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RE: COMMENTS ON THE DISASTER MANAGEMENT TAX RELIEF BILLS AND RELATED MATTERS

INTRODUCTION

The South African Institute of Tax Professionals (SAIT), appreciates the opportunity to comment on the Disaster Management Tax Relief Bill [B 11 - 2020] and the Disaster Management Tax Relief Administration Bill [B 12 - 2020] (the Tax Relief Bills). In this submission, we discuss matters pertaining directly to the Tax Relief Bills that according to the SAIT’s various Work Groups and Industry Forums, must still be addressed. We would appreciate any opportunity to engage further on these matters, and can provide additional information upon request.

Thereafter, we focus on other matters pertaining to COVID-19 that have yet to be addressed by Government, although they have previously been submitted to the National Treasury and SARS for consideration. Where a matter was previously included in a submission, we shall refer to it only briefly, but would gladly provide the full submission for your consideration should you require.

SAIT is mindful that the ability and scope of the fiscus to provide relief in the current economy is extremely limited. We appreciate the dedication and continued effort from our Government, Treasury, and SARS colleagues in protecting and supporting our country and her people during this challenging time.

We acknowledge further that due to the limited time and fiscal room available due to the immediate and devastating effect of the coronavirus, the tax relief granted thus far had to be limited as of necessity. We have though highlighted some examples in this submission of areas where the relief/certainty sought is more administrative than fiscal in nature, and even where policy decisions have to be made, the proposals would not put the fiscus under further strain in the short-term.
COMMENTS ON THE TAX RELIEF BILLS

1. THE EMPLOYMENT TAX INCENTIVE AND ADMINISTRATIVE JUSTICE

1.1 In order to minimise the loss of jobs during the outbreak of COVID-19, Government proposed expanding the Employment Tax Incentive (ETI) programme to ‘eligible employers’ for a limited period of four months, beginning 1 April 2020 and ending on 31 July 2020.

1.2 However, the proposed amendments to the ETI Act changed approximately four (4) times since they were first announced, in the form of Explanatory Notes on COVID 19 Tax measures published by National Treasury on 29 March 2020.

1.3 Due to the changes made in how ETI had to be calculated between the initial version, and the final version of the draft amendments, there are instances where employers have overclaimed ETI in relation to prior months, specifically April and May 2020.

1.4 Employers that have overclaimed ETI based on the initial version of the draft amendments, would like to rectify the matter with SARS. However, unlike the usual circumstances where a late payment is deserving of interest and penalties, in this instance the affected employers would be truly without error – they applied the draft amendments as they stood at the time, at the Government’s behest.

1.5 Since the changes to the draft amendments were beyond the control of the employers, it is our belief that it would not be administratively just to levy interest and penalties where employers claimed ETI for the months of April 2020 and May 2020, provided that they claimed the ETI in accordance with the prevailing draft amendments at the time. However, there are unfortunately no legislative relief currently available that allows SARS to remit the penalties and interest in this case.

1.6 SAIT has had discussions with SARS regarding this matter, and at present SARS is investigating various ways in which employers could possibly be assisted. We trust that the Parliamentary Committees would be in agreement that it would not be appropriate or administratively fair to levy interest and penalties under these circumstances, and that SARS would be supported to assist employers that have made use of the relief provided at the time.

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1 I.e. the amount of ETI available to be claimed changed in the case where the employer paid the employee less than R2 000 (the initial ETI available was calculated at 50% of monthly remuneration plus R750), whilst the ETI available as per the final version is calculated at 87.5% of the monthly remuneration in the first 12 months (starting from 1 April 2020).
2. **POSSIBLE EXTENSION OF 4-MONTHS OF RELIEF**

2.1 It is noted that the relief provided through the deferral of the payment of PAYE, and provisional tax, and the SDL holiday and enhanced ETI, was only meant to last for 4 (four) months.

2.2 However, it is widely acknowledged that South African businesses remain in severe distress. We request consideration on extending the periods of the relief in order to assist those businesses (and their employees) that may still survive the crises.

2.3 In particular, we request that consideration be given to an indefinite deferral of the liability to pay (most if not all) tax types, for any and all taxpayers who are unable to generate any revenue from local sales as a result of the lockdown and/or any related bans. This would include alcohol manufacturers/retailers, tobacco manufacturers/retailers, health clubs (gyms), etc.

2.4 Furthermore, where there exists restricted revenue generation opportunity, we request that consideration be given to tax deferrals to the extent of lost revenue generation.

3. **DIES NON (NO DAYS) FOR TAX ADMINISTRATION PURPOSES**

3.1 The Tax Administration Act, No. 28 of 2011, deals with various tax administrative processes which are subject to specific timelines. the Disaster Management Tax Relief Administration Bill, provides for certain periods to be regarded as *dies non*. It is submitted that given the uncertainty associated with the Covid-19 pandemic and whether our country (and / or provinces) will again move to Alert Level 5, it may be prudent to provide for sufficient flexibility for the *dies non* period to be adjusted without having to return to Parliament to amend the legislation. Given that this is not a money bill, the Minister of Finance could be provided with authority in this regard.
COMMENTS ON ADDITIONAL MEASURES

4. SECTION 12I TAX INCENTIVES

4.1 As part of its approval as Industrial Policy Projects\(^2\), Industrial Projects are required to meet an extensive set of requirements, characterised by compliance with set time frames, such as:

- The period during which qualifying manufacturing assets must be brought into use\(^3\);
- A compliance period for fulfilment of the point scoring requirements\(^4\); and
- The period during which submission of annual progress reports are required\(^5\).

