TAX & EXCHANGE CONTROL

SPECIAL EDITION ALERT

BUDGET SPEECH

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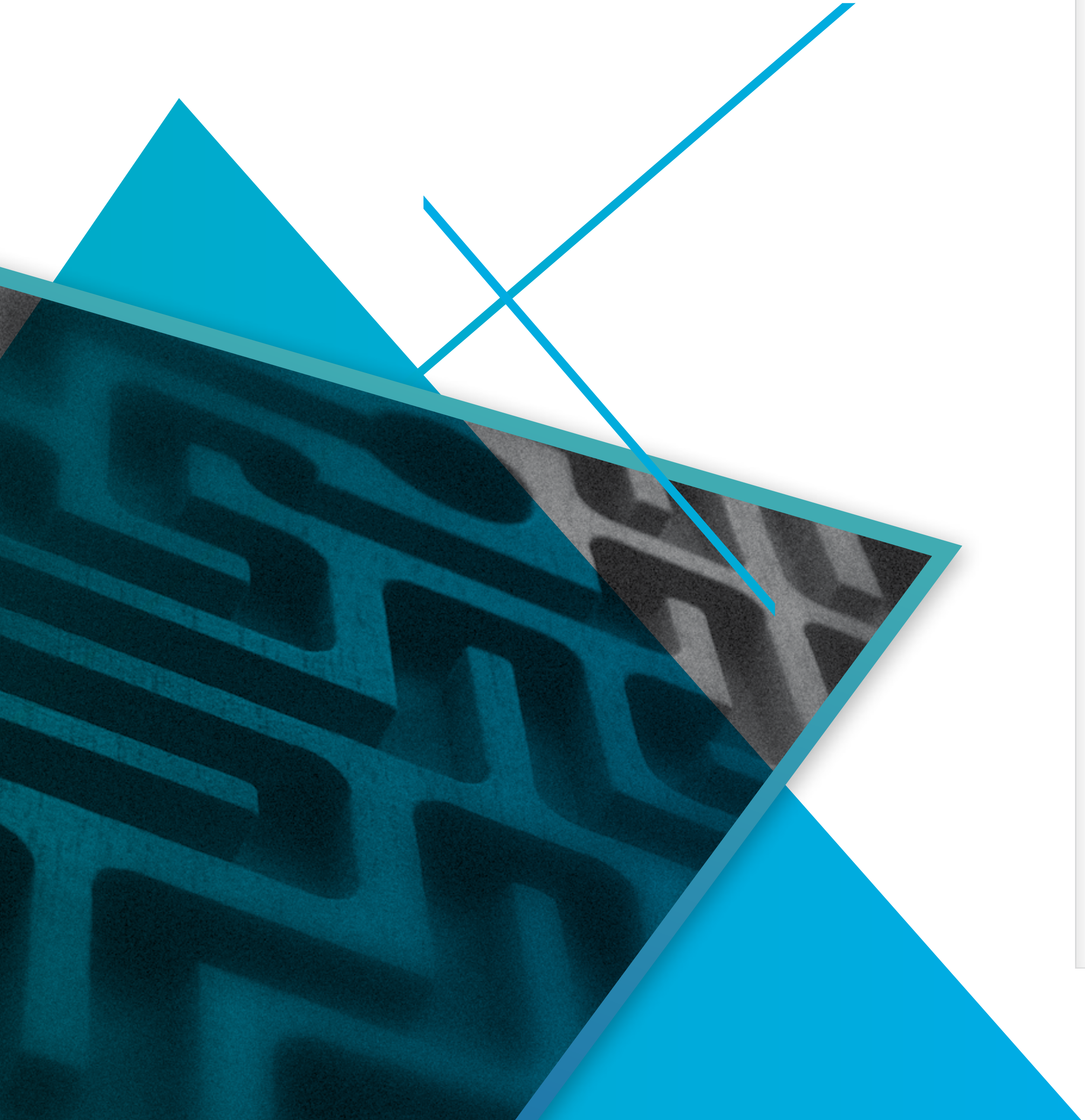

Corporate income tax: A bittersweet reduction

FIRST THE SWEET

Despite recent implications to the contrary, the Minister of Finance (Minister) announced in the 2022 Budget Speech that the corporate income tax (CIT) rate will be reduced to 27% for years of assessment ending on or after 31 March 2023.

The reasons outlined by the minister for proceeding with this reduction, against many expectations, are as follows:

- Corporate income and profits have been more resilient than anticipated with tax collection recently buoyed by strong increases in the prices of exports relative to imports.
- South Africa's corporate income tax rate exceeds the Organisation for Economic Co-operation and Development's average of 23%.
- The CIT rates of countries with strong investment and trading ties to South Africa have significantly lower rates of CIT, which provides a strong incentive for tax avoidance.
- The reduction in CIT is part of a broader restructuring of the corporate income tax system in South Africa.
- While the reduced CIT rate will result in a revenue loss, it will be offset by the additional revenue earned from protecting and broadening the tax base.

AND NOW THE BITTER

With the reduction in the CIT rate now confirmed, the following key proposals aimed at protecting and broadening the tax base also come into play (i.e. for years of assessment ending on or after 23 March 2023):

- the limitation on the use of assessed losses; and
- further restricting the deductibility of interest paid to tax exempt persons.

We deal with these proposals in more detail below.

LIMITATION ON USE OF ASSESSED LOSSES

Some exceptions aside, South African corporate taxpayers are currently permitted to use the full balance of an assessed loss to shield taxable income in a year. However, under the revised rules, which now become effective for years of assessment ending on or after 31 March 2023, a company can only offset a balance of an assessed loss against the higher of R1 million or 80% of taxable income arising in a year. The impact of this revised rule is illustrated in the following example:

Company A has an assessed loss brought forward of R2 million and makes taxable income of R1,100,000 for its tax year ending 30 June 2023. In determining its taxable income for this year, Company A can only offset the higher of R1 million or R880,000 (80% of R1,100,000) by the assessed

Corporate income tax: A bittersweet reduction...CONTINUED

loss brought forward. Company A will thus pay tax on R100,000 and will carry forward an assessed loss of R1 million to the following tax year.

While the overall aim of this proposal is generally appreciated by the taxpaying public, the timing of it is still unfortunate and may burden businesses trying to recover from the effects of the COVID-19 pandemic. It also negates the effect of accelerated allowances as an incentive, which is particularly concerning and may adversely impact the level of investment into critical energy and gas related projects going forward.

FURTHER RESTRICTING THE DEDUCTIBILITY OF INTEREST PAID TO TAX EXEMPT PERSONS

The existing rules that limit the tax deductibility of interest paid to tax exempt persons are encapsulated in section 23M of the Income Tax Act 58 of 1962 and first became effective for interest incurred on or after 1 January 2015. In order to strengthen the application of these rules (i.e. to increase the amount of "*interest*" that does not qualify for a tax deduction) the 2021 legislative cycle included changes to section 23M as follows:

- broadening the definition of interest to include payments made under interest rate swap agreements, the finance cost element of finance leases, and foreign exchange differences;
- curbing the circumvention of the rules by using back-to-back loans; and
- ensuring that the rules apply even if the interest is subject to interest withholding tax in South Africa.

We draw attention to the last change outlined above as section 23M currently does not apply where the interest has been subject to any level of withholding tax in South Africa. This is a critical change and will result in significantly more cross border interest-bearing loans being subject to section 23M.

