2020 RATES AND MONETARY AMOUNTS AND REVENUE LAWS AMENDMENT BILL, 2020 TAXATION LAWS AMENDMENT BILL , 2020 TAX ADMINISTRATION LAWS AMENDMENT BILL

Presentation to the Select Committee on Finance (SeCoF)

Presenters: National Treasury and SARS | 26 November 2020

national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

Consultation process on the 2020 Tax Bills

- The 2020 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill (Draft Rates Bill), the 2020 Draft Taxation Laws Amendment Bill (Draft TLAB) and the 2020 Draft Tax Administration Laws Amendment Bill (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 on 9, 10 & 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 a draft response document to the SCoF containing a summary of draft responses to public comments received on the 2020 Draft Tax Bills.

Consultation process on the 2020 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.
- The 2020 Tax Bills were passed by the National Assembly on 17 November 2020.
- On 17 November 2020, National Treasury briefed the SeCoF on the 2020 Tax Bills.
- Oral presentations by taxpayers and tax advisors on the 2020 Draft Tax Bills were made at hearings by the SeCoF on 24 November 2020.
- Today, on 26 November 2020, National Treasury and SARS present to the SeCoF, a summary of responses to public comments received on the 2020 Tax Bills.

Key issues raised during consultation process

The key issues raised during oral presentations during the SeCoF public hearings are the following:

2020 Rates Bill

- Increase on excise duty on tobacco
- Excise duty on heated tobacco products

2020 TLAB

- ➢ **Customs and Excise Act, 1964**
- 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

Key issues raised during consultation process

The key issues raised during oral presentations during the SeCoF public hearings are the following:

2020 TLAB

- **Income Tax :Business Tax (Incentives)**
- Venture Capital Companies (VCC) Incentive Tax Regime-Section 12J –Income Tax Act
- **Tax Administration Act, 2011**
- **Income Tax Act, 1962: Value Added Tax Act, 1991 & Tax Administration Act, 2011**
- Removal of requirement to prove intent from certain statutory tax offence

Key issues raised during consultation process

The key issues raised in written submissions during the SeCoF public hearings are the following:

2020 TLAB

- ➢ **Employment, Individuals and Savings**
- Amendments to section 3(2)(bA) & 3(3)(e) of the Estate Duty Act
- Addressing the circumvention of anti-avoidance rules for trusts
- ➢ **Business Tax (General)**
- Refining the interaction between the anti-avoidance provisions for intra-group transactions
- Clarifying the rollover relief for unbundling transactions
- ➢ **Business Tax (Incentives)**
- Reviewing the special economic zone tax incentive regime
- ➢ **Business Tax (Financial)**
- Amendments to REITs tax dispensation
- Amendments to sections 11(j) & 11(jA) of the Income Tax Act

Key issues raised during consultation process

The key issues raised in written submissions during the SeCoF public hearings are the following:

2020 TLAB

➢ **Business Tax (International)**

- Amendments to section 9(2)(k) of the Income Tax Act
- Amendments to section 9D of the Income Tax Act
- Amendments to section 9H of the Income Tax Act
- Amendments to section 9K of the Income Tax Act

2020 TLAB

➢ **Value Added Tax Act, 1991**

- Amendments to section 11(2)(y) of the VAT Act

2020 TALAB

➢ **Tax Administration Act, 2011**

- Notification of requests for relevant material

KEY ISSUES RAISED DURING ORAL PRESENTATIONS

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
- ***Comment***:
  - Excise duties on tobacco are too low and should be increased substantially to mobilise additional revenue and reduce consumption of cigarettes to improve health outcomes. The threat that there will be greater illicit trade in tobacco with higher excise duties does not hold as non-price factors are more important in terms of the size of the illicit market.
- ***Response:***
  - The Minister of Finance only announces changes to excise duties on tobacco in the Budget in February each year. The targeted value of 40 per cent of the retail selling price of the most popular brand is a guideline, and excise duties on tobacco would be considered as one of multiple tax instruments that could be used in order to raise any additional revenue that is required. Any amendments would consider the impact of illicit tobacco, the administrative capacity of SARS and the negative health impacts of tobacco.

Excise duty on heated tobacco products (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 subject heated tobacco products to excise duty.
- As a result, a new excise duty category of tariff subheading for heated tobacco products (HTPs) was introduced in schedule of excise duties to be taxed at a rate of 75 per cent of the cigarette with effect from 26 February 2020.
- ***Comment***:
  - The introduction of a tax rate of R815.63/kg for HTPs erroneously excluded the word "net" after kg in the definition. There are 28 other countries that only tax the HTP on the net amount of tobacco in the product and this should be aligned with that treatment. The mention of potentially moving to a "per stick" basis would also distort the playing field and not provide a fair treatment for existing HTP products.
- ***Response:***
  - The exclusion of the word "net" was not done erroneously as the application of the rate based on the weight of each HTP stick would result in a tax per pack of 20 sticks that is close to 75 per cent of the tax paid on a regular pack of 20 cigarettes.
  - As stated in the previous response document, the initial classification of including HTP products is broad and further refinements are expected to be made in the 2021 Budget.

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 March 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%

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)

- ***Comment*:**
  - The primary concern with the proposed exemptions is that it would give rise to the opportunity for circumvention of the export duty system if exports are re-routed to take advantage of the EFTA or SADC Treaty. Given that the relevant avoidance actions would take place outside of SA, there is very limited practical possibility of direct control or audit.
- ***Response:***
  - The risk that circumvention may undermine the effectiveness of an export duty is small, in particular because scrap metal exports to the EU and SADC countries have been insignificant when compared to total exports of scrap metal from South Africa. Any abuse of the system will be monitored, and firm action will be taken in the event of illegal activities.
- ***Comment:***
  - South Africa should consider a refund mechanism (where exporter is required to make payment upfront) rather than an exemption, with refund requiring proof of final destination. The refund mechanism will not breach the SADC Treaty (Articles 5 & 9) since is to promote custom enforcement and prevent deceptive practices.
- ***Response:***
  - As the export tax is a new system, careful consideration is required before implementation of any further mechanisms such as refund mechanism.

