2022 Draft Taxation Laws Amendment Bill and Revenue Laws Amendment Bill

Submission
September 2022

pwc

Dear Sirs and Mesdames

Representations on the (draft) Tax Laws Amendment Bill, 2022 (“TLAB 22”) as well as the (draft) Revenue Laws Amendment Bill 2022

We present herewith our written submissions on the above-mentioned draft Bills.

Our submissions include a combination of representations, ranging from serious concerns about the impact or effect of certain provisions to simple clarification-suggestions for potentially ambiguous provisions. We have deliberately tried to keep the discussion of our submissions as concise as possible, which does mean that you might require further clarification. You are more than welcome to contact us in this regard.

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

Yours sincerely

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Attached:

- Detailed submissions

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1:INCOME TAX

INDIVIDUALS, SAVINGS AND EMPLOYMENT

INCOME TAX ACT:
Section 7B

Comment	Recommendation
It is noted that the draft EM does not provide the reasons for change, but rather repeats the proposal numerous times.	The EM should be amended to provide the reasons for change.
The proposed proviso to subsection (2) relating to deceased employees lacks precision and could have unintended consequences. For example, where an employee becomes entitled to a bonus in February Year 1 and which is only due to be paid in April Year 1, ordinarily s7B would result in the bonus only being deemed to have accrued in April, to have been incurred by the employer in April and only be subject to employees' tax in April. However, if the employee happens to become deceased in March, after becoming entitled to the bonus but before it is paid, the effect of the proviso would be that the employee would be obliged to account for the bonus in Year 1, the employer would be able to deduct the bonus as at February Year 1 and, most problematically, the employer would have a retrospective obligation to withhold employees' tax in February rather than April. From an employer perspective, this could result in practical difficulties in differentiating variable remuneration liabilities for deceased and living employees at the end of the year of assessment as well as create technical non-compliance for employees' tax with resultant penalty and interest implications.	In light of the consequences highlighted, it is suggested that the proviso should operate only from the perspective of the timing of accrual for the employee. From the perspective of the employer the section should continue to operate insofar as the timing of any incurral of expenditure and employees' tax is concerned. Alternatively, the proposed amendment should refer to the date of accrual or incurral as deemed to be the day before the employee died.

	Comment	Recommendation
	The draft legislation refers to remuneration payable with reference to “units produced”. Clarity is needed regarding what constitutes a “unit produced”. For example, in organised agriculture, many staff are paid a basic salary (equal to minimum wage) plus an amount per crate picked or per plant sprayed or per plant pruned for example. In such instances the amounts paid are not commission or a bonus but is also not an amount paid per unit produced as no unit is actually produced. Is the intention that such amounts paid would constitute variable remuneration and, if so, the legislation should then rather refer to amounts paid per outcome. Furthermore, employees may only be involved in a stage of a unit being produced and they may have completed their stage but the actual unit may not as yet have been produced and they are remunerated with reference to their input on the production of a unit. Would the payment for the completion of their stage then fall within these provisions or not?	Treasury should consider amending the legislation to define “units produced” to include payments linked to outputs excluding commission or bonuses or amend the legislation to refer to amounts paid with reference to outputs as opposed to units produced. Furthermore, it should clarify whether or not this only applies to units that have been produced in full.
INCOME TAX ACT: Section 7B	The draft EM refers to employees in the informal sector, however, nothing in the draft legislation links the proposed change to only the informal sector and, instead, any current amount paid with reference to a unit produced would fall into the proposed definition of “variable remuneration”.	If this change is meant for only remuneration linked to units produced in the informal sector, then the informal sector should be defined and the legislation should clearly stipulate that this subparagraph of 7B only applies to employees in the “informal sector” as defined.

1.2 Apportioning the interest exemption and capital gains tax annual exclusion when an individual ceases to be tax resident

Comment	Recommendation
We would point out that the interest exemption and the capital gains annual exclusion are not the only annual amounts that may be impacted by a 12 month period being split between two years of assessment and for which the Act does not make provision for apportionment. Examples include the monetary cap on deductible contributions to retirement funds and the annual cap on contributions to tax-free savings accounts. There may well be other monetary amounts that, in the interests of fairness and equity, should also be apportioned for years of assessment shorter than 12 months.	Treasury should consider whether there are other monetary amounts that should be apportioned for years of assessment shorter than 12 months.

INCOME TAX ACT:
Section 10(1)(i), Para 5(1) 8th Sch.

1.3 Reviewing the transfer of total interest in a retirement annuity fund

Comment	Recommendation
No comment	

INCOME TAX ACT:
Section 1(1)

1.4 Clarifying the compulsory annuitisation and protection of vested rights when transferring to a public sector funds

Comment	Recommendation
The amendments to the definitions of pension fund and provident fund have effective dates of years of assessment commencing on or after 1 March 2023 in the draft bill instead of years of assessment commencing on or after 1 March 2021 as indicated in the draft EM.	The effective date in the draft bill should be amended to correspond with that in the draft EM.

INCOME TAX ACT:
Section 1(1)

1.5 Clarifying paragraph (eA) of "gross income" regarding public sector funds

Comment	Recommendation
No comment	

INCOME TAX ACT:
Section 1

1.6 Retirement of a provident fund member on grounds other than ill-health

Comment	Recommendation
The proposed amendment contains grammatical errors ("by the deletion of" is stated twice).	The grammar should be corrected.
The draft EM states that the effective date will be years of assessment commencing on or after 1 March 2023. However, the draft bill has an effective date of 1 March 2023. While in practice these are likely to amount to the same thing, it would be preferable for the bill to specify what years of assessment the amendment applies to.	The bill should provide that the effective date is years of assessment commencing on or after 1 March 2023.

