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Submission File

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Dear Ms Majola and Ms Collins

SUBMISSION - ANNEXURE C 2019 BUDGET REVIEW

1. We present herewith our written submissions on the request for Annexure C 2019 on behalf of the South African Institute of Chartered Accountants (SAICA) National Tax Committee (NTC), as set out in Annexure A.
2. Our submissions include a combination of representations, ranging from serious concerns about the impact or effect of certain provisions to simple clarification or suggestions for potentially ambiguous provisions, in relation to either existing sections or the latest amendments to various sections of the Income Tax Act, No 58 of 1962 (the Act), the Value Added Tax Act, No 89 of 1991 (the VAT Act) and the Tax Administration Act, No 28 of 2011 (the TAA), as contained in the Taxation Laws Amendment Bill, 2018 (TLAB2018) and the Taxation Administration Laws Amendment Bill, 2018 (TALAB2018), respectively.
3. We also enclose a copy of our prior year Annexure C submissions for 2017, as Annexure B, for ease of reference. We note specifically that with the exception of a few items, National Treasury (NT) has largely not favourably considered our prior year submissions and we would seek to engage with NT on why it believes the relevant proposals would not be in the interests of the South African fiscal policy.
4. We indicate in each instance in Annexure B, the current status of the prior year's submissions, noting whether the proposals have been implemented by NT, and indicating where the proposals were partially accepted by NT.
5. We have deliberately tried to keep the discussion of our submissions as concise as possible, which does mean that you might require further clarification. In this respect, you are more than welcome to contact us in this regard.



6. As always, we thank NT and SARS for the on-going opportunity to participate in the development of the SA tax law.

Should you require any further clarification on any of the matters raised please do not hesitate to contact us.

Yours sincerely

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CHAIRPERSON: NATIONAL TAX COMMITTEE
The South African Institute of Chartered Accountants

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SENIOR EXECUTIVE: TAX



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ANNEXURE A

CATEGORY - INCOME TAX: INDIVIDUALS, EMPLOYMENT AND SAVINGS

Section 7C – “Unpaid” distributions to beneficiaries of a Trust

Legal Nature

7. Section 7C of the Act promulgated on 19 January 2017 came into effect on 1 March 2017 and applies to any amount owed by a trust in respect of a loan, advance or credit provided to that trust by a connected person (including a beneficiary) before, on or after that date.

Factual Description

8. 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”.
9. The question arises whether these amounts that have been 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 would arguably be “any loan, advance or credit”.
10. Since the introduction of section 7C various commentators and tax specialists in South Africa have expressed different and contrasting views on this. In the Explanatory Memorandum to the Taxation Laws Amendment Bill 2016, the following comments have been expressed by NT:

“The proposed rules will apply only in respect of loans advanced or provided by a natural person or, at that person’s instance, by a connected company. An amount that is vested irrevocably by a trustee in a trust beneficiary and that is used or administered for the benefit of that beneficiary without distributing or paying it to that beneficiary will not qualify as a loan or credit provided by that beneficiary to that trust if:

- *The vested amount may in terms of the trust deed governing that trust not be distributed to that beneficiary, e.g. before that beneficiary reach a specific age; or*
- *That trustee has the sole discretion in terms of that trust deed regarding the timing of and the extent of any distribution to that beneficiary of such vested amount.*

An amount vested by a trust in a trust beneficiary that is not distributed to that beneficiary will, however, qualify as a loan or credit provided by that beneficiary to that trust if that non-distribution results from an election exercised by that beneficiary or a request by that



beneficiary that the amount not be distributed or paid over, e.g. if the beneficiary has reached the age which a vested amount must be paid over or distributed to him or her”.

11. In the first instance it is noted that the above view was expressed in relation to an example that did not directly deal with unpaid trust distributions but indirect loans. It is submitted that based on above, it appears that NT and SARS may not have intended to regard the amounts that have been vested in the hands of the beneficiaries without actually paying it as “loan, advance or credit” for the purpose of section 7C.
12. However it remains unclear what the relevance is of the above statement “*unless the beneficiary elected or requested that the amount should not be paid to him/her*”, as without the trust deed providing for such discretion it cannot be unilaterally withheld. Where such discretion is exercised in terms of the trust deed, i.e. payment is also subject to a discretion, it may impact on the actual vesting of the amount (i.e. vesting creates a right to demand immediate payment for the benefits to flow).
13. The lack of clarity in this regard leaves taxpayers in an uncertain position where the wording of the legislation (section 7C) and the Explanatory Memorandum may not be completely aligned and reflective of NT intention.

The nature of the businesses impacted

14. All beneficiaries of discretionary trusts, where the amounts have been vested in the hands of the beneficiaries, but not yet paid.

Proposal

15. It is requested that the legislation be amended to expressly clarify under which circumstances unpaid distributions from a discretionary trust constitute a loan, advance or credit for section 7C purposes, or less ideally, that a Binding General Ruling be issued in this regard.

Section 25(5) and section 7C of the Act – application of section 7C in relation to a deceased estate

Legal Nature

16. Section 25(5) of the Act, effectively deems a deceased estate to be a natural person for income tax purposes. Currently section 7C of the Act is not excluded from the application of section 25(5) of the Act.

Factual Description

17. As the main purpose behind section 7C of the Act is to discourage the use of trusts for estate planning purposes, section 7C should no longer apply after a person’s date of death (being the relevant date as at which the liability for estate duty is determined).



18. 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.
19. A further anomaly that arises in relation to section 25(5) is that, despite being treated as a natural person, a deceased estate could never be a “resident” as defined in section 1 of the Act as after death one can no longer be said to be ordinarily present or physically present in the Republic (even if that was the case before death).

The nature of the business impacted

20. All deceased estates, where a loan was granted by the deceased (to which section 7C applies).

Proposal

21. Section 25(5) of the Act, which has the effect of deeming a deceased estate to be a natural person other than for the application of certain sections, should not apply to section 7C effective 1 March 2017.
22. Clarity is also needed as to how the residency status of a deceased estate should be determined for income tax purposes.

Section 7C(1A) of the Act – clarification of loan rights

Legal Nature

23. We note that the inclusion in section 7C(1A) of the Act is aimed at covering instances where a loan is granted by a person and thereafter the loan is bequeathed or donated to another person.

Factual Description

24. The phrase “person acquires a claim” is used, without including a definition of “a claim”, which leaves this broad term open to interpretation. For example, in the case of a deceased estate of a person who advanced a loan to a trust, upon death, the deceased estate is considered to be a person for purposes of the Act, but the provisions of section 7C are not intended to apply to a deceased estate. The executor of the estate is appointed to wind up the deceased estate and if there are distributions thereafter, these will be distributed to the heirs/legatees of the deceased.
25. In this scenario, it is unclear whether the executor would be treated as having acquired the claim of the loan to the trust. However, that the executor is not a connected person in relation to the trust, in terms of the definition of connected person in relation to a trust. It is not clear whether the application of section 7C would then be switched off at death



as the claim of the loan is treated as having been acquired by the executor who is not a connected person in relation to the trust.

26. Alternatively, if the executor is not treated as having acquired a claim to the loan, the heirs/ legatees (on the assumption that they are connected persons to the trust) would then be treated as having acquired the claim in relation to the loan. If this is the case, the date of the acquisition of such claim is not clear from the legislation. This claim could either be acquired on death of the funder of the loan or only on the date on which the estate is wound up and the loan remains for the inheritance of the heirs/legatees.
27. Furthermore, it is seemingly not required that the loan be acquired (i.e. loan ceded), but merely that a claim to an amount owing is acquired. This also raises concern as to whether debt security cessions or other security arrangements fall within the ambit of section 7C.

The nature of the business impacted

28. All deceased estates and heirs/legatees, where a loan was granted by the deceased (to which section 7C applies) and subsequently inherited by the heirs/legatees.

Proposal

29. We request that the word “claim” be defined in the Act. To eliminate the scope for differing interpretations, we submit that clarity be provided on the term “acquisition of a claim”, specifically in the context of deceased estates.
30. We further request clarity on how a claim for purposes of this provision is regarded as having been acquired and how it is validated and effected. Clarification is sought in the legislation as to whether the acquisition of a claim is a lesser or broader right than a ceded loan.

Section 7C of the Act – extension to company loans

Legal Nature

31. 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.
32. The insertion of section 7C(1)(ii) in 2017, as amended in terms of the Taxation Laws Amendment Bill of 2018, makes the application of section 7C overly broad so as to apply to transactions that were not intended to be subject to section 7C.
33. The amended section 7C(1)(ii) reads as follows:

“(ii) a company if at least 20 per cent of—

(aa) the equity shares in that company are held, directly or indirectly; or



(bb) the voting rights in that company can be exercised,

by a trust referred to in subparagraph (i) whether alone or together with any person who is a beneficiary of that trust or the spouse of a beneficiary of that trust or any person related to that beneficiary or that spouse within the second degree of consanguinity.”

Factual Description

34. The reason for the introduction of section 7C of the Act was stated in the Explanatory Memorandum to the Taxation Laws Amendment Bill 2016 as introducing measures to combat the avoidance of donations tax and estate duty by taxpayers who utilised interest-free loans to transfer assets/wealth:

“At issue is the avoidance of estate duty and donations tax when a person transfers wealth through the use of an interest free loan or a loan with interest below market rates. These loans are either used to facilitate the transfer of assets or assist the trust to acquire an asset. This is done in order to avoid donations tax as no donation arises on the sale of an asset or on advancing loan funding to a trust.”

35. Although the legislator had a specific mischief/avoidance in mind with this amendment (taxpayers transferring wealth to companies where the shares of the companies are being held by trusts where such wealth would grow outside the “estate” of the taxpayer) these amendments appear to have a number of unintended consequences.

36. Firstly, the use of a company the shares of which are held by a trust as a structure for the avoidance of Estate Duty is not the only reason why interest-free or low interest loans are provided to companies. Normal trading companies receiving working capital loans from the owners of these companies are now also affected by section 7C.

37. These loans are provided to the companies in question as part of the normal trading operations and to provide for the cash flow needs of the companies in question and are not for the purposes of transferring wealth to trusts or for the purpose of future reduction of estate duty. Also, in some instances the shareholding in the companies are held in trusts to provide protection to the natural person beneficiaries from potential claims that might arise from other risky trading ventures also conducted by the natural person and not for the purpose of avoiding Estate Duty.

38. Secondly, 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.

39. Thirdly, section 7C(1)(ii) could in certain instances result in section 7C being applied to funding derived from the same amount of a loan more than once, for example, where Mr



A provides a loan to Company A (shares of which are held by Trust B) and Company A then on-advances the same funds to Company C (the shares of which are also held by Trust B). Section 7C will then potentially apply to both loans, which seems absurd.

40. The impact of section 7C appears to be much wider than the stated purpose as per the original Explanatory Memorandum released in 2016, as loans in the above circumstances have either nothing to do with the trust or else were not advanced for purposes of avoiding estate duty.

The nature of the business impacted

41. Any company that has been provided with a loan by a natural person who holds at least 20% of equity shares or voting rights in that company, while such natural person is also a beneficiary in relation to a trust.

Proposal

42. It is submitted that at the very least there should be a requirement of a direct or indirect shareholding by the trust in the company in excess of 50% alone or together with any other connected persons, since no trust beneficiary would dispose of the debt and assets to an independent majority shareholder to merely avoid estate duty. The current threshold in section 7C(1)(b)(ii) is too low.
43. The importance of the overly broad application of section 7C of the Act was also raised in our 2017 Annexure C submission, which is attached as Annexure B.

Section 7C of the Act – interpretation of the phrase “at the instance of”

Legal Nature

44. 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.
45. There is considerable uncertainty as to the ambit of the provision in relation to low interest loans provided by companies i.e. subsection 7C(1)(b) of the Act.

Factual Description

46. For example, in the case of a company the shares of which are held by a discretionary family trust, is a loan “at the instance of” a natural person if the natural person is a director of the company and is also a member of the family? In the latter situation such an outcome would be absurd, since there is no estate duty benefit to such a person by the provision of the loan (the shares in the company are outside the estate of the natural person, since they are already held by the trust).

The nature of the business impacted

47. Low-interest loans between companies that are already under a discretionary family trust structure appear to be hit by the provision.



Proposal

48. It is submitted that the ambit of the provision would be better clarified in line with policy intent by the inclusion of an estate duty benefit trigger as a requirement and the deletion of the phrase “at the instance of that person” in subsection 7C(1)(b) of the Act.
49. The trigger could be worded “[and] in the case of any loan, advance or credit contemplated in subsection (1)(b), any share in the company would have directly or indirectly formed part of the estate, as defined in section 1 of the Estate Duty Act No. 45 of 1955, of the natural person at any time during the year of assessment, had the natural person died at such time”.

Section 7C(3) of the Act – calculation of deemed donation on last day of year of assessment

Legal Nature

50. In terms of section 7C(3) of the Act a deemed donation is made on the last day of the year of assessment of the trust. The issue is that the loan balance is not necessarily determinable on year-end date.

Factual Description

51. Example: If one assumes the trust’s year of assessment ends on 28 February, the deemed donation must be calculated on 28 February. The loan balance is not necessarily determinable on 28 February. The financial statements of the trust are the only accurate indication of what the loan amount should be. As the financial year only ends on 28 February, the financial statements will not yet be available and will only be available a few months after that (tax certificates are required, etc.).

The nature of the business impacted

52. Applicable to all trust and/or companies having an outstanding loan, advance or credit provided by a connected person in terms of which section 7C of the Act would be applicable.

Proposal

53. We propose that the Act needs to provide additional time for the calculation of the deemed donation in terms of section 7C of the Act.

Section 7C and section 60 of the Act – payment of donations tax by the end of the following month

Legal Nature

54. 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.



Factual Description

55. As the donations tax return cannot be submitted via e-filing, an IT144 form needs to be completed manually and submitted to SARS along with proof of payment.
56. The problem is firstly that the payment of this donations tax needs to be loaded onto eFiling and processed as a “credit push” transaction. Because the system does not provide for it, the payment has to be made as an overpayment of income tax that SARS then later has to allocate to donations tax.
57. Secondly, 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 in this instance.

The nature of the business impact

58. Section 59 of the Act provides that the donor will be liable for donations tax. Hence all natural persons that provided interest free loans or low interest rate loans to the trust would be impacted.

Proposal

59. It is submitted that SARS will have to adjust the eFiling system to provide for the submission of donations tax returns and the payment of the donations tax via eFiling. It appears that the period of 30 days has to be extended in the case of section 7C deemed donations.

Section 7C(5)(h) of the Act – exclusion of employer share trusts from section 7C

Legal Nature

60. Section 7C(5)(h) of the Act excludes employee share schemes from the application of section 7C to ensure that such schemes are not negatively affected. Certain requirements must, however, be met for the exclusion to apply.

Factual Description

61. Whilst the amendment to exclude employee share scheme trusts is welcomed, we respectfully remind NT that it was proposed in the 2017 Budget Review that an exclusion for business trusts and therefore business companies held by trusts, would also be introduced.
62. In many instances, trusts are used to conduct active trades (business trusts) and the interest-free loans made are representative of the equity or capital introduced by the entrepreneur into the business.
63. The latter is similar to interest-free loans made by a shareholder to a company (with which no objection can be found). It is therefore submitted that the ambit of the provisions of section 7C of the Act have been cast too widely in this regard.



64. An exclusion should be provided for trusts that conduct an active trade as these trusts and the concomitant interest-free loans have not been set up with the sole or main purpose of avoiding Estate Duty or Donations Tax.
65. The trusts pay tax on their taxable income derived from an active trade and retained by the trust at the rate of 45%.
66. While hypothetically interest could be levied on such loans in order to avoid the penal consequences of section 7C(3) of the Act, in many instances it will not be practically possible to do so. For example, the trust may have external borrowings in respect of which the levying of interest may result in a breach of any covenants, bearing in mind that the interest-free loan is effectively equity.

The nature of the business impacted

67. All business trusts carrying on an active trade as well business companies held by trusts, which have a loan that will fall within the ambit of section 7C of the Act.

Proposal

68. The exclusion of *bona fide* employer share incentive trusts is welcomed and must be extended to business trusts carrying on an active trade as well business companies held by trusts.

Incidental impact of section 7C – Charged interest and the National Credit Act No 34 of 2005 (the NCA)

Legal Nature

69. We have noted that loans that were previously interest free but that have been made interest bearing to minimise the impact of section 7C, may have an unintended impact in relation to the NCA.

Factual Description

70. Simplistically, any loan granted to a trust will generally be termed a credit agreement as defined in the NCA under the provisions of section 8(4)(f)¹ of the NCA. Alternatively, such

¹ Section 8(4)(f) reads as follows: “An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is –...

(f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of –

(i) the agreement; or
(ii) the amount that has been deferred.”



loan granted to a trust may fall within the ambit of section 8(3)² of the NCA being a credit facility or section 8(5)³ of the NCA being a credit guarantee.

71. This means that most loans, if interest bearing, are legally required to be registered with the National Credit Regulator.
72. Per the definitions in section 1 of the NCA, a trust is considered to be a juristic person if it has three or more trustees.
73. The scope of the NCA is to protect individuals and small businesses. There are exceptions contained in section 4(1)(a) of the NCA, however these tend to mainly apply to relationships between natural persons and juristic persons with an asset threshold above R1 million or where such loans do not exceed R250 000.
74. However, the determination of such amounts is made at the time the loan was advanced. No transitional rules have seemingly been inserted in the NCA for pre-existing loans to value these asset thresholds at the time when the loan was made and not on the commencement of the NCA.
75. It would therefore seem that if, for example, Mr A sold his holiday house to the trust (the trust's only asset) on loan account for R200 000 in 1965 (MV R3m 2017) interest free, then by applying an interest rate after 1 March 2017 to avoid section 7C, the NCA would apply as the value of the trust's assets at the time the credit transaction was made was below R1m and also the loan amount was below R250 000.
76. Furthermore, such an arrangement between beneficiary and trust or beneficiary and company held by the trust is not excluded by section 4(2) NCA as they are not deemed to be acting at arms-length.
77. The charging of interest due to section 7C also affects the actual existence of the loan.

² Section 8(3) reads as follows: "An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4(6)(6), constitutes a credit facility if, in terms of that agreement-

(a) a credit provider undertakes-

(i) to supply goods or services or to pay an amount or amounts, as 40 determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

(ii) either to-

(aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of 45 an amount contemplated in subparagraph (i); or

(bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and

(b) any charge, fee or interest is payable to the credit provider in respect of- (i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or (ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided in the agreement.

³ Section 8(5) reads as follows: "An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act 20 applies."



78. Section 89(2)(d) read with section 89(5)(a) of the NCA provides that a credit agreement is void from the date the agreement was entered into, where the credit provider was unregistered, but required to do so in terms of the NCA at the time the agreement was made. Such null and void credit agreement trumps any provision of common law, any other legislation or any provision of an agreement to the contrary, per section 89(5) of the NCA.
79. In a Supreme Court of Appeal (SCA) case⁴, the appeal turned on whether an agreement of purchase and sale, which provided for interest to be payable on deferred payments, amounted to a credit transaction under s 8(4)(f) of the NCA. Such agreement would be unlawful unless the party extending the credit was registered as a credit provider in terms of section 40 of the NCA. The court in this case declared the agreement null and void *ab initio*.
80. The legalities of charging interest must be considered by all parties to the agreement when considering whether or not to charge interest on a loan, advance or credit. These include the application of the *in duplum* rule as proposed in section 7D which effectively means that the NCA prohibits interest from being charged in excess of the amount of the loan capital, while section 7D read with section 7C may nevertheless effectively impose donations tax on such interest.

Proposal

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

Section 7C(5) of the Act – loan subject to secondary tax on companies (STC)

Legal Nature

82. Section 7C(5)(g) of the Act currently excludes loans that were subject to section 64E(4) of the Act.
83. Section 64E(4) of the Act essentially provides for a deemed dividend where any loan provided by a company to a non-company tax resident that is either a connected person in relation to that company, or a connected person of the first mentioned person.

Factual Description

84. Section 7C(5), however, does not address loans that were subject historically to section 64C of the Act which loans are excluded from section 64E(4) to avoid double taxation.

⁴ *Visagie NO and Others v Erwee NO and Another* (unreported case no 734/2013) (judgement delivered on 19 September 2014)



85. Section 64C of the Act deemed certain amounts to be a dividend for STC purposes.

Proposal

86. It is submitted that section 7C(5)(g) should be extended to include loans that were historically subject to section 64C of the Act.

Section 10(1)(o) of the Act – residency workshop to discuss practical difficulties

Legal Nature

87. In the 2017 Budget Speech, the Minister of Finance addressed the exemption for tax provided to South African residents working in a foreign country for more than 183 days a year. According to the Minister, this exemption on foreign employment income appears excessively generous and depending on the tax legislation in the host country, that foreign employment income will benefit from double non-taxation. The Minister then proposed that this exemption be adjusted so that foreign employment income will only be exempt from tax if it is subject to tax in the foreign country.

