

Ref#: 358128
Submission File

20 June 2011

Mr. Allan Wicomb
Committee Secretary
Standing Committee on Finance
3rd Floor
90 Plein Street
Cape Town
8000

BY E-MAIL: awicomb@parliament.gov.za

Dear Sir

**CALL FOR COMMENT: DRAFT TAXATION LAWS AMENDMENT BILL 2011,
DRAFT TAXATION LAWS SECOND AMENDMENT BILL 2011 (“DTLAB 2011”)
AND DRAFT EXPLANATORY MEMORANDUM**

We refer to the call for comment on the above-mentioned documents. Set out below please find the SAICA National Tax Committee’s submission regarding policy comments. As requested the comments follow the sequence of the Draft Explanatory Memorandum (“EM”) (the numbering in this document refers directly to the numbering as contained in the EM).

**DRAFT TAXATION LAWS AMENDMENT BILLS 2011 AND DRAFT
EXPLANATORY MEMORANDUM**

MAIN AMENDMENTS

1. INCOME TAX: RATES AND THRESHOLDS

No comments.

2. INCOME TAX: EMPLOYMENT, INDIVIDUALS AND SAVINGS

2.4 Long-term insurance: key person plan elections

Clause 33 / Section 11(w)(ii) of the Income Tax Act, No. 58 of 1962 (“the Act”)

Problem statement

The EM stipulates that employers with conforming plans which meet certain criteria will be able to deduct the premiums paid in respect of these plans.



It needs to be noted that there are products in the market where the premium for ensuring your total work force for accident cover is based on the total salary expense of the company and the company is the sole beneficiary of any proceeds should a claim be submitted by the company. The company has full discretion to use of the monies and in instances where the decision is taken to pay this amount to the dependants of the employee; the amount is taxed as a voluntary contribution in the hands of the employee. The business rational for this has nothing to do with providing a benefit in the hands of the employee and cannot be linked to employment at all.

Proposed solution

We suggest an exemption to ensure that the premium is excluded from fringe benefit tax as it is a pure insurance / accident cover and will be taxed if an event occurs that results in a lump sum payment to the employer. This is completely different to a Group Life Insurance policy where it is a condition of employment and the employee has an entitlement to the proceeds directly from the insurer.

2.5 Long-term insurance: taxation of proceeds

Clause 7(1)(x) / amending para (m) of the “gross income” definition

Problem statement

The proposal to tax the proceeds of a life insurance policy where the premiums were/are deductible creates economic double taxation of the income returns within such policy. This is wholly inappropriate in a country with a (very) low savings rate and the existence of such policies encourages savings by individuals. By way of example if a taxpayer invests R100 in a policy and obtains a deduction for such amounts, and the insurer invests the proceeds and earns R120 in capital gains and R30 in interest income over a 5 year period, the insurer will bear CGT of R18 and Income Tax of R9 in the IPF, thus leaving R223 [R100+R120+R30-R18-R9] as policy proceeds which will then be taxed in the recipients hands. Assuming a maximum marginal rate the recipient is then taxed on the growth (R123) at 40% = R49.20. In total R100 has been invested and returned growth of R150, giving total policy proceeds of R250. The growth of R150 has borne effective tax of R76.20 [R18+R9+R49.20] giving an effective tax rate of 50.8%. Clearly the effect of this will be to discourage long-term savings through the mechanism of insurance policies.

Proposed solution

The individual policy holders fund should be exempt on all its income if the recipient is to be taxed on the proceeds. Perhaps, the individual policy holder fund needs to be split into two, exempt funds and taxable funds to ensure the tax burden is appropriate to the underlying tax regime.



Clause 7(1)(x) / amending para (m) of the “gross income” definition and income protection policies (section 23(m))

Problem statement

The proposal to tax the proceeds of a life insurance policy where the premiums were/are deductible requires certainty regarding the deductibility of the insurance premiums. SARS has recently issued Interpretation Note 13 (issue 3) (“IN”). In discussion the deductibility of any premium paid by a person in terms of an insurance policy, to the extent that it covers that person against the loss of income as a result of illness, injury, disability or unemployment as contemplated in section 23(m), the IN comments as follows:

*“The policy must provide cover against the **loss of income** as a result of one of the following:*

- *Illness;*
- *Injury;*
- *Disability; or*
- *Unemployment.*

Many policies purport to cover loss of income but pay in the event of illness, injury or disability. Some calculate the benefit with reference to days in hospital or sickness, or the severity of the disability, but do not test against actual loss of income. Premiums on these policies do not qualify for deduction.”

We respectfully disagree with this interpretation. The fact that a loss of income policy takes into account factors like *days in hospital or sickness, or the severity of the disability* does not change the nature of these policies. The amount that is due by the insurer in terms of these policies needs to be determined in some way or by the application of some formula.

Related to this issue are the problems being experienced by our members in relation to loss of income insurance included in PPS Permanent Incapacity Benefit.

The permanent incapacity benefit is part of a life insurance policy. **Permanent Incapacity** is defined as either total permanent incapacity or partial permanent incapacity. **Total Permanent Incapacity** means that a policyholder is, in accordance with PPS Insurance’s permanent incapacity assessment process, permanently and totally unable to carry out his own profession as well as any other profession that could be carried out by persons with similar or comparable qualifications and experience.

Partial Permanent Incapacity shall mean that a policyholder is in accordance with PPS Insurance’s permanent incapacity assessment process permanently but not totally unable to carry out his own profession as well as any other profession that could be carried out by persons with similar or comparable qualifications and experience.

Permanence is a requirement for a valid claim as per the aforementioned definitions. The permanent incapacity benefit is not paid where the policyholder is unable to carry out his profession for a short time (Policyholders suffering from a sickness that would prevent that policyholder from working for a short period of time can claim under a separate benefit, the



sickness benefit). Permanent incapacity benefits are paid out monthly until the policyholder attains the age of 66 years.

The purpose of this policy is to fund lost income as a result of being unable to work. PPS Insurance issues an IRP5 with respect to permanent incapacity benefits paid and tax is deducted in accordance with the tax tables.

It is submitted that the permanent incapacity policy meets the requirements of section 23(m), i.e.:

- the premium constitutes an expense, not of a capital nature, actually incurred for purposes of trade and in the production of income as required by section 11(a) read with section 23(g) (the Act does not require the expense to produce income in the same year that it is incurred. The only requirement is that it must be for the purpose of earning income. In addition, the loss of income insurance is directly related to the professional trade or employment in conducted by the taxpayer);
- it covers the person against the loss of income as a result of illness, injury, disability or unemployment (it is a requirement for the payment of the benefit);
- the amounts payable in terms of that policy constitute or will constitute income as defined (PPS withholds tax and issues IRP5's when paying amounts in terms of the policy).

