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Parliamentary Standing Committee on Finance  
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Dear Sirs and Madams

**SAICA'S ADDITIONAL COMMENTS ON THE DRAFT TAXATION LAWS AMENDMENT  
BILL OF 2021 – CONTRIBUTED TAX CAPITAL**

**Background**

1. The National Tax Committee, on behalf of the South African Institute of Chartered Accountants SAICA made [a submission](#) on 27 August 2021 to the National Treasury in respect of the second batch of the DTLAB released by National Treasury on 12 August 2021. The National Treasury only released its response document on 10 November 2021 and the draft bills were released by the Minister of Finance the next day (11 November 2021).
2. This timing unfortunately did not provide sufficient time for us to further engage or provide further comments on the proposed changes by National Treasury to the DTLAB as is usually the case.

3. On 17 November 2021 the matter of the proposed changes, contained in the latest Draft Taxation Laws Amendment Bill 2021 (DTLAB) released by the Minister of Finance on 11 November 2021 to the section 1 definition of “**Contributed Tax Capital**” (CTC), was deliberated by the 15 members of the SAICA National Tax Committee as regards to its negative unintended impact on taxpayers and whether that impact would be significantly broad as to different taxpayers. It was concluded that it would be and that the matter should not be left to stand over for addressing in the next legislative cycle.
4. It is for this reason, that we urgently request the National Treasury to consider our concerns.
5. We are patently aware of the imminent consideration of the Standing Committee on Finance of the DTLAB, and unfortunately, we have had to circulate this document to National Treasury and to the Standing Committee on Finance (SCoF) simultaneously, to enable the SCoF time to at least consider our submission, and should they agree, exercise their rights and obligations of amending the bills as set out in the 2008 Money Bills Amendment Procedure and Related Matters Act.
6. We set out the background as well as our concerns regarding these changes below.

### **Proposed changes to CTC**

7. Under the latest 2021 DTLAB proposals, if a company wishes any amount of a distribution to constitute a return of CTC, all shareholders must share, pro-rata to their shareholding, in the return of CTC.
8. General share repurchases by SA-listed companies are excluded from this requirement i.e. in a general repurchase by a SA-listed company, the directors of the company may resolve that the distribution, or part thereof, constitutes a return of CTC, regardless of the fact that not all shareholders participate in the transfer or are actually allocated a pro-rata amount of CTC.
9. Under current law (and this will also be the position if the proposed amendments are promulgated), the maximum amount of CTC that can be allocated to any particular shareholder is limited to the shareholder’s pro-rata share of the CTC.

### **Concerns**

10. The proposed amendment will **effectively prevent targeted share buy-backs** from taking place in which CTC is sought to be returned to a particular shareholder.
11. Targeted share buy-backs are valid commercial transactions which are catered for in section 48 of the Companies Act.
12. The commercial reasons for these targeted share buy-backs include situations in which shareholders are experiencing financial difficulties and thus wish to dispose of their shares to the company that issued them. Often there is not a ready buyer for the shares other than

such company that issued the share. Often targeted share buy-backs are also used in the restructuring of companies, including BEE transactions. It can also apply where the investing company or pension fund etc has been compelled, due to change in circumstances or by its own shareholders, to dispose of a particular significant shareholding. This could occur, for example, where it wants to cut its losses or exposure or where holding that share has become socially intolerable.

13. If the proposed amendment becomes effective, the entire amount returned to shareholders in such targeted share buy-backs will be a 'dividend' and no amount returned to shareholders may constitute a return of capital.
14. As mentioned above, in many situations not allowing a taxpayer to sell the shares using CTC will lead to inequitable treatment in the hands of shareholders as the following example illustrates.