88. The proposal was legislated by section 16(1)(g) of the Taxation Laws Amendment Act of 2017 by essentially granting the exemption only to remuneration of up to R1 000 000 without reference to the tax treatment of the remuneration in the host country, the differences in cost of living, or the impact of exchange rate fluctuations to the threshold.

89. It is submitted that the revised version of section 10(1)(o)(ii) 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.

Factual Description

90. In the current global environment in which we operate, it is very common to send employees on international assignments. These arrangements benefit the companies as well as the employees. It is common cause that so-called expatriate assignments generally attract significant remuneration packages as the employees are as a rule provided with housing, vehicles, medical aid, schooling, country allowances etc in addition to their monthly cash salaries, bonuses and share incentives. In some instances, these benefits are conditions of employment and are specifically exempted from fringe benefit tax in the assignment country.

91. Most, if not all, expatriates will earn in excess of R1 000 000 and will therefore fall outside the scope of the revised section 10(1)(o)(ii) exemption, since most assignment benefits will be taxable under the South African rules for fringe benefit tax as stipulated in the Seventh Schedule.

92. Taxing the remuneration in excess of R 1 000 000 in South Africa will be administratively burdensome, especially if the tax regime in the host country is vastly different to the tax regime in South Africa.



93. While section 6quat will provide relief from double taxation, in practice it may be extremely difficult to prove the amount of tax that was payable in the host country as is required by section 6quat. These practical difficulties may arise because:

- Some countries do not have an end of tax year assessment for individuals, Angola is an example;
- Years of assessment for individuals are not aligned with the 28/29 February year applicable in South Africa;
- Expatriates will have to register as provisional taxpayers as their employers will be resident in the host country and will therefore not be able to withhold South African PAYE. The information relating to taxes paid in the host country may not be available at the time of submitting provisional tax return, resulting in the employee/employer having to fund double taxation until such time as a tax return is submitted, assessed and the overpaid taxes refunded;
- The calculation will be impacted by exchange rate fluctuations; and
- Employees will not be able to administer their own taxes and will have to enlist the services of a tax professional in both the home and the host location which will be costly and difficult to coordinate.

94. We also refer NT back to the joined submission made by SAICA and other stakeholders dated 17 May 2017 wherein the practical implications were discussed in detail.

The nature of the businesses impacted

95. All multi-national enterprises sending South African resident employees on international assignments will be impacted by this change.

Proposal

96. NT undertook in Parliament to host a residency workshop to discuss the proposed amendments to section 10(1)(o) of the Act. We propose that NT proceed with this workshop, and provide details as to when it will occur.

Section 10(1)(q) of the Act - bursaries awarded to employees and relatives of employees and nature of payment

Legal Nature

97. Section 10(1)(q) of the Act provides that no taxable benefit arises when an employer provides a bursary or study loan to assist employees or relatives of employees to study and become skilled.

98. The nil value benefit will only apply should the bursary be provided for the purpose of studying at a recognised educational/research institution, and in the event that



assistance is provided to employees, an agreement has to be concluded whereby the employee agrees to refund the employer for the bursary in the event of failing to continue with the studies (for any reason other than death, ill-health or disability).

Factual Description

99. In terms of section 10(1)(q) 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.
100. Many employers do not have the resources to manage full bursary schemes or to fund payments upfront to institutions or to manage approval processes in time for registration dates to be met.
101. For many employers, the award of bursaries is an *ad hoc* function and the reimbursement mechanism gives the employer some flexibility in payment options.
102. It is noted that NT has indicated before that they do not favour a reimbursive structure for education. However, given the dire need for education in South Africa, the policy rationale behind this stance is unclear.
103. It is unclear what NT's concerns are as we perceive little in the way of abuse as the payment would be directly associated to a study outcome and this approach merely addresses employer risk.
104. A reimbursement substantially reduces the employer's risk in having to manage debt for non-completion, which the Department of Higher Education has in its 2016 report on fees indicated, can apply to as much as 60% of first year students.

Proposal

105. If the true nature of the payment, in whatever form, is for the purpose of enabling an employee or relative of an employee to study further then the section 10(1)(q) exemption should apply. Section 8 of the Act should therefore be amended to specifically allow for the reimbursement of study fees to be a non-taxable reimbursement. Further the Interpretation Note should therefore be amended to include the other forms of funding.
106. In our view NT should be encouraging employers to fund these studies as it eases the burden on the state in terms of education, as well as for future social grants as more individuals will be qualified to earn a living wage.



Section 10(1)(q) of the Act - bursaries awarded to employees and relatives of employees and recovery of debt

Legal Nature

107. Section 10(1)(q) of the Act provides that no taxable benefit arises when an employer provides a bursary or study loan to assist employees or relatives of employees to study and become skilled.
108. The nil value benefit will only apply should the bursary be provided for the purpose of studying at a recognised educational/research institution, and in the event that assistance is provided to employees, an agreement has to be concluded whereby the employee agrees to refund the employer for the bursary in the event of failing to continue with the studies (for any reason other than death, ill-health or disability).
109. Paragraph 13 of the Seventh Schedule to the Act provides for a taxable benefit to arise on the waiver or release of an employee from a debt. However, there are certain nil value provisions under paragraph 13(2) that are not relevant for the further discussion below.

Factual Description

110. In terms of section 10(1)(q) 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.
111. 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. NT and SARS are of the view that the provisions for a low or interest free debt provided for under paragraph 11(4)(b) of the Seventh Schedule to the Act only apply to loans given for purposes of study (and not debts that arise as a result of section 10(1)(q) not being fulfilled). As a result, the employer must either charge interest on the debt or must account for a fringe benefit in relation to the interest benefit being provided.
112. Further, if the employee is unable to repay the debt and the employer opts to write off the debt, a benefit under paragraph 13 of the Seventh Schedule to the Act will arise.
113. Bursaries awarded to lower income earners in order to up-skill and enhance their qualifications are usually significant in value when compared with the salaries of the employees. If the employee is unable to complete his/her studies and a debt arises, he/she is then burdened not only having to repay the debt but also the interest on the debt. If the employer, realising that the debt is burdensome for the employee and/or that it will take the employee a long time to repay the debt then chooses to waive the debt, a further benefit becomes taxable.

Proposal

114. In order to assist employees and to encourage employers to implement broad-based bursary schemes, we recommend the following:



- Paragraph 11(4) of the Seventh Schedule to the Act be amended to allow for low interest or no interest to be levied on a debt that arises from a section 10(1)(q) bursary without triggering a taxable fringe benefit; and
- Paragraph 13(2) of the Seventh Schedule to the Act be amended to allow an employer to waive a debt that arises by virtue of a section 10(1)(q) bursary where the employee's remuneration proxy is less than R250,000.

Section 58 of the Act – deemed donations

Legal nature

115. Section 58 of the Act gives rise to a deemed donation where property is disposed of for a consideration which, in the opinion of the Commissioner, is not adequate consideration. This section gives rise to interpretational issues.
116. Although SARS has in the past issued binding private rulings indicating that section 58 presupposes an element of gratuitousness, academic writers have in the past opined that this section may be applied regardless of the motive behind the disposal.
117. Clarity is needed as to the scope of the section. In particular, it is not clear what is meant by the term “adequate consideration” included in the section, which is not defined.

Factual description

118. Based on the literal wording of section 58, the deemed donation potentially applies to any disposal of property at less than what the Commissioner may regard as adequate consideration. 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.

The nature of business impacted

119. The impact of this section is very broad. It potentially applies to any disposal of property at less than market value, despite having an underlying commercial rationale.
120. In particular, the potential of suffering donations tax at 20% discourages the introduction of BBBEE partners into a business at less than market value (which is often how these transactions are structured).

Proposal

121. 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”. A Binding General Ruling or Interpretation Note would be welcomed.



CATEGORY – DOMESTIC BUSINESS TAXES

Section 24C(2) of the Act – Amounts received in terms of contracts and future expenditure

Legal Nature

122. Section 24C(2) of the Act provides for an allowance where the income of any taxpayer in any year of assessment includes or consists of an amount received by or accrued to him in terms of any contract and the Commissioner is satisfied that such amount will be utilised in whole or in part to finance future expenditure which will be incurred by the taxpayer in the performance of his obligations under such contract.
123. Section 24C was introduced into tax legislation by section 18(1) of the Income Tax Act No. 104 of 1980. The explanatory memorandum on the Income Tax Bill, 1980 explains the reason for the insertion of section 24C as follows:

“The new section caters for the situation which often arises in the construction industry and sometimes in manufacturing concerns, where a large advance payment is made to a contractor before the commencement of the contract work, to enable the contractor to purchase materials, equipment etc. In a number of instances such advance payments are not matched by deductible expenditure, resulting in the full amounts of the advance payments being subject to tax.” (own emphasis)

124. It is submitted that the wording of section 24C does not always achieve the outcome envisaged in the Explanatory Memorandum.

Factual Description

125. Taxpayers engaged in the distribution of high value machinery, equipment or motor vehicles often enter into agreements with customers in terms of which the customer has to pay a significant portion of the consideration as a deposit before the taxpayer orders the trading stock which is the subject matter of the agreement. The deposit becomes taxable in the year of assessment in which it is received.
126. Taxpayers also enter into agreements in terms of which the customer pays the full consideration in terms of the agreement towards the end of a year of assessment but delivery of the machinery, equipment or motor vehicle only occurs after year end for a variety of reasons. The full consideration becomes taxable upon receipt.
127. In both scenarios, the taxpayer has ordered and paid for the machinery, equipment or vehicle but has not yet delivered the machinery, equipment or vehicle to the customer and transfer of ownership has therefore not yet taken place. The stock is therefore on hand and has not been disposed of.
128. While the expense has been incurred for purposes of section 11(a), the expense does not qualify for deduction in arriving at taxable income as the machinery, equipment or



vehicle will be included in closing stock for tax purposes. The expense in relation to the acquisition of the machinery, equipment or vehicle will only be deductible in the subsequent year of assessment through its inclusion in the opening balance of trading stock.

129. This is confirmed in Interpretation note 78 (IN 78) which states at paragraph 4.2.3 on page 12: *“A similar issue arises with trading stock when a taxpayer has incurred expenditure in acquiring items of trading stock. Once the expenditure has been incurred it does not constitute future expenditure even if the trading stock is included in the taxpayer’s closing stock.”*
130. This means that the taxpayer is taxed on the full receipt which is not matched by deductible expenditure.

The nature of the business impacted

131. Taxpayers engaged in the distribution of high value machinery, equipment or motor vehicles often enter into agreements with customers in terms of which:
- the customer has to pay a significant portion of the consideration as a deposit before the taxpayer orders the trading stock which is the subject matter of the agreement; or
 - the customer pays the full consideration in terms of the agreement towards the end of a year of assessment but delivery of the machinery, equipment or motor vehicle only occurs after year end for a variety of reasons.

Proposal

132. It is recommended that section 24C be reworded to achieve its intended purpose in relation to all taxpayers. This can be achieved by amending the definition of “future expenditure” in section 24C(1) as follows:

“For the purposes of this section, “future expenditure” in relation to any year of assessment means an amount of expenditure which the Commissioner is satisfied has been incurred during the current or any preceding year of assessment or will be incurred after the end of such year:

- a. *in such manner that such amount will be allowed as a deduction from income in a subsequent year of assessment; or*
- b. *in respect of the acquisition of any asset in respect of which any deduction will be admissible under the provisions of this Act.”*



Paragraph 64E of the Eighth Schedule to the Act – exclusion of capital gains when section 8C applies

Legal Nature

133. Paragraph 64E of the Eighth Schedule to the Act was inserted into the Act by section 74(1) of the Taxation Law Amendment Act of 2017. The Explanatory Memorandum to the 2017 Taxation Laws Amendment Bill noted that paragraph 64 was inserted to clarify that amounts included in the employee's income in terms of section 8C of the Act will be disregarded by the share incentive scheme for capital gains tax (CGT) purposes.

134. Paragraph 64E of the Eighth Schedule to the Act, effective 1 March 2017, reads as follows:

“Where a capital gain is determined in respect of the disposal of an asset by a trust and a trust beneficiary has a vested right to an amount derived from that capital gain, that trust must disregard so much of that capital gain as is equal to that amount if that amount must in terms of section 8C be:

- a. *included in the income of that trust beneficiary as an amount received or accrued in respect of a restricted equity instrument; or*
- b. *taken into account in determining the gain or loss in the hands of that trust beneficiary in respect of the vesting of a restricted equity instrument.”*

135. It is submitted that the wording of paragraph 64E does not achieve the outcome envisaged in the Explanatory Memorandum.

Factual Description

136. Employers often introduce share based incentives schemes that utilise trusts.

137. These schemes are often implemented as follows:

- The employer establishes a trust with its employees being the beneficiaries of the trust;
- The employer makes a contribution to the Trust;
- The Trust uses the contribution to acquire equity shares. The shares may vest in the beneficiaries immediately in the sense that the employees are entitled to dividends and voting rights attached to the shares, but the shares will only be distributed to the employees by the trust after a lock-in period. Alternatively, the shares only vest in the employees after expiry of the lock-in period;
- After a lock-in period, the shares held by the Trust are distributed to the employees and all restrictions are lifted.



138. The tax implications are as follows:

- The contribution made by the employers may or may not be deductible under section 11(a) of the Act depending on the purposes with which the contribution was made;
- The contribution will be of a capital nature in the hands of the Trust;
- The acquisition of the shares by the Trust will constitute an asset in the hands of the Trust with a base cost equal to the expenditure incurred in acquiring the shares. Having said that, since the base cost of the shares was funded by the employer company it is arguable that as a result of paragraph 20(1)(a) read with paragraph 20(3)(b), the base cost of the shares in the hands of the Trust is Nil;
- Paragraph 11(1)(d) of the Eighth Schedule includes in the definition of disposal, the vesting of an interest in an asset of a trust in a beneficiary. Paragraph 13(1)(iiB) of the Eighth Schedule determines that the time of disposal of an asset by means of the granting by a trust to a beneficiary of an equity instrument contemplated in section 8C is the time that that equity instrument vests in that beneficiary as contemplated in that section;
- For purposes of section 8C, the shares vest in the hands of the employees after the lock-in period when all the restrictions are lifted;
- The employees, being beneficiaries of the trust, are connected persons in relation to the Trust. The disposal of the shares to the beneficiaries at the time of vesting will therefore be deemed to take place at market value (paragraph 38);
- To the extent that the market value of the shares at the time of vesting exceeds the base cost of the shares, a capital gain will arise in the hands of the Trust. The same gain will also be taxed in the hands of the employees in terms of section 8C;
- Paragraph 64E exempts the gain arising from the disposal of an asset (the shares) in the hands of the Trust where a trust beneficiary has a vested right to an amount derived from that capital gain to the extent that the gain is taxed in terms of section 8C; and
- It is submitted that the employees in the scenario described, have a vested right to the asset and do not have a vested right to an amount derived from that capital gain.

The nature of the businesses impacted

139. All employers operating share based incentive schemes housed in trusts.

Proposal

140. It is recommended that paragraph 64E be reworded to achieve its intended purpose.



141. The suggested wording is to set the phrase “*a trust beneficiary has a vested right to an amount derived from that capital gain*” as an alternative, as noted below:

“Where a capital gain is determined in respect of the disposal of an asset by a trust as a result of the vesting of an equity instrument as contemplated in section 8C or a trust beneficiary has a vested right to an amount derived from that capital gain ~~and a trust beneficiary has a vested right to an amount derived from that capital gain~~ that trust must disregard so much of that capital gain as is equal to that amount if that amount must in terms of section 8C be:

- a. included in the income of that trust beneficiary as an amount received or accrued in respect of a restricted equity instrument; or*
- b. taken into account in determining the gain or loss in the hands of that trust beneficiary in respect of the vesting of a restricted equity instrument.”*



CATEGORY – VALUED ADDED TAX & CUSTOMS

Section 1(1) of the VAT Act – definition of ‘surrender of goods’

Legal Nature

142. Section 1(1) of the VAT Act defines the term “surrender of goods” as meaning the termination of any instalment credit agreement by the debtor and subsequent obligation on the creditor, to that agreement, to take possession of any goods previously supplied under that agreement.
143. Section 8(10) of the VAT Act provides that where there is a surrender of goods under an instalment credit agreement, a supply of such goods shall be deemed to be made by the debtor under such instalment credit agreement to the person exercising the person’s right or obligation of possession under such instalment credit agreement.
144. The Explanatory Memorandum that amended section 8(10) of the VAT Act and inserted the definition of “surrender of goods” in the VAT Act, stated the following:
- “It is proposed that the current deemed supply pertaining to the repossession of goods be expanded to cater for a surrender of goods by a vendor to a financier (creditor) in terms of any instalment credit agreement covered in terms of the National Credit Act, 2005.”*
145. Section 127 of the National Credit Act, No 34 of 2005 (the NCA) sets out the provisions regarding the surrender of goods. Without quoting the section, the purpose of this section is to set out the procedures to be followed by a debtor when he/she wants to surrender the goods outside the pre-agreed terms of the financing arrangement. It involves giving notice to the financier, delivery of the goods, a waiting period where the debtor can again change his/her mind, how the financier can sell the goods and set-off against the creditor, etc.

Factual Description

146. Some instalment credit agreements (ICA) provide that at the end of the agreement the debtor has to return the goods or alternatively pay a lump sum or re-finance the outstanding balance.
147. This return of the goods is a contractual obligation of the debtor and not the termination of the ICA by the debtor as a result of the surrendering of the goods as envisaged in the NCA and the definition of “surrender of goods” in the VAT Act.
148. As a result the return of the goods in terms of these ICA’s do not fall within the provisions of section 8(10) of the VAT Act and the financier will consequently not have an input tax deduction as there is no deemed supply.



The nature of businesses impacted

149. Financiers of goods in terms of ICA's.

Proposal

150. It is 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.

Sections 8(20) and 20(4) of the VAT Act – consideration to be included on tax invoices pursuant to a deemed supply by an agent

Legal Nature

151. Section 8(20) of the VAT Act provides that where an importation of goods is deemed to be made by an agent, as contemplated in section 54(2A)(b) of the VAT Act, such agent shall be deemed to make a supply of goods to the recipient of the supply by the principal as contemplated in subparagraph (iii) of that section.

152. Section 10(22B) of the VAT Act states that the consideration for the deemed supply contemplated in section 8(20) of the VAT Act will be deemed to be the total amount of the value placed on the importation of the goods in terms of section 13(2) of the VAT Act (i.e. the customs value, the duty levied plus 10 per cent of the said value) and the amount of tax levied on the importation.

Factual Description

153. As a result of section 8(20) of the VAT, the agent will be required to issue a tax invoice, in terms of section 20(4) of the VAT Act, to the recipient for the full consideration due on the supply in terms of section 10(22B) of the VAT Act. However, the recipient will only be liable to pay the import VAT (and potentially the customs duty depending of the agreement with the supplier) to the agent as the consideration (i.e. the sale price) will be due and payable to the foreign supplier. Therefore, if the agent includes the full consideration on the invoice it may have (depending on the manner in which it issues this invoice and its accounting system) an outstanding debtor in its accounting records, as only the import VAT will be payable by the recipient to the agent.

The nature of businesses impacted

154. Any agent importing goods on behalf of a non-resident, non-registered VAT vendor subject to section 54(2A) of the VAT Act.

Proposal

155. It is recommended that section 20 of the VAT Act be amended to allow the agent to invoice for the import VAT amount only on the tax invoice. If required the full consideration could still be included on the tax invoice, but as part of for example the details/description.



156. Alternatively, we recommend that a provision is included in section 20 of the VAT Act that would allow the Commissioner to prescribe the particulars to be included in a tax invoice issued for deemed supplies under section 8(20) of the VAT Act in a regulation.

Section 8(29) of the VAT Act – leasehold improvements

Legal Nature

157. Section 8(29) of the VAT Act states that where a (vendor) lessee makes leasehold improvements for no consideration, in circumstances where the lessee will use the property and improvements for taxable supplies or mixed supplies, there will be a deemed taxable supply by the lessee to the lessor.

Factual Description

158. Based on previous submissions made it is again submitted that section 8(29) of the VAT Act is not necessary, since it is extremely uncommon and unlikely that a lessee will make leasehold improvements for no consideration, other than in cases where the lease agreement provides that upon termination of the lease, the premises should be returned to the lessor in the same state in which the lessee received it.

159. Furthermore, there is an actual supply of goods by the lessee to the lessor, in respect of leasehold improvements affected, on the basis of accession. The introduction of the section introduces unnecessary ambiguity.

