Legislative Review, 2022 – Presentation

PIT, EMPLOYMENT TAXES AND RETIREMENT

8 September 2022

Overview of the 2022 tax process

2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill (Rates Bill)

- The 2022 Draft Rates Bill was first published on Budget Day (25 February 2022) and published again on 29 July 2022, in order to solicit comments on the tax proposals contained therein.
- The 2022 Draft Rates Bill contains tax announcements made in the 2022 Budget, dealing with changes in rates and monetary thresholds to the personal income tax tables.

Personal income tax

	Personal income tax	**Gross tax revenue**	**%**
2018/2019	492 083	1 287 690	38%
2019/2020	527 633	1 355 766	39%
2020/2021	487 011	1 249 711	39%
2021/2022	***553 529***	***1 547 071***	***36%***
2022/2023	587 907	1 598 447	37%
2023/2024	628 220	1 694 259	37%
2024/2025	678 296	1 807 614	38%

Growth in personal income tax collections is expected to be constrained by a weaker employment outlook compared with the 2021 MTBPS projections.

Inflationary relief through a 4.5% adjustment in the personal income tax brackets and rebates.

Overview of the 2022 tax process

2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill

- The 2022 Draft Revenue Laws Amendment Bill was published for public comment on 29 July 2022 and contains proposed amendments to the Income Tax Act dealing with the two pot retirement system.
- More on this proposal lateron.

Overview of the 2022 tax process

2022 Draft Taxation Laws Amendment Bill (TLAB) and 2022 Draft Tax Administration Laws Amendment Bill (TALAB)

- The 2022 Draft TLAB and TALAB were published for public comment on 29 July 2022.
- These draft bills contain the remainder of the tax announcements made in Chapter 4 and Annexure C of the 2022 Budget Review, which are legislatively more complicated and require greater consultation with the public.
- Following the budget announcement on 25 February 2022, National Treasury held technical consultations with selected stakeholders to discuss the certain proposals announced in the 2022 Budget Review.

Overview of the 2022 tax process

2022 Draft Taxation Laws Amendment Bill (TLAB) and 2022 Draft Tax Administration Laws Amendment Bill (TALAB)

- Due to constitutional requirements, the draft tax bills are split into two separate bills, i.e., money bills in terms of section 77 of the Constitution dealing with national taxes, levies, duties and surcharges (draft Rates Bill, Draft Revenue Laws Amendment Bill and draft TLAB) and an ordinary bill in terms of section 75 of the Constitution, dealing with tax administration issues (draft TALAB).
- The draft tax bills have been published for public comments on 29 July 2022 and the public has been granted a month-long period to submit comments in writing. The closing date for public comments is 29 August 2022.

Overview of the 2022 tax process

2022 Draft Taxation Laws Amendment Bill (TLAB) and 2022 Draft Tax Administration Laws Amendment Bill (TALAB)

- SCoF/ SeCoF normally convenes public hearings on the draft tax bills prior to their formal introduction in Parliament.
- NT and SARS will also engage stakeholders submitting comments in more detail through workshops to be held during the month of September 2022.
- NT and SARS will present a response document to the SCoF/SeCoF after which the draft tax bills will be revised taking into account public comments.

Personal income tax

Limiting doubling exemptions in exit year

Apportioning the interest exemption and capital gains tax annual exclusion when an individual ceases to be tax resident.

Tax research and reviews

A discussion document will be published in 2022 on a personal income tax regime for remote work.

Personal income tax – affected areas

Provisional taxpayers – Wealth asset disclosure
Disclosure of specific assets at market value by provisional taxpayers with assets above R 50 million from the 2023 year of assessment.

Review of provisional tax system
There is a proposal to change the provisional tax system to align it with changing circumstance and international development. A discussion paper will be published on these proposed changes.

Employment taxes

ETI increase

50% increase in the value of the benefit which can be claimed by employers in respect of qualifying employees – 1 March 2022.

