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2022 PENSION LAWYERS ANNUAL CONFERENCE

Recent and upcoming tax developments relating to retirement funds.

Agenda

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Jenny Gordon

1. Implementation of Paragraph 2B of the Fourth Schedule
2. Proposals in the National Budget 2022
3. Aspects of retirement fund payments to members who cease to be tax resident
   3.1. Directives on pensions -RSTO1
   3.2. Directives on lump sums

Joon Chong

1. SARS Vision 2024
2. Negotiation of tax treaties before deemed withdrawal provisions can be implemented
   – insights
3. Aspects of retirement fund payments to members who cease to be tax resident
   3.1 How to cease to be a resident
   3.2 How to TCS

Paragraph 2B –why?

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- Intended date 1 March 2021 - Postponed to 1 March 2022
- PAYE withheld on pensions and annuities including voluntary annuities
- Each administrator applies the tax tables as if sole source of PAYE income.
- Rebates are applied by each annuity provider
- More than one source of PAYE income eg: salary/ two annuities from two administrators/ insurers.
- Annual tax rebates applied more than once.
- Lower PAYE withholding tax brackets
- Shortfall on assessment - rebates and bracket creep
- Taxpayers have cashflow problems - spent the refund
- Original draft Bill– intention to alleviate cashflow of surviving spouses
- Only applies where one of the annuities originates from a fund.

Paragraph 2B – Final legislation

1. Applicable to persons who pay an annuity
   - from a pensions fund (all types)
   - An insurer – including section 10A
2. When deducting PAYE, apply the fixed rate that SARS directs
3. Where the person receives an amount from more than one employer
4. Calculated on the remuneration after deducting section 11F deductions.

Paragraph 2B – discussions

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1. Mutual co-operation on implementation between Industry and SARS
2. Legislation originally impossible- had to apply for directive
3. Reached understanding that SARS will provide tax directive to administrators
4. SARS to provide fixed rate to administrators
5. Questions on how the fixed rate would be determined
6. Existing annuitants only?
7. New annuitants during the year?
8. Is a fixed rate an effective rate?
9. Opt outs? When and how?
10. Managing understanding of own clients
11. Fixed rates before and after Budget 2022
12. Rates on Easi@file

What does the paragraph 2(2B) Directive say?

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1. Insurers/ pensions administrators must apply the effective rate determined by SARS (called the fixed rate in legislation)
2. Applies from 1 March 2022 to 28 Feb 2023.
3. Takes retirement income and salary income into account.
4. Must be applied WEF 1 April 2022 (may choose to apply from 1 March 2022)
5. The fixed PAYE rates available on e@syFile.
6. Where the administrator pays more than one annuity it must apply to all annuities even if not that PAYE number.
7. Annuitant may at any time opt out, in writing
   - elect the PAYE tables
   - higher than the PAYE tables.
   - From date of agreement or when the administrator can implement

What does the paragraph 2(2B) Directive say?

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8. The administrator must, prior to implementation of opt out inform the annuitant of a "tax debt risk" on assessment.
9. The formula for fixed rate will consider rebates, medical tax credits and deductions that they have on record.
10. Fixed rate must be applied to the gross value of the annuity subject to 11 below.
11. Any other deductions or additional medical expenses tax credits can be applied by Administrators when applying the fixed rate.
12. DTAs supersede this directive
13. **NB: This directive provides the fixed PAYE rates to administrators, and not to other employers. Thus, where an annuitant is also in receipt of, for example, a salary-based income, the fixed PAYE rate may in some instances equal or exceed 45%.**

Vision 2024

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- SARS is taking its first steps towards becoming a future revenue authority by implementing Vision 2024:
  - IT3b, IT3c, IT3d return –potential change from annual to monthly filing
  - Collection of taxes via an app
  - Opting out
  - Higher tax rates than tax table rates but lower than effective tax rates to be used?
  - CGT? Net rental income?
  - Donations to PBO
  - Trust distributions
  - Recent issue: Masters' office and loss of trust documents

Vision 2024 *cont.*

- Practical issues
  - Employment law
    - Effective tax rates and Capital Gains
    - Considerations for employees
    - Considerations for employers
  - Huge capital investment required in terms of administration and processing
  - Amendments to TAA, and all tax statutes required
- Budget 2022 – review of provisional tax system and discussion paper

Budget 22: Provident Fund Annuitisation and public sector funds

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Clarifying paragraph (eA) of gross income.

