South African Institute of Taxation

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3 December 2021

To: The National Treasury
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To: The South African Revenue Service
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Via email: National Treasury (2022AnnexCProp@treasury.gov.za)
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ANNEXURE C PROPOSALS FOR BUDGET 2022: PERSONAL & EMPLOYMENT TAXES

Please find attached hereto the comments from the SAIT Personal and Employment Taxes Technical Work Group for consideration as part of the Budget 2022 Annexure C pertaining to Personal and Employment Taxes and related matters.

We value the opportunity to participate in the legislative process and would welcome further engagement where appropriate.

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

Yours sincerely,

Sait Personal & Employment Taxes Technical Work Group

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1. General comments

All references to legislation are to the Income Tax Act, No. 58 of 1962 (the ITA) unless otherwise indicated.

2021 LEGISLATION

2. APPLYING TAX ON RETIREMENT FUND INTEREST WHEN AN INDIVIDUAL CEASES TO BE A TAX RESIDENT

2.1. This matter was addressed in the draft Response Document based on the hearings by the Standing Committee on Finance in Parliament. It was noted that whilst the introduction of section 9HC during the 2021 legislative cycle, will be withdrawn, further amendments will be considered in the next legislative cycle in order to address the complexities that were raised through the comment cycle. Should there be an intent to continue with the process during the 2022 legislative cycle, we propose that further changes be considered in consultation with the retirement industry with the requisite economic analysis.

2.2. We would like the note the following points as part of the continuing discussion on the amendments affecting the retirement industry.

2.3. The current retirement savings tax incentive regime (predominantly) covers two very different and distinct focus areas:

- On one hand are the ordinary workers saving for their retirement. These workers have very little autonomy in the decision-making process and mostly follow the guidance of their employers. Furthermore, although their retirement savings are in the majority of cases their biggest investment over their lifetime, most often they do not retire with enough savings to sustain them in old age.
- On the other hand are the sophisticated investors that use retirement products as a tax structuring vehicle or as part of their investment portfolio, spreading their investment risk over various asset classes, financial products, etc.

2.4. In the case of the ordinary worker, a simple tax incentive regime would be the most effective since it would ensure that it is cost effective and accessible for workers to understand and buy into. However, in the case of the sophisticated investor, anti-abuse mechanisms are required to ensure that the fiscal spend in the incentive remains justified and progressive.

2.5. The current legislation underpinning the retirement savings tax incentive regime is meant to cater for both of these sets of taxpayers. However, the more complex and fairer the legislation becomes, the less cost-effective and understandable it becomes. We appreciate and support National Treasury trying to find a mid-way point where the provisos and deterrents are balanced against a clear incentive also appropriate for ordinary workers. The WG would welcome further engagement on these and other matters affecting the retirement savings tax incentive regime.

3. STRENGTHENING ANTI-AVOIDANCE RULES IN RESPECT OF LOAN TRANSFERS BETWEEN TRUSTS

3.1. According to the draft Response Document based on the hearings by the Standing Committee on Finance in Parliament, a risk was identified that through the use of low interest bearing or interest free loans between trusts, taxpayers could achieve tax free disinvestments from companies facilitated through loan arrangements.

3.2. We understand that this risk remains of concern to National Treasury and that more specific anti-avoidance measures outside structure of section 7C will be considered in future to target the perceived abuse. Although we note that no specific timeframe has been proposed in respect of prospective amendments, we would request that at that time further clarity be provided to describe the details of the specific schemes or the circumstances which gives rise to this perceived abuse.

2022 LEGISLATION

4. HOME OFFICE AND RELATED MATTERS

4.1. Background

4.1.1. In the 2021 Budget Review, National Treasury indicated that a process of reviewing tax provisions for travel and working from home was being considered.

4.1.2. To this end, it was specifically stated that:

> *"In light of the large-scale migration to working at home over the past year, the National Treasury will review current travel and home office allowances to investigate their efficacy, equity in application, simplicity of use, certainty for taxpayers and compatibility with environmental objectives. In recognition of the potential effect on salary structuring, this will be a multi-year project, starting with consultations during 2021/22."* [Own emphasis]

4.1.3. The statement in the Budget Review was followed by SARS issuing a call for comment on draft interpretation note 28 (Issue 3) (hereinafter "the draft IN"). The draft IN was amended with the view to providing clarity regarding the deductibility of home office expenses incurred by persons in employment or persons holding an office. We have noted that SARS issued an amended version of the draft IN on 15 November 2021 for comment by 14 January 2022.

