

## AMENDMENT ACTS: CHANGES THAT AFFECT PAYROLLS

The 2022 Budget proposals were followed by the issue of draft Amendment Bills and the further steps of the legislation amendment cycle during 2022, culminating in the issue on 5 January 2023 of the following Amendment Acts:

1. Taxation Laws Amendment Act [TLAA]  
This Act deals with the substantive changes to the Income Tax Act proposed in the 2022 budget.
2. Tax Administration Laws Amendment Act [TALAA]  
This Act deals with the administration-related changes proposed in the 2022 budget to the various Acts that fall under SARS.
3. Rates and Monetary Amounts and Amendment of Revenue Laws Act [Rates Act]  
This Act confirms the tax tables, rebates and threshold changes proposed in the 2022 Budget.
4. Draft Revenue Laws Amendment Bill [Revenue Bill]  
This Bill introduced the 'Two-pot' retirement system reforms.

## CHANGES THAT AFFECT PAYROLLS

There were very few changes to the legislation that have an impact on payrolls, the least that I can remember in decades, and with one exception of an earlier date for the ETI Understatement Penalty, they are all effective from 1 March 2023.

There are several changes that affect retirement funds and the members of these funds, but except for one, these changes are outside of payroll administration and are not discussed here.

The following amendments do have an impact on employers and payroll suppliers.

### ETI Understatement Penalty

#### ***Budget 2022 Proposal***

In view of the abuse of the Employment Tax Incentive (ETI) that has been encountered it is proposed that the Employment Tax Incentive Act be amended in order to facilitate the imposition of understatement penalties on ETI reimbursements improperly claimed.

This is achieved by classifying ETI reimbursements as refunds for purposes of the Tax Administration Act and specifically as refunds of tax for purposes of the understatement penalty provisions.

#### ***The Changes to the Legislation***

Section 221 of the Tax Administration Act is hereby amended by the substitution for the definition of 'tax' of the following definition:

*“‘tax’ means a tax as defined in section 1, excluding a penalty and interest, and will for purposes of this Part include an employment tax incentive as contemplated in section 2(1) of the Employment Tax Incentive Act, 2013 (Act No. 26 of 2013);”.*

#### ***Effective date:***

This proposed amendment will come into operation on 1 September 2022.

Note that in the draft amendment Bill issued in July 2022 this change was proposed to come into effect on 1 September 2022, long before the amendment was promulgated on 5 January 2023.

The reason behind making the effective date retrospectively effective was no doubt to align the penalty on ETI reimbursements that are incorrectly claimed with the start of the second 6-monthly tax certificate submission cycle of September to February.

From memory, draft legislation can be implemented prior to promulgation as long as it is a matter of urgency, the amendment is clear, understandable, and properly communicated and explained.

Also from memory, this same situation arose in April 2020 with the Covid-19 draft Disaster Management Tax Relief Bill that introduced retrospective changes back to 1 April 2020 for the enhanced ETI requirements that were introduced under huge pressure and as a matter of extreme urgency.

Following comments from concerned parties, SARS agreed to clarify how the penalty will be determined to explain the interaction between section 4(2) of the ETI Act and the USP (understatement penalty) to ensure that there is not a duplication of penalties.

## Section 7B Variable Remuneration

This is a relatively minor change to section 7B, but section 7B is starting to make its presence felt in other areas of payroll administration, so you would be well-advised to become familiar with its requirements.

To assist you, this Newsflash goes into detail to explain the concept of 'variable remuneration', the changes introduced by the amending legislation, as well as aspects of the application of 'variable and 'non-variable remuneration' both now and in the future.

### **Background to Section 7B**

The general taxation rule is that income, including remuneration as defined by the Fourth Schedule of the Income Tax Act, must be taxed on the earlier of the date of accrual (when there is an unconditional entitlement to the money), and the date of payment.

For many years before 2013, the PAGSA drew the attention of the tax authorities to the administration difficulties experienced by payroll suppliers and employers when certain types of remuneration accrue in the last month (or months) before the end of a tax year but can only be paid in the first month (or months) after the start of the new tax year when the amounts are available and/or can be quantified.

