



Monthly Tax Update: SEPTEMBER 2021

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What we are covering this month

- Draft 2021 amendments – feedback and submissions
- SARS Guide on the Taxation of Franchisors and Franchisees (Issue 2 – updated in August 2021)
- SARS notice on crypto assets
- Claiming s 18A deductions
- Periform Scaffolding Engineering (Pty) Ltd v CSARS

Main proposals discussed

- Time of disposal from deceased estates
- Change to long service awards
- New anti-avoidance rules for loans between trusts
- Exit tax on retirement fund interest
- Restricted set-off of assessed losses
- Curbing abuse of the Employment Tax Incentive
- Extension of certain incentives

Time of disposal from deceased estates

- Added to s 25(3):
 - that deceased estate must be treated as having disposed of that asset on the date when the liquidation and distribution account becomes final.
- Comes into operation on 1 March 2022 and will apply in respect of liquidation and distribution accounts finalised on or after that date.

Submissions:
Date of death or date
proposed?

New anti-avoidance rules for loans between trusts

- Section 7C amended to also apply to any loan, advance or credit that
 - a trust
 - directly or indirectly provides to a trust in relation to which
 - any beneficiary or the founder of the borrowing trust and any beneficiary or the founder of the lending trust is a connected person.
- Amendment to come into operation on the date of the publication of the draft TLAB 2021 (28 July 21) and applies in respect of any amount owed by a trust in respect of a loan, advance or credit provided to that trust before, on or after that date.

Concerns:

- Questionable whether the amendment is necessary
- Double taxation
- Unclear

Recommendation:
Withdraw or amend

New exit tax: s 9HC

To come into operation on 1 March 2022

Where a natural person that is a resident ceases during any year of assessment of that person to be a resident that person must be treated as having disposed of that person's interest in a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund on the date immediately prior to the day on which that person so ceases to be a resident;

Concerns:

- Constitutionality
- DTA override
- Double taxation
- Resident – non-resident – resident
- Problems with interpretation and application

Recommendation: withdraw the amendment

Restricted set-off of assessed losses

Section 20(1)(a) amended by adding a paragraph:

There shall be set off against the income of such person ..

- (i) that is a company, any balance of assessed loss incurred by that person in any previous year which has been carried forward from the preceding year of assessment, to the extent that the amount of such set-off does not exceed 80% of the amount of taxable income determined before taking into account the application of this provision;
- (ii) that is not a company (as before).

To come into operation on 1 April 2022 and will apply in respect of years of assessment commencing on or after that date.

Concerns:

- Undermines certainty
- Impact on smaller businesses

Recommendations:

- Group tax/ carry back
 - Postpone
- Rand value limitation

Curbing the abuse of the Employment Tax Incentive

Amended definition of "employee" in s 1 of the ETI Act, 2013:

'employee' means a natural person -

(a) who works for another person; ~~and]~~

(b) who receives, or is entitled to receive remuneration from that other person;

(c) who in any other manner assists in carrying on or conducting the business of that other person; and

(d) who is documented in the records of that other person as envisaged in the record keeping provisions in section 31 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997),

but does not include an independent contractor.

Concerns:

May not achieve the objective

Recommendations:

- Revise
- 1 submission on repealing the ETI

VAT treatment of temporary letting of immovable property: Proposed new s 18D

- Where a developer develops or holds a dwelling wholly for the purpose of making taxable supplies and subsequently temporarily lets the property, the vendor is deemed to have supplied the property.
 - Consideration = adjusted cost to the vendor (s 10(29)).
 - Time of supply: time that the property is applied as a dwelling (s 9(6)).

Proposed new s 18D (cont.)

- When the vendor subsequently sells the property, the sale is deemed to be a taxable supply
 - in accordance with s 9(3)(d) (i.e. time of supply is the earlier of –
 - date the property transfer is registered at the Deeds office; or
 - date of any payment towards the consideration.
 - Consideration = consideration contemplated in s 10(2) less the amount taken into account under s 10(29).
- New s 18D to come into effect from 1 April 2022

Concerns:

- Rather allow an input tax equal to the output tax on the change of use and then VAT on the full consideration.
- What if the vendor deregisters?

