# REPUBLIC OF SOUTH AFRICA

# EXPLANATORY MEMORANDUM

# ON THE

# TAXATION LAWS AMENDMENT BILL, 2008

[W.P. –- '08]

**CONTENTS**

**INTRODUCTION**

**EXPLANATION OF MAIN AMENDMENTS**

**Retirement fund reforms**

**Expatriate accommodation**

**Intra-group rollover relief: closure of disguised sales**

**Restructuring of South African controlled foreign companies**

**Limitation of expenditure incurred in respect of unbundling company shares**

**Entry into and exit from South African tax jurisdiction**

**CLAUSE BY CLAUSE EXPLANATION**

**Index to clause by clause explanation**

| Clause | Section of Income Tax Act, 1962 (unless otherwise stated) | Description |
|---|---|---|
| 1 | | Rates & thresholds for income tax and VAT |
| 2(1)*(a)* | 1 | 'building society' – deletion of obsolete definition |
| 2(1)*(b)* | 1 | 'child' – updated definition |
| 2(1)*(c)* | 1 | 'date of deep level production' - deletion of obsolete definition |
| 2(1)*(d)* | 1 | 'dividend' – technical correction to definition |
| 2(1)*(e)* and *(f)* | 1 | 'dividend' – clarification that share buy-backs and share cancellations could result in a dividend |
| 2(1) *(g)* | 1 | 'dividend' – clarification that cross-ownership cancellations could result in a dividend |
| 2(1)*(h)* and *(i)* | 1 | 'dividend' – clarification of pro-rata reduction rules |
| 2(1)*(j)* | 1 | 'entertainment expenditure' – deletion of obsolete definition |
| 2(1)*(k)* to *(o)* | 1 | Retirement fund reforms (see explanation of main amendments) |
| 2(1)*(p)* | 1 | 'married woman' – deletion of obsolete definition |
| 2(1)*(q)* | 1 | 'mutual building society' – deletion of obsolete definition |
| 2(1)*(r)* | 1 | Retirement fund reforms (see explanation of main amendments) |
| 2(1)*(s)* | 1 | 'other deep level gold mine' – deletion of obsolete definition |
| 2(1)*(t)* to *(z*F*)* | 1 | Retirement fund reforms (see explanation of main amendments) |
| 2(1)*(z*G*)* | 1 | 'tax' – inclusion of administrative penalty as tax |
| 2(1)*(z*H*)* | 1 | Retirement fund reforms (see explanation of main amendments) |
| 3 | 5 | Retirement fund reforms (see explanation of main amendments) |
| 4*(a)* | 7 | Retirement fund reforms (see explanation of main amendments) |
| 4*(b)* and *(c)* | 7 | Attribution rules – widening of ambit to include stepchildren |
| 5 | 8 | Technical corrections |
| 6 | 9A | Technical corrections |
| 7 | 9C | Capital treatment - clarification of scope of three year rule |
| 8 | 9D | Clarification of intra-CFC debt rules |
| 9*(a)* | 10(1)*(c*M*)* | Non-profit agricultural distribution companies – deletion of exemption |
| 9*(b)* | 10(1)*(d)* | Retirement fund reforms (see explanation of main |

| | | |
|---|---|---|
| | | amendments) |
| 9*(c)* | 10(1)*(e)* | Housing associations – R50 000 exemption for non-levy income |
| 9*(d)* | 10(1)*(k)*(ii)*(bb)* | Foreign dividend exemption – deletion of 10% shareholding requirement |
| 9*(e)* and *(f)* | 10(1)*(k)*(ii)*(dd)* | Foreign dividend participation exemption – provision made for dividends from foreign co-operatives |
| 9*(g)* | 10(1)*(n*H*)* | Fringe benefits – deletion of obsolete exemption |
| 9*(h)* | 10(1)*(x)* | Lump sums (on termination of employment/retirement) – deletion of obsolete proviso relating to married women |
| 10(1)*(a)* | 11*(e)* | Technical correction |
| 10(1)*(b)* and *(c)* | 11*(k)*(i) and para (v) of proviso to 11*(l)* | Retirement fund reforms (see explanation of main amendments) |
| 10(1)*(d)* | 11*(n)(aa)*(A) | Technical correction |
| 10(1)*(e)* | para (i) of proviso to 11*(n)* | Retirement fund reforms (see explanation of main amendments) |
| 10(1)*(f)* | para (ix) of proviso to 11*(n)* | Deletion of obsolete proviso relating to married women |
| 11 | 11D | R&D deductions – extension of 150% deduction |
| 12 | 12D | Introduction of allowance for pipelines transporting water used by power stations |
| 13 | 12E | Depreciation of small business corporation assets – election for allowance in terms of s12E or s11(*e*) |
| 14 | 14(1)*(a)*(ii) | Deletion of obsolete provisions |
| 15 | 20 | Technical corrections |
| 16 | 22 | Technical correction |
| 17 | 23A | Ring-fencing of rental losses – clarification of definition of 'rental income', and technical corrections |
| 18 | 23D | Letting/licensing of depreciable assets – limitation of allowances |
| 19*(a)* | 23H(1)*(a)* | Pre-trade expenditure – deduction made subject to s23H |
| 19*(b)* | Para *(cc)* of proviso to 23H(1) | Technical correction |
| 20 | 24I | Foreign exchange gains/losses – deletion of obsolete provisions relating to hedging transactions |
| 21 | 29A | Retirement fund reforms (see explanation of main amendments) |
| 22*(a)* | 30(1) | PBOs – deletion of limitation in respect of PBO foreign activities |
| 22*(b)* | 30(3)*(b)*(iii)*(aa)* | PBOs – relaxation of rules relating to dissolution |
| 23 | 36 | Deletion of obsolete wording |
| 24 | 38 | Retirement fund reforms (see explanation of main amendments) |

| | | |
|---|---|---|
| 25(1)*(a)* | 41(1) | Technical correction |
| 25(1)*(b)* | 41(1) | Updating of reference |
| 25(1)*(c)* and *(d)* | 41(1) | Technical corrections |
| 25(1)*(e)* | 41(1) | Intra-group rollover relief: extending the scope of 'group of companies' (see explanation of main amendments) |
| 25(1)*(f)* | 41(1) | 'qualifying interest' – deletion of definition |
| 25(1)*(g)* | 41 | Corporate reorganisations – reporting requirements |
| 26(1)*(a)* | 42 | Technical correction |
| 26(1)*(b)* | 42(1) | Asset for share rollover relief – widening of definition |
| 26(1)*(c)* | 42(1) | Technical correction |
| 26(1)*(d)* | 42(1) | 'qualifying interest' – substitution of definition |
| 26(1)*(e)* | 42(2)*(b*A*)* | Technical correction |
| 26(1)*(f)* | 42(6) | Consequential amendments |
| 27(1)*(a)* | 44(1) | 'qualifying interest' – substitution of definition |
| 27(1)*(b)* | 44(14)*(b)* and *(b*A*)* | Amalgamation transactions and collective investment schemes |
| 28 | 45 | Intra-group rollover relief: closure of disguised sales (see explanation of main amendments) |
| 29 | 46 | Restructuring of South African CFCs |
| 30 | 46A | Limitation of expenditure incurred in respect of unbundling company shares (see explanation of main amendments) |
| 31(1)*(a)* | 47(5) | Liquidation distributions – disregarding of part disposal by holding company |
| 31(1)*(b)* | 47(6)*(c)* | Liquidation distributions – extension of time period allowed |
| 32 | 64B | Restructuring of South African CFCs and limitation of intra-group exemption |
| 33 | 64C | Intra-group deemed dividends – clarification of exemptions |
| 34 | 102A | Deletion of obsolete reference |
| 35 | 2nd Schedule heading | Retirement fund reforms (see explanation of main amendments) |
| 36 | 2nd Schedule, para1 | Retirement fund reforms (see explanation of main amendments) |
| 37 | 2nd Schedule, para 2 | Retirement fund reforms (see explanation of main amendments) |
| 38 | 2nd Schedule, para 2B | Retirement fund reforms (see explanation of main amendments) |
| 39 | 2nd Schedule, para 2C | Retirement fund reforms (see explanation of main amendments) |
| 40 | 2nd Schedule, para 3 | Retirement fund reforms (see explanation of main amendments) |
| 41 | 2nd Schedule, para 4 | Retirement fund reforms (see explanation of main amendments) |
| 42 | 2nd Schedule, para 6 | Retirement fund reforms (see explanation of main amendments) |
| 43*(a)* | 4th Schedule, | Retirement fund reforms (see explanation of main |

| | | |
|---|---|---|
| | para 1 | amendments) |
| 43*(b)* | 4th Schedule, para 1 | Housing associations – exclusion from definition of provisional taxpayer |
| 44(1)*(a)* | 4th Schedule, para 11B | Retirement fund reforms (see explanation of main amendments) |
| 44(1)*(b)* and *(c)* | 4th Schedule, para 11B | SITE reform |
| 45 | 4th Schedule, para 16 | Retirement fund reforms (see explanation of main amendments) |
| 46(1)*(a)* and *(b)* | 4th Schedule, para 19 | Technical corrections |
| 46(1)*(c)* | 4th Schedule, para 19 | Provisional tax – exclude retirement lump sum benefits |
| 47 | 7th Schedule, para 1 | Retirement fund reforms (see explanation of main amendments) |
| 48(1)*(a)* | 7th Schedule, para 9 | Technical corrections |
| 48(1)*(b)* | 7th Schedule, para 9 | Expatriate accommodation (see explanation of main amendments) |
| 49 | 8th Schedule, para 1 | Deletion of duplicated definitions |
| 50(1)*(a)* to *(d)* | 8th Schedule, para 12 | Entry into and exit from South African jurisdiction |
| 50(1)*(e)* and *(f)* | 8th Schedule, para 12 | Reduction/discharge of debts – extension of anti-avoidance provision |
| 50(1)*(g)* | 8th Schedule, para 12 | Reduction/discharge of debts – extension of time period allowed for liquidation |
| 51 | 8th Schedule, para 13 | Technical correction |
| 52 | 8th Schedule, para 20 | CFCs – multi-tier base cost rule |
| 53 | 8th Schedule, para 24 | Entry into and exit from South African tax jurisdiction (see explanation of main amendments) |
| 54 | 8th Schedule, para 40 | Retirement fund reforms (see explanation of main amendments) |
| 55 | 8th Schedule, para 42 | Disposal and acquisition of identical financial instruments – technical correction |
| 56 | 8th Schedule, para 54 | Retirement fund reforms (see explanation of main amendments) |
| 57 | 8th Schedule, para 55 | Retirement fund reforms (see explanation of main amendments) |
| 58(1)*(a)* | 8th Schedule, para 64B | Disposals of shares in foreign companies – technical correction |
| 58(1)*(b)* | 8th Schedule, para 64B | Disposals of shares in foreign companies – requirements for gain/loss to be disregarded |
| 58(1)*(c)* | 8th Schedule, para 64B | Disposals of shares in foreign companies – restructuring of South African CFCs |
| 58(1)*(d)* and *(e)* | 8th Schedule, para 64B | Technical corrections |

| 59 | 8th Schedule, para 74 | Awarding of capitalisation shares not regarded as distribution |
|---|---|---|
| 60(1)*(a)* and *(b)* | 8th Schedule, para 76 | Technical corrections |
| 60(1)*(c)* | 8th Schedule, para 76 | Capital distributions and part disposals |
| 61(1)*(a)* | 8th Schedule, para 76A | Heading – technical correction |
| 61(1)*(b)* | 8th Schedule, para 76A | Distributions of shares in unbundling transactions |
| 61(1)*(c)* | 8th Schedule, para 76A | Capital distributions and part disposals – change of effective date |
| 62 | 8th Schedule, para 80 | Capital gains attributed to beneficiary – clarification |
| 63 | 9th Schedule, Part I para 4 | Updating of provisions |
| 64 | 9th Schedule, Part II para 3 | Updating of provisions |
| 65 | 10th Schedule, para 1 | Formatting correction |
| 66 | Act 91 of 1964 Schedule I | Customs & excise – changes to rates of duty |
| 67 | Act 91 of 1964 Schedules | Customs & excise – continuation of amendments to Schedules |
| 68 | Act 89 of 1991 Section 1 | Value-Added tax – technical correction |
| 69 | Act 45 of 2002 Section 99 | Collective Investment Schemes Control Act – technical correction |
| 70 | Act 20 of 2006, Schedule 1 | 2010 FIFA World Cup provisions |
| 71 and 72 | Act 15 of 2007 Sections 11 and 14 | Diamond export levies |
| 73 | Act 25 of 2007 Section 8 | Technical correction |
| 74 | Act 35 of 2007 Section 52 | Technical corrections |
| 75 | Act 35 of 2007 Section 54 | Certain share-for-share transactions deemed to be asset-for-share transactions |
| 76 | Act 35 of 2007 Section 125 | Amalgamation of sporting bodies |
| 77 | | Short title and commencement |

# EXPLANATORY MEMORANDUM
# ON THE
# TAXATION LAWS AMENDMENT BILL, 2008

## INTRODUCTION

The Taxation Laws Amendment Bill, 2008, introduces amendments to the Income Tax Act, 1962, the Customs and Excise Act, 1964, the Value-Added Tax Act, 1991, the Collective Investment Schemes Control Act, 2002, the Revenue Laws Amendment Act, 2006, the Diamond Export Levy Act, 2007, the Securities Transfer Tax Act, 2007 and the Revenue Laws Amendment Act, 2007.