The nature of businesses impacted

160. Parties to property leases where leasehold improvements are made.

Proposal

161. To overcome the potential difficulties with the application of section 8(29) of the VAT Act, we recommend that the section should be deleted from the VAT Act along with sections 9(12) and 10(28) of the VAT Act.

Section 8A(1) of the VAT Act - Sharia compliant financing arrangements: Murabaha agreements

Legal Nature

162. 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.

163. For example, the bank will purchase a vehicle from a third party on instruction from the client and sell it to the client at a pre-agreed price. The mark-up on the resale by the bank creates a profit for the bank which is calculated with reference to the time value of money. The client then pays the marked-up price on a deferred basis similar to an instalment sale agreement, i.e. an ICA.



164. A material term of these agreements will usually include that should the client default in terms of the obligations stated in the agreement that the bank may institute action to repossess the vehicle. Normally, when dealing with ICA's and when motor cars are repossessed the provisions in section 8(10) of the VAT Act relating to repossessions apply.
165. However, Murabaha agreements as contemplated in section 8A(1) of the VAT Act do not constitute ICA's as defined in section 1(1) of the VAT Act. It follows that the provisions in section 8(10) of the VAT Act relating to repossessions can therefore not apply.
166. This does not mean that there isn't a supply when the bank repossesses the vehicle. There is in fact a supply which takes the form of a sale and should the bank be able to claim input tax where it acquires, by way of repossession, the vehicle from a resident client the amount of input tax claimed will be limited to the tax fraction of the lesser of the amount paid (i.e. realised by the Bank and set off against the debt) or the open market value.

Factual Description

167. Financial institutions that provide finance to debtors, based on Murabaha agreements, are affected by the fact that the repossession provisions, contemplated in section 8(10) of the VAT Act do not apply to such transactions. Such institutions include banks and collective investment schemes in shares.

The nature of businesses impacted

168. Sharia financial institutions entering into finance arrangement as contemplated in section 8A(1) of the VAT Act.

Proposal

169. It is proposed that the VAT Act be amended to state that, in the case of Murabaha agreements as contemplated in the VAT Act, the amount fetched when the asset is disposed of in order to recover the debt (for example where the asset is sold on auction) should be deemed to be the market value of the supply under repossessions. This proposal is based on the fact that the amount fetched at auction is the amount that is set-off against the debtor's account.

Section 8A(2)(c) of the VAT Act - Sharia compliant financing arrangements

Legal Nature

170. Section 8A(2)(c) of the VAT Act provides that, in the case of any diminishing Musharaka as defined in section 24JA(1) of the Act, any amount contemplated in section 24JA(5)(d) of the Act paid or payable to the bank by the client shall be deemed to be consideration in respect of an exempt financial service supplied by the bank as contemplated in section 2(1)(f): Provided that this paragraph shall not apply to the extent to which the consideration constitutes any fee, commission or similar charge.



Factual Description

171. The Act does not contain a section 24JA(5)(d). Instead, section 24JA(6)(b) of the Act provides the formula that must be used to determine the financing charge.

The nature of businesses impacted

172. Any parties to a Sharia compliant financing arrangement in terms of section 24JA(1) of the Act.

Proposal

173. It is recommended that the VAT Act be amended to delete the reference to section 24JA(5)(d) of the Act and to replace it with a reference to section 24JA(6)(b) of the Act.

Section 15(2A) - Accounting for VAT on the payments basis – the R100 000 rule

Legal nature

174. Section 15(2A) of the VAT Act allows certain categories of vendors registered on the payments basis to account for output tax on the payment basis notwithstanding the fact that the value of the consideration for a supply exceeds R100 000.

175. The exclusion applies to, amongst others, a public authority.

176. “Public authority” is defined in paragraph (ii) of the definition of “public authority” in section 1(1) of the VAT Act as “any public entity listed in Part A or C of Schedule 3 to the Public Finance Management Act.”

177. 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.

Factual description

178. It thus follows from the above 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.

179. Most municipalities are currently under financial strain resulting in payments to Water Boards being outstanding for protracted periods of time.

180. The above situation places undue strain on the finances of Water Boards.

The nature of the businesses impacted

181. All Water Boards.



Proposal

182. We recommended that Water Boards listed in Part B of the Public Finance Management Act listed be excluded from the R100 000 threshold contained in section 15(2A) of the VAT Act.

Sections 16(2)(d) of the VAT Act – documentary requirements for purposes of claiming input tax on retrospective adjustments to the value of goods imported

Legal Nature

183. Section 1 of the VAT Act defines the term “input tax”, *inter alia*, to mean the VAT incurred by a vendor on the importation of goods by that vendor, provided that the goods or services concerned are acquired by the vendor wholly for the purpose of consumption, use or supply in the course of making taxable supplies or, where the goods or services are acquired by the vendor partly for such purpose, to the extent that the goods or services concerned are acquired by the vendor for such purpose.

184. Section 16(2)(d) of the VAT Act disallows the deduction of input tax in respect of the importation of goods into the Republic, unless a bill of entry or other document prescribed in terms of the Customs and Excise Act, No 91 of 1964 (Customs and Excise Act), together with the receipt for the payment of the tax in relation to the said importation, have been delivered (including by means of an electronic delivery mechanism) in accordance with that Act and are held by the vendor making that deduction, at the time that any return in respect of that importation is furnished.

185. Section 40(1)(c) of the Customs and Excise Act provides that no entry shall be valid unless the true value of the goods on which duty is leviable or which is required to be declared under the provisions of this Act and the true territory of origin, territory of export and means of carriage have been declared.

186. Section 40(3)(a)(i) of the Customs and Excise Act provides that subject to the provisions of sections 76 and 77 and on such conditions as the Commissioner may impose and on payment of such fees as he may prescribe by rule –

- (i) an importer or exporter or a manufacturer of goods shall on discovering that a bill of entry delivered by him or her –
 - (aa) does not in every respect comply with section 39; or
 - (bb) is invalid in terms of subsection (1) of this section, adjust that bill of entry without delay by means of –
 - (A) a voucher of correction; or
 - (B) cancellation of such bill of entry and substitution of a fresh bill of entry; or

in such other manner as the Commissioner may prescribe (own emphasis).



Factual Description

187. In terms of section 16(2)(d) of the VAT Act, a vendor claiming the VAT paid on the importation of goods as input tax must, at the time of making the deduction, hold a bill of entry or other prescribed document in terms of the Customs and Excise Act together with receipt of payment.
188. In this regard, section 40(3)(a)(i)(bb)(C) of the Customs and Excise Act provides that a bill of entry may be adjusted in a manner as prescribed by the Commissioner. The aforementioned adjustments result for a number of reasons, for example retrospective transfer pricing adjustments, and may include a significant number of bills of entry over a period. In certain instances, and to curb the costs and effort involved in retrospective adjustments where various bills of entry are involved, vendors often make such subsequent adjustment to the original bill of entry by making disclosure to SARS, followed by SARS issuing a Letter of Demand and the vendor completing and submitting a CEB01.
189. It seems that most SARS branch offices accept the Letter of Demand issued by SARS together with the completed CEB01 form and proof of payment of the VAT to SARS as the “other document prescribed in terms of the Customs and Excise Act” as envisaged in section 16(2)(d) of the VAT Act. However, we understand that this may not be the interpretation of all SARS officials.

The nature of businesses impacted

190. All importers, especially importers importing from related parties where annual transfer pricing adjustments are required to be made.

Proposal

191. It is recommended that SARS provides clarity on the above by issuing an Interpretation Note or Binding General Ruling which describes what it considers “*other prescribed document in terms of the Customs and Excise Act*” to be.

Section 18A(2) of the VAT Act – adjustment in consequence of acquisition of going concern wholly or partly for purpose other than making table supplies

Legal Nature

192. Section 18A(2) of the VAT Act provides *inter alia*, that the value of the supply deemed by subsection 18A(1) to have been made by the vendor, shall be the full cost to such vendor of acquiring such enterprise, part, goods or services, as the case may be, reduced by an amount which bears to the amount of such full cost the same ratio as the intended use or application of the enterprise, part, goods or services in the course of making taxable supplies bears to the total intended use or application of the enterprise, part, goods or services: Provided that—



- (i) the cost to such vendor of acquiring such enterprise, part, goods or services may be reduced by any amount which represents an appropriate allocation of such full cost to the acquisition of any goods or services which form part of such enterprise or part of an enterprise and in respect of the acquisition of which by the vendor a deduction of input tax would be denied in terms of section 17(2); or
- (ii) where such enterprise, part, goods or services were acquired—
 - (aa) by means of a supply made by a vendor for no consideration or for a consideration in money which is less than the open market value of the supply; and
 - (bb) in circumstances where the supplier and the recipient are connected persons,

the cost of such enterprise, part, goods or services shall be deemed to be the open market value of the supply of such enterprise, part, goods or services. (own emphasis).

Factual Description

193. The purpose of this section 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.
194. The value of an enterprise is generally determined to include the following, where applicable:
- Seller, discretionary earnings (SDE) + Tangible assets (i.e. the value of properties and buildings + other assets) + Estimated value of intangible (i.e. the value of brand, reputation, trademarks) + Value of debtors) less value of business liabilities.*
195. It follows that the cost of acquiring an enterprise (actual cost paid for the enterprise or the open market value of such enterprise) includes an amount appropriated to the value of non-taxable supplies (i.e. the book value of debtors and liabilities the estimated value of future income associated with trademarks and reputation of the enterprise, etc.).
196. Based on a strict reading of the section, it seems that the acquiring vendor is required to also account for output tax on the cost of the non-taxable assets appropriated to the cost of the enterprise. Given that this section intends to place SARS in the same position had the enterprise not been disposed of and the fact that the section is not a charging section, the effects, based on a strict interpretation, are that SARS will collect output VAT on items that are otherwise not subject to VAT.

The nature of businesses impacted

197. Vendors that acquire an enterprise partly for a purpose other than making taxable supplies are required to account output tax on the value of taxable goods or services (excluding goods or services in respect of which input tax would be denied in terms of section 17(2) of the VAT Act), to the extent to which such goods or services are acquired



for purposes of consumption, use or supply otherwise than in the course of making taxable supplies.

Proposal

198. It is recommended that the below is inserted as a further provision to provide clarity on the exclusion of non-taxable items appropriated to the value of an enterprise:

“Provided further that the cost to such vendor shall further be reduced by the cost of any goods or services which would, if supplied by a vendor in the course of its enterprise, will not be subject to VAT in terms of section 7(1) of the VAT Act.”

Section 18C of the VAT Act - leasehold improvements rules for the Lessor

Legal Nature

199. Section 8(29) of the VAT Act states that where a (vendor) lessee makes leasehold improvements for no consideration, in circumstances where the lessee will use the property and improvements for taxable supplies or mixed supplies there will be a deemed taxable supply by the lessee to the lessor.

Factual Description

200. Following on section 8(29), section 18C of the VAT Act provides that 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.

The nature of businesses impacted

201. Any lessor where a lessee performs leasehold improvements for no consideration in terms of section 8(29) of the VAT Act.

Proposal

202. It is proposed that section 18C of the VAT Act should be deleted from the VAT Act.

Section 20 of the VAT Act – tax invoices

Legal Nature

203. Section 20 of the VAT Act places a statutory obligation on all vendors to issue tax invoices within a prescribed time, form and manner. Any document which does not contain the particulars as envisaged in section 20(4) of the VAT Act, does not constitute a tax invoice and as such a vendor is not entitled in terms of section 16(2) of the VAT Act to claim an input tax deduction based on such document.

204. Further, in terms of section 20(1) of the VAT Act, where a supply of goods and/or services has been made from a vendor (i.e. supplier) to another vendor (i.e. recipient) the supplier must issue a tax invoice within 21 days from making the taxable supply.



205. Section 54(3) of the VAT Act requires that where tax invoices are issued to an agent as contemplated in section 54(2) of the VAT Act, the agent must notify its principal in a written statement within 21 days of the end of the calendar month during which the supply was made.
206. 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.

Factual Description

207. Where a supplier refuses to issue a tax invoice in terms of section 20 of the VAT Act to the recipient, 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.
208. It is a criminal offence in terms of section 234 of the TAA not to issue a document as required under the VAT Act, including a tax invoice. Similarly, in terms of section 58 of the VAT Act it is a criminal offence where the agent fails to issue the statement in terms of section 54(3) of the VAT Act to its principal. SARS, however, rarely if ever takes legal proceedings as a result of the non-issue of tax invoices by suppliers or statements by agents. The lack of SARS action in the case of the non-issue of tax invoices was also commented on in the Jazz Festival case⁵ by the taxpayer:

“It was furthermore contended by the appellant that the Commissioner is responsible, in terms of section 4(1) of the VAT Act, to carry out the provisions of the Act and that he took no action against the sponsors to ensure compliance with section 20, nor did he impose punitive measures on them.”

209. Notwithstanding section 16(2)(g) of the VAT Act, which is a timeous and costly solution to assist the recipient and which is subject to SARS discretion and therefore not guaranteed, and section 234 of the TAA which is unlikely to be imposed due to timing and cost factors for SARS, there are no other provisions in the VAT Act or the TAA that would allow SARS to provide assistance to vendors who request suppliers to issue tax invoices, where such suppliers refuse to do so.

The nature of businesses impacted

210. All vendors where suppliers refuse to issue tax invoices, after having received written requests to do so, in relation to taxable supplies made as required by section 20 of the VAT Act.

⁵ *South Atlantic Jazz Festival (Pty) Ltd v Commissioner for the South African Revenue Service* [2015] ZAWCHC 8 (judgment delivered on 6 February 2015)



Proposal

211. It is recommended that SARS be given powers to ensure that the obligations under sections 20(1) and 54(3) of the VAT Act are enforced where supplier vendors/agents refuse to be compliant. It is recommended that SARS be given authority to impose an administrative non-compliance penalty, in cases where vendors have requested these documents without success. Supplying vendors and agents may then be given the opportunity to object if they believe the penalty was wrongfully imposed, since they had no liability to issue such documents.

Section 41B of the VAT Act – provisions to allow backdated rulings for 5 years to allow for equity and fairness – section 17(1) proviso (iii) read with section 16(3) proviso (i)

Legal nature

212. A taxpayer's liability for VAT is calculated as the sum of output tax attributable to a tax period, less the amounts of input tax to which the taxpayer is entitled, as supported by documentary evidence. This is the basic premise of a VAT system.

213. Section 1 of the VAT Act defines the term "input tax" to mean the VAT incurred by a vendor in respect of goods or services acquired, where the goods or services concerned are acquired for the purpose of consumption, use or supply in the course of making taxable supplies.

214. Where goods or services are acquired for another purpose, no deduction of input tax is allowed and in terms of section 17(1) of the VAT Act, where the goods or services are acquired for a dual purpose, the deduction of input tax is allowed proportionally (apportioned) based on the intended taxable use, usually expressed as a percentage of total "intended use".

215. There is generally a five- year period within which input tax may be deducted (see the proviso to section 16(3) of the VAT Act). This balances fairness and the necessity for efficient tax administration.

216. 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. This provides for certainty. It is noted from the Explanatory Memorandum when the said limitation was introduced, that the purpose was to prohibit vendors from claiming refunds in respect of prior years, albeit that they failed to apply timeously for a special method of apportionment.

Factual description

217. Input tax apportionment occurs throughout the year with every VAT return which is submitted, calculated by applying the ratio calculated in respect of the previous financial year. At the end of the current financial year, the apportionment ratio is recalculated and



any over- or under recoveries of input tax is corrected in one adjustment. Should it be determined that the method is inequitable, whether in favour of the taxpayer or SARS, SARS is only permitted to issue a ruling on an alternative method to be applied from a future date. This leaves the year in which the inequality prevailed, unaltered.

218. Although SARS may acknowledge that the turnover based method of apportionment yields a grossly unfair and obscure result, where a taxpayer, for whatever reason, did not apply the standard turnover based method of apportionment in the absence of an apportionment ruling, and although the amendment does not appear to have been intended that SARS can assess for prior years, SARS now has no discretion but to assess using the standard turnover basis.

The nature of the businesses impacted

219. This matter influences all vendors who receive non-taxable revenue who apply for a ruling to use an alternative apportionment method, where the turnover-based methods yields inequitable results.

Proposal

220. For the reasons above we recommend that SARS be granted discretion to issue rulings retrospectively from the time that SARS deems equitable. Furthermore, we recommend that section 44 of the VAT Act be amended to include a section which would prohibit vendors to claim VAT refunds in respect of retrospective tax periods prior to the first day of the financial year in which the ruling application was duly submitted to SARS.

Section 41B of the VAT Act and Chapter 7 of the TAA – provisions dealing with the re-application of existing rulings, subject to expiration dates

Legal nature

221. The provisions in section 41B of the VAT Act stipulates that the Commissioner may issue a VAT class ruling or a VAT ruling and the specifics in relation to such rulings.
222. Chapter 7 of the TAA includes the provisions dealing with the application and issuing of advance rulings.

Factual description

223. Neither section 41B of the VAT Act, nor Chapter 7 of the TAA make provision for the time frame within which a person must re-apply for rulings subject to an expiration date.
224. Although in practice SARS in some cases allow the existing ruling to remain in force after the expiration date, provided the person has timeously submitted a re-application, no legislative provisions exist in this regard.

The nature of the businesses impacted

225. Persons relying on rulings granted subject to expiration dates.



Proposal

226. We recommend that a provision is introduced to section 41B of the VAT Act and Chapter 7 of the TAA that the re-application of rulings subject to expiration dates must be made within a particular timeframe prior to the expiration date.
227. Further, we recommend that a provision be included that if the person submitted the re-application within the required timeframe that the existing ruling will remain in force until the re-application has been confirmed, amended or declined by SARS.

Section 50 of the VAT Act – inequitable apportionment/non-deductibility of input tax as a result of VAT registrations in terms of section 50

Legal nature

228. Section 50 of the VAT Act provides that a vendor (e.g. a company who is liable to be registered as a VAT vendor, hereinafter referred to as “the Vendor”) may apply to the Commissioner to register branches or divisions of the Vendor as separate vendors. Where the Commissioner has approved such application and the branches and divisions are registered separately (hereinafter referred to as the Branches) section 50(2) of the VAT Act provides that the Branches shall be deemed to be carried on by a person separate from the Vendor.
229. Section 17(1) of the VAT Act read with the definition of “input tax” provides that the tax incurred by the vendor on the acquisition or importation of goods or services, constitute “input tax” only to the extent to which the goods or services are acquired/imported for purposes of consumption, use or supply in the course of making taxable supplies. The extent of taxable application, use or supply is to be determined in accordance with a method prescribed by the Commissioner, which is the standard turnover basis, envisaged in Binding General Ruling 16 Issue 2 (BGR 16).
230. Section 10(23) of the VAT Act provides that where a supply is made for no consideration, the value of the supply is deemed to be nil. In this regard the Court held in the *KCM* case⁶ that section 10(23) of the VAT Act only functions in respect of taxable supplies. It was further held that since taxable supplies are, in terms of section 7(1) of the VAT Act required to be made in the course or furtherance of the vendor’s “enterprise”, it is necessary to have regard to the definition of “enterprise” to determine whether the supply can be said to be made in the course or furtherance of an enterprise. The definition of “enterprise” specifically requires that supplies need to be made to another person for a consideration and specifically excludes exempt supplies. Also refer to Interpretation Note 70 (IN 70) issued by SARS which deals with the VAT treatment of supplies made for no consideration.

