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The South African Revenue Service
Le Hae La SARS
299 Bronkhorst Street
Pretoria
0181

BY EMAIL: policycomments@sars.gov.za

Dear SARS

SAICA COMMENTS: DRAFT INTERPRETATION NOTE ON THE DEFINITION OF EMPLOYEE (EMPLOYMENT TAX INCENTIVE ACT)

1. On behalf of SAICA, we would like to thank SARS for affording us the opportunity to comment on the draft interpretation note on the definition of employee (DIN) for the purpose of the Employment Tax Incentive Act, 2013 (the ETI Act).

2. Our comments and proposals have been set out below, firstly in respect of those aspects addressed in the DIN and thereafter, the aspects that we believe should be addressed in the DIN.

Purpose

3. The last paragraph in this section notes: 'No income tax or employees' tax implications such as fringe benefits are considered in this Note.'

4. Submission: For completeness, we propose that the term 'fringe benefits' be preceded by the word 'taxable' – to read 'taxable fringe benefits'.

Background

5. In the last paragraph in this section, the DIN notes that the proposed amendment to the definition of "employee" as proposed by the National Treasury in the 2021 Draft Taxation Laws Amendment Bill (TLAB) is not considered. However, the amendment has now been

tabled and accepted by Parliament and in our view, the final interpretation note should be reflective of the relevant legislation at the time of publication.

6. Submission: The DIN should be updated to take into account the amendment to the definition of 'employee' contained in the 2021 TLAB as enacted.

4.1: Definition of "employee"

7. The opening line in this section notes that: 'The purpose of definitions in a statute is to define the meaning of key words and phrases **frequently** used in that statute.'

8. In our view, the frequency with which a word is used is irrelevant. What is particularly relevant here is that the word "employee" is defined in the ETI Act, Income Tax Act and labour law.

9. Submission: Remove reference to the word ' frequently' in the above-mentioned sentence.

10. On page 4, it is noted that: '…the definition of "employee" in paragraph 1 of the Fourth Schedule will not apply for purposes of the ETI.'

11. In our view, this should refer to the definition in any other Act also not being applicable, in the context of the DIN.

12. Submission: The sentence should read as follows: 'Therefore, the definition of "employee" in paragraph 1 of the Fourth Schedule (to the Income Tax Act) **or any other Act** will not apply for purposes of the ETI', or similar.

4.1.2: Requirement to work for another person

13. The last paragraph on page 7 dealing with the distinction between section 12H learnership agreements versus arrangements with learning institutions to provide courses for the duration of the 'employment' term refers.

14. In our view, the discussion in this part creates the view that the ETI requires a learnership agreement in order for one to qualify for such and requires further clarification to avoid any misunderstanding.

15. Submission: We propose that examples of where there is no learnership agreement should be given, in order to illustrate the point that SARS would like to make.

16. There are employment tax incentive (ETI) schemes where employees are 'seconded' to another person and may or may not perform services for that person, such services which may or may not be in furtherance of the employer's business. In our view, the DIN fails to take into account the different scenarios that may apply in this regard with guidance as to

which type of secondment arrangement would allow the legitimate use of the ETI versus those types of arrangements in respect of which the ETI would not be claimable.

17. A further consideration may be whether or not the employer provides a 'secondment' or labour broking service in the ordinary course of its business or if this type of arrangement has been entered into purely to reach agreement with the third party, in which case, employees are seemingly employed in excess of the need of the employer in conducting its ordinary business activities.

18. Whilst we agree that the employee must be personally providing services to the employer in the furtherance of the employer's business, we are not convinced that this has been adequately addressed in the DIN.

19. Submission: The DIN must provide insight into SARS' views regarding different types of secondment arrangements, with the use of examples to illustrate the correct treatment based on the relevant circumstances.

20. We note that the DIN cannot cover all the different scenarios and a disclaimer can be inserted to that effect.

21. We understand that learnerships and apprenticeships may be subject to different rules in terms of the National Minimum Wage Act, over and above the requirements in terms of section 4 of the ETI Act.