SARS notice on crypto assets

<https://www.sars.gov.za/individuals/crypto-assets-tax/>

“Financial instrument” (s 1) includes ...

(f) Any crypto asset (previously cryptocurrency) – amended in line with a proposed uniform definition of crypto assets within the SA regulatory framework (*Explanatory Memorandum on the TLAB, 2020*)

SARS notice on crypto assets

<https://www.sars.gov.za/individuals/crypto-assets-tax/>

Do I need to pay tax on crypto assets?

Yes, normal income tax rules apply to crypto assets and affected taxpayers need to declare crypto assets' gains or losses as part of their taxable income.

The onus is on taxpayers to declare all crypto assets-related taxable income in the tax year in which it is received or accrued. Failure to do so could result in interest and penalties.

SARS notice on crypto assets

<https://www.sars.gov.za/individuals/crypto-assets-tax/>

How will it work?

Following normal income tax rules, income received or accrued from crypto assets transactions can be taxed on revenue account under “gross income”

OR

... may be regarded as capital in nature

Determination of whether an accrual or receipt is revenue or capital in nature is tested under existing jurisprudence (of which there is no shortage).

Claiming s 18A deductions

<https://www.sars.gov.za/wp-content/uploads/Docs/TaxExemption/Tax-Exempt-Institutions-S18A-Fact-sheet-2020-2021.pdf>

- [SARS Fact Sheet](#)
- Donation of cash or assets
- S 18A certificate
- Payroll giving
- Limitation – 10% of taxable income after all other deductions (20% for donations to the Solidarity Fund between 1 April and 30 September 2020)

PERI Formwork Scaffolding Engineering (Pty) Ltd v CSARS [2021] ZAWCHC 165 (23 August 2021)

- Penalty for late payment of PAYE and interest thereon
- Due date for payment
- Reasonable ground for late payment?

PERI Formwork Scaffolding Engineering (Pty) Ltd v CSARS

- Due date for payment
- Business reopened 3 Jan 2018
- 7 Jan 2018 fell on a Sunday
- Payment of R10m due to be made on 3 Jan 2018 but insufficient cashflow as debtors had not paid on time
- Arranged R5m overdraft 5 Jan 2018 but still short of R138 262
- Payment could not be released on time – payment made on 8 Jan 2018

TAA s 217: Remittance of penalty

(3) In the case of a penalty imposed under s 213, SARS may remit the penalty, or a portion thereof, if SARS is satisfied that —

- (a) the penalty has been imposed in respect of a 'first incidence' of the non compliance described in s 210, 212 or 213, or involved an amount of less than R2 000;
- (b) reasonable grounds for the non-compliance exist; and
- (c) the non-compliance in issue has been remedied.

PERI Formwork Scaffolding Engineering (Pty) Ltd v CSARS

[63] As the legislation now stands, there is certainty amongst tax-payers, that in the event of non-compliance, a penalty of 10% is levied on the amount owing to SARS, irrespective of the degree of lateness.

[64] It is evident that on SARS's own approach to remission of penalties in the imposition of percentage based penalties, that *all* penalties can be waived in the event of a first incidence of non-compliance. The Appellant argued that it had a clean record with the SARS and that this would qualify under a first incidence of non-compliance. This contention was not disputed by the Respondent.

PERI Formwork Scaffolding Engineering (Pty) Ltd v CSARS

[66] In my view, s 217(3) envisages a mechanism to come to the assistance of an aggrieved first incidence non-complying tax payer, who has in addition, satisfied two further requirements, most notably, that they have satisfied SARS that reasonable grounds exist for the non-compliance.

In my view, in this instance, a factor which SARS failed to consider, which could, in my view, render it as a reasonable ground, is the *manner* in which the Appellant, when it realised that it would be unable to comply with the payment instruction on 3 January 2018, attempted to rectify the deficiency.

PERI Formwork Scaffolding Engineering (Pty) Ltd v CSARS

... evidences reasonable grounds for the penalty imposed to be have been remitted, especially given the fact that it was a first incidence of non- compliance.

In the circumstances, I am of the view that the appeal must succeed.

QUESTIONS?

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