PPS Insurance provides policyholders (upon request) with proof of premiums paid by that policyholder for the permanent incapacity benefit. Despite this, these premiums are disallowed by SARS upon assessment in relation to some members while other members are allowed to claim the premiums as a deduction in determining taxable income.

Taxpayers are therefore being taxed on the income from these policies but are not allowed a deduction in relation to the premiums incurred.

In addition, the amounts are taxed without giving any consideration to premiums paid in the past, but not deducted.

Proposed solution

We propose that the above uncertainty be addressed either by a legislative amendment or an amendment to IN13. If IN13 is going to be amended, we suggest that it be amended by providing guidance as to determine whether a policy is a loss of income policy (as was mentioned, the mere fact that the amount paid in respect of loss of income takes into account factors such as days sick or in hospital or the degree of incapacity does not necessarily alter the nature of the policy).

IN13 should also deal with the deductibility of the premiums paid to PPS (and similar organisations) in relation to permanent incapacity or similar policies which pay benefits for loss of income.



Consideration should be given to include an exemption in the Act for income received in respect of loss of income policies to the extent to which premiums were not deducted in the past. The legislation could include a requirement that the exempt amount be substantiated by way of a certificate from the insurer of total premiums paid over the life of the policy.

Clause 30 / Section 10(1)(gH); paragraphs 2(k) and 12B of the Seventh Schedule and paragraph 55 of the Eight Schedule

Problem statement

We welcome the changes proposed by the inclusion of paragraphs 2(k) and 12B of the Seventh Schedule aimed to provide certainty in relation to the tax implications of so-called Group Personal Accident Schemes (“GPAS”). It is submitted, with respect, that the proposed amendments do not address all the issues of uncertainty. These issues are as follows:

- (i) Section 10(1)(gH) exempts from tax, *inter alia*, any amount received by or accrued to any person other than the policyholder if no amount of any premium in respect of a policy as defined in section 29A ranked for a deduction by any taxpayer (our emphasis). The same section provides that a premium paid on or after 1 January 2011 must be deemed not to have ranked for a deduction if an amount equal to the amount of that premium was included in the income of any other taxpayer in respect of that premium; and no amount was deductible by that other taxpayer.

This exemption should be read with paragraph 2(k) which deems a fringe benefit to exist where the employer has during any period directly or indirectly made any payment to any insurer directly or indirectly for the benefit or on behalf of the employee or his or her surviving spouse, child, dependant or nominee and also paragraph 12C which determines the cash equivalent of the value of the taxable benefit contemplated in paragraph 2(k) as the amount of any contribution or payment made by the employer in respect of a year of assessment to any insurer as defined in section 29A in respect of any premiums payable under a long-term insurance policy directly or indirectly for the benefit or on behalf of the employee or his or her surviving spouse, child, dependant or nominee (our emphasis).

Section 10(1)(gH) and paragraph 12C (and by implication paragraph 2(k) of the Seventh Schedule) refer specifically to long-term insurance policies. The EM confirms that the amendments to the Seventh Schedule apply only to long-term insurance – refer the first paragraph on page 18 of the EM.

It is important to note that these policies can however also be provided in terms of short term insurance policies. Section 1 of the Short-Term Insurance Act, 1998 defines a “short term policy” to mean an engineering policy, guarantee policy, liability policy, miscellaneous policy, motor policy, accident and health policy, property policy or transportation policy or a contract comprising a combination of any of those policies; and includes a contract whereby any such contract is renewed or varied.



“Accident and health policy” is in turn defined to mean a contract in terms of which a person, in return for a premium¹, undertakes to provide policy benefits if a disability event²; health event³; or death event⁴, contemplated in the contract as a risk⁵ event occurs, and includes a reinsurance policy in respect of such a contract, specifically including any category of contracts identified by the Minister by regulation under section 70(2A) as an accident and health policy, subject to exclusions that are not currently relevant.

GPAS can therefore also fall within the scope of an “accident and health policy” as defined in the Short-term insurance Act and certain employers provide short term insurance policies to cover accidents and disability.

By limiting these proposed amendments to long-term insurance policies, the existing uncertainties are only partially addressed.

- (ii) The inclusion of premiums paid by an employer within the scope of fringe benefits means in turn that the amounts are included in remuneration subject to PAYE. It is proposed that paragraph 2(k) become effective on 1 January 2011. This amounts to retrospective legislation and will result in interest and penalties in the hands of employers as the premiums may not have been included in remuneration since the beginning of the individual 2012 tax year on 1 March 2011.
- (iii) The benefits payable in terms of a GPAS can be categorised as follows:
 - a) Compensation for injury and/disability
 - b) Payment of medical expenses.

Sometimes the insurer pays the proceeds to the employer, who received the proceeds on behalf of the employee and then also pays the medical costs on behalf of the employee. The employer is effectively acting as the agent of the employee in receiving the proceeds and in paying the medical expenses.

Paragraph 2(j) deems a fringe benefit to arise if the employer has, directly or indirectly, *incurred* any amount in respect of any medical, dental and similar services, hospital services, nursing services or medicines provided to the employee or his or her spouse, child, relative or dependant.

¹ Defined to mean the consideration given or to be given in return for an undertaking to provide policy benefits, which in turn is defined to mean one or more sums of money, other than an annuity, or services or other benefits;

² Defined to mean the event of the functional ability of the mind or body of a person or an unborn becoming impaired

³ Defined to mean an event relating to the health of the mind or body of a person or an unborn

⁴ Defined to mean the event of the life of a person or an unborn having ended

⁵ Defines to mean a possibility that a particular event may occur during the period for which a short-term policy is operative



- (iv) It is submitted that paragraph 2(j) does not apply to the scenario described above as the employer, acting as the employee's agent, cannot be said to have incurred any expense, but there is an element of uncertainty.

Since the premiums will be subject to PAYE, the benefits derived from GPAS by the employees should be tax-free. For CGT purposes:

- Paragraph 55 of the Eighth Schedule effectively exempts from capital gains tax, any capital gain arising from the receipt by a person of an amount in terms of a policy with an insurer who is registered or deemed to be registered under the Long-term Insurance Act. Paragraph 12.4.2 of SARS' Comprehensive CGT Guides makes it clear that "(T)he exclusion applies to a long term policy as defined in the Long-term Insurance Act 52 of 1998, issued by a *South African* Insurer." (our emphasis)
- Paragraph 53 provides for a general exemption relating to personal use assets. Excluded from the scope of personal use assets is inter alia any short-term policy contemplated in the Short-Term Insurance Act, 1998, to the extent that it relates to any asset which is not a personal-use asset. Therefore, unless the GPAS is a short-term policy contemplated in the Short-Term Insurance Act, 1998, it will be excluded from the definition of a personal use asset and the exemption provided for in paragraph 53 will not apply. To fall within the scope of a policy as contemplated in the Short-Term Insurance Act, the insurer has to be a South African insurer.

