REPUBLIC OF SOUTH AFRICA

EXPLANATORY MEMORANDUM

ON THE

TAXATION LAWS AMENDMENT BILL, 2020

20 January 2021

[W.P. – ‘20]

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1. INCOME TAX: INDIVIDUALS, SAVINGS AND EMPLOYMENT

1.1 REIMBURSING EMPLOYEES FOR BUSINESS TRAVEL

[Applicable provision: Section 8(1)(*a*)(ii) of the Income Tax Act, No. 58 of 1962 (“the Act”)]

I. Background

The Act makes provision for advances or reimbursements paid by an employer to the employee in respect of meals and incidental costs, if the employee is obliged to spend a night away from home for business purposes, to be excluded from taxable income. This applies provided that the amount does not exceed the amount published by the Commissioner for the South African Revenue Service (SARS) by Notice in the Government Gazette, and the expenses were incurred in the furtherance of the employer’s trade.

Further, if the employee is obliged to be away from the office on a day trip, advances or reimbursements paid by an employer to the employee in respect of meals and incidental costs are not subject to tax, if the employee can prove that they incurred these expenses on the instruction of the employer, in the furtherance of the employer’s trade.

II. Reasons for change

At issue is where an employee is obliged to be away from the office on a day trip, and such employee purchases meals and incurs incidental costs (for example, purchases lunch, utilise an Uber or the Gautrain, utilises airport parking) in the furtherance of the employer’s trade, but the employee has not been explicitly instructed by the employer to purchase meals and incur incidental costs. Due to the fact that the employee is not explicitly instructed by the employer to incur such expenses, the reimbursement is subject to tax in the employee’s hands.

III. Proposal

In order to provide clarity on the tax treatment of the reimbursement of expenses incurred by the employee in respect of meals and incidental costs when the employee is obliged to be away from the office on a day trip, it is proposed that changes are made to the legislation.

As such, if the employee is obliged to be away from the office on a day trip, the reimbursement of expenses incurred by the employee in respect of meals and incidental costs in the furtherance of the employer’s trade should be excluded from taxable income in the hands of the employee. This will apply provided that the employer’s policy makes provision for and allows such reimbursement. In addition, as with advances and reimbursements when the employee is obliged to spend a night away from home, the exclusion from taxable income will also apply provided that the amount does not exceed the amount published by the Commissioner for SARS by Notice in the Government Gazette.

IV. Effective date

The amendments will come into operation on 1 March 2021 and apply in respect of years of assessment commencing on or after that date.

1.2 ADDRESSING AN ANOMALY IN THE TAX EXEMPTION OF EMPLOYER PROVIDED BURSARIES

[Applicable provisions: Sections 10(1)(*q*) and10(1)(*q*A)of the Act]

I. Background

The Act contains provisions that provide exemption in respect of *bona fide* bursaries or scholarships granted by employers to employees or relatives of qualifying employees, subject to certain monetary limits and requirements stipulated in the Act.

In the case of a *bona fide* bursary or scholarship granted to a relative of the employee without a disability, paragraph (ii) of the proviso to section 10(1)(*q*) of the Act makes provision for the exemption to apply only if the employee's remuneration does not exceed R600 000 during the year of assessment. In addition, the amount of the bursary or scholarship will only be exempted up to a limit of R20 000 for studies from Grade R to 12 including qualifications at NQF levels 1 to 4, and R60 000 for qualifications at NQF levels 5 to 10.

In the case of a *bona fide* bursary or scholarship granted to a relative of the employee with a disability, paragraph (ii) of the proviso to section 10(1)(*q*A) of the Act makes provision for the exemption to apply only if the employee's remuneration does not exceed R600 000 during the year of assessment. In addition, the amount of the bursary or scholarship will only be exempted up to a limit of R30 000 for studies from Grade R to 12 including qualifications at NQF levels 1 to 4, and R90 000 for qualifications at NQF levels 5 to 10.

When these provisions were initially introduced in 1992, the applicability of the exemption was dependent on the fact that the employee's remuneration package was not subject to an element of salary sacrifice. However, in 2006 changes were made to the tax legislation to remove the exclusion of salary sacrifice from the exemption requirements. The policy rationale for the removal of this exclusion was to encourage skills development as a means of addressing the country's skills shortage. Following the 2006 amendments, the tax exemption was available irrespective of whether or not a bursary or scholarship scheme contained an element of salary sacrifice.

II. Reasons for change

It has come to Government's attention that a number of schemes have emerged in respect of employer bursaries granted to relatives of employees. These bursary schemes are developed by an institution other than the employer and marketed to the employer as a means of providing tax exempt bursaries to relatives of employees at no additional cost to the employer. These schemes seek to reclassify ordinary taxable remuneration received by the employee as a tax-exempt bursary granted to the relatives of employees. As a result, an employee can cater for their relative's studies by way of a salary sacrifice. The portion of the salary sacrificed by the employee is paid directly by the employer to the respective school and is treated as a tax-exempt bursary in the employee's or relative's hands.

The increase in the number of these schemes as well as the tax planning opportunities that result in a loss to the fiscus resulted in Government reviewing its policy position taken in 2006 of making the tax exemption available irrespective of whether or not a bursary or scholarship scheme contained an element of salary sacrifice.

III. Proposal

In order to address these concerns, the following changes are proposed to the tax legislation:

- The exemption in respect of a *bona fide* bursary or scholarship granted by the employer to the relatives of the employee as contemplated in paragraph (ii) of the provisos to section 10(1)(*q*) and section 10(1)(*q*A), should only apply if that *bona fide* bursary or scholarship granted by the employer is not subject to an element of salary sacrifice. As a result, if the bursary or scholarship is subject to an element of salary sacrifice, the exemption will be denied.

- In turn, if a bursary or scholarship is subject to an element of a salary sacrifice, the exemption will be denied. However, the employer deduction in relation the said bursary or scholarship will be allowed.

IV. Effective date

The amendments will come into operation on 1 March 2021 and apply in respect of years of assessment commencing on or after that date.

1.3 CLARIFYING DEDUCTIONS IN RESPECT OF CONTRIBUTIONS TO RETIREMENT FUNDS

[Applicable provision: Paragraph 5(1)(*a*) and 6(1)(*b*)(i) of the Second Schedule to the Act and section 10C of the Act]

I. Background

The Act contains rules in the Second Schedule that deal with the tax treatment of lump sum benefits received from a pension fund, pension preservation fund, provident fund, provident preservation fund and retirement annuity fund as defined in section 1 of the Act. Paragraph 2 of the Second Schedule to the Act makes provision for the calculation of the amount of lump sum benefits to be included in the person's gross income in terms of paragraph (*e*) of the definition of gross income in section 1 of the Act.

In turn, paragraphs 5(1)(*a*) and (6)(1)(*b*) of the Second Schedule to the Act make provision for contributions to pension funds, provident funds and retirement annuity funds, that did not qualify for a deduction in terms of section 11F of the Act, to be allowed as deductions in calculating the amount of lump sum benefits to be included in the person's gross income.

Section 10C was introduced to cater for instances where a retirement fund member receives an annuity and the non-deductible portion of their retirement fund contributions exceeds any retirement lump-sums received by said individual. In calculating the taxable portion of the annuity, contributions to pension funds, provident funds and retirement annuity funds, that did not qualify for a deduction in terms of section 11F of the Act are allowed as a deduction.

With effect from 1 March 2016, section 11F of the Act made provision for deductions in relation to contributions to a pension, provident or retirement annuity fund to be allowed when calculating the taxable income of a person. The calculation of the amount to be deducted is prescribed in the formula and is subject to a cap.

II. Reasons for change

The policy rationale comprised in paragraphs 5(1)(*a*) and 6(1)(*b*) of the Second Schedule to the Act as well as section 10C of the Act for deducting amounts that did not qualify for an income tax deduction in terms of section 11F of the Act is to prevent double taxation of amounts contributed. However, paragraphs 5(1)(*a*) and 6(1)(*b*) of the Second Schedule to the Act and section 10C of the Act only refer to "the person's own contributions", which inadvertently prevents employer retirement fund contributions on behalf of employees (made on or after 1 March 2016) from qualifying for a deduction when calculating the taxable portion of retirement lump sum benefits.

III. Proposal

In order to ensure that both employer and employee contributions to pension, provident funds and retirement annuity funds qualify for a deduction in terms of paragraphs 5(1)(*a*) and 6(1)(*b*) of the Second Schedule to the Act and section 10C of the Act, it is proposed that changes be made to the above-mentioned paragraphs and section and the reference to "a person's own contributions" is replaced with a reference to "any contributions".

In order to ensure that the proposed changes cater for all employer contributions to pension, provident funds and retirement annuity funds on behalf of employees made since the introduction of section 11F, it is proposed that the effective date for the proposed amendments be aligned with the effective date of section 11F, which is 1 March 2016.

IV. Effective date

The amendments are deemed to have come into operation on 1 March 2016.

1.4 WITHDRAWING RETIREMENT FUNDS UPON EMIGRATION

[Applicable provisions: Section 1 of the Act, the definitions of "Pension Preservation Fund", "Provident Preservation Fund" and "Retirement Annuity Fund"]

I. Background

Currently, the definitions of "pension preservation fund", "provident preservation fund" and "retirement annuity fund" in section 1 of the Act make provision for a payment of lump sum benefits when a member of a pension preservation, provident preservation or retirement annuity fund withdraws from the retirement fund due to that member emigrating from South Africa, and such emigration is recognised by the South African Reserve Bank (SARB) for exchange control purposes.

II. Reasons for change

As outlined in Annexure E of the 2020 Budget Review, Government will be modernising the foreign exchange control system. As a result, a new capital flow management system will be put in place. This new system will move from a "negative list" system to one where all foreign-currency transactions, other than those contained on the risk-based list of capital flow measures, are allowed.

In respect of individuals, one of the changes to be implemented during modernisation of the foreign exchange control system is the phasing out of the concept of "emigration" for exchange control

purposes. The phasing out of this concept will have a direct impact on the application of the tax rules as the tax legislation makes provision for a payment of lump sum benefits when a member emigrates from South Africa and such emigration is recognised by the SARB for exchange control purposes.

III. Proposal

In order to ensure efficient application of the tax legislation, it is proposed that the definitions of “pension preservation fund”, provident preservation fund and “retirement annuity fund” in section 1 of the Act be amended to remove the reference to payment of lump sum benefits when a member emigrates from South Africa and such emigration is recognised by the SARB for exchange control purposes. As such, with effect from 1 March 2021, a new test should apply as follows:

- the legislation will make provision for the payment of lump sum benefits when a member ceases to be a South African tax resident (as defined in the Act), and
- such member has remained non-tax resident for an uninterrupted period of three years or longer on or after 1 March 2021.

As a transitionary measure, a transitionary period shall be allowed for the processing of emigration applications already submitted to the SARB. As such, the existing test which refers to payment of a lump sum benefits when a member emigrates from South Africa and such emigration is recognised by the SARB for exchange control purposes will apply in respect of all applications that have been received on or before 28 February 2021 and approved by SARB or an authorised dealer in foreign exchange on or before 28 February 2022.

IV. Effective date

The amendments will come into operation on 1 March 2021.

1.5 ADDRESSING AN ANOMALY IN THE ROLLOVER OF AMOUNTS CLAIMABLE UNDER THE EMPLOYMENT TAX INCENTIVE

[Applicable provision: Section 9(3) of the Employment Tax Incentive Act, No 26 of 2013 (the ETI Act)]

I. Background

The Employment Tax Incentive (ETI) programme was introduced in January 2014 to promote employment, particularly of young workers. The ETI programme aims to reduce the cost of hiring young people between the ages of 18 and 29 (also referred to as “qualifying employees”) through a cost sharing mechanism with Government, while leaving the wages received by the qualifying employees unaffected. The ETI programme makes provision for employers to reduce the amount of employees’ tax (PAYE) they pay to SARS for the first two years, in respect of qualifying employees with a monthly remuneration of less than R6 500, subject to certain limitations.

The ETI programme contains certain limitations aimed at encouraging tax compliance, and prevents non-tax compliant employers from claiming the ETI reduction of PAYE. Sections 8 and 10(4) of the ETI Act contain provisions that prevent a non-tax compliant employer from claiming the ETI if the employer has failed to submit any tax returns as required in terms of the Tax

Administration Act No. 28 of 2011 (the TAA), or has any outstanding tax debt as defined in the TAA.

In turn, section 9 of the ETI Act makes provision for the ETI allowable to be claimed by the employer to be rolled over to the following month under any of the following conditions:

- The incentive amount available to a compliant employer exceeds the PAYE otherwise due in a month;
- The compliant employer fails to reduce the PAYE payable to SARS despite being eligible to receive the incentive; or
- The non-compliant employer was not allowed to claim the ETI to reduce the PAYE payable to SARS due to tax returns outstanding, or an outstanding tax debt with SARS.

That said, in respect to tax compliant employers, any unclaimed monthly ETI must be claimed by the last month of each PAYE reconciliation period (namely August or February). In particular, section 9(3) of the ETI Act provides that any unclaimed amounts at the said time will be forfeited, on the first day of the month following the end of the PAYE reconciliation period (either 1 September or 1 March). As a result, the excess ETI on either 1 September or 1 March will be deemed to be nil.

II. Reasons for change

In instances where an employer is not tax compliant as described above, such employer is in terms of the ETI Act unable to claim the ETI for qualifying employees until such time that the employer becomes compliant. Any amounts not claimed while the employer is non-tax compliant will be an excess ETI subject to roll over into the next month. This roll over will continue until such time that said employer becomes tax compliant and the excess ETI will be allowed as a reduction against their PAYE liability in the first month the employer is tax compliant.

The above-mentioned provisions result in an anomaly as tax compliant employers are worse off in terms of tax treatment compared to non-tax compliant employers. The excess ETI amount of tax compliant employers is forfeited at the end of the PAYE reconciliation period, while non-tax compliant employers are able to roll over their excess ETI amount irrespective of whether the roll over goes beyond the PAYE reconciliation period.

III. Proposal

In order to address this anomaly and encourage tax compliance, it is proposed that changes be made in the ETI legislation, making non-tax compliant employers subject to the above-mentioned forfeiture rule applicable to tax compliant employers in instances where any excess ETI amounts are not utilised by the end of the PAYE reconciliation period. As a result, the excess ETI amounts of non-tax compliant employers will not be rolled over at the end of the PAYE reconciliation period.

IV. Effective date

The amendments are deemed to have come into operation on 31 July 2020.

1.6 ADDRESSING THE CIRCUMVENTION OF ANTI-AVOIDANCE RULES FOR TRUSTS

[Applicable provision: Section 7C of the Act]

I. Background

Scope of the anti-avoidance measure over the years

The Act contains anti-avoidance measures aimed at curbing the tax-free transfer of wealth to trusts through the use of low interest or interest-free loans, advances or credit. These anti-avoidance measures were first introduced in 2016 to target schemes under which taxpayers transfer assets to a trust and allow for the purchase price that the trust owes in respect of the assets to be left outstanding as a loan, advance or credit in favour of that taxpayer on which no interest or very low interest is charged. Alternatively, taxpayers would advance a low interest or interest-free loan, advance or credit upfront to a trust in order for the trust to use the money to acquire assets.

Following the introduction of these anti-avoidance measures in 2016, taxpayers devised further schemes aimed at undermining these measures. For example, taxpayers would advance interest free or low interest loans to companies whose shares are held by trusts. By advancing the loan to the company rather than the trust, the anti-avoidance measure introduced in 2016 did not apply as, at that time, the anti-avoidance measure only applied in respect interest free or low interest loans, advances or credit that were made by a natural person or a company (at the instance of a natural person) to trusts. In order to curb the abovementioned abuse, changes were made in the tax legislation in 2017 to strengthen these rules. As a result, interest free or low interest loans, advances or credit that are made by a natural person or a company (at the instance of a natural person) to a company that is a connected person in relation to a trust are also subject to the anti-avoidance measure.

Deemed donation on applicable avoidance structures

Prior to the introduction of these anti-avoidance measures in 2016, the use of low interest or interest free loans to facilitate the transfer of assets in terms of the schemes described above avoided Donations Tax because when assets are transferred in exchange for a low interest or interest free loan, advance or credit, such transfers are treated as sale transactions and not donations. Furthermore, in some instances, the amount that is owed to the taxpayers (i.e. the loan claim) would remain outstanding with no real intention of settlement. Coupled with the above, taxpayers reduce or waive the loan which is supposed to be paid back to him or her. This way, the waived amounts will not form part of his estate for purposes of Estate Duty but the assets will be the property of the trust in which taxpayers can make their children and/or spouses beneficiaries.

In order to limit the abuse, changes were made in the tax legislation to make provision for the annual donation to be triggered in the hands of a natural person who advances the loan or credit or the natural person at whose instance a company advances the loan or credit. In every year of assessment of the trust that the interest free or low interest loan remains outstanding, the amount of the deemed donation made by the natural person to the trust is determined as the difference between the interest charged on the loan, advance or credit and the interest that would have been payable by the trust had the interest been charged at the official rate of interest, as defined in the Seventh Schedule to the Act.