INCOME TAX ACT:
Para 4 2nd Sch.

1.7 Clarifying the applicability of tax-neutral transfers from a pension to a provident fund

Comment	Recommendation
No comment	

INCOME TAX ACT:
Para 6 2nd Sch.

Comment	Recommendation
Is it the intention of Treasury to classify the amount in the “savings pot” as “gross income” when an individual emigrates by virtue of it being considered a “savings withdrawal benefit” as contemplated in the new proposed paragraph (eD) of the “gross income” definition as opposed to a withdrawal benefit? If so, why is an individual who has emigrated penalised and taxed at their marginal tax rate whereas if they retire or resign, the savings pot amount is not included included in “gross income” but rather taxed according to the lump sum withdrawal tables. In our view, the inclusion of “savings pot” amounts in “gross income” should only occur in instances where an individual elects to actually withdraw an amount from their “savings pot” as the current proposal results in inconsistent treatment of the “savings pot” amount based on a non- withdrawal event.	The legislation should only include the “savings pot” amount in “gross income” in instances where an individual is only making a withdrawal from the “savings pot” as opposed to a withdrawal that includes withdrawals of “vested pot”, “savings pot” and “retirement pot” amounts due to emigration. There should be a clear distinction between withdrawal to access funds and the resultant tax consequences versus withdrawal due to emigration.

INCOME TAX ACT: Definitions of various retirement vehicles

	Comment	Recommendation
	In the example in the draft EM the definition of "savings withdrawal benefit" reference is made to a withdrawal on the 21 March 2025 and stated the next withdrawal can be on/after 22 March 2026. However, the proposed definition of "savings withdrawal benefit" states that "the member's right is limited to one withdrawal in any 12 month period". The use of "any 12 month period" could potentially cause confusion as it is not clear whether the 12 month period is 12 completed months or 365 days or a calendar month for example.	It is proposed that the legislation is amended to provide for only one withdrawal that may be made in a 365(6) day cycle. Alternatively, if the intention is 12 completed months, then the legislation must say 12 completed months from the date of the last withdrawal.
	It is not clear why the new definitions of "savings pot" and "savings withdrawal benefit" would be inserted after the definition of "domestic treasury management company". Similar considerations apply to the definition of "retirement pot".	The definitions should be inserted such that the definitions run in alphabetical order.
INCOME TAX ACT: Definition of "savings withdrawal benefit"	It is noted that no amendments are made to the Fourth Schedule to include a savings withdrawal benefit in the definition of remuneration. Furthermore, no amendments are made to require the fund to obtain an employees' tax directive for such a payment.	Consequential amendments should be made to the Fourth Schedule.

	Comment	Recommendation
INCOME TAX ACT: Definition of “savings pot”	It is proposed that the rules of a fund must provide that contributions during a year of assessment that exceed one-third of the deductible amount for that person contemplated in section 11F(2) are not allowed to the savings pot. However, there will be practical challenges with this making it difficult if not impossible for funds to administer. Firstly, a fund would not know what deduction is available to its members as this would require them to have detailed knowledge of the tax position of each fund member. Secondly, even if they were able to obtain such information, this information would only be available after the member had been assessed for the relevant year and would not be available at the time of the contributions. Thirdly, a taxpayer could be a member of more than one fund (e.g. both a provident fund and a RAF) which would make it practically impossible for a fund to take into account contributions to the savings pot in another fund or it would mean that taxpayers can circumvent this rule by splitting contributions across multiple funds and double dipping the limit..	The proposed limitation of contributions to the savings pot to one-third of deductible contributions appears to be unworkable and should be abandoned. It is acknowledged that this could have the effect that the savings pot has non-deductible contributions associated with it and would necessitate a deduction in respect thereof at the time of any withdrawal.

Comment	Recommendation
It is intended that the two pot system will be implemented with effect from 1 March 2023. However, in order for this to happen all retirement fund rules will need to be amended before then as the draft legislation refers to "… the rules of the fund provide…" for the two pot system. This will require all retirement fund rules to be amended and approved before 1 March 2023 and it is unclear if this will be practically possible especially given that the legislation is not yet finalised.	Delay the implementation date to allow for (1) legislation to first be finalised and (2) all fund rule amendments to be made and approved subsequent to legislation being finalised.
It is intended that the two pot system will be implemented with effect from 1 March 2023. However, in order for this to happen (even if fund rules are amended and approved in time), systems will need to be developed and updated to cater for the proposed changes. From a system development perspective, developments and amendments should be made on finalised legislation to avoid system infrastructure failure. It is unclear if this is possible given the tight proposed implementation date.	Delay the implementation date to allow for (1) legislation to first be finalised and (2) all fund rule amendments and (3) systems to be updated and developed.

INCOME TAX ACT:
Effective date

Comment	Recommendation
It is anticipated that a majority of the withdrawal requests will come from lower income earners who are not required to submit annual tax returns to SARS. On that basis, how will SARS determine the tax rate to be applied to the withdrawal and, secondly, will these taxpayers be required to file a tax return in the year that they make a “savings pot” withdrawal?	Treasury must provide clear guidelines as to how the tax will be determined for these lower income earners and what their filing obligations will be for years where they make “savings pot” withdrawals.