Corporate taxpayers are thus advised to revisit the application of section 23M to interest paid once the revised rules become effective.

LANCE COLLOP

Changes to the intra-group transaction rule

The intra-group transaction rule allows for tax-neutral transfers of assets within a group of companies. However, it comes with many caveats that need to be managed. One of these is that, where an asset is transferred on intercompany loan or for shares, the transferor is deemed to have a nil base cost for such loan or shares. Before last year, this nil base cost was only ignored where the loan was repaid, or share capital was returned, within the same group of companies.

This nil base cost rule could result in economic double tax in some circumstances. For example, if the transferee de-groups within six years, the de-grouping claw back would be triggered in the hands of the transferee, whereas the transferor would still have a nil base cost for the loan and would trigger tax on the repayment or sale of the loan.

The 2021 amendments provided for additional circumstances in which the nil base cost can be ignored. These circumstances now include:

- the expiration of six years from the date of the asset transfer;
- a de-grouping event within six years of the asset transfer; and
- where the asset is on-sold outside of the group of companies within 18 months.

The 2021 amendments did not go far enough, as there are still other circumstances in which the nil base cost should be ignored. For example, it should be ignored where the asset is disposed of within six years (not 18 months). It has therefore been proposed in the 2022 Budget Speech that further circumstances be introduced in which the nil base cost can be disregarded.

MARK LININGTON

Contributed tax capital changes put on hold for now

"Contributed tax capital" is defined in section 1 of the Income Tax Act 58 of 1962 and is a key concept in differentiating between distributions that are regarded as dividends and distributions that are regarded as returns of capital for tax purposes.

In a very general sense, the contributed tax capital of a company (in relation to a particular class of shares) is the aggregate of all capital that has been contributed to a company by shareholders in that class, less the capital that has been returned to them.

Where a company distribution reduces the contributed tax capital, it is considered a return of capital, and where there is no reduction it is a dividend for tax purposes.

The definition of *"contributed tax capital"* contains a proviso to the effect that no shareholder (in relation to a particular class of shares) may receive contributed tax capital in excess of that shareholder's proportion of shares held in the class. In other words, there is a principle of proportionality that applies.

In the Taxation Laws Amendment Bill 2021, read with the National Treasury's explanatory memorandum, it was indicated that Government intended to amend and clarify this proviso.

The purported reason was that some companies were exploiting the provision by allocating contributed tax capital to certain shareholders on the basis of a share premium contribution, which is not allocated to all shareholders.

The amendment that was ultimately captured in the Taxation Laws Amendment Act 20 of 2021 did, however, cause concern.

Specifically, a further proviso was introduced to the effect that there can be no transfer of contributed tax capital unless all shareholders in the class participate in the transfer in the same manner and are allocated an amount of contributed tax capital on a proportional basis.

Seemingly it would then not be possible to effect a transfer of contributed tax capital (and thus a return of capital) if just some shareholders participate and not all.

The amendments are supposed to come into effect on 1 January 2023.

However, in the 2022 Budget Speech, it has now been indicated that the National Treasury will further consider the impact of the proposed amendments and review the matter during the 2022 legislative cycle. It therefore appears that the proposed amendments will not necessarily come into effect on 1 January 2023 in their current form.

HEINRICH LOUW

The debt forgiveness rules are being widened

The debt forgiveness rules set out a waterfall of adverse tax consequences that are triggered where debt is forgiven or capitalised. To apply these rules, the debtor needs to identify what the forgiven debt was used for. For example, if the debtor used the proceeds of the debt to fund operational expenditure and claimed an income tax deduction for such expenditure, the debtor must recoup the income tax deduction. Likewise, if the debtor used the proceeds of the debt to acquire a fixed asset which is written off annually for tax purposes, the debtor must recoup the wear and tear allowances.

According to the 2022 Budget Speech, there is a perceived gap in these rules in relation to assets that were sold in previous years, and where the debtor claimed a scrapping allowance or realised a capital loss. It has been proposed that the debt forgiveness rules be amended to make it clear that they also apply to the scrapping allowance or capital loss realised upon the disposal of assets in prior years.

MARK LININGTON

The end of an era (or four): Further tax incentives discontinued

Tax incentives are applied to encourage certain behaviours and activities by providing businesses and individuals with favourable tax treatment. The introduction of a tax incentive is generally based on a social, economic or environmental need that has been identified and can be alleviated by the actions or behaviours of taxpayers in exchange for a tax benefit.

Although tax incentives are introduced in order to remedy or improve a particular circumstance or behaviour, there are potential negative effects from these incentives that make them economically less desirable, including:

- the reduction of the tax base;
- increasingly complicated governing legislation;
- greater benefits to larger entities that can obtain specialised tax advice; and
- additional South African Revenue Service resources required to monitor and audit the incentives.

In order to mitigate these possible negative effects, tax incentive provisions often include a sunset clause that indicates a predetermined date on which the relevant incentive will cease to be in effect. In addition, these incentives are continually reviewed in order to determine their effectiveness and ascertain whether the desired outcome (1) has been achieved; and (2) outweighs any negative consequences arising from the incentive. These reviews often inform a decision by the National Treasury either to extend or discontinue a tax incentive.

Following the reviews undertaken during 2021, the Minister of Finance has indicated that the following corporate tax incentives provided for in the Income Tax Act 58 of 1962 will not be renewed when they reach their sunset date:

- section 12DA, dealing with deductions in respect of rolling stock, which will end on 28 February 2022;
- section 12F, dealing with deductions in respect of airport and port assets, which will end on 28 February 2022;

The end of an era (or four): Further tax incentives discontinued...CONTINUED

- section 12O, providing for an exemption in respect of films, which lapsed on 31 December 2021; and
- section 13sept, dealing with deductions in respect of the sale of low-cost residential units on loan account, which will end on 28 February 2022.

Notably, the research and development (R&D) tax incentive, provided for in section 11D of the Act is intended to come to an end on 30 September 2022. However, a discussion document and an online survey reviewing the R&D tax incentive was published on 15 December 2021 and workshops will be held with interested parties in 2022 in order to ascertain its effectiveness. On the basis that the public consultation process for reviewing the R&D tax incentive is still ongoing, it was proposed in the 2022 Budget Speech that the sunset clause for the R&D tax incentive be extended until 31 December 2023 in order to create certainty for taxpayers.

Taxpayers who have benefited from the tax incentives that are being discontinued should take note of the dates on which the relevant incentives cease to be in effect in order to ensure that they do not erroneously rely on the relevant provisions going forward. Whether the R&D tax incentive will be extended beyond 31 December 2023 remains to be seen and will likely depend on the outcome of the public consultation process that is underway.

LOUISE KOTZE

You can run, but you can't hide: Taxation of collective investment schemes up for further discussion

Collective investment schemes (CISs) essentially pool funds together for the purpose of operating as a type of investment vehicle for investors. CISs have a special taxation regime in that for income tax purposes, distributions (that are not of a capital nature) from a CIS to unit holders within 12 months after that income is accrued (or in the case of interest is received by a CIS) follow the flow-through principle and are deemed to accrue to the unit holders on the date of distribution and subject to tax in the hands of the unit holders. This is in accordance with the well-established conduit pipe principle in South African law.