II. Reasons for change

It has come to Government's attention that taxpayers are continuing to implement other variations of these structures in order to avoid the deemed annual donation triggered by the anti-avoidance measure. In this instance, the application of the anti-avoidance measure is being avoided by natural persons that subscribe for preference shares with no or a low rate of return in a company owned by a trust that is a connected person to those individuals. The use of preference share funding avoids the application of the anti-avoidance rules as the 2017 changes only apply in respect of loans that are advanced or credit that is made available to a company that is owned by a trust that is a connected person in relation to the natural person advancing that loan or credit.

III. Proposal

In order to curb this abuse, it is proposed that changes be made in the tax legislation as follows:

(a) A definition of "preference share" be inserted in section 7C. That definition will provide that, for purposes of section 7C, "preference share" means "preference share" as defined in section 8EA. In section 8EA, a "preference share" is defined to mean "…any share other than an equity share or in the case of an equity share, where the dividends relating to such equity shares are based on or determined with reference to a specified rate of interest or the time value of money".

(b) the subscription price of preference shares used will be deemed to be a loan advanced. In addition, any dividends or foreign dividends in respect of those preference shares shall, for purposes of these provisions, be deemed to be interest in respect of such a deemed loan. In this respect, the deeming provision will apply, if –

- a natural person; or at the instance of a natural person, a company that is connected in relation to that natural person in terms of paragraph (*d*)(iv) of the definition of connected person

subscribes to preference shares in a company if –

- at least 20 per cent of the equity shares in that company are held (whether directly or indirectly) or the voting rights in that company can be exercised by a trust that is a connected person in relation to the subscribing natural person or company (as the case may be), whether alone or together with any person who is a beneficiary.

IV. Effective date

The amendments will come into operation on 1 January 2021 and apply in respect of any dividend or foreign dividend accruing during any year of assessment commencing on or after that date.

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2. INCOME TAX: BUSINESS (GENERAL)

2.1 ADDRESSING ANOMALIES ON THE ACQUISITION OF ASSETS IN EXCHANGE FOR DEBT ISSUED

[Applicable provision: Section 40CA of the Act]

I. Background

Establishing base cost in asset-for-share and asset-for-debt transactions

The rules that establish base cost in respect of asset-for-share and asset-for-debt transactions were first introduced in the Act in 2012 and amended in 2013. These rules were necessitated by the decision of the Supreme Court of Appeal in *C: SARS v Labat Africa Ltd (669/10) [2011] ZASCA 157* in which the Court had to determine whether the issuing of shares by a company as consideration for the acquisition of a trademark amounts to "expenditure actually incurred" by the issuing company. In view of the fact that the term "expenditure" is not defined in the Act, the Court relied on its ordinary meaning which encompasses the action of spending funds, disbursement or consumption and hence, requires a diminution of the assets by the person who expends. As a result, the Court held that the issue of shares does not give rise to any diminution in the assets of the issuing company and that the shares issued as consideration for the acquisition of the trademark accordingly do not amount to "expenditure". This meant that for tax purposes, taxpayers had a zero base cost in respect of assets acquired in exchange for the issue of shares by the acquiring company.

A policy decision was subsequently made that a base cost should be granted in respect of asset-for-share exchanges as these were generally entered into for economic purposes and the zero base cost had adverse effects by not reflecting that the shares received by the party disposing of assets to the issuing company would have received value. Although, the exchange of assets for debt issued did not give rise to a zero base cost as "expenditure" arises in the case of debt issued due to the fact that a diminution of the assets of the issuing party arises, a similar base cost rule was included in the same provision.

Consequently, the tax rules that determine a base cost for assets acquired in exchange for the issue of shares or debt currently make provision for a company that acquires an asset in exchange for the issue of shares by that company to be deemed to have incurred expenditure in respect of the acquisition of such asset, which is equal to the market value of those shares immediately after the acquisition. Similarly, a company that acquires an asset in exchange for the issue of debt is deemed to have incurred expenditure in respect of the acquisition of such asset, which is equal to the amount of that debt.

Anti-value shifting rules applicable to asset-for-share transactions

Anti-value shifting rules were introduced in the Act to ensure that all asset-for-share transactions should be entered into by taxpayers on a value-for-value basis (i.e. an asset must be acquired or disposed of in exchange for an issue of shares of an equal market value). Under these rules, where a company acquires an asset in exchange for the issue of shares by that company and the market value of the asset immediately before the disposal exceeds the market value of the shares immediately after that issue, the amount in excess is deemed to be a capital gain in respect of a disposal by that company of the shares and the base cost of the shares issued must be reduced in the hands of the person selling the asset by the amount of that excess. In the instance that a

company acquires an asset in exchange for the issue of shares and the market value of the shares immediately after that issue exceeds the market value of that asset immediately before the disposal, the amount in excess is deemed to be a dividend that consists of a distribution of an asset *in specie* that is paid by the company on the date of the issue of those shares.

Tax treatment of disposals between connected person

Taxpayers that are connected persons in relation to each other can often structure their transactions in a manner that avoids tax. For capital gains purposes, the Act contains a provision that deems a market value consideration where an asset is disposed of in a transaction that involves connected persons for a consideration that does not reflect an arm's length consideration.

II. Reasons for change

It has come to Government's attention that the rules that establish base cost in respect of asset-for-share and asset-for-debt transactions enable taxpayers to avoid the application of the market value deeming rule in respect of transactions between connected persons that are not entered into at an arm's length price. This is due to the fact that currently, the market value deeming rule in respect of transactions between connected persons provides that the market value deeming rule will not apply if the rules that establish base cost in respect of asset-for-share and asset-for-debt transactions have been applied to the transaction. This exclusion is justified in the case of asset-for-shares transactions as these transactions are subject to anti-value shifting rules where an asset-for-share transaction is not entered into on a value-for-value basis.

However, asset-for-debt transactions are not subject to any anti-avoidance rule but are granted the same exclusion when considering the application of the market value deeming rule in respect of transactions between connected persons. This results in some taxpayers misusing asset-for-debt transactions to achieve asset transfers in exchange for debt consideration that is not at arm's length without tax consequences. Further, it is, in any case, not necessary that a specific base cost rule should be provided for in respect of asset-for-debt transactions as in terms of normal principles, expenditure is actually incurred when an asset transferred in exchange for debt.

III. Proposal

In light of the above, it proposed that the specific asset-for-debt rule contained in the provision that deals with rules that establish base cost in respect of asset-for-share and asset-for-debt transactions should be deleted. It is envisaged that going forward, taxpayers will apply normal tax principles for the determination of base cost in respect of assets acquired in exchange for debt (i.e. base cost will be determined as expenditure actually incurred). Further, such transactions will be subject to the market value deeming rule in respect of transactions between connected persons in the instance that inadequate consideration is given for the asset by a connected person.

IV. Effective date

The amendments will come into operation on 1 January 2021 and apply in respect of acquisitions made on or after that date.

2.2 REFINING THE INTERACTION BETWEEN THE ANTI-AVOIDANCE PROVISIONS FOR INTRA-GROUP TRANSACTIONS

[Applicable provision: Section 45 of the Act]

I. Background

The Act contains corporate reorganisation rules that allow taxpayers to transfer their business assets on a tax neutral basis by allowing for a deferral of the tax consequences that would have otherwise been triggered on asset disposals. These corporate reorganisation rules contain a provision dealing with intra-group transactions in section 45 of the Act. An intra-group transaction is a transaction between two companies where one company transfers an asset to the other company and both companies form part of the same group of companies at the end of the day of that transaction.

The intra-group transaction rules also contain anti-avoidance measures aimed at limiting or discouraging abuse by taxpayers of the tax neutral transfer of assets, namely, (a) de-grouping charge rule applicable to the group of companies that entered into intra-group sale, and (b) zero base cost rule applicable to transfer of assets and assumption of related debt.

De-grouping charge rule applicable to the group of companies that entered into intra-group sale

The de-grouping charge rule was introduced to mitigate against the risk that taxpayers may enter into an intra-group transaction, benefit from tax deferral and then cease to form part of a group of companies soon after the said transaction. The de-grouping charge rule is triggered when a transferor company (i.e. the company that disposes of its asset) ceases to form part of any group of companies as the transferee company (i.e. the company that acquires the asset) within six years of the original intra-group transaction. In the instance that the de-grouping rule is triggered, any deferred tax consequences from the original intra-group transaction are triggered in the hands of the transferee which in effect reverses the tax benefit of that original intra-group transaction.

Zero base cost rule applicable to transfer of assets in exchange for debt or non-equity shares

This anti-avoidance rule applies to intra-group transactions where assets are transferred in exchange for debt or non-equity shares issued by another company that forms part of the same group of companies as the transferor of those assets. Section 45(3A) of the Act makes provision for the holder of the debt to be deemed to have acquired the debt or non-equity shares for an amount of expenditure of nil. This implies that debt and non-equity shares issued as consideration under intra-group transaction are deemed to have a zero base cost in the hands of the transferor as the holder of such instruments acquired in exchange for assets transferred. However, any gain or income from the repayment of such debt or non-equity shares are tax neutral if the repayment thereof by the issuer to the holder forms part of the same group of companies. The policy rationale for this anti-avoidance rule was to limit the use of debt or non-equity shares by taxpayers to transfer market value consideration for assets transferred under an intra-group transaction which could further be abused by transferring the debt or non-equity shares outside of the group by the transferor.

II. Reasons for change

The interaction between the de-grouping charge rule applicable to the group of companies that entered into intra-group asset sales and the zero base cost rule applicable to transfer of assets in exchange for debt or non-equity shares gives rise to anomalous results. Where an asset transfer in terms of an intra-group transaction is funded by debt or a non-equity share issued by a fellow

group company, the transferor is regarded as having a zero base cost for that debt note or non-equity share. Should a de-grouping occur in respect of that intra-group transaction, the de-grouping charge rule will apply to reverse the tax deferral of that intra-group transaction. However, as a result of the zero base cost rule, the holder of the debt still remains without base cost in respect of the debt or non-equity shares. The latter gives rise to an anomalous outcome as base cost would have been allowed had the provisions of section 45 not applied.

III. Proposal

In order to address this anomaly, it is proposed that changes be made in the tax legislation to ensure that in the instance that a de-grouping charge rule has been triggered in respect of an intra-group transaction under which the zero base cost rule was applied, the tax attributes of the debt or non-equity shares should be re-instated to reflect those that would have existed on the date of that de-grouping had tax deferral not applied at all.

As such, it is proposed that a debt or non-equity share in respect of which the zero base cost rules applied, should be deemed to have a base cost equal to its face value in the case of debt or subscription price in the case of non-equity shares on the date of the intra-group transaction less any repayments made prior to the de-grouping.

IV. Effective date

The amendments will come into operation on 1 January 2021 and apply in respect of years of assessment commencing on or after that date.

2.3 CLARIFYING ROLLOVER RELIEF FOR UNBUNDLING TRANSACTIONS

[Applicable provision: Section 46(7) of the Act]

I. Background

The corporate reorganisation rules were first introduced in the South African tax legislation in 2001. These rules are aimed at facilitating transactions between group companies or between shareholders and their companies on a tax neutral basis. The South African corporate reorganisation rules contain a provision dealing with unbundling transactions. This rule makes provision for tax deferral where shares of a resident company (unbundled company) that are held by another resident company (unbundling company) are distributed to the shareholders of that unbundling company in accordance with the effective interest of those shareholders. As a result, distribution of shares in terms of unbundling transactions are disregarded for purposes of determining the taxable income, assessed loss or net income of an unbundling company and are disregarded for Dividends Tax purposes and there is no consideration for reduction of contributed tax capital. These unbundling rules also contain anti-avoidance measures aimed at limiting or discouraging abuse by taxpayers from distributing shares on a tax neutral basis if the shareholders are not in the tax net. These anti-avoidance measures make provision for roll-over relief not to be granted if immediately after the distribution of shares in terms of an unbundling transaction, 20 per cent or more of the shares in the unbundled company are held by disqualified persons either alone or together with any connected persons (who is a disqualified person) in relation to that disqualified person.

For purposes of this anti-avoidance measure, the initial shareholding threshold for disqualified persons was set at 5 per cent. However, in 2008 this shareholding threshold was increased to 20

per cent in order to allow widely held companies to benefit from tax neutral unbundling transactions. In addition, "disqualified persons" is defined to include a person that is regarded as a non-resident in terms of the South African tax legislation or exempt persons in terms of South African tax legislation (for example, the government of the Republic in the national, provincial or local sphere contemplated in section 10(1)(*a*), a public benefit organisation as defined in section 30, a recreational club as defined in section 30A, a mining rehabilitation company or trust contemplated in section 37A, a pension fund, a provident fund, a retirement annuity fund, a benefit fund contemplated in section 10(1)(*d*)(i) or (ii) or a person contemplated in section 10(1)(*cA*) or (*t*)).

II. Reasons for change

The policy rationale for allowing tax deferral in unbundling transactions is based on the principle that where the economic group or the shareholders have retained a substantial interest in the assets transferred, it is appropriate to permit the transfer of assets to the entity where they can be most efficiently used for business purposes without immediate adverse tax consequences that usually apply in respect of asset transfers by way of a disposal or distribution. Therefore, a tax deferred distribution of the equity shares of an unbundled company in terms of an unbundling transaction to tax exempt persons or non-residents means that after deferral, capital gains or taxable income from subsequent disposals or distributions will fall outside of the South African tax net.

Government has noticed the increased use of the unbundling transaction provisions to erode the tax base in structures that use unbundling transactions to distribute shares of unbundled companies tax free to tax exempt persons and non-resident investors. In particular, the current anti-avoidance measure in unbundling transactions creates a loophole in that the 20 per cent exclusionary rule may not apply as intended to limit such transactions where tax exempt or non-resident shareholders are not connected persons in relation to each other. This implies that tax exempt persons and non-residents may collectively hold 20 per cent or more of the shares in the unbundled company, but to the extent that they are not connected, the anti-avoidance rule in unbundling transactions may not apply. The result is that in aggregate, the shareholding of disqualified persons immediately after an unbundling transaction may exceed the 20 per cent threshold that aims to curb the erosion of the South African tax base.

III. Proposal

In order to close this loophole, it is proposed that changes be made in the tax legislation to provide that no tax deferral under section 46 will apply in respect of any equity share that is distributed by an unbundling company to any shareholder that –

(a) is a disqualified person; and
(b) holds at least 5 per cent of the equity shares in the unbundling company immediately before that unbundling transaction.

These changes will result in the "pro-rata" operation of the anti-avoidance rule and will give effect to a more equitable outcome in respect of unbundling transactions as only shares distributed to persons that are not disqualified persons will benefit from roll-over relief. This new mechanism of the anti-avoidance rule is in line with the policy rationale of the reorganisation rules that are intended to be tax deferral rules. However, there will be tax deferral in respect of disqualified persons that hold less than 5 per cent of the shares in the unbundling company immediately before that unbundling transaction. This concession is made in order to remove the necessity to consider and ascertain the status of persons holding smaller shareholdings in listed entities.

As a result of the above changes, it is proposed that consequential changes be made in subsections 46(2) which provides for the deferral of any taxable income or assessed loss or section 9D attributed income and 46(5) which provides for the deferral of any dividends tax will be subject to this new anti-avoidance rule in order to further clarify that under the circumstances envisaged in the anti-avoidance rule, these deferral provisions will not be applicable.

IV. Effective date

The amendments are deemed to have come into operation on 28 October 2020 and apply to unbundling transactions entered into on or after that date.

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3. INCOME TAX: BUSINESS (FINANCIAL INSTITUTIONS AND PRODUCTS)

3.1 CLARIFICATION THE MEANING OF "MARKET VALUE" FOR THE TAXATION OF LONG-TERM INSURERS

[Applicable provision: Section 29A of the Act]

I. Background

Section 29A of the Act makes provision for the tax treatment of long-term insurance companies based on a five-funds approach, namely, taxation based on the untaxed policyholder fund, the individual policyholder fund, the company policyholder fund, the risk policy fund and the corporate fund. The application of this five-fund approach requires long-term insurers to allocate their assets to the above-mentioned five different tax funds. The assets should be allocated to each of the five funds if they relate exclusively to business conducted by the long term-insurer in the fund or in a way that is consistent with and appropriate to the manner in which the long-term insurer's business is conducted.

The excess of assets in each policyholder fund or risk policy fund, which represents the long-term insurer shareholders' interest, should be transferred to the corporate fund. The excess is calculated by deducting the adjusted International Financial Reporting Standards (IFRS) value of liabilities relating to the fund from the market value of assets allocated to that fund.

Section 29A(7) and (12) of the Act provides for the allocation of assets and other items to the funds and the requirements for the calculation of excess assets to be transferred to the corporate fund. In summary, section 29A(7) of the Act provides that the insurer should re-determine the value of its policyholder liabilities for each of the policyholder funds and its risk policy fund as at the last day of a year of assessment. To the extent that the market value of assets allocated to and held by the fund exceeds the value of its policyholder liabilities, the insurer is required to transfer assets equal to the surplus from that fund to the corporate fund. Also, in the case where the market value of assets allocated to and held by the policyholder fund or risk policy fund is less than the value of its policyholder liabilities, the insurer is required to transfer assets equal to the shortfall from the corporate fund to the relevant fund.

