NATIONAL
TREASURY

REPUBLIC OF SOUTH AFRICA

DRAFT EXPLANATORY MEMORANDUM

ON THE

TAXATION LAWS AMENDMENT BILL, 2014

17 July 2014

[W.P. –– ‘14]

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1.1. VALUATION OF FRINGE BENEFIT FOR DEFINED BENEFIT CONTRIBUTION

[Applicable provision: Paragraph 1 and 12D of the Seventh Schedule and the introduction of specific regulations]

I. Background

In 2013 changes were made in the Taxation Laws Amendment Act of 2013 regarding the valuation of defined benefit contributions by an employer as a fringe benefit in the hands of the employee.

Defined benefit funds have retirement benefits that are calculated according to the rules of the pension fund where the value of the contributions to the fund may not be an accurate reflection of the benefits that may be received by the retirement fund member. For example, if the pension fund is in financial difficulty and the employer needs to make additional contributions to meet the expected liabilities, it may be unfair to tax the individual on those contributions as if they were a fringe benefit if there is no associated increase in benefits.

In order to: avoid these discrepancies; align the tax treatment of contributions to defined contribution pension funds and defined benefit pension funds; and improve fairness in relation to the receipt of retirement benefits within defined benefit funds, a formula was introduced to approximate the value of the fringe benefit that arises due to the increase in retirement benefits accruing over the tax year to a member of a defined benefit fund.

The formula calculates a notional employer contribution to the defined benefit fund based on the estimated increase in retirement benefits. The notional amount is deemed a fringe benefit to the employee.

II. Reasons for change

The formula that was included in the Taxation Laws Amendment Act of 2013 requires the use of a factor to determine the value of the notional employer contribution. The methodology that should be used by the pension fund actuaries to calculate the factor that is sent by the fund to the employer as an input in the final formula was not included in the previous amendments. These amendments provide details on how the factor should be determined and also describe the processes required to ensure that the factor and additional relevant information is provided on a timely basis to employers and has been verified by the appropriate personnel.

With regard to hybrid pension funds which have an ‘underpin’ component, the amendments also provide additional details on the calculation of the notional employer contributions. These funds have retirement benefits which consist of both a defined contribution element and a defined benefit element, but where the retirement benefit is based on whichever element is greater.

III. Proposal

A. Fund member category

The amended proposal relies on the concept of a 'fund member category'. A 'fund member category' is a group of members of a fund whose entitlement to receive benefits and the value of those benefits when they are received are determined by the same rules, and in respect of whom the same contributions are paid or payable as a proportion of pensionable salary by them and by their employer. If either condition does not hold in a fund, there will be more than one fund member category. Funds that have different accrual rates based on length of service are to be treated as one 'fund member category' since all employees face the same rules. Funds which have different benefit rules for different employees will have separate 'fund member categories'. The notional employer contribution should be calculated separately for each fund member category of a fund. This refinement is introduced to ensure that the notional employer contributions are calculated across groups of members in the same way as the fund pools contributions and the costs of paying benefits across members. The calculation of the notional employer contribution, which is used to calculate the total pension contributions and is assessed as a percentage of total remuneration to determine deductibility, thus introduces no additional unfairness between different individual members beyond that which is already captured in the fund rules.

Example 1: Determination of fund member category if the same rules apply

A retirement fund has an accrual rate of 1/55 for all members in respect of service less than ten years, rising to 1/40 in respect of service greater than ten years. The employer pays a contribution rate of 16% of pensionable salary in respect of all members of the fund, and all members pay contributions at a rate of 7.5% of pensionable salary.
Although the fund has two accrual rates, all members are eligible to receive the additional accrual under the same circumstances, and the employer and employee contribution rates are the same for all members. The fund therefore pools costs across members with less than ten years' service and members with more than ten years' service. There is thus only one fund member category. The accrual rate to be used will be a simple average of the different accrual rates.

Example 2: Determination of fund member category with separate accrual rates by type

A retirement fund has an accrual rate of 1/55 for staff and 1/30 for executives. The employer pays contributions of 20% of pensionable salary for staff and 30% of pensionable salary for executives. Since a different contribution rate is paid by the employer, there are two fund member categories and separate notional employer contribution amounts should be calculated for each.

B. Contribution certificate

It is proposed that a separate 'contribution certificate' be provided by the fund to the employer for each fund member category. The fund will initially be required to send a contribution certificate to the employer one month before the 2015/16 year of assessment and then each time that the fund submits their statutory actuarial valuations. An updated contribution certificate must also be completed at any time that fund rule changes will impact any aspect of the contribution certificate, including the fund member category factor or when the fund is required to provide the statutory actuarial valuation. If there are no changes the employer may continue to use the contribution certificate from the preceding year of assessment. The contribution certificate must contain various pieces of information, including:

- Details of the pension fund and the different components of the fund – whether they are defined benefit components, defined contribution components; risk benefit components or hybrid elements; and
- Details of the employer; and
- The fund member category factor for the applicable fund member category.

Requirements for the contribution certificate are laid out in the regulations.

C. Calculation of the value of the fringe benefit

To calculate the notional employer contribution to a defined benefit fund, the employer would need to multiply the employee's pensionable salary by the 'fund member category factor' that is provided in the contribution certificate of the fund member category, of which the employee is a member, and subtract the value of any contributions made by the employee (but excluding any additional voluntary contributions or payments to purchase additional years of service).

The pension fund would be required to calculate the 'fund member category factor' by following the calculation method specified in the regulation. This requires the fund to separate benefits for which members of the fund are eligible into defined benefit, defined contribution, underpin and risk benefit components. A separate calculation method is specified for each type of component. If the fund offers more than one benefit component of a particular type (where that benefit type is provided from within the fund), a calculation would need to be performed for each benefit component separately, and the results aggregated.

D. Defined benefit component factor

A formula is prescribed for the calculation of this factor. The formula assumes that the defined benefit on retirement can be represented as a combination of an annuity and a lump sum or gratuity. Funds that do not explicitly represent any portion of the annual increase in benefits in the form of a gratuity will only need to value the benefits in relation to the increase in the annuity value. The impact of commutation at retirement can be ignored.

The value of the annuity accrual is determined by multiplying the annuity accrual rate by a number intended to reflect the value of the benefits, which is determined by finding the midpoint between the age of 65 and the earliest age at which retirement with unreduced benefits is permitted in terms of the fund rules. The number is read off a column provided in the regulations.

This table has been calculated taking the following factors into consideration:

- Average expected levels of post-retirement mortality
- Average expected salary-weighted levels of pre-retirement mortality
- Expected investment returns pre- and post-retirement on a portfolio of assets whose term, nature and security broadly matches the lump-sum and annuity liabilities promised by defined benefit pension funds
- The average level of spousal benefits provided by pension funds, and
- The prices of annuities available in the private market

Consistent with the overall methodology, the intention of the factors is to approximately reflect some estimate of the long-run cost of providing a benefit to a particular group of members, rather than the pace at which particular employers may choose to fund for those benefits.

The annuity accrual rate is defined as the average increase (over all members of the fund member category) in the annuity benefit expressed as a proportion of final salary occurring as a result of membership of the fund over the year of assessment, assuming that individual members remain in the fund until retirement. Valuators should first calculate the improvement in annuity benefits expressed as a proportion of final salary for each individual member over the year of assessment, and then take the average across all members of the fund member category. For funds without split accrual this should be a simple exercise.

If the fund rules specify an increase in a lump sum or gratuity amount, the lump sum accrual rate would be multiplied by 0.8 to estimate the increase in the lump sum retirement benefit. These amounts are added together to obtain the defined benefit component factor.

E. Underpin component factor

Retirement funds that have an ‘underpin’ would use a revised formula which takes the maximum of either the defined benefit sub-component factor calculated using the method specified above or the defined contribution sub-component factor and adds 10 per cent of whichever component factor is smaller. Adding the 10 per cent is intended to represent the additional benefit to the member of having the protection offered by the underpin.

F. Risk benefit component factor

The risk benefit component factor is calculated by multiplying the average risk benefit that members of the fund member category are entitled to should they die in the year of assessment, expressed as a proportion of pensionable salary, by 0.005. Disability benefits are not valued by the formula, but are expected to be broadly proportional to the value of the death benefits and are included in the pre-retirement mortality factor in the provided column. As before, the valuator should first calculate the risk benefits payable to each individual member or their dependents as a proportion of pensionable salary, and then take an average of members of the fund member category. Any defined contribution account values paid to the member’s dependents on their deaths should be excluded from this calculation. Risk benefits that are provided outside of the fund are not required to be included within the risk benefit component factor. The actual value of these premiums will continue to be a non-deductible fringe benefit in the hands of the individual.

G. Defined contribution component factor

Pure defined contribution funds are excluded from the application of paragraph 12D and are not required to either compile contribution certificates or to use the formula in 12D(3) to calculate the deemed value of employer contributions for tax purposes. However, since many defined benefit funds have defined contribution benefit components, allowance for the cost of these is made in the prescribed method for calculating the fund member category factor.

In these cases, the defined contribution component factor is simply the total contribution rate in respect of the defined contribution components.

The fund member category factor is the aggregate of all the factors calculated in respect of the benefit components of the fund.

The contribution certificate must be compiled by the board of the pension fund in consultation with the valuator of the fund. The first contribution certificate must be provided to the employer no later than the 31st December 2014 and thereafter at the time of the statutory actuarial valuation or when the fund rules are amended in a manner which alters any information contained in the contribution certificate, including the aggregate fund member category factor or any of its components.

Example 3: Calculating the notional employer contribution

An employer offers a defined benefit pension to their employees, which has an annuity accrual rate of 1/55 for those who have less than ten years' service and 1/40 for those who have more than ten years' service. The fund also has a defined gratuity benefit which pays a lump sum at retirement of 0.067 of final salary per year of service. Members of this fund are able to retire from age 60 with unreduced benefits in terms of the rules.

There are no differences in contribution rates or rules determining the eligibility for and value of the benefits paid to members of the fund so there is only one fund member category. The pension fund is required to complete a 'contribution certificate' for that fund member category that needs to be passed on to the employer before the 31st December 2014.

The pension fund would need to calculate the expected actual accrual rate for members. This value is calculated by averaging the increase in the annuity accrual across all members during the year of assessment. Since the fund has increased benefits for those who have served longer than ten years, the simple average annuity accrual rate is 1/50. The pension fund then needs to read off the value in the table of numbers provided in the annexure that is associated with the midpoint between the age of 65 and the earliest age at which unreduced benefits may be taken. In this case it is 62.5, which is rounded up to 63. The number to be used in the defined benefit component factor calculation is therefore 8.6.

The defined benefit component factor is calculated according to the formula in the regulations and equals (1/50 * 8.6) + (0.067 * 0.8) which is 0.2256.

The pension fund would also calculate the average risk benefit that members (or their dependents or nominees) would be entitled to upon death should they die during the year of assessment, expressed as a proportion of their pensionable salary. This amount should include an estimate of the capitalised value of any spouse's or dependents pensions paid as part of the death benefit. If this amount is five times pensionable salary the risk benefit component factor would equal (5 * 0.005) which is 0.025.

Since there are no other benefit components for which calculation methodologies are supplied, the defined benefit component factor and the risk benefit component factor are added together in the 'contribution certificate' to get a fund member category factor of 0.2506.

The employer, or the payroll company, would receive this number from the pension fund in the 'contribution certificate' and use it in the formula provided in the legislation to calculate the value of the notional employer contribution (which would be a fringe benefit). An employee who had a gross annual salary of R500 000 and a pensionable salary of R350 000, with employee contributions of 7.5% of pensionable salary, would have a notional employer contribution of (0.2506 * 350 000) – (0.075 * 350 000) = 87 710 – 26 250 = R61 460 for the year of assessment.

To check whether the employee is within the allowable deductible limits of either 27.5% of total remuneration or the R350 000 deductibility cap, the employer would need to add the notional employer contribution onto gross salary to obtain total remuneration. In this example total remuneration would be (500 000 + 61 460) = R561 460 and the total contributions to a retirement fund would be (61 460 + 26 250) = R87 710. The percentage contribution to the retirement fund is thus (87 710 / 561 460) which is 15.63%. The individual could make further retirement contributions (say to a retirement annuity) of up to (0.275 – 0.1563) * 561 460 = R66 645 while still receiving a tax deduction.

Example 4: Calculating the notional employer contribution with an underpin

An employer offers a hybrid pension scheme to their employees. On retirement, the employees get a benefit which is the greater of 1/40 of their final salary per year of service and an annuity which can be purchased by a contribution rate of 15% of pensionable salary to a defined contribution account. The fund allows retirement from age 60 with unreduced benefits. Death benefits are 3 times pensionable salary plus the value of the defined contribution account on death.

The fund therefore has one fund member category, who are eligible for two benefit components – a risk benefit and an underpin benefit.

The value of the underpin benefit is the greater of the factor in respect of the defined benefit sub-component and the factor in respect of the defined contribution sub-component plus 10% of the lesser of the two.

Following the method described above, the value of the defined benefit sub-component factor is 8.6 / 40 = 0.215. The defined contribution sub-component factor has a value of 0.15. The underpin component factor is therefore equal to 0.215 + 0.1 x 0.15 = 0.23.

The risk benefit component is valued at 0.005 x 3 = 0.015 (the value of any defined contribution account paid out on death is excluded from the calculation of risk benefit factors).

The fund member category factor is therefore 0.23 + 0.015 = 0.245.

IV. Effective date

The proposed amendments will come into operation on 1 March 2015.

1.2. EXEMPTION OF AMOUNTS RECEIVED OR ACCRUED IN RESPECT OF TAX FREE INVESTMENTS

[Applicable provisions: New section 12T; section 10(i); section 29A, section 64F(1)]

I. Background

The South African tax system incentivises non-retirement savings through a limited exemption of interest income from taxable income. This feature has been in the tax system since before 1980, initially operating as a lever to ease the administrative burden of processing small amounts of interest income. Since 2000, tax free interest income thresholds have been actively used as a tax measure to incentivise non-retirement savings, frequently being adjusted upward on an inflation related basis.

II. Reasons for change

Household savings have been declining steadily in South Africa since the early 1980's and continue to be low by international standards. The interest exemption has not been a highly visible feature of the tax system, limiting its effectiveness as an incentive. Moreover, the tax free interest exemption is limited only to interest bearing instruments.

Given the expenditure incurred in offering incentives to the public, government must consistently assess the effectiveness of such policies in achieving the intended objectives and adjust these incentives if more effective options are available. Product design features may be more useful when trying to encourage households to save, however these features are absent in the current interest exemption environment and could only be created with the implementation of an alternative non-retirement savings tax incentive.

III. Proposal

In the 2014 Budget Review, the Minister announced the implementation of tax free savings accounts as an incentive to encourage household savings. The proposal will be enacted by creating a definition of 'tax free investments' in section 12T of the Income Tax Act. It is envisaged that service providers will offer tax free savings accounts that would solely comprise of products that qualify as 'tax free investments'. A contribution into a tax free savings account is thus equivalent to an investment in a 'tax free investment'.

Individuals may open multiple tax free savings accounts that may each invest in different ‘tax free investments’, however they may only contribute up to a maximum of R30 000 into these investments within a tax year. The R30 000 annual contribution limit applies to the contributions across all their tax free investments. A lifetime contribution limit of R500 000 will also apply. The returns accruing to these investments will be exempt from income and dividends tax. Amounts within the tax free investments may be withdrawn at any time, however if these amounts are returned to the tax free investments, those amounts will subject to the annual contribution limit. Transfers between tax free investments at different service providers will not count towards the annual contribution limit.

The design features of the tax free investments have been included to overcome behavioural limitations leading to poor financial decisions. The proposed incentive is also applicable to a wider range of asset classes than is the case with the current tax free interest income thresholds. The envisaged eligible products will include exposure to money market instruments, equities and property investments.

The institutions that will be permitted to provide these investments to taxpayers are JSE authorised users, banks, long term insurers, collective investment scheme companies, linked investment services providers and national government. The products that institutions will be permitted to invest in will be determined in accordance with a set of characteristics that will be included in regulations governing the conduct of these investments.

Where a taxpayer contributes in excess of the prevailing annual and lifetime contribution limit in any year, a penalty of 40 per cent on the amount of the excess contribution will be levied by SARS on the individual. The reporting requirements of service providers will be specified through the Business Requirement Specifications that will be issued by SARS.

Where a taxpayer dies while having one or more tax free investments in their name, these investments will be added to the estate of the taxpayer for purposes of levying of estate duty. While the investments are held within the estate, the returns from these investments will continue to be exempt from income and dividends tax. However, the amounts within the tax free investments cannot be transferred to their beneficiary’s tax free investments. Any transfer of tax free investments from one individual (or his estate) to another will be deemed to be a contribution and subject to the annual and lifetime contribution limits of the recipient.

In determining the aggregate capital gain or capital loss of a person, any capital gain or capital loss in respect of the disposal of tax free investments must not be taken into account.

It is proposed that the existing tax free interest income thresholds available in section 10(1)(i) of the Income Tax Act will not be removed from the system. However, they will be retained at current nominal levels, to be eroded in value by inflation over time.

IV. Effective date

The proposed amendments will come into operation on 1 March 2015 and applies in respect of amounts contributed in respect of tax free investments on or after that date.

1.3. VALUATION OF FRINGE BENEFIT FOR EMPLOYER PROVIDED RENTAL ACCOMODATION

[Applicable provision: Paragraph 9 of the Seventh Schedule]

I. Background

In certain instances employers provide employees with residential accommodation. This practice is fairly common when employees are required to be away from their usual place of residence for an extended period due to work commitments.

The provision of residential accommodation by an employer to an employee will result in a taxable fringe benefit for the employee if the accommodation is provided free of charge, or for a consideration which is less than the "rental value". The "rental value" of the accommodation represents the value of the use of the accommodation. The value of the fringe benefit for the employee is the "rental value" of the accommodation less any costs incurred by the employee that relates to the accommodation. Depending on the circumstances under which the employer provided the accommodation, the Income Tax Act dictates different methods to be applied to calculate the "rental value" of the accommodation, and thus the value of the taxable fringe benefit.

However, should the actual value of the use of the accommodation be less than the "rental value" as determined in accordance with the Income Tax Act, the employer may apply for a tax directive. SARS has the discretion to issue a tax directive allowing the "rental value" to be calculated at a lower amount as appears to be fair and reasonable in relation to the specific circumstances.

II. Reasons for change

In instances where the employer provides rental accommodation sourced from a third party to an employee, the "rental value" determined in accordance with the Income Tax Act is often higher than the actual value, giving rise to a higher fringe benefit than is economically fair.

As a result, employers often have to apply to SARS for a tax directive in order to ensure that the employee's calculated fringe benefit is in line with the actual (market value) of the use of the accommodation.

III. Proposal

It is proposed that the tax treatment of the fringe benefit for employer provided rental accommodation sourced from a third party should be aligned for all employees.

It is proposed that if employer-provided accommodation is rented by the employer from an unconnected third party, the "rental value" be determined as equal to the cost to the employer in providing the accommodation. The basis of the proposal is that the cost to the employer would be a fair reflection of the market related cost if the accommodation is provided in terms of an arm's length lease agreement.

IV. Effective date

The proposed amendments will come into operation on 1 March 2015 and applies in respect of years of assessment commencing on or after that date.

1.4. VALUATION OF COMPANY CAR FRINGE BENEFITS

[Applicable provision: Paragraph 7(1)(a) of Seventh Schedule]

I. Background

A company car fringe benefit arises when an employer grants an employee the right of use of a motor vehicle and is described in paragraph 7 of the Seventh Schedule in the Income Tax Act. There are a variety of conditions and exemptions that are described in the Act, but in general the monthly fringe benefit is deemed to be 3.5% of the 'determined value' of the vehicle.

The determined value may vary between different types of employers or transactions since it is based on whether the vehicle was 'acquired', according to the definitions in the legislation. If the vehicle was 'acquired' under a bona fide agreement of sale or exchange concluded between parties at arm's length, the determined value will be the original cost to the employer of purchasing the vehicle. However, in other scenarios the determined value will be either the 'cash value' of the vehicle, the retail market value or the market value of the motor vehicle at the time when the employer first obtained the vehicle or the right of use of that vehicle.

For local vehicle manufacturers however, this cost can be considerably less. Car manufacturers are able to acquire company cars from within the group or even directly from the assembly factories at a considerably lower 'cost' than retail market value.

II. Reasons for change

The separate calculation of determined value based on the method of acquisition creates inequities in the value of the fringe benefit for employees who are granted the right of use of a motor vehicle. Two employees may incur a different fringe benefit even if the motor vehicle of which they have the right of use is identical.

Similar anomalies may arise for local vehicle manufacturers, where the type of acquisition, and the calculation of the determined value, may differ between locally manufactured vehicles and those acquired by other means.

