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29 August 2008

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Dear Sirs

2008 DRAFT REVENUE LAWS AMENDMENT BILLS

1. INTRODUCTION

This submission contains comments on the 2008 Draft Revenue Laws Amendment Bill and the Draft Revenue Laws Second Amendment Bill of 2008.

2. DRAFT REVENUE LAWS AMENDMENT BILL, 2008 ("DRLAB")

2.1. Clause 6(1) – definition of "contributed tax capital"

2.1.1. The proposal to introduce the concept of "contributed tax capital" cannot be supported as this will give rise to greater divergence between tax and accounting concepts. Taxpayers are now familiar with the definition of "dividend" contained in section 1 of the Income Tax Act, Act 58 of 1962, as amended (**"the Act"**).

2.1.2. If the decision is made to persist with the introduction of the definition of "contributed tax capital", it is necessary to clarify how existing companies should determine "contributed tax capital" for purposes of future distributions. It will be necessary for existing companies to investigate the nature of their share capital from the date of inception and the legislation does not appear to cater for complications that might arise in this regard.

edward nathan sonnenbergs incorporated registration number 2006/018200/21

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2.1.3. The legislation, on the face of it, appears to deal with the position of a company issuing shares currently, as opposed to companies that have issued shares over the life of the company. It is, therefore, necessary that the definition be amended to explain how existing companies should determine the "contributed tax capital" in respect of shares issued over a period of many years.

2.1.4. At paragraph (a) of the definition of "contributed tax capital", reference is made to "more than 20% of the shares of the company". It is unclear what the position will be in the case of a company that has issued preference shares or different classes of shares. Is it intended that the calculation required takes account of equity shares or all shares in issue?

2.1.5. Section 41 of the Act, for example, refers to equity share capital and it is unfortunate that the definition of "contributed tax capital" is not consistent with terminology used generally in the Act.

2.2. **Definition of foreign dividend**

2.2.1. The DRLAB proposes defining the term "foreign dividend" by referring to the term "dividend", which means:

> "any dividend as defined prior to the coming into operation of the Part VIII of Chapter II of this Act, received by or which accrued to any person from a foreign company as defined in section 9D;"

2.2.2. It would be far preferable if the definition does not require readers of the legislation to refer to prior provisions of the Act, but rather that the term "foreign dividend" is comprehensively defined in section 1 of the principal Act.

2.3. **Clause 13 – taxation of passive holding companies (revised draft clause issued on 20 August 2008)**

2.3.1. It is contended that the proposed introduction of section 9E, which seeks to levy a higher rate of tax on so-called "passive holding companies", is ill-conceived. The Explanatory Memorandum on the 2008 DRLAB, raises concerns about the possibility of the difference in the company tax rate of 28% and affords natural persons an opportunity for arbitrage in that the maximum rate applicable to individuals is 40%.

2.3.2. The underlying problem facing South Africa is the divergence in tax rates applicable to individuals, currently subject to a maximum marginal rate of 40%, and companies which face a rate of 28%. Unfortunately, the opportunity for arbitrage has increased because of National Treasury's decision to reduce the

corporate rate from 29% to 28%. It would be far preferable, in our opinion, if the maximum rate applicable to individuals was reduced, thereby alleviating the arbitrage opportunity referred to in the Explanatory Memorandum.

2.3.3. It is our understanding that the intention of introducing the concept of "passive holding companies", was to seek a higher rate of taxation from so-called passive investment companies, owned by natural persons, where such companies derived interest income.

2.3.4. Based on the current provisions of the clause, it would appear that the punitive tax rates applicable under section 9E will apply to special purpose vehicles utilised by banks and others in financing black economic empowerment ("**BEE**") transactions, thereby creating further hurdles for corporate South Africa to comply with obligations imposed under the BEE Charters and related legislation.

2.3.5. Furthermore, at the time that capital gains tax ("**CGT**") was introduced, natural persons were afforded an opportunity to transfer primary residences' owned by them via companies, trusts or close corporations, into their personal names without adverse tax consequences. If the decision to introduce a higher rate of tax on passive holding companies is persisted with, natural persons should be afforded an opportunity to transfer the financial instruments owned by so-called "passive holding companies", free of adverse tax consequences, within a limited period of time into their own names.