4.2 COVID-19 is likely to have a lasting and detrimental effect on the economy with the depth and length on the economic downturn remaining uncertain. Irrespective of how committed section 12I applicants are to ensure due compliance, and whether they are in the business of producing essential products or not, there is little doubt that the applicants will find it very difficult to meet some of the section 12I compliance requirements, which require active economic activity.

4.3 Approved Industrial Policy Projects in terms of section 12I of the ITA, are required to meet various requirements in terms of its approval. As a result, it is expected that many applicants will find it difficult in the short term as they focus on navigating businesses survival through this period.

4.4 We request that consideration be given to forming a combined task team between the Department of Finance and the Department of Trade, Industry and Competition to investigate ways in which Government can support section 12I applicants through focussing on adjusted compliance requirements, as the applicants in turn focus on finding ways to ensure sustainability of their businesses during these challenging times.

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\(^2\) In terms of section 12I of the Income Tax Act, No. 58 of 1962 (the ITA).
\(^3\) Section 12I(2) of the ITA.
\(^4\) In terms of the points awarded to the projects in terms of section 12I(8), read with section 12I(12)(a)(ii) of the ITA.
\(^5\) In terms of section 12I(11) of the ITA.
5. PLACE OF EFFECTIVE MANAGEMENT AND PERMANENT ESTABLISHMENTS, AND RESIDENCE STATUS

5.1 Due to the impact of lockdown regulations globally, individuals are not able to move freely. In most instances, these individuals continue to work and render services. We request guidance and possible relief in instances where a person or entity’s tax residency changes or where a tax liability is established due to individuals being stuck in a country due to lockdown. There is international precedent regarding these incidences, and we urge the Parliamentary Committees and SARS to investigate the application of the international precedent and policies locally.

6. GLOBALLY MOBILE EMPLOYEES

*Outbound South African workers – section 10(1)(o)(ii) of the ITA*

*Inbound foreign workers – residency issues and provisions of the double taxation agreement*

6.1 We are cognisant of the fact that the Government imposed national lockdown as well as travel bans implemented by various governments worldwide have resulted in many individuals being literally stuck in a country which is not their home.

6.2 The repatriation of South Africans back to South African as well as foreigners in South Africa to their home countries is not within the control of those individuals.

6.3 Policies implemented by the various governments will result in these individuals being physically present in countries for an extended period which could have a direct impact on their tax resident status and the possibility of being liable to such countries’ taxation.

6.4 The following are examples of practical implications for outbound foreign employees grounded here in South Africa by virtue of the national lockdown or other Government intervention necessitated due to COVID-19, where they would otherwise be working elsewhere in the world:

- Those who would be claiming section 10(1)(o)(ii) but cannot return to the country where they were based;
- Those that may trigger tax residence here under physical presence test by virtue of being grounded in South Africa;
- Either of above could also impact taxability of section 8C gains for cross border workers.
6.5 There may also be unintended employment tax-related consequences that might arise as a result of the employee being forced to remain in the host country for an unexpected longer period owing to COVID–19. This could potentially result in unbudgeted additional employment related costs. For example, a detained employee on project work overseas can accidentally exceed 183 days in a country and trigger tax residence status in that country, thereby becoming subjected to all of the issues that accompany that tax residency status.

6.6 It should be noted that certain countries have relaxed their rules around tax residency where it is owing to exceptional circumstances, e.g. COVID-19. Accordingly, it may be the case that where one can prove that the employee would have returned home to South Africa at an earlier date but for the virus outbreak, depending on the country involved, it might be the case that the additional days spent in the foreign country are ignored for tax purposes.

6.7 We understand that many countries (including Australia, Ireland, UK) have confirmed they will be ignoring these days for residence purposes and that the OECD has also stated it will not factor in these days for tax treaty residence purposes.

6.8 We propose that South Africa should similarly adopt this approach otherwise the lack of a consistent approach among tax treaty partners will leave globally mobile employees in an uncertain position where double taxation may just be a reality.

7. CONTRIBUTIONS TO COMMUNITIES BY TAXPAYERS

7.1 In certain instances, companies are providing water and other amenities to disadvantaged communities in order to enable community to be better equipped to deal with the challenges of COVID-19.

7.2 From a tax perspective, the donating taxpayer cannot argue section11(a), nor are they routing the contribution via a public benefit organisation, so there is no possibility of a section 18(A) deduction.

