchanged, on the basis that it allows the Commissioner to consider the transaction in question holistically, including the timing of tax liabilities.

VALUE ADDED TAX ACT:
Sections 72

Comment	Recommendation
The proposed amendment introduces a requirement that the decision must not be contrary to the construct and policy intent of the Act as a whole or any provision thereof. The proposed amendment also allows for a public notice setting out a list of transactions in respect of which no decision may be made to be published.	The policy as it relates to the various provisions of the Act is generally unknown, save for the published SARS documents which are (for the most part) general in nature. Taxpayers currently experience uncertainty in many instances with regard to the policy. In order for a vendor to evaluate the decision and determine if the proposed provision may be applicable, it is essential that the policy intent and construct of the Act be documented and published for taxpayers' information and reference. Without this, a taxpayer would in many instances not know what the policy intent is. That said, the courts have made it clear that the intention of legislation can only be determined having regards to the words actually used, read in context having regard to the apparent purpose. In other words, the policy intent is to be determined from the legislation itself and not from the say so of a SARS official.

VALUE ADDED TAX ACT:
Sections 72

	Comment	Recommendation
	If a "no rulings" list is published, SARS will not be aware of those transactions that may fall within the ambit of section 72. Taxpayers would be prohibited from applying for such an arrangement. A taxpayer will be left without any recourse when experiencing a difficulty simply as a result of the manner in which it conducts its business. The proposed amendment makes provision for a "no rulings" list. It is questioned whether SARS will ever engage with requests for a decision under section 72. It is noted that SARS has seldom applied the said provisions over the past 2-3 years.	It is not appropriate for SARS to publish a list of matters for which no decision will be made. Rather, every application should be considered on its merits having regard to its particular facts and circumstances. Nothing compels SARS to make a decision as contemplated in the section and it can always decline to do so if it is not satisfied as required.
VALUE ADDED TAX ACT: Sections 72	The proposed effective date is problematic in that it effectively results in section 72 being rendered inoperative insofar as applications between 21 July 2019 and the date of promulgation are concerned. Due to the transactional nature of VAT, the need for section 72 is essential in an ever changing business landscape. A vendor needs immediate certainty with regard to the application of the Act to the difficulty it is experiencing.	The amendment should be applicable only from date of promulgation and not from 21 July 2019. Because the current provisions are the only provisions that may be used to evaluate section 72 applications, any applications submitted until date of promulgation must be considered under the current provisions of section 72.

6.3 Reviewing Section 72 of the VAT Act

Comment	Recommendation
The only remedies available to taxpayers insofar as a decision or non-decision is concerned are a review in terms of section 9 of the TAA or in terms of PAJA.	A decision under section 72 should be made subject to objection and appeal in order to provide for a more cost effective measure for taxpayers to dispute decisions made by SARS (other than a PAJA review).

VALUE ADDED TAX ACT:
Section 72

6.4 Refining the VAT treatment of foreign donor funded projects

Comment	Recommendation
Regarding section 1(1) - the definition of “enterprise”: A conflict may arise between *(b)*(i) and the proposed *(b)*(v). It is not clear whether *(b)*(v) overrides *(b)*(i). Should the intention be that *(b)*(v) overrides *(b)*(i), an amendment should be made to ensure that the policy intent is achieved.	It is suggested that *(b)*(v) be amended to include the words “Notwithstanding any other provision in this paragraph”.
Regarding section 1(1) - the definition of “foreign donor funded project”: The term “official development assistance agreement” is not defined.	It is suggested that a definition of “official development assistance agreement” be included to clarify the requirements applicable. The interaction between the the two provisions should be considered, and clarity provided. A streamlined and dedicated approval process should be introduced to allow for efficient and expedited turnaround times. Consideration should also be given to publish or make available an easily accessible list of pre-approved projects.

VALUE ADDED TAX ACT:
Sections 1(1), 8(5B) and 50(1)

6.4 Refining the VAT treatment of foreign donor funded projects

Comment	Recommendation
It is not clear how section 231(3) of the Constitution aligns with the approval by the Minister of Finance. Is the additional requirement restricting this definition considering that Parliament has approved it yet the Minister may not do so? Is this an approval created just for VAT purposes?	Appropriate clarification should be provided.
What are the anticipated turnaround times for the approval? Will a list of projects approved be published? Will there be a dedicated and efficient process available to obtain this approval?	Appropriate clarification should be provided.