Therefore, both these exemptions have as an underlying requirement that the insurer has to be a South African insurer. While we understand the need for the exclusion from the exemption proceeds received from foreign insurers which fall outside the South African tax net, it may happen that the foreign insurer is a Controlled Foreign Company which do not qualify for any of the exemptions provided for in section 9D. As such a CFC is effectively brought into the South African tax net, it is submitted that the exemptions mentioned above should apply to proceeds from these insurers.

Proposed solution:

- (i) It is submitted that the wording in paragraph 2(k) is wide enough to cover both long-term and short term insurance policies. It is proposed that the EM refer to both long-term and short term insurance policies.

It is further proposed that paragraph 12C and section 10(1)(gH) also refer to "policies" as defined in section 1 of the Short-Term Insurance Act, (Act No. 53 of 1998).

- (ii) The amendment should be effective 1 March 2011 at the earliest and employers should be exempt from paying interest and penalties during the period 1 March 2011 and the date of promulgation of the Act.



- (iii) It is proposed that paragraph 12B(3)(d) is inserted after paragraph 12B(3)(c) of the Seventh Schedule, reading as follows: *“Where the payment of any amount contemplated in subparagraph (1) is made by the employer from an amount received by the employer from an insurer under a group personal accident scheme.”*
- (iv) It is proposed that the Eight Schedule is amended to provide for the exemption of proceeds received from foreign insurers (long or short term) who are controlled foreign companies in relation to the employer and who do not qualify for any of the exemptions provided for in section 9D.

2.6 Medical scheme credits

Clause 10 and 47 / Section 6A and section 18(2)(c)

Problem statement (i)

The amounts proposed for the medical credits are very low in comparison to the current capped amounts considering the rising costs of medical contributions and expenses. This change will result in financial hardship to employees that have to contribute to provide for own medical insurance.

The EM indicates that the tax breaks are used as a tax structuring vehicle by high income earners to reduce the tax payable. The contributions to a medical aid are compulsory for most employees and the medical plan and option elected is directly linked to the medical risk and needs of the member. There is no alternative medical health scheme and the employers and employees are providing for their own cover that should be recognized by the government until such time as South Africa introduces a National Health Scheme.

The premiums of medical aid plans are continually increasing and it becomes more and more difficult for all employees to provide for their medical needs for dependants.

It is important to note that some closed medical aid schemes for Companies are subsidizing premiums based on income to provide the same medical aid cover for lower income earners at a fraction of the premium. There are also strict regulations for the medical aid companies to adhere to rules to prevent abuse of funds and protect the members.

The impact on lower income earners will have severe financial implications as these are normally the families with more dependents and more desperate need for medical assistance.

We seek clarity that the tax credit will be allowed on a monthly basis and applied through the payroll system as currently provided for. This will ensure that persons who are not required to submit tax returns are still in receipt of the credit and it will alleviate hardship.

Proposed solution (i)



We submit that the amounts should be more in line with the current costs of medical aids. We propose that this change becomes effective at a future date when the members have an alternative.

Problem statement (ii)

In terms of the current system, elderly taxpayers (being 65 years and older – qualifying for a rebate in terms of section 6(2)(b)) and disabled taxpayers, will qualify for a 100% tax deduction for their medical aid contributions. In terms of the proposed tax credit system these taxpayers will only receive a R216 additional tax credit per month (compared to taxpayers younger than 65 who are not disabled). It is also not clear from the draft legislation if the additional R216 per month in clause 6A(3)(b) is per person or per “family” who have a disabled member or a member who is 65 or older.

The cost of medical aid contributions have significantly increased over the past few years and the additional R216 credit per month might not be sufficient to cover the total medical aid contributions by these special classes of taxpayer, even if calculated at an average tax rate of 30%.

Proposed solution (ii)

We propose that the medical aid contribution deduction system of a 100% for elderly taxpayers (being 65 years and older – qualifying for a rebate in terms of section 6(2)(b)) and disabled taxpayers be retained and that these taxpayers be excluded from the new tax credit system to prevent these taxpayers from suffering hardship as a result of a reduction in the tax benefits for their medical aid contributions.

Problem statement (iii)

In terms of existing legislation, medical aid deductions may potentially give rise to an assessed loss. However, section 6A is silent on medical scheme credits that are not used in the year of assessment in which they arose. It would thus seem that such unutilised credits will be forfeited.

Proposed solution (iii)

The legislation should make provision for unused medical scheme credits to be carried forward to successive years of assessment.

2.9 Employee compensation fund entities

Clause 137(1) / Section 1 (paragraph (a)) – New proviso (xi) to the definition of enterprise in section on of the Value- Added Tax Act, No. 89 of 1991 (“the VAT Act”)

Problem statement

This amendment will require significant system changes in organisations affected (who will in future make both taxable and exempt supplies requiring the introduction of apportionment methodologies, possible apportionment ruling applications to SARS, etc.).



Furthermore, due to the flexible nature of products offered by the industry affected, the interpretation of “... *compensation that is identical to compensation that ...*” is likely to cause interpretational difficulties.

The current proposed effective date of the amendment is likely to cause significant administrative and operational difficulties for entities affected.

Proposed solution

We recommend that the effective date of the amendment be delayed by at least one year. We further recommend that in the interim, in conjunction with the industry, an Interpretation Note be drafted to address interpretational and operational difficulties and uncertainties.

2.10 *Judicial long distance commuting*

Clause 111 / Paragraph of the 7(8) of the Seventh Schedule

Proposals/Comments

We request clarification as to why this provision only applies to judges specifically as there are many professionals who travel to different locations daily to perform their duties.

We submit that this should be reconsidered in light of the number of employees without a fixed place of work to travel to on a daily basis as virtual offices become the norm in many industries and thus having a similar effect on all taxpayers.

The reporting criteria and compulsory log books make it virtually impossible to abuse.

Effective date 1 March 2011

Any amendment that results in a change in the tax calculation through the payroll systems can only be performed from a future date as the tax is calculated on a monthly basis and retrospective changes are therefore not possible.

Retrospective changes should be amended to 1 March 2012.

3 INCOME TAX BUSINESS

3.7 *Incentive: venture capital company regime*

Clause 42 (d) and (g) / Section 12J definition of “qualifying share”

Problem statement

Subsection (b) refers to “section 8E(1), but for the three-year period requirement.....”

Proposed solution:

This should be ten-year period. This is also incorrect in subsection (g)(b).

