Dear Madams,

We refer to the invitation to submit technical proposals to improve or correct current tax legislation. Set out below please find the SAICA National Tax Committee’s proposals with respect to three additional items. We apologise for the late submission.

The three proposals deal with Value-Added Tax (input tax), section 29A of the Income Tax Act (assets allocated and held in the corporate fund of an insurer) and section 36(4) of the Tax Administration Act (reportable arrangements).

**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 seeks 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 on-going 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.

DISALLOWANCE OF ANY DEDCUTION BY WAY OF AN ALLOWANCE IN RESPECT OF ANY ASSET AS DEFINED IN THE EIGHTH SCHEDULE TO THE INCOME TAX ACT
(Section 29A(11)(h) of the Income Tax Act)

Legal nature of the problem

With the introduction of section 29B (‘Mark-to-market taxation in respect of long-term insurers), it was intended that the deemed mark-to-market event will not give rise to any recoupment of prior allowances, hence real estate and other assets will not be subject to a recoupment of prior depreciation allowances. However, as a trade-off, no depreciation allowances will be allowed for these assets going forward.

Section 29A(11)(h) was inserted and provided that no amount may be claimed as a deduction by way of an allowance in respect of an asset as defined in the 8th Schedule to the Income Tax Act.
The provisions of section 29A(11)(h) applies in respect of years of assessment commencing on or after 1 January 2013.

However, the deemed mark-to-market event, as contemplated by section 29B of the Income Tax Act, only applies to assets held by the insurer in all its policyholders funds (29B(2) of the Income Tax Act). The corporate fund was therefore not impacted.

**Factual description of relevant transaction and nature of business and associated transactions that are impacted**

Section 29A(11)(h) of the Income Tax Act applies to the determination of the taxable income by an insurer in respect of its individual and company policyholder funds, as well as the corporate fund.

The assets allocated to the corporate fund, which was not subject to the deemed mark-to-market event, are unintentionally impacted by the provisions of section 29A(11)(h) of the Income Tax Act.

**Proposal**

The provisions and application of section 29A(11)(h) of the Income Tax Act should exclude assets allocated and held in the corporate fund of an insurer. Normal tax principles should therefore be applied to determine the taxable income of the corporate fund.

**Exclusions from arrangements to be reported**

**Legal nature**

Section 36(4) of the Tax Administration Act read as follows before the 2014 Taxation Laws Amendment Bill: “The Commissioner may determine an ‘arrangement’ to be an excluded
‘arrangement’ by public notice, if satisfied that the ‘arrangement’ is not likely to lead to an undue ‘tax benefit’.”

Section 80N(4) of the Income Tax Act used to read as follows before it was repealed by the Tax Administration Act: “The Minister may determine an arrangement to be an excluded arrangement by notice in the Gazette, if he or she is satisfied that the arrangement is not likely to result in an undue tax benefit”

Section 269(1) of the Tax Administration Act states: “Rules, notices and regulations issued under the provisions of a tax Act repealed by this Act that are in force immediately before the commencement date of this Act, remain in force as if they were issued under the equivalent provisions of this Act, to the extent consistent with this Act, until new rules, notices and regulations are issued under such provisions.”

The wording of section 36(4) of the Tax Administration Act was arguably still consistent with the wording of section 80N(4) of the Income Tax Act. As such, the notice issued in terms of section 80N(4) should still apply.

From the date of promulgation of the Tax Administration Laws Amendment Act, the wording of section 36(4) of the Tax Administration Act will read: “The Commissioner may determine an ‘arrangement’ to be an excluded ‘arrangement’ by public notice”

**Proposal**

This may no longer be consistent with the wording of the repealed provision (80N(4)). It is therefore important that an indication be given by SARS that the notice still applies (i.e. that the wording of the provisions is still viewed as being consistent) or that a new notice is issued when the Tax Administration Laws Amendment Act is promulgated.
Failure to clarify this may expose taxpayers and advisors to penalties in terms of section 212 of the Tax Administration Act in respect of arrangements that should strictly speaking have been reported (given the lack of the exclusion notice) even though they are not likely to pose a risk of being avoidance arrangements. It may also place SARS under unnecessary administrative pressure if taxpayer or advisors report transactions that do not pose a risk to the fiscus.

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

Yours faithfully

Piet Nel CA(SA)

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