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)

- ***Comment***:
  - A quota system especially for the SADC countries should be imposed limiting scrap metals through EFTA or SADC, with the quota based on normal export levels before the announcement of the export levy.
- ***Response:***
  - As the export tax is a new system, careful consideration is required before implementation of any quota system. [The trade agree.]
- ***Comment:***
  - South Africa should consider a refund mechanism (where exporter is required to make payment upfront) rather than an exemption, with refund requiring proof of final destination. The refund mechanism will not breach the SADC Treaty (Art 5 & 9) since is to promote custom enforcement and prevent deceptive practices.
- ***Response:***
  - As the export tax is a new system, careful consideration is required before implementation of any further mechanisms such as refund mechanism.

Income Tax: Individuals, Savings and Employment

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 and administered 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)

CHANGES MADE IN THE 2020 DRAFT TLAB 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)

CHANGES MADE AFTER PUBLIC CONSULTATION PROCESS, IN THE 2020 TLAB THAT WAS TABLED IN PARLIAMENT:

- 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.

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)

- ***Comment:*** Treasury stated that if a salary sacrifice is used for a bursary / scholarship, then it is **NOT a *bona fide* bursary.**
- This is **contradictory** to the inclusion of the element of a salary sacrifice for Section 10(1)(q) during 2006 as this section in the Act deals **ONLY** with bona fide bursaries and scholarships.
- Instead of removing the salary sacrifice requirement, make exemption dependent on the following 2 conditions:
  - That only educational institutions registered with the Department of Education may receive payments
  - Employers must make payments directly to said institutions
- Current financial constraints make it difficult for employers to offer bursaries that aren't subject to an element of salary sacrifice. It is believed that concerns raised by government can be addressed by not tinkering with the salary sacrifice requirement.
- Also, the statistics requested during the SCoF public hearings on 7 October 2020 have not yet been provided.

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)

- ***Response:***
  - The dictionary definition of a bursary says it is *"an amount of money* ***given*** *to a person by an organisation to pay for them to study".* (Emphasis added.)
  - In a salary sacrifice arrangement, the employer is not funding the education of the employee or their relatives, the employee however pays for education with before tax income after agreeing with the employer to restructure their remuneration, whereas those employees who do not get the benefit of a salary sacrifice pay for the education with after tax income.
  - The original intent was to shield a targeted group of employees from increased fringe benefit taxes when the employer pays for the furthering of their education – it was not to give people a tax benefit as has now become practice.
  - While Government remains committed to the skills development objectives, Government also needs to acknowledge when a policy decision previously taken no longer renders desirable outcomes.
  - Government is not taking away the bursary exemption on a *bona fide* bursary, but, only restricting availability of the exemption if there is 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)

- ***Response:***
  - The 2006 amendments which made provision for exemption to apply even if the remuneration is subject to an element of salary sacrifice lacks equity, as it is dependent on the employers' internal policies and decisions to restructure employees salaries and unfairly impacts on those employees who are not in a position to structure their salaries, for example, self employed, entrepreneurs.
  - The 2006 amendments legally do not work, as it is legally arguable that a bursary that is subject to an element of salary sacrifice cannot be regarded as a *bona fide* bursary . If the employee is not gaining a single cent more from the employer than they used to, that cannot be considered a "true" bursary.
  - We currently require NQF certification for the purpose of the exemption. There are legitimate concerns about sub-standard qualification or whether the money is paid for education at all. That is not the type of abuse that we are trying to address through this amendment, those examples amount to some variant of fraud. What we seek to address is the abuse that the fiscus suffers, when people's behaviour is still completely unchanged – apart from making a tax gain.

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 latest data that we have for 2018/19 indicate total claims of over R500 million from around 27,000 individuals. Revenue foregone was close to R110 million, an increase of 180% in a period of 2 years - even before aggressive marketing of salary sacrifice schemes started. The marketing involves packaging the salary sacrifice along with other tax incentives for the employer.

Tax year	Individual claims	Amount claimed (R million)	Revenue foregone (R million)
2013	8,214	130	18
2014	9,013	138	22
2015	10,099	168	32
2016	9,012	151	33
2017	10,619	218	39
2018	17,782	357	64
2019	27,397	568	109

– Explicitly allowing a salary sacrifice arrangement will overturn the fundamental tax policy principle that private expenditure is not tax deductible. If this is allowed, all formal sector employees with an income below R600,000 could restructure their affairs to have a portion of education costs paid before tax. The revenue foregone from doing so would be far greater (over 10 million formal sector employees have remuneration below R600,000).

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.

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

- ***Comment***: Requirement for a 3 year uninterrupted period is contradictory to other existing residency provisions in the Act. It also fails to take recently emigrated fund members with SARB approval, and should therefore be withdrawn.
- Current emigration requirements should be maintained and additional “ceasing residency” requirement can be included in the legislation.
- ***Response:*** This comment was raised in the 2020 Draft TLAB that was published for public comment. The 3 year rule is a test which is applied over and above the tax residency tests currently available in the Act. It applies if an individual has ceased to be tax resident in South Africa, irrespective of the particular test under which the tax residency was determined.
- Amendments were made in the 2020 TLAB that was tabled by the Minister to allow for a transitionary period that caters for complete applications received, processed and finalised before the legislation comes into effect. As such, any complete application received before 28 February 2021 and finalised before 28 February 2022 will be subject to the old rules.