Notably, the conduit principle only applies for income tax purposes, whereas in the event a CIS realises a capital gain or loss, then such gain or loss is disregarded for capital gains tax purposes under para 61(3) of the Eighth Schedule to the Income Tax Act 58 of 1962.

Determining whether a receipt is capital or revenue in nature is one of the most debated topics in South African tax law and has made its way to court on countless occasions. This is because the distinction is not explicitly stated in the Act and reliance is based on facts and circumstances as well as the principles developed in case law.

2018 PROPOSALS

During 2018, the Government identified that some CISs are in effect generating profits from the active frequent trading of shares and other financial instruments. These CISs, however, were of the view that the profits were of a capital nature (and thus exempt from capital gains tax) on the basis of the intention of long-term investors in the CIS.

In 2018, amendments were thus proposed by the National Treasury to clarify and provide certainty on the tax treatment of trading profits of CISs. The CDH Tax & Exchange Control Department previously discussed this proposal in the Special Budget Day Alert for 2018. It is worth revisiting the 2018 proposals which were as follows:

- Distributions from the CIS to unit holders derived from the disposal of financial instruments within 12 months of their acquisition would be deemed to be income of a revenue nature and be taxable as such in the hands of the unit holders if distributed to them under current tax rules relating to distributions.

You can run, but you can't hide: Taxation of collective investment schemes up for further discussion...CONTINUED

- Where a CIS acquired financial instruments at various dates, the CIS would be deemed to have disposed of financial instruments acquired first, thereby using the first in first out method to determine the period the financial instruments were held.
- Deductions and allowances would not flow through to unit holders and amounts deemed to have accrued to unit holders would be limited to amounts of gross income reduced by deductions allowable under section 11.

PUBLIC SUBMISSIONS

There was significant public consultation on the proposals with the asset management industry submitting that the proposals should be withdrawn for various reasons. In the Response Document on the 2018 Taxation Laws Amendment Bill, the National Treasury referenced the following submissions made by the industry as to why the amendments should be withdrawn:

- The proposed amendment would cause unfairness between unit holders within a portfolio when a large unit holder decides to redeem units, thereby triggering the sale of portfolio assets that have been held for less than 12 months, resulting in a tax liability on distribution to all unit holders.
- The proposed time-based rule affected all manner of transactions, including unit holder withdrawals, portfolio rebalancing, index tracking, hedging and transactions directed at efficient portfolio management (for example, purchasing a derivative to gain economic exposure to a share in lieu of holding the physical share).
- The industry was engaged in a study of the impact of the proposals, which was not completed in time before the effective date of the amendments.

Given the above, the 2018 proposals were put on hold to give Government and the asset management industry more time to investigate and find solutions that would have a less negative impact on the industry and holders of participatory interests. Since 2018, there have been numerous discussions and workshops regarding the proposed changes to the taxation of CISs with various concerns being raised by the industry.

Government now proposes that a discussion document dealing with the tax treatment of amounts received by or accrued to CISs be published for public comment before any amendments are proposed to the tax legislation. CISs and asset managers should thus ensure they keep an eye out for the discussion document as it will most certainly have a potential impact on the way in which CISs will be taxed.

JEROME BRINK

Resolving the anomaly between new assessed loss utilisation restrictions and section 36 mining capital allowances

In 2021 amendments were proposed relating to section 20 of the Income Tax Act 58 of 1962 to limit corporate taxpayers' ability to utilise assessed losses carried forward to 80% of the value of such assessed losses in a given year of assessment. With the remainder of the assessed loss rolling over for use in the next year of assessment.

The capital deductions regime for miners is contained in section 15(a) of the Act, read with section 36(7C). Section 15 provides that a deduction shall be allowed as per section 36, in lieu of an ordinary deduction under section 11. Section 36 in turn provides for a deduction of any capital expenditure to be allowed from income derived from working any producing mine.

The mining industry is thus entitled, subject to certain limitations, to claim the capital expenditure incurred as an income tax deduction against mining income in the year in which such expenditure is incurred. This is an exception to the general tax rule that one cannot deduct capital expenditure against income as it recognises the substantial upfront capital that is required to commence mining operations.

Section 36(7E) provides a cap on the amount of capital expenditure that can be deducted under the mining capital expenditure regime. It limits the amount of the section 36(7C) deduction to taxable income regarding a mine or mines – to be determined before applying the section 15(a) deductions, but after the set-off of any balance of assessed loss incurred by the taxpayer in relation to such mine or mines in any previous year which has been carried forward from the preceding year of assessment.

The anomaly identified in the 2022 Budget Speech appears to lie in the disjunction between allowing the full amount of an assessed loss to be applied for the purposes of section 36(7E) and the restrictions imposed on the utilisation of assessed losses under section 20. It is therefore notable that the National Treasury proposes publishing draft legislation that will clarify the interaction between the provisions.

DRIES HOEK AND
TSANGA MUKUMBA

Lay-by arrangements and debtors allowances

A lay-by arrangement can be characterised as one where a prospective purchaser agrees with a prospective seller that a particular item or asset will be set aside or reserved for purchase. The prospective purchaser usually pays a deposit for the reservation (sometimes followed by further payments). Once the prospective purchaser has presented full payment, the sale is concluded and the purchaser takes possession and ownership of the item. (There may be different characterisations depending on the relevant terms of the agreement.)

Section 24 of the Income Tax Act 58 of 1962 essentially provides for a deemed accrual for a seller of goods or other property in certain circumstances, mainly in the context of credit agreements.

The circumstance in which section 24(1) applies is where transfer to the purchaser is subject to receipt by the seller of the whole or a certain portion of the purchase price.

The accrual of the full purchase price will then be deemed to have occurred during the tax year that the agreement was entered into, and not only when ownership is passed.

This particular provision was the subject of the case of Milnerton Estates Ltd v Commissioner for South African Revenue Service 81 SATC 193, which caused some concern in the property industry in 2018.

Section 24(2) does, however, provide some relief for the seller in the form of a debtors allowance in respect of amounts that have accrued under section 24(1) but which have not yet been received. The allowance applies where at least 25% of the amount is payable only after 12 months of the date of the agreement.

In the 2022 Budget Speech, the National Treasury has indicated that it will review the debtors allowance provisions in the context of lay-by arrangements, as these arrangements are often for a period of less than 12 months, resulting in the seller not qualifying for the allowance.

Our view, however, is that section 24(1) is not necessarily applicable to lay-by arrangements as characterised above. As such, there should be no concern in relation to the debtors allowance.

In any event, whether section 24(1) applies or not, it appears that the National Treasury may make provision for shorter-term arrangements.

HEINRICH LOUW

The BEPS Project: Introducing the Two-Pillar Solution and implementation framework in South Africa

The shifting of profits by multinational enterprises (MNEs) to lower or no-tax jurisdictions has an adverse impact on economies globally as this practice (amongst others) erodes the tax base in countries with higher tax rates and undermines the integrity of tax systems, often taking undue advantage of developing countries and low-income jurisdictions.

In order to curb tax base erosion and profit shifting (BEPS), the Organisation for Economic Co-operation and Development (OECD) (in conjunction with the G20) first introduced the BEPS Project in 2013 with the 15-point Action Plan announced in 2015. The BEPS Project aims to ensure that profits are taxed in the jurisdiction where the economic activities generating such profits are performed.

