23 November 2018

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Adele Collins (acollins@sars.gov.za)

RE: ANNEXURE C PROPOSALS FOR BUDGET 2019: PERSONAL TAX

We have attached the comments from the SAIT Personal Tax Technical Work Group on the draft Taxation Laws Amendment Bill pertaining to key Personal Tax issues. We appreciate the opportunity to participate in the process and would welcome further dialogue.

Please do not hesitate to contact us should you need further information.

Yours sincerely

Jaco la Grange

Chair of the Personal Tax Work Group

Enclosures: Annexure C Proposals

SAIT representatives to be invited to National Treasury workshops

ANNEXURE C SUBMISSIONS FOR 2019 BUDGET: PERSONAL TAX

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ANNEXURE C FOR 2018 BUDGET: PERSONAL TAX

1 SECTION 10(1)(o)(ii) OF THE INCOME TAX ACT, NO. 58 OF 1962 (THE ITA) – AMBIT

This submission addresses the ambit of the exemption post the amendment in the **Taxation Laws Amendment Bill**, 2017 (TLAB) to be effective from 1 March 2020.

1.1 The legal nature of the problem

Section 10(1)(o)(ii) of the ITA has been amended with effect from 1 March 2020 to, in addition to all of the current requirements, only apply to exempt remuneration from income tax ''*to the extent to which that remuneration does not exceed one million Rand in respect of a year of assessment*".

It is accepted by most of the industry that the new exemption cap should limit the impact of the amendment for most self-sponsored, lower to middle income South African tax residents who are working abroad in high income tax jurisdictions. E.g. an individual that took a work opportunity abroad, will not have an income tax liability up to the first R1 000 000 in remuneration earned abroad).

Whilst the exemption cap does assist a particular group of taxpayers (self-sponsored, lower to middle income South African tax residents who are working abroad in high income tax jurisdictions), it does not address the concerns of multi-national groups sending employees to South Africa, or using talent from South Africa.

From subsequent analysis, it has become evident that the R1 million exemption will provide little relief for typical employer-sponsored assignees, who are normally provided with a number of assignment specific benefits. These benefits are not geared at enriching said assignees, but rather towards ensuring that they are no better or worse off due to their employer initiated transfer and at providing them with a quality of life equivalent as possible to that which they would have enjoyed at home.

Other than the tax gross-up (e.g. in the case of tax equalisation, which ensures that an assignee is not adversely affected <u>or benefited</u> by host country tax rates / regimes) and cost-of-living allowances, the major fringe benefit that impacts the taxable remuneration of the employer-sponsored assignees significantly, is the provision of residential accommodation. Residential accommodation is often a large part of an international assignee's package, irrespective of whether the assignee will be living in Rwanda or the United Kingdom.

It is notable that the principle of treating residential accommodation as exempt for assignees is at least partially recognised in terms of inbound assignees in paragraph 9(7A) of the Seventh Schedule to the ITA. The current structure and quantum of the exemption will leave the employers (or individuals, where no equalisation applies) materially worse off in situations where commercial reasons dictate the transfer and assignment benefits result in a tax rate charge than which the assignee would have had, had he/she not been so transferred.

Changes to 10(1)(o)(ii)

It been determined by multi-national groups operating in South Africa, that the R1mil exemption will add a significant cost to doing business in South Africa. The following additional concessions/concerns need addressing:

- The section 10(1)(o)(ii) exemption calculation is included as part of the planning of multi-national groups when selecting and establishing individuals in South Africa, and South African tax residents abroad. The volatility of the ZAR increases the risk for multi-national groups to operate in South Africa, and to use talent from South Africa. It is proposed that the exemption be pegged against a more stable foreign currency, especially considering the fact that the salary packages of the majority of individuals will be based in foreign currency.
- Consideration is requested in respect of increasing the exemption cap annually. If the exemption cap is specifically intended to support low to middle income individuals (e.g. nurses and teachers) working abroad, there is an argument that the exemption cap should be increased annually to accommodate annual salary increases.
- One of the biggest benefits while on foreign assignment is employer-provided accommodation. This benefit ordinarily forms part of remuneration in a South African expat context, as well as on inbound assignees. Due to the very high cost of accommodation, this benefit alone could erode the R1mil

