



Structuring Remuneration Packages

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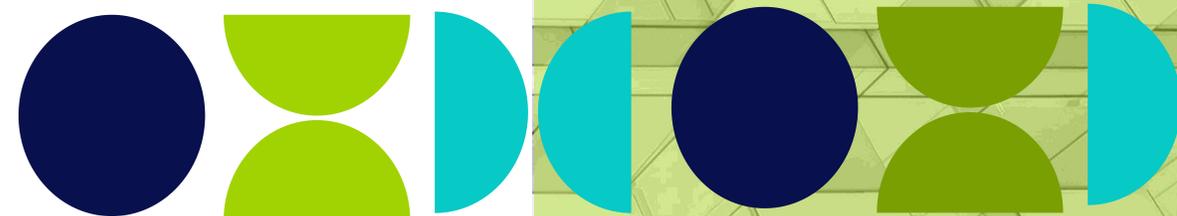
Kreston South Africa

Johan Heydenrych: Director Tax Services

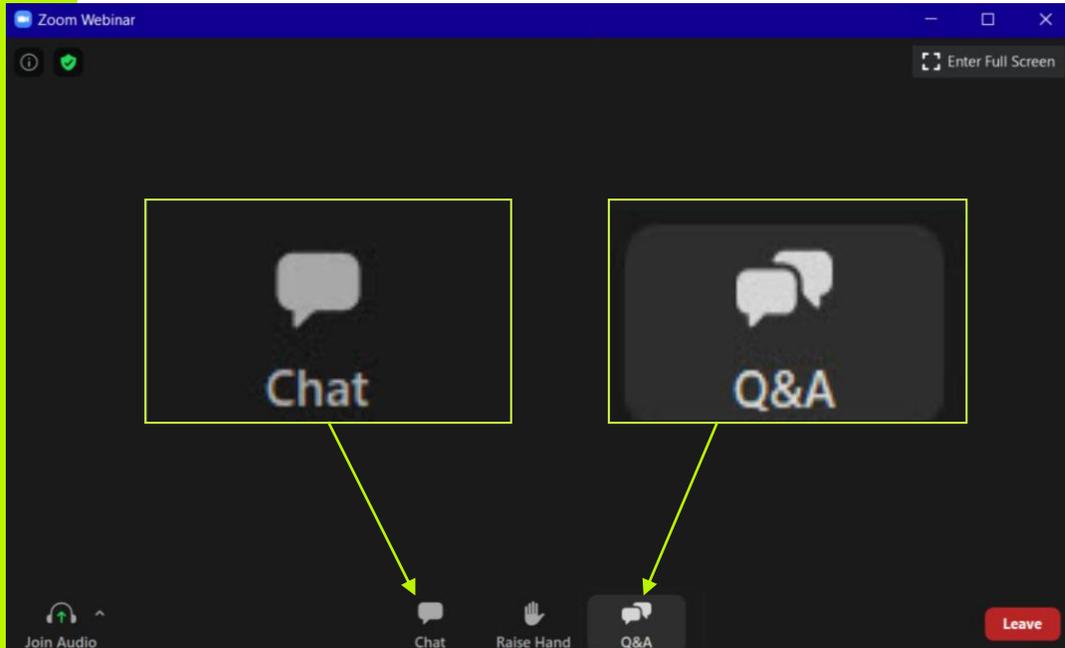
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20 July 2022

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Assessment on Statements of Tax Standards
(25 Questions)

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Assessment on Statements of Tax Standards
(25 Questions)
Assessment on VAT, Corporate, Individual and Payroll Taxes
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ABOUT THE PRESENTER

Johan Heydenrych Kreston South Africa



Johan is a Chartered Accountant who specialised in taxation since 1991. He holds the following qualifications:

- B. Com (Accounting) (Cum Laude)
- B. Com (Accounting) (Hons) (Cum Laude) (Award: "Best student in Audit 700")
- Certificate in the Theory of Accounting
- M. Com (Taxation) (Cum Laude) (Award: "Best M. Com (Tax) student")
- Chartered Accountant (Specialising in Taxation)
- Member of SAICA
- Registered Tax Practitioner

Johan was a tax partner at KPMG from 1997 to 2020 and is currently a partner in the Kreston SA network specialising in taxation.

He provides a wide range of tax services to various clients across industries. These include but are not limited to the following:

- Advice on Tax Risk Management and Tax Governance.
- Tax compliance services including but not limited to ITR 14 and IT 14SD
- Dealing with tax disputes including representing clients at Alternative Dispute Resolution (ADR) hearings.
- Submission of documentation and revised returns under the Voluntary Disclosure Programme.
- Issuing of tax technical opinions on Income Tax, VAT and PAYE. This include preparing briefs to Senior Counsel and submissions of requests for Binding Opinions from SARS.
- Audit support services that includes Normal Tax and Deferred Tax disclosure and disclosure of uncertain tax positions.
- Assistance with implementation of tax reporting for new accounting standards such as IFRIC 23, IFRS 9, IFRS 15 and IFRS 16.
- Facilitation of tax diagnostic sessions with existing and prospective clients.
- Advice on mergers, acquisitions and reorganizations.
- Tax due diligences
- Advice on tax implications of recapitalization transactions, debt restructures, liquidations and deregistration's



ABOUT THE PRESENTERS

Marina Pretorius

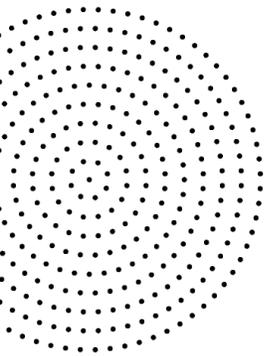
Kreston South Africa



- Marina joined the Kreston Pretoria team on 1 March 2021 after specialising in tax at KPMG for the last 13 years. She is an experienced tax advisor who holds an H. Dip(Tax) Degree. She completed her articles at Deloitte where she also passed the CA(SA) qualifying examination.
- She worked in the UK on large listed clients for 2 years and joined KPMG tax department in 2007.
- As Associate Director and head of KPMG's Global Compliance Managed Services business unit, she is very experienced in tax and accounting reporting requirements for large multi-nationals.
- This includes ITR 14 disclosures required for multi-nationals as well as submissions of CbC Reports, Master Files and Local Files.