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 February 2020 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.

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)

Comment:

- Although reducing the number of days to 117 may assist in many instances, the concern is that the remuneration earned by individuals for services rendered whilst working in South Africa during lockdown would be regarded as being from a South African source and taxable in South Africa and the section 10(1)(o)(ii) exemption would not be applicable to this remuneration.
- Rather than changing the number of days in the section 10(1)(o), we suggest that, as was done in the UK, Ireland and Australia, the presence of an individual in South Africa, if such presence is shown to result from travel restrictions related to COVID-19, be disregarded. The time period to determine this will of course be unique to each individual but will ensure that taxpayers will not be prejudiced by the effects of COVID-19.
- Should this not be accepted, we propose that a temporary relief measure be incorporated in section 10(1)(o)(ii) by removing or reducing the requirement for a person to be physically outside South Africa when rendering services to non-resident employers if the reason for this was due to restrictions of travel due to COVID-19.
- The temporary relief measures should also be applicable to section 10(1)(o)(i) and not just section 10(1)(o)(ii). Changes should also be considered in respect of the DTA's (clause 14 in most South African treaties and clause 15 in the model OECD treaty) – that is, the 183 days in any 12-month period should not be applied in the 2020 and 2021 tax years.

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)

Response:

- As indicated in the Response Document to COVID-19 Tax Bills, the intention behind the changes to section 10(1)(o)(ii) to reduce the number of days from 183 days to 117 days, was to at least cater for restrictions that were imposed due to decisions taken by the South African government, also taking into account the current tax legislative provisions.
- With regard to comments that the proposed changes should be extended to apply to section 10(1)(o)(i), this is a new comment which was not raised during the COVID 19 tax bills public consultation process. It is important to note that during the public consultation process, the comments raised were only related to section 10(1)(o)(ii) not to section 10(1)(o)(i).
- DTAs are negotiated instruments, which are ratified by both parties, so treaty issues will be resolved through mutual agreement procedures if necessary, during which due regard will be had to the guidance issued by the OECD.
- With regard to new comments, taxpayers are urged to submit their new tax proposals in terms of the Annexure C process, for consideration in the 2021 legislative cycle.

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)

Response:

- In addition, the application of the provisions of section 10(1)(o)(i) are different from the provisions of section 10(1)(o)(ii) in that this section:
  - Is limited to apply to only crew members & seafarers .
  - Makes provision for complete exemption and does not a have a cap of R1.25 million .
  - Refers to the year of assessment not to a 12 month period

Income Tax: Business Tax (Incentives)

VCC tax incentive regime: Section 12J of the Income Tax Act

VCC Tax Incentive Regime: Section 12J of the Income Tax Act

Comment:

- To open the way for investment, growth and jobs, government must initiate the legislative process to extend Section 12J at least for the next five years before the "sunset" takes effect.
- Not doing so will risk losing:
  - Billions of Rands in onshore investment in South Africa
  - The creation of 45000 jobs in defined key sectors
  - The opportunity to embed an essential SMME-focused ecosystem that can grow local jobs and skills;
  - Billions of Rands in investment from ultra-high net worth individuals will flow out of South Africa; and
  - Hundreds of businesses risk closure –especially those in the hospitality sector that are battling to stay afloat due to the Covid-19 pandemic.
- Doing so late risks the viability of the businesses that manage VCC investments and the lack of policy certainty erodes investor confidence, which may have the commercial impact of crippling the industry.

VCC Tax Incentive Regime: Section 12J of the Income Tax Act

Response:

- The VCC tax incentive regime was introduced in the Act in 2008. The VCC tax incentive regime similar to other tax incentives in the Act has a sunset clause of 30 June 2021.
- In the 2020 Budget review, an announcement was made that Government will review the effectiveness, impact and role of this regime to ascertain whether the incentive should be discontinued.
- On 31 July 2020, the Minister of Finance published a VCC survey. The purpose of this survey was to request all VCCs registered with SARS as at 1 March 2020 to submit information to the Minister in the prescribed manner. The information will be considered in determining to what extent the incentive contributes towards the policy objectives of small business development, economic growth and job creation.
- On 3 November 2020, National Treasury issued a media statement inviting technical tax proposals for consideration for Annexure C of the 2021 Budget Review and advising taxpayers about the public workshops to take place on 2, 3, 4 December 2020 to discuss the comments received on VCC survey as well as 2021 technical tax proposals.
- The tax proposals regarding the extension or discontinuation of the VCC tax incentive regime will be included in the 2021 Budget proposals.
- It is important to note that the Act makes provision for certainty as the sunset date of 30 June 2021 was included in the legislation when the VCC incentive tax regime was introduced in 2008.

2020 TALAB

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*).
- 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 fails to pay over the VAT collected from customers 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).
- The "wilfully" requirement is purely subjective and there can be no reference to what a reasonable person would have done in the circumstances.

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 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.

INITIAL PROPOSAL INCLUDED IN THE 2020 DRAFT TALAB THAT WAS RELEASED FOR PUBLIC COMMENT:

- 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.

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)

CHANGES MADE AFTER PUBLIC CONSULTATION PROCESS, IN THE 2020 TLAB THAT WAS TABLED IN PARLIAMENT:

- 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.

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)

Comment:

SAICA states; "Before a person can be found guilty of a criminal offence the presence of **wilful intent** on the part of the perpetrator should have to be proved by the State before the perpetrator is found guilty." (Emphasis in original.)