7.3 We request tax relief in the form of a deduction in instances where taxpayers are taking on some of what typically would be government responsibilities (e.g. supply of water).
8. **JOINT LIABILITY FOR EMPLOYEES’ TAX (INDIVIDUAL INCOME TAX)**


8.2 Due to the current crisis, it is expected that the number of employers that fail to pay over to SARS employees' tax withheld from their employees will increase significantly.

8.3 We request a relaxation of paragraph 28 to allow employees to satisfy the ‘burden of proof’ that any amount of employees’ tax has been deducted or withheld by their employer through a payslip provided by the employer, instead of an IRP5 tax certificate, which rarely if ever is issued by the non-compliant employer.

9. **SPECIAL REMUNERATION AS DEFINED IN SECTION 5(9) OF THE ITA**

9.1 The application of section 5(10) of the ITA essentially allows for the treatment of ‘special remuneration’ paid to qualifying individuals as defined in section 5(9) in the same manner as tax on a bonus/annual payment is calculated, e.g. thereby not including the special remuneration in the annualisation calculation for purposes of determining the employees’ tax liability.

9.2 Section 5(9) provides that this beneficial tax dispensation is reserved for mineworkers performing hazardous tasks during any emergency in a mine.

9.3 This process does not relieve the individual from the liability for taxation upon any portion of their taxable income. Therefore, the correct tax is ultimately withheld by the employer.

9.4 We propose that these provisions be extended to all employees of businesses which qualify as essential services as prescribed in the appropriate laws/regulations. This will allow a qualifying employer the flexibility to structure payments to its employees in order to benefit from the dispensation, e.g. where overtime pay is necessitated whether due to limited resources or production demand, this compensation could qualify as ‘special remuneration’. Since ‘special remuneration’ is not added to the monthly remuneration which is then annualised in order to calculate the employees’ tax less employees’ tax is withheld on a monthly basis resulting in a direct cash-flow increase.
10. **HOME OFFICE DEDUCTIONS**

10.1 The need for employees and business owners to work at their private homes was a consequence of the national lockdown. The traditional office working environment has been substituted by an employee’s private home.

10.2 The question of the deductibility or not of expenses incurred in respect of working at home is governed by section 23(b) of the ITA. The proviso to this section allows for a deduction of expenses against a taxpayer’s income based on the ratio of the square metres occupied for trade purposes to the square metres of the premises.

10.3 To assist individual taxpayer’s in bearing the additional costs in respect of working at home such as an escalation in fibre use, 3G/data use, water and electricity etc, the ability to claim home office expenses on assessment of the taxpayer’s income tax return will offer some financial relief.

10.4 We propose that the words to proviso (a) and (b) of section 23(b) of the ITA, namely ‘regularly and exclusively’ and ‘duties are mainly performed’ should be interpreted having consideration only to the period of the national lockdown. This will allow all employees working at home during the national lockdown the ability to claim a tax deduction in respect of home office expenses.

11. **REDUCED SALARIES AND BENEFITS**

11.1 During the lockdown and for some time after that, certain businesses will receive no income yet continue to incur increased overheads. In addition to the normal overheads, COVID-19 related costs now also need to be included, e.g. additional security for empty premises; employees working from home with resultant data and telephone costs, etc.

11.2 The projected impact for some businesses is so severe that they are considering various cost reduction measures to avoid having to lay off staff. One of the measures that a number of business either have, or are considering implementing, is asking high-level employees to sacrifice a certain percentage of their salaries so that the business can save the jobs of the more vulnerable employees.

11.3 It is recommended that a provision similar to section 7B of the ITA be implemented to assist employees that defer part of their salary in order to protect the business and the jobs of their co-workers.
11.4 Temporary relief in respect of company car benefits: Many employees are in receipt of a company car benefit and are duly being taxed. During the lockdown, these employees are not using their company cars for private or business purposes yet they are still being taxed on the private use of the cars. We recommend that temporary relief be considered in terms of which employees are not taxed on the company car fringe benefit for the duration of the lockdown.

CONCLUSION

There remain instances where, through innovative solutions, and team effort, Government and the private sector can partner to address areas where additional relief may be provided to businesses without the fiscus needing to finance the expense. Here we refer to:

- An improved process unlocking the diesel refunds that remain due, and which, as a result of the inability to do physical audits, appear to be stuck in limbo.
- Engagement with the Mining Industry to investigate to possibility of granting limited access (via a loan or a brough-forward payment structure), for mines to borrow up to 30%-40% of the cash balances from their own respective mining rehabilitation trust funds and that these trusts are deemed to have been authorised to make these loans.
- A fast-tracked process for taxpayers to apply for structured payment agreements, and the waiving of penalties for the late payment of taxes due to distress caused by the pandemic.
- Enhances access to retirement funds, such as allowing individuals to access their preserved retirement interest without the punitive rate disincentivising early withdrawal; allowing individuals to further access their preservation funds in cases where they have already taken a lump sum, etc.
- Focussing on locating persons entitled to the so-called unclaimed benefits.

In all of these cases, the fiscus need not be out of pocket. However, the mandate to investigate these options and to drive the interventions is now required. We cannot rest now; the second phase of relief is sorely needed.

End.