3.9 *Assumption of contingent liabilities: taxable company acquisitions*



Clause 36 / Section 11F

Problem statement (i)

Certain contingent liabilities such as leave pay provisions, doubtful debts provisions and employee benefits provisions are specifically covered by the existing legislation. The proposed section 11F does not clarify whether these existing provisions will be subject to section 11F. If the intention of section 11F is to apply to those contingent liabilities that are not specifically covered in the legislation, its provisions do not clarify this.

Proposed solution (i)

The Act should clarify whether section 11F is subject to other provisions of the Act such as section 23E, section 11(l) and section 11(j).

Problem statement (ii)

The provisions of section 11F apply where a business undertaking is disposed of as a “going concern”. The Act does not define the words “going concern”. However, “going concern” is defined in the Value Added Tax Act. It is not clear whether the same definition is intended to apply in the Act. If the definition of “going concern” per the VAT Act is intended to apply to the Act then the provisions of section 11F may not apply to certain sales of business that do not meet the definition of “going concern”.

Proposed solution (ii)

The words “going concern” should be defined in the Act.

Problem statement (iii)

Section 11F requires that the market value of contingent liabilities is determined in respect of the disposal of a business undertaking. The Act defines market value in the context of assets and it is not clear what is envisaged by “market value” in the proposed legislation in the context of contingent liabilities.

Proposed solution (iii)

The proposed section should define “market value”.

Clause 53 / Section 24CA

Problem statement (i)

The provisions of section 24CA do not distinguish between contingent liabilities of a capital nature and contingent liabilities of a revenue nature. If the intention of this section is to tax the reduction of acquisition price of assets acquired as equivalent to proceeds on partial disposal of those assets, the treatment of contingent liabilities should reflect this.

Proposed solution (i)

The amount of contingent liabilities that reduces capital assets which are not subject to tax allowances should be taxed at capital gains tax rates rather than normal tax rates. For



example, if the contingent liabilities reduce land (assuming that a taxpayer is not a land dealer), the contingent liabilities should be taxed at CGT rates.

Problem statement (ii)

Section 24CA(2) focuses on expenditure incurred and does not deal with losses that could arise when the contingent liability crystallises. For example where contingent liabilities are represented by provisions for credit notes, it is unlikely that the acquirer will incur expenditure in future. However, the acquirer could suffer a loss when these credit notes crystallise.

Proposed solution (ii)

Section 24CA(2) should be amended to include losses incurred as well.

Problem statement (iii)

The provisions of section 24CA do not clarify the amount to be used to calculate tax allowances in respect of acquired provisions. For capital gains tax purposes paragraph 20 has been amended to clarify that the amount to be taken into account in determining the base cost includes contingent liabilities. However, there are no such provisions in the Act for the purposes of determining tax allowances.

Proposed solution (iii)

The provisions of sections 11(e), 12C etc should be amended to allow for the inclusion of contingent liabilities in the cost of the assets.

3.10 Small business: micro-business turnover tax relief

Clause 106 / Schedule 6

Problem statement

While a number of changes have been proposed to encourage people to register for turnover tax, there are still a number of barriers that could hinder the intentions of micro-business turnover tax relief. Some of these barriers are:

1. A maximum of R1million for registration is very small. It means this dispensation applies to people who have a monthly turnover of less than R84 000.
2. The schedule does deal with temporary fluctuations above the R1million threshold. A single once off sale requires a person who meets the threshold under normal circumstances to deregister within 21 days if such a person no longer exceeds the R1million threshold. This creates uncertainty to people who may want to register for turnover tax.
3. It is not clear why people who are providing professional services should not be part of this dispensation. The costs of hiring tax advisors to help these people with their tax affairs are burdensome enough to warrant turnover tax.



Proposed solution

The turnover tax should be amended to deal with the above issues.

3.11 Debt cancellation: character issues

Clause 7 / Section 1 definition of “gross income”

Problem statement (i)

The treatment of the forgiveness of debt is better placed in a special inclusion paragraph than the main gross income definition. The definition of gross income includes a partial or full relief from any liability. In the EM, it is stated that the intention of this change is to include certain forms of debt reduction in gross income. One example that is made in the EM is the reduction or discharge of debt in respect of services rendered. However, the proposed amendment does not appear to be isolated to the circumstances that are referred to in the EM only i.e. the practical application of this provision has a wider impact. For example, a discharge from debt in respect of a capital debt that results from insufficient funds should not trigger gross income!

Proposed solution (i)

The gross income definition should isolate a discharge or relief from debt that is linked to services rendered from discharge or relief from debt that results from other circumstances and only include the former.

Problem statement (ii)

The definition of gross income includes a partial or full relief from any liability. In the EM, it is stated that the intention of this change is to include certain forms of debt reduction in gross income. One example that is made in the EM is the reduction or discharge of debt in respect of services rendered. However, there is no proposed amendment to clarify the deductibility of the amount equal to the value of services rendered in the hands of the creditor.

Proposed solution (ii)

Section 11(a) and section 11(d) should be amended to allow for the deduction of the amount by which the debt is reduced if such reduction would have resulted in deduction had the taxpayer paid the service provider instead of reducing the debt. For example, where a plumber who owes a taxpayer performs routine maintenance and his/her debt to the taxpayer is reduced, the taxpayer should be able to deduct the amount by which the debt is reduced.

3.14 Dividends tax: collective investment scheme adjustments

Clause 59 / amending section 25BA

Problem statement

The proposal seeks to tax dividends received by a CIS and retained by the CIS (i.e. not distributed to unit holders). Dividends are paid out by the underlying companies out of after-tax income (i.e. income that has been previously taxed). The proposal amounts to economic double taxation which fundamentally breaches the principle of equity that any good taxation



system should encompass. The proposal will discourage small investors from saving in a country where it is universally acknowledged that the saving rate is too low.

The argument raised in the EM, that the amounts retained are essentially a cession of dividends in exchange for services, is fallacious for the following reasons:

- 1) The underlying income has been taxed in the company that paid the dividend;
- 2) Any fees paid to the Manco are taxable in the hands of the Manco;
- 3) If the unit holder held the shares directly, the dividends would be exempt.

Proposed solution

Dividends should retain their exempt nature in the hands of a CIS as they do in the hands of the investor.

3.16 Dividends Tax: Removal of the Value-Extraction Tax (VET)

Clause 91 / Removal of part IX (the VET)

Problem statement

The proposal removes the detailed VET rules to determine if a payment from a company to its shareholder is a disguised dividend or not. In the EM it is stated that “the determination of whether a payment by a company to its shareholders constitutes a disguised dividend is essentially a question that entirely depends on the facts and circumstances”. As such it is proposed that the cause of the payment by a company must be determined solely by reliance on the facts and circumstances. As such, the legal connection of the payment (e.g. “in respect of” or “as consideration for”) needs to be determined.