15. **Example:** A company issued ordinary shares to shareholders at R100 per share. Some shareholders are retail investors. The company did not perform as well as expected – thus the shares are currently valued at around R90. The initial investors are therefore already in a loss position.
16. If the company issued 1 000 ordinary shares at R100, it has CTC of R100 000.
17. Although the shares are traded on some over the counter platform, there is no liquid market for them. Some retail investors experience financial pressure and wish to sell their shares in the company. The company offers to buy these shares back from them.
18. Shareholder A (natural person) holds 1 share purchased at R100 and takes up the offer to sell back to the company at R90.
19. In terms of the current legislation, the company's board can determine that up to R100 (R100 000 x 1/1000) is paid to Shareholder A from CTC. The full R90 repurchase price can be a return of capital. Shareholder A's tax position is **a loss of R10** (R90 – R100). Shareholder A does not pay any tax on the sale. This is arguably the correct outcome given that he suffered an economic loss.
20. In terms of the amended legislation, no portion of the repurchase price can be paid from CTC since the distribution is made to Shareholder A, a specific shareholder who wishes to sell his shares back to the company, not all the ordinary shareholders.
21. The **full repurchase price is a dividend** and is **subject to dividends tax at 20%** for natural person retail investors. For Shareholder A the dividends tax on R90 repurchase price is R18 (R90 x 20%). Shareholder A now suffers an economic loss of R10 (R100 – R90), which is exacerbated to become **an economic loss of R28** because of the dividends tax of R18. There will be no mechanism in the tax law to prevent this unjust outcome.

22. This example illustrates the problem which results in the economic loss on the sale of the share. Whilst the example provided is rather simplistic there are some shareholders that paid a significant amount for a specific shareholding therefore having a high base cost attached to such shares. If the shareholder is forced to dispose of the shares by way of a buy-back (assuming no external purchaser available etc). then that taxpayer would be severely prejudiced as they will lose that entire base cost if there is no amount payable from CTC. In principle, the same concern, however, arises when the shares are sold back to the company at a gain but a portion of original investment must now be repaid and taxed as a dividend. This affects any share repurchase from a person who is not exempt from dividends tax.
23. The response of National Treasury and SARS to the comments submitted on the proposed amendments, per the Draft Response Document, does not address the various concerns raised in the comments provided, although it purports to do so as follows: *"Partially Accepted. Changes will be made in the 2021 Draft TLAB to exclude a general repurchase of listed shares (share buy-backs) by companies listed on the JSE or other South African exchange"*.
24. The exclusion of a general repurchase of listed shares from the proposed amendments does not address the above concerns. The exclusion of general repurchases from the requirement that in order to constitute a reduction of CTC, all shareholders must share proportionately in the reduction of CTC, is unnecessary. This is because the proceeds received by or accruing to a shareholder arising from the disposal of shares in such a general repurchase of listed shares is expressly excluded from the definition of 'dividend' and would therefore constitute 'proceeds' for capital gains tax purposes.
25. It would therefore not make sense for the directors of such a company to resolve that any amount arising from such a general repurchase be a reduction of the CTC attributable to that class of share, since doing so would reduce the contributed tax capital of the company, which the company may wish to return to shareholders at a later stage. Therefore, granting the directors of a SA-listed company this ability, is no real concession in practice.
26. A further concern is that the interaction of this change with the provisions of paragraph 43A of the Eighth Schedule, which could result in further possible anomalies that would need to be considered as this paragraph would require the dividend to be taken into account as part of the proceeds from the disposal of the share (held as a capital asset).

27. Submission: In order to prevent an unfair tax situation from arising with targeted share buy-backs as a result of the proposed amendment, we respectfully request that targeted share buy-backs be expressly excluded from the new proviso.
  28. Should this not be accepted, we request that the effective date of the proposed amendment be deferred until 1 January 2023 so that sufficient time can be provided for National Treasury to consider the concerns raised above.



Please do not hesitate to contact us should you have any queries in relation to anything contained in this submission.

Yours sincerely

**David Warneke**

**Chairperson: National Tax Committee**

**Pieter Faber**

**Executive: Tax**

**Dr Sharon Smulders**

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*The South African Institute of Chartered Accountants*