4.1.4. Under the current position as set out by SARS in its draft IN, very few individuals will qualify to claim a deduction for home office expenses. The specific requirement that a home office be regularly and exclusively used by a taxpayer, is interpreted to exclude the sharing of office space by more than one person in the home, and requires the use of a specific designated room for the purposes of the home office.

4.1.5. Moreover, as per SARS interpretation of the current Legislation, the expenses that may be claimed by individuals are minimal in contrast to the myriad of actual direct expenses that individuals working from home have had to make.

4.2. The legal nature of the problem

4.2.1. Change in working environment requires change in policy and application

4.2.1.1. The strict interpretation and very limited deduction with extremely limiting requirements made sense in an environment where working from home was the exception, and where National Treasury had to guard against abuse.

4.2.1.2. However, the word of work has shifted substantially as a result of COVID-19. Starting during the initial level-five National lock down (27 March 2020 to 31 May 2020), employers encouraged employees who were able to continue working, to do so from their homes. Due to further lock downs, and the continued risk of COVID-19, many employers stayed the course with their employees not returning to traditional office space.

4.2.1.3. In some instances, the shift has proved advantageous for both the employer and employee due to factors such as inter alia increased productivity, travel and office space cost-saving, flexibility, reduced traveling time, etc. Whilst some employers see the shift as an interim solution during the COVID-19 pandemic, others have shifted permanently as a long-term, cost-saving solution to aid in their economic recovery.

4.2.1.4. Form the feedback provided by our members, many employers have adopted a hybrid model where an employee is (a) required to word from home; and (b) only come to the office on certain designated days.

4.2.1.5. Therefore, not only is working from home no longer 'exclusive', it has also become part of the contractual requirements of individuals.

4.2.1.6. The application of the Legislation as it currently reads, has the effect of being an 'elitist' provision; only those taxpayers that have the luxury of maintaining a home office which is exclusively used by one member of the household for purposes of that individual's trade, may claim their expenses.

4.2.1.7. This is not acceptable in the South African context where rooms are shared by more than one person, or where rooms are multi-purpose. Although, to be fair this is not necessarily only the South African context but a world-wide shift away from 'formal' work to 'nomadic' work.

4.2.1.8. That stated, from our perspective, employees who are required to work from home should not be penalised because they do not fit into an historic model that is based on an individual having exclusive use of a formal home office.

4.2.1.9. Other than the general 'exclusivity' requirement, there are number of expenses that also require consideration.

4.2.2. Non-property related expenses

4.2.2.1. The requirements of section 23(b), appear to be mainly focused on home office expenses that are property related. However, property related expenses are not the sole expenses that taxpayers who worked from home typically incur. For example, in addition to property related expenses, taxpayers have also incurred stationery and data/ connectivity related costs whilst working from home. It seems likely that the majority of taxpayers (regardless of their trade) would incur the aforementioned costs.

4.2.2.2. However, the draft IN includes the following statement:

> *"Expenditure such as phone costs (including the monthly charges), stationery, furniture, and computer and communication equipment are not incurred in connection with premises and fall outside of the scope of what is permitted by section 23(b)."*

4.2.3. Insurance costs

4.2.3.1. Insurance costs are generally not claimable. Bond insurance is normally a life insurance product and is specifically prohibited from being deducted, and is most likely capital in nature."

4.2.3.2. Regarding the above statement, there are two types of insurance that a bank may require when a home loan/mortgage bond is granted. The first is homeowner's insurance which covers the homeowner for damage to property caused by fire, floods etc.

4.2.3.3. The second type of insurance that the bank may possibly require is life insurance to cover the outstanding balance on the mortgage bond should the person pass away. However, the bank granting the home loan/mortgage bond may permit the person to arrange their own life insurance.

