SAICA SUMMARY
2020 DRAFT TLAB & TALAB WORKSHOP
THURSDAY, 10 SEPTEMBER 2020, 9:00-16:00
DAY 2: BUSINESS TAX INCENTIVES, BUSINESS TAX GENERAL, BUSINESS TAX FINANCIAL & INTERNATIONAL TAX
ONLINE MICROSOFT TEAMS MEETING

MORNING SESSION (starting at 9am)

A. BUSINESS TAX: INCENTIVES

1. Addressing the tax treatment of allowable mining capital expenditure
   1.1. Taxpayers (other than mineral right holders) claiming capital expenditure
      - *Section 36 allows capex deduction in 1 year, other sections allow 5 years.*
      - *NT reiterated that the amendment is not an exclusion from claiming an allowance but it relates to the timing of the claim for capital expenditure.*
      - *Commentator concerns:*
      - *Piecemeal changes to contract mining is concerning – potential to destabilize industry.*
      - *Scenarios could arise where both parties do not have mining rights.*
      - *Certain mining capex would not qualify for deduction under other sections (see point 1.2 below).*
      - *Influence on other taxes (mineral royalties etc) should also be considered.*
      - *Certain (unincorporated) JV's might fall foul of proposed amendment as well as those waiting for approval of a sale of a mine (Section 11 transfer application processes do still take long).*
      - *Overall suggestion – need to have more consultations.*
   1.2. Impact of the current definitions of "mining operation" and "mining" on ability to claim under provisions of section 12C after proposed amendment
      - *Concern:*
      - *S12C excludes farming & mining, s11(e) excludes structures of a permanent nature, s12B only lists certain things (does not include certain items listed in s36(11).*
      - *Possible solution suggested: Amend s11(e) to include mining capex not claimable under s36?*
      - *Concern that it is not that simple – nature of capex expenditure for s36 is not equivalent to the other sections, it is much broader.*
   1.3. Balance of unredeemed capital expenditure
      - *Not clear whether this is allowed to continue for deduction under other sections of the Act.*
      - *There are two types of unredeemed expenditure - Creates compliance challenges for all.*
      - *Change to come in on 1 Jan 2021 – complex to apply with changes during a YOA.*
   1.4. Impact of proposed amendment on prospecting operations – *NT will consider further*
   1.5. Insertion of proposed mineral right ownership wording throughout section 36
      - *Remove from s36 because s15 already has it or is there a risk arising from the current wording?*
      - *S15 already has it so s36 wording is superfluous – so it shouldn't be there if it is*
2. Changing the Minister of Finance discretion in lifting ring-fencing of capital expenditure per mine
   2.1. Conflict of interest of SARS as an administrative organ –
      - *NT - ITA has many provisions that give the Commissioner the discretion so why is this different.*

- *Commentators: Concern is the constitutionality of this as it allows the legislation to be overridden.*
- *Other view is that this is not unconstitutional as powers are referenced to guidelines.*
- *Concerns that Commissioner will not take overall economic effect into account and only focus on revenue collection.*
- *Suggestion; make decision subject to objection & appeal*

2.2. Proposed listed criteria

- *Commentators concerns: The criteria have been changed – South Africa needs investment so removing fiscal, financial and technical considerations is not clear.*
- *Need to include technical and financial considerations and must be in consultation with DMRE and include NT & MOF to assist Commissioner to make final decision.*
- *Suggestion: Keep as is.*

2.3. Existing directives

- *Concern: Tax is an annual event & if rules changed risk that it could be interpreted in a different way if discretion given to Commissioner.*

2.4. Discretion not subject to objection or appeal

- *Commentators: Should allow objection & appeal considering that this could relate to a policy consideration.*
- *Suggestion: Internal appeal to Minister of Finance & Minister of Minerals & Energy as a further safeguard to ensure that policy decisions do not become administrative decisions.*

3. Reviewing the sunset date of the **Special Economic Zone** tax incentive regime

3.1. Reconsideration of the proposed sunset clause

- *Currently extension till 1 Jan 2028*
- *Commentators concern: affects credibility of SA as an investment destination (certainty?)*
- *Suggest: take into account big build – allowing 10 years. Investors are long-term.*

3.2. Full write-off of building costs under section 12S

- *Discussed at Annexure C & NT requested further info on this, but has not yet received this.*
- *NT states that there are also incentives from DTI which could result in double-dipping.*
- *Need for improved communication.*

3.3. Matters not included in the 2020 Draft TLAB

3.3.1. Use of domestic transfer pricing instead of the 20 per cent connected person income/expenditure rule

- *Purchases or sale > 20% with related parties – don't qualify for incentive.*
- *NT did consult with SARS & will consult on this further.*