22. Submission: SARS should consider providing more context in the DIN as to how the different Acts interact with each other, with reference to the specific sections impacted – one example being the compliance with a wage regulating measure.

4.1.3: Requirement to receive or is entitled to receive remuneration

23. The DIN does not take into account the proposed change to the definition of "monthly remuneration".

24. Submission: Given the amendment to the definition of "monthly remuneration" in the 2021 TLAB, consideration should be given to updating the DIN for this, once enacted.

25. The 2021 TLAB also proposes a change to section 6 (Qualifying employees) of the ETI Act, proposing the following proviso be inserted:

> ''*Provided that the employee is not, in fulfilling the conditions of their employment contract during any month, mainly involved in the activity of studying, unless the employer and employee have entered into a learning programme as defined in section 1 of the Skills Development Act, 1998 (Act No. 97 of 1998), and,* ***in determining the time spent studying in proportion to the total time for which the employee is***

employed, the time must be based on actual hours spent studying and employed.'' [our emphasis]

26. The wording in bold may give the impression that if the employer and employee have entered into such a learning programme, even if in fulfilling the conditions of the employment contract during any month, as long as they are not mainly involved in the activity of studying, this proviso would not apply.

27. However, we are not certain that this is the intention of National Treasury or that it addresses the potential tax avoidance schemes that resulted in these amendments. We note below the comments made by the public in relation to the proposed changes to the ETI Act contained in the first batch of the TLAB as well as National Treasury's response in relation to this:

    Comment: The proposed amendments to section 6 of the ETI Act result in what are actually legitimate ETI claims no longer qualifying for the incentive. As a result, instances where the employer provides on the job training, where the employer and employee have entered into a learnership or apprenticeship programme, or where the employee is on a secondment may no longer qualify for the incentive. Consideration should rather be given to clarifying that the employee should be given a cash payment in lieu of services rendered.

    Response: Accepted. The incentive is intended to apply to all legitimate arrangements where the employee is not only engaged in the activity of studying, but rather gaining valuable work experience. In the event that some of the employee's duties involve some sort of training or studying, the costs of said training or studying should ideally be borne by the employer. To ensure that the employee's remuneration package is not solely allocated to costs associated with any required training or studying, qualification for the incentive shall further be based on the employee receiving a cash payment in lieu of services rendered. Changes will be made in the 2021 Draft TLAB to reflect this intention.

28. In our view, based on the above comment and response, it seems that the where the employee is registered for a learning programme as defined in section 1 of the Skills Development Act, 1998 (Act No. 97 of 1998), any costs incurred for such programme must be borne by the employer and should not in any way impact the cash wage that the employee is entitled to in terms of the employment contract and in line with the Basic Conditions of Employment Act.

29. This is to prevent schemes whereby the employees do not/will not receive payment from the employer, since the employer must pay such remuneration to, for example, a consulting firm or training college under the relevant agreement, on a monthly basis. In some instances, the agreement will provide that the employees 'cede' their remuneration to the consulting firm or training college.

30. In such circumstances, it is envisaged that the employees will have a right or entitlement to remuneration from the employer and then cede such right or entitlement. So, whilst the

requirement that remuneration is 'paid or payable' will be met, there needs to be consideration of whether or not the requirement of the minimum wage being paid to the employee, in terms of section 4, has been met. If not, the employer will not be entitled to claim the ETI.

31. Submission: Assuming the final interpretation note will be published after promulgation of the above-mentioned amendment, we believe that the DIN must clarify the amendment, to adequately explain the principle to be applied in the circumstances.

32. Specifically, the waiver or cession of the wage or salary in favour of the fees for the learning programme should result in a disqualification of the arrangement for receiving the ETI.