III. Proposal

It is proposed that the tax treatment of company car fringe benefit should be aligned for all employees. In determining the value of the company car fringe benefit, it is proposed that actual retail market value of the car is used in all cases. To avoid a significant impact on the fringe benefit value for employees who currently have the right of use of a motor vehicle it is proposed that this amendment only be applicable for motor vehicles that are acquired after the implementation date.

IV. Effective date

The proposed amendments will come into operation on 1 March 2015 applies in respect of vehicles acquired on and after that date.

1.5. CLARIFICATION OF THE LOSS REQUIREMENT IN RESPECT OF KEY PERSON INSURANCE POLICIES

[Applicable provisions: Section 11(w)(ii)(c)]

I. Background

A 'key person', in the context of 'key person insurance policies', is an employee who is critical to the success of an organisation. Organisations often insure the life of such persons so that if they should die, the negative effects on business continuity are lessened through a benefit pay-out.

The default tax treatment for key person insurance policies is not to allow a deduction on premium contributions but to also not to tax the pay-outs.

In 2011, the dispensation was changed to accommodate policyholders who preferred deductible premiums and to receive a taxable pay-out. Individuals are now allowed to elect a tax treatment whereby premiums are deductible while pay-outs are taxable.

II. Reasons for change

As the legislation stands, it is possible for policyholders to take advantage of this election in respect of policies which protect the organisations, not against normal business losses in the generation of income, but also for policies that protect businesses against losses from these employees not having been able to pay loans with third parties.

It is not an intended outcome of tax policy that insurance policies insuring any costs other than 'normal business losses' resulting from the death of a 'key person' receive deductible tax treatment. Therefore, insurance policies insuring the costs of a company as a result of the 'key person' dying prior to being able to pay outstanding debts are not intended to form part of the election envisaged in the 2011 deduction election.

III. Proposal

It is proposed that the legislation should be amended to clarify that insurance policies ceded for outstanding loans of company employees/directors are not permitted to receive a deduction on policy premiums.

IV. Effective date

The proposed amendments will come into operation on 01 March 2014 and applies in respect of years of assessment commencing on or after that date.

1.6. THE RETIREMENT FUND ACCRUAL DATE

[Applicable provisions: Section 1, Paragraph 4 of the Second Schedule]

I. Background

During retirement individuals who are members of a retirement fund have the option to either annuitise the entire pension fund interest or take up to one third of it as a lump sum. Where the individual annuitises a portion of the benefit, the annuities are taxed as normal income according to the individual's marginal tax rate. Where an individual elects to take a portion of the benefit as a lump sum, the lump sum is taxed according the retirement fund lump sum benefit table.

To this end, individuals are compelled to make an election as to the portion of their retirement interest that they would like to receive as a lump sum and annuity. As the lump sum is taxed according to the lump sum tax tables, and is dependent on the previous level of lump sums received from the retirement fund by the individual, the fund is required to apply to SARS for a tax directive to determine the amount of tax that must be withheld from the lump sum payment to the retiring individual.

The lump sum benefit is deemed to accrue to the individual on the earliest of the dates at which an election is made, a transfer is made, death, or on his or her retirement. Retirement is deemed to occur at the 'normal retirement age', which is usually a predetermined age as defined by the fund rules.

II. Reasons for change

There are instances where, by the date of retirement, individuals have not made an election as to the amount of the retirement fund interest they wish to receive as a lump sum. In these cases, funds are unable to calculate or withhold the required amount of income tax, thus falling foul of the withholding obligations. Further complications arise since the amount of the lump sum that is provided to SARS in the tax directive is based on the amount in the fund on the date of accrual, which may be different to the date on which the individual made an election.

The current stipulation also provides little flexibility for the individual to determine when they would like to start receiving their pension benefits, as it is determined by the normal retirement age of the fund. It is thus difficult for individuals to preserve their retirement fund assets at retirement, which may be preferable if they would like to continue in employment beyond their normal retirement age.

III. Proposal

It is proposed that the date on which the lump sum benefit shall be deemed to accrue to the individual should no longer be dependent on the normal retirement age, but instead should be the date on which the election by the individual takes place.

Individuals may then extend their own date of retirement according to their own circumstances and when they would prefer to start receiving their pension benefits, enhancing preservation. Retirement funds would be required to apply to SARS for a tax directive on the date that the election is made and the amount of the lump sum benefit that would be provided to SARS would match the corresponding amount at the date of election.

IV. Effective date

The proposed amendments will come into operation on 1 March 2015.

1.7. RESTRAINT OF TRADE RECEIPTS

[Applicable provisions: paragraph (cA) definition of gross income and section 11(cA)]

I. Background

A restraint of trade is a contract between two entities where a payment is made from one entity to the other to limit that party's ability to engage in business or seek alternate employment, as determined by the conditions of the contract. For companies and trusts the receipts from restraint of trade agreements are seen as being of a capital nature and are subject to capital gains tax, rather than being treated as normal income.

Restraint of trade payments to natural persons were historically also treated as being of a capital nature. However, to avoid arrangements where employees were being paid large amounts under the guise of a restraint of trade payment (in place of employment income and so avoiding normal income tax), the definition of "gross income" was amended to include restraint of receipts for natural persons. Restraint of trade receipts were also to be included in gross income for labour brokers (who did not have a specific exemption) and personal service providers to focus on the link with employment related income.

II. Reasons for change

The intent of the amendment was to include restraint of trade payments in gross income where the payments could likely be seen to replace remuneration through employment. However, the inclusion of the definition of natural person extended the amendment to situations where no relationship of employment existed.

The result of the amendment is that there exists an anomaly in the treatment between an incorporated business and a sole proprietor. A sole proprietor who receives a restraint of trade payment to not do business within a certain radius will be taxed on the amount in terms of paragraph (cA) and be subject to a deduction of PAYE irrespective of the employment relationship with the entity from whom the restraint of trade payment is made. If a company or trust was involved in an identical arrangement the restraint of trade receipt would be recognised as a capital payment, resulting in different tax implications for the same receipt.

III. Proposal

To align the tax treatment of restraint of trade receipts between natural persons, trusts and companies, and ensure that the avoidance provision is linked to an employment relationship, it is proposed that the provision of 'natural persons' in paragraph (cA) under the definition of 'gross income' be amended.

Instead of including restraint of trade receipts in gross income for all natural persons, it is proposed that only those individuals who have received the payment as a result of any past, present, or future employment or holding of office with the entity making the payment will have the receipt included in gross income. The effect will be that incorporated instances of restraints of trade payments and receipts will be treated the same as instances of unincorporated instances of restraints of trade payments and receipts.

IV. Effective Date

The proposed amendments will come into operation on 1 March 2015.

2. INCOME TAX: BUSINESS (GENERAL)

2.1. THIRD PARTY BACKED SHARES: PREFERENCE SHARE REFINEMENTS ON GUARANTEES

[Applicable provisions: Section 8EA]

I. Background

The third-party backed shares anti-avoidance rule concerns preference shares with dividend yields backed by third parties. The dividend yield of third-party backed shares is treated as ordinary revenue per section 8EA unless the funds derived from the issue of the third-party backed shares were used for a qualifying purpose. This rule equally applies to domestic and foreign dividends.

Third-party backed shares are defined as preference shares in respect of which an enforcement right or obligation exists for the benefit of the holder of the preference shares.

A qualifying purpose can include—

a) the direct or indirect acquisition of equity shares in an operating company;
b) the settlement of debt used for the acquisition as contemplated in (a);
c) the acquisition or redemption of any preference shares used for the acquisition as contemplated in (a); or
d) the payment of any dividend, foreign dividend or interest as it relates to (b) or (c).

At its core, the qualifying purpose exceptions to the anti-avoidance rule require that the consideration for the share issue to be used to fund the acquisition of equity shares (e.g. ordinary equity shares) in an active operating company—

Under the first exception, the consideration for the preference shares issued may be applied to acquire equity shares in an operating company. (Note: No relief from the anti-avoidance rule exists if the holder of the preference share acquires shares in an operating company from a company that is part of the same group of companies as the holder. This limitation is meant to avoid cash injections to a related member of the group posing as an artificial acquisition).

Under the second exception, the consideration may be used for retiring bridging loans initially used for the same purpose.

Under the third exception, the consideration may be used for refinancing preference shares if the initial preference were used directly or indirectly to finance the acquisition of equity shares in an operating company. In the case of this refinancing arrangement, the consideration for the newly issued preference cannot exceed the balance outstanding in respect of the original shares (as well as the accrued interest thereon).

Under the fourth exception, the consideration may be used for the payment of dividends in respect of a redeemed preference share issued for any other qualifying purpose.

II. Reasons for change

A. Refinancing

As indicated above an exception exists that allows for the refinancing of preference shares if the initial preference shares were used to finance the acquisition of equity shares in an operating company.

Concerns have been raised that certain exception rules might erroneously fail to reach the technical relief originally envisaged for the refinancing of preference shares. The provision of security when refinancing third-party backed shares originally used to fund equity acquisitions in operating companies are erroneously not fully covered under the exceptions. The combination of the qualifying purpose definition read with section 8EA(3) provide the ambit for the qualifying purpose exemption. The definition of 'qualifying purpose' allows for the refinancing of debt or preference shares. However section 8EA(3)(b)(ii) currently only allows for the provision of security by the issuer on the issue of preference shares for the direct or indirect acquisition of equity shares but is erroneously silent on the provision of security by the issuer on the refinancing of the preference shares originally used for a qualifying purpose. There is no policy rationale for excluding refinancing in structures covered under the exceptions to the rule. It is, therefore, proposed that the refinancing of qualifying transactions be allowed.

B. Asset-backed preference shares

It has been submitted that the third party guarantees / obligations can be broadened to allow for asset-backed preference shares. Currently, if the exceptions against the anti-avoidance provisions as contemplated in section 8EA apply, the exceptions will allow for a variety of third party guarantees / obligations. These guarantees / obligations can come from:

- The target operating company;
- The initial issuer;
- An intermediary of the initial issuer where the consideration is applied for the purpose of the direct or indirect acquisition of the target operating company;
- Any person that directly or indirectly holds at least 20 per cent of the equity shares of the target operating company, the initial issuer of the preference share or an intermediary issuer as contemplated above; or
- A company that forms part of the same group of companies as the initial issuer of the preference share or an intermediary issuer as contemplated above.

III. Proposal

A. Refinancing

It is proposed that refinancing of qualifying purpose as defined in section 8EA be allowed as an exemption.

B. Asset-backed preference shares

It is proposed that the scope of the exemption guarantees in section 8EA(3)(b) be broadened to allow for the pledging of the equity shares and associated debt claims in the issuer of preference shares.

IV. Effective Date

The proposed amendments will be deemed to have come into operation on 1 January 2013 and applies in respect of any dividend or foreign dividend received or accrued during years of assessment commencing on or after that date.

2.2. THIRD PARTY BACKED SHARES: REVISION OF THE DEFINITION OF OPERATING COMPANY

[Applicable provision: Section 8EA]

I. Background

The third-party backed shares anti-avoidance rule concerns preference shares with dividend yields backed by third parties. The dividend yield of third-party backed shares is treated as ordinary revenue per section 8EA unless the funds derived from the issue of the third-party backed shares were used for a qualifying purpose. The qualifying purpose definition almost in all instances refers to the acquisition of equity shares in an operating company.

II. Reasons for change

The definition of operating company for purposes of this section is very limited. The term ‘operating company’ for the purposes of this section is defined to mean an operating company that conducts continuous business activities that results in the provision of goods and services for consideration.

This definition tends to exclude the activities of Exploration Companies. According to the Mineral and Petroleum Resources Development Act an exploration operation is the processing of new and old seismic data or the process to define a trap to be tested by drilling, logging and extended well testing with the intention of locating a discovery of mineral resources. As per the nature of Exploration Companies the main business activities (exploration) will result in the business activity being carried on continuously but will not result in the provision of goods and services for consideration as contemplated in the ‘operating company’ definition . Third-party backed preference shares issued to acquire equity shares in an Exploration Company (usually by BEE parties) are excluded from the exemption contemplated in this section because of the current definition of ‘operating company’.

III. Proposal

It is proposed that the definition of “operating company” be extended to acknowledge the ambit of the ‘limited’ provision of goods and services business activity of an Exploration Company.

IV. Effective date

The proposed amendments will be deemed to have come into operation on 1 January 2013 and applies in respect of any dividend or foreign dividend received or accrued during years of assessment commencing on or after that date.

2.3. DEDUCTIBLE INTEREST LIMITATION IN RESPECT OF DEBTS OWED TO PERSONS NOT SUBJECT TO TAX

[Applicable provision: Section 23M]

I. Background

While debt capital is an important tool for investment, it can also create opportunities for base erosion. Taxation follows a matching principle – every deduction should have a matching inclusion. Transactions are often entered into whereby deductible interest paid to foreign and other exempt persons is not taxed in the hands of the recipient. For example, a company resident in South Africa claims a deduction for an interest payment and the corresponding income is not taxed in the hands of the company in the foreign jurisdiction.

The impact on the fiscus (domestically) should not raise concern given that it is one deduction against the domestic tax base. However, the combination of two factors: (i) the tax induced bias to use debt over equity financing, and (ii) hybrid entity mismatches resulting from the ‘interaction’ of domestic tax laws and tax treaties has resulted in multinational companies increasingly using such provisions to their advantage Section 23M, (effective 1 January 2015) was introduced to cater for these concerns.

II. Reasons for change

Certain unintended anomalies in the application and impact of these rules have been identified. The anomalies include the following:

A. Adjusted taxable income

Inclusion of Assessed Losses

The interest limitation rule determines a percentage (currently 40 per cent) of adjusted taxable income to limit the deduction of interest incurred on debt owed to persons not subject to tax.

Adjusted taxable income is determined as follows:

Starting point:	Taxable income
Less:	Interest received / accrued
	CFC income
	Recoupments
Plus:	Interest incurred
	Depreciation and amortisation

Taxable income as determined at the end of any year of assessment may have been reduced by the set off of an assessed loss carried forward from the previous year. Taking previous years' assessed losses into account further limits the base on which the overall limitation of interest deduction is calculated.

B. Formula

As a further relief measure, the Act provides for an adjustment of the 40 per cent limit through a formula. The 40 per cent factor is only adjusted in circumstances where a significant increase in the repo rate occurs, i.e. when it exceeds 10 per cent. This does not fully take into account changing market conditions and the resulting costs of servicing commercial debt.

III. Proposal

Based on the above, the following proposals are made:

A. Adjusted taxable income

It is proposed that the adjusted taxable income be amended to exclude the previous years' assessed losses from the current year's adjusted taxable income.

B. Formula

It is proposed that the interest deduction limitation be more closely aligned to the cost of debt financing in the market. The limitation (expressed as a percentage of the tax equivalent of "earnings before interest, taxation, depreciation and amortisation" (EBITDA)) will adjust up and downwards based on the prevailing repo rate. As such, the formula will be amended to link deductible interest expenditure to the average repo rate for the year instead of the current adjustment if the repo rate exceeds 10 per cent. The interest deduction limitation will now be based exclusively on an adjustable formula whereby any change to the average repo rate for the year of assessment (together with a 400 basis point addition to the average repo rate) is reflected to allow for a balanced reflection of market conditions on the interest deduction limitation. A 400 basis point addition to the average repo rate will mimic the current costs of obtaining debt.

As a mechanism to protect the fiscus and tax base in periods of high interest rates, a cap on the interest deduction limitation of 60 per cent is proposed. The proposed limitation implies a doubling of the current repo rate (5.5 per cent) before the cap applies. Excessive debt can also have macroeconomic implications for the economy if companies are unsustainably leveraged and the tax system should not play a role in 'encouraging' companies towards a debt financing bias.

IV. Effective date

The proposed amendments will come into operation on 1 January 2015 and applies in respect of interest incurred on or after that date.

2.4. DEDUCTIBLE INTEREST LIMITATION IN RESPECT OF REORGANISATION AND ACQUISITION TRANSACTIONS

[Applicable provision: Section 23N]

I. Background

During 2013 specific rules relating to the limitation of interest deductions for reorganisation and acquisition transactions were introduced to reduce the risk to the economy and fiscus emanating from the use of excessive debt to fund company acquisitions.

Interest incurred in respect of debt used to finance the acquisition of business assets is generally deductible, as business assets are intended to produce income. Interest incurred on debt used to acquire shares is generally not deductible because shares produce only exempt dividend income.

Despite the above, interest deductions associated with share acquisitions can be achieved indirectly through the use of the section 45 rollover provisions (or to a lesser extent, the section 47 rollover provisions). This objective is generally achieved when, for example, an acquiring company purchases all of the shares of a target company using temporary debt-financing. The acquiring company cannot deduct the interest incurred as the debt was used to acquire shares.

This is followed by a tax-deferred sale of assets by the target company to a newly formed subsidiary of the acquiring company that is funded via long-term debt. In these circumstances, the interest on the long-term debt is deductible (after applying the limitations introduced by section 23N) by the newly formed subsidiary on the assumption that the debt is directly linked to income producing assets of the former target company. In addition, the target company is sitting on cash received for the sale of assets that it declares as dividends to the acquiring company. The dividend income will be exempt in the hands of the acquirer.

II. Reasons for change

Certain unintended anomalies in the application and impact of these rules have been identified. The anomalies include the following:

A. Adjusted taxable income

Inclusion of Assessed Losses

The interest limitation rule determines a percentage (currently 40 per cent) of adjusted taxable income to limit the deduction of interest incurred on debt used to finance reorganisation and acquisition transactions by the acquiring company.

Adjusted taxable income is determined as follows:

Starting point:	Taxable income
Less:	Interest received / accrued
	CFC income
	Recoupments
Plus:	Interest incurred
	Depreciation and amortisation
	75 per cent of rental income

Taxable income as determined at the end of any year of assessment may have been reduced by the set off of an assessed loss carried forward from the previous year. Taking previous years' assessed losses into account further limits the base on which the overall limitation of interest deduction is calculated.

Year in which the limitation calculation is determined

In determining the interest limitation, the taxpayer is allowed to select the higher of adjusted taxable income for two years, that is, (a) the year in which the acquisition or reorganisation transaction is entered into; or (b) the year of assessment in which the interest expenditure is incurred. The adjusted taxable income for the year preceding the transaction is not taken into account.

The purpose of giving taxpayers the benefit of the higher of the adjusted taxable income for two years was to provide parties undertaking a company reorganisation or acquisition with the certainty that they can at least rely on the adjusted taxable income amount for the year in which the transaction is entered into. However, the taxable income in the year of acquisition could be influenced by the reorganisation or acquisition transaction which could be seen as an extraordinary event and hence is not an accurate reflection of the profitability of the company compared to the previous year of assessment.

B. Formula

As a further relief measure, the Act provides for an adjustment of the 40 per cent limit through a formula. The 40 per cent factor is only adjusted in circumstances where a significant increase in the repo rate occurs, i.e. when it exceeds 10 per cent. This does not take into account the costs of servicing commercial debt.

III. Proposal

Based on the above, the following proposals are made:

A. Adjusted taxable income

The proposed changes to adjusted taxable income are twofold:

The previous years' assessed losses will be excluded from the current year's adjusted taxable income.

The year of assessment on which adjusted taxable income is based can also include the year of assessment immediately preceding the year during which the reorganisation or acquisition transaction takes place (depending on which is the highest of the three possibilities).

B. Formula

It is proposed that the interest deduction limitation be more closely aligned to the cost of debt financing in the market. The limitation (expressed as a percentage of the tax equivalent of "earnings before interest, taxation, depreciation and amortisation" (EBITDA)) will adjust up and downwards based on the prevailing repo rate. As such, the formula will be amended to link deductible interest expenditure to the average repo rate for the year instead of the current adjustment if the repo rate exceeds 10 per cent. The interest deduction limitation will now be based exclusively on an adjustable formula whereby any change to the average repo rate for the year of assessment (together with a 400 basis point addition to the average repo rate) is reflected to allow for a balanced reflection of market conditions on the interest deduction limitation. A 400 basis point addition to the average repo rate will mimic the current costs of obtaining debt.

As a mechanism to protect the fiscus and tax base in periods of high interest rates, a cap on the interest deduction limitation of 60 per cent is proposed. The proposed limitation implies a doubling of the current repo rate (5.5 per cent) before the cap applies. Excessive debt can also have macroeconomic implications for the economy if companies are unsustainably leveraged and the tax system should not play a role in 'encouraging' companies towards a debt financing bias.

IV. Effective date

The proposed amendments will come into operation on 1 January 2015 and applies in respect of years of assessment commencing on or after that date.