3.3.2. Accelerated building allowances in respect of building situated on leased property

- *Only allowed allowance if owner. Lease land is not regarded as ownership - thus don't qualify for incentive. This is restrictive.*
- *NT states other sections in ITA are available & has previously asked for reasons why these cannot be used.*

4. Sunset clauses for section 12DA and section 12F

4.1. Tax treatment of currently held assets

- *NT: Sunset date does not imply that incentives will be taken away, but will help to make a decision on their effectiveness.*
- *Results of review will be released before sunset clause.*
- *Reviews will include a consultative process.*

5. Substitution of the Eleventh Schedule dealing with government grants
   5.1. Effective date – *NT will consider as government grants are an instrument of other departments and can happen at various times so updating the Eleventh Schedule.*
6. Sunset clause for section 13*quat*
   6.1. Effective date – changed in light of review. Extension to 2024 requested due to COVID – *NT noted comment.*
7. Venture Capital Companies
   7.1. Clarifying administrative provisions
   - *Commentators welcomed this.*

   7.2. National Treasury feedback on VCC survey
   - *NT thanked all (109) respondents & NT is now busy collating & analyzing results.*
   - *Commentators: Concern that survey did not address:*
     - *expenditure & assets acquired*
     - *information on indirect jobs was requested (NT won't see full job-creation position).*
   - *NT: Sunset clause inserted in 2009 as 2021. In budget it was mentioned that a review of sunset clause might be moved – continue or not, but NT stated that it is not to bring forward sunset clause. Announcement to made in budget next year.*

B. BUSINESS TAX: GENERAL

1. Refining the interaction between the anti-avoidance provisions for intra-group transactions
   1.1. Reinstatement of base cost for debt and non-equity shares
   - *No comments received in this regard.*

   1.2. Reference made in the 2020 Draft TLAB to a "specific" group of companies
   - *Should be put in the position as if transaction did not happen – FV of debt or subscription price of share. NT understands this.*

   1.3. Reinstatement of base cost at the 6th year anniversary of intra-group transactions
   - *NT wants to understand urgency of this.*
   - *Requests were made to correct now as fits into budget and aligns with base cost issue.*
   - *Concern: Situations where this will not apply: eg. Degrouping charge will no longer apply – assets disposed of outside of roll-over relief (SARS already collected tax).*
   - *Need further discussions on this.*

2. Clarifying rollover relief for unbundling transactions
   2.1. Limitation of the definition of "disqualified person"
   - *Some commentator suggestions:*
   - *There is no transfer of value to shareholders in an unbundling! The value is simply split between the unbundling company and the unbundled company. Both companies remain entirely within the tax net.*

- *The ultimate tax effect on the sale of the shares retains the same consequences as before the unbundling. Unbundling is not a tax scheme it is to achieve more value to shareholders and thus more CGT on the ultimate sale.*
- *PBOs should be excluded from the definition for purpose of s 46 considering that one would disregard a capital gain in respect of a donation to a PBO (par 62 of the 8th Schedule).*
- *Commentators: what does NT want to achieve & what led to this change?*
- *NT Concern: Current rule is outdated but defn of disqualified person takes into account non-resident & resident exempt persons. Roll-over rules are creating an exemption for some shareholders (exempt & non-resident persons).*
- *NT reluctant to change definition but will engage further on this.*

2.2. All-or-nothing nature of the proposed 20 per cent rule

- *Commentator concern:*
- *Practically, listed companies would not be able to comply with the 20% limit as it would have difficulties determining who their shareholders are & then also knowing what the tax status is of these shareholders.*
- *Suggestion: scrap proposal, keep existing rule read with connected person test or use a pro-rata approach but concerns with this too.*
- *NT: agrees to engage further.*

2.3. Effective date of the proposed 20 per cent rule

- *Concern: Effective from date of release of draft affects live transactions.*
- *Suggestion: it should be from a prospective date.*

C. BUSINESS TAX: FINANCIAL

3. Clarification the meaning of "market value" for the taxation of long-term insurers

3.1. Definition of "market value"

- *Most commentators agree with principle*
- *But concern that it might be impractical to value (eg. subjective valuations), so what is the trigger to use MV not BV?*

4. Reviewing the interaction between rules for the taxation of benefits received by short-term insurance policyholders and the tax treatment of related expenses

4.1. Current wording in the TLAB

- *Most comments in support of change but some concern around s23L(3) [not s23(c)].*
- *S23L(3) brings all contracts into gross income irrespective if deduction was allowed or not.*
- *NT: noted.*

4.2. References to investment contracts

- *NT agrees with comments (not specified)*

5. Clarifying the tax treatment of secured non IFRS 9 doubtful debt

5.1. Clarifying the current wording

- *"Security" requires further clarification.*
- *NT will consider.*

5.2. Effective date – *Yanga to discuss when online again (not discussed in meeting)*

6. Clarifying the tax treatment of doubtful debts for taxpayers conducting leasing business and applying IFRS 9 for financial reporting

