2020 TAX BILLS

Select Committee on Finance

Presenters: National Treasury and SARS | 17 November 2020

national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

Officials presenting

- Ismail Momoniat, NT
- Yanga Mputa, NT
- Christopher Axelson, NT
- Franz Tomasek, SARS

Consultation process

- The 2020 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill (Draft Rates Bill) was first published for public comment on the same day as the Budget (26 February 2020) and gives effect to changes in rates and monetary thresholds, transfer duty and excise duties on alcohol and tobacco as announced in Chapter 4 the Budget Review. The 2020 Draft Rates Bill was published again for the second time for public comment on 31 July 2020.
- The 2020 Draft Taxation Laws Amendment Bill (Draft TLAB) and the 2020 Draft Tax Administration Laws Amendment Bill (Draft TALAB) contain the remainder of tax announcements made in Chapter 4 of the Annexure C of the Budget Review, which are more complex, technical and administrative in nature. The 2020 Draft TLAB & 2020 Draft TALAB were published for public comment on 31 July 2020.
- National Treasury and SARS received written comments from 112 contributors on the 2020 draft tax bills by deadline of 31 August 2020.
- National Treasury and SARS briefed the SCoF on the 2020 draft tax bills on 19 August 2020.
- Workshops with stakeholders to discuss their comments on the 2020 draft tax bills were held by National Treasury and SARS on 9, 10 and 11 September 2020.
- Oral presentations by taxpayers and tax advisors on the 2020 draft tax bills were made at hearings by the SCoF on 7 October 2020.
- On 13 October 2020, National Treasury and SARS presented to the SCoF a draft response document containing a summary of draft responses to public comments received on the draft tax bills.
- The 2020 tax bills were introduced by the Minister in the National Assembly on 28 October 2020.
- The SCoF voted on the 2020 tax bills on 11 November 2020.
- Today, 17 November 2020, National Treasury and SARS are briefing the Select Committee on Finance on key issues in the 2020 tax bills .

Key issues raised in the 2020 tax bills

Key issues in the 2020 tax bills that received the most comments in the SCoF public hearings are the following:

2020 Rates Bill

- Increase on excise duty on tobacco

2020 TLAB

- **Customs and Excise Act**
- Introduction of export taxes on scrap metals
- **Employment, Individuals and Savings**
- Addressing an anomaly in the tax exemption of employer provided bursaries
- Withdrawing from retirement funds upon emigration
- Amending the 183 day rule to the foreign remuneration exemption, in light of the 2020 travel ban
- **Business Tax (General)**
- Clarifying rollover relief for unbundling transactions

2020 TALAB

- **Tax Administration Act, 2011**
- Raising of assessments based on an estimate
- Grace period to determine if a payment in excess of an assessment was erroneous
- **Income Tax Act, 1962; Value-Added Tax Act, 1991 & Tax Administration Act, 2011**
- Removal of requirement to prove intent from certain statutory tax offences

Technical changes to the 2020 Tax Bills after the introduction by the Minister in the National Assembly

- After the introduction of the tax bills by the Minister of Finance in the National Assembly , the following technical correction were made in the 2020 Tax Bills
- **2020 Rates Bill**
  - ***Clause 4 of the 2020 Rates and Monetary Amounts and Amendment of Revenue Laws Bill [B26-2020]***
    - The amendment corrects the paragraph numbers.
- **2020 TLAB**
  - ***Clause 17 of the 2020 Taxation Laws Amendment Bill [B27-2020]***
    - The amendment corrects the date of coming into operation of a provision.

2020 Rates Bill

Increase on excise duty of tobacco (Clause 8 & Schedule II, Part 1 of the Rates Bill: Part 2A of Schedule No 1 to the Customs and Excise Act)

- In the 2020 Rates Bill, a proposal was made to increase the excise duty on tobacco from R16.66/20 cigarettes to R17.40/20 cigarettes, with effect from 26 February 2020.