---

## EXPLANATION OF MAIN AMENDMENTS

### RETIREMENT FUND REFORMS

#### Consistency and alignment of definitions with the Pension Funds Act

Current Legislation

In terms of the Pension Funds Act, 1956 (Act No. 24 of 1956), every retirement fund is required to register with the Financial Services Board ('the FSB') as a 'pension fund organisation' (also referred to in the Pension Funds Act as a 'pension fund'). A fund so registered is then required to apply to SARS to be approved as one of three types of retirement fund, i.e. as a 'pension fund', 'provident fund' or 'retirement annuity fund' (all as defined in the Income Tax Act). The tax treatment of contributions to, growth within, and payments from such funds is determined based on this approval by SARS.

Problem statement

In terms of the current legislation, retirement funds are required to comply with two sets of regulations (i.e. one set under the Pension Funds Act and another set under the Income Tax Act). This is administratively onerous, both to administrators of funds and to SARS.

Before the definitions of the different types of funds contained in the Income Tax Act can be moved across to the Pension Funds Act, these definitions need to be revised in order to ensure that:

- Their interpretation and application, in the context of the Income Tax Act, remains unchanged in the context of the Pension Funds Act;
- Existing provisions in the Income Tax Act that duplicate existing provisions in the Pension Funds Act are deleted; and
- These definitions are consistent with recent amendments to the Pension Funds Act.

Proposal

It was announced in the 2007 Budget that certain regulatory definitions contained in the Income Tax Act would be moved to the Pension Funds Act. This will result in a streamlining of the registration and regulation process. As a first step towards this single registration process, the Income Tax Act definitions are updated to streamline the requirements for approval relating to the different types of retirement funds operating in the market today.

**Partnerships and the definition of 'pension fund'**

Current Legislation

The definition of 'pension fund' only allows for a partner of a partnership to join the pension fund of that partnership if the partner was previously an employee of the partnership.

Problem Statement

A person who joins a partnership without having been an employee of that partnership may not join its pension fund.

Proposal

It is proposed that the definition of 'pension fund' be amended to allow all partners to join a partnership's pension fund irrespective of whether such partners were previously employed by the partnership.

Since partners do not receive a salary as such, certain consequential amendments are also proposed in order to determine the amount that is tax deductible.

**Proposed new definition of 'living annuity'**

Current Legislation

Members of pension funds, pension preservation funds and retirement annuity funds are compelled to take a minimum of two-thirds of their fund value upon retirement in the form of an annuity. Certain aspects of living annuities in the retirement context are defined in SARS Retirement Fund Note 1/96. The Long-Term Insurance Act also captures certain aspects of a living annuity in the definition of a 'linked policy'.

Problem Statement

Although the term ‘annuity’ is generally well understood to include a ‘living annuity’, paragraph (*a*) of the definition of ‘gross income’ in section 1 does not specifically refer to a ‘living annuity’. The term ‘living annuity’ is also not defined in the Income Tax Act.

Proposal

To put it beyond doubt that a ‘living annuity’ is regarded as an annuity in terms of the Income Tax Act, it is proposed that paragraph (*a*) of the definition of ‘gross income’ in section 1 of the Income Tax Act be amended to include a ‘living annuity’, and that a definition of ‘living annuity’ be inserted in section 1 of the Income Tax Act. Accordingly, certain references to the term ‘annuity’ or ‘annuities’ now specifically include living annuities. The defining characteristics of living annuities in the retirement context (as set out in SARS Retirement Fund Note 1/96 and in the definition of ‘linked policy’ in the Long-Term Insurance Act) have been incorporated in the proposed new definition of ‘living annuity’.

**Lump sums to dependants of a deceased fund member**

Current Legislation

Dependants of a deceased fund member may elect to receive the full benefit in the form of a lump sum. However, the Income Tax Act stipulates that this election may not be made later than six months after the death of that member. The payment of these benefits and the protection of dependants are governed by the Pension Funds Act.

Problem Statement

In many instances, trustees of a pension fund do not find all the dependants within six months of the death of the member, and these dependants are therefore precluded from electing to receive a lump sum.

Proposal

It is proposed that the requirement that dependants of a deceased fund member make an election within six months after the death of that member be removed. This will allow such election to be made at any time after the death of the member.

**Payment of benefits to dependants of a deceased member of a Retirement Annuity Fund**

Current Legislation

In terms of current provisions, upon the death of a member of a retirement annuity fund, benefits from that retirement annuity fund may only be paid to that member's dependants.

Problem Statement

A problem arises where the deceased member has no dependants. The Act does not allow for a lump sum to be paid into the deceased member's estate. This results in the money being 'trapped' in the fund and the heirs not receiving any benefit.

Proposal

It is proposed that the Act be amended to allow benefits to be paid into the estate of a deceased member in the absence of dependants.

**Withdrawals where a member emigrates**

Current Law

Members of a retirement annuity fund may not withdraw their funds prior to retirement except where the value is very small.

Problem Statement

Where members of a retirement annuity fund emigrate before retirement, those members are unable to withdraw their funds until such time as they retire (which may be many years into the future).

Proposal

It is proposed that the Act be amended to allow members who emigrate from South Africa before they retire to withdraw their funds prior to retirement, provided they pay the full tax on the benefit.

**Proposed new definitions of 'pension preservation fund' and 'provident preservation fund'**

Current Legislation

Preservation funds are currently recognised in terms of either the definition of 'pension fund' or 'provident fund' in the Income Tax Act. Consequently, the membership eligibility, transfer, withdrawal and other related requirements are closely linked to the approval requirements of occupational pension and provident funds.

Problem Statement

A member of a pension fund or provident fund whose employment is terminated, and who wishes to preserve his or her retirement savings within a tax-free retirement vehicle, faces a number of difficulties. Firstly, there is a limited choice of preservation funds. Secondly, there are certain difficulties related to transferability between preservation funds (i.e. once transferred, the savings are in many cases effectively 'trapped' in the preservation fund).

Proposal

Two new definitions (i.e. 'pension preservation fund' and 'provident preservation fund') to separately recognise preservation funds are proposed, without regard to any employer-employee relationship.

The two main differences between 'pension preservation funds' and 'provident preservation funds' are the following:

- Pension preservation funds may only receive amounts transferred from pension funds (and other pension preservation funds) and provident preservation funds may only receive amounts transferred from provident funds (and other provident preservation funds); and
- Pension preservation funds contain the same retirement compulsory annuity provision as a pension fund.

These new definitions will allow more flexibility and choice to persons who wish to preserve their retirement savings within a tax-free retirement vehicle.

The proposed new definitions effectively untie a preservation fund from the employer-employee relationship that is a requirement for the approval of an occupational pension or provident fund. The proposed definitions will allow an employee to choose his or her own pension or provident preservation fund upon termination of employment. Transfers between the preservation funds of the same type will also be possible and no person will be 'trapped' in any preservation fund.

In addition, the definition allows for membership and transfer of benefits of divorcees, who previously had a limited choice of retirement vehicles in which to house their divorce settlements payable from pension or provident funds of former spouses.

In terms of the proposal, preservation funds can also be established to house 'unclaimed benefits' (e.g. where no benefit has been paid to a member or his dependants within 24 months of the benefit becoming due).

Transfers to preservation funds will be tax-free (paragraph 6 of the Second Schedule) and growth within these funds will also be tax-free (section 10(1)(*d*)(i) of the Income Tax Act). Payments from these funds will be subject

to tax calculated on the same basis as similar payments from pension, provident and retirement annuity funds.

---

## EXPATRIATE ACCOMMODATION

### Current Legislation

Legislation was amended in 2007 to grant a one-year tax-free period for accommodation provided to expatriate employees by employers with effect from 1 March 2008. Employer-provided accommodation is tax-free during the expatriate's first year of stay in South Africa. Thereafter the full rental value is taxed in the hands of the employee.

### Proposal

a) Long-term stay: accommodation exemption

It is proposed that residential accommodation provided by an employer to an expatriate be provided tax-free for a two-year period. The tax-free period commences on the date of arrival of the employee in the Republic for the purpose of performing the duties of his or her employment.

*Anti-avoidance*
The exemption does not apply if the person was in South Africa for a period of 90 days in the tax year prior to the year in which that person arrives in South Africa to perform the duties of employment.

*Monetary cap*
In order to limit the potential cost to the fiscus, a monthly monetary cap of R25 000 is placed on the value of the tax-free accommodation. To the extent that the value of the employer-provided accommodation exceeds the cap multiplied by the number of months the benefit is granted, the excess will be taxable in the hands of the employee.

b) Short-term stay: accommodation exemption

Employer-provided accommodation will be tax-free if the employee is present in South Africa for a period of less than 90 days during the relevant tax year. No monetary cap is placed on this tax-free accommodation.

## INTRA-GROUP ROLLOVER RELIEF: CLOSURE OF DISGUISED SALES

### Current Legislation

Under current law, various company reorganisations are eligible for rollover relief on the assumption that these reorganisations merely represent a reshuffling of investments as opposed to a cash-out. One form of relief applies to the movement of assets within a single economic (and fully taxable) group of companies. More particularly, in the case of an intra-group transfer, all gain or loss in respect of transferred assets is rolled over to the group company acquiring the assets. Assets are generally transferred for consideration in the form of cash or, alternatively, the purchase price is left outstanding on loan account. A deferred gain or loss will subsequently be triggered when either: (i) the assets are transferred outside the group, or (ii) when the transferor and transferee companies become separated from one another so that they are no longer part of the same group.

### Reasons for change

It has come to Government's attention that certain taxpayers are seeking to misuse intra-group relief so as to arguably achieve disguised tax-free cash-outs. These schemes come in several forms. The nature of these schemes can best be illustrated as follows:

*Example*
*Facts*
Parent owns all of Operating Sub. Operating Sub has assets with a value of R1 million and a base cost of R200 000. Parent plans to sell Operating Sub to Independent Purchaser without tax. In order to achieve these goals, the parties enter into the following transactions:

Step 1: Parent forms Newco Sub for nominal consideration.
Step 2: Operating Sub transfers all of its assets to Newco Sub in exchange for R1 million of cash provided by Newco Sub. Newco Sub obtained the cash by borrowing the cash from an unrelated bank backed by a guarantee from Independent Purchaser.
Step 3: Operating Sub distributes the R1 million cash to Parent as a tax-free dividend, leaving Operating Sub as an empty shell.
Step 4: Parent transfers all the shares of Operating Sub to Newco Sub in exchange for the issue of additional Newco Sub shares.
Step 5: Independent Purchaser pays nominal consideration for all the shares of Newco Sub (which now have nominal value due to the newly attached debt).

*Result (assuming the general anti-avoidance rule does not apply)*
In Step 2: The transfer from Operating Sub to Newco Sub is currently a tax-free section 45 rollover with the R200 000

base cost of the business assets rolling over to Newco Sub.

In Step 3: The dividend distribution by Operating Sub of the cash to Parent is free from the Secondary Tax on Companies under section 64B(5)(*f*) by virtue of the group relief election.

In Step 4: The transfer of the Operating Sub shares by Parent to Newco Sub will not generate any gain because Operating Sub is now an empty shell.

In Step 5: Due to the newly incurred indebtedness, the shares of Operating Sub have little or no net value that can be taxed upon transfer to Independent Purchaser.

The above transaction fails to trigger a de-grouping charge because Operating Sub and Newco always remain part of the same group. The separation of both companies from Parent is irrelevant. Intra-group loans (debt instruments) can be utilised to achieve a similar tax-free sale to Independent Purchaser.

**Proposal**

*1. Main proposal*

The proposed legislation seeks to eliminate potential misuse of intra-group relief by adding additional triggers to the de-grouping charge. First and foremost, the de-grouping charge will now apply if the transferee company becomes separated not just from the transferor company but also from any controlling parent (i.e. any shareholder having direct or indirect control) of the transferee or transferor company. Secondly, a de-grouping charge will be triggered if the intra-group consideration (e.g. cash received or loans (debt instruments) issued in exchange for the rolled-over assets) leaves the group of companies (as defined in section 41) for no consideration, less than arm's length consideration or as a distribution. A similar result follows if amounts derived from this consideration leave the group in a similar fashion. However, the de-grouping charge for intra-group consideration (or amounts so derived) is only triggered if the consideration leaves within 2 years of the intra-group transfer.

*Example 1*
*Facts*
Common Parent owns all the shares of Operating Company. Common Parent forms Newco. Newco acquires all of the business assets from Operating Company in exchange for the issue of a debt instrument of equal value by Newco. Operating Company distributes the debt instrument to Common Parent, and Common Parent transfers all the shares of Operating Company to Newco in exchange for additional Newco shares. Common Parent then sells all the Newco shares and the debt instrument to Independent Purchaser.

*Result*
The sale to Independent Purchaser triggers the de-grouping charge because Newco is no longer owned by Common Parent.

*Example 2*
*Facts*
Common Parent (a pure holding company) is owned equally by Company X and Company Y. Common Parent owns all the shares of Operating Company. Common Parent forms Newco. Newco acquires all of the business assets from Operating Company in exchange for the issue of a debt instrument of equal value by Newco. Operating Company immediately distributes the debt instrument to Common Parent, and Common Parent then distributes the debt instrument equally between Company X and Company Y. Both Company X and Company Y sell their shares in Common Parent (along with the debt instrument) to Independent Purchaser.

*Result*
The distribution of the debt instrument outside the group triggers the de-grouping charge (even though the group remains intact).