2.3.6. A further question arises regarding the introduction of the concept seeking a higher rate of tax on passive holding companies and that is whether the provision complies with the constitutional right to equality contained in section 9 of the Constitution of the Republic of South Africa, Act 108 of 1996, as amended ("**the Constitution**"). It is contended that the provision could be construed as discriminatory in nature and, thus, a violation of taxpayers' rights to equality in section 9 of the Constitution.

2.3.7. At paragraph (b) of the definition of "excluded company" in the proposed section 9E(1), the following is stated:

> "a member of the same group of companies as defined in section 41 as a listed company"

2.3.8. It is suggested that the above be re-worded along the following lines:

> "a member of the same group of companies as defined in section 41, where the controlling group company is a listed company"

2.3.9. It is submitted that the definition of "excluded shareholder" should refer to any other company thereby alleviating the concerns relating to special purpose vehicles created for achieving compliance with the State's BEE Charters, and structures utilised in BEE transactions.

2.3.10. Unfortunately, the Explanatory Memorandum dealing with the proposed amendment and the draft legislation itself, does not state clearly how capital gains will be taxed in the hands of passive holding companies. Currently, natural persons are liable to CGT at a maximum rate of 10% and companies at 14%. Is it National Treasury's intention that capital gains realised by passive holding companies will, in future, be liable to tax at 20%? Unfortunately, it is not clear whether this is the position.

2.3.11. Currently, the draft section 9E(4) states as follows:

> "A dividend paid by a company is not subject to the dividends tax imposed in terms of Part VII of Chapter II to the extent that the sum of that dividend and all other dividends paid on or after the effective date as defined in that Part does not exceed the sum of –"

2.3.12. It is unclear, currently, as to the company referred to in the first line of the above-mentioned provision. Is it intended that the reference should, in fact, be to "a dividend paid by a passive holding company"?

2.4. Clause 21 – insertion of section 12J into the principal Act

2.4.1. By introducing the concept of "venture capital companies", National Treasury seeks to encourage investment in certain activities. When reference is made to the provisions imposing tax on "passive holding companies", is it National Treasury's intention that venture capital companies will be treated as passive holding companies? If not, the draft legislation should be amended accordingly.

2.4.2. The proposed section 12J(5)(iii) of the DRLAB, requires that the gross income of the venture capital company will be derived solely from financial instruments. It is our understanding that venture capital companies will, often, derive income in the form of management fees or other fees for services rendered by the investor into the venture capital company. However, if the venture capital company derives income other than in the form of interest, it would appear to fall outside of the rules contained in the proposed provision and this is too restrictive.

2.5. Clause 23 – amendment to section 13*quat* of the Act

The proposed provision refers to the term "residential unit" but this is, unfortunately, not a term that is defined in section 13*quat* of the Act. This should be rectified.

2.6. Clause 24 – insertion of section 13*sex* into the principal Act

It is suggested that the heading to this section should be amended along the following lines:

"Deduction in respect of certain residential units outside of urban development zones"

2.7. Clause 25 – insertion of section 13*sept* into the principal Act

2.7.1. The proposed provision requires that the employee must not pay interest in respect of the amount owing for the residential unit acquired.

2.7.2. This would appear to constitute a fringe benefit that would give rise to income tax being payable by the affected employee. Should this not be the intention, the Seventh Schedule to the Act should be amended to specifically provide that such interest-free loans will not give rise to a taxable fringe benefit in the hands of affected employees.

2.8. Clause 26 – insertion of section 13*oct* into the principal Act

The provision refers to licence fees payable to any *Sphere of Government*. It is unclear how licence fees payable to certain regulatory bodies such as ICASA and others, will be treated and if it is intended that such licence fees will fall into section 13*oct*. The term "Sphere of Government" should, therefore, be defined or clarified in the DRLAB.

2.9. Clause 30(1)(d) – amendment of section 22(3)(a)(iii)(aa)

2.9.1. The above clause proposes amending section 22(3)(a)(iii)(aa) and currently a bracket has been omitted after the reference to the Eighth Schedule in the fourth line of the proposed wording.

2.9.2. The provision should read as follows:

"A right in the controlled foreign company held directly by a resident, include an amount equal to the proportional amount of the net income (without having regard to the percentage adjustments contemplated in paragraph 10 of the Eighth Schedule) ..."

2.10. **Clause 33 – amendment of section 24B of the principal Act**

2.10.1. It is unclear why there is no reference to the 20% shareholding threshold as contained in the "contributed tax capital" definition, proposed to be inserted into section 1 of the Act.