ETI penalty - SAIT submission

Imposition of understatement penalty for employment tax incentives improperly claimed to prevent the abuse by employers of this incentive.

Employment taxes

Accommodating commission based on based on units produced

Reviewing the timing of accrual and incurral of variable remuneration.

- The Act makes special dispensation for variable remuneration and makes provision for the deferral of the taxation of variable remuneration to the date when the amount is received by the employee as opposed to when it accrues to the employee.

Employment taxes

Accommodating commission based on based on units produced

- Currently, variable remuneration is defined in the tax legislation to include the following amounts: (i) overtime pay, bonuses or commission as contemplated in the "remuneration" definition contained in paragraph 1 of the Fourth Schedule to the Act; (ii) an allowance or advance paid in respect of transport expenses as contemplated in section 8(1)(b)(ii); (iii) an amount which the employee becomes entitled to as a result of unutilised leave; (iv) any night shift or standby allowance; or (v) any amount paid or granted for a reimbursement as contemplated in section 8(1)(a)(ii) of the Act.

Employment taxes

Accommodating commission based on based on units produced

- Government is cognisant of the fact that the above-mentioned list of amounts that fall within the definition of variable remuneration may not fully cater for all types of variable remuneration.
- For example, although the commission is included in the current list of variable remuneration, however, such commission only caters for formal sector performance-based payments that form part of the employee's salary and the informal sector, where such payments are for example calculated based on units produced, is not catered for, since the word "commission" is defined as a percentage-based payment, and not determined on units produced.

Retirement funds

Deemed withdrawal from South African retirement funds upon ceasing SA tax residency

Renegotiation of certain double tax agreements aimed at the cross-border tax treatment of retirement funds.

Tax research and reviews

A review of the exemption of foreign retirement benefits in domestic tax legislation will be conducted.

Two pot retirement system

Public comments on the tax treatment of contributions to the two pots retirement system are being reviewed in preparation for public consultations.

Two pot retirement system: Policy Background

- South Africa has different retirement fund vehicles available to individuals, including pension funds, provident funds, retirement annuity funds, pension preservation funds and provident preservation funds.
- Historically, each of these funds had a different tax treatment for contributions, alongside different rules for withdrawals.
- Since 2012, the South African retirement fund regime has been undergoing fundamental reforms
- These reforms include amendments to harmonise the tax treatment of contributions to the different types of funds, measures to increase preservation (both before retirement and at retirement), and reforms to lower charges and improve defaults, governance and market conduct.

Two pot retirement system: Policy Background

- Many of these reforms have been implemented, including:
  - The harmonisation of the tax treatment of contributions to funds, which was implemented with effect from 1 March 2016
  - The preservation of provident funds at retirement through annuitisation, effective from 1 March 2021.
- There are two primary concerns regarding the current design of the retirement system.
  - The first concern is the lack of preservation before retirement.
    - For pension funds and provident funds, this access is dependent on an employee terminating employment.
    - Individuals can then access their funds, in full, when changing or leaving a job
  - The second concern is the lack of access even in cases of emergency by some households that are in financial distress that have assets within their retirement funds.

Two pot retirement system: Policy Background

- In order to address these concerns, during the February 2021 Budget Speech and November 2021 MTBPS Speech, the Minister made an announcement in this regard.
- These announcements were followed by a discussion document published by National Treasury for public comment on 15 December 2021, titled " *Encouraging South African Households to save more for retirement*".
- The discussion document proposed a new retirement fund regime that aims to address the above-mentioned concern, a "two-pot" retirement system, namely, a "Savings Pot" and a "Retirement Pot"
- These two pots will be housed within the current types of available funds, for example, pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund.

Two pot retirement system: Policy Background

- The two pot retirement system will retain the current principle of EET, i.e, exempting contributions, exempting growth, taxing withdrawals and benefits.
- Members of retirement funds will still receive a deduction on contributions up to the lower of 27.5% of gross remuneration or R350,000 per tax year.
- Below is the summary of the tax treatment of contributions and withdrawals proposed by the two pot retirement system. It is important to note that the proposed tax changes are subject to the rules of the fund.
- The proposed two pot retirement system will come into effect on the proposed implementation date, which is 1 March 2023 and will apply in respect of amounts contributed to retirement funds on or after that date.

