Dear Sir/Madam

We refer to the call for proposals on the above-mentioned. Enclosed is the SAICA National Tax Committee’s submission.

INCOME TAX – INDIVIDUALS, EMPLOYMENT AND SAVINGS

1. **Definition of “determined value” under paragraph 7 of the Seventh Schedule**

   **Legal nature**

   The current definition of determined value under paragraph 7(1)(a) of the Seventh Schedule to the Act provides that in cases where the motor vehicle was acquired by the employer under a *bona fide* agreement of sale or exchange concluded by parties acting at arm’s length, the original cost thereof to the employer (excluding any finance charges payable by the employer in respect of the employers acquisition) shall be the determined value for purpose of calculating the fringe benefit.
Factual description
Where the employer has acquired the motor vehicle under a bona fide agreement of sale, the original cost excluding interest shall be used as the determined value. Such a determined value shall be used for all the years of assessment where the employee utilises the motor vehicle for private purposes. No regard is taken of the fact that the motor vehicle depreciates.

Nature of business impacted
All employees who have been granted the right of use of a company car

Proposal
We propose that the definition of determined value under paragraph 7(1)(a) of the Seventh Schedule to the Act be amended to allow the employers to reduce the yearly determined value of the motor vehicle by a wear and tear allowance provided in section 11(e) of the Act.

The current treatment is not equitable to the employee as the taxable fringe benefit remains unchanged while the actual value of the motor vehicle gets reduced yearly. The corporate deduction for wear and tear is therefore not matched with a reduction in value in determining the value of the fringe benefit.

2. **Paragraph (cA) and (cB) of the definition of remuneration in the Fourth Schedule**

Legal nature
Paragraph (cA) and (cB) of the definition of remuneration requires the employer to include either 80% or 20% of the travel allowance for the private usage of an employer provided motor vehicle in the remuneration of the employee.

The two options provided by the legislation have a detrimental impact on employees who travel or use the company car significantly on business, i.e. tool of trade vehicles but do not reach the 80% threshold. As a result of the current restriction, 80% is therefore included in their remuneration and taxed on a monthly basis.

Factual description
Many employers have employees who travel extensively for business or are provided with a company vehicle, which is used extensively for business i.e. tool of trade vehicle or allowances. The problem faced by these employees is that the business usage or the actual business travel is very close to the 80%.

However as the wording of the legislation is clear in their circumstances, 80% of the travel allowance/company car gets included in their remuneration thereby assuming that 80% of their total travel is personal. This gets included in their remuneration at a higher inclusion rate and leaves them out of pocket on a monthly basis.

**Nature of business impacted**
All individuals that receive travel allowances or company provided vehicles for business purposes.

**Proposal**
We propose that the paragraphs (cA) and (cB) be amended to include an option for employers to rely on the actual kilometres travelled by the employees.

3. **Definition of retirement funding employment in section 1 of the Act**

**Legal nature**
We have difficulties with the classification of income on the IRP5 certificate of the employees who temporarily suspend their retirement contributions but continue with their risk contributions. It is not clear from the legislation how the income must be reflected during the temporary suspension of the retirement contributions. The reference to retirement contributions in this paragraph means pension fund contributions.

**Factual description**
Certain pension funds allow employees to temporarily suspend their retirement fund contributions for few months. During the suspension period, employees are compelled to continue with their risk contributions which forms part of the suspended retirement contributions. The risk contributions cover the employees for inter alia dread diseases.
The problem that arises is the manner in which the retirement fund income must be reflected on the IRP5 certificate of the employees. It is not clear whether all income that was paid to the employees during the period when the retirement contributions were suspended should be reflected under gross retirement funding income (coded as 3697 on the IRP5 certificate) or non retirement funding income (coded as 3698 on the IRP5 certificate).

The incorrect allocation of income on which no retirement contributions are made to gross retirement funding income under code 3697 of the IRP5 certificate will affect both the pension deduction and the potential RAF deduction available to individuals.

We propose an amendment to the definition of “retirement funding income” to exclude those periods when the pension fund contributions are suspended despite the contributions of risk contributions.

**Nature of business impacted**
All employers who allow employees to temporarily suspend their retirement fund contributions.

4. **Paragraph 2(c) read with paragraph 8 of the Seventh Schedule to the Act**

**Legal nature**
Paragraph 2(c) of the Seventh Schedule to the Act provides that a taxable benefit shall arise where an employee has been provided with any meal, or refreshment or voucher entitling the employee to any meal or refreshment, either for free of charge or for a consideration less than the value of such meal, refreshment or voucher, as the case may be.

**Factual description**
Employers often grant employees with meal vouchers which must be redeemed only at the employers’ canteen, cafeteria or a dining room operated by the employer. Vouchers are used by the employers for various reasons, for example to monitor costs.

Paragraph 8(3) of the Seventh Schedule to the Act provides circumstances under which the taxable benefit shall not attract tax. We have noted that a voucher is excluded under the no
value provisions of the Act, even where such vouchers will only be redeemed at the employers’ canteen.

We propose that paragraph 8(3) of the Seventh Schedule be amended to cater for circumstances where the meal vouchers granted to an employee shall only be redeemed at the employers’ canteen.

**Nature of business impacted**

Employees

5. **Bursaries awarded to employees and relatives of employees**

*Background*

Many employers provide bursaries and study loans to up-skill and develop employees and to assist relatives of employees to study and become skilled.

Employers are often committed to the continuous development of their employees and associated relatives. This contributes to the continued increase in education levels across the nation and should be encouraged by government in order to lessen the burden on the already over-extended education departments and tertiary institutions.

There are however a number of challenges that employers face in this arena. These will be discussed further below.

*Legal nature*

Section 10(1)(q) of the Income Tax Act provides for the exemption of bursaries provided to staff and relatives of staff under certain circumstances. The proviso to section 10(1)(q) provides that the exemption will apply unless one of two circumstances is present:

a) It must be a requirement that the employee will refund the bursary if he/she fails to complete his/her studies; or

b) If the bursary is provided to the relative of an employee, the employee must not earn remuneration in excess of R100,000 for the year of assessment and the amount of the bursary does not exceed R10,000.
Factual description
The values in the current legislation have not been revised since 2008. The low remuneration value is limiting the availability of the benefit to very few individuals. The employers would provide bursaries but the result for employees will be that they will be taxed on a fringe benefit and therefore they cannot afford this benefit. Most employees will therefore not apply for this assistance.

The R100,000 threshold refers to remuneration. Remuneration is only defined in the Fourth Schedule to the Act and is a very wide definition including variable payments, discretionary payments, lump-sums, allowances etc. The challenge is that it is unclear at what point remuneration limit is determined. Complexities include:

- Changes in enrolment periods – If enrolment is in January, the employer would have a very good idea of the remuneration for the year whereas enrolments in March for example, the employer would not know what the remuneration for the year could be.
- Promotions/increases during the year – will trigger tax on a bursary awarded earlier in the year. This must be an unintended consequence as the employee will have to pay tax on a tax free fringe benefit at time of award.
- Unexpected overtime, travel or allowances – will trigger tax on a bursary awarded earlier in the year.