One of the fundamental principles of tax is certainty, meaning the amount of tax which each individual is bound to pay must be certain, and not arbitrary (Adam Smith – Wealth of Nations – 1776). For most owner managed small companies, it is often a grey area whether in fact a payment to the shareholder is a dividend, remuneration or even a loan. Without a clear set of rules to guide taxpayers in this regard, a great deal of uncertainty and confusion among such small companies would exist, which would result in more disputes and tax court cases between SARS and taxpayers, until a set of rules have been laid down by the courts, which could take a number of years to happen.

For example, in the EM, an interest free loan to a shareholder is indicated as a disguised dividend. But what about a loan to a shareholder at an interest rate of one or two points below the prime rate? And would a loan to a shareholder at prime rate, but who experience financial difficulties, be classified as a disguised dividend, since it could be argued that as the shareholder is not financially sound he or she should not have received a loan at all? These are just a few of the number of uncertainties that would now exist if the proposal to remove the VET is incorporated in our legislation.



Proposed solution

The proposal to scrap the VET should be reconsidered and the VET should be retained as part of the new Dividend Tax system to provide certainty to taxpayers regarding their tax liability.

3.18 Dividends tax: collateral definition issues

Clause 7(h) / definition of “dividend” addition of sub-paragraph (b)

The relevance of this addition is unclear and appears unnecessary.

Clause 7(zQ) / return of capital

The inclusion of sub-paragraph (b) in this added definition appears to have no relevance and is unnecessary.

3.22 Anti-avoidance: suspension of intra-group rollovers

Clause 75 / amending section 45

Problem statement

The proposal is to suspend the intra-group relief available in section 45 of the Act with effect from 3 June 2011.

Most of the proposals contained in the DTLAB were announced in the 2011 Budget presented to Parliament by the Minister of Finance on 23 February 2011.

From an examination of the 2011 Budget Review, published by National Treasury, it is clear that no mention whatsoever was made of the proposal to suspend section 45 of the Act. It has become customary that most of the changes contained in the Tax Bills are announced in the Budget documentation so that taxpayers know what changes they are likely to face and, more importantly, the likely date on which these changes may take effect.

Section 45 forms part of the so-called “group restructuring rules”, which were introduced into law by section 44 of the Second Revenue Laws Amendment Act No. 60 of 2001. This section has undergone significant amendments over the years as the authorities have sought to refine the provisions and curtail the perceived abuse thereof.

The corporate restructuring rules were introduced into the Act with effect from 1 October 2001 and that is the date on which capital gains tax took effect in South Africa, to enable groups of companies to restructure their affairs without adverse tax consequences arising. Also, section 45 always ensured that a group of companies are put on par with a single company with separate divisions within such company, as far as restructuring, moving and disposal of assets etc. goes.

There were similar measures in place since 1988 to allow for companies to restructure their affairs without incurring tax liabilities where a qualifying group of companies restructured their affairs.



The Media Statement issued by National Treasury on 2 June 2011, refers to the fact that the DTLAB contains a number of new anti-avoidance measures and a separate annexure dealing with the suspension of intra-group roll-over relief currently contained in section 45 of the Act. The DTLAB specifically provides that section 45 will not apply in respect of any asset disposed of on or after 3 June 2011 and before 1 January 2013. Thus, section 45 has, for all practical purposes, been suspended for a period of 18 months to allow the National Treasury to investigate the perceived abuse of the section regarding excessive debt.

National Treasury, in its Media Statement, points out that the section 45 intra-group roll-over relief was originally intended to facilitate transfers amongst companies which constituted a group as defined in the Act. Thus, the purpose of section 45 was to ensure that the tax system did not pose a barrier to intra-group transfers, whether the transfer took place by way of an exchange of shares, debt or cash, or as a dividend. National Treasury makes the point that intra-group relief is a common feature of most advanced tax systems around the world.

National Treasury is concerned about the way in which section 45 is being used, as taxpayers have, in its view, sought to use it as a means of acquiring businesses and that the section involves what is referred to as “debt push-down structures”. National Treasury contends that section 45 allows for the use of excessive debt schemes and creates the means whereby taxpayers utilise so-called “funnel schemes”, whereby debt proceeds are indirectly linked to tax free preference share dividends.

National Treasury has identified the following issues relating to section 45 as part of a larger set of problems and these include:

- The free use of excessive debt to eliminate substantial amounts of operating income for an extended duration.
- The seeming freedom to re-characterise shares as debt (or debt as shares) with little regard for accounting and commercial concepts.
- Excessive tax losses available in the tax system and the potential to move losses amongst entities if a viable business purpose can be asserted.
- The need for section 45 within an intra-group context, as well as the need for the movement of losses within a single domestic group.
- The need to allow for interest deductions stemming from leveraged buy-outs, regardless of the form of that acquisition.

It must be remembered that South Africa does not impose tax on a group basis and, thus, section 45 alleviated the adverse tax consequences that would otherwise arise where business assets are moved from one company in a group to another.

To summarily suspend section 45 of the Act, without prior notice in the Budget documentation, by way of a Media Statement, is extremely draconian.



It is questionable also whether this proposal is valid under the Constitution of the Republic of South Africa, Act 108 of 1996, as amended. Numerous companies have prepared agreements to transfer businesses in terms of section 45 of the Act and the costs they incurred would now appear to have been wasted as a result of this immediate suspension of section 45. It is unfair that businesses should be expected to carry these costs in light of the manner in which section 45 has been suspended. The proposal undermines the rule of law insofar as the tax system is concerned, and cannot be supported.

In addition, corporates are reviewing their corporate structures on an on-going basis and, no doubt, many companies in South Africa were in the process of evaluating the most appropriate manner to rationalise their businesses in South Africa. The manner in which section 45 has been suspended in the proposals relating thereto create great uncertainty for taxpayers in South Africa and does not bode well for foreign investors who own groups of companies in South Africa, who are currently in the process of reviewing the manner in which those operations are structured. Investors in a country require certainty as to the legal framework within which they are required to operate. The manner, in which section 45 has been amended, effectively by way of a press release, seriously undermines the certainty to which both domestic and foreign investors have come to expect in South Africa. This cannot bode well for future economic growth and development and job creation in South Africa.

Section 75(1)(b) of the DTLAB 2011 proposes to amend section 45(6) of the Act by the insertion of a new paragraph (a).

The effect of the proposed amendment is to suspend section 45 from 3 June 2011 until 1 January 2013. The amendment not only applies to transactions entered into between 3 June 2011 and 31 December 2012, it also effects any transaction concluded before 3 June 2011 that is subject to a suspensive condition that is fulfilled after 3 June 2011. This makes the amendment retrospective as many transactions currently in progress will be impacted.

