Ref #:

FEEDBACK SUMMARY

GENERAL

SAICA attends various discussions and meetings on behalf of members with National Treasury (NT), the South African Revenue Service (SARS) and other stakeholders (internal and external). These meetings represent an opportunity for them to obtain further information on any tax matter from the public and discussions and views expressed do not represent policy or decisions. Furthermore, these discussions do not represent an undertaking by SARS, NT or other stakeholders, but merely statements of their understanding or how they perceive or anticipate a particular matter to be addressed.

The below Feedback Summary should be seen in the above context as merely attempts to inform SAICA members of the discussions and of any proposals that were made during such discussions.

NATIONAL TREASURY PUBLIC WORKSHOP ON ANNEXURE C

16 January 2019

Below are some of the matters discussed at the NT Public Workshop on the Annexure C submissions made for 2019, held on 7 December 2018.

GENERAL

NT noted that the Bills and amendments for 2019 will be minimal given that 2019 is an election year.

The 2018 Taxation Laws Amendment Bill (TLAB18) and 2018 Tax Administration Laws Amendment Bill (TALAB18) has been presented for signature in the middle of December 2018, which will result in the release of the Final Explanatory Memorandums. The President has, however, not signed the TLAB18 and TALAB18 to date.

RETIREMENT REFORMS

Partial access to retirement benefits

Stakeholders requested that taxpayers obtain partial access to retirement benefits allowing them to access their lump sum upon retirement, while only claiming access to the annuity benefit at a later stage.

Transfer of in-fund living annuities to other employer funds

Stakeholders noted that it is not clear whether taxpayers may transfer in-fund living annuities to an employer's umbrella fund and requested that this should be clarified by amending the definition of living annuity. NT noted that they will clarify the issue with an updated notice rather than amendments to the legislation.

Section 10C exemption in relation to provident or provident preservation funds

NT noted that it will take stakeholders' requests relating to the section 10C exemption in relation to provident or provident preservation funds into consideration with the retirement reform rules.

Transfer of unclaimed benefits from a retirement annuity

Stakeholders requested that the legislation allows taxpayers to transfer an unclaimed benefit from a retirement annuity to a provident fund. NT was open to the request but noted that it will be limited to a pension preservation fund with a limitation that no lump sum can be withdrawn.

Definition of normal retirement age

SARS and the Institution of Retirement Funds (IRFA) had a meeting during 2018 in order to discuss the definition of normal retirement age, given the different meanings within the Income Tax Act, 58 of 1962 (the Act) and various Fund Rules. NT noted that no amendments will be made in the legislation, thus stakeholders requested an interpretation note from SARS. SARS, however, noted that IRFA and SARS have reached a common understanding and will not issue an interpretation note.

Beneficiary fund

Stakeholders noted that the Pension Fund Act allows for the transfer from a beneficiary fund to an unclaimed benefit fund, while the Act does not allow it. Currently there is no definition of a beneficiary fund and NT stated that they are hesitant to incorporate such definition.

In-fund living annuity of a deceased active member

Stakeholders noted that uncertainty exist as to whether dependants can elect to receive an in-fund living annuity of a deceased active member. NT noted that this has been removed historically by taxpayers' request, but they are willing to insert it into the Act again.

EMPLOYMENT ISSUES

Employment Tax Incentive (ETI)

NT noted that ETI issues were discussed at the job summit where all the labour unions were present. Hence NT will await the outcome thereof before adhering to any other requests.

Tax directive application

Stakeholders requested NT to legislate a minimum threshold where employers do not have to apply for a tax directive. NT noted that the reason for a tax directive is to ensure that the

necessary tax ia collected, and if it is done away with it will lead to being more difficult to collect.

INDIVIDUAL TAX ISSUES

Low or no interest loans granted in respect of employer provided low-cost housing

The TLAB18 proposed that relief from triggering a taxable benefit be extended to apply to a low or interest free loan with a value not exceeding R450 000 provided by an employer to a low-income earning employee with a remuneration proxy not exceeding R250 000, provided the loan is granted solely for the acquisition of residential accommodation.

Stakeholders, however, requested that the cap of the R450 000 market value of residential accommodation needs to be re-considered as some employees may be excluded from the benefit given that the residential accommodation is higher than the threshold. Stakeholders noted that both thresholds, i.e. the R250 000 salary cap and the R450 000 need to be reconsidered.