INCOME TAX ACT: Practical considerations

2:INCOME TAX

BUSINESS (GENERAL)

INCOME TAX ACT:
Section 1

Comment	Recommendation
While we welcome National Treasury's stated intent to limit the impact of the amendment on legitimate business transactions, we don't believe that the proposed changes effectively achieve this.	
While in the absence of any distributions within the 91 days before or after a share buyback or redemption made out of CTC, such a transaction would not be impacted by the proviso, where there are other distributions within that period and where CTC is not distributed as part of those distributions, the buyback or redemption would not qualify to be out of CTC. To illustrate, if a distribution is paid to ordinary shareholders as a dividend (i.e. not out of CTC) 90 days prior to a buyback of ordinary shares being made, the buyback will not qualify to be made out of CTC. While it is possible that the timing of dividends and buybacks could potentially be managed in the context of private companies (noting that this would still come with challenges), this is almost impossible for listed companies to do given that dividends are generally paid twice a year as an interim dividend and a final dividend (considering the timing rule proposed essentially amounts to a 6 month rule).	We once again recommend that the proviso should not apply to share buybacks or redemptions. The mischief which National Treasury seeks to address does not apply in the context of disposals of shares.

2.1 Clarifying the definition of contributed tax capital

Comment	Recommendation
The proposed 91 day rule is onerous, particularly for listed companies that have less scope to manage the timing of the payment of dividends.	As a second best option, the 91 day rule should be reduced, ideally to 30 days or, at most, 45 days.
We note that the manner in which the proposed 91 day rule is formulated arguably creates a loophole for distributions to be made in the manner which National Treasury is attempting to address. This is because the rule is formulated as 91 days before or after the date of the transfer that is being tested. The result is that, arguably, a transfer could be made to one shareholder out of CTC and on the same date a transfer could be made to another shareholder as a dividend as the second transfer is not on a date before or after the first transfer.	Should it be decided to retain this rule, it should be amended to make provision for transfers on the same date as the tested transfer.

INCOME TAX ACT:
Section 1

2.1 Clarifying the definition of contributed tax capital

INCOME TAX ACT:
Section 1

Comment	Recommendation
It is unclear what is meant by "all holders of shares in that class to which transfers are made within a period of 91 days before or after the date of that transfer are actually allocated an amount of contributed tax capital based on their proportional shareholding within that class of shares". The uncertainty relates to two aspects as explained below. **Quantum of CTC** The provision requires that an amount of CTC must be allocated to all shareholders receiving a distribution within the time period. However, conceivably this could include any amount and does not have to bear any relationship to the CTC distributed on the tested transfer. The result is that, for example, a distribution of CTC could be made to shareholder 1 on day 1 of R100/share in terms of a share buyback and to shareholder 2 a distribution of R100/share is made on day 2 with only R1/share being made out of CTC. This is seemingly permissible on the wording of the proviso. **Proportionality** The provision is not clear on when proportionality should be determined. CTC is allocated at the time of a distribution and is therefore redetermined for each distribution. Given the purpose of the proviso, it is not clear if achieves its objective - refer the above example in this regard.	National Treasury should clarify the mechanics of the provision insofar as the allocation of CTC is concerned across multiple distributions on different dates.

2.2 Refining the reversal of the nil base cost rules applicable to intra- group transactions

Comment	Recommendation
The proposed amendment does not address the situation where a transferee company ceases within 6 years to form part of any group of companies in relation to a controlling group company in relation to the transferor company, contrary to what is indicated in the draft explanatory memorandum. This is because the proposed section 45(3B)(a)(i) does not deal with the controlling group scenario at all.	Section 45(3B)(a)(i) should be amended to address a transferee company ceasing to form part of any group of companies in relation to a controlling group company in relation to the transferor company. Subparagraph (i) can, however, be greatly simplified by simply referring to the scenario where subsection (4) applies - this would then cover all degroupings whether with a transferor,controlling group company or deemed in terms of subsection (4B).
It is not clear why a scenario for a disposal of an asset as contemplated in subsection (5) would still be required. In such a scenario no reorg relief applies in any event.	Subparagraph (iii) is considered unnecessary and subparagraph (iv) should be amended to apply to any disposal where the reorg rules don't apply and there is no need to distinguish between disposals within and after 18 months.

INCOME TAX ACT:
Section 45

2.2 Refining the reversal of the nil base cost rules applicable to intra- group transactions

Comment	Recommendation
When it comes to the disposal of an asset, s45(3B) does not explicitly require that asset to have been funded by the debt or shares in question. For example, the proposed subparagraph (iv) only requires the disposal of an asset outside the reorg rules. Arguably, that could be any asset (whether the subject of a s45 transaction or not and whether funded by the debt or shares in question or not) and could trigger a restatement of the base cost of the entire debt or shares even if only comprising a portion of the assets funded.	It should be made clear that the restatement of the base cost of the debt or shares is only to the extent that it funded an asset that was the subject of the intra-group transaction and that has been disposed of outside of the reorg rules.

INCOME TAX ACT:
Section 45

2.3 Clarifying the rule that triggers recoupment under the debt forgiveness rules

Comment	Recommendation
The proposed amendment to s19(6A) would result in the taxpayer being worse off than in the scenario where the debt reduction takes place as contemplated in s19(6). This can be illustrated by a simple example. Assume a taxpayer acquired an allowance asset for R100, fully funded by debt of R100. Allowances of R40 are claimed on the asset and it is disposed of for R30 and the full amount of the debt is reduced. If the debt reduction takes place in the same year as disposal of the asset, s19(6) applies and there is no scrapping allowance, a recoupment of R40 and a capital gain of R30 (para 12A(3)). However, if the debt benefit arises in the subsequent year to the disposal, in year 1 there would be a scrapping allowance of R10 and no capital gain or loss. In year 2 the proposed s19(6A) would result in a recoupment of R100 and para 12A(4) would result in a capital gain of R30. In effect, the capital gain gets taxed as both a capital gain and a recoupment. This is because the proposed s19(6A) does not take into account that a portion of the debt benefit may be taxed in terms of para 12A(4).	The recoupment in s19(6A) should be reduced by any capital gain in para 12A(4).