4.2.4. Fibre installation and subscription

4.2.4.1. It appears from the draft IN that according to SARS' interpretation, the initial costs and monthly subscriptions of fibre installation and other telecommunication expenses are prohibited from being deducted by section 23(m).

4.2.5. Interest on a mortgage bond

4.2.5.1. In the draft Briefing Note accompanying the second version of the draft IN, noted that the draft IN has been updated to address the deductibility of interest incurred in connection with a home office.

4.2.5.2. In short, the view is that the consequence of bond interest being deductible under section 24J(2) and not under section 11(a), is that bond interest incurred in respect of a home office premise is prohibited from deduction by section 23(m). Currently, the law only permits employees to claim a home office expense deduction for interest which is deductible under section 11(a) and, in most cases, the deduction is under section 24J(2) and not section 11(a).

4.2.5.3. SARS states:

> *"To date IN 28 has indicated that bond interest incurred in respect of a home office premise will not be prohibited from deduction. The interpretation discussed above represents a significant change and, accordingly, the updated draft IN 28 is being released for a second round of comment. Comments must be submitted by close of business on 14 January 2022."*

4.2.6. Peripheral matters

4.2.6.1. On the basis that zero-value fringe benefits are generally viewed as work-related services and goods being provided by an employer for use in the office. We recognise that in certain instances, the services may be acquired by the individual for use on their home office. We request that a hybrid approach on fringe benefits be considered in that certain services and/or goods be taxable at zero value irrespective of whether they are provided at the employee's home for work purposes, or at the office, for example data.

4.2.6.2. Due to the increase in remote working options and specifically digital nomads (doing social marketing for large foreign companies), we often see tax non-residents and residents performing their duties in South Africa.

4.2.6.3. The foreign employer often pays an employee a home office allowance. This allowance intends to include the following costs: Office space and equipment at home, interest access and mobile phone cost.

4.3. Proposal

4.3.1. Exclusivity

4.3.1.1. In view of the above, rather than disqualifying taxpayers from claiming home office expenditure, we recommend that National Treasury considers the following amendments in relation to regular and exclusive trade use of an office at home:

4.3.1.2. Viewing a taxpayer who works mainly from home to be using the home office regularly and exclusively for purposes of trade, while they are actually working in the home office during office hours. This will allow limited private use of the home office by other members of the household, after hours or over weekends. Alternatively, National Treasury can consider the use of apportionment on a time or space basis.

4.3.1.3. Permitting taxpayers (e.g. spouses/partners) sharing a home office to each claim a percentage of the allowable expenditure incurred in connection with the premises, assuming that the home office is specifically equipped for the purpose of each taxpayer's trade.

4.3.2. Specific expenses

4.3.2.1. Non-property related expenses: We recommend that the provision "expenses in connection with premises" in section 23(b) of the Act, be extended to include the cost of equipping the home office with the necessary consumables (stationery etc) and running costs (e.g., monthly charges in respect of computer and communication equipment).

4.3.2.2. Insurance: We request clarity regarding whether homeowner's insurance, which a person may be required to take out via the bank granting the home loan, is a deductible expense incurred in connection with the premises in terms of section 23(b).

4.3.2.3. Interest on a bond: In our view this is a regular expense that a person working from home should be allowed to claim, the current legislative interpretation notwithstanding. We request that the Legislation be amended to clarify this policy.

4.3.2.4. Peripheral matters:

- On the basis that zero-value fringe benefits are generally viewed as work-related services and goods being provided by an employer for use in the office. We recognise that in certain instances, the services may be acquired by the individual for use in their home office.

- We request that a hybrid approach on fringe benefits be considered in that certain services and/or goods be taxable at zero value irrespective of whether they are provided at the employee's home for work purposes, or at the office, for example data.
- Moreover, the cost of home office deduction in the 3rd millennium can no longer distinguish between physical costs and connectivity costs. We request that National Treasury consider either allowing for a home office allowance against which current home office deductions and connectivity costs can be deducted, or alternatively recognise and acknowledge the need for connectivity as part of the qualifying home office expenses.