The Interpretation Note states ‘It is clear, therefore, that the meaning of remuneration in this regard is not “remuneration” as defined in paragraph 1 of the Fourth Schedule to the Act.’ We respectfully submit that this is not clear at all from the wording of section 10(1)(q).

For example:
Employee A is on a R90,000 CTC package. She therefore earns approximately R5,500 after employer contributions. Her daughter is studying at UNISA and is a recipient of a R9,000 bursary from Employee A’s employer.

Based on the current scenario, the bursary is exempt from tax and is not a fringe benefit.
Should Employee A become entitled to a significant amount of overtime in one period or receive a discretionary bonus, the bursary which has remained non-taxable for most of the year will now become taxable.

*Practical payroll issue*
This requires a continuing monitoring process that will trigger as soon as the remuneration exceeds the remuneration ceiling which is administratively burdensome on payroll. It is also very uncertain for the employees as for the entire year the bursary has been non-taxable but on the final payslip for the tax year, the bursary becomes taxable and the employees’ net pay is affected significantly by the tax on the benefit.

*Nature of business impacted*
Employees, particularly lower income earners who may benefit from bursaries.

*Proposal*
The ceilings need to be revised in line with inflationary changes. One option is to link the remuneration level to the annually changing Basic Conditions of Employment earnings threshold, currently R183,008. Another option would be to link it to the lowest tax bracket currently R160,000.

We suggest that section 10(1)(q) is amended to place the burden of determining the remuneration level on the employer thereby requiring the employer to be satisfied that at the time the award is made, the annual remuneration of the employee is not expected to exceed the ceiling for that tax year. We would also suggest that in this section remuneration be defined more narrowly than in the Fourth Schedule by restricting remuneration to cost to company package or annual salary for the tax year and excluding any lump sum payments, share gains and variable payments.

It is highly unlikely that this benefit will be used as a structuring tool.

Section 10(1)(q) does not stipulate the manner in which the bursary is to be awarded or funded so guidance must be sought from the Interpretation Note. The newly released Interpretation Note deals with study loans and reimbursement of study expenses as being materially different from a bursary/scholarship and regards these as being taxable.
• The law does not stipulate how the payments are to be made and the Interpretation Note is too restrictive thereby preventing many employers from implementing bursary schemes.

• The Interpretation note does not take into account commercial realities.

• The provision of a loan to further studies does not in itself trigger tax; however, the waiver of such a loan on completion of studies does create a taxable event.

• The payment of fees directly to an institution does not trigger tax; however, payment to the employee to reimburse for expenses paid to the same institution does create a taxable event.

Practical difficulties
Many employers do not have the resources to manage full bursary schemes or to fund payments upfront to institutions or to manage approval processes in time for registration dates to be met.

Other payment methodologies used in practise include the creation of a staff loan or the reimbursement of expenses incurred particularly in cases where payment to the institution cannot take place in time for registration and the employee is forced to fund the upfront payment themselves to guarantee a position.

Proposal
For many employers, the award of bursaries is an ad hoc function and these mechanisms give the employer some flexibility in payment options.

If the true nature of the payment, in whatever form, is for the purpose of enabling an employee or relative of an employee to study further then the section 10(1)(q) exemption should apply.

The Interpretation Note should therefore be amended to include the other forms of funding.
National Treasury should be encouraging employers to fund these studies as it eases the burden on the state in terms of education as well as for future social grants as more individuals will be qualified to earn a liveable wage. Other mechanisms of funding should therefore be permitted.

6. Residential accommodation fringe benefit

Legal nature
Paragraph 2(d) of the Seventh Schedule provides for the taxation of residential accommodation provided by an employer to an employee.

Paragraph 9 of the Seventh Schedule provides the method used to determine the value of the fringe benefit. The value to be included as a fringe benefit is the greater of the formula or the actual rental paid. The formula will apply where the accommodation is owned by the employer. The formula used to determine the value of the benefit is based on the previous year’s remuneration of the employee and the size of the accommodation and the services included.

Paragraph 9(7A) and (7B) provide an exemption for accommodation provided to expatriates provided the cash equivalent of the taxable benefit does not exceed R25,000. Paragraph 9(2) then provides that the cash equivalent of the benefit will be determined in accordance with subparagraph 3 (which is the greater of the formula or the rental payable), subparagraph 3A (which is the circumstances under which only the formula will apply), subparagraph 4 (holiday accommodation) and subparagraph 5 (other cases, where a directive should be requested).

Factual description
1. The current structure of the fringe benefit when using the formula is linked to the remuneration of the employee.

a) “Remuneration factor” as defined in paragraph 9 (1) is the remuneration derived by the employee in the preceding year of assessment. This therefore includes lump sum payments such as bonuses and share gains which can significantly distort the earning
of the employee in a particular year and thereby create an inflated benefit that is higher than the market related value.

b) The value of a housing benefit should not be linked to remuneration but to value of monthly rental or the value of the property.

The value of the benefit therefore differs depending on the remuneration level of the employee. The calculations for two employees receiving the same type of accommodation will render different taxable values. The higher earner will therefore pay a higher marginal rate on a higher value therefore essentially being punished twice for receiving the same benefit.

For example:
Employee A earned remuneration of R150,000 in the previous year of assessment. Employee B earned R400,000. They are each provided with a fully furnished apartment owned by the employer with all services included for a 6 month contract within SA. A market related rental for a similar apartment for a six month period is R60,000.

Employee A
(R150,000 – R63,556) x 19/100 x 6/12
= R 8,212.18 for the 6 month period
= R 1,368.69 taxable fringe benefit per month

Employee B
(R400,000 – R63,556) x 19/100 x 6/12
= R31,962.18 for the 6 month period
= R 5,327.03 taxable fringe benefit per month

The individuals are being taxed on a lower amount due to the fact that accommodation is employer-owned and paragraph 9 prescribes that employer-owned accommodation is determined in accordance with the formula however there is no equity as the higher earner is paying on a higher value and would already be on a higher tax bracket.
If a market related value was obtainable and allowable as the taxable value the individuals would be taxed on the same amount at their respective marginal rates.

c) Expatriate exemption

Paragraph 9(7A) and (7B) require the cash equivalent to be determined. Under subparagraph 2, the employer in these circumstances can only use subparagraph 3 to determine the cash equivalent, which is the greater of the formula or the rental paid. In a number of cases the formula provides a higher value than the actual market related rental paid.

The employer is then required to apply to SARS for a directive to confirm that the rental value may be used instead of the formula created value.

For example:

Employee A is a foreign resident on a 1 year assignment in SA. His remuneration factor is R1,800,000 due to the assignment allowances provided and he is provided with a 1 bedroom fully furnished and serviced apartment for which the employer pays R10,000 per month.

Calculation:

\[(R1,800,000 - R63,556) \times \frac{19}{100} \times \frac{12}{12}\]

\[= R1329,924 \text{ for the 12 month period}\]

\[= R27,493.66 \text{ taxable benefit per month}\]

Under paragraph 9(3) he will be taxed on R27,493.66 per month being the greater of the formula result (i.e. R27,493.66) or the rental paid (i.e. R10,000 per month).

