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# **Tax Practice: *On the Move***

## Tax Administration

SAIT Webinar

22 September 2022

*YOUR KEY TO THE TAX COMMUNITY*

## PRESENTER

**Dr Julia Choate**
**Senior Associate**
julia.choate@bowmanslaw.com

Julia is a senior associate in the Bowmans Cape Town office Tax Practice. She has a specific interest in tax dispute resolution and tax administration and has been involved in litigating and settling several large income tax and customs and excise disputes. Julia has a particular interest in the application of Constitutional and administrative law principles to tax administration and disputes.

Julia regularly advises on a wide range of tax issues for both South African and multinational groups, including types of acquisition funding, and the establishment of a business presence in South Africa. She also regularly advises on employee incentive schemes and analyses the tax consequences of such schemes.

Julia has an interest in customs and excise and Inter-African trade and has advised on aspects of the South African Customs Union (SACU) Agreement and the new African Continental Free Trade Agreement. Her clients include SABMiller, Chevron, Investec Asset Management, Massmart, CIVH, and WACO International.

Julia has an LLB degree from the University of Cape Town, a Postgraduate Diploma in Tax (awarded with Distinction) and a PhD in Tax Law (specializing in Tax Administration) from the University of Cape Town.

# 2022 TALAB: Amendments affecting the Employment Tax Incentive

## Proposed amendment to section 221 of the TAA – ETI excess "refund" subject to understatement penalties

- Effective 1 September 2022 (retrospective) – SARS to clarify whether this will apply to additional assessments issued after this date (which may involve prior periods), or only in respect of ETI "refunds" claimed from 1 September onwards

## Amendments to section 10 of the Employment Tax Incentive Act 26 of 2013

- No significant changes but there is still no clarity regarding the "prescribed form and manner" for submission of ETI claims – clarity from SARS would be welcomed

# 2022 TALAB: Proposed amendments to section 256 of the TAA

- In order to combat fraud, SARS is proposing a “qualification” to newly registered taxpayers’ TCS from a third-party access perspective

- SARS revoking third party access if compliance status is “questioned”

- SARS required to provide the taxpayer prior notice and an opportunity to respond to the allegations of at least **10 business days** prior to the revocation.”.

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## Customs and Excise Tax

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## PRESENTER

**Lebo Motsumi-Nkoloti**
**Senior Associate at Bowmans Law**
lebo.motsumi-nkoloti@bowmanslaw.com

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# AGENDA

**1. Background**

- Chapter 4 2022 Budget Review
- Annexure C 2022 Budget Review

**2. Key proposals included in the 2022 draft TLAB**

- Introduction of a new tax on vaping products.

**3. Proposals included in the 2022 draft TALAB**

- Clarifying the requirements for invoices in respect of import and export goods
- Introduction of advance rulings under the Customs and Excise Act.
- Time of entry for break-bulk cargo imported by sea, air and rail.
- Goods imported into South Africa through Mozambique

# BACKGROUND – CHAPTER 4 2022 BUDGET REVIEW

- **Excise duties on alcoholic beverages and tobacco products**

*The targeted excise tax burdens for wine, beer and spirits are 11 per cent, 23 per cent and 36 per cent of the weighted average retail price, respectively. Excise duties have increased more than inflation in recent years, resulting in a higher tax incidence. **Government proposes to increase excise duties on alcohol by between 4.5 and 6.5 per cent for 2022/23.***

*The targeted excise tax burden as a percentage of the retail selling price of the most popular brand within each tobacco product category is currently 40 per cent. The consumption of cigars has moved towards more expensive brands, requiring a higher-than-inflation increase to maintain the targeted tax burden**. Government proposes to increase the excise duty rate by between 5.5 and 6.5 per cent**. Review papers on the alcohol and tobacco excise duties policy framework will be released shortly for comment.*

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# BACKGROUND – CHAPTER 4 2022 BUDGET REVIEW

- **Beer powders**

*The current excise duty regime applies a flat excise rate for traditional African beer powder of 34.7c/kg. There are similar products in the market. In the interest of equity, these products will be included in the tax net with an excise equivalent to the powder rate from 1 October 2022.*

- **Vaping**

*Following public consultation, government proposes to apply a flat excise duty rate of at least R2.90/ml to both nicotine and non-nicotine solutions. The proposal will be included in the 2022 Taxation Laws Amendment Bill for further consultation before being introduced from 1 January 2023.*

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# BACKGROUND – CHAPTER 4 2022 BUDGET REVIEW

- **Increase in health promotion levy**

*The health promotion levy for beverages with more than 4g of sugar content per 100ml will be increased from 2.21c/g to 2.31c/g from 1 April 2022. Consultations will also be initiated to consider lowering the 4g threshold and extending the levy to fruit juices.*

# BACKGROUND – ANNEXURE C 2022 BUDGET REVIEW

- **Advance rulings under the Customs and Excise Act**

*"There are currently no provisions in the Customs and Excise Act (1964) enabling the SARS Commissioner to issue advance rulings. It is proposed that an enabling framework for advance rulings be provided in the act.".*

- **Time of entry for break-bulk cargo imported by sea, air and rail**

*"There is currently no provision in the Customs and Excise Act enabling the SARS Commissioner to prescribe the period within which entry must be made in respect of loose or break-bulk cargo imported by sea, air or rail. Government proposes that the act be amended to allow the Commissioner to make rules for the entry time of any category of goods, which may include break-bulk cargo imported by sea,air or rail."*