Response:

- SAICA quotes the **Masingili** Constitutional Court (CC) case as the basis for this assertion, i.e. "This Court has thus recognised the common-law requirement of dolus for criminal liability." (Emphasis added.)
- This is based on a paragraph in the **Coetzee** CC case, fully quoted in **Masingili**, which states; "when a person has committed an unlawful act intentionally or negligently, the State may punish them." (Emphasis added.)
- The context of the **Masingili** quote is important – in this case the CC was dealing with the common law offence of armed robbery and the question if the common law requirement of intent must be proven for both the robbery and the aggravated circumstances (use of a weapon).

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)

- A key point by O'Regan J in **Coetzee** with respect to statutory offences has been overlooked; "In addition, it should be borne in mind that significant leeway ought to be afforded to the legislature to determine the appropriate level of culpability that should attach to any particular unlawful conduct to render it criminal."
- The Law of South Africa, Volume 11, paragraph 98 notes; "Although *culpa* plays a limited role as far as common-law crimes are concerned… it plays an important role in respect of statutory offences." It then provides multiple examples of statutes where the courts have found that negligence is sufficient to establish that a criminal offence has been committed. This includes a decision by the Supreme Court of Appeal after **Coetzee** was decided by the CC.
- The use of negligence as a standard of culpability has thus been recognised in the CC and is well established in statutory law.
- In this context a taxpayer would be negligent if they did not maintain a standard of reasonable care as would be expected of a reasonable taxpayer in the same circumstances; in short "unreasonable non-compliance".
- It is only if the prosecution can prove this beyond reasonable doubt that the taxpayer is guilty of an offence.

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)

Comment:

As examples of "minor administrative compliance", SAICA provides; "not notifying SARS of a change in address, failing to appoint representative taxpayer, submitting an erroneous or incomplete document" and neglecting to make a document available." (Emphasis in original.)

Response:

- These may appear to be minor administrative compliance issues at first blush but they are not. Dealing with each in turn:
  - "Not notifying SARS of a change in address" – This obligation is critical for contacting a taxpayer; prior notice and institution of recovery proceedings which require a current address for 'service' of legal documents.
  - "Failing to appoint representative taxpayer" – In the absence of a representative taxpayer there is no person who can be held accountable for e.g. a company's defaults.

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)

- "Erroneous or incomplete document" – The revised proposal requires intent for the offence of issuing "an erroneous, incomplete or false document", so this inclusion in the list is misplaced. As the written submission concedes; "Therefore, there is only a criminal offence if there is a wilful submission of false documents."
- "Neglecting to make a document available" – The taxpayer is the only person with full knowledge of the documents they have in their possession or control to respond to SARS queries or legislative requirements. Full disclosure is fundamental to the administration of the tax system.

- **Metcash** CC held: "Compliance by taxpayers is crucial for effective revenue collection and will necessarily entail a measure of "policing" by the authorities."
- These obligations are to ensure that the collection of revenue can be monitored and enhanced. The system of tax collection is premised on the submission of returns, accurate information, etc. as and when required by law.

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)

Comment:

SAICA suggests in its presentation "criminal sanction only for repeated administrative offences" and in its written submission that; "These minor offences should be subject exclusively to civil sanction."

Response:

- Failure to submit personal and corporate income tax (PIT and CIT) returns are subject to administrative penalties, which escalate the longer a default continues.
- These administrative penalties assist in ensuring compliance but are far from a panacea, as SARS' 2019/20 Annual Report demonstrates:
  - % PIT filing compliance of 52.17% compared to a target of 92%
  - % CIT filing compliance of 19.99% compared to a target of 75%
  - Debt book for unpaid administrative penalties of R9 billion, compared to R8.4 billion in 2018/19.
- While there are multiple drivers for the poor compliance, it is clear that administrative penalties on their own are not a sufficient deterrent.

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)

Comment:

SARS officials choose who to prosecute without oversight or transparency; an objective and clear standard of proof should be imposed to compel prosecutions.

Response:

- As should be apparent from the previous slide, SARS is confronted by widespread non-compliance in South Africa.
- SARS must thus prioritise the application of its scarce criminal investigation resources to maximize their impact on overall compliance. (A total of 500 criminal investigation cases were handed over to the NPA for prosecution in 2019/20.)
- In this regard, SARS is no different from other law enforcement authorities in South Africa that are confronted by widespread non-compliance.
- Attempting to craft a rule that all offences must be investigated and charges laid is simply unworkable in practice.
- It is incorrect to state that there is no oversight as SARS is required to act administratively fairly and in accordance with the rule of law under the Constitution.

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)

- For example, if the concern is that SARS will launch investigations and lay charges with ulterior purposes, the **Zuma** (2009) Supreme Court of Appeal case made it clear that this is not permissible in a related context; "This does not, however, mean that the prosecution may use its powers for 'ulterior purposes'. To do so would breach the principle of legality."
- The NPA and, ultimately, the courts serve as a check and balance in this regard.

KEY ISSUES RAISED IN WRITTEN SUBMISSIONS

2020 TLAB

Income Tax: Individuals, Savings and Employment

Amendments to sections 3(2)(bA) & 3(3)(e) of the Estate Duty Act

Amendments to sections 3(2)(bA) & 3(3) (e) of the Estate Duty Act (Main references: clause 1 of the TLAB)

In the 2020 TLAB, amendments were made to delete paragraph (bA) of section 3(2) of the Estate Duty Act and to place this paragraph under section 3(3) of the Estate Duty Act, dealing with provisions of deemed property for estate duty purposes, as it was incorrectly included under the section dealing with property.

Comment:

- SARS should amend the REV267. The return must allow the executor to separately declare these amounts as deemed property.