NT noted that it is open to proposals to increase the R450 000 threshold or either cap it at a certain amount, where after employees will be taxed. NT did however note their concern of whether the employees will be able to afford it given that Government does not want to over indebt people. Stakeholders also proposed a family means test in this regard.

Employer provided bursaries

Stakeholders noted that in terms of section 10(1)(q) of the Act, the payment of fees directly to an institution does not trigger tax, however, payment to the employee to reimburse for expenses paid to the same institution does create a taxable event. IT was therefore proposed that section 8 of the Act should be amended to specifically allow for the reimbursement of study fees to be a non-taxable reimbursement.

NT noted that this has been addressed in Interpretation Note 66, which provides that the determining factor would be whether it was for studies of the employee or not.

Recovery of debt

In terms of section 10(1)(q) of the Act the employee must be obligated to repay the bursary, i.e. a debt to the employer arises, should the employee fail to complete the studies for reasons other than death, ill-health or disability.

Stakeholders noted that there is currently no provision in law that would allow for the debt/loan to be regarded as interest free or at a low interest rate without triggering a fringe benefit. Nor is there a provision that would allow for the waiver of the debt by the employer given the burden the debt has on the employee, without triggering a fringe benefit. It was therefore proposed that relief is provided to employees in order not to trigger taxable fringe benefits.

NT noted that such an amendment may lead to incentivising employees not to complete their studies. If employers wish to implement the above, they will need to gross up.

Employee share incentive plans: Section 8C

Stakeholders raised the concern on the private company definition of market value. The Scheme Rules usually stipulate the valuation that needs to be used, but stakeholders noted that older plan rules does not necessarily define it. NT noted that it will try and accommodate the submission by making minor adjustments.

Employer provided company cars

A stakeholder requested that the legislation should be amended to stipulate that the employer should not be able to stipulate that the employee need to pay for the maintenance of a company car, as this may potentially penalise employees. NT noted that such an amendment tends to touch on company policy and would therefore not support such a proposal.

It was noted that the regulation that will be issued will clarify what the market value of sponsored vehicles and the concerns around the acquisition cost that is Rnil.

Property deemed to be disposed of under a donation: Section 58

Stakeholders noted that based on the literal wording of section 58 of the Act, the deemed donation potentially applies to any disposal of property at less than what the Commissioner may regard as adequate consideration. It was noted that it is presumed that what is meant by “adequate consideration” is the current market value of the property although this is unclear. Examples of where property may be disposed of at less than market value include instances where BBBEE partners are introduced into a business for a discounted consideration with long term BBBEE objectives in mind.

NT noted that clarity is needed with regard to the interpretation of section 58, particularly as to whether at least a partial motive of gratuitousness is required for the provision to be invoked and in relation to the meaning of the term “adequate consideration”.

Section 10(1)(o)(ii) workshop

Stakeholders noted that the revised version of section 10(1)(o)(ii) of the Act, which becomes effective on 1 March 2020, does not take into account the practical difficulties that will result from the application of the revised section and will result in the unintended consequence of limiting international assignment opportunities for residents of South Africa.

Stakeholders also noted that NT undertook in Parliament to host a residency workshop to discuss the proposed amendments to section 10(1)(o) of the Act.

NT confirmed that the workshop will proceed and is scheduled to occur late January 2019.

Loan or credit advanced to a trust by a connected person: Section 7C

Interaction with the attribution rules

Stakeholders discussed the interaction between section 7C and the attribution rules contained in section 7 of the Act which may lead to double taxation. NT noted that there is no double taxation on the same amount, but multiple consequences. For example where a loan is made

to a trust resulting in a deemed donation on interest the attribution rules would determine where the income should be attributed to, i.e. the specific person.

Extension to include loans to companies held by trusts and threshold of the shareholding of the trust

In the 2017 amendments the legislator widened the scope of section 7C by also including loans to companies where 20% or more of the shares of the company are held directly or indirectly by a trust or a beneficiary of the trust.