Education and Qualifications

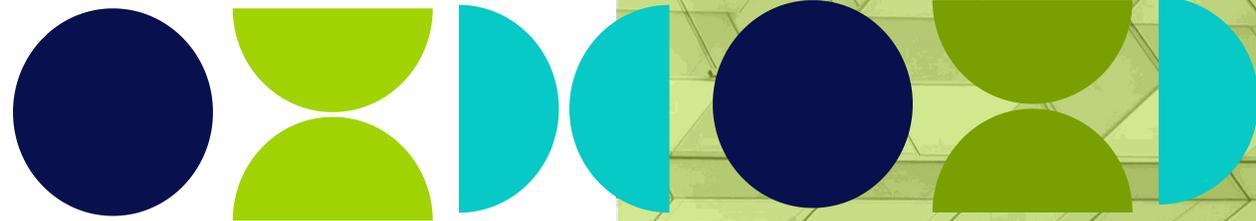
- B. Com (Accounting)
- B. Com (Accounting) (Hons)
- Certificate in the Theory of Accounting
- Passed qualifying CA(SA) exam.
- H.Dip (Tax)
- Registered Tax Practitioner



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tax happy hour

The logo for 'tax happy hour' features the text 'tax happy hour' in a bold, black, sans-serif font. A horizontal line is positioned under the word 'tax'. To the right of the text is a stylized smiley face icon where the eyes are represented by two overlapping speech bubbles, one light blue and one teal.

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1

Introduction: Structuring Remuneration

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1. Introduction

Structuring remuneration packages in a tax efficient manner is an important cornerstone for every employer and employee. It is not only important to be familiar with the taxation of fringe benefits, it is important to be familiar with certain concepts and principles.

- What is Total Cost to Company "TCC"?
- What is salary sacrifice and is it permissible?
- What is an Employee Benefit Form and how can it be implemented.
- Which benefits can be included in a Total Cost to Company structure and which benefits cannot be included. We will inter alia discuss the following:
 - Company Cars and Car Allowances
 - Fuel cards
 - Company credit cards
 - Pool Cars
 - Use of company assets
 - Relocation Costs
 - Bursaries
 - Subsistence allowances
 - Cell phones
 - Home office
 - Free services

2

What is the total cost to company principle?

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2. Total cost to company

- In the past, many employers adopted a “Basic Salary Plus” remuneration structure
 - For example, an employee will receive a basic salary of R100k per month PLUS
 - A company car
 - A fuel card
 - Medical aid
 - Provident Fund
 - The problem with this approach is that the employee’s personal choices impacts the cost of employment for the employer.
 - Company car/fuel card:
 - The employee who chooses to live far from work is more than the cost of employment if the employee lives close to work
 - Medical aid
 - The cost of employment is higher for the employee who chooses to get married and have children than that of a single employee
- This problem is solved whereby the employer agrees a particular cost of company with the employee and allows the employee various choices within this framework.
- It is important that the contract between the employer and the employee reflects the true nature of the agreement.

3

Are salary sacrifice arrangements legal?

tax happy hour

3. Salary Sacrifice: Introduction

- The term “salary sacrifice” is often misconstrued.
- Many taxpayers believe that it is either tax evasion (illegal) or impermissible tax avoidance.
- SARS scrutinise salary sacrifice arrangements since these arrangements are often incorrectly implemented and not because they are inherently illegal.
- The legality of salary sacrifice arrangements were considered by the Supreme Court of Appeal in Anglo Platinum Management Services (Pty) Ltd vs SARS



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20725/2014

In the matter between:

ANGLO PLATINUM MANAGEMENT SERVICES (PTY) LTD

APPELLANT

and

THE COMMISSIONER FOR THE SOUTH AFRICAN

RESPONDENT

Subject of dispute

[1] This appeal involves a salary sacrifice scheme whereby the appellant, Anglo Platinum Management Services (Pty) Ltd (the taxpayer), gave its employees an opportunity to participate in what it believed, and still believes, was a legitimate arrangement. The scheme involved its employees sacrificing or foregoing a portion of their cash remuneration 'packages' in return for their use of company-owned motor vehicles.

[6] In this matter the taxpayer determined the cash equivalent of the motor vehicles and paid employees' tax on this amount. It is not an issue in this appeal that this determination was correctly done. What is in issue is whether the scheme constituted a valid and binding salary sacrifice arrangement that gave rise to a cash equivalent to be determined in accordance with the Seventh Schedule under para (i).

SARS approach

But what is
substance
over form?

[8] In this court, the Commissioner ... approaches the matter on a firmer and proper foundation that in commercial practice and in the commercial world employers and employees are entitled to structure salary packages in a tax efficient manner. And that salary sacrifice arrangements, whereby employees sacrifice or forego a portion of their cash salaries in return for some quid pro quo or fringe benefit from the employer that reduces their tax liability, are perfectly lawful.

[9] ... the Commissioner does not contend that the scheme was a sham or disguised to appear to be genuine, whereas in truth it was not. In other words he does not invoke the substance over form doctrine.

Instead his case is that the taxpayer and its employees did not achieve what they purported to achieve, namely, a valid and binding salary sacrifice agreement. And therefore, that the use of the vehicles, was, in reality, a consideration the employees received as part of their employment and formed part of their gross remuneration.

Question of fact whether structure is “genuine”

[10] It is a question of fact in each case whether a salary sacrifice agreement was achieved.

- In this regard a court is not concerned with the subjective belief of the parties to the agreement – no matter how genuine this belief may be – but with whether the facts, objectively viewed, establish that this result was attained.
- It must thus consider the oral and documentary evidence to assess the probabilities.
- The taxpayer bears the burden of proving that the Commissioner’s decision to disallow its objection to the assessments was wrong.
- And where, as in this case, the taxpayer’s is the only oral evidence, it must be considered carefully in the light of the available documentary evidence before a court is able to conclude whether or not the taxpayer has discharged the onus.

[11] So, to succeed in this appeal, the taxpayer must establish, on the evidence of Mr Dolf Broodryk, who testified on its behalf, and the documents on which it relies, that a genuine salary sacrifice was concluded as a matter of fact.

- It would thus have to show that the employees’ remuneration packages were structured in a manner that they received their remuneration partly by way of cash and the balance by way of a fringe benefit; and that the taxpayer unconditionally assumed liability for payments and contributions for the motor vehicles that were part of the scheme, thereby releasing its employees from any such obligation.
- In other words by foregoing part of their remuneration package in return for the use of a motor vehicle, the employees divested themselves of their right to this amount of money. The implication of such divestment is that the amount would not have been received or accrued for services to be rendered by the employees as contemplated in para (c) of the definition of ‘gross income’.



The evidence

[12] I now consider the evidence. Mr Broodryk, who devised the scheme for the taxpayer, was taken through the documents and explained to the Tax Court how the scheme worked. The relevant documents are:

- Policy and Procedures of the Motor Vehicle Scheme ('the policy document');
- The Motor Vehicle Use Agreement ('the MVA');
- The Notional Instalment Sale Agreement ('the NISA');
- The Annual Total Package Allocation Agreement ('the AA');
- The Notional Account.