exemption. Whilst it is accepted that this benefit may be taxed in the other country and consequently a FTC should be available against this benefit, such a process would put a significant administrative and cashflow burden on the taxpayer and SARS. We propose that employer provided accommodation be excluded from remuneration, in line with many other countries that follow worldwide residence basis of taxation (e.g. the USA has both a salary and a housing exemption for their offshore employment exemption).

1.2 A detailed factual description of the affected transaction

Whilst we appreciate the decision to keep the exemption in place (albeit with a cap), we would wish to motivate in this submission, and through future engagements for further tweaking of the exemption, specifically to also cater for employer-sponsored employees. The intention is to protect South Africa's attractiveness as both a Headquarter destination, as well as for inward bound investment. We do recognise that we would have to present specific facts to motivate any request for further nuancing of the exemption. We are engaging with our members and intend to submit information backing this submission as soon as it becomes available.

1.3 The nature of the business impacted

Employer-sponsored employees that are South African tax residents, and their employers (often multi-national groups).

2 SECTION 10(1)(o)(ii) AND SECTION *6quat* OF THE ITA

This submission addresses the expected increase in applications for a tax credit in terms of section 6*quat* as a result of the amendment of section 10(1)(o)(ii) of the ITA, with effect from 1 March 2020.

2.1 The legal nature of the problem

In future, should a South African tax resident only enjoy limited relief in terms of section 10(1)(o)(ii), they may be eligible to claim a tax credit in terms of section 6*quat* to the extent that the individual paid income tax in the country where the services were rendered.

In addition, where a South African resident is still on a South African payroll during his/her assignment outside South Africa, his/her employer may currently elect not to withhold employees' tax (PAYE) from remuneration that is exempt from South African tax in terms of section 10(1)(o)(ii). However, post the effective date, such employers would need to withhold PAYE from remuneration in excess of the R1 million cap.

Most other jurisdictions require payroll withholding in respect of remuneration that is taxable in that jurisdiction, even if paid from a foreign payroll. Although section 6quat will result in no final double taxation, the individual would clearly be in a negative cash-flow situation should payroll tax withholding take place simultaneously in two jurisdictions. Mitigation can be obtain through a so-called, 'hardship' directive under paragraph 11 of the Fourth Schedule to the ITA, but this is a cumbersome process and reliant on what SARS considers a 'hardship'.

Section 6*quat* has been amended numerous times and considering the expected influx of applications, it is recommended that a comprehensive review be conducted by National Treasury to ensure that the section is fit for purpose.

We also propose that:

- Section 6quat mandates the SARS to issue regulations to deal with the practical difficulties that taxpayers currently experience with the section (e.g. provide proof of taxes paid). The, regulations could for example recognise a foreign payslip as sufficient proof of a final tax liability in a particular country that does not have individual income tax return filing requirements; and
- Paragraph 2(4) of the Fourth Schedule to the ITA be amended to ease the interplay between employees' tax and income tax by allowing an employer to automatically (i.e. without obtaining a hardship directive) take into account any foreign taxes that would qualify under section 6quat as an allowable foreign tax credit in the determination of the employee's 'balance of remuneration'.

2.2 A detailed factual description of the affected transaction

An employee of a South African headquartered multi-national group who works and suffers tax in a foreign jurisdiction should be entitled to a foreign tax credit against its South African employees' tax and income tax liability on the foreign income.

2.3 The nature of the business impacted

Individuals applying for a tax credit in terms of section 6*quat*, and employers applying for a tax directive to apply the 6*quat* tax credit upfront in their payrolls.

3 SECTION 8C OF THE ITA

This submission addresses concerns regarding the treatment of, so-called 'clawback provisions' that are increasingly being included in employer equity incentive and executive reward schemes under section 10(1)(o)(ii) of the ITA.

