South African Institute of Taxation

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24 November 2023

To: The National Treasury
240 Madiba Street
PRETORIA
0001

The South African Revenue Service
Lehae La SARS,
299 Bronkhorst Street
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Via email: **National Treasury** (2023AnnexCProp@treasury.gov.za)
SARS (acollins@sars.gov.za)

Dear Colleagues,

RE: ANNEXURE C PROPOSALS: SAIT PERSONAL & EMPLOYMENT TAXES TECHNICAL WORK GROUP

We attach the Annexure C proposals from the SAIT Personal & Employment Taxes Technical Work Group (the WG), as it pertains to technical proposals for possible inclusion in Annexure C of the 2024 Budget Review.

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

Unless otherwise indicated, all references to sections of the Income Tax Act, No. 58 of 1962 (the ITA)

1.EMPLOYEES' TAX ISSUES REGARDING THE RECRUITMENT OF NON-RESIDENT EMPLOYEES AND INDEPENDENT CONTRACTORS

[Applicable provisions: Fourth Schedule]

1.1. Background

1.1.1. As part of the 2023 Annexure C legislative cycle, we had previously submitted comments regarding the employees' tax issues surrounding the recruitment of non-resident employees and independent contracts. The below is a reiteration of the comments made in these submissions.

1.2. The legal nature of the problem

1.2.1. In terms of the definition of "gross income" in section 1 of the ITA, non-residents are only subject to tax in South Africa on income, which is from a source within South Africa. Therefore, if the employee does not render any services to the South African employer whilst physically present in South Africa, the remuneration of the employee would not constitute South African sourced income and would therefore not be subject to income tax in South Africa.

1.2.2. In addition, where there is an applicable double taxation agreement (DTA) between South Africa and the country where the employee is tax resident, the income from employment article typically provide that salaries, wages and other remuneration derived by a resident of one contracting state in respect of employment shall be taxable only in that state unless the employment is exercised in the other contracting state. Furthermore, if the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other state.

1.2.3. The result is that under such a DTA provision, South Africa would only have taxing rights in respect of the remuneration of a non-resident individual who is tax resident in a treaty country to the extent such employment is exercised in South Africa. If the employment is not exercised in South Africa, South Africa has no taxing rights in terms of the double taxation agreement.

1.2.4. Despite the analysis above, there has been some interpretation of the legislation which suggests an employer in the scenario sketched above will have an employees' tax obligation. The argument flows from paragraph 2(1) of the Fourth Schedule, every employer who is a resident, who pays or becomes liable to pay any amount by way of remuneration to any employee, shall, unless SARS has granted authority to the contrary, deduct or withhold from that amount by way of employees' tax an amount which shall be determined as provided in the Fourth Schedule in respect of the liability for normal tax of that employee.

1.2.5. However, it is important to note that the definition of "remuneration" means any amount of income, which is paid or is payable to any person by way of any salary, leave pay etc. "Income" is specifically definition in section 1(1) as the amount remaining of the gross income of any person for any year or period of assessment after deducting therefrom any amounts exempt from normal tax under Part I of Chapter II. Since the definition of gross income, as mentioned above, in the case of non-residents only includes income of a South African source, there can be no income and therefore no remuneration, since the definitions build on one another.

1.2.6. However, we note some SARS officials hold the view that there would still be an amount of remuneration and, the South African employer would be obliged to deduct employees' tax from the employee's remuneration despite the fact that the employee has no normal tax liability in South Africa. Despite the above, SARS in practice requires

employers to deduct employees' tax in these circumstances.

1.2.7. It is submitted that the Fourth Schedule should not apply to an individual who has no South African normal tax liability. In our view, enforcing any withholding tax obligation at this point would only result in administrative cost on the side of SARS and the taxpayer and employer.

1.2.8. A similar issue arises for non-resident independent contractors (including non-executive directors) who work exclusively outside South Africa, because they would not qualify for the exclusion from the definition of "remuneration" in the Fourth Schedule since the exclusion only applies to resident independent contractors.

1.3. **A detailed factual description**

1.3.1. A South African employer (Bike Traders) employ an individual (Alitia) that resides and is tax resident in Fiji. Alitia only provides their services in Fiji and does not travel to South Africa.