INCOME TAX ACT:
Section 19

2.4 Reviewing the debtors’ allowance provisions to limit the impact on lay-by arrangements

Comment	Recommendation
We note that the proposed provision would result in a new allowance being available for lay-by agreements. However, it should be noted that in the unusual scenario where a lay-by agreement is longer than 12 months, the taxpayer could be entitled to both the s24(2) allowance and the proposed allowance for lay-bys. The latter should be reduced by any allowance under s24(2).	It should be ensured that a taxpayer cannot double dip on both the s24(2) and s24(2A) allowances.
The proposed provision provides for an allowance to the extent that an allowance was not made under s11(j). It is submitted that the reference to s11(j) is misplaced in the context of lay-by agreements as these do not give rise to debts as contemplated in that section.	The reference to s11(j) is misplaced and should be removed.

INCOME TAX ACT:
Section 24

3:INCOME TAX

BUSINESS (FINANCIAL INSTITUTIONS AND PRODUCTS)

Comment	Recommendation
We have made our comments on these proposed amendments through ASISA.	

INCOME TAX ACT:
Section 28

Comment	Recommendation
We have made our comments on these proposed amendments through ASISA.	

INCOME TAX ACT:
Section 29A

4: INCOME TAX

BUSINESS INCENTIVES

INCOME TAX ACT:
Section 20

Comment	Recommendation
The proposed amendment may result in potentially unintended consequences for taxpayers conducting mining operations and influence the proposed restriction of the balance of assessed losses. To illustrate the point and with reference to the example provided on page 23 of the draft EM, the deductible portion of the balance of assessed loss for the taxpayer should be limited to 2,000 (2,500 * 80%) based on the proposed wording of the section and not 2,100 as illustrated in the example. The example effectively ignores the impact of the tax loss for the year incurred by Mine 2 and allows the loss on Mine 3 to be used in full in the overall calculation of the restriction (see column F). In effect, the example treats each of the mines and the non-mining income as separate taxpayers and performs a separate taxable income calculation for each. However, such ring-fencing actually technically applies only for purposes of determining the capital expenditure deduction (even though s36 requires assessed losses to be determined for mining and per mine).	The position of taxpayers conducting mining operations should be clarified with reference to the proposed amendments to section 20, the example included in the EM and the policy intent of the mining ring-fencing provisions.

4.1 Interactions between the application of the assessed loss restrictions rules and capital expenditure regime for mining operations

Comment	Recommendation
The proposed amendment may result in neutralising the ring-fencing provisions contained in s36. Again with reference to the principles applied in the example on page 23 of the draft EM, the taxpayer could claim a deduction for capital expenditure in excess of its taxable income derived from mining operations (i.e. potentially negating the ring fencing provision contained in s36(7E)). This can be illustrated as follows applying the 'principles in the example' (i.e. treating each mine as a separate taxpayer). Assume the following facts: - Mine 1: Taxable income 5,000 (before application of sections 20 and 15/36) + Balance of assessed loss of 2,000 + Unredeemed capital expenditure of 4,000 - Mine 2: Tax loss of 4,000 (before application of sections 20 and 15/36) + Balance of assessed loss of 2,000 + Unredeemed capital expenditure of 3,000	The position of taxpayers conducting mining operations should be clarified with reference to the proposed amendments to section 20, the example included in the EM and the policy intent of the mining ring-fencing provisions. An option that Treasury may wish to consider is, rather than to amend section 20, to rather amend the ring-fencing rules in section 36 to provide that the deduction of capital expenditure be limited to taxable income determined **before** the deduction of the assessed loss. This would have the effect of increased the deduction of capital expenditure compared to what is proposed but would also reduce the deduction of assessed losses (which is determined on a higher base) with the advantage of greatly simplifying the regime.

INCOME TAX ACT:
Section 20

Comment	Recommendation
Mine 1 will be entitled to claim a loss of 2,000 and capital expenditure of 3,000. However, as there is a net taxable income from mining operations (i.e. mine 1 + mine 2) of only 1,000, capital expenditure should be limited in terms of section 36(7E) after deducting the assessed loss relating to mining. Applying section 20 and section 36(7E) the result would be the deduction of an assessed loss of only 800 and a deduction of capital expenditure of only 200 (mine 1).	

INCOME TAX ACT:
Section 20

4.1 Interactions between the application of the assessed loss restrictions rules and capital expenditure regime for mining operations

Comment	Recommendation
It is proposed that s20 apply before taking into account sections 36(7E), (7F) and (7G). It appears that the intention is that the assessed loss limitation be applied before any deduction of mining capex. However, the provisions referred to are simply the ring-fencing provisions of s36 and not the provisions in terms of which the actual deduction of capex is made. The actual deduction of capex is made in terms of s15(a) read with s36(7C).	It is recommended that the provision in s20 should reference s15(a).

INCOME TAX ACT:
Section 20

Comment	Recommendation
We welcome the proposal to exclude interest forming part of capex from the provisions of s23M. However, there are a few uncertainties that should be clarified.	
The proposed subsection (6A) provides that the entire section does not apply to the interest in question and not just the limitation itself in s23M(2). The effect is that uncertainty is created as to whether such interest should be taken into account in the determination of adjusted taxable income (applicable to the limitation for other interest falling within the scope of the section).	The uncertainty of the extent of the operation of the exclusion for interest included in capex should be clarified.