The payroll for the last month of the tax year must be re-opened, the remuneration adjustments made, the payroll re-run, employees paid the additional net pay amount, the EMP201 in respect of that last month must be adjusted and paid with penalties, and the tax certificates in respect of the previous tax year must be adjusted.

From this can be seen that retrospective adjustments place a significant administration burden on payrolls, payroll offices, and in some cases also on SARS (adjustments to EMP201's, tax certificates, and EMP501 reconciliations).

After many requests from the PAGSA, section 7B of the Income Tax Act was added and introduced the concept of 'variable remuneration' from 1 March 2013 as the solution. Variable remuneration is deemed to accrue when it is paid to the employee, and it is therefore taxed when it is paid.

In other words, all remuneration types that are 'variable remuneration' are taxed and administered in the month in which they are paid, not the month in which they would normally have accrued.

### **Which Remuneration Types are Variable Remuneration?**

Section 7B divides the various types of Fourth Schedule remuneration into two groups:

1. Variable Remuneration:

Section 7B specifies nine 'variable' remuneration types (listed in the Appendix) including commonly occurring remuneration types such as overtime, bonuses, commission, travel allowances and travel reimbursements, as well as night shift and standby allowances, and BCEA leave that is paid out on termination. [Recently added to

variable remuneration from 1 March 2023 is an amount “that is determined based on the employee’s work performance” (see ‘Changes to the Legislation’ below).]

Variable remuneration is deemed to accrue on the date of payment and must be taxed when paid.

2. **Non-variable Remuneration:**

All remuneration types that are not variable remuneration, are referred to as non-variable remuneration, of which the most obvious examples are salaries and wages.

Non-variable remuneration must be taxed at the earlier of the date of accrual, or the date of payment.

**Budget 2022 Proposal**

The 2022 Budget proposal explains the reason for the change.

*Section 7B of the Income Tax Act (1962) allows for the taxation of variable remuneration to be deferred to the date when the amount is paid to the employee rather than when it accrues to the employee.*

*The act provides that any amount of variable remuneration paid by the employer to the employee is deemed to accrue to the employee on the date during the tax year in which the amount is paid.*

*Under the Income Tax Act, variable remuneration includes:*

1. *overtime pay, bonuses or commission;*
2. *an allowance or advance paid for transport expenses;*
3. *an amount the employee becomes entitled to as a result of unused leave;*
4. *any night shift or standby allowance; or*
5. *any amount paid or granted for a reimbursement as contemplated in the Act.*

*While the inclusion of commission caters for performance-based payments that form part of the employee’s salary in the formal sector, it does not cater for the informal sector, where such payments may be calculated based on units produced (because the word “commission” means a percentage-based payment and is not determined based on units produced).*

*Government proposes that changes be made to section 7B to cater for these performance-based variable payments.*

*Further to the above, the current provisions of section 7B of the Act need to be clarified to cater for instances where any type of variable remuneration accrues to the employee and the employee dies before the date of payment of the variable remuneration.*

**Standing Committee on Finance (SCOF)**

In September 2022, the SCOF removed all reference to the informal sector (remuneration based on units produced can be paid in both the formal and the informal sector) from the draft amendment, and explained the necessity of introducing payments that are calculated based on units produced as follows:

*Although “commission” is included in the current list of variable remuneration, such commission only caters for performance-based payments that form part of the employee’s salary, it does not cater for instances where such payments are for example calculated based on units produced.*

*This is due to the fact that the common meaning of “commission” refers to a percentage-based payment as opposed to an amount determined based on units produced.*

*The proposed amendment is essentially intended to cater for instances where a performance-based payment, over and above the employee’s wages, is dependent on the fulfilment of a suspensive condition by the employee.*

An example would be of a salaried employee who packs boxes, and is paid an incentive based on the number of boxes packed that exceed 1,000 boxes, checked in the month following the month in which the boxes were packed.