On 8 October 2021, the members of the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework) agreed to the Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (2021 Statement). This statement contains the Two-Pillar Solution that is intended to establish a new framework for international tax, as well as a detailed implementation plan that envisages the implementation of this new framework by 2023. The CDH Tax & Exchange Control Department previously discussed the Two-Pillar solution in a Tax Alert article published on 9 December 2021, however, as a brief summary:

- Pillar One aims to ensure a fairer distribution of profits and taxing rights among countries with respect to the largest MNEs operating in those countries. An important element in respect of the implementation of Pillar One is the removal of digital service taxes and other similar measures.
- Pillar Two encompasses the imposition of (1) a global minimum tax rate of 15% on specified entities (which will operate as a top up tax) and (2) limited source taxation on certain related party payments that are subject to tax below a minimum rate.

The BEPS Project: Introducing the Two-Pillar Solution and implementation framework in South Africa...CONTINUED

The OECD/G20 is developing a multilateral convention and a supplementary explanatory statement that will facilitate the implementation of Pillar One between different jurisdictions. In addition, model rules and a model treaty provision will be developed to give effect to Pillar Two. It is the intention of the inclusive framework to finalise the implementation of both Pillar One and Pillar Two by 2023.

In the 2022 Budget Speech it was announced that local legislative amendments to implement Pillar One and Pillar Two in South Africa will be proposed once the implementation framework for the Two-Pillar Solution has been finalised by the OECD/G20 and has been translated into a local context.

Given the extent of jurisdictions involved and the aim to reach consensus-based solutions, there have been various delays in the publication of the various framework documents by the OECD/G20 and it is unclear whether the intended 2023 deadline for the publication of the complete implementation framework will be met. In any event, the Minister of Finance has made it apparent that the National Treasury will be unable to make the necessary local legislative proposals until such time as the implementation framework has been completed by the OECD/G20.

While the MNEs that will be affected by the implementation of Pillar One and Pillar Two may benefit from these delays, they should nevertheless take cognisance of the changes that are likely to come as these are expected to be significant considering the agreed upon Two-Pillar Solution.

LOUISE KOTZE

The good, the bad and the employment tax incentive

One of the greatest challenges faced by South Africa is the high unemployment rate, which especially impacts the youth. High levels of unemployment have a profound impact on the socio-economic fabric of South Africa as a society. Chapter 4 of the Budget Review Documents states that youth unemployment in South Africa was at 56,2% for 20 to 29-year-olds in the third quarter of 2021. Even by emerging market economy standards, that figure is staggeringly high.

Given the high unemployment rates in South Africa, Government introduced the Employment Tax Incentive (ETI) in January 2014 as one of the tools to try increase employment. The preamble to the Employment Tax Incentive Act 26 of 2013 (ETI Act) sets out the key reasons why it was introduced:

> *"Since the unemployment rate in the Republic is of concern to Government;*
>
> *And since Government recognises the need to share the costs of expanding job opportunities with the private sector;*
>
> *And since Government wishes to support employment growth by focusing on labour market activation, especially in relation to young work seekers;*
>
> *And since Government is desirous of instituting an employment tax incentive."*

Notwithstanding some of the negative publicity around certain ETI arrangements in the past 18 months, positive developments have also been seen in the latest statistics referred to by the National Treasury, which reflect modest positive effects on growth rates of youth employment in firms claiming the ETI, coupled with some of the anticipated significant negative effects not materialising.

ETI INCREASES

At its simplest, payment of the ETI is effected by eligible employers being able to reduce the employees' tax liability ordinarily due by the amount of the ETI that they can claim, provided that they meet the requirements of the ETI Act. Currently, the maximum amount that an employer can claim in the first 12 months in which a qualifying employee is employed is R1,000, whereas the current maximum for the second 12 months of employment is R500.

The good, the bad and the employment tax incentive...CONTINUED

In order to encourage businesses to employ young people, an increase of 50% in the value of the employment tax incentive, effective from 1 March 2022, has now been proposed. The ETI will therefore increase from a maximum of R1,000 to a maximum of R1,500 per month in the first 12 months, and from R500 to a maximum of R750 in the second 12 months of eligibility.

In addition, in order to better encourage small and medium firms to take up the ETI, it has been proposed that there should be improved targeting of the incentive to support jobs for long-term unemployed work seekers together with an expansion of the eligibility criteria for qualifying employees. These are welcome announcements on the back of the Minister of Finance's encouragement to firms to take up the ETI in the 2022 Budget Speech.

However, the good news must be treated with some caution. In the last 18 months, certain arrangements making use of the ETI have been in the National Treasury and South African Revenue Service's (SARS) crosshairs, which eventually culminated in a series of amendments to the ETI Act with effect from 1 March 2022. Many taxpayers have also been faced with verifications and audits of their ETI claims resulting in additional assessments issued by SARS reversing the ETI initially claimed by these employers. Interestingly, SARS has generally not imposed any understatement penalties in relation to the reversal of the ETI claims. However, it was announced by the minister that given the abuse of the ETI, Government proposes that the ETI Act be amended to impose understatement penalties on reimbursements that are improperly claimed. Any anomalies in the legislation (if any) will thus be closed.

The ETI is constantly being refined, expanded and tightened and it is important for employers claiming the ETI to keep their fingers on the pulse in order to ensure they remain within the bounds of the ETI Act and to answer Government's call to assist with decreasing the high unemployment rate.

JEROME BRINK

2022 RESULTS

CHAMBERS GLOBAL 2018 - 2021 ranked our Tax & Exchange Control practice in Band 1: Tax.

Emil Brincker ranked by **CHAMBERS GLOBAL 2003 - 2022** in Band 1: Tax.

Gerhard Badenhorst was awarded an individual spotlight table ranking in **CHAMBERS GLOBAL 2022** for tax: indirect tax. **CHAMBERS GLOBAL 2009–2021** ranked him in Band 1 for tax: indirect tax.

Mark Linington ranked by **CHAMBERS GLOBAL 2017 - 2022** in Band 1: Tax: Consultants.

Ludwig Smith ranked by **CHAMBERS GLOBAL 2017 - 2022** in Band 3: Tax.

Stephan Spamer ranked by **Chambers Global 2019-2022** in Band 3: Tax.

TOP RANKED Chambers Global 2022
Cliffe Dekker Hofmeyr

Expanding the scope of amounts constituting variable remuneration

In 2013, section 7B was introduced to the Income Tax Act 58 of 1962. At its essence, it is a timing provision whose purpose is to match the timing between the accrual with the payment of various forms of variable remuneration. Variable remuneration amounts paid by an employer to an employee need to be reflected on the employee's IRP5 certificate issued by the employer. However, in many instances, these payments are only made after year end due to the fact that these variable remuneration amounts can only be correctly determined after work has been completed or targets achieved.

The section provides that the timing of accrual of variable remuneration must be on the payment basis and will only be included in the employee's income (and be taken into account for employees' tax purposes) on the date of the actual payment. The same will apply for employers claiming the expenditure for their own income tax purposes.

Currently, "*variable remuneration*" as defined in the Act includes:

- overtime pay, bonuses or commission (per the definition of "*remuneration*" in the Fourth Schedule to the Act);
- an allowance or advance paid for transport expenses as contemplated in section 8(1)(b)(ii) or (iii);
- an amount the employee becomes entitled to as a result of unused leave;
- any night shift or standby allowance; or
- any amount paid or granted for a reimbursement as contemplated in section 8(1)(a)(ii).