4.3.3. Administration: Paragraph 4.5.4(b) of the draft IN contains the following statements:

> *"Whether or not the employer requires the employee to perform the employment duties mainly at home is not the test"*
>
> *"It is for employees to prove on a balance of probabilities that more than 50% of their duties were performed in the home office".*

4.3.3.1. When an employee works from home, this is typically upon the instruction of their employer. To this end, we recommend for ease of administration that the latter burden of proof may be pre-empted by requiring that the employer must state in the employment agreement that the employee is required to work from home.

5. PROFESSIONAL GLOBAL MOBILITY TAX SERVICES – DISPENSATION

5.1. Background

5.1.1. Global mobility refers to the ability of a business' workforce to seamlessly move from one country to another and continue to thrive and be productive. Most businesses today have mobile workforces, even if the workforce is not necessarily globally mobile.

5.1.2. Globally mobile employees within a workforce, are those workers who have permanent transfers to another country, long-term or short-term assignments in another country, travel often to other countries, or commute to another country regularly.

5.1.3. In order to send an employee into another country for business purposes, the employer must undertake certain research, training, regulatory and administrative arrangements.

5.1.3.1. Culture acclimation: The business trains its global workers about local business practices and interpersonal relationships.

5.1.3.2. Employment law: The business researches and is responsible for local contracts, assignment letters, and local legislative requirements pertaining to the employer-employee relationship.

5.1.3.3. Global talent management: The business has a retention plan and career development program in order to keep the top employees that join the global team within the business, and available for further assignments or transfers.

5.1.3.4. Immigration: The business is responsible for determining whether they can send an employee to a country, and will therefore have to secure all necessary work permits, residence permits, and visas.

5.1.3.5. Income tax and social security obligations: The business is responsible for informing its workers of any tax and social security obligations in both home and host locations should the worker accept an assignment or transfer. In some instances, the business could also take the contractual responsibility of tax-equalising or tax protecting the worker. This means that the business would effectively guarantee a specific outcome in respect of an employee's take-home pay. Typically in instances where a business has risk in that it has tax equalised or tax protected a worker, the business also takes responsibility for the worker's tax compliance obligations. The business in that instance would ensure that the worker's tax compliance obligations are met.

5.1.3.6. Payroll: The business is required to manage the payment of salaries to its global workers, as well as any related payment currency, split or shadow payroll requirements, tax withholding, and reporting requirements

5.1.3.7. Pensions and benefits: The business is required to facilitate the provision of all contractual home and host pensions and benefits.

5.1.3.8. Relocation logistics: The business is responsible for a structured relocation and return program in respect of its global workforce.

5.1.4. A business needs the following resources to work together in order to facilitate the functions listed above: Executives, human resources, administrative leaders, financial team, legal team and a global mobility team.

5.1.5. All of the resources listed above could either be provided in-house to the business, or (other than in the case of the executives) could be out-sourced to third-party professional consultants. In the case where the functions are outsources by the business to a professional consultant, the services would be rendered as per agreement between the business and the professional consultant.

5.1.6. In certain instances, more than one of the functions would be performed by a specific professional consultant.

5.2. The legal nature of the problem

5.2.1. Historically, tax practitioners, employers and other stakeholders were of the view that professional fees incurred in providing '*tax compliance services*' to globally mobile workers (expatriates) were not wholly incurred for private or domestic purposes.

5.2.2. The view was that whilst there was a private element to these services, the majority of the benefit was to employers who could:

- Ensure their foreign nationals were compliant in the country they were working, which would protect the reputation of the company; and
- Where expatriate employees were contractually tax equalised or tax protected, that the company is not paying more or less tax for each expatriate employee than they should have been.

5.2.3. Based on the above, it was the view of most employers, practitioners and stakeholders, that tax services for equalised expatriates would not constitute a free or cheap service as defined in paragraph 2(e) of the Seventh Schedule.

5.2.4. On 6 September 2019 -, the Supreme Court of Appeal's (SCA) delivered judgement in the unreported case of BMW South Africa (Pty) Ltd v C:SARS (BMW Case).

5.2.5. The BMW Case dealt with specific tax compliance services provided to expatriate employees, namely, the registration and de-registration of the expatriates as taxpayers, the preparation and submission of annual income tax returns and review of annual income tax assessments, the preparation of objections to assessments issued by SARS, exit meetings and, if applicable, the submission of provisional tax returns [paragraphs 22 and 23 of the judgement].