The evidence

[13] The employees, he explained, had to complete the AA indicating how they wished their 'cost to the company' remuneration packages to be structured flexibly as between cash and other benefits, which included the use of a motor vehicle. **This choice was available to new and to existing employees when they were offered annual increases.**

[14] Once an employee had chosen to participate in the scheme and had selected a vehicle of his choice,

- the taxpayer purchased it and paid the dealer in cash.
- It then entered the vehicle in its asset register and claimed depreciation on it.
- The vehicle was registered in the employee's name, but the taxpayer owned the vehicle until the employee had settled the finance obligation and paid the related fringe benefit tax on it.
- The cost of the purchase was recovered from the employee through a monthly deduction – predetermined at the time he elected to participate in the scheme – from the portion of his salary he had to forego in return for the use of the vehicle.

Example

Quantifying the cost to the employer to purchase a company car for use by the employee

| | |
|---|---------------|
| Purchase cost of the car | 500 000 |
| Interest rate | 7.0% |
| Determining the amount to be sacrificed in favour of non-cash benefit | |
| Estimated monthly instalments 60 months | 9 901 |
| Estimated insurance cost (4% of cost) | 1 667 |
| Estimated fuel and maintenance | <u>2 000</u> |
| Total monthly estimated cost | <u>13 567</u> |
| Total cost to company | |
| Basic salary | 86 433 |
| Free use of company car | 13 567 |

The actual cost is then compared with this anticipated cost:

- If the actual cost is more than this amount, then the employee must pay in
- If the actual cost is less than this amount, then the employee will get a fully taxable bonus

The above are managed by a "notional account"

The evidence

[16] It is the manner in which the scheme was implemented:

- In particular the entitlement of the employees to claim an amount of credit in the notional account, which I discuss below, and their contractual obligation to pay insurance premiums on the motor vehicles that lie at the heart of this dispute.
- The Commissioner contends that the entitlement to this credit and the obligation to pay the premiums are inconsistent with a genuine salary sacrifice scheme as, in substance, the employees retain their power over their salary packages.

[17] The method used to recover the cost of the motor vehicle, was the subject of considerable disagreement between the taxpayer and the Commissioner.

- The evidence was that the taxpayer and the relevant employees entered into a NISA, as envisaged in the policy document.
- This served as a mechanism whereby 'notional interest' on the amount paid to the car-dealer would be calculated over the period of the operation of the scheme, for example 48 months.

[18] In the Tax Court, the Commissioner contended that this agreement amounted to the taxpayer extending a credit facility to the employees, which was ultimately deducted from their monthly salary.

- But it is important to understand that the interest so calculated was not actual interest since the taxpayer had paid for the vehicle in cash. It was instead a theoretical calculation of what the vehicle would have cost the taxpayer had it purchased the vehicle on credit; hence the description of the interest as 'notional'.
- The taxpayer added this notional interest to the capital cost of the motor vehicle. Before us, the Commissioner, correctly in my view, did not persist with this contention.

The evidence

[20] Mr Broodryk testified that the taxpayer prepared 'notional accounts' it sent to its employees who chose the taxable benefit of the use of their motor vehicles.

- These accounts, which I have indicated lie at the heart of this dispute, set out the 'optimal value' of the motor vehicle, defined as the 'theoretical representation' of the capital amount outstanding at the end of each month determined according to the reducing cap method.
- This was part of the methodology used to determine the actual value of the motor vehicle, taking into account the finance costs from the NISA. In addition to being represented as part of the capital cost of the motor vehicle, notional interest was recorded separately in the notional accounts.

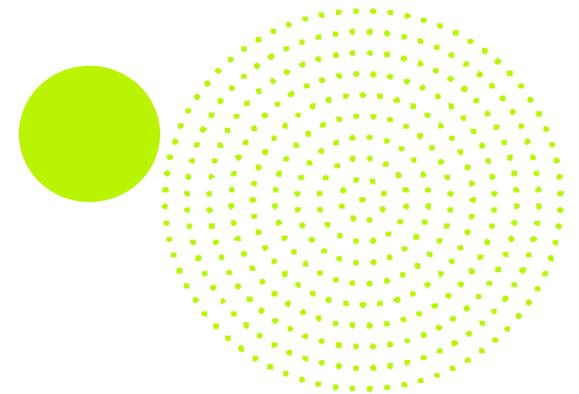
[21] The accounts also detailed actual payments the taxpayer made for maintenance and running expenses, insurance premiums and licensing fees.

- These payments were debited to the notional account, as was the notional interest.
- The predetermined monthly deduction from the employees' salary appeared from month to month as a credit in the notional account.

The evidence

[22] The evidence, both documentary and oral, was that, from time to time, there would be a shortfall in the notional account where the actual expenditure plus notional interest exceeded the amounts credited to an employee through the monthly deduction.

- Where this occurred, the outstanding amounts would be recovered from the employee.
- Where, however, the amount credited to the employee exceeded the expenditure, the policy allowed the employee to withdraw the money from the credit available once every quarter.
- Any amount so withdrawn was, subject to normal taxation, part of his gross income.



The finding

[35] To conclude:

- The parties sought to fund a taxable benefit from a salary sacrifice.
- They were entitled to do so in accordance with the relevant provisions of the Act.
- And they achieved this through the scheme they agreed on and implemented.
- The following features of the scheme indicate that it was properly designed and implemented:
 - The taxpayer purchased the motor vehicles, owned and claimed depreciation on them.
 - The recovery of their total cost, including their running expenses was obtained from the salary sacrifice, not from the employees.
 - In return for the amount they had foregone the employees received a taxable benefit; ie, the use of the vehicles.

[36] ... Therefore, the Commissioner's argument that the use of the vehicles was in reality a consideration received by each employee as part of their employment and thus taxable under para (c) of the definition 'gross income', as opposed to para (i) as a taxable benefit by virtue of a valid salary sacrifice, must fail.

Indications that a salary sacrifice arrangement has not been properly implemented

- The Retirement Fund Rules states that contributions and benefits must be calculated on “Basic Salary”. Despite the salary sacrifice, the retirement fund contributions are still calculated on the pre-sacrifice amounts.
 - Solution is to change the retirement fund rules so that the amounts paid and benefits are not based on “basic salary” but on an “amount as determined by the employer and recorded on the employee benefit form” from time to time.
- The personnel policies and regulations state that maternity benefits, sick leave etc will be based on “basic salary”. Even after the salary sacrifice the benefits remain payable on pre-sacrificed amounts.
 - Important to review personnel policies and procedures for any inconsistencies
- The contract of salary sacrifice states for example that the cost of a particular non-cash benefit (e.g. free housing) will be DEDUCTED from basic salary.
 - Avoid terms such as “deducted from”. This implies a disposal after accrual.