4.1.4: Exclusion of independent contractors

33. With reference to independent contractors, the DIN on page 9, makes reference only to the common law 'dominant impression test'. However, if the word remuneration takes the Fourth Schedule meaning, then the statutory test with respect to an independent contractor is also relevant.

34. Certain of the wording in this section is not consistent with the terminology used in the relevant Interpretation Note 17, Issue 5 – Employees' Tax: Independent Contractors (IN17).

35. Submission: To avoid confusion, it may be worthwhile referring to IN17 and merely providing a summary of the relevant legislation and interpretation in this section.

OTHER ASPECTS

Compliance with wage regulating measures

36. Whilst the purpose of the DIN is to provide guidance as to the meaning of "employee" for the purpose of the ETI, we note that an important aspect that must be addressed is compliance with section 4 of the ETI Act (Compliance with wage regulating measures) as non-compliance with this section, precludes employers from claiming the ETI.

37. There may be schemes that comply with the definition of employee, but do not comply with relevant wage regulating measures, where relevant, or the minimum wage of R2 000 (pro-rated depending on the number of hours worked) in the absence of a wage regulating measure, due to remuneration due to employees being paid to third parties, whether or not subject to a cession agreement (referred to above).

38. There are a few opinions that we have had sight of or have been made aware of that appear to disregard the requirement for compliance with wage regulating measures.

39. The term "wage" is defined in section 1 of the ETI Act and means: *'wage as defined in section 1 of the Basic Conditions of Employment Act No. 75 of 1997'* (the BCEA).

40. The term "wage" is defined in the BCEA as: *'the amount of **money** paid or payable to an employee in respect of ordinary hours of work or, if they are shorter, the hours an employee ordinarily works in a day or week'*. (our emphasis)

41. Based on the above, there is an argument that the term "wage" as defined in the BCEA means **cash** and not a payment in kind. If a payment in kind is regarded as acceptable, then consideration must be given as to how the value of such a payment was derived.

42. The proposed amendment to the term "monthly remuneration" seems to indicate that National Treasury agrees with this concept of there being a need for a cash payment.

43. Furthermore, the word "paid" is not defined in the ETI Act and therefore one would need to refer to the ordinary meaning of the word. The word "paid" means being given money for something, in this case – work performed.

44. There are schemes whereby the employees do not/will not receive payment from the employer, since the employer must pay such remuneration to, for example, a consulting firm or training college under the relevant agreement, on a monthly basis. In some instances, the agreement will provide that the employees 'cede' their remuneration to the consulting firm or training college.

45. In such circumstances, it is envisaged that the employees will have a right or entitlement to remuneration from the employer and then cede such right or entitlement. So whilst the requirement that remuneration is 'paid or payable' will be met, there needs to be consideration of whether or not the requirement of the minimum wage being paid to the employee, in terms of section 4, has been met. If not, the employer will not be entitled to claim the ETI.

46. In addition, the substance over form of such agreements must be considered and we are concerned that the DIN does not address these types of arrangements which, in our view, seek to undermine the ETI.

47. Submission: The DIN should be extended to include a discussion of section 4 of the ETI, as related to the right of the employee to receive "remuneration", as well as guidance as to SARS' interpretation and application thereof, including examples to illustrate the conclusions reached in respect of this.

48. The implications of non-compliance with this section should also be discussed in the DIN, that is, the penalty in terms of section 4(2) of the ETI Act.

Interaction between the ETI Act and other Acts

49. As mentioned above, there are a number of sections within the ETI Act, which refer to definitions and provisions of other Acts – namely the Income Tax Act, 1962, the Labour Relations Act, 1995 and the Basic Conditions of Employment Act, 1997.

50. In our view, there is insufficient reference to these Acts and how they impact on the interpretation of specific sections in the ETI Act.

51. Submission: SARS should consider providing more context in the DIN as to how the different Acts interact with each other, with reference to the specific sections impacted – one example being the compliance with a wage regulating measure.

Please feel free to contact us should you wish to clarify any of the above comments.

Yours sincerely

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