INCOME TAX ACT:
Section 23M

Comment	Recommendation
The provision is not clear when referring to interest incurred whether it is referring to the much broader definition of interest in s23M or to the narrower concept of interest in s36(11)(b). For example, exchange differences on a s36(11)(b) loan would not be included in capex while common law interest would be. It is submitted that the reference to interest in this provision should be to the broader concept of interest as defined in s23M and not the narrower concept of interest that applies for other provisions of the Act as the alternative would result in anomalies, e.g. exchange differences being subject to limitation but common law interest not on the same loan.	The meaning of interest incurred in the context of the exclusion should be clarified as interest as defined in s23M and not interest as contemplated in s36(11)(b).

INCOME TAX ACT:
Section 23M

4.2 Interaction between the application of the interest limitation rules and capital expenditure regime for mining operations

Comment	Recommendation
The proposed subsection (6A) is limited to 'interest incurred on a loan utilised for mining purposes during any period of non-production'. Section 36(11)(b) however extends to interest incurred prior to the commencement of production (e.g. loan used during development of a mine). The effect is that uncertainty is created as to whether interest incurred prior to the commencement of production may potentially be limited by section 23M and whether a distinction is intended.	The uncertainty as to whether interest incurred prior to the commencement of production should be excluded from the application of section 23M should be clarified by aligning the wording with section 36(11)(b).

INCOME TAX ACT:
Section 23M

	Comment	Recommendation
INCOME TAX ACT: Section 11(e)	S12P(4) provides that where any amount is received by or accrues to a person by way of a government grant as contemplated in subsection (2) or (2A) for the acquisition, creation or improvement of an allowance asset or as a reimbursement for expenditure incurred in respect of that acquisition, creation or improvement, the aggregate amount of the deductions or allowances allowable to that person in respect of that allowance asset may not exceed an amount equal to the aggregate of the expenditure incurred in the acquisition, creation or improvement of that allowance asset, reduced by an amount equal to the sum of the amount of the government grant and the aggregate amount of all deductions and allowances previously allowed to that person in respect of that allowance asset. This provision applies to both cash grants and grants in kind and has the effect of limiting any allowances for assets funded with grants to the net cost to the taxpayer. The need for the proposed amendments is therefore questioned.	It is not clear that the proposed amendments are necessary to limit s11(e) allowances for assets acquired by way of a grant in kind.

Comment	Recommendation
The proposed extension of the sunset clause in section 11D to 31 December 2023 and the further consideration thereof in the 2023 Budget is welcomed. Given the uptake of this incentive and the impact thereof on the technological and scientific development in South Africa would likely urge further extension and enhancement of this incentive.	

INCOME TAX ACT:
Section 11D

5:INCOME TAX

INTERNATIONAL

5.1 Updating definitions and terms relating to the Insurance Act, 2017, in the determination of net income of CFCs

Comment	Recommendation
No comments	

INCOME TAX ACT:
Section 9D

Comment	Recommendation
No comments	

INCOME TAX ACT:
Section 9D

5.3 Clarifying the treatment of amounts from hybrid equity instruments deemed to be income under CFC rules

Comment	Recommendation
The phrase “including any similar amount adjusted in terms of section 31” is vague and the reasons / proposal in the draft Explanatory Memorandum do not include comments in this respect.	Comments should be included in the Explanatory Memorandum to clarify the purpose and application of this phrase and consideration should be given to use more specific wording in the amendment.

INCOME TAX ACT:
Section 9D(9)(*f*A)

5.4 Clarifying the exclusion of participatory interest in foreign collective investment schemes from the definition of foreign dividend

Comment	Recommendation
The draft EM indicates an effective date of years of assessment commencing on or after 1 January 2023; however, the draft bill contains an effective date of 1 January 2023.	Given that the amendment is suggested to be clarificatory in nature, it is submitted that there should be no defined effective date and it should come into effect on the date of promulgation.

INCOME TAX ACT:
Section 1

6:VALUE-ADDED TAX

Comment	Recommendation
Proviso (xiii) to the definition of "enterprise" in section 1(1). The proposed amendment including the supply of parts is welcomed. However, the manner in which the amendment currently reads (referring to "and") is interpreted to mean that the non-resident must supply the aircraft **and** the parts (as example) under a rental agreement. In practice there are many instances where the non-resident, non-vendor may only supply parts to an SA recipient under rental, like an aircraft engine and another non-resident, non-vendor may lease the aircraft to the SA recipient.	It is recommended that the amendment be broadened to exclude the activities of a non-resident, non-vendor to the extent of the rental of the parts which is independent from the main lease of the aircraft/ship. The Explanatory Memorandum appears to support the above notion that the amendment should not be limited to where the supplier of the part is also the supplier of the actual aircraft, ship or rolling stock as it refers to 'separate agreement'. Consideration could be given to amending "and" to "or" or to make it more explicit in some other way.

VAT ACT:
Section 1(1)
Enterprise

Comment	Recommendation
Proviso (xiii) to the definition of “enterprise” in section 1(1). (cont..)	It is impractical to expect vendors to register for VAT during this period and then deregister. This imposes an unnecessary administrative burden and cost on both SARS and taxpayers. In the alternative, it’s requested that transitional rules be provided for the interim period to prevent affected taxpayers from having to register for VAT. The practice by SARS has been, since 1 January 2021, for these suppliers to register for VAT. In light of this amendment, such vendors will now be required to deregister for VAT. It is therefore proposed that provision be made under section 8(2) to exempt them from any exit VAT.