⁶ *KCM v Commissioner South African Revenue Service* (VAT 711) [2009] ZATC 2 (judgement delivered on 14 August 2009)



231. The provision which deems the Branches or divisions to be persons separate from the Vendor, has the effect that goods or services made available by one Branch to another constitutes a “supply” of “goods” or “services” by one vendor to another vendor and that such a supply may be taxable as if the Branches are separate legal persons from one another. Consequently, where such a supply is taxable, the supplying vendor is liable for VAT at either the standard or the zero rate of VAT and is required to issue a tax invoice in the ordinary course as if the supplies were made to a separate legal person, whereas the recipient vendor is entitled to claim such VAT charged to it as input tax subject to the general rules for input tax, including apportionment where relevant. Equally, where any exempt supplies are made by one Branch to another, such exempt supplies need to be reflected on the supplying vendor’s VAT return.
232. From the said provisions and effects, 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.
233. These two scenarios occur where:
- 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). In this instance, for VAT purposes, the borrowing Branch makes an exempt supply to the other Branch by on-lending the funds acquired, and in the ordinary course may or may not elect to account for a notional amount of “interest” for management accounting purposes – notional since a legal entity cannot legally charge itself interest and where it is accounted for, it will accordingly be eliminated in the “consolidated” financial statements of the company. Where the borrowing Branch elects to account for the so-called notional interest, such interest may have the effect that the lending Branch may be required to apportion input tax incurred on overhead/administration costs, on the basis that it receives this non-taxable income. However, where the borrowing Branch elects not to account for this notional amount of interest, section 10(4) of the VAT Act does not find application to deem the value for this notional amount of interest at a market related rate, since firstly, it is arguable whether a notional amount of interest constitutes interest, and secondly, since the receiving Branch is not required to apportion input tax on the basis that it makes only taxable supplies.
 - One of the Branches acquires goods or services which are used by another Branch. For VAT purposes, the first-mentioned Branch who acquired the goods or services once again supplies the acquired goods or services to the last-mentioned Branch. As is the case with notional interest, the acquiring Branch may decide, for management accounting purposes, to account for the value of the goods or services supplied or not to account for such a value. Where the decision is not to account for any amounts, SARS’ view at the moment is that, instead of regarding the goods or



services supplied and deeming it supplied for no consideration (as envisaged in section 10(23) of the VAT Act), SARS deems such supplies made otherwise than in the course of the first-mentioned Branch's enterprise. This has the effect that no input tax is claimable by either of the Branches. Furthermore, should SARS' logic be followed and be extended to any other scenario where one Branch supplies goods or services for no consideration to another Branch in any other circumstance (i.e. not being goods or services acquired expressly with the intention of use by the other Branch), the supplying Branch's deemed non-supply of the goods or services will imply a change-in-use by the supplying Branch which will require an output tax adjustment by the one Branch with no corresponding deduction by the other.

Factual description

234. It thus follows from the above that the current VAT implications effectively depend on the accounting treatment, which is clearly undesired.

The nature of the businesses impacted

235. All vendors who are given approval by SARS to register its branches or divisions as separate vendors and who provide goods or services to one another.

Proposal

236. We recommended that the value of any supply by one person to another person as contemplated in section 50 of the VAT Act, be deemed to be nil. This is not uncommon in other jurisdictions like the European Union.

237. Alternatively, we would recommend that the VAT Act or BGR 16 be amended to exclude fictitious financial service entries or non-supplies from the standard turnover based method of apportionment for purposes of section 50 VAT registrations. This will also limit the number of unnecessary ruling applications, unnecessary disputes and clearly undesirable results for the Vendor.

Section 52 of the VAT Act – pooling arrangements

Legal Nature

238. Section 52 of the VAT Act finds application to, *inter alia*, “any pool managed by anybody for the sale of agricultural, pastoral or other farming products, being a pool as contemplated in section 17 of the Marketing of Agricultural Products Act, 1996 (Act No 47 of 1996), may on written application by such body, for the purposes of this Act be deemed to be an enterprise or part of an enterprise carried on by that body separately from the members of such body...”

Factual Description

239. The pool registration option is only available to bodies that manage pools for the sale of agricultural, pastoral or other farming products, being a pool contemplated in section 17 of the Marketing of Agricultural Products Act, No 47 of 1996 (Marketing of Agricultural



Products Act) and rental pool schemes in respect of time sharing interests, sectional title schemes and shareholders in share block companies.

240. Before an agricultural pool can apply for and be deemed to be an enterprise separate from its members it must firstly be a pool as contemplated in section 17 of the Marketing of Agricultural Products Act.
241. It appears as if there are no pools, as envisaged in section 17 of the said Marketing of Agricultural Products Act, currently approved by the Minister. Hence no pool within the agricultural space is in a position to apply for section 52 of the VAT Act to apply.
242. Consequently, section 52 of the VAT Act can only find application to rental pools as noted in the section.
243. 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.

The nature of businesses impacted

244. Agricultural pools for various supplies of produce and any other industry where there may be pooling arrangements.

Proposal

245. It is recommended that this section be amended to provide discretionary powers to the Commissioner to approve of any industry who applies for pooling.
246. In particular regard must be had to the agricultural industry where pooling is common but since these pools are not approved in terms of section 17 of the Marketing of Agricultural Products Act, these pools cannot apply for separate VAT registration.

Section 54(2A)(a) of the VAT Act – importation of goods by an agent on behalf of its principal

Legal Nature

247. Section 54(2A)(a) of the VAT Act states the following:

“For the purposes of this Act, where any goods are imported into the Republic by an agent who is acting on behalf of another person who is the principal for the purposes of that importation, that importation shall be deemed to be made by that principal and not by such agent: Provided that a bill of entry or other document prescribed in terms of the Customs and Excise Act in relation to that importation may nevertheless be held by such agent.” (own emphasis)



Factual Description

248. In practice where an agent imports goods on behalf of a principal, the customs documentation is in some cases issued in the name of the agent.
249. As far as we are aware, no distinction is made for purposes of claiming the import VAT, i.e. regardless of whether the customs documentation is issued in the name of the agent or issued in the name of the principal but merely held by the agent, the principal is allowed to claim the import VAT.
250. For purposes of clarity however, we have included our recommendation below.

The nature of businesses impacted

251. Any importer of goods that utilizes an agent to import goods on its behalf.

Proposal

252. It is recommended that the wording in the proviso to section 54(2A)(a) of the VAT Act be changed from “be held by the agent” to “ be issued to the agent”.

Section 54(2A)(b)(ii) of the VAT Act – importation of goods by an agent on behalf of a foreign principal

Legal Nature

253. Section 54(2A)(a) of the VAT Act provides that where any goods are imported into the Republic by an agent acting on behalf of another person, being the principal, such goods shall be deemed to be imported by such principal and not by the agent.
254. Section 54(2A)(b) of the VAT Act provides, *inter alia*, that:
- “(b) Notwithstanding the provisions of paragraph (a), where any goods are imported into the Republic by an agent who is acting on behalf of another person who is the principal for the purposes of that importation and -*
- (i) The agent is a registered vendor; and*
 - (ii) The principal is not a resident of the Republic and is not a registered vendor; and*
 - (iii) The goods are imported by the principal for the purposes of a supply made or to be made by him to a person in the Republic; and*
 - (iv) The agent obtains and retains documentary proof, as is acceptable to the Commissioner, that -*
 - (aa) he paid the tax on importation on behalf of that principal; and*
 - (bb) such agent and that principal agree in writing that the said tax has not and will not be reimbursed to such agent by that principal,*



That importation shall for the purposes of this Act be deemed to be made by such agent and not by that principal.”

255. Section 8(20) of the VAT Act provides that where an importation of goods is deemed to have been made by an agent, as contemplated in section 54(2A)(b) of the VAT Act, such agent shall be deemed to make a supply of goods to the recipient of the supply by the principal as contemplated in subparagraph (iii) of that section.

Factual Description

256. Where a non-resident continuously and regularly imports goods into the Republic, for use or on-supply to any other person, that non-resident is liable to register as a VAT vendor in the Republic if its taxable turnover in a 12 month period exceeds the R1 million registration threshold.
257. Where such non-resident is duly registered, the VAT incurred on importation will be claimable as input tax only by that vendor and section 54(2A)(b) of the VAT Act does not apply. However, where a non-resident who is liable to register does not register as a vendor, such non-compliance will entitle the non-resident to the relief afforded by the section, by virtue of the fact that the person is not a resident of the Republic and not a registered vendor.
258. It is our understanding that the said sections were introduced to provide relief to vendors who purchase goods from non-residents (who are not liable and not able to register as VAT vendors), so as to avoid cascading.

The nature of businesses impacted

259. Vendors that purchases goods from non-residents that are not liable/able to register as VAT vendors.

Proposal

260. It is recommended that the word “registered” which precedes the word “vendor” in section 54(2A)(b)(ii) of the VAT Act be deleted.

Schedule 1 to the VAT Act – the meaning of “exported” for purposes of Schedule 1

Legal Nature

261. For purposes of the VAT Act the term “exported” is defined in section 1(1) of the VAT Act and only relates to movable goods supplied by any vendor, under a sale or an instalment credit agreement. Therefore, any goods that are consigned or delivered from a place in the Republic to a place in a foreign jurisdiction where transfer of ownership of the goods does not occur pursuant to a sale or instalment credit agreement will not fall within the definition of “exported” for purposes of the VAT Act.



262. Schedule 1 to the VAT Act stipulates that, subject to certain conditions, goods temporarily exported from the Republic will be exempt from import VAT when the goods are returned to the Republic, where no change of ownership has taken place.
263. Similarly, an exemption from import VAT exists pursuant to Schedule 1 to the VAT Act where, subject to certain conditions, goods are imported, re-exported and thereafter returned to the Republic, where no change of ownership has taken place.

Factual Description

264. The term “exported” as defined in section 1(1) of the VAT Act, is applicable to all sections in the VAT Act, including the schedules thereto.
265. Therefore, the term “exported” as included in Schedule 1 to the VAT Act could cause ambiguity for the reasons detailed below.
266. We acknowledge that the wording, “where no change of ownership has taken place” indicates the intention of the legislature, i.e. that this does not envisage “exported” as defined in section 1(1) of the VAT Act in terms of a sale or instalment credit agreement.
267. With the current wording however, a narrow interpretation could be 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.
268. This is clearly not the intention of the legislature as the items included in the exemptions are items that has/will not be sold, to mention a few examples:
- Goods temporarily admitted for processing, repair, cleaning, reconditioning or for the manufacture of goods exclusively for exportation, e.g. goods (including parts therefore) for repair, cleaning or reconditioning;
 - Goods temporarily admitted for specific purposes, e.g. goods for display or use at exhibitions, fairs, meetings or similar events or commercial samples owned abroad and imported for the purpose of being shown or demonstrated in the Republic for the soliciting of order for goods to be supplied from abroad;
 - Goods temporarily admitted subject to exportation in the same state, e.g. private motor vehicles belonging to a person taking up temporary residence in the Republic or models or prototypes, to be used in the manufacture of goods.
269. In terms of re-imported goods subject to the exemption in Schedule 1 the exemption only applies where section 11(1)(a) of the VAT Act does not apply, i.e. the goods were exported pursuant to a sale or instalment credit agreement, which again strongly indicates that the term as defined in section 1(1) of the VAT Act would not apply to Schedule 1 to the VAT Act.



The nature of businesses impacted

270. Any vendor that temporarily exports or re-imports goods in terms of Schedule 1 to the VAT Act.

Proposal

271. We recommend that a paragraph 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, the following exemptions will apply.

272. Alternatively, a definition of “exported” applicable only to Schedule 1 to the VAT Act, could be included that replicates the definition of “exported” in section 1(1) of the VAT Act, excluding the wording “under a sale or an instalment credit agreement”.



CATEGORY – TAX ADMINISTRATION (TAA)

Determining days in the TAA

Legal Nature

273. The calculation of time for things to be done or not done in the TAA is fundamental to it being implemented and operating effectively.
274. It is also only administratively fair if taxpayers clearly know when something must be done or not done and how to determine the period or date by which or within it must be done or not done.
275. In the TAA, calculation of time can apply in many different manners, including due to the use of both the undefined word “day” and defined word “business day”.
276. Furthermore, calculation of time is also impacted by:
- “Business day” as defined in section 1 excluding Chapter 9 disputes;
 - “Business day” as defined in section 1 including Chapter 9 disputes, thus excluding the period from 16 December – 15 January;
 - “Day”, which takes its normal meaning of calendar day;
 - A day notified, i.e. a specific day (section 244);
 - Months, which by the Interpretation Act means calendar months;
 - Section 215(3) where time commences from the first day;
 - Where it is a number of days, section 4 of the Interpretation Act applies and the first day is excluded and the last day included;
 - If SARS specifies a day for payment, submission or other action, and the period or day specified ends on a Saturday, Sunday or Public holiday, the “day” becomes the last business day before such date;
 - In any other instance than the above, section 4 of the Interpretation Act applies and if last day lands on a Saturday, Sunday or Public holiday, that day becomes the “business day” after such day; and
 - Where a time on that day is specified, then that is the end of the “day” and after that is the beginning of the next “business day”.



277. Reckoning of days is also subject to other common law methods⁷.

Factual Description

278. The determination of something as rudimentary as by when something needs to be done is overly complex in the TAA with various other laws and other provisions in the TAA applying.

279. This complexity is clearly also creating confusion for SARS officials. For example, the standard verification letter requires submission of documents within 21 business days, yet the final demand letter and eFiling system calculates the requirement in calendar days.

The nature of businesses impacted

280. All taxpayers.

Proposal

281. It is proposed that all days in the TAA be “business days” and if SARS requires a shorter period that they specify a specific return date and not a number of business days.

282. Furthermore, consideration should be given to consolidate the various provisions of determining “days” and time periods in the TAA into a single section for taxpayers.

Chapter 16 Part B and section 104 of the TAA

Legal Nature

283. Chapter 16 Part B of the TAA deals with the Voluntary Disclosure Programme (VDP). In particular section 227 makes provision for the requirements for a valid VDP. Section 231 of the TAA makes provision that SARS may, subsequent to the conclusion of a VDP agreement, withdraw the relief granted under that VDP agreement, if a taxpayer failed to disclose a matter that was material for the purposes of making a valid voluntary disclosure.

284. Section 104 of the TAA deals, *inter alia*, with objections that may be lodged against the following decisions made by SARS:

- A decision not to extend the period for lodging an objection; and
- A decision not to extend the period for lodging an appeal.

Factual Description

285. It is clear from the above sections that where SARS declines a VDP application for whatever reason, the taxpayer has no right to object to such decision and it thus follows

⁷ http://www.justice.gov.za/sca/judgments%5Czca_2001/2000_440.pdf at [6]



that where SARS declines a VDP application, taxpayers are reliant upon PAJA to bring a review application to the High Court, which is very costly.

The nature of businesses impacted

286. All taxpayers who submit VDP applications are potentially subject to this treatment.

Proposal

287. It is proposed that section 104 of the TAA be amended to include a decision by SARS to decline a VDP application.

Section 210 and 211 of the TAA – corporate tax administrative penalty applying retroactively

Legal Nature

288. SARS recently released a Regulation for incidences of non-compliance by a person in terms of section 210(2) of the TAA that are subject to a fixed amount penalty in accordance with section 210 and 211 of the TAA.

289. It is accepted that though the penalty will apply to non-compliance dating back to 2009, the monthly penalty will only be calculated with reference to the effective date of the penalty notice referencing the notice i.e. monthly penalty will only apply prospectively from effective date (SARS noted 9 December 2018). This is however not expressly stated in the notice.

Factual Description

290. Concern is expressed regarding the wording of section 211(2)(b) of the TAA, in that when SARS does not have the company's most recent address to which to deliver the penalty notice, the monthly penalty will apply from date of non-compliance, which may be from 2009. It may be that this is not an issue as section 210(2) states that non-compliance is failure to comply with an obligation that is imposed under a tax Act and is listed in a public notice. The concern is that it does not expressly require that these two criteria must be present on the date from which the penalty is calculated, but merely on the date when the penalty is imposed.

291. Furthermore, section 252 read together with section 23 of the TAA includes delivery by physical, postal and electronic means. Thus, even if the company is on eFiling, can SARS issue a penalty assessment to the invalid postal address (which practice seems to have increased recently) and apply section 211(2)(b) of the TAA notwithstanding that it could have effectively delivered the assessment by SARS eFiling or email instead.

The nature of businesses impacted

292. All companies that may be liable for the tax administrative penalty with outdated addresses.



Proposal

293. It is submitted that if the penalty is imposed in terms of section 211(2)(b) of the TAA from the date of historical non-compliance where a company's address may be out of date (for whatever reason including SARS eFiling errors), it would be retroactive and in our view not what was intended by the legislature.
294. In this regard we submit that the notice should expressly state that for the purposes of section 211(2)(b) of the TAA, the date of non-compliance is the effective date of the notice. It is further requested that SARS clarify the address update and effective delivery concern expressed above.



Annexure B

2017 ANNEXURE C SUBMISSION

1. We note that, with a few exceptions, as noted below, most of the proposals made in terms of the SAICA Annexure C submission made on 27 November 2016 were not accepted or implemented by NT.
2. The exceptions, which have been implemented or partially implemented by NT, are the following:
 - Adhering to the request have a workshop to understand the unintended consequences of the amendments to section 19(1) and paragraph 12A of the Eighth Schedule to the Act and partially implementing our proposals;
 - Amending the error in the formula for determining “debt benefit” in section 19(1) and paragraph 12A of the Eighth Schedule to the Act;
 - Clarifying the exact time at which the face value or market value must be determined for purposes of section 19(1) and paragraph 12A of the Eighth Schedule to the Act;
 - Noting the precedence over the corporate roll-over provisions in section 22B and paragraph 43A of the Eighth Schedule to the Act;
 - Taking into account the difficulties experienced relating to the issue of tax invoices, credit and debit notes from sale of enterprise in terms of section 20(5A) and section 21(8) of the VAT Act; and
 - Removing certain section references in the VAT Act that are no longer required.

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| CATEGORY - INCOME TAX: INDIVIDUALS, EMPLOYMENT AND SAVINGS |
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NOT IMPLIMENTED - Section 7C of the Act - Excessively broad ambit of section 7C in respect of loans provided to companies in which a beneficiary of a trust holds participation or voting rights exceeding 20% (TLAB 2017)

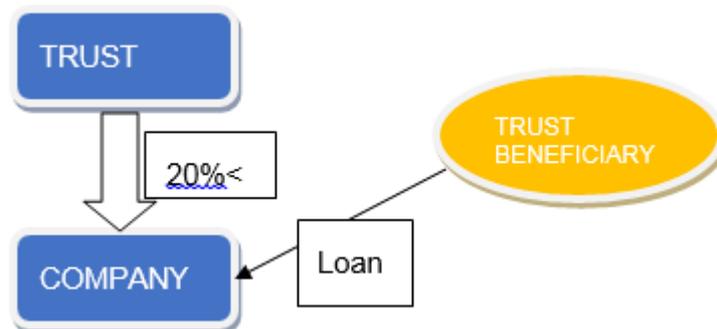
Legal nature

3. Section 7C(1) of the Act will apply (post the TLAB2017) where, inter alia, a natural person or a company (at the instance of a natural person who is a connected person in relation to that company) directly or indirectly provides a loan, advance or credit to a company in which at least 20 per cent of the equity shares or voting rights can be exercised by a trust that is a connected person in relation to the natural person or company that provided the loan or by any beneficiary of that trust.

Detailed factual description

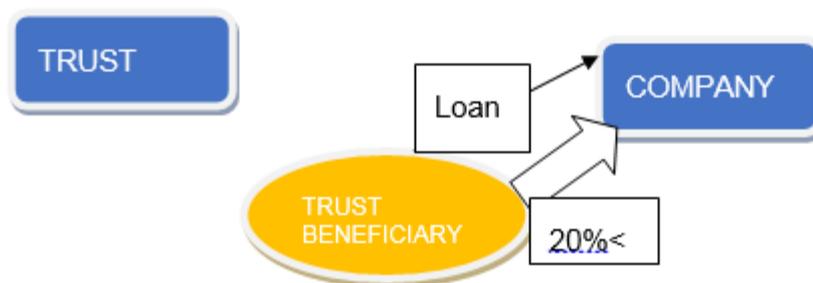
4. It is submitted that the ambit of section 7C is too wide and that the reference to the participation or voting rights of a beneficiary of a trust that is a connected person in relation to the natural person or company providing the loan, advance or credit will inevitably result in section 7C applying to normal business loans.

5. The effect of the proposal, as currently worded, is that any natural person who is a beneficiary of a trust and who holds at least 20 per cent of the equity shares or voting rights in an operating company to which he or she has advanced an interest free or low interest loan (even if there is no shareholding link between the company and the trust) will potentially be affected if no interest is charged on the loan, or if interest is charged at a rate less than the official rate.
6. This means that no causal link is required between the trust (where the targeted estate assets would be housed, either directly, or through its ownership in a company) and the company (as illustrated in paragraph 13 below). The section 7C provisions would now also apply to a natural person even though his or her estate assets are fully included in the estate, including the interest in the company.
7. This same point was raised in our TLAB2017 submission.
8. NT seemingly intended to address the following scenario:



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9. However, it now also applies to this scenario:





Proposal

10. The reference in section 7C(1)(b)(ii)(bb) to "...or by a beneficiary of that trust..." should be deleted.

NOT IMPLEMENTED - Section 10(1)(k)(i) - Dividend tax exemption claim for employees

Legal nature

11. Section 10(1)(k)(i) of the Act contains three provisos with respect to dividends paid in connection with employee share schemes, namely proviso (dd), (ii) and (jj), with effect from 1 March 2017.
12. These taxable dividends are included in the definition of "remuneration", for PAYE purposes, in paragraph 1 of the Fourth Schedule to the Act, with effect from 1 March 2017.
13. Consequently, such dividends will be exempt from dividends tax, in terms of section 64F(1)(l) of the Act, as they constitute income of the beneficial owner.