# BACKGROUND – ANNEXURE C 2022 BUDGET REVIEW

- **Clarifying the requirements for invoices in respect of import and export goods**

*"Because of existing uncertainty, it is proposed that amendments be made to the Customs and Excise Act to clarify the legislative requirements for invoices in respect of import and export goods.".*

# 2022 DRAFT TLAB PROPOSAL: VAPING

- The legislature has proposed amendments to **Part 2A of Schedule No. 1 to Customs and Excise Act, 1964** by the **<u>addition</u>** of the following tariff items under tariff subheading 2404.12 and 2404.19:

| Tariff Item | Tariff Subheading | Article Description | Rate of Excise Duty |
|---|---|---|---|
| 104.37.14 | 2404.12 | Other, containing nicotine | R2.90/ml |
| 104.37.16 | 2404.19.10 | Containing nicotine substitutes | R2.90/ml |
| 104.37.19 | 2404.19.20 | Other, put up for retail sale in the form of sticks | R7.43/10 sticks |
| 104.37.21 | 2404.19.90 | Other | R929.33/kg |

- Various tariff items were also added to rebate items 622.08, 622.13 and 622.23.

# 2022 DRAFT TLAB PROPOSAL: VAPING

- Purpose:
  Legislative attempt to regulate the harmful effects of these products.

- Effective date:
  The proposed amendment will come into operation on 1 June 2023.

- Problems with this proposal
  - Taxing e-cigarette solutions that contain no tobacco or nicotine.
  - Illegal trade in e-cigarettes.

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# 2022 DRAFT TALAB PROPOSAL: INVOICING

- SARS to prescribe details to be reflected on invoices or certificates in respect of goods to be imported into or exported out of South Africa.
- New definition of "invoice" inserted in section 1 of the Customs and Excise Act.
- Various consequential amendments (sections 39, 40(1)(d), 41, 84, 107)
- Effective Date: date to be determined by the Minister by notice in the Government Gazette.
- Advantage: Certainty.
- Other considerations:
  - Definition of invoice says "true, <u>correct and sufficient</u>". By what standard?

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# 2022 DRAFT TALAB PROPOSAL: ADVANCE RULINGS

- Provides for 3 types of advance rulings: advance tariff rulings, advance valuation ruling and advance origin ruling;
  - "Advance tariff ruling": issued in respect of the tariff classification of goods;
  - "Advance valuation ruling": issued in respect of valuation criterion to be applied to the valuation of goods;
  - "Advance origin ruling": issued in respect of in respect of the origin of goods.

- Can be obtained by a registered importer or exporter upon application to SARS.

- Validity period to be limited to 2 years from the date of issue of a ruling subject to specified exceptions.

- Possibility of a fee being payable for a ruling.

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# 2022 DRAFT TALAB PROPOSAL: ADVANCE RULINGS

- Effective date:

  The proposed amendment will come into effect on a date to be determined by the minister.

- Benefits of this proposal:
  - Certainty and predictability
  - Less disputes at clearance or release

- Other considerations ?

# 2022 DRAFT TALAB PROPOSAL: OTHER PROPOSALS

- SARS allowed to make rules for the time of submission of entries in respect of any type of cargo.
    - Section 38.

- Goods imported into South African through Mozambique.
    - Section 71(1) repealed.

# END

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# **Tax Practice:** ***On the Move***

## Personal and Employment Taxes

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22 September 2022

## PRESENTER

**Claire Abraham (Chartered Tax Advisor)**
**Senior Manager at Vialto Partners**
claire.abraham@vialto.com

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## REVIEWING THE TIMING OF ACCRUAL AND INCURRAL OF VARIABLE REMUNERATION

- Receipt vs accrual
- Problem with timing: amount became taxable prior to receipt of the money, problems when in different tax years, or lag in cash being paid
- Section 7B introduced to tax certain types of remuneration when they are paid, not when they accrue
- Initially applied to e.g. bonuses, overtime payments
- Now scope to be widened to include amounts from “informal sector”
- Consequences for deceased taxpayers
- Proposed effective date: 1 March 2023

# APPORTIONING THE INTEREST EXEMPTION AND CAPITAL GAINS TAX ANNUAL EXCLUSION WHEN AN INDIVIDUAL CEASES TO BE TAX RESIDENT

- When a person ceases to be tax resident, year of assessment deemed to end the day before the cessation of residence.
- Effectively, two years of assessment created in a 12 month period
- Currently no apportionment for the interest exemption and CGT exclusion
- Now proposed to apportion over the two years of assessment, so that effectively the exemption only applies for 12 months in total
- Proposed effective date: 1 March 2023

- Interaction with SARS system
- Manner in which apportionment is or should be calculated
- Impact on death of taxpayer
- Practical problems, e.g. CGT exclusion impact by apportioning (may be needed in 2nd 12 months but apportioned over both)

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## TWO POT SYSTEM

Policy alignment of two competing problems:

- Ability to have sufficient money saved for retirement
- immediate access to retirement funds without having to resign, to cater for immediate hardship

- Culminated in a “two-pot” system

TWO POT SYSTEM

There will be three pots:

- Vested pot: all funds prior to implementation date (currently proposed 1 March 2023)
- Retirement pot: 2/3 contributions after implementation date
- Savings pot: maximum of 1/3 of all contributions to the retirement fund after implementation date

TWO POT SYSTEM

Rules for each pot

- Vested pot: at retirement, current rules (i.e. prior to implementation date apply). No further contributions can be made, amounts can be accessed as per current rules.
- Retirement pot: Compulsory annuitisation (unless value below R247 500*2/3= R165 000. However, wording compared to policy intent is not aligned on this matter.
- No access prior to retirement
- Savings pot: 1 withdrawal in a twelve month period, minimum R2 000. Withdrawals will be taxed at marginal rates. Currently no withholding applicable, so will be taxed on assessment, which could create problems for taxpayers who didn't consider tax.

