COMMENT: THE FIRST BATCH OF THE DRAFT TAXATION LAWS AMENDMENT BILL, 2014

Dear Sir/ Madam

We refer to the call for comments on the above-mentioned document. Set out below please find the SAICA National Tax Committee’s submission relating to the proposed determination of fringe benefit calculation for Defined Benefit fund contributions as outlined in the First Draft of the Tax Laws Amendment Bill, 2014.

Paragraph 12D(4) of the Seventh Schedule to the Income Tax Act 58 of 1962 (‘ITA’)

Legal nature of problem

The proposed paragraph 12D(4) of the Seventh Schedule requires the board of a fund to provide employers with contribution certificates within specific time periods each year or whenever fund rules are amended.
Description of the problem

The wording in proposed paragraph 12D(4) does not limit the requirement to provide contribution certificates to employers of defined benefit funds only. Clarity is sought on application of this provision, and whether it is limited to Defined Benefit or Hybrid funds, or is it intended to be applied to Defined Contribution funds as well.

Proposal

SAICA is of the view that contribution certificates should not be required for Defined Contribution funds, as the employer provides the fund with the schedule setting out the contributions paid as is required in terms of section 13A and Regulation 33 of the Pension Funds Act. See Annexure A hereto.

Determination of ‘fund member category factor’ - Draft Regulations to paragraph 12D(5)(a) of the Seventh Schedule

Legal nature of problem

The rate of discount methodology proposed differs to that which in place for statutory valuations (benefits and contributions calculations).

Description of the problem

There may be misalignment if there are different assumptions used for the calculation of fringe benefit in terms of the ITA versus the assumptions in place for statutory valuations (benefits and contributions calculations).

Proposal

It is appropriate to place a value on the benefits using the assumptions underlying the previous statutory actuarial valuation of the fund. This would ensure consistency between:

- The value that the TLAB places on the benefits for tax purposes; and
- The actual rates of contribution being paid to the fund as well as the actual benefits being paid to members.
Future pension increases and the determination of ‘fund member category factor’ - Draft Regulations to paragraph 12D(5)(a) of the Seventh Schedule

Legal nature of problem

This section deals with the method of calculation of the “Paragraph 12D(5)(a)”. The proposed method of calculation of ‘fund member category factor’ as proposed in the Draft Regulations to paragraph 12D(5)(a) effectively requires that funds base the tax to be paid by active members on the level of past pension increases.

Description of the problem

The consequence of applying the current Draft Regulations will mean that the higher the pension increases granted the higher the fringe benefit tax value will be attributed to active members. This conflict of interest between the interests of active members and the interests of pensioners (non-members), places trustees in an invidious position and can be detrimental to both active members and pensioners.

In addition, many Defined Benefit funds no longer provide pensions from within the fund and retirees are required to purchase a pension from a long-term insurer. These Defined Benefit funds will not have a history of pension increases. The draft TLAB does not specify what happens in such cases. In addition, certain Defined Benefit funds grant pension increases plus, if affordable, lump sum bonuses (or 13\textsuperscript{th} cheque). The draft TLAB also does not cover this position.

Proposal

An alternative to a fund’s Pension Increase Policy should be sought, in the determination of a ‘fund member category factor’.

Determination of risk benefit factor of ‘fund member category factor’ - Paragraph 6 of the Draft Regulations to paragraph 12D(5)(a) of the Seventh Schedule
Legal nature of problem

The proposed formula in paragraph 6 of the Draft Regulations assumes that the cost of a lump sum death benefit equal to one year’s salary is equal to 1% of salary per annum.

Description of the problem

This assumed cost of risk benefits appears too high. The true cost of risk benefits provided by a fund are a function of the demographic profile of the membership, the proportion married, number and age of children, and so on. There are also differences in death benefits e.g. some funds base the spouse’s pension on past service plus projected service to normal retirement date, whereas other funds do not.

Proposal

The one size fits all approach is not appropriate given the variance underlying demographic profile of funds.