- As a result, the excise burden for tobacco is slightly above the targeted 40 per cent of the retail selling price of the most popular brand

2020 TLAB

Introduction of export taxes on scrap metals

Introduction of export taxes on scrap metals (Clauses 58, 59 & 60 of the TLAB: Section 48 , Schedules 1 & 5 of the Customs and Excise Act)

- On 10 May 2013, the then Minister of Economic Development issued a Trade Policy Directive for the International Trade Administration Commission of South Africa ("ITAC") to regulate the exportation of scrap metal through the introduction of the Price Preference System (PPS).
- The objective was to improve the availability of better-quality scrap metal at affordable prices for foundries and mills in the domestic market to assist them in becoming more cost competitive as against imports, enhancing investment, jobs and industrialization.
- The PPS seems not to have provided sufficient support such that the sector can flourish in competition with global counterparts, many of which benefit from an export tax on scrap and lower domestic prices for scrap. ITAC conducted its investigation and based on the findings, recommended that the current PPS be replaced with export duties since it has not effectively provided support to the foundries and mills with availability of affordable, quality scrap.
- The DTIC consider an export tax to be superior to the PPS in terms of its easy administration and believe it should be more effective in reducing the domestic price as it will have the effect of reducing the export price achieved by local scrap dealers, unlike the PPS.
- Based on the above, proposed changes were made in the Customs and Excise Act and schedules to the Customs and Excise Act to insert provisions dealing with the introduction of export duties on scrap metals , with effect from 1 April 2021.

Introduction of export taxes on scrap metals (Clauses 58, 59 & 60 of the TLAB: Section 48 , Schedules 1 & 5 of the Customs and Excise Act)

Scrap metal category	Equivalent specific tax(% per tonne)
Ferrous waste and scrap: remelting scrap ingots of iron or steel	
Waste and scrap of cast iron	20%
Waste and scrap alloy steel	
Stainless steel	15%
Waste and scrap of tinned iron or steel	20%
Other waste and scrap	
Turnings, shavings, chips, milling waste, sawdust, filings, trimmings and stampings, whether or not in bundles	20%
Remelting scrap ingots	20%
Copper waste and scrap	10%
Aluminium waste and scrap	15%

Addressing an anomaly in the tax exemption of employer provided bursaries

Addressing an anomaly in the tax exemption of employer provided bursaries
(Clause 10 of the TLAB: Sections 10(1)(q) and 10(1)(qA) of the Income Tax Act)

- The Act contains provisions that provide exemption in respect of *bona fide* scholarship or bursary granted by an employer to an employee or relative of qualifying employees, subject to certain monetary limits and requirements.
- When this exemption was initially introduced in 1992, the applicability for tax exemption was dependent on the fact that the employee's remuneration was **not** subject to an element of salary sacrifice.
- In 2006, changes were made in the Act to remove the requirement that the employees remuneration should not be subject to an element of salary sacrifice.
- Government has noticed that a number of tax schemes have emerged in respect of employer bursaries granted to the relatives of employees, for example:
  - These schemes are developed by an institution other than the employer and marketed to the employer and seek to reclassify ordinary taxable remuneration received by the employee as a tax exempt bursary granted to the relatives of employees.
  - The portion of the salary sacrificed by the employee is paid directly by the employer to the respective school and is treated as a tax-exempt bursary granted to the relatives of the employees.

Addressing an anomaly in the tax exemption of employer provided bursaries
(Clause 10 of the TLAB: Sections 10(1)(q) and 10(1)(qA) of the Income Tax Act)

- In order to address these concerns, the following changes were proposed in the 2020 Draft TLAB that was published for public comment on 31 July 2020:
  - The exemption in respect of a *bona fide* bursary or scholarship granted by the employer to the relatives of the employee should only apply if that *bona fide* bursary or scholarship granted by the employer is not restricted only to the relatives of the employees, but is an open bursary or scholarship available and provided to members of the general public;
  - The requirement that the applicability of the exemption is dependent on the fact that the employee's remuneration package is not subject to an element of salary sacrifice, be reinstated; and
  - As a means of further encouraging employers to grant bursaries to relatives of employees without subjecting such bursary to an element of salary sacrifice, that the employer deduction in relation to said bursaries is only afforded if the bursary to the employee's relative is not subject to an element of salary sacrifice.

Addressing an anomaly in the tax exemption of employer provided bursaries
(Clause 10 of the TLAB: Sections 10(1)(q) and 10(1)(qA) of the Income Tax Act)

- After the public consultation process, the following changes were made in the 2020 TLAB that was tabled by the Minister, in order to take into account comments received:
  - The requirement that the bursary or scholarship granted by the employer should be an open bursary or scholarship available and provided to members of the general public was removed, and the tax exemption will not be depended on whether or not the bursary or scholarship is open to members of the general public;
  - The only test that will remain is that the exemption will only apply if the employee's remuneration package is not subject to an element of salary sacrifice. As a result, if the bursary or scholarship is subject to an element of salary sacrifice, the exemption will be denied;
  - In turn, if the bursary or scholarship is subject to an element of salary sacrifice, then the employer deduction in relation to the said bursary or scholarship will be allowed.