Be on the look-out for any inconsistencies. This will prejudice the total cost to company structure

Example



Salary sacrifice by President and other office bearers during 1st Covid Lockdown

- In support of this effort we have decided that the President, the Deputy President, Ministers and Deputy Ministers will each take a 1/3rd cut in their salary for the next three months.
- This portion of their salaries will be donated to the Solidarity Fund
- ... the Premiers of our country and our provinces have also joined in, in that they will also take a 1/3rd pay cut and donate that to the Solidarity Fund.
- We are calling on other public office bearers and executives of large companies to make a similar gesture and to further increase the reach of this national effort.



What does this mean?

- Effectively, the office bearers are
 - sacrificing 8.3325% of their annual salaries with
 - the proviso that the employer will use that portion of total “cost to company” to make a donation to the Solidarity Fund.
- *We are calling on executives of large companies to make a similar gesture and to further increase the reach of this national effort.*

Effectively, the President called on individuals to sacrifice a portion of their salaries so that it can be donated to the Covid relief fund (Solidarity Fund)



What if an employee simply committed that they will make a donation equal to $1/3^{\text{rd}}$ of their salaries to the Solidarity Fund?

Section 18A

18A. Deduction of donations to certain organisations.—(1) Notwithstanding the provisions of section 23, there shall be allowed to be deducted in the determination of the taxable income of any taxpayer so much of the sum of any bona fide donations by that taxpayer in cash or of property made in kind, which was actually paid or transferred during the year of assessment to ... public benefit organisation...

as does not exceed—

(B) ... ten per cent of the taxable income (excluding any retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit and severance benefit) of the taxpayer as calculated before allowing any deduction under this section or section 6quat (1C):

Provided that any amount of a donation made as contemplated in this subsection and which has been disallowed solely by reason of the fact that it exceeds the amount of the deduction allowable in respect of the year of assessment shall be carried forward and shall, for the purposes of this section, be deemed to be a donation actually paid or transferred in the next succeeding year of assessment.

8.3325% of gross income
may exceed 10% of
Taxable Income. This is
position on assessment

And PAYE? (Par 2(4)(f) of the 4th Schedule)

The amount required to be deducted or withheld from any remuneration under this Schedule by way of employees' tax must be calculated on the balance of the remuneration remaining after deducting therefrom -

(f) so much of any donation made by the employer on behalf of the employee—

- (i) as does not **exceed 5 per cent of that remuneration** after deducting therefrom the amounts contemplated in [items \(a\)](#), [\(b\)](#) and [\(bA\)](#); and
- (ii) for which the employer will be issued a receipt as contemplated in section 18A (2) (a):



This is a monthly limit – as such cannot be done for 3 months at 33%

How are the salaries of the President and Ministers determined?

| | | | |
|---|-------------------|--|-------------------|
| CAPE TOWN, 23 SEPTEMBER 1998 | | No. 19274 | |
| Vol. 399 | | KAAPSTAD, 23 SEPTEMBER 1998 | |
| OFFICE OF THE PRESIDENT | | KANTOOR VAN DIE PRESIDENT | |
| No. 1188 | 23 September 1998 | No. 1188. | 23 September 1998 |
| It is hereby notified that the Acting President has assented to the following Act which is hereby published for general information:--- | | Hierby word bekend gemaak dat die Waarnemende President sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:— | |
| No. 20 of 1998: Remuneration of Public Office Bearers Act, 1998. | | No. 20 van 1998: Wet op die Besoldiging van Openbare Amptsbekleërs, 1998. | |

To provide for a framework for determining the salaries and allowances of the President, members of the National Assembly, permanent delegates to the National Council of Provinces, Deputy President, Ministers, Deputy Ministers, traditional leaders, members of provincial Houses of Traditional Leaders and members of the Council of Traditional Leaders; to provide for a framework for determining the upper limit of salaries and allowances of Premiers, members of Executive Councils, members of provincial legislatures and members of Municipal Councils; to provide for a framework for determining pension and medical aid benefits of office bearers; to provide for the repeal of certain laws; and to provide for matters connected therewith.

How are the salaries of the President and Ministers determined?

Resolution of National
Assembly

Salary, allowances and benefits of President

2. (1) The President shall be paid, apart from any privilege which he or she may enjoy, such salary and allowances as may be determined from time to time by resolution of the National Assembly, after taking into consideration—

- (a) the recommendations of the Commission;
- (b) the role, status, duties, functions and responsibilities of the President;
- (c) the affordability of different levels of remuneration of political office bearers;
- (d) current principles and levels of remuneration in society generally; and
- (e) inflationary increases.

(2) Section 8(1)(d) of the Income Tax Act, 1962 (Act No. 58 of 1962), shall apply to such portion of the remuneration of the President as the National Assembly may from time to time determine by resolution, as if such portion was an allowance granted as contemplated in that section.

(3) The National Assembly may determine different portions under subsection (2) in respect of different amounts of remuneration.

(4) The salary and allowances to which the President is entitled in terms of this section, apart from any other privilege that he or she may enjoy, are paid to him or her in monthly instalments, the first month to be reckoned from the date on which he or she assumes office as contemplated in section 87 of the Constitution.

In addition, the actual donations made by Government must go through proper channels to ensure that it is regarded as an “employer” contribution to the Solidarity Fund and not an employee contribution.

Determined by President and proclaimed in the
Gazette

Salaries and allowances of Deputy President, Ministers and Deputy Ministers

4. (1) The Deputy President, Ministers and Deputy Ministers shall be entitled to such salaries and allowances as may be determined by the President from time to time by proclamation in the *Gazette*, after taking into consideration—

- (a) the recommendations of the Commission;
- (b) the role, status, duties, functions and responsibilities of a Deputy President, a Minister and a Deputy Minister;
- (c) the affordability of different levels of remuneration of political office bearers;
- (d) current principles and levels of remuneration in society generally; and
- (e) inflationary increases.

(2) Despite the provisions of subsection (1), a Deputy President, a Minister or a Deputy Minister who holds different public offices simultaneously is only entitled to the salary, allowances and benefits of such office for which he or she earns the highest income.

(3) Section 8(1)(d) of the Income Tax Act, 1962 (Act No. 58 of 1962), shall apply to such portion of the remuneration of a Deputy President, a Minister or a Deputy Minister as the President may from time to time determine, as if that portion was an allowance granted as contemplated in that section.

(4) The President may determine different portions under subsection (3) in respect of different amounts of remuneration.

(5) Every Deputy President, Minister and Deputy Minister shall be paid the salary and allowances to which such office bearer is entitled in terms of this section in monthly instalments, the first month to be reckoned from the date on which such office bearer begins to perform his or her functions as contemplated in section 95 of the Constitution.