*Example 3*
*Facts*
Common Parent (a pure holding company) owns all the shares of Operating Company. Independent Purchaser purchases all the shares of Common Parent via a transaction triggering capital gains for the shareholders of Common Parent. Independent Purchaser funds the purchase by borrowing an amount by way of a bridging loan from an unrelated bank.

In the second step of the transaction, Common Parent (now controlled by Independent Purchaser) forms Newco, which borrows funds from a second bank. Newco uses the cash to acquire all the assets of Operating Company. Operating Company distributes the funds to Common Parent, which in turn distributes these funds to Independent Purchaser. Independent Purchaser then uses the funds to settle the bridging loan.

*Result*
The use of the funds to pay off the bridging loan does not trigger a de-grouping charge. Settlement of the bridging loan reflects arm’s length consideration for the utilisation of the cash funds, and Independent Purchaser remains as the top parent despite the funds leaving the group.

*Example 4*
*Facts*
Common Parent (a pure holding company) is owned equally by Company X and Company Y. Common Parent owns all the shares of Operating Company. Common Parent declares a dividend of R100 to

its shareholders, but does not pay the dividend immediately. Common Parent then forms Newco. Newco acquires all of the business assets from Operating Company in exchange for cash of R100 (whether or not such cash was borrowed from a third party. Operating Company immediately distributes the cash of R100 to Common Parent, and Common Parent then applies the cash to make payment of the dividend it previously declared to Company X and Company Y. Both Company X and Company Y sell their shares in Common Parent to Independent Purchaser. The group (through Newco) still remains subject to the debt owed to the unrelated bank.

*Result*
The use of the cash to make payment of the dividend constitutes a distribution outside the group, which triggers the de-grouping charge (even though the group remains intact).

*2. Group of companies definition*

In 2007, the section 41 group of companies definition was narrowed to exclude exempt or partially exempt companies. As part of this change, foreign companies were fully excluded from the section 41 definition, even if effectively managed in South Africa (i.e. fully taxable as South African resident companies). The proposed legislation partially reverses this result by allowing foreign companies to be part of the section 41 group of companies definition if effectively managed in South Africa. Foreign companies treated as fully taxable South African resident companies have been re-included in the group definition because foreign investment into South Africa may occur through the use of a South African effectively managed foreign company for non-tax reasons. The exclusion of these foreign companies may also be problematic from a treaty non-discrimination perspective.

A second issue stemming from the 2007 narrowing of the section 41 group of companies definition relates to the effective date. This narrowing of the group definition technically triggers a de-grouping charge even though the event is legislative (as opposed to an event under the control of the parties). In view of this legislative de-grouping, the 2007 narrowing was postponed until 1 January 2009 to provide taxpayers with time to reconfigure their groups so as to avoid this charge. The proposed legislation modifies this effective date. The legislative narrowing of the group definition brought about by the 2007 legislation will no longer trigger a de-grouping charge for pre-existing intra-group transactions. Because this legislative de-grouping will no longer trigger a de-grouping charge, it is proposed that the narrowed group definition takes effect as of 21 February 2008.

*3. Special reporting*

In view of the misuse of section 45 giving rise to this corrective legislation, SARS will be given enhanced information gathering powers in respect of all reorganisations eligible for rollover relief. SARS may now prescribe the circumstances where special reporting (over and above annual income tax

returns) will be required when reorganisations are undertaken. It is envisaged that this reporting will potentially act as an advance warning system so potential misuses are identified as reorganisations are undertaken.

---

## RESTRUCTURING OF SOUTH AFRICAN CONTROLLED FOREIGN COMPANIES

### Current legislation

South African tax legislation provides significant flexibility for South African multinationals seeking to restructure their offshore subsidiary operations. The main provision providing for this flexibility is paragraph 64B of the Eighth Schedule. Paragraph 64B allows for the tax-free disposal of foreign shares of South African (directly or indirectly) owned foreign subsidiaries to foreign companies (including other South African owned foreign subsidiaries of the same group). In addition, South African companies can obtain section 45 rollover relief when disposing of South African owned foreign subsidiaries to other South African companies within the same group of companies.

### Problem statement

While the Income Tax Act generally takes a very permissive approach toward the restructuring of South African (directly or indirectly) owned foreign subsidiaries within the same group, a small deficiency exists. No relief exists when a South African group of companies seeks to transfer an indirectly owned foreign subsidiary to direct South African ownership within the same group. This deficiency exists as a result of recent changes to section 45 that excludes non-resident companies from group company status for section 45 purposes.

### Proposed amendment

The proposed amendment provides section 46 relief for the unbundling of South African controlled foreign companies. This unbundling relief mainly seeks to facilitate the unbundling of indirectly controlled foreign subsidiary shares so the subsidiary shares can be shifted to direct South African ownership without triggering an immediate tax charge. This methodology seeks to provide flexibility without returning to some of the problems associated with the previous relief under section 45. In order for a South African controlled foreign company to unbundle the shares of another foreign controlled company to direct South African ownership, the shares of the unbundled and unbundling companies must be at least 95 per cent owned by the unbundling company and a single South African company, respectively. The 5 per cent escape hatch recognises that the company law of many foreign countries requires company shares to be held by two or more persons.

*Example*
*Facts*
South African Holding Company owns all the shares of South African Company 1 and all the shares of South African Company 2. South African Company 1 owns all the shares of Foreign Subsidiary X, which in turn owns all the shares of Foreign Subsidiary Y. The above set of companies ultimately seeks to transfer the ownership of Foreign Subsidiary Y directly to South African Company 2. This aim is achieved in two steps. Foreign Subsidiary X initially distributes all the shares of Foreign Subsidiary Y to South African Company 1. South African Company 1 then transfers all the shares of Foreign Subsidiary Y to South African Company 2 in exchange for a loan (debt instrument) issued by South African Company 2.

*Result*
The distribution of the Foreign Subsidiary Y shares by Foreign Subsidiary X qualifies for section 46 rollover relief by virtue of the proposed amendment. The transfer of the Foreign Subsidiary Y shares from South African Company 1 to South African Company 2 qualifies for section 45 relief by virtue of pre-existing law.

---

## LIMITATION OF EXPENDITURE INCURRED IN RESPECT OF UNBUNDLING COMPANY SHARES

### Current legislation

In accordance with prevailing international practice, foreign persons are as a general rule not subject to any capital gain or loss when selling South African shares. This practice is often enshrined by tax treaty.

### Problem statement

Certain foreign persons are seeking to shift their capital gains exemption on domestic shares further down the chain of South African companies. In the transactions of concern, foreign shareholders use this exemption to increase the tax value (i.e. base cost and cost price) of all domestic shares at every level of shareholding within a domestic group of companies controlled by the foreign shareholder. This transaction can best be illustrated as outlined below.

*Example*
*Facts*
Foreign Parent owns all the shares of Old Holdco, the holding company of a South African group of companies. Old Holdco owns all the shares of five Operating Subsidiaries. The shares in Old Holdco have a value of R100 million and a base cost of R15 million. In order to increase the

base cost of all the subsidiaries to market value without tax, the overall structure is reorganised as described below:

Step 1: Foreign Parent forms a resident company, New Holdco, by subscribing for R100 million of shares in New Holdco.
Step 2: New Holdco uses the R100 million to acquire Old Holdco from Foreign Parent.
Step 3: Old Holdco unbundles all of the Operating Subsidiaries to New Holdco.

*Result*
Assuming the General Anti-Avoidance Rule does not apply, the overall transaction allows for the base cost of the shares in all the Operating Subsidiaries to be increased to market value without tax (thereby being capable of sale to outsiders without any remaining taxable gain).

In Step 2: The sale to New Holdco is tax-free (because the sale is made by Foreign Parent). This tax-free result is based on the premise that the South African companies do not have significant value attributable to South African real estate.
In Step 3: The new R100 million base cost for the shares in Old Holdco (caused by Step 2) is spread among the Operating Subsidiaries according to their market value by virtue of the tax-free unbundling provisions of section 46.

The net effect of the above transaction is to extend the exemption available to non-residents to all domestic subsidiary shares throughout the group. It should be noted that other parties exempt from capital gains (besides foreign taxpayers) can similarly perform the same form of conversions.

### Proposed legislation

The proposed legislation seeks to eliminate the above unbundling concern by limiting the base cost of shares received in an unbundling if the shares in the unbundling company are preceded by connected person disposals that are not fully taxable. More specifically, the legislation applies if:
(a) a shareholder in an unbundling company acquires an unbundled company's shares within two years after the unbundling company shares were held by a connected person; and
(b) the connected person was not fully subject to normal tax on disposal of the shares.

In these circumstances, the expenditure for tax purposes of the unbundling company shares from the perspective of the current shareholder does not relate to the shareholder's acquisition cost. Instead, the starting point is the acquisition cost incurred by the first connected person for the unbundling shares in the two year period. Adjustments are then made from this starting point for deductions, ordinary revenue and capital gains of any connected person holding the unbundling shares during the two year period.

> *Example*
> *Facts*
> New Holdco owns all the shares of Old Holdco, which in turn owns a number of wholly owned operating subsidiaries. New Holdco acquired the Old Holdco shares for R150 million from a foreign company that is connected to New Holdco. Foreign Company acquired the Old Holdco shares for R25 million. Foreign Company was not subject to tax on the gain arising from the disposal of Old Holdco shares to New Holdco. Six months after the New Holdco acquisition, Old Holdco unbundles one of the operating subsidiaries.
>
> *Result*
> The new anti-avoidance provision applies. New Holdco does not have a R150 million base cost in the Old Holdco shares. Instead, the base cost is R25 million (the cost incurred by Foreign Company).

---

## ENTRY INTO AND EXIT FROM SOUTH AFRICAN TAX JURISDICTION

### Current legislation

Under paragraph 12(2) of the Eighth Schedule, persons who cease to be South African residents or South African controlled foreign companies are generally subject to the capital gains tax in respect of assets leaving the South African tax jurisdiction. More specifically, exiting South African company residents are subject to capital gains tax except for South African real estate and permanent establishments. Exiting controlled foreign companies are

subject to tax except for certain foreign business establishment assets (i.e. assets that do not otherwise give rise to taxable income under section 9D).

Under paragraph 12(4) of the Eighth Schedule, persons who become South African residents or South African controlled foreign companies generally treat assets held upon entry as having a market value base cost (without any South African capital gains tax incurred). One exception is for South African real estate and South African permanent establishment assets, both of which are already in the South African tax net on a source basis (regardless of the initial non-residency of the entering parties).

**Problem Statement**

The current entry and exit rules do not envisage a situation where a controlled foreign company becomes a resident. While it is agreed that the conversion gives rise to a market value step-up in base cost under current law, at issue is whether the conversion should be a taxable event.

A related issue is the impact of the participation exemption of paragraph 64B of the Eighth Schedule. Paragraph 64B exempts the disposal of foreign company shares from capital gains tax if the disposing party has at least a 20 per cent (i.e. a meaningful) interest in the foreign company before the disposal. This exemption includes the deemed disposal of a share, including deemed disposals under paragraph 12(2) but not under paragraph 12(4).

**Proposed legislation**

*1. Relationship between paragraphs 12(2) and 12(4)*

The proposed legislation clarifies the relationship between events described in paragraphs 12(2) and 12(4) of the Eighth Schedule. Paragraph 12(2) applies as a general matter. The net effect is that the entry or cessation of residence or controlled foreign company status triggers a deemed disposal and repurchase at market value (with gain or loss on the deemed disposal effectively ignored if arising before the assets enter direct or indirect South African tax jurisdiction). In this scenario, an exception will exist for assets already under the direct South Africa tax jurisdiction (e.g., South African real estate or permanent establishment assets). This latter group of assets will not be subject to taxable treatment nor receive market value status.

However, paragraph 12(4) overrides this general rule when a controlled foreign company becomes a South African resident. In this scenario, the controlled foreign company will again be deemed to enter into a purchase and resale of all assets as a general matter. However, an exception not only exists for South African real estate or permanent establishment assets, but also for controlled foreign company assets subject to tax upon disposal under section 9D. This latter group of assets will again not be subject to taxable treatment nor will the group be eligible for market value status (i.e. these assets will receive effective rollover treatment).

*2. Interaction with the participation exemption of paragraph 64B*

The proposed legislation also clarifies the impact of the paragraph 64B participation exemption in relation to paragraphs 12(2) and 12(4). The participation exemption has always been intended to provide relief for two scenarios: (a) disposals to wholly foreign parties, and (b) restructuring of controlled foreign companies. The proposed legislation clarifies this intent by limiting the exemption to the following three scenarios:

- Disposals to all persons other than South African residents or controlled foreign companies (i.e. to foreign parties under foreign control);

- Deemed disposals under paragraph 12(2)(*a*) if the deemed disposal is triggered by a disposal to foreign parties under foreign control (i.e. the deemed disposal of controlled foreign company assets caused by the sale of shares of a controlled foreign company to wholly foreign parties); and

- Disposals of controlled foreign company shares to another controlled foreign company as long as both controlled foreign companies remain in the same group of companies (as defined in section 1).

*3. Impact upon STC of assets entering SA tax jurisdiction*

Under current law, pre-entry capital and ordinary profits effectively fall outside the scope of the secondary tax on companies (STC) when distributed on liquidation of the company. If a foreign company becomes a resident (i.e. foreign effective management of the foreign company moves onshore), special step-up provisions exist to eliminate future STC on liquidation of the company. Pre-entry capital profits on entering assets are exempt from STC (by virtue of section 64B(5)(*c*)(ii)) as well as pre-entry ordinary profits (by virtue of section 64B(5)(*c*)(iii)).