II. Reasons for change

While section 29A(7) of the Act makes provision for the allocation to be determined with reference to the market value of assets in the policyholder funds and risk policy fund, it is not clear what should happen with assets that do not have a "market value" as defined. For example, assets such as prepayments or intangible assets may in some instances not have a "market value" as defined, although they are treated as assets for financial reporting purposes.

III. Proposal

In order to clarify the current rules regarding assets that do not have a "market value" as defined, such as prepayments or some intangible assets, for purposes of section 29A(7) of the Act, it is proposed that the definition of "market value" in section 29A be amended to cater instances where the market value of an asset cannot be determined. The market value of the asset should be an amount equal to the value at which that asset is recognised in the audited annual financial statements of the insurer at the end of the year of assessment.

IV. Effective date

The amendments will come into operation on 20 January 2021

3.2 REVIEWING THE INTERACTION BETWEEN RULES FOR THE TAXATION OF BENEFITS RECEIVED BY SHORT-TERM INSURANCE POLICYHOLDERS AND THE TAX TREATMENT OF RELATED EXPENSES

[Applicable provisions: Sections 23(*c*) and 23L of the Act]

I. Background

The Act contains provisions in relation to limitation of deductions in respect of certain short-term insurance policies. Section 23L of the Act makes provision for limitation of deduction by disallowing the deduction of any premiums incurred by a taxpayer on short-term insurance policies, unless that taxpayer is recognising the insurance premiums as an expense for the purposes of financial reporting pursuant to IFRS in either the current or future year of assessment. This limitation of deduction is aimed at policies that are disguising an investment in the wrapper of short-term insurance, resulting in policyholder profits not being reduced by these insurance premiums because the insurance premiums are recognised as an asset (i.e. an investment of the policyholder).

Therefore, in terms of section 23L of the Act, policyholders may not deduct premium payments in respect of short-term policy contracts that are not viewed as an expense. Upon maturity or termination of those policies, the policyholders are subject to tax on ordinary revenue when receiving or accruing policy benefits less non-deductible premiums in respect of that investment.

In contrast to the above, in terms of section 23(*c*) of the Act, expenditure and losses covered by policy benefits, that would otherwise be allowed as deductions, for example under section 11(*a*) of the Act, is not allowed to the extent that it is recoverable under any contract of insurance, guarantee, security or indemnity. This leads to insurance benefits being taxed for policyholders of short-term insurance under section 23L(3) and on the other hand any related expenditure that is recovered being disallowed as a deduction under section 23(*c*) of the Act.

II. Reasons for change

As illustrated above, the interaction between section 23(*c*) and section 23L of the Act is not clear where on one hand, insurance benefits are being taxed and on the other hand, any related expenditure recovered being disallowed as a deduction.

III. Proposal

In order to clarify the interaction between the limitation of deductions in terms of section 23(*c*) of the Act and the inclusion in income of short-term insurance policy benefits in terms of section 23L of the Act, it is proposed that amendments be made in the tax legislation to clarify that the rules in section 23L(3) of the Act override the limitation provision of section 23(*c*) of the Act. In addition, given that that section 23L has wider application to a broader range of *bona fide* short-term insurance transaction, the provisions of section 23L(3) will also be limited.

IV. Effective date

The amendments will come into operation on 1 January 2021 and apply in respect of years of assessment commencing on or after that date.

3.3 CLARIFYING THE TAX TREATMENT OF SECURED NON IFRS 9 DOUBTFUL DEBT

[Applicable provision: Section 11(*j*) to the Act]

I. Background

In 2018, amendments were made to section 11(*j*) of the Act to provide specific criteria for determining the doubtful debt allowance. These amendments provide specific doubtful debts allowance provision for taxpayers applying IFRS 9 for financial reporting purposes and for taxpayers not applying IFRS 9 for financial reporting purposes.

In summary, taxpayers that apply IFRS 9 for financial reporting purposes are required for purposes of section 11(*j*) of the Act to deduct an allowance amount that is equal to a percentage of a loss allowance relating to impairment as contemplated in IFRS 9. IFRS 9 requires recognition of impairment losses on a forward-looking basis, which means that impairment loss is recognised before the occurrence of any credit event. These impairment losses are defined in IFRS 9 as the difference between all contractual cash flows that are due to an entity in accordance with the contract and all the cash flows that the entity expects to receive discounted at the original effective interest rate.

The 2018 tax amendments to section 11(*j*) of the Act require taxpayers that apply IFRS 9 to be allowed a deduction of (i) 40 per cent of the loss allowance relating to impairment that is measured at an amount equal to the lifetime expected credit loss and (ii) 25 per cent of the difference between the IFRS 9 loss allowances relating to impairment and the IFRS 9 loss allowance in respect of which the 40 per cent tax allowance is determined. Therefore, taxpayers that apply IFRS 9 take into account any estimated cash flows that are expected from the realisation of collateral that is part of the contractual terms of the secured financial asset (debt).

However, for taxpayers not applying IFRS 9, the Act makes provision for an age analysis of debt be used to determine the doubtful debt allowance. The following allowances are allowed as a deduction: (i) 40 per cent of the face value of doubtful debts that are at least 120 days past due

date, and (ii) 25 per cent of the face value of doubtful debts that are at least 60 days past due date, but excluding doubtful debts that are at least 120 days past due date. That said, this age based allowance used by taxpayers not applying IFRS 9 does not take cognisance of security given in respect of the debt.

II. Reasons for change

At issue is the fact that the tax legislation does not result in parity between taxpayers that apply IFRS 9 and those that do not apply IFRS 9 when determining the doubtful debt allowance under section 11(*j*) of the Act because the current 25 per cent and 40 per cent allowances for taxpayers not applying IFRS 9 does not take cognisance of security given in respect of the debt.

III. Proposal

In order to address this anomaly, it is proposed that changes be made in in section 11(*j*) of the Act to make provision for the amount of debt to be reduced by security that is available in respect of that debt before the 25 per cent and 40 per cent are applied by taxpayers that do not apply IFRS 9 for financial reporting purposes.

IV. Effective date

The amendments will come into operation on 1 January 2021 and apply in respect of years of assessment commencing on or after that date.

3.4 CLARIFYING THE TAX TREATMENT OF DOUBTFUL DEBT IN RESPECT OF CERTAIN IMPAIRMENTS FOR BANKING REGULATED TAXPAYERS

[Applicable provision: Section 11(*j*A) to the Act]

I. Background

In 2017, section 11(*j*A) of the Act dealing with doubtful debt allowance was introduced to provide an allowance for the debts that are considered to be doubtful for persons referred to in paragraphs (*c*)(i) to (iii) and (*d*) of the definition of “covered person” in section 24JB of the Act, that are subject to prudential banking regulation. This doubtful debt allowance was formulated using impairment requirements in IFRS 9 that are based on an expected credit loss and contains terminology that is derived from IFRS 9.

In turn, section 11(*j*) of the Act dealing with doubtful debt allowance, generally applying to taxpayers that are not subject to prudential banking regulation i.e. other than covered persons that value their financial assets at fair value, makes provision for a doubtful debt allowance, provided that the following requirements are met, namely that there is an amount of a debt due to a taxpayer and had that debt become bad it would have been allowed as a deduction under Part I of Chapter II of the Act (i.e. section 11(*a*) or 11(*i*)). In addition, such amount must be included in the taxpayer’s income in the current year of assessment or must have been included in a previous year of assessment.

It therefore follows that the application of doubtful debt allowance rules contained in section 11(*j*A) relating to taxpayers subject to prudential banking regulation is not aligned with the requirements provided in section 11(*j*) of the Act dealing with doubtful debt allowance.

II. Reasons for change

It has come to Government's attention that, unlike doubtful debt allowance rules relating to taxpayers generally not subject to prudential banking regulation contained in section 11(*j*) of the Act, the current doubtful debt allowance rules contained in section 11(*j*A) applicable to taxpayers subject to prudential banking regulation do not restrict the allowance to be granted to a debt, if it had become a bad debt, that would have been deductible in terms of section 11(*a*) or 11(*i*) of the Act.

For instance, certain impairments, which relate to financial assets under IFRS 9 that are held by a non-banking regulated taxpayer would not be deductible in terms of the provisions dealing with doubtful debt deduction in section 11(*j*) of the Act, are deductible in terms of IFRS 9. An example of such a financial asset is a financial guarantee contract, which in terms of IFRS 9 is a contract that arises where a provider of a loan obtains a guarantee from a third party for a potential loss because a borrower may fail to pay the debt. As a result, a taxpayer subject to prudential banking regulation that applies IFRS 9 to fair value a debt for financial reporting would be able to claim a doubtful debt allowance under section 11(*j*A) in respect of the impaired financial guarantee. However, for other taxpayers the requirements of section 11(*j*) that provide for a deduction of doubtful debts would not have been met because the cost or value of the impaired financial guarantee would not have been deductible under section 11 had it become bad.

III. Proposal

In order to address this anomaly, it is proposed that loss allowances relating to impairments of financial assets under IFRS 9 that would not have been allowed as a deduction under section 11(*a*) or 11(*i*) of the Act had they become bad, should not qualify for a doubtful debt allowance in terms of section 11(*j*A) of the Act.

IV. Effective date

The amendments are deemed to have come into operation on 28 October 2020 and apply in respect of years of assessment commencing on or after that date

3.5 CLARIFYING THE TAX TREATMENT OF DOUBTFUL DEBTS FOR TAXPAYERS CONDUCTING LEASING BUSINESS AND APPLYING IFRS 9 FOR FINANCIAL REPORTING

[Applicable provisions: Sections 11(*j*) and 11(*j*A) to the Act]

I. Background

The Act sets out different rules for the tax treatment of doubtful debt in respect of taxpayers subject to prudential banking regulation for debt that is fair valued for financial reporting (section 11(*j*A) of the Act) as well as in respect of other taxpayers and other debt (section 11(*j*) of the Act)

Currently all taxpayers conducting leasing operations and applying IFRS 9 for financial reporting purposes cannot claim a doubtful debt allowance for leasing debt because lease receivables are specifically excluded. IFRS 9 lease receivables include future lease payments as well as lease payments that have accrued to the lessor but remain outstanding and are in arrears if the lessee has defaulted on its obligation to pay these amounts ('arrear lease payments').

II. Reasons for change

One of the reasons for excluding lease receivables from doubtful debt allowance is that IFRS 9 lease receivables also include all lease receivables that have not yet been received by or accrued to the lessor. It would therefore be inappropriate to grant a doubtful debt allowance in respect of those amounts that have not yet been received by or accrued to the lessor, even if they have been impaired for accounting purposes.

At issue is that in arrears lease payments are not different from any other amounts that qualify for a doubtful debt allowance in terms of the provisions of section 11(*j*) or section 11(*j*A) of the Act. In addition, taxpayers not applying IFRS 9 for financial reporting purposes are able to claim a doubtful debt allowance in respect of these arrear lease payments, depending on the period that it has remained unpaid.

However, taxpayers applying IFRS 9 for financial reporting purposes cannot claim a doubtful debt allowance in respect of in arrears lease payments due to the fact that lease receivables in IFRS 9 include both lease receivables that have not yet been received by or accrued to the lessor and in arrears lease payments.

III. Proposal

In order to address this anomaly, it is proposed that changes be made in the tax legislation to both sections 11(*j*) and 11(*j*A) so that taxpayers applying IFRS 9 for financial reporting purposes are allowed doubtful debt allowances in respect of lease receivables that have accrued to them but not in respect of future lease amounts.

IV. Effective date

The amendments are deemed to have come into operation on 28 October 2020 and apply in respect of years of assessment commencing on or after that date.

3.6 CURBING POTENTIAL TAX AVOIDANCE CAUSED BY DIVIDEND DEDUCTIONS

[Applicable provision: Section 24JB(2) to the Act]

I. Background

In general, section 24JB of the Act requires every "covered person" (for example banks and brokers) for tax purposes to include in, or deduct from, their income all amounts in respect of fair valued financial assets and financial liabilities that are recognised for accounting purposes in profit or loss in the statement of profit or loss and other comprehensive income.

In relation to a bank, the concept of a 'covered person' includes, amongst others, any company or trust that forms part of a banking group as defined in section 1 of the Banks Act, 1990.

Therefore, in accordance with the principles of section 24JB of the Act covered persons must, subject to exclusions, include in or deduct from their statement of comprehensive income all amounts in respect of qualifying financial assets and financial liabilities that are recognised in the statement of profit or loss and other comprehensive income. However, one of the exclusions of section 24JB is a dividend or foreign dividend received by or accrued to a "covered person".

II. Reasons for change

It has come to Government's attention that some "covered persons" as defined in section 24JB are devising schemes with the aim of providing investment opportunities to investors by forming a special purpose vehicle that is part of a banking group and interpose this special purpose vehicle between a "covered person" and an investor. This special purpose vehicle issues shares (financial instruments) to the investors that yield dividends while it receives interest or other income on its financial assets. The special purpose vehicle effectively converts income to dividends for the benefit of investors.

This structure of interposing a special purpose vehicle between an investor and a bank yields an undesirable mismatch in that the investor's underlying income is distributed as a dividend, while the special purpose vehicle may arguably be in a tax neutral position. That is against the policy rationale of section 24JB.

III. Proposal

In order to close this loophole, it is proposed that changes be made in the tax legislation so that the exclusions from the rules for the taxation of "covered persons" in section 24JB(2)(b) be extended to cover dividends declared.

IV. Effective date

The amendments will come into operation on 1 January 2021 and apply in respect of dividends declared on or after that date.

3.7 CLARIFYING THE MEANING OF A SHARE IN THE DEFINITION OF REIT

[Applicable provision: Section 1 of the Act, definition of REIT and section 25BB(1), definition of qualifying distribution]

I. Background

A special tax dispensation for REITs was introduced in the Act in 2012 with effect from 1 April 2013. Prior to the introduction of this special tax dispensation, the tax legislation dealt with two forms of formal property investment entities, namely, property loan stock companies and property unit trusts. The property unit trust operated as a trust, while a property loan stock company operated in the form of a company.

When this REITs special tax dispensation was introduced, the policy rationale was for it to apply to both the company and trust REITs that comply with the Johannesburg Stock Exchange Limited (JSE) Listings Requirements, and are listed and publicly traded on the JSE. These requirements were based on the premise that the shares in a company or a trust which is deemed to be a company for tax purposes must be listed as shares in a REIT as defined in paragraph 13.1(*x*) of the JSE Listings Requirements and the company or trust will then qualify as a REIT for income tax (including capital gains tax) purposes.

With the introduction of other recognised exchanges as defined in the Financial Markets Act, 2012, in South Africa, the requirement that shares in a REIT should be listed on such recognised exchange and the listing requirements of such recognised exchange should be approved as stipulated in the Act still remains.

In general, the definition of a share, which must be listed in the case of a REIT, is in section 1(1) of the Act and means, in relation to any company, any unit into which the proprietary interest in that company is divided.

II. Reasons for change

It has come to Government's attention that some REITs are considering issuing and listing preference shares on a recognised exchange. This is against the policy rationale of the REITs tax dispensation as holders of preference shares were never intended to benefit from the REITs tax dispensation because preference shares are mainly used for financing, and not to provide full equity exposure to investors.

III. Proposal

It is proposed that: –

- clarification be provided in the tax legislation and that non-equity shares be specifically excluded from the shares that must be listed on a recognised exchange for purposes of the REITs special tax dispensation; and

- the tax benefit of a deduction of dividends payable by REITs be limited to dividends in respect of equity shares by amending the definition of qualifying distribution

IV. Effective date

The amendments to the definition of qualifying distribution will come into operation on 1 January 2021 and apply in respect of years of assessment commencing on or after that date.

3.8 AMENDING THE TAXATION OF FOREIGN DIVIDENDS RECEIVED BY REITs

[Applicable provisions: Sections 10B(2)(a) and 25BB(2A) of the Act]

I. Background

Section 25BB of the Act contains provisions dealing with REITs' special tax dispensation. The main feature of the REITs special tax dispensation is that income and capital gains distributed are taxed solely in the hands of the shareholders and not in the REIT or controlled company. In order to achieve that result, a REIT or a controlled company may deduct distributions to its shareholders against its income. This deduction is available only if a distribution is a "qualifying distribution" (i.e. at least 75 per cent of the gross income of the REIT consists of rental income or other amounts received or accrued from property companies, as defined).

The Act contains a participation exemption in section 10B(2) which exempts from income tax any foreign dividends declared by non-resident companies to a South African tax resident holding at least 10 per cent of the equity shares and voting rights in such companies. This implies that a REIT or a controlled company holding at least 10 per cent of the equity shares in a non-resident company qualifies for a participation exemption in respect of foreign dividends received from that non-resident company.

II. Reasons for change

At issue is the mismatch in the application of rules dealing with REITs' special tax dispensation in section 25BB of the Act and the participation exemption for foreign dividends in section 10B(2). In the main, is the taxation of the REIT's or controlled company's dividends from foreign companies that are exempt if they qualify for a participation exemption under section 10B(2)(a) and on on-distribution qualifies for deduction as a "qualifying distribution" to the extent of taxable income. Therefore, the opportunity is created to shield other sources of taxable income from tax and to retain profits in the REIT equal to the amount of the exempt foreign dividend.