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# TWO POT SYSTEM

## Cessation of tax residence

- Three year period remains
- Vested pot: current rules will continue to apply
- Retirement pot: taxed at lump sum withdrawal table
- Savings pot: marginal tax rate

# TWO POT SYSTEM- some comments from the retirement fund industry and the public

- Implementation date: too soon? Still many issues to iron out, e.g. legislation for DB funds, discussion on seeding etc.
- Access in 12 month period. No immediate access, need contributions to savings pot. So for example, you need to wait until the savings pot accumulates to at least R2 000 prior to being able to access.
- Concept of seeding for savings pot
- Compulsory annuitisation
- Applicability of section 11F deduction and visibility by fund administrators

# REVIEWING THE TRANSFER OF TOTAL INTEREST IN A RETIREMENT ANNUITY FUND

- Currently, where a member has more than one plan or contract in a retirement annuity fund, it is not possible to transfer only one plan to another fund, but rather all plans must be transferred together.
- This is out of alignment with other funds, such as preservation funds.
- Proposal is to allow separate transfer of plans, subject to the value in the fund being at least R495 000 and if the remaining value in the retirement annuity plans is at least R495 000.

- Proposed effective date is 1 March 2023.

# CLARIFYING THE COMPULSORY ANNUITISATION AND PROTECTION OF VESTED RIGHTS WHEN TRANSFERRING TO A PUBLIC SECTOR FUND

- Anomalies in the definition of “pension fund” and “provident fund” in section 1 of the Income Tax Act means that currently, if a provident fund member transfers benefits to a public sector fund, their vested rights prior to 1 March 2021 are not protected, and are arguably forfeited. Vested rights include the right not to annuitize prior to 1 March 2021.
- Changes are proposed to the above definition to protect these vested interests.
- Since this is an unintended consequence, it is proposed that these apply retrospectively to 1 March 2021.

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# CLARIFYING PARAGRAPH (eA) OF “GROSS INCOME” REGARDING PUBLIC SECTOR FUNDS

- Currently, paragraph eA of the definition of “gross income” is silent on public sector funds that fall within paragraph (a) of the definition of “provident fund”.
- It is not clear whether or not annuities received from a public sector pension fund that operates similarly to a provident fund should be included in paragraph (eA) of the definition of “gross income”. However, viewed in totality with other changes, it appears to have been an oversight that will be corrected.
- As with the previous change, this is intended to have retrospective effect, and will be amended with effect from 1 March 2021.

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# RETIREMENT OF A PROVIDENT FUND MEMBER ON GROUNDS OTHER THAN ILL-HEALTH

- Currently, there is an unequal taxation at early retirement between provident funds and other funds.  Provident fund members taking early retirement will have their lump sum taxed at the withdrawal table, unless taken for ill-health.
- The proposed change results in such retirement lump sums also being taxed at the retirement tables.
- This change comes into effect from 1 March 2023

## CLARIFYING THE APPLICABILITY OF TAX-NEUTRAL TRANSFERS FROM A PENSION TO A PROVIDENT FUND

- According to the objectives of the Retirement Reform, transfers between pension and provident funds should now all be done without tax consequences.
- There continues to be an anomaly for transfers of contributions in pension funds prior to 1 March 2021 to provident funds, which will be corrected with effect from 1 March 2021.

HOME OFFICE EXPENDITURE

National Treasury position: Intention to have a discussion document, not useful to publish amendments without good policy discussion.

Employer policies: impact

Zero submissions.  Need to be sent

For now, the current legislation remains in place

## OTHER SUNDRY AMENDMENTS

- Section 7C

The proposed amendment clarifies that the provisions of section 7C also apply to loan made to companies by adding that a donation is deemed been made on the last day of the year of assessment of not only a trust but a company too

- Paragraph 11 of the $4^{th}$ schedule

The amendment is a technical amendment that seeks to replace ';or' with a full stop at the end of the paragraph

- Paragraph 3 of the $7^{th}$ schedule

The proposed amendment is a technical amendment that firstly seeks to correct a grammatical error with reference to the spelling of employees' tax, and secondly seeks to make the paragraph more gender neutral

# NEXT STEPS

Public comments discussed 8, 9 and 12 September

Responses and clarifications will be available during the week of 19 September, updates will be presented by SAIT in a later training

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# Tax Practice: *On the Move*
## Corporate Tax

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## PRESENTER

**Itumeleng Nkadimeng**
**Director at KPMG**
itumeleng.nkadimeng@kpmg.co.za

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# Recap: 2022 Budget Proposals Corporate Income Tax

The reduction in rate will be implemented in a fiscally neutral manner through the introduction of measures to broaden the tax base.