2.5. DIVIDENDS TAX: CONTRIBUTED TAX CAPITAL REFINEMENTS

[Applicable provisions: Section 1-"contributed tax capita definition"]

I. Background

Contributed tax capital is a notional tax amount derived from contributions made to a company by holders of a class of shares as consideration for the issue of that class of shares by that company. It is reduced by any capital amount that is subsequently transferred back by the company to one or more shareholders of that class of shares (commonly known as a capital distribution) utilising that notional tax amount so received.

Contributed tax capital roll-overs are permitted where shares are transferred in certain reorganisation transactions.

II. Reasons for change

Shares that are issued at a specific amount per share (convertible shares) may be converted to another class of shares (or the same class but with all the rights attached to that share now vesting to that shareholder) on the occurrence of any specified contingency. It is envisaged that if it is the same class of shares but with different rights attached to it pending the specified contingency, that it would be deemed for tax purposes to be two separate classes of shares. Currently, roll-over treatment does not apply to convertible shares. As a result, the contributed tax capital on the convertible shares will be lost because the class of shares to which it relates differs from the class of shares after conversion. This type of conversion was not considered when the concept of contributed tax capital was introduced.

III. Proposal

It is proposed that the portion of the contributed tax capital in relation to the convertible shares immediately prior to conversion that relates to the shares that are converted to the other class of shares be added to the contributed tax capital of that other class of shares and deducted from the contributed tax capital reflected in respect of the remaining convertible shares. It is also proposed that any consideration received by the company in respect of the conversion of the shares be reflected as part of the contributed tax capital in relation to that other class of shares.

IV. Effective date

The proposed amendments will come into operation on or after 1 January 2015.

2.6. REVISION OF SHARIA COMPLIANT FINANCING ARRANGEMENTS

[Applicable provisions: Section 24JA]

I. Background

Legislation was enacted in 2010 that recognises certain forms of Islamic finance as equivalent to traditional finance entailing interest. During 2011 more forms of Islamic finance were included in the Income Tax Act, as Islamic financing, like conventional financing, required government bonds as a “risk-free” standard so as to set the pricing for all other privately issued Islamic bonds.

A Sukuk is defined in the Income Tax Act as a sharia financing agreement, whereby the government disposes of an interest in an asset to a trust (which the investors fund) and leases the asset back from the trust. Any consideration received for the use of that asset by the trust is distributed to the investors and per the Income Tax Act is deemed to be interest in the hands of the investors. At the end of the lease term, government repurchases the asset which serves as the repayment of the principal investment.

II. Reasons for change

The current definition excludes other entities from also entering into Sukuk arrangements. Sharia compliant financing is a potential source of affordable funding which will benefit the economy, and particularly state owned enterprises.

III. Proposal

It is proposed that public entities should be included in the Islamic Finance arrangement. It is proposed that the definition and deeming provisions of a Sukuk should be amended to also include other entities.

IV. Effective Date

The proposed amendments will come into operation on 1 April 2015.

3. INCOME TAX: BUSINESS (FINANCIAL INSTITUTIONS AND PRODUCTS)

3.1. LONG-TERM INSURER'S RISK INSURANCE BUSINESS TO BE TAXED IN CORPORATE FUND

[Applicable provision: section 29A]

I. Background

Currently, South Africa taxes long term insurance business in accordance with the four funds approach. In terms of the four funds approach, all long-term insurance business written by a long-term insurer must be separated into three policyholder funds and a corporate fund. These are as follows:

- The Individual Policyholder Fund (IPF) for policies owned by individuals.
- The Company Policyholder Fund (CPF) for policies owned by corporate entities.
- The Untaxed Policyholder Fund (UPF) for policies owned by untaxed entities and annuity contracts. It consists of policies owned by retirement funds and other tax exempt entities and annuity contracts currently paying annuities.
- Corporate Fund. It consists of all the assets held by the insurer and all the liabilities owed by the insurer not falling in the above-mentioned policyholder funds.

With regard to the three policyholders funds ((i.e. IPF, CPF and UPF), the insurer is required to allocate assets, income, expenditure and liabilities relating to each fund and the taxable income of each fund is determined separately in accordance with the applicable taxation principles. With regard to the policyholder funds, the insurer acts as a "trustee" to collect tax from the pool of policyholders and to pay it to SARS "on behalf" of the policyholders.

With regard to the corporate fund, the intention of the legislature is to tax the insurer (corporate fund) in respect of "profits earned" from running the insurance business. The liabilities of each policyholder fund are required to be actuarially valued at the end of each year of assessment and to the extent that assets in a policyholder fund exceed the liabilities the surplus must be transferred to the corporate fund where it is taxed at the corporate income tax rate. The surpluses transferred represent part of the profit earned by the "shareholder" fund of the long-term insurer.

II. Reasons for change

There are concerns that the current taxation of long term insurers does not distinguish between investment and risk business. In practice, a risk policy will pay out a specified cash amount on the happening of an event regardless of the amount of investment income earned during the term of the policy. As such, this could result in a loss in respect of a specific policy.

Example:

Facts

A disability policy is issued for R500 000 in year 1.
The policyholder becomes disabled in year 4.
During the duration of the policy, the policyholder paid premiums of R36 000.
The policyholder received a cash payment of R500 000 when he became disabled.

Results

Ignoring other expenses such as sales commission and the cost of administering the policy, the disability policy will result in a loss of R464 000 for the insurer.
Profit or loss arising in respect of risk business should therefore not form part of the tax calculation of a policyholder fund since it is not part of the investment business that should be taxed on the trustee basis. It should be taxed in the corporate fund.

III. Proposal

A. Overview

It is proposed that business in respect of risk policies be taxed in the corporate fund.

B. Risk policy

A risk policy is defined as:

a policy issued by an insurer during the insurer's year of assessment commencing on or after 1 January 2016 in terms of which any benefits payable under a policy is dependent on any future event the happening of which is uncertain or in terms of which any amount payable under the policy is only payable by reason of death; or any reinsurance policy in respect of a policy described under the bullet above.

A policy with both investment and risk elements will be a risk policy if any of the policy benefits under the policy are risk benefits, even if it represents only a small portion of the total policy benefits.

Currently disability policies, health policies, term life insurance and credit life insurance are all policies where the benefits under the policy depend on any future event the happening of which is uncertain. Funeral cover and life cover are policies under which an amount is payable by reason of death.

Assets to cover liabilities of policies where any of the total policy benefits are risk benefits are to be allocated to the corporate fund. Only assets having a market value equal to the value of liabilities determined in relation to policies that are not risk policies shall be placed in policyholder funds.

C. Deduction for risk insurance liabilities

The corporate fund shall be allowed to annually claim a deduction equal to the amount of the insurance liabilities reduced by reinsurance assets in respect of risk policies determined at the end of the year in accordance with IFRS as applied for purposes of financial reporting by the insurer in respect of that year of assessment. The amount of insurance liabilities reduced by reinsurance assets in respect of risk policies claimed in the preceding year of assessment must be added back.

D. Avoiding loss for the fiscus

The corporate fund will be a mixed fund in which both surplus assets of the insurer and the risk business of the insurer (which relates to policies issued during the insurer's years of assessment commencing on or after 1 January 2016) is allocated.

The insurer will have to include all premiums received or accrued in respect of risk policies in the income of the corporate fund and will *inter alia* be allowed to deduct all claims actually incurred in respect of risk policies from its income. In terms of subsection 12 the insurer allocates amounts in respect of dividends received, foreign dividends received and proceeds and expenditure in respect of capital assets to the four funds. To the extent that those amounts are allocated to the corporate fund they could be utilised by the corporate fund to pay claims on risk policies. This can lead to an inconsistency in that an amount of say dividends, which is exempt from tax, could be used to pay a claim in respect of a risk policy which will further entitle the insurer to claim a tax deduction in respect of the amount in the corporate fund.

To avoid this subsection 11*(b)* has been inserted. This subsection provides that the following percentage of dividends or foreign dividends received will not be exempt from income tax:

$$\frac{\text{Liabilities in respect of risk policies as determined in accordance with IFRS in respect of the year of assessment}}{\text{Total value of assets in the corporate fund at the end of the year of assessment}} \text{ X } 100$$

In the case of capital gains, the above percentage of capital gains will be subject to normal tax at a rate of 28%.

E. Reinsurance premiums and reinsurance claims

The corporate fund will have to include reinsurance claims received in and deduct reinsurance premiums paid from its income. Therefore, subsection 11*(g)* will not apply to risk policies.

IV. Effective date

The proposed amendments will come into operation on 1 January 2016 and applies in respect of years of assessment commencing on and after that date.

3.2. LONG TERM INSURERS: AVOIDANCE OF UNWARRANTED RELIEF FROM ONGOING TAXATION IN RESPECT OF FOREIGN REINSURANCE

[Applicable provision: section 29A(11)(g)]

I. Background

Long-term insurers must disregard premiums paid and claims received in respect of reinsurance policies when they calculate taxable income in accordance with the four fund approach. Due to amendments to section 29A (see 3.4 below) this will only apply to reinsurance premiums paid and reinsurance claims received in respect of investment policies.

However, a problem exists in the case of foreign reinsurance because this form of reinsurance held by long-term insurers have unwarranted relief from ongoing taxation.

II. Reasons for change

Where a policyholder invest in a linked policies issued by long-term insurers the policy is for example linked to the growth of a share in a foreign company. The Long-term insurer reinsures the linked policy with a foreign reinsurer in a low tax jurisdiction or in a tax haven. The foreign reinsurer utilises the premium it received to purchase shares in the relevant foreign company. On the maturity date of the policy, the long-term insurer claims the full payout value of the linked policy from the reinsurer. Since the long-term insurer must disregard premiums paid and claims received on reinsurance policies when it calculate taxable income under the four fund approach, no tax is payable on the growth in the linked policy.

<u>Example:</u>

The policyholder invests R100 in a linked policy. The growth in the policy is linked to the performance of shares in foreign company X. The long-term insurer reinsures the linked policy and pays a R100 premium to the foreign reinsurer, which is often a subsidiary of the long-term insurer. The foreign reinsurer invests the R100 in shares in company X. On the maturity date of the linked policy, the long-term insurer pays R150 to the policyholder and claims R150 from the reinsurer.

Since the long-term insurer must disregard the premiums paid and the claims received on reinsurance policies when determining taxable income in accordance with the four fund approach in section 29A of the Income Tax Act, the R50 growth in the linked policy is not subject to tax.

III. Proposal

In order to rectify this, it is proposed that amendments should be made in section 29A (11)(g) of the Income Tax Act so that the net returns from foreign reinsurance be included in the calculation of the insurer's taxable income.

IV. Effective date

The proposed amendment will come into operation on 17 July 2014 and applies in respect of years of assessment commencing on or after that date.

3.3. AMENDMENT OF DEFINITION OF INSTRUMENT

[Applicable provision: section 24J]

I. Background

In terms of this section total interest, as widely defined in this section, is spread over the period or term of a financial arrangement by compounding the interest over fixed accrual periods using a predetermined rate referred to as 'yield to maturity'. This section provides for the deduction of interest in the hands of the holder of an income instrument as well as the amounts that must be included in gross income of the issuer of an instrument, as defined.

"Instrument" is defined to include:

- any form of interest-bearing arrangement or debt;
- any acquisition or disposal of any right to receive interest or the obligation to pay any interest, as the case may be, in terms of any other interest-bearing arrangement; but excluding any lease agreement (other than a sale and leaseback arrangement as contemplated in section 23G).

II. Reasons for change

Long-term insurance companies issue policies such as endowment policies and smoothed/stable bonus products that have a guaranteed value for the policyholder. These types of products may inadvertently be treated as "instruments" for purposes of section 24J which could result in the long-term insurer, acting as a trustee of the policyholders, being taxed in terms of section 24J on the interest that accrued to the long-term insurer. That was never the intention when the legislation was enacted.

III. Proposal

It is proposed that the wording of the definition of "instrument" is amended by excluding any policy issued by an insurer as defined in section 29A from the definition.

IV. Effective date

The proposed amendment will be deemed to have come into operation on 1 January 1996 and applies in respect of years of assessment commencing on and after that date.

3.4. REFINEMENTS OF REAL ESTATE INVESTMENT TRUSTS (REITS)

[Applicable provision: section 25BB]

I. Background

In terms of REITs tax legislation, a REIT or controlled company, which is a resident, must deduct from its income for a year of assessment the amount of any qualifying distribution made to its shareholders. (Where the REIT is a trust and a collective investment scheme in property under the Collective Investment Schemes Control Act it is deemed to be a company).

Broadly speaking, a qualifying distribution means dividends paid or payable by the REIT or controlled company and interest incurred in respect of debentures that form part of a linked unit in a company that is a REIT or property company where 75 per cent of the gross income of that company in the preceding year of assessment consisted of rental income.

A dividend or foreign dividend from a company that is a property company at the time of the distribution of that dividend forms part of the rental income of the REIT or controlled company, as the case may be.

A REIT or controlled company is also exempt from capital gains tax on the disposal of shares or linked units in a property company.

Currently a property company is defined as a company “in which 20 per cent or more of the equity shares or linked units are held by a REIT or a controlled company, and

of which at the end of the previous year of assessment 80 per cent or more of the value of the assets in the annual financial statements prepared in accordance with the Companies Act for the previous year of assessment, is directly or indirectly attributable to immovable property”.

II. Reason for change

In many instances a REIT or controlled company holds more than 20% (often 100%) of the shares in a foreign company of which 80 per cent or more of the value of assets consists of immovable property. Foreign companies will not prepare annual financial statements in accordance with the South African Companies Act since this act does not apply to a foreign company. By inserting the requirement that annual financial statements must be prepared in accordance with the Companies Act, all companies incorporated in foreign jurisdictions were therefore inadvertently excluded from the definition of ‘foreign company’.

III. Proposal

It is proposed to amend paragraph (b) of the definition of ‘property company’ to the effect that financial statements prepared in accordance with the Companies Act or IFRS will be acceptable.

IV. Effective date

The proposed amendment is deemed to have come into operation on 1 April 2013 and applies in respect of years of assessment commencing on and after that date.

3.5. REVISION OF FAIR VALUE TAXATION IN RESPECT OF FINANCIAL ASSETS AND LIABILITIES

[Applicable provision: Section 24JB]

I. Background

Currently, a covered person as defined in this section must annually be taxed at fair value on the growth (or decline) in the value of an interest in a partnership. The reason for this is that an interest in a partnership is regarded as a financial asset under International Accounting Standard 39.

II. Reasons for change

The normal tax principles applicable to partnerships in the Act should rather apply to tax the partners on the disposal of ‘partnership’ assets. The intention of the legislature was not to tax the covered person annually on the growth of its interest in a partnership.

III. Proposal

In order to address the anomaly, the following is proposed:

- Exclude ‘interest in a partnership’ from financial assets to which fair value taxation in terms of subsection (2) apply.
- Replace the term ‘financial instrument’ with the term ‘financial assets and financial liabilities’
- Change the heading of the current section to more accurately reflect the intention of the provision.

IV. Effective date

The proposed amendment is deemed to have come into operation on 1 January 2014 and applies in respect of years of assessment commencing on and after that date.

4. INCOME TAX: BUSINESS (INCENTIVES)

4.1. REFINEMENT OF ALLOWANCES IN RESPECT OF TELEPHONE LINES OR CABLES USED FOR THE TRANSMISSION OF ELECTRONIC COMMUNICATIONS

[Applicable provision: Section 12D]

I. Background

Assets that are considered to be permanent in nature have a long lifespan or period of use and are generally viewed differently to plant and machinery that is subject to wear and tear that has a much shorter lifespan. However, over a number of years there has been a need to allow certain assets to be depreciated over a specified period for income tax purposes.

In line with international practice, section 12D was introduced (in 2000) to cater for the depreciation of pipelines, transmission lines and railway lines.

The following write-off periods were granted under this section:

- 10 years for pipelines used for transporting natural oil;
- 20 years for electricity and telephone transmission lines; and
- 20 years for railway lines.

The allowances were made available for new and unused structures used directly by the owner thereof in carrying on the business of transmitting or transporting the relevant products.

II. Reasons for change

A. Revision of useful life

It appears that it is necessary to review the period over which telephone lines or cables used for the transmission of any signal for the purposes of telecommunication are depreciated for two main reasons. Firstly, improvements in technology, and secondly, the move from copper wiring to fibre optics to maintain a suitable standard of telecommunication services has an impact on the expected useful life of these lines and cables. Failure to maintain lines / cables that are damaged from wear and tear (resulting from the elements, civil construction activities, motor vehicle and other accidents, copper theft, sabotage, lightning damage or normal ageing) results in slower DSL speeds and noise problems. Maintenance and the addition of new lines / cables to the network often results in multiple joins of copper wiring, sometimes of differing thickness that reduces speeds and impinges on the useful economic life.

Moving to fibre optics makes sense in such an environment; however fibre optic cabling is also not immune to wear and tear either. Cable route damage is often inflicted by third parties in construction activities or road alterations. Such damage has a medium to long-term effect, increasing the fibre stress levels and / or bending radius and normally results in the introduction of additional fibre joints that further degrade the cable's transmission capabilities.

Industry practice is to write off both copper and fibre optic lines / cables over 15 years for accounting purposes. International comparisons show that other countries allow a favourable tax depreciation allowance for these assets.

B. Second-hand purchases

Purchases of used assets (lines or cables used for the transmission of any signal for the purposes of telecommunication) are becoming more common in the telecommunications industry. Doing a fibre swap in existing infrastructure is cheaper than outlaying capital to build new infrastructure required to support the fibre. Such purchases are not eligible for the section 12D allowance, which requires assets to be new and unused.

III. Proposal

It is proposed that the write-off period for telephone lines or cables used for the transmission of any signal for the purposes of telecommunication should be refined on the following grounds:

To align the tax treatment, for depreciation purposes, of such assets with international practice;

To move towards the most suitable expected economic life of such assets, given technological improvements and the environment that affect the useful life of the asset; and

To allow for used assets in respect of the telecommunications industry to qualify for the depreciation allowance.

In view of the above, it is proposed that:

Telephone lines or cables used for the transmission of any signal for the purposes of telecommunication be eligible for a 15 year depreciation allowance (this translates into an annual write off of 6.67 per cent); and

Used assets for the transmission of any signal for the purposes of telecommunication be eligible be eligible for a depreciation allowance in terms of section 12D.

IV. Effective date

The proposed amendments will come into operation on 1 April 2015.

4.2. REVISION OF THE RESEARCH AND DEVELOPMENT INCENTIVE

[Applicable provision: Section 11D]

Policy background for research and development (R&D) incentive

The income tax system contains an incentive for research and development aimed at realising the following objectives:

a) To increase the after-tax return of the investment to the company so that it becomes more profitable to increase R&D investment and conduct more R&D in South Africa.
b) To increase the positive spill-over to the rest of society through knowledge transfer and skills upliftment.
c) To encourage spending on R&D activities and the conducting of R&D that would not have occurred in the absence of the incentive (additionality).

The tax incentive is in the form of a 150 per cent deduction for non-capital R&D expenditure.

Clinical Trials

I. Background

Offshoring and outsourcing the pharmaceutical value chain has become standard practice for companies to split the drug development process into two: (i) early stage research is undertaken in one country and (ii) clinical trials are outsourced to different countries. This presents an opportunity for South Africa to develop the capability to undertake clinical trial activities, which will lead to increased opportunities to participate in early stages of the drug development process.

The value of carefully constructed clinical trials for the testing and evaluation of new treatments and medicines is well recognized internationally as constituting R&D activities. The policy intent during the 2013 Taxation Laws Amendment Bill process was to recognise this and allow taxpayers conducting certain clinical trials to claim the R&D tax incentive.

Clinical trials and their protocols are highly regulated and strictly controlled (both internationally and in South Africa) with little scope for the alteration or amendment thereof, or for any deviation therefrom – particularly once finalized, approved and registered. For this reason, clinical trials were (prior to the 2013 amendments) not considered to be research and development for the purposes of the tax incentive if the person conducting the research and development did not have the authority to determine or alter the methodology of research.

In terms of section 11D(6)(a), a person carries on research and development if that person may determine or alter the methodology of the research.

II. Reasons for change

The 2013 Taxation Laws Amendment Bill introduced amendments to section 11D whereby section 11D(6)(b) was introduced. Section 11D(6)(b) provides that the Minister of Science and Technology may allow as research and development (for the purposes of the tax incentive) certain categories that would not have constituted research and development because the taxpayer did not have the authority to determine or alter the methodology of research.

This amendment sought to allow the Minister of Science and Technology to categorise clinical trials as research and development eligible for the tax incentive even though the person conducting the research does not have the authority to determine or alter the methodology of research. However, a further barrier prevents clinical trials from being eligible for this incentive - the definition of research and development for the purposes of s11D(1) does not cater for clinical trials. The proposed amendments seek to amend this oversight and deem clinical trials to be R&D in terms of section 11D, subject to certain criteria.