3.1 A detailed factual description of the affected transaction

For context and to ensure common understanding of terminology used, we have included a detailed description below.

3.1.1 Clawback Provisions

1. In terms of a typical clawback provision, employees will be asked to accept clawback terms as a condition of accepting forward looking share scheme awards. The clawback will be triggered by specific events such as financial misstatement and events that could damage the reputation of the company. Typically, up to say 3 years after the vesting date of shares (or should an investigation not be concluded, an extended period), the company can claw back the equivalent cash value of the shares at the point of their vesting.

2. A clawback is intended to be a post-vesting event, which entitles the employer company to demand an amount in cash from the employee who participated in a share scheme award. The company may not demand the return of the shares that vested.
3. The maximum cash amount equals the value of the shares upon vesting. The company does not claim a higher amount if the value of the shares has increased.

3.1.2 Commercial Necessity of Clawback Provisions

1. Excessive executive remuneration and perverse incentives continue to fuel debate amongst company stakeholders. First the global financial crisis of 2008-9 and more recently the well-publicised corporate scandals raised widespread concern that inappropriate remuneration practices create unacceptable risk-taking and incentivise executives to focus on short-term gains. There is an enlarged focus on the role that executive remuneration plays in increasing the company's risk exposure.
2. In an attempt to curb problematic remuneration arrangements clawback provisions are becoming more prevalent globally in executive share schemes, and especially in schemes offered by listed companies, or those that are part of the financial sector.
3. Put simply, a clawback provision creates an obligation on an employee to repay remuneration to the company that <u>should not have been paid to them</u>, as it was awarded erroneously.1
4. Clawback policies are recommended in most EU jurisdictions, as well as in the UK, and are mandated by legislation in the USA and the Netherlands. The Australian Federal Government has also proposed to amend legislation to provide for an executive remuneration clawback. The South African regulatory framework in relation to director and executive remuneration does not provide for mandatory remuneration clawbacks, but certain guidelines are set out in the King IV Report on Corporate Governance™.
5. Clawbacks serve as a risk management tool:

5.1 Clawbacks are designed to deter executives from pursuing inappropriate strategies that would enable them to benefit from short-term increases in the company's value, but which could potentially undermine the sustainability of the company in the long-term.

[1] Clawback provisions differ from Malus provisions. The latter is a "pre-vesting" risk adjustment tool over executive pay, although the trigger events for malus are often the same as or very similar to those prescribed for clawback.

5.2 Clawbacks may also discourage the manipulation of data by executives in order to increase their bonuses. There are a number of examples of executives who have overstated their companies' financial results by large amounts in order to boost their bonuses and gains from the sale of their shares.

3.2 The legal nature of the problem

3.2.1 General

1. The timing of the vesting of an equity instrument depends on whether the equity instrument is a "restricted" or an "unrestricted equity instrument".
2. In terms of section 8C(3), a restricted equity instrument is deemed to vest at the **earliest** of several events, one of which is when all the restrictions (which result in that equity instrument being a restricted equity instrument) cease to have effect.
3. The other subparagraphs of the definition of "restricted equity instrument" do not apply. In our view, the only paragraph which requires further analysis is paragraph (b)(ii) of the definition of "restricted equity instrument". Paragraph (b)(ii) states that a restricted equity instrument in relation to a taxpayer means an instrument

> *"(b) which is subject to any restriction that could result in the taxpayer—*
> *(i) forfeiting ownership or the right to acquire ownership of that equity instrument otherwise than at market value; or*
> *(ii) being penalised financially in any other manner for not complying with the terms of the agreement for the acquisition of that equity instrument;"*[2]

4. If clawback provisions have the effect of imposing a further restriction in terms of paragraph (b)(ii) of the definition of "restricted equity instrument", this would have an impractical, unbusinesslike or oppressive consequence, as is apparent from the following:

[2] It is important to read paragraph (b)(ii) with paragraph (b)(i). When a Participant is forced to forfeit ownership or the right to acquire ownership of an equity instrument otherwise than at market value he is "penalised financially", it is in this context that one must consider whether the Participant is being penalised "in any other manner" in terms of the clawback provision (for purposes of paragraph (b)(ii)).

