

FEEDBACK SUMMARY - 7 September 2017

GENERAL

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

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

PUBLIC HEARINGS AT THE STANDING COMMITTEE OF FINANCE (SCoF) ON 29 AUGUST 2017

Consultation process

Overview

SAICA has again raised concern that the consultation process is inefficient and lacking, especially given that NT only do public consultations after SCoF has done so, resulting in many obvious distortions being discussed at SCoF rather than addressing actual anomalies or disagreements in policy with NT. This inhibits public stakeholders engaging with SCoF on the actual salient matters given the limited time available to do. SAICA still welcomes and awaits the further public consultation proposed by SCoF on the matter of the public consultation process and the importance in tax policy of the distinction between retroactivity and retrospectivity in the context of legislative amendments. Stakeholders have further noted that no consultation has been scheduled for the tax administration bill for a second year and that this may be as a result of SARS being the drafters of the law that governs it.

NT response

NT confirmed that there would be further consultation with stakeholders in the first week of September 2017. Whilst this is accepted, the process needs to be efficient in a number of respects that still require to be addressed by SCoF, SARS and NT and in respect of which SAICA will continue to engage. NT noted that it would address the matter on the tax administration bill and was currently also addressing concerns of conflicts in SARS drafting its own governing law.



SCoF response

SCoF urged NT to put mechanisms in place to confirm at the next round of consultation whereby NT would commit to proposed amendments that have been agreed on with stakeholders. These processes must ensure that effective consultation happens where the public have a clear understanding why their views were considered and either accepted or rejected. SCoF reiterated that though it would always provide greater support for NT views over that of the public, NT must ensure that those views presented to SCoF are properly informed and have followed due process. SCoF also requested NT to address the concern regarding consultation on the tax administration bill.

Proposed repeal of Section 10(1)(o)

Overview

The proposed repeal of the foreign employment income exemption in terms of section 10(10)(o)(ii) of the Income Tax Act (the Act) was discussed at length by various stakeholders. The repeal appeared to be one of the major concerns for most stakeholders present.

SAICA pointed out that its main issues are around parity and equity and that if NT sets out to achieve this, the actual tax paid must be equal including allowing the same deductions so that South Africans working abroad must be in the same position as they would be when working on South Africa. The assessed position must also be weighed up against the cash flow position. Further concerns raised concerns centred mainly around the perceived lack of research done by (NT, the unintended and harsh adverse economic impact that the proposed repeal will have on South African tax residents working abroad, whilst further issues were raised around the potential increase in costs for employers who may simply need to absorb costs to ensure an equitable tax equalisation. Of particular concern, should a tax credit mechanism be used, was the perceived increased tax compliance burden for taxpayers, the additional administrative processes required for SARS as well as the inability of the current foreign tax credit system, i.e. through the operation of section 6quat to effectively deal with the challenges. Specific matters dealt with are as set out below.

Double non-taxation

Whilst the purpose of the repeal is to prevent the incidence of double non-taxation, the manner in which this is being achieved is considered to be inequitable and NT was urged to consider the various submissions made by stakeholders.

Foreign tax credits inadequate

On the basis that the foreign tax credit system is inadequate to deal with the challenges faced by the proposed repeal of the current exemption, NT was urged to consider alternative mechanisms whereby the credits could be made available to affected individuals and employers. Stakeholders further recognised that the issue around the repeal is highly emotive and that the matter should be approached with circumspection.

The fact that a credit is technically due as a possible refund does not consider the lengthy time delays in getting a refund paid out, i.e. impacting on cash flows of employers and employees.



Tax equalization

It was noted that employers/employees already face high tax rates in Africa and there are real concerns that employers will ultimately bear the employment costs, where additional costs cannot equitably be borne by employees.