Response:

- The comment regarding changes to REV 267 was raised during the public workshops and taxpayers were advised that this is a matter of interpretation and does not require a change in legislation.

Amendments to sections 3(2)(bA) & 3(3) (e) of the Estate Duty Act (Main references: clause 1 of the TLAB)

Comment:

- It should be clarified that the section applies to actual contributions made after 1 March 2016 and does not include deemed contributions (under section 11F).
- The above may well be the intention, but then it is not clear why section 10C has been left out. It would reduce the annuity, or living annuity, taken in the period 1 March to date of death and as such, reduces the excess contributions at the beginning of the period of assessment.

Response:

- These are new comments that were not raised during the public consultation process.
- With regard to new comments, taxpayers are urged to submit their new tax proposals in terms of the Annexure C process, for consideration in the 2021 legislative cycle.

Addressing the circumvention of anti-avoidance rules for trusts

Addressing the circumvention of anti-avoidance rules for trusts (Main references: Section 7C of the Income Tax Act: clause 3 of the TLAB)

In 2016, anti-avoidance measures aimed at curbing the tax-free transfer of wealth to trusts through the use of low interest or interest-free loans, advances or credit were introduced in the Income Tax Act. Soon after the introduction of these measures, taxpayers devised further schemes to undermine the 2016 measures, by advancing interest free or low interest loans to companies held by trusts. In order to curb this, further changes were made in 2017. Taxpayers are now implementing other variations of the structures in order to avoid the deemed annual donation triggered by these anti-avoidance measures. These structures involve natural persons that subscribe for preference shares with no or a low rate of return in a company owned by a trust that is a connected person to those individuals. In order to curb this abuse, the following legislative amendments were included in the 2020 TLAB:

- A deeming provision was inserted under which the subscription price of preference shares issued will be deemed to be a loan advanced.
- In addition, any dividends in respect of those preference shares shall, for purposes of the anti-avoidance measure, be deemed to be interest in respect of such a deemed loan.

Addressing the circumvention of anti-avoidance rules for trusts (Main references: Section 7C of the Income Tax Act: clause 3 of the TLAB)

Comment: The proposed amendment will apply to preference shares issued by companies, the shares of which are held by trusts, and will force dividends to be declared annually at a rate at least equal to the 'official rate of interest'. This treatment will apply even if there was a genuine commercial reason for the issuing of preference shares by the company as a form of funding.

Response: The extension of the anti-avoidance rules will apply to the same circumstance that the current loan rules apply (i.e. the involvement of individuals using trusts and companies held by trust to transfer assets free of tax). During public hearings National Treasury enquired what other circumstances would be unintentionally caught, but such arrangements have not been provided. In addition, the anti-avoidance rules contained in section 7C were introduced to curb the avoidance of Donations Tax, which is ordinarily levied at 20 per cent of the value of the property or amount donated. In this regard, the official rate of interest, which is lower than the Donations Tax rate of 20 per cent (currently 4.50%), was preferred as the rate at which a deemed donation would be triggered as an annual donation in the limited circumstances that such arrangements are entered into.

Income Tax: Business Tax (General)

Refining the interaction between the anti-avoidance provisions for intra-group transactions

Refining the interaction between the anti-avoidance provisions for intra-group transactions
(Main References: Section 45 of the Income Tax Act: clause 33 of the TLAB)

- The Income Tax Act contains corporate reorganisation rules (sections 41- 47 of the Income Tax Act) that allow for the tax neutral transfer of assets between companies that are part of the same group of companies. One of these rules are the provisions dealing with intra-group transactions (section 45).
- The intra-group transaction rules contain anti-avoidance measures aimed at limiting or discouraging abuse by taxpayers of the tax neutral transfer of assets, namely, (i) de-grouping charge rule applicable to the group of companies that entered into intra-group sale, benefits from tax deferral and then one of the companies ceases to form part of a group of companies shortly after the said transaction, and (ii) zero base cost rule applicable to intra-group transactions where assets are transferred in exchange for debt or non-equity shares issued by another company that forms part of the same group of companies as the transferor of those assets.
- The interaction between the above-mentioned anti avoidance rules gives rise to anomalous results. In order to address this, amendments were made in the 2020 TLAB to ensure that in instances that the de-grouping charge rule has been triggered in respect of an intra-group transaction under which the zero base cost rule was previously applied, the taxpayer be put in the same position as if the rollover provisions did not apply and be given base cost for their debt and non-equity shares in terms of the current applicable rules.

Refining the interaction between the anti-avoidance provisions for intra-group transactions
(Main References: Section 45 of the Income Tax Act: clause 33 of the TLAB)

- ***Comment:*** Intra-group transactions that have reached the 6-year anniversary do not benefit from the proposed amendment and therefore are prejudiced despite them not triggering the de-grouping provisions. It is recommended that the proposed provision be expanded to include intra-group transactions that have reached the 6-year anniversary.

- ***Response:*** As indicated in the Response Document to the 2020 tax bills, the 2020 tax bills give effect to the tax proposals announced in the 2020 Budget Review. The 2020 Budget Review provides for legislative amendments to be made to address the interaction between the de-grouping change and the zero base cost rule that potentially give rise to double taxation. The proposal in respect of the re-instatement of the base cost for a debt or a share used to facilitate the transfer of an asset once an intra-group transaction has reached its 6-year anniversary falls outside legislative amendment proposed for the 2020 legislative cycle. As such, it is proposed that this proposal should be considered for the 2021 legislative cycle.