How are the salaries of the President and Ministers determined?

PROCLAMATION NO. 37 OF 2018

by the

President of the Republic of South Africa

DETERMINATION OF SALARIES AND ALLOWANCES OF THE DEPUTY PRESIDENT, MINISTERS AND DEPUTY MINISTERS OF 2018/2019

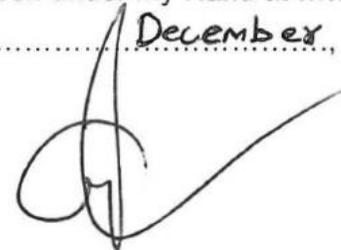
1. In terms of section 4(1) of the Remuneration of Public Office Bearers Act, 1998 (Act No. 20 of 1998) (hereafter referred to as "the Act"), I hereby determine that the total remuneration of the positions of office bearers in Column 3 of Schedule 1 shall be as set out in Column 4 of Schedule 1 with effect from 1 April 2018, subject to the provisions of sections 4(2)-(7) of the Act, and terms and conditions set out herein.
2. The total remuneration packages shall include the following elements:
 - 2.1 A basic salary component equal to 60% of the total package, which constitutes the pensionable salary;
 - 2.2 An amount of R120 000 per annum, which is an amount to which section 8(1)(d) of the Income Tax Act, 1962, applies. This amount is included in the basic salary component;

Cannot sacrifice

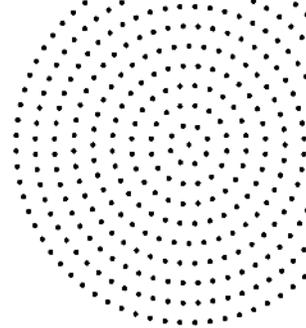
If pension contributions remains unchanged, it is indication of inappropriate salary sacrifice

- 2.3 An employer's pension benefit contribution equal to 22.5% of pensionable salary; and
 - 2.4 A flexible portion for the remaining amount of the total remuneration.
3. Proclamation No. 41 published in the Government Gazette No.41313 of 8 December 2017, is hereby repealed.

Given under my Hand at Johannesburg on this 10th day of December, Two Thousand and Eighteen.



PRESIDENT



Extremely risky to do a salary sacrifice where the salary is e.g. R100k per month and it is reduced to R66 667 per month for 3 months with understanding that R33 333 will be contributed to S18A entity.



May in some instances even be impossible if the executive is entitled to a guaranteed salary.



Can be done with non-guaranteed portion only... but be very careful if performance bonus is formula driven



Summary: Per BDO on-line article

VALIDITY OF SALARY SACRIFICE ARRANGEMENTS

- A salary sacrifice is a reduction or substitution of an employee's cash salary which provides other benefits in its place, for example contributions to benefit funds, medical aid contributions or the granting of travel allowances.
- For a salary sacrifice arrangement to be valid, the arrangement must divest the employee of his or her liability to pay any part of the member's contribution to, for example, a provident fund, and therefore shift the legal payment liability to the employer. This can be achieved by the employee sacrificing an amount of salary equal to the contribution that will no longer be paid by the employee. Unless done in that manner, the amount sacrificed would still accrue to the employee after the sacrifice and the arrangement may come under SARS' scrutiny as being invalid.
- Since changes to an employee's contract of employment is the most important requirement for a valid salary sacrifice, it is of the utmost importance that such contract is correctly worded to accurately reflect and confirm the composition of the employees' total remuneration package. The contract must clearly set out the key components, including gross remuneration; detail of the employer's contributions to medical aid, pension and provident funds; detail of the employee's leave and bonus entitlements and how they are calculated; and all fringe benefits.

Source: <https://www.bdo.co.za/en-za/news/articles/salary-sacrifice-arrangements-back-to-basics>

Summary: Per BDO on-line article

DOCUMENTATION REQUIREMENTS

To discharge the onus of proof that a valid salary sacrifice arrangement has been entered into, at least the following information or documentation should be retained. Depending on the specifics of the arrangement, other information or documentation may also be necessary:

- minutes of directors / members meetings and meetings held with staff regarding the arrangement;
- confirmation that the change has been discussed and agreed with the union representing the employees, if applicable;
- remuneration policies and any amendments;
- information regarding training sessions conducted by management to enable staff to clearly understand the salary sacrifice arrangement;
- documents signed by the employer and employees evidencing agreement and understanding of the salary sacrifice arrangement;
- employment contracts and amendments thereto;
- in the case of fund contributions which are part of the arrangement:
 - the rules of and relevant agreements relating to the fund; and
 - monthly contribution schedules
- sample payslips which include the pre- and post-implementation results

Source:

<https://www.bdo.co.za/en-za/news/articles/salary-sacrifice-arrangements-back-to-basics>

4

Legislator's and SARS reaction to the granting of tax efficient non-cash benefits via salary sacrifices

tax happy hour



SARS and legislator's reaction

Over time, the majority of tax benefits enjoyed by taxpayer's have been taken away by legislation (in some instances punitive) and by practice

- Section 23(m) limits tax deductions claimable by employees. The structuring of entertainment allowances etc has disappeared.
- Retirement fund reform has made salary sacrifice arrangements obsolete. It does not matter if the employer or the employee makes the contribution. The net tax effect is the same.
- Medical aid fund reform has made salary sacrifice arrangements obsolete. It does not matter if the employer or the employee makes the contribution. The net tax effect is the same.
- Company car taxation is now extremely punitive (3.25% or 3.5% per month). This is 39% or 42% per annum making the use of company cars very punitive.
- Legislation was introduced to curb salary sacrifice schemes for bursaries granted to employees and family of employees.
- Free holiday accommodation is taxed at market value.

In summary the legislator has over time closed most of the most tax efficient remuneration structures. The aim is that employers will as a matter of fact prefer paying cash remuneration to employees as opposed to non-cash benefits. The focus of the relationship with the employee has therefore moved to tax certainty,

Relevant laws S23(m)

23. *Deductions not allowed in determination of taxable income.*— No deductions shall in any case be made in respect of the following matters, namely—

(m) subject to paragraph (k), any expenditure, loss or allowance, contemplated in section 11, which relates to any employment of, or office held by, any person (other than an agent or representative whose remuneration is normally derived mainly in the form of commissions based on his or her sales or the turnover attributable to him or her) in respect of which he or she derives any remuneration, as defined in paragraph 1 of the Fourth Schedule, other than—

(i) any contributions to a pension fund, provident fund or retirement annuity fund as may be deducted from the income of that person in terms of section 11F;

(ii) any allowance or expense which may be deducted from the income of that person in terms of section 11(c), (e), (i) or (j);

(iiA) any deduction which is allowable under section 11 (nA) or (nB); and

(iii)

(iv) any deduction which is allowable under section 11 (a) or (d) in respect of any rent of, cost of repairs of or expenses in connection with any dwelling house or domestic premises, to the extent that the deduction is not prohibited under paragraph (b);

Allowed deductions

Refunded income

Home study allowed

Bursaries

Section 10(1)(q) exempts from tax:

- any *bona fide* scholarship or bursary, other than any scholarship or bursary contemplated in [paragraph \(qA\)](#), granted to enable or assist any person to study at a recognized educational or research institution;
- Provided that if any such scholarship or bursary has been so granted by an employer or an associated institution (as respectively defined in [paragraph 1](#) of the [Seventh Schedule](#)) to an employee (as defined in the said paragraph) or to a relative of such employee, the exemption under this paragraph shall not apply—
 - (cc) if any remuneration to which the employee was entitled or might in the future have become entitled was in any manner whatsoever reduced or forfeited as a result of the grant of such scholarship or bursary.