Stakeholders noted that the amendment is overly broad applying to transactions that were not intended to be subject to section 7C. For example, normal trading companies receiving working capital loans from the owners of these companies are now also affected by section 7C. Furthermore, as section 7C applies to loans made by both natural persons or companies at the instance of a natural person, the impact of section 7C(1)(ii) is that even goods or services provided on credit by one company to another company through normal trading transactions, the shares of which are already under a trust structure, may potentially, at least on the literal wording of the provision, invoke the application of section 7C if the transaction was done at the instance of the specified natural person.

It was noted that the current threshold in section 7C(1)(b)(ii) is too low and it was proposed to increase it to 50%, since no trust beneficiary would dispose of the debt and assets to an independent majority shareholder to merely avoid estate duty.

NT noted that there is no rationale provided to increase it to 50% and therefore they cannot amend it.

Unpaid distributions to beneficiaries

Historically trustees of discretionary trusts have exercised their discretion and vested amounts in the hands of beneficiaries in terms of section 25B of the Act and paragraph 80 of the Eighth Schedule to the Act. However, as allowed in terms of discretion provided to the trustees by the trust deeds, these amounts were not “paid” to the beneficiaries. Typically, these amounts have been disclosed on the financial statements of the trust as “amounts owed to beneficiaries”.

The question was raised whether amounts that have vested in the hands of the beneficiaries are considered to be “any loan, advance or credit” as contemplated in section 7C, as an unpaid vested amount that would arguably be “any loan, advance or credit”.

SARS however noted that a bilateral act is required in order to create a loan. NT confirmed that section 7C of the Act will not apply where the trust deed allows for a unilateral act.

Application to deceased estates

It was noted that in the absence of the exclusion of section 7C from section 25(5), these sections when read together could have the unintended consequence of a loan, advance or credit owing to a deceased estate giving rise to an application of section 7C in relation to the estate i.e. resulting in a deemed donation by that estate, which is contrary to the rationale of section 7C.

SARS noted that the South African system is structured to create a separate person for taxation purposes and the executor steps into the shoes of the deceased. It's SARS' view that section 7C will not find application in the circumstances noted above, as the deceased estate is not a connected person.

NT noted that it will therefore not make any amendments.

Interpretation of the phrase "at the instance of"

Stakeholders noted that in relation to section 7C of the Act, there is very little precedent regarding the interpretation of the phrase "at the instance of" a natural person.

SARS stated that it is a factual question and referred taxpayers to case law dealing with "control" for purposes of companies which may provide some clarity as to what the courts may take into consideration when looking at the phrase "at the instance of".

Time of deemed donation and section 60

In terms of section 60 of the Act, donations tax is payable by the end of the month following the month during which a donation takes effect. The Commissioner can allow for a longer period in terms of section 60(1) of the Act.

Stakeholders noted that the time period of 31 days (end of March) is not enough time to allow for the calculation and payment, as well as the allocation of the payment given that donations tax returns cannot be submitted via eFiling. It was therefore requested that the period for submission and payment should be extended in the case of section 7C deemed donations.

NT noted that taxpayers may approach SARS to request an extension.

Consequences under the National Credit Act

It was noted, simplistically, that any loan granted to a trust will generally be termed a credit agreement as defined in the National Credit Act. This means that most loans, if interest bearing, are legally required to be registered with the National Credit Regulator.

Stakeholders requested that SARS and NT should also therefore consider the possible anomalous impact that the National Credit Act has on loans that will now be interest bearing due to section 7C of the Act. The effect of the loan possibly being null and void/illegal in terms of the National Credit Act should also be considered where such loan is possibly disposed of by operation of law.

NT noted that this is not a tax legislative issue and spreads much wider.

Loans subject to secondary tax on companies (STC)

Stakeholders requested that section 7C(5)(g) of the Act should be extended to include loans that were historically subject to section 64C of the Act, which deemed certain amounts to be a dividend for STC purposes.

NT requested examples as to how many taxpayers were impacted given that the STC regime has been removed from the tax system for a number of years.

Taxation of deceased estates: Section 25

It was noted that the residency status of a deceased estate will follow the deceased person's residency status.

Stakeholders requested that the deceased estate should be considered to be finalised for tax purposes when the liquidation and distribution account is submitted to ease the administration and practical difficulties that currently arise. NT noted that it is something they will look into.