III. Proposal

In order to address this anomaly, it is proposed that a REIT or controlled company should not qualify for participation exemption in respect of foreign dividends in terms of section 10B(2)(a).

A REIT or controlled company will be able to avoid economic double taxation that may result when a REIT pay tax on both the attributed profits and the dividend from the CFC.

Net income of a CFC that is imputed to a REIT or controlled company will not be taxed again when those amounts are distributed as a foreign dividend by the CFC due to the exemption under section 10B(2)(c).

IV. Effective date

The amendments will come into operation on 1 January 2021 and apply in respect of years of assessment commencing on or after that date.

3.9 ADDRESSING TAX AVOIDANCE INVOLVING LENDING AND COLLATERAL ARRANGEMENT PROVISIONS

[Applicable provision: Section 64EB of the Act]

I. Background

The Act and the Securities Transfer Tax Act No. 25 of 2007 ('STT Act') contain rules that provide relief in respect of an outright change in beneficial ownership of specific financial instruments for both collateral arrangements and lending arrangements, hereafter collectively referred to as "securities arrangements". As a result, if a listed share is transferred as part of a security arrangement, there are no income tax (including capital gains tax) and securities transfer tax implications, provided that identical shares are returned to the borrower by the lender within a limited period of time from the date on which the security arrangement was entered into.

Since the introduction of this relief in 2015 changes were made to these provisions in 2016 and 2017 to extend the scope of the relief. The anti-avoidance provisions in section 64EB of the Act were expanded in 2018 to also apply to dividend conversion schemes using collateral arrangements.

II. Reasons for change

Despite the anti-avoidance measures introduced in 2018, Government has identified certain adjusted dividend conversion transactions that are circumventing these anti-avoidance measures.

The conversion is essentially structured to avoid dividends tax by entering into a number of transactions between different parties during the period when a dividend is announced and the dividend is paid. The adjustment to previously identified schemes of just adding more parties to the scheme, than catered for in the anti-avoidance measure, has the effect that the party paying a manufactured dividend to the party avoiding dividends tax is no longer holding a share in the company declaring the dividend and falls outside the ambit of the anti-avoidance measures

Example:

A foreign shareholder transfers listed shares in South African company A to South African company B under a securities lending arrangement after company A announced a dividend declaration but before the dividend is paid. Company B shortly thereafter enters into a collateral arrangement with South African company C as security for a loan granted by company C to company B and the listed shares are transferred to company C. Company C receives the dividends from company A free from dividends tax (company-to-company exemption) and then, per the collateral agreement, pays a contractual amount (manufactured dividend) based on the dividends received to company B. Company B in turn pays a manufactured dividend to the foreign shareholder, which is not subject to dividends tax as company B is not holding a share in company A when the manufactured dividend is paid. The current anti-avoidance measures of section 64EB of the Act do not recognise the existence of multiple lending arrangements or the combination of a lending arrangement and a collateral agreement, to break the current causal link of the anti-avoidance measure of holding a share in the company declaring the dividend, in this example through companies C and B, to avoid dividends tax by the foreign shareholder.

III. Proposal

In order to further counter the avoidance of dividends tax, it is proposed that the current provisions of section 64EB of the Act be amended to adjust the anti-avoidance trigger that currently requires the person paying a manufactured dividend to a person that is subject to dividends tax, to hold a share in the company declaring the dividend. The holding of a share requirement is to be deleted.

IV. Effective date

The amendments will come into operation on 1 January 2021 and apply to amounts paid on or after that date in respect of shares that are borrowed or acquired in terms of a collateral arrangement.

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4. INCOME TAX: BUSINESS (INCENTIVES)

4.1 REVIEWING THE SUNSET DATE OF THE SPECIAL ECONOMIC ZONE TAX INCENTIVE REGIME

[Applicable provisions: Sections 12R and 12S of the Act]

I. Background

In 2013, the Special Economic Zone (SEZ) tax regime was introduced in the Act. Tax benefits for this regime are contained under two separate provisions of the Act. The first provision contained in section 12R deals with the criteria determining what constitutes a qualifying company that qualifies to be taxed at 15 per cent instead of the statutory 28 per cent corporate tax rate. The second provision contained in section 12S provides for an accelerated capital allowances for buildings owned and used by a qualifying company in the production of its income within SEZ.

When the SEZ tax regime was first introduced in the Act, it was intended to come into effect on the date on which the Special Economic Zones Act (Act No.16 of 2014) (SEZ Act) came into operation. The SEZ Act was anticipated to come into operation during the course of 2014. However, this only occurred in 2016, while the gazette notices approving specific SEZs in terms of section 12R were later published in July 2018.

The SEZ tax regime, like most tax incentives, has a sunset date. The sunset date is intended to allow Government the opportunity to review the effectiveness of the tax incentive regime. Qualifying companies were initially intended to have the incentives available to them for a period of 10 years. As a result, a sunset date was introduced to make provision for this tax regime to cease to apply in respect of any year of assessment commencing on or after 1 January 2024. This sunset date was intended to be aligned between sections 12R and 12S of the Act.

II. Reasons for change

At issue is the misalignment in the sunset dates of the two provisions dealing with the SEZ tax regime with their original intent. The sunset date contained in section 12R of the Act dealing with the criteria for the determination of what constitutes a qualifying company that qualifies to be taxed at 15 per cent was subsequently amended in 2017 due to the delay of the ratification of the SEZ Act which only came into operation on 9 February 2016. Due to the delay in the coming into operation of the SEZ Act, the section 12R sunset date provision currently states that the provisions applicable to qualifying companies under the SEZ tax regime will cease to apply in respect of any year of assessment commencing on or after 1 January 2024 or, if later, 10 years after the commencement of the carrying on of a trade in a special economic zone.

Similarly, the sunset date contained in section 12S of the Act dealing with the claiming of accelerated allowance in respect of building remained unchanged and section 12S will ceases to apply in respect of any year of assessment commencing on or after 1 January 2024. These sunset dates referencing January 2024 are no longer appropriate as they would not allow qualifying companies the intended 10-year period over which the incentives would be available to them. As indicated, government gazettes approving the first SEZs in terms of section 12R were only published in July 2018.

Government's fiscal position has deteriorated in recent years, and this situation has worsened significantly due to the impact of the COVID-19 pandemic and economic lockdown. The benefits of the SEZ tax regime, like other spending programmes, have been reduced to take account of the fiscal implications for the State.

III. Proposal

In order to provide clarity and certainty, it is proposed that amendments be made to the legislation in order to provide for a single date for the end of the application of the SEZ tax regime. As such the legislation will be amended to provide that the provisions of the SEZ tax regime will cease to apply in respect of any year of assessment commencing on or after 1 January 2031. This new sunset date of 1 January 2031 provides for a 10-year period from when legislation is changed in terms of the 2020 draft TLAB. New investors and other stakeholders now have been alerted upfront that qualifying companies will, subject to a review of the SEZ tax regime, only be guaranteed the current tax benefits in their present form (i.e. taxation at 15 per cent and accelerated capital allowance) until 1 January 2031.

IV. Effective date

The amendments are deemed to have come into operation on 9 February 2016.

4.2 CLARIFYING ADMINISTRATIVE PROVISIONS OF VENTURE CAPITAL COMPANIES TAX INCENTIVE REGIME

[Applicable provision: Section 12J of the Act]

I. Background

In 2008, Government introduced the Venture Capital Company (VCC) tax regime as one of several measures to encourage the establishment and growth of Small, Medium and Micro-Enterprises (SMME), as a tool to address job creation and inequality and more specifically to assist SMMEs to obtain funding that would not otherwise be available. Taxpayers investing in a VCC are allowed an upfront deduction for their investment in that VCC (whereas most equity investments are non-deductible) with a recoupment upon withdrawal if the investment is not held for a minimum period of five years.

Unfortunately, over the last few years questionable VCC structures, advertised as tax investment solutions, started appearing. These structures deviate from the spirit and original intention of the VCC incentive without making a meaningful contribution to the SMME funding universe. In response to this, Government introduced anti-avoidance measures over the past two years. One of the anti-avoidance measures introduced in 2018 had the policy intent that no shareholder may hold, directly or indirectly, more than 20 per cent of the shares of any class in a VCC. This measure is aimed at closing to close the structural base around which certain abusive schemes were created.

II. Reasons for change

It has come to Government’s attention that the anti-avoidance measures introduced in 2018 regarding the 20 per cent shareholding limitation on VCC shares have unintended consequences. For example, the VCC shareholders could unintentionally breach the more that 20 per cent ownership of any class of share measure within a VCC structure, especially upon the legitimate unwinding of the underlying investment into a qualifying company related to that class of share.

III. Proposal

In order to address this anomaly, it is proposed that the legislation be amended to allow for an exclusion of the application of the 20 per cent ownership provisions, if that VCC, in writing, notifies the Commissioner for SARS of the intent to the cancel a class of shares within that VCC.

To ensure the continued protection of the fiscus against abusive structures on an open-ended termination ability, an anti-avoidance measure is proposed where a maximum period of 6 months, from the date of notification to the Commissioner, is allowed for the cancellation of any class of shares. In addition, should that allowable termination period be breached then normal provisions as contemplated in section 12J(3B) be applied.

IV. Effective date

The amendments are deemed to have come into operation on 31 July 2020 and apply in respect of years of assessment ending on or after that date.

4.3 REFINING THE TAX TREATMENT OF FOREIGN DONOR-FUNDED PROJECTS

[Applicable provision: Section 10(1)(*y*A) of the Act]

I. Background

In 2006, changes were made in the tax legislation to make provision for the uniform tax treatment of support (for example grants, loans, technical assistance) granted in terms of an Official Development Assistance Agreement (ODAA). An ODAA is an international agreement in terms of section 231(3) of the Constitution of the Republic of South Africa.

Consequently, section 10(1)(*y*A) of the Act makes provision for exemption in respect of amounts received by or accrued to any person in terms of an ODA agreement which is binding under section 231(3) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution), provided that the following requirements are met, namely, (a) that amount is received or accrued in relation to projects that are approved by the Minister and (b) the agreement provides that those receipts and accruals of that person must be exempt.

II. Reasons for change

It has come to Government's attention that some ODAAs were entered into a long time ago and the wording in those ODAAs does not specifically make provision for the outright exemption. As a result, those ODAAs may not qualify for exemption in terms of section 10(1)(*y*A) of the Act as they do not meet the requirement under section 10(1)(*y*A)(bb) of the Act that the ODAA agreement must provide that the amounts received by or accrued to the person are exempt.

For example, some of the wording in the old ODAAs makes provision for the grant amount to be used to fund the activities of the project itself and cannot be used to pay any taxes. In other instances, the wording in the old ODAA envisages a situation where the foreign donor procures goods and services directly for the benefit of the South African government and does not envisage a situation where those procurement duties can be allocated to a local contractor. Further, such ODAA makes provision for the foreign donor to be exempt from indirect taxes and duties in respect of procurements financed under the ODAA, and that exemption is not granted to the local contractor who has been allocated the duties, and secondly, there is no provision for income tax

exemption as it was not envisaged that the foreign donor can allocate funds to the local contractor to procure those goods and services in terms of the ODAA.

III. Proposal

In view of the fact that at the time when South Africa entered into these ODAAs, there was a clear intention that foreign donors offering this support often seek to ensure that their support packages remain free from South African tax as a precondition for funding, it is proposed that changes be made in the tax legislation as follows:

- With regard to ODAAs entered into until 2006, the requirement under section 10(1)(*y*A)(*bb*) that the ODAA agreement must provide that the amounts received by or accrued to the person are exempt should not apply.
- With regard to ODAAs entered into after 2006, the requirement under section 10(1)(*y*A)(*bb*) that the ODAA agreement must provide that the amounts received by or accrued to the person are exempt should apply.

IV. Effective date

The amendments are deemed to have come into operation on 1 January 2007 and apply in respect of years of assessment ending on or after that date.

4.4 ALIGNING IMMUNITY FROM TAXATION OF INTERNATIONAL ORGANISATIONS

[Applicable provision: Section 10 of the STT Act]

I. Background

South Africa is a member of several internationally recognised organisations and has entered into numerous international agreements in this regard. In order to enable the recognised international organisations to fulfil their entrusted functions and conduct their operations uninterrupted in South Africa, the international agreements underpinning these memberships make provision for the international organisations to be granted certain privileges and immunities. In particular, these international agreements often contain an article which outlays the status, immunities and privileges of the said international organisation. This article makes provision for the exemption from taxation of any kind and description in respect of the international organisation and its activities in South Africa. Consequently, in order to ensure that the South Africa tax legislation aligns with the intention of these international agreements, the tax Acts currently contains a provision for immunities from taxation.

II. Reasons for change

It has come to Government's attention that some provisions of the tax Acts are not aligned with the intention of these international agreements. For example, the current provisions of section 10 of STT Act provide that no exemption provided for by any other law will apply to the tax payable under the STT Act. This implies that the provision for exemption from taxation of any kind and description granted to the international organisation in terms of the above-mentioned international agreement will be nullified by the provisions of section 10 of the STT Act.

III. Proposal

In order to ensure that South Africa upholds the intention of these international agreements, it is proposed that changes be made in the STT Act to make provision for this immunity from taxation.

IV. Effective date

The amendments will come into operation on 20 January 2021.

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5. INCOME TAX: INTERNATIONAL

5.1 INTRODUCING AN ANTI-AVOIDANCE PROVISION REGARDING CHANGE OF RESIDENCE

[Applicable provisions: Sections 9H and 10B of the Act and paragraph 64B of the Eighth Schedule to the Act]

I. Background

In 2001, South Africa like many other countries introduced the taxation of capital gains aimed at levying normal tax on the gain made from the disposal of certain assets. When a South African tax resident company changes its tax residency to another tax jurisdiction, such company ceases to be tax resident for South African income tax purposes (regardless of whether the assets of such company are still located in South Africa or whether the company still continues to do business in South Africa or not). Generally, the cessation of South African tax residence is deemed to be a disposal for capital gains tax purposes and triggers capital gains tax. The Act deems the South African tax resident company to have disposed all the assets for a consideration equal to their market value. As a result, the deemed disposal is subject to CGT at the prevailing tax rates.

Subsequently, in 2003, South Africa introduced a participation exemption (currently in section 10B(2) of the Act) which exempts from income tax any foreign dividends declared by non-resident companies to a South African tax resident holding at least 10 per cent of the equity shares and voting rights in such companies. A further participation exemption in paragraph 64B of the Eighth Schedule to the Act exempts from capital gains tax any disposal of equity shares held by a South African tax resident holding a least 10 per cent of the equity shares and voting rights in a non-resident company.

The policy rationale for participation exemption in section 10B(2) which exempts foreign dividends from income tax where a South African tax resident has a meaningful interest in the non-resident company paying the dividend was to encourage capital inflows and to provide an incentive for South African tax residents to repatriate foreign dividends to South Africa. The policy rationale for participation exemption in paragraph 64B of the Eighth Schedule to the Act which exempts from capital gains tax any disposal of equity shares held by a South African tax resident holding a least 10 per cent of the equity shares and voting rights in a non-resident company follows the notion behind the participation exemption in section 10B(2) for foreign dividends. The profits realised from the sale of shares represent unrealised dividends and that such profits would in any event have qualified for the participation exemption in section 10B(2) for foreign dividends had they been declared as a dividend to the South African tax resident shareholder.

A company that ceases to be a South African tax resident is deemed to have declared and paid a dividend equal to its distributable reserves (determined based on the market value of shares it that company less its contributed tax capital) is a dividend in specie. However, a dividend tax exemption under section 64FA may be available to exempt the deemed dividend, e.g. a company to company exemption.

II. Reasons for change

The interaction between the current rules aimed at taxing capital gains in the hands of the South African tax resident shareholders on the disposal of the shares in a South African company and the rules providing a participation exemption from capital gains tax on the disposal of equity shares held by a South African tax resident holding a least 10 per cent of the equity shares and voting rights in a non-resident company creates a loophole.

Government has noticed an increased use of participation exemption by South African tax resident shareholders. These erode the South African tax base in instances where a South African tax resident company changes its tax residency to another tax jurisdiction and shares in that company are subsequently sold by South African shareholders, qualifying for a participation exemption. For example, on day 2, a South African tax resident company changes its tax residence to another tax jurisdiction (foreign Newco) and triggers a deemed disposal of its assets on day 1. On day 3, after exit, the South African tax resident shareholders dispose of the equity shares in foreign Newco and qualify for participation exemption in respect of the gain on disposal of the shares, even though the unrealised growth in the value of the shares occurred while the company was a South African tax resident.

Allowing South African resident shareholders to benefit from a participation exemption on disposal of the shares in a non-resident company that was a resident company when the shares were acquired is against the intended purpose of the participation exemption. It was aimed at encouraging capital inflows and to provide an incentive for South African tax residents to repatriate foreign dividends or capital gains on shares acquired in foreign companies back to South Africa on a tax neutral basis.