While pre-entry capital and ordinary profits should not give rise to tax upon entry into the South African tax jurisdiction, it is submitted that the current STC system is too generous in this regard, especially in relation to STC credits. As a general matter under current law, foreign dividends (including liquidating dividends) entering the South African tax jurisdiction are free from STC. However, foreign dividends (including liquidating foreign dividends) do not give rise to STC credits.

In order to remedy these concerns, the proposed legislation places entering (realised and unrealised) profits on a par with foreign dividends entering the South African tax jurisdiction in respect of the STC. These realised and unrealised profits remain free from STC upon entry into the South African tax jurisdiction, but none of these entering profits will give rise to STC credits for the company to which they are passed when that company is liquidated.

4. *Examples*

*Example 1*
*Facts*
South African Company owns all the shares of Controlled Foreign Company 1, which owns all the shares of Controlled Foreign Company 2. Controlled Foreign Company 1 is a pure holding company. Controlled Foreign Company 2 has active foreign business establishment assets falling outside section 9D and portfolio passive assets falling within section 9D. South African Company sells all the shares of Controlled Foreign Company 1 to Independent Foreign Company that is wholly owned by foreign parties.

*Result*
The actual sale of shares by South African Company of Controlled Foreign Company 1 is exempt from capital gains tax by virtue of paragraph 64B. However, the sale triggers a deemed sale of all Controlled Foreign Company 1 and Controlled Foreign Company 2 assets by virtue of paragraph 12(2) (because both companies will lose their section 9D controlled foreign company status once owned by Independent Foreign Company). The deemed sale of the portfolio passive assets by Controlled Foreign Company 2 will trigger immediate section 9D income whereas the foreign business establishment assets will fall outside this taxable paradigm. The deemed sale of Controlled Foreign Company 2 shares under paragraph 12(2) will be exempt from capital gains tax by virtue of paragraph 64B (because the underlying triggering event is a sale to a wholly foreign party).

*Example 2*
*Facts*
South African Company owns all the shares of Controlled Foreign Company. Controlled Foreign Company has active foreign business establishment assets falling outside section 9D and portfolio passive assets falling within section 9D, including all the shares of a Controlled Foreign Company 2. Controlled Foreign Company shifts its effective management to South Africa, thereby triggering South African residence status (and the loss of section 9D controlled foreign company status).

*Result*
The conversion of Controlled Foreign Company to South African residence status is a paragraph 12(4) event. Paragraph 12(4) triggers a deemed sale of the foreign business establishment assets, none of which is taxable by virtue of the business establishment exemption of section 9D. However, the deemed sale results in a market value base cost step-up of those foreign business establishment assets. The portfolio passive assets and the shares of Controlled Foreign Company 2 are not subject to deemed sale treatment, meaning that those assets retain their historic base cost.

*Example 3*
*Facts*
South African Company owns all the shares of Controlled Foreign Company. Controlled Foreign Company has assets with a value of R10 million and a cost of R6 million as well as R14 million of ordinary profits. Controlled Foreign Company moves its effective management onshore.

*Result.*
The onshore shift of realised and unrealised profits does not give rise to a taxable event. However, if those profits are distributed up the chain to its shareholders, the distribution gives rise to STC. This STC result is similar to the impact of Controlled Foreign Company liquidating with all assets transferred to South Africa Company.

---

## CLAUSE BY CLAUSE EXPLANATION

CLAUSE 1

***Income Tax: Fixing of rates of normal tax and amendment of certain amounts for purposes of the Income Tax Act, 1962***

Table I: Current rates for individuals and special trusts:

| **Taxable Income** | **Rate of Tax** |
|---|---|
| Not exceeding R112 500 | 18 per cent of the taxable income |
| Exceeding R112 500 but not exceeding R180 000 | R20 250 plus 25 per cent of the amount by which the taxable income exceeds R112 500 |
| Exceeding R180 000 but not exceeding R250 000 | R37 125 plus 30 per cent of the amount by which the taxable income exceeds R180 000 |
| Exceeding R250 000 but not exceeding R350 000 | R58 125 plus 35 per cent of the amount by which the taxable income exceeds R250 000 |
| Exceeding R350 000 but not exceeding R450 000 | R93 125 plus 38 per cent of the amount by which the taxable income exceeds R350 000 |
| Exceeds R450 000 | R131 125 plus 40 per cent of the amount by which the taxable income exceeds R450 000 |

Table II: Proposed rates for individuals and special trusts:

| **Taxable Income** | **Rate of Tax** |
|---|---|
| Not exceeding R122 000 | 18 per cent of the taxable income |
| Exceeding R122 000 but not exceeding R195 000 | R21 960 plus 25 per cent of the amount by which the taxable income exceeds R122 000 |
| Exceeding R195 000 but not exceeding R270 000 | R40 210 plus 30 per cent of the amount by which the taxable income exceeds R195 000 |
| Exceeding R270 000 but not exceeding R380 000 | R62 710 plus 35 per cent of the amount by which the taxable income exceeds R270 000 |
| Exceeding R380 000 but not exceeding R490 000 | R101 210 plus 38 per cent of the amount by which the taxable income exceeds R380 000 |
| Exceeds R490 000 | R143 010 plus 40 per cent of the amount by which the taxable income exceeds R490 000 |

Table III: Current rate for trusts (no change proposed):

| **Taxable Income** | **Rate of Tax** |
|---|---|
| All taxable income | 40 per cent of the taxable income |

Table IV: Current rate for companies:

| **Taxable Income** | **Rate of Tax** |
|---|---|
| All taxable income | 29 per cent of the taxable income |

Table V: Proposed rate for companies:

| **Taxable Income** | **Rate of Tax** |
|---|---|
| All taxable income | 28 per cent of the taxable income |

Table VI: Current rate for small business corporations:

| Taxable Income | Rate of Tax |
|---|---|
| Not exceeding R43 000 | 0 per cent of taxable income |
| Exceeding R43 000 but not exceeding R300 000 | 10 per cent of the amount by which the taxable income exceeds R43 000 |
| Exceeding R300 000 | R25 700 plus 29 per cent of the amount by which the taxable income exceeds R300 000 |

Table VII: Proposed rate for small business corporations:

| Taxable Income | Rate of Tax |
|---|---|
| Not exceeding R46 000 | 0 per cent of taxable income |
| Exceeding R46 000 but not exceeding R300 000 | 10 per cent of the amount by which the taxable income exceeds R46 000 |
| Exceeding R300 000 | R25 400 plus 28 per cent of the amount by which the taxable income exceeds R300 000 |

Table VIII: Current rates for gold mining companies:

| Taxable Income | Rate of Tax |
|---|---|
| On gold mining taxable income | See formula in paragraph 4(*c*) of Appendix I |
| On non gold mining taxable income | 29 per cent of the taxable income |
| On non gold mining taxable income if exempt from STC | 37 per cent of the taxable income |
| On recovery of capital expenditure | Greater of average rate or 29 per cent of the taxable income |

Table IX: Proposed rates for gold mining companies:

| Taxable Income | Rate of Tax |
|---|---|
| On gold mining taxable income | See formula in paragraph 4(*c*) of Appendix I |
| On non gold mining taxable income | 28 per cent of the taxable income |
| On non gold mining taxable income if exempt from STC | 35 per cent of the taxable income |
| On recovery of capital expenditure | Greater of average rate or 28 per cent of the taxable income |

Table X: Current rate for employment companies:

| Taxable Income | Rate of Tax |
|---|---|
| All taxable income | 34 per cent of taxable income |

Table XI: Proposed rate for employment companies:

| Taxable Income | Rate of Tax |
|---|---|
| All taxable income | 33 per cent of taxable income |

Table XII: Current rate for long-term insurance companies:

| Taxable Income | Rate of Tax |
|---|---|
| Taxable income of individual policyholder fund | 30 per cent of taxable income |
| Taxable income of company policyholder fund | 29 per cent of taxable income |
| Taxable income of corporate fund | 29 per cent of taxable income |

### Table XIII: Proposed rate for long-term insurance companies

| Taxable Income | Rate of Tax |
|---|---|
| Taxable income of individual policyholder fund | 30 per cent of taxable income |
| Taxable income of company policyholder fund | 28 per cent of taxable income |
| Taxable income of corporate fund | 28 per cent of taxable income |

### Table XIV: Current rate for tax holiday companies (no change proposed)

| Taxable Income | Rate of Tax |
|---|---|
| All taxable income | 0 per cent of taxable income |

### Table XV: Current rate for non resident companies:

| Taxable Income | Rate of Tax |
|---|---|
| All taxable income from South African source | 34 per cent of taxable income |

### Table XVI: Proposed rate for non resident companies:

| Taxable Income | Rate of Tax |
|---|---|
| All taxable income from South African source | 33 per cent of taxable income |

### Table XVII: Current rate for taxable amount of lump sum benefit derived upon retirement or death:

| Taxable Income | Rate of Tax |
|---|---|
| Taxable income not exceeding R300 000 | 18 per cent of the taxable income |
| Taxable income exceeding R300 000 but not exceeding R600 000 | R54 000 plus 27 per cent of the taxable income exceeding R300 000 |
| Taxable income exceeding R600 000 | R135 000 plus 36 per cent of the taxable income exceeding R600 000 |

### Table XVIII: Calculation of tax-free portion of lump sum benefit (no change proposed):

| Description | Reference to the Income Tax Act, 1962 | Amount |
|---|---|---|
| Tax-free portion of lump sum benefit | Paragraph (*b*) of the definition of **'formula B'** in paragraph 1 of the Second Schedule | R300 000 |

### Table XIX: Current rebates:

| Description | Amount |
|---|---|
| Primary rebate | R7 740 |
| Secondary rebate | R4 680 |

### Table XX: Proposed rebates:

| Description | Amount |
|---|---|
| Primary rebate | R8 280 |
| Secondary rebate | R5 040 |

## *Income Tax: Monetary thresholds subject to periodic legislative change:*

Table XXI: General savings thresholds

| **Description**<br>*(The contents of this column are solely for convenience and are of no force or effect)* | **Reference to the Income Tax Act, 1962** | **Monetary amount** |
|---|---|---|
| **Broad-based employee share schemes:**<br>Employees can receive tax-exempt shares if the shares are part of a broad-based employee share plan. Companies can also deduct shares issued under the plan. | | |
| Maximum exemption for shares received by employees | The definition of **'qualifying equity share'** in section 8B(3) | R9 000 |
| Maximum deduction for shares issued by the employer | The proviso to section 11(*l*A) | R3 000 |
| **Exemption for interest and certain dividends:** | | |
| Exemption for domestic interest and otherwise taxable domestic collective scheme dividends in respect of persons younger than 65 years | Section 10(1)(*i*)(xv)(*bb*)*(*B*)* | R19 000 |
| Exemption for passive portfolio savings in respect of persons 65 years or older | Section 10(1)(*i*)(xv)(*bb*)*(*A*)* | R27 500 |
| Maximum application of the above exemption for foreign interest and otherwise taxable dividends | Section 10(1)(*i*)(xv)(*aa*) | R3 200 |
| **Annual donations tax exemption:** | | |
| Exemption for donations made by entities | Section 56(2)(*a*) and the proviso thereto | R10 000 |
| Exemption for donations made by individuals | Section 56(2)(*b*) | R100 000 |
| **Capital gains exclusions:** | | |
| Annual exclusion for individuals and special trusts | Paragraph 5(1) of Eighth Schedule | R16 000 |
| Exclusion for the disposal of a primary residence | Paragraph 45(1) of Eighth Schedule | R1, 5 million |
| Maximum market value of all assets allowed within the small business definition on disposal when person over 55 | Definition of **'small business'** in paragraph 57(1) of Eighth Schedule | R5 million |
| Exclusion amount on disposal of small business when person over 55 | Paragraph 57(3) of Eighth Schedule | R750 000 |
| Exclusion on death | Paragraph 5(2) of Eighth Schedule | R120 000 |

Table XXII: Retirement savings thresholds

| **Description**<br>*(The contents of this column are solely for convenience and are of no force or effect)* | **Reference to the Income Tax Act, 1962** | **Monetary amount** |
|---|---|---|
| **Deductible retirement fund contributions:**<br>Pension fund and retirement annuity fund members may deduct their contributions subject to certain percentage or monetary ceilings (the latter of which are provided below) | | |
| Pension fund monetary ceiling for contributions | The proviso to section 11(*k*)(i) | R1 750 |
| Pension fund monetary ceiling for arrear contributions | Paragraph (*aa*) of the proviso to section 11(*k*)(ii) | R1 800 |
| Retirement annuity fund monetary ceiling for contributions (if also a member of a pension fund) | Section 11(*n*)(*aa*)(B) | R3 500 |
| Retirement annuity fund monetary ceiling for contributions (if not a member of a pension fund) | Section 11(*n*)(*aa*)(C) | R1 750 |
| Retirement annuity fund monetary ceiling for arrear contributions | Section 11(*n*)(*bb*) | R1 800 |
| **Permissible lump sum withdrawals upon retirement:**<br>Pension fund and retirement annuity fund members may withdraw lump sums upon retirement. | | |
| Pension fund monetary amount for permissible lump sum withdrawals | Paragraph (ii)(*dd*) of the proviso to paragraph (*c*) of the definition of **'pension fund'** in section 1 | R50 000 |
| Retirement annuity fund monetary amount for permissible lump sum withdrawals | Paragraph (*b*)(ii) of the proviso to the definition of **'retirement annuity fund'** in section 1 | R50 000 |