Clarifying rollover relief for unbundling transactions

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

- 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
(Main References: Clause 34 of the TLAB: Section 46 of the Income Tax Act)

INITIAL PROPOSAL INCLUDED IN THE 2020 DRAFT TLAB PUBLISHED FOR PUBLIC COMMENT ON 31 JULY 2020

- To close this loophole, changes were made in the 2020 draft TLAB published for public comment on 31 July 2020 to remove the reference to "connected persons".
- 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
(Main References: Clause 34 of the TLAB: Section 46 of the Income Tax Act)

CHANGES MADE AFTER PUBLIC CONSULTATION PROCESS, IN THE 2020 TLAB THAT WAS TABLED IN PARLIAMENT:

Following the public consultations that on the dates set out below, changes were made and were included in the 2020 TLAB currently before parliament.

- 10 September 2020-Public workshops on the Draft TLAB
- 23 September 2020-Consultative meeting on the specific proposed amendment
- 7 October 2020-SCoF Hearings

- The deferral in terms of the unbundling transactions will not apply in respect of any equity share that is distributed by an unbundling company to any shareholder that –
  - is a disqualified person; and
  - holds at least 5 per cent of the equity shares in the unbundling company immediately before that unbundling transaction.
- The proposed changes are in line with the policy rationale of the reorganisation rules that are intended to be tax deferral rules

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

Comment: The proposal affects 'live' transactions and not all transaction that will be impacted will be done with an avoidance intent as conceded. It is therefore unfair to treat them all the same with retrospective effect. The amendment should apply to unbundling transactions that are entered into after the date of promulgation of the Taxation Laws Amendment Act or another date in the future given that it impacts legitimate transactions as well that do fall within the policy intent.

Response:

- In the 2020 draft TLAB that was published for public comment on 31 July 2020, the effective date for the proposed amendment was 31 July 2020. After the public consultation process, changes were made in the 2020 TLAB to take into accounts the public comments. In addition, changes were made to change the effective date of the provisions from 31 July 2020 to 28 October 2020 (date of tabling of the 2020 TLAB).

Income Tax: Business Tax (Incentives)

Reviewing the special economic zone tax incentive regime

Reviewing the special economic zone tax incentive regime (Main reference: Sections 12R and 12S of the Income Tax Act: clauses 18 and 19 of the TLAB)

In order to align the SEZ tax regime with other tax incentives that have certainty in respect of their sunset dates, changes are made to the legislation in order to provide for a single date for the end of the application of the SEZ tax regime. As such, the legislation will be amended to provide that the provisions of the SEZ tax regime will cease to apply in respect of any year of assessment commencing on or after 1 January 2031.

Comment: Shortening the period of which the incentive will be enjoyed will thus have the effect of undermining confidence in future incentives provided by the State and should be reconsidered. It is also unclear as to how taxpayers must treat buildings that would have qualified for the allowance under section 12S, but have not yet claimed the full value of the section 12S building allowance by the sunset clause date (i.e. whether the taxpayer would continue to claim the accelerated building allowance, or whether sections 13 or 13quin would apply to the remainder of the allowance once the section 12S provision ceases to apply).

Reviewing the special economic zone tax incentive regime (Main reference: Sections 12R and 12S of the Income Tax Act: clauses 18 and 19 of the TLAB)

Response: After accepting taxpayer comments on the initial sunset date of 1 January 2028 proposed, the sunset date in the 2020 Draft TLAB will be amended to provide that the two SEZ provisions (sections 12R and 12S) ceases to apply in respect of any year of assessment commencing on or after 1 January 2031.

This new sunset date provides for a 10-year period from when legislation is changed in terms of the 2020 draft TLAB. Current investors will not be affected by the change, and the change incentivises prospective investors to bring forward their investments. The tax legislation is not the main factor in SEZs failing to attract sufficient investment, and the proposed amendments seek to protect the tax base amid severe fiscal constraints. New investors and other stakeholders have been alerted upfront that qualifying companies will, subject to a review of the SEZ tax regime, only be guaranteed the current tax benefits in their present form (i.e. taxation at 15 per cent and the accelerated capital allowance) until 1 January 2031.

The building allowance and reduced corporate tax rate are finite incentives, and will cease after 1 January 2031. Take up of building allowances after the sunset date is hence not included. In terms of section 12S, the National Treasury has engaged SEZ entities to provide more information on their current leasing structures, the nature of improvements to buildings, and take up of other government grants to enable the National Treasury to assess the possibility of amendments to section 12S in the following legislative cycle.

Income Tax: Business (Financial)

Amendments to “REITs” tax dispensation

Amendment to the definition of REIT (Main reference: Sections 1 and 25BB of the Income Tax Act: clauses 2 and 29 of the TLAB)

In the 2020 TLAB, clarification was made in the Income Tax Act to provide that non-equity shares must be specifically excluded from the shares that must be listed on a recognised exchange for purposes of the REITs special tax dispensation.

- ***Comment:*** The proposed amendment still does not appear to prevent a REIT from issuing preference shares.
- ***Response:*** This comment was raised in the 2020 Draft TLAB that was published for public comment. In the Response Document this comment was accepted and consequential amendments were made in section 25BB(1) to the definition of a "qualifying distribution" in the 2020 TLAB that was tabled by the Minister, so that a deduction of dividends payable by a REIT will be limited to dividends in respect of equity shares only.

General amendment to REITs tax dispensation (Main reference: Sections 1 and 25BB of the Income Tax Act: clauses 2 and 29 of the TLAB)

- ***Comment:*** The effective dates of any amendments to REIT tax dispensation included in the 2020 TLAB should be delayed, due to COVID-19
- **Response:** The 2020 Tax bills give effect to the tax proposals mentioned in the 2020 Budget. On the other hand, the COVID-19 tax bills give effect to the COVID-19 tax proposals, to take into account the effects of the COVID-19 pandemic.
- In addition, all other comments raised with regard to the REITs tax dispensation are new comments which do not deal with the changes included in the 2020 Tax Bills. With regard to new comments, taxpayers are urged to submit their new tax proposals in terms of the Annexure C process, for consideration in the 2021 legislative cycle.