This amendment creates uncertainty in the markets and will have a negative impact on South Africa's reputation in the global investment market. It will also increase the cost of BEE transactions and as a result make currently attractive deals, unaffordable. Section 45 contains anti-avoidance provisions, surely these could have been expanded to address the concerns of National Treasury and in the process avoid suspending the section completely.

Proposed solution

It is hoped that the Standing Committee on Finance will recommend that the proposals contained in the DTLAB, insofar as section 45 are concerned, should be removed from the DTLAB and that the matter should be investigated further before the section is summarily suspended. If National Treasury and the SARS have concerns about the manner in which section 45 is being utilised by taxpayers, the authorities should rely on the General Anti-Avoidance Rule ("GAAR") contained in sections 80A – 80L, which was introduced in November 2006, and not merely suspend the section whilst the matter is investigated further. The GAAR was introduced after much discussion and debate to replace the anti-avoidance



rule contained in section 103(1) of the Act. However, it would appear that the Commissioner: SARS is reluctant to rely on the GAAR to attack a perceived abuse of the tax system by taxpayers. This also raises the question of whether the GAAR serves any purpose in the Act, with no cases yet having been reported dealing with the application of the GAAR. If the GAAR is not considered adequate, we propose that National Treasury legislate for specific anti-avoidance against the perceived abuse.

As a longer term measure we recommend that National Treasury consider Group Tax for South Africa. In this regard we refer to the SAICA submission made to National Treasury dated 30 August 2010 (see attached).

3.23 *Anti-avoidance: dividend cessions*

Clause 30(n) / amending section 10(1)(k)

Problem statement

The EM refers to dividend cessions being used for anti-avoidance purposes however the proposed amendments are not merely limited to dividend cessions and have wide ranging implications on genuine commercial arrangements. The Act should not be used to deny the legitimate use of financial instruments but should appropriately tax the transactions in an equitable manner that reflects the economic substance. Firstly, dividends are paid by companies out of after tax income and the effect of taxing them creates economic double taxation, an iniquitous result. For example para B has the effect, as shown in example 3 in the EM that a dividend received on shares that have been held for a prolonged period of time (2 years in the example) are deemed to be of a revenue nature because the shares were disposed of shortly after that date (within 45 days). Noting that the dividends have been paid out of underlying post-tax profits the effect is that a total tax burden of 48.16% [$28\% + 28\% \cdot .72$] has been incurred on the income underlying the dividends. The effect of this is market distorting, companies will be forced to hold shares for the 45 day period irrespective of their economic objectives. In the example quoted there is no tax avoidance but merely a cascading tax on the same underlying income. The situation quoted in the example would be exacerbated if the shares had been held for 3 years and thus qualified for capital treatment in terms of section 9C.

The derivatives market will be severely distorted by the proposed amendment. For example, a company grants share options to its staff and chooses to hedge those options by buying similar options from a bank (to avoid shareholder dilution and fix the cost to shareholders). In terms of paragraph B(BBB) the bank would be taxable on any dividends it receives on any shares it has purchased to hedge its position. Noting that the dividends have in any event been paid out of after-tax income economic double taxation results and the hedge, although it makes absolute economic sense to shareholders, may become uneconomic due to the additional tax costs of the transaction. Again no tax avoidance has taken place yet a punitive tax burden has distorted the economic results of a transaction.



The same arguments apply to the proposed subsection (gg). If the concern is that exempt dividends are being transferred from one taxpayer to another through scrip lending then the appropriate way to address that would be to exempt any synthetic or manufactured dividend in the hands of the original taxpayer while taxing the recipient of the dividend. In that way tax neutrality is maintained.

Proposed solution

Paragraph (ee)(A) neatly traps any dividend that is ceded post declaration from a shareholder to a third party. Paragraph (ee)(B) creates economic double taxation and distorts the equity markets and should be deleted. Paragraph (gg) is also inequitable, results in economic double taxation and distorts the market unless any synthetic or manufactured dividends are exempt in the hands of the beneficial owner of the shares. It is hoped that the Standing Committee on Finance will recommend that the proposals contained in the DTLAB, insofar as paragraphs (ee)(A), (ee)(B) and (gg) go, are concerned, should be removed from the DTLAB.

3.24 Anti-avoidance: debt without set maturity dates

Clause 23 / Section 8G

Problem statement

While we understand the need to counter tax avoidance, it is submitted that this section may have unintended consequences. It is common for group treasury companies to provide funding by way of loans to other companies in the group at market related interest rates, payable on a monthly basis, without setting a repayment date. The purpose of these loans and specifically the failure to set a repayment date is not to avoid tax.

Proposed solution

Section 8G should not apply where the holder and issuer are part of the same group of companies.

3.25 Anti-avoidance: third-party backed shares

Clause 21 / Section 8EA

Problem statement

The concern with third-party backed shares does not appear to have a valid basis. In particular preference share dividends are not taxable but neither are they deductible for the payer of the dividends. The accounting treatment of such shares is irrelevant unless the Act is going to follow the accounting treatment for both parties, i.e. the accounting treatment would treat the dividends as finance charges incurred by the payer. Thus if it is proposed to tax the dividends in the hands of the recipient the payer should be entitled to deduct the cost (subject of course to all the tests already contained in the general deduction provisions) to maintain tax equity. There are many valid commercial reasons for the use of these instruments, such as debt: capital ratios, capital adequacy, etc and the reclassification of only one side of the transaction creates an economic distortion. The Act should not be used to prefer the use of one type of



instrument over another, through penal tax treatment, but should maintain tax equity and seek to equitably tax the economic outcomes of the instruments concerned.

Proposed solution

The proposed section 8EA should either be withdrawn or it should re-characterise the dividends as interest for both the payer and the recipient.

Clause 20 / Section 8E

Has National Treasury considered the impact on BEE schemes of the new 10 year period (rather than 3 years from the current provision)?

4 INCOME TAX: INTERNATIONAL

4.1 Re-haul of the controlled foreign company (CFC) regime

Clause 27 / Section 9D

Problem statement (i)

While we applaud the efforts to simplify South Africa's CFC regime, it is submitted that the new diversionary rules coupled with the deletion of the 75% high tax rule leads to unintended consequences. It is our understanding that it was merely the intention to move the 75% rule and not delete it entirely and that it will be reinstated.

We support this rule in principle but find that the practical application of this rule is administratively burdensome. Many South African companies own participation rights in a significant number (in excess of 100) of Controlled Foreign Companies ("CFC's"). To perform a detailed South African tax calculation for each CFC is administratively almost impossible.

The current wording of the Act, as well as the format of the IT14, indicate that the 75% calculation needs to be done first before considering the exemptions provided for in section 9D(9). In practice most taxpayers only perform the 75% calculation after considering and falling foul of the section 9D(9)(b) exemptions.