4.1 All of the conditions for vesting of the award have been met (both the employment condition and performance conditions). In other words, the Participant has fulfilled the contractual obligations under the scheme rules and acquire the shares. While it is arguable that it is an implied term of the Participant's employment contract that he must not commit fraud or misconduct, this has nothing to do with the provisions of the scheme rules (which is the relevant contract). The contract has been performed. If it had not, the Participant would not have acquired the shares. There is also no desire to cancel the contract.

4.2 From a policy perspective, the existence of "wrongdoing" (intention or misconduct) is typically disregarded when considering whether to apply the clawback provisions. This is in line with clawbacks required in terms of regulations in the US, the EU, the UK, and Australia. In terms of all of the regulatory instruments in these jurisdictions, **the clawbacks could be invoked regardless of whether or not there was wrongdoing on the part of the company or the individuals concerned**.

The Participants are agreeing to pay the clawback amount even where they are not directly to blame (e.g. the head of human resources would be bound by the clawback provisions if the CFO misstates the accounts of the group of companies, despite having no oversight over the preparation of the accounts).

4.3 If the clawback were to impose an additional restriction, shares would vest immediately before the Participant disposed of the shares or immediately before the Participant died (assuming all restrictions are lifted at death) or at the end of the clawback period (when all of the restrictions cease to have effect). Setting aside death, this would mean that a Participant could "cherry pick" a desirable vesting date by disposing of the shares on a day when the share price is most favourable. It would be administratively burdensome for the employer company to keep track of vesting dates in such a scenario.

5. Clawback provisions are not driven by tax structuring considerations. There is no desire to artificially influence the (tax) vesting date, but rather by considerations of executive accountability.

6. Clawback provisions were introduced into foreign legislation and governance codes over the past few years and have only started to make their way into the South African market since about 2016. The legislature cannot have had clawback provisions in mind specifically when drafting paragraph (b)(ii) of the definition of "restricted equity instrument" in 2008.

3.2.2 Proposed Solution

1. It is proposed that section 8C be amended to clarify that a provision in a share incentive scheme entitling an employer company to claw back a cash amount equal to the value of shares on the vesting date due to the occurrence of certain trigger events is not a restriction as contemplated in subparagraph (b)(ii) of the definition of "restricted equity instrument" in section 8C(7).

3.2.3 The nature of the business impacted

All equity or employee retention / reward schemes which seek to impose clawback provisions as part of the terms of the scheme.

4 DEFINITION OF 'RESIDENT' IN SECTION 1 AND SECTION 9H OF THE ITA

This submission addresses concerns regarding the capital gains tax treatment of individuals who ceases South African tax residency in terms of a DTA.

4.1 Legal nature of the problem

The definition of resident in section 1 of the ITA includes the proviso that the term resident "*does not include any person who is deemed to be exclusively a resident of another country for the purposes of the application of any agreement entered into between governments of the Republic and that of that other country for the avoidance of double taxation*."

From the **Explanatory Memorandum on the Exchange Control Amnesty Amendment of Taxation Laws Act, 2003**, it is clear that the intention with the introduction of the proviso was to ensure that a person should no longer be tax resident in South Africa from the date when that person is considered exclusively resident of another country after the application of the residency provisions (including the tie-breaker clause) in a Double Tax Agreement (DTA) and that this determination will happen irrespective of whether a double tax situation actually exists.

In addition, section 9H(2) of the ITA determines that a person must be treated as having disposed of his/her worldwide assets (excluding South African immovable property) on the date immediately before he/she ceased to be a resident for an amount received / accrued equal to the market value of the assets on that date.