1. Public-sector pension funds that operate like provident funds, required to annuitise, subject to the vested rights
2. Paragraph (eA) does not mention paragraph (a) public-sector funds in the definition of provident fund.
3. But needs to go further as that's not where the problem lies.
4. Definition of provident fund – annuitisation applies only to paragraph "d" funds

Budget 22: Provident Fund Annuitisation and public sector funds

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Protection of vested rights when transferring to a public-sector fund

1. *"It has been drawn to Government's attention that the current provisions would cause former members of provident funds to forfeit the vested rights protection if a transfer is made into a public-sector fund. To address this anomaly, government proposes amending the pension and provident fund definitions to ensure that historical vested rights remain protected even if they are transferred to a public-sector fund"*
2. Have to await the legislation as not just on transfer
3. Drafting of annuitisation provisions – in paragraph "d" of definition and not "a,b and c" public sector funds.
4. Need to ensure the legislation addresses the problem.

Budget 22: Retirement from a provident fund younger than age 55

Paragraph 4(3)

1. If a member of a provident fund who is younger than 55 retires from that fund for reasons other than ill health, any lump sum is taxed as a withdrawal benefit
2. No similar provisions in pension funds or RA funds.
3. No longer necessary since harmonisation on 1 March 2021
4. Proposes to delete.

Budget 2022 – transfer of contracts from RA funds

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1. Permitted to transfer from RA to RA
2. Sometimes multiple contracts in a RA fund – have to transfer all
3. Preservation funds – not the case. Each transfer can be transferred separately
4. Proposed legislative change to allow transfers of separate contracts

Budget 22: non-resident deemed accrual of withdrawal benefit

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1. Much consultation on last year's proposal regarding the tax treatment of retirement interest when changing tax residence
2. Showed that multiple tax treaties need to be revised to ensure South Africa retains taxing rights on payments from local retirement funds.
3. Government intends to initiate these negotiations this year.
4. How long??
5. DTAs with countries with sole taxing rights – UK, Australia, New Zealand, People's Republic of China, Hong Kong SAR, Denmark, Germany, Italy, Portugal and Spain

Budget 22: Review of section 10(1)(gC)?

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One liner in the Budget Review "review of the exemption of foreign retirement benefits in domestic tax legislation will be conducted"

Tax resident

- An individual is tax resident
  - ordinarily residence
  - physical presence
- "ordinarily residence"
  - not clearly defined
  - determined on a case-by-case basis and based on a number of factors
  - most fixed and settled place of residence
  - habitual abode, i.e. present habits and mode of life
  - place of business and personal interest
  - status of individual in country, i.e. immigrant, work permit periods and conditions, etc
  - Nationality and location of personal belongings
  - family and social relations (schools, church, etc)
  - political, cultural or other activities

Tax resident

- Physical presence test

  - > 91 days in current year of assessment
  - > 91 days in each of immediately preceding five years of assessment
  - > 915 days during five immediately preceding years of assessment (or average of 183 days for each preceding year of assessment)

- Regardless of whether they qualify as a resident in terms of either test, an individual who is deemed to be exclusively a resident of another country for purposes of a Dis excluded from the definition of “resident”.

Cease to be a resident

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- [Cease to be a Resident | South African Revenue Service (sars.gov.za)]
- Factors taken into account in determining whether ordinary residence ceases:
  - Type of visa on which they went to foreign country
  - Proof of permanent residence in foreign country
  - Certificate of tax residence or letter indicating tax residence in foreign country
  - Property
  - Business interests
  - Family members
  - Social interests and location of their personal belongings
  - Return visits
- A resident by virtue of the physical presence test ceases to be a resident when outside South Africa for at least 330 days continuously
- An individual who has become a tax resident of another country through the application of a double tax agreement will also cease to be a resident

Cease to be a resident

- How to declare to SARS that I have ceased to be tax resident
  - Use Registration, Amendments and Verification Form (RAV01) on efiling and capture the date when the individual ceased to be tax resident under the income tax liability section
  - Capture on ITR12

Cease to be a resident

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- Qualifying basis 1: cease to be ordinarily resident
  - Signed declaration, letter of motivation and copy of passport / travel diary
  - The type of visa on which you have gone to the foreign country.
  - Where you have already taken up permanent residence in the foreign country, submit proof thereof.
  - A certificate of tax residence from the foreign revenue authority or a letter from the authority that indicates that you are regarded as a tax resident in that country (if available).
  - Details of any property that you may still have available in South Africa (Indicate the purpose that such property is being used for).
  - Details of any business interest (e.g. investment and employment) that you may still have in South Africa.
  - Details of your family. Indicate whether any family members are in South Africa and the reason thereof.
  - Details of your social interests (e.g. gym contract, recreational clubs and societies) and location of your personal belongings.
  - Details of any return visits to South Africa, the frequency thereof and the reason for undertaking such visits.