This exceeds the R25,000 limit provided for in paragraph 9(7B) and the excess will therefore become taxable but the formula result bears no relation to the actual cost of the accommodation provided i.e. R10,000.

2. How to value this benefit where two employees share a house

A further difficulty arises for employees that share employer provided accommodation.
No provision exists in the current legislation to deal with this situation. It is inequitable for both employees to be taxed on the full benefit as they do not enjoy the full benefit of the accommodation.

For example:
Employees A, B and C are provided with a 3 bedroom fully furnished rented house for the duration of their 1 year assignment in SA. The market related rental for the property is R20,000 per month which is paid for by the employer. Their remuneration level is R250,000 for the prior year.

Based on current legislation:

\[
\begin{align*}
(R250,000 &- R63,556) \times 19/100 \times 12/12 \\
= &\ R35,424.36 \text{ for the 12 month period} \\
= &\ R2,952.03 \text{ taxable fringe benefit per month}
\end{align*}
\]

For the 3 employees the taxable benefit is therefore R8,856.09 with each of them being taxed as if they were the sole occupant of the premises.

As can be seen, the taxable benefit bears no relation to the market-related cost of the accommodation.

Nature of business impacted
Employers and employees provided with residential accommodation.

Proposals
a) The current structure of the fringe benefit when using the formula is linked to the remuneration of the employee.

b) We suggest that the definition of remuneration for the purposes of paragraph 9 be narrowed by excluding lump sums, share gains and every discretionary amount; alternatively

c) We suggest that the entire taxable benefit calculation be revised and remuneration be removed as the determining factor in the calculation of the taxable fringe benefit and an
alternative amount be used such as either the market related rental or the municipal rate value of the property.

d) Expatriate accommodation should not be subject to the formula as the only factor that triggers the taxable benefit is the remuneration factor. The market related cost of rental subject to the R25,000 limitation should determine the taxable benefit. This would significantly reduce the administrative burden on both the employer and SARS on the directive process. SARS would still collect revenue on those expatriates that are provided high value accommodation.

Where a market related/arms length rental value is determinable for employer–owned accommodation, the employer should have the option to use this value to determine the fringe benefit without the administrative burden of applying to the Commissioner for rulings under paragraph 9(5). A provision that requires the employer to be satisfied that the value being used in the determination of the fringe benefit is market related/arms length is suggested and that the employer is therefore required to maintain some documentary proof of research or information obtained in order to satisfy himself as to this fact.

For those types of employer-provided accommodation where no market value can be determined such as in the farming, mining or forestry industries, a formula based approach with a narrow definition of remuneration could then be used to determine the value of the benefit.

e) How to value this benefit where two employees share a house?
   We suggest that the legislation allow for the apportionment of the taxable benefit where the accommodation is occupied by more than one employee at the same time.

   We would suggest the insertion of paragraph 9(6A) to provide for the equal apportionment of accommodation under these circumstances.

7. Travel allowance

Legal nature
Employees who are paid a travel allowance are not able to claim a deduction of business expenses incurred in using the Gautrain.

**Factual description**
A travelling allowance paid to an employee is subject to the monthly PAYE withholding of either 80 percent or 20 percent. Section 8(1)(b) of the Act provides that taxpayers who used a motor vehicle for business purposes shall be able to obtain a deduction based on the number of business kilometres travelled.

Due to the petrol increases, proposed toll fees, congestion on the road, employees find it easier, economical and much quicker to use the Gautrain. The current predicament is that employees who are paid a travelling allowance cannot claim the business travelling expenses on the Gautrain as the Act requires actual business mileage and does not allow for other transport expenses to be claimed.

We propose an amendment to section 8(1)(b) of the Act which should take into account other means of public transport other than a motor vehicle which are used by employees for business travel.

**Nature of business impacted**
Employees

**8. Restriction of remuneration for purposes of UIF and SDL**

**Legal nature**
The definitions of remuneration for purposes of unemployment insurance contributions and skills development levies are linked to the definition in the Fourth Schedule to the Act. Furthermore, the definition of remuneration in the Unemployment Insurance Contribution Act\(^1\) and Skills Development Levies Act\(^2\) excludes certain amounts, such as once lump sum from retirement funds and amounts paid by the employer upon termination of employment by the employee for purpose of determining the liability for skills development levy and unemployment insurance contributions.

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1 No 4 of 2002  
2 No 9 of 1999
**Factual description**
Certain payments such as share gains are paid to employees during the year of assessment which creates an inflated liability for the employer. These amounts do not occur yearly, such as lump sum from retirement funds and amounts paid by the employer upon termination of the employment by the employee.

We propose that amounts such as share gains payments must be excluded in calculation of the monthly liability for the employer as they inflate the monthly liability for the employer. This amendment will be aligned with the current treatment which does not include similar lump sum payments.

**Nature of business impacted**
Employers and employees

9. **Inclusion of cash for purpose of long service award**

**Legal nature**
Under paragraph 5(2)(a) and (b) of the Seventh Schedule, no taxable benefit arises where an employee is given an asset for long service or an award for bravery.

**Factual description**
Under the current legislation, employer must acquire the asset and then award it to the employee in order to make use of the no value provisions. To allow greater flexibility to the employee, we propose an amendment to paragraph 5(2)(a) and (b) which allows the employer to award cash in respect of long service and bravery award.

**Nature of business impacted**
Employers

10. **Concept of “economic employer” in the Fourth Schedule**

*Background*
In 2010 SARS issued Binding Private Ruling No. 85 in which the concept of an “economic employer” was endorsed. The concept was applied to determine that foreign employees were taxable in South Africa because the local entity was ultimately charged for these services and that the individuals could therefore not benefit from protection under their respective Double Taxation Agreements (“DTA”) with South Africa.

The ruling went further to say that the South African company would be obliged to comply with paragraph 2 of the Fourth Schedule to the Act on the remuneration paid by the foreign employer in their respective countries during their assignments to South Africa.

**Legal nature**

Paragraph 2(1) of the Fourth Schedule provides that every employer (defined below) who is a resident or a representative employer in the case of a non-resident employer, who “pays or becomes liable to pay any amount by way of remuneration to any employee”, shall deduct or withhold employees’ tax.

Employer is defined as “any person who pays or becomes liable to pay to any person any amount by way of remuneration.”

Representative employer is defined as inter alia “in the case of any employer who is not resident in the Republic, any agent of such employer having authority to pay remuneration.”

**Factual description**

Under the existing legislation there is no provision for an economic employer to be obliged to withhold employees’ tax under the Fourth Schedule. While the economic employer may bear the costs of employment via a chargeback structure this does not amount to the economic employer being obliged to pay remuneration nor does it make the economic employer liable to pay remuneration. The economic employer therefore does not meet the definition of an “employer” under the Fourth Schedule.

Further the economic employer does not become a representative employer by virtue of the chargeback as this is not an agency agreement and the economic employer is not authorised to pay the remuneration of the foreign employees as the foreign employer retains this obligation.
The economic employer therefore does not meet the definition of a representative employer under the Fourth Schedule either.