2.10.2. It is proposed that section 24B(1)(a) will provide as follows:

> "That company is deemed to have actually incurred an amount of expenditure in respect of the acquisition of that asset, which is equal to the lesser of the market value of that asset at the time of acquisition or the market value of the shares at that time;"

2.10.3. From a review of the phrase "at the time of acquisition or the market value of the shares at that time" it is unclear whether reference must be made to the market value at the date of acquisition or just thereafter. This should be clarified in the DRLAB.

2.11. **Clause 40 – amendment to section 41 of the principal Act**

2.11.1. It is submitted that the above-mentioned provision should apply from the beginning of 2008.

2.11.2. Furthermore, it is contended that insofar as replacement assets are concerned, sections 41 to 47 of the Act do not make adequate provisions for the scenario where assets that are required in terms of the roll-over provision are disposed of within 18 months for replacement assets in terms of paragraphs 65 and 66 of the Eighth Schedule to the Act.

2.12. **Clause 42 – amendment to section 44 of the principal Act**

2.12.1. The above proposes inserting a new sub-section (4A) and refers to a date of 21 February 2007.

2.12.2. The term "contributed tax capital" will, if enacted, only apply once the dividends tax comes into effect. It is, therefore, questioned how the insertion of the above clause can refer to a date of 21 February 2007, when the concept, "contributed tax capital", is not yet in the Act.

2.12.3. Clause 42(2) provides that sub-section (1)(b) is deemed to have come into operation on 1 January 2007 and shall apply in respect of a transaction entered into on or after that date. This provision is, therefore, retrospective and should take effect with prospective effect only.

2.13. **Clause 43 – amendment to section 45 of the principal Act**

2.13.1. The above clause amends section 45 of the Act and at sub-section (e), the clause proposes amending sub-section (4A) and changes the date to 21 February 2008.

2.13.2. This is most unfortunate as the date previously referred to in the said sub-section, was 1 January 2009 and the provision is, therefore, retrospective.

2.13.3. Currently, taxpayers have a choice whether to elect that section 45 shall apply to the transaction under consideration. The DRLAB proposes that the taxpayer will no longer have a choice unless they elect that the section should not apply.

2.13.4. We are of the opinion that it would be preferable that the *status quo* be preserved such that taxpayers elect whether this section applies or not, as opposed to the reverse situation.

2.14. **Clause 44 – amendment to section 46 of the principal Act**

2.14.1. The above-mentioned clause proposes amending section 46 and seeks to insert sub-section (3A) into the section. In the last line of sub-section (3A)(a), it is provided that:

> "... to the aggregate market value of the shares immediately before distribution;"

2.14.2. It is unclear whether the reference to "shares" is to shares in the unbundling company or the unbundled company. Thus, the reference to the market value of the shares immediately before the distribution needs to read as either "those shares" or the "shares in the unbundling company".

2.14.3. At sub-section (3A)(b), the provision contains a circular reference in that the first line of the said sub-section, refers to the unbundled company and later in the same provision at (ii), the wording refers to "an amount which bears to the contributed tax capital of the unbundled company". It would, therefore, appear that taxpayers will have great difficulty to undertake the required calculation in that the provision refers to "unbundled company" in the two parts referred to.

2.14.4. It is contended that the CTC in the unbundling company needs to be split between the unbundling company and the unbundled company, based on the relative market values of the unbundling company and the unbundled company after the distribution.

2.15. **Clause 48 – insertion of Part VIII into the principal Act: dividends tax**

2.15.1. The DRLAB proposes that certain dividends are exempt from tax, in accordance with the new section 64F.

2.15.2. It is noted that dividends received by a public benefit organisation, approved by the Commissioner: South African Revenue Service ("**the Commissioner**") in terms of section 30(3) of the Act, will be exempt from the dividends tax. It is unclear why the provisions do not exclude dividends received by recreational clubs as envisaged in section 30A of the Act.

2.15.3. The new section 64I deals with secondary tax on companies ("**STC**") credits and the on-going utilisation thereof in the new tax regime. The concession that such STC credits will not be lost must be supported and welcomed. It is suggested though that the time period for utilisation be increased from three years to five years.

