16 February 2021

To: The National Treasury
240 Madiba Street
PRETORIA
0001

To: The South African Revenue Service
Lehae La SARS, 299 Bronkhorst Street
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Via email:	National Treasury	- Christopher.Axelson@treasury.gov.za; Yanga.Mputa@treasury.gov.za
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Dear Colleagues,

RETIREMENT FUND WITHDRAWAL: INTERPRETATION AND APPLICATION

Current process

As you may be aware, there are currently delays in processing FIA and TCS applications. The current bottlenecks have resulted from taxpayers wanting to withdraw their retirement interest, prior to the withdrawal rules amendment coming into effect on 1 March 2021[i].

An urgent matter that has been raised by our members, is the interpretation and application of the newly amended legislation to the existing process: Specifically the fact that the transitionary period as proposed in the Explanatory Memorandum to the Taxation Laws Amendment Bill, 2020 (the EM), will only be effective if retirement fund members are able to get their applications approved by the SARB or an authorised dealer in foreign exchange on or before 28 February 2021. Considering the current delays, the transition period may be unintentionally ineffectual.

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According to the EM to the Taxation Laws Amendment Bill, 2020: "*As a transitional measure, a transitional period shall be allowed for the processing of emigration applications already submitted to the SARB. As such, the existing test which refers to payment of a lump sum benefits when a member emigrates from South Africa and such emigration is recognised by the SARB for exchange control purposes will apply in respect of all applications that have been received on or before 28 February 2021 and approved by SARB or an authorised dealer in foreign exchange on or before 28 February 2022.*"

According to our understanding, the existing process is as follows:

- Step 1: The individual downloads and completes Form MP336(b), which is titled "*Emigration: Application for foreign capital allowance*". The authorised dealer adds a stamp to the Form.
- Step 2: The individual applies for an emigration tax clearance certificate from SARS. The individual supplies SARS with a certified copy of the completed MP 366(b) Form that includes a breakdown of their capital assets remaining in South Africa. SARS issues the taxpayer with TCS certificate verifying their tax compliance status.
- Step 3: The individual makes their application to SARB (done through their bankers) to change their status from resident to non-resident for exchange control purposes, and either SARB or the authorised dealer in foreign exchange gives final approval

In the absence of an accommodation, whether by interpretation or through legislative amendment, it is likely that, despite the intended 'transition period' described in the EM, numerous individuals will be stuck in the system, and will not be able to withdraw their retirement interest under the current retirement withdrawal rules.

New Tax Directive rules in respect retirement fund withdrawal

As part of the determination of whether a fund member qualifies to withdraw their retirement interest, they must meet the requirements as per the withdrawal rules applicable at the time (contained in the definitions in section 1(1) of the Income Tax Act, No. 58 of 1968). Once the determination is made, and the member elects to withdraw their retirement interest, the retirement fund must apply for a Tax Directive.

As communicated on 2 February 2021, SARS is in the process of enhancing the Tax Directives process and trade testing for Independent Software Vendor (ISV) submissions. To prepare for the implementation of these enhancements, trade testing will run from 22 March until 22 April 2021. SARS' intention is to go-live within the first quarter of the 2021/22 financial year. As part of the trade testing, the ISV must ensure compliance with the IBIR-006 -Tax Directive Interface Specification (the specification).

The specification is representative of SARS' interpretation and application of the legislation in that it drives the rules in the process through which SARS grants the necessary Tax Directive. For example, Tax Directive applications may be declined for various reasons, but in most instances, the reason for the decline is that the retirement fund or fund administrator did not make the correct determination on whether the member was entitled to withdraw. In these instances, SARS overrides the determination of the retirement fund or fund administrator on the availability of the withdrawal by declining the Tax Directive, and as a result the member is prevented from withdraw their retirement interest.

The specification at issue contains the following instructions regarding the withdrawal of retirement interest in the case of an emigration process (current legislation) and in the event of ceasing to be a tax resident and remaining a non-tax resident for an uninterrupted period of three years (legislation effective as from 1 March 2021); specifically with reference to reasons whereby a Tax Directive application may be declined.

Reasons for the decline of a Tax Directive as per the specification:

Where the reason for a directive is 'Emigration Withdrawal' (eFiling submissions only)	These rules presumably apply to instances where an individual should still qualify for a withdrawal under the current legislation, i.e. 'emigration' is short-hand for an emigration recognised by the SARB.
o The date of accrual is prior to 01/03/2008	Accepted
o The date of accrual is greater than or equal to 01/03/2021	Accepted: Accrual takes place on the date of election. The decision to withdraw should precede 01/03/2021.
o The date of emigration is greater than or equal to 01/03/2021	Not accepted: SARB also allows and approves emigration for intended emigrants as there must be an intention to reside outside CMA as permanent resident. Therefore, factually the 'emigration' could have preceded 01/03/2021.
o The Total value of the full annuity is not equal to the Gross Amount of Lump Sum Payment	Accepted
o The answer to any of the following questions are not "Yes" □ Was an application for emigration recognised by the Reserve Bank? □ Is the certificate of residence of the new country of residence attached? □ Is proof of a valid Tax Clearance certificate attached?	Not accepted: (1) The recognision of the 'emigration' may be recognised by the SARS or by the authorised dealer. The reference to the 'authorised dealer has been omitted. (2) Why is a 'certificate of residence of the new country of residence' required? This is not a legislative requirement?

Where the reason for a directive is ‘Cessation of SA Residence’ (eFiling submissions only)	These rules presumably apply to instances where an individual should qualify for a withdrawal under the amended retirement withdrawal rules.
o The date of accrual is prior to 01/03/2021	Not accepted: Accrual takes place on the date of election. The decision to withdraw could precede 01/03/2021.
o The date of Cessation of SA Residence is prior to 01/03/2021	Not accepted: There is no reason in legislation why the individual should have ceased their SA tax residence prior to 01/03/2021.
o The answer to any of the following questions is not “Yes” □ Certificate of residence □ Document confirming cessation of residence	Not accepted: Tax residence may cease due to the application of a Tax Treaty, without a ‘certificate of residence’ becoming available. Furthermore, there is currently no document ‘confirming cessation of residence’ available from SARS. It is also unclear how SARS will determine and track the tax residence of individuals.

There appears to be significant questions around the application for Tax Directives under the amended Legislation. Moreover, the trade testing will continue until 22 April 2021, with the new Tax Directive ‘rules’ only becoming active thereafter.

Conclusion

Following on from discussions held with affected parties and Tax Practitioners alike, we request that:

- Additional transition rules be considered in respect of the current legislation;
- The Tax Directive rules be reviewed in respect of the current and amended legislation; and
- Guidance be provided in respect of the amended legislation.

Yours faithfully,

Keith Engel

Keith Engel
CEO

[i] **Section 2 of the Taxation Laws Amendment Act, No. 23 of 2020:**

"2. (1) Section 1 of the Income Tax Act, 1962, is hereby amended—

(p) by the substitution in subsection (1) in paragraph (b)(x)(dd) of the proviso to the definition of ''retirement annuity fund'' for subitem (A) of the following subitem:

''(A) (AA) is a person who is or was a resident who emigrated from the Republic and that emigration is recognised by the South African Reserve Bank for purposes of exchange control in respect of applications for that recognition received on or before 28 February 2021 and approved by the South African Reserve Bank or an authorised dealer in foreign exchange for the delivery of currency on or before

28 February 2022; or;

(BB) is a person who is not a resident for an uninterrupted period of three years or longer on or after 1 March 2021;''

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