## Table XXIII: Deductible business expenses for individuals

| **Description**<br>*(The contents of this column are solely for convenience and are of no force or effect)* | **Reference to the Income Tax Act, 1962** | **Monetary amount** |
|---|---|---|
| **Car allowance:**<br>Individuals receive an annual vehicle allowance to defray business travel expenses, including deemed depreciation on the vehicle. | | |
| Ceiling on vehicle cost | Section 8(1)(*b*)(iiiA)(*bb*)(A) | R400 000 |
| Ceiling on debt relating to vehicle cost | Section 8(1)(*b*)(iiiA)(*bb*)(B) | R400 000 |

## Table XXIV: Employment-related fringe benefits

| **Description**<br>*(The contents of this column are solely for convenience and are of no force or effect)* | **Reference to the Income Tax Act, 1962** | **Monetary amount** |
|---|---|---|
| **Exempt scholarships and bursaries:**<br>Employers can provide exempt scholarships and bursaries to employees and their relatives, subject to annual monetary ceilings. | | |
| Annual ceiling for employees | Paragraph (ii)(*aa*) of the proviso to section 10(1)(*q*) | R100 000 |
| Annual ceiling for employee relatives | Paragraph (ii)(*bb*) of the proviso to section 10(1)(*q*) | R10 000 |
| **Exempt termination benefits:**<br>Employees of age 55 or older receive exemption for payments related to employment termination subject to a monetary ceiling. | Section 10(1)*(x)* | R30 000 |
| **Medical scheme contributions:**<br>Medical scheme contributions are tax deductible if the individual pays (and tax-free if the employer pays) subject to monthly ceilings. | | |
| Monthly ceiling for schemes with one beneficiary | Section 18(2)(*c*)(i)(*aa*) and paragraph 12A(1)(*a*) of Seventh Schedule | R570 |
| Monthly ceiling for schemes with two beneficiaries | Section 18(2)(*c*)(i)(*bb*) and paragraph 12A(1)(*b*) of Seventh Schedule | R1 140 |
| Additional monthly ceiling for each additional beneficiary | Section 18(2)(*c*)(i)(*cc*) and paragraph 12A(1)(*c*) of Seventh Schedule | R345 |
| **Awards for bravery and long service:**<br>The deemed values of bravery and | Paragraphs *(a)* and (*b*) of the further proviso to paragraph 5(2) of Seventh Schedule | R5 000 |

| | | |
|---|---|---|
| long service awards are reduced by the monetary amount indicated. | | |
| **Employee accommodation:** Employee accommodation is taxed by means of a formula if the employer owns the accommodation, but no tax is payable if the employee earns less than the amount indicated. | Paragraph 9(3)(*a*)(ii) of Seventh Schedule | R46 000 |
| **Accommodation for expatriate employees:** The value of accommodation provided to expatriate employees is taxable to the extent that it exceeds the amount indicated. | Paragraph 9(7B)(ii) of Seventh Schedule | R25 000 |
| **Exemption for *de minimis* employee loans:** Employee loans below the amount indicated are not deemed to have any value as a fringe benefit. | Paragraph 11(4)(*a*) of Seventh Schedule | R3 000 |
| **Employer deductions for employee housing:** Expenses incurred for providing employee housing is limited to the ceiling indicated (per dwelling). | Paragraph (ii) of the proviso to section 11(*t*) | R15 000 |
| **Additional employer deductions for learnerships:** Employers receive additional deductions for learnerships depending on the circumstances. | | |
| Monetary ceiling of additional deduction for the employer when entering into a learnership agreement with an existing employee | Section 12H(2)(*a*)(i)(*bb*) | R20 000 |
| Monetary ceiling of additional deduction for the employer when entering into a learnership agreement with a new employee | Section 12H(2)(*a*)(ii)(*bb*) | R30 000 |
| Monetary ceiling of additional deduction for the employer in the case of completing a learnership agreement (all employees) | Section 12H(2)(*b*)(ii) | R30 000 |
| Monetary ceiling of additional deduction for the employer when entering into a learnership agreement with an existing disabled employee | Section 12H(2A)(*a*)(i)(*bb*) | R40 000 |

| | | |
|---|---|---|
| Monetary ceiling of additional deduction for the employer when entering into a learnership agreement with a new disabled employee | Section 12H(2A)(*a*)(ii)(*bb*) | R50 000 |
| Monetary ceiling of additional deduction for the employer in the case of completing learnership agreements with disabled employees | Section 12H(2A)(*b*)(ii) | R50 000 |

## Table XXV: Depreciation

| **Description**<br>*(The contents of this column are solely for convenience and are of no force or effect)* | **Reference to the Income Tax Act, 1962** | **Monetary amount** |
|---|---|---|
| **Small-scale intellectual property:**<br>Intellectual property with a cost below the amount indicated is immediately deductible. | Paragraph (*aa*) of the proviso to section 11(*g*C) | R5 000 |
| **Urban Development Zone incentive:**<br>Developers undertaking projects in excess of the amount indicated must provide special notice to the Commissioner. | Section 13*quat*(10A) | R5 million |

## Table XXVI: Miscellaneous

| **Description**<br>*(The contents of this column are solely for convenience and are of no force or effect)* | **Reference to the Income Tax Act, 1962** | **Monetary amount** |
|---|---|---|
| **Public benefit organisations:** | | |
| PBO trading income is exempt up to the greater of 5 per cent of total receipts and accruals or the amount indicated. | Section 10(1)(*c*N)(ii)(*dd*)(ii) | R100 000 |
| Donations to transfrontier parks are deductible if the donation is equal to or exceeds the amount indicated. | Section 18A(1C)(*a*)(ii) | R1 million |
| PBOs providing housing are exempt if beneficiaries are households with a monthly income of the stated amount or less. | Paragraph 3*(a)* of Part I of Ninth Schedule and paragraph 5*(a)* of Part II of Ninth Schedule | R7 500 |
| **Recreational clubs:**<br>Club trading income is exempt up to the greater of 5 per cent of total receipts and accruals or the amount indicated. | Section 10(1)(*c*O)(iv)(*bb*) | R50 000 |

| | | |
|---|---|---|
| **Farmer deductions for employee housing:**<br>Ceiling for expenses incurred by farmers to provide employee housing (per employee) | Paragraph 12(5) of First Schedule | R15 000 |
| **Prepaid expenses:**<br>Limit of prepaid expenses that will not be deferred until delivery of goods, services or benefits | Paragraph (*bb*) of the proviso to section 23H(1) | R80 000 |
| **Small business corporations:**<br>Corporations qualify for tax incentives if gross income does not exceed the amount indicated. | Section 12E(4)(*a*)(i) | R14 million |
| **Housing associations:**<br>Housing association investment income is exempt up to the amount indicated. | Section 10(1)(*e*) | R50 000 |

## Table XXVII: Administration

| **Description**<br>*(The contents of this column are solely for convenience and are of no force or effect)* | **Reference to the Income Tax Act, 1962** | **Monetary amount** |
|---|---|---|
| **Investment income exempt from provisional tax:**<br>If a natural person solely generates income from interest, dividends and real estate rentals, the income amount indicated is exempt from provisional tax. | | |
| In the case of natural persons younger than 65 years | Paragraph 18(1)(*c*)(ii) of Fourth Schedule | R20 000 |
| In the case of natural persons 65 years and older | Paragraph 18(1)(*d*)(i) of Fourth Schedule | R80 000 |
| **S.I.T.E. threshold:**<br>Tax on employment income is subject to the S.I.T.E (Standard Income Tax on Employees) system up to the amount indicated. | Items *(a)* and *(b)* of paragraph 11B(2) and items (*a*), (*b*)(ii) and (*b*)(iii) of paragraph 11B(3) of Fourth Schedule | R60 000 |
| **Automatic appeal to the High Court:**<br>The full bench of the High Court has automatic jurisdiction to appeals if the disputed amount exceeds the amount indicated. | Section 83(4B)(*a*) | R50 million |

## CLAUSE 2

***Income Tax: Amendment of section 1 of the Income Tax Act, 1962***

*Subclause (1)(a):* The proposed amendment deletes the definition of 'building society' as obsolete.

*Subclause (1)(b)*: The proposed amendment updates the definition of 'child' in line with changes in respect of the laws relating to children.

*Subclause (1)(c)*: The proposed amendment deletes the definition of 'date of deep level production' as obsolete.

*Subclause (1)(d)*: The proposed amendment effects a technical correction.

*Subclause (1)(e)*: Paragraph *(c)* of the definition of 'dividend' was deleted by section 5(1)(*f*) of the Revenue Laws Amendment Act, 35 of 2007. Some commentators have since suggested that the effect may have been to place a buy-back of shares outside the definition of 'dividend', even if that buy-back involved a reduction in the acquiring company's profits. Their argument is that since the buy-back of shares involves a *quid pro quo* being the shares acquired, the company has not made a 'distribution'.

Paragraph *(c)* was deleted with a view to simplifying the definition and there was never any intention to effect a change in policy. This can be seen from the fact that paragraph (iii) of the first proviso still refers to an acquisition of shares in terms of section 85 of the Companies Act, and so too does section 70(3A). To put the matter beyond doubt, paragraph *(c)* is proposed to be reinstated with the wording appropriately adjusted to eliminate the previous reference to the nominal value of shares. In addition, the paragraph is proposed to be simplified in line with the policy to simplify the definition as a whole. The reference to section 85 of the Companies Act has not been reinstated as the definition also applies to buy-backs of shares by foreign companies.

*Subclause (1)(f):* It is proposed that paragraph *(c*A*)* of the definition of 'dividend' be deleted, since the circumstance it sought to address is now dealt with under the reinstated paragraph (*c*) (see subclause *(e)*). When a company acquires its own shares as a result of a distribution of those shares from another company, the reduction in profits that occurs upon *cancellation* (not acquisition) of those shares by the recipient company will be a dividend under paragraph *(c)*.

*Subclause (1)(g):* This subclause proposes the insertion of a new paragraph *(cB)*. The application of paragraph *(cB)* may best be illustrated by way of the following examples:

*Example 1*
*Facts*

- HoldCo owns shares in SubCo

- SubCo acquires shares in HoldCo
- HoldCo cancels the shares acquired by SubCo for no consideration or for a consideration that is less than the cost of the HoldCo shares

*Result*
SubCo's profits are reduced as a result of the write-off of the shares in HoldCo, and it is this reduction that is deemed to be a dividend distributed by SubCo. HoldCo's profits would be unaffected by the cancellation, and it would simply transfer the nominal value of its cancelled share capital to a special reserve fund.

*Example 2*
*Facts*
Holdco owns all the shares in Subco. Subco buys 100 000 shares in Holdco on the open market at a cost of R1 million. The shares have a nominal value of R1 each. Subsequently Holdco, with the consent of Subco, cancels these shares for no consideration.

*Result*
Upon the cancellation of the Holdco shares, Subco writes off its investment in Holdco. This results in a reduction in Subco's profits of R1 million which is treated as a dividend distributed by Subco under the proposed paragraph *(cB)* of the definition of a 'dividend' .

Upon cancelling the shares, Holdco transferred an amount of R100 000 from its share capital account to a special reserve fund.

*Subclause (1)(h):* As with the proposed amendment to paragraph (*c*) of the definition of dividend, this amendment is proposed to simplify the definition where possible and to ensure consistent use of language. Hence the simplified language of paragraph (*c*) of the definition is used, with adaptations, for purposes of this amendment.

*Subclause (1)(i):* See subclause (1)(*h*) above. Also, as explained in the Explanatory Memorandum to the Revenue Laws Amendment Act, 2007, this paragraph was introduced as distributions of share capital were being utilised to effectively sell companies tax-free.

The problem is that the wording prescribed matters that are properly regulated by company law in that it prescribed the amount of share capital or share premium that could be allocated to a class of shares. The proposed amendment accepts that companies can freely allocate share capital or share premium, but upon cancellation of shares, any share capital or share premium exceeding capital contributed in respect of the shares is deemed to be a distribution of profit subject to STC.

*Example*
*Facts*
Company has two classes of ordinary shares – Ordinary Class A shares and Ordinary Class B shares. Shareholders of the Ordinary

Class A shares previously contributed share capital and share premium of R30 000. Before the creation of the Ordinary Class B shares, Company has a value of R1 million. The Ordinary Class B shares are then issued for R1 million (bringing the total value of the company to R2 million). Shortly thereafter, R1 million is distributed to the Class A shareholders.

*Result*
The reduction in share capital (and premium) that exceeds R30 000 (the initial contribution for the Ordinary Class A shares) is treated as a dividend.

*Subclause (1)(j):* The proposed amendment deletes the definition of 'entertainment expenditure' as obsolete.

*Subclause (1)(k) to (m):* See notes on **RETIREMENT FUND REFORMS**.

*Suclause (1)(n):* In terms of the Pension Funds Act, the amount of surplus funds in a retirement fund has to be apportioned between the 'employer surplus account' and the 'employee surplus account'. In terms of International Accounting Standards, the amount allocated to the employer surplus account has to be accounted for as an asset on the employer's balance sheet even though the employer cannot access that amount other than in certain circumstances set out in the Pension Funds Act. The employer also has to obtain approval from the fund's board in order to access funds in the employer surplus account.