VAT ACT:
Section 1(1)
“Enterprise”

Comment	Recommendation
Flash title sales Proviso to the definition of "enterprise" in section 1(1). The amendment is welcomed in general with some recommendations. The new proviso (xiv) excludes from the definition of "enterprise" the first Qualifying Purchaser who supplies goods on a flash-title basis. However, it does not provide for subsequent QP's who also supply the goods on a flash title basis whilst the goods are still at the port in SA. In addition, consideration should be given to making this proviso optional and allow QP's to register as a VAT vendor in the instance whereby they incur VAT on certain expenditure in SA and wish to recover such VAT (similar to section 12(k)). The registration of the QP will create a mechanism for the QP to recover the VAT paid in SA. This option will also allow QPs who have other enterprise activities to regard this an an enterprise activity as well.	It is recommended that the proviso be - ● Extended to include all QPs who supply goods on a flash title basis; and ● Optional to allow QPs to recover any local VAT charged or to regard this as an enterprise activity where they are required to register for other activities.

VAT ACT:
Section 1(1)
"Enterprise"

Comment	Recommendation
Flash title sales (cont…) *"(xiv) where goods are supplied…provided that the documentary requirements prescribed in regulation 10 of the regulation referred to in paragraph (d) of the definition of 'exported' in section 1(1) are complied with;"* It is unclear on the purpose of including the requirement to comply with documentary requirements in order to apply the proviso and exemption to the QP. Our understanding is that the documentary requirements are only applicable to the South African registered vendor who elects to apply VAT the zero rate to supplies made to the QP.	It is further recommended that the documentary requirements be deleted.

VAT ACT:
Section 1(1)
"Enterprise"

Comment	Recommendation
Section 16(3)(c) Proposed wording: *(c) by the substitution in subsection (3) for paragraph (o) of the following paragraph:* *"(o) an amount equal to the tax fraction of the amount calculated in accordance with section 10(29):".* It appears that this amendment is intended to provide clarity. However, section 10 does not calculate the value of the supply but determines that the value of the supply is the adjusted cost.	Consideration should be given to rewording the subsection as follows: *"(c) by the substitution in subsection (3) for paragraph (o) of the following paragraph:* *"(o) an amount equal to the tax fraction of the adjusted cost contemplated* ***in*** *section 10(29):".*

VAT ACT:
Section 16(3)(c)

Comment	Recommendation
Section 20(8A) *"(8A) Notwithstanding anything in this section, where a supplier makes a deemed supply (not being a taxable supply) of goods contemplated in section 8(10) to a recipient, being a registered vendor, the recipient shall maintain sufficient records to enable the following particulars to be ascertained:* … *<u>(c) further particulars</u> in the form and manner as the Commissioner may prescribe.".*	We are of the view that the wording "further particulars" is too broad and suggest that this requirement be clarified to provide clear guidelines on what further particulars the Commissioner may add.

VAT ACT:
Section 20(8A)

	Comments	Recommendation
VAT ACT: Section 23(2A)	Section 23(2A) is added to provide for non-resident entities to register as a branch of a local vendor under certain circumstances. The amendment is welcomed in general with some recommendations. The section allows a non-resident who becomes liable to register to register as a branch of the “registered vendor”. The manner in which the section reads or is interpreted and understood is that the registered vendor referred to must be a local SA entity registered for VAT. This however does not cater for circumstances where there is no SA group company registered for VAT in SA. It does however allow a non-resident company to independently register for VAT but only in circumstances when the SA company de-registers for VAT. This requirement does not allow for continuation of the existing VAT number and requires the non-resident to apply again for VAT.	It is recommended that the non-resident company be allowed to register independently of its SA group company and such registration be allowed to cater/include all non-resident group companies’ activities in SA. This will provide for scenarios where the non-resident company does not have a SA group company. It will further allow for the non-resident group company to maintain the same VAT number. It is noted that the non-resident entity would in any event be required to appoint a representative vendor in SA providing SARS with some security for ensuring that the tax is collected.

6.5 Branch registrations

	Comments	Recommendation
VAT ACT: Section 23(2A)	The current wording deems the branch to be a separate enterprise from the registered SA vendor. The section should rather be consistent with other provisions in the VAT Act and deem them to be separate persons. The proposed amendment does furthermore not deal with the relationships between the entities falling within the branch registration. For example, what are the intended VAT consequences of supplies made between the entities falling within the branch registration? Would such supplies be subject to VAT or not? In our view, the entities falling subject to the branch registration should be deemed to be one and the same person for VAT purposes thereby ignoring any transactions taking place amongst the entities falling under the one VAT registration number. It is noted that provision is made to offset refunds between the branch and main VAT registrations. This create loans between the two vendors. The repayment of this loan may trigger SARB approval requirements. It is further recommended that this provision to be tested against all legal principles to ensure that it is permissible without following the normal recovery provisions.	Having regard to our comments, it is recommended that: • specific wording be included to deem the main registration and branch registration to be separate persons; • the group companies forming part of the branch registration should be deemed to be one and the same person; and • consideration be given to the provision relating to the offsetting of a refund to ensure that it is legally compliant.

Comment	Recommendation
Pooling arrangements The amendment is welcomed in general. The purpose of the amendment is made clear in the Explanatory Memorandum. However, the wording of the proposed section currently causes some confusion. Section 51 already creates for a separation of a body or partnership where there is a separate enterprise being conducted by a body from its members.	It is recommended that the opening wording in the section be amended so as not to refer to shareholders of a company or partners in a partnership or members of a body as this creates confusion with reference to section 51. It is recommended that it be clarified what is meant by a "professional body"; When will the body be regarded as a professional body? Which bodies are intended to qualify for this VAT treatment? With reference to provio (iii), it is recommended that it be clarified whether the three tests of Laws vs Regulations vs Rules are independent from tests from each other. Clarification is requested as to whether section 52(3) is intended as an alternative to section 51(1) and (2); for example can an agricultural pool qualify under section 52(3) in light of the relevant regulations envisaged in section 52(1) never having been published?