III. Proposal

It is proposed that changes be made in section 9H of the Act to deem shareholders of a South African tax resident company that changes its tax residence to another tax jurisdiction to be deemed to have disposed of all their shares in the company at market value on the day before it ceased to be a South African tax resident and to have reacquired the shares at market value on the day of the exit. These rules will only apply to shareholders that triggered a dividends tax exemption for the company when a deemed dividend in specie is declared under section 9H(3)(c)(iii).

IV. Effective date

The amendments will come into operation on 1 January 2021 and apply in respect of the holder of shares in a company that ceases to be a resident on or after that date.

5.2 INTRODUCING AN ANTI-AVOIDANCE PROVISION REGARDING TAXATION OF FOREIGN DIVIDENDS RECEIVED BY RESIDENTS

[Applicable provision: New section 10B(6A) of the Act]

I. Background

In general, a dividend is defined in section 1 of the Act as an amount transferred or applied by a company for the benefit of any person in respect of any share in that company. A foreign dividend is defined in section 1 of the Act as an amount that is paid or payable by a foreign company in respect of a share in that foreign company. Dividends and foreign dividends received by or accrued to a person are included in that person's gross income under paragraph (*k*) of the definition of "gross income" in section 1(1) of the Act and qualify for potential exemption under section 10(1)(*k*)(i) or 10B of the Act.

Section 10(1)(*k*)(i) of the Act makes provision for dividends received or accrued from resident companies to be exempt from normal tax, subject to certain exceptions. The exceptions included under section 10(1)(*k*)(i) of the Act are aimed at limiting tax avoidance. These exceptions include a rule in paragraph *(hh*) of the proviso to section 10(1)(*k*)(i) referring to a scenario where a company incurs an obligation to pay deductible expenditure that is determined directly or indirectly with reference to dividends in respect of an identical share to the share from which the company received or accrued a dividend. The amount of the dividend is taxable to the extent of the deductible expenditure.

The rule in paragraph (*hh*) has a proviso stating that the deductible expenditure referred to must be reduced by any amount of income accrued to the company in respect of any distribution in respect of any other share that is an identical share to that share. This implies that the expenditure incurred with reference to the local dividend must be reduced by local dividends or distributions from identical shares that form part of income, as defined.

On the other hand, section 10B of the Act makes provision for exemptions for foreign dividends from South African listed shares; for foreign dividends received by or accrued to South African residents holding at least 10 per cent of the equity shares and voting rights in the foreign company; and to reduce the effective rate of tax on foreign dividends to 20 per cent.

II. Reasons for change

Currently, section 10B(2) and (3) of the Act (exemptions) does not have an anti-avoidance rule similar to paragraph (*hh*) of the proviso to section 10(1)(*k*)(i), that denies the exemptions for foreign dividends on foreign shares if the amount of a deductible expense is determined with reference to the foreign dividends. This anti-avoidance rule is required where the reference shares are shares in foreign companies and especially where the reference shares are listed on any of the South African exchanges, where companies are getting a deduction for amounts determined with reference to foreign dividends in respect of identical shares to those foreign shares.

III. Proposal

In order to address this anomaly, it is proposed that foreign dividends received by or accrued to a company on a share in a non-resident company be taxed in full if that company incurs deductible expenditure that is determined directly or indirectly with reference to a foreign dividend in respect of an identical share in relation to the share in that foreign company.

IV. Effective date

The amendments will come into operation on 1 January 2021 and apply to foreign dividends received or accrued on or after that date.

5.3 REFINING THE SCOPE OF THE TRANSFER PRICING RULES APPLYING TO CFCs

[Applicable provision: Section 31(2) of the Act]

I. Background

The Act contains transfer pricing rules aimed at preventing the reduction in South African taxable income as a result of mispricing or incorrect characterisation of transactions. In particular, the definition of "affected transaction" in section 31 of the Act includes transactions between a person that is not a resident and any other person that is a controlled foreign company in relation to a resident.

In turn, a Controlled Foreign Company (CFC) is defined in section 9D of the Act as any foreign company if more than 50 per cent of the total participation rights or voting rights in that company are directly or indirectly held or exercisable by one or more persons that are residents.

An amount equal to the net income of a CFC is attributed to and included in the taxable income of South African resident shareholders in proportion to that resident's participation rights or voting rights in the CFC.

II. Reasons for change

Government has identified certain instances, where the current scope of transfer pricing rules presents a limitation in its application. For example, in the case of a transaction between a controlled foreign company in relation to a resident and a non-resident connected person, a tax benefit may not be derived by the foreign company, but may be derived by a South African resident shareholder as a result of a lower inclusion of an amount equal to a portion of the controlled foreign company's net income for the resident.

III. Proposal

In order to address this anomaly, it is proposed that changes be made to section 31(2)*(b)*(ii) of the Act by referring to a tax benefit that may be derived by any resident in relation to a controlled foreign company.

IV. Effective date

The amendments will come into operation on 1 January 2021 and apply in respect of years of assessment commencing on or after that date.

5.4 LIMITING THE APPLICATION OF DIVIDEND AND CAPITAL GAIN EXEMPTIONS IN LOOP STRUCTURES

[Applicable provisions: Section 9D of the Act and paragraph 64B of the Eighth Schedule to the Act]

I. Background

Under the current Exchange Control Regulations of 1961, regulation 10(1)(*c*) provides that no person shall, except with permission granted by the National Treasury and in accordance with such conditions as the National Treasury may impose, enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic. In summary, regulation 10(1)(*c*) implies that residents may not enter into a transaction or a series of transactions with the purpose or effect of directly or indirectly exporting capital from South Africa. Offshore structures held by South African persons that re-invests into the Common Monetary Area (CMA) by acquiring shares or other interest in a CMA company or CMA asset are known as ‘loop structures’. The CMA countries are South Africa, Namibia, Lesotho and eSwatini.

The Financial Surveillance Department of the SARB generally regards this type of transactions as a risk in that they result in or have the potential to result in the direct or indirect export of capital abroad to a non-resident company or other relevant non-resident trust or entity for the ultimate benefit of a resident. The export of capital could be in the form of dividends arising from increased profits, revenue reserves or capital reserves from CMA growth assets of the CMA company.

However, as an exception to the above, private individuals and South African companies are permitted to acquire up to 40 per cent equity or voting rights in a foreign target company which may in turn hold investments (including loans) in any CMA country. Loop structures where the 40 per cent shareholding is exceeded require approval from the Financial Surveillance Department of SARB with due consideration to transparency, tax, equivalent audit standards and governance.

In general, loop structures are created as follows:

- a South African resident individual, trust or company transfers authorised or unauthorised funds from the Republic (could also be existing offshore funds or a combination thereof) to, for example, set up a foreign trust or foreign company. Authorised funds are those foreign funds held in a manner that does not contravene the Regulations;

- the foreign trust or company would then directly or indirectly (via another offshore entity) invest the authorised or unauthorised funds in the Republic, thereby creating a loop structure. The investment could be in the form of South African shares, loans or other assets;

- returns accruing to the foreign company or trust on the South African investments could be in the form of dividends, interest or other amounts; and

- the result of the loop structure could be that profits from investments by the offshore trust or company into the Republic could be accumulated offshore.

For example, where a South African resident individual invests cash and acquires the shares in a non-resident company which then acquires shares in a resident company, a loop structure will be created and the current tax rules will apply to:

- the resident company with respect to its taxable income and dividends tax will apply to dividends paid to the non-resident company, subject to the relevant double taxation treaty;

- the non-resident company, which may be taxed on South African sourced income. The current CFC rules require an amount equal to the non-resident company's passive income, such as interest earned on loans granted to the resident company in a loop structure, to be taxed in the resident individual. However, under CFC rules dividends accrued by the non-resident company from the resident company would be exempt under section 10(1)(*k*) of the Act. In addition, when the non-resident company distributes the amount of the exempt dividend to the South African resident individual as a foreign dividend, the foreign dividend will be exempt for the South African resident individual under the participation exemption in section 10B of the Act. The existence of the non-resident company in the loop structure may provide tax planning opportunities for the South African individual with respect to dividends tax as the dividend flowing through the structure may not be taxed at the current dividends tax rate of 20 per cent, but at a reduced rate or in some instances at a zero rate depending on the relevant double taxation treaties;

- beneficiaries of a non-resident trust that is part of the loop structure. Section 25B(2A) and (2B) of the Act will tax a resident beneficiary on vesting of the capital of the trust in the resident. In addition, under paragraph 80 of the Eighth Schedule, when a non-resident trust vests an asset or an amount derived from a gain in a resident beneficiary, a capital gain that would have been determined had the trust been a resident is taken into account in the tax calculation of that resident;

- any donation, settlement or other disposition by a resident to an entity in a loop structure resulting in amounts accruing to that entity that would have been income if that entity had been a resident. The application of section 7(8) of the Act would give rise to income for the resident.

That said, the current tax rules have the effect that gains on the sale of shares in a non-resident company to a non-resident are not taxed because of the participation exemption in section 10B(2)(*a*) of the Act. This exemption creates tax planning opportunities.

II. Reasons for change

As indicated in Annexure E of the 2020 *Budget Review,* Government proposes to review the current exchange control rules and move towards a new capital flow management framework that is aimed at promoting investment, reducing unnecessary burdensome approvals by SARB and providing a modern, transparent and risk-based approvals framework for cross-border flows. One of the changes to the current exchange control rules envisaged above is the relaxation of the approval that is required for loop structures where the 40 per cent shareholding is exceeded. It is stated in Annexure E of the 2020 *Budget Review* that the relaxation of exchange control rules in respect of loop structures will take effect after the tax amendments to address the effect of reducing South Africa's tax base by an offshore company in a loop structure are implemented.

As stated above, the Act contains some rules that may reduce the risk of loop structures. However, increased tax planning opportunities may arise as a result of the relaxation of the approval by the Financial Surveillance Department of SARB that is required for loop structures where the 40 per cent shareholding is exceeded. These tax planning opportunities may arise from the current participation exemptions available for foreign dividends and capital gains derived from the disposal of shares in foreign companies to non-residents.

III. Proposal

In order to reduce tax planning opportunities that may emerge from loop structures as a result of the relaxation of the current approval requirement, the following measures are proposed:

A. Dividend exemption

In view of the fact that dividends are included in gross income under paragraph (*k*) of the definition of "gross income," but may qualify for exemption under section 10(1)(*k*)(i), such dividends would therefore not be included in the net income of the CFC. It is proposed that changes be made in the CFC legislation so that a non-resident company that is a CFC include a portion of a dividend that is received or accrued from a resident company in net income. To determine the portion of a dividend that is not exempt, it is proposed that the non-resident CFC include in net income an amount equal to the ratio of the number 20 to 28 of the dividend that is received or accrued from a resident company. This aggregate of dividends received or accrued to the CFC in a loop structure will be reduced by 100% of dividends where dividends tax has been paid at 20%; 50% of dividends where dividends tax has been paid at 10%; 40% of dividends where dividends tax has been paid at 8%; 37.5% of dividends where dividends tax has been paid at 7.5% or 25% of dividends where dividends tax has been paid at 5%.

B. Disposal of shares in a controlled foreign company

As stated above, gains on the disposal of shares in a non-resident company to a non-resident are not taxed because of the participation exemption in paragraph 64B of the Eighth Schedule. It is proposed that the participation exemption should not apply to the disposal of shares in a CFC to the extent the value of the assets of the CFC are derived from South African assets. This will create equal tax treatment of residents holding South African assets directly versus South African assets held indirectly via a CFC.

It is further proposed that the "look-through" rule for capital gains in paragraph (*f*) of the proviso to section 9D(2A) be removed for natural persons and special trusts. The reason is that the attribution of an amount of net income of a CFC to residents does not retain the character or nature of the underlying elements of net income for the residents. However, the paragraph (*f*) rule will be retained only for long-term insurers to cater for the impact on the individual policyholder fund. A higher effective tax rate on the gains of CFCs may have an adverse impact on savings by South African individual policyholders.

IV. Effective date

The amendments will come into operation on 1 January 2021 and apply in respect of dividends received or accrued to any controlled foreign company and in respect of the disposal of shares in controlled foreign companies on or after that date.

5.5 TAXATION OF THE TRANSFER OF LISTED SECURITIES TO AN OFFSHORE EXCHANGE

[Applicable provision: New section 9K of the Act]

I. Background

Under the current exchange control rules, a resident individual or company that owns a listed domestic security is not permitted to migrate that listed security abroad to an exchange outside

South Africa without prior approval from the SARB. This approval requirement before the transfer of a listed domestic security is imposed and administered by the financial surveillance department of SARB. The financial surveillance department of SARB has an emigration form called MP336(b) that needs to filled by any person who wants to emigrate from South Africa, for exchange control purposes, upon receipt of that person of a SARS Tax Clearance Certificate for emigration. This emigration form also requires the person emigrating from South Africa to include any JSE listed security that person holds that will be migrated to any exchange outside South Africa.

In general, for the financial surveillance department of SARB to approve the transfer of the securities, the following procedure needs to be met:

- an account of that person migrating needs to be opened with the exchange that is outside South Africa (exchange where securities are migrating to);
- the shares currently held on the JSE register will have to be re-materialised and removed from JSE register;
- the security, in physical form, will have to be endorsed “non-resident” by the Authorised Dealer; and

thereafter, the security will be dematerialised directly to that person’s account on the exchange that is outside South Africa

II. Reasons for change

As indicated in Annexure E of the 2020 *Budget Review,* Government proposes to review the current exchange control rules to be replaced by implementing a new capital flow management framework that is aimed at promoting investment, reducing unnecessary burdensome approvals by SARB and providing a modern, transparent and risk-based approvals framework for cross-border flows. One of the changes to the current exchange control rules is the phasing out of the approval requirement by SARB when a resident individual or company that owns a listed domestic security is exporting that listed domestic security abroad.

III. Proposal

In order to ensure efficient application of the law, it is proposed that changes be made in the tax legislation by introducing a new rule that triggers a deemed disposal and reacquisition of a security when a domestic listed security is removed by a South African resident natural person or a trust from the JSE register and is listed on an exchange that is outside South Africa. In addition, if a person holding the security remains a South African tax resident, such person will be liable for income tax on further gains when the security is subsequently sold.

IV. Effective date

The amendments will come into operation on 1 March 2021 and apply in respect of any security listed on an exchange outside of South Africa on or after that date.

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6. VALUE ADDED TAX

6.1 REVIEWING THE VAT ACCOUNTING BASIS OPTION AVAILABLE FOR AN INTERMEDIARY

[Applicable provision: Sections 15(2)(*a*)(vii) and 54(2B) of the Value-Added Tax Act No. 89 of 1991 ("the VAT Act")]

I. Background

In 2018, amendments were made to the Regulations Prescribing Electronic Services. The main aim of the amendments to the Regulations was to widen the scope of the Regulations to apply to all "services" as defined in the VAT Act that are provided by means of an electronic agent, electronic communication or the internet for any consideration. Consequently, changes were made to section 54 of the VAT Act by introducing subsection (2B) which makes provision for certain supplies made by an underlying foreign electronic service supplier to be deemed to be made by the intermediary, who is then required to levy and account for South African VAT on these supplies. Further, section 15(2)(*a*)(vii) of the VAT Act permits vendors that are foreign electronic service suppliers to apply to the Commissioner of SARS ("the Commissioner") to account for VAT on a payments basis. In terms of the payments basis of accounting for output and input tax credits, the vendor will account for output tax only when payments are actually received (as opposed to when an invoice is issued). On the other hand, such vendor will only be entitled to input tax credits when payment is made (as opposed to when an invoice is received).

II. Reasons for change

At issue is the fact that section 15(2)(*a*)(vii) of the VAT Act which allows a vendor that is a foreign electronic service supplier to apply to the Commissioner to account for VAT on a payment basis does not however, allow a vendor that is an intermediary to account for VAT on the same payment basis. This creates an inconsistency in the VAT treatment in respect of suppliers of the same services, namely, foreign electronic services.

III. Proposal

In order to address this, it is proposed that changes be made in section 15(2)(*a*)(vii) to permit vendors that are deemed as suppliers for purposes of supplying foreign electronic services in terms of section 54(2B) to apply to the Commissioner to register for VAT on the payments basis.

IV. Effective date

The amendments will come into operation on 1 April 2021.

6.2 CHANGING THE VAT TREATMENT OF TRANSACTIONS UNDER THE CORPORATE REORGANISATION RULES

[Applicable provision: Sections 8(25) and 11(1)(*e*) of the VAT Act]

I. Background

Section 8(25) of the VAT Act makes provision for VAT relief during corporate reorganisation transactions between companies that form part of the same group of companies. This is achieved by treating the supplier and the recipient of the goods or services as the same person, provided that the relevant rollover relief provisions of the Income Tax Act are met. The proviso to section

8(25) of the VAT Act states that with respect to supplies between group companies contemplated in sections 42 (asset for share transactions - company formations) or section 45 (intragroup transaction) of the Income Tax Act, the VAT relief is only available if the transfer relates to the transfer of an enterprise, or part of an enterprise capable of separate operation, as a going concern.