In addition, assuming the rule is intended to remove section 9D compliance in relation to CFC's in high tax jurisdictions, the rule is not effective in high tax jurisdictions with group taxation if it requires a comparison of taxes paid rather than tax rates. The problem may be best illustrated by way of an example: Say a South African resident owns two CFC's in the United Kingdom ("UK"). Both CFCs are subject to tax in the UK at a rate of say 26% but CFC 1 is in an assessed loss position. The income of CFC 2 is subject to imputation as it receives dividends from foreign companies, which it deposits in the bank, receiving interest from the bank.

In terms of UK group tax, the assessed loss of CFC 1 can be set off against the taxable income of CFC 2, resulting in the tax paid by CFC 2 being reduced or even in CFC 2 not



paying any tax. The South African tax computation does not take the assessed loss of CFC 1 into account and the 75% rule is not met. Please refer to a related discussion under the comments to section 6quat.

Proposed solution (i)

The high tax rule should be moved to section 9D(9)(b) so that it forms part of the exemptions. It is also proposed that the high tax rule be amended to require a comparison of tax rates rather than a comparison of tax payable.

Problem statement (ii)

The new diversionary rules relating to the sale of goods and the provision of services by a CFC to a connected person who is a resident require that the amounts must be attributable to a permanent establishment of that CFC. It is submitted that this requirement is superfluous as the amount already has to be attributable to a foreign business establishment of the CFC. The requirements to qualify as a foreign business establishment are more onerous than those to qualify for a permanent establishment. It is therefore submitted that if a CFC has a foreign business establishment, it will have a permanent establishment and if an amount is attributable to a foreign business establishment it will be attributable to a permanent establishment.

Proposed solution (ii)

The requirements contained in sections 9D(9A)(a)(i)(bb) and 9D(9A)(a)(ii)(bb) be deleted.

Problem statement (iii)

The new diversionary rule relating to amounts received from the sale of goods by a CFC to a connected person who is a resident require that the amount of tax payable to all spheres of government of any country other than the Republic by the CFC in respect of that amount to be more than 50 per cent of the amount of normal tax that would have been payable in respect of that amount had the controlled foreign company been a resident.

Based on the assumption that the “amount of normal tax” can only be determined once taxable income has been determined, the application of this requirement necessitates two “mini” tax calculations in relation to each amount received, i.e. a South African tax calculation and a tax calculation to determine the tax that would have been payable to governments other than the South African government. This is administratively excessively burdensome.

Proposed solution (iii)

It is proposed that this requirement be amended to require a comparison of tax rates rather than a comparison of tax payable.

Alternatively the Act can revert back to the current diversionary rules applicable to the sale of goods by a CFC to a connected person who is a resident.

Problem statement (iv):



The new diversionary rule relating to rental income effectively excludes lease income (i.e. income from the renting of movable property other than in terms of an operating lease) from the section 9D(9)(b) exemption. The reason for discriminating against companies that earn lease income is unclear. Taxpayers owning car rental business (or rental businesses for heavy equipment) often also enter into full maintenance lease agreements with customers. If the car rental business is outside South Africa, companies are incorporated outside South Africa as the customers and markets being served are outside South Africa. This exemption will mean that a resident owning participation rights in say a Mauritian CFC with a full foreign business establishment will not have to impute income from renting cars to tourists but will have to impute lease income from entering into a five year full maintenance lease agreement with for example the Central Electricity Board of Mauritius.

Proposed solution (iv)

It is proposed that this diversionary rule only apply if the renting/leasing of movable goods is not the principle trading activity of the CFC. Alternatively, the 50% rule should be incorporated into this provision, subject to our comments above.

4.2 Unification of source rules

Clause 24 / Section 9 and definition of “gross income”

Problem statement

It is not clear that every aspect of source is adequately covered by the amended section 9 (in clause 24).

Proposed solution

It is proposed that the heading for section 9 be changed to “deemed source” and the reference to deemed source be retained in the gross income definition.

Clause 24(1) – Section 9 subsection (j)

Problem statement

While it is true that case law supports the identification of originating cause, in the event that a multitude of equally dominant originating causes exist, the principle of apportionment should be applied. This provision appears to override such principle. It is further unclear as to whether a source in SA exists when SA features in one of the originating causes but such cause is not dominant. Is this the intention?

Clause 24(1) / Section 9 (1)(c) and (d)

Problem statement

Both these new subsections regarding the source of royalties and know how refer to the definitions of intellectual property in section 23I. There is no change or reference to section 35 which has a wider ambit than section 23I (includes motion pictures and video’s etc). This means that for parts of section 35 source will have to be determined under the common law



rules and no withholdings tax is necessary as section 35 now refers to section 9(1)(c) or (d) only. Is this the intention or an oversight?

Clause 24

Is it the intention to remove reference to minerals and mining from the source provisions?

4.3 Special foreign tax credits for management fees

Clause 11 (g) / Section 6quat

Problem statement

Subsections (1C) and (1D) are deleted. Section 6quat(2) refers to the “*rebate under subsection (1) and the deduction under subsection (1C) shall not be granted.....*”.

Proposed solution

The phrase “and the deduction under subsection (1C)” must also be deleted.

Clause 12 / Section 6quat and 6quin

Problem statement (i)

We applaud the pragmatism behind the introduction of section 6quin. We are however concerned that the deletion of section 6quat(1C) creates uncertainty as to the relief from double taxation available in relation to income from a South African source that is taxed in other jurisdictions.

Section 6quin applies to amounts received or accrued in respect of any services rendered in the Republic. It is unclear what types of activities are included within the scope of services rendered. If the section relates to services such as management or consultancy or technical services, income such as interest, rent and franchise fees that are from a South African source but paid to residents by non-residents, will still be subject to withholding taxes with no possibility of relief in terms of section 6quat.

Proposed solution (i)

Section 6quin should contain a definition for “services” which should include the granting of:

- loans or credit or other financial assistance
- the use or right to use intangible property
- the use or right to use movable property

Problem statement (ii)

South Africa’s tax system is comparable to the tax systems of developed countries and contains many of the features of these tax systems. One feature that is absent is group taxation. When South African residents own participation rights in controlled foreign companies (“CFC’S”) in countries that apply group taxation, the wording of section 6quat and the application thereof by SARS brings the concept of group taxation into the South African tax system. The problem may be best illustrated by way of an example:



Say a South African resident owns two CFC's in the United Kingdom ("UK"). Both CFCs are subject to tax in the UK at a rate of say 26% but CFC 1 is in an assessed loss position. The income of CFC 2 is subject to imputation as it receives dividends from foreign companies, which it deposits in the bank, receiving interest from the bank.