## Reduction in Corporate Income Tax Rate and Broadening the Tax Base

### CIT Rate

- Corporate income tax (CIT) rate would be reduced from 28% to 27%.
- Effective Date: Years of assessment ending on or after 31 March 2023

### Assessed Losses

- Introduction of a limitation on the ability of a company to utilise assessed tax losses.
- A maximum of R1 million or 80% of taxable income (whichever is greater) is permitted to be set-off against taxable income

### Interest Limitation

- Section 23M which limits the deduction of interest payable to certain parties who are not subject to tax was significantly widened. The widening of the rules by broadening of definition of interest, Change in the definition of 'controlling relationship' and application of the rules even where interest is subject to SA withholding tax

# 2022 Draft Taxation Laws Amendment Bill

## CIT Rate

Effective Date :
2022 Rates Bill

- Corporate income tax (CIT) rate would be reduced from 28% to 27%.
- Effective Date: Years of assessment ending on or after 31 March 2023

## Assessed Losses

Effective Date :
2022 Rates Bill

- A maximum of R1 million or 80% of taxable income (whichever is greater) is permitted to be set-off against taxable income. **Therefore effectively you have a taxable income threshold of R1 250 000.**
- Effective Date : Years of assessment ending on or after 31 March 2023
- 2022 Draft Taxation Laws Amendment Bill introduces a new provision for mining companies confirming that the assessed loss limitation must be applied before the mining capex provisions are applied.*

*19 January 2022
Date of Promulgation of the 2021 Amendment Bill

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# 2022 Draft Taxation Laws Amendment Bill

Section 23M

- Exclusion of the provisions of section of 23M in relation to interest incurred by a mining company on loans used for mining purposes and which has been capitalised to mining capital expenditure during a period of non-production.
- Effective Date : Years of assessment ending on or after 31 March 2023

# 2022 Draft Taxation Laws Amendment Bill

## Amendments : Contributed Tax Capital (CTC) Definition

- **Definition** : The CTC of a company is the aggregate of all capital that has been contributed to a company by shareholders in a specific class, less the capital that has been returned to them. CTC largely remains a tax concept.

- **2021 Amendments**: The 2021 amendments in broad terms included the introduction of a further proviso to the CTC definition which included a requirement that all shareholders in a class participate in the transfer in the same manner and are actually allocated an amount of contributed tax capital based on their proportional shareholding within that class of shares.

The 2022 draft TLAB proposes that the further proviso to the CTC definition as included in the Taxation Laws Amendment Act (2021) be replaced with the wording which notes that one can only have a transfer of contributed tax capital unless all holders of shares in that class are allocated an amount of contributed tax capital based on their proportional shareholding within that class of shares (subject to a 91 day period).

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# 2022 Draft Taxation Laws Amendment Bill

## Other Amendments

Section 7B

**Change to definition of variable remuneration**

Applicable with effect from 1 March 2023 and applies to expenditure incurred on or after that date

Eleventh Schedule

**Government Grants**

Inclusion of a new tax exempt government grant from the Social Employment Fund (deemed to have come into operation on the date that the grant is awarded and applies in respect of amounts received on/after that date)

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# Thank You.

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# Tax Practice: *On the Move*

## Carbon Tax

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22 September 2022

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PRESENTER


# Andrew Gilder

## Director at Climate Legal

Andrew@climatelegal.co.za

+ 27 (0) 73 690 6265

www.climatelegal.co.za


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# Why does South Africa need to respond to climate change?

- On one of the emissions scenarios there are projected temperature increases over South Africa of up to around 4°C inland, and around 3°C nearer the coasts – there are consequences for these changes.

- Precipitation is projected to decrease over most of South Africa, particularly in the far west, with decreases of up to 20%

- Crop yields could decrease and patterns of agriculture will need to change.

- Floods, droughts, storm surges, more extreme weather events generally, incidence of disease, habitat and species loss, migration and human settlements implications.

- Disease vectors will shift, e.g., large parts of Gauteng are anticipated to become malaria areas.

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# Mitigation

- The term 'mitigation' refers to actions that reduce anthropogenic greenhouse gas emissions, e.g., from industrial and power generation processes that rely on fossil fuels.

- South Africa:
  - has the highest greenhouse emissions on the African continent (by far) – thus leads the Continent in terms of responsibility for mitigation
  - is within the global top group of emitters on a *per capita* emissions basis
  - has an economy that is among the most carbon intense in the world, equivalent to the likes of highly industrialised economies like Japan.

- Mitigation actions will be primarily achieved and funded domestically, e.g., through regulatory and financial mechanisms

# Adaptation

- The term ‘adaptation’ refers to actions taken within systems to adapt to the anticipated impacts of climate change.

- Human systems – economies, institutions, political formations - are at risk from such impacts and will need to be adapted to take account of geophysical circumstances very different from those which have supported the rise of human civilisation.

- South Africa is highly vulnerable to climate impacts and will need to implement adaption policies and laws (UNFCCC, Article 4(8) and 4(9).

- While the costs of mitigation might best be borne by local industry – generally-speaking, the costs of adaptation will be over-and-above current economic capacities.