Withdrawing from retirement funds upon emigration

Withdrawing from retirement funds upon emigration (Clause 2 of the TLAB: Section 1 of the Income Tax Act

- The definitions of “pension preservation fund”, “provident preservation fund” and “retirement annuity fund” in section 1 of the Act currently make provision for a payment of lump sum benefits when a member of a pension preservation, provident preservation or retirement annuity fund withdraws from the retirement fund due to that member emigrating from South Africa, and such emigration is recognised by the South African Reserve Bank (SARB) for exchange control purposes.
- As outlined in Annexure E of the 2020 Budget Review, Government will be modernising the foreign exchange system. As a result, a new capital flow management system will be put in place. In relation to individuals, one of the changes to be implemented during modernisation of the foreign exchange system is the phasing out of the concept of “emigration” for exchange control purposes.
- The phasing out of this concept will have a direct impact on the application of the tax rules as the tax legislation makes provision for a payment of lump sum benefits when a member emigrates from South Africa and such emigration is recognised by the SARB for exchange control purposes.
- In order to ensure efficient application of the tax legislation, it is proposed that the definitions of “pension preservation fund”, “provident preservation fund” and “retirement annuity fund” in section 1 of the Act be amended to allow for the payment of lump sum benefits after a member of the fund ceases to be a South African tax resident (as defined in the Act), and the member has remained non-tax resident for 3 consecutive years or longer.

Amending the 183 day rule to the foreign remuneration exemption, in light of the 2020 travel ban

Amending the 183 day rule to the foreign remuneration exemption , in light of the 2020 travel ban
(Clause 10 of the TLAB: Section 10(1)(o)(ii) of the Income Tax Act)

- As stated in the Response Document to COVID 19 Tax Bills to the SCoF on 28 July 2020 as well as media statement issued by National Treasury on 31 July 2020, National Treasury would consider additional tax proposals which may have less of an impact on the fiscal framework, such as the tax-residency test.

- In terms of the current provisions of section 10(1)(o)(ii) of the Income Tax Act, individuals who spent more than 183 days working outside South Africa would have qualified for exemption in respect of their remuneration.

- However, due to travel bans during the COVID-19 pandemic, these individuals could not travel in order to work outside South Africa, and therefore could not qualify for the above-mentioned section 10(1)(o)(ii) exemption.

Amending the 183 day rule to the foreign remuneration exemption , in light of the 2020 travel ban
(Clause 10 of the TLAB: Section 10(1)(o)(ii) of the Income Tax Act)

- In order to take into account the lockdown period during the COVID-19 pandemic, changes were made in the 2020 TLAB so that the 66 days that commence on 27 March 2020 and end on 31 May 2020, when the country operated under Covid-19 alert level 5 and 4, should be subtracted from the 183 day threshold rule used to determine the eligibility for exemption of foreign remuneration.
- In order to qualify for exemption, the number of days that a person spent working outside South Africa will be reduced to more than 117 days in any 12 month period, for years of assessment ending from 29 February2020 to 28 February 2021.
- The current requirement in section 10(1)(o)(ii) that 60 of the days abroad should be a continuous period remains as is. In view of the fact that these individuals would have qualified for section 10(1)(o)(ii) exemption if there was no lockdown due to COVID 19 pandemic, the proposed relief to reduce the number of days from 183 to 117 in order to take into account the lockdown period during the COVID-19 pandemic is likely to be revenue neutral and will have minimal impact on the fiscal framework.

Clarifying the roll-over relief for unbundling transactions

Clarifying rollover relief for unbundling transactions
(Clause 34 of the TLAB: Section 46 of the Income Tax Act)

- The Act contains corporate reorganisation rules (sections 45-47 of the Act) that allow for the tax neutral transfer of assets between companies that are part of the same group of companies .
- The corporate reorganisation rules contain provision in section 46 that provides for roll over relief where shares of a resident company (unbundled company) that are held by another resident company (unbundling company) are distributed to the shareholders of that unbundling company in accordance with the effective interest of those shareholders.
- These unbundling transactions are also subject to an anti-avoidance measure aimed at limiting or discouraging tax avoidance by taxpayers from distributing shares on a tax neutral basis.
- This anti-avoidance measure makes provision for roll-over relief not to be granted if immediately after the distribution of shares in terms of an unbundling transaction, 20 per cent or more of the shares in the unbundled company are held by disqualified persons (such as non-residents and tax exempt entities) either alone or together with any connected persons (who is also a disqualified person) in relation to that disqualified person.