EXPANDING THE DEFINITION

In the 2022 Budget Speech, it was proposed that the "*variable remuneration*" definition, as contained in section 7B, be expanded on the basis that it still does not adequately cater for some types of variable remuneration. Government has identified that performance-based payments (especially in the informal sector) that form part of an employee's salary are not adequately catered for in the definition of variable remuneration.

This is because in the formal sector, the inclusion of "*commission*" caters for performance-based payments that form part of an employee's salary, but in the informal sector, such payments are more likely to be calculated based on units produced. "*Commission*" refers to a percentage-based payment and cannot be determined based on units produced, thereby excluding this type of performance-based payment from the ambit of section 7B as it currently exists.

It has therefore been proposed in the 2022 Budget Speech that section 7B be amended to cater for these types of performance-based variable payments. It is important that employers take note of the proposed amendments made to the definition of "*variable remuneration*" to ensure that employees' tax is withheld and IRP5 certificates are correctly issued for variable remuneration in the correct tax period.

KESHEN GOVINDSAMY

Welcome relief for individual taxpayers

Revenue collections for 2021/22 reached approximately R1,55 trillion, beating projections by 24%. To encourage economic stabilisation the Minister of Finance announced in the 2022 Budget Speech that South African individual taxpayers would benefit from R5,2 billion worth of tax relief, through a 4,5% upward adjustment to the personal income tax brackets, income tax rebates and thresholds.

The upward adjustment of personal income tax brackets has avoided a phenomenon known as "*bracket creep*". This occurs where not adjusting the income tax brackets leads to higher tax collected due to inflationary increases in people's income, as people either move into higher brackets or earn more above the taxing threshold in their current bracket.

The personal income brackets for the 2022/23 tax year are as follows:

Taxable Income (R)	Rates of Tax (R)
R1 – R226,000	18% of taxable income
R226,001 – R353,100	R40,680 + 26% of taxable income above R226,000
R353,101 – R488,700	R73,726 + 31% of taxable income above R353,100
R488,701 – R641,400	R115,762 + 36% of taxable income above R488,700
R641,401 – R817,600	R170,734 + 39% of taxable income above R641,400
R817,601 – R1,731,600	R239,452 + 41% of taxable income above R817,600
R1,731,601 and above	R614,192 + 45% of taxable income above R1,731,600

The income tax rebates have been increased to the following amounts:

- Primary: R16,425
- Secondary: R9,000
- Tertiary: R2,997

The income tax thresholds are as follows:

- Below age 65: R91,250
- Age 65 to 75: R141,250
- Age 75 and over: R157,900

Added disposable income in the hands of South African consumers is essential for economic growth, especially following the income constraints faced from the COVID-19 pandemic. The tax relief provided in the 2022 Budget Speech is therefore a welcome decrease in the burden South African individual taxpayers must bear.

TSANGA MUKUMBA

SARS to increase its focus on high-net worth individuals

It was announced in the 2021 Budget that the South African Revenue Service (SARS) would set up a specialised unit to improve compliance of individuals with wealth and complex financial arrangements (HNWIs). The High Wealth Individuals Unit (HWI Unit) was established in 2021 with Ms Natasha Singh appointed as its director in October 2021. At the time of her appointment, SARS indicated that the HWI Unit had initially selected about 1,500 wealthy individuals and their related entities to be investigated for compliance purposes, but that it would extend its reach to include more individuals and families.

In the 2022 Budget Speech, it was announced that the HWI Unit was taking shape, as part of the rebuilding of SARS. In addition, further proposals have been made that appear to be aimed at ensuring compliance by HNWIs. Currently, provisional taxpayers with business interests are required to declare their assets (based on their cost) and liabilities in their tax returns each year. It is proposed that to assist with the detection of non-compliance or fraud through the existence of unexplained wealth, all provisional taxpayers with assets above R50 million be required to declare specified assets and liabilities at market values in their 2023 tax returns. The 2022 Budget Speech notes that this additional information will also help to determine the levels of wealth holdings and structures as recommended by the Davis Tax Committee.

CORRECT DISCLOSURE OF ASSET VALUES

It appears that this proposal gives effect to SARS' announcement in October 2021 about expanding the reach of the HWI Unit. It is likely that all individual provisional taxpayers who end up having to declare their assets under this proposal may also be investigated by the HWI Unit. From a practical perspective, this proposal will place a greater burden on taxpayers to declare the market values of their assets correctly. Taxpayers must also keep in mind that under the Tax Administration Act 28 of 2011, it is an offence to declare false information in a return. In other words, taxpayers could face the risk of prosecution if they do not declare the correct value of their assets in an attempt to fall below the R50 million threshold and avoid detection by SARS.

SARS to increase its focus on high-net worth individuals...CONTINUED

Importantly, taxpayers who are required to declare certain assets at market value will not necessarily end up paying more tax as a mere increase in wealth does not necessarily mean that more tax will be paid. An increase in the value of an asset will only result in additional tax being payable if that asset is disposed of and capital gains tax becomes payable. Practically speaking, the implementation of the proposal may also allow SARS to assess whether an individual has correctly declared their income in a given year and whether their income tax liability seems correct, given the taxpayer's level of wealth.

Another interesting announcement in the 2022 Budget Speech is the proposal to review the provisional tax system given changing circumstances and international developments and the intention to publish a discussion paper in this regard. Given the proposal for provisional taxpayers owning assets in excess of R50 million to declare specified assets and liabilities in their 2023 tax returns, it will be interesting to see whether the review of the provisional tax system will affect the impact or reach of the proposal.

LOUIS BOTHA

2022's ice-cream won't taste twice as nice: Preventing double-dipping by those ceasing tax residency

Where a person (other than a company) ceases to be a tax resident during a year of assessment, section 9H(2)(b) of the Income Tax Act 58 of 1962 deems their year of assessment to come to an end on the day before the person's tax residency ceases. Section 9H(2)(c) then provides that that person's next year of assessment will commence on the day their tax residency ceases. In effect, that person may then have two consecutive years of assessment in a 12-month period.

Previously, this allowed a person to claim exemptions and exclusions available within a single year of assessment twice during a 12-month period – once during the first year of assessment, and then again during the second year of assessment. To prevent this double-dipping, it was proposed in the 2022 Budget Speech that legislation be amended to apportion both the interest exemption and capital gains annual exclusion between these two years of assessment.

An example using capital gains tax illustrates this well. Where a person disposes of a capital asset before ceasing to be a tax resident, any capital gain will be included in the "*first year of assessment*". Should that person then dispose of another capital asset after ceasing to be a tax resident, but the capital gain falls within the South African capital gains tax net (say where immovable property is concerned), this capital gain will be included in the "*second year of assessment*".

Until now, that person would be able to reduce their capital gain in their "*first year of assessment*" by the R40,000 annual exclusion. In addition, that person would also be able to reduce their capital gain in their "second year of assessment" by another R40,000 as this annual exclusion is granted per "*year of assessment*".

Under the proposal announced in the 2022 Budget Speech, this R40,000 annual exclusion would only be available once over a person's two years of assessment where they cease to be a tax resident. Therefore, in the above scenario, the person's aggregate capital gain over both years of assessment would be reduced by the R40,000 annual exclusion which is only applied once.