There is therefore no provision in the Fourth Schedule under which the economic employer is obliged to withhold employees’ tax and we submit that the BPR is technically incorrect in this regard.

If the intention is to create an obligation for the economic/local employer to withhold PAYE, an amendment to the Fourth Schedule paragraph 2 and the definitions of employer and/or representative employer would be necessary to include the economic employer in the realm of employees’ tax withholding obligations.

**Nature of business impacted**
Employers

**11. Dividend tax and normal tax (employees’ tax) implications where dividends are paid to employees who hold restricted equity instruments**

**Legal nature**
The provisions of section 10(1)(k)(ee) of the Income Tax Act, No 58 of 1962 (“the Act”) subjects to normal tax dividends paid to companies by the exercise of the discretion of trustees of a trust where the company is a beneficiary of a trust which holds the shares in a company is merely a used to pool the interest of minority shareholders holding shares in any other company. The pooling of the shareholding of the minorities is important in order to ensure that they collectively are able to prevent the passing of special resolutions etc. The beneficiaries of these trusts are usually a mixture of companies – usually SME’s – and individuals.

**Factual description**
Dividends received by the trust and then vested in the hands of these companies are no longer exempt from normal tax in terms of the provisions of section 10(1)(k)(ee) of the Act.
In these scenarios, the shareholders of these companies are individuals who operate their business through a legal entity, i.e. a company or close corporation. There are a number of empowerment transactions which are structure on this basis, especially in the agricultural
sector. The participants who operate through a legal entity are placed at a significant disadvantage when compared to their compatriots who operate in normal partnerships or are sole proprietors.

Nature of business impacted
Various companies where empowerment transactions involving the local communities or suitable suppliers/customers form part of the ownership structure of the companies.

Proposal
The taxation of dividends received in these scenarios is unjustified. The reach of section 10(1)(k)(ee) of the Act must be limited to deal only with the specific mischief it is aimed at.

12. Dividend tax and normal tax (employees’ tax) implications where dividends are paid to employees who hold restricted equity instruments

Legal nature
There is double taxation on the same amount, i.e. the dividends received in the hands of the same taxpayer.

Factual description
Dividends received in respect of restricted equity instruments as defined in section 8C of the Income Tax Act, No 58 of 1962 ("the Act") are excluded from the exemption from normal tax in terms of section 10(k)(i)(dd) of the Act unless the restricted equity instrument constitutes an equity share or the dividend itself is an equity instrument as defined in section 8C of the Act. The recipient employee of a dividend in respect of a restricted equity instrument is therefore subject to normal tax - usually calculated at 40% - on the dividend received.

With the introduction of dividends tax with effect 1 April 2012, the recipient will also be liable to dividend withholding tax of 10% on the dividend received. This situation causes 2 issues, i.e. results in the same taxpayer being subject to tax on the same amount twice as well as the effective tax rate being 50% (40% plus 10%).
In addition, the payor entity is also "punished" as it does not get a deduction for an amount which is considered to be remuneration and therefore a deductible expense to an employee.

**Nature of business impacted**

All companies with share incentive schemes where dividends are paid to employees whilst the shares are still restricted equity instruments.

**Proposal**

The taxation of dividends received from restricted equity instruments needs to be revisited as the same taxpayer is effectively going to be subjected twice on the same amount of income once the dividend tax becomes effective and the effective rate is tax is excessive.

In addition, it is our view that the current tax treatment of dividends received in respect of restricted equity instruments are grossly excessive and needs to be revisited especially when the fact that the payor entity does not get a deduction for an amount paid which is viewed as "remuneration" in the hands of the recipient.

**13. Dividend tax implication where loans to shareholders which were subject to secondary tax on companies have not yet been repaid at 1 April 2012**

**Legal nature**

There are a number of companies which had outstanding interest-free or low interest loans granted to shareholders as at 31 March 2012, the last day secondary tax on companies ("STC") was applicable to dividends declared. These loans were subject to STC as it was deemed to be a dividend in terms of section 64C(2)(g) read with section 64C(4)(e) of the Income Tax Act, No 58 of 1962 ("the Act").

Repayment of the loan caused the company to be deemed to have received a dividend equal to the amount repaid (section 64C(5) of the Act) and thereby effectively created an STC credit equal to the repaid amount in the hands of the company.

The current dividend tax regime does not provide for either a deduction against dividend tax payable or the inclusion of such repayments made in the STC credit which can be applied against the dividend tax where these repayments are made after 31 March 2012.
The shareholders repaying the loans after 31 March 2012 are at a disadvantage if the company subsequently declares and pays a dividend to its shareholders as the dividend will be subject to dividend tax.

**Factual description**

Two companies, company A and company B each granted interest-free loans of R100 000 to its shareholders on say 1 April 2011. The shareholder of company A repaid the loan in full on 31 March 2012 whereas shareholder of company B repaid the loan 1 day later on 1 April 2012. Both companies declare and pay dividends of R100 000 to its shareholders on 30 September 2012. The STC and dividend tax consequences for the companies and shareholders are as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Company A</th>
<th>Company B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Loan granted on 1 April 2011</td>
<td>100 000</td>
<td>100 000</td>
</tr>
<tr>
<td>STC payable</td>
<td>15 000</td>
<td>15 000</td>
</tr>
<tr>
<td>Repayment of loan</td>
<td>100 000</td>
<td>100 000</td>
</tr>
<tr>
<td>Deemed dividend = STC credit</td>
<td>100 000</td>
<td>0</td>
</tr>
<tr>
<td>Dividend payment</td>
<td>100 000</td>
<td>100 000</td>
</tr>
<tr>
<td>STC Credit</td>
<td>100 000</td>
<td>0</td>
</tr>
<tr>
<td>Net dividend subject to dividend tax</td>
<td>0</td>
<td>100 000</td>
</tr>
<tr>
<td>Dividend tax</td>
<td>0</td>
<td>15 000</td>
</tr>
<tr>
<td>Net dividend received</td>
<td>100 000</td>
<td>85 000</td>
</tr>
</tbody>
</table>

**Nature of business impacted**

All companies with loans granted to shareholders where those loans were subject to STC but have not been repaid at 1 April 2012.

**Proposal**

The dividend tax regime should make provisions for the creation of an STC credit as and when the loans are repaid. The effective date should be 1 April 2012. The time limit of this benefit can be linked to the STC credit period of 3 years.

14. **Extension of definition of “disability” to include diabetes, especially type 1 diabetes and to a lesser extent type 2 diabetes**
**Legal nature**

The proposed list contained in Annexure 1 of the discussion document do not include all medical conditions which cause sufferers to be physically impaired as defined, i.e. the conditions restrict the person’s ability to function or perform daily activities, such as Diabetes Type 1, amongst other. The reason for the exclusion of conditions such as Diabetes Type 1 is not clear.