Clarifying rollover relief for unbundling transactions
(Clause 34 of the TLAB: Section 46 of the Income Tax Act)

- In order to address these concerns, the following changes were proposed in the 2020 Draft TLAB that was published for public comment on 31 July 2020:
  - To close this loophole, changes were made to remove the reference to "connected person".
  - The intent was to disallow deferral in terms of an unbundling transaction if, immediately after any distribution of shares in terms of an unbundling transaction, an aggregate of 20 per cent or more of the shares in the unbundled company are held by disqualified persons.
  - It was intended that these changes should apply in respect of unbundling transactions entered into on or after the date on which the draft TLAB was published for public comment (i.e. 31 July 2020).

Clarifying rollover relief for unbundling transactions
(Clause 34 of the TLAB: Section 46 of the Income Tax Act)

- After the public consultation process, the following changes were made in the 2020 TLAB that was tabled by the Minister, in order to take into account comments received:
  - The deferral in terms of unbundling transaction will not apply in respect of any equity share that is distributed by an unbundling company to any shareholder that-
    - is a disqualified person. Disqualified persons in this regard include most of the exempt entities or persons not subject to tax in South Africa; and
    - holds at least 5 per cent of the equity shares in the unbundling company immediately before that unbundling transaction.
  - These changes are deemed to apply in respect of unbundling transactions entered into on or after the date on which the TLAB was introduced by the Minister in the National Assembly (i.e. 28 October 2020).

2020 TALAB

Raising of assessments based on an estimate

Raising of assessments based on an estimate (Clauses 27, 28, 29 and 30 of the TALAB: Sections 91, 93, 95 and 100 of the Tax Administration Act)

- The Act provides that SARS may currently issue an estimated assessment if:
  - a taxpayer does not file a return;
  - no return is required but a taxpayer fails to pay the tax required; or
  - a return or information supplied is inadequate.
- In the first case the assessment may not be disputed until the required return is filed and SARS has failed to revise the assessment in the light thereof.
- This approach ensures that all the facts are available when the assessment is revisited and that the dispute resolution timelines that would otherwise apply may be relaxed.

Raising of assessments based on an estimate (Clauses 27, 28, 29 and 30 of the TALAB: Sections 91, 93, 95 and 100 of the Tax Administration Act)

- In order to underpin SARS' move to auto assessment and reduce the number of cases where failures to answer SARS queries result in assessments that enter dispute resolution prematurely, the following changes were proposed in the 2020 Draft TALAB that was published for public comment on 31 July 2020:
  - Estimated assessments also be permitted where no tax is due or a refund is due, to assist taxpayers and personal income tax administration reform.
  - Cases where specific relevant material was requested from a taxpayer on more than one occasion, without an adequate response, also be subject to the limitation on disputes for the reasons set out above.
  - Time-period within which taxpayer may request SARS to revise the assessment by providing outstanding return or relevant material be extended from 30 to 40 business days.
  - Maximum extension of time-period by senior SARS official be aligned with the prescription period for the assessment, i.e. three/five years from date of original assessment.

Raising of assessments based on an estimate (Clauses 27, 28, 29 and 30 of the TALAB: Sections 91, 93, 95 and 100 of the Tax Administration Act)

- After the public consultation process, the following changes were made in the 2020 TALAB that was tabled by the Minister, in order to take into account comments received:
  - Limitation on disputes will no longer apply if no adequate response is received but rather if no response to a request for relevant material is received. The response may thus set out valid grounds as to why the relevant material is not available or need not be supplied to SARS. It is implicit that the response must be something more than a frivolous response.
  - Although it is difficult to see on what basis an estimated assessment would be raised on a taxpayer in respect of a failure to provide a response in respect of third party data requested, it has been clarified that the request for relevant material must be respect of the affairs of the taxpayer to whom the request was directed.