- Adaptation actions will need to be funded from novel and innovative sources, e.g., climate change financial flows typically only available at the international level.

| South Africa's Post-2020 Mitigation System | | |
|---|---|---|
| Component | Applies to | Legal foundation |
| National GHG Emissions Trajectory | National GHG emissions | Future Climate Change Act, established and administered by the DFFE |
| Sectoral Emissions Targets | Government (sectoral) departments | Future Climate Change Act, established and administered by the DFFE |
| Monitoring & Evaluation | Emitting installations conducting listed reportable activities | • National Environmental Management: Air Quality Act 39 of 2004 (NEMAQA) and the Amended National Greenhouse Gas Emissions Reporting System (NGERs), established and administered by the DFFE utilising the South African GHG Reporting System (SAGERS).<br>• DFFE's intention is to migrate administration of the Amended NGERs to the dedicated climate change legal regime expected to be created under the Climate Change Act |
| Carbon Budgets (pending) | Emitting installations to which carbon budgets have been allocated | Future Climate Change Act, established and administered by the DFFE in terms of anticipated Carbon Budget Regulations (currently under development) |
| Pollution Prevention Plans | Emitting installations subject to the Pollution Prevention Plan Regulations | • NEMAQA and the Pollution Prevention Plans Regulations, established and administered by the DFFE. DFFE's intention is to migrate administration the Pollution Prevent Plan Regulations (renamed the Greenhouse Gas Mitigation Plan Regulations) to the dedicated climate change legal regime expected to be created under the Climate Change Act |
| Carbon Tax | Emitting installations conducting listed taxable activities | • Carbon Tax Act and Regulations (including Carbon Offsets Regulations), Customs and Excise Act and SARS Rules. The carbon tax legal regime is established and maintained by the Treasury and is administered by the South African Revenue Services (SARS) in terms of the Customs and Excise Act. |

# Explanatory Memorandum to TLAB-2022

- Nationally Determined Contribution (September 2021) set out climate change commitments, including for mitigation and adaption, and specifying carbon tax as an essential mitigation mechanism
- To meet these commitments, the country's greenhouse gas emissions must peak by 2025 and then quickly decline to between 350 million and 420 million tonnes by 2030, and approach net-zero emissions by 2050
- South Africa's exports of carbon intensive goods such as iron and steel are likely to face carbon border taxes in Europe (Carbon Border Adjustment Mechanism)
- To prepare South Africa for the structural transition to a climate-resilient economy and to ensure future competitiveness in increasingly carbon-constrained international trade:
    - pending legislation will implement carbon budgets and sector emission targets to reduce emission
    - government proposes to progressively increase the domestic carbon price (carbon tax base rate)

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# Proposed carbon tax pricing amendments

- 2023 to 2025 (extended first phase): annual increase by at least US$1 to reach *US$20 per tonne of carbon dioxide equivalent by 2026*

  >> Review of carbon taxation legal regime

- 2027 to 2029 (revised dates for second phase): more rapid annual increase of US$2.5 to reach *US$30 per tonne of carbon dioxide equivalent by 2030*
- Between 2035 and 2040: accelerating to higher levels
- Beyond 2050: up to US$120

- Carbon pricing approach aligns with global institutions:
  - World Bank's High-Level Commission on Carbon Prices recommends carbon prices of US$40 to US$80 per tonne by 2025 and US$50 to US$100 by 2030
  - IMF recommends lower minimum carbon prices for developing countries of US$25 to US$50 by 2030 to achieve the Paris climate goals

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# Further anticipated changes

- The basic tax-free allowances will also be gradually reduced to strengthen the price signals under the carbon tax from 1 January 2026 to 31 December 2030
- To encourage investments in carbon offset projects, government intends to increase the carbon offset allowance by 5 per cent from 1 January 2026.
- Flowing from a future Climate Change Act and Carbon Budget Regulations:
    - Mandatory carbon budgeting system – effectively allocated caps on greenhouse gas emissions
    - Carbon budget allowance of 5% will fall away
    - Penalising emissions exceeding mandatory carbon budgets: to address concerns about double penalties for companies under the carbon tax and carbon budgets, it is proposed that a higher carbon tax rate of R640 per tonne of carbon dioxide equivalent will apply to greenhouse gas emissions exceeding the allocated carbon budget

# Reactions to the proposed TLAB-2022

- Increases to the base rate of carbon tax
- Carbon offsets allowance
- Carbon budgets and penalties
- Expected next steps in the various processes

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PRESENTER

## Andrew Gilder

## Director at Climate Legal

Andrew@climatelegal.co.za

+ 27 (0) 73 690 6265

www.climatelegal.co.za

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# International Tax

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22 September 2022

*YOUR KEY TO THE TAX COMMUNITY*

# Presenter:

Vanessa Turnbull-Kemp- Senior Manager at Regan van Rooy

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**Amendment to the definition of foreign dividend**

- A foreign dividend is currently defined as "an amount paid by a foreign company in respect of a shares in that company.
- This definition specifically excludes any amounts that constitutes the redemption of a participatory interest in a foreign portfolio of collective investment scheme (CIS) from being regarded as a foreign dividend.
- However, foreign law does not only deal with redemptions but also the sale of units, shares or interest to the foreign management company of the scheme.

***<u>What is being proposed?</u>***

- It is therefore proposed that the term *"or other disposal"* be included to cater for any amounts that constitute the sale of a participatory interest in a foreign collective investment scheme's portfolio.

## Amendment to the definition of foreign dividend

***<u>What is the impact of this proposal?</u>***

- An interest in a CIS can be disposed of by way of sale in the market or by way of sale to the issuer.
- A sale to the issuer = transaction being classified as a share buy back which gives rise to a foreign dividend as opposed to a disposal.

- Section 10B regulates the tax treatment of foreign dividends with the ability to achieve a full or partial exemption (depending on the case in question).
- To the extent that the partial exemption applies, this would result in a tax rate of 20% for the recipient.
- This is greater than the tax rate applicable to capital gains as well as precluding the investor from accessing any capital losses that would have shielded the gain on the redemption.

- To overcome this, SA CIS investors sold their investments to a company that was set up specifically for the purpose of acquiring CIS interests to ensure that the disposal was treated as a disposal as not as a share buy back.
- This transaction mechanism added a layer of costs and complexity to the administration of the fund.