III. Proposal

To provide clarity and certainty to taxpayers, it is proposed that the definition of R&D (for the purposes of section 11D eligibility) be revised to make clinical trials eligible for the 150 per cent deduction.

The criteria for eligible R&D activities will be provided by way of regulation.

IV. Effective date

The proposed amendments will be deemed to have come into operation on 1 October 2012 and applies in respect of expenditure incurred on research and development on and after that date, but before 1 October 2022.

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Multisource pharmaceutical products

I. Background

In terms of existing legislation, benefitting from S11D requires the multisource pharmaceutical product manufacturer to be the inventor or developer, or be making a significant and innovative improvement to the original brand name drug. Generally, local multisource pharmaceutical product manufacturers will be denied a deduction under S11D as their activities constitute conducting R&D to achieve results or using technology which is already common place.

II. Reasons for change

The process of bringing a multisource pharmaceutical product of an established brand name drug to market requires extensive investment in research, development and human resources for each stage of the development of the multisource pharmaceutical product. The company producing such products must also conduct certain studies and pass strict standards before the product can be made available.

Diseases place a heavy burden on South Africa's health system. Government support is essential for encouraging and strengthening local research and development, R&D and innovation capabilities to produce and make available multisource pharmaceutical products at a lower cost to consumers.

III. Proposal

It is proposed that section 11D be amended to make multisource pharmaceutical products eligible for the R&D tax incentive.

The criteria for eligible R&D activities will be provided by way of regulation.

IV. Effective date

The proposed amendments for clinical trials and multisource pharmaceutical products will be deemed to have come into operation on 1 October 2012 and applies in respect of expenditure incurred on research and development on and after that date, but before 1 October 2022.

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Refining the functional design requirement to include the innovative nature of the design

I. Background

The previous version of section 11D required the Minister of Science and Technology to have regard to the innovative nature of the research and development when approving an application.

Section 11D(1)(b)(ii) includes in the definition of "research and development" the creating or developing of a functional design as defined in section 1 of the Designs Act capable for qualifying for registration under section 14 of that Act.

Section 1 of the Designs Act defines a functional design to mean -

"any design applied to any article, whether for the pattern or the shape or the configuration thereof … having features which are necessitated by the function which the article to which the design is applied, is to perform, …"

Section 14 of the Designs Act requires that "(1)(b) in the case of a functional design, is – (i) new; and (ii) not commonplace in the art in question."

For a design to be "new" it must simply be different from a previous design and for it not to be "commonplace" it must not be common-or-garden or of a type which would excite no particular attention to those in the relevant art.

II. Reasons for change

It is possible for a new design of an existing article to qualify as a functional design even though there has been no scientific or technological advance.

The Oslo Manual states in paragraph 162 that -

"[d]esign is an integral part of the development and implementation of product innovations. However, design changes that do not involve a significant change in a product's functional characteristics or intended uses are not product innovations."

III. Proposal

It is proposed that the definition of "research and development" be revised to re-instate the innovation requirement in respect of functional design and to align the requirement with that identified in the Oslo Manual.

IV. Effective date

The proposed amendment to functional designs will come into operation on 1 January 2015 and applies in respect of expenditure incurred on research and development on and after that date, but before 1 October 2022.

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Adjustment of deduction in respect of R&D funding

I. Background

Companies often enter into arrangements whereby one company conducts R&D activities that are funded by another company. This arrangement often occurs between connected parties. Prior to the 2013 Taxation Laws Amendment Bill, either the domestic company undertaking an R&D activity or the funding group member could seek approval for the additional 50 per cent deduction (depending which party was able to alter or determine the methodology of the said R&D). If the funding party obtained approval for this additional 50 per cent, the deduction was available only to the extent of the expenditure undertaken by the domestic company for the purposes of the R&D activity (no 50 per cent deduction allowed in respect of mark-up or administrative costs, for example).

The 2013 Taxation Laws Amendment Bill introduced amendments to section 11D whereby section 11D(3) was deleted and replaced by an amended section 11D(2). The amended section 11D(2) now allows for a 150 per cent deduction, subject to approval, and not just an additional 50 per cent on qualifying expenditure. Section 11D(4)(c)(ii), which allows funding of qualifying research and development between group companies, was then amended to refer to section 11D(2) of the Act, however s11D(5) was left unchanged.

II. Reasons for change

The deduction mentioned in section 11D(5) of the Act relates to the additional 50 per cent deduction that is claimable on qualifying research and development activities in terms of the previous section 11D(3) of the Act. The subsection was not amended to relate to the 150 per cent deduction claimable on qualifying research and development activities in terms of the amended section 11D(2) of the Act. This has led to an unintended consequence whereby the company funding the research and development within a group of companies can only claim 50 per cent of the actual expenditure incurred by the party conducting the R&D, instead of 150 per cent of actual expenditure incurred. Refinement of the inclusion of certain categories as research and development

III. Proposal

It is proposed that section 11D(5) be amended to make the deduction by the company that funds the expenditure limited to an amount of 150 per cent of actual expenditure incurred by the funded company directly and solely in respect of that research and development.

IV. Effective date

The proposed amendments for R&D funding will be deemed to have come into operation on 1 January 2014 and applies in respect of expenditure incurred on research and development on and after that date, but before 1 October 2022.

4.3. TAX TREATMENT OF ALLOWANCES IN RESPECT OF PUBLIC PRIVATE PARTNERSHIP

[Applicable Provisions: Sections 12NA and 10(zI)]

I. Background

The general denial of the improvement allowance in respect of leased land or buildings of an exempt lessor was enacted in the early 1980's to prevent tax avoidance. At that time, a number of lease financing schemes existed so that financiers could obtain artificial write-offs for improvements on leased property as if these financiers had directly owned and operated the underlying property. These schemes were particularly prevalent in the case of exempt parties seeking finance because these entities lacked a tax base from which a depreciation allowance could be utilised.

There are many instances where Government enters into arrangements with the private sector to provide underlying land for constructing buildings or improvements thereon without parting with ownership of the land. Such an arrangement is known as a Public Private Partnership (PPP). PPPs are necessary as Government sometimes lacks the upfront cash funds to directly undertake the desired construction. In recognition of this practice, a straight-line write-off was allowed for improvements in the case of PPPs and in the case of Government-owned land (as long as the lease period lasted at least 20 years). However, because this write-off was sometimes less favourable than those in the case of improvements made to directly-owned land (e.g. the accelerated write-offs in a UDZ), section 12N was introduced.

Section 12N, which is currently applicable in respect of a right of use or occupation granted to a private party in terms of a PPP on or after 2 November 2010, treats a qualifying taxpayer (private party) that effects an improvement on land or buildings in terms of a PPP as if it owns the land and buildings in respect of which the improvements were made. Provided the requirements of section 12N and the various capital allowance sections are met, the private party to the PPP may claim the capital allowances in respect of the improvements.

In order to qualify for an allowance under section 12N, the taxpayer must:

a) hold a right of use or occupation of land or a building;
b) effect an improvement on the land or to the building in terms of a PPP;
c) incur expenditure to effect the improvement noted above; and
d) use or occupy the land or building for the production of income, or derive income from the land or building.

If the above applies, the private party is treated as if it owns the building and can claim an allowance on improvements in terms of sections 11D, 12B, 12D, 12F, 12I, 12S, 13, 13*bis*, 13*ter*, 13*quat*, 13*quin*, 13*sex*, or 36, to the extent that the other requirements of those sections are met.

II. Reasons for change

Public private partnerships are an important element of South Africa's strategy to develop its public infrastructure. Certain types of PPP agreements do not meet the criteria set out in section 12N and these limitations have an impact on the affordability for Government in respect of PPPs. The private party incurring expenditure of a capital nature is unable to claim depreciation on the cost of the improvement (e.g. building) and cannot claim a section 11(a) deduction as it is not revenue in nature. This is priced into the contract by the private party, rendering the project more expensive for Government. The main stumbling block is that the '*right of use or occupation*' is not granted to the private party in all PPPs.

An example of an agreement that does not meet the section 12N criteria is a serviced office accommodation project. In such models, Government normally enters into a contract with a private party where the private party will be responsible for financing; designing and constructing; and operating and maintaining a Government owned building. Government is essentially buying a serviced working environment and the asset is only constructed to provide the service. Here, the private party fails to meet the requirements of section12N as they typically have *service access* to the building, not a *right of use* or *occupation* of the land or a building.

III. Proposal

A. Overview

Taxpayers that are the private party to a PPP contract with Government where government will use or occupy the land or building will be allowed to claim a capital allowance for expenditure incurred (of a capital nature) to effect improvements on Government-owned land. To be eligible for a capital allowance in terms of section 12NA, the private party must be party to a PPP agreement with Government and must incur expenditure of a capital nature. All maintenance and operating expenses will be allowed as per normal under section 11(a).

While the artificial shifting of depreciation allowances from exempt persons to taxable persons remains of concern, the general prohibition of depreciation allowances in respect of improvements undertaken by private parties of government-owned property where government will use or occupy the land or building potentially constrains overall Government policy as it relates to infrastructure development for institutional functionality.

B. Anti-double-dipping

Reduction of tax attributes:

In the case of exempt receipts and accruals received from Government for the performance of an obligation pursuant to a PPP (catered for in section 10(zI)), an anti-double-dipping rule will apply. Stated differently, the use of a tax exempt 'capital contribution' in respect of that PPP should not be allowed as a means of achieving a further tax deduction that can be used against other earnings. In instances where a tax exempt capital contribution is awarded to the taxpayer, this rule will apply as follows:

To the extent that the contribution is actually expended to an amount at least equal to that in respect of the actual cost of acquisition, creation or improvement of the land or building, the amount of the allowance against income generated from the PPP agreement over the lesser of the duration of the PPP contract or 25 years must be reduced by the amount of the capital contribution (catered for in section 10(zI)). This ensures alignment with the tax treatment of Government grants as per section on 12P of the Act.

Example:

Facts:

Government enters into an agreement with a private party whereby the private party is responsible for the financing, design, constructing, operating and maintaining a new building that will house a national department:

- ***Financing:***

The private party is responsible for sourcing debt and equity financing.

- ***Capital contribution:***

Government pays a capital contribution to reduce future monthly unitary payments and overall cost. Such contributions are budget line items catered for in the MTEF. In this instance, the contribution is R2 billion.

- ***Monthly unitary payments:***

Government pays monthly unitary payments over 25 years to cover the bond and maintenance costs. The sum of such payments is R18 billion, making the total value of the contract worth R20 billion. The unitary payments are used to cover debt servicing costs, operational, maintenance and lifecycle refurbishment costs, and a return on equity.

Result:

The capital contribution from Government of R2 billion will be exempt in the hands of the private party to the extent that the amount is utilized in full for improvements on land or buildings owned by any sphere of government. The proposed capital allowance against any land or building improved with such a capital contribution will be reduced to the extent of the capital contribution so utilized for the actual expenditure incurred for the acquisition, creation or improvement of the land or building.

The unitary [balance of the] payments from Government will be taxable in the hands of the taxpayer. All other expenses would be of a revenue nature and must be claimed under s11(a).

IV. Effective date

The proposed amendments will come into operation on 1 April 2015 and applies in respect of expenditure incurred to effect improvements during any year of assessment commencing on or after that date.

4.4. REFINEMENT OF OIL AND GAS INCENTIVE

[Applicable provisions: para 8(2)(a) & (b) of the Tenth Schedule to the Income Tax Act]

I. Background

The Tenth Schedule to the Income Tax Act outlines the tax dispensation applicable to oil and gas companies. Companies that hold an exploration or production right (defined in section 1 of the Mineral and Petroleum Resources Development Act) are entitled to submit a request for a fiscal stability agreement (in respect of the right(s) held) to the Minister of Finance.

The legislation permits an oil and gas company holding an exploration or production right to assign all of its fiscal stability rights to another oil and gas company.

II. Reasons for change

Oil and gas companies may wish to enter into a joint venture and partially assign the fiscal stability rights to the other party so that both parties are covered by the original fiscal stability agreement and equally enjoy the rights contained therein. There is uncertainty with respect to how to interpret the current wording in the legislation. Taxpayers interpret the phrase 'assign all of its fiscal stability rights to another oil and gas company' to mean that the original party transfers all the rights to the new party, without retaining any of those rights for itself. There is no reason why this should be the case – both parties should be entitled to the fiscal stability rights contained in the fiscal stability agreement.

III. Proposal

It is proposed that amendments be effected to achieve the following result: where an oil and gas company has an existing FSA with Government and subsequently enters into a joint venture with another oil and gas company, both oil and gas companies that are party to a joint venture will be entitled to all the rights under the fiscal stability agreement entered into by the original oil and gas company.

IV. Effective date

The proposed amendment will come into operation on 1 April 2015.

4.5. REFINEMENT OF ALLOWANCES IN RESPECT OF INDUSTRIAL POLICY PROJECT INCENTIVE

[Applicable provision: Section 12I(2)]

I. Background

Section 12I of the Income Tax Act allows taxpayers an additional investment and training allowance in respect of Industrial Policy Projects (IPP) if they meet certain criteria prescribed by way of regulation. The investment allowance ranges from 35 per cent of the cost of any new and unused manufacturing asset to 100 per cent – depending on whether the project has qualifying or preferred status, and whether it is located in an industrial development zone (or special economic zone approved by the Minister of Finance in consultation with the Minister of Trade and Industry).

To be eligible for this incentive, the Act requires a taxpayer to be owner of the asset. Property law dictates that any immovable property attached to a piece of land automatically becomes the property of the owner of the land. Taxpayers investing in IPPs undertaken on leased land are currently precluded from claiming this incentive in respect of new and unused (immovable) manufacturing assets.

II. Reasons for change

Because this incentive is an additional investment allowance and not a deduction for the purposes of wear and tear over the useful life of an asset, it seems reasonable to remove the ownership requirement for the section 12I incentive. In addition, with some taxpayers conducting their manufacturing activities on leased land (99 year leases in some instances), the ownership requirement constrains investment activities government would like to promote.

III. Proposal

It is proposed that taxpayers undertaking an IPP (in terms of section 12I) in respect of immovable property be accommodated for purposes of this incentive. As a result, it is proposed that the ownership requirement in terms of section 12I of the Income Tax Act be removed in instances where the qualifying manufacturing assets are immovable.

IV. Effective date

The proposed amendment will be deemed to have come into operation on 1 January 2009.

4.6. REVISION OF ALLOWANCE FOR ENVIRONMENTAL CONSERVATION IN RESPECT OF NATURE RESERVES OR NATIONAL PARKS

[Applicable provisions: New section 37D and section 37C (5) (6) and (7)]

I. Background

Government embarked on the biodiversity stewardship programme (BSP) in partnership with private land owners to preserve biodiversity through conserving threatened or depleted ecosystems to support critical species habitats. The BSP is mainly implemented through creating and expanding protected areas through bilateral agreements where private landowners voluntarily restrict and maintain the land on the government's behalf. Declared land should be managed according to the agreed management plan (endorsed by the Minister) which is regularly audited by the conservation authorities. As a result, landowners participating in the BSP incur costs in managing these areas as well as forgo income by contracting their land.

The BSP bilateral agreements can be in the form of:

a) biodiversity management agreements (5-year contract);
b) protected environments (30-year contract); and
c) nature reserves/ national parks (99-year contract).

A. Biodiversity management agreements

Expenses incurred by landowners to conserve or maintain declared land under biodiversity management agreements or its immediate proximity can be deducted against trading income and if expenditure exceeds income in the year of assessment, excess deductions are rolled over to the following year of assessment (section 37C(1)).

B. Protected environments

For protected environments, operating expenditure (not capital) to conserve or maintain the declared land is deemed to be a donation by the landowner actually paid or transferred to the government during the year of assessment and qualifies for a tax deductible section 18A donation (section 37C(3)). Unused deductions can now be rolled over as provided for in the reformulated current incentive.

C. Nature reserve / national park

Nature reserve/ national park (section 37C (5)) contracts have the declaration endorsed on the title deed of the land. Cost of land plus capital expenditure incurred by the landowner in respect of the land being declared qualifies for a tax deductible section 18A donation. An amount equal to 10% of the lesser of the municipal or market value of the land (disregarding any right of use retained by the landowner) is deemed to be a donation of immovable property for purposes of section 18A and paragraph 62 of the Eighth Schedule to the government in the year of declaration for which a receipt has been issued in terms of section 18A (2). A rollover of unused deductions in excess of 10% of taxable income is allowed.

Two main issues have been noted as hampering the uptake of these contracts by some landowners:

a) uncertainty as to what a deemed receipt implies in terms of allowances for deemed donations for income tax deductions and
b) how basing tax deductions on taxable income instead of land values does not benefit low income landowners equitably.

With regard to the interpretation issue about deemed donations, the uncertainty has been cleared by SARS issuing a draft Binding General Ruling (BGR) to provide certainty and clarity on the application of the deeming provisions in section 37C (3) and (5) as far as it relates to a deduction claimed under section 18A.

With regard to using taxable income as the basis of allowable deductions, government proposes to delink the current incentive for nature reserves/ national parks from the provisions of section 18A of the Income Tax Act and allow for a straight line deduction of the adjusted land value as currently calculated in terms of s18A (3A).

II. Reasons for change

Concerns have been raised that the current incentive is mostly likely to benefit individuals or corporations with the highest taxable incomes and not the ones with the most important land to conserve. This is because the allowance for the tax deduction is based on taxable income and not on land value. Landowners with taxable incomes much lower than their land values do not see the benefit in committing their land as they face loss of income due to the expenses incurred in maintaining the land whilst being restricted in how much deduction they can claim especially the 10% limitation imposed by the section 18A cap. Thus to leverage landowners' on-going investment in maintenance, a straight line deduction is deemed more attractive and predictable to landowners.

III. Proposal

Land declared as a nature reserve or national park should no longer be treated as a section 18A donation. Instead, it should be allowed a straight line deduction based on the actual cost of acquisition of land and improvements thereon or the lower of market value or municipal value if they exceed the cost of the land over a period of 25 years (4% allowance). This ensures equal treatment of landowners with similar land values despite different income levels to be able to recover maintenance expenses from participating in the incentive scheme.

IV. Effective date

The proposed amendments will come into operation on 1 March 2015 and applies in respect of years of assessment commencing on or after that date.

4.7. REVISION OF SMALL BUSINESS CORPORATION TAX RELIEF

[Applicable provision: Section 12E (4)(a)(i)]

I. Background

Enterprises with an annual turnover of no more than R 20 million have the option to be on the small business corporation (SBC) regime. Instead of the flat corporate rate of 28 per cent, SBC's are taxed according to a graduated scale, resulting in lower effective tax rates (see Table 1 below)

Table 1: Tax Rates for SBC's

Taxable Income	*Rate of tax*
Not exceeding R67 111	0 per cent of taxable income
Exceeding R67 111 but not exceeding R365 000	7 per cent of taxable income that exceeds R67 111

Exceeding R365 000 but not exceeding R550 000	R20 852 plus 21 per cent of amount by which taxable income exceeds R365 000
Exceeding R550 000	R59 702 plus 28 per cent of amount by which taxable income exceeds R550 000

Enterprises with an annual turnover below R 1 million can also opt to be taxed on their turnover rather than taxable income. This is meant to minimise compliance costs and to make it easier for enterprises to calculate their tax liability.

II. Reasons for change

The Tax Review Committee headed by Judge Dennis Davis completed a report on SMME taxation during January 2014. The Tax Review Committee concluded that the lower tax rates for small business corporations are not effective, do little to support the objective of small business growth and do not address tax compliance costs. The current regime provides tax relief to only 50 000 businesses and in some instances to professions not originally intended as beneficiaries. In addition businesses in a tax loss position don’t benefit from the current SBC regime, despite having the same tax compliance burden as profit making enterprises.

Statistics indicate that over 50 per cent of SBC’s have an annual turnover of less than R 1 million. This implies that the turnover tax regime is perhaps a more suitable regime for these enterprises, particularly since compliance costs are often cited as one of their main concerns. The Tax Review Committee proposed a more attractive turnover tax regime, which would make it more beneficial for micro enterprises.

III. Proposal

It is proposed that the reduced rate SBC regime be replaced with an annual refundable tax compliance rebate (RCR). Small business corporations will be taxed at 28 per cent and not according to the graduated scale. Any enterprise (with a turnover of between R 1 million and 20 million) that is compliant in terms of its tax returns and liabilities will be entitled to receive an annual tax rebate of R 15000. The rebate will be refundable, meaning that enterprises in a tax loss position will also receive it. The primary purpose of the rebate will be to assist small enterprises with their tax compliance costs.