VALUE ADDED TAX (VAT) ISSUES

Crypto currency VAT treatment

NT noted that they cannot deem crypto currencies as money given the South African Reserve Bank (SARB) policy not to treat it as money

E-services Regulations

NT noted that South Africa will not have Business to Business (B2B) exclusion for purposes of e-services, but introduced the group of companies' exclusions instead. Stakeholders, however, requested that the 100% shareholding should be reduced to 70%. NT noted the request and said it will discuss the views.

A stakeholder further noted that the exclusion should not be limited to consumption only and also alluded to some textual changes that are required.

NT noted that SARS should issue a Frequently Asked Questions (FAQs) paper to address questions that taxpayers may have relating to the e-services regulations. SARS confirmed that it will release such a FAQ Guide within the first week of February 2019.

Tax Invoice Issues

Stakeholders requested that the minimum amount required to issue tax invoices should be increased, given that it is so burdensome. However, SARS is of the view that South Africa is featuring well in comparison to the world given the benchmark that has been done.

NT noted that it needs to understand the economic substance for the request to increase the threshold. Stakeholders noted that within the retail industry issues arise where invoices are not required given that no input VAT can be claimed. However, NT stated that it is their understanding that where people buy for more than the R5 000 they usually request an invoice. Hence, NT noted that they require statistics and data to determine how many taxpayers are affected by the request.

VAT threshold issues

NT noted that it is a policy decision not to implement a transitional rule in circumstances where there is a VAT rate change (i.e. 14% to 15%).

Stakeholders requested that the R1 million monetary VAT turnover threshold be increased.

NT, however, noted that taxpayers want to be in the VAT system given the many voluntary registrations. Hence an increase in the threshold may be counterproductive to support small businesses.

Stakeholders however noted that the R1 million monetary VAT turnover threshold is different to the voluntary registrations, especially when considering the service industries where there is minimal input VAT claims. NT noted that it will not change the threshold.

Stakeholders raised some concerns that in certain circumstances of notional loan funding where a company and its branches are registered separately for VAT purposes. From the said provisions in the stakeholder submission, it follows that the ultimate amount of tax payable to SARS should be identical to the amount that would have been payable, had separate VAT registrations not been effected. However, at least two scenarios exist where the aim is not achieved (i.e. where the ultimate amount of tax payable will increase due to the separate registrations, albeit that all of the branches only make taxable supplies):

- One Branch (typically the Branch where the treasury function is housed) borrows funds to be used by another Branch wholly in the course of making taxable supplies (typically an operational Branch); and
- One of the Branches acquires goods or services which are used by another Branch.

The above scenarios lead to VAT leakage despite businesses having legitimate reasoning for registering separate branches, for example decentralising, limiting the administrative burden, etc. NT noted that taxpayers should get a dispensation in terms of section 72 of the Value Added Tax Act,o 89 of 1991 (the VAT Act).

<u>VAT roll-over relief on company re-organisations: section 8(25)</u>

Stakeholders submitted that in certain instances of re-organisations not all assets are necessarily transferred, thereby affecting companies' ability to claim the VAT roll-over relief as provided for in section 8(25) of the VAT Act. Stakeholders therefore requested amendments including a definition of "going concern" in such circumstances.

SARS stated that taxpayers can apply for rulings in these circumstances, but stakeholders in turn noted that rulings do not cater for these types of transactions, given that it happens quickly and rulings take time to be approved.

NT noted that it will look into making minimal amendments, but advised the alternative will still be applying for rulings.

<u>VAT Rulings</u>

In terms of section 17(1) proviso (iii) of the VAT Act, where SARS has previously issued a ruling as to the method by which the "intended taxable use" should be determined (i.e. an apportionment ruling), the method may subsequently only be changed from a future date.

Stakeholders therefore requested NT for a provision to allow SARS to backdate such rulings to use an alternative apportionment method, where the turnover-based methods yields inequitable results.

Stakeholders furthermore requested that a provision is introduced to section 41B of the VAT Act and Chapter 7 of the TAA stipulating that the re-application of rulings subject to expiration dates must be made within a particular timeframe prior to the expiration date. In addition, a provision should also be included that if the taxpayer submitted the re-application within the required timeframe, the existing ruling will remain in force until the re-application has been confirmed, amended or declined by SARS.