- The amendment to the treatment of hybrid equity instruments secures the CGT treatment for the investor regardless of how they dispose of their investment in that CIS.

## CFC amendments

- Amending definitions and terms relating to the Insurance Act

  - The Insurance Act came into effect on 1 July 2018, which deleted and inserted certain new definitions, such as the definition of a "linked policy".
  - Section 9D contains an exclusion which excludes the participation rights held by an insurer in any policyholder fund which are directly attributable to a linked policy from the CFC imputation requirement (provided certain requirements are met).

***<u>What is being proposed?</u>***

- The definitions in section 9D will be amended to refer to the appropriate provisions of the Insurance Act.

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**CFC amendments (cont.)**

- The deeming provisions will be extended to cater for royalties derived by CFCs

  - The net income of the CFC must be calculated as if the CFC is a taxpayer for SA tax purposes and as if the CFC is a resident when applying certain provisions of the Act.
  - For example, a CFC is deemed to be a resident in relation to interest derived from a SA source.
  - However, section 9D(2A) does not mention royalties derived by the CFC.

  - Currently, section 10(1)(l) provides for an exemption from SA tax on royalties which are received by or accrue to a non-resident unless certain conditions apply.
  - Technically, a CFC would be able to benefit from the exemption in this clause as it is not deemed to be a resident for purposes of 10(1)(l) of the Act.

***What is being proposed?***

  - Amendments are proposed to update the net income calculation contained in section 9D(2A) to include the fact that CFCs are residents for purposes of section 10(1)(l).
  - Therefore, the royalty exemption contained in section 10(1)(l) will not apply to a CFC.

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## CFC amendments (cont.)

- Clarifying the treatment of amounts from hybrid equity instruments deemed to be income under CFC rules
  - The CFC rules contain an exclusion applicable to a payor and payee for intra-CFC interest, royalties, rental income, insurance premiums or income of a similar nature, provided both the payor and payee are part of the same group of companies.
  - In terms of hybrid equity instrument rules, certain dividends in relation to the recipient are deemed to be income.

***<u>What is being proposed?</u>***

- To ensure neutral tax treatment, it is proposed that specific reference be made to the exclusion of the payee company's deemed income for hybrid equity instruments between CFCs.

## Other recent developments to note

- SARS bind class ruling 080

  ***<u>Background</u>***

  - A foreign pension trust is typically a hybrid product where a trust structure is combined with a pension scheme.
  - Many SA individuals have invested in foreign pension trusts over the years.
  - Previously, contributions to these foreign pension trusts were not treated as donations, and payments by the trust to the beneficiaries were often regarded as tax exempt.

  - However, a recent binding class ruling by the SARS has cast these foreign pension trusts in doubt.

- ***<u>What did SARS say?</u>***

  - SARS ruled that the foreign pension trust was not a pension fund, provident fund or a retirement annuity fund as defined in the Act and therefore the benefits associated with a pension product would not apply.

**Other recent developments to note**

- SARS bind class ruling 080 (cont.)
  - ***What does this mean?***
    - Investors in the trust would not qualify for a tax deduction on their annual contributions, and would be seen to acquire a vested personal right to the income and capital of the foreign pension trust.
      - Therefore, any annuity received or accrued by an investor would form part of their taxable income in SA.
    - The impact of this ruling is that when investors die before retirement age, they will be subject to SA CGT on the deemed disposal of their vested right. If they die after retirement age, the right to the annuity will attract estate duty and CGT on the deemed disposal of the annuity.
    - The annuities paid by the pension trust will form part of the investor's taxable income. The right to the annuity after retirement will be part of their estate.
    - In summary, there is no deduction on contributions, and there are potentially CGT, estate duty and personal income tax liabilities.

South African Institute of Taxation

# **Tax Practice:** ***On the Move***

## Value-Added Tax

SAIT Webinar

22 September 2022

*YOUR KEY TO THE TAX COMMUNITY*

## PRESENTER

**Mabutho Mthembu**
**Senior Tax Manager at SNG-Grant Thornton**
Mabutho.Mthembu@sng.gt.com

sait South African Institute of Taxation

**Section 23(1A) of the VAT Act**

- Non-resident supplier of electronic service **must register** as a vendor at the end of the month where the value of taxable supplies exceeded R1 million, **with no exception**.

**Proposal**

- Insertion "*Provided that such person shall not be liable to register where the said total value of taxable supplies made by that person has exceeded R1 million in any consecutive 12-month period solely as a consequence of abnormal circumstances of a temporary nature.*"

**Purpose**

- To prevent unnecessary registrations, costs and administrative burden to both non-resident suppliers of electronic services or intermediary and SARS.

- A similar principle applies to resident registrations (Proviso (iii) to section 1(a))

**Section 23(2A)(a) of the VAT Act (Inserted)**

- Non-resident liable for registration be deemed to be branch of the registered vendor upon application to SARS.
    - Proviso’s
        - More than 1 non-resident which are part of “group of companies” as defined for Income Tax, all to constitute a ***single branch registration***
        - Branch treated as single enterprise
        - Commissioner may cancel, if application is made or the duties are not performed satisfactory
        - The registered vendor and each of the holding companies and subsidiaries shall be jointly and severally liable for any tax due by such branch

**Purpose**

- Allow non-residents to be registered as a branch under the VAT registration of the registered vendor in South Africa

- Impact on the supply of electronic services supplied within a group of companies?