The practical effect can be illustrated by the following example:

An individual may be sent on a temporary assignment to another country. If the individual has the firm intention to return to South Africa, he/she remains ordinarily resident in South Africa based on the first part of the tax residency test. However, if South Africa has entered into a DTA with said country, the individual will cease to be a South African tax resident if he/she triggers tax residency in that other country (perhaps based on as little as a 183-day tax residency test, which is quite common) and "fails" the exclusively residency test under the DTA concerned.

In this regard, it is worthwhile to note that the tie-breaker clause may be "failed" if a person does not, e.g. have a permanent home available to him/her in South Africa. Under current international interpretation (embodied in the Commentary to the OECD Model Convention), this result would follow even if the person rented out his/her (owned) property in South Africa whilst on the assignment, and has a (employer rented) property available in the other country during the assignment. Furthermore, it would be theoretically possible to cease and re-acquire South African tax residency in the same year of assessment, e.g. if the person decides to no longer rent out his/her property and the other considerations of the applicable DTA tie-breaker clause points to South Africa as the country of exclusive tax residency.

It is clear that in the case of individuals, the determination of exclusive tax residence under an applicable DTA may be dependent on the vagaries of a person's personal circumstances, and in many cases on circumstances outside of their control. Furthermore, a person may be liable for CGT through the application of the 'deemed disposal' rule of section 9H of the Act, which liability could be substantial and will have to be settled from other income / by selling assets, since the deemed disposal is a "cashless" transaction.

A related aspect is that taxpayers cannot obtain roof of non-residency/breaking tax residency in South Africa. It is contended that taxpayers should be certain that they are non-residents or receive confirmation when they have broken South African tax residency. Currently there is no way for a taxpayer to obtain such confirmation and it is especially relevant for taxpayers who left South Africa before filing their annual tax return in which they are requested to state whether they have broken tax residency during that year of assessment.

4.2 Suggestion

In light of the above, we request that consideration be provided in respect of the following:

- When a person who is ordinarily resident in South Africa, ceases to be a South African tax resident by virtue of being considered exclusively tax resident of another country in terms of the application of the residency provisions of a DTA, the deemed disposal' rule of section 9H of the Act should, at the election of the taxpayer, –
  - Not apply if he/she re-acquires South African tax residency within a specific period, say, 5 years of assessment; but
    - After expiry of the 5-year period, the income tax liability calculated in respect of any capital gains determined by virtue of the section 9H deemed disposal rule will become due and payable; or
    - If the person disposes of an asset (other than immovable property situated in South Africa) during the above-mentioned 5-year period, any income tax liability relating to any capital gains determined by virtue of the section 9H deemed disposal rule in respect of that asset, will become due and payable upon such actual disposal.
  - The election could be made subject to the taxpayer providing security for the due payment of said tax liability.
- To extend the scope of Chapter 7 of the **Tax Administration Act** to allow for SARS to issue certificates of residency or to confirm that a person is no longer a South African tax resident.

5 TAXATION OF SOUTH AFRICAN SOURCED REMUNERATION IN HANDS OF NON-RESIDENTS AND RELATED EXEMPTION UNDER DTAs

This submission addresses practical difficulties regarding the determination of the taxability of South African sourced income in the hands of non-residents who work in South Africa for very short periods of time.

5.1 Legal nature of the problem

In terms of the definition of "gross income" in section 1 of the ITA, non-resident persons are taxable in South Africa on their South African sourced income only.

In the case of individuals, this means that they are taxable in respect of remuneration earned from services rendered in South Africa. South Africa does not have a *de minimis* rule. This means that in the case of short-term assignees, they would in principle be taxable on any remuneration from a South African source. International organisations are increasingly using short-term assignees instead of the traditional long-term assignments, due to the costs involved with the latter approach and as a result of more intelligent and "just-in-time" resourcing of mobile specialists.

