



Tax Alert



27 October 2023

Let's talk

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2023 Draft tax bills - National Treasury's and SARS' response to public comments

In brief

On 25 October 2023, National Treasury (NT) and the SA Revenue Service (SARS) responded to public comments, received during the Standing Committee of Finance (SCoF) meetings in September 2023 and in public workshops, on the proposed 2023 tax legislation. Importantly, the proposed amendment to the Foreign Business Establishment (FBE) exemption will be withdrawn pending the Constitutional Court judgment in the *Coronation* case and Practice Note 31 (PN 31) will remain in effect until 1 January 2025 for further consultations.

In detail

On 25 October 2023, NT and SARS responded to public comments, received during the SCoF meetings in September 2023 and in public workshops, on the proposed 2023 tax legislation.

Stakeholders had raised concerns about the various proposals, including on the retirement system reform, the FBE amendment to CFC legislation and the withdrawal of PN 31, together with the introduction of a new section 11G, and imposing an obligation on non-resident employers to deduct employees' tax. We summarise the key NT responses on these matters below.

Two-pot retirement system

NT proposed a new implementation date of 1 March 2025 to allow time for the implementation of system changes by both the industry and SARS and engagement with fund members regarding the changes.

In a further change, the amount to be included as seed capital in the savings pot is proposed to be increased from the lesser of 10% of the "vested component" and R25,000 to a maximum of R30,000.

PN 31 withdrawal

In November 2022, SARS issued a notice of its intention to withdraw PN 31 due to increasing abuse of the concession contained therein. After significant pushback from stakeholders, it was decided that the withdrawal of PN 31 would be postponed until a statutory replacement was put in place.



The draft 2023 Taxation Laws Amendment Bill (TLAB) proposed a new section 11G to apply for years of assessment commencing on or after 1 January 2024 to allow for a deduction of interest for certain legitimate transactions between groups of companies. However, numerous concerns with this proposal were raised by stakeholders, largely to the effect that the provision did not go far enough and that PN 31 should be incorporated into the law in its entirety.

NT has made a number of concessions. These concessions include that access to business funding should not be adversely affected by the withdrawal of PN 31 and that section 11G will be expanded to apply to any person that incurs interest expenditure in the production of interest income (limited to said interest income) without regard to any shareholding threshold of any back-to-back lending arrangement. While somewhat unclear, it appears that NT has also conceded that section 11G should also apply to natural persons entering into back-to-back arrangements to fund personal expenditure. To allow for further consultation, NT has proposed that section 11G should be legislated during the 2023 legislative cycle, but only come into effect for years of assessment commencing on or after 1 January 2025 and that PN 31 should remain in effect until then.

FBE exemption

The draft TLAB proposed to amend the FBE definition to require that all important functions for which a CFC is compensated should be performed either by the CFC or by another CFC in the same group of companies that is located and subject to tax in the same country as the CFC's fixed place of business in order for the CFC to qualify for the FBE exclusion.

Stakeholders pushed back strongly against this proposed change, including on the grounds that the change was unnecessary in view of the fact that SARS had won the *Coronation* case in the Supreme Court of Appeal and that proposed changes would have severe consequences for the operating models and international competitiveness of SA-based multinationals.

NT has now proposed to withdraw this amendment pending the Constitutional Court judgment in the *Coronation* case.

Non-resident employers' obligation to deduct employees' tax

The draft proposal sought to remove the distinction between resident and non-resident employers and to require all employers (resident and non-residents), as well as representative employers, to deduct employees' tax.

Stakeholders had raised numerous concerns with the proposal to require non-resident employers to withhold employees' tax without any SA nexus threshold as going too far.

NT and SARS have accepted this and have now proposed that, in respect of non-resident employers, this requirement should be limited to those employers conducting business through a permanent establishment in South Africa.

Takeaway

The proposed changes made by NT and SARS are broadly welcomed. However, the proverbial devil will be in the detail and taxpayers should carefully consider the amendments contained in the final tax bills and amendment acts and consider the implications of these provisions for them having regard to their circumstances and the actual wording of the law.



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