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Submission File

15 April 2020

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Dear National Treasury and Ms Collins

COMMENTS ON THE DRAFT DISASTER MANAGEMENT TAX RELIEF BILL 2020

1. We herewith take an opportunity to present our comments on behalf of the South African Institute of Chartered Accountants' (SAICA) National Tax Committee on the draft Disaster Management Tax Relief Bill 2020 (the Draft Bill) published by National Treasury on 1 April 2020.
2. We once again thank the National Treasury and SARS for the ongoing opportunity to provide constructive comments in this regard. SAICA continues to believe that a collaborative approach is best suited in seeking solutions to complex challenges, especially in these very difficult economic times.

COMMENTS

Employment Tax Incentive (ETI)

3. The ETI relief is welcomed as it is administratively effective and will go some way towards assisting employers in retaining certain employees. However, the scope of the ETI is perhaps too limited in that it only applies to businesses that are registered as employers with SARS.
4. There are whole industries where the employees all earn less than the tax threshold and accordingly, the employers are not registered as employers with SARS. These businesses are the ones that will be in most need of the ETI support. Examples of such cases are schools/crèches in the early childhood development sector in townships. The teachers earn no more than R3 500 a month and accordingly none of the schools or crèches are registered with SARS.
5. Possibly there are some who could have registered to gain the normal ETI advantage, but the reality is that most are so stretched in terms of time and resources that they have not had a chance to register. They are now unable to access the ETI benefit as a result.



6. Submission: The intention of the government, we believe, was for the benefit to be broad-based and a relief distribution mechanism should be used that includes relief to individuals such as those mentioned above.
7. It would seem that, notwithstanding the expansion of qualifying employees, the time limitation of having to be employed after 1 October 2013 in terms of section 6(e) continues to apply.
8. Submission: Due to the dire economic state that South African businesses find themselves in and to prevent further increases in the already dangerously high unemployment rate, we propose that the ETI relief measures be extended to all employees and that it not exclude those employed before 1 October 2013.
9. The ETI relief will not apply to employers that were registered with SARS after 1 March 2020. This prevents new businesses that applied to SARS for registration before this period as well as those that were registered with SARS during the period 1 March 2020 up until 25 March before the announcement, from qualifying for the ETI relief (assuming they had qualifying employees at this stage), but they might be in dire need of these benefits as they are even more vulnerable than more established businesses.
10. Submission: The ETI relief should be provided for businesses that had applied to SARS for registration before this period or at a minimum it should be applied to those that were registered with SARS during the period 1 March 2020 up until 25 March 2020, being the period before lockdown commenced.
11. The proposed ETI relief applies to employees who are not less than 18 years old and not more than 29 years old at the end of any month in respect of which the employment tax incentive is claimed; or who are not less than 30 years old and not more than 65 years old at the end of any month in respect of which the employment tax incentive is claimed. A person that is just over 29, but not yet 30, will be excluded from the incentive.
12. Submission: It is suggested that the wording be changed to incorporate the employees older than 29 years of age but younger than 30.
13. The Draft Bill states that “COVID-19 disaster relief” measures in terms of the ETI are in general deemed to have come into operation on 1 April 2020 and apply in respect of any remuneration paid on or before 31 July 2020. These amendments are made to the original ETI Act 26 of 2013. It is uncertain if the amendments override the original law for the period of four months and are then repealed or if another mechanism is needed to reinstate the original law after the four-month period. The Interpretation Act does not provide clarity on this situation either.
14. Submission: It is proposed that it be clearly stipulated in these Bills that the original law is reinstated after these proposals come to an end.

COVID-19 disaster relief trusts

15. The definition of a “COVID-19 disaster relief trust” in the Draft Bill refers to any trust established for the sole purpose of disaster relief in respect of the COVID-19 pandemic.
16. Firstly, it is unclear whether this *trust* should be a registered trust that complies with the common law principles of a trust and the Trust Property Controls Act 1988. For instance, is a trust deed required stipulating who the grantors and beneficiaries are and what their rights and obligations are, what the purpose of the trust is etc. and must this trust be registered at the Master of the High Court and with SARS?
17. Secondly, “disaster relief” has historically been narrowly interpreted by SARS and would, for example, questionably not extend to the envisaged SMME loan schemes.
18. Thirdly, it is uncertain why other entities, such as companies and associations of persons, should be disqualified from qualifying as disaster relief funds.