2.15.4. There are concerns that if a subsidiary company reflects an STC credit, based on the current wording in the provision, that the subsidiary company may forfeit that credit as the dividends withholding tax comes into force. Or is it intended that the STC credit would still be available, even though dividends are declared by the subsidiary company to its holding company and, ultimately, to natural persons?

2.15.5. The new section 64K(7) provides as follows:

> "Every shareholder and director that controls or regularly involved in the management of the overall financial affairs of an unlisted company as defined in section 41 or an unregulated intermediary that is liable to withhold tax is personally liable for the dividends tax, additional tax, penalty or interest for which that company or intermediary is liable."

2.15.6. It is submitted that the above provision violates taxpayers' rights to property, contained in section 25 of the Constitution.

2.15.7. The proposed provision contains no reference to the conduct of the directors and shareholders and is a peremptory provision that shall apply in all circumstances. It is contended that the provision is too wide and would be struck down by the Constitutional Court, were it to be challenged on the grounds that it violates the right to property.

2.15.8. The provision should require that the Commissioner takes account of the directors' and shareholders' conduct and intent in failing to pay over the tax as and when it falls due.

2.15.9. The new section 64L regulates refunds of the dividends tax and it is submitted that it will be preferable that shareholders seek to recover the overpaid tax from the Commissioner and not from the company declaring the dividend.

2.15.10. Furthermore, a difficulty may arise where a company is a discretionary beneficiary of a trust and that company subsequently receives a dividend from the trust. If no other shareholders exist, the company will encounter problems in recovering the dividends tax from the company paying dividends in the future as no tax is payable.

2.15.11. The proposed section 64M provides as follows:

> "Every person that pays any dividend to any other person must by the time of the payment notify that other person in writing of the extent to which that dividend constitutes a capital distribution as defined in paragraph 74 of the Eighth Schedule"

2.15.12. The above provision needs to be reworded in that it appears unlikely that a capital distribution will constitute a dividend as defined in section 1 of the Act. It may be preferable to reword the first line of the provision as follows:

> "Every person that distributes any amount to any other person ..."

2.15.13. The current DRLAB does not propose any amendments to paragraph 74 of the Eighth Schedule and it must be questioned whether it is not necessary to amend paragraph 74 of the Eighth Schedule of the Act, to take account of the introduction of the concept of "contributed tax capital" and other changes introduced to dividend definition.

2.16. Insertion of section 89*sept* into the principal Act (contained in the third batch of legislation released on 20 August 2008)

2.16.1. The rationale for inserting the above-mentioned provision is understood. However, it is questioned whether the proposed amendment is valid under the Constitution in that it fails to treat taxpayers equally as required under the provisions of section 9 of the Constitution.

2.16.2. Why should a company that has elected a year-end of 31 March of each year be prejudiced and required to pay tax earlier than other taxpayers who have year-ends other than 31 March of each year?

2.17. **Clause 56 – amendment of paragraph 2C of the Second Schedule to the Act**

2.17.1. We would like to point out that this proposed amendment creates hardship to retirement funds who have paid amounts which qualified for the relief afforded by paragraph 2C of the Second Schedule during the period 1 March 2008 to 31 July 2008.

2.17.2. At present, the DRLAB does not make provision for a specific date on which the proposed amendment to paragraph 2C of the Second Schedule to the Act comes into effect, and therefore, the general provisions as it affects the effective date of amendments would apply.

2.17.3. In this regard, the DRLAB provides as follows:

> "Except insofar as is otherwise provided for in this Act or the context indicates otherwise, the amendments effected to the Income Tax Act, 1962, by this Act shall for purposes of assessments in respect of normal tax under the Income Tax Act, 1962, be deemed to have come into operation as from the commencement of years of assessment ending on or after 1 January 2009."

2.17.4. It is therefore apparent that any payments made to pensioners during the period 1 March 2008 to 31 July 2008 would be affected by the proposed amendment as these payments would be made during the pensioner's year of assessment that would end after 1 January 2009, that is, the tax year ending on 28 February 2009, even though the fund would not have been aware of the proposed amendment at that date. This proposal is clearly retrospective and should be reconsidered.

2.18. **Clause 61 – insertion of "personal service provider" definition in paragraph 1 of the Fourth Schedule to the Act**

2.18.1. Item (a) of the proposed new definition of a "personal service provider" states that a personal service provider means any person where any service is rendered to a client by that person personally.

