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Technical Advisory Services • Tax • IFRS

Tax developments

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In the pipeline: Requirement for transfer pricing documentation

Section 31(2) of the Income Tax Act requires taxpayers to make an adjustment to their taxable income where a transaction has been entered into with certain connected persons (cross-border transactions), if the terms and conditions of such transaction are different from what persons dealing at arm's length would have agreed to and this results in a tax benefit.

Current documentation requirements

As with any transaction or event, the burden of proof rests upon the taxpayer to show that it is not required to make an adjustment to its taxable income or if an adjustment is made, that such adjustment reflects the arm's length terms and conditions of the particular transaction. Chapter V of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations provides some guidance as to what documentation should be kept and prepared in respect of controlled transactions for purposes of resolving transfer pricing issues and facilitating enquiries from the tax authorities. At present, section 29 of the Tax Administration Act (TAA) imposes a duty on the taxpayer to keep records, books of account or documents to enable that taxpayer to observe the requirements of a tax Act or to enable SARS to be satisfied that these requirements were observed, without being prescriptive as to the nature of the documentation to be kept. The section also makes provision for documentation to be kept if specifically required by legislation or by public notice to be issued by the Commissioner.

Overview proposed requirements

During December 2015 SARS issued a draft version of a public notice (hereafter draft PN) that will require taxpayers to keep certain documentation in relation to their transfer pricing positions.

The draft PN distinguishes between two groups of taxpayers as far as transfer pricing documentation is concerned.

The first group consists of taxpayers who form part of a group with consolidated South African turnover of ZAR 1 billion or more and who entered into a potentially affected transaction. It is proposed in the draft PN that consolidated South African turnover in this context should refer to turnover of the group that is subject to normal tax in South Africa, rather than global turnover for all companies forming part of that group. This would presumably be the basis for determining possible transfer pricing risk from a South African perspective as such income may be at risk of being shifting away from the South African tax base if a taxpayer can find a way to exclude it from the taxable income of the relevant entities. For these purposes a potentially affected transaction is one that meets all the elements of an affected transaction without considering whether the terms and conditions are at arm's length or not, as this will be confirmed in the documentation.

For this first group of taxpayers the draft PN suggests that a wide range of documentation should be kept (numbered and listed from *(a)* to *(s)* in the draft PN). Without going into the detailed proposed requirements, it is important to note that the listing includes (not an exhaustive summary) the following:

- Business operation summaries, including recent business restructurings, an analysis of key value drivers and the position of that person and its connected persons in the supply chain;
- Nature and terms of potentially affected transactions as well as copies of contract or agreements for such transactions;
- A functional analysis, operational flow analysis and detailed financial allocation information applying the transfer pricing policy for potentially affected transactions;
- Comparable data and consideration of methods to determine the arm's length return and transfer pricing of potentially affected transactions;
- In relation to financial assistance, detailed information relating to the funding structure, purpose and application of the funding and financial strategy of the business.

In many respects, these requirements may already reflect the content of transfer pricing documents and policies prepared by corporate taxpayers or their advisors. Once the final public notice is issued, it would however still be necessary to perform a detailed gap analysis to identify any additional information to be obtained or retained.

The second group of taxpayers are taxpayers who are not members of a group with consolidated South African turnover exceeding ZAR 1 billion. The documentation requirement is relaxed for these taxpayers in the sense that it is not as prescriptive as the requirements for the first group of taxpayer. The requirement for the second group is merely that the person keep and retain records, books of account or documents that enable the person to ensure and SARS satisfied that the person's potentially affected transactions are conducted at arm's length. This requirement is arguably not different from the current requirements contained in section 29(1)*(a)* and *(c)* of the TAA. It is however clear that not having any transfer pricing documentation is unlikely to be an option available to taxpayers going forward.

Changes to requirements for and exclusions from reportable arrangements

Part B of Chapter 4 of the Tax Administration Act (TAA) requires that taxpayers and/or their advisors report certain transactions to SARS. An arrangement is a reportable arrangement if it has the characteristics listed in section 35(1) or if it specifically listed in a public notice by the Commissioner. During March 2015 the Commissioner issued the first such notice (Government Notice no. 212) under the TAA (the previous notice was issued under the reportable arrangement provisions of the Income Tax Act). This notice listed certain hybrid instruments, buyback/subscription transactions, contributions to foreign trusts, premiums paid to foreign insurers and the acquisition of the shares of a company with assessed losses exceeding R50 million as arrangements that are reportable.

Section 36(4) also allows for the Commissioner to list arrangements that do not have to be reported by public notice. The notice issued in 2015 listed an arrangement that met the requirements of section 35(1) but where the aggregate tax benefits derived by all participants do not exceed R5 million.

A new public notice was issued on 3 February 2016 (Government Notice no. 140) with a revised list. This article considers the changes from the previous notice.