Any individuals that anticipate ceasing their tax residency in the near future should be aware of this pending amendment as it will affect their tax return declarations.

NICHOLAS CARROLL AND JEROME BRINK

Proposals in relation to the retirement fund industry

The Minister of Finance has announced various proposed amendments to the taxation regime of retirement funds which we discuss below.

CLARIFICATION ON THE TRANSFER OF TOTAL INTEREST IN A RETIREMENT ANNUITY FUND

Under a current reading of the Income Tax Act 58 of 1962, the transfer by members of their retirement interest from one retirement fund to another is permitted, subject to certain conditions that include, *inter alia*, transfer to a similar type of retirement fund or a fund that imposes more restrictions than the current one. The Minister of Finance (Minister) has expressed recognition of the fact that these conditions may result in retirement annuity fund members with more than one contract in a particular fund being constrained in their ability to transfer one or more contracts from one retirement annuity fund to another. Preservation funds are, however, not restricted on the proportion of their retirement interest that can be transferred into another fund.

To address this, the Minister proposes amending the relevant legislation, to allow fund members to transfer one or more contracts in a particular retirement annuity fund, subject to certain conditions to ensure that the current minimum thresholds are not contravened.

CLARIFICATION ON THE APPLICABILITY OF TAX-NEUTRAL TRANSFERS FROM A PENSION TO A PROVIDENT FUND

The Minister has identified that pursuant to various amendments to the retirement fund regime, the current provisions of the Act create an anomaly in that transfers from a pension fund to a provident fund related to contributions made before 1 March 2021 are not tax-neutral. It appears that there was no policy intent for the tax-neutral transfers to apply exclusively to transfers after this date, and the Minister has proposed that contributions to a pension fund before 1 March 2021 also receive tax-neutral transfer status. As a result, transfers to a provident or provident preservation fund are proposed to be tax-neutral irrespective of the type of retirement fund from which the retirement interests were transferred and the timing thereof.

CLARIFICATION IN RESPECT OF THE COMPULSORY ANNUITISATION AND PROTECTION OF VESTED RIGHTS WHEN TRANSFERRING TO A PUBLIC SECTOR FUND

The Minister has expressed the view that the current provisions of the Act forfeit the protection of historical vested rights if a transfer of rights is made into a public-sector fund. This follows tax

Proposals in relation to the retirement fund industry...CONTINUED

changes in 2013, which resulted in amendments to annuitisation requirements for provident funds and provident preservation funds. These amendments were intended to preserve retirement fund interests during retirement and to ensure consistent tax treatment (regarding the requirement to annuitise retirement benefits) across the various retirement funds. The intended result would be that provident funds would be treated similarly to pension and retirement annuity funds, and provident preservation funds would be treated similarly to pension preservation funds.

These amendments came into effect on 1 March 2021, subject to the protection of historical vested rights. The irregularity is owing to the pension fund and provident fund definitions not making any reference to the protection of vested rights for individuals who were members of a provident or provident preservation fund as at 1 March 2021. To address this irregularity, the Minister proposes amending the pension and provident fund definitions to ensure that historical vested rights remain protected, even if they are transferred to a public-sector fund.

STEPHAN SPAMER AND
HOWMERA PARAK

Value-added tax

Despite much speculation regarding another increase in the value-added tax (VAT) rate as well as the introduction of a higher VAT rate for luxury goods, the VAT rate will remain unchanged and no higher VAT rate for luxury goods has been introduced. No further significant VAT amendments were announced; however, we discuss the two proposals that were announced below.

VAT ON ELECTRONIC SERVICES

Revised regulations

Revised regulations to prescribe and clarify the extent of electronic services (e-services) supplied by foreign suppliers to South African consumers which are subject to VAT were proposed in 2018. These regulations significantly broadened the scope of e-services. In the 2019 Budget Review the Minister of Finance then announced that further amendments would be made to the e-services regulations to broaden the scope of e-services that would be subject to VAT in line with the Organisation for Economic Co-operation and Development/Group of 20 Base Erosion and Profit Shifting Action 1 Report (OECD BEPS Report). The revised regulations came into effect on 1 April 2019.

It is proposed that further changes will once again be made to the e-services regulations to account for further developments in this area.

Registration exemption

Foreign suppliers of e-services are required to register as VAT vendors in South Africa to the extent that they make taxable supplies of e-services in excess of R1 million in a 12-month period.

It is proposed that where a foreign e-services supplier makes a once-off supply of e-services in excess of the R1 million registration threshold, that a specific exception to the rule requiring registration be considered. This will prevent unnecessary registrations, costs and the administrative burden for both non-resident suppliers and the South African Revenue Service (SARS). Notably, it is an exception already available to resident suppliers who exceed the registration threshold only as a result of *"abnormal circumstances of a temporary nature"*.

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Value-added tax...CONTINUED

SECTION 72 ARRANGEMENTS AND DECISIONS

Section 72 of the Value-Added Tax Act 89 of 1991 (VAT Act) deals with the Commissioner's discretion to make arrangements or decisions to overcome difficulties, anomalies or incongruities that vendors may face when applying the VAT Act as a result of the manner in which the vendor conducts their enterprise.

This section was amended in 2019 to narrow the extent of the South African Revenue Service (SARS) Commissioner's discretion in making such a decision and to clarify the circumstances under which the provision can be invoked.

It is proposed that the legislation be amended to incorporate specific dispensations which require decisions under the new provisions of section 72, in order for vendors or classes of vendors to operate in terms of the VAT legislation as opposed to under a special dispensation.

GERHARD BADENHORST, VARUSHA MOODALEY AND TERSIA VAN SCHALKWYK

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Excisable products

As is the case each year, Government proposes an increase in duties and levies for excisable products in Schedule 1 Part 2A to the Customs and Excise Act 91 of 1964 (Customs Act).

Of relevance this year are the following:

TOBACCO AND ALCOHOL (EXCLUDING TRADITIONAL AFRICAN BEER)

- The targeted excise tax burdens for wine, beer and spirits are 11%, 23% and 36% of the weighted average retail price, respectively. Government proposes to increase excise duties on alcohol by between 4,5% and 6,5% for 2022/23.
- The targeted excise tax burden as a percentage of the retail selling price of the most popular brand within each tobacco product category is currently 40%. The consumption of cigars has moved towards more expensive brands, requiring a higher-than-inflation increase to maintain the targeted tax burden. Government proposes to increase the excise duty rate by between 5,5% and 6,5%.
- The policy framework for both alcohol and tobacco will be reviewed during 2021/2022.

TRADITIONAL AFRICAN BEER

- As was the case last year, there will be no change to the excise duty on traditional African beer.
- The current excise duty regime applies a flat excise rate for traditional African beer powder of 34.7c/kg.
- As there are similar products in the market, in the interest of equity these products will be included in the tax net with an excise equivalent to the powder rate from 1 October 2022.

VAPING

- Following public consultation, Government proposes to apply a flat excise duty rate of at least R2,90/ml to both nicotine and non-nicotine solutions.
- The proposal will be included in the 2022 Taxation Laws Amendment Bill for further consultation before being introduced from 1 January 2023.