<u>Example 1:</u>

Small business corporation A has a taxable income of R30 000

Outcome 1:

(R30 000 -67 000) X 7%
Tax liability R0.00

Outcome 2:

Under Proposes RCR regime
R30 000 X 28% - R15 000

Tax Liability (R6 600) Tax refund

Example 2:

Small business corporation B has a taxable income of R 750 000

Outcome 1

Under the current SBC regime
(R 750 000 – R 550 000) X 28% + R 59 702
Tax Liability = R 115 702

Outcome 2:

Under the proposed RCR regime
R 750 000 X 28% - R 15 000
Tax Liability= R 195 000

Example 3:

Small business corporation makes a loss of R 20 000

Outcome 1

Under the current SBC regime
Tax Liability = R 0

Outcome 2

Under the proposed RCR regime
R 0 – R 15 000
Tax Liability = (R 15 000) tax refund

IV. Effective date

The proposed amendments will come into operation on1 January 2016 and applies in respect of years of assessment commencing on or after that date.

4.8. TAX INCENTIVES FOR PROVISION OF FUNDING TO SMME'S

[Applicable provisions: Sections 10, 30C and 64F]

I. Background

Most SMME's find it difficult to access funding due to their inherent risk and lack of collateral together with the fact that they often lack the necessary training and commercial skills to manage and develop the businesses.

Several funding entities are engaged in activities that support SMME's. They provide developmental funding to SMME's, including business support and training. These activities contribute towards overall SMME development, which makes a positive contribution to society in several ways including:

a) employment creation,
b) capacity building,
c) fostering entrepreneurial activity and skills development,
d) poverty alleviation and
e) economic and social upliftment

Currently, the Income Tax Act affords relief to funders of SMME's only if monies are invested through the Venture Capital Company Regime. In addition, another relief is provided in the Income Tax Act through the Public Benefit Organisation (PBO) regime. The provision of support and financial assistance to micro enterprises (classified as poor and needy) qualifies for relief if such activity qualifies as a public benefit activity in the Ninth Schedule of the Income Tax Act. Therefore, any activity provided to SMME's that does not fall under the VCC regime or the PBO regime, will not qualify for relief in terms of the Income Tax Act.

II. Reasons for change

The 2014 Budget has emphasised the importance of the development of SMME's. The Income Tax Act can assist in the development of SMME's through the proposed tax relief on both the originators of the funding as well as the funding itself received by the SMME's for their development.

III. Proposal

In order to assist in the development of SMME's, similar to the relief provided to PBO's, it is proposed that receipts and accruals of entities providing funding to SMME's should be exempt from income tax in terms of section 10 of the Income Tax Act. In order to qualify for this exemption, the entity providing funding to SMME's will have to be approved by SARS and amendments will be made in the Income Tax Act by introducing new section 30C, which sets out the criteria for the approval process.

IV. Effective Date

The proposed amendments will come into operation on 1 April 2015.

4.9. EXEMPTION OF GRATUITOUS FUNDING IN THE HANDS OF SMME's

[Applicable provisions: Sections 10(1)(zk) and 23O)]

I. Background

Currently, gratuitous funding or payments received by small and medium enterprises ('SMME's') for their development are taxable unless received from Government in the form of a 'government grant' as defined in section 12P of the Income Tax Act. Making gratuitous funding to SMME's for their development tax free is part of a range of policy measures proposed in order to support SMME's. It is believed that SMME's growth and development is key to job creation and poverty reduction.

II. Reasons for change

Lack of funding remains one of the key challenges for SMME's. In the 2014 Budget, it was announced that gratuitous funding and / or payments received by SMME's will be exempt from tax.

It is envisaged that the tax free gratuitous funding to SMME's will assist SMMEs' cash flow and enable them to expand.

III. Proposal

In order to assist SMME's to better utilise their gratuitous funding, it is proposed amounts received by SMME's from the approved funding entities in terms of the proposed section 30C of the Income Tax Act should be exempt from income tax in terms of section 10 of the Income Tax Act. In order for SMME's to qualify for the exemption envisaged in section 10, the SMME's will have to meet requirements of a micro enterprise as contemplated in the Sixth Schedule or small business corporation as contemplated in section 12E of the Income Tax Act.

Any expenditure incurred in respect of trading stock allowed as a deduction in terms of section 11(a) or any amount taken into account in respect of the value of trading stock or the base cost of an allowance asset must be reduced to the extent that the amount received or accrued from the small business funding entity is applied for that purpose.

IV. Effective Date

The proposed amendments will come into operation on 1 March 2015 and applies in respect of amounts received or accrued on or after that date.

4.10. BROADENING THE SCOPE OF THE VENTURE CAPITAL REGIME

[Applicable provision: Section 12J]

I. Background

The Venture Capital Company (VCC) regime was introduced in order to encourage potential funders to invest equity into small businesses. A VCC acts as an investment vehicle through which investors can fund a portfolio of small businesses and/or junior miners. Currently the VCC regime allows for investors to deduct the value of their investments from taxable income. Upon disposal of their investments, those deductions are recouped. In order qualify for inclusion in a VCC portfolio, investee companies are limited in a variety of ways, most notably asset size. Currently investee companies' assets cannot exceed R 20 million, while junior miners have an asset limit of R 300 million.

II. Reasons for change

Since its introduction in 2008, the VCC regime has seen very limited uptake, despite amendments in 2011. Only five VCC's have been registered so far, with only three still being active. All three were registered in 2013.

Following consultation with all three current VCC's, as well as other stakeholders, further amendments to the current VCC regime are proposed.

III. Proposal

In order to get the VCC regime to gain more traction, the following proposals are made:

Making the tax deductions permanent (no recoupment at disposal)
Increasing the asset limits for qualifying investee companies

Making the tax deductions permanent

It is proposed that the tax deduction should not be recouped for investments held in a VCC for a period of at least 5 years. Bringing in a timeframe condition ensures that investors are investing for the right reason, not purely to obtain a permanent tax deduction. The example below illustrates the principle.

<u>Example:</u>

Year 1:

Investment into section 12J VCC: R100 000
Allowable deduction: R100 000

Deduction claimed: R100 000

Outcome 1:

Disposal before the end of Year 5: Disposed of for R250 000
Capital gain: R150 000 (R50 000 included in taxable income)
Recoupment of s 12J allowance: R100 000 (included in taxable income)

Outcome 2:

Disposal after the end of Year 5: Disposed of for R250 000
Capital gain: R150 000 (R50 000 included in taxable income)
Recoupment of s 12J allowance: R0.00

Increasing the asset limits

It is proposed that the asset limits be increased as follows:

For qualifying investee companies from R 20 million to R 50 million
For junior mining companies from R 300 million to R 500 million

IV. Effective Date

The proposed amendments will come into operation on 1 April 2015.

4.11. CLARIFICATIONS ON THE VENTURE CAPITAL REGIME

[Applicable provision: Section 12J(6A)]

I. Background

In 2008, an investment incentive was added to the Income Tax Act that seeks to encourage retail investment in VCCs that are mainly directed toward investments in smaller businesses and junior mining companies. In order to qualify as a VCC, the company must meet requirements as to form, structure and allocation of expenditures, amongst others.

The Act provides for a 36-month deferral period to allow newly-created VCC's time to find suitable investment expenditures relating to smaller businesses and junior mining companies.

One of the most integral requirements to the VCC tax regime is the investment expenditure allocation requirements.

After a period of 36 months VCC's have to utilise 80 per cent of investment expenditure incurred to acquire assets consisting of qualifying shares issued by qualifying companies before 36 months. If a VCC fails to adhere to that requirement, its VCC approval may be revoked.

In addition VCC's are also prevented from holding more than 20 per cent equity share in any one qualifying company. This is to ensure that a larger number of qualifying companies benefit from Venture Capital Company funding.

II. Reasons for change

A. 36 Month Rule

Prior to 2009 the VCC tax regime required upfront SARS approval for VCCs which was impractical when read in conjunction with the 36-month deferral period. SARS couldn't be expected to provide upfront verification as to whether a particular company would satisfy various investment expenditure allocation requirements after a 36-month period. During 2009 the VCC tax regime was amended to a post-36 month satisfaction of verification requirements on the VCC method.

Concerns have been raised regarding the fact that the legislation still remains unclear regarding the 36 month period. Section 12J(6A)(b) currently reads *"at least 80 per cent of the expenditure incurred by the company in that period to acquire assets held by the company was incurred to acquire qualifying shares issued to the company by qualifying companies"* [our emphasis].

This could be interpreted that the 80 per cent rule to expenditure incurred will only be applied within that 36 month period, and not after the 36 months. It could be understood to imply that subscriptions monies can be invested in any asset after 36 months, which was never the intention of the legislation.

B. Methodology of verification requirements

The methodology of the verification requirements has also been identified as a possible restriction for uptake of the VCC tax regime. The VCC verification requirements as an example currently could require that no more than 20% of that investment expenditure incurred after a period of 36 months relate to qualifying shares in any one qualifying company.

By using expenditure incurred as a basis for calculating the 20 per cent test, VCC's are more likely to breach the 20 per cent test. For instance, if VCC A has incurred expenditure of R 1000, it will not be permitted to invest more than R 200 (20%) in any one qualifying company. If VCC A disposes of one of the qualifying companies, only four qualifying companies will remain in its portfolio. If calculated as a percentage holding of expenditure incurred, each of the remaining four qualifying companies will constitute a 25% holding, which will be in breach of the 20 per cent test. The same problem will occur if the VCC declares dividends, leaving the VCC's with limited flexibility regarding their portfolio management.

III. Proposals

A. Clarify the 36 month rule

It is proposed that Section 12J(6A)(b) be amended so that VCC's will be required to adhere to the 80 percent rule on assessment every year after the 36 months period. This would mean in practice that:

80 per cent of the assets held (inclusive of capital gains) and not disposed of at any time (excluding money held in cash) must be in shares of qualifying companies.

This requirement will not be breached if investments are disposed of provided that at all times other (non-qualifying) assets remain under 20 per cent of expenditure incurred on assets still held.

To ensure that a breach does not occur excessive other (non-qualifying) assets will have to be disposed of.

B. Methodology of verification requirements

As stated previously the VCC verification requirements as an example currently could require that no more than 20% of that investment expenditure incurred after a period of 36 months relate to qualifying shares in any one qualifying company.

It is proposed that the legislation be amended to rather allow the 20% rule to be applied to the <u>total subscription monies received</u> together with any capital gains on any disposal of a qualifying share held at assessment every year after the 36 month period.

This will avoid a breach on the sale of an investment in a qualifying company.

The VCC could then use the proceeds to increase its investment in any qualifying company to the 20% limit, if it was below that limit at assessment every year after the 36 month period.

The VCC could declare dividends without breaching the rule.

The 80% rule methodology can also be amended from 'expenditure' to 'subscription monies received together with any capital gains' to similarly reduce any limitation that VCC's could've experienced using 'expenditure'.

<u>Example 1: Using subscription monies as the basis for calculation of 80% rule – basic example</u>

Facts:

VCC A raises R1 000 through a share issue
It invests R200 (20%) in each of 5 qualifying companies
It disposes of its investment in Company 1 for R 450 resulting in a capital gain of R250

Table 1: VCC holding as percentage of subscription monies and capital gain received:

	Before disposal		*After disposal*	
	Investment	*%*	*Investment / Capital Gain*	*%*
Company 1 (sold)	200	20	250	24
Company 2	200	20	200	19
Company 3	200	20	200	19
Company 4	200	20	200	19
Company 5	200	20	200	19
Total subscription monies / capital gain utilised for qualifying company test	1 000	100	1050	100

<u>Example 2: Using subscription monies as the basis for calculation of 80% rule – comprehensive example</u>

Facts:

VCC A raises R1 000 through a share issue
It invests R200 (20%) in each of 5 companies, 4 of which are qualifying companies
It disposes of its investment in Company 1 for R 450 resulting in a capital gain of R250

Table 2: VCC holding as percentage of subscription monies received (including investment in non-qualifying company) and capital gain received:

	Before disposal		After disposal	
	Investment	%	Investment / Capital Gain	%
Company 1 (sold)	200	20	250	24
Company 2	200	20	200	19
Company 3	200	20	200	19
Company 4	200	20	200	19
Company 5 (not qualifying company)	200	20	200	19
Total subscription monies / capital gain utilised for qualifying company test	800	80	850	81
Total subscription monies / capital gain utilised for year of assessment	1 000	100	1050	100

<u>Example 3: Using expenditure incurred as the basis for calculation of the 20% rule – original concept</u>

Facts:

VCC A incurs expenditure of R1 000 through investing in qualifying companies
It invests R200 (20%) in each of 5 qualifying companies

It disposes of one investment.

Outcome:

As Table 3 below indicates, it finds itself in breach of the 20 per cent rule

Table 3: VCC holdings as percentage of expenditure incurred:

	Before disposal		After disposal	
	Investment	%	Investment	%
Company 1	200	20	0	0
Company 2	200	20	200	25
Company 3	200	20	200	25
Company 4	200	20	200	25
Company 5	200	20	200	25
Total expenditure incurred	1 000	100	800	100

The VCC's approval is liable to be withdrawn and the only corrective steps that can be taken are that the monies received from the disposal of the one investment have to be re-invested in a new qualifying company.

<u>Example 4: Using subscription monies received as the basis for calculation of the 20% rule – proposed concept</u>

Facts:

VCC B receives R 1000 in subscription monies
It incurs expenditure of R1000 to invest in qualifying companies
It invests R200 (20%) in each of 5 qualifying companies
It disposes of one investment.

Outcome:

As Table 4 indicates, VCC B will still be within the 20 per cent limit.

Table 4: VCC holding as percentage of subscription monies received:

	Before disposal		After disposal	
	Investment	%	Investment	%
Company 1	200	20	0	0
Company 2	200	20	200	20
Company 3	200	20	200	20
Company 4	200	20	200	20
Company 5	200	20	200	20
Total subscription monies received	1 000	100	1000	80

IV. Effective date

The proposed amendments will come into operation on 1 April 2015.

4.12. PUBLIC BENEFIT ORGANISATIONS: LOWERING OF THE DISTRIBUTION REQUIREMENT

[Applicable provisions: Sections 18A(b) and 18A(2A)(b)(i)]

I. Background

Government provides incentives to encourage donations to organisations involved in public benefit activities. A conduit PBO as contemplated in section 18A(1)(b) is obliged to distribute or incur the obligation to distribute at least 75% of the donations received for purposes of providing funds and assets to other approved PBO's and qualifying statutory bodies which carry on in South Africa public benefit activities listed in Part II of the Ninth Schedule, for which a section 18A tax deductible receipt was issued within 12 months of the end of the year of assessment in which the donation was received. SARS may, having regard to the public interest and purpose for which the conduit PBO wishes to accumulate the funds defer, reduce or waive the obligation to distribute 75 per cent of those funds.

The purpose of 75 per cent distribution rule is twofold in that it discourages conduit PBOs from locking in funds and to obtain a degree of matching between timing of the tax deduction claimed by the taxpayers and the distribution of such donations by the conduit PBO's.

II. Reason for change

While Government is concerned that the funds required to support public benefit activities might potentially be locked-in to accumulate reserves, several entities have indicated that the 75 per cent distribution rule is too restrictive, and affects their sustainability adversely. Conduit PBOs need to have some flexibility to build up reserves over time so as to ensure some degree of financial sustainability. Similar to allowing non-funding PBO's to conduct limited trading activities, it is proposed that conduit PBO's be allowed more flexibility to earn passive income.

III. Proposal

A. Distribution requirement

It is proposed that the 75 per cent distribution requirement of all funds received by way of donation during that year in respect of which receipts were issued be reduced to at least 50 per cent.

B. Conditions regarding the use of undistributed funds

100 percent of all returns on investments made by the conduit PBO should be distributed to qualifying PBOs (Part II of the ninth schedule) after 5 years from the date of this amendment, and every 5 year interval after that. Conduit PBO's will be required to change their founding documentation to facilitate this condition.

Undistributed funds should be invested with financial institutions similar to Rehabilitation Trusts. Illiquid investments and speculative investments with unpredictable yield are prohibited.

Example 1:

Facts:

Funding PBO A receive donations amounting to R200 000.

Result:

Funding PBO A is required to distribute R150 000 (75 percent) during the current year.

With a distribution requirement of 50 percent, Funding PBO A will only be required to distribute R100 000 during the year. The remaining funds must be invested with accredited financial institutions and / or in approved financial instruments. None of this remainder can be used for administrative purposes.

IV. Effective Date

The proposed amendments will come into operation on 1 March 2015 and applies in respect of donations made on or after that date.

4.13. REFINEMENTS TO THE EMPLOYMENT TAX INCENTIVE

[Applicable provisions: Sections 7(5); 9(4) and 10(3) of the Employment Tax Incentive Act]

I. Background

The employment tax incentive was introduced on 1 January 2014 to support employment growth amongst the youth by sharing the cost of employment between the government and the private sector. The incentive is available to employers if they hire qualifying employees on or after 1 October 2013. One of the conditions for an employee to qualify for the incentive is that their monthly remuneration must be greater than R2 000 or the applicable minimum wage and less than R6 000. The value of the incentive that the employer may claim is dependent on the value of the monthly remuneration.

For employees who only work for a part of the month their remuneration must be 'grossed up' to calculate the value of the incentive and then the amount of the incentive they can claim is 'grossed down' in the same proportion.

Employers that do not have a sufficient pay-as-you-earn liability in a month to deduct the value of the incentive may roll over this excess amount to the following month. The Employment Tax Incentive Act allows for the introduction of a reimbursement mechanism that would reimburse employers the amount of the incentive that is rolled over on a bi-annual basis. The rolled over amounts of the incentive are capped at R6 000 per qualifying employee on the day after the reimbursement is intended to take place. The intention of the cap was to limit the potential liability that may arise from rolled over amounts for employers that were not tax compliant.

II. Reasons for change

The 'grossing up' provision entails some discretion on the part of the employer to determine the level of remuneration for that employee if they had worked the full month. Different sectors may also have varying stipulated working hours for full time employees. An employer who has a 'full time' employee who works 80 hours a month and receives R4 000 in remuneration will receive the same incentive as an employer who employs a 'full time' employee who works 160 hours a month with the same remuneration. The definition of 'full time' is not sufficiently clarified in the legislation and may create these unintended anomalies. Employers have also indicated that the calculation of 'full time' may be administratively difficult and they are concerned that SARS may question their assumptions used. Employers have asked for clarity on the calculation of the value of the incentive for employees who only work for part of a month.

The reimbursement mechanism is expected to be introduced in the last quarter of 2014. The current legislation will apply a limit to the rolled over amount on 1 September 2014 that would apply to all employers, notwithstanding whether the employer is tax compliant or not. The policy intention was not to limit the rolled over amount before the reimbursement mechanism was introduced. The current wording of the legislation would also imply that if an employer is not tax compliant on 31 August 2014, any excess would be rolled over to be claimed in the following months, but they can only access the reimbursement mechanism six months later, even if they were to become tax compliant on 2 September 2014.

III. Proposal

To simplify the calculation of the incentive, and link the incentive to an hourly wage, it is proposed that the grossing up mechanism be linked to a baseline of 160 hours of work per month, rather than through the use of a discretionary 'full time' calculation. In effect, the incentive can be claimed for qualifying employees who earn between R12.50 an hour (if there is no minimum wage) and R37.50 an hour.

If the qualifying employee works 80 hours a week the remuneration is grossed up to the 160 hours (i.e. doubled) to check whether the remuneration falls between R2 000 (or the minimum wage) and R6 000. The incentive is calculated on this amount and then grossed down (or halved). If the qualifying employee works more than 160 hours in a month the actual value of remuneration is used to calculate the incentive amount.

The reimbursement mechanism will be simplified by 'ring fencing' the excess amount that is available to be rolled over as at the end of the employer reporting period (e.g. 31 August 2014). Employers will be able to claim the full value of the excess amount that has been ring fenced after SARS have determined that they are tax compliant. If an employer is not tax compliant, the excess amount will be reimbursed when the employer becomes tax compliant. However, if the employer fails to become tax compliant within the next six months (before the end of the next reporting period) the excess amount will be lost.

The amendment would still limit the potential liability from non-compliant employers and since the excess amount is no longer rolled over to the next period there will no longer be a need to retain the rollover cap. Instead, the excess amount that can be rolled over will be reset to zero at the first day after the end of the bi-annual reporting period. Under this approach employers would still be able to claim the full value of the excess amount if the reimbursement mechanism were to be introduced at a date later than 31 August 2014.

The incentive is currently based on monthly remuneration; however National Treasury will continue to monitor the application of the incentive to ensure that employers do not manipulate the timing of salaries to claim for employees who significantly exceed R72 000 in remuneration over the year of assessment.

IV. Effective date

The proposed amendments regarding the grossing up provision will come into operation on 1 March 2015.