Listing of arrangements to be reported

The first change involves the deletion of the item that refers to instruments that would have been a hybrid debt instruments had the prescribed period been 10 years. It is submitted that this requirements was obsolete as it was based on the previous wording of section 8F of the Income Tax Act, which was amended from 1 April 2014 to remove its 3-year rule.

The second amendment may turn out to be closely linked to the anticipated repeal of the withholding tax on service fee regime. It has been indicated on a number of occasions that the withholding tax regime was aimed at gathering information on Foreign Service providers, which can also be done by requiring such services to be reported. Transactions with the following characteristics should be reported:

- Services have to be rendered to a resident or a non-resident in relation to its permanent establishment in South Africa (recipient requirement);
- The services must be consultancy, construction, engineering, installation, logistical, managerial, supervisory, technical or training services (nature of the services requirement); and
- The service provider must be a non-resident (or an employee, agent or representative of such person) who was physically present in South Africa, or is anticipated to be physically present in South Africa, in connection with the rendering of those services (service provider requirement);
- The expenditure incurred under the arrangement must exceed or be anticipated to exceed R10 million (amount requirement); and
- Lastly, the consideration paid should not constitute remuneration for purposes of the Fourth Schedule.

This requirement is arguably much more targeted and specific than the broad proposal in 2014 that any service fee exceeding R5 million paid to a non-resident for services rendered to a resident had to be reported. This particular requirement did not make it into the 2015 public notice.

Excluded arrangements

Similar to the 2015 public notice, the excluded arrangements listed in the new notice only apply to arrangements contemplated in section 35(1) and not those specifically listed as reportable. The R5 million aggregate tax benefit threshold remains in place.

A new exclusion has been added to also exclude arrangements referred to in section 35(1)*(c)* of the TAA if the tax benefit (or assumed tax benefit) is not the main or one of the main benefits of the arrangement. Section 35(1)*(c)* requires the following to be reported:

"the 'arrangement' … gives rise to an amount that is or will be disclosed by any 'participant' **in any year of assessment or over the term** of the 'arrangement' as—
(i) a deduction for purposes of the Income Tax Act but not as an expense for purposes of 'financial reporting standards'; or
(ii) revenue for purposes of 'financial reporting standards' but not as gross income for purposes of the Income Tax Act" (own emphasis added)

The requirement of this provision could be interpreted that a wear and tear allowance which differs from the accounting depreciation for the specific year of assessment, even though perhaps not over the term of the life of the asset, should be reported if the tax benefit in a year (i.e. tax effect of the accelerated wear and tear compared to accounting depreciation) exceeds R5 million. This could result in absurd outcomes as any items indicated as reconciling items on the IT14 return could arguably fall into this category. It would seem that this is the reason for the exclusion. The intention of the participant is however only relevant for this exclusion – in all other instances the exclusion per the notice is based on the amount of the tax benefit.

Anglo Platinum Management Services (Pty) Ltd v C:SARS: A perspective on salary sacrifices

It is common commercial practice for employers to enter into salary sacrifice arrangements with employees. Such arrangements do however run the risk of attracting the attention of SARS and have been the subject of numerous tax cases. Davis J, in ITC 1682, described the concept of a salary sacrifice:

> "In the commercial world a key decision regarding the remuneration of an employee concerns the overall cost of remuneration to the employer. Assuming that an employer is prepared to bear a cost of remuneration of R100, it is common for employees to be given a choice as to how that R100 should be structured. Certain employees, for example, may prefer to take the full R100 by way of a cash emolument, other may prefer to take R60 in cash, in order that an employer contribute R20 to a retirement instrument on behalf of such employee and utilize the balance in order to acquire a motor vehicle. The choice made by the employee will naturally determine the extent of his or her liability for tax."

A specific salary sacrifice entered into between Anglo Platinum Management Services (Pty) Ltd (hereafter APMS) and its employees in respect of a right to use a vehicle was recently considered by the SCA.

Relevant legislation

The tax issue arising from a salary sacrifice or restructuring scheme is whether the remuneration falls into para *(c)* or para *(i)* of the definition of gross income. Amounts are included in gross income under para *(c)* if is "received or accrued in respect of any employment or the holding of any office". Para *(i)*, which relates to fringe benefits, applies to "any benefit or advantage granted in respect of employment or to the holder of any office, being a taxable benefit as defined in the said Schedule". Proviso (i) to para *(c)* specifically excludes benefits that fall under paragraph *(i)* from the scope of para *(c)*.

The question to consider in making this determination is essentially whether the employee gave up, or foregone, the right to a cash salary in exchange for another form of benefit, in which case the benefit should fall under paragraph *(i)* and be included at the cash equivalent value under the Seventh Schedule, *or* whether the employee still had a right to receive a cash salary, but used or applied such cash to obtain another benefit, in which