A strict source-based approach creates administrative complexities even in circumstances where the taxable income of the particular individuals may be relatively small. The administrative complexities are as follows:

- The individuals mostly remain on the payroll in their home country. Since the South African resident entity normally does not take over the obligation to pay their remuneration, the individuals need to register as provisional taxpayers and submit annual income tax returns.
- Due to the, so-called, "economic employer" approach taken by the South African Revenue Service (SARS) in a Binding Private Ruling (BPR) (BPR085) (issued in June 2010) with regard to the determination of a person's employer for DTA purposes, organisations need to evaluate every short-term assignment in order to establish whether the individual concerned qualify for treaty relief. In our view, the associated administrative costs do not, justify the added revenue earned by the South African *fiscus*.

5.2 Suggestion

We therefore consider that a *de minimis* rule (e.g. 45 days per annum), be introduced exempting remuneration earned by non-resident individuals for services rendered in South Africa.

6 TAXABLE (FRINGE) BENEFITS ON LOW-COST HOUSING/LOANS – FOCUS ON LOW-INCOME NOT LOW-COST HOUSING

This submission addresses concerns regarding the treatment of low-cost housing/loans provided by employers to employees.

6.1 The legal nature of the problem

1. Paragraph 11(4) of the Seventh Schedule to the ITA has been amended with effect from 1 March 2019 to extend the relief from a taxable benefit in the hands of a low income earning employee who is provided with a low or interest free loan for the acquisition of a low cost house, by an employer.
2. The intention to be in support of employers who seek to empower their low income earning employees through homeownership3 which underlies the proposed change, is welcomed. However, we recommend that the requirement that the market value of the immovable property acquired does not exceed R450 000 in relation to the year of assessment during which the property is acquired, be reconsidered in terms of the income earned by the employee as opposed to the market value of the immovable property.
3. This will allow for
   - the variance that affects the market value in different areas;
   - the promotion of ownership of low-income employees that may have savings that they would want to apply, or where they acquire homes with a spouse or family member; and
   - the stimulation of the low-cost housing market where R450 000 does not reflect the current market conditions, i.e. houses more than R450 000 but regarded as low-cost housing nonetheless.

6.2 A detailed factual description of the problem statement

1. Example 1
   - In certain circumstances, specifically in the mining industry, due to the specific area of the immovable property the market value is high due to supply and demand and other factors. It is often found that houses and similar immovable property in rural areas are valued higher due to the scarcity of houses and immovable property. For example, in the Lephalale region, we found that only plots are sold for R450 000 and below. Two-bedroom apartments prices are in the region of R500 000 and above. This requirement will therefore negatively impact employees in rural areas that acquire a property that is valued higher than R450 000.
2. Example 2
   - Furthermore, if the market value exceeds the R450 000 minimally (for example R10 000) the relief of this proposed amendment will not apply, notwithstanding that the other requirements are met.
3. Example 3
   - An employee who inherits or has saved R200 000 seeking an additional R450 000 low or interest free loan for the acquisition of a house with a market value of R650 000 will not qualify for this relief. The employee is forced to buy the house with a market value of R450 000.
4. Example 4
   - A husband and a wife working for a mine, who individually qualify for the low or interest free loan for the acquisition of a house with a market value of R450 000, would not be able to get relief if they combined to get a bigger loan together in order to purchase a property that fits the needs of a big family.
5. The new **Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018** ("Mining Charter") requires companies (i.e. employers) to provide financial assistance for acquisition of housing. We await the release of a further document on 27 +November which will provide an outline of what this proposal will entail.
6. In an effort to retain the benefit for low income earning employees, we agree the remuneration proxy should remain R250 000 (for now, to be increased when market conditions so dictate) however the requirement that the market value of the immovable property acquired not exceed R450 000, should be removed.

7. In addition, the relief could remain to limit to R450 000 and to the extent that a low or interest free loan exceeds R450 000, excess remains a taxable benefit. The likelihood of abuse of this benefit in this regard is minimal as the limitation in terms of affordability will still be a factor.

6.3 The nature of the business(es) impacted.

1. Low-income earning employees with a remuneration proxy not exceeding R250 000 who receive low or interest free loans for the acquisition of residential accommodation.