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| <ol style="list-style-type: none">19. <u>Submission:</u> Clarity should be provided on the legal requirements needed for the trusts envisaged in the Draft Bill.20. With such a short lifespan for these entities, it would be problematic if they had to be created in terms of the common law and subject to the Trust Property Control Act (which would include the obligation for trustees to receive Letters of Authority from the Master’s Office before they can act on behalf of the trust etc.) considering the lengthy time it currently takes to get these type of entities registered.21. Confirmation should be provided in the Explanatory Memorandum of the envisaged scope and interpretation of “disaster relief” in the Ninth Schedule of the Income Tax Act to affirm specifically that loans to SMMEs is envisaged as “disaster relief”.22. The administrative burden on these Trusts seems unclear. Given that the administrative registration and compliance burden of these Trusts is governed by legislation, it remains unclear what SARS is expecting these trusts to report for the 4-month period. In addition, both sections 30 and 30C require three persons to take fiduciary responsibility for the organisation. By deeming the trusts to first be a PBO and then later a Small Business Funding Entity, this requirement would in certain circumstances have to be met after the fact. It therefore remains unclear who will assume the responsibility of the organisation towards SARS especially when the PBO is automatically dissolved. |
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23. The Draft Explanatory Memorandum to the Draft Bill states that “COVID-19 disaster relief funds will on application and approval by the Commissioner for SARS be deemed to be PBOs as contemplated in section 10(1)(cN) and 30 of the Income Tax Act” (our underlining added). In contrast, however, the Draft Bill deems such funds to be PBOs subject to complying with all conditions imposed by section 30. This misalignment in wording leads to uncertainty, in that disaster relief funds are uncertain whether they will be applying for retrospective approval in terms of section 30(3B) of the Income Tax Act or not.

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| <ol style="list-style-type: none">24. <u>Submission:</u> We support the current legislation over the Explanatory Memorandum in deeming the registration to take place, rather than having to apply for registration, as we |
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do not believe the SARS Tax Exemption Unit (TEU) has the capacity to, within the next 3 months, register these new trusts. The misalignment between the Draft Bill and the Explanatory Memorandum should be clarified to ensure that the Explanatory Memorandum aligns with the requirements of the Draft Bill. This will prevent further registration approval backlogs at the SARS TEU and it will also prevent the dual registration requirement (normal tax registration until exemption status is approved) for these entities.

25. The Draft Explanatory Memorandum to the Draft Bill seems to indicate that only SMMEs will be able to benefit from the funding provided by COVID-19 disaster relief trusts. The Draft Bill does not make this distinction.

26. Submission: We again support the broader scope of the relief as the reality is that disaster relief extends beyond just money loans but includes feeding schemes, making water available and donations of medical equipment and consumables. The misalignment between the Draft Bill and the Explanatory Memorandum should be corrected so that the Explanatory Memorandum provides for the wider provisions as contained in the Draft Bill as the need for disaster relief funding will not only be limited to SMMEs.

27. Should the COVID-19 disaster relief trust not be dissolved and its assets have not been distributed on or before 31 July 2020, it will be deemed to be a small SBFEs as contemplated in section 30C of the ITA. Deeming these PBOs to be SBFEs, does not in reality ensure that all the requirements of section 30C have been complied with.

28. Furthermore, 'converting' a PBO to a SBFE (by means of deemed approval by SARS) in these circumstances does not provide for a PBO that would want to continue providing public benefit activities in relation to disaster relief (as it is unlikely that the need for these services will cease after 31 July 2020, for example, the PBO may simply provide food or cash to those affected by the disease or it may provide a combination of loan funding and food or cash). The nature and purpose of a SBFE is many aspects very different to the nature and purposes of a PBO. The SBFE provides funding to SMEs and a section 30 PBO conducts the PBO activities. It would therefore be inappropriate to force such a trust to convert to a SBFE.

29. Submission: An additional option should be provided to a PBO that wants to continue conducting public benefit activities in relation to disaster relief after 31 July 2020. Currently, the only options are for the PBO to be dissolved and its assets transferred to another PBO as contemplated in section 30(3)(b)(iii) or for it to be 'converted' into a SBFE. The additional option should allow the PBO to continue conducting PBO disaster relief activities.

30. For those PBOs that wish to be 'converted' to SBFEs, they should be required to formalise their affairs by reapplying to SARS, as is required of all other entities wishing to be SBFEs. This is to ensure that all the requirements of section 30C are met, such as the trust deed is updated to take the change in purpose of the trust into account etc.

31. The 4-month period from 1 April to 31 July 2020 within which COVID-19 disaster relief trusts must have distributed their assets and be dissolved is too short. It does not allow



enough time for the necessary application and approvals processes relating to persons seeking assistance from the trusts to run their course.

32. Submission: The period to distribute the trust assets and for the trust to be dissolved should be extended to at least the end of December 2020 to take into account the practical difficulties in dissolving the trust.