The proposed amendment puts it beyond doubt that the amount in the employer surplus account will only constitute 'gross income' for the employer when the employer can access that money in terms of the Pension Funds Act.

*Subclause (1)(o):* See notes on **RETIREMENT FUND REFORMS**.

*Subclause (1)(p):* The proposed amendment deletes the definition of 'married woman' as obsolete.

*Subclause (1)(q)*: The proposed amendment deletes the definition of 'mutual building society' as obsolete.

*Subclause (1)(r):* See notes on **RETIREMENT FUND REFORMS**.

*Subclause (1)(s)*: The proposed amendment deletes the definition of 'other deep level gold mine' as obsolete.

*Subclause (1)(t) to (zF):* See notes on **RETIREMENT FUND REFORMS**.

*Subclause (1)(zG):* The proposed amendment clarifies that the definition of 'tax' includes an administrative penalty under the Income Tax Act, 1962.

*Subclause (1)(zH)*: See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 3

***Income Tax: Amendment of section 5 of the Income Tax Act, 1962***

See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 4

***Income Tax: Amendment of section 7 of the Income Tax Act, 1962***

*Subclause (1)(a):* The proposed amendment effects general technical corrections as well as technical changes that are a result of the new definitions of different types of retirement funds (see notes on **RETIREMENT FUND REFORMS**).

*Subclause 1(b) and (c):* Section 7(3) and (4) of the Income Tax Act deal with parent to minor child dispositions. These provisions deem any income derived by a minor child back to the parent if the income results from a donation, settlement or other disposition by the parent, whether directly or indirectly. It is proposed that the ambit of section 7(3) and (4) be widened to include a stepchild of a parent.

CLAUSE 5

***Income Tax: Amendment of section 8 of the Income Tax Act, 1962***

The proposed amendments correct cross references and remove obsolete cross references.

CLAUSE 6

***Income Tax: Amendment of section 9A of the Income Tax Act, 1962***

The proposed amendments provide for consistent use of language in respect of subsections (2) and (4).

CLAUSE 7

***Income Tax: Amendment of section 9C of the Income Tax Act, 1962***

*Subclause (1)(a)*: Currently, a share will be a qualifying share unless it is—

1. a share in a share block company;

2. a share in a company which, at any time during the 3 year period preceding the disposal, was not a resident, other than a nonresident listed on the JSE;
3. a hybrid equity instrument as defined in section 8E.

The problem is that 1 and 3 imply that the share will be disqualified only if it is a share block share or an 8E share at the time of disposal. The proposed amendment provides that the share is disqualified if it is a share block share or 8E share at any time during the three year period preceding the disposal.

*Subclause (1)(b)*: The previous amendment gives rise to a problem if a person disposes of a share which qualifies under the three year period, but that person retains the right to a dividend declared after the disposal of the share. In terms of the rule, the dividend will be an amount accrued in respect of a qualifying share and will be treated as capital. The effect of the proposed amendment is therefore that proceeds from a qualifying share do not include dividends from such share.

*Subclause (1)(c)*: Currently, a share will not be a qualifying share if the share was issued by a company that holds mainly immovable property. This immovable property exception does not apply if the property is held indirectly by a person that is not connected to the taxpayer. The proposed amendment extends the exception to property held directly by such an un-connected person.

A further current exception is if the property was held for a period of more than three years before the disposal of the share. The proposed amendment provides that the share must have been held for a continuous period of more than three years immediately prior to the disposal.

In addition, the proposed amendment clarifies that a share will not be a qualifying share if the company that issued the share entered into a bare dominium transaction in respect of property acquired by the company within the period of three years.

CLAUSE 8

***Income Tax: Amendment of section 9D of the Income Tax Act, 1962***

*Subclause (1)(a):* Under current law, certain gains and losses between controlled foreign companies forming part of the same group are disregarded (subject to an election).

For example, if CFC A loans funds to CFC B and interest is payable by B to A in respect of the loan, the interest inclusion for A and the interest deduction for B will be disregarded if A and B are part of the same group of companies. This principle is proposed to be extended to debt forgiveness between CFCs forming part of the same group. Debt forgiveness between CFCs forming part of a ‘group of companies’ as defined in section 1 will not give rise to a recoupment or a taxable capital gain.

*Subclause (1)(b) and (c):* The proposed amendments effect technical corrections.

CLAUSE 9

***Income Tax: Amendment of section 10 of the Income Tax Act, 1962***

*Subclause (1)(a):* The proposed amendment deletes the obsolete exemption for non-profit agricultural distribution companies in section 10(1)*(c*M*)*.

*Subclause (1)(b):* See notes on **RETIREMENT FUND REFORMS**.

*Subclause (1)(c):* In terms of current law, the levies paid to certain bodies (such as a body corporate of a sectional title development) for the management of the collective interests of their members are exempt. The proposed amendment provides that income derived by such bodies from other sources (such as, for example, investment income) will likewise be exempt up to a limit of R50 000.

*Subclause (1)(d):* Currently foreign dividends are exempt if the company declaring the dividend is a foreign company with a listing in South Africa and an off-shore listing, and if more than 10 per cent of the shares are held by South African residents. As a matter of competitiveness between large and smaller dual listed companies, the proposed amendment extends the exemption by deleting the requirement of a 10 per cent holding by such residents.

*Subclause (1)(e) and (f):* Foreign dividends are exempt if, inter alia, the South African recipient holds at least 20 per cent of the equity shares and voting rights in the foreign company declaring the dividend. Currently dividends from foreign co-operatives are technically not exempt as these co-operatives do not have equity shares. Foreign dividends from co-operatives are proposed to be exempt if the recipient holds 20 per cent of the member's interest and voting rights therein.

*Subclause (1)(g):* The proposed amendment deletes an obsolete provision which exempted certain fringe benefits arising as a result of loans given to employees to enable the employees to participate in share incentive schemes (this exemption expired in 1995).

*Subclause (1)(h):* The proposed amendment deletes a proviso relating to married women as obsolete.

CLAUSE 10

***Income Tax: Amendment of section 11 of the Income Tax Act, 1962***

*Subclause (1)(a):* Sections 12DA (deductions in respect of rolling stock) and 37B (deductions in respect of environmental expenditure) were inserted by the

Revenue Laws Amendment Act, 2007 (Act No. 35 of 2007). Since these provisions now take precedence over section 11*(e)*, it is proposed that they be excluded from the ambit of that provision.

*Subclause (1)(b) and (c):* See notes on **RETIREMENT FUND REFORMS**.

*Subclause (1)(d):* The proposed amendment deletes an obsolete cross reference.

*Subclause (1)(e):* See notes on **RETIREMENT FUND REFORMS**.

*Subclause (1)(f):* The proposed amendment deletes a proviso relating to married women as obsolete.

CLAUSE 11

***Income Tax: Amendment of section 11D of the Income Tax Act, 1962***

*Subclause (1)(a), (b) and (c):* The proposed amendments delete paragraph *(d)* of subsection (2), as the requirements of this paragraph are incorporated into subsection (2) by cross reference to subsection (1), and are thus obsolete.

*Subclause (1)(d):* Generally, if a research and development ('R&D') company receives funding from another person, its deduction for qualifying R&D expenditure is limited to 100 per cent and the funder can deduct 150 per cent of the funding. The proposed amendment provides that the R&D company should remain entitled to the 150 per cent deduction to the extent the funder does not qualify to deduct the funding in terms of any provision of the Income Tax Act (e.g. an exempt or foreign funder).

CLAUSE 12

***Income Tax: Amendment of section 12D of the Income Tax Act, 1962***

*Subclause (a):* The proposed amendments provide for the depreciation of water pipelines over a period of 20 years, if the pipelines are used to transport water used by power stations in the process of generating electricity.

*Subclause (b):* The proposed amendment effects a technical correction.

*Subclause (c):* The proposed amendment is consequential upon the amendment proposed by subclause (*a*).

CLAUSE 13

***Income Tax: Amendment of section 12E of the Income Tax Act, 1962***

A small business corporation must deduct the cost of certain assets over a period of 3 years. Some of the assets which qualify for this write-off period are

assets in respect of which a 100 per cent upfront deduction would otherwise be allowed in terms of section 11(*e*). The proposed amendment allows the small business corporation to choose between this accelerated depreciation or for the deduction allowable in terms of section 12E.

CLAUSE 14

***Income Tax: Amendment of section 14 of the Income Tax Act, 1962***

The proposed amendment deletes obsolete provisions.

CLAUSE 15

***Income Tax: Amendment of section 20 of the Income Tax Act, 1962***

The proposed amendment effects a formatting correction.

CLAUSE 16

***Income Tax: Amendment of section 22 of the Income Tax Act, 1962***

The proposed amendment adds a cross reference.

CLAUSE 17

***Income Tax: Amendment of section 23A of the Income Tax Act, 1962***

Section 23A ring-fences rental losses claimed by lessors of movable assets including plant and machinery. The section applies when the loss is caused by specified capital allowances and the ‘affected asset’ is let otherwise than under an operating lease.

*Subclause (1)(a):* At present the definition of ‘rental income’ refers to rent derived from the letting of ‘movable property or any machinery or plant’. The definition has proved to be open to different interpretations because it does not state explicitly that the rental income is restricted to income from the letting of affected assets. To provide clarity it is proposed that the term ‘movable asset or any machinery or plant’ be replaced with a reference to ‘any affected asset’.

In addition, the proposed amendments delete an obsolete reference and update certain references.

*Subclause (1)(b):* The proposed amendments update references.

CLAUSE 18

***Income Tax: Amendment of section 23D of the Income Tax Act, 1962***

Section 23D of the Income Tax Act is proposed to be amended to limit the allowances a taxpayer may claim in respect of a depreciable asset if the taxpayer leases the asset to a lessee who held the asset within a period of two years prior to commencement of the lease. This rule is extended to circumstances where the asset was held during the two year period by a connected person to the lessee. The allowances that may be claimed in respect of the asset are limited based on the principles of section 23J.

> *Example*
> *Facts*
> On 1 January 2008 Trust A disposes of an asset to company B. B in turn leases the asset to beneficiary C of Trust A. The lease commences on 1 January 2009.
>
> *Result*
> Trust A and C are connected persons and the asset was held by Trust A within a period of two years before the commencement of the lease. The limitation provision will thus be triggered.

CLAUSE 19

***Income Tax: Amendment of section 23H of the Income Tax Act, 1962***

*Subclause (a):* The proposed amendment provides that the deduction of pre-trade expenditure in terms of section 11A be subject to section 23H. As a result, the expenditure can be deducted only upon delivery of the goods or services in respect of which the expenditure was incurred. In other words, the deduction of start up expenditure is deferred until delivery of the goods or services.

*Subclause (b):* The proposed amendment deletes references to sections 24I and 24J since these sections have their own timing rules.

CLAUSE 20

***Income Tax: Amendment of section 24I of the Income Tax Act, 1962***

The proposed amendments delete obsolete provisions.

CLAUSE 21

***Income Tax: Amendment of section 29A of the Income Tax Act, 1962***

See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 22

***Income Tax: Amendment of section 30 of the Income Tax Act, 1962***

*Subclause (a):* Currently, in order for a PBO to qualify as such, it must conduct at least 85 per cent of its public benefit activities for the benefit of persons in the Republic. Given the fact that many PBOs conduct a substantial amount of activities outside South Africa and the fact that foreign PBOs fall outside the South African tax net per se, it is proposed that this restriction be removed.

*Subclause (b):* The proposed amendment removes the word 'similar' in subsection (3)*(b)*(iii)*(aa)*, thereby allowing a liquidating disposal to any PBO.

CLAUSE 23

***Income Tax: Amendment of section 36 of the Income Tax Act, 1962***

The proposed amendments delete obsolete references to other deep level gold mines.

CLAUSE 24

***Income Tax: Amendment of section 38 of the Income Tax Act, 1962***

See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 25

***Income Tax: Amendment of section 41 of the Income Tax Act, 1962***

*Subclause (1)(a):* The proposed amendment effects a technical correction.

*Subclause (1)(b):* The proposed amendment updates a reference.

*Subclause (1)(c) and (d):* The proposed amendments effect technical corrections consequent upon the amendment to the 'group of companies' definition proposed by subclause (*e*).

*Subclause (1)(e):* See discussion relating to the 'group of companies' definition under notes on **INTRA-GROUP ROLLOVER RELIEF: CLOSURE OF DISGUISED SALES**.

*Subclause (1)(f):* The definition of 'qualifying interest' in section 41 is applicable only in the context of sections 42 and 44, with modifications required in respect of each of those sections. Thus the definition is proposed to be moved to those sections and modified as required. The proposed amendment facilitates this by deleting the definition in section 41.

*Subclause (1)(g):* See discussion relating to special reporting under notes on **INTRA-GROUP ROLLOVER RELIEF: CLOSURE OF DISGUISED SALES**.

CLAUSE 26

***Income Tax: Amendment of section 42 of the Income Tax Act, 1962***

*Subclause (1)(a):* The proposed amendment effects a technical correction.

*Subclause (1)(b):* Section 42 currently allows for a tax-free rollover in the case of an asset transferred in terms of an asset-for-share transaction if, inter alia, the transferor will be engaged on a full-time basis in the business of the transferee company of rendering a service. The proposed amendment provides that the transferor may be engaged in the business of a controlled group company, in relation to the transferor, of rendering a service.