Cease to be a resident

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- Qualifying basis 2: Cease by way of physical presence test
  - “Only the standard requirements must be supplied”
  - Signed declaration
  - Letter of motivation setting out facts and circumstances in detail to support the disclosure
  - Copy of passport / travel diary

- Qualifying basis 3: Cease due to DTA
  - Certificate of tax resident from foreign revenue authority
  - Alternatively, letter from authority of status as tax resident in foreign country

Emigration – 1 March 2021

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- From 1 March 2021, emigration as recognised by the SARB is replaced by a tax and/or risk and source of funds verification process.
- Except the R1 million single discretionary allowance, no remittance of funds offshore unless Tax Compliance Status ("TCS") issued by SARS, which confirms that the emigrant has ceased to be tax-resident.
- A TCS will only be issued in respect of tax compliant taxpayers of 18 years or older.
- Authorised Dealers may allow the transfer of assets abroad, provided a private individual:
  - has ceased to be a resident for tax purposes in South Africa;
  - has obtained a TCS in respect of "emigration" from SARS; and
  - is tax compliant upon verification of TCS
- As stated in Exchange Control Circular 6/2021, the most important aspect applicable to non-residents, is the requirement to apply for a TCS PIN letter whenever they want to externalise funds from South Africa. There are very few exceptions.
- A TCS PIN letter will be issued to non-residents for tax purposes
- Authorised Dealers must use the TCS PIN to verify the applicant's tax compliance status via SARS e-Filing prior to effecting any transfers.
- Authorised Dealers must ensure that the amount to be transferred does not exceed the amount approved by SARS.

Tax Compliance Status (TCS) application

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You may request a Tax Compliance Status by Selecting the type of TCS you are applying for, completing the Tax Compliance Status Request and submitting it to SARS.

- Where applying for TCS in respect of emigration and the applicant is a member of, *inter alia,* a pension fund, the following particulars in respect of **each** fund must be submitted on a separate sheet:
  - Name of fund;
  - Expected lump sum amount to be paid out; and
  - Date of expected payment
- Specific documents required for emigration applications differ according to the source of capital (donation, loan, inheritance, shares etc)

Tax Compliance Status (TCS) application

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- Loan
  - Loan agreement and bank statement
  - Latest trust financials
  - Trust's latest share portfolio
  - Company's latest annual financial statements
- Donation
  - Declaration IT144
  - Bank statement of done
  - Proof of donations tax paid
- Inheritance
  - Letter from executor
  - Liquidation and distribution account
  - Bank statement

Tax Compliance Status (TCS) application

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- Shares
  - Portfolio statement not older than 3 months
  - Number of shares and current market values
- Sale of property
  - Letter from conveyancer confirming transfer
  - Proof of receipt of proceeds and applicant’s bank statement
- Distributions from a trust
  - Trust resolutions
  - Details of source from trust
  - Bank statement
  - Trusts’ latest share portfolio
  - Trust deed and AFS
- Income from any local or foreign entity
  - Nature of relationship
  - Proof of amounts / distributions
  - Group structure
  - Shareholders agreement

Tax directives on pensions paid to non-residents

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1. Many DTA's give taxing rights to country of residence, including pensions
2. Pensions are subject to PAYE unless a tax directive to withhold nil tax
3. If no tax directive, potential double taxation and have to apply for refund in SA
4. Declare cease to be resident and supporting docs
5. TCS – emigration in first year
6. TCS – good standing in second year
7. Procedure annually is -RST01 – Application by Non-Resident for a Directive for Relief from South African Tax for Pension and Annuities in terms of a DTA.
8. Tax office in country of residence certify RST01
9. Emailed or posted back to SARS
10. Schedules in RST01
11. TCS every year
12. Delays in country of residence
13. Submission to allow just a certificate of residence so that administrator can be satisfied that circumstances haven't changed
14. SARS often given nod but not officially.

Tax directive for retirement fund lump sums

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1. After informing SARS – ceased to be resident
2. Certificate of tax residence - not older than 6 months.
3. A TCS of emigration PIN of emigration and to be provided to the authorised dealer to transfer the funds.
4. The SARS website has details of supporting documents required.
5. A letter of employment to show employment outside SA, if applicable
6. To be sent to the administrator
7. Administrator provides a letter that a DTA applies.
8. Administrator completes the tax directive and attaches the certificate and letters.
9. Since December 2019 fund - submit through e-filing
10. Once loaded a case is created on SARS system to verify all complete within 21 days,
11. Administrator will complete the months of service rendered inside and outside SA
12. It is suggested that the employment history is obtained where possible on leaving the employe
13. Tax directive issued and we will pay without withholding PAYE if the tax directive authorises.
14. TCS PIN letter must be submitted to the authorised dealer with the request for payment

THANK YOU

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