1.3.2. Despite Alitia not being liable for normal South African tax, SARS would require Bike Traders to deduct employees' tax from Alitia's remuneration.

1.3.3. The only available remedy for Alitia at that point to avoid the deduction of employees' tax would be to obtain a hardship directive from SARS which directs that no employees' tax be deducted from their remuneration in these circumstances.

1.3.4. In order to apply for a hardship directive, Alitia (the non-resident employee) would have to register as a taxpayer with SARS (despite not being legally required to do) and apply for the directive on eFiling.

1.3.5. In the absence of a hardship directive, Alitia (the non-resident employee) would receive an IRP5 tax certificate from Bike Traders and would have to claim a refund from SARS at the end of the year of assessment for the employees' tax that has effectively been overpaid.

(From a practical perspective, there is also no specific IRP5 code which applies to non-taxable remuneration paid to non-residents for services rendered outside South Africa. The IRP5 codes for foreign services only apply to South African residents who work abroad for purposes of claiming the foreign earnings exemption).

1.3.6. The result is that the Alitia (the non-resident employee) would have to register as a taxpayer in South Africa (despite the fact that Alitia has no South African income tax liability) and submit annual income tax returns in order to claim a refund of the employees' tax deducted by Bike Trader (the employer).

1.4. **The nature of the business / persons impacted.**

1.4.1. Non-resident individuals employed by a South African employer but who renders services abroad.

1.5. **Proposal**

1.5.1. We propose that the Fourth Schedule be clarified to confirm that employers need not to deduct employees' tax in circumstances where they employ a non-resident individual who works exclusively outside South Africa on the basis that the relevant employee/contractor does not earn any South African sourced income, i.e., if there is certainty that the employee does not earn any SA sourced income, and additionally, is a non-resident. From our point of view, the proviso/exclusion could be subject to the employer obtaining confirmation from the individual that they are tax resident in a foreign country e.g., a certificate of tax residence or similar for countries where no such document is obtainable.

1.5.2. In the event that the proposal above is accepted, we request that consideration be given to also provide a similar exclusion from the skills development levy ('SDL') and unemployment insurance fund ('UIF') contributions in the relevant legislation. However, it is understood that

any amendment processes pertaining to SDL and UIF would not necessarily run concurrently with the tax legislative cycle.

2. PROVISION OF SECURITY TO KEY EMPLOYEES

[Applicable provisions: Paragraphs 2(e) and 10(2)(c) of the Seventh Schedule]

2.1. Background

2.1.1. As part of the 2023 Annexure C legislative cycle, we had previously submitted comments regarding the treatment of the provision of security to key employees. The below is a reiteration of the comments made in these submissions.

2.2. The legal nature of the problem

2.2.1. Paragraph 2(e) of the Seventh Schedule:

2. For the purposes of this Schedule and of paragraph (i) of the definition of "gross income" in section 1 of this Act, a taxable benefit shall be deemed to have been granted by an employer to his employee in respect of the employee's employment with the employer, if as a benefit or advantage of or by virtue of such employment or as a reward for services rendered or to be rendered by the employee to the employer—

(e) *any service (other than a service to which the provisions of subparagraph (j) or (k) or paragraph 9 (4) (a) apply) has at the expense of the employer been rendered to the employee (whether by the employer or by some other person), where that service has been utilized by the employee for his or her private or domestic purposes and no consideration has been given by the employee to the employer in respect of that service or, if any consideration has been given, the amount thereof is less than the amount of the lowest fare referred to in item (a) of subparagraph (1) of paragraph 10, or the cost referred to in item (b) of that subparagraph, as the case may be; or*

2.2.2. The Seventh Schedule does recognise certain circumstances where 'no

value' provisions are appropriate. Under these circumstances, although there is a fringe benefit, the legislation deems the value of the fringe benefit to be zero for the purposes of that particular transaction.

2.2.3. 'No value' services are listed throughout the Seventh Schedule. The characteristics that these 'no value' fringe benefits have in common, are that they are provided solely or predominantly for the benefit of the employer either to protect the employer's assets or in order to enable the employee to better perform their duties, and the 'benefit' for the individual is incidental to the main purpose in providing the goods or services.