The proposed amendments regarding the cap on the rolled over amount of the incentive will come into operation on 1 January 2014.

4.14. REFINEMENTS OF SPECIAL ECONOMIC ZONE TAX INCENTIVE PROVISIONS

[Applicable provision: Sections 12R and 12S of the Income Tax Act]

I. Background

In the 2012 *Budget Review*, it was announced that tax incentives would be considered for the new special economic zones (SEZ) as proposed by the Department of Trade and Industry that would build on experience with the current industrial development zones (IDZs). This was achieved by introducing sections 12R and 12S into the Income Tax Act during the 2013 Tax Laws Amendment Bill process. In the 2012 Budget Review, it was announced that tax incentives would be considered for the new especial economic zones (SEZs), that would build on experience with the current industrial development zones (IDZs),as proposed by the Department of Trade and Industry. This was achieved by introducing sections 12S and12R in the Income Tax Act, which specifically deal with the SEZs.

II. Reasons for change

Some of the provisions captured in section 12R are vague and potentially conflicting. Amendments are required to enhance the clarity of these provisions.

To further enhance the understanding of SEZ tax provisions, the following explanation is meant to assist taxpayers in ascertaining whether they are eligible for the tax incentives or not. The main elements are as follows:

The Minister of Trade and Industry will be responsible for regulating the qualifying criteria for entry into a special economic zone. Tax concessions provided to companies locating in a SEZ are as follows:

All special economic zones will qualify for temporary VAT and customs relief (similar to that for the current IDZs), and the new employment tax incentive, with no age restriction.

Qualifying companies operating within approved SEZs (by the Minister of Finance, after consultation with the Minister of Trade and Industry) may be eligible for two additional tax incentives:

All qualifying companies that do *not* conduct any of the activities as per section 12R(4)(a) of the Act will automatically be entitled to claim accelerated depreciation allowances on buildings (contained in section 12S).

Only qualifying companies that are *not* conducting either of the following:

- activities as per section 12R(4)(a) of the Act; and
- activities listed (according to the Standard Industrial Classification (SIC) codes) in the draft regulations

will be entitled to the building allowance and subject to a reduced corporate tax rate (i.e. 15 per cent instead of 28 per cent).

Companies can make use of the decision tree below to determine eligibility for the tax incentives.

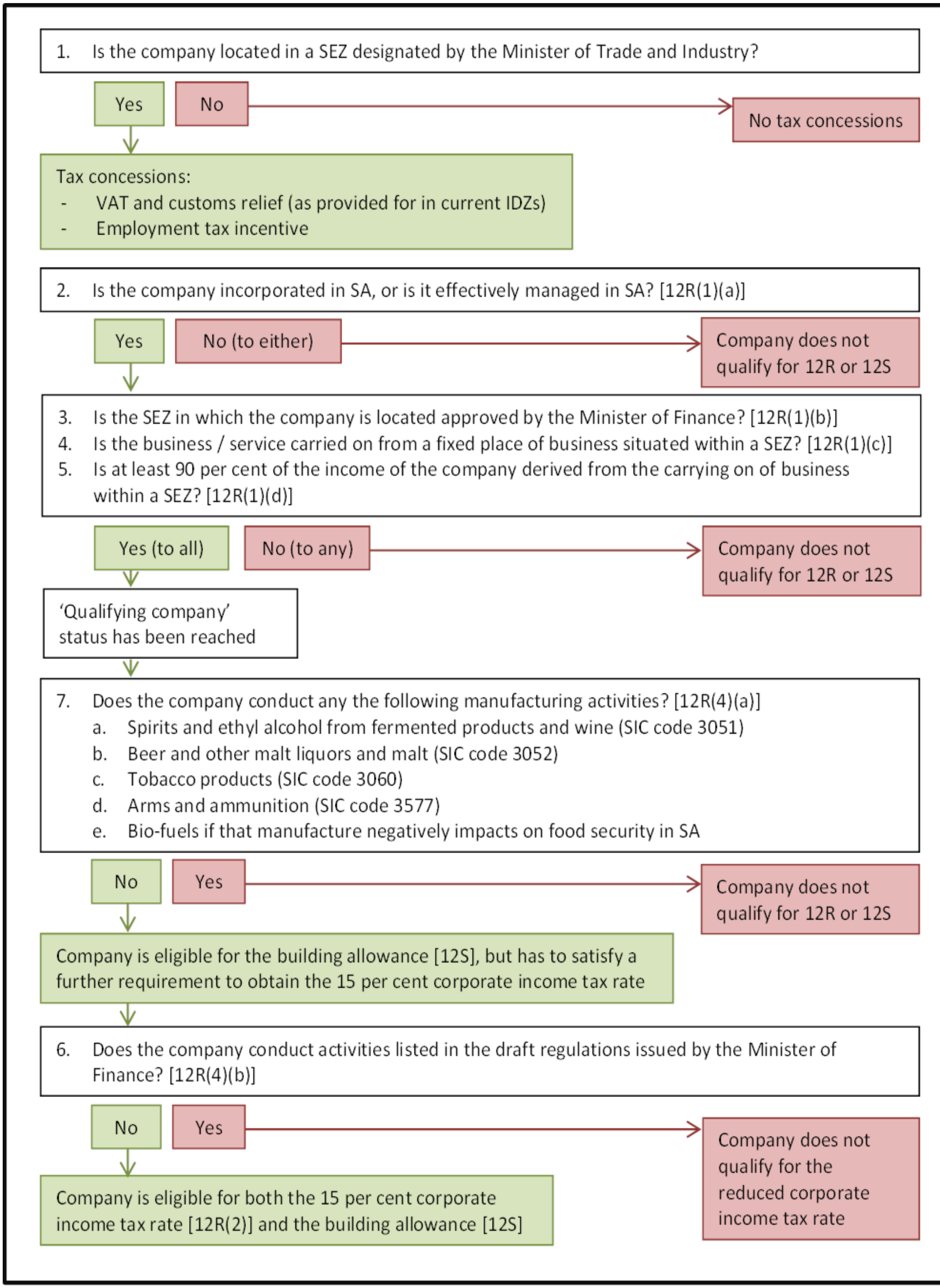
III. Proposal

It is proposed that section 12R be refined to take care of the following anomalies:

- It is unnecessary to refer to a category of special economic zone designated by the Minister of Trade and Industry;
- Approval of a SEZ by the Minister of Finance will be done by way of a notice in the Gazette.
- Requiring a business to carry on a type of business or provision of service that may be located in a SEZ is redundant in that this requirement is already achieved without the need for repetition.
- A qualifying company will not be required to apportion its taxable income in an instance where, for example, 5 per cent of its income is derived from activities that will are listed in the draft regulations as per section 12R(4)(b) of the Act, or 7 per cent of its activities are carried on outside of the SEZ.

IV. Effective date

The proposed amendments will come into operation on the date on which the Special Economic Zones Act, 2014 (Act No.16 of 2014) comes into operation.


1. Is the company located in a SEZ designated by the Minister of Trade and Industry?
Yes
No
No tax concessions
Tax concessions:
- VAT and customs relief (as provided for in current IDZs)
- Employment tax incentive
2. Is the company incorporated in SA, or is it effectively managed in SA? [12R(1)(a)]
Yes
No (to either)
Company does not qualify for 12R or 12S
3. Is the SEZ in which the company is located approved by the Minister of Finance? [12R(1)(b)]
4. Is the business / service carried on from a fixed place of business situated within a SEZ? [12R(1)(c)]
5. Is at least 90 per cent of the income of the company derived from the carrying on of business within a SEZ? [12R(1)(d)]
Yes (to all)
No (to any)
Company does not qualify for 12R or 12S
'Qualifying company' status has been reached
7. Does the company conduct any the following manufacturing activities? [12R(4)(a)]
a. Spirits and ethyl alcohol from fermented products and wine (SIC code 3051)
b. Beer and other malt liquors and malt (SIC code 3052)
c. Tobacco products (SIC code 3060)
d. Arms and ammunition (SIC code 3577)
e. Bio-fuels if that manufacture negatively impacts on food security in SA
No
Yes
Company does not qualify for 12R or 12S
Company is eligible for the building allowance [12S], but has to satisfy a further requirement to obtain the 15 per cent corporate income tax rate
6. Does the company conduct activities listed in the draft regulations issued by the Minister of Finance? [12R(4)(b)]
No
Yes
Company does not qualify for the reduced corporate income tax rate
Company is eligible for both the 15 per cent corporate income tax rate [12R(2)] and the building allowance [12S]

5. INCOME TAX: INTERNATIONAL

5.1. SIMPLIFIED FOREIGN BUSINESS ESTABLISHMENT EXEMPTION FOR CONTROLLED FOREIGN COMPANIES

[Applicable provision: Proviso to section 9D(2A)]

I. Background

Controlled foreign company attribution rules are subject to various exemptions, such as the foreign business establishment exemption, related controlled foreign company party exemptions and the high-tax exemption. These exemptions seek to strike a balance between protecting the tax base and the need for South African multinational entities to be competitive.

The 2009 legislative amendments introduced the high-tax exemption for controlled foreign companies. The purpose of the high-tax exemption is to disregard all passive and diversionary controlled foreign company income if little or no South African tax is at stake once South African tax rebates are taken into account.

To qualify for high-tax exemption, the aggregate of foreign taxes payable by the controlled foreign company must be at least 75 per cent of the amount of South African tax that would have been imposed had the controlled foreign company been a South African taxpayer. In determining the aggregate of foreign taxes payable there should be taken into account the provisions of all applicable double tax agreements and any credit, rebate or other right of recovery of tax from a foreign government after disregarding any tax losses from other tax years or from other foreign companies.

II. Reasons for change

The structure of section 9D requires that the high-tax exemption be tested before the specific exclusions under subsection (9) are determined. As stated above, the high-tax exemption involves a hypothetical South African tax calculation based on the transactions of a controlled foreign company as if it had been a South African tax resident. If the actual foreign tax payable is at least 75% of the hypothetical South African normal tax, then no amount is taxed in the hands of the South Africa residents controlling the controlled foreign company under section 9D.

It is often an onerous exercise to establish whether the high-tax exemption applies if all amounts affecting the net income of the controlled foreign company are attributable to a foreign business establishment. For example, if a South African resident company controls more than 100 foreign subsidiaries, it would be difficult to establish whether a high- tax exemption applies if most of the income of these foreign subsidiaries is attributable to a foreign business establishment.

III. Proposal

In view of the above, it is proposed that the net income of a controlled foreign company be deemed to be nil if either the high-tax exemption or the foreign business establishment exclusion, when applied to aggregate taxable amounts, is met. The foreign business establishment will only be available if the controlled foreign company earned no passive or diversionary income which would otherwise constitute net income of the controlled foreign company.

IV. Effective date

The proposed amendment is deemed to have come into operation on 31 December 2014 and applies in respect of years of assessment ending on or after that date.

5.2. TRANSFER PRICING: SECONDARY ADJUSTMENTS

[Applicable provision: Section 31]

I. Background

The transfer pricing rules apply arm's length principles to a transaction, operation, scheme, agreement or understanding that has been entered into between connected persons with terms and conditions that would not have applied between independent persons dealing at arm's length.

Prior to the 2011 legislative amendments, deemed dividend rules contained a provision relating to transfer pricing, in terms of which a deemed dividend arose from any additional taxable income (or reduced assessed loss) of a South African company stemming from a transfer pricing adjustment.

The 2011 legislative amendments introduced secondary adjustment rules in the form of a deemed loan. The deemed loan constitutes an affected transaction which implies that arm's length interest is to be calculated on the deemed loan. The accrued interest on the deemed loan is capitalised annually for the purposes of calculating the balance of the deemed loan. The deemed loan and the interest calculated on it is deemed to be payable until the amount is regarded as having been repaid to the taxpayer. The taxpayer is required to calculate and account for interest income at an arm's length rate on the deemed loan.

II. Reasons for change

Advanced tax systems make secondary adjustments in different forms such as deemed dividends, deemed equity contributions or deemed loans. According to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, "ordinarily, the secondary transactions will take the form of constructive dividends, constructive equity contributions, or constructive loans. For example a country making a primary adjustment to the income of a subsidiary of a foreign parent may treat the excess profits in the hands of the foreign parent as having been transferred as a dividend, in which case witholding tax may apply. It may be that the subsidiary paid an excessive transfer price to the foreign parent as a means of avoiding that withholding tax".

While the secondary adjustment is a well-established practice adopted by many countries, secondary adjustment in the form of a deemed loan is an administrative burden both for the taxpayer and the Revenue Administration. In practice, it is impossible for the foreign company to repay the loan and the deemed interest because the loan is a deemed loan and there are no contractual legal obligations supporting the settlement of the loan. It also creates difficulties in relation to the accounting treatment of the deemed loan and the relevant currency of the deemed loan and deemed interest.

Further, due to exchange control restrictions in the country of the connected person it may be impossible to repatriate the funds resulting in an ongoing interest charge for tax purposes.

III. Proposal

In view of the above, it is proposed that the current form of the secondary adjustment be revised. The amount of the secondary adjustment will be deemed to a dividend in specie paid by the South African taxpayer to the non-resident connected person. Therefore, where a South African subsidiary undercharges its foreign Parent company, the shortfall will be deemed to be a dividend by the South African subsidiary to its Foreign Parent.

<u>Example 1</u>

Facts:

Foreign Parent company pays R65 million for goods provided by the South African subsidiary. The South African Subsidiary records taxable income based on the sale to its Foreign Parent. The arm's length price for the goods is in fact R100 million.

Result:

A primary adjustment in terms of section 31 is effected, whereby the taxable income of the South African Subsidiary is increased to reflect the arm's length price of R100 million. The differential of R35 million constitutes a deemed in specie dividend paid by the South African subsidiary to its Foreign Parent.

<u>Example 2</u>

Facts:

Foreign Sister company grants a R1 million loan to the taxpayer (a South African company). Foreign Sister company charges interest at a rate of 10 per cent, whereas the market related interest rate is 6 per cent. South African Company claims an interest deduction of R100 000.

Result:

SARS effects a primary adjustment in terms of section 31, whereby interest allowable as a deduction is reduced to the market related interest of R60 000. A secondary adjustment, in the form of a deemed dividend in specie paid to Foreign Sister company is triggered. Dividends tax is imposed on the R40 000 dividend deemed to have been paid by the South African company.

IV. Effective date

The proposed amendment will come into operation on 1 January 2015.

5.3. CURRENCY OF REACQUISITION OF ASSETS OF PERSONS CEASING TO BE RESIDENT

[Applicable provisions: Section 9H and paragraph 43(5) of the Eighth Schedule]

I. Background

Prior to 12 December 2013, assets of a taxpayer ceasing to be a South African tax resident were excluded from the exit charge if those assets consisted of direct or indirect interests of at least 20 per cent in an entity if 80 per cent of the market value of the interest in that entity is attributable to South African immovable property. The exit charge did not apply because these interests were assumed to remain within South Africa's taxing jurisdiction.

However, new rules deeming a person that ceases to be a South African resident to have disposed of all assets, including any interest in a property rich company on the day before ceasing to be a resident at market value and to have immediately reacquired those assets at an expenditure equal to that market value, became effective on 12 December 2013.

II. Reasons for change

The new rules deeming a person who ceases to be a South African resident to have disposed of and reacquired shares in a property owning company in South Africa do not state in which currency the reacquisition of these shares takes place. In this regard, clarity is required as this has an effect on the tax calculation when the reacquired shares are disposed of by the non-resident.

III. Proposal

In view of the above, it is proposed where a person is deemed to have disposed of and reacquired shares in a property owning company in South Africa or a similar right to ownership or a vested interest in the assets of a trust, the currency in which the asset was actually acquired be deemed to be the currency of reacquisition.

IV. Effective date

The proposed amendment is deemed to have come into operation on 12 December 2013

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6. VALUE ADDED TAX

6.1. SECOND HAND GOODS – PRECIOUS METALS

[Applicable Provision: Section 1(1) of the Value-Added Tax Act]

I. Background

In certain circumstances a vendor may acquire goods, not incur any VAT upon the acquisition of the goods, and yet still be entitled to claim a deduction of input tax in respect of the acquisition of the goods. A vendor who acquires second-hand goods, including goods made from precious metals, from a seller who is not a vendor, is entitled to claim a notional input tax deduction. This allows for the unlocking of part of the VAT on goods previously paid by final consumers as those goods re-enter the formal supply chain.

II. Reasons for change

While the acquisition of gold jewellery by VAT vendors from non-VAT vendors should allow for the deduction of notional input VAT, in practice this provision significantly contributes to creating an enabling environment to obtain fraudulent input tax deductions. Jewellery is smelted along with gold coins and illegally acquired raw gold.

III. Proposal

In order to address this problem, it is proposed that second-hand goods made from precious metals be excluded from obtaining the notional input tax.

IV. Effective date

The proposed amendment will come into operation on 1 April 2015.

6.2. DOCUMENTATION

[Applicable Provision: Section 16(2)]

I. Background

Under current VAT legislation, input tax is allowed where a bill of entry or other documents, as prescribed in terms of the Customs Act, together with proof of payment of the tax in relation to the said importation, are held by the vendor or his agent at the time any return in respect of that importation is furnished.

However, the Customs Modernisation Programme was implemented which addressed a number of critical issues, such as paper-based systems and processes. The main change was the introduction of an automated workflow driven system, which allowed Customs and taxpayers to complete all clearance processes end-to-end without having to perform manual functions. Accordingly, paper-based documents are no longer generated and issued to taxpayers.

II. Reasons for change

The customs modernisation programme has eliminated the need for paper-based documents to be generated and issued to taxpayers. Therefore, documents that are legally required will be aligned with the modernised customs processes and procedures.

III. Proposal

The documentary requirements contained in this section needs to be aligned to the modernised Customs processes and procedures.

IV. Effective date

The proposed amendment will come into operation on 1 April 2015.

6.3. TAX INVOICES, DEBIT AND CREDIT NOTES

[Applicable Provision: Section 54(1)]

I. Background

Section 20(1) requires any registered vendor making taxable supplies to another person, to issue a tax invoice within 21 days of the date of the supply. Where an agent makes or receives a supply of goods or services for and on behalf of a principal (a registered vendor), who is resident in South Africa, the supply is deemed to be made by or to the principal and not by or to the agent. However, section 54(1) allows a VAT registered agent to issue a tax invoice in relation to that taxable supply made on behalf of the principal as if the agent had made a taxable supply.

However, there is no time limit stated in section 54 for the agent to issue a tax invoice. This results in an anomaly as the agent may take as long as he wants to issue a tax invoice that places the recipient of the supply in a difficult position by not having a valid tax invoice to deduct input tax.

II. Reasons for change

Current provisions give rise to an anomaly in the requirements placed on the principal and agent to issue a tax invoice. As a result, the agent may take as long as he wants to issue a tax invoice that places the recipient of the supply in a difficult position by not having a valid tax invoice to deduct input tax.

III. Proposal

To require Agents making taxable supplies to issue a tax invoice within 21 days from the date of the supply.

IV. Effective date

The proposed amendment will come into operation on 1 April 2015.

6.4. AGENTS

[Applicable Provision: Section 54(3)]

I. Background

Currently, any goods imported into the Republic by an agent (acting on behalf of the principal), is deemed to be made by the principal and not by the agent. The 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.

However, the statement envisaged in section 54(3) only refers to supplies made by or to the agent on behalf of the principal but does not extend to the importation of goods. The particulars of the statement contemplated in paragraphs (e), (f) and (g) of section 20(4) does not include any particulars relating to the proof of payment.

II. Reasons for change

There is currently uncertainty as to which documentation is acceptable to the Commissioner as proof of payment to entitle a principal to deduct input tax in respect of VAT paid on the importation of goods.

III. Proposal

The statement envisaged in section 54(3) includes the importation of goods. Furthermore, the statement should include the receipt number for the payment of the tax in relation to the importation of the goods.

IV. Effective date

The proposed amendment will come into operation on 1 April 2015.

6.5. CONTRACT PRICES

[Applicable Provision: Section 67]

I. Background

VAT is imposed on the supply of goods or services by a vendor in the course or furtherance of that vendor's enterprise. In this instance, a "vendor" includes a person who is liable to register under the VAT Act. Accordingly, a supplier making a supply of goods or services to the recipient, has a remedy to recover from the recipient an amount of VAT imposed on the supply subsequent to the conclusion of the agreement in terms of which the supply is made.

However, a person who was liable to register for VAT, but not so registered at the time of the agreement in respect of any supply of goods or services, and who is subsequently registered and thus required to account for output tax on the supply in terms of the agreement cannot apply to recover the amount of VAT payable by him from the recipient of the supply. In this regard, VAT is technically imposed at the time of conclusion of the agreement and not subsequently.

