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31 August 2024

To: The National Treasury
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PRETORIA
0001

The South African Revenue Service
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Via email: National Treasury (2024AnnexCProp@treasury.gov.za); and
SARS (acollins@sars.gov.za)

RE: DRAFT TAXATION LAWS AMENDMENT BILL, 2024: PERSONAL AND EMPLOYMENT TAXES (NDIVIDUAL, SAVINGS AND EMPLOYMENT)

Dear Colleagues,

We attach the comments from the SAIT Personal & Employment Taxes Technical Work Group (**WG**) on the proposals contained in the draft Tax Administration Laws Amendment Bill, 2024 (**DTALAB**) as well as the draft Taxation Laws Amendment Bill, 2024 (**DTLAB**).

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.

Personal & Employment Tax Technical Work Group

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All references to the legislation are to the Income Tax Act, No. 58 of 1962 (the Act), and proposals contained in the draft Taxation Laws Amendment Bill (DTLAB) and the draft Tax Administration Laws Amendment Bill (DTALAB)

1. Curbing the abuse of the Employment Tax Incentive scheme

[Applicable provisions: Sections 1(1) and 5(3) of the Employment Tax Incentive Act, No. 26 of 2013 ("the ETI Act")]

1.1 Government Proposal

1.1.1 The Draft Explanatory Memorandum on the DTLAB, 2024 (the 2024 EM) notes that in the past three years, the Government has amended the ETI Act to curb abuse of the incentive through 'aggressive tax schemes'. These schemes often involved training institutions claiming the incentive for students classified as employees under the ETI Act, who, however, never received cash payouts in their bank accounts. Instead, the training institutions would deduct training fees from their wages. The Government's position is that training costs should be the responsibility of the employer. The misuse of the ETI for creating fictitious employment, primarily to exploit the incentive, contradicts the policy's intention.

1.1.2 Mention is made in the 2024 EM that the employees' wage should remain unaffected and Government's position is that training costs should be the responsibility of the employer, which position does not seem to have been canvassed before.

1.1.3 Punitive measures are proposed to be refined to curb the alleged abusive behaviour of certain taxpayers towards the incentive.

1.2 WG response

1.2.1 It is difficult to see how the behaviour identified can be considered an abuse if not previously specifically legislated. Having regard to the past three year's amendments, there is also no mention of the newly identified alleged abuse (see the background discussion below).

1.2.2 This is considered rather unfortunate in circumstances where the private sector and Government should preferably be finding solutions and ways of working together in addressing the youth unemployment issue and not introducing further punitive measures, which would instead act as a disincentive for compliant private sector employers and therefore have the opposite effect.

1.2.3 The Explanatory Memorandum on The Employment Tax Incentive Bill, 2013 (the 2013 EM) issued on 31 October 2013 sets out that for the incentive to have the biggest impact on youth unemployment, it seeks to encourage private sector employers to hire young and less experienced work seekers, for them to gain work experience. The incentive is aimed at forming part of a holistic programme of policies and complement Government programmes, to address the causes and consequences of youth unemployment. The incentive is said to effectively target the most vulnerable, i.e. those earning below the personal income tax threshold. It was acknowledged that the incentive was 'a work in progress' and that changes could be introduced:

> *The employment tax incentive is a new instrument, and it will take some time to determine its effect on the behaviour of employers. Therefore, it is not yet possible to produce a finite list of objectionable behaviour that an employer wanting to access the tax incentive should not engage in. This provision aims to allow the Minister of Finance (after consultation with the Minister of Labour) sufficient scope to prescribe additional conditions in order to address specific concerns that may arise as employers start to access the tax incentive*

1.2.4 Notably, the Minister may issue regulations to change any of the requirements.

1.2.5 The 2013 EM makes no mention of training costs being the sole responsibility of the employer, as is now stated in the 2024 EM.

1.2.6 With regards to the comment in the 2024 EM that the ETI Act was amended in the past three years to curb abuse 'through aggressive tax schemes' that often involved training institutions claiming the incentive for students classified as employees, who never received cash payouts in their bank accounts, it is noted that:

1.2.6.1 there were no amendments to the incentive in the 2023 Taxation Laws Amendment Act, nor in the 2023 Tax Administration Laws Amendment Act;

1.2.6.2 In the 2022 Tax Memorandum on the Objects of the Tax Administration Laws Amendment Bill, an amendment was proposed to section 221 of the Tax Administration Act, 28 of 2011, in view of perceived abuses, to facilitate the imposition of understatement penalties (USP) on ETI reimbursements improperly claimed. The amendment was proposed to apply to returns filed on or after 1 September 2022. The USP imposed would be reduced by any penalty imposed on the relevant ETI reimbursement improperly claimed under the ETI Act. The definition of 'tax' in section 221 was accordingly amended to include, for purposes of understatement penalties, the incentive. This amendment came into effect on 1 September 2022, and applies to any return, for purposes of paragraph 14 (2) of the Fourth Schedule to the Act submitted on or after that date. It was also proposed to amend section 10 of the ETI Act, and

1.2.6.3 In the 2021 Explanatory Memorandum on the Taxation Laws Amendment Bill, (the 2021 EM) an entirely different 'abuse' was identified and proposals were made to amend the definition of 'employee' in section 1 and the definition in section 6 of 'qualifying employee'. Certain amendments were also made to counter the effects on employers and employees as a result of the lockdown.