   6.1. Effective date - *Yanga to discuss when online again (not discussed in meeting)*

7. Curbing potential tax avoidance caused by dividend deductions

   7.1. Reference to a 'dividend declared'

   - *NT concerns: SPV is being interposed & shield taxable dividends*
   - *Commentators: Wording should be aligned with Companies Act considering that no formal declaration needed.*

8. Clarifying the meaning of a share in the definition of REIT

   8.1. Definition of a "REIT"

   - *NT concern: REITS cannot issue preference shares but could be drafting concern as contradiction between EM & law.*
   - *Commentators: confused by proposed amendments & what NT wants to achieve*
   - *NT view: Preference shares weren't meant to qualify for REITs tax incentive regime.*
   - *Commentators: Proposed amendments does not achieve this.*
   - *NT: will clarify EM & law*

9. Amending the taxation of foreign dividends and foreign gains received by REITs

   9.1. Scope of the amendment is wide and raises other anomalies

   - *NT acknowledges that scope of amendment was wide & comments noted that this should be looked at holistically with all other tax provisions.*
   - *Commentators suggested a workshop be held on this & to also consider the CFC implications.*
   - *Unlisted REITs as mentioned in Budget will be considered once FSCA is up and running.*

10. Addressing tax avoidance involving lending and collateral arrangement provisions

    10.1. Administrative burden

    - *NT does not see that an additional burden will be created with the proposed changes.*
    - *Commentators requested that EM example be considered as it does not seem to relate to what NT wants to achieve.*

AFTERNOON SESSION (starting at 2pm)

D. INTERNATIONAL TAX

11. Introducing an anti-avoidance provision regarding change of residence

    11.1. The proposed changes result in double taxation

    - *Reason: Participation exemption not being used as was intended.*
    - *Commentator concern: economic double taxation as company taxed when ceasing to be tax resident and now also at shareholder level. Don't understand the mischief. Minority interest concern also.*
    - *NT: could consider excluding minority interest*

    11.2. Denial of participation exemption

- *No need for deemed disposal as impact of this is of concern as this would be a cashless transaction.*
- *NT noted points.*

11.3. Minority interest relief

- *Concern is that the minority shareholders should not be prejudiced by a decision that they were not able to influence and where they will remain in a tax net.*
- *NT noted point.*

11.4. Subsequent amendment to section 9C

- *Suggestions:*
- *Should current proposal be kept, then s9C should be changed.*
- *Deemed disposal triggered but no actual disposal – should still have s9C protection.*
- *NT noted points.*

12. Introducing an anti-avoidance provision regarding taxation of foreign dividends received by residents

12.1. The scope of the amendment is wide

- *S10B has no anti-avoidance rule as is contained in s10(1)(k)*
- *Commentator concern: Why is scope broader for s10B (that applies to any person) wider than s10(1)(k)? Possibly include a de-minimus rule.*

13. Refining the scope of the transfer pricing rules applying to CFCs

13.1. The scope of the amendment is wide

- *NT Concern: s31 is limited in its application so introduced change.*
- *Commentators concern:*
- *Need more clarity & reference to what is targeted as s9D might be applicable in any event.*
- *Way in which legislation is written is unclear: CFC doesn't even need to be involved in transaction? + is it all shareholders or only those that are connected to CFC that are affected by this change?*

13.2. Guidance on "associated enterprises"

- *This guidance was requested in 2019 to be effective in Jan 2021*
- *NT: noted that amendment has been postponed to Jan 2022*

14. Limiting the application of dividend and capital gain exemptions in loop structures

14.1. Removal of section 9D(2A)(f)

- *NT: Trying to find alternative test for when exchange controls no longer there.*
- *Concerns:*
- *Double taxation for DWT for dividends paid to CFC & legal loop structures will also be caught by the changes.*
- *Apportionment not appropriate (par64B) + no threshold for application of this rule. Recommend a de minimus threshold (10% might not be appropriate).*
- *Commentator suggestion: Para (f) should be retained, especially for long-term insurers.*
- *NT noted comments and suggestions*

14.2. Minority shareholders be excluded from this proposal - *noted*

14.3. Scope of the amendment should not be applicable to a CMA structure –

- *Commentators concerns: Loop structures allowed (approved) in CMA now could be treated as a loop ito changes*

- *NT: points noted*

14.4. Relief from double taxation – *see above*

15. Taxation of the transfer of listed securities to an offshore exchange

15.1. Section 9K should be scrapped

- *NT reasons for amendment: Linked to exchange control changes*
- *Commentator concerns: many unintended consequences & there are cash flow concerns (it's a non-cash event). Change in register listing should not have tax consequences (as would be required for change in domicile). No exit from tax net when register listing is changed.*
- *NT: points noted*