Two pot retirement system: “savings pot”

- There is no seeding finance available in the “Savings Pot”. As such, any amounts available for withdrawal from the ‘Savings Pot” will be accumulated from the date of implementation of the two pot retirement system.
- A maximum of 1/3 of the total contribution can go to the “Savings Pot”
- Contributions in excess of the allowable deduction will not be permitted into the “Savings Pot”.
- Amounts contributed to the “Savings Pot” can be accessed, however, individuals can only have one withdrawal during any twelve month period from the “Savings Pot”.
- The minimum withdrawal amount from the “Savings Pot” is R2000

Two pot retirement system: “savings pot”

- Withdrawals from the “Savings Pot” will be added to taxable income in the year of withdrawal and be subject to tax in the hands of the individual in terms of the normal income tax rules.
- Should an individual opt not to make a withdrawal within a twelve month period, the funds available in the “Savings Pot” will be available for withdrawal in the subsequent twelve month period.
- An individual will be allowed to transfer the available funds from the “Savings Pot” to another “Savings Pot” or “Retirement Pot” free of tax.
- On the death of an individual member or on retirement of an individual member, any available amount from the “Savings Pot” will be taxable as a retirement lump sum subject to the retirement lump sum tables.

Two pot retirement system: “savings pot”

- When an individual ceases to be a tax resident for an uninterrupted period of three years, or leaves South Africa at the expiry of the visa, the individual member will be allowed to withdraw all the funds from the ‘Savings Pot” and such withdrawal will be added to taxable income and be subject to tax in the hands of the individual in terms of the normal income tax rules.
- These withdrawals will be subject to the rules of the fund allowing them.

Two pot retirement system: “retirement pot”

- Not less than 2/3 of the total contribution can go to the “Retirement Pot”
- All contributions not allocated to the “Savings Pot” will go to the “Retirement Pot”.
- Amounts contributed to the “Retirement Pot” cannot be accessed before retirement date.
- At retirement date, the total amount from the “Retirement Pot” must be paid in the form of an annuity (including a living annuity).
- The current minimum amount for purchasing an annuity (de minimis of R167 500) will apply to the ‘Retirement Pot”.

Two pot retirement system: “retirement pot”

- An individual member will be allowed to transfer the available funds from the “retirement Pot” only into another “Retirement Pot” free of tax.
- When an individual ceases to be a tax resident for an uninterrupted period of three years, or leaves South Africa at the expiry of the visa, the individual member will be allowed to withdraw all the funds from the ‘Retirement Pot” and such withdrawal will be taxable as a withdrawal lump sum benefit in terms of the withdrawal tables.
- The proposed changes are subject to the rules of the fund.

Two pot retirement system: “vested pot”

- All contributions and growth (i.e. retirement interest) prior to the implementation date of the two pot retirement system will have to be valued at the date immediately prior to the implementation, to enable vesting of right.
- This amount will be housed in the “Vested Pot”. As such, this implies that the ‘Vested Pot” will consist of the total retirement interest in the fund that exists immediately prior to the implementation of the two pot retirement system.
- No contributions may be made to this pot after the implementation of the two pot retirement system, except in the case of a person who was a member of the provident fund and who was 55 years of age or older on 1 March 2021.

Two pot retirement system: “vested pot”

- An individual member will be allowed to transfer the available funds from the “Vested Pot” only into another “Vested Pot” free of tax.
- When an individual ceases to be a tax resident for an uninterrupted period of three years, or leaves South Africa at the expiry of the visa, the individual member will be taxed in accordance with the tax provisions that applied prior to the implementation of the two pot retirement system.
- The rules of the fund applicable prior to the implementation of the two pot retirement system will apply in this regard.