1.2.7 Having regard to the above amendments over the past three years, there is accordingly no clear indication of aggressive or abusive behaviour, as now mentioned in the 2024 EM.

1.3 **Recommended proposal**

1.3.1 *Proposed amendment to section 1*

1.3.1.1 The proposed amendment to the definition of 'monthly remuneration' in section 1 of the ETI Act seems to be focused primarily on whether 'cash' is received by the employee, the main concern seemingly being that the actual amount of wages received by the employee should be left unaffected and that the employer should not claim the incentive for anything more than the net amount received by employees. This amendment is understood to be based on a newly identified or perceived 'abuse' that could, however, be better addressed through effective engagement, simplified drafting and/or issuing regulations instead of ad hoc 'tweaks' that are more likely to add to the complexity. (Please see the proposal below regarding more effective engagement with stakeholders)

1.3.1.2 In this regard, the wording of the section could for example be simplified to reflect that the amount paid into the employee's bank account is the amount linked to and qualifying for the incentive, and that any amount of training fees refundable to the employer does not qualify for the incentive. As an alternative, the wording could also be amended to reflect that the qualifying amount of the incentive is reduced by any

amount deducted from such amount paid to the employee and therefore there seems to be no need to refer to newly created terms such as 'cash payment'.

1.3.2 *Proposed amendment to section 5*

1.3.2.1 It is considered unnecessary to impose penalties where instead the wording of the Act could be clarified to achieve the correct ambit and scope.

1.3.2.2 The provisions of the Tax Administration Act, 28 of 2011 (the TAA) provide SARS with the power to impose USP for any understatement, as defined. It seems to be entirely unnecessary and contrary to the purpose of the incentive to expand the punitive provisions in the ETI Act as the USP provisions in the TAA already address any of the identified behaviours that may be considered to prejudice SARS or the fiscus.

1.4 **Proposals**

1.4.1 It is proposed that SARS and National Treasury:

1.4.1.1 initiate an effective engagement session or workshop to address the overall scheme and implementation of the incentive to ensure that there is an holistic approach to achieving the primary purpose of being an effective incentive for the private sector to provide the required experience and learning to address youth unemployment. This is to be preferred over the current approach of ad hoc 'tweaks' to the legislation which in any event do not seem to properly address the concerns raised.

1.4.1.2 consider the various stakeholder proposals over several years to render the incentive more effective, including for example:

1.4.1.2.1 to increase the qualifying threshold wages for employees to reduce the inflationary effects which are preventing a wider participation by the private sector;

1.4.1.2.2 To simplify the administrative provisions and reduce the administrative burden for participants; and

1.4.1.2.3 To forfeit the credits only for PAYE non-compliance or tax debt. The incentive has proven to be largely ineffective in addressing youth unemployment and does not take into account the significant challenges and an increased administrative burden in the implementation thereof. In this regard, numerous stakeholders have made proposals for improving the effectiveness of the incentive. SAIT has also made submissions and proposals to address challenges with the implementation of the incentive through the PAYE system. It was noted that proper implementation is proving to be particularly difficult as the ETI credits may only be claimed if the employer has no outstanding tax debt or any outstanding tax returns, i.e. this is not limited to outstanding PAYE or PAYE returns. The forfeiture mechanism has unintended consequences and in practice works as a disincentive for private sector participation, particularly in circumstances where, even if all incentive requirements are met, the incentive is nevertheless forfeited due to some

minor unrelated non-compliance issue or minor outstanding debt, thus resulting in unintended costs for the private sector employer.

1.4.1.3 continue to recognise in their public communications that the majority of taxpayers are compliant and want a more modern and responsive revenue administration, but that there is only a minority that seeks to evade tax. In this regard, while targeted measures could be introduced to identify and curb any perceived abuses, it should be taken into account that any prejudice to SARS is already addressed through the understatement penalty provisions in the TAA.

1.4.1.4 Consider issuing regulations as a more effective way in which to make changes to the incentive scheme and to dynamically address any unintended consequences.

2. Amending the definition of "remuneration proxy" in section 1
[Applicable provision: Definition of "remuneration proxy" in section 1 of the Act]

2.1. **Government Proposal**

2.1.1. Currently, the term "associated institution" is used in the definition of "remuneration proxy" with its ordinary meaning, as "associated institution" is not defined in the main body of the Act, but in the Seventh Schedule. Since the ordinary meaning of the term "associated institution" is used in the definition of "remuneration proxy" in section 1 of the Act, this creates an inconsistency in the application of several other sections in the Act.

2.1.2. The difficulty lies with the term "associated institution" which should not be given its ordinary meaning but should be given its meaning by reference to where it is defined in the Act, i.e. in paragraph 1 of the Seventh Schedule. Therefore, Government proposes aligning the policy objective for an "associated institution" to carry its intended meaning and use in the Act.