II. Reasons for change

These provisions are open to two contradictory interpretations as shown in a court case where it was ruled that vendors who had failed to register as VAT vendors, at the time an agreement was concluded, are also entitled to the remedies provided in this section. This interpretation was not contemplated by the legislature.

III. Proposal

It is recommended that section 67(1) be clarified as to specifically eliminate vendors that default to register under the VAT Act from applying the subsection.

IV. Effective date

The proposed amendment will come into operation on 1 April 2015.

6.6. BARGAINING COUNCILS

[Applicable Provision: Section 12(l)]

I. Background

The supply of any goods and services provided by a bargaining council to its members, to the extent that the consideration for such supply consists of membership contributions, are exempt from VAT.

However, the bargaining councils also receive a fee for administering Funds such as Sick Pay, Leave Pay and Holiday Pay Funds on behalf of the employees in the industries. The contributions to the Funds are made on behalf of the employees and are deposited into the bank accounts of the National Bargaining Council (NBC) which the council hold in trust (not registered trusts). The fee charged by the NBC for the administering of these Funds is equal to the interest earned on the Funds. Any money that is not required for immediate use may be invested by the NBC in terms of the Labour Relations Act, 1995. The legal entitlement to the interest earned on invested income vests in the NBC in terms of a Main Collective Agreement.

II. Reasons for change

There is currently no provision in the VAT Act to exempt the supply in respect of which contributions are made to these funds however, such funds should enjoy the same tax benefit as a "superannuation scheme".

III. Proposal

To broaden the exemption in terms of section 12(ℓ) to include the supply of administration services for which the bargaining councils receives a separate fee (i.e. the interest that it is entitled to in terms of the Main Collective Agreement).

IV. Effective date

The proposed amendment will come into operation on 1 April 2015.

6.7. ZERO RATING OF GOODS FOR AGRICULTURAL, PASTORAL OR OTHER FARMING PRUPOSES

[Applicable Provision: Section 11(1)(g), Schedule 1 and Schedule 2, Part A]

I. Background

Currently, the supply of goods used or consumed for agricultural, pastoral or other farming purposes, as are set forth in Part A of Schedule 2, are charged with tax at the rate of zero per cent. These goods may be supplied at the zero rate only if the recipient is a registered vendor who carries on agricultural, pastoral or other farming operations and is authorized by South African Revenue Service (SARS) to acquire the goods at the rate of zero per cent. This concession was intended to provide cash-flow relief to the agricultural sector.

II. Reasons for change

There is strong evidence that substantiates that this provision is open to abuse as various entities (i.e. those with and without endorsement to acquire goods at the zero rate) have entered into activities to fraudulently obtain VAT input tax deduction.

Example:

Vendor A acquires goods from Vendor B at the zero rate, as Vendor A is in possession of a VAT103 (Notice of Registration) with the endorsement that it is entitled to acquire goods listed in Part A to Schedule 2 at the zero rate, in terms of section 11(1)(g).

Vendor A sells the same goods back to Vendor B at a lower rate per ton per commodity whilst charging VAT at the standard rate of 14%. This resulted in the refund to Vendor B and the refund is shared in proportions with Vendor A.

In addition to the above, Vendor B (in possession of a VAT103 that does not have an endorsement to acquire goods at the zero rate) would place huge orders at one of its suppliers, Vendor C, to supply goods at the zero rate to Vendor A. Vendor B would then, before the transaction is passed in the accounts of Vendor C, cancel the order but would request Vendor C to provide the paperwork and agreed to pay the penalty as set out in the penalty clause in the contract. Vendor B would continue with the transaction as if the original order for the commodities were never cancelled. Vendor A would in turn, generate paperwork supporting the sale of the said commodities back to Vendor B at the lower rate per ton per commodity, but charging VAT at the standard rate of 14%.

III. Proposal

It is proposed that the zero rating of goods for agricultural, pastoral and other farming activities in section 11(1)(g) of the VAT Act be repealed.

IV. Effective date

The proposed amendment will come into operation on 1 April 2015.

6.8. VAT TREATMENT OF LEGAL TENDER OR MONEY

[Applicable Provision: Section 1, Section 12 and Schedule 1]

I. Background

The South African Reserve Bank has the sole right to make issue and destroy banknotes and coins in South Africa. The SA Mint Company and the SA Bank Note Company, wholly owned subsidiaries of the Reserve Bank, mints all circulation coins issued and prints all banknotes denominations currently in use on behalf of the Reserve Bank, respectively. The Reserve Bank is also responsible for the wholesale distribution of banknotes and coins, whereas banks distribute banknotes and coin to their branch offices to ensure availability to the public.

The Reserve Bank pays SA Bank Note Company a fee, based on the production costs and profit margin, for the printing of paper notes and it is less than their face value of the paper notes. Based on the wording of the current law, before the paper notes are issued by the Reserve

Bank, they do not qualify as “money” under the VAT Act thus the supply of paper notes by the SA Bank Note Company is subject to VAT at the standard rate.

Only when the paper notes are issued by the Reserve Bank, are they legal tender or considered banknotes and therefore exempted from VAT. As a result, the Reserve Bank cannot claim a VAT input tax deduction on acquiring paper notes from SA Bank Note Company.

II. Reasons for change

The Reserve Bank operates in peculiar circumstances unlike any other ordinary business, with the sole right to make and issue banknotes and coins for circulation as legal tender. As such, the Reserve Bank honours any paper note, which meets its technical specifications, that is in circulation to maintain public confidence in the currency. However, from a practical point of view, the paper notes are the same as banknotes since the Reserve Bank does not add anything to them before they are issued.

There is, therefore, a need to align the VAT tax treatment of the issuing of banknotes and the supply of the paper notes, since from a practical point of view, are the same. This will relieve the Reserve Bank of the current VAT cost it incurs when acquiring paper notes.

III. Proposal

It is proposed that the supply of banknotes (paper notes) by the SA Bank Note Company to the South African Reserve Bank be exempted from VAT.

IV. Effective date

The proposed amendment will come into operation on 1 April 2015.

7. CLAUSE BY CLAUSE

CLAUSE 1

Income Tax Act: Amendment to section 1

Sub clause (a): Amendment to paragraph (e)(iii) of the definition of 'company'. The definition of REIT requires an entity to be a company and thereby causes a circularity issue which will be solved by the proposed amendment.

Sub clause (b) to (g) : See notes on DIVIDEND TAX : CONTRIBUTED TAX CAPITAL REFINEMENTS.

Sub clause (h): In order to avoid repetition of the full citation of Acts referred to in the Income Tax Act, it is proposed to define the relevant Act using a shortened version of its name, the Estate Duty Act.

Sub clause (i): The 'Financial Services Board' and 'Financial Services Board Act' have been defined since both terms are used in section 29A (1) in the definition of 'value of liability'.

Sub clause (j): See notes on RESTRAINT OF TRADES RECEIPTS

Sub clause (k): The term 'mining authority' was used in the Minerals Act, 1991 which was repealed and replaced by the Mineral and Petroleum Resources Development Act. The term 'mining authority' is not used in the Mineral and Petroleum Resources Development Act but the latter act requires that a mining permit must be granted before a mining company may commence operation. Paragraph (b) was therefore inserted to make provision for companies that acquired mining permits after 14 April 2004 in terms of the Mineral and Petroleum Resources Development Act.

Sub clause (l): The system of regional electricity distributor has not been implemented.

Sub clause (m): See notes on THE RETIREMENT FUND ACCRUAL DATE.

Sub clause (n): See notes on THE RETIREMENT FUND ACCRUAL DATE.

Sub clause (o): In order to avoid repetition of the full citation of Acts referred to in the Income Tax Act, it is proposed to define the relevant Act using a shortened version of its name, the Share Blocks Control Act.

Sub clause (p): For the definitions of 'small business funding entity' and 'small medium or micro-sized enterprise' and: See notes on TAX INCENTIVES FOR PROVISION OF FUNDING TO SMME'S.

CLAUSE 2

Income Tax Act: Amendment to section 3

Sub clauses (a) and (b): In order to avoid repetition of the full citation of Acts referred to in the Income Tax Act, it is proposed to define the relevant Act using a shortened version of its name, i.e. the Financial Services Board Act.

CLAUSE 3

Income Tax Act: Amendment to section 6quin

Although the current return on foreign rebates requires information for purposes of section 6*quin*(1)*(a)* and *(b)*, while subsection (3A) only refers to subsection (1)*(a)*, information in the return related to subsection (1)*(b)* would be a return "as required by the Commissioner" under section 25 of the Tax Administration Act, 2011, (as amended by the Tax Administration Laws Amendment Act, 2013). Thus the return would include return information required under "a tax Act" (section 6*quin*(3A)) for purposes of s6*quin*(1)*(a)* as well as information required by the Commissioner "for purposes of administration of" section 6*quin*(1)*(b)*. It makes no practical sense to require two separate returns. However, to clarify this and to address public pronouncements that the part of the return relating to section 6*quin*(1)*(b)* need not be completed as section 6*quin*(3A) does not refer to it, the above amendment is proposed.

CLAUSE 4

Income Tax Act: Amendment to section 7

Section 37D(1)(d)(ii) of the Pensions Fund Act has been repealed and the essence of its contents is replaced by a newly inserted section 37D(1)(e). The proposed amendment aligns the Income Tax Act with the provisions of the Pensions Fund Act.

CLAUSE 5

Income Tax Act: Amendment to section 8

The amendment in sub clause (a) aims at ensuring gender-neutral language.

Sub clause (b): Section 14bis has been repealed by section 50 of TLAB 31 of 2013. The proposed amendments delete references to this repealed section.

Sub clause (c): Section 8(5)*(b)* of the Act provides that an amount paid by a person for the right of use or occupation of any property which is thereafter acquired by that person or any other person for a consideration which in the opinion of the Commissioner is not an adequate consideration or for no consideration, it will be deemed that the amount, or so much thereof that does not exceed the fair market value of such property as determined by the Commissioner less the amount of the consideration, if any, has been applied in reduction or towards settlement of the purchase price of that property.

Section 1 of the Tax Administration Act, 2011, defines the term “fair market value”. The proposed amendment aims to clarify that the fair market value for purposes of section 8(5) will be the fair market value as defined and not as determined by the Commissioner.

CLAUSE 6

Income Tax Act: Amendment to section 8C

Section 9B was repealed by section 17 of the Taxation Laws Amendment Act 31 of 2013. The proposed amendment deletes a reference to that section in section 8C(1)(a). The amendment takes effect as from the date on which section 9B was repealed.

CLAUSE 7

Income Tax Act: Amendment to section 8EA

See notes on THIRD PARTY BACKED SHARES: REVISION OF THE DEFINITION OF OPERATING COMPANY.

CLAUSE 8

Income Tax Act: Amendment to section 8FA

The proposed amendment clarifies that the deemed dividend in specie accrues to the person on the last day of the year of assessment of the company that owes the debt.

CLAUSE 9

Tax Act: Amendment to section 9

The proposed amendments align the treatment of lump sum payments to the treatment of pension and annuity payments.

CLAUSE 10

Tax Act: Amendment to section 9C

The Share Blocks Control Act is defined with its full citation in section 1 of the Income Tax Act. It is therefore proposed that the defined version of its name is used throughout the Income Tax Act.

CLAUSE 11

Income Tax Act: Amendment to section 9D

Sub clause (a): The deletion of the definition of “foreign financial instrument holding company” is proposed because the defined term is no longer used in the provisions of the Income Tax Act.

Sub clause (b): The proposed amendment will have the effect that capital gains tax of the CFC to be included in the taxable income of a natural person, special trust or insurer in respect of its individual policyholder fund should be calculated at the rates of the resident and not at the rate of the CFC.

Sub clause (c): See notes on SIMPLIFIED FOREIGN BUSINESS ESTABLISHMENT EXEMPTION FOR CONTROLLED FOREIGN COMPANIES.

CLAUSE 12

Income Tax Act: Amendment to section 9H

Sub clause (a): The amendment proposes to delete an obsolete cross reference. Section 2(1)(w) of the Taxations Law Act 22 of 2012 was repealed by section 191 of Act 31 of 2013 (high tax exemption in definition of “resident”).

Sub clause (b): See notes on CURRENCY OF REACQUISITION OF ASSETS OF PERSONS CEASING TO BE RESIDENT.

CLAUSE 13

Income Tax Act: Amendment to section 10

Sub clause (a): See notes on EXEMPTION OF GRATUITOUS FUNDING IN THE HANDS OF SMME’S.

Sub clause (b): The Share Blocks Control Act is defined with its full citation in section 1 and it is therefore proposed that the defined version of its name is used throughout the Income Tax Act.

Sub clause (c): The proposed amendment to subsection (1)(gC)(ii) aligns the treatment of lump sum payments to the treatment of pension and annuity payments.

Sub clause (d): Amendments to subsection (1)(gI)(ii) are proposed to include “illness’ as well as ‘severe illness’ for disability policies and to also include employer provided disability policies.

Sub clause (e): Amendment to subsection (1)*(i)*(i) See notes on EXEMPTION OF AMOUNTS RECEIVED OR ACCRUED IN RESPECT OF TAX FREE INVESTMENTS.

Sub clause (f): The amendment to subsection (1)(iB) proposes to correct an incorrect reference and to clarify the wording.

Sub clause (g): An anomaly arises between subsection (1)(k)(gg) and (ff) if a company earns dividends on shares held as well as on shares borrowed but not delivered to the market under a short sale by the time the dividend accrues. The dividend on the borrowed shares will be taxed under paragraph *(ff)* and the dividend on the other shares will be taxable to the extent of the manufactured dividend incurred on the borrowed shares. Paragraph *(gg)* was only supposed to address the situation where shares are held long and a short sale has been entered into.

Example:
The borrower of shares is holding them when a dividend accrues. That dividend is income in terms of paragraph *(ff)*. The borrower is already the owner of 10 of the same kind and quality shares as 10 shares borrowed and delivered in the market under a short sale. Under *(gg)* the dividend accrued on the shares owned is income to the extent of the manufactured dividend incurred in respect of the borrowed shares as the borrower has no net exposure to shares.
If a borrower is already the owner of 10 of the same kind and quality shares as 10 shares borrowed and also held at the time of accrual of the dividend, the current version of paragraph *(gg)* has the effect that the dividends on all 20 shares will be income. As the borrower still has the full economic interest in the shares owned, the dividend in respect of those shares should not be deemed to be income.

Sub clause (h): The proposed amendment is of a grammatical nature.

Sub clause (i): The proposed amendment seeks to clarify that there must be a link between the intellectual property or knowledge or information in respect of which the royalty payment is made and the permanent establishment of the non-resident. The amendment also change the word “accrued” to “accrues” as matter of style consistency.

Sub clause (j): The system of regional electricity distributor has not been implemented.

Sub clause (k): See notes on PUBLIC PRIVATE PARTNERSHIP.

Sub clause (l): See notes on TAX INCENTIVE FOR PROVISION OF FUNDING TO SMME’S.

CLAUSE 14

Income Tax Act: Amendment to section 10B

Participation exemption for foreign dividends has been lowered to 10%. There is no CFC imputation in terms of section 9D if the resident holds less than 10% of the participation rights or may not exercise at least 10% of the voting rights in that CFC. Based on the above section 10B(2)(c) becomes irrelevant is therefore deleted.

CLAUSE 15

Income Tax Act: Amendment to section 10C

The proposed amendments will also allow non-deductible contributions to be deducted from the taxable income arising from the annuity.

CLAUSE 16

Income Tax Act: Amendment to section 11

Sub clause (a): The amendment to paragraph *(i)* proposes a grammar correction.

Sub clause (b): For the deletion of paragraph (w)(ii)(cc): See notes on CLARIFICATION OF THE LOSS REQUIREMENT IN RESPECT OF KEYPERSON INSURANCE POLICIES.

CLAUSE 17

Income Tax Act: Amendment to section 11D

See notes on REVISION OF THE RESEARCH AND DEVELOPMENT INCENTIVE.

CLAUSE 18

Income Tax Act: Amendment to section 12D

Sub clause (a) to (e): See notes on REFINEMENT OF ALLOWANCES IN RESPECT OF TELEPHONE LINES OR CABLES USED FOR THE TRANSMISSION OF ELECTRONIC COMMUNICATIONS.

CLAUSE 19

Income Tax Act: Amendment to section 12E

Sub clause (a): See notes on REVISION OF SMALL BUSINESS CORPORATION TAX RELIEF.

Sub clause (b): In the 2013 legislation the term “shareholder of a company” was changed to “holder of shares in a company”. The proposed amendment adjusts the wording in subsection (4)*(a)*(ii) accordingly.

CLAUSE 20

Income Tax Act: Amendment to section 12H

Section 18 has been deleted with effect from 1 March 2014 and ‘disability’ is defined in section 6B(1).

CLAUSE 21

Income Tax Act: Amendment to section 12I

See notes on REFINEMENT OF ALLOWANCES IN RESPECT OF INDUSTRIAL POLICY PROJECT INCENTIVE.

CLAUSE 22

Income Tax Act: Amendment to section 12J

Sub clause (a): Subsection (3)(b)(ii) has been amended to clarify the wording.

Sub clauses (b) to (d): See notes on BROADENING THE SCOPE OF THE VENTURE CAPITAL REGIME and CLARIFICATIONS ON THE VENTURE CAPITAL REGIME.

CLAUSE 23

Income Tax Act: Insertion of section 12NA

See notes on TAX TREATMENT OF ALLOWANCES IN RESPECT OF PUBLIC PRIVATE PARTNERSHIP.

CLAUSE 24

Income Tax Act: Amendment to section 12R

See notes on REFINEMENTS OF SPECIAL ECONOMIC ZONE TAX INCENTIVE PROVISIONS.

CLAUSE 25

Income Tax Act: Amendment to section 12S

See notes on REFINEMENTS OF SPECIAL ECONOMIC ZONE TAX INCENTIVE PROVISIONS.

CLAUSE 26

Income Tax Act: Insertion of section 12T

See notes on EXEMPTION OF AMOUNTS RECEIVED OR ACCRUED IN RESPECT OF TAX FREE INVESTMENTS.

CLAUSE 27

Income Tax Act: Amendment to section 18A

See notes on PUBLIC BENEFIT ORGANISATIONS: LOWERING OF THE DISTRIBUTION REQUIREMENT OF TAX DEDUCTIBLE DONATIONS.

CLAUSE 28

Income Tax Act: Amendment to section 19

The Estate Duty Act is defined with its full citation in section 1 of the Income Tax Act. It is therefore proposed that the defined version of its name is used throughout the Income Tax Act.

CLAUSE 29

Income Tax Act: Amendment to section 20

Paragraph (i) of the proviso to section 20(1)(a) was inadvertently deleted by the Taxation Laws Amendment Act of 2012. Without a reinstatement both the insolvent estate (through section 25C) and the person after sequestration are entitled to the pre-sequestration assessed loss.

CLAUSE 30

Income Tax Act: Amendment to section 22

The proposed amendment removes the Commissioner's discretion and follows costs allowed under IFRS.

CLAUSE 31

Income Tax Act: Amendment to section 23

Paragraph (r) has been amended to clarify that the natural person that pays the premiums that cover the natural person against illness, severe illness, injury, disability, unemployment or death may not claim the deduction in respect of premiums but the employer of the natural person may deduct the premiums if it is paid by the employer.

CLAUSE 32

Income Tax Act: Amendment to section 23B

See notes on REVISION OF THE RESEARCH AND DEVELOPMENT INCENTIVE.

CLAUSE 33

Income Tax Act: Amendment to section 23I

The proposed amendments correct ensure the style is consistent with other sections in the Act.

CLAUSE 34

Income Tax Act: Amendment to section 23M

Sub clauses (a) and (c): See notes on DEDUCTIBLE INTERST LIMITATION IN RESPECT OF DEBTS OWNED TO PERSON NOT SUBJECT TO TAX.

Sub clause (b): Section 23M was inserted by section 61 of the TLAA, 2013. A layout error in subsection (2) creates the impression that the words following subparagraph (ii) of paragraph (b) apply only to paragraph (b). The proposed amendment indents these words correctly to indicate that they apply to the whole of subsection (2) and do not only relate to paragraph (b).

CLAUSE 35

Income Tax Act: Amendment to section 23N

See notes on DEDUCTIBLE INTEREST LIMITATION IN RESPECT OF REORGANISATION AND ACQUISITION TRANSACTIONS.

CLAUSE 36

Income Tax Act: Insertion of section 23O

See notes on EXEMPTION OF GRATUITOUS FUNDING IN THE HANDS OF SMME'S.

