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Submission File

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South African Revenue Service
Private Bag X923
PRETORIA
0001

BY E-MAIL: nalberts@sars.gov.za

Dear Sir

SECTION 12H: INTERPRETATION OF THE EFFECTIVE DATE

We refer to the substitution of section 12H of the Income Tax Act No. 58 of 1962 (“the Act”) as substituted by section 23 of the Taxation Laws Amendment Act No. 17 of 2009 (“TLAA 2009”). More specifically we refer to the effective date of the substitution of section 12H, and we seek confirmation that the substituted section 12H applies also to existing contracts that were entered into before 1 January 2010, i.e. clarification that the new section 12H is NOT limited to only new contracts signed on or after 1 January 2010?

Our view is as follows:

- The new legislation is effective as from the commencement of years of assessments ending on or after 1 January 2010.

- The new legislation will apply to existing contracts that were in place on or before 1 January 2010, for years of assessment ending on or after 1 January 2010 onwards.

- The new rules apply to ALL contracts (i.e. all qualifying “registered learnership agreements”) in existence during the 2010 tax year, irrespective of when they were signed.

- The old rules simply cease to exist so there is no basis for using the old rules in the tax calculation for years of assessments ending on or after 1 January 2010 (even if it has to do with a learnership that started in 2009 or 2008).

We submit that the commentary above adequately presents the correct interpretation. However, in response to an opposing suggestion (i.e. that the new section 12H should actually only apply to new learnership agreements entered into on or after 1 January 2010) we attach as an annexure our refutation of that contrary suggestion.
Our request is that SARS head office confirms the view to SAICA in writing and further to confirm this view in an updated IN.

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

Yours faithfully

Muneer Hassan CA(SA)

PROJECT DIRECTOR: TAX

The South African Institute of Chartered Accountants
ANNEXURE: Refutation of the opinion that the new section 12H ITA should apply only to new learnership agreements entered on or after 1 January 2010

As the basis for this refutation, we refer to the attached non-binding private opinion (“NPO”) issued by SARS in terms of section 76I of the Act. Our views expressed above differ from the SARS NPO. Whilst we appreciate that taxpayers as well as SARS are perfectly entitled to ignore NPOs (section 76I of the Act), we prefer that the matter be clarified by SARS.

Our comments below focus on the three “decisive” paragraphs of the NPO under the heading of “LAW AND APPLICATION OF THE LAW”:

1st paragraph

- Firstly, the effective date is NOT simply 1 January 2010, i.e. it is not a single point fixed in time. Rather, section 111(2) of the TLAA 2009 unambiguously sets the effective date at the COMMENCEMENT of tax years ending on/after 1 January 2010. This means that if a taxpayer has a 28 February year-end, then the new section12H applies to that taxpayer for the tax year that runs from 1 March 2009 to 28 February 2010. It would be inappropriate to argue that such a taxpayer should apply the old rules for all contracts entered into for the first 10 months of the tax year (1 March 2009 to 31 December 2009), and to only apply the new rules to contracts entered into in the last two months of the tax year.

- Secondly, section 12H has not been “amended” but in fact “substituted”. (See section 23 TLAA 2009 which “amends” the Act —by “substituting” section 12H. This means that section 12H was replaced in its entirety and that, importantly, the old section 12H ceases to exist from the effective date. So whilst the NPO suggests that the new section 12H cannot be applied to older contracts, it ignores the fact that there is no authority to apply the OLD section 12H in the 2010 tax year. If we follow this reasoning, it would mean that newer contracts qualify for the new section 12H but older contracts will now qualify for no allowance at all.

- There are several examples where the Act intends for the older rules to continue being applied into the future in respect of a specific set of older events, even though newer rules have been introduced to deal with later events. Compare for example section 8A vs. section 8C, and section 11B vs. section11D — but the 2009 substitution of section 12H does not remotely resemble these.

- Even if we do argue that the old rules could technically survive in the 2010 tax year, we should consider also the intention of the substitution as explained in the Explanatory Memorandum to the TLAA 2009 (“the EM”). Under the heading of “Reasons for change” on page 20, the EM bemoans the “complexity” of the old rules and notes that it is “difficult to understand” and contains “too many variables”. Would these concerns really be addressed by preserving the old rules and then layering on top of that an entirely new set of
rules with the result that taxpayers have to apply two sets of tax rules in the same tax return? And then that would have to continue into future tax years until all the old contracts have ended? Furthermore, to argue that the old rules survive in the new tax year would mean that (for example) contract terminations could still trigger the old recoupment penalty — which is one of the issues that National Treasury specifically addresses at the bottom of the EM’s page 20. Can it really be expected of employers to continue to perform recoupment calculations in respect of older contracts in future tax years? We repeat the point that the only correct position is that the old rules cease to exist and can no longer be applied at all.

2nd and 3rd Paragraphs

- The fact that there is no new Interpretation Note ("IN") simply means that the position has not been more expressly clarified by SARS head office. The ABSENCE of an IN certainly cannot be support for any position one way or the other.

- The EM calculation examples are clearly intended to clarify ONLY the calculation process and the allowance amounts — not the effective date. The mere use of “2010” in an illustrative example can surely not be taken to be any indication as to the effective date.

- Paragraphs 2 and 3 also apply a misdirected connotation of “retrospective”. First, no taxpayer is arguing that the new section 12H can be applied in completing their 2009 or 2008 tax returns. Secondly, however, the rules are indeed “retrospective” in the sense that they were only promulgated on 29 September 2009 but yet could apply to a time period before that (e.g. if the taxpayer has a 28 February 2010 tax year, thus starting on 1 March 2009). But this is no different from the normal natural person tax tables and many other matters that effectively came into operation before 29 September 2009. In any event, the application of the CURRENT law to the tax return in respect of the CURRENT tax year can certainly not be seen as retrospective application (even if it relates to contracts that were commenced in previous tax years).