In terms of UK group tax, the assessed loss of CFC 1 can be set off against the taxable income of CFC 2. The interest income of CFC 2 will be included in the income of the South African resident and despite the fact that this income is subject to tax at a rate of 26%, the SA resident will not be entitled to any relief as the assessed loss of CFC 1 will result in no actual tax being paid to the UK government.

The end result is that the South African resident is taxed on income of an offshore holding company that is established in a high tax jurisdiction, i.e. not established offshore for tax reasons, with no relief in terms of section 6quat.

The high tax exemption in section 9D will not be of assistance as CFC 2 will not pay any tax in the UK for the reasons mentioned. Please refer to a related discussion under the comments to section 6quat.

Proposed solution (ii)

Section 6quat should be amended by adding a proviso to subsection (1A) which provides that in determining the amount that is prove to be payable to another government in respect of the inclusion of income in terms of section 9D, any assessed loss of another entity that is allowed to be set-off against the income of the CFC in question, should be disregarded.

Clause 12 / Section 6quin

Is it the intention to override treaty relief that may apply by virtue of the language used in this proposed section (i.e. MUST be applied)?

5 VALUE-ADDED TAX

5.1 Temporary relief for the rental of residential property developers

Clause 146 / New section 18B of the VAT Act

Problem statement (i)

Developer is defined in section 18B(1) as "... a person who constructs, extends or improves a building or part of a building for the sole purpose of disposing of that building or part of the building after the construction, extension or improvement".

The proposed section 18B (2)(a) currently reads as follows:



- (a) *Is developed by a vendor who is a developer wholly for the purpose of consumption, use or supply in the course of making taxable supplies or is held or applied for such purpose.*

Based on the proposed definition of *developer* the sole purpose with which a building may be constructed, extended or approved must be to dispose of such structure after completion to qualify as a developer as defined. The reference to *consumption* and *use* in the proposed section 18B(2)(a) is therefore superfluous as the supply of the goods should be the only test to qualify as a developer.

Proposed solution (i)

We recommend that the reference to *consumption* and use be removed from the sub-section.

Problem statement (ii)

The EM deals in detail with some of the philosophical issues and global principles underpinning the impact and application of the issues of change in use, application, and purposes. A number of these issues have not been clarified by our courts; neither is there clear tax policy governing same.

The extent to which these issues have been dealt with in the EM may create the impression that the memorandum contains the Commissioner for SARS' official view on a number of uncertain issues.

The purpose of the memorandum should merely be to explain the nature of the change and how it is to be applied.

Proposed solution (ii)

We recommend that the following paragraphs be removed from the EM:

- Theoretical issues raised
- Purpose versus application
- Consumption versus recoupment Rental income as a proxy for consumption/recoupment

Problem statement (iii)

From the proposed wording of the current legislation, it appears that the interim rental charged on the properties (being the supply accommodation in a dwelling in terms of a contract of rental or lease), would still be regarded as exempt supplies for VAT purposes.

If so, it would imply that property developers would then be making both taxable and exempt supplies (i.e. conducting a mixed enterprise).

The accounting structures of property developers have not been developed to deal with the VAT complexities of mixed supply environments.



Proposed solution (iii)

We recommend that, during the 36 month grace period, residential rental income be disregarded when determining whether the developer is making taxable or mixed supplies, i.e. a developer should not become liable to use an apportionment percentage solely as a result of earning temporary rental income.

Problem statement (iv)

The EM uses words like “is fully committed to selling the property” and “take the townhouse to market” as possible tests whether a change in intention has taken place in the 36-month period.

The above tests are very subjective and likely to lead to interpretational difficulties and disputes with SARS.

Proposed solution (iv)

We recommend that an Interpretation Note be issued to clarify the boundaries between “fully committed to sell” versus “intention to sell have changed.”

Problem statement (v)

The current legislation does not deal with historic adjustments made in terms of section 18(1). If the intention of the proposed legislation is to assist property developers adversely affected by the global and SA economic meltdown, VAT previously paid should be released in respect of vendors that would have qualified as property developers as defined.

Proposed solution (v)

We recommend that the legislation be applied to all developers qualifying as developers as defined and which have been affected by the economic decline.

5.5 Intra-warehouse transfers

Clause 143 / Section 13(2A) of the VAT Act

Problem statement

Paragraph III (proposal) to the EM states that “... *the value of the goods upon entry for home consumption will instead be deemed to equal the value of the goods taken into account when the VAT vendor acquired the goods. The import value will be ignored.*”

The proposed wording of the new section 13(2A) states that “*the value ... shall be deemed to be the greater of the value determined in terms of subsection (2)(a) or the value of the of the acquisition determined under section 10(3).*”

Proposed solution

We recommend that the EM be aligned with the proposed wording of the VAT Act.



Other

Clause 145 / Section 16(2) – pre-amble

Problem statement

The proposed inclusion of *service* (“*no deduction ... the importation of any goods or services ...*”) is superfluous as VAT on imported services is only payable to the extent that such services are to be used other than for taxable purposes. VAT so paid will therefore never qualify as deductible input tax due to the structure of the VAT Act.

Proposed solution

We recommend that the reference to *services* imported be deleted.

Clause 138(c) – Section 1 (paragraph (c)) – amended definition of *superannuation scheme* in section on of the VAT Act

Problem statement

The ambit of the inclusions of medical aid schemes in the definition of *superannuation schemes* need to be extended to include developments in the medical aid industry.

An example of the above is where medical aid schemes outsource certain of its risks. The entity assuming these risks (in practice referred to as Managed Health Care Organisations) performs the exact same activities and takes the same risks as traditional medical aid schemes, with the only exception that its only client/s are the respective medical aid schemes.

It is our understanding that the Commissioner for SARS has issued ruling to various Managed Health Care Organisations confirming their status as superannuation schemes in the past.

Proposed solution

We propose that the definition of superannuation schemes be further extended to include Managed Health Care Organisations to the extent of activities conducted that are identical to medical aid schemes.

Clause 172 / Supplies made by Cricket South Africa

Problem statement

The proposed amendment will retroactively zero-rate supplies made by Cricket South Africa in respect of the hosting of the International Cricket Council Championship Trophy South Africa 2009 and the Champion’s League Twenty20. The provisions specifically relate to activities of Cricket South Africa and do not cover the wider tax base.

Proposed solution

These provisions are very specific to Cricket South Africa and should rather be included in VAT Ruling instead of being introduced as part of legislation.

Please do not hesitate to contact us, should you have any questions regarding the above. We will provide additional comments on or before 04 July 2011.



Yours faithfully

Muneer Hassan CA(SA)
PROJECT DIRECTOR: TAX
The South African Institute of Chartered Accountants

cc: Adele Collins (SARS)
Email: acollins@sars.gov.za
Nomfanelo Mpotulo (National Treasury)
Email: Nomfanelo.mpotulo@treasury.gov.za