NT noted that it is difficult to legislate given the practical issues relating to the specific facts and circumstances. Stakeholders noted that the ruling won't apply in any event under current law, if circumstances change.

NT proposed that taxpayers should look at it pragmatically by applying for a confirmation ruling 3 months in advance before it expires and noting that nothing has changed. SARS also noted that the matter can be addressed within the ruling system and it does not require amendments to legislation.

Interest on delayed VAT refunds

Stakeholders requested NT to align section 45 of the VAT Act with Chapter 12 of the TAA to ensure consistency where interest is due. NT noted that this is a bigger policy issue.

VAT treatment of Exports/ imports

NT noted that the draft export regulations will be released where after taxpayers will have the opportunity to give their comments.

Stakeholders requested clarity as to what constitutes export given that the current wording in the legislation may result in a narrow interpretation being applied, i.e. the exemptions envisaged in Schedule 1 to the VAT Act would only be applicable where goods are exported under e.g. a sale, but the goods are returned before ownership had transferred for whatever reason.

Stakeholders therefore requested a paragraph to be included in the pre-amble to Schedule 1 to the VAT Act that states that notwithstanding the definition of "exported" in section 1(1) of the VAT Act, exemptions will apply, including goods originally exported and subsequently imported upon return.

NT requested stakeholders to submit more details in this regard.

Stakeholders requested amendments to simplify the documentary requirements for VAT claims on imported goods. NT noted that this relates more to an administrative issue rather than custom documentation. Hence NT stated that no amendment is necessary and requested that taxpayers look at their internal resources to ensure the correct procedure is followed.

Stakeholders also noted that uncertainty occurs regarding what documents are required during the audit process, as SARS is not consistent. NT noted that this is a SARS execution issue and proper internal communication should be done within SARS to ensure consistency.

Updating VAT Act to include the New Insurance Act

Stakeholders noted that certain sections within the VAT Act would need to be amended given that the New Insurance Act does not distinguish between long term insurance and short term insurance. NT noted that it will amend and update the legislation on an ongoing basis.

Sharia Compliant Finance Arrangements

Murabaha agreements are mark-up financing transactions. These agreements are generally offered by financial institutions, such as a bank, to clients in order for clients to obtain financing for various assets such as vehicles. Stakeholders requested NT to align the VAT Act to the Act for purposes of Murabaha arrangements. NT noted that it will have an internal discussion, especially from the Act's perspective.

Clarity on the definition of "enterprise"

Stakeholders noted that in practice it would be difficult for the non-resident to determine whether he/she should be registered in South Africa. The terms "regularly" or "continuously" are difficult to interpret in practice and may vary from instance to instance depending on the level of procurement by the non-resident in South Africa. The determination is challenging for the non-resident, and nearly impossible for the South African supplier. Stakeholders therefore recommended that section 11(1)(q)(i) of the VAT Act be amended.

NT noted that it is not the first time that the issue has been raised and re-affirmed that it is a bigger policy issue.

VAT treatment of pooling arrangements

Section 52 of the VAT Act can only find application to rental pools as noted in the section. Stakeholders noted that it is unclear on what basis only one industry is effectively singled out to make use of pooling, i.e. rental pools, in circumstances where there are other industries where these pooling arrangements will also find application, like the agricultural industry.

Stakeholders requested that this section be amended to provide discretionary powers to the Commissioner to approve of any industry who applies for pooling. The regulations in this regard was never approved/issued by the Minister of Agriculture and is therefore done on an *ad hoc* basis by SARS.

VAT exemptions for imports for ships used for international shipping

Stakeholders requested a point of clarity as to whether registration of ships in South Africa should be VAT exempt or alternatively every ship coming into South Africa should be treated the same as a South African flagship.

NT noted that this is a bigger policy issue and it will have a separate discussion with the affected taxpayers. NT also confirmed that this is a custom litigation matter.

Leasehold improvements: Rules for lessor

Section 18C of the VAT Act provides that a vendor (lessee) making mixed supplies will get the full input tax deduction, whilst the lessor is liable for output tax which it cannot recover with the result that it may not have the funds to pay the VAT. Stakeholders therefore noted section 18C should be deleted to close the loophole. NT took note thereof and stated that they will amend.

Clarification of definition of "surrender of goods"

Stakeholders proposed that the definition of "surrender of goods" be amended to include scenarios where it is a contractual obligation of the debtor to return the goods. NT stated that it will look into the matter.