HEALTH PROMOTION LEVY

The health promotion levy for beverages with more than 4g of sugar content per 100ml will be increased from 2,21c/g to 2,31c/g from 1 April 2022.

Consultations will also be initiated to consider lowering the 4g threshold and extending the levy to fruit juices.

FUEL TAXES

For the first time, fuel prices in South Africa exceeded R20/l for inland unleaded petrol in December 2021 due to higher crude oil prices and exchange rate depreciation. To support consumers and the economic

Excisable products...CONTINUED

recovery, **no increases will be made to the general fuel levy on petrol and diesel for 2022/23**, providing tax relief of R3,5 billion. There will also be **no increase in the Road Accident Fund (RAF) levy**.

The last time the fuel price was not increased due to a change in either the general fuel levy or the RAF levy was in 1990.

PLASTIC BAG LEVY

To further discourage consumers from buying plastic bags, and to support reuse and recycling, it is proposed that the plastic bag levy be increased from 25c/bag to 28c/bag, in line with inflation, from 1 April 2022.

Government aims to reduce single-use plastics. An upstream plastic tax and a tax on single-use plastics will be investigated.

MOTOR VEHICLE EMISSIONS AND INCANDESCENT GLOBE TAXES

Government proposes to:

- Increase the vehicle emissions tax rate on passenger cars from R120 to R132/gCO2/km;
- Increase the tax on double cabs from R160 to R176/gCO2/km from 1 April 2022; and
- The incandescent light bulb levy will be increased from R10 to R15 per light bulb from 1 April 2022.

GENERAL

Government states that:

- The rebuilding of the South African Revenue Service (SARS) is evident in improved revenue collection and compliance trends. Over the past year, SARS has recruited an additional 490 staff across various levels and skills areas and has invested R430 million in refreshing and modernising its information and communications technology infrastructure.
- The multi-year customs modernisation programme is under way, with an initial focus on improving Beitbridge border operations through data-driven risk profiling and number plate recognition. SARS will expand the modernisation programme to other ports of entry over the medium term.
- There are currently no provisions in the Customs Act enabling the SARS Commissioner to issue advance rulings. It is proposed that an enabling framework for advance rulings be provided in this act.
- There is currently no provision in the Customs Act enabling the commissioner to prescribe the period within which entry must be made in respect of loose or break-bulk cargo imported by sea, air or rail. Government proposes that the Customs Act be amended to allow the commissioner to make rules for the entry time of any category of goods, which may include break-bulk cargo imported by sea, air or rail.
- Because of existing uncertainty, it is proposed that amendments be made to the Customs Act to clarify the legislative requirements for invoices in respect of import and export goods.
- Draft amendments to the diesel refund notes and rules to the Customs Act were published for public comment in 2020 and 2021. Industry-specific workshops were conducted in the second half of 2021 to refine and finalise the proposed reforms. Government proposes that legislation effecting these amendments be put forward.

PETR ERASMUS

Changes in carbon tax rates

In terms of section 5 of the Carbon Tax Act 15 of 2019 (Carbon Tax Act), the carbon tax rate must increase annually by the change in the November consumer price index as determined by Statistics South Africa, compared with the November consumer price index that falls within the tax period, plus 2%. Pursuant to this, it was announced that the carbon tax rate for the 2022 tax year (January to December) would increase from R134 per tonne CO_2e, to R144 per tonne CO_2e.

As a result of this increase in the carbon tax rate, the carbon fuel levy, which is administered under the fuel levy regime will also increase by the same percentage. The carbon fuel levy for 2022 will increase by 1c to 9c/l for petrol and by 1c to 10c/l for diesel from 6 April 2022. It must be appreciated that this levy is separate from the general fuel levy and the road accident fund levy.

On the plus side, it is proposed that the carbon tax cost recovery quantum for the liquid fuels refinery sector will increase from 0,56c/l to 0,63c/l (in effect since 2020). It remains to be seen whether the benefit enjoyed by refineries, by virtue of a potentially decreased carbon tax liability will be passed on to consumers.

LOUIS BOTHA AND PETR ERASMUS

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Tax compliance status for taxpayers under business rescue to be investigated

South Africa introduced the concept of business rescue in the (new) Companies Act 71 of 2008 with the intention of including a mechanism for the rehabilitation of financially distressed companies.

Once a company is placed under business rescue, temporary supervision and management of the company is handed to a business rescue practitioner. The aim is to rescue the company from its financial distress by, for example, reducing cost overheads and positioning the company to continue offering its products or services. As with all businesses, customers and suppliers expect the businesses that they transact with to be tax compliant.

Section 256 of the Tax Administration Act 28 of 2011 (TAA) deals with the tax compliance status (TCS) of taxpayers. Specifically, section 256(3) states that a taxpayer's TCS may only be marked as *"compliant"* if the taxpayer is:

- registered for tax;
- does not have any outstanding tax debt (excluding a tax debt that has been suspended or where the taxpayer has entered into an instalment payment arrangement or there has been a debt compromise with the South African Revenue Service (SARS); and
- does not have any outstanding returns (unless the taxpayer has made an arrangement with SARS regarding the submission of the return).

The requirement that there must be no outstanding tax debt has historically posed a problem for businesses in the early stages of business rescue that need to obtain a TCS. The workaround to this, in terms of the TAA, is that a taxpayer may enter into an instalment or compromise agreement with SARS. However, this is not always possible in the earlier stages of business rescue proceedings. A business cannot hope to continue operating without a *"compliant"* TCS, thereby defeating attempts at rescuing it.

The Minister of Finance has recognised this unfortunate defect and has proposed investigating the viability of empowering SARS to assist companies in early-stage business rescue, under certain conditions, to obtain a *"compliant"* TCS.

This is a welcome announcement that will assist taxpayers in this unique situation, thereby having a positive effect on the prospects of success of business rescue efforts.

TAIGRINE JONES AND JEROME BRINK

Better or worse? Extension of the first phase of the carbon tax and related proposals

EXTENSION OF THE FIRST PHASE

When the carbon tax came into effect in 2019, it was announced that the first phase of the tax would come to an end on 31 December 2022. In principle, it is contemplated that the transition from the first phase to the second phase would result in a broadening of the carbon tax base, increase in the annual carbon tax rate increase and a reduction in the allowances that taxpayers could qualify to reduce their carbon tax liability. Of course, all of this must be seen in the context of South Africa's obligations under the Paris Agreement to reduce its carbon emissions read with its revised commitment made under its revised Nationally Determined Contribution, which was submitted to the UNFCCC in 2021.

In the 2022 Budget Speech, it was announced that the first phase of the carbon tax will be extended by three years from 1 January 2023 to 31 December 2025. As such, the transitional support measures afforded to companies in the first phase, such as significant tax-free allowances and revenue recycling measures, will continue over this period, alongside other adjustments. The main proposals in this regard include:

- Extending the energy-efficiency-savings tax incentive from 1 January 2023 to 31 December 2025. This incentive is contained in section 12L of the Income Tax Act 58 of 1962.
- Extending the electricity price neutrality commitment until 31 December 2025. The electricity-related deduction will be limited to the carbon tax liability of fuel combustion emissions of electricity generators and will not be offset against the total carbon tax liability.
- Adjusting the threshold for the maximum trade exposure allowance upwards from 1 January 2023. Updated sectors and allowances will be published for public consultation.
- Penalising emissions exceeding mandatory carbon budgets. The mandatory carbon budgeting system comes into effect on 1 January 2023, at which time the carbon budget allowance of 5% will fall away. To address concerns about double penalties for companies subject to the carbon tax and carbon budgets, it is proposed that a higher carbon tax rate of R640 per tonne CO_2e will apply to greenhouse gas emissions exceeding the carbon budget. These amendments will be legislated once the Climate Change Bill is enacted.