7 ROLL-OVER RELIEF FOR THE TRANSFER OF ASSETS OUT OF TRUSTS FOLLOWING INTRODUCTION OF SECTION 7C

7.1 The legal nature of the problem

Section 7C became effective from 1 March 2017 to treat the interest foregone on an interest-free or low-interest loan to a trust as a deemed donation by the individual lender/s. The implementation of section 7C has dramatically altered the consequences for taxpayers who hold have sold their assets to trusts on loan account, often as part of their estate planning. Many taxpayers would like to transfer these assets out of the trusts but find the transaction taxes, and particularly the transfer duty, to be prohibitive.

7.2 A detailed factual description of the affected transaction

Many taxpayers have sold their assets to their family trusts, often on interest-free loan account. These assets could include, e.g. commercial properties, residential properties and farms. These taxpayers will now be suffering donations tax at 20% on the deemed donation of the interest foregone (i.e. shortfall before the official rate of interest). Many of these taxpayers would prefer to unwind their trust structures, and sacrifice the estate planning benefit of generation skipping, as section 7C is acting as an effective deterrent.

Over recent years, National Treasury have introduced measures to address the perceived tax abuse of trusts. The Davis Tax Committee have also recommended stricter measures in relation to trusts. We propose the creation of a window of opportunity to allow the transfer of assets out of trusts on a tax neutral basis so that the trusts can be wound-up should be introduced. All taxes, including capital gains tax and dividends tax, and duties, including transfer duty and securities transfer tax, should be considered in this regard.

7.3 The nature of the business impacted

Trusts and taxpayers who have made loans to trusts.

8 SECTION 25 AND THE FINALISATION OF DECEASED ESTATE (PRACTICAL PROBLEM)

8.1 The legal nature of the problem

Where section 25 applies to deaths on or after 1 March 2016, it determines that the deceased estate rather than the heirs are taxable on the post-death income.

SARS interprets this provision to mean that the executor of the deceased estate must continue to submit returns of income for each year of assessment until the liquidation and distribution account (L&D) becomes final. Only thereafter is the post-death income taxable in the hands of the heirs.

While we acknowledge that this might well be the correct interpretation of the law as it stands (as set out in the recently updated interpretation notes 69 and 79), we would like to highlight that it causes significant problems in practice.

8.2 A detailed factual description of the affected transaction

The fact that the estate must account for the income until the L&D becomes final and not only until it is drawn is the concern. The L&D only becomes final when it has lain for inspection without objection for 21 days.

The L&D is drawn as at a point in time and the income arising in the estate up to that point in time is accounted for in that L&D. The L&D includes, as a liability, the estate's liability to SARS for the assessment/s relating to the income accounted for in that L&D.

The L&D is submitted to the Master of the High Court & SARS for audit and, only once the audits are completed and the Master's requirements complied with, does the Master authorise the executor to advertise the account. The 21-day advertising period runs its course and, if no objections are lodged, the L&D becomes final.

If objections are lodged, the dispute/s relating thereto may take a considerable time to be settled, at the end of which, it may be that the objections are not sustained and the L&D only then becomes final. Consequently, significant time passes after the point in time to which the L&D has been drawn and the income accounted for and assessed by SARS to the point in time that the L&D becomes final.

During this time, significant further income frequently arise, which would as per the recent SARS interpretation notes, need to be taxed in the estate. This would require further income tax returns to be submitted & assessed, the liability for which would not have been reflected in the L&D and which, had they been so reflected, may have prompted further objections. In addition, while the revised assessment/s are being finalised, further income would continue to arise which, in turn would require yet further returns & assessments, and so on, ad infinitum.

Therefore, an amendment is requested to the effect that the estate must account for income up to the point in time to which the L&D is drawn not the point in time it becomes final. The income in the estate thereafter should be taxable in the hands of the heirs, perhaps on the basis that it is received directly on their behalf.

8.3 The nature of the business impacted

Deceased estates and their heirs and executors.

Any other – please circulate for comment

South African Institute of Tax Professionals

SAIT REPRESENTATIVES TO BE INVITED TO NATIONAL TREASURY WORKSHOPS

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