VALUE ADDED TAX ACT:
Sections 1(1), 8(5B) and 50(1)

VALUE ADDED TAX ACT:
Sections 1(1), 8(5B) and 50(1)

Comment	Recommendation
What happens to the FDFPs that are currently already registered?	Transitional rules should be provided, which should include guidance for specific industries (for example Universities and welfare organisations that receive substantial donor funding from more than 5 or 6 donors, etc).
The amendment to section 50(1) deems the FDFP conducted by an implementing agent to be a separate person for VAT purposes. This will thereafter permit individual VAT registrations. However, section 50(2) does not force this separate registration but allows the Commissioner on application to permit this. What is the SARS policy regarding a single registration for multiple FDFPs? Why is a separate VAT registration required for each project?	Section 50(2) does not force a separate registration. Should the policy be that a separate registration is required, then engagement with stakeholders is recommended so that the policy rationale may be understood.
Forcing an implementing agent to have more than one VAT registration will be onerous, taking the administration burden and cost into account where several FDFPs are managed by a single implementing agent.	Should a separate registration be imposed, consideration should be given to allowing an implementing agency to account for all of the numerous FDFP's under one separate VAT registration.

Comment	Recommendation
The amendments are set to come into operation on 1 April 2020, which only allows for a very short implementation period.	The effective date of 1 April 2020 should be postponed to allow FDFPs and any person who will be affected sufficient time to effect the necessary changes, which may include system updates, supplier updates, documentation requirements, etc.
	What is the likelihood of the various processes referred to in the EM (e.g. approval by the Minister of Finance) being ready on 1 April 2020? In the case that the processes are not in place by this date, how will the application processes be managed? When will notification of such processes be made available to taxpayers?

VALUE ADDED TAX ACT:
Sections 1(1), 8(5B) and 50(1)

7: CLAUSE-BY-CLAUSE

Comment	Recommendation
While the rationale for the proposed deletion of the deemed source rule for recoupments is understood in the context of residents, it is questioned whether that rationale is relevant in the context of non-residents. For example, it would seemingly open the door for a foreign company with a branch in SA to argue that the sale of an asset of that branch is not from a SA source and therefore not subject to SA tax on the exact basis set out in the EM.	The proposed deletion of the provision should be carefully considered in light of this comment.

INCOME TAX ACT:
Section 1

	Comment	Recommendation
	The proposed requirement that the amount of interest must have been included in taxable income in order to qualify for deduction under section 7F is misplaced. Although an amount of interest that is deemed to have accrued to a person in terms of section 7E might have been taken into account in determining the taxable income of a person, such an amount can never have been "included in the taxable income of that person". This is because amounts that accrue to a person are always included in gross income, from which amounts that are exempt are subtracted to yield income, from which (in turn) deductions are subtracted to yield taxable income. The existing requirement of section 7F that the amount of interest must be deemed to have accrued is sufficient (on the basis that, if it is so deemed to have accrued, it is included in gross income and thereby taken into account in determining taxable income).	The proposed insertion of the requirement that the amount of interest must have been included in taxable income is completely misplaced and should be withdrawn. If it is the intention that amounts of interest that were previously exempt should not qualify for deduction in terms of section 7F, appropriate amendments should be made in this regard (e.g. by providing for a deduction *to the extent that the interest was included in income*).
INCOME TAX ACT: Section 7F	It is concerning that the effective date is proposed to be in respect of interest paid by SARS on after 1 March 2018 and would result in a retrospective tax liability in some cases. The amendment should be prospective in nature (e.g. by applying to interest repaid in years of assessment commencing on or after 1 January 2019).	The amendment should be prospective, not retrospective.

Clause 6 - trading stock not previously held as trading stock

Comment	Recommendation
The lack of a specific effective date the proposed amendment creates uncertainty as to whether it applies for years of assessment ending on or after the promulgation date or only to conversions of capital assets to trading stock on or after the promulgation date.	A specific effective date should be included.