Bursaries

Section 10(1)(qA) exempts from tax:

- any *bona fide* scholarship or bursary granted to enable or assist any person who is a person with a disability as defined in [section 6B \(1\)](#) to study at a recognised educational or research institution;
- Provided that if any such scholarship or bursary has been so granted by an employer or an associated institution (as respectively defined in [paragraph 1](#) of the [Seventh Schedule](#)) to an employee (as defined in the said paragraph) who is a person with a disability as defined in [section 6B \(1\)](#) or to any person with a disability as defined in section 6B (1) who is a member of the family of an employee (as defined in [paragraph 1](#) of the [Seventh Schedule](#)) in respect of whom that employee is liable for family care and support, the exemption under this paragraph shall not apply—
 - (cc) if any remuneration to which the employee was entitled or might in the future have become entitled was in any manner whatsoever reduced or forfeited as a result of the grant of such scholarship or bursary

Subsistence allowances

8. Certain amounts to be included in income or taxable income.—

(1) (a) (i) There shall be included in the taxable income of any person (hereinafter referred to as the “recipient”) for any year of assessment any amount which has been paid or granted during that year by his or her principal as an allowance or advance, excluding any portion of any allowance or advance to the extent that the allowance or advance or a portion of the allowance or advance is exempt from normal tax under [section 10 \(1\)](#) or has actually been expended by that recipient—

(bb) on any accommodation, meals and other incidental costs, as contemplated in [paragraph \(c\)](#), while such recipient is by reason of the duties of his or her office or employment obliged to spend at least one night away from his or her usual place of residence in the Republic;

It is a “net amount” that is included in taxable income

Subsistence allowances

Even though it is not in the law, it is our understanding that SARS will not allow the “deemed expenses” where the subsistence is claimed on a salary sacrifice basis. SARS is of the view that it must be “over and above” the guaranteed package. This has not been tested in court.

- (c) A recipient shall, for the purposes of paragraph (a) (i) (bb), be deemed to have actually expended,—
- (i) where that recipient proves to the Commissioner the amount of the expenses incurred by him or her in respect of accommodation, meals or other incidental costs (other than any amount of expenditure borne by the employer otherwise than by way of payment or granting of the allowance), the amount so actually incurred but limited to the amount of the allowance or advance paid or granted to meet those expenses; or
- (ii) for each day or part of a day in the period during which that recipient is absent from his or her usual place of residence, such amount in respect of meals and other incidental costs, or incidental costs only, as the Commissioner may determine for a country or region for the relevant year of assessment by way of notice in the Gazette, but limited to the amount of the allowance paid or granted to meet those expenses: Provided that this subparagraph does not apply to the extent that—
- (aa) the employer has borne the expenses (otherwise than by way of granting the allowance or advance) in respect of which the allowance was paid or granted for that day or part of that day; or
- (bb) the recipient has proved to the Commissioner any amount of actual expenditure in respect of meals or incidental costs for that day or part of that day, as contemplated in [subparagraph \(i\)](#).

Actual expenses

Deemed expenses

- In RSA
 - R493 per day for meals and incidentals
 - R152 for incidentals
- Foreign – per table and varies

5

The Employee Benefit Form

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Purpose of the employee benefit form

- The primary purpose is not to serve as a “salary sacrifice” tool.
- The primary purpose is to create 100% certainty as to the following:
 - The elements making up the employee’s total cost to company;
 - The PAYE implications thereof
 - The cash flow implications of all benefits
- In addition, it reduces the risk of costly disputes between the employer and employee as to the basis that should be used for future salary increases, retrenchment pay, overtime etc.
- The intention is that the appointment letter will simply refer to the EBF that will be updated every time that the employee’s remuneration changes.
- It is signed by both the employer and employee in recognition of the make-up of the package.



EMPLOYER COMPANY



EMPLOYEE BENEFIT FORM

| | | |
|--|------------------|---------------|
| Name | EMPLOYEE NAME | |
| Employee Number | EMPLOYEE NUMBER | |
| Validity of remuneration package: 12 months ended | 28 February 2023 | Annual TCOE |
| Total monthly guaranteed cost of employment to company | R73 034.00 | R876 408.00 |
| Do you elect that a 13th Cheque be paid in December? | Yes | |
| If you elect that bonus is paid in December - Must the PAYE be deducted monthly or in December? | Monthly | |
| Bonus payment if 13th cheque is elected | R49 388.59 | Annual Travel |
| Monthly travel allowance selected as part of TCOE | R7 000.00 | R84 000.00 |
| What percentage of the travel allowance should be subject to PAYE? | 80% | |
| Irrespective of the choice - 100% of the allowance will appear on the IRP 5. (NB: 20% may only be elected if the employer is satisfied that the vehicle will at least 80% be used for business purposes) | | |
| Maximum monthly reimbursement of business expenses: Cell Phone | 350 | |
| Medical Aid Contributions and information | | |
| Total monthly employee contribution to medical aid | R1 000.00 | |
| Medical Aid Number of dependants (INCLUDING SELF) | 3 | Annual Credit |
| Medical Aid Credit per month | 928 | 11 136 |
| Retirement Fund Contributions | | |
| | | Amount ZAR |
| Percentage of TCOE Employer contribution to Pension Fund | 0% | R0.00 |
| Percentage of TCOE Employee contribution to Pension Fund | 15.0% | R10 955.10 |
| Voluntary monthly employee contributions to Pension Fund in ZAR | R1 000.00 | R1 000.00 |
| Employer contribution to Group Life | 0.274% | R200.11 |
| Employer contribution to Income Disability: Compulsory | 1.430% | R1 044.39 |
| Employer contribution to Dreaded Disease | 0.280% | R204.50 |
| Funeral Cover | R16.05 | R16.05 |
| Employer contribution to fund administration: Compulsory | 0.150% | R109.55 |