In turn, section 11(1)(*e*) of the VAT Act dealing with zero rating of certain supplies makes provision for the supply of an enterprise or part of an enterprise capable of separate operation to be subject to VAT at the zero rate, provided that certain requirements are met. In order for the supply of a going concern to qualify as a zero-rated supply in terms of section 11(1)(*e*) of the VAT Act as clarified by SARS Interpretation Note 57 (dated 31 March 2010), the following requirements must be met:

- The seller and purchaser must be registered vendors.
- The supply must consist of an enterprise or part of an enterprise which is capable of separate operation.
- The parties must agree in writing that the supply is a going concern.
- The seller and purchaser must, at the conclusion of the agreement, agree in writing that the enterprise will be an income-earning activity on the date of transfer thereof.
- The assets necessary for carrying on the enterprise must be disposed of to the purchaser.
- The parties must agree in writing that the consideration for the supply includes VAT at the zero rate.

II. Reasons for change

At issue is that the relevant Income Tax roll over relief provisions may not apply to the transfer of certain assets and hence that transfer will also not qualify for the VAT relief, even though the assets form part of the entire transaction. For example, Group Company A wishes to transfer an entire going concern to Group Company B. However, some of the assets being transferred do not qualify for the section 45 roll over relief of the Income Tax Act due to the base costs of those assets exceeding their market value. As a consequence of this, the VAT relief provided for in section 8(25) will also not apply, rendering the supply of those assets subject to VAT at the standard rate. The assets on their own do not constitute the transfer of a going concern or part thereof capable of separate operation.

This limitation of relief creates unintended consequences for VAT. The entire transaction could qualify for VAT relief under the going concern provisions of section 11(1)(*e*) of the VAT Act but are excluded because the transaction falls within the ambit of the corporate reorganisation rules, which automatically require that the provisions of section 8(25) of the VAT Act apply.

III. Proposal

In order to address this limitation, it is proposed that amendments be made to section 8(25) of the VAT Act. It is proposed that vendors be permitted to elect to agree in writing that the provisions of section 8(25) of the VAT Act will not apply to the transfers contemplated in section 42 or 45 of the Income Tax Act, and instead the provisions of sections (7) and 11(1)(*e*) of the VAT Act will be applicable to the transfer between the group companies.

IV. Effective date

The amendments will come into operation on 1 April 2021.

6.3 CLARIFYING THE VAT TREATMENT OF IRRECOVERABLE DEBTS

[Applicable provision: Proviso (ii) to section 22(3) of the VAT Act]

I. Background

Vendors that account for VAT on the invoice basis generally claim input tax credits in the tax period in which a valid tax invoice was received, irrespective of whether payment was actually made or not. Payments for such supplies may be due at a later date or be payable over a period of time. The input tax credit claimed would be on the full VAT payable in terms of that tax invoice.

In turn, section 22(3) of the VAT Act provides that where such payment is not made in full within a period of 12 months after the expiry of the tax period in which the deduction was made, the vendor that claimed the input tax credit is required to make an adjustment in the VAT return whereby the vendor declares output tax to SARS calculated on the unpaid amount. Further, proviso (ii) to section 22(3) of the VAT Act provides that where such a vendor is sequestrated, declared insolvent, enters into a compromise in terms of section 155 of the Companies Act, 2008 (typically business rescue scenarios) or ceases to be a vendor, the vendor must within 12 months after the expiry of the period in which a deduction was made, declare the output tax on the unpaid amount at the time of occurrence of the sequestration, declaration of insolvency or compromise arrangement, or immediately before ceasing to be a vendor.

II. Reasons for change

The current provisions of the VAT Act provide clarity on the time of supply within which such output tax is to be declared. However, where proviso (ii) to section 22(3) applies, there is uncertainty regarding the application of the value of supply rule as it seems to indicate that the value of the output tax payable is equal to the unpaid amount. This is against the intention of the legislation as the intention was that the output tax be calculated by applying the tax fraction to the unpaid amount.

III. Proposal

In order to remedy the anomaly, it is proposed that the provisions of proviso (ii) to section 22(3) be amended to state clearly that the output tax due must be calculated by applying the tax fraction (at the rate applicable when the input tax deduction was made) to the unpaid amount.

IV. Effective date

The amendments will come into operation on 1 April 2021.

6.4 REVIEWING THE SECTION 72 DECISION WITH REGARD TO THE VAT TREATMENT OF TELECOMMUNICATION SERVICES

[Applicable provision: Section 11(2) of the VAT Act]

I. Background

In 2019 changes were made to section 72 of the VAT Act, which provides the Commissioner with the discretionary powers to make arrangements or decisions as to the manner in which the provisions of the VAT Act shall be applied or the calculation or payment of tax or the application of any rate of zero per cent or any exemption from tax provided for in terms of the VAT Act, provided that the Commissioner is satisfied that as a consequence of the manner in which any vendor or class of vendors conducts his, her or their business, trade or occupation, difficulties, anomalies or incongruities have arisen or may arise in regard to the application of the VAT Act. These changes have an impact on the arrangements or decision made in terms of this section before 21 July 2019. One of the arrangements and decisions made in terms of section 72 of the VAT Act before 21 July 2019, which is impacted by these changes refers to the VAT treatment of telecommunication services.

II. Reasons for change

South Africa is a signatory to the International Telecommunications Regulations that were concluded at the World Administrative Telegraph and Telephone Conference, Melbourne 1988 (the Melbourne ITR) as well as the International Telecommunication Regulations that were concluded at the World Conference on International Telecommunication held in Dubai in 2012 (effective 2015) (Dubai ITR). In terms of these ITRs, the SA vendors may only levy VAT on these charges if the customer has a South African billing address. SA vendors supplying roaming and other services to non-resident telecommunications suppliers are thus obliged, in terms of the Dubai ITR, to zero-rate these charges levied to their non-resident counterparts.

The Commissioner had, before 21 July 2019, issued rulings in terms of section 72 of the VAT Act to vendors in the telecommunications industry to zero-rate the charges levied to their non-resident counterparts so as to give effect to the Dubai ITR, in respect of transactions between resident telecommunications service suppliers and non-resident telecommunications services suppliers.

In view of the fact that the 2019 changes to section 72 of the VAT Act imply that all the rulings issued by the Commissioner before 21 July 2019 that relate to the VAT treatment of telecommunication services will no longer be valid after 31 December 2021, at issue is whether these rulings should be discontinued or extended in accordance with the new provisions of section 72 of the VAT Act.

III. Proposal

It is proposed that changes be made in section 11 of the VAT Act dealing with zero ratings and a new subsection be inserted which deals with zero rating of international roaming supplies between resident telecommunications services suppliers and non-resident telecommunications services suppliers in terms of the Dubai ITR Agreement.

IV. Effective date

The amendments will come into operation on 1 April 2021.

6.5 REVIEWING THE SECTION 72 DECISION WITH REGARD TO THE VAT TREATMENT OF CROSS BORDER LEASES OF FOREIGN-OWNED SHIPS, FOREIGN-OWNED AIRCRAFT AND FOREIGN-OWNED ROLLING STOCK FOR USE IN RSA

[Applicable provision: Definition of "enterprise" in section 1(1) of the VAT Act]

I. Background

In 2019 changes were made to section 72 of the VAT Act, which provides the Commissioner with the discretionary powers to make arrangements or decisions as to the manner in which the provisions of the VAT Act shall be applied or the calculation or payment of tax or the application of any rate of zero per cent or any exemption from tax are provided for in terms of the VAT Act, provided that the Commissioner is satisfied that as a consequence of the manner in which any vendor or class of vendors conducts his, her or their business, trade or occupation, difficulties, anomalies or incongruities have arisen or may arise in regard to the application of the VAT Act. These changes have an impact on the arrangements or decisions made in terms of this section before 21 July 2019. One of the arrangements and decision made in terms of section 72 of the VAT Act before 21 July 2019, which is impacted by these changes refers to the VAT treatment of cross border leases of foreign-owned ships, aircraft and rolling stock for use in South Africa.

II. Reasons for change

Section 1(1) of the VAT Act defines an "enterprise" in the case of any vendor, to generally mean any enterprise or activity which is carried on continuously or regularly by any person in or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit. In turn, a "vendor" is defined in section 1(1) of the VAT Act to mean any person who is or is required to be registered for VAT in the Republic.

In instances where foreign-owned ships, aircraft or rolling stock are leased for use in the Republic, and the lessor of such goods has no physical or business presence in the Republic (other than the leased goods), and the lessee is obliged in terms of the lease agreement to import the goods into the Republic, uncertainty existed regarding whether the foreign lessor is conducting an enterprise in the Republic.

In order to address this uncertainty, the Commissioner had, before 21 July 2019, issued rulings in terms of section 72 of the VAT Act to lessors stating that the foreign lessors are not required to register as vendors and requiring the lessee in the Republic to declare and pay the VAT on the importation of the goods, the value of which was determined having regard to the term of the lease agreement in order to ensure that the lessors do not import these goods into the Republic and have no commercial intention to operate in the Republic.

In view of the fact that the 2019 changes to section 72 of the VAT Act imply that all the rulings issued by the Commissioner before 21 July 2019 that relate to the VAT treatment of cross border leases of foreign-owned ships, aircraft and rolling stock for use in South Africa will no longer be valid after 31 December 2021, at issue is whether these rulings should be discontinued or extended in accordance with the new provisions of section 72 of the VAT Act

III. Proposal

In order to address the uncertainty with regard to cross border lease agreements in instances where the lessee imports these goods for use in the Republic and the lessor of such goods is not a resident of the Republic and is not a registered vendor, it is proposed that changes be made in the VAT legislation. It is proposed that the definition of an "enterprise" in section 1(1) of the VAT

Act should be amended to exclude such lessor from the definition of "enterprise" in instances where the lessee imports the following goods, namely, ships, aircraft and rolling stock for use in or partly in the Republic and the lessor of the above-mentioned goods is not a resident of the Republic and is not a registered vendor. That said, further changes should be made to compel the lessee to declare the VAT on the importation of the above-mentioned goods.

IV. Effective date

The amendments will come into operation on 1 April 2021.

6.6 REVIEWING THE SECTION 72 DECISION WITH REGARD TO THE VAT TREATMENT OF THE MANAGEMENT OF SUPERANNUATION SCHEMES

[Applicable provisions: Sections 2(1)(*i*) and 10(22A) of the VAT Act]

I. Background

In 2019 changes were made to section 72 of the VAT Act, which provides the Commissioner with the discretionary powers to make arrangements or decisions as to the manner in which the provisions of the VAT Act shall be applied or the calculation or payment of tax or the application of any rate of zero per cent or any exemption from tax are provided for in terms of the VAT Act, provided that the Commissioner is satisfied that as a consequence of the manner in which any vendor or class of vendors conducts his, her or their business, trade or occupation, difficulties, anomalies or incongruities have arisen or may arise in regard to the application of the VAT Act. These changes have an impact on the arrangements or decisions made in terms of this section before 21 July 2019. One of the arrangements and decision made in terms of section 72 of the VAT Act before 21 July 2019, which is impacted by these changes refers to the VAT treatment of the management of superannuation schemes.

II. Reasons for change

Suppliers of long-term insurance policies, including superannuation schemes generally levy a consolidated charge for both the insurance cover and the fees or commissions charged. In 1996, a special valuation rule was introduced in section 10(22A) of the VAT Act, in order to assist the above-mentioned vendors to determine the value on which to declare the VAT on the fees / commission portion of the supplies. In terms of this section, such vendors are required to use the higher of the cost of making such supply or any consideration for such supply which would be embedded in the premium charged.

The application of the valuation rule available in section 10(22A) of the VAT Act has been challenging, especially to the suppliers of long-term insurance policies, including superannuation schemes that generally levy a consolidated charge for both the insurance cover and the fees or commissions and are also not able to correctly determine the costs involved in managing the superannuation scheme. As a result, the Commissioner had, before 21 July 2019, issued a Binding General Ruling BGR (No. 34) to the industry in terms of section 72 of the VAT Act prescribing a method for the calculation of the cost of making such supplies.

In view of the fact that the 2019 changes to section 72 of the VAT Act imply that all the rulings issued by the Commissioner before 21 July 2019 that relate to the VAT treatment of the management of superannuation schemes will no longer be valid after 31 December 2021, at issue

is whether these rulings should be discontinued or extended in accordance with the new provisions of section 72 of the VAT Act.

III. Proposal

In order to ensure that such vendors do not encounter difficulty in determining the cost of making such supplies, it is proposed that changes be made in the VAT legislation. As such, it is proposed that section 10(22A) of the VAT Act be deleted. This will have the effect that, where there is no fee embedded in the premium charged by the long-term insurer, the entire premium will be exempt under section 2 of the VAT Act. Should a long-term insurer wish to embed a fee in the premium charged, such premium will constitute a consolidated charge and section 10(22) of the VAT Act will be applicable. Section 10(22) requires a vendor to attribute that portion of the consideration received (being a consolidated charge for more than one supply) to the making of taxable supplies as is properly attributable to it. Although the fee / commission part of any superannuation scheme is not separately reflected in any tax invoice, the vendor, in the normal course of business, would still be in a position to determine what this fee amount is.

IV. Effective date

The amendments will come into operation on 1 April 2021.

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7. CUSTOMS AND EXCISE DUTY ACT- EXPORT TAXES

7.1 INTRODUCTION OF EXPORT TAXES ON SCRAP METALS

[Applicable provision: section 48 and Schedules 1, 5, and 8 to the Custom and Excise Act, No. 91 of 1964 (“the Customs and Excise Act”)]

I. Background

On 10 May 2013, the then Minister of Economic Development issued a Trade Policy Directive (“the Directive”), in terms of section 5 of the International Trade Administration Act, No. 71 of 2002 (“the ITA Act”), for International Trade Administration Commission of South Africa (“ITAC”) to regulate the exportation of scrap metal through the introduction of the Price Preference System (PPS). The objective was to improve the availability of better-quality scrap metal at affordable prices for foundries and mills in the domestic market to assist them in becoming more cost competitive as against imports, enhancing investment, jobs and industrialization. The PPS provided that ITAC would not authorise the exportation of scrap metal unless it had first been offered for sale to the domestic consuming industry of scrap metal for a period and at a price discount or other formula determined by ITAC. The PPS was introduced in September 2013 for an initial period of five years, which period ended on 30 September 2018. The PPS has been extended a number of times since then by notices in the government gazette.

II. Reasons for change

The PPS seems not to have provided sufficient support such that the sector can flourish in competition with global counterparts, many of which benefit from an export tax on scrap and lower domestic prices for scrap. The Minister of Trade and Industry therefore directed ITAC, in terms of section 18 of the ITA Act, to investigate and advise him whether it would be appropriate to replace

the existing PPS regulating the exportation of ferrous and non-ferrous waste and scrap metal with an export duty on scrap metal. ITAC conducted its investigation and based on the findings, recommended that the current PPS be replaced with export duties since it has not effectively provided support to the foundries and mills with availability of affordable, quality scrap metal. An export tax is considered to be superior to the PPS in terms of its easy administration and generating funds to assist in its policing. In addition, it should be more effective in reducing the domestic price as it will have the effect of reducing the export price achieved by local scrap dealers unlike the PPS.

III. Proposal

Based on the above, it is proposed that changes be made in the Customs and Excise Act and schedules to the Customs and Excise Act to insert provisions dealing with the introduction of export duties on scrap metals. The specific export duties that are proposed on certain categories of scrap metal are as follows:

Scrap metal category	Ad-valorem duty rate
Stainless steel	15%
Ferrous metals	20%
Aluminium	15%
Red metals	10%
Other (waste and scrap metals)	20%

The export duties on scrap metal proposed would apply to exports to all countries except those countries benefitting from exemptions under trade agreements to which South Africa is a party.

IV. Effective date

The amendments will come into operation on 1 March 2021.

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8. CARBON TAX ACT

8.1 ALIGNING THE CARBON FUEL LEVY ADJUSTMENT WITH THE CARBON TAX ACT

[Applicable provision: Notes to Part 5A of Schedule No. 1 of the Customs and Excise No. 91 of 1964 (“the Customs and Excise Act”)]

I. Background

Carbon Tax Act No. Act 15 of 2019 (“the Carbon Tax Act”) came into effect on 1 June 2019 and is administered by SARS in terms of the Customs and Excise Act. Non-stationary greenhouse gas emissions from petrol and diesel used for road transport are for purposes of the administration of the carbon tax incorporated in the current fuel levy as the carbon fuel levy in terms of the Customs and Excise Act.

II. Reasons for change

To allow for the automatic adjustment to the carbon fuel levy under the Customs and Excise Act when the carbon tax rate changes annually as provided for in Section 5 of the Carbon Tax Act, there is a need to link the Carbon Tax Act and the Customs and Excise Act by amending the Notes to Part 5A of Schedule No. 1 of the Customs and Excise Act. This link would enable SARS to implement automatic adjustments in the Customs and Excise Schedules to enable the carbon fuel levy adjustment from January each year in line with the principal carbon tax rates changes.

III. Proposal

Given that the implementation of the carbon tax on fuel and its collection will be done through the fuel levy mechanism, several administration procedures have been implemented to indicate that the carbon tax will be administered as a separate line item. In terms of Note 6 to Part 5A of Schedule No. 1 of the Customs and Excise Act, the fuel levy consists of the GFL and the carbon fuel levy. The current cents per litre rates of the general fuel levy and carbon fuel levy are specified in Note 7 to the said Part. In order to create the necessary explicit link between the carbon fuel levy rate and the carbon tax rate, it is proposed that these Notes be amended to include the formulas to calculate the carbon fuel levy rates.