5.2.6. The court held that such fees constituted a taxable benefit in terms of paragraphs 2(e) and 10 of the Seventh Schedule.

5.2.7. The court stated that, in terms of the South African statutory tax regime, it remained the responsibility of each employee to register for tax and to submit their tax returns i.e. the employee bore the tax obligation towards SARS [paragraph 12 of the judgement]. The court stated further that all of these services were in relation to the expatriate employees' tax obligations under our tax regime [paragraph 23 of the judgement], and the payments in question were for services that the expatriate employees would otherwise have had to pay for personally [paragraph 24 of the judgement].

5.2.8. However, tax compliance services rendered to expatriate employees in respect of their own tax compliance obligations (being the subject of the BMW Case), must be distinguished from other professional services provided by a professional consultant to an employer in respect of their globally mobile workforce.

5.3. Proposal

5.3.1. <u>Which services are taxable and which are not</u>?

5.3.1.1. Subsequent to the BMW Case, SARS has understandably audited a number of professional consultants in order to ensure that the tax compliance services rendered to employers were in fact taxed as a fringe benefit in the hands of the affected individuals.

5.3.1.2. However, during these audits and in other discussions with SARS it has become apparent that clarity is also required from a legislative point on which professional services form part of the so-called 'tax compliance services' and which are directly for the benefit of the business and therefore do not generate a fringe benefit obligation. Whilst it may seem trite to determine such a distinction as part of legislative interpretation, the environment is complex and as such we request policy guidance and legislative clarity.

5.3.1.3. The main services are listed hereunder. More detailed descriptions can be provided should that be required.

Description of service	Explanation
Tax briefing	Exit/entrance/repatriation briefing providing an overview of the South African tax system and the compliance requirements as well as the company tax policy applicable to the assignee.
	Tax equalised/tax protected
	Not tax equalised/tax protected
E-filing profile move	Transfer between tax practitioners
Registration / de-registration	Individual income tax
	Employees not on payroll
	De-registrations
Provisional tax registration	Individual provisional tax registration, If required
	Registration requirement arises from passive income
	Registration requirement does not arise from passive income
Residency determination	Confirmation of the tax residency status of the individual in South Africa
	Tax equalised/tax protected
	Not tax equalised/tax protected
Provisional tax status determination	**Expat has passive income**
	Expat does not have any passive income
Annual return (ITR12) preparation and submission	Including amendments to returns submitted
	Tax equalised/tax protected
	Not tax equalised/tax protected
Provisional return (IRP6)	Including amendments to returns submitted
	Equalised and tax protected employees
	Not tax equalised/tax protected

Description of service	Explanation
Review of Notice of Assessment (ITA34)	**Tax equalised/tax protected**
	Not tax equalised/tax protected
Submission of supporting documents	
Notice of Objection/Appeal/Request for Reasons	**Tax equalised/tax protected**
	Not tax equalised/tax protected
Request for suspension of payment	**Tax equalised/tax protected**
	Not tax equalised/tax protected
Tax refund/ payment co-ordination	**Tax equalised/tax protected**
	Not tax equalised/tax protected
Verification of bank details	**Tax equalised/tax protected**
	Not tax equalised/tax protected
Tax Clearance Certificate applications	**Tender purposes**
	Foreign investment purposes
Calculations related to assignment policies	Cost Projection, Tax Equalisation, Hypo tax calculation, gross-up, etc.
Outbound expatriate employees	
Foreign tax briefings	
Calculations related to assignment policies	Cost Projection, Tax Equalisation, Hypo tax calculation, gross-up, etc.
Case assessment	
Visa application	Assignee
Visa application	Partner/ spouse/ dependants
Set-up costs	
Employer registrations	
Monthly payroll calculations	
Employer declarations	Monthly and bi-annual i.e. EMP201, EMP501 and IRP5
Directive applications	Lump sum payments, retrenchment, share vesting
Gross-up calculation	Assignees on local payroll that are equalised

5.3.2. Bundled fees

5.3.2.1. As stated above, the BMW Case dealt with fees for tax compliance services provided to and for the benefit of specific expatriate employees. In terms of paragraph 10 of the Seventh Schedule, the taxable value of a service rendered to an employee at the expense of the employer and utilised for the employee's private or domestic purposes must generally be determined as the cost to the employer in rendering such service or having such service rendered, less the amount of any consideration given by the employee in respect of such service.

