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Dear Ms Mputa and Mr Swart

RE: REQUEST TO REMOVE THE TECHNICAL INCONSISTENCY BETWEEN SECTIONS 64F AND 64FA OF THE INCOME TAX ACT (NO. 58 OF 1962)

The South African Institute of Tax Professionals (“SAIT”) would like to thank National Treasury and SARS for continuously following an open approach in the legislative process through engaging with stakeholders.

Set out below are concerns regarding the exemptions provided by section 64FA for dividends *in specie*. It is respectfully requested that these concerns be remedied through the issuance of an interpretation note and a possible legislative amendment to harmonise the wording throughout the Income Tax Act (No. 58 of 1962) (“ITA”).

1 BACKGROUND

Dividends Tax contains two forms of withholding – one for cash dividends and the second for dividends *in specie*. The withholding systems for both types of liabilities are slightly different with the liability for cash dividends technically falling on the payee; whereas, the liability for dividends *in specie* fall on the payor. The tax liability for dividends *in specie* fall on the payor because these types of dividends cannot easily be split amongst multiple parties (shareholders).

Both sections 64F and 64FA of the ITA were firmly in place when Dividends Tax took effect from 1 April 2012 as part of the split between cash dividends and dividends *in specie*. The goal was to have closely matching exemptions for both forms of dividends. However, the slight wording

differences between both sections mean that the section 64FA exemption for dividends *in specie* may not be effective. The wording of both sections also appears to be somewhat circular.

The Institute's members have raised concerns about the fact that the provision seems unclear as to what must be tested or excluded. It should be remembered that the onus of an exemption is on the taxpayer. In terms of the Tax Administration Act (No. 28 of 2011), the taxpayer must prove the application or entitlement to any exemption.

2 DISCUSSION

2.1 Dividends versus Distributions

The primary source of the problem stems from the inconsistent use of the terms "dividend *in specie*" contained in section 64F and a "distribution of an asset *in specie*" contained in section 64FA.

As stated above, cash dividends are exempt under section 64F. More specifically, to be exempt, any dividend is exempt from tax "to the extent that it does not consist of a dividend *in specie*".

Unfortunately, the exemption for dividends *in specie* is improperly linked with section 64F.

"64FA. Exemption from and reduction of tax in respect of dividends *in specie*.—(1) *Where a company declares and pays a dividend that consists of a distribution of an asset in specie, that dividend is exempt from the dividends tax to the extent that it constitutes a distribution of an asset in specie if—*

(a) the person to whom the payment is made has, by the date of payment of the dividend, submitted to the company—

*(i) a declaration by the beneficial owner in such form as may be prescribed by the Commissioner that the portion of the dividend that constitutes a distribution of an asset in specie would, **if that portion had not constituted a distribution of an asset in specie, have been exempt from the dividends tax in terms of section 64F; and...***

Sections 64F and 64FA do not neatly link. "Dividends *in specie*" fall outside section 64F. However, section 64F technically applies only "to a dividend that consists of a distribution of an asset *in specie*". Why the different wording? A distribution is a wider term than a dividend because a distribution also includes capital distributions. It is submitted that a dividend "*in specie*" essentially means a distribution of asset other than cash. It is questionable whether the term "asset" also really adds anything (note that the term "asset" under the Eighth Schedule to the ITA specifically excludes cash – meaning that the term "asset" could conceivably include

cash under the main ITA). Even if the impact of the two different phrases can be viewed as trivial, why create the confusion in the first place?

2.2 Hypothetical Circularity

The test under section 64FA(a)(i) requires some form of hypothetical test as to whether the dividend qualifies for exemption in terms of section 64F.

The dividend exemption in section 64F seems to apply merely based upon the nature of the taxpayer and only if the amount is not a dividend *in specie*.

On the other hand, section 64FA requires that all the requirements in section 64F must be met. The dichotomy is that section 64FA requires a hypothetical question if the dividend *in specie* is not a dividend *in specie* but rather a dividend, which by definition includes a dividend *in specie*.

This hypothetical test creates unnecessary confusion. Section 64FA should instead apply if the payment is made to the persons listed in paragraphs (a) through (n) of section 64F. This change would eliminate any circularity caused by the present structure.

Thank you for the opportunity to address this technical (but far reaching) issue. Dividends *in specie* are widely utilised and should accordingly not be placed in jeopardy from a tax perspective. Should you have any enquires regarding our submission please do not hesitate to contact us.

Yours sincerely,

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