2.18.2. The proposed definition, therefore, appears to deal with services rendered by individuals, that is, natural persons, sole proprietors, as well corporate entities and trusts.

2.18.3. However, it is submitted that it is not clear how this definition is intended to apply to individuals, trading as sole proprietors and, in particular, how the proposed definition interacts with the exclusion from the definition of "remuneration" contained in paragraph 1 of the Fourth Schedule to the Act, in

respect of persons who render services in the course of any trade carried on independently of the person to whom the services are rendered, that is, independent contractors.

2.19. **Clause 70 – amendments to paragraph 12 of the Eighth Schedule**

2.19.1. It is unclear how a foreign company that commences being a controlled foreign company is affected by the provisions contained in paragraph 12 of the Eighth Schedule to the Act.

2.19.2. Based on our reading of the Explanatory Memorandum, the comments contained in the DRLAB do not agree and reconcile to the proposed amendments. Furthermore, paragraph 24 of the Eighth Schedule to the Act is not correct as a result of the changes made to paragraph 12(4) of the Eighth Schedule to the Act.

2.20. **Clause 120 – amendment of section 38 of Act 3 of 2008**

The above-mentioned clause refers to the Taxation Laws Amendment Bill of 2008 and that reference should now refer to the Taxation Laws Amendment Act No. 3 of 2008.

3. AMENDMENTS PROPOSED TO THE CUSTOMS AND EXCISE ACT NO. 91 OF 1964

3.1. **General comment**

The 2008 Draft Revenue Laws Amendment Bills introduce certain fundamental changes to the Customs Act. The amendments (more especially the amendments to section 4 of the Customs Act) lack the level of detail that we would have preferred in amendments of this nature.

3.2. **Clause 83 – period clearance of goods imported into licensed customs and excise warehouse**

3.2.1. Clause 83 allows for periodic clearance of imported goods into a licensed customs and excise warehouse.

3.2.2. The proposed amendment provides that when the licensee of a warehouse issues either a "certificate, invoice or such other document as the Commissioner may prescribe by rule" the goods therein shall be deemed to be duly entered from the time of removal of the goods from the customs and excise storage warehouse. The corresponding rules have not yet been published for comment. It would be advisable for the corresponding rules to be published simultaneously so that the content of the proposed amendment to the section of

the Customs Act can be reviewed holistically. It is hoped that the rules in this regard will spell out in detail what the licensee of the customs and excise warehouse must do to ensure that there is "due entry".

3.3. **Clause 90 – deletion of reference to "buying commission" in section 67**

3.3.1. The amendment to subsection 2(b) of section 67 by deleting the reference to "buying commission" to a buying agent is problematic. Buying commission would otherwise be deductible from the price paid or payable by the purchaser of goods in South Africa, for purposes of the calculation of import duty. The existing sections 67(1) and (2) allows for buying commission payable to a buying agent to not form part of the dutiable value of goods imported into South Africa.

3.3.2. The Explanatory Memorandum on the amendment to section 67(2) provides that "the WTO Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade ("**the WTO Agreement**"), to which the Republic is a signatory, does not provide for the deduction of buying commission from the price actually paid or payable as it is payable to the buying agent by the purchaser of goods in the Republic".

3.3.3. In terms of Article 8 of the WTO Agreement, *"In determining the customs value under the provisions of Article 1, there shall be <u>added to the price actually paid or payable</u> for the imported goods: the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods<u>: commissions and brokerage, except buying commissions</u>"* (our emphasis). The provisions of Article 8 of the WTO Agreement are mirrored in section 67() of the Customs Act, which remains unchanged.

3.3.4. In our view, whilst the WTO Agreement does not specifically provide that buying commission must be deducted from the price paid or payable, where it makes provision for specific inclusion in determining the price paid or payable for imported goods, commissions and brokerage fees are included, except buying commission, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods. The intention is therefore that buying commission will not be dutiable.

3.3.5. We therefore do not fully agree with the statement in the Explanatory Memorandum that the WTO Agreement does not provide for the deduction of buying commission from the price actually paid or payable.

3.3.6. Many taxpayers have procured the services of buying agents to source goods for them from overseas countries and to represent them in international sales of goods. The proposed amendment to remove buying commission as an allowable deduction in ascertaining the transaction value of imported goods is unnecessary and would have the unintended consequence that the buying commission will be included in the dutiable value of the goods. This is contrary to the WTO Agreement. We would therefore strongly advise that this amendment to section 67(2) be re-considered.