Administrative burden

The proposed amendments will not assist in improving compliance. In theory one could rely on the foreign tax credit, but considering the measure of proof required this is a major concern in practice, considering the issues around lack of information available especially within the African continent, as well as manual systems in a number of cases. The burden of proof on taxpayers namely proof that paid or payable is exceptionally onerous on taxpayers which could ultimately result in the taxes paid becoming a cost.

Stakeholders also stressed that the burden of proof requirements will need to be addressed as part of the current legislative process as SARS will only deal with the issues to the extent that the necessary legislation is in place.

Further research by NT

It was raised that NT does not seem to take cognizance of the number of individuals likely to be impacted by the proposed amendments and the impact a flight of capital where South Africa will be losing taxing rights altogether.

Stakeholders reminded SCoF that one of the purposes for the introduction of the exemption was to secure skills transfers into Africa and back in to South Africa and that the proposed amendments must consider that the ultimate purpose is effectively retained. Reference was made that NT should refer to the South African Migrations report recently issued by the department of Home Affairs. This report is also available on the SAICA Legal and Policy page.

NT was asked to give due consideration to the issues around a potential capital flight and the factors that indicate a lack of competitiveness for residents working abroad. NT pointed out that the effective date of the proposed amendments is for the 2020 tax year and that this will provide sufficient time to iron out difficulties in implementation.

NT advised that they have done research around the proposed section 10(1)(o) and that the current SA tax dispensation is overly generous compared to every other country in the world. In Australia, New Zealand, the UK, Spain a 330 day rule applied. NT considers that the repeal would have a limited impact as they consider that just over 5000 people who currently claim the exemption would be impacted and it was unclear why stakeholders were claiming that tens of thousands of people would be impacted. NT noted that further research would be done but that many of the concerns seem to center around not the repeal of the exemption itself but rather that it would force people who have already emigrated but have not finalized their financial affairs in SA to do so now.

SCoF response

The SCoF chairperson urged NT to take the various practical implications into account and to come up with a workable solution, even if a postponement of implementation needs to be



considered. It is anticipated that a number of the practical issues will be addressed in the proposed workshops with NT set down for 4 and 5 September 2017.

Amnesty for Bargaining Counsels

Overview

SAICA noted that it was not in principle opposed to the use of a tax amnesty as an extraordinary policy tool and it was sometimes a necessary evil to achieve a greater good. However the current relief proposed seemed extraordinary generous and that there are two parties qualifying for relief in terms of the proposed amnesty, namely the Counsels and their deemed employees and that the taxes should at least be recovered from the employees. Of particular concern was that the amnesty was very narrowly focused on a specific group of taxpayers (i.e. about 40 bargaining councils) which was a fundamental departure from previous relief which targeted much bigger and less specific groups. There also seemed to be no explanation that given the relevant circumstances that the current rules in the Fourth Schedule and the TAA compromise provisions could not be used to address this matter. NT seemed to suggest that this is not always possible but there are a number of outstanding issues that would be addressed in the NT workshops.

SCoF response

SCoF urged NT to take the submissions into account in refining the proposed amendments.

NT Response

NT advised that further clarity and refinement will be done in terms of the September workshops.

Share buy backs

Overview

Whilst some support was in principle expressed for the proposed amendments there are a number of concerns that needed to be addressed. This included the concern around proceeds being recharacterised as dividends as well as the fact that dividends received 18 months prior to the disposal are added to proceeds irrespective of whether they are linked to any share transaction.

The proposed amendments will have a broader impact than the identified mischief and should only deal with extraordinary dividends derived after 19 July 2017. It was pointed out that there is already legislative precedent in this regard.

SAICA addressed the share buy-back issues in more detail and proposed that a different mechanism must be used instead of the proposed capital gains tax. An issue was also identified by SAICA around the absence of a causal link between the issue and the sale, there being no connection of the loan to the funding, which may have been intended.



Unintended consequences

It was submitted that the proposed anti-avoidance should only target equity shares and not preference shares as the latter are settled for different reasons than just sale of participation rights, for example being used in equity share finance transactions in BEE structures and would in terms of current proposals also be recharacterised.