Section A: Make-up of Total Cost of Employment

| Description | Cash/Non Cash | Monthly Remuneration | Annual Remuneration | Income Tax and PAYE implications |
|--|---------------|----------------------|---------------------|--|
| Basic Salary | Cash | 60 343.69 | 724 124.26 | Subject to PAYE in full. |
| 13th Cheque | Cash | 0.00 | 49 388.59 | Subject to PAYE in full. With the approval of the employee, the PAYE may be deducted on a monthly basis. If formal approval not received, PAYE deducted in month of payment. |
| Travel Allowance | Cash | 7 000.00 | 84 000.00 | 80% of this amount is subject to PAYE but 100% of the amount will appear on the IRP 5. A claim must be made in the personal income tax return based on a detailed logbook of business km. You may use actual expenditures or deemed expenditures to calculate a rate per km for tax deduction. NB: Any reimbursement of business km will not be subject to PAYE but will be added to this amount on the IRP 5. |
| Company contribution to pension fund | Non-Cash | 0.00 | 0.00 | This amount is taxable in full. However, it is taken into account in determining the retirement fund deduction. (See below) |
| Company contribution to GLA, Income Protector, Dreaded Disease, Funeral Cover and Management fee | Non-Cash | 1 574.60 | 18 895.15 | Monthly contributions are fully taxable, but benefits received from Group Life are not taxable. |
| Total Guaranteed Cost of employment after 13th Cheque ("TCOE") | | 68 918.28 | 876 408.00 | This is the amount on which all benefits are calculated. This includes but is not limited to Retirement Funding, Overtime, Unpaid Leave, maternity benefits and retrenchment pay. |
| Reimbursement of business expenses: Cell phone costs - maximum reimbursement amount | Cash | 350.00 | 4 200.00 | The reimbursement of business related expenses is not taxable. The employee must submit to EMPLOYER COMPANY a detailed cell phone account substantiating the business related expenses. |
| Employer contribution to Skills Development Levy (SDL) | Non-Cash | 596.79 | 7 161.47 | Not taxable. Calculated as 1% of "remuneration" that is used for calculating PAYE. |
| Employer contribution to UIF | Non-Cash | 177.12 | 2 125.44 | Not taxable. Amount is 1% of TCOE with a maximum of R177.12 per month. |
| Total non-guaranteed Cost of employment | | 70 042.19 | 889 894.91 | |

Section B: Estimation of PAYE

| Description | Monthly Remuneration | Annual Remuneration | Income Tax and PAYE implications |
|---|----------------------|---------------------|--|
| Gross income for PAYE purposes | 61 918.28 | 743 019.41 | TCOE as calculated above. |
| Travel allowance percentage taxable | 5 600.00 | 67 200.00 | As a general rule, 80% of the travel allowance is normally subject to PAYE but the employee may elect that 100% of this allowance is subject to PAYE. 100% of the allowance will appear on the IRP 5 and the employee may claim a tax deduction based on the actual business km (per detailed logbook) and a rate per km (either deemed or actual). Reimbursement of business km will not be subject to PAYE but will be disclosed on the IRP 5 as a travel allowance against which a tax deduction must be claimed. NB, if the actual claim in the tax return is less than 20%, an amount will be taxable upon assessment. If the claim is more than 20%, a refund will be due to the taxpayer. |
| Tax on 13th cheque | 4 115.72 | 49 388.59 | Subject to PAYE in full. With the approval of the employee, the PAYE may be deducted on a monthly basis. If formal approval not received, PAYE deducted in month of payment. |
| Less: Tax deduction for contribution to Retirement Fund | -11 955.10 | -143 461.20 | The employee contribution as well as the employer contribution are added together and qualifies for a tax deduction. This tax deduction may not be larger than the smaller of R350k per annum or 27.5% of Taxable Income |
| Maximum deduction: 27.5% | -18 159.35 | -217 912.20 | Claim may not be more than 27.5% of taxable income |
| Apply R350k | -11 955.10 | -143 461.20 | Claim may not be more than R350k. |
| Taxable income for PAYE | 59 678.90 | 716 146.80 | |
| Tax thereon for 2022_2023 tax year after primary rebate | 15 288.35 | 183 460.25 | |
| Medical aid credit | -928.00 | -11 136.00 | The MONTHLY tax credit is determined as R347 for the member and 1st dependant, and R234 per dependant thereafter. (Credit may not exceed the collective amount contributed by the employer and the employee) |
| Estimated PAYE | 14 360.35 | 172 324.25 | |
| | | | |

Section C: Cash-Flow Estimation

| Description | Monthly Remuneration | Annual Remuneration |
|---|--|---------------------|
| Basic Salary | 60 343.69 | 724 124.26 |
| 13th Cheque | 0.00 | 49 388.59 |
| Travel allowance | 7 000.00 | 84 000.00 |
| Reimbursement of business expenses: Cell phone costs - maximum reimbursement amount | 350.00 | 4 200.00 |
| Employee contribution to pension fund | -11 955.10 | -143 461.20 |
| Employee contribution to medical aid | -1 000.00 | -12 000.00 |
| Employee contribution to UIF | -177.12 | -2 125.44 |
| Estimated PAYE | -14 360.35 | -172 324.25 |
| Estimated Cash Flow | 40 201.11 | 531 801.96 |
| | In addition, a 13th cheque will be received in December. | |

Confirmation:

EMPLOYER SIGNATURE:

EMPLOYEE SIGNATURE:

I confirm that I am required to use a motor vehicle regularly for business purposes and that the total monthly allowance is not excessive in relation to my TCDE and in relation to the total cost of ownership of the vehicle.

Date:

6

Some practical examples

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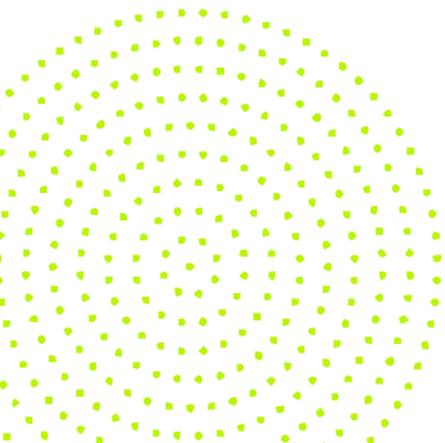