**Factual description**

Diabetes is recognised as a disability for tax purposes by many jurisdictions. The current definition of "disability" contained in section 18 of the Income Tax Act, No 58 of 1962 ("the Act") does not include dread diseases, such as diabetes. The management of these conditions are expensive, if done properly and consequently patients with insufficient financial means or who do not have adequate medical aid cover do not management their conditions properly. It is noted that the majority of the tax jurisdictions include dread diseases where special dispensation is given to disability related expenditure. The exclusion in the South African context is therefore unclear and even possibly unfounded.

Failure to management these conditions properly may eventually result in the patients becoming disabled or suffering from conditions which qualify as "disabilities" as defined in section 18 of the Act. The costs of treating these conditions exceed the costs of the products needed to manage and treat the dread diseases are less than the costs of treating the "disabilities".

**Nature of business impacted**

Various individuals suffering from diabetes

**Proposal**

The definition of "disability" contained in section 18 of the Act should be extended to include dread diseases.

In addition, annexure 1 the discussion paper on proposed list of qualifying physical impairment and disability expenses under section 18(1)(d) of the Income Tax Act, No 58 of
1962 and proposed criteria for diagnosis of a disability need to be expanded to include the following items:

- Insulin;
- Needles and syringes required for the administration of insulin;
- Blood Glucose Meters;
- Glucose Test strips;
- Lancing devices;
- Lances;
- Ketone test strips;
- Infusion pumps;
- Glucogon or similar products.

**INCOME TAX – DOMESTIC BUSINESS**

15. **Applicable provision/issue: section 9D(9A)(a)(iii)(aa)(B) and section 9D(2A) proviso(i)**

**Legal nature**

With effect 1 April 2012 and applicable in respect of the foreign tax year of a controlled foreign company (“CFC”) ending during years of assessment commencing on/after that date, income arising as a result of the activities of a treasury company no longer qualify for the so-called foreign business establishment exemption contained in section 9D(9)(b).

The net income of treasury companies incorporated in high tax jurisdictions may however be deemed to be R nil is the aggregate amount of tax payable by the CFC to all spheres of government of any country other than the Republic is at least 75% of the amount of normal tax that would have been payable in respect of any taxable income of that CFC had that CFC been a resident (“the 75% rule”).

It is submitted that the 75% rule does not always provide relief to bona-fide treasury companies operating in high tax jurisdiction as a result of the wide variety of tax provisions applicable in these countries.
**Factual description**

Say for example a South Africa Group operates throughout the world. They have established a treasury company in South Africa for funding to the South and Southern African trading operations as well a treasury company in the UK to fund UK and European trading operations. The UK treasury company is also the intermediate holding company for the UK and European subsidiaries. The UK treasury company was established for valid commercial reasons in the UK, close to London, which is widely regarded as a financial services centre of excellence.

One of the key difference between SA tax legislation and UK tax Legislation is that UK tax legislation allows a UK holding company to claim all its operating expenses regardless of whether in the production of dividend income or not whereas in the SA tax computation, an apportionment of expenses is required and expenses attributable to exempt dividends is not deductible. The UK tax payable will be lower than the SA tax payable for this reason alone.

Other differences exacerbate the situation. For example, it may be that in terms of group policy, the UK Treasury company enters into foreign currency swap contracts to hedge equity investments in Eurozone countries. These contracts may either result in profits or losses during the foreign tax year depending on movements in exchange rates. For UK tax purposes, the UK Company can elect not be taxed on these profits, in which case it is also not able to claim the losses. If there are significant exchange gains in a tax year, the tax paid by the UK Company electing not to pay UK tax on these profits will not be at least 75% of the corresponding SA tax liability. Thus the high tax exemption will not apply and there will be a significant imputation in the SA resident’s hands of the exchange gains and interest income earned in the UK Treasury with limited UK foreign tax credits being available. If there are losses in any given foreign tax year, the 75% will in all likelihood be met, but with the possibility of not utilising the all the losses against profits in future years.

**Nature of businesses impacted**

South African held groups with bona fide treasury companies incorporated in high tax jurisdictions where the tax laws applicable in the foreign tax jurisdiction differs from the tax laws applicable in South Africa.

**Proposal**
At the very least, the 50% tax rule applied in the diversionary rule applicable to income derived from the sale of goods (section 9D(9A)((a)(i)aa) should also apply to income arising from financial instruments derived by Treasury companies.

However, it is submitted that the foreign business establishment requirement is sufficient to ensure that mala fide treasury companies are kept within the SA tax net.

Alternatively, if the treasury company is “subject to tax” in the foreign jurisdiction at a rate of at least 75% of the SA rate then it should qualify for the exemption in paragraph (9A)(iii)(aa)(A).

16. Applicable provision/issue: Uncertainty surrounding the tax implications of transferring contingent liabilities as part of a going concern disposal

Legal nature
There remains significant uncertainty as to the tax implications in the hands of the buyer and the seller of the transfer of contingent liabilities as part of the disposal of a business.

It is acknowledged that there is case law on the matter as well as some guidance in BPR122 but this is not sufficient to provide the certainty required.

Draft legislation addressing these transactions formed part of the first draft of the 2011 Taxation Laws Amendment Bill but was removed from the Second draft with a promise of an Interpretation Note to be issued.

More than a year has expired and no Interpretation note has been issued.

Factual description
Going concern disposals which include the transfer of contingent liabilities from the seller to the purchaser.

Nature of business impacted
All taxpayers disposing of and acquiring businesses.
17. Clarification that output tax that needs to be accounted for in respect of zero-rated export sales where documentary evidence and/or proof of payment was not obtained in the agreed period allowed by SARS, is accrued at the time the agreed period has expired.

Legal nature
The Income Tax Act, No 58 of 1962 (“the Act”) does not contain a specific provision which deals with the accrual of the value-added tax (“VAT”) which need to be accounted for as output tax in the tax period during which the period granted to obtain documentary proof of export, including proof of payment that movable goods have been exported has expired. Whilst it is generally accepted that the output tax should be deductible in terms of the section 11(a) of the Act read with section 23(g) of the Act, instances have presented itself where the South African Revenue Service (“SARS”) is challenging these deductions on the basis that the output tax is not actually incurred in the production of income.

Factual description
Paragraph 7.2 of Interpretation Note 30 (“IN 30”) issued by SARS and which deals with the documentary proof required to substantiate the zero-rating of the sale of movable goods to recipients in an export country provides that, in the event that documentation required is not obtained within the specified time period of 3 months or more if agreed with SARS, the supplying vendor is deemed to have supplied the movable goods at the standard rate in the tax period in which the 3 month or longer period ends. The only exception is if the documents are received after the expiry of 3 months but before the earlier of the VAT return’s submission date or the due date.

Section 64(1) of the Value Added Tax Act, No 89 of 1991 (“the VAT Act”) provides that “(A)ny price charged by a vendor in respect of any taxable supply of goods or services shall for the purposes of this Act be deemed to include any tax payable in terms of section 7(1)(a) in respect of such supply; …”. This section therefore deems the supplies made by inclusive of VAT at a rate of 14%.