VAT ACT:
Pooling arrangements

Comment	Recommendation
The proposed effective date of the amendments in lieu of the section 72 rulings is currently 1 January 2023. Section 72, however, withdrew all existing section 72 VAT rulings with effect from 1 January 2022. This in essence leaves a one year gap where the persons falling under the relevant sections are technically required to register as vendors just to deregister come 1 January 2023. This leaves both vendors and SARS with unnecessary administration and costs to manage where the intention is clearly for the activities either not to result in an enterprise in SA or for multiple enterprises to register under one branch VAT registration.	It is recommended in general that the amendments be backdated to 1 January 2022, i.e. the date following the expiry date of the section 72 rulings. Alternatively, transitional rules should be published for this interim period so that vendors are not penalised, disadvantaged or required to go through the whole process of registering and then deregistering.

VAT ACT:
Effective date

7:CARBON TAX

7.1 Carbon tax rate trajectory for 2023 to 2025, 2026, 2027 to 2029 and 2030

Comment	Recommendation
No comments	

CARBON TAX ACT:
Section 5

7.1 Carbon tax rate trajectory for 2023 to 2025, 2026, 2027 to 2029 and 2030

Comment	Recommendation
The Income Tax Act defines the average exchange rate with reference to a year of assessment. However, the carbon tax is levied for a calendar year (a tax period) and which would commonly not coincide with a company's year of assessment.	It is recommended that a definition of average exchange rate be incorporated into the Carbon Tax Act and defined with reference to a tax period.
The USD equivalent of the carbon tax rate is currently approximately US$9/t$CO_2$e. The US$/ZAR exchange rate is highly volatile and it is not inconceivable that the ZAR/USD exchange rate could increase to, say, R21 by 2026. Such a change would dilute the effect of the current and increased rates over the next 3 years and result in a substantial shock in 2026. For example, a scenario could arise where the USD equivalent rate for 2025 at an exchange rate of R21 is US$ 12 where the Rand gradually weakens. Such a scenario would result in a substantial price shock in 2026 when the rate moves to US$20. The opposite could also happen if the Rand strengthens significantly over the period, resulting in the US$20 rate being reached quicker than intended.	In light of the potential volatility referred to, it may be preferable to set the US$ equivalent rate for each of 2023, 2024 and 2025 rather than the increase to the rates. This would result in a more stable US$ rate trajectory. The same would apply equally to the periods 2027, 2028 and 2029 to ensure that the US$30 rate for 2030 is reached in a smooth manner.

CARBON TAX ACT:
Section 5

INCOME TAX ACT:
Section 12L

Comment	Recommendation
The proposed amendment aims to extend the Energy Efficiency Savings (EES) tax incentive by three years from 1 January 2023 to 31 December 2025 to tie in with the proposed start of the second phase of carbon tax. However, the policy rationale behind the Section 12L EES tax incentive expiring at the end of 2025 is unclear. Section 12L aims to incentivise behavioural change and to increase government's commitment to decarbonising South Africa's industrial and commercial industries. As noted in the EM, this is one of the revenue recycling measures that Treasury undertook to apply and which is crucial to limiting the negative impact of the carbon tax on economic growth. It is of critical importance that the revenues from carbon tax are recycled back to business (either in the form of incentives or in the form of a reduction in other taxes on business) and should not be viewed as an opportunity to increase the levels of taxes extracted from the economy.	It is recommended that the Section 12L EES tax incentive continues beyond 2025 in order to stimulate new energy efficient practices within industry to drive decarbonisation. It is recommended that National Treasury explore the expansion of 'green' tax incentives within fiscal legislation to encourage reward for behavioural change. 'Green' incentives coupled with the application of a carbon tax will drive decarbonisation efforts. Globally, South Africa tracks behind insofar as it applies to 'green' incentives. Alternatively, the increased carbon tax rates should be seen as part of the base-broadening initiatives and the revenues generated should be used to reduce the CIT tax rate.

CARBON TAX ACT:
Section 6(2)(c) and (d)

Comment	Recommendation
National Treasury has outlined that the proposal is aimed at incentivising the uptake of renewable electricity while protecting households from higher electricity prices over the short term, it is proposed that the commitment to electricity price neutrality provided in terms of Sections 6(2)(c) and (d) of the Carbon Tax Act is extended by three years, from 31 December 2022 to December 2025. Given the potential impact that dramatic increases to the price of electricity may have on carbon intensive industries, it would be prudent for National Treasury to provide clarity on its intention from 1 January 2026. This causes uncertainty, specifically when one considers industries that remain highly dependant on Eskom supplied electricity. A dramatic increase to the price of electricity from the start of 2026 may cause a shock within the market and it is recommended that express proposals be made regarding the future of the credit for the renewable energy premium and the electricity levy.	It is cautioned that a limited and/or full cost “pass-through” of carbon tax costs would not be appropriate. A pass through mechanism would not encourage behavioural change and is misaligned with the “Polluter-Pays-Principle”. The pass-through of carbon tax costs will result in heightened indirect costs for end users, while simultaneously disincentivizing behavioural change by suppliers - who continue to place reliance on “dirty energy”, due to their ability to “pass-through” their carbon tax cost to end users.

