

Goals for 2010 & beyond

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2010 PLA CONFERENCE - SPIER - WESTERN CAPE
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Company Company: Old Mutual

Topic Topic: Taxation of Divorce awards to the non-member spouse. Where are we now?

Four stages

1. Prior to the Clean Break
2. 13 September to 31 October 2008
3. 1 November to 28 February 2009
4. 1 March 2009 onwards

Stage 1: Prior to the Clean Break

- SARS Practice to tax member spouse on accrual of benefits
- ITC 10404: No accrual of award to member – non-member receives capital lump sum
- Introduction of **paragraph 2B**
 - the part of the pension interest awarded
 - is deemed to have accrued to the member
 - on date pension interest
 - accrues to the member.

Stage 1 : Right of Recovery in paragraph 2B

Proviso:

- Member's right of recovery of tax from non-member spouse.
- Divorce order - "in full and final settlement of all claims" between the parties.
- Implied contractual waiver?

Stage 2: Clean Break Principle – 13 September 2007

- Income Tax Act not yet aligned
- RLA Act 8 January 2008 introduced **paragraph 2(b)**.

Paragraph 2(b): (2(b)(i))

- Amounts deducted from the **minimum individual reserve** into s37D(i)(d)
 - **Deemed** to be lump sum benefit of the **member**
 - On date of **deduction**
- **Date of deduction = Date of “receipt” of court order
= Date of tax accrual**

Stage 2: Clean Break -13 September 2007

In cash

- Withdrawal benefit
- Average rate of member

Election to transfer

- After tax
- Tax free on exit from transferee fund
 - Amendment to Formula “B” - $Z = C + \text{“E”} - D$ **
 - Amendment to **paragraph 6** **
- Can transfer to Preservation Fund – no er /ee relationship needed

(**Now in paragraphs 5 and 6)

Stage 2: Tax on tax

- Deduction of **award** and **tax** from minimum individual reserve
- Tax on award is additional deemed accrual
- Therefore tax on tax

- **GN 33**
- tax on tax formula
- Two directives

- Proviso in 2(b): Right of recovery of tax but not of 'tax on tax'
- s37D(1)(d)(i) and not (ii).

Stage 2: Clean Break – paragraph 2B?

- Para 2B still there applies:

“not deemed to have been received by or have accrued to the member in terms of paragraph (2b)” ie where not deducted from minimum reserve

- Applies to GEPF and funds not administered under PF Act; and
If non-member fails to claim prior to benefits accruing?
Amendment needed – potential change of taxpayer

Stage 3: Financial Services General Laws Amendment Act of 2008

- 1 November 2008
- Retrospective to pre 13 September 2007 orders

Tax change

- **Date of election = date of deduction**
- Date of deduction = date of tax accrual.
- **No election – date of payment**
- The rest the same

2009 Budget announcements and Explanatory Memorandum

- New policy
- **Non member spouse** taxpayer on accruals after 1 March 2009
- Four categories
- Memorandum TLA Act and RLA Act.

Stage 4: Divorces pre 13 September 2007

- Member deemed to be taxpayer - **Always**
- Vested rights
- Date of election = date of deduction
Date of deduction = date of tax accrual

- Accrual prior to 1 March 2009 – average rate
- Accrual post 1 March 2009 – new withdrawal table

- Tax on tax
- Transfers – after tax

Stage 4: Divorces after 1 March 2009

In cash

- Non-member spouse = Taxpayer.
- Date of accrual = date of deduction = date of election .
- If no election date of payment = date of accrual

- New withdrawal table will apply.
- No tax on tax liability - tax deducted from the nms award

Transfer :

- Paragraph 6 deduction

Stage 4: Divorces 13 September 2007 to 28 February 2009

Election Prior to 1 March 2009

- member is taxpayer
- member's average rate of tax.
- tax on tax
- **Transfer:** after tax transfer

Election after 1 March 2009 – change of taxpayer

- non-member spouse is taxpayer
- withdrawal table
- No tax on tax
- **Transfer** : paragraph 6 deduction

Stage 4: Combination of factors

1. Date of court order
2. Member or non-member spouse
3. Date of accrual
 - receipt by fund of court order
 - date of election
 - date of payment
4. Average rate or withdrawal table
5. Deduction from minimum individual reserve para 2 (b) or when benefit accrues to member para 2B

Stage 4: Pre 13 September 2007 orders – error in legislation

- Revenue Laws Amendment Act of 2008. Paragraph 4(4)
“that person”
- Mistakenly taxes non-member on pre 13 September 2007 orders.
- Correction promised in Taxation Laws Amendment Bill of 2009.
SARS to continue providing tax directives on member
1st draft “that person” amended to “the member”
- Redrafted first draft
- Second draft
- But - BILL and Act? Paragraph 2(b)(iA)
- right of recovery deleted

Stage 4: Letter from SARS – 4 November 2009

- Letter via ASISA and IRF
- Pre 13 September 2007 orders which accrue w.e.f 1 March 2009
- Policy to tax member
- Act incorrectly allocated tax liability to non member spouse
- Treasury intention not reflected in Act
- Expected announcement from Treasury to amend law next cycle
- Technically non-member spouse is taxpayer
- Member's tax to be reversed
- Nil tax directives on non-member spouse

To do list

- Amendment re pre 13 September 2007 orders
- Paragraph 2B

Thank you

QUESTIONS ARE WELCOME

PENSION LAWYERS
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