IN 30 further provides that “(T)he supplying vendor must consequently calculate output tax by applying the tax fraction to the consideration (in terms of section 64(1) of the VAT Act, the selling price is deemed to include tax), and declare an output tax adjustment in the VAT
rendered for the tax period in which the period of three months ends. However, where the documents are received after the expiry of three months but before the earlier of the VAT return’s submission date or the due date, an output tax adjustment is not required.”

An exporter is therefore obliged to account for VAT at the standard rate of 14% if it is not able to obtain the necessary documentary proof and/or proof of payment within a period of 3 months (or longer period if agreed with SARS). It is at this time that the exporter actually incurred expenditure equal to the output tax which needs to be paid to SARS as the obligation to account for the VAT in these circumstances is not contingent or conditional upon the happening of a future event other than the receipt of the documents before the earlier of the submission date of the VAT return related to that tax period or the due date thereof.

Nature of business impacted
Various exporters are unable to obtain the required documentary proof or proof of payment within the required period. This is especially relevant where the movable goods were exported to countries in Africa due to logistical problems with obtaining the documentation required or the customers being unable to pay for the movable goods acquired due to exchange control issues or insufficient foreign exchange reserves being available in their countries.

Proposal
A provision need to be inserted in the Act to clarify that the output tax paid will be actually incurred in the production of income tax at the time it has to account to SARS for output tax.

18. Extension of legal professional privilege to non-legal tax practitioners

Legal nature
Currently legal professional privilege is only afforded to tax practitioners in legal practice. Unlike other legal advisory services and legal litigation services, tax advisory services are provided by a number of qualified practitioners who are not lawyers. Clients of these practitioners currently do not enjoy legal professional privilege regarding any tax advisory services which are the subject to privilege where the services were provided by non-lawyers. As all South African residents are entitled to equal treatment and rights, the clients of the non-legal advisors are in effect the victims of discrimination.
Factual description
Section 64 of the Tax Administration Act, No 28 of 2011 (“the TAA”) deals with situations where documents which are subject to legal professional privilege may be obtained during a search and seizure operation performed by the South African Revenue Service.
The TAA does not contain a definition of "legal professional privilege” nor does it contain any provisions in terms of which the term can be said to apply to material produced or prepared by other non-legal professional.
The discriminatory aspect of the exclusion of legal professional privilege in the case of tax law has been recognised by various other countries such as Canada, Australia, New Zealand, the United Kingdom of Great Britain, and Hong Kong to mention a few.
As South Africa prides itself as a nation with one of the most advanced Constitutions, the exclusion of clients of non-legal professionals from the right to legal professional privilege is unwarranted.

Nature of business impacted
All taxpayers who make use of the services of non-legal professional tax services.

Proposal
A definition of “legal professional privilege” which states that the privilege will also apply to non-legal professional tax advisors must be inserted into the TAA.
Alternatively, the provisions of section 64 of the TAA must be expanded to include material produced by non-legal professional tax advisors.

INCOME TAX – INTERNATIONAL

19. Expatriate exclusions from UIF and SDL

Legal nature
Inbound expatriates are currently excluded from UIF contributions under section 4(1)(d) of the Unemployment Insurance Contributions Act, No 4 of 2002 provided they are to leave the Republic on the termination of the contract/learnership. No similar provision exists in the Skills development legislation.
**Factual description**

Outbound expatriates are still required to contribute towards UIF and their employers are still required to contribute to SDL.

In most cases the employees remain on the payroll purely for pension contributions etc and should they become unemployed, their last remuneration levels would be determined based on a significantly reduced remuneration figure.

We would suggest that for consistency, the UIF and SDL treatment for employees out of the country on temporary assignment, similarly structured to section 4(1)(d) of the Unemployment Insurance Contributions Act be enacted to allow employees and employers to temporarily cease UIF and SDL contributions for those employees on assignment for the period of assignment on the condition that the contract requires them to return to South Africa on termination.

**Nature of business impacted**

Employers

**20. Conversion of par value shares to no par value shares**

**Legal nature**

The new Companies Act No. 71 of 2008 (“the Companies Act”) does not provide for par value shares. All shares issued under the new Companies Act will therefore be no par value shares. Companies with par value shares have the option of converting the current issued par value shares to no par value shares within a period of 5 years. All future increases to the authorised share capital of a company will be done by the issue of no par value shares.

The conversion of the par value shares to no par value shares may have tax implications for the shareholders. Shareholders who hold the shares on revenue account may have to account for “gross income” on the basis that there was a receipt or accrual in their favour in terms of the definition of “gross income” contained in section 1 of the Income Tax Act, No 58 of 1962 (“the Act”) whereas shareholders who hold the shares on capital account may be deemed to have disposed of the par value shares upon the conversion in terms of paragraph 11 of the Eighth Schedule to the Act.
In addition, securities transfer tax ("STT") may be due on the conversion as it may be deemed to be a “transfer” as defined in section 1 of the Securities Transfer Tax Act, No 25 of 2007 ("the STT Act").

**Factual description**
The transactions entail the conversion of all the par value shares in a company to no par value shares as directed under item 6 of Schedule 5, read with Regulation 31 and section 35(2) of the Companies Act, in order to comply with the Companies Act.

The steps required to implement the proposed conversion transaction are specified in Regulation 31 of the Companies Act, namely–
- The preparation by the board of the company of a report relating to the conversion;
- The adoption of special resolutions by the shareholders of the Applicant to implement the conversion; and
- The filing of the proposed special resolutions and report with the Companies and Intellectual Property Commission and the South African Revenue Service.

These transactions are implemented on the basis that all par value of a class of shares in the company will be converted to no par value shares of the same class. All shareholders of the same class are treated the same. In addition, the rights relating to the shares before and subsequent to the conversion remain unchanged. The shareholders are not compensated as a consequence of the conversion.

**Nature of business impacted**
All companies with par value shares.

**Proposal**
The conversion of par value shares to no par value shares where the rights attached to the shares remain unchanged, all shareholders of the same class of shares are treated equally and the shareholders do not receive any compensation as a consequence of the conversion should be exempt from any normal tax, capital gains tax and STT.

**21. General Anti-avoidance Rules**
Legal nature
The current general anti-avoidance rule (“GAAR”) as set out in Part IIA of Chapter III of the Income Tax Act, No 58 of 1962 (“the Act’) came into effect on 2 November 2006 and applies to any arrangement or any steps in an arrangement entered into on or after , i.e. more than 6 years ago. To date, the South African Revenue Service (“SARS”) has not invoked the GAAR or made their voice heard in regard to any transaction which may be attacked in terms of the GAAR. Instead, SARS has fallen into the habit of enacting specific anti-avoidance provisions to frustrate impermissible transactions in circumstances where the GAAR should have been effective.

This has resulted in uncertainty regarding the purpose of the GAAR and has indeed made the GAAR superfluous.

Factual description
The following are examples of specific anti-avoidance provisions recently introduced by SARS which could have been remedied by the application of the GAAR:
  o Section 64EB of the Act dealing with Joint dividend schemes;

Nature of business impacted
All taxpayers.

Proposal
Part IIA of Chapter III of the Act must be repealed in its entirety.