> *Example*
> *Facts*
> A renders services on a full time basis to Company S and holds all the shares of this company. A disposes of these shares to company H in return for shares in company H and continues to render the services to S on a full time basis.
>
> *Result*
> Because A continues rendering the services to S, which is a controlled group company in relation to H, the transaction qualifies for rollover relief as an asset -for-share transaction.

*Subclause (1)(c):* The proposed amendment effects technical corrections.

*Subclause (1)(d):* The proposed amendment provides that a qualifying interest includes a participatory interest in a portfolio of a South African collective investment scheme in securities or in a company that will become such a collective investment scheme within 12 months of the transaction

*Subclause (1)(e):* The proposed amendment effects a technical correction.

*Subclause (1)(f):* The proposed amendments effect changes consequent upon the amendments proposed by subclauses 1(*b*) and (*d*) above.

CLAUSE 27

***Income Tax: Amendment of section 44 of the Income Tax Act, 1962***

*Subclause (1)(a):* The current definition of 'qualifying interest' in section 44 refers to the definition in section 41, which is proposed to be deleted. The proposed amendment thus deletes the reference and incorporates the relevant provisions of the proposed to be deleted definition directly into the definition in section 44. In addition, the proposed amendment provides that a qualifying interest includes a participatory interest in a portfolio of a South

African collective investment scheme or in a company that will become such a collective investment scheme within 12 months of the transaction.

*Subclause (1)(b):* The proposed amendment provides that a tax-free transfer of assets will be allowed in terms of an amalgamation transaction if the transferor (i.e. the amalgamated) company is transferring the assets to a resultant company that is a collective investment scheme. This will only be allowed for transfers from a South African collective investment scheme in securities to another South African collective investment scheme in securities if the other requirements for an amalgamation transaction are fulfilled.

CLAUSE 28

***Income Tax: Amendment of section 45 of the Income Tax Act, 1962***

See notes on **INTRA-GROUP ROLLOVER RELIEF: CLOSURE OF DISGUISED SALES**.

CLAUSE 29

***Income Tax: Amendment of section 46 of the Income Tax Act, 1962***

See notes on **RESTRUCTURING OF SOUTH AFRICAN CONTROLLED FOREIGN COMPANIES**.

CLAUSE 30

***Income Tax: Insertion of section 46A of the Income Tax Act, 1962***

See notes on **LIMITATION OF EXPENDITURE INCURRED IN RESPECT OF UNBUNDLING COMPANY SHARES**.

CLAUSE 31

***Income Tax: Amendment of section 47 of the Income Tax Act, 1962***

*Subclause (1)(a):* The proposed amendment provides that if a liquidating company makes a capital distribution to the holding company, the part disposal rules of paragraphs 76 and 76A of the Eighth Schedule must be disregarded.

*Subclause (1)(b):* Because of the numerous complications that often arise in liquidations, the period within which a liquidating company must take steps to liquidate, wind up or deregister after a liquidation distribution is proposed to be extended from 6 months to 18 months.

CLAUSE 32

***Income Tax: Amendment of section 64B of the Income Tax Act, 1962***

*Subclause (1)(a), (b) and (c):* See notes on **RESTRUCTURING OF SOUTH AFRICAN CONTROLLED FOREIGN COMPANIES**.

*Subclause (1)(d):* The exemption for intra-group dividends is proposed not to apply if declared by a controlling group company to a controlled group company.

*Subclause (1)(e), (f) and (g):* The proposed amendment deletes obsolete provisions.

CLAUSE 33

***Income Tax: Amendment of section 64C of the Income Tax Act, 1962***

In terms of section 64C, certain amounts distributed to a shareholder, or a connected person to the shareholder, are deemed to be a dividend and thus subject to STC. Currently, an exemption applies if the shareholder forms part of the same group of companies as the company deemed to declare the dividend and if the shareholder has taken the dividend into account when determining its profits.

The proposed amendment provides that the exemption will apply—

- in the case of a distribution to the shareholder, if the shareholder and the company are part of the same group of companies; or
- in the case of a distribution to the connected person, if the company, the shareholder and the connected person form part of the same group of companies.

In addition, the proposed amendment provides that for the exemption to apply to either type of distribution, the dividend must be taken into account as profit by the shareholder or connected person.

*Example*
*Facts*
Company H holds all the shares of Company S1, and 70 per cent of the shares in Company S2. Company S2 is indebted to Company S1 for R100. Company S1 cancels the debt.

*Result*
In terms of section 64C, cancellation of the debt due by Company S2 to Company S1 is a deemed dividend of R100 by Company S1 to Company H. However, this deemed dividend will (to the extent the other requirements of the exemption are fulfilled) be exempt from STC as Company S1, Company S2 and Company H form part of the same group of companies.

CLAUSE 34

***Income Tax: Amendment of section 102A of the Income Tax Act 58 of 1962***

The proposed amendment deletes an obsolete reference.

CLAUSE 35

***Income Tax: Amendment of Second Schedule to the Income Tax Act, 58 of 1962***

See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 36

***Income Tax: Amendment of paragraph 1 of the Second Schedule to the Income Tax Act, 58 of 1962***

See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 37

***Income Tax: Amendment of paragraph 2 of the Second Schedule to the Income Tax Act, 58 of 1962***

See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 38

***Income Tax: Amendment of paragraph 2B of the Second Schedule to the Income Tax Act, 1962***

See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 39

***Income Tax: Amendment of paragraph 2C of the Second Schedule to the Income Tax Act, 1962***

See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 40

***Income Tax: Amendment of paragraph 3 of the Second Schedule to the Income Tax Act, 1962***

See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 41

***Income Tax: Amendment of paragraph 4 of the Second Schedule to the Income Tax Act, 1962***

See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 42

***Income Tax: Amendment of paragraph 6 of the Second Schedule to the Income Tax Act, 1962***

See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 43

***Income Tax: Amendment of paragraph 1 of the Fourth Schedule to the Income Tax Act, 1962***

*Subclause 1(a):* See notes on **RETIREMENT FUND REFORMS**.

*Subclause 1(b):* See notes on clause 9(1)(*c*) above regarding the proposed amendment to section 10(1)(*e*). It is proposed that such bodies and associations be excluded from the definition of 'provisional taxpayer'.

CLAUSE 44

***Income Tax: Amendment of paragraph 11B of the Fourth Schedule to the Income Tax Act, 1962***

*Subclause (1)(a):* See notes on **RETIREMENT FUND REFORMS**.

*Subclause (1)(b) and (c):* Currently, if a SITE taxpayer earns remuneration for a part year, the monthly withholding tax (SITE) is calculated as if he or she worked a full year (i.e. based on a 12-month working period ). SITE is, in most instances, a final withholding tax and the taxpayer would therefore not be able to claim a refund for the excess tax withheld. The proposed amendments provide that taxpayers will now be entitled to have their final tax liability calculated based on the period they worked and they will be able to claim the excess tax withheld as a refund when they file their tax return.

> *Example*
> Mr P worked for 4 months and earned a salary of R5 000 per month. SITE of R210 was deducted (calculated on an annual salary of R60 000). Mr P's salary for the year amounts to R20 000 and he should therefore not pay any tax. Mr P will now be able to claim the R840 of SITE that was withheld from his salary as a refund when he files a tax return.

CLAUSE 45

***Income Tax: Amendment of paragraph 16 of the Fourth Schedule to the Income Tax Act, 1962***

See notes on **RETIREMENT FUND REFORMS**.
.

CLAUSE 46

***Income Tax: Amendment of paragraph 19 of the Fourth Schedule to the Income Tax Act, 1962***

*Subclause (1)(a) and (b):* The proposed amendments effect technical changes.

*Subclause (1)(c):* Provisional tax is calculated based on a taxpayer's actual income for the tax year, or his or her income in a prior year. Many taxpayers do their provisional tax calculation based on the previous year's taxable income because it provides a lower estimate or because they are not certain what their actual taxable income for the year is on the date the provisional tax payment is due. The previous year's taxable income should only include regular income streams and extraordinary payments (e.g. capital gains) or once-off payments should be excluded. Lump sum payments from retirement funds are extraordinary and once-off payments and are therefore excluded.

CLAUSE 47

***Income Tax: Amendment of paragraph 1 of the Seventh Schedule to the Income Tax Act, 1962***

See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 48

***Income Tax: Amendment of paragraph 9 of the Seventh Schedule to the Income Tax Act, 1962***

*Subclause (1)(a):* The proposed amendments correct a cross reference and effect technical changes.

*Subclause (1)(b):* See notes on **EXPATRIATE ACCOMMODATION**.

CLAUSE 49

***Income Tax: Amendment of paragraph 1 of the Eighth Schedule to the Income Tax Act, 1962***

The proposed amendments effect technical changes by deleting duplicated definitions.

CLAUSE 50

***Income Tax: Amendment of paragraph 12 of the Eighth Schedule to the Income Tax Act, 1962***

*Subclause (1)(a) to (d):* See notes on **ENTRY INTO AND EXIT FROM SOUTH AFRICAN TAX JURISDICTION**

*Subclause (1)(e) and (f):* Currently, where a creditor discharges a debt due by a debtor, the debtor will be treated as having proceeds equal to the amount of the discharge. This does not apply if the debtor and creditor are part of a group or the debtor is liquidating, unless the transaction is part of a scheme to avoid tax imposed by this subparagraph. The proposed amendment extends the anti-avoidance measure to apply to transactions that are part of a scheme to avoid tax imposed by the Income Tax Act.

*Subclause (1)(g):* Currently, the abovementioned exception for a liquidating company applies if the liquidation is proceeded with within 6 months of the discharge. This period is extended to 18 months or such further period as SARS may allow.

CLAUSE 51

***Income Tax: Amendment of paragraph 13 of the Eighth Schedule to the Income Tax Act, 1962***

See notes on **ENTRY INTO AND EXIT FROM SOUTH AFRICAN TAX JURISDICTION**.

CLAUSE 52

***Income Tax: Amendment of paragraph 20 of the Eighth Schedule to the Income Tax Act, 1962***

The proposed amendment to paragraph 20(1)*(h)*(iii)*(aa)* is of a technical nature. Paragraph 20(1)*(h)*(iii)*(bb)* establishes the base cost of the shares held by one controlled foreign company (CFC) in another CFC. This is necessary in order to determine the capital gain or loss attributable to a resident under section 9D when a CFC disposes of its shares in another CFC. The problem with the present wording is best illustrated with a simple example.

*Example*
*Facts*
Resident Company holds 80 per cent of the shares in CFC1 and CFC1 holds 80 per cent of the shares in CFC2. All three companies have February year ends. CFC1 acquired the shares in CFC2 on 1 March 2006 at a cost of R1 000. During the year ending 28 February 2007 CFC2 earned net income of R100. Of this amount R64 (80% x 80% x R100) was attributed to Resident Company under section 9D. On 28 February 2007 CFC2 declared a dividend of R50 to its shareholders out of the net income of R100. CFC1's share of the dividend was 80% x R50 = R40. On 1 March 2008 CFC1 sold all its shares in CFC2 for R1 100.

*Result*
As paragraph 20(1)*(h)*(iii)*(bb)* reads at present, it could be argued that CFC1 must determine the base cost of its shares in CFC2 as follows:

| | R |
|---|---|
| Cost of shares | 1 000 |
| Amount included in net income of resident company | 64 |
| *Less:* Exempt dividend | (40) |
| Base cost of shares in CFC2 | 1024 |

R

The capital gain attributable to Resident Company would then be R1100 – R1024 = R76 x 80% = R60,80.

However, it is clear that it is not the amount of R64 that must be added to the base cost of the CFC2 shares held by CFC1, but rather R100 x 80% = R80. This is because the capital gain in CFC1 will be multiplied by 80% when determining the amount to be attributed to Resident Company. Since the amount added to base cost is deducted from proceeds there is currently effectively a double reduction of base cost.

Under the proposed amendment the base cost of CFC1 in respect of its CFC2 shares should be determined as follows:

| | R |
|---|---|
| Cost of shares | 1 000 |
| Amount included in net income of CFC1 | 80 |
| *Less:* Exempt dividend | (40) |
| Base cost of shares in CFC2 | 1040 |

The capital gain will be R1100 – R1040 = R60. Of this amount R60 x 80% = R48 will be attributed to Resident Company. The difference in the capital gains under the proposed and current law is as follows:

| | R |
|---|---|
| Capital gain under present law | 60,80 |
| Capital gain as it should be | 48,00 |
| Difference | 12,80 |

The difference of R12,80 can alternatively be proven as follows:

| | R |
|---|---|
| Base cost that should be attributed to Resident Company (i.e. R80 x 80%) | 64,00 |
| *Less:* Present base cost attributed to Resident Company (i.e. R64 x 80%) | (51,20) |
| Difference | 12,80 |

CLAUSE 53

***Income Tax: Amendment of paragraph 24 of the Eighth Schedule to the Income Tax Act, 1962***

See notes on **ENTRY INTO AND EXIT FROM SOUTH AFRICAN TAX JURISDICTION**.

CLAUSE 54

***Income Tax: Amendment of paragraph 40 of the Eighth Schedule to the Income Tax Act, 1962***

See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 55

***Income Tax: Amendment of paragraph 42 of the Eighth Schedule to the Income Tax Act, 1962***

Paragraph 42 of the Eighth Schedule provides that if a person disposes of financial instrument A for a capital loss, and within 45 days preceding or following the disposal acquires identical instrument B, the loss is effectively deferred until instrument B is disposed of. Also, instrument B is deemed to have been acquired on the date instrument A was acquired. This deemed date of acquisition might result in instrument B qualifying for the three year safe haven rule in terms of section 9C. However, because paragraph 42 is an anti-avoidance provision, the benefits of section 9C should not arise. Accordingly, it is proposed that the provision which deems the date of acquisition be deleted.