INCOME TAX ACT:
Section 8

Clause 8 - Section 8E definition of "hybrid equity instrument": partial redemptions

	Comment	Recommendation
INCOME TAX ACT: Section 8E	The proposed amendment is misplaced in that it confuses the different company law and tax law concepts underpinning payments to shareholders. The proposed amendment contemplates a situation in which the company is contractually obliged to distribute a return of capital or the holder has a right to require the company to distribute a return of capital. However, a return of capital is simply a reduction of CTC that is (in terms of the definition of CTC) made purely at the direction (and discretion) of the directors of the company. It is quite possible for the redemption of a share (whether in whole or in part) to take place that does not involve any return of capital (this would be the case where there is a redemption of a share but the directors fail to make a determination, as contemplated in the definition of CTC, in respect of that redemption). It is submitted that, in the context of section 8E, the issue is essentially whether a portion of the subscription price in respect of the instrument in question is repaid. The existing wording of the definition of "hybrid equity instrument" is adequate to cover all circumstances and transactions that involve such a repayment. To attempt to describe or list all such circumstances and transactions within the definition of "hybrid equity instrument" would likely create opportunities for avoidance and would be inappropriate and counter-productive. Finally, it should be self-evident that the issues outlined above are merely compounded in the context of a foreign return of capital, which involves the application of foreign company law and foreign tax laws.	The proposed amendment should be withdrawn and the current wording of the definition of "hybrid equity instrument" should be retained. Given the plethora of circumstances in which the full or partial redemption of a "hybrid equity instrument" can take place (simply because of the fact that preference shares, by their very nature, vary substantially in terms of the different rights and obligations that attach thereto), it is suggested that, should certainty be required relating to partial redemptions, the issue be dealt with by way of an appropriate Interpretation Note.

Clause 9 - Definition of third-party backed shares & deletion of definition of "enforcement obligation"

Comment	Recommendation
The EM simply states that the proposed amendments delete the definition of "enforcement obligation". No explanation is given for why this has been done. It is therefore not possible to comment on whether this amendment is appropriate.	The EM should explain why it is proposed that the definition of "enforcement obligation" be deleted.

INCOME TAX ACT:
Section 8EA

Clause 10 - Exclusion of headquarter companies from definition of a CFC

Comment	Recommendation
No effective date is specified for the amendment to the definition of a CFC to exclude a headquarter company.	Given that this was an oversight and unintended, the amendment should be backdated to the date the original amendment took effect.

INCOME TAX ACT:
Section 9D

Comment	Recommendation
No specific effective date is provided.	On the basis that, as per the EM, the purpose of the proposed amendment is to align the policy intent with amendments made in 2018, the amendment should be made effective from 1 January 2019 and applicable in respect of years of assessment commencing on or after that date (i.e. the effective date of the amendments made in 2018).

INCOME TAX ACT:
Section 11*(j)*

Clause 13 - Central bank exemption

Comment	Recommendation
No specific effective date is provided, which will create uncertainty.	A specific effective date should be provided for.

INCOME TAX ACT:
Section 10

INCOME TAX ACT:
Section 23O

Comment	Recommendation
The proposed amendment fundamentally alters the manner in which section 23O applies and therefore represents a change in policy, and to state (as the EM does) that the purpose of the proposed amendment is to remove words that "are confusing" is misleading. Effectively, under current law, the amount of the deduction available to an SMME in respect of trading stock will be reduced by any amount received by it and applied by it in respect of the trading stock. The effect of the proposed amendment is that the deduction will be reduced by the amount received, irrespective of whether the amount was actually applied by the SMME. Affected SMMEs, already facedstruggling in a difficult economic environment, will be severely affected.	Given the difficulties faced by SMMEs in the current economic environment, the proposed amendment should be withdrawn.

8: MATTERS NOT ADDRESSED IN THE BILL; GENERAL COMMENTS

Comment	Recommendation
We have, in commenting on specific issues and clauses, highlighted instances in which there are clearly problems with effective dates. Our comments in this regard should not be seen as an exhaustive review of all of the applicable dates, and there are, given the nature and the extent of the problems we have identified in specific instances, almost certainly problems with other effective dates that we have not highlighted in our review of the draft TLAB.	It is imperative that a comprehensive review of all applicable effective dates be undertaken to ensure that each effective date (whether specified in the specific amending provision or applicable on promulgation) is correct and that each effective date is consistent and consonant with the provision that is being amended. This will limit the necessity to retrospectively address obvious errors in future years.