Amendments to sections 11(j) and 11(jA) of the Income Tax Act

Amendments to sections11(j) and 11(jA) of the Income Tax Act (Main reference: Sections 11(j) and 11(jA) 9K of the Income Tax Act: clause 13 of the TLAB)

In the 2020 TLAB, amendments were made in sections 11(j) and 11(jA) of the Income Tax Act to clarify the tax treatment of doubtful debts for taxpayers conducting leasing business and applying IFRS 9 for financial reporting. The effect of this amendment is that taxpayers applying IFRS9 for financial reporting purposes are allowed to claim doubtful debt allowances in respect of lease receivables that have accrued to them but not in respect of future leases.

Comment:

- The effective date of this proposed amendment relating to doubtful debt on lease receivables should commence on 1 January 2019.

Response:

- This comment was raised in the 2020 draft TLAB that was published for comment. As a result, changes were made in the 2020 TLAB that was tabled by the Minister to change the effective date from years of assessment ending on or after 1 January 2021 to 28 October 2020. A change to 1 January 2019 would have been retroactive, and may affect already submitted tax returns.

Amendments to section 64EB(2) of the Income Tax Act

Amendment to section 64EB(2) of the Income Tax Act (Main reference: Section 64EB(2) of the Income Tax Act: clause 37 of the TLAB)

In the 2020 TLAB, amendments were made in section 64EB(2) of the Income Tax Act to address tax avoidance involving lending and collateral arrangement provisions.

Comment:

- The proposed change to the wording will have the effect that if there are multiple consecutive cessions of the right to dividends, all cedents will potentially be subject to dividends tax on the same dividend. This is economic double taxation.

Response:

- Share borrowing and collateral arrangements are done by financial institutions and large corporates. Government as a measure of policy to avoid economic double taxation, inserted section 64F(1)*(a)* of the Act with effect from 1 April 2012, which as standard practice, exempts dividends (including deemed dividends) from dividends tax if the beneficial owner is a company that is resident. As such, no risk of double economic taxation exists. This comment was raised during the public consultation on the 2020 Draft TLAB and a clarification was made to highlight the effect of the standard section 64F exemption in the example to the proposed amendments to section 64EB in the Explanatory Memorandum to TLAB 2020

Income Tax: International Tax

Amendments to section 9(2)(k) of the Income Tax Act

Amendments to section 9(2)(k) of the Income Tax Act (Main reference: Section 9(2)(k) of the Income Tax Act: clause 5 of the TLAB)

In the 2020 TLAB, amendments were made in section 9(2)(k) of the Income Tax Act to replace the words “attributable to” with the words “effectively connected to”.

- ***Comment:*** It is proposed that the amendment to section 9(2)(k) of changing the words “attributable to” with “effectively connected with” be extended to other paragraphs in section 9(2).

- ***Response:*** This is a new comment, which was not raised during the public consultation process.
- It is important to note that in terms of application of the law, items of income are *attributable to* a permanent establishment and an asset is *effectively connected with* a permanent establishment. Therefore, the proposals to extend this amendment to other paragraphs is not in line with the application of the law.
- That said, with regard to new comments, taxpayers are urged to submit their new tax proposals in terms of the Annexure C process, for consideration in the 2021 legislative cycle.

Amendments to section 9D of the Income Tax Act

Amendments to section 9D of the Income Tax Act
(Main reference: Section 9D of the Income Tax Act: clause 6 of the TLAB)

In the 2020 TLAB, amendments were made in section 9D of the Income Tax Act to limit the application of dividend exemption in loop structures, as a result of Government's proposal to modernise the foreign exchange system and replacing it with a new capital flow management system .

<u>Comment:</u>

- The inclusion of a net capital gain of a CFC in the hands of a natural person or special trust at the rate of 40% and not 100%, should be retained.

<u>Response:</u>

- This comment was raised in the 2020 draft TLAB that was published for comment and a response was provided in the Response Document to the 2020 Tax Bills. Net capital gains are not included in the income of residents but an amount equal to the net income of a CFC is included in the income of residents. Therefore, the first principle is that amounts taxed for residents holding participation rights in a CFC loses their character.
- That said, changes were made in the 2020 TLAB that was tabled by the Minister to reinstate some of the provisions of paragraph (f) in section 9D(2) to make provision for the relief to be limited to individual policyholder funds of Long-term insurers in order not to negatively affect savings by South African individual policyholders.

Amendments to section 9D of the Income Tax Act (Main reference: Section 9D of the Income Tax Act: clause 6 of the TLAB)

Comment:

- It would be better to refer to "an amount equal to the amount of dividends tax withheld in terms of section 64G or 64H, or of dividends tax paid as contemplated in section 64EA(b) read with section 64FA, in respect of any dividend paid to that controlled foreign company".

Response:

- This is a new comment which was not raised during the public consultation process and does not change the effect of the current wording that spells out clearly in detail how the dividend exemption will be limited.
- That said, with regard to new comments, taxpayers are urged to submit their new tax proposals in terms of the Annexure C process, for consideration in the 2021 legislative cycle.

Amendments to section 9D of the Income Tax Act
(Main reference: Section 9D of the Income Tax Act: clause 6 of the TLAB)

Comment:

- The proposed amendment is punitive for South African corporate investors, that own CFCs that will invest via those CFCs into SA companies.