2.2.4. Currently, the provision of security in respect of an employee's physical person, is viewed as a taxable benefit. However, in our view the benefit is not enjoyed by the employee for their private purposes. The employer is undertaking the security of the employee for the sole purpose of ensuring business continuity and keeping its 'human capital' asset safe. Although security provided at the place of work would be a 'no value' fringe benefit, employees are often more vulnerable when away from their place of work.

2.3. **A detailed factual description**

2.3.1. Example 1: An employer does a risk assessment on the potential assassination or kidnapping of its CEO, due to threats that have been made against her. The risk is calculated as very high. The employer contracts with a security firm to physically protect the employee 24 (twenty-four) hours every day. The risk assessment is reviewed every three months and once the threat has passed, the security detail is withdrawn.

2.3.2. Example 2: Employee A is employed to manage high-level disputes and grievances between the employer and its employees. Based on past experience, and after assessing the risk, the employer contracts security to guard the employee's physical person 24 hours of every day.

It is determined that the risk remains constant and as such the security detail is attached to that position in the organisation.

2.4. **The nature of the business / persons impacted.**

2.4.1. All employees that are at risk due to their employment and are the subject of security detail on their physical person funded or provided by their employer.

2.5. **Proposal**

2.5.1. We request consideration of adding a 'no value' fringe benefit to paragraph 10(2)(c) to include security services for key personnel specifically included in the organisations security policy, following a risk analysis which puts the employees at particular risk for assassination and/or kidnapping.

3. LEARNERSHIP AGREEMENTS

[Applicable provisions: Section 12H of the ITA]

3.1. **Background**

3.1.1. A learnership agreement entered into on or after 1 April 2024 will not qualify for the relief as contemplated under section 12H of the ITA.

3.2. **The legal nature of the problem**

3.2.1. Section 12H supports and stimulates the employment rate in South Africa as part of strategic growth of the economy.

3.2.2. Terminating this allowance will increase costs for corporate employers and have an immediate impact on government's strategies to increase the employment rate.

3.2.3. Section 12H significantly contributes to young people and people with disabilities entering the employment sector by participating in learnership agreements. Terminating the learnership allowance in

terms of section 12H will discourage companies from entering into learnership agreements due to a significant cost increase.

3.3. **A detailed factual description**

3.3.1. Where employers conclude registered learnership agreements, they qualify for the relief provided under section 12H.

3.3.2. The sunset date in respect of this relief of April 2024 means that employers will no longer be incentivized to employ young individuals looking to enter the employment sector.

3.4. **The nature of the business / persons impacted.**

3.4.1. Young individuals entering the employment sector and corporate employers.

3.5. **Proposal**

3.5.1. An amendment to paragraph (b) of the definition of "registered learnership agreement" in section 12H (1) extending the relief to 1 April 2027.

4. MISALIGNMENT OF EMPLOYEES' TAX, UNEMPLOYMENT INSURANCE FUND AND SKILLS DEVELOPMENT LEVIES WITHHOLDING OBLIGATIONS FOR FOREIGN EMPLOYERS

[Applicable provisions: Paragraph 2 of the Fourth Schedule]

4.1. **Background**

4.1.1. Foreign employers are required to make Unemployment Insurance Fund ('UIF') and Skills Development Levy ('SDL') contributions in respect of remuneration paid to employees who render services in the Republic.

4.2. **The legal nature of the problem**

4.2.1. Paragraph 2 of the Fourth Schedule previously required representative

employers (where the employer is a foreign employer) to withhold employees' tax in respect of remuneration paid to employees. Where there was no representative employer, no obligation to withhold employees' tax would arise. The same would not apply to UIF and SDL contributions.

4.2.2. In the 2023 Taxation Laws Amendment Bill, paragraph 2 of the Fourth Schedule is amended to only extend to non-resident employers conducting business through a permanent establishment in the Republic**.**

4.3. **A detailed factual description**

4.3.1. Foreign employers remain obligated to make UIF and SDL contributions.

4.3.2. Any employee who renders services in South Africa will trigger a requirement for the employer to register for, and contribute to UIF and SDL, irrespective of time spent in South Africa.