IV. Effective date

The amendments will come into operation on 20 January 2021

8.2 ALLOWING A CARBON TAX "PASS THROUGH" FOR THE REGULATED LIQUID FUELS SECTOR

[Applicable provision: Section 6 of the Carbon Tax Act]

I. Background

The Carbon Tax Act which came into effect on 1 June 2019 provides for all direct non-stationary and stationary greenhouse gas (GHG) emissions from diesel and petrol use, implemented through the fuel levy mechanism, to be deducted from the combustion related emissions of a taxpayer. Currently, greenhouse gas emissions from crude oil and synthetic coal-to-liquid and gas-to-liquid refining processes qualify for tax-free allowances up to a maximum of 90 per cent and 95 per cent respectively. Due to the regulated nature of petrol and diesel fuel prices, refineries are unable to recover these carbon tax costs.

II. Reasons for change

The 2013 Carbon Tax Policy Paper recommended a limited, transparent and equitable "pass-through" mechanism for carbon tax costs. In principle, the design of the pass-through mechanism should provide for some of the cost of the carbon tax to be recovered, but a full cost pass-through would not be appropriate as it does not incentivise behaviour change by refineries.

III. Proposal

Taking into account the maximum tax-free allowances for fuel combustion and fugitive emissions, amendments are proposed to allow a limited recovery of the carbon tax costs for regulated fuels.

It is proposed that the cost recovery mechanism applies as a deduction against the carbon tax liability of petroleum refineries.

It is proposed that a new sub-section be inserted in Section 6 of the Carbon Tax Act to allow for the deduction of the carbon tax cost offset against the payable tax for refineries for petrol produced as follows:

X = A – (B x P)

In which formula –

- **“X”** represents the amount to be determined that must not be less than zero;
- **“A”** represents the amount of tax payable in respect of a tax period determined in terms of subsection (1);
- **“B”** represents an amount of 0.1 cents per litre; and
- **“P”** represents the total amount of petrol produced expressed in litres.

IV. Effective date

The amendments are deemed to have come into operation on 1 January 2020.

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9. CLAUSE BY CLAUSE

CLAUSE 1

Estate Duty Act: Amendments to section 3

Sub-clause (a): The proposed amendment seeks to delete paragraph (*b*A) as it is erroneously placed in subsection (2). This paragraph should be placed in subsection (3) with the rest of the provisions dealing with deemed property of the deceased.

Sub-clause (b): The proposed amendment is a consequential amendment which inserts a new paragraph (*e*) in subsection (3) to clarify what constitutes deemed property.

CLAUSE 2

Income Tax Act: Amendments to section 1

Clause 2(1)

Sub-clauses (a) and (b): The definition of “controlled foreign company” - The proposed amendments give effect to the deletion of the definition of “controlled foreign company” after the definition of “controlled group company” and the insertion of the same definition after the definition of “contributed tax capital” to correct the alphabetical order of the definition of “controlled foreign company”.

Sub-clause (c): Definition of “financial instrument” – The proposed amendment to paragraph (*f*) deletes the word “cryptocurrency” and replaces it with “crypto asset” in line with the proposed adoption of a uniform definition of crypto assets within the South African regulatory framework.

Sub-clause (d): Definition of “gross income” – The proposed amendment to paragraph (*m*) refines the definition to make it consistent with the rest of the Act by the deletion of obsolete words “loan or advance” and replacing them with “debt”.

Sub-clause (e): Definition of “living annuity” – The proposed amendment seeks to delete the word “and” at the end of paragraph (*e*) and replaces it with a semi-colon to make way for a new paragraph *(f)*.

Sub-clause (f): Definition of “living annuity” – The proposed amendment inserts a new paragraph *(f)* to the definition of “living annuity” to make provision for the termination of a trust as the word “death” in the definition of “living annuity” is problematic as trusts cannot die, but can only be terminated. Therefore, if the word “die” is only limited to the death of a natural person, there is an anomaly because when trust that was initially nominated as the owner of a living annuity upon the death of the original annuitant is subsequently terminated, such trust is unable to make payments to its nominees. Subsequent to this change, the numbering sequence changes and the previous paragraph *(f)* now becomes paragraph *(g)*.

Sub-clauses (g) and (h): Definition of “pension preservation fund” – The proposed amendment re-arranges this definition and moves paragraph (iii) of this definition, dealing with unclaimed benefits, to paragraph (v).

Sub clause (i): See notes on **WITHDRAWING RETIREMENT FUNDS UPON EMIGRATION**

Sub clause (j): Definition of "provident preservation fund" – The proposed amendment is consequential to the amendment relating to the annuitisation of provident funds.

Sub-clauses (k) to (m): Definition of "provident preservation fund" – The proposed amendment re-arranges this definition and moves paragraph (iii) of this definition, dealing with unclaimed benefits, to paragraph (v).

Sub-clause (n): See notes on **WITHDRAWING RETIREMENT FUNDS UPON EMIGRATION**

Sub-clause (o): Definition of "REIT"- The proposed amendment regarding the inclusion of the word "equity" before a share seeks to clarify the meaning of a share for purposes of the REIT tax dispensation - See notes on **CLARIFYING THE MEANING OF A SHARE IN THE DEFINITION OF REIT.**

The additional proposed amendment to the definition of REIT changes the approval of listing requirements by the appropriate authority under the Financial Markets Act of 2012 in consultation with the Minister of Finance and replaces it with consultation with the Director General of National Treasury in order to ease the administrative burden on the Minister of Finance.

Lastly, a further amendment is proposed to the definition of REIT to bring this definition in line with the Financial Sector Regulation Act of 2017 that established Financial Sector Conduct Authority (FSCA).

Sub-clause (p): See notes **WITHDRAWING RETIREMENT FUNDS UPON EMIGRATION**

Sub-clause (q): Definition of "retirement annuity fund" - The proposed amendment in subsection 1 in paragraph *(b)(x)(dd)(*B) of the proviso to the definition of "retirement annuity fund" replaces a comma after sub-subitem (BB) with a semi colon.

Clause 2(2): This paragraph introduces effective dates for paragraphs (*e*), (*f*), (*g*), (*h*), (i), (j), (k), (l),(m) (n) (p) and (*q*) of amendments to the definitions in section 1 of the Act.

CLAUSE 3

Income Tax Act: Amendments to section 7C

See notes on **ADDRESSING THE CIRCUMVENTION OF ANTI-AVOIDANCE RULES FOR TRUSTS**

CLAUSE 4

Income Tax Act: Amendments to section 8

Sub-clause (*a*): See notes on **REIMBURSING EMPLOYEES FOR BUSINESS TRAVEL**

Sub-clause (b): The proposed amendment is a technical correction to 2019 amendments made to section 8(4)(*k*). This amendment, clarifies that the deemed disposal of assets also applies in instances where a taxpayer commences to hold an asset as trading stock

CLAUSE 5

Income Tax Act: Amendments to section 9

The proposed amendment is a consequential amendment which deletes the words "*attributable to*" a permanent establishment and replaces them with the words "*effectively connected with*" a permanent establishment as a matter of consistency with the rest of the Act and brings the wording in line with the OECD Model Tax Treaty.

CLAUSE 6

Income Tax Act: Amendments to section 9D

See notes on **LIMITING THE APPLICATION OF DIVIDEND AND CAPITAL GAIN EXEMPTIONS IN LOOP STRUCTURES**

CLAUSE 7

Income Tax Act: Amendments to section 9H

See notes on **INTRODUCING AN ANTI-AVOIDANCE PROVISION REGARDING CHANGE OF RESIDENCE**

CLAUSE 8

Income Tax Act: Amendments to section 9J

The proposed amendment in subparagraph (i) in subsection (2)(*b*) of section 9J is a consequential amendment to the amendments made to this section in 2019, regarding the insertion of the provisions dealing with "interest of non-resident property in immovable property that are also available in paragraph 2(1)(*b*) of the Eighth Schedule to the Act and seeks to mirror the wording in paragraph 2(1)(*b*) of the Eighth Schedule to the Act by including the following words after immovable property "*situated in the Republic or any interest or right of whatever nature to or in immovable property situated in the Republic including rights to variable or fixed payments as consideration for the working of, or the right to work mineral deposits, sources and other natural resources in the Republic*".

CLAUSE 9

Income Tax Act: Insertion of new section 9K

See notes on **TAXATION OF THE TRANSFER OF LISTED SECURITIES TO AN OFFSHORE EXCHANGE**

CLAUSE 10

Income Tax Act: Amendments to section 10

Clause 10(1)

Sub-clause (a): The proposed amendment in paragraph (*b*) of the proviso to subsection (1)(*cA*) deletes the words "*of its profits or gains*" and replaces them with the word "*amount*" as a matter of style and consistency. The deleted words were previously consistent with the wording contained in the now repealed Companies Act of 1973. In this regard the proposed amendment achieves alignment with the current Companies Act of 2008.

Sub-clauses (b) and (d): See notes on **ADDRESSING AN ANOMALY IN THE TAX EXEMPTION OF EMPLOYER PROVIDED BURSARIES**

Sub-clause (c): As stated in the Response Document to COVID-19 Tax Bills to the SCoF on 28 July 2020 as well as media statement issued by National Treasury on 31July 2020, National Treasury would consider additional tax proposals which may have less impact on the fiscal framework, such as the tax residency test. In terms of the current provisions of section 10(1)(o)(ii) of the Act, individuals who spent more than 183 days working outside South Africa would have qualified for exemption in respect of their remuneration. However, due to travel bans during the COVID19 pandemic, these individuals could not travel in order to work outside South Africa, and therefore could not qualify for the above-mentioned section 10(1)(o)(ii) exemption.

In order to take into account the lockdown period during the COVID19 pandemic, it is proposed that changes be made in section 10(1)(o)(ii) so that the 66 days that commenced on 27 March 2020 and end on 31 May 2020, when the country operated under COVID19 alert level 5 and 4, should be subtracted from the 183 day threshold rule used to determine the eligibility for exemption of foreign remuneration. In order to qualify for the exemption, the number of days that a person spent working outside South Africa will be reduced to more than 117 days in any 12 month period for years of assessment ending on or after 29 February 2020 but on or before 28 February 2021.

Sub-clause (e): See notes on **REFINING TAX TREATMENT OF FOREIGN DONOR-FUNDED PROJECTS**

Clause 10(2): This paragraph introduces effective dates for sub-clauses (b) to (d) dealing with amendments on **ADDRESSING AN ANOMALY IN THE TAX EXEMPTION OF EMPLOYER PROVIDED BURSARIES** and will come into operation on 1 March 2021 and apply in respect of years of assessment commencing on or after that date.

Clause 10(3): This paragraph introduces an effective date for sub-clause (c) and are deemed to have come into operation on 29 February 2020.

Clause 10(4): This paragraph introduces an effective date for sub-clause (e) dealing with amendments on **REFINING TAX TREATMENT OF FOREIGN DONOR FUNDED PROJECTS.** and will come into operation on 1 January 2007 and apply in respect of years of assessment ending on or after that date.

CLAUSE 11

Income Tax Act: Amendments to section 10B

See notes on **INTRODUCING AN ANTI-AVOIDANCE PROVISION REGARDING TAXATION OF FOREIGN DIVIDENDS RECEIVED BY RESIDENTS**

CLAUSE 12

Income Tax Act: Amendments to section 10C

Clause 12(1)

Sub-clause (a): The proposed amendment in subsection 1 of the definition of “qualifying annuity” deletes the word “or” after paragraph (*c*) to make provision for the replacement of the current paragraph (*d*) with a new paragraph (*d*) and insertion of new paragraph (*e*) and aligns the provision of this section with consequential amendments relating to the annuitisation of provident funds.

Sub-clause (b): The proposed amendment in subsection 1 of the definition of “qualifying annuity” replaces the current paragraph (*d*) with a new paragraph (*d*) which reads as follows: “*as contemplated in paragraph (b)(iv) of the proviso to the definition of “provident fund”. P*aragraph (*b*)(iv) of the proviso to the definition of “provident fund” is a new paragraph which is consequential to the amendments relating to the annuitisation of provident funds.

Sub-clause (c): The proposed amendment in subsection 1 of the definition of “qualifying annuity” inserts a new paragraph (*e*) which reads as follows: “*as contemplated in paragraph (e) of the proviso to the definition of “provident preservation fund”. Paragraph (e) of the definition of* “provident preservation fund*”* is a new paragraph which is consequential to the amendments relating to the annuitisation of provident funds.

Sub-clause (d): See note on **CLARIFYING DEDUCTIONS IN RESPECT OF CONTRIBUTIONS TO RETIREMENT FUNDS**

Clause 12(2): This paragraph introduces an effective date for sub-clauses (b) and (c) and will come into operation on 1 March 2021.

CLAUSE 13

Income Tax Act: Amendments to section 11

Sub-clauses (a) – (c): See notes on **CLARIFYING THE TAX TREATMENT OF DOUBTFUL DEBT FOR TAXPAYERS CONDUCTING LEASING BUSINESS AND APPLYING IFRS 9 FOR FINANCIAL REPORTING**

Sub-clause (d): See notes on **CLARIFYING THE TAX TREATMENT OF SECURED NON IFRS 9 DOUBTFUL DEBT**

Sub-clause (e): See notes on **CLARIFYING THE TAX TREATMENT OF DOUBTFUL DEBT IN RESPECT OF CERTAIN IMPAIRMENTS FOR BANKING REGULATED TAXPAYERS**

Sub-clause (f): See notes on **CLARIFYING THE TAX TREATMENT OF DOUBTFUL DEBT FOR TAXPAYERS CONDUCTING LEASING BUSINESS AND APPLYING IFRS 9 FOR FINANCIAL REPORTING**

CLAUSE 14

Income Tax Act: Amendments to section 12C

The proposed amendment deletes an incorrect reference to a Government Grant, namely *"Automotive Incentive Scheme* "administered by the Department of Trade and Industry and listed in the Eleventh Schedule of the Act. This deletion in this paragraph is replaced by the correct reference to a Government grant, namely "*Automotive Investment Scheme".*

CLAUSE 15

Income Tax Act: Amendments to section 12DA

In Chapter 4 of the 2020 *Budget Review*, Government indicated that it would undertake a review of various tax incentives in order to determine their effectiveness and eligibility for extension. It was further indicated that some tax incentives, that currently do not have sunset dates, will be made subject to a sunset date of 28 February 2022 which would be extended subject to the aforementioned review. This amendment to section 12DA of the Act dealing with "*deduction in respect of rolling stock"* provides that the allowances under section 12DA will be available in respect of assets brought into use in the taxpayer's trade in any year of assessment ending on or before 28 February 2022. As a result, where an asset is brought into use as contemplated under section 12DA by 28 February 2022, taxpayers will be able to claim allowances on the cost incurred in respect of such an asset over a 5-year period.

CLAUSE 16

Income Tax Act: Amendments to section 12F

In Chapter 4 of the 2020 *Budget Review*, Government indicated that it would undertake a review of various tax incentives in order to determine their effectiveness and eligibility for extension. It was further indicated that some tax incentives, that currently do not have sunset dates, will be made subject to a sunset date of 28 February 2022 which would be extended subject to the aforementioned review. This amendment to section 12F of the Act dealing with "*deduction in respect of airport and port assets*" provides that the allowances under section 12F will be available in respect of assets brought into use in the taxpayer's trade in any year of assessment ending on or before 28 February 2022. As a result, where an asset is brought into use as contemplated in section 12F, taxpayers will be able to claim allowances on the cost incurred in respect of such an asset over a 20-year period

CLAUSE 17

Income Tax Act: Amendments to section 12J

See notes on **CLARIFYING ADMINISTRATIVE PROVISIONS OF VENTURE CAPITAL COMPANY TAX INCENTIVE REGIME**

CLAUSE 18

Income Tax Act: Amendments to section 12R

See notes on **REVIEWING THE SUNSET DATE OF THE SPECIAL ECONOMIC ZONE TAX INCENTIVE REGIME**

CLAUSE 19

Income Tax Act: Amendments to section 12S

See notes on **REVIEWING THE SUNSET DATE OF THE SPECIAL ECONOMIC ZONE TAX INCENTIVE REGIME**

CLAUSE 20

Income Tax Act: Amendments to section 13*quat*

The proposed amendment to section 13*quat* of the Act dealing with "*deduction in respect of certain erection or improvement of buildings in urban development zones*" extends the sunset date of this incentive from 31 March 2020 to 31 March 2021 as contemplated in Chapter 4 of the 2020 *Budget Review*.

CLAUSE 21

Income Tax Act: Amendments to section 13*sept*

In Chapter 4 of the 2020 *Budget Review*, Government indicated that it would undertake a review of various tax incentives in order to determine their effectiveness and eligibility for extension. It was further indicated that some tax incentives that currently do not have sunset dates, will be made subject to a sunset date of 28 February 2022 which would be extended subject to the aforementioned review. This amendment to section 13*sept* of the Act dealing with "*deduction in respect of sale of low cost residential units on loan account*" introduces a sunset date of 28 February 2022 as proposed in the 2020 *Budget Review*.