Requirements for proposed contribution certificate – paragraphs 5 (g) through to (l) of the Draft Regulations to paragraph 12D(5)(b) of the Seventh Schedule to the ITA

Legal nature of problem

The proposed requirements of the contribution certificate content as stipulated in paragraphs (5) (g) through to (l) of the Draft Regulations to paragraph 12D(5)(b) is too wide in that it attempts to legislate all possible elements affecting a fund valuation.

Description of the problem

Many of the proposed calculations in the Draft Regulations are based on the actual experience of the fund, such as “average age at retirement”, past pension increases as a percentage of inflation, proportion married, percentage commuted, etc.
However the actual experience over the recent past is often a poor indication of likely future experience, particularly if the employer has undergone a significant event such as a restructuring exercise.

**Proposal**

The current requirements for the contribution certificate are too prescriptive. Fund valuators should be allowed an element of discretion in setting the assumptions underlying the calculations required for the TLAB. A ‘one size fits all’ approach is not feasible and leeway in setting the assumptions underlying the calculations should be permitted by TLAB.

**General**

i) Additional administration requirements proposed by the TLAB, particularly with regard to the onerous contribution certificate data will significantly add to the existing costs incurred by funds and are in conflict with the policy consideration to reduce costs.

ii) In terms of the Pension Funds Adjudicator, as a general principle, every registered fund must in terms of section 9A of the Pension Funds Act appoint a valuator, who must in terms of section 16 perform an investigation into the financial condition of the fund at least once in every cycle of three years. The detailed requirements for periodical investigations by the valuator (generally referred to as “actuarial valuations”) are set out in section 16 of the Pension Funds Act and as well as in the relevant Board Notices, which sets out the particulars for inclusion in a report by a valuator relating to a statutory actuarial valuation in terms of section 16 of the Act. There must be alignment between these requirements and the current draft regulations issued, which require a contribution certificate to be provided annually to employers.’

iii) Certain terms in the proposed paragraph 12D are aligned with occupational funds (pension and provident funds) and are consequently inconsistent with employer contributions to retirement annuity funds. In particular:
a. ‘Benefit’ is defined in relation to an employee. Members of retirement annuity funds do not comprise employees; and

b. ‘Retirement funding income’ is defined in relation to an employee or office bearer’s remuneration used to make contributions to a pension or provident fund. This definition cannot be applied to members of retirement annuity funds as they may not also be members of occupational funds. Specific consideration must be made for such members.

Annexure A

Section 13A of the Pension Funds Act:
13A. Payment of contributions and certain benefits to pension funds

Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely-

(a) Any contribution which, in terms of the rules of the fund, is to be deducted from the member’s remuneration; and
(b) Any contribution for which the employer is liable in terms of those rules

Regulation 33 in terms of section 13A of the Pension Funds Act:
33. Requirements in terms of section 13A of Act

Minimum information to be furnished by every employer to the fund with regard to payments of contributions in terms of section 13A(2) of the Act, shall consist of at least the following:

(a) Initial Contribution Statement:

(i) Name of the fund; identification of the fund (e.g. registration number); period in respect of which the contribution is payable;

(ii) Name and address of the employer or pay-point which made the deduction; responsible person to contact at the employer or pay-point;
(iii) Full name, date of birth, ID number or employer pay number, or other means of identification, date of membership, pensionable emoluments of member and percentage or amount of contributions, split between member and employer as well as an indication of any additional voluntary contributions paid.

(b) Subsequent Contribution Statement:

In respect of each contribution period either:

(i) The information required in paragraph (a)(i) and (5) above and part or all of the information contained in paragraph (a)(iii) above; or

(ii) a reconciliation with the contribution statement for the previous period showing any differences in the data such as additions as a result of new members, reductions as a result of membership terminations, adjustments as a result of changes in pensionable emoluments or the payment of additional voluntary contributions or other information and corrections due to error.

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

Yours faithfully

Piet Nel CA(SA)
PROJECT DIRECTOR: TAX
The South African Institute of Chartered Accountants