5.3.2.2. Where the fees for tax compliance services are invoiced separately per expatriate, the cost to the employer for each individual employee can easily be determined. However, where the fees for tax compliance services provided to expatriate employees are invoiced on a global fee basis for a group of expatriates, it must be considered how such global fees should be apportioned between the expatriates on an equitable basis in order to determine the taxable value of the benefit to each expatriate.

5.3.2.3. In practice, the fee structure and the appropriate apportionment methodology would depend on the contractual arrangement between the employer and the tax advisor and the basis on which the tax compliance service fees are charged. The tax affairs of some employees may be more complex than others, and additional tax compliance services may be included in the global fee and not invoiced separately by the professional consultant. This would be negotiated between the employer and the professional consultant.

5.3.2.4. In our view, the apportionment of global tax compliance service fees should be made by employers on a reasonable basis. Depending on the nature of the mandate between the employer and the professional consultant, a reasonable approach may be to apportion the global fee equally between all the expatriate employees in the event that such fees cannot be specifically attributed to specific employees. If there were additional fees which were separately invoiced by the tax advisor in respect of a specific employee, these fees would clearly be attributable to specific expatriate employees.

5.3.2.5. We request that consideration be given to providing an appropriate apportionment or alternatively allowing SARS the discretion to accept a reasonable apportionment of tax compliance service fees as motivated by employers based on the specific circumstances.

6. EXPATRIATES

6.1. The legal nature of the problem

6.1.1. Accommodation

6.1.2. SA tax residents working abroad do not enjoy the same tax exemptions as non-resident immigrant workers in South Africa. Furthermore, the 7th Schedule has not been updated to align with the (now) part inclusion of foreign earned income (being in excess of R1,25m FEIE - foreign earned income exemption).

6.1.3. Currently, non-resident immigrant workers are not taxed on employer-provided accommodation, provided that :

- The employer is physically present in SA for 90 days or less during a tax year (in the case of most treaties, this should be 183 days in any 12 months); and
- The employer has not been present in SA for a period exceeding two years from the date of arrival to perform employment duties. (we note there are other disqualifying criteria not relevant for now).

6.1.4. The above exemption does not apply to SA resident expats working abroad and enjoying the same or similar housing allowance.

6.1.5. The R25 000 per month monetary value for an expat in UAE (where a one-bedroom shared apartment equals R20 000 pm) is unrealistic.

6.1.6. It should be noted that the foreign-based employee also enjoys free flights on the date of relocation and, for say, at least one more family visit.

6.1.7. Where the employer is SA-based, we have found that in fear of PAYE audit, they fully tax the employee on both flights. Clearly, the flight there (relocation) and ultimate return flight is not a benefit. It is an employer instruction if not a bare necessity. Clarity is required to exempt relocation costs, including flights (despite the family not relocating). The family visit is equally not a benefit. If the employee was seconded to the Upington branch, the flight's home for Christmas break is not taxed (by prevailing practise and interpretation of tax law). The minute the employee is seconded to Uganda or, say, the UK, the same flights appear to be deemed taxable, be it by fear or misguided SARS publications.

6.2. Proposal

6.2.1. Tax certainty is requested, and ideally the Schedule 7 should be updated to cover cross-border employment.

6.2.2. In addition, the exempt R1,25m should, by definition, exclude non-taxable fringe benefits such as relocation flights and the first two years of free accommodation. Currently, there is a misperception the R1,25m must be apportioned between all fringe benefits.

7. EMPLOYMENT TAX INCENTIVE (ETI)

7.1. The legal nature of the problem

7.1.1. In our view, the additional proviso to the definition of monthly remuneration does not adequately cater for the abuse of the incentive scheme that National Treasury is trying to curb.