7.4 Limitation of electricity price neutrality deductions to electricity generation from fossil fuels

Comment	Recommendation
National Treasury has proposed amendments to Section 6(2) of the Carbon Tax Act to clarify that "*taxpayers in respect of generation of electricity from fossil fuels*" includes activities under the IPCC Codes 1A1: energy industries and 1A2: manufacturing industries and construction	The proposed amendment is welcomed given the uncertainty raised by taxpayers in the past regarding the application of Section 6(2).

CARBON TAX ACT:
Section 6(2)

Comment	Recommendation
There is a grammatical error in the proposed section 6(4)(a) which should read “the process **of** storing …”	The error should be corrected.

CARBON TAX ACT:
Section 6(4)

	Comment	Recommendation
	We note that in accordance with policy documents released by National Treasury in February 2022, the intention is that the basic tax-free allowances will be gradually reduced to strengthen the price signals under the carbon tax from 1 January 2026 to 31 December 2030.	We note that National Treasury is silent on the anticipated percentage reductions in the basic tax-free allowances from 2026. This causes uncertainty and difficulty from a forecasting and impairment testing perspective, specifically when one considers the proposed carbon tax rate increases coupled with a reduction in the basic tax free allowances. It is recommended that express proposals be made regarding the percentage reductions year-on-year for the basic tax free allowances to provide more clarity and certainty to taxpayers on the position moving forward from 2026 onwards (as has been provided for under the proposed rate increases to Section 5).
CARBON TAX ACT	National Treasury has indicated that in order to encourage investments in carbon offset projects, government intends to increase the carbon offset allowance by 5 per cent from 1 January 2026.	It is recommended that if the intention is to encourage investments in carbon offset projects, the allowance should be increased with effect from 2023 and not from 1 January 2026. It is not understood why the increase in the allowance is only taking effect from 2026, if the intention is aimed to encourage investment in carbon offsets. Furthermore, this should be incorporated into the legislation to provide the requisite certainty.

Comment

In the February 2022 Budget documentation it was stated that in order to address concerns about double penalties for companies under the carbon tax and carbon budgets, a higher carbon tax rate of R640 per tonne of carbon dioxide equivalent will apply to greenhouse gas emissions exceeding the carbon budget. These amendments will be legislated once the Climate Change Bill in enacted.

National Treasury indicated in Parliament that because the Climate Change Bill has not yet been enacted, the proposed penalty was not included in the DTLAB.

Recommendation

As the mandatory carbon budgeting system comes into effect on 1 January 2023, at which time the carbon budget allowance of 5% will fall away, the penalty should have aligned with this date and the provision should have been made for this penalty in the current DTLAB. The penalty cannot be included in the Climate Change Bill, as it is not a money bill.

Thus, should the intention be that the Climate Change Bill and the mandatory carbon budgeting process will be implemented at a later date (which will be after 1 January 2023), then it is recommended that the current carbon budget allowance should be extended, as it expires at the end of 2022.

CARBON TAX ACT

8: CLAUSE-BY-CLAUSE

Comment	Recommendation
The amendment does not insert the word “company” in all relevant instances in the subsection.	The amendment should insert the word “company” as follows: “....must, for purposes of Part V of Chapter II, be treated as a donation made to that trust or company by the person …”

INCOME TAX ACT:
Section 7C

Comment	Recommendation
As far as we can tell, one additional grant is added to the schedule. However, the entire schedule is replaced which makes it difficult to monitor what changes have been made.	It is recommended that instead of substituting the entire schedule, only the actual changes be made to the schedule by way of additions to or deletions from it.

INCOME TAX ACT:
Eleventh Schedule

9: MATTERS NOT ADDRESSED

INCOME TAX ACT: Collateral arrangements

Comment	Recommendation
Clarifying the tax treatment of collateral arrangement provisions National Treasury stated in the 2022 Budget that Government proposes to review the impact of the 2021 amendments during the 2022 legislative cycle. The draft EM and TLAB are silent on these aspects. However, National Treasury indicated that Government's decision (post discussions with stakeholders) was that no further amendments are required and that the provisions contained in the 2021 TLAA will come into effect.	
2021 TLAA amendments (effective 1 January 2023) The 'collateral arrangement' definition provides for certain exceptions (i.e. arrangements that will not qualify as a collateral arrangement) and the limitation on re-use of the collateral is included as one of these exceptions. This could have significant consequences.	Only the parts of the overall arrangement that are non-compliant with the collateral arrangement principles should be subject to normal tax principles, i.e. the subsequent non-compliant re-use of the collateral and not the original provision thereof.

Comment	Recommendation
STT and CGT may be triggered with retrospective effect for collateral provided under a compliant collateral arrangement where a subsequent transfer of the collateral is non-compliant and renders the original collateral arrangement non-compliant. To subject the provider of the collateral to such a result is draconian considering that they have no control over the re-use of the collateral. The extent of the problem is most clearly illustrated by the position where the collateral is subsequently realized in the event of a default on the debt to which the collateral arrangement relates. To suggest that in such circumstances the arrangement should not qualify as a collateral arrangement is patently ridiculous and would undermine the very purpose of the provision.	Furthermore, the permitted use of the collateral should be expanded.

INCOME TAX ACT: Collateral arrangements

Comment	Recommendation
Upstream petroleum tax regime: National Treasury stated in the 2022 National Budget (Chapter 4) that a workshop will be held so that a proposal can be included in the 2022 TLAB on this tax regime. However, no proposal was included in the 2022 Draft TLAB.	The progress on arranging the workshop and drafting the proposal should be communicated to stakeholders.

INCOME TAX ACT: Upstream petroleum tax regime