The proposed retrospective application is also considered problematic by a number of stakeholders and it was proposed that the amendments should only impact dividends declared after the 19th of July 2017 and not disposals on or after that date.

NT response

NT committed to addressing the issues around extraordinary dividends in the NT workshops in September.

CFC extension rules to trusts

Overview

Various concerns were raised in respect of NT proposal that a *spes* in a trust distribution is akin to a corporate participating right. SAICA pointed out that a discretionary beneficiary cannot be considered to have an interest in any underlying asset until such time as the trustees exercise their discretion. Other stakeholders addressed the issues around the proposed changes insofar that section 9D already addresses the identified issues. It was also a concern that IFRS 10 was proposed as instrument to determine participation rights given that the consolidation concepts used in this accounting statement was not reconcilable with how CFC imputation is done.

Section 25BC

The proposed section 25BC is anticipated to create significant issues as exempt income and capital gains are included in revenue, which leads to unintended consequences.

It was pointed out that the proposed introduction of section 25BC disregards the underlying quality and nature of items such that capital gains are turned into income and this is not aligned with the position applicable to local trusts whilst innocent dividends are affected. Furthermore, the provisions of the proposed section 25BC should be refined and that in the meantime NT should postpone implementation thereof.

Relief for dormant group company debt waivers

Overview

The proposed amendments were mostly welcomed due to the current lack of alignment between group tax capital waivers and revenue waivers were addressed. SAICA requested the retention of scope of the current para 12A and that this just be duplicated in section 19.



Unintended consequences

Whilst it is recognized that the dormant company relief is aimed at assisting companies in distress, the carve outs for anti-avoidance are considered to be too broad and need to be more restricted to cover the targeted mischief.

The proposed effective date of 19 July 2017 poses practical problems as the disposal may be an isolated step in a composite transaction leading to unintended consequences and this is furthermore considered procedurally unfair.

NT Response

NT will look into the anomalies noted but stated that they do intend to narrow the ambit of the group company relief which they were of the view is too broad.

SCoF response

SCoF noted that a request for a specific time delay should be taken into account by NT as it could not be considered unreasonable. SCoF further noted that where more time was required by NT to consider the submissions made by stakeholders, that this would be preferred over a rushed response.

Section 7C

Overview

Stakeholders addressed concerns around the proposed amendments to interest free loans in terms of section 7C. It was pointed out that the proposed amendments are too broad in ambit and will have a number of unintended consequences.

Unintended consequences

The connected party requirement is applied too broadly and the mere fact that a person is a beneficiary of a trust could unintentionally result in the required connectedness of a loan by a company to a trust to be affected.

The interest free loan provisions should not adversely affect share incentive schemes as this is not in the public interest and NT must consider the remoteness of the incidence of perceived mischief where such mischief will be addressed by virtue of section 8C.

NT response

NT committed to address the issues raised in the proposed workshops in September.

Tax administration and separation of powers

A concern was raised around the tax administration proposals and the fact that no workshop was held in the last legislative cycle and that there was accordingly no opportunity for stakeholders to discuss the proposed amendments.



A further concern was raised that with SARS drafting the TALAB, which amend the law that regulates their conduct, there was a lack of separation of powers.

SCoF response

SCoF requested NT to respond pertinently to the confusion of roles as stated and that this has been a longstanding issue since 2012.

NT Response

NT Noted that they are busy addressing the matter as to who drafts the TALAB and will schedule a workshop to address the TALAB concerns.

SARS confidentiality restrictions

SCoF raised concern that it faces challenges in ensuring that SARS as the executive properly account as to how they are addressing concerns such as BEPS as the tax confidentiality provisions seemed to pose an obstacle to SARS disclosing specific progress in addressing evasion and avoidance. SCoF noted that it may need to look at international precedent in this regard or whether having closed sessions to that used in the security cluster does not provide a solution to address this challenge.