> *" '**monthly remuneration**'—*
>
> *(a) where an employer employs and pays remuneration to a qualifying employee for at least 160 hours in a month, means the amount paid or payable to the qualifying employee by the employer in respect of a month; or;*
>
> *(b) where the employer employs a qualifying employee and pays remuneration to that employee for less than 160 hours in a month, means an amount calculated in terms of section 7(5):*
>
> *Provided that in determining the remuneration paid or payable, an amount other than a cash payment that is due and payable to the employee after having accounted for deductions in terms of section 34(1)(b) of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997), must be disregarded;"*

7.1.2. We note from the above proviso that a payment other than cash (i.e. a benefit in kind) would be disregarded from monthly remuneration. However, this does not deal with the scenario that we encounter, where the cash accrues to the employee and is thereafter ceded by the employee to pay for their training costs. The employee receives no physical cash in their hands. In our view, the cost of training to do their job should be the employer's cost.

7.2. Proposal

7.2.1. We recommend that the legislation be clarified to cater for the scenario described above, where the amount paid to the employee has been ceded by the employee to pay for their training costs. This should not form part of their monthly remuneration and in our view the employer should not be entitled to claim the ETI in this scenario.

8. DEDUCTION OF PRE-1 MARCH 2016 PROVIDENT FUND CONTRIBUTIONS AGAINST RETIREMENT FUND LUMP SUM BENEFITS AND RETIREMENT FUND LUMP SUM WITHDRAWAL BENEFITS

8.1. The legal nature of the problem

8.1.1. It has recently come to our attention that in certain instances SARS has not allowed pre-1 March contributions made to a provident fund as a deduction against a retirement fund lump sum when applying for the tax directive. We are not entirely sure about the reason for this approach. However, in reviewing the legislation we have noted an anomaly. We set out the issue below.

8.1.2. There was no deduction for contributions made to provident funds allowed under section 11(k) until 1 March 2016. The deduction of provident fund contributions was added to section 11(k) and came into operation on 1 March 2016. It applied in respect of amounts contributed on or after 1 March 2016.

8.1.3. It was only excess contributions (above the 27,5% or R350k), made after 1 March 2016, that were (added to the other contributions) that could be carried forward and ended up in section 11F.

8.1.4. Until 1 March 2016, paragraphs 5(1)(a) and 6(1)(b)(i) of the Second Schedule to the Act allowed a deduction against any retirement fund lump sum benefit or retirement fund lump sum withdrawal benefit of any contribution that did not rank for a deduction against the person's income in terms of section 11(k) to any pension fund, pension preservation fund, provident fund, provident preservation fund and retirement annuity fund of which he or she is or previously was a member.

8.1.5. Therefore, the employee's own contributions, which did not rank as a deduction prior to 1 March 2016 could have been deducted from the lump sum. With the introduction of section 11F and the deletion of section 11(k) the wording of paragraphs 5(1)(a) and 6(1)(b)(i) of the Second Schedule was amended to refer to section 11F.

8.1.6. Only contributions made after 1 March 2016 did not rank as a deduction against section 11F, which means that the contributions which did not rank as a deduction in terms of section 11(k) should effectively not be allowed as a deduction.

8.1.7. This may be the basis for SARS not allowing the deduction against the lump sum. However, from our understanding of the policy objectives the outcome is unintended since the intention has always been to allow these amounts as a deduction against the lump sum and it was only due to an (apparent) unintended consequence of the change in legislation.

8.2. Nature of the taxpayers impacted

8.2.1. All members of provident funds who made own contributions to the provident fund prior to 1 March 2016

8.3. Proposal

8.3.1. We propose that the wording of paragraphs 5(1)(a) and 6(1)(b)(i) of the Second Schedule and section 10C of the Act be amended to take into account the person's own pre-1 March 2016 contributions to a provident fund in determining the taxable lump sum and taxable annuities.

9. PROVISIONAL TAXES AND EXPATRIATES

9.1. The legal nature of the problem

9.1.1. The provisional tax rules deem any tax resident employed by a foreign employer to be a provisional taxpayer.

9.1.2. Therefore, tax practitioners filed provisional tax returns on behalf of expatriates, and those taxpayers paid the provisional tax (2020) for rental income and (2021) for rental income and foreign earned income in excess of R1,25m. This was correct as per the legislation at the time.