CLAUSE 22

Income Tax Act: Amendments to section 18A

The proposed amendment in subsection (3A)*(c)* is a technical correction which deletes the word "it" and replaces it with the words "the immovable property" to provide clarity in that subsection.

CLAUSE 23

Income Tax Act: Amendments to section 20A

The proposed amendment to subsection (2)*(b)* deletes the word "cryptocurrency" and replaces it with "crypto asset" in line with the proposed adoption of a uniform definition of crypto assets within the South African regulatory framework.

CLAUSE 24

Income Tax Act: Amendments to section 23

See notes on **REVIEWING THE INTERACTION BETWEEN RULES FOR THE TAXATION OF BENEFITS RECEIVED BY SHORT-TERM INSURANCE POLICYHOLDERS AND THE TAX TREATMENT OF RELATED EXPENSES**

CLAUSE 25

Income Tax Act: Amendments to section 23A

Sub-clause (a): Definition of "affected asset"- The proposed amendment seeks to remove obsolete provisions from the Act.

Sub-clause (b): The proposed amendment seeks to remove an obsolete provision from the Act.

CLAUSE 26

Income Tax Act: Amendment to section 23L

See notes on **REVIEWING THE INTERACTION BETWEEN RULES FOR THE TAXATION OF BENEFITS RECEIVED BY SHORT-TERM INSURANCE POLICYHOLDERS AND THE TAX TREATMENT OF RELATED EXPENSES**

CLAUSE 27

Income Tax Act: Amendments to section 24JB

See notes on **CURBING POTENTIAL TAX AVOIDANCE CAUSED BY DIVIDEND DEDUCTIONS**

CLAUSE 28

Income Tax Act: Amendments to section 25B

Sub-clause (a): The proposed amendment is a technical correction which seeks to correct the heading of this section and replaces the current heading "***Income of trusts and beneficiaries of trusts"*** with the proposed heading "***Taxation of trusts and beneficiaries of trusts*"** in order to provide clarity.

Sub-clause (b): The proposed amendment is a consequential amendment to the proposed amendment in the definition of "living annuity" in section 1 of the Act to make provision for the termination of a trust as the word "death" in the definition of "living annuity" is problematic as trusts cannot die, but can only be terminated. Therefore, if the word "die" is only limited to the death of a natural person, there is an anomaly because a when trust that was initially nominated as the owner of a living annuity upon the death of the original annuitant is subsequently terminated, such trust is unable to make payments to its nominees. In addition, it is a consequential amendment to the proposed amendment regarding the insertion of paragraph 3B of the Second Schedule that makes provision for the amount to be taxable in the trust immediately prior to the date of termination of the trust. Furthermore, some commentators have contended that section 25B(1) also applies to amounts of a capital nature (for example, proceeds on disposal of a capital asset). There is no substance in this contention because the Eighth Schedule contains specific provisions dealing with such amounts, but for the purposes of clarity it is proposed to exclude amounts of a capital nature that are not deemed to be included in gross income from the ambit of section 25B(1).

CLAUSE 29

Income Tax Act: Amendments to section 25BB

Sub-clause (a): See notes on **CLARIFYING THE MEANING OF A SHARE IN THE DEFINITION OF REIT.**

Sub-clause (b): See notes on **AMENDING THE TAXATION OF FOREIGN DIVIDENDS AND FOREIGN GAINS RECEIVED BY REITS**

CLAUSE 30

Income Tax Act: Amendments to section 29A

See notes on **CLARIFYING THE MEANING OF “MARKET VALUE” FOR THE TAXATION OF LONG-TERM INSURERS.**

CLAUSE 31

Income Tax Act: Amendments to section 31

See notes **REFINING THE SCOPE OF THE TRANSFER PRICING RULES APPLYING TO CFCs**

CLAUSE 32

Income Tax Act: Amendments to section 40CA

See notes on **ADDRESSING ANOMALIES ON THE ACQUISITION OF ASSETS IN EXCHANGE FOR DEBT ISSUED**

CLAUSE 33

Income Tax Act: Amendments to section 45

See notes on **REFINING THE INTERACTION BETWEEN THE ANTI-AVOIDANCE PROVISIONS FOR INTRA-GROUP TRANSACTIONS**

CLAUSE 34

Income Tax Act: Amendments to section 46

See notes on **CLARIFYING ROLLOVER RELIEF FOR UNBUNDLING TRANSACTIONS**

CLAUSE 35

Income Tax Act: Amendments to section 64

In 2018, changes were made to the Act for donations which exceeded R30 million to be subject to the donations tax rate of 25 per cent and the effective date was 1 March 2018. The proposed amendment clarifies that aggregation only commences on 1 March 2018.

CLAUSE 36

Income Tax Act: Amendments to section 64D

Clause 36(1): The proposed amendment is a technical correction which seeks to correct the reference effected by section 60 of the Amendment Act 2018 (Act 23 of 2018).

Clause 36(2): The proposed amendment is a technical correction which seeks to correct the reference effected by section 60 of the Amendment Act 2018 (Act 23 of 2018).

CLAUSE 37

Income Tax Act: Amendments to section 64EB

See notes on **ADDRESSING TAX AVOIDANCE INVOLVING LENDING AND COLLATERAL ARRANGEMENT PROVISIONS**

CLAUSE 38

Income Tax Act: Amendments to paragraph 1 of the Second Schedule to the Act

The proposed amendment in the definition of "public sector fund" seeks to insert paragraph *(a)* of the definition of provident fund in that definition in order to align this definition with the consequential amendments relating to the annuitisation of provident funds.

CLAUSE 39

Income Tax Act: Insertion of new paragraph 3B of the Second Schedule to the Act

The proposed insertion of new paragraph 3B of the Second Schedule to the Act makes provision for the amount to be taxable in the trust immediately prior to the date of termination of the trust. It is a consequential amendment to the proposed amendment to the definition of "living annuity" in section 1 of the Act to make provision for the termination of trust because the word "death" in the definition of "living annuity" is problematic as trusts cannot die, but can only be terminated. Therefore, if the word "die" is only limited to the death of a natural person, there is an anomaly because a when trust that was initially nominated as the owner of a living annuity upon the death of the original annuitant is subsequently terminated, such trust is unable to make payments to its nominees. It is also a consequential amendment to section 25B of the Act which deals with the same issue.

CLAUSE 40

Income Tax Act: Amendments to paragraph 5(1)(*a*) of the Second Schedule to the Act

See notes on **CLARIFYING DEDUCTIONS IN RESPECT OF CONTRIBUTIONS TO RETIREMENT FUNDS**

CLAUSE 41

Income Tax Act: Amendments to paragraph 6 of the Second Schedule to the Act

See notes on **CLARIFYING DEDUCTIONS IN RESPECT OF CONTRIBUTIONS TO RETIREMENT FUNDS**

The proposed amendment is consequential to the amendment relating to the annuitisation of provident funds.

CLAUSE 42

Income Tax Act: Amendments to paragraph 6A of the Second Schedule to the Act

The proposed amendment is consequential to the amendment relating to the annuitisation of provident funds.

CLAUSE 43

Income Tax Act: Amendments to paragraph 5 of the Seventh Schedule to the Act

The proposed amendment in subparagraph (3A) of paragraph 5 of the Seventh Schedule is technical in nature and adds the following words "used for residential purpose" in order to align this provision with the original policy intent and to clarify that the limitation of placing a nil value on an asset under this paragraph only applies to immovable property which is used for residential purposes.

CLAUSE 44

Income Tax Act: Amendments to paragraph 11 of the Seventh Schedule to the Act

The proposed amendment subparagraph 4(*c*)(i) of paragraph 11 of the Seventh Schedule is technical in nature and adds the following words "used for residential purpose" in order to align this provision with the original policy intent and to clarify that the limitation of placing a nil value on an asset under this paragraph only applies to immovable property which is used for residential purposes.

CLAUSE 45

Income Tax Act: Amendments to paragraph 2 of the Eighth Schedule to the Act

The proposed amendment in paragraph 2(2)(*a*) of the Eighth Schedule to the Act is a consequential amendment to the amendments made to this section in 2019, regarding insertion of the provisions dealing with "interest of non-resident property in immovable property) that are also available in paragraph 2(1)(*b*) of the Eighth Schedule to the Act and seeks to mirror the wording in paragraph 2(1)(*b*) of the Eighth Schedule to the Act by including the following words after immovable property "*situated in the Republic or any interest or right of whatever nature to or in immovable property situated in the Republic including rights to variable or fixed payments as consideration for the working of, or the right to work mineral deposits, sources and other natural resources in the Republic*".

CLAUSE 46

Income Tax Act: Amendments to paragraph 12 of the Eighth Schedule to the Act

Sub-clauses (a) and (b): The proposed amendment is a technical correction which seeks to delete the superfluous words "and paid" as a matter of style and consistency as these words are no longer used in paragraph 20(1)(*a*).

CLAUSE 47

Income Tax Act: Amendments to paragraph 12A of the Eighth Schedule to the Act

The proposed amendment is a technical correction which inserts a comma after the word 'trading stock' in the body of the subparagraph (2)(*b*), in order to clarify the meaning.

CLAUSE 48

Income Tax Act: Amendment to paragraph 20A of the Eighth Schedule to the Act

The proposed amendment is a technical correction which seeks to delete the superfluous words "and paid" as a matter of style and consistency as these words are no longer used in paragraph 20(1)(*a*).

CLAUSE 49

Income Tax Act: Amendment to paragraph 34 of the Eighth Schedule to the Act

The proposed amendment is a technical correction which seeks to delete the superfluous words "and paid" as a matter of style and consistency as these words are no longer used in paragraph 20(1)(*a*).

CLAUSE 50

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

The proposed amendment is a technical correction which seeks to delete the superfluous words "and paid" as a matter of style and consistency as these words are no longer used in paragraph 20(1)(*a*).

CLAUSE 51

Income Tax Act: Amendments to paragraph 64B of the Eighth Schedule to the Act

See notes on **LIMITING THE APPLICATION OF DIVIDEND AND CAPITAL GAIN EXEMPTIONS IN LOOP STRUCTURES**

CLAUSE 52

Income Tax Act: Amendments to paragraph 80 of the Eighth Schedule to the Act

Sub-clause (a): The proposed amendments seek to deal separately with a capital gain derived by a resident and a non-resident trust which is vested in a resident beneficiary during the same year of assessment in subparagraph (2).

Sub-clause (b): The proposed amendments seek to deal separately with an amount derived by a non-resident trust that would have been a capital gain had the non-resident trust been a resident in new subparagraph (2A).

CLAUSE 53

Income Tax Act: Amendments to paragraph 4 of Part I of the Ninth Schedule to the Act

The proposed amendment in subparagraph (*d*) is a technical correction which seeks to delete the words "public college" in line with the definition available in the Continuing Education and Training Colleges Act, 2006.

CLAUSE 54

Income Tax Act: Amendments to paragraph 3 of Part II of the Ninth Schedule to the Act

Sub-clause (a): The proposed amendment in paragraph (*c*) is a technical correction which seeks to delete the word "Basic" in the Adult Basic Education and Training Act, 2000 in line with the new name of the act which is Adult Education and Training Act, 2000.

Sub-clause (b): The proposed amendment in paragraph (*d*) is a technical correction and seeks to delete the word "Further" and replaces it with "Continuing". The subsequent amendment seeks to

delete the words “public college”. The proposed amendments are in line with the definition available in the Further Education and Training Colleges Act, 2006.

CLAUSE 55

Income Tax Act: Amendments to paragraph 7 of the Tenth Schedule to the Act

The proposed amendment is a technical correction which seeks to delete the superfluous words “and paid” as a matter of style and consistency as these words are no longer in use.

CLAUSE 56

Income Tax Act: Amendments to Eleventh Schedule to the Act

The proposed amendments seek to update the names of government grants, remove obsolete grants from the list and update current grants reflecting their correct names into the Eleventh Schedule.

CLAUSE 57

Customs and Excise Act: Continuation of certain amendments of Schedules

The proposed amendments makes provision for the continuation of certain amendments of Schedules to the Customs and Excise Act.

CLAUSE 58

Customs and Excise Act: Amendments of section 48

See notes on **INTRODUCTION OF EXPORT TAXES ON SCRAP METALS**

CLAUSE 59

Customs and Excise Act: Amendment of section 76

See notes on **INTRODUCTION OF EXPORT TAXES ON SCRAP METALS**

CLAUSE 60

Customs and Excise Act: Amendments of Schedule 1

See notes on **INTRODUCTION OF EXPORT TAXES ON SCRAP METALS** and notes on **ALIGNING THE CARBON FUEL LEVY ADJUSTMENT WITH THE CARBON TAX ACT**

CLAUSE 61

Value Added Tax Act: Amendments to the definition of “enterprise” in section 1(1)

See notes on **REVIEWING THE SECTION 72 DECISION WITH REGARD TO THE VAT TREATMENT OF CROSS BORDER LEASES OF FOREIGN OWNED SHIPS, AIRCRAFT AND OTHER EQUIPMENT FOR USE IN RSA**

CLAUSE 62

Value Added Tax: Amendments to section 8

See notes on **CHANGING THE VAT TREATMENT OF TRANSACTIONS UNDER THE CORPORATE REORGANISATION RULES**

CLAUSE 63

Value Added Tax: Amendment to section 10

See notes on **REVIEWING THE SECTION 72 DECISION WITH REGARD TO THE VAT TREATMENT OF THE MANAGEMENT OF SUPERANNUATION SCHEMES**

CLAUSE 64

Value Added Tax: Amendments to section 11

See notes on **REVIEWING THE SECTION 72 DECISION WITH REGARD TO THE VAT TREATMENT OF TELECOMMUNICATIONS SERVICES**

CLAUSE 65

Value Added Tax: Amendments to section 15

See notes on **REVIEWING THE VAT ACCOUNTING BASIS OPTION AVAILABLE FOR AN INTERMEDIARY**

CLAUSE 66

Value Added Tax: Amendments to section 22

See notes on **CLARIFYING THE VAT TREATMENT OF IRRECOVERABLE DEBTS**

CLAUSE 67

Securities Transfer Tax Act: Amendments to section 1

Sub-clauses (a) and (b): Definition of “lending arrangement”- The proposed amendments correct a grammatical error and changes the word “Listing” to “Listings”.

CLAUSE 68

Securities Transfer Act: Amendments to section 8

See notes on **ALIGNING IMMUNITY FROM TAXATION OF INTERNATIONAL ORGANISATIONS**

CLAUSE 69

Securities Transfer Tax Act: Amendments to section 10

See notes on **ALIGNING IMMUNITY FROM TAXATION OF INTERNATIONAL ORGANISATIONS**

CLAUSE 70

Employment Tax Incentive: Amendment to section 9

See notes on **ADDRESSING AN ANOMALY IN THE ROLLOVER OF AMOUNTS CLAIMABLE UNDER THE EMPLOYMENT TAX INCENTIVE**.

CLAUSE 71

Taxation Laws Amendment Act, 2013: Amendments to section 13

The proposed amendment postpones the effective date of amendments to sections 8F(3)(b)(ii), 8F(3)(c)(ii) and 8F(3)(d) from 1 January 2021 to 1 January 2022.

CLAUSE 72

Taxation Laws Amendment Act, 2013: Amendment to section 15

The proposed amendment postpones the effective date of amendments to sections 8FA(3)(b)(ii), 8FA(3)(c)(ii) and 8FA(3)(d) from 1 January 2021 to 1 January 2022.

CLAUSE 73

Taxation Laws Amendment Act, 2013: Amendment to section 62

The proposed amendment postpones the effective date of amendments to section 23M from 1 January 2021 to 1 January 2022.

CLAUSE 74

Taxation Laws Amendment Act, 2015: Amendment to section 3

The proposed amendments are consequential and relate to the annuitisation of provident funds.

CLAUSE 75

Revenue Laws Amendment Act, 2016: Amendment to section 1

The proposed amendments are consequential and relate to the annuitisation of provident funds.

CLAUSE 76

Taxation Laws Amendment Act, 2017: Amendment to section 39

The proposed amendment seeks to delete paragraph *(c)* and inserts an effective date for this deletion.

CLAUSE 77

Carbon Tax Act: Amendment to section 6

See notes on **ALLOWING A CARBON TAX "PASS-THROUGH" FOR THE REGULATED LIQUID FUELS SECTOR**

CLAUSE 78

Taxation Laws Amendment Act, 2019: Amendment of section 37

The proposed amendment seeks to extend the effective dates relating to the 2019 changes in respect of **REVIEWING OF THE "AFFECTED TRANSACTION" DEFINITION IN THE ARM'S LENGTH TRANSFER PRICING RULES** from 1 January 2021 to 1 January 2022.

CLAUSE 79

Taxation Laws Amendment Act, 2019: Amendment to section 51

The proposed amendment seeks to extend the effective dates for the operation of the provisions dealing with **REVIEWING THE TAX TREATMENT OF SURVIVING SPOUSE PENSIONS** from 1 March 2021 to 1 March 2022.

CLAUSE 80

Short title and commencement