Retirement funds

Alignment, removing glitches

- Reviewing the transfer of total interest in a retirement annuity fund
- Clarifying the compulsory annuitisation and protection of vested rights when transferring to a public sector fund
- Clarifying paragraph (eA) of gross income regarding public-sector funds
- Retirement of a provident fund member on grounds other than ill health
- Clarifying the applicability of tax-neutral transfers from a pension to a provident fund

Other retirement matters

- **Reviewing the transfer of total interest in a retirement fund**: Proposed that changes be made in the legislation to allow retirement annuity fund members to transfer one or more contracts in a particular retirement annuity fund, subject to certain conditions aimed at ensuring that the current de-minimis thresholds are not contravened.
- **Clarifying the compulsory annuitisation and protection of vested rights when transferring to a public sector fund**: Government proposes amending the pension and provident fund definitions in section 1(1) of the Act to ensure that historic vested rights remain protected even if transferred to a public sector fund.
- **Clarifying paragraph (eA) of the definition of gross income regarding public sector funds**: To confirm the policy intent that annuities received from public sector pension funds should be included in gross income, it is proposed that clarification be made in paragraph (eA) of gross income to include these public sector funds.

Other retirement matters

- **Retirement of provident fund members on grounds other than ill-health:** The Act provides that if a member of a provident fund who is younger than 55 retires from that fund for reasons other than ill-health, any lumpsum received pursuant to said withdrawal shall be taxable as a withdrawal benefit as opposed to a retirement benefit. This is however not the case for members of pension or retirement annuity funds. To address this anomaly and ensure uniform treatment across all types of retirement funds, it is proposed that paragraph 4(3) of the Second Schedule to the Act should be deleted.
- **Clarifying the applicability of tax neutral transfers from a pension to a provident fund**: It is proposed that consequential amendments be made in this paragraph to ensure that pre-1 March 2021 contributions to a pension fund also enjoy tax neutral transfer status.

Other interesting items

Tax research and reviews:

- Government will review the approach to adjusting thresholds for inflation.
- A review of depreciation and investment allowances will take place during 2022/23, followed by the release of a discussion document.

Payroll and legislative environment, 2022 – Presentation

PIT, EMPLOYMENT TAXES AND RETIREMENT

8 February 2022

Employees' tax, what is it?

- Employees' tax or Pay As You Earn (PAYE) refers to the amount withheld, deducted & paid to SARS by an employer in respect of remuneration paid or payable to its employees
- The amounts deducted or withheld must be paid by the employer to SARS on a monthly basis
- Conceptual individual tax base: Taxable income of South African residents & non-residents with South African sourced & deemed source income
- Tax is calculated at the marginal rate of the individual or according to tax tables depending on the nature of the income

- Employees’ tax = withholding tax: Tax deducted at source from amount payable (para 2(1) of the 2^{nd} Schedule to the Income Tax Act (ITA))
- The withholding obligation leads to own liability & responsibility to comply for the employer
- Conceptually most employers do not budget for employees’ tax on the basis that the amounts payable are deducted from employees’ remuneration & employees’ tax is therefore not a cost for the employer
- However . . .

- Although employers have a right of recovery to claim employees' tax from the employee (para 5(3) of the 4^{th} Schedule to the ITA), recovery becomes unlikely after a period where an employer has underpaid, because:
  - The responsibility to withhold rests on the employer (position & power)
  - Although employees & employers are jointly & severally liable in respect of an amount (employer for employees' tax & employee for income tax), SARS prefers in practice to collect from the employer
  - Employees cannot afford to pay or may no longer be in employment
- The employer may decide to settle the liability with SARS even in instances where the liability falls on the employee with the employer only having a reporting obligation
- What is the effect of paragraph 5(5) of the 4^{th} Schedule to the ITA?