INCOME TAX – OTHER TAXES

22. Business rescue and Value-added tax liabilities

Legal nature
Section 22(3) of the Value-added Tax Act, No 89 of 1991 (“the VAT Act”) requires a vendor, being a debtor, who previously claimed an input tax deduction in respect of goods or services supplied to the vendor, but the vendor has not paid the full consideration within a period of
12 months from the tax period in which the vendor claimed an input tax deduction, to account for output tax in respect of the amount still outstanding. The same situation applies where a vendor entered into a written contract in terms of which it has to make payment by a specific date.

Section 22(4) of the VAT Act provide that the vendor may, after having accounted for output tax in terms of this provision, claim an input tax deduction if the vendor subsequently repaid all or part of the amount outstanding. The input tax deduction will be equal to the tax fraction of the amount subsequently repaid.

**Factual description**
The purpose of business rescue proceedings is to facilitate the rehabilitation of companies which are in financial distress. Its objective is to restructure the affairs of the company in order to secure the continuing existence of the company or to secure the best possible returns for the creditors of the company that would ordinarily result from the liquidation of the company.

It is most likely that companies which are placed in business rescue have debts owing to their suppliers for period in excess of or very close to the 12 month period noted above. The value of these supplies may be significant and being obliged to account for output tax on these outstanding amounts may result in the failure of any otherwise viable business rescue attempt.

**Nature of business impacted**
All companies placed in business rescue.

**Proposal**
The provisions of section 22(3) of the VAT Act should not apply in circumstances where business rescue proceedings have been instituted by a company. In these circumstances it should only come in effect once the business rescue proceedings have failed and the company is placed in liquidation.

**23. Registration of enterprises as vendors for purposes of Value-Added Tax**

**Legal nature**
The legal nature of the problem
Ineffective VAT registration processes and unfair administrative processes.
Administrative processes and capacity at various offices of the Commissioner for SARS are inadequate to put new vendors on register within a period adequate to comply with the VAT return submission requirements of the VAT Act.
Where a person is obliged to register as a VAT vendor (i.e. compulsory registration) that person is deemed to be a vendor from the time that he/she first becomes liable to register as such. Any supplies made between the date that the person applies to be registered as a vendor and the date that a VAT number is issued to the person attracts VAT which should be paid to the Commissioner at the end of the tax period to which it relates.
No mechanism currently exists to make a payment to SARS before a VAT number is allocated to a person. Notwithstanding the above, SARS imposes understatement penalties and interest on such late payments when the VAT number is finally allocated.
For more detail of the problems encountered please refer to the SAICA stand alone submission dealing with the problems encountered by entities when they apply to be registered.

The nature of the business impacted by the problem
Every person applying to be registered as a vendor for purposes of value-added tax.

Proposal
We recommend that section 39 of the VAT Act be amended to automatically waive any penalties and interests relating to the period between when a vendor submits its application for registration and the actual date of registration.

24. Input tax on goods imported for taxable supplies

Legal nature
The problem that is currently being experienced with the definition of input tax is that with regard to the importation of goods, it is not clear as to what is meant by the word “acquired” in the definition.

The South African Revenue Service (‘‘SARS’’) interprets and applies the word “acquired” is meaning acquiring legal title or ownership of the goods. Therefore if the person is not the
owner of the goods when they are imported, then the SARS is of the opinion that the importer is not entitled to claim the VAT paid on the importation of the goods as input tax.

This interpretation affects various vendors negatively, for example:

- Where the terms of the sale stipulates that ownership of the goods passes to the South African recipient upon delivery of the goods at the premises of the recipient. In these circumstances the recipient will generally be the importer of record for Customs purposes and will pay the import VAT. However, in view of the SARS interpretation the recipient is not entitled to claim the VAT as an input tax deduction because the recipient is not the owner of the goods upon importation, even though the recipient acquires ownership subsequent to importation and uses the goods wholly for the making of taxable supplies. A wide range of vendors are affected by this interpretation, including capital expansion projects, construction companies, mining companies and the textile industry;

- Where the goods are rented or leased by the recipient for a period or project and then returned to the foreign supplier. The recipient will generally be the importer of record for Customs purposes and will pay the import VAT. However, in view of the SARS interpretation the recipient is not entitled to claim the VAT as an input tax deduction because the recipient is not the owner of the goods upon importation, even though the goods are wholly used or applied for the purpose of making taxable supplies. A wide range of vendors are affected by this interpretation, including capital expansion projects where specialised equipment is imported for a specific purpose, airline operators, construction companies, mining companies and the textile industry;

- Where the goods are imported into South Africa for processing, testing, grading, manufacturing etc and the processed, tested, graded or manufactured goods are then returned to the supplier. The South African beneficiator will generally be the importer of record for Customs purposes and will pay the import VAT, especially in instances where SARS Customs refuses to apply any exemption upon importation of the goods.

The SARS interpretation seems to be contrary to the basic VAT principle that an input tax deduction should be allowed for vendors that consume, use or supply goods or services in the
course of making taxable supplies. There does not seem to be any reason as to why vendors that import goods for the purpose of use or consumption in the course of making taxable supplies should incur a non-deductible VAT cost.

The legal position
“Input tax” is defined in section 1 of the Value-Added Tax Act, No 89 of 1991 (“the VAT Act”) to mean

(a) Tax charged under section 7 and payable in terms of that section by-
   (i) A supplier on the supply of goods or services by that supplier to the vendor; or
   (ii) The vendor on the importation of goods by him; or
   (iii) The vendor under the provisions of section 7(3);

where the goods or services concerned are acquired by the vendor wholly for the purpose of consumption, use or supply in the course of making taxable supplies, or where the goods or services are acquired partly for such purpose to the extent (as determined in accordance with the provisions of section 17) that the goods or services concerned are acquired by the vendor for such purpose.

Proposal
We propose that the definition of “input tax” be amended to read as follows:
where the goods or services concerned are acquired or imported by the vendor wholly for the purpose of consumption, use or supply in the course of making taxable supplies, or where the goods or services are acquired partly for such purpose to the extent (as determined in accordance with the provisions of section 17) that the goods or services concerned are acquired by the vendor for such purpose.

The proposed solution is in line with the VAT legislation of New Zealand and Australia.

25. Supplies between connected persons

Legal nature
Where goods are supplied under an agreement (other than an instalment credit agreement or rental agreement) and the consideration for the supply cannot be determined at the time the
goods are supplied, then the VAT on the supply only becomes payable when payment for the supply is due or is received or an invoice relating to the supply is issued, whichever is earlier (section 9(4) of the VAT Act refers).

The consideration for a supply cannot be determined in instances where the price is determined by the quality of the goods supplied, dependent on international markets and/or the price is subject to exchange rate fluctuations. The following industries are affected:

- A mining company supplies ore or concentrate to a refiner where the price of the ore is dependent on the quantity of metals extracted from the ore, the average international metal prices for the month in which the ore or concentrate is supplied and the average exchange rate of the same period. In these circumstances the price of the ore can only be determined two to three months after the supply of the ore or concentrate;
- A forester supplies logs to a wood mill where the price of the logs is dependent on the quality and moisture content of the logs, which is determined by the purchaser only after risk and ownership passes;
- A sheep farmer supplies wool where the price is dependent on the quality of the wool supplied and the average international wool price and exchange rate in the month in which the wool is supplied.