2.1.3. It is proposed that a cross-reference be added in the definition of "remuneration proxy" to refer to the definition of an "associated institution" by reference to paragraph 1 of the Seventh Schedule to the Act.

2.2. **WG response**

2.2.1. It is our understanding that this is a technical amendment to align the definition of associated institution throughout the relevant provisions of the Act and related Schedules; and to ensure consistency with *inter alia bona fide* bursaries and scholarships. On that basis, this is a welcome amendment.

3. Payroll amendments and refunds made in the current year
[Applicable provision: Section 11(*n*A) of the Act]

3.1. Government Proposal

3.1.1. SARS has informally allowed payroll administrators to make corrections within the same year of assessment to avoid prejudicing taxpayers. However, with the introduction of monthly payroll reporting, it is now necessary to amend section 11(*n*A) of the legislation. This amendment should explicitly clarify that refunds made within the same year of assessment can be allowed as a deduction under section 11(*n*A) of the Act if the income received is included in taxable income.

3.1.2. It is proposed to amend section 11(*n*A) of the Act to explicitly state that refunds occurring within the same year of assessment can be allowed as a deduction under section 11(*n*A) of the Act if the income received is included in taxable income.

3.1.3. In addition, we note that a consequential amendment is proposed in the DTALAB to paragraph 2(4) of the Fourth Schedule to the Act which will allow employers to deduct any amount referred to in section 11(*n*A) of the Act which is actually refunded to the employer granting the deduction under that subparagraph when determining the balance of remuneration for purposes of employees' tax withholding.

3.2. WG response

3.2.1. This has been a long-standing practical issue in prior years. These proposed amendments are welcomed on the basis that they rectify an omission in the legislation.

3.2.2. We are also in agreement with the proposed effective date of 1 March 2025.

4. Transfers between retirement funds by members who reached normal retirement age but before retirement date

[Applicable provisions: Definition of "retirement annuity fund" in section 1, paragraphs 2(1)(*c*) and 6A of the Second Schedule to the Act]

4.1. Government Proposal

4.1.1. Government seeks to address an inconsistency in the law, whereby tax-free transfers are allowed for involuntary transfers between pension funds or provident funds, but not for retirement annuity fund members who transfer to another retirement annuity fund in similar circumstances. Specifically, members who have reached normal retirement age but have not elected to retire and are subject to tax on these transfers, despite the involuntary nature of the transfer.

4.1.2. To ensure parity amongst members of retirement annuity funds who have reached normal retirement age in terms of the fund rules but have not yet opted to retire from their respective fund, the following is proposed as it relates to involuntary transfers:

4.1.2.1. that members of retirement annuity funds who have reached normal retirement age as stipulated in the fund rules, but have not yet opted to retire from said fund, must have the ability to have their retirement interest

transferred from a retirement annuity fund into another retirement annuity fund without incurring a tax liability; and

4.1.2.2. that the value of the retirement interest, including any growth thereon, will remain ring-fenced and preserved in the receiving retirement annuity fund until the member elects to retire from that fund subject to fund rules. This means that these members will not be entitled to the payment of a withdrawal benefit in respect of the amount transferred.

4.2. WG response

4.2.1. The proposal is welcomed on the basis that it provides for similar tax-free treatment for involuntary transfers between retirement annuity funds (e.g. in the case of dissolution or liquidation of the fund) as applies to involuntary transfers between pension funds and provident funds when an individual has reached normal retirement age in terms of the rules of the fund but hasn't yet retired.

4.3. General comments regarding retirement funds

4.3.1. We note the frequency of amendments made to the tax legislative framework applicable to retirement funds over several legislative cycles, which are aimed at aligning the tax legislation in relation to different types of retirement funds. On a more holistic basis, it would be prudent and beneficial to conduct a comprehensive review of the existing legislative framework to identify any additional aspects that may require refinement or clarification.

4.3.2. Whilst we agree that amendments to the retirement fund legislative framework is a complex matter - especially with the impending changes introduced by the "two-pot" retirement system - we believe that it would be advisable for National Treasury to consider a broader investigation into potential technical amendments to retirement fund legislation as a whole to ensure consistency and greater clarity.

5. Miscellaneous

5.1. WG response to the proposed amendments as set out in the DTALAB.

5.1.1. We have no further comments on the proposals set out in the DTALAB pertaining to paragraph 1 and paragraph 2 of the Fourth Schedule to the Act.

5.2. Employees' tax registration

5.2.1. During the 2023, DTLAB cycle, National Treasury and SARS had proposed amendments to the paragraph 2 of the Fourth Schedule to the Act.

5.2.2. We note that the withholding obligations for non-resident employers were amended from a PAYE perspective with the result that non-resident employers with a permanent establishment in South Africa are required to register for PAYE purposes and deduct PAYE. However, the matter that was raised pertaining to the

misalignment of the SDL and UIF provisions with the Fourth Schedule, has not been satisfactorily resolved. In our view, there remains a lack of clarity on this matter.

5.2.3. For ease of reference, we set out our comprehensive submission in Annexure A to this document. We request that clarification be provided in this regard.

End.