3.4. **Clause 91 – import duty on waste or scrap from rebated goods**

3.4.1. Clarity is required as to whether the waste or scrap will be deemed to have the same qualities as the goods that were imported due to the ambiguity contained in the words "the extent of the rebate shall be reduced by the duty payable on such waste or scrap".

3.4.2. It should also be noted that provision needs to be made for instances where the value, the nature and the quantity of the waste or scrap remaining after destruction cannot be determined at the time of entry. In most instances this will be the case, which will result in SARS requesting provisional payments to cover the possible duty which cannot be determined upfront.

3.4.3. Provision should be made for instances where the waste or scrap do not actually enter home consumption e.g. where the goods imported goods are destroyed in a rebate store or in a customs and excise warehouse and are not entered for home consumption.

3.5. **Clause 20 – Powers of arrest**

3.5.1. It is insufficient to simply provide that certain delegated officers may be given the power of arrest without providing for circumstances when it may be appropriate for such powers to be exercised.

3.5.2. The provisions in subsection (1)(b) that an officer may be authorised to "carry out an arrest for the purposes of enforcing this Act" is too broad and needs to be circumscribed. Provision should be made for actual circumstances where an arrest would be appropriate and the steps that should be taken by the officer in effecting an arrest. Provisions should be introduced containing remedies for wrongful and unlawful arrest.

3.5.3. Specific provision needs to be made for instances where a warrant would be required prior to arrest and instances where an arrest may be effected without a

warrant. It is not appropriate to simply make a cross reference to the Criminal Procedure Act 51 of 1977. The persons that are subject to the Customs Act should be able to refer first hand, in the said Act, to their rights and obligations in instances where their personal freedom could be compromised.

3.5.4. We would, therefore, strongly urge that section 4A only be presented for comment once the sub-section that provides for instances when it may appropriate for powers of arrest to be exercised and when a warrant is necessary, is drafted and presented for comment.

3.6. **Clause 21 – possession and use of firearms**

3.6.1. The reference to "for the purpose of enforcing this Act" is too broad. The manner in which it will be determined which category of officers will be authorised to possess firearms needs to be regulated.

3.6.2. The reference to actual sections of the Firearms Control Act 60 of 2000 needs to be considered and then added to amplify the reference to this Act section 4B(1)(b).

3.6.3. The reference to "imminent or future death" in section 4B(4)(a) and (b) is ambiguous and needs clarification. The word "future" needs amplification.

3.6.4. The provisions of section 4(13) of the Customs Act which absolve the Commissioner from claims for compensation for any loss or damage arising out of any *bona fide* action of an officer needs to be re-considered in light of the proposed section 4B. In our view, the Commissioner cannot rely on strict liability in instances where an officer unlawfully points or fires a firearm at a taxpayer.

3.7. **Clause 22 – Border patrol**

3.7.1. Subsection 2(a)(i) should be amended to refer to the vessel not coming to a stop "without good reason" and subsection 2(a)(ii) should be amended to refer to the operator of the vessel refusing the vessel to be boarded "without good reason".

3.7.2. Subsection (4) in relation to the exemption from registration, licensing and fees might be contrary to the provisions of the National Ports Act and the intention that there must be control over vehicles and goods that move into and out of the ports as the ports are under the control of the ports authority. This would be especially so in light of the proposed amendments to section 4 which provide for powers of arrest and possession and use of firearms.

4. EXPLANATORY MEMORANDUM ON THE 2008 REVENUE LAWS AMENDMENT BILL

4.1. In the third last line of the second last paragraph on page 5, the wording of the Explanatory Memorandum needs to be corrected to read as follows:

> "Income in terms of various sections of the Income Tax Act in (instead of on) order for the separate right schedule to apply correctly to this retirement fund lump sum withdrawal benefit."

4.2. On page 20, in the example commencing on page 19, the last sentence of the Result should read as follows:

> "It is proposed that the employer should be able to buy-back the shares from Y (Y is currently omitted) at the R2 market value at date of grant."

4.3. On page 21, it is suggested that the reference to a pension fund at (d) of the beneficial owners exempt from the dividends tax, should refer also to provident funds and retirement annuity funds.