Where the supplier and the recipient are independent in relation to each other, the provisions of section 9(4) of the VAT Act apply and the VAT only becomes due when payment for the supply is due or is received or an invoice relating to the supply is issued, whichever is earlier.

If however, the supplier and recipient are connected persons in relation to each other, (as is often the case in BEE transactions), then the VAT is payable when the goods are removed by the recipient or when they are made available to the recipient. This causes practical difficulties in that the consideration for the supply must be estimated at the time the goods are delivered, and adjustments must be made when the consideration for the goods is finally determined.

Where both the supplier and the recipient are VAT registered vendors, there does not seem to be any reason as to why the VAT payment should be brought forward as the recipient will be entitled to claim the VAT in the same period that the supplier is required to account for output tax.
**The legal position**

Section 9(2)(a)(i) of the VAT Act provides that where the supplier and the recipient are connected persons, a supply is deemed to take place at the time of removal of goods in the case of a supply of goods which are to be removed, unless an invoice is issued or payment is made prior to the date when a return in respect of such supply would have been furnished.

Section 1 of the VAT Act defines “connected persons” to include any company and any other company which is controlled by the same persons who control the first-mentioned company.

Section 9(4) provides that, subject to the provisions of section 9(2), where goods are supplied under an agreement, other than an instalment credit agreement or rental agreement, and the goods are appropriated by the recipient in circumstances where the whole of the consideration is not determined at the time they are appropriated, the supply is deemed to take place when and to the extent that any payment in terms of the agreement is due or is received, or an invoice relating to the supply is issued by the supplier to the recipient, whichever is the earliest.

**Proposal**

We propose that the proviso to section 9(2) be amended to stipulate as follows:

“Provided that this paragraph shall not apply if the recipient is a registered vendor and is entitled under section 16(3) to make a deduction of the full amount of tax in respect of that supply. Priced further that this paragraph shall not apply in any case where an invoice is issued ….”

**26. Electronic products**

**Legal nature**

Electronic products such as e-books, music and films are considered to be the supply of services for VAT purposes. The supply of such services is subject to VAT if supplied by a vendor in South Africa. However, where electronic products are supplied by a foreign supplier, the foreign supplier is not required to register for VAT in South Africa unless it has a physical presence in South Africa, which is often not the case.
The supplies of electronic products by foreign entities are therefore not subject to VAT. For supplies with a value less than R100, the supply is also exempt from VAT in terms of section 14(5)(e) of the VAT Act. Practically, individuals who purchase electronic goods in excess of R100 also do not pay any VAT thereon. There is therefore a substantial incentive for consumers to purchase electronic products from foreign suppliers as opposed to local suppliers, and local suppliers are unable to compete in this environment.

The legal position
Section 7(1)(c) Act levies VAT at the rate of 14 percent on the supply of any imported services by any person, subject to the exemptions, exceptions, deductions and adjustments provided for in the Act.

Section 14(5)(e) of the VAT Act provides for an exemption from the tax levied in terms of section 7(1)(c) if the value of the services does not exceed R100 per invoice.

Proposal
We propose that foreign suppliers of electronic products to South Africa consumers be compelled to register and account for VAT on their supplies, similar to the process that was implemented in the European Union.

27. Value-Added Tax levied on memberships fees of employees paid by employers

Legal nature

The tax levied on the membership fees of employees belonging to professional bodies are not allowed as a deduction if paid by the employer on behalf of the employee. This is normally where it is a requirement of the employment by the employer that the employee belong to the professional body. The issue is much bigger than SAICA membership. It touches at the heart of the VAT system that seeks to tax value added in the supply chain. It specifically taxes the residual after the VAT on goods and services acquired for the purpose of consumption, use or supply in the course of making taxable supplies has been set off against the value generated by the inputs (referred to as output tax). We are in agreement that the VAT Act cannot cater for each and every individual transaction or situation in the course of running businesses, but
where established principles are under threat, the VAT Act must be amended to give effect to the foundational principles.

Membership of professional bodies primarily seek to ensure that the members of the profession represented by the body act within the professional guidelines of the body and that continuous development and maintenance of key skills are maintained. In this regard it is important to understand that the professional bodies only regulate their members; they are not responsible for their members’ conduct and training. Employers in employing professionals require that their employees remain members of their respective governing bodies to ensure effective monitoring of ongoing professional conduct and development, failing which, the employer would need to assume this responsibility. The reason why the employer pays for the employee’s membership fees is to effectively outsource the regulatory requirements to the regulatory bodies. The only practical difficult is that only the employees (and not the employers) qualify to be members of professional bodies.

From a VAT perspective the cost of the professional membership is part and parcel of the cost of employing the professional resources, and as such part of the cost to make taxable supplies. In income tax terms recognition is given to this fact as no fringe benefits accrue to the employee, the real beneficiary being the employer.

The legal position
The definition of input tax in section 1 of the Value-Added tax requires that for the tax to be input tax the services must be acquired by the vendor, which in this case it is not.

Proposal

Based on the above we recommend that a general public ruling be issued to confirm the recoverability of VAT on professional membership fees as an interim measure. As a longer term solution we recommend an amendment to the VAT Act to regulate and clarify the position.

28. Estate Duty

Legal nature
When the inclusion rate for purposes of determining a taxable capital gain was increased no adjustment was made to the rate at which Estate Duty is levied. It was acknowledged when the tax on capital gains was introduced that the imposition of both capital gains tax and estate duty may have an impact on the liquidity of the deceased estate and the estate duty rate was reduced from 25 per cent to 20 per cent.

The legal position
The inclusion rate for individuals at death increased from 25% to 33.3% with effect from 1 March 2012 in terms of the amendment to paragraph 10 of the Eighth Schedule to the Income Tax Act. The First Schedule to the Estate Duty Act was not amended to provide for relief in this regard.

Proposal

It is suggested that the rate of estate duty applying to estates where the death occurred after 1 March 2012 be reduced.

29. Estate Duty

Legal nature
Before the introduction of the Tax Administration Act the number of days available to a person to object to an assessment was counted as business days. This was of particular relevance where the period included the days between 16 December of a year and 15 January of the year. The tax Administration Act effectively deleted the provision which allowed for the use of business days.

The nature of persons impacted by the problem
Every taxpayer objecting to an assessment is impacted by this.

The legal position
The Tax Administration Act (in paragraph 66 of the First Schedule) repealed section 83 of the Income Tax Act. Section 83(23) defined a day for purposes of the rules of the Tax Court.
The Regulations issued in terms of section 107A still refers to section 83 and refers to a “day” and not a business day.

Proposal

It is proposed that the reference in the Rules promulgated under section 107A be emended to refer to business day and not day in rule 1.

Please do not hesitate to contact us, should you have any questions regarding the above.

Yours faithfully

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