CLAUSE 56

***Income Tax: Amendment of paragraph 54 of the Eighth Schedule to the Income Tax Act, 1962***

See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 57

***Income Tax: Amendment of paragraph 55 of the Eighth Schedule to the Income Tax Act, 1962***

See notes on **RETIREMENT FUND REFORMS**.

CLAUSE 58

***Income Tax: Amendment of Paragraph 64B of the Eighth Schedule to the Income Tax Act, 1962***

*Subclause (1)(a)*: The proposed amendment effects a technical correction.

*Subclause (1)(b):* Currently, where a person holds 20 per cent of the shares in a foreign company, any gain or loss from the disposal of the shares is disregarded. The proposed amendment provides that the person must hold 20 per cent of the voting rights in the foreign company as well as 20 per cent of the equity shares therein.

*Subclause (1)(c):* See notes on **RESTRUCTURING OF SOUTH AFRICAN CONTROLLED FOREIGN COMPANIES**.

*Subclause (1)(d) and (e):* The proposed amendments effect technical corrections.

CLAUSE 59

***Income Tax: Amendment of paragraph 74 of the Eighth Schedule to the Income Tax Act, 1962***

The proposed amendment clarifies that with effect from 1 October 2001 the awarding of capitalisation shares will not be a 'distribution' as defined in this paragraph.

CLAUSE 60

***Income Tax: Amendment of paragraph 76 of the Eighth Schedule to the Income Tax Act, 1962***

*Subclause 1(a) and (b):* The proposed amendments effect technical changes.

*Subclause 1(c):* The purpose of the proposed amendment is to ensure that capital distributions received or accrued on or after 1 October 2007 are treated as proceeds when a part-disposal occurs under paragraph 76A.

CLAUSE 61

***Income Tax: Amendment of paragraph 76A of the Eighth Schedule to the Income Tax Act, 1962***

*Subclause (1)(a):* The proposed amendment effects a technical correction.

*Subclause (1)(b):* Currently, a capital distribution by a company to a shareholder is deemed to be a part-disposal of the relevant share and consequently a capital gain or capital loss may arise on the disposal. The proposed amendment excludes the distribution of a share in terms of an unbundling transaction from this part-disposal rule.

*Subclause (1)(c):* Paragraph 76A was introduced into the Eighth Schedule by the Revenue Laws Amendment Act of 2007. It introduced a new part-disposal approach to dealing with capital distributions with effect from 1 October 2007. Before this date capital distributions were only accounted for as proceeds when the shares were disposed of (a deferral approach). In order to deal with capital distributions that had accumulated between 1 October 2001 and 30 September 2007 a special transitional measure was introduced. For shareholders not using the weighted-average method, a part-disposal will be triggered on 1 July 2011 (assuming that the shares have not been disposed of by that date). For shareholders using the weighted-average method, paragraph 76A(2) provides that if the weighted-average base cost of the shares is negative on 31 December 2010, the negative amount is deemed to be a capital gain on 1 July 2011, and the base cost on 31 December 2010 will be reset to nil.

It is proposed that the date of 31 December 2010 be changed to 'at the end of 30 June 2011'. In this way the dates will be brought in line with those applicable to persons not adopting weighted average. The reference to 'at the end of' will also provide clarity as to exactly when the capital gain must be determined and the weighted-average base cost be reset to nil.

CLAUSE 62

***Income Tax: Amendment of paragraph 80 of the Eighth Schedule to the Income Tax Act, 1962***

At present paragraph 80(3)*(a)*(ii) appears to read as an alternative to paragraph 80(3)*(a)*(i). It is, however, intended to expand the scope of paragraph 80(3)*(a)*(i). The proposed amendment clarifies this intention.

CLAUSE 63

***Income Tax: Amendment of paragraph 4 of Part I of the Ninth Schedule to the Income Tax Act, 1962***

The proposed amendments update provisions of paragraph 4 in line with the repeal of the Further Education and Training Act, 1998, which has been replaced by the Further Education and Training Colleges Act, 2006.

CLAUSE 64

***Income Tax: Amendment of paragraph 3 of Part II of the Ninth Schedule to the Income Tax Act, 1962***

See clause 63.

CLAUSE 65

***Income Tax: Amendment of paragraph 1 of the Tenth Schedule to the Income Tax Act, 1962***

The proposed amendment effects a formatting correction to the text.

CLAUSE 66

***Customs and Excise: Amendment of Schedule No. 1 to the Customs and Excise Act, 1964***

This clause provides for the amendment of Schedule No. 1 to the Customs and Excise Act, 1964. These amendments give effect to the taxation proposals which were tabled by the Minister of Finance during his Budget Speech on 20 February 2008 and contain the rates of duty in respect of alcoholic and tobacco products.

CLAUSE 67

***Customs and Excise: Continuation of amendments to the Customs and Excise Act, 1964***

This clause provides for the continuation of the amendments to the Schedules to the Customs and Excise Act, 1964, which were effected by the Minister of Finance during the 2007 calendar year and amendments published on 27 February 2008 as a result of the 2008 Budget Review.

CLAUSE 68

***Value-Added Tax: Amendment of section 1 of Value-Added Tax Act, 1991***

The proposed amendment effects a textual change.

CLAUSE 69

***Collective Investment Schemes: Amendment of section 99 of the Collective Investment Schemes Control Act, 2002***

The proposed amendment effects a technical correction.

CLAUSE 70

***Income Tax: Amendment of Schedule 1 to the Revenue Laws Amendment Act, 2006***

*Subclause (1)(a):* In order to fulfil its duty to design the international broadcasting centre for the 2010 World Cup, the Host Broadcaster (an organisation appointed by FIFA) has been operating in South Africa since 2007. As a consequence, it will not enjoy the benefit of the 'tax-free bubble' in respect of a large portion of its work relating to the 2010 World Cup. The proposed amendment addresses this problem.

*Subclause (1)(b):* The proposed amendment broadens the definition of 'affiliated entities' to cater for the actual group of companies which act as FIFA Designated Service Providers.

*Subclause (1)(c):* Certain entities (FIFA, its subsidiaries and Participating National Associations other than SAFA) are generally exempt from South African taxes, duties and levies. While these entities are also not required to register as employers in terms of the Fourth Schedule, they do have obligations relating to UIC and SDL in respect of all of their employees who are residents of South Africa.

*Subclause 1(d) and (e):* FIFA and the Commissioner can agree that additional areas or facilities used for official events can be recognised as 'tax-free bubbles'. The purpose of these two proposed amendments is to provide a time period during which such 'tax-free bubbles' will operate.

*Subclause (f):* Payments to certain entities (such as FIFA) that relate to the 2010 World Cup are not subject to withholding taxes in terms of section 35 and 35A of the Income Tax Act. The proposed amendment extends this arrangement to payments to certain other entities. Such payments were originally intended to be included in this arrangement.

*Subclause (g):* Receipts and accruals derived from activities that are connected to the 2010 World Cup by certain individuals who are not resident in South Africa are excluded from 'gross income'. The effect of this is that such individuals are not liable to income tax in South Africa in respect of such receipts and accruals.

Where such individuals are employed by any entity set out in paragraph 6 of Schedule 1, it is proposed that that entity:

- not be required to deduct employees' tax from remuneration paid to such individuals;
- be exempt from paying SDL in respect of such individuals;
- along with the individuals themselves, not be required to make UIF contributions; and
- not be required to register for purposes of PAYE (if it only employs such individuals).

*Subclause (h):* The proposed amendment corrects an incorrect reference.

CLAUSE 71

***Diamond Export Levy: Amendment of section 11 of the Diamond Export Levy Act, 2007***

*Subclause (a):* For purposes of the current gross sales to diamond beneficiator (i.e. numerator) determination, only unpolished diamonds sold and delivered to the premises of a diamond beneficiator may be taken into account for purposes of satisfying this determination. However, industry practice dictates that due to the high net worth of unpolished diamonds, the sale of unpolished diamonds to beneficiators usually takes place at secure and undisclosed sites away from the premises of beneficiators. Thus, the proposed amendment allows unpolished diamond deliveries made directly to the premises of beneficiators or to secured premises other than that of the beneficiators (but for the benefit of that beneficiator) to satisfy the gross sales to diamonds beneficiator determination.

*Subclause (b):* The 'gross sales' formulation of section 11 imposes on all unpolished diamond producers the following ratio: gross sales to diamond beneficiators (including import sales) over total gross sales. Total gross sales (contained in section 11(1)(*b*)) reflects the sum of a producer's gross local sales plus the net value of its exports (i.e. total exports less total imports).

Some large exporters export their unpolished diamond production in order to aggregate that production with their production from other countries. These exporters subsequently import such aggregate (which includes formerly exported South African unpolished diamonds) back into South Africa for sale to their clients. This practice results in a greater consistency and predictability of unpolished diamond assortment that is highly prized by the clients.

Concern arises over the above-mentioned practice when read together with section 11(1)(*b*)(i). This section (as part of the 'total gross sales' formulation) reflects the inclusion into 'total gross sales' of the sum total of a producer's local sales to diamond beneficiators excluding its unpolished diamond exports (i.e. the parenthetical which reads: 'other than unpolished diamonds described in subparagraph (ii)'). Because this parenthetical permanently excludes (i.e. subtracts) from the local sales component all exported unpolished diamonds, the exclusion may logically apply to aggregate unpolished diamonds imported for purposes of local sale that is made up of those formerly exported unpolished diamonds.

In other words, for purposes of section 11(1)(*b*)(i), a large producer may arguably be subject to a double subtraction in determining its local sales calculation (from (i) and (iii) of the calculation. This double subtraction would dilute the 'total gross sales' calculation and lead to the unintended consequence of artificially lower sales of unpolished diamonds to local beneficiators. The proposed amendment removes this potential double subtraction interpretation.

CLAUSE 72

***Diamond Export Levy: Substitution of section 14 of the Diamond Export Levy Act, 2007***

*Proposed subsections 14(1) and (2):* Transitional measures are required for the first six months after the Diamond Export Levy Act takes effect. This is because the exemptions for producers are measured over a 1-year period (i.e. two 6-month assessment periods). This proposed amendment accordingly allows the 6-month period prior to the implementation of the Diamond Export Levy Act and the entire initial 6-month period after the Act comes into operation to be taken into account for purposes of satisfying the exemptions described in sections 7, 8 or 9 during the first 6 months after implementation of that Act.

*Proposed subsection (3):* Under section 7(1)(*c*) of the Diamond Export Levy Act, in order to be exempt from the levy otherwise imposed during an assessment period, a large producer is required to obtain (from the Minister of Minerals and Energy) and hold during that 6-month period an exemption from tendering its unpolished diamonds at a South African diamond bourse. Without this exemption, a large producer's unpolished diamonds will be subject to the levy.

With the introduction of any new legislation, administration in terms of the granting of permits and exemptions may be problematic. Thus, for purposes of only the initial assessment period (i.e. first 6 months) after this Act comes into operation, the proposed amendment extends the section 7(1)(*c*) time requirement of holding the exemption within the initial 6-month period to the twenty-ninth day of the month immediately following the initial assessment period.

*Proposed subsection (4):* Privately negotiated agreements entered into between Government and large producers that require the sale of unpolished diamonds to local beneficiators are currently in effect and force. With the advent of the Act, such agreements are no longer required. This is because the Act regularises the affairs of all producers for purposes of consistency and predictability in respect of their legislative obligations to South Africa in lieu of the prior agreements. Thus, the proposed amendment terminates negotiated agreements for large producers once this Act comes into operation.

*Proposed subsection (5):* The proposed amendment introduces a definition of the terms ‘initial assessment period’ that is used throughout this section.

CLAUSE 73

***Securities Transfer Tax: Amendment of section 8 of the Securities Transfer Tax Act, 2007***

The proposed amendment effects a technical correction.

CLAUSE 74

***Income Tax: Amendment of section 52 of the Revenue Laws Amendment Act, 2007***

See notes on **INTRA-GROUP ROLLOVER RELIEF: CLOSURE OF DISGUISED SALES**.

CLAUSE 75

***Income Tax: Amendment of section 54 of the Revenue Laws Amendment Act, 2007***

Section 43 of the Income Tax Act was repealed during 2007 as the same rollover relief is provided by section 42. Therefore persons who qualified in terms of section 43 should likewise qualify for the rollover relief provided by section 42. However, section 42 requires the taxpayer to elect that section 42 applies (not required for section 43). The proposed amendment provides that a transaction that would have qualified under section 43 will now qualify under section 42 despite there being no election.

CLAUSE 76

***Income Tax: Substitution of section 125 of the Revenue Laws Amendment Act, 2007***

Section 125 of the Revenue Laws Amendment Act, 2007 provides relief for national sporting organisations that have split their professional and amateur arms into separate entities and wish to combine these arms again. However, the relief is limited to amalgamation transactions in terms of which the entity housing the amateur arm acquires all the assets of the professional arm, after which the professional arm ceases to exist as a separate entity. Some organisations wish to use the entities housing their professional arms to absorb the assets of their amateur arms. The proposed amendment will extend rollover relief to such transactions. The extended relief will also remain available for a limited window-period that will end on 31 December 2009.

CLAUSE 77

***Short title and commencement:***

This clause provides for the name of the Act and its commencement date.