**Section 18(D) - Inserted**

**Purpose**

- Dwelling units that have been developed for taxable supply.
- Temporarily let for exempt residential use while developer continues to make taxable supply.
- Section 18D applies from the date that any newly developed property held for taxable supplies is temporarily let for the first time on or after 1 April 2022
    - such fixed property shall be deemed to have been supplied by that vendor by way of a taxable supply for the consideration contemplated in section 10 (29) and shall take place in accordance with section 9 (13).
        - Value of Supply: s. 10(29) - for a consideration in money equal to the adjusted cost to the vendor of the construction, extension or improvement of such fixed property
- **Impact of withdrawal of section 72 rulings**

South African Institute of Taxation

# INCOME TAX:
# BUSINESS INCENTIVES

# The proposed changes

- Interaction between the assessed loss restrictions rules and capital expenditure regime for mining operations
- Interaction between the interest limitation rules and capital expenditure regime for mining operations
- Tax treatment of an asset acquired as government grant in kind
- Extension of the research and development tax incentive sunset date

## Interaction between the assessed loss restrictions rules and capital expenditure regime for mining operations

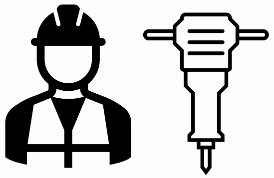
<u>Background</u>

- The mining industry is entitled, subject to certain limitations, to claim the capital expenditure incurred as an income tax deduction against mining income in the year in which such expenditure is incurred.
- The limitations under Section 36(7E) required that the taxable income derived from mining operations to be calculated before applying the deductions contemplated in section 15(*a*), but after the set-off of any balance of assessed loss incurred by the taxpayer in relation to such mine or mines from any previous year which has been carried forward from the preceding year of assessment.
- The government noted an anomaly in the ordering between the application of the new assessed loss restriction rules in section 20 and the current capital expenditure regime applicable to mining operations in terms of section 36 of the Act.

# Interaction between the assessed loss restrictions rules and capital expenditure regime for mining operations

<u>Proposal</u>

- It is proposed that the calculation of the assessed loss restriction in terms of section 20 of the Act should be determined before considering the capital expenditure deduction in terms of section 36 of the Act



Mining company

→ **Step 1 Assessed loss deduction**: deduct the higher of R1million or 80 percent of taxable income

→ **Step 2 Capex deduction**: deduct of any unredeemed capex follows in the order of determining a miner’s taxable income.

- Should the mining company have sufficient unredeemed capex, the unredeemed capex can be set off against the remaining taxable income resulting in a R nil tax liability.
- If, however, the mining company does not have sufficient unredeemed capex, the mining company will, like any other resident company in South Africa, be subject to corporate tax at 27% on the remaining taxable income.
- Proposal provides clarity and certainty.

# Example

| Name | Company XYZ | | Schedule A |
|---|---|---|---|
| **Reference No.** | [000/000/00/0] | | |
| **Year End** | [30 June 2023] | | |
| | **A** | **B** | **C** |
| | Non-mining | Mining | Total [A + B] |
| Net profit / (loss) per income statement | 1000 | 1500 | 2500 |
| *Less* Debit adjustments (decrease net profit) | 0 | 0 | 0 |
| *Add* Credit adjustments (increase net profit) | 0 | 0 | 0 |
| **Taxable income before loss b/f and capex** | **1000** | **1500** | **2500** |
| Assessed loss brought forward | (2000) | (2000) | (4000) |
| Utilisation of assessed loss brought forward | (800) | (1300) | (2100) |
| **Taxable income after loss b/f** | **200** | **200** | **400** |
| Capex balance | n/a | (400) | (400) |
| Redemption of capex balance | n/a | (200) | (200) |
| **Taxable income after loss b/f and capex** | **200** | **0** | **200** |
| Capital expenditure redemption ito s36(7G) | n/a | 0 | 0 |
| **Taxable income / (loss) for the year** | **200** | **0** | **200** |

## Interaction between the interest limitation rules and capital expenditure regime for mining operations

Background

- During a period of non-production or a mine being in care and maintenance, otherwise deductible expenditure of a mine is regarded to constitute unredeemed capital expenditure as opposed to increasing or creating an assessed loss.
- Section 23M contains rules that limit excessive interest deductions in respect of debt owed to persons not subject to tax in South Africa, if the debtor and the creditor are in a controlling relationship.
- These rules limit the deduction of interest paid predominantly to non-resident funders.
- Concerns were raised regarding the application of the provisions of section 23M to the interest of non-producing mining operations that forms part of capital expenditure of such mining operations.

# Interaction between the interest limitation rules and capital expenditure regime for mining operations

Proposal

- It is proposed that clarification be made to section 23M, that the interest limitation rules will not be applied to the interest expense of non-producing mining operations that form part of capital expenditure of such mining operations in terms of section 36 of the Act

Comments

- Interest in section 23M versus interest in section 36(11)(b)
- Pre-commencement interest versus interest during periods of non-production

# Interaction between the interest limitation rules and capital expenditure regime for mining operations

"(6A) This section does not apply to interest incurred on a loan utilised for mining purposes during any period of non-production as contemplated in paragraph *(b)* of the definition of 'capital expenditure' in section 36(11).".