Detailed factual description

14. In terms of section 64G(2), the company paying the dividend must not withhold dividends tax if the beneficial owner of the dividend has, by the determined date, submitted to the company the necessary declaration (of exemption) and undertaking (to notify the company of any change in status).
15. Currently, in order to claim such exemption, the beneficial owner of the dividend (the employee in receipt of the dividend) must complete a declaration and undertaking in the format suggested in Appendix G of the SARS BRS: Administration of Dividends Tax (DTD(EX)).

Persons impacted

16. Whenever an employer processes a non-exempt dividend through payroll and subjects that amount to PAYE, it is essential that dividends tax is not also withheld from the same amount. It is impractical, however, for all affected employees to complete and submit a DTD(EX) form to the employer on a timely basis, as this is an administratively onerous requirement on the employee.
17. This is particularly the case where the company paying the dividend may be different to the employer, as is often the case in large corporate groups.

Proposal

18. It is proposed that section 64G(2) be amended to permit an employer to complete and submit the necessary declaration and undertaking on behalf of all affected employees, in cases where taxable dividends are subject to PAYE.



19. It is furthermore proposed that a specific version of DTD(EX) be developed by SARS (and included in an updated BRS) which permits the exemption to be claimed by means of a bulk declaration and undertaking to the paying company, wherein all relevant employees and their tax reference numbers are listed.
20. Please also see the proposals in relation to the company under **Domestic Business Taxes** below.

NOT IMPLEMENTED - Amendment to section 10(1)(nB) - Relocation allowances

Legal nature

21. Section 10(1)(nB) of the Act grants an employee an exemption on costs incurred by the employer for an employee who relocates for work purposes. In the exemption, the qualifying costs (travel expenses, costs of selling previous place of residence and costs for temporary accommodation) were not subject to tax. Furthermore, the section provided for a discretion to be exercised by the Commissioner in allowing other relocation amounts payable to be deemed non-taxable.
22. In practice, an allowance amount equal to one month's gross salary of the employee was accepted as a reasonable allowance to allow the employee to cover certain other expenses.
23. In 2015, the discretion afforded to the Commissioner to deem certain relocation based payments to be non-taxable was removed from the section, thus resulting in the relocation allowance being fully taxable in the hands of the employee.
24. The amendment was effective 1 March 2016.

Factual description

25. The costs incurred by an employer on behalf of an employee relating to the relocation of employees previously assisted employees who were not in a financial position to relocate, to enable them to settle in to their new location quickly and to fund any expenses that may have arisen by the employer's request to relocate.
26. Given the current economic conditions, it may be challenging for employees to afford the relocation expenses and may result in a lack of appetite for relocations by employers and employees. From an employer perspective, this change may result in the employers having to bare the tax incurred by the employee as a result of the relocation.

Persons impacted

27. All employees who are required to relocate for work purposes are negatively impacted by the lack of a dispensation in this regard.



Proposal

28. A dispensation similar to what was previously available, whereby employees were able to relocate without bearing the costs of such relocation or any tax thereon if such costs were borne by their employer, needs to be reconsidered in the current economic climate. Therefore, we propose the inclusion of a threshold to allow for an allowance to be paid that will be regarded as non-taxable.
29. A possible suggestion might be to allow for 15% of annual remuneration as an allowable non-taxable allowance for relocation purposes, alternatively a value or percentage can be linked to the remuneration proxy definition already contained in the Act.
30. However, irrespective of how this dispensation is achieved, we request that a workshop be held to discuss and debate potential solutions in order for relief to be provided to employees in this regard.

NOT IMPLEMENTED - Section 10(1)(o)(ii) - Foreign income exemption (TLAB2017)

Legal nature

31. The Taxation Laws Amendment Bill No. 27 of 2017 amends section 10(1)(o)(ii) of the Act with the insertion of a R1 million threshold applicable to the exemption.

Detailed factual description

32. While the amendment is significantly more workable than the proposal in the draft legislation, there are still a number of concerns in this regard.
33. No amendments have been made to either employees' tax or provisional tax provisions under the Fourth Schedule, which provide clarity on the mechanism to be used in order to implement the threshold and the resultant (double) tax that will be suffered by the impacted individuals.

Persons impacted

34. South African residents working abroad and earning foreign remuneration.

Proposal

35. We submit that this amendment to section 10(1)(o)(ii) has been considered in isolation and that the proposed amendments should be reconsidered taking into account the practicalities of implementing this change, i.e. the other tax collecting mechanisms within SARS that are impacted.
36. We therefore propose that extensive consultation is required to workshop the practical hurdles which will need to be overcome in order to ensure that no double tax is suffered.
37. In addition, we propose that further legislative amendments to the Fourth Schedule, as well as changes to the way in which the foreign tax credit provisions contained in section



6quat of the Act are administered, may be required to facilitate an effective change in the tax policy in this regard.

NOT IMPLEMENTED - Para 11B Fourth Schedule - “Non-standard employment” definition inadvertently deleted

Legal nature

38. In Act No. 23 of 2015, paragraph 11B of the Fourth Schedule to the Act was repealed thereby removing the defunct Standard Income Tax on Employees (SITE) provisions with effect from 1 March 2016.
39. Part of the provision which was repealed included the definition of “standard employment”, which had wider impact beyond the SITE regime.

Factual description

40. Following from the definition of “standard employment” followed the concept of “non-standard employment” for those employees who did not meet the criteria of “standard employment”. If an employee was deemed to be in non-standard employment, a standard fixed rate of 25% was applied to the remuneration earned.
41. The Employers’ Guide however retains the concepts of both standard and non-standard and refers to non-standard as follows:

Any employment which cannot be classified under Standard or Deemed Standard employment.

- Workers are employed on a daily basis and are paid daily, for example:
 - Casual commissions paid, such as spotter’s fees;
 - Casual payments to casual workers for irregular services rendered or occasional services;
 - Fees paid to part-time lecturers;
 - Honoraria paid to office bearers of organisations, clubs, etc.
42. The Guide further provides that employees’ tax will be determined on non-standard employment as follows:

Non-standard employment income

Employees’ tax must be calculated and deducted at 25% on the balance of remuneration.



43. With the repeal of the definition of “standard employment” there appears to be no basis in law for the treatment of non-standard employment in such a manner and this creates legal uncertainty regarding the application of the fixed rate.
44. This is a concept which is widely used in business for ensuring that PAYE is being paid on remuneration where the employment relationship is a temporary one or is largely casual in nature.

Persons impacted

45. Temporary or casual employees, especially those who earn less than the threshold and who now become subject to PAYE but have no tax liability.

Proposal

46. We propose the reintroduction of the definition of “standard employment” in paragraph 1 of the Fourth Schedule to the Act and the inclusion of the relevant rate in the tables to allow for legal certainty, particularly as regards the application of a fixed tax rate of 25% for those in “non-standard employment”.

NOT IMPLEMENTED - Paragraph 13 Fourth Schedule – Furnishing of employees’ tax certificates

Legal nature

47. Currently paragraph 13(5) of the Fourth Schedule to the Act places a duty on the employee who has not received an employees’ tax certificate (an IRP 5) to apply to the employer for such certificate, but requires no further action from the employee.
48. Paragraph 30(1)(f) creates an offence where an employer fails to comply with its obligations to furnish employees with an employees’ tax certificate where PAYE has been withheld.
49. Consequently, SARS has a legal obligation to compel the employer to comply by applying the offence provision.

Factual description

50. Where an employer has not furnished its employees with an IRP5, and in many instances not submitted its EMP501 reconciliation, but has withheld PAYE from its employees, the employees are left in a very difficult position, as they cannot submit their tax returns, and even if they do, SARS will not give them the PAYE credit but it will tax the income.
51. SARS has to date indicated that this is a matter between the employer and its employees, notwithstanding its legal obligation to apply and enforce the tax Acts and the IRP5 is not a document that flows from the labour law, unlike a payslip and employment contract.



52. Therefore, it is not created in terms of the employee/employer relationship but in terms of the obligation imposed by the tax law on the employer with SARS as the custodian of implementing the tax law.

Persons impacted

53. Employees who have not received their IRP5, including where the employer company is in liquidation, business rescue or where the employer has absconded.

Proposal

54. It is submitted that paragraph 13 of the Fourth Schedule be amended to place a positive obligation on SARS to act once the employee has complied with paragraph 13(5).
55. Furthermore, paragraph 13 should be amended to provide relief by allowing employees to submit other evidence to SARS as proof of the withholding of PAYE from their remuneration that will be considered a payment of normal tax in terms of section 5 of the Act.

NOT IMPLEMENTED - Section 8(1)(b) – Business travel for call outs for standby employees

Legal nature

56. Section 8(1)(b) of the Act allows an employee to claim the expense incurred for travelling on business against any allowance or advance received from his or her employer, whether as a fixed allowance or re-imbursive allowance. However, section 8(1)(b)(i) of the Act states that private travel cannot be claimed.
57. Private travel is qualified as including travelling between the employee's place of residence and his or her place of business.
58. Section 8(1)(b) therefore does not distinguish between an employee travelling during his or her normal hours of work from their residence to place or work, and an employee travelling abnormal/after hours, such as standby and callout.

Factual description

59. Many emergency service professions including nurses, radiographers, policeman, fireman, engineers, etc. are required to work normal working hours but also to be on standby for certain 'off duty' times when an emergency happens which requires the assistance of additional staff.
60. Given the nature of these professions, and the lack of such skilled professionals, these practices have become standard practice.
61. The employee will in most instances be at his or her place of residence or another place for private or domestic purposes when such a call out event occurs.



62. The current legislation will preclude the employee from claiming the expense incurred against the allowance or advance received for such travel, resulting in a tax charge for these employees, effectively reducing the amount recovered. This appears to be overly punitive.

Proposal

63. It is proposed that an exception be inserted into section 8(1)(b)(i) to exclude from private travel, travel between work and home where such travel is outside the employee's normal working hours, not for the purposes of his or her normal working hours and such employee is contractually required to be on standby or subject to be called out to a place of work outside of such employee's normal working hours.
64. Furthermore, to prevent abuse, we propose that the rate that such amounts may be reimbursed be limited to the rates and threshold issued by a Gazette in terms of section 8(1)(b)(iii) of the Act. In addition, although the same unfairness applies, the proposal could exclude employees who are subject to the marginal rate of tax to limit the relief to the more vulnerable employees on whom the burden is even more disproportionate.



CATEGORY – DOMESTIC BUSINESS TAXES

NOT IMPLEMENTED - Section 1 of the Act - Definition of “resident” in relation to persons other than natural persons

Legal Nature

65. Tax residency in South Africa for persons other than natural persons can be triggered either by being incorporated, formed or established (hereinafter referred to as “incorporation”) in South Africa or by having the person’s place of effective management (POEM) in South Africa.
66. In most countries, tax residency is also triggered by incorporation in that specific country.

Detailed factual description

67. The interpretation of POEM adopted in Interpretation Note 6 (IN6), in short, defines POEM as the place where the key commercial and strategic decisions affecting a person is taken. This is in line with the interpretation adopted by the Organisation for Economic Cooperation and Development (OECD) and therefore IN6 aligned South Africa with the international community.
68. Whilst this should be applauded, it is also important to understand the impact this has on multinational entities, which may be effectively managed in South Africa, resulting in possible dual residency.
69. The resolution of dual residency is extremely difficult in practice.
70. Where there is no double taxation agreement (DTA), as is still relatively common in Africa (only 23 DTAs out of 54 African countries), the company may be resident in two countries, with a resultant compliance burden in two countries, often with no increased taxes being due in South Africa, as the tax rates in African countries tend to be high.
71. Where there is a DTA, the tie breaker rule is either POEM or a requirement that the tax authorities need to mutually agree on the residency of the person.
72. In practice, the mutual agreement process takes in excess of 18 months to complete and may place a significant strain on SARS’ resources. In the intervening time, the company is placed in a very uncertain tax position, as it does not know where it is resident for tax purposes. In this regard, it is also important to note that the mutual agreement process may be the tie-breaker rule in all of South Africa’s DTA’s as South Africa has signed the Multilateral Instrument developed by the OECD and have indicated that they will follow Article 4 thereof (depending if the other country also agreed to follow Article 4). Paragraph 1 of Article 4 reads as follows:

Where by reason of the provisions of a Covered Tax Agreement a person other than an individual is a resident of more than one Contracting Jurisdiction, the competent



authorities of the Contracting Jurisdictions shall endeavour to determine by mutual agreement the Contracting Jurisdiction of which such person shall be deemed to be a resident for the purposes of the Covered Tax Agreement, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by the Covered Tax Agreement except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting Jurisdictions.

73. Where POEM is the tie-breaker, it is in practice very difficult to explain to the other tax authority that the company is now resident in South Africa, despite being incorporated in that other country and that this will have an impact on, for example, withholding taxes. Some source based countries even deny access to the DTA tie-breaker rule based on the wording of Article 4(1), which excludes from the definition of resident in the DTA, “any person who is liable to tax in that State in respect only of income from sources therein” despite the OECD making it clear that this is not the intention behind the exclusion in paragraph 8 of the Commentary on paragraph 4 of the Model Tax Treaty (<http://www.oecd.org/tax/transfer-pricing/36221030.pdf>):

“Thus it has to be interpreted restrictively because it might otherwise exclude from the scope of the Convention all residents of countries adopting a territorial principle in their taxation, a result which is clearly not intended.

74. Even once residency in South Africa has been determined, registering the company for tax purposes in South Africa first requires the company to register with the Companies and Intellectual Property Commission (CIPC).
75. It is further submitted that the Act is not written with these situations in mind, which in certain instances prejudices the foreign incorporated companies with South African tax residency status.
76. For example, it is submitted that the foreign incorporated companies will not qualify for the section 11(l) deduction in relation to contributions to South African retirement funds, as these retirement funds are unlikely to have been approved by SARS, and will therefore not fall within the scope of retirement funds as envisaged in section 11(l). It is then arguable whether the deduction can be claimed under section 11(a).
77. If the foreign incorporated companies pay insurance premiums on the lives of their key employees, these payments will not qualify for deduction, as the specific deduction in terms of section 11(w) will not apply, since the contributions are not subject to tax in the hands of the employees in terms of the Seventh Schedule to the Act. Section 23B will prohibit a deduction under section 11(a).
78. It is unlikely that the foreign incorporated companies will qualify for the section 12H allowances, as they are unlikely to have entered into learnership agreements registered



with a SETA as required in terms of section 12H, despite having entered into local training agreements in that country.

79. It is unlikely that the foreign incorporated companies will qualify for a deduction of donations paid under section 18A, as the companies are unlikely to have made donations to public benefit organisations (PBOs) sanctioned in terms of the Act, even though they may have made donations to PBOs approved under domestic legislation in that country.
80. The disposal of the foreign companies' capital assets will have CGT implications in South Africa. For CGT purposes, the valuation date of the foreign incorporated companies' pre-valuation date assets remains 1 October 2001. It would therefore have been important to have identified assets which may have CGT implications if disposed of (such as fixed property or shares investments) and to perform market valuations for these assets as at 1 October 2001 before 30 September 2004. This is unlikely to have happened. In the absence of a market valuation, the foreign incorporated companies will be restricted to apply the time apportioned base cost or 20% of proceeds method. Capital gains are often not taxed in Africa and as a result there may also not be a section 6quat rebate allowed.

Nature of business impacted

81. All multinational companies which are effectively managed in South Africa.

Proposal

82. Consideration should be given to the practical difficulties experienced by foreign companies, which are effectively managed in South Africa, when complying with the provisions of the Act.

NOT IMPLEMENTED - Section 7C interaction with section 31: Application of section 7C to cross-border loans subject to transfer pricing and exclusion in section 7C(5)(e)

Legal nature

83. Section 7C of the Act was first introduced in 2016 to address tax avoidance structures using trusts and interest free loans and became effective on 1 March 2017.
84. However, as noted by NT at its workshops conducted during 2016, anomalies may arise which were not anticipated given the broad application of this anti avoidance provision. Therefore, NT invited stakeholders to engage should they identify such anomalies.

Proposal

85. Section 7C(5)(e) contains an exclusion from the scope of section 7C(2) and (3) if a "loan, advance or credit constitutes an affected transaction as defined in section 31 (1) that is subject to the provisions of that section"
86. An affected transaction is defined in section 31(1) as:



“a transaction between certain persons listed in sub-paragraphs (i) to (iv) of paragraph (a) of the definition who are connected in relation to each other; and

any term or condition of that transaction, operation, scheme, agreement or understanding is different from any term or condition that would have existed had those persons been independent persons dealing at arm’s length (paragraph (b) of the definition).

87. Section 31(2) requires a transfer pricing adjustment where a transaction is an affected transaction and any term or condition differs from what persons dealing at arm’s length would have agreed to.
88. From the final 2016 Explanatory Memorandum (dated 15 December 2016), the purpose of this exclusion in section 7C(5)(e) appears to be to avoid any overlap between the application of the transfer pricing rules in section 31 and the application of section 7C. The Explanatory Memorandum specifically states that the anti-avoidance measures under section 7C will not apply to a loan that is subject to the transfer pricing rules in section 31.
89. The Explanatory Memorandum explains the reason for the exclusion as being that the loan would already have been subject to an anti-avoidance rule, aimed at the mispricing of interest on loans to trusts, and should therefore not be subjected to section 7C, which is also aimed at the mispricing of such interest.

Detailed factual description

90. It is submitted that the current wording of section 7C(5)(e) excludes loans with terms or conditions that are not arm’s length (i.e. loans that meet both paragraphs (a) and (b) of the definition of an affected transaction in section 31(1)), and in respect of which a transfer pricing adjustment is required, from the scope of section 7C.
91. However, loans between a natural person (resident) and trust (not resident) with terms or conditions which are similar to those that would have existed between persons dealing at arm’s length are not “affected transactions”, as defined, as paragraph (b) of the definition of ‘affected transaction’ is not met.
92. This means that these loans, which are on arm’s length terms (including interest rate pricing), arguably remain within the scope of section 7C, even though the terms and conditions meet the arm’s length requirements of section 31, but have an interest rate which is less than the official interest rate in the Seventh Schedule.

Nature of business impacted

93. Taxpayers with cross border loans to offshore trusts.



Proposal

94. We suggest that the reference in section 7C(5)(e) to an affected transaction, as defined in section 31(1), be amended to ensure that all loans to offshore trusts which are either on arm's length terms (including the rate of interest) or have been subjected to the penalty provisions in section 31(2), are excluded from the ambit of section 7C. The problematic words in section 7C(5)(e) are "subject to the provisions of that section", since this appears to apply only to loans which are not on arm's length terms and excludes loans which are on arm's length terms (including pricing).
95. Therefore, it is proposed that the words to be used in this section should rather be "compliant with the provisions of that section", which would then apply to loans where the pricing is correct and loans which have been subject to the penalty provisions of section 31(2) and (3).

NOT IMPLEMENTED - Section 9 - Headquarter regime

Legal nature

Background to South Africa's Headquarter Company Regime

96. Section 9I of the Act was promulgated to promote South Africa as a gateway for investments into Africa. While the initiative is welcomed, the regime is limited to new entrants looking to set up a holding company. Existing groups with an intermediate holding company are prejudiced due to the Controlled Foreign Company (CFC) rules in South Africa.

Headquarter companies

97. In terms of section 9I, a headquarter company is subject to tax in the same way as any other resident company. However, it is entitled to certain relief from income tax, capital gains tax and dividends tax which is not available to resident companies that are not headquarter companies.
98. As a consequence of the special relief granted to headquarter companies they are also subject to special anti-avoidance rules.
99. In addition to the headquarter companies themselves, a foreign person receiving interest or royalties from a headquarter company will, under specified circumstances, be exempt from withholding tax on interest and royalties respectively.

CFC rules

100. Section 9D(2) of the Act generally requires that a portion of a CFC's net income must be included in the income of any resident, other than a resident who is a headquarter company, who directly or indirectly holds any participation rights in a CFC. This is commonly referred to as "attribution".



101. The amount which must be attributed to a particular resident is a proportional amount determined by applying the percentage of the resident's participation rights over the total participation rights in the company on the last day of the year of assessment to the CFC's net income, as determined under section 9D.
102. Attribution is also not required to the extent the participation rights are indirectly held by a resident through any company which is a resident other than a company which is a headquarter company. The result is that headquarter companies are not subject to section 9D.
103. However, South African resident companies which indirectly (through the headquarter company) participate in a non-resident CFC are subject to section 9D.

Description of problem

104. Section 9I is aimed at incentivising South Africa as a destination to locate a headquarter company. The impact is favourable for non-resident groups looking to invest for the first time.
105. However, a number of corporate groups with an intermediate holding company (sitting between the non-resident parent company and the headquarter company) are not able to take advantage of the regime due to the CFC attribution shifting up a level to the intermediate holding company.