Effective Dates

Outstanding proposals

Comment	Recommendation
Over the previous four years, the Budget has included proposals on, *inter alia*, the following issues that have not yet been addressed: ○ loyalty programmes; ○ educational services; ○ loop transactions; ○ national housing programmes.	Outstanding proposals should be actioned as a matter of urgency.

National Budget Review

Technical correction: Amendment to section 11(jA) re "holding company"

	Comment	Recommendation
INCOME TAX ACT: Section 11(*j*A)	We have a concern with the amendment made to section 11(*j*A) in the Taxation Laws Amendment Act, 2018. Effectively, for years of assessment commencing on or after 1 January 2018, a "holding company" (as defined in the Banks Act, 1990) is excluded from the ambit of section 11(*j*A), and is therefore not entitled to the deductible allowance available to covered persons. This exclusion is far-reaching - the definition in the Banks Act refers to the definition of "holding company" in the Companies Act, 2008. Effectively, any "covered person" that controls a subsidiary based on shareholder or board member voting rights is excluded from the ambit of section 11(*j*A). The fact that the amendment was mae retrospective compounds the problem. This does not appear to have been the intention and does not accord with policy - if this was the case, the majority of "covered persons" would be excluded. The objective of section 11(*j*A) was to essentially provide a dispensation for banking groups to substitute the previous SARS Directive issued for banks.	The unintended anomaly can easily be corrected by merely amending the references to "holding company" in section 11(*j*A) to "controlling company". This would give effect to the original intention and policy. Given that this is an obvious error, we recommend that this matter be addressed in the current legislative cycle and retrospectively to the date on which the amendment in the TLAB, 2018, became effective.

Comment

The effect of the amendment made in the Taxation Laws Amendment Act, 2018, is that any Bank that holds a subsidiary (even a dormant subsidiary) will be excluded from the relief provided for in section 11*(j*A*)*. Again, this could never have been the intention. In this regard, we refer to the clause-by-clause commentary in the EM relating to the amendment to section 11*(j*A*)*, which provides as follows:

"*Paragraph (f): The proposed amendment to paragraph (jA) is a consequential amendment to 2017 amendments dealing with the exclusion of controlling companies and clarify the policy intent that any holding company as defined in the Banks Act is not eligible for the allowance in section 11(jA)*".

It should further be appreciated that section 24JB includes any controlling company in respect of a bank in its ambit, and that the original version of section 11*(jA)* did not specifically exclude a controlling company but achieved this by applying only to covered persons as defined in subsection *(c)*(i) to (iii) and *(d)* of section 24JB.

Subsection *(c)*(iv) of the definition of "covered person", which refers to a controlling company of a bank as per the Banks Act, was therefore excluded.

The 2018 amendment, in our view, was therefore not necessary, and this is supported by the clause-by-clause explanation quoted above.

It is submitted that it was the intention to use the same wording in the revised section 11*(j*A*)* (i.e. as used in section 24JB), given that the original intention was always to exclude bank controlling companies from the envisaged doubtful debt allowances dispensation.

INCOME TAX ACT:
Section 11*(j*A*)*

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INCOME TAX ACT: Section 11*(j*A*)*	The effect of the amendment made in the Taxation Laws Amendment Act, 2018, is that any Bank that holds a subsidiary (even a dormant subsidiary) will be excluded from the relief provided for in section 11*(j*A*)*. Again, this could never have been the intention. In this regard, we refer to the clause-by-clause commentary in the EM relating to the amendment to section 11*(j*A*)*, which provides as follows: "*Paragraph (f): The proposed amendment to paragraph (jA) is a consequential amendment to 2017 amendments dealing with the exclusion of controlling companies and clarify the policy intent that any holding company as defined in the Banks Act is not eligible for the allowance in section 11(jA)*". It should further be appreciated that section 24JB includes any controlling company in respect of a bank in its ambit, and that the original version of section 11*(jA)* did not specifically exclude a controlling company but achieved this by applying only to covered persons as defined in subsection *(c)*(i) to (iii) and *(d)* of section 24JB.	