- Employees’ tax is a self-assessment tax
- Self-assessment is a mechanism applied as part of a tax collection system
- Under self-assessment, the taxpayer is required to report the basis of assessment (e.g. taxable income), to submit a calculation of the tax due & usually, to simultaneously pay any outstanding tax due as calculated by the taxpayer
- Under a self-assessment tax, the onus is on the taxpayer to calculate the correct amount of tax payable
- A feature of a self-assessment system is that it seeks to reduce administration (need to have substantive administrative systems)

- The employer is personally liable for the employees’ tax (para 5.(1) of the 4th Schedule to the ITA, read with Chapter 10 the Tax Administration Act (TAA))

- The employer also becomes liable for penalties & interest which may far exceed the employees’ tax liability:

  - Under payment penalties (up to 200%),

  - Late payments penalties (10%) &

  - Interest at the SARS prescribed rate (often for multiple years)

- But prescription . . . .

- In the case of a self-assessment tax, the prescription period prohibits SARS from issuing an additional assessment (section 99 of the TAA)
- Technically, five years after the date of assessment of an <u>original</u> assessment by way of self-assessment by the taxpayer . . . (section 99 of the TAA)
- What happens when you resubmit a particular year?
- Prescription not does not apply if the reason why the full amount of tax chargeable was not assessed was due to - (section 99 of the TAA):
  - fraud;
  - intentional or negligent misrepresentation;
  - intentional or negligent non-disclosure of material facts; or
  - the failure to submit a return or, if no return is required, the failure to make the required payment of tax.

- Generally to determine negligence, a person's conduct would be measured against the conduct of a "reasonable man" faced with similar circumstances

- However, an employer is not only responsible as the author of any value transfers to an employee, but also as taxpayer in respect of any resulting employees' tax liability

- It is submitted that on the basis of the employer's responsibilities, the mark of a "reasonable employer" is that it must have completed its duty of care regarding its responsibilities adequately

- In short, the employer should have applied its mind to all the transactions & agreements relating to its employees in order to determine the correct tax treatment, & then to report on that basis to SARS

- It is submitted that an employer will struggle to argue a lack of tax knowledge

- An employer should rather, as a shield against any possible allegation of negligence, ensure that it has a complete tax risk management plan in place (e.g. policies, processes, procedures & controls in place to manage its employees' tax) liability
- In the event that an employer cannot argue prescription, SARS is not limited to 5 years from the date of assessment
- What is the effect of the requirement that an employer only keep information for a period of 5 years from the date of the submission of the return (section 29(3)(a) of the TAA)?
- As a result of E@syFile™ SARS has sufficient information from the employer, as well as trends across industries to allow SARS to make adequate estimations of tax owed (section
- Section 95 of the TAA specifically allows SARS to make an assessment on an estimate if the taxpayer submits a return or information that is incorrect or inadequate.

Inside the employer: Who is responsible?

- There is a high volume of transactions & often great complexity
- The perception prevails that employees’ tax is not a cost of doing business; i.e. “employees’ tax is withheld & paid over by an employer on behalf of its employees”
- Furthermore, employers are heavily reliant on payroll software to manage their employees’ tax risk
- So who is responsible in the business to manage the employees’ tax risk?

Inside the employer: The environment

- Employees’ tax generating transactions may originate from anywhere in the business & even where decisions are centralised, budgets are not & business unit heads often have the authority to act on behalf of the business

- Stakeholder responsibility falls on human resources (HR), payroll, finance, information technology (IT), & business units (BUs)

- The motivation of the various stakeholders in the business differs & are often in opposition

Payroll planning and other tips and tricks

- Policies and procedures = risk management
- The effect of the modernisation of employees’ tax administration

Commonly occurring defaults

When conducting employees' tax reviews and employees' tax due diligence reviews, one frequently identify non-compliance in the following areas:

- Non-executive directors
- Third party service providers
- Accommodation
- Travel allowances (still seeing employees with Travel allowances of 20% of package)
- Employer provided insurance
- Bursaries
- Loans to employees
- Severance benefits

Thank you