Response:

- This is a new comment, which was not raised during the public consultation process that relates to restructuring whereby South African operating companies will be “transferred” to a foreign entity after the modernisation of the exchange control system.
- With regard to new comments, taxpayers are urged to submit their new tax proposals in terms of the Annexure C process, for consideration in the 2021 legislative cycle.
- The amendment in the 2020 TLAB seeks to ensure that any tax planning to avoid the imposition of dividends tax after the relaxation of exchange control is addressed.

Amendments to section 9H of the Income Tax Act

Amendments to section 9H of the Income Tax Act
(Main reference: Section 9H of the Income Tax Act: clause 7 of the TLAB)

In the 2020 TLAB, amendments were made in section 9H of the Income Tax Act to introduce an anti-avoidance provision regarding change in residence. The effect of these amendments is to deem a South African tax resident shareholder who holds shares in a South African tax resident company that changes its tax residency to another tax jurisdiction to be deemed to have disposed of and acquired the shares at market value on the day before exit.

- ***Comment:*** The proposed amendment to section 9H introduces economic double taxation - i.e. there is taxation both at the level of the company that ceases to be South African tax resident and in respect of the South African tax resident shareholder. We suggest that the proposed amendment should be withdrawn.
- ***Response:*** Companies and their shareholders are regarded as separate taxpayers and the South African tax system requires taxable income to be determined separately for each taxpayer. Shareholders are not subject to double tax as the base cost of the shares is increased to market value at the time of the deemed disposal and reacquisition.

Amendments to section 9K of the Income Tax Act

Amendments to section 9K of the Income Tax Act (Main reference: Section 9K of the Income Tax Act: clause 9 of the TLAB)

In the 2020 TLAB, amendments were made in section 9K of the Income Tax Act to make provision for the taxation of the transfer of listed securities to an offshore exchange as a result of Government's proposal to modernise the foreign exchange system and replacing it with a new capital flow management system .

Comment:

- The mere transfer of the listing of a share to an exchange outside the Republic should not constitute a deemed disposal of the share.
- Upon cessation of an individual's tax residence in South Africa, a capital gains tax exit charge must be calculated and it is unclear why an exception to this rule must be made in the case of the transfer of the listing of a share, simply because the South African Reserve Bank will phase out the approvals process for the transfer of a listing abroad.
- We propose that the proposed amendment be withdrawn.

Amendments to section 9K of the Income Tax Act
(Main reference: Section 9K of the Income Tax Act: clause 9 of the TLAB)

Response:

- This comment was raised on the 2020 draft TLAB that was published for comment. In the Response Document, it was stated that this amendment is part of the package to review the current exchange control rules and the potential risks that may emerge due to timing and tax compliance issues when an individual becomes a non-resident.
- The aim of the amendment is catering for risk given that the policy is to phase out the approval requirement by SARB when a resident individual or trust that owns a listed domestic security is exporting that listed domestic security abroad.

Value Added Tax Act

Amendments to section 11(2)(y) of the VAT Act (Main reference: Section 11(2)(y) of the VAT Act: clause 64 the TLAB)

In the 2020 TLAB, amendments were made in section 11(2) of the VAT Act by inserting new paragraph (y) due to the review of the section 72 decision with regard to the VAT treatment of international telecommunication services. These amendments make provision for the zero rating of telecommunication services provided between telecommunication services providers and is aimed at complying with the requirements of the International Telecommunication Regulations concluded at the World Conference on International Telecommunication held in Dubai in 2012 (effective 2015) (Dubai ITR), to which South Africa is a signatory.

- **Comment:** The current proposed wording of section 11(2)(y) is ambiguous as it is not clear whether the proposed zero rating applies to all services supplied to International Telecommunication Service Providers by Telecommunication Service Providers registered in the Republic of South Africa, or whether zero rating under this provision applies only to international telecommunication services as contemplated in Dubai, 2012.
- **Response:** This comment was raised in the 2020 Draft TLAB that was published for public comment. As a result, changes were made in the 2020 TLAB that was tabled by the Minister to clarify that the zero-rating will be applicable on a transaction level.

2020 TALAB

Notification of requests for information

Comment:

We have seen many examples where taxpayers were not aware of requests for information, as the method of communication was uploading a letter on the taxpayer's or tax practitioner's eFiling profile, without notification that the correspondence had been uploaded. Requests for information must be sent via multiple communication platforms.

Response:

As indicated on the next slide, SARS eFiling previously permitted taxpayers to specify whether they wished to receive emails when documents were placed on their eFiling profiles. This option has recently been done away with and eFilers will be notified by email automatically when key documents are placed on their eFiling profiles. This includes requests for supporting documentation. This will, unfortunately, not assist eFilers who have not provided SARS with current email addresses. If there are edge cases where difficulties are still being experienced, SAICA is welcome to engage with the SARS' technical team through SARS stakeholder relations.

Notification of requests for information

SARS eFiling - Menu

https://secure.sarsefiling.co.za/Individual/Default.aspx

SARS eFILING — FOR INDIVIDUALS

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SARS Registered Details

Special Links

Change Details

Required Details

Title | Initials | First Name | Surname

Identification Type: South African ID

ID Number

Do you wish to receive SMS notifications for the following events: Yes / No
- After activation as an eFiler
- After any payment

Cell Number

E-mail Address

Telephone Number

This user is a:
- Tax Consultant / Tax Practitioner
- Organisation Representative

As part of our ongoing efforts to keep you, the taxpayer, informed we send out periodic communications either via email or SMS.
Please indicate whether you would like to be included in these communications: Yes / No

See below for optional details that you may want to capture now.

Update Details | Reset

Option to Enable Notifications

Thank You

QUESTIONS?