CLAUSE 37

Income Tax Act: Amendment to section 24I

The proposed amendment clarifies that the deferral of exchange gains and losses should only apply to the extent that the exchange item meets the requirements of the section. For example, the portion of a loan that is disclosed as a current asset or current liability should not have the effect that the exchange difference in respect of the longer term portion of the loan be taken into account for tax purposes.

CLAUSE 38

Income Tax Act: Amendment to section 24J

Sub clause (a): See notes on AMENDMENT OF DEFINITION OF INSTRUMENT.

Sub clauses (b) and (c): The proposed amendment to section 24J9()(g)(i) and 24J(9A)(b)(i) will align the date in respect of covered persons with the date on which section 24JB came into operation.

CLAUSE 39

Income Tax Act: Amendment to section 24JA

See notes on REVISION OF SHARIA COMPLAINT FINANCIAL ARRAGEMENTS.

CLAUSE 40

Income Tax Act: Amendment to section 24JB

See notes on REVISION OF FAIR VALUE TAXATION IN RESPECT OF FINANCIAL ASSETS AND LIABILITIES.

CLAUSE 41

Income Tax Act: Insertion of section 24P

These amendments propose to reinstate the ship repair allowance which was inadvertently deleted in 2013.

CLAUSE 42

Income Tax Act: Amendment to section 25BB

Sub clause (a): See note on REFINEMENT OF REAL ESTATE INVESTMENT TRUSTS (REITS).

Sub clause (b): it is proposed to specify in subsection (5)(a) that the capital gains tax exemption will only apply to immovable property of a company that is a REIT or controlled company at the time of the disposal of the immovable property. This amendment will come into operation on the date of promulgation of the 2014 Taxation Laws Amendment Act.

Sub clause (c): It is proposed to specify in subsection (6)*(a)* that a linked unit envisaged in that paragraph is a linked unit in a REIT or a controlled company, that is a resident. Where a controlled company is not a resident, the controlled foreign company rules in section 9D can apply in which case the REIT will be taxed on a percentage of the income of the CFC.

Sub clause (d): It is proposed to specify in subsection (6)*(b)* that a linked unit envisaged in that paragraph is a linked unit in a REIT or a controlled company, that is a resident, and that the interest received must be deemed to be a dividend or foreign dividend. Where a controlled company is not a resident, the controlled foreign company rules in section 9D can apply in which case the REIT will be taxed on a percentage of the income of the CFC.

Sub clause (e): The amendment proposes to bring the wording in subsection (8(b) in line with the wording used in the Income Tax Act.

CLAUSE 43

Income Tax Act: Amendment to section 25D

The purpose of these amendments is to ensure that there is a provision for the translation of the functional currency to the currency of the Republic if the functional currency is not a currency that denominated in Rand.

CLAUSE 44

Income Tax Act: Amendment to section 29A

Sub clauses (a), (c), (d), (f), (g), (j), (k) and (m): See notes on LONG TERM INSURERS: TAX TREATMENT OF RISK BUSINESS OF LONG TERM INSURERS.

Sub clause (b): the definition of 'value of liabilities' has been amended to bring it in line with amendments to the Financial Services Board Act.

Sub clause (e): The proposed amendment will apply from 1 March 2015 and will ensure that policies that fall under tax free investments as contemplated in section 12T will be placed in the untaxed policyholder fund.

Sub clause (h): The reason for this amendment is that section 9B was repealed by Act 31 of 2013.

Sub clause (i): In its current form the formula in subsection (11)(a)(ii) does not give the right result. Because the unrealised gains for the year are added in the denominator under DD of symbol Z, the hypothetical taxable amount must be excluded from symbol X by deleting DD in X under the current legislation. The formula must be amended by adding numerator U. Numerator U is equal to the CGT inclusion rate applicable to the fund multiplied by the amount in DD under symbol Z. In symbol X a new DD must be added to avoid a circular calculation with regard to subparagraph (iii). The reason for other amendments is to clarify the wording.

Sub clause (l): Proviso to section 29A(11)(g)- See notes on LONG-TERM INSURERS: AVOIDANCE OF UNWARRANTED RELIEF FROM ONGOING TAXATION IN RESPECT OF FOREIGN REINSURANCE.

CLAUSE 45

Income Tax Act: Amendment to section 30

Section 30(4) was intended as a transitional measure for public benefit organisations which could amend their founding documents. The submission of a written undertaking will only remain in respect of a branch of a foreign organisation, which does not have a separate founding document relating to its activities in the Republic, and a trust established in terms of the last will of a natural person, which cannot be amended.

CLAUSE 46

Income Tax Act: Amendment to section 30C

See notes on TAX INCENTIVES FOR PROVISION OF FUNDING TO SMME'S.

CLAUSE 47

Income Tax Act: Amendment to section 31
Sub clause (a): See notes on TRANSFER PRICING: SECONDARY ADJUSTMENTS

Sub clause (b), (c) and (d): These amendments propose an additional test that requires no interest to have been charged on the debt during the year of assessment. The debt will be tested annually to determine whether it meets the requirements for tax relief.

CLAUSE 48

Income Tax Act: Amendment to section 37C

See notes on REVISION OF ALLOWANCE IN RESPECT OF ENVIRONMENTAL CONSERVATION IN RESPECT OF NATURE RESERVES OR NATIONAL PARKS.

CLAUSE 49

Income Tax Act: Amendment to section 37D

See notes on REVISION OF ALLOWANCE IN RESPECT OF ENVIRONMENT CONSERVATION IN RESPECT OF NATURE RESERVES OR NATIONAL PARKS.

CLAUSE 50

Income Tax Act: Amendment to section 41

Sub clause (a): The amendment proposes to delete the definitions of "associated group of companies", "domestic financial instrument holding company", "foreign financial instrument holding company" and "prescribed proportion" in subsection (1). These terms are no longer used in the Income Tax Act and the definitions have become obsolete.

Sub clause (b): The proposed amendment rectifies the wording of the definition of "trading stock".

CLAUSE 51

Income Tax Act: Amendment to section 42

Sub clause (a): The amendment proposes to rectify a cross-reference to 'qualifying interest' in subsection (6)(a)(i).

Sub clause (b): The proposed amendment moves the words of the proviso to subsection (7)(b)(i) into the text of the paragraph to improve the structure of the subsection.

CLAUSE 52

Income Tax Act: Amendment to section 43

Since subsection (3) was deleted with effect from 4 July 2013, the reference to the subsection is deleted from subsection 4(b)(i).

CLAUSE 53

Income Tax Act: Amendments to section 44

The proposed amendments will allow the amalgamated company to retain assets to satisfy anticipated liabilities as well as the cost of administration relating to liquidation or winding- up of the amalgamated company.

CLAUSE 54

Income Tax Act: Amendments to section 46

The proposed amendment provides that section 46 does not apply if a REIT or controlled company as defined in section 25BB is the unbundling company.

CLAUSE 55

Income Tax Act: Amendments to section 47

The proposed amendment will allow the liquidating company to retain assets to satisfy anticipated liabilities as well as the cost of administration relating to liquidation or winding- up of the liquidating company.

CLAUSE 56

Income Tax Act: Amendments to section 49D

The amendment seeks to clarify that there must be a link between the property in respect of which the royalty payment is made and the permanent establishment of a non-resident and that the non-resident person must be registered as a taxpayer in South Africa.

CLAUSE 57

Income Tax Act: Amendments to section 49E

The amendments change the word “royalty” to “amount of royalties” as matter of style consistency.

CLAUSE 58

Income Tax Act: Amendments to section 49F

The amendments change the word “royalty” to “amount of royalties” as matter of style consistency. The amendments also clarify that the person who withholds tax on royalties must submit a return to SARS.

CLAUSE 59

Income Tax Act: Insertion of section 49H

The royalty regime will now contain currency translation rules. The amount of royalties must be translated to the currency of the Republic at the spot rate on the earlier of the date on which the amount of royalties is paid or becomes payable.

CLAUSE 60

Income Tax Act: Amendment to section 50E

The proposed amendment specifies that the rate at which withholding tax on interest must be withheld is the same as the rate at which the withholding tax on interest is imposed in section 50B(1).

CLAUSE 61

Income Tax Act: Amendment to section 51A

The proposed amendment corrects a grammatical error.

CLAUSE 62

Income Tax Act: Amendment to section 56

Subsection (1)(h) has been amended to exempt donation to or by small business funding entities from donations tax. (Also see notes on FUNDING OF SMME’s.)

CLAUSE 63

Income Tax Act: The amendment proposes the repeal of Part VII of Chapter II of Act 58 of 1962 since the secondary tax on companies has been replaced by the dividends tax.

CLAUSE 64

Income Tax Act: Amendment to section 64EB

The amendment proposes to only deem a manufactured dividend paid from the borrower to the lender to be a dividend and that the deemed dividend is deemed to have been paid by the borrower.

CLAUSE 65

Income Tax Act: Amendment to section 64F

Sub clause (a): The proposed amendments bring the wording in line with other provisions of the Income Tax Act.

Sub clause (b): See notes on TAX INCENTIVES FOR PROVISION OF FUNDING TO SMME'S.

Sub clause (c), (d) and (e): See notes on EXEMPTION OF AMOUNTS RECEIVED OR ACCRUED IN RESPECT OF TAX FREE INVESTMENTS.

Sub clause (f): *De minimis* rule is inserted to create a dividend tax exemption if dividend tax payable on the dividend is less than R100.

CLAUSE 66

Income Tax Act: Deletion of paragraph 4(1)(d) of the Second Schedule

See notes on THE RETIREMENT FUND ACCRUAL DATE.

CLAUSE 67

Income Tax Act: Amendment to paragraph 9 of the Sixth Schedule
See notes on the REVISION ON SMALL BUSINESS TAX RELIEF.

CLAUSE 68

Income Tax Act: Amendment to paragraph 1 of the Seventh Schedule

See notes on VALUATION OF FRINGE BENEFIT FOR DEFINED BENEFIT CONTRIBUTION.

CLAUSE 69

Income Tax Act: Amendment to paragraph 5 of the Seventh Schedule

The proposed amendment clarifies that subparagraph (3A) must not apply if one of the conditions in item (a), (b) or (c) are met. The current wording suggests that all the conditions must be met.

CLAUSE 70

Income Tax Act: Amendment to paragraph 7 of the Seventh Schedule

Sub clauses (a) and (b): See notes on VALUATION OF COMPANY CAR FRINGE BENEFIT.

Sub clause (c): The proposed amendment is to clarify that travelling between an employee's place of residence and place of business is also regarded as traveling done for private purposes.

CLAUSE 71

Income Tax Act: Amendment to paragraph 9 of the Seventh Schedule

See notes on VALUATION OF FRINGE BENEFIT FOR EMPLOYER PROVIDED RENTAL ACCOMODATION.

CLAUSE 72

Income Tax Act: Amendment to paragraph 12D of the Seventh Schedule

See notes on VALUATION OF FRINGE BENEFIT FOR DEFINED BENEFIT CONTRIBUTIONS.

CLAUSE 73

Income Tax Act: Amendment to paragraph 1 of the Eighth Schedule

The proposed amendment replaces the reference to The Securities Services Act, 2004 since that Act was repealed by and replaced by the Financial Markets Act, 2012 (Act No. 19 of 2012).

CLAUSE 74

Income Tax Act: Amendment to paragraph 11 of the Eighth Schedule

The insertion of item (m) proposes to prevent a capital gain or loss from arising on an exchange in the circumstances contemplated in section 8B(2). The intention is that a capital gain or loss will only be determined when the replacement share is disposed of after the five-year period elapsed.

CLAUSE 75

Income Tax Act: Amendment to paragraph 12 of the Eighth Schedule

Sub clause (a): The proposed amendments firstly delete the words *"Unless subparagraph (4) applies"* since it is superfluous. Subparagraph (2) does not refer to the event in subparagraph (4). Secondly the words *"and paid"* are deleted since expenditure actually incurred is sufficient.

Sub clauses (b), (c) and (d): When section 9H(3) was introduced in the Act, subparagraph (2)(a)(iii) became superfluous and is therefore deleted.

CLAUSE 76

Income Tax Act: Amendment to paragraph 12A of the Eighth Schedule

Sub clause (a): The proposed amendment corrects wording. The reference should be to the paragraph and not to a section.

Sub clause (b): The proposed amendment to subparagraph (4) indicates the correct position of the words following item (a).

CLAUSE 77

Income Tax Act: Amendment to paragraph 15 of Eighth Schedule

The Share Blocks Control Act is defined with its full citation in section 1 of the Income Tax Act. It is therefore proposed that the defined (shortened) version of its name is used throughout the Income Tax Act.

CLAUSE 78

Income Tax Act: Amendment to paragraph 20 of Eighth Schedule

The use of the words “a disposal” in have an unintended consequence of limiting the applicability of the provision because a non-resident would not have a disposal of an asset except for the limited range of assets referred to in paragraph 2(1)(b). The intention is to refer to the means by which the person acquired the asset and the proposed amendment gives effect to this intention.

CLAUSE 79

Income Tax Act: Amendment to paragraph 29 of Eighth Schedule

The Financial Services Board has been defined in section 1 and the words following the term have become redundant.

CLAUSE 80

Income Tax Act: Amendment to paragraph 31 of Eighth Schedule

The Estate Duty Act is defined with its full citation in section 1 of the Income Tax Act. It is therefore proposed that the defined (shortened) version of its name is used throughout the Income Tax Act.

CLAUSE 81

Income Tax Act: Amendment to paragraph 41 of Eighth Schedule

The Estate Duty Act is defined with its full citation in section 1 of the Income Tax Act. It is therefore proposed that the defined (shortened) version of its name is used throughout the Income Tax Act.

CLAUSE 82

Income Tax Act: Amendment to paragraph 43 of Eighth Schedule

See notes on CURRENCY OF REACQUISITION OF ASSETS OF PERSON CEASING TO BE RESIDENT.

CLAUSE 83

Income Tax Act: Amendment to paragraph 44 of Eighth Schedule

The Share Blocks Control Act is defined with its full citation in section 1 of the Income Tax Act. It is therefore proposed that the defined (shortened) version of its name is used throughout the Income Tax Act.

CLAUSE 84

Income Tax Act: Amendment to paragraph 67B of Eighth Schedule

The proposed insertion of a definition of Share Blocks Control Act with its full citation in section 1 of the Income Tax Act renders the definition in paragraph 67B obsolete. It is therefore proposed that the obsolete definition be deleted.

CLAUSE 85

Income Tax Act: Amendment to paragraph 77 of Eighth Schedule

The definition of “shareholder” was deleted by section 7(1)(zO) of Act 24 of 2011 with effect from 1 April 2012. The proposed amendment to the heading aligns the wording with the term now used in the Act.

CLAUSE 86

Income Tax Act: Amendment to paragraph 8 of the Tenth Schedule

See notes on REFINEMENT OF OIL AND GAS INCENTIVE.

CLAUSE 87

Value Added Tax Act: Amendment to section 1

Sub clause (a): The proposed amendment inserted an additional measure to determine whether the provider of the service is an enterprise.

Sub clause (b): The proposed amendment will exclude second-hand goods containing gold (e.g. gold jewelry) from obtaining the notional input tax.

CLAUSE 88

Value Added Tax Act: Amendment to section 11

The proposed amendment clarifies that electronic services can never be subject to zero rating.

CLAUSE 89

Value Added Tax Act: Amendment to section 12

Subclause (a): See notes on BARGAINNING COUNCILS.

Subclause (b): See notes on VAT TREATMENT OF LEGAL TENDER OR MONEY.

CLAUSE 90

Value Added Tax Act: Amendment to section 16

See notes on DOCUMENTATION.

CLAUSE 91

Value Added Tax Act: Amendment to section 20

The proposed amendment makes provision for invoices issued by a vendor to be regulated by Regulations issued by the Minister.

CLAUSE 92

Value Added Tax Act: Repeal of section 40A
The provisions of section 40A apply to the supply of goods and services by public authorities or public entities on or before 31 March 2005. This section has now become obsolete and the proposal is therefore to delete it.

CLAUSE 93

Value Added Tax Act: Repeal of section 40B

The provisions of section 40B apply to the supply of goods and services by local authorities on or before 31 March 2005. This section has now become obsolete and the proposal is therefore to delete it.

CLAUSE 94

Value Added Tax Act: Amendment to section 54
See notes on AGENTS.

CLAUSE 95

Value Added Tax Act: Amendment to section 65

The proposed amendment allows a vendor to advertise electronic services at a price that does not include VAT.

CLAUSE 96

Value Added Tax Act: Amendment to section 67

See Notes on CONTRACT PRICES.

CLAUSE 97

Value Added Tax Act: Amendment to section 74

The proposed amendments rectify incorrect reference to the Custom Duty Act and the Exercise Duty Act and refer to the correct sections of the said acts.

CLAUSE 98

Value Added Tax Act: Amendment to section 86A

See Notes on REFINEMENT OF SPECIAL ECONOMIC ZONE TAX INCENTIVE PROVISIONS.

CLAUSE 99

Value Added Tax Act: Amendment to Schedule 1 to Act 89 of 1991

Sub clause (a): See notes on VAT TREATMENT OF LEGAL TENDER OR MONEY

Sub clause (b): See notes on ZERO RATING OF GOODS FOR AGRICULTURAL, PASTORAL OR OTHER FARMING PURPOSES.

CLAUSE 100

Value Added Tax Act: Amendment to Schedule 2 to Act 89 of 1991

See notes on ZERO RATING OF GOODS FOR AGRICULTURAL, PASTORAL OR OTHER FARMING PURPOSES.

CLAUSE 101

Tax on Retirement Funds Act: Repeal of Act

The last assessment period in terms of the Tax on Retirement Funds Act, Act 38 of 1996, was in 2007 and the Act is now obsolete. It is therefore proposed that the Act be repealed as from 1 January 2015.

CLAUSE 102

Securities Transfer Tax Act: Amendment to section 1

The proposed amendments replace the reference to The Securities Services Act, 2004 since that Act was repealed by and replaced by the Financial Markets Act, 2012 (Act No. 19 of 2012) and refer to the relevant sections in the Financial Markets Act.

CLAUSE 103

Employment Tax Incentive Act, 2013: Amendment to section 1

See notes on REFINEMENTS OF THE EMPLOYEE TAX INCENTIVE.

CLAUSE 104

Employment Tax Incentive Act, 2013: Amendment to section 4

The proposed amendment corrects a reference to a section of the Labour Relations Act.

CLAUSE 105

Employment Tax Incentive Act, 2013: Amendment to section 5

Sub clauses (a) to (c): The proposed amendment makes provision for a person that is a refugee who is in possession of a refugee identity document to be a qualifying employee.

Sub clauses (d) to (f): The proposed amendment aligns the qualifications of a qualifying employee in section 6 with the determination of the Employment Tax Incentive in section 7.

CLAUSE 106

Employment Tax Incentive Act, 2013: Amendment to section 6

See notes on REFINEMENTS TO EMPLOYMENT TAX INCENTIVE.

CLAUSE 107

Employment Tax Incentive Act, 2013: Amendment to section 7

See notes on REFINEMENTS TO EMPLOYMENT TAX INCENTIVE.

CLAUSE 108

Employment Tax Incentive Act, 2013: Amendment to section 9

See notes on REFINEMENTS TO EMPLOYMENT TAX INCENTIVE.

CLAUSE 109

Employment Tax Incentive Act, 2013: Amendment to section 10

See notes on REFINEMENTS TO EMPLOYMENT TAX INCENTIVE.

CLAUSE 110

Taxation Laws Amendment Act, 2013: Amendment to section 29

The proposed amendment will align section 11D with the provisions of the Tax Administration Act.

CLAUSE 111

Taxation Laws Amendment Act, 2013: Amendment to section 92

The proposed amendments are to rectify retrospective legislative amendments made in the 2013 Taxation Laws Amendment Act to section 43 of the Income Tax Act. Taxpayers did transactions in terms of wording of section 43 of the Income Tax Act prior to the amendments to section 43 being introduced in Parliament and published on the NT website on 24 October 2013. These 2013 Taxation Laws Amendment Act amendments to section 43 could therefore not be done with effect from 4 July 2013 but only from the date of publication of the amendments on the NT website.

CLAUSE 112

Taxation Laws Amendment Act, 2013: Amendment to section 108

Section 108(1)(a) of the Taxation Laws Amendment Act, 2013, amended paragraph (b) of section 64J(2) of the Income Tax Act. This amendment erroneously included the words following on paragraph (b). The proposed amendment indicates clearly that the words "reduced by … effective date." do not form part of paragraph (b) and therefore apply to both paragraphs (a) and (b) of section 64J(2).

CLAUSE 113

Taxation Laws Amendment Act, 2013: Amendment to section 171

The purpose of this amendment it is to align the effective date of section 13(2B) of the Value Added Tax Act with the corresponding provision in the Custom and Exchange Act.

CLAUSE 114

Short title and commencement.