9.1.3. However, SARS issued 2020 and 2021 assessments removing the provisional tax status. There is no credit interest on excess provisional tax, and the taxpayer was sent SMS's informing them that the tax filing deadline is 23 November 2021.

9.1.4. Furthermore, the eFiling system does not allow taxpayers to notify SARS that they are indeed a deemed provisional taxpayer.

9.2. Proposal

9.2.1. Align the eFiling system with tax law. Therefore, once a taxpayer filed provisional tax, allow a system override to force the taxpayer to be viewed as a provisional taxpayer. Although this may seem like a SARS Administrative matter, the question remains whether a legislation amendment is required to ensure that SARS to update as the taxpayer opted or for SARS to have no right to raise underpayment of provisional tax where it has removed the coding.

10. TAA– EXTENSION OF VDP OPTIONS / TECHNICAL CORRECTIONS

10.1. The legal nature of the problem

10.1.1. There is currently no provision in the Tax Administration Act allowing for a mere correction of technically incorrect filing, nor does the Act provide for a resultant reduction in subsequent tax years' returns following the use of the Voluntary Disclosure Programme (VDP). In addition, the request for correction fails whenever verification has been triggered or where a consistency check is being completed – (this is currently happening in the case of VAT returns but it is a matter of time before the same happens in other taxes).

10.1.2. Example 1

10.1.2.1. The taxpayer discovers that they should have tax emigrated in the 2015 tax year, and the exit tax (section 9H) totals R15 000. The VDP process allows for the correction and tax to be paid (including interest).

10.1.2.2. In the 2016 to 2020 tax years, the taxpayer incorrectly claimed interpretation note 16 (Section 10(1)(0)(ii) exemption in respect of foreign earned remuneration—SA tax as paid on SA rental income, worldwide interest, local and foreign dividends.

10.1.2.3. Following the VDP, the 2016 to 2020 tax assessments should be reduced to claim a treaty position and have foreign interest and foreign dividends exempted.

10.1.2.4. The theoretical refund (since the tax paid incorrectly totals R20 000), i.e. the net loss to the fiscus was Rnil.

10.1.2.5. In the 2021 year, the assessment was verified. The correction is technical as the question "*Did you cease to be tax resident in current or past tax years*" needs to be answered. Furthermore, the exempt-interest should be moved from taxable code to exempt in terms of a DTA. No additional tax (thus no VDP). Because of the finalised verification and request for correction time rules, a NoO (objection) is forced upon the taxpayer.

10.1.2.6. The 2021 ITR12 needs to align with the Tax Emigration Clearance (TEC) filed in the 2021 calendar year.

10.1.3. Example 2

10.1.3.1. Taxpayers moved to the UK. Their tax residency test is applied on 5 April 2020, and it seems the taxpayer is exclusively UK tax resident as of 6 April 2019. The April 2020 tax return was only due for filing on 31 January 2021. During the 2021 SA tax filing session, we discovered the taxpayer is now deemed tax non-resident as of 6 April 2019.

10.1.3.2. The 2020 ITR12 needs to be corrected as the taxpayer wish to access his SA retirement annuity on or after 1 March 2022 (3-year rule)

10.1.3.3. 2020 ITR12 does not qualify for VDP as the exit gain is below R40 000, and the 2020 interest exemption could result in a refund.

10.1.3.4. The taxpayer is not sensitive about the refund as the UK did not tax him (remittance basis of taxation); therefore, DTA-based exemption fails. The unilateral exemption may apply.

10.1.3.5. SARS N0O team declined the objection filed being late. The reason as listed was provided, but assessors do not understand how HMRC first day of tax residence differs from ours in the no mid-tax year change residency is allowed.

10.2. Proposal

10.2.1. We request that the TAA be expanded to provide for:

- Technical corrections to ensure the default is correctly attended to and brought to SARS' attention.
- VDP to be expanded to allow for a successful VDP application to cover technical corrections despite no additional taxable income/tax liability being applicable.

10.2.1.1. Where VDP is several years in the past, allow the taxpayers to deal with resultant tax years where a tax refund is due. For tax emigrants, the total tax issue is the additional exit tax and a full or net tax position. They often need to do a VDP in their own country to now declare the SARS exempted SA sourced income to their now tax home.

End.