### **Final Change to Section 7B**

The final Taxation Laws Amendment Act of 5 January 2023 states as follows:

*“Section 7B of the Income Tax Act, 1962, is hereby amended—*

*(b) by the addition in subsection (1) in the definition of “variable remuneration” of the following paragraph:*

*“(g) any amount of ‘remuneration’ as defined in paragraph 1 of the Fourth Schedule (other than a bonus) that is determined based on the employee’s work performance.”; and*

*(c) by the addition in subsection (2) of the following proviso:*

*“: Provided that where the employee is deceased before the date of payment, the amount is deemed to accrue to the employee and constitutes expenditure incurred by the employer, on the day during the year of assessment prior to the date of the employee’s death.”.”*

### **Effective date:**

The proposed amendments will come into operation on 1 March 2023 and apply in respect of amounts accrued or expenditure incurred on or after that date, or deaths occurring on or after that date.

### **Comments on the Application of Section 7B**

The section 7B requirements are gradually spreading into other legislation and payroll tax administration areas.

### **Unemployment Insurance Contributions Act**

Section 7B of the Income Tax Act is linked to the Unemployment Insurance Contributions Act by the definition of remuneration in the Fourth Schedule.

Remuneration paid in a month (or months) after must be applied differently depending on whether the remuneration paid is ‘variable remuneration’ or ‘non-variable remuneration’.

SARS has provided the PAGSA with an opinion on how to apply section 7B to UIF contribution requirements under circumstances where the employee is paid remuneration in a month (or months) after an employee’s services have been terminated. The application is different depending on whether the remuneration paid is ‘variable remuneration’ or ‘non-variable remuneration’.

The initial SARS opinion has raised more questions that are in the process of being clarified.

As soon as these opinions are finalised, a Newsflash will be issued.

### **SARS Modernisation of Personal Income Tax Act (PIT)**

While section 7B was introduced to simplify payroll and tax certificate administration for employers over the period spanning the end of one tax year and the start of the next tax year, section 7B applies equally to any period during a single tax year.

This might influence the ‘SARS Modernisation of PIT’ project (see PAGSA NF 2023-03 for an update).

Again a Newsflash will be issued as soon as possible.

## **Retirement of a Provident Fund Member on Grounds other than Ill-health**

### **Background**

Major retirement reforms were implemented with effect from 1 March 2016 to standardise tax treatment and administration across the three types of retirement funds.

To improve preservation of retirement benefits after retirement or early withdrawal, and to align the pay-out rules of provident funds with those of pension funds and retirement annuity funds, the retirement reforms that require mandatory annuitisation for provident fund members came into effect from 1 March 2021.

As from 1 March 2021, it is no longer necessary to differentiate between a pension, retirement annuity, and provident fund for retirement purposes as these funds now operate in the same way.

However, paragraph 4(3) of the Second Schedule to the Act retains a level of distinction as it stipulates that in the event that a member of a provident fund retires before he reaches the age of 55 years and such retirement is for reasons other than ill-health, any lump sum benefits received by or accrued to said member shall be taxed as a withdrawal benefit as opposed to as a retirement benefit.

Since the provisions of paragraph 4(3) do not apply to types of retirement funds other than provident funds, an anomaly exists as paragraph 4(3) of the Second Schedule to the Act results in differentiated tax treatment for provident fund members and members of other types of retirement funds.

***Budget 2022 Proposal***

To address this anomaly and ensure uniform treatment across all types of retirement funds, Government proposed that paragraph 4(3) of the Second Schedule to the Act be repealed.

***Legislation Change***

Paragraph 4(3) of the Second Schedule is hereby amended by the deletion of subparagraph (3).

***Effective date***

The amendment will come into operation on 1 March 2023 and apply in respect of years of assessment commencing on or after that date.

**Budget 2023 Proposals**

The PAGSA is busy finalising a Newsflash that will assist you with the 2023 Budget proposals, but at this early stage there are again relatively few changes that affect payrolls.

Regards,

Rob Cooper

*Chairman Payroll Authors Group of South Africa*

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