33. One of the relief measures provided by COVID-19 disaster relief trusts is that the trust can loan a SMME money but the money will be paid by means of a weekly allowance directly to the SMME's employees without the SMME having to withhold employees' tax. The amount paid by the trust to the employee is specifically excluded from the definition of 'remuneration' for the purposes of paragraph 2(4) of the Fourth Schedule.

34. The employees will thus only be taxable on the amounts received at the end of the year of assessment. The concern in this regard is that many employees' will not save the tax that is payable and thus will not be able to pay the tax due at the end of the year of assessment, resulting in interest and penalties being charged which would further aggravate their dire economic situation.

35. In addition to the above concern, it is uncertain how SARS will be able to verify whether these amounts have been declared by the employees on assessment, especially in respect of those employees who earned below the threshold, were not required to be registered with SARS and not required to submit a tax return.

36. Submission: SARS should clarify the reporting obligations of the trust, the SMME and the employee (if any) to ensure that SARS is aware of all the income/remuneration received by these employees and that the correct amount of tax is paid on assessment.

37. To ensure that all amounts are appropriately declared, the public notice issued stipulating who should submit a return for the 2021 year of assessment should include those individuals that received amounts from a COVID-19 disaster relief trust. The COVID-19 disaster relief trusts could also be required to submit a list of its 'individual beneficiaries' that received these payments to SARS for verification purposes.

38. As mentioned above, the remuneration received / accrued from a COVID-19 disaster relief trust are proposed to be excluded from PAYE withholding. However, this exclusion only applies from 1 April 2020 to 31 July 2020.

39. Submission: In view of the recommendation made above, that the period allowed within which such trusts should have distributed all assets etc. be extended to the end of the year at the earliest, this exclusion from remuneration should similarly be extended.

Section 18A donation deductions

40. It is unclear why donations in kind to a COVID-19 disaster relief trust should not qualify for a section 18A deduction like any other section 18A donation.

41. Submission: As many donations of essential goods (such as sanitizers, facemasks, protective gloves, soap, water etc.) will be made to assist those in need to fight the spread

of the virus, it is suggested that a deduction be permitted for income tax purposes for these donations as is the case for *cash* donations. This would not only potentially motivate taxpayers to contribute towards the fight against COVID-19 but it would also reduce costs to consumers and the government.

42. It is uncertain how taxpayers will determine whether a trust is a legitimate COVID-19 disaster relief trust for the purposes of making a donation. As the law currently stands, SARS will also not know if these entities comply with all the requirements as the Draft Bill states that these entities are deemed to be PBO's subject to complying with all conditions imposed by section 30 – which SARS will only know at a later stage considering the time and resource constraints currently being experienced by SARS.

43. Submission: COVID-19 disaster relief trust should be required to notify SARS within 7 days of their registration as such trusts.

44. SARS should then be required to include the names of these trusts on its website for the public to review.

45. Entities that abuse and contravene these registration provisions should be guilty of an offence and, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.

Small Business Funding Entities

46. The deemed approval of a COVID 19 PBO becoming a SBFE is subject to subsection 30C(2)-(7). It remains unclear how this would operate in practice.

47. For example, is the deemed approval subject to the SBFE meeting all the conditions of those sections including the various satisfactions of the CSARS? If so, then in fact there is no deemed approval but merely the normal process for application and approval.

48. Submission: The deemed approval and subjugation in practice should be clarified.

49. It remains unclear what the consequences would be for non-compliance with section 30C(2)-(7) and who will be responsible for those consequences. For example, the SBFE has no written constitution or no board, just a single person managing it.

50. Submission: The actual mechanism that is envisaged remains unclear in practice as in theory the legislation seems to maintain the *status quo*. Clarification is sought on how it is envisaged the trusts will comply with section 30C, by when the trust needs to comply with the provisions and who will be responsible for this compliance.

Government wage reduction

51. Although the ETI and other relief measures are most welcome, many employers will be undertaking unilateral employee salary adjustments as they will be financially constrained. These adjustments will most likely only be applicable to certain higher salary bands, such as those above the UIF threshold rate.



52. Submission: Especially given the high government wage bill, government should ideally apply the same principle to its personnel across the board, to divert urgently needed funds to save economically productive private sector jobs.

CONCLUSION

53. We urge SARS and the National Treasury to urgently address the above concerns and legislative changes that are required in order to assist persons during this extremely difficult period.

Should you wish to clarify any of the above matters please do not hesitate to contact us.

Yours sincerely

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Chairperson: National Tax Committee

Dr Sharon Smulders
Project Director: Tax Advocacy

The South African Institute of Chartered Accountants