Adjustment in acquisition of going concern for purposes other than making taxable supplies

The purpose of section 18A of the VAT Act is to place the acquiring vendor in the same position as he would have been had he paid VAT on the acquisition of goods or services acquired in respect of the exempt activities of the enterprise acquired. However, based on a strict interpretation SARS will collect output VAT on items that are otherwise not subject to VAT.

Stakeholders therefore requested NT to relook at the entire section to ensure that it mirrors both the purchaser and seller. NT noted that it will look at the matter and requested further clarity in this regard.

Water boards – Accounting for VAT on payment basis

Water Boards are currently listed under Part B of the Public Finance Management Act, hence these entities do not constitute "public authorities" for VAT purposes.

It follows that Water Boards are currently required to account for output tax on the invoice basis on all sales in excess of R100 000. In the case of Water Boards this will include virtually all supplies made as most supplies relate to the supply of bulk water to municipalities.

Most municipalities are currently under financial strain resulting in payments to Water Boards being outstanding for extended periods of time. The above situation places undue strain on the finances of Water Boards.

NT noted that it may have been an unintended consequence when the legislation was implemented.

TAX ADMINISTRATION ACT (TAA) ISSUES

Keeping the taxpayer informed – compliance of legislation with administrative justice

The purpose of section 42 of the Tax Administration Act, 28 of 2011 (the TAA) is to keep a taxpayer informed when he is under audit. Stakeholders raised the issue that SARS in practice only applies this provision to a "formal audit", and not to a "verification".

NT noted that the submission is more of an operational issue rather than a technical amendment.

Disparity between taxpayers' rights and SARS' rights to correct assessments

Stakeholders noted that there is disparity between SARS' rights to correct assessments compared to that of the taxpayer's right to have its assessments corrected. The detailed submission referred to the objection and appeal system, and the request for reduced assessment (section 93 of the TAA).

SARS noted that the disparity existed prior to the TAA and that through the implementation of the TAA such disparity reduced. Furthermore the TAA rules were amended to provide for addition time to submit objections and requests for extension.

Amendments to section 93 of the TAA resulted in limited circumstances when section 93 of the TAA can be applied, i.e. if there is a "readily apparent" undisputed error in the assessment. Stakeholders noted that this term should be defined.

SARS noted that it is open to suggestions to define "readily apparent" but stated it should be kept in mind that consultants historically used this avenue to submit numerous documents to SARS which SARS then needed to work through to determine whether the request can be approved or not.

Assessments issued in response to discrepancies contained in an IT14SD

Stakeholders noted that the TAA does not currently make provision for the IT14SD process, as it is arguably not a return. Assessments made on the basis of discrepancies found in an IT14SD reconciliation is of concern and gives rise to significant practical issues. Hence, it was proposed that the TAA is amended to specifically include a legislative provision that will govern the IT14SD process.

SARS noted that it is more of an operational issue rather than legislation.

Additional interest remittance provisions should be inserted

Stakeholders requested for an interest remittance provision to be inserted into the TAA to apply to all relevant tax types, in terms of which SARS is authorised to remit, in whole or in part, interest imposed.

SARS noted that this would be difficult to implement as the interest is there to compensate the *fiscus* for the loss of use of money. SARS noted that if interest is wrongfully levied, SARS should in practice in any event remit such interest. Stakeholders noted that this however only happens right at the end when a matter is referred to the dispute process.

General: Tax invoices

Stakeholders requested NT to provide for a penalty provision where a supplier refuses to issue a tax invoice in terms of section 20 of the VAT Act to the recipient, given that the recipient is not able to claim the input tax (where applicable) since it is not in possession of a tax invoice

in relation to that supply as required in terms of section 16(2)(a) of the VAT Act. This means that the recipient is left "out of pocket" until it obtains a tax invoice.

SARS noted that it welcomes the proposal but questioned why section 16(2)(g) of the VAT Act is not utilised. Section 16(2)(g) of the VAT Act provides that SARS may issue a ruling to a recipient for the use of alternative documentation, where the recipient has, despite taking reasonable steps, inter alia, been unable to obtain a tax invoice as a result of the supplier having failed to issue the tax invoice.