Examples of benefits that may be included in total cost to company

- Relocation costs
 - Section 10(1)(nB)
 - Alternative to “sign on bonus” or part of voluntary retrenchment pay. Can be paid on appointment, resignation, retirement and transfer
- Uniform allowance / costs
 - If clearly distinguishable from normal clothing and it is obligatory to wear, it may be included tax free
 - S10(1) (nA) *“where an employee is as a condition of his employment required while on duty to wear a special uniform which is clearly distinguishable from ordinary clothing, the value of any such uniform given to the employee by his employer, or so much of any allowance made by the employer to the employee in lieu of any such uniform as is reasonable*
- Free use of employer owned cell phone or computer or wifi
 - Provided that business use >50% - then fully tax free
 - Onus on taxpayer to prove business use > 50%
 - Par 6(4) of 7th Schedule: *“No value shall be placed under this paragraph on the private or domestic use of an asset by an employee, if—(bA) the asset consists of telephone or computer equipment which the employee uses mainly for the purposes of the employer’s business”*
 - Par 10(2) *“No value shall be placed under this paragraph on—(bA) any communication service provided to an employee if the service is used mainly for the purposes of the employer’s business”*

Examples of benefits that may be included in total cost to company

- Free service provided by employer
 - General Rule: Taxed on cost for employer to provide free service
 - E.g. school/university provides free education to children of teachers/lecturers – Argued that “cost” is “marginal cost” which should be minimal.
 - E.g. Firm of attorneys providing legal services, firm of accountants providing tax service – Marginal cost is deemed to be R nil.
 - E.g. Bank providing free bank services.
 - E.g. Cell Phone provider providing free cell phone costs
 - E.g. Car wash at premises

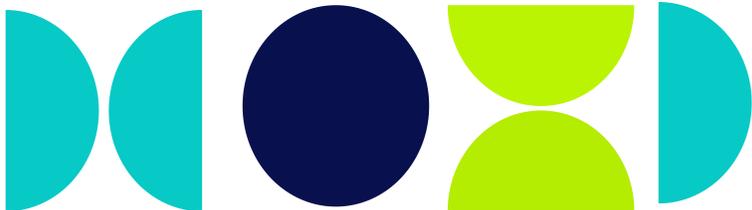


Examples of benefits that may be included in total cost to company

- Free service provided by employer
 - Special Rules for employer engaged in transport of people and goods
 - (2) *No value shall be placed under this paragraph on—*
 - (a) *any travel facility granted by any employer who is engaged in the business of conveying passengers for reward by land, sea or air to enable any employee in his employment or such employee's spouse or minor child to travel—*
 - (i) *to any destination in the Republic or to travel overland to any destination outside the Republic; or*
 - (ii) *to any destination outside the Republic if such travel was undertaken on a flight or voyage made in the ordinary course of the employer's business and such employee, spouse or minor child was not permitted to make a firm advance reservation of the seat or berth occupied by him or her;*
 - Special Rules for transporting employees to place of work:
 - (2) *No value shall be placed under this paragraph on—*
 - (b) *any transport service rendered by any employer to his employees in general for the conveyance of such employees from their homes to the place of their employment and vice versa.*

Examples of benefits that may be included in total cost to company

- Gymnasium, creche
 - (2) *No value shall be placed under this paragraph on— (c) any services rendered by an employer to his employees at their place of work for the better performance of their duties or as a benefit to be enjoyed by them at that place or for recreational purposes at that place or a place of recreation provided by the employer for the use of his employees **in general**;*
- Residential accommodation
 - Generally limited to instances where it is commonly found or where employer owns the property
 - Special rules for expats – 2 years
 - Formula driven but may ask for ruling – e.g. Mine of farm.



Examples of benefits that may be included in total cost to company

- Free use of books, literature and recordings or works of art.
 - Par 6(4) of 7th Schedule: “No value shall be placed under this paragraph on the private or domestic use of an asset by an employee, if—((c) the asset consists of books, literature, recordings or works of art.

- Meals at place of work

Par 8(3) of 7th Schedule: No value shall be placed under this paragraph on—

- (a) any meal or refreshment supplied by an employer to his employee in any canteen, cafeteria or dining room operated by or on behalf of the employer and patronised wholly or mainly by his employees or on the business premises of the employer;
- (b) any meal or refreshment supplied by an employer to an employee during business hours or extended working hours or on a special occasion; or
- (c) any meal or refreshment enjoyed by an employee in the course of providing a meal or refreshment to any person whom the employee is required to entertain on behalf of the employer.

Examples of benefits that may be included in total cost to company

- *Study loan*
 - *Par 11 (4) of 7th Schedule: “No value shall be placed under this paragraph on the taxable benefit derived in consequence of— (b) the debt owed to any employer by an employee incurred for the purpose of enabling that employee to further his or her own studies;”*
- *Other loans - official rate of interest is still below prime rate.*
 - *Official rate of interest = repo rate plus 100 basis points*

“official rate of interest” means—

 - (a) in the case of a debt which is denominated in the currency of the Republic, a rate of interest equal to the South African repurchase rate plus 100 basis points; or
 - (b) in the case of a debt which is denominated in any other currency, a rate of interest that is the equivalent of the South African repurchase rate applicable in that currency plus 100 basis points:

Provided that where a new repurchase rate or equivalent rate is determined, the new rate of interest applies for the purposes of this definition from the first day of the month following the date on which that new repurchase rate or equivalent rate came into operation;

Examples of benefits that may be included in total cost to company

- Fuel cards
 - Regarded as part of travel allowance
- Company credit cards
 - Only tax free if TRULY business related
- Pool Cars

(10) For the purposes of this paragraph the private use by an employee of a motor vehicle shall be deemed to have no value, if—

(a) (i) the vehicle is available to and is in fact used by employees of the employer in general;

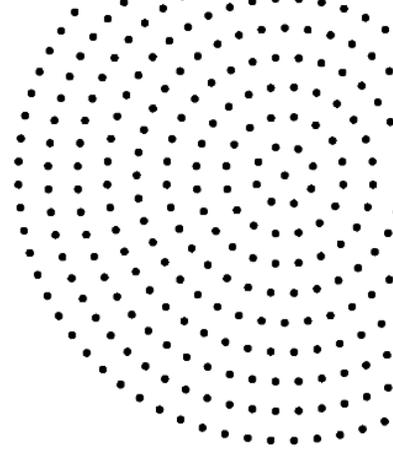
(ii) the private use of the vehicle by the employee concerned is infrequent or is merely incidental to its business use; and

(iii) the vehicle is not normally kept at or near the residence of the employee concerned when not in use outside of business hours; or

(b) the nature of the employee's duties are such that he or she is regularly required to use the vehicle for the performance of those duties outside his or her normal hours of work, and he or she is not permitted to use that vehicle for private purposes other than—

(i) travelling between his or her place of residence and his or her place of work; or

(ii) private use which is infrequent or is merely incidental to its business use.



THANK YOU

For joining us.
Stay In touch.
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SEE YOU AGAIN

24 August 2022
Wednesday

tax happy hour