**"interest"** means interest as defined in section 24J, and includes—

(a) amounts incurred or accrued under any "interest rate agreement" as defined in section 24K (1);

(b) any finance cost element recognised for purposes of IFRS in respect of any lease arrangement that constitutes a finance lease as defined in IFRS16;

(c) amounts taken into account in determining taxable income in terms of section 24I (3) and (10A); and

(d) any amount deemed to be interest under section 24JA,

but excludes any amount that is deemed to be a dividend *in specie* as contemplated in sections 8F and 8FA;

36(11)(*b*) expenditure on development, general administration and management (including any interest and other charges payable after the thirty-first day of December, 1950, on loans utilized for mining purposes) prior to the commencement of production or during any period of non-production; and

# Tax treatment of an asset acquired as government grant in kind – the current position

Is the government grant listed in the 11th Schedule?

No

Is the government grant identified by the Minister by notice in the Gazette for the purpose of exempting that government grant

Yes

Yes

The government grant is exempt from normal tax

Was the government grant used for the acquisition, creation or improvement, or as a reimbursement for expenditure incurred in respect of the acquisition, creation or improvement of an allowance asset

Yes

Reduce the base cost to the extent that the amount of that government grant is applied for that purpose

# Tax treatment of an asset acquired as government grant in kind – the problem

Does the government grant comprise an allowance asset?

11(e) **value** of any machinery, plant, implements, utensils and articles

12B(h)(2) **cost** to the taxpayer of the asset

12D(3)(a) **cost** incurred in respect of any asset

No base cost reduction since it is based on value not cost

Base cost reduction

Proposed amendment

"(x) no allowance may be made in respect of any machinery, plant, implement, utensil or article acquired by the taxpayer as a government grant as defined in section 12P(1);";

## Tax treatment of an asset acquired as government grant in kind - notes

Background

- In terms of section 12P and the Eleventh Schedule, government grants are tax exempt in the hands of taxpayers that receive them
- However, section 12P coupled with section 11(e) of the Income Tax Act resulted in double-dipping in relation to the tax treatment of government grants in kind
- Section 11(e) provides for wear and tear allowances on the "value" of an asset and entitles a taxpayer to an allowance regardless of whether an expense was incurred by a taxpayer to acquire that asset, which would then effectively apply to a government grant in kind
- While section 12P provides a tax exemption, it only applies to cash government grants received and not to government grants in kind
- This resulted in the claiming of an allowance on the full value of an asset received as a government grant

# Tax treatment of an asset acquired as government grant in kind - notes

Proposal

- it is proposed that the rule under section 11(e) that provides for wear and tear allowances based on the value of assets should not apply to assets received by a taxpayer as a government grant
- Consequently, assets that are received by a taxpayer in the form of a government grant will, similarly to assets funded with government grant funding, not be eligible for wear and tear allowances
- The proposal is effectively bringing in 'anti-double dipping' provisions and ensuring the equitable treatment of taxpayers in these situations.
- In addition to receiving tax free government funding and grant recipient taxpayers cannot also benefit from tax deductions
- The proposed amendments are deemed to have come into operation on the date that the 2022 Draft Taxation Laws Amendment Bill is published for public comment and applies in respect of years of assessment ending on or after that date

# Extension of the research and development tax incentive sunset date

**1 Nov 2006**
R&D Tax Incentive introduced

**15 Dec 2021**
*Reviewing the Design, Implementation and Impact of South Africa's Research and Development Tax Incentive*

**After 2022 TLAB**
a document which outlines the intended changes to the incentive. This will provide the public with more opportunity to provide comments and assist in formulating more concrete proposals to be included in the 2023 Budget Review

**Feb 2023**
more detailed announcement to be included in the 2023 Budget

**31 Dec 2023**
R&D incentive extended in its current form until 31 December 2023

# Extension of the R&D tax incentive sunset date

## Background

- The current R&D tax incentive was introduced on 1 November 2006 and has undergone various design changes to better tailor it to meet its objectives
- The most significant of these changes was the introduction of a pre-approval process in 2012
- The pre-approval process is administered by the Department of Science and Innovation (DSI), supported by an adjudication committee that evaluates applications and makes recommendations to the Minister of Higher Education, Science and Innovation
- The R&D tax incentive allows for operating expenses incurred directly and solely for the purpose of conducting R&D to be deductible at 150 per cent if the R&D is approved by the Minister of Higher Education, Science and Innovation

## Extension of the research and development tax incentive sunset date

### Reasons for change

- On 15 December 2021, Government published a discussion document titled *Reviewing the Design, Implementation and Impact of South Africa's Research and Development Tax Incentive*
- This review (which included a survey) sought to determine whether to extend the R&D tax incentive beyond its sunset date and, if so, in what form
- Following the review and consultation with interested parties, government has determined that the R&D tax incentive should continue
- Given the sunset date of 1 October 2022 and to provide taxpayers with certainty, it was announced in the 2022 Budget Review that the incentive be extended in its current form until 31 December 2023
- The review also identified improvements required to enhance simplicity and certainty with respect to eligibility for the incentive

# Extension of the research and development tax incentive sunset date

## Proposal

- In addition to proposing that the incentive be extended in its current form until 31 December 2023, it is proposed that a more detailed announcement be included in the 2023 Budget
- However, to provide continuity and certainty for taxpayers, a separate document will be published soon after the publication of the 2022 draft TLAB that outlines the intended changes to the incentive based on the review and public consultation
- This will provide the public with more opportunity to provide comments and assist in formulating more concrete proposals to be included in the 2023 Budget Review

thank you; should you have any questions, please feel free to contact:

Mansoor Parker: Executive: Tax

011 269 7860

083 680 2074

mparker@ENSafrica.com

Africa's largest law firm

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