Nature of business impacted

106. The current wording in the legislation affects all businesses which are established in South Africa, which invest into Africa, with an intermediate holding company situated in South Africa, but ultimately held offshore.
107. As a result, using South Africa as a base for a regional headquarter company is not attractive and does not encourage foreign direct investment, contrary to the legislative intention.

Proposal

108. To overcome the above inequality, a carve out for CFC purposes should be extended to intermediate holding companies which hold a regional headquarter company – this carve out could be limited to the potential attribution arising from CFCs that are held by the regional headquarter company.

NOT IMPLEMENTED - Section 10(1)(k)(i) - Income tax deduction for re-characterized dividends

Legal nature

109. With effect from 1 March 2017 certain amounts received by or accrued to a person by way of dividends contemplated in paragraphs (dd), (ii) and (jj) of the proviso to section



10(1)(k)(i) of the Act constitute income, and are regarded as “remuneration” for the purposes of the Fourth Schedule to the Act.

110. These dividends are subject to employees’ tax in the hands of the employee.
111. These dividends are exempt from dividends tax in terms of section 64F(1)(l) of the Act.
112. Despite the re-characterization of the dividends as remuneration in the hands of the recipient employees, the amount payable by the company is still regarded as a dividend, and as such, no income tax deduction is allowed thereon in the hands of the company.
113. The absence of a matching principle, in these circumstances, is considered to be unjust in relation to the company, especially since there is no tax avoidance motive by any of the parties.

Detailed factual description

114. Black empowerment employees typically are vested income beneficiaries under certain share incentive schemes and this is aimed at efficient empowerment and as a result to enhance the BEE credentials of a company.
115. Dividends would be distributed by the company to the employee share trust, which in turn will distribute same to the vested income beneficiaries.
116. Employees’ tax will be withheld from the payments to the vested income beneficiaries.
117. Despite the amount paid by the company representing remuneration in the hands of the employees, the amount so paid is not treated as remuneration subject to an income tax deduction in the hands of the company.
118. This is not considered to be equitable from the employer’s perspective.

Nature of business impacted

119. Various companies which have established employee share incentive schemes to incentivise their workforce.

Proposal

120. In order to achieve equity, an income tax deduction should be allowed in the hands of the employer company paying the dividend to an employee where such dividend is re-characterised as remuneration and PAYE withholding applies, in terms of the matching principle.
121. Please also see our comments on the proposed amendments under **Individuals** above.



NOT IMPLEMENTED - Section 12B((1)(h) – Renewable energy technical correction

Legal nature

122. Section 12B(1)(h) of the Act sets out the various items that qualify for deduction in terms of section 12B(2), for purposes of the production of renewable energy.
123. Items (i) to (iv) are listed and the formula appears to be incorrect insofar that an “and” is interposed between items (iii) and (iv) because it appears that all of the criteria from (i) to (iv) are required in order for relief to be granted. This is clearly not the case.

Proposal

124. It is proposed that the “and” between section 12B(1)(h)(iii) and section 12B(1)(h)(iv) is replaced with an “or” to reflect the correct position.

NOT IMPLEMENTED - Section 12J - Venture Capital Companies

Legal nature

125. One of the main challenges to the economic growth of small and medium-sized businesses and junior mining companies is access to equity finance.
126. To assist these sectors in terms of equity finance, the government has implemented a tax incentive for investors in such enterprises through a Venture Capital Company (VCC) regime. Investors will receive a tax benefit in the form of a tax deduction in respect of expenditure actually incurred to acquire shares in certain small and medium-sized businesses (approved VCCs).
127. The approved VCC will issue investor certificates to its investors which will provide SARS with proof when the investor claims the relevant tax deduction. The VCC regime is subject to a 12 year sunset clause, i.e. it will end on 30 June 2021.
128. The purpose of this clause is to allow a review of the effectiveness of the VCC regime and the decision will be made as to whether it should be continued.

Detailed factual description

129. One of the major obstacles investors are facing when assisting small and medium-sized businesses through the VCC regime is the limit on the book value of the assets of the approved VCC after the expiry of a period of 36 months. The current wording of the legislation limits the book value of the assets of the approved VCC to an amount not exceeding R50 million (where the qualifying company was a company other than a junior mining company), which limits various successful small and medium-sized businesses from accessing equity funding from investors and thereby growing their businesses further. There has been interest by investors to participate in the VCC regime but the limit, as noted above, presents an obstacle for investing in small and medium-sized businesses, which have the potential to exceed the R50 million limitation on assets.



Nature of business impacted

130. Due to the limit which is set in section 12J(6A) of the Act, and as explained above, investors are not willing to participate in the VCC regime and benefit from the tax dispensation. In addition, the limit of R50 million disqualifies a number of companies from participating in the VCC regime.

131. This prevents small and medium-sized businesses from accessing much needed equity finance.

Proposal

132. It is proposed that the policy intent behind the limitation of R50 million be re-visited in light of potential highly successful small and medium-sized businesses being denied access to much needed capital. If the economic reality of such potential small and medium-sized businesses warrants the need for this limitation to be reduced to a higher Rand amount, then NT is encouraged to increase this amount in order to incentivise more taxpayers to participate in the VCC regime and thereby support small and medium-sized businesses by granting them access to much needed equity finance.

PARTIALLY IMPLEMENTED - Section 19(1) and paragraph 12A of the Eighth Schedule to the Act - The definition of 'concession or compromise' is too wide

Legal nature

133. The definition of "concession or compromise" in section 19(1) and paragraph 12A(1) of the Eighth Schedule to the Act includes a change in any term or condition applying in respect of a debt, which then triggers a tax event for the debtor if such change results in a "debt benefit".

Detailed factual description

134. The introduction of this new concept of a "concession or compromise" replaces the existing rules relating to a "reduction amount", which creates a tax event or a debtor when a debt is reduced. The current regime taxes realized gains whereas the new regime creates a tax trigger in circumstances where there is only a potential unrealized gain, for example where a loan is subordinated. The subordination of a loan may be required for a number of commercial reasons, including when a company is in financial distress.

135. Given that the policy rationale behind this change in regime has not been explained in the draft TLAB2017 Explanatory Memorandum because the changes were only introduced into the TLAB2017, and were not in the draft legislation, we are uncertain as to why this new regime has been implemented at all. The reason for our uncertainty is due to the fact that the 2017 Budget Speech indicated that provisions relating to the alignment of the tax treatment of debt foregone for dormant companies and companies in business rescue would be implemented during the 2017 legislative cycle. Whilst it is clear that the TLAB2017 changes have addressed the tax treatment of debt foregone for



dormant companies, these new provisions have not addressed debt foregone for companies in business rescue. In fact, the regime appears to have further burdened such companies by creating an unrealized taxable gain in their hands.

Nature of businesses impacted

136. All debtors will be impacted by the provisions of section 19 and paragraph 12A of the Eighth Schedule to the Act, especially companies in business rescue.

Proposal

137. We recommend that the provisions of subparagraph (a)(i) of the definition of a “concession or concession” in both section 19 and paragraph 12A of the Eighth Schedule to the Act should be repealed or at least deferred until such time as appropriate consultation has taken place in this regard to ensure that the policy intent, as stated in the 2017 National Budget Speech, is actually achieved and that the unintended consequences in relation to commercial transactions is fully understood.

PARTIALLY IMPLEMENTED - Section 19(1) and paragraph 12A of the Eighth Schedule to the Act - The definition of ‘concession or compromise’ is too wide

Legal nature

138. The definition of “concession or compromise” in section 19(1) and paragraph 12A(1) of the Eighth Schedule to the Act includes a change in *any* term or condition applying in respect of a debt.

Detailed factual description

139. It seems likely that in a number of situations the new debt reduction provisions will apply where there is a prospective change in the interest rate relating to a debt, notwithstanding that “an amount of interest” has been excluded from the definition of “debt” for purposes of the debt reduction provisions. Per definition, a “concession or compromise” includes any change in the terms or conditions relating to a debt (which will therefore include a change in the interest rate applying to that debt).

140. We understood that NT had accepted that a prospective amendment to the interest terms of a debt would be excluded from the application of the new debt reduction provisions. It is unclear whether this was sought to be achieved by excluding “an amount of interest” from the definition of debt, but if so, it is submitted that such exclusion does not achieve the desired outcome.

141. For example, assume the capital outstanding in respect of a debt is R100 and accrued but unpaid interest is R20, making a total face value of R120. If the parties to the debt agree that prospectively, zero interest should apply to the debt, and if the open market value of the debt decreases to R90 as a result, it would appear that there would be a



“debt benefit” as defined of the R10 decrease in the capital amount of the debt even though the ‘amount of interest’ of R20 is excluded from the definition of “debt benefit”.

Proposal

142. Specific exclusions should be introduced that provide that the provisions of section 19 and paragraph 12A of the Eighth Schedule will not apply to prospective changes to the interest terms of a debt.

NOT IMPLEMENTED - Proviso to section 89quat(4) of the Act – Technical corrections due to erroneous referencing

Legal nature

143. The proviso to section 89quat(4) of the Act provides that where any interest is payable to the taxpayer on any amount in respect of any period in terms of the provisions of section 88 of the Act, no interest shall be payable to the taxpayer in terms of the provisions of this subsection in respect of the said amount and period.
144. Section 88 of the Act has been repealed by section 271 read with paragraph 66 of Schedule 1 of the TAA.
145. Section 164(7) of the TAA contains similar wording to the repealed section 88 of the Act.

Proposal

146. In view of the repeal of section 88 of the Act, in terms of the provisions of the TAA, we submit that the reference to section 88 in section 89quat(4) of the Act must be replaced by a reference to section 164(7) of the TAA.

CATEGORY – VALUED ADDED TAX & CUSTOMS

NOT IMPLEMENTED - Section 8(25) of the VAT Act - Relief in respect of group reorganisation

Legal nature

147. Proviso (i) to section 8(25) of the VAT Act provides that the section will not find application in respect of supplies contemplated in sections 42 and 45 of the VAT Act, “*unless that supply is of an enterprise or part of an enterprise which is capable of separate operation, where the supplier and recipient have agreed in writing that such enterprise or part, as the case may be, is disposed of as a going concern*”.

Factual description

148. Having said that, one needs to determine the meaning of the term “going concern” as used in the context of the section. Unlike section 11(1)(e) of the VAT Act, no specific criteria needs to be met in order for the sale of the business to be considered as being one of a going concern.



149. Further, no definition of the term exists in the VAT Act. As a result one is reliant upon the ordinary English meaning of the term. In this regard the dictionaries do not seem to provide a definition of the term.
150. However, it seems that most commentators on the meaning of the term make reference to the meaning thereof from an accounting point of view.
151. The concept of preparing financial statements on the going concern principle is contained in IAS 1 Presentation of Financial Statements Reporting Framework though the concept is undefined and relies on a principle that an entity is a going concern unless evidence shows it won't be able to meet its obligations without substantial disposition of asset.
152. The below is an extract of a description of the meaning of the term by www.accountingformanagement.org/going-concern-concept:

“The going concern concept of accounting implies that the business entity will continue its operations in the future and will not liquidate or be forced to discontinue operations due to any reason. A company is a going concern if no evidence is available to believe that it will or will have to cease its operations in foreseeable future.

An example of the application of going concern concept of accounting is the computation of depreciation on the basis of expected economic life of fixed assets rather than their current market value. Companies assume that their business will continue for an indefinite period of time and the assets will be used in the business until fully depreciated. Another example of the going concern assumption is the prepayment and accrual of expenses. Companies prepay and accrue expenses because they believe that they will continue operations in future.

The going concern concept is applicable to the company's business as a whole. If, for example, a company closes a small business segment or discontinues one of its product and continues with others, it does not mean that the company is no longer a going concern because the going concern concept is applicable to the entity as a whole not to the particular segment of business or product.

The going concern concept of accounting is of great importance for accountants because if a company is a going concern, it must prepare its financial statements in accordance with applicable financial reporting framework such as generally accepted accounting principles applicable in United States of America (US-GAAP) and international financial reporting standards (IFRS).

The auditors conduct their own evaluation to see whether the going concern assumption is appropriate or not at the time of auditing financial statements even if the company claims to be a going concern.”



153. From the said description and many other descriptions considered by different authors on the meaning of the term “going concern”, it appears that solvency/liquidity is the key criteria.
154. Based on this, it follows that no need exists for all of the criteria envisaged in section 11(1)(e) of the VAT Act to apply, for example, it is not necessary for the parties to agree that the enterprise or part thereof will be an income earning activity on date of transfer. Based on this interpretation it will be possible for the provisions of section 8(25) to apply in the event where a vendor carries on an enterprise consisting of, for example, prospecting or plantation farming, where no income is generated at the time of transfer of the business, provided the vendor is sufficiently capitalised to continue its operations.
155. However, in the absence of any definition of the term, in relation to section 8(25) and in the absence of any specific criteria for a “going concern” to be included in section 8(25), the application of the section remains ambiguous.

Nature of business impacted

156. Businesses involved in restructuring and group re-organisations.

Proposal

157. It is recommended that the VAT Act be amended by either including a definition of the term “going concern” applicable to section 8(25), or to provide the intended criteria in the body of section 8(25).

NOT IMPLEMENTED - Section 8(28) – Merging or boundary changes for Municipalities (TLAB17)

Legal nature

158. The recently introduced section 8(28) of the VAT Act appears to have two requirements that must be met, namely (a) and (b), before the relevant relief applies.
159. We submit that the current wording of the section is open to interpretation that requirements (a) and (b) must be read as separate and independent rules or tests notwithstanding the conjoining “and”.
160. In a situation where two municipalities are merged, but as a result of such merger, both municipalities cease to exist, the question arises whether the transferring municipality is deemed to make a supply.
161. If this is the case, this gives rise to uncertainty, given that (a) applies to mergers (i.e. where the outcome is one municipality) and (b) with separate municipalities so the requirements are distinct.



Detailed factual description

162. The effect of SARS Binding General Ruling 39, (the ruling) is that as at the effective date of the municipal boundary change:

- No supply of any goods or services is made by the existing municipality for the purposes of section 7(1)(a), and consequently, there will be no output tax payable by the existing municipality under section 16(4);
- No goods or services are acquired by the superseding municipality from the existing municipality, and consequently, no input tax deduction will be allowed under section 16(3) to the superseding municipality;
- No change of use adjustments under section 18 will be allowed to, or required by, either the existing municipality or the superseding municipality;
- An output tax or input tax adjustment may be required as contemplated in section 15(5) in a case where the existing and superseding municipalities do not account for VAT on the same accounting basis;
- The provisions of section 8(2) will not apply to the existing municipality upon its disestablishment and subsequent deregistration for VAT purposes unless any goods or rights capable of assignment, cession or surrender are not transferred to the superseding municipality as a result of the municipal boundary change, in which case, section 8(2) shall only apply to that extent;
- For the purposes of sections 16(2), 16(3), 17(1), 20 and 21, any valid tax invoice, debit or credit note or other prescribed document which has been issued in the name of the existing municipality, may be used as acceptable documentary proof for the purposes of deducting input tax or other allowable deduction in the name of the superseding municipality for a period of six months after the effective date of the municipal boundary change, provided such deduction has not previously been allowed to the existing municipality;
- For the purposes of calculating the superseding municipality's apportionment percentage as prescribed by section 17(1) and the related annual adjustment, symbols (a), (b) and (c) in the Formula in BGR 4 (Issue 3) shall be the aggregate of the values of those symbols for the existing and superseding municipalities for the financial year concerned;¹ and
- As a superseding municipality becomes the successor in law of the existing municipality, the superseding municipality is liable to account to SARS for any VAT liability or outstanding VAT returns in relation to the activities of the existing municipality which arose before the effective date of the municipal boundary change.



Nature of business impacted

163. All municipalities are impacted.

Proposal

164. In order to address the unintended VAT consequences as a result of the structural changes to certain municipalities, we propose that an amendment is made to the provisions of the VAT Act to provide for interim measures in these instances, in line with the provisions of the ruling and that the “and” is deleted and replaced with an “or” as it envisages two distinct alternatives.

NOT IMPLEMENTED - Section 11(1)(u) of the VAT Act – Extension of ambit of application

Legal nature

165. Section 11(1)(u) of the VAT Act defines as a zero-rated supply “*the supply of goods ... which have been imported and entered for storage in a licenced Customs and Excise warehouse but have not been entered for home consumption.*”

166. Section 12(k) of the VAT Act defines as an exempt supply “*the supply of goods in the Republic by any person that is not a resident of the Republic and that is not a vendor ... which have not been entered for home consumption.*”

167. Sections 11(1)(u) and 12(k) essentially serve the same purpose. Section 11(1)(u) ensures that supplies in bond do not attract VAT as the person that ultimately clears the goods will be liable for VAT on the importation of the goods. Section 12(k) ensures that any goods supplied by a non-resident that is not a VAT vendor in South Africa is exempt from VAT if the sale takes place before the goods are cleared for home use. This will include goods that are within the South African territorial waters (i.e. in the Republic as defined in section 1(1) of the VAT Act) that have not yet been cleared for importation (for example goods on a ship in a South African harbour).

168. Where a South African VAT vendor sells goods before the goods are cleared through a South African harbour but where the goods are within the South African territorial waters (for example goods on a ship in a South African harbour), the supply will be subject to VAT at the standard rate as well as further importation VAT when the goods are cleared for home use by the purchaser.

Detailed factual description

169. The payment of VAT by a South African recipient of goods on the supply of goods still to be cleared by Customs as well as on the importation of the same goods, could not have been intended by the legislator.

170. In the case of a purchaser that is not entitled to an input tax credit, the limited application of section 11(1)(u) will effectively result in double taxation on the importation of such goods.



The nature of the businesses impacted

171. All South African VAT vendors that sell goods prior to clearing the goods for home use, where the goods have not been entered into a licenced Customs and Excise warehouse.

Proposal

172. To overcome the above unintended consequences we propose that section 11(1)(u) be amended as follows:

“the supply of goods in the Republic, by any vendor other than the supply of goods by an inbound duty tax free shop, which have not been [imported and entered for storage in a licensed Customs and Excise storage warehouse but have not been] entered for home use; or”

NOT IMPLEMENTED - Section 11(2)(g)(iv) read with section 11(1)(b) of the VAT Act (TLAB17)

Legal nature

173. This matter was raised in 2016 and an amendment proposed in TLAB17 but that amendment has not achieved what was requested but instead created a worse problem.

174. Section 11(1)(b) of the VAT Act zero rates goods supplied by a vendor in the course of repairing, renovating, modifying treating, processing, cleaning, reconditioning or manufacture any goods to which, inter alia, section 11(2)(g)(iv) of the VAT Act refers and the goods supplied –

- Are wrought to, affixed to, attached to or otherwise form part of those other goods; or
- Being consumable goods, become unusable or worthless as a direct result of being used in that repair, renovation, modification or treatment process.

175. Section 11(2)(g)(iv) zero-rates services supplied by a vendor directly in respect of the repair, maintenance, cleaning or reconditioning of a foreign-going ship or foreign-going aircraft.

176. The activities listed in section 11(1)(b) do not mirror the activities listed in section 11(2)(g)(iv). This inconsistency gives rise to an anomaly that should be addressed by expanding the activities listed in section 11(2)(g)(iv) in line with those listed in section 11(1)(b). We are aware that SARS have issued Section 72 rulings in the past to deal with the anomaly. The VAT Act should however now be amended to formally address the anomaly i.e. the 8 activities in s11(1)(b) should be also the in section 11(2)(g)(iv) instead of the 4 listed.

177. For example, as the amended legislation reads, a foreign going ship entered into SA for modifying will qualify for the zero rate on the ship, but the actual service for which the



ship was entered SA will not be zero rated under s11(2)(g)(iv) as that service is not listed, though clearly it should be as that is why 11(1)(b) zero rated the ship itself in the first instance.

178. Furthermore, section 11(1)(b) refers to "... repairing, renovating, any goods to which subsection 2(g)(iv) refers ..." (Our underlining))
179. While section 11(2)(g)(i) of the VAT Act deals with goods temporarily imported, section 11(2)(g)(iv) does not deal with any goods; it deals with a specific category of services. Technically, based on the current working of the section, no goods supplied with regards to section 11(2)(g)(vi) activities will qualify to be supplied at the zero-rate of VAT.

Detailed factual description

180. Technically any goods supplied relating to services supplied in terms of section 11(2)(g)(iv) will not qualify to be supplied at the zero-rate of VAT, the goods contemplated in section 11(1)(b) not being linked to goods contemplated in section 11(2)(g)(iv).

Nature of business impacted

181. All vendors that supply goods to foreign-going ships and aircrafts where such goods become part of such ships or aircraft.