4.4. **The nature of the business / persons impacted.**

4.4.1. Foreign employers and their employees rendering services in South Africa.

4.5. **Proposal**

4.5.1. We recommend an amendment to the definition of remuneration to also exclude income subject to treaty relief so that if income is exempt under a treaty, then it would also be exempt under the SDL and UIF Acts.

5. EMPLOYMENT TAX INCENTIVE

[Applicable provisions: Section 8(1) of the Employment Tax Incentive Act, No. 26 of 2013 ('the ETI Act')]

5.1. **Background**

5.1.1. Section 10 of the ETI Act deals with the reimbursement of the bi-annual

excess of Employment Tax Incentive credits.

5.1.2. More specifically, section 10(4)(a) of the ETI Act sets out that the amount of the excess may not be paid out if the employer has failed to submit any return contemplated in section 8(1)(a) of the ETI Act, whereas section 10(4)(b) of the ETI Act sets out that the excess may not be paid to the employer if the employer has any tax debt contemplated in section 8(1)(b) of the ETI Act.

5.1.3. Section 8(1)(a) of the ETI Act refers to any return as contemplated in the definition of 'return' in section 1 of the Tax Administration Act, 2011 (the TAA) that requires to be submitted per the formal submission requirements in section 25 of the Act.

5.1.4. Section 8(1)(b) of the ETI Act refers to any outstanding tax debt as defined in section 1 of the Act. The only exclusions are where an instalment payment agreement (per section 167 of the TAA) or tax compromise (per section 204) had been concluded, where the tax debt had been suspended in terms of section 164 of the TAA or where the tax debt does not exceed R100 as per section 169(4) of the TAA.

5.2. **The legal nature of the problem**

5.2.1. The requirements for a taxpayer to be fully tax compliant in respect of all tax returns and in respect of all outstanding tax debt (except for some carve outs) other than employees' tax is too broad and therefore adversely impact on the ability of employers to access the incentive to create youth employment.

5.2.2. The requirements are onerous, especially considering that the tax returns may be entirely unrelated to the employees' tax compliance and do not pose any risks to SARS in relation to the ETI credits. Furthermore, taxpayers and SARS may both contribute thereto that the required agreement (e.g., instalment payment agreement, compromise agreement or suspension of payment approval) is not in

place at the exact time that the employees' tax bi-annual refund is due. This is therefore hampering the effectiveness of the ETI system and discouraging instead of encouraging employers to participate.

5.3. **A detailed factual description**

5.3.1. An example will illustrate the challenges experienced in qualifying for the bi-annual refund in its current form.

5.3.2. The taxpayer submits its employer reconciliation (EMP501) and is due a refund of say R1 million. The taxpayer has submitted all employees' tax returns but there is an open audit on income tax and the taxpayer is in the process of preparing its objection but by the time the refund is due (and hence by which time the taxpayer is required to be fully tax compliant to qualify for such refund) the suspension of payment request is not in place yet. The income tax dispute may be for a minimal amount compared with the refund amount due to the taxpayer yet may have a significant effect on the refund being paid or not.

5.3.3. There is furthermore no prescribed time frame within which SARS is required to provide an outcome to such suspension of payment request. This leaves the taxpayer exposed to a situation where it does not qualify for the employees' tax refund and even the risk of forfeiting the ETI credit, which means that the incentive is applied in a manner that is inconsistent with the intended result of creating youth employment.

5.4. **The nature of the business / persons impacted.**

5.4.1. Any taxpayer who qualifies for the Employment Tax Incentive by virtue of employing qualifying employees, and therefore any taxpayer who is trying to provide youth employment and therefore endeavouring to address the youth employment crises in South Africa.

5.5. **Proposal**

5.5.1. It is proposed that the exceptions as contemplated in sections 8(1)(a)

and 8(1)(b) should therefore be revisited and replaced with a more targeted provision whereby the only requirement to qualify for the employees' tax refund is for a taxpayer to have submitted its employees' tax returns and where the outstanding tax debt refers to employees' tax debt and not to all outstanding tax debt.

5.5.2. It is proposed that an objective tax compliance test replaces the current test which is subject to too many variable factors hence making it difficult to observe.

5.5.3. The proposal for only employees' tax returns to be submitted will ensure compliance that will be a more objective test and ensure that the taxpayer is employees' tax compliant when accessing the relevant employees' tax refund.

End.