Better or worse? Extension of the first phase of the carbon tax and related proposals...CONTINUED

The revised Climate Change Bill was published on 18 February 2022. In anticipation of the bill coming into law in the near future, persons who may be liable for carbon tax should carefully consider the Climate Change Bill provisions dealing with the carbon budget and ensure that they comply with the carbon budget provisions once in effect. The proposed penalty rate of R640 per tonne CO2e for carbon budget offenders is substantially higher than the current rate of R144 per tonne CO2e and compliance with the carbon budget provisions is key, especially if the proposed penalty rate comes into effect.

PROPOSAL REGARDING THE RENEWABLE ENERGY PREMIUM AND CARBON SEQUESTRATION DEDUCTIONS

In terms of section 6(2) of the Carbon Tax Act 15 of 2019 (Carbon Tax Act), taxpayers generating electricity can claim a tax deduction for electricity generation levy payments and additional renewable electricity purchases. These provisions were amended in 2021 to allow taxpayers entering into power purchase agreements in certain contexts to also claim the premium and qualify for the benefit.

It is now proposed that section 6(2) of the Carbon Tax Act be amended to clarify that taxpayers would qualify for a deduction if they generate electricity from fossil fuel and conduct fuel combustion activities under IPCC code 1A1 (energy industries) and 1A2 (manufacturing industries and construction). Hopefully, the proposed amendment will result in more taxpayers being able to use the premium to reduce their carbon tax liability.

In relation to the issue of carbon sequestration, it is proposed to limit the deduction for forestry management and harvested wood product sequestration activities to only those activities within the operational control of the taxpayer conducting paper and pulp activities. This follows amendments made in 2021 to expand the scope of the carbon sequestration deduction to include emissions sequestered in harvested wood products for the paper and pulp activities under IPCC code 1A2D (referred to in the Schedule to the Carbon Tax Act).

LOUIS BOTHA

Process to include crypto assets in the exchange control regulations is under way

Regulation 10(1)(c) is the overarching provision for South African exchange control as it precludes the export of any capital out of South Africa unless specifically approved by the South African Reserve Bank (SARB) or condoned by way of publication of a circular of the SARB. The concept of "*capital*" is defined broadly in the regulations as a "*general term*" and it is known to include within its ambit, assets of any nature or currency, with the specific exclusion of intellectual property.

In 2014, the SARB, for the first time, expressed its view on whether "*virtual currency*" is subject to South African exchange controls in a position paper issued through its National Payment System Department. The outcome of the paper was that, while the SARB was cognisant of the risk inherent in virtual currency and was monitoring activity surrounding cryptocurrency and the impact on the South African foreign exchange reserves, it expressed the view that transactions involving cryptocurrency were not subject to South African exchange controls.

Pursuant to, amongst other things, the ongoing developments in the cryptocurrency industry, the Intergovernmental Fintech Working Group (IFWG) was established in 2016 to foster responsible financial technology (fintech) and to develop a consistent understanding among regulators and policymakers of fintech developments, as well as to establish co-ordinated regulatory and policy implications for the financial sector and the economy. The SARB, in addition to other financial sector and fiscal regulators, is a member of the IFWG.

In June of last year (2021), the IFWG published a position paper on crypto assets, and one of its recommendations was that the SARB must request that the Minister of Finance amend the Exchange Control Regulations to, *inter alia*, include crypto assets in the definition of "*capital*" for the purposes of Exchange Control Regulation 10(1)(c).

In the 2022 Budget Speech it was stated that, following the IFWG's paper on crypto assets, the process to specifically include the concept of "*cryptocurrency*" within the ambit of exchange control monitoring and reporting is underway. That means

Process to include crypto assets in the exchange control regulations is under way...CONTINUED

that one could expect a potential amendment to the Exchange Control Regulations shortly. The amendment will have a significant impact on cryptocurrency as it will, in principle, mean that any cross-border transfers of cryptocurrency will require prior SARB approval. As a result, it is anticipated that it will burden our authorised dealer system with a host of these applications in the future, unless the SARB regulates the extent of approval requirements through the publication of a circular.

The 2022 Budget Speech also makes mention of other regulatory authorities implementing the recommendations of the IFWG, such as:

- including crypto asset service providers as accountable institutions within the Financial Intelligence Centre Act 38 of 2001; and
- potentially declaring crypto assets as a financial product under the Financial Advisory and Intermediary Services Act 37 of 2002 for purposes of protecting consumers.

The 2022 Budget Speech also confirms that we can look forward to further reports to be published by IFWG this year. Any people engaged in cryptocurrency transactions should thus be aware that several regulatory changes are afoot, and would be well advised to seek advice to ensure compliance.

HOWMERA PARAK

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Exchange control modernisation

In the 2020 Budget Speech it was announced that the National Treasury would embark on a substantive revision of the South African exchange control regime. It was anticipated that the Exchange Control Regulations, 1961 would be rewritten and that restrictions would be relaxed significantly. Specifically, it was announced that the National Treasury would take a smarter, risk-based approach to foreign currency transactions and capital flows with the introduction of a capital flow management system.

Of these anticipated changes, only some have trickled through. For example, following the introduction of amendments to certain provisions of the Income Tax Act 58 of 1962, the prohibition on loop structures has been completely abolished. A further example is the removal of the distinction between emigrants and residents.

In the 2022 Budget Speech, the National Treasury has again confirmed its commitment to modernisation, and made several proposals.

In respect of individuals:

- The export of dual listed securities to a recognised foreign securities exchange will be permitted subject to allowance limitations.
- Residents may use their discretionary allowance to participate in online foreign exchange trading, but may not use credit or debit cards.
- Residents may receive and retain gifts from non-residents offshore (no repatriation required).
- Residents may lend or dispose of authorised foreign assets held offshore to other residents (but this will not apply retrospectively and past irregular transactions must be regularised).
- Residents may transfer more than R10 million per year to offshore trusts (subject to tax and reporting requirements).
- Authorised dealers may, on a once-off basis, remit abroad the remaining cash balances (of up to R100,000 in total) of people who have ceased to be residents for tax purposes, without reference to the South African Revenue Service.

Exchange control modernisation...CONTINUED

In respect of companies:

- Debt securities referencing foreign assets listed in a South African stock exchange will remain classified as foreign.
- The foreign direct investment limit for companies investing funds offshore will increase from R1 billion to R5 billion, provided the stipulated investment conditions, tax obligations and reporting requirements are met. Excess income or profits of offshore branches and offices of South African firms may be retained offshore, subject to annual reporting.
- Authorised dealers may process transfers from a parent company to a domestic treasury management company up to a maximum of R5 billion (an increase from R3 billion) per calendar year for listed entities, and up to R3 billion (an increase from R2 billion) per calendar year for unlisted entities. Funds transferred under this dispensation may be used for new investments, expansions and other transactions of a capital nature.

HEINRICH LOUW AND
LOUIS BOTHA

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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