Proposal

182. To remedy the anomaly stated above, it is proposed that section 11(1)(b) of the VAT Act must be amended to read:...the goods have been supplied in the course of repairing ...any goods to which subsection (2)(g)(ii) and any service to which subsection (iv) refers...
183. We further propose that the activities listed in section 11(2)(g)(iv) must be extended to mirror the activities listed in section 11(1)(b).

NOT IMPLEMENTED - Sections 11(2)(ℓ) and 11(1)(q) of the VAT Act – zero rate

Legal nature

184. The interaction between sections 11(2)(ℓ) and 11(1)(q) of the VAT Act gives rise to unintended consequences under certain circumstances.
185. Section 11(1)(q) provides for the zero-rating of a transaction where goods are supplied by a vendor to a non-resident non-vendor:
- Where the vendor must deliver the goods to another resident vendor, as part of the non-resident's supply to the second resident vendor; and
 - Who will use them in the course or furtherance of his enterprise.
186. This is aimed at avoiding cascading effect of VAT for the VAT registered purchaser.



Detailed factual description

187. The application of section 11(1)(q) is limited to the supply of goods to a non-resident. If the local vendor supplies services to a local recipient, who is the client of a non-resident, there is currently no provision available in section 11(2) to provide for the zero-rating of such services.

188. The only provision in section 11(2) that bears a slight resemblance to section 11(1)(q) is section 11(2)(l)(ii)(bb), which only applies if the services are supplied directly in connection with certain movable property. If the services provided by the local vendor to the non-resident are not supplied directly in connection with movable property, the zero rating will not apply.

Nature of business impacted

189. Supplies of services by local VAT registered suppliers, to non-resident non-vendors, where the supply is made to a SA recipient who is a registered vendor.

Proposal

190. We propose that a provision comparable to section 11(1)(q) should be inserted into section 11(2) for services but limited to recipients that are fully taxable.

NOT IMPLEMENTED - Section 12(b) of the VAT Act & section 9(1)(c) of the Transfer Duty Act - Donations used more than 80% to supply goods/services

Legal nature

191. Section 12(b) of the VAT Act exempts the supply by an association not for gain of donated goods or services or goods made or manufactured by such association if at least 80 per cent of the value of the materials used in making or manufacturing such other goods consists of donated goods.

Detailed factual description

192. Section 12(b) generally exempts the supply of any donated goods or services, if made by any association not for gain. It follows that:

- Where a donor donates goods (for example a farm) to an association not for gain, and the association in turn sells the goods (i.e. the farm), the sale is exempt from VAT; and
- Where a donor donates his or her services (or otherwise acquired services which the donor then donates to the association not for gain), and the donor's services are on-supplied by the association in a fund raising endeavour (for example a natural person who donates his or her time and effort in a car wash for fundraising event), the supply of these services by the association will be exempt from VAT.



193. Section 12(b) furthermore exempts an association not for gain's supply of any other goods where the goods are manufactured from donated goods such that the value of the goods donated constituted at least 80% or more of the total value of goods and materials used in the manufacturing process. It follows that, by way of an example, a few broken TV sets could be donated to an association not for gain, from which one TV set could be manufactured from the parts obtained from the broken TV sets. The sale of the working (manufactured) TV set is exempt from VAT.
194. Apart from the above rule with regards to goods manufactured from donated goods, this section does not cater for a scenario where the association not for gain generates income from donated goods or services otherwise than by onwards supply.
195. For example, where goods were donated to an association not for gain, and the goods were supplied temporarily by way of a lease to another party (i.e. asset use to generate rental income rather than sale income). Had the goods been sold outright, the supply would have been exempt from VAT. However, since the association supplied the goods over the short term by way of a lease, the association will incur these unintended consequences:
- Although the goods received by way of a donation was fully used in the course of making a supply by way of lease, the lease was not exempt; and
 - The exemption from transfer duty in terms of section 9(1)(c) of the Transfer Duty Act did not find application. In terms of this section, the acquisition of property by certain associations not for gain is exempt from transfer duty provided that the property is acquired by the association wholly or substantially for the purposes of using it in one or more approved public benefit organisation activities carried on by the association. Because the wording in the Act does not provide any clarity in this regard, it is arguable whether the nexus was sufficiently close between the lease (i.e. the fundraising endeavour) and its approved benefit activities for it to qualify for the exemption.

Nature of the business impacted

196. Associations not for gain are affected.

Proposal

197. Section 12(b) of the VAT Act should be amended to exempt the supply by an association not for gain of donated goods or services if at least 80 per cent of the value of goods or services utilised, consumed or supplied in the course of making the supply consists of donated goods or services.
198. Section 9(1)(c) of the Transfer Duty Act should be amended to provide clarity as to what constitutes property which is wholly or substantially acquired for the purposes of using it in one or more approved public benefit organisation activity carried on by the association.



NOT IMPLEMENTED - Section 17(2)(c) of the VAT Act – Denial of input tax credit on rental of cars

Legal nature

199. Section 17(2)(c) of the VAT Act denies an input tax deduction in respect of any motor car supplied to or imported by a vendor.
200. The term “supply” is wide enough to include motor cars supplied by way of rental agreements.
201. Other than specific rules, the VAT Act currently does not generally recognize the purpose for which a motor car is acquired and applied. As such input tax on the supply of motor cars is often denied where it is incurred wholly for business purposes.

Detailed factual description

202. The intention of denying input tax on the supply of motor cars is to effectively tax the potential private use of the vehicle.
203. In the case of entertainment, the legislator acknowledges that where a person is away overnight from their normal place of work and residence on official business, VAT on the supply of goods and services associated with the person’s personal subsistence cannot be regarded as entertainment and as such should be allowed as input tax. This is on the basis that under these circumstances the consumption of the goods and services by the employee concerned, cannot be regarded as private consumption; it is a cost necessary to maintain the resource while away on business.
204. The above application has not been extended to the rental of motor cars where employees are away overnight on business.

Nature of business impacted

205. Any enterprise renting motor cars for employees when away overnight.

Proposal

206. We propose that the “away on business overnight” rule applicable to entertainment, be extended to the rental of motor cars used by employees when away overnight on business.

NOT IMPLEMENTED - Section 18B – Removal of time restriction

Legal nature

207. Section 18B of the VAT Act provides relief to property developers in respect of residential properties that cannot be sold immediately and is according temporarily rented out pending the sale of such properties. The section will cease to apply on 1 January 2018.



Detailed factual description

208. The nature of the property development industry is that not all properties would be able to be sold immediately after completion of the construction of such properties. The fact that properties are temporarily rented out pending finding a buyer for the properties is no indication of an intention to deal with the properties as rental properties as long as there is a clear evidence that the properties are still actively marked for sale.

Nature of business impacted

209. All residential property developers.

Proposal

210. We propose that section 18B be made a permanent section in the VAT Act as it mirrors the commercial reality of property development. We therefore propose that the current applicable limited time frames be removed.

NOT IMPLEMENTED - Section 21(1) of the VAT Act - Credit and debit notes

Legal nature

211. Vendors that make taxable supplies must issue tax invoices to recipients within 21 days of the date of the supply. Vendors may issue credit and debit notes for supplies under specific scenarios. These scenarios cover cancelled supplies, fundamental changes to a supply, adjustment to agreed consideration, the return of supplies and the correction of mispriced tax invoices.

Detailed factual description

212. Where a vendor has issued a tax invoice with the incorrect name of the recipient, or where an invoice was just issued in error, the vendor is prohibited from issuing a credit note to correct the mistake because it falls outside the list of permissible scenarios.

Nature of business impacted

213. All vendors that issue tax invoices.

Proposal

214. We propose that the scenarios in section 21(1) of the VAT act be expanded to include any scenario where a tax invoice had been issued in error. In practice, we experience that SARS allows for credit notes to be issued in these scenarios but it is not supported by the current legislation.



NOT IMPLEMENTED - Section 21(3)(a) of the VAT Act - Credit notes for supplies after sale of an enterprise as a going concern

Legal nature

215. Company A sells its enterprise to Company B. Subsequent to the acquisition of the enterprise a customer of Company A returns goods acquired from Company A, but the return is made to Company B.
216. Section 21(3)(a) provides that where the amount shown as tax charged in a tax period exceeds the actual tax charged in respect of a supply, the supplier shall provide the recipient with a credit note.
217. In the instance where the enterprise has been sold and the goods are returned to the purchaser, this creates an issue since the purchaser cannot issue a credit note from a VAT perspective and will accordingly not have the requisite documentary evidence to claim the input tax deduction.

Detailed factual description

218. The provisions are similar to the provisions for bad debts written off where the debt has been acquired on a non-recourse basis.

Nature of business impacted

219. All vendors where goods may be returned subsequent to a sale of the business.

Proposal

220. We propose that an amendment is made to the effect that it will allow the purchaser of an enterprise to issue a credit note in respect of goods supplied by the supplier of the enterprise but returned to the purchaser of the enterprise.

NOT IMPLEMENTED - Section 21(3)(a) and section 21(3)(b) of the VAT Act - Credit and debit notes

Legal nature

221. Section 21(3)(a)(i) and section 21(3)(b)(i) of the VAT Act provide that when a credit note or debit note is issued, the credit note/debit note must contain the words “credit note” or “debit note”.

Detailed factual description

222. Certain international IT systems require customization to include the prescribed wording and this has unnecessary cost implications.

Nature of business impacted

223. All vendors who issues and/or receives credit and/or debit notes.



Proposal

224. We propose that section 21(3) is amended to provide for the use of the alternative wording for a “credit note” or debit note” such as “credit memo” or debit memo” in circumstances where an international IT system is used to ensure that this description may be used in the alternative and therefore not impact on the tax compliance of the taxpayer.

NOT IMPLEMENTED - Section 21 of the VAT Act – Interpretation of section 21(1)(e)

Legal nature

225. Section 21(1)(e) of the VAT Act defines as an adjustment incidence “an error has occurred in stipulating the amount of consideration agreed upon for a supply.”

226. Section 21 of the VAT Act deals with two categories of adjustments: adjustments resulting from incorrect VAT documentation (section 21(1)(i) of the VAT Act) and adjustments resulting from the incorrect completion of a VAT return (section 21(1)(ii) of the VAT Act).

227. Section 21(3) of the VAT Act determines that debit or credit notes must be issued in respect of adjustments resulting from incorrect VAT documentation issued (section 21(1)(i) incidences). There is no requirement that debit or credit notes must be issued in respect of section 21(1)(ii) incidences. This construction of the VAT Act makes sense, as errors made in submitted returns would not require any change to original VAT documentation issued.

228. In practice uncertainty exists as to whether section 21(1)(e) applies to such circumstances (i.e. instances where errors occurred in the submission of VAT returns, especially with regards to the amount of the consideration for supplied disclosed on such returns). The Explanatory Memorandum dealing with the amendment in 2013 only deals with incorrect values used on tax invoices. There therefore appears to be a delink between the circumstances set out in section 21(1) of the VAT Act and the category of adjustments envisaged in section 21(1)(ii) of the VAT Act (errors on VAT returns).

Detailed factual description

229. In practice vendors sometimes make capturing errors resulting in an excess amount of output tax payable (for example disclosing zero-rated supplies as standard rate supplies). The VAT Act contains a simple mechanism to correct such errors in section 21 of the VAT Act, but in practice the view is sometimes held that the section 21(1)(e) read with section 21(1)(ii) of the VAT Act does not apply to such cases.

230. Vendors are then required to follow the remedies of applying for reduced assessments as envisaged in section 93(1)(d)(ii) of the TAA. This could be a prolonged exercise with unnecessary strain on taxpayer and SARS resources.



The nature of business impacted

231. All vendors submitting VAT returns.

Proposal

232. We propose that a clear link be created to section 21(1) insurances and section 21(1)(ii) adjustments. If the legislator did not intend the link, the legislation should be amended to clearly link the section 21 adjustments to tax documentation only.

NOT IMPLEMENTED - Section 22(3)A and 22(6) of the VAT Act - Supplying vendor ceases to be a vendor and the shares in this vendor are subsequently disposed of to a third party who is not part of the group of companies

Legal nature

233. Section 22(3) of the VAT Act provides that where a vendor accounts for VAT on the invoice basis and has made an input tax deduction on a taxable supply made to him and the vendor has not, after expiry of a period of twelve months from the tax period in which the input tax was claimed, paid the full consideration, the vendor is liable to account for VAT equal to the tax fraction of the outstanding consideration.

234. However, where the supplier and the recipient are part of the same “group of companies”, section 22(3A) provides that, subject to subsection 6, the provisions of subsection (3) will not apply for as long as both parties are part of the same group of companies (our emphasis).

235. Subsection (6) provides that where a vendor, who is part of a group of companies, makes a taxable supply to another vendor, who is part of the same group of companies, the supplying vendor may not make a deduction of input tax, as envisaged in subsection 1 read with subsection 3, in respect of any amount of tax that has become irrecoverable.

236. Insufficient clarity is, however, given to distinguish between a taxable supply of goods as opposed to a taxable supply of services in circumstances where the supplying vendor ceases to be a vendor and the shares in this vendor are subsequently disposed of to a third party who is not part of the group of companies.

Detailed factual description

Taxable supply is a supply of services or goods (e.g. management fees or consumables).

237. Where the taxable supply in question is in respect of a supply of services and certain goods (not included in the assets detailed below), the supplying vendor will not have a section 8(2) liability upon deregistration, since this section deems the service in question to be one of a service, and the supply of a debtor, is an exempt supply being a debt security.



238. Equally, the supplying vendor will not have an input tax claim on the bad debt, since the recipient vendor is still part of the group of companies. Should the shares in the supplying company (now non-vendor) subsequently be disposed of to a third party, say after a year, the recipient vendor will in terms of section 22(1) be liable to account for output tax in terms of section 22(3A) read with section 22(3), since it has been deregistered. In this scenario, it is considered that SARS will be prejudiced.

Taxable supply is a supply of goods

239. Where the taxable supply is one of goods which form part of the assets of his enterprise when ceasing to be a vendor, the supplying vendor will equally not have a section 8(2) liability and will equally not be able to claim any input tax on the recipient debt being written off, since they are still part of the same group of companies.

240. Should the supplying vendor subsequently no longer be part of the group of companies, the recipient vendor will, in terms of section 22(3A) read with section 22(3) have an output tax liability. In this situation, it is considered that SARS will be enriched.

241. If the taxable supply in question was one of goods which form part of the assets of his enterprise when ceasing to be a vendor, the said anomaly will not in our view exist since the recipient vendor will have had a section 8(2) liability upon de-registration.

Nature of business impacted

242. Any group of companies making taxable supplies to each other where payment is not made or becomes irrecoverable.

Proposal

243. It is proposed that the provisions of sections 22(3A) and 22(6) be clarified to ensure that they remain applicable for as long as the parties are part of the same group of companies and for as long as both parties are vendors.

NOT IMPLEMENTED - Section 50(2) of the VAT Act - Requirements for separate VAT registrations of enterprises, branches or divisions

Legal nature

244. Section 50 (1) of the VAT Act read with section 50(2) of the VAT Act provides that:

Where separate enterprises are carried on by any vendor or an enterprise is carried on by any vendor in branches or divisions, the vendor may apply to the Commissioner for separate VAT registrations of such enterprise, division or branch, where:

- it maintains an independent system of accounting; and
- is separately identifiable by the nature of its activities carried on or the location of the separate enterprise, branch or division.



Detailed factual description

245. Based on experience, the words “independent system of accounting” is often interpreted by vendors to mean that the said enterprise, branch or division will need to implement a separate accounting or ERP system to collect, store and process accounting data.
246. It is our view that the intention of the legislation was not to impose an additional cost on the vendor by procuring multiple accounting systems for the enterprises, branches or divisions requiring separate VAT registration.
247. Instead, a vendor, should be required to keep separate accounting records for the said enterprise, branch or division requiring separate VAT registration (i.e. the activities of the said enterprise, branch or division must be clearly distinguished or ring-fenced from the remaining vendor’s activities, within the same accounting/ ERP system).

Nature of business impacted

248. All vendors who register separate enterprises, branches or divisions.

Proposal

249. It is proposed that the phrase “maintains an independent system of accounting” is amended to read “maintains an independent set of accounting records” instead.

NOT IMPLEMENTED - Section 51 of the VAT Act - Unincorporated bodies of persons (jointly owned fixed property)

Legal Nature

250. Where two or more persons jointly own undivided interests in fixed property (e.g. a shopping centre) which is let for the collective benefit of the co-owners, such activity constitutes the carrying on of an “enterprise” by an unincorporated body of persons.
251. This is evident from the following provisions in the VAT Act:
- Section 1 defines the term “person” as including anybody of persons, (incorporated or unincorporated); and
 - Section 51 deals with bodies of persons corporate or unincorporated and provides, inter alia, that where anybody of persons, whether corporate or unincorporated (excluding companies) carries on any enterprise:
 - Such body shall be deemed to carry on such enterprise as a person separate from the members of such body;
 - Registration of that body shall be affected separately from any registration of any of its members;



- Liability for tax in respect of supplies by the body shall be determined and calculated in respect of the enterprise carried on by the body as an enterprise carried on independently of any enterprise carried on by any of the members of such body; and
- The duties and obligations imposed by this Act on the body shall be performed separately from the duties and obligations of the members of such body.

Detailed factual description

VAT on cost of acquisition and development

252. The first question to be asked is who is entitled to claim the VAT incurred on the original acquisition of the property and the development costs, especially since the individual co-owners are often registered vendors in their own right.
253. This question is of particular importance since the Deeds Office requires that the property be registered in the names of the co-owners. In order for the co-owners to individually claim the VAT incurred on the said costs as input tax, the property need to be acquired/developed for purposes of use or supply in the course of making taxable supplies.
254. Although the property will be acquired/developed for the said purpose, the rental activity will be conducted in the unincorporated joint venture (the UJV), which has no legal standing in our law, but rather is a “VAT persona” created by the VAT Act. From an accounting point of view, the fixed property, together with the development costs, will be capitalised in the balance sheets of the individual co-owners, net of VAT.
255. In this regard we may experience different scenarios for example, the VAT is claimed as input tax by the co-owners individually, but the VAT on the rentals charged to tenants is accounted for by the UJV vendor. Alternatively, the total amount of VAT incurred is claimed as input tax by the UJV vendor, and the UJV accounts for the VAT on rentals charged to tenants.
256. The first scenario is where the input tax is claimed by the individual co-owners. In this scenario, the question is whether they are entitled to do so, since the individual co-owners will not make any taxable supplies with their individual undivided interests in the fixed property. Instead, they will receive their individual profit shares from the UJV, which profits are not subject to VAT.
257. In this instance, we have seen rulings issued by SARS which consider this treatment to be correct on the basis that the co-owners essentially make taxable supplies of their rights of use available to the UJV for no consideration, as envisaged in section 10(23) of the VAT Act. This interpretation may be questioned against the findings in the KCM case read with SARS’ IN70.



258. The second scenario is where the individual co-owners enter into an agreement with the other co-owners (UJV), in terms of which the individual co-owners make the right of use of their respective undivided interests in the fixed property available to the UJV, in exchange for a consideration equal to the amounts of profit distributed to them.
259. This implies that the individual co-owners are entitled to claim input tax on the acquisition/development, and are liable to account for output tax on their profit share (i.e. rental for VAT purposes), which VAT will be claimable by the UJV vendor as input tax, since the rights of use are acquired to make taxable supplies to tenants.
260. The third scenario is where the total amount of VAT on expenses incurred is claimed by the UJV vendor. In this scenario, although the costs may be borne by the co-owners, they do so in their capacity as agent for the purpose of their principal being the UJV, and as a result, any VAT incurred would be attributable as “input tax” to the UJV and not the co-owners.
261. The fourth scenario is where the VAT on costs incurred are, based on the VAT registration status of the parties, proportionally claimed by certain co-owners in their respective returns with the remaining VAT being claimed in the UJV, especially in cases where some of the co-owners are not VAT vendors in their own right.

VAT on running costs, maintenance and upgrades/renovations

262. The second question is who is entitled to claim input tax on the running costs, maintenance and upgrades/renovations, considering yet again that legally these costs are incurred by the individual co-owners. It should also be borne in mind that the supplier tax invoices may either be issued to the individual co-owners, albeit not very common, or to the co-owners collectively, or to and in the name of the UJV (i.e. the name of the shopping centre in our example). As is the case with the acquisition and development costs, various scenarios occur in practice. These may include that the VAT on running costs and maintenance is claimed as input tax in the UJV, whilst the VAT on upgrades and renovations is claimed by the individual co-owners, or all of the VAT is claimed in the UJV or all of the VAT is claimed by the individual co-owners. Here too, the question is whether the co-owners are entitled to claim any of the input tax, where they will not account for VAT on the making available of their right of use to the UJV, as envisaged in the first scenario above.