Grace period to determine if a payment in excess of an assessment was erroneous

Grace period to determine if a payment in excess of an assessment was erroneous (Clause 31 of TALAB; Section 187 of the Tax Administration Act)

- Payments that are not properly allocated to a specific tax type by a taxpayer are administratively difficult to allocate correctly.
- If the payment had to be allocated to a specific tax type but is refunded as an erroneous payment, the taxpayer will be charged interest on an unpaid debt.
- SARS requires a period to determine if the payment was erroneous.

- An amendment to provide SARS a period of up to 60 business days to determine the erroneous nature of the payment prior such payment being refunded to the taxpayer was proposed in the 2020 Draft TALAB that was published for public comment on 31 July 2020.

- After the public consultation process, the period was shortened to 30 calendar days in the 2020 TALAB that was tabled by the Minister, in order to take into account comments received.

Removal of requirement to prove intent from certain statutory tax offences

Removal of requirement to prove intent from certain statutory offences
(Clauses 8, 21 & 35 of Draft TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

- For a person to be guilty of an offence, the person needs to have committed an unlawful act and the person's conduct must be culpable.
- In South African law such culpability is normally referred to as *mens rea* and may be present in one of two forms i.e. intent (*dolus*) or negligence (*culpa*)
- Intent and negligence are mutually exclusive – any reference to wilful conduct must necessarily exclude negligent conduct.
- The current "wilfully and without just cause" requirement included in the opening words to certain lesser tax offences listed in the Income Tax Act, VAT Act and Tax Administration Act, means:
  - The NPA must prove intent as the only basis of *mens rea* in respect of the relevant tax offences, e.g. failure to withhold or pay over employees' tax.
  - Negligent, even grossly negligent, conduct is excluded, e.g. a vendor who negligently overcharges VAT cannot be prosecuted.
- The test for intention is subjective, while the test for negligence is objective (i.e. the person's conduct is measured against the reasonable person standard).

Removal of requirement to prove intent from certain statutory offences

(Clauses 8, 21 & 35 of TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

- The “wilfully” requirement is purely subjective and there can be no reference to what a reasonable person would have done in the circumstances.
- The requirement of intent is generally applicable to common law offences and serious statutory offences in South Africa, while the requirement of negligence, whether explicitly stated or not, is more typical of lesser statutory offences.
- The requirement of “wilfully and without just cause” was not a general requirement for lesser tax offences before the promulgation of the Tax Administration Act, it does not appear in any other South African legislation and, as the NPA has pointed out to SARS, its proposal and adoption through the Tax Administration Act appears to have been an error

- In order to address these concerns, the deletion of the words “wilfully and” from the opening words of “wilfully and without just cause” was proposed in the 2020 Draft TALAB that was published for public comment on 31 July 2020.

Removal of requirement to prove intent from certain statutory offences

(Clauses 8, 21 & 35 of TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

- After the public consultation process, the following changes were made in the 2020 TALAB that was tabled by the Minister, in order to take into account comments received:
  - As it is not the intention to introduce strict liability, explicit references to negligence were inserted to remove any doubt in this regard.
  - A differentiated approach was adopted where, rather than do away with intent entirely, offences are categorised into those for which intent or negligence is required and those for which intent is required.
    - The first category includes aspects of non-compliance that strike at key duties that the tax system's broad application depends on, such as failing to register, submit returns, pay over tax that has been collected from a third party and so on.
    - The second category includes aspects of non-compliance where the nature of the non-compliance is such that the requirement of intent is implied, such as issuing a false document, obstructing or hindering a SARS official, assisting another person to dissipate their assets to impede tax collection and so on.

Technical changes to the 2020 tax bills after introduction by the Minister in the National Assembly

2020 Rates Bill

Clause 4 of the 2020 Rates Bill

- The amendment corrects the paragraph numbers in line with the 2018 amendment to section 6A of the Income Tax Act, 1962.

- There is no request to amend the amounts of the medical aid credits.

2020 TLAB

Clause 17 of the 2020 TLAB

- The amendment corrects the date of coming into operation of a provision.
- The amendment proposed in the 2020 Draft TLAB that was published for public comment on 31 July 2020, contains the date of coming into operation of 31 July 2020.
- The amendment proposed in the 2020 TLAB tabled by the Minister contains the date of coming into operation of 31 July 2021.
- This is an oversight as the date of coming into operation of 31 July 2021 comes after the sunset date attached to section 12J of the Income Tax Act, 1962, which is 30 June 2021

THANK YOU