4.4. On page 28, 'passive holding companies', under the sub-heading "problem statement" in the fifth line, the word "will" is redundant and should be removed so that the sentence in question reads as follows:

> "As a practical matter, the deferral of dividends is probably the largest revenue item of concern."

4.5. On page 57, investee company requirements, the reference "ALTEX" should, in our view, read "Alt X".

4.6. On page 66, proposal, the first line of the third paragraph the "legible" is not correct and should rather be "eligible" or "qualifying".

5. 2008 DRAFT REVENUE LAWS SECOND AMENDMENT BILL ("DRLSAB")

5.1. Clause 4 – amendment to section 75B of the principal Act

5.1.1. Unfortunately, the National Treasury and SARS did not release an Explanatory Memorandum on the amendments contained in the DRLSAB. It is unclear, at this stage therefore, why the word "may" is being replaced by the word "must" in section 75B(1) of the Act.

5.1.2. It is, in our opinion, more equitable that the Commissioner is required to exercise a discretion in the imposing of administrative penalties, as opposed to the provision being peremptory in nature.

5.1.3. At clause 4(a), the amendment to section 75B(1), at the last line, refers to "... any procedural or administrative action or duty imposed or requested in terms of this act." Should the word "requested" not be required?

5.2. **Clause 13 – amendment to paragraph 20 of the Fourth Schedule to the Act**

5.2.1. The above-mentioned provision has been included in the 2008 DRLSAB, which is intended to be enacted as a Bill envisaged under section 76 of the Constitution.

5.2.2. By virtue of the fact that the proposed amendment increases the financial burden on taxpayers, it is submitted that the above-mentioned provision should be included in the DRLAB, to be enacted as a Money Bill, in conformity with the provisions contained in section 77 of the Constitution.

5.2.3. The effect of the amendment to taxpayers is that it imposes a tax or increases the fiscal burden borne by taxpayers and, thus, in our opinion, is not purely dealing with a procedural matter, but should be dealt with as part-and-parcel of a Money Bill.

5.2.4. The proposed amendment does not, in our opinion, take account of the realities facing taxpayers in South Africa in that the financial statements and financial results required to determine taxable income are generally only available three or four months after the close of the taxpayer's financial year.

5.2.5. The proposal to remove the choice that taxpayers currently have to base the second provisional payment on the lower of 90% of taxable income in the current year and the basic amount is extremely draconian and cannot be supported.

5.2.6. The amendment affects all businesses in South Africa, whether conducted under the style of companies, close corporations, trusts or sole proprietors. The amendment also affects professional practices where the financial statements are generally only finalised many months after the close of the financial year.

5.2.7. If National Treasury wishes to persist with the amendment, it should then reduce the 90% to a maximum of 75% of taxable income in the current year. Alternatively, National Treasury should seek to amend the provisions of paragraph 20 of the Fourth Schedule to the Act, such that the taxpayer cannot rely on the basic amount without increasing that amount by a prescribed percentage, such as 10%.

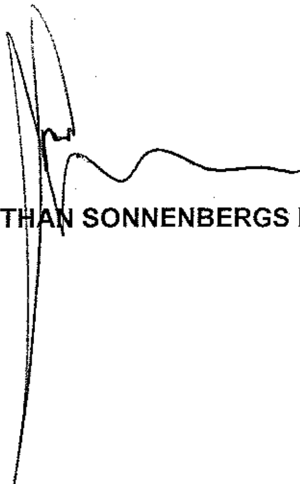
5.2.8. It is contended that it is practically impossible for businesses in South Africa to comply with the 90% requirement in that an accounting adjustment made after the close of the year-end, but relating to the financial year in question, generally exceeds 10% and thus, the 90% requirement will, in most cases, not be capable of being complied with, which will result in all taxpayers facing penalties.

5.2.9. The above-mentioned proposal is, therefore, ill-conceived and should be removed.

6. CONCLUSION

6.1. We wish to express our concern at the significant number of amendments to the fiscal statutes introduced during 2008. It has become difficult for professional advisors to keep abreast of developments in the law and, even more so, for taxpayers generally. The current Bills contain amendments to the 2008 Taxation Laws Amendment Act No. 3 of 2008, which was only recently enacted and contains a plethora of amendments that need to be digested by business and taxpayers alike. It is hoped that in 2009, the volume of amendments will not be as significant.

6.2. We wish to thank you for the opportunity for commenting on the proposed Bills.



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