VAT treatment of sale of undivided share to another person

263. A further ambiguity exists where one of the co-owners disposes of its undivided share in the fixed property to another person. In law, this transaction constitutes the sale of fixed property. Despite the legal nature of the transaction, different terminology is used to describe the transaction with potentially different VAT consequences namely, the sale of the partner’s interest in the UJV to a new member of the UJV, the sale of the undivided interest in the fixed property to another person, or the sale by the existing UJV of its business as a going concern to the new UJV (i.e. the UJV after the original co-owner



sold its undivided share to a new co-owner who is now part of the UJV). As is the case with the sale of any other fixed property, the co-owner (seller) is required to make a declaration to SARS as to whether it is a VAT vendor and if so whether VAT is payable and at what rate, or whether the sale is subject to Transfer Duty, payable by the purchaser. This declaration needs to be approved by SARS, and if Transfer Duty is payable, same has to be paid, before the Deeds Office will effect registration of the property.

264. Considering, as stated above, that the co-owner in question may or may not be VAT registered and may or may not have claimed the VAT incurred on the property as input tax, and the fact that the declaration is to be made by the co-owner and not the UJV, this declaration becomes difficult and confusing and the correct VAT treatment equally is challenging and ambiguous, dependent upon the terminology used to describe the transaction. We discuss the bases of the different interpretations and consequential ambiguities below.
265. Section 7(1)(a) of the VAT Act imposes VAT on the supply of goods by a vendor in the course of his enterprise. The term “vendor” is defined as meaning any person who is, or who is liable to be registered.
266. Section 11(1)(e) of the VAT Act provides, inter alia, that where, but for this section, a supply of goods would be charged with tax terms of section 7(1), such supply of the business as a going concern will be charged with tax at the rate of zero per cent, in circumstances where the supply is made to a registered vendor of an enterprise or part of an enterprise which is capable of separate operation, where the supplier and the recipient have agreed in writing that such enterprise or part, as the case may be, is disposed of as a going concern, provided that:
- The parties have, at the time of conclusion of the agreement agreed in writing that the enterprise or part, as the case may be, will be an income earning activity on the date of transfer thereof; and
 - The assets which are necessary for the carrying on such enterprise or part, as the case may be, are disposed of to the recipient; and
 - The parties have, at the time of conclusion of the agreement for the disposal of such enterprise or part, as the case may be, agreed in writing that the purchase consideration agreed upon for that supply is inclusive of tax at the rate of zero per cent.
267. Section 51(2) of the VAT Act provides where a body of persons who is a partnership or other unincorporated body, dissolved in consequence of the retirement or withdrawal of one or more (but not all) of its members or the admission of a new member and a new partnership or unincorporated body comes into being consisting of the remaining members of the dissolved partnership of body or remaining members and one or more



new members and such new partnership or body continues to carry on the enterprise of the dissolved partnership or body as a going concern, the dissolved partnership or body and the new partnership or body, shall unless the Commissioner, having regard to the circumstance of the case, otherwise directs for the purpose of the VAT Act be deemed to be one and the same partnership or body as the case may be. (our emphasis)

Potential different interpretations and effects

268. Where the co-owner is not a vendor, or is a vendor but the VAT on the fixed property has been claimed as input tax by the UJV and not the co-owner, the result could be that the transaction is subject to Transfer Duty, since the co-owner never used the fixed property in any enterprise carried on by it, as envisaged in section 7(1)(a) of the VAT Act. In this instance the question is whether the co-owner buying the fixed property, or the UJV in which the rental activities are carried on, can claim a notional input tax on second-hand goods acquired, and if neither can claim it, the Transfer Duty will remain a cost.
269. Where the co-owner has claimed the input tax on the fixed property on the basis that it accounted for output tax on the “rental” equal to its profit share charged to the UJV, or has claimed the input tax rightly or wrongly, on the basis that it made its right of use available for no consideration as envisaged in section 10(23) of the VAT Act, the co-owner would be liable for output tax, with no Transfer Duty payable. The question is whether this VAT will be claimable as input tax by either the new co-owner buying the fixed property or the UJV in which the VAT on the rentals charged to tenants will be accounted for.
270. This brings us back to the earlier question of who is entitled to claim the VAT incurred on the acquisition of the property, given the different permutations/interpretations, e.g. no input tax can be claimed by the co-owner if he will only receive profit share which is not taxable.
271. Where the co-owner did account for output tax on its “rental” (i.e. making available its right of use) charged to the UJV, it may dispose of its business as a going concern to the new co-owner and may apply the zero rate of VAT, if the conditions of section 11(1)(e) are met.
272. Alternatively, the existing UJV could sell its business as a going concern to the new UJV, since the old and the new UJV are deemed by section 51(2) to be two separate persons, which sale can be subject to zero rate VAT, provided the conditions of section 11(1)(e) are met.
273. A further alternative interpretation is that, unless the Commissioner otherwise directs, the sale of the undivided interest by one member of a UJV to another person who is, or becomes a member of the UJV, is in terms of section 51(2) disregarded since the old UJV and the new UJV are deemed to be one and the same person.

VAT registration of the UJV



274. Once any one co-owner has disposed of its undivided interest in the fixed property to another co-owner, the question is whether the existing UJV is required to de-register and the new UJV is required to register as a vendor, or whether the new UJV may continue to account for VAT under the VAT registration number of the old UJV. Since section 51(2) does not require any application or disclosure to be made to SARS and since sections 25 of the VAT Act and 23 of the TAA do not require that the vendor informs SARS of the change in composition of the UJV, it is unclear on what basis the Commissioner will become aware of the change, in order for him to exercise his discretion.

Transfer Duty declaration TDC01

275. From a VAT point of view, the TDC01 requires the seller to declare his/her/its VAT registration number, in the absence of which Transfer Duty will be payable. In this regard the Guide for Transfer Duty via e-Filing (TD-AE-02-G02 Revision 11) states the following on page 27:

276. “The VAT registration number of the seller (if the seller is a registered VAT vendor) must be completed. Where the standard or zero rate is applicable, the VAT reference number of the seller (i.e. the registered owner) must be captured, otherwise the transaction will be regarded as being subject to Transfer Duty”.(our emphasis).

277. The said guide further confirms that one of the exemptions from Transfer Duty is where the seller is a vendor and the transaction is subject to VAT.

278. Thus, since all fixed property jointly owned are registered in the collective names of the co-owners, and not in the name of the UJV, it follows that where a co-owner who is not a vendor, sells its undivided share in the fixed property to another person, such supply will be subject to Transfer Duty, regardless of whether the UJV is VAT registered and has claimed the VAT on acquisition, development, repairs/maintenance etc. This is due to the fact that the TDC01 requires the seller’s VAT registration number.

279. Equally, where the existing UJV sells the entire business as a going concern to a new UJV, as a result of one or more co-owners selling their undivided share to new co-owners, the exemption from Transfer Duty will strictly speaking not apply, since the UJV’s VAT number cannot be disclosed on the TDC01 as it is not the owner of the property. As a result that transaction is automatically subject to Transfer Duty, and not zero rate VAT. The same applies where the transaction is to be disregarded in terms of section 51(2).

280. However, in practice it appears as if the VAT registration numbers declared on the TDC01 are not verified to confirm it belongs to the seller. This observation is made since many non-vendor owners sell their undivided interests in fixed property, leased through a VAT registered UJV, at the zero rate, which suggests that the UJV VAT registration number was declared on the TDC01 form.



Nature of business impacted

281. Any co-owners of fixed property as part of a UJV.

Proposal

282. It is proposed that the wording of the entire section 51 of the VAT Act be reconsidered in order to address the abovementioned anomalies. It should also be noted that some of the said anomalies (e.g. is VAT payable on the “capital” contributions made by the participants to the UJV, considering that the profit share is not necessarily subject to VAT and if so can the UJV claim the VAT as input tax) also apply to other UJV’s such as mining joint ventures, with the result that these difficulties should also be considered. It is further recommended that the TDC01 be amended to specifically cater for fixed property which is owned jointly by more than one person, and where such fixed property is traded with through a UJV envisaged in section 51 of the VAT Act.

NOT IMPLEMENTED - Schedule 1 to the VAT Act – Definition of brown bread

Legal nature

283. Clause 87 of the draft TLAB2017 defines brown bread (qualifying to be supplied at the zero-rate of VAT) as “Brown Bread as defined in Regulation 1 of the Regulations in terms of Government Notice 405 published in Government Gazette No. 40828 of 5 May 2017”.

284. “Brown Bread” is defined in the regulation as “wheat obtained by baking fermented or otherwise leavened dough made from brown bread wheat flour which complies with the requirements prescribed in regulation 8(1)(b).”

285. “Brown bread wheat flour” is defined as “wheat flour which complies with the requirements prescribed in regulation 4(12).”

286. Regulation 4(12) determines that brown bread wheat flour must comply with certain specific requirements.

287. The characteristics of high bran wheat flour and whole-wheat brown flour are separately contained in regulations 4(13) and 4(14) respectively.

Detailed factual description

288. The impact of the reference to brown bread as defined in the regulation will exclude zero-rating high-fibre and whole-wheat brown bread. This exclusion goes against the policy of zero-rating basic foodstuffs and should be reconsidered.

Nature of business impacted

289. All business selling and all consumers consuming brown bread.



NOT IMPLEMENTED - Section 22(1A) of the VAT Act - definition

Legal nature

290. Section 22(1A) of the VAT Act should include the definition of 'face value' which is contained in clause 36 of the Explanatory Memorandum to the Taxation Laws Amendment Bill, 1997, i.e. the net value of the account receivable at the time of transfer, thus after adjustments have been made for debit and credit notes, and bad debts already written off by the transferor.



CATEGORY - TAX ADMINISTRATION

NOT IMPLEMENTED - Assessments issued in response to discrepancies contained in an IT14SD

Legal nature

291. Assessments made on the basis of discrepancies found in an IT14SD reconciliation is of concern and gives rise to significant practical issues.
292. The TAA does not currently make provision for the IT14SD process, as it is arguably not a return (i.e. not something a self-assessment or liability for tax is based on) nor a record or relevant information (i.e. it is not something held by the taxpayer but created under instruction from SARS) and the manner in which it is applied by SARS officials is inconsistent and to the prejudice of taxpayers, leading to significant disputes that are costly and ineffective.
293. Where a discrepancy appears in the reconciliation in terms of the IT14SD, this does not mean that there is prejudice to the fiscus and the cause of the discrepancies requires a detailed analysis of the underlying reasons.

Detailed factual description

294. We submit that it would appear that SARS officials consider discrepancies in the IT14SD reconciliation as a basis for issuing an assessment. In one example, the taxpayer submitted an IT14SD which showed a VAT reconciling item of say R14 000. The SARS official issued a letter of audit findings to the taxpayer indicating that an assessment will be issued for the 'grossed up' income tax amount of R114 000, unless proof of the discrepancy is provided. On the basis that there is no statutory prescribed process governing the IT14SD process, the taxpayer was not given sufficient time to respond and the assessment was issued.
295. The only manner in which the matter could be dealt with was to initiate a dispute process in terms of lodging an objection and subsequently noting an appeal, which was a costly and time consuming process, in circumstances where there was clearly no proper legal basis for the assessment.

Nature of business impacted

296. Any taxpayer required to submit an IT14SD.

Proposal

297. It is proposed that the TAA is amended to specifically include a legislative provision that will govern the IT14SD process, setting out specific time lines, as well as the duties and obligations of the SARS' officials responsible for this process.



NOT IMPLEMENTED - Sections 227 - Outstanding returns

Legal Nature

298. Section 227 of the TAA details the requirements for a valid voluntary disclosure in terms of the Voluntary Disclosure Programme (VDP) and lists only six matters which include that it must be voluntary and involve a default.
299. A “default”, by definition, includes the submission of inaccurate information or non-submission of information, which would include relevant information.
300. A “return”, by definition, in section 1 of the TAA includes any document or information submitted to SARS that incorporates relevant information.

Factual Description

301. When Part B of Chapter 16 was implemented, SARS accepted VDP applications in respect of taxpayers who had failed to submit the relevant returns.
302. However, since that time, SARS has taken a different view and rejected such submissions on the basis that it was either not voluntary (i.e. SARS knew it to be outstanding) or that it was not a default (i.e. was a failure to submit a return and not information).
303. Though it is understandable that SARS does not want to encourage non-compliance, these views do not seem valid in respect of taxpayers who have never registered for tax, such as a foreign branch or a natural person becoming tax resident in South Africa.
304. This may create a position where, for example, taxpayers argue that if they lie on the outstanding return and submit R1, they then qualify for VDP, as opposed to just applying for VDP directly just for it to be rejected and an additional assessment issued with no relief.
305. We acknowledge that the inclusion or exclusion of outstanding returns in the VDP dispensation is a policy matter, but the legal application and the legal uncertainty it creates, especially with the current wording, is a legal and an operational anomaly.

Proposal

306. It is submitted that NT should take a policy position with regard to the eligibility of taxpayers for VDP relief on outstanding returns for both tax registered and unregistered taxpayers and then clarify the law with its intent.

NOT IMPLEMENTED - Sections 225-233 - Chapter 16 of the TAA - Voluntary Disclosure

Legal Nature

307. It is often experienced in making voluntary disclosure submissions to SARS that uncertainty exists as to whether or not a person has a particular VAT or other tax liability.



308. In these instances, taxpayers often seek clarity by requesting a ruling from SARS with the view that, if it transpires that a tax liability does exist, that they would make voluntary disclosure of the relevant VAT or other tax exposure to obtain the relief afforded by the VDP in accordance with the VDP provisions contained in Chapter 16 of the TAA.
309. Similarly, where a taxpayer becomes aware of an historic VAT registration liability and wishes to make a voluntary disclosure, he or she cannot do so unless and until being duly registered as a vendor. Although it seems, on the face of it, to be a straight forward process to obtain a ruling in the circumstances or to register as a VAT vendor, whilst remaining eligible for VDP relief, these processes have proved to be tedious and ineffective since neither the VAT Act nor the TAA makes specific provision for such circumstances.
310. Furthermore, Part B of Chapter 16 of the TAA does not make provision for circumstances where the vendor is unable to accurately determine the quantum of the tax liability. Although section 95(3) of the TAA provides that where a taxpayer is unable to submit an accurate return, a senior SARS official may agree in writing with the taxpayer as to the amount of tax chargeable and issue an assessment accordingly, which assessment may not be objected to, this section of the TAA does not seem to find application in the case of a voluntary disclosure made by the vendor.

Factual Description

311. In essence, one seems to be dealing with a 'chicken and egg' situation, as it remains unclear whether a taxpayer should first request a ruling or first apply for VDP or do both simultaneously. Either way, there are inherent risks in not obtaining the required relief and therefore not making a voluntary disclosure, which risks further include the following:
- 311.1 If the ruling request is lodged first, and SARS commences an audit or notifies the taxpayer of an audit, pending the outcome of the ruling request, the taxpayer may, in terms of section 226(2) of the TAA, be disqualified from applying for VDP relief;
- 311.2 If SARS rules that a tax liability does exist, SARS may either issue an assessment, or commence an audit or argue that since the taxpayer made full disclosure of the facts in the ruling application, the taxpayer is disqualified from VDP relief since one of the requirements of section 227(a) of the TAA (i.e. the disclosure must be voluntary) can no longer be met; and
- 311.3 Where voluntary disclosure is made first, it can only be done on the assumption that the tax liability actually exists. However, it will be necessary to make disclosure with the proviso that should the SARS ruling (to be requested) proves that no tax liability exists, the VDP application should be considered null and void. In this instance various risks exist, including:
- 311.3.1 SARS may decline the application on the basis that until it has been determined that tax is in fact due, no "understatement" as defined exists;



311.3.2 The ruling request may take extensive time to finalise, with the result that the VDP unit advises that unless the revised VAT returns are filed before a certain date, the VDP application will be turned down;

311.3.3 If the revised returns are filed and the tax is paid, and the SARS ruling is subsequently finalised on the basis that no tax liability existed, an onerous refund process is required, not to mention the negative cash flow suffered by the taxpayer;

311.3.4 In the case of retrospective registration as a vendor, SARS may issue returns for completion before the VDP application has been submitted. Alternatively, SARS may argue that since full disclosure of the tax liability has been made upon application for registration, any subsequent disclosure can no longer be said to be “voluntary”, with the result that the taxpayer is disqualified from the VDP relief.

Proposal

312. It is proposed that a new section be introduced in Part B of Chapter 16 of the TAA which makes provision for a VDP application to be lodged, subject to SARS finalising a ruling requested by the vendor or taxpayer within a specified period from the date that the VDP application is lodged.

313. Insofar that retrospective VAT registrations are concerned, it is proposed that the VAT 101 form be amended to provide for the selection of VDP relief in respect of retrospective registrations, to be lodged within a specified period from the date that the VAT registration number has been allocated and communicated to SARS.

314. A provision should be included in the VDP provisions to ensure that the agreement between SARS and the taxpayer in instances where an amount must be agreed to for purposes of finalising the VDP agreement is properly governed.

NOT IMPLEMENTED - Sections 240(4) - Suspension pending criminal prosecution

Legal Nature

315. Section 240(4) of the TAA allows a Senior SARS official against whom criminal proceedings have been instituted to not register or suspend registration as a tax practitioner.

316. There is no requirement to notify the relevant Registered Controlling Body (RCB) of such action, which is inherent and critical to an RCB's part of the regulatory framework.

Factual Description

317. Where such action happens, the relevant RCB will not be able to respond to enquiries from the member and neither be able to suspend him or her from its list of tax practitioners or from the RCB's tax activities.



Proposal

318. Section 240(4) of the TAA should be amended to specifically require SARS to notify the relevant RCB wherewith whom the tax practitioner in question is registered of the suspension immediately before it is implemented and immediately after it has been restored.

NOT IMPLEMENTED - Sections 240(1) and (3) - Registration and deregistration of tax practitioners

Legal Nature

319. Section 240(1) of the TAA empowers SARS to register a tax practitioner but provides no mechanism for them to inform the relevant RCB that the person is registered and what his practitioner is. An RCB requires a member's tax practitioner number in order to submit RCB related member information on members to SARS via SARS' eFiling.
320. Furthermore, there is no prescribed deregistration process or grounds other than listed in section 240(3) of the TAA (i.e. no process for voluntary or non-compliance with RCB requirements as grounds for deregistration) or an obligation on SARS to notify the RCB of the deregistration.

Factual Description

321. Section 240(1) of the TAA requires a tax practitioner to be both registered as a member of an RCB and as a tax practitioner with SARS.
322. There is also an obligation on RCBs to communicate such registration as a member for the purposes of tax practitioner reporting to SARS on eFiling and annually to report the compliance of members with chapter 18 (section 240A(3) of the TAA).
323. Furthermore, once a member is non-compliant with the RCB requirements and this is reported to SARS, such person can be deregistered or on application voluntarily so but there is no statutory mechanism for this.

Proposal

324. Section 240 of the TAA should be amended to prescribe a process for deregistration of RCB members as tax practitioners for all instances where this is required, including voluntary deregistration, and compel SARS to notify the RCB immediately after such deregistration has been effected.
325. A mechanism to report member registrations with SARS as tax practitioners to the RCB immediately thereafter should also be added.



PARTIALLY IMPLEMENTED - Sections 240 & 70(2)(e) - Tax compliance status and process enhancement

Legal Nature

- 326. The section 70(2)(e) of the TAA empowers a senior SARS official to disclose such information as may be required by an RCB for the purposes of verifying compliance with section 240A(2) and 240A(3) of the TAA.
- 327. This would include adherence to the code of ethics and disciplinary code, as well as to enable reporting on the information required by SARS for the relevant RCB report.
- 328. However, unlike section 70(1), section 70(2) does not specifically refer to both SARS' information and taxpayer information but rather the purpose of the information.

Factual Description

- 329. Where SARS requests in the report in terms of section 240A(3) of the TAA that the tax practitioner's tax compliance must be indicated, SARS has taken a conservative view on whether section 70(2)(e) of the TAA applies to tax compliance information or SARS' information.
- 330. This restriction is overly broad, although we acknowledge the challenges SARS would face without a broad interpretation.
- 331. It also makes it difficult for an RCB to assist SARS in implementing systems or obtaining data on SARS service, etc. to assist SARS in improving services to tax practitioners or performing joint research on such data.

Proposal

- 332. It is proposed that section 70(2)(e) of the TAA specifically refer to both SARS information and taxpayer information to enable an RCB to efficiently comply.
- 333. Furthermore, it is proposed that the Commissioner be granted the discretion to determine what SARS or taxpayer information an RCB may obtain that will be used to enhance the effectiveness of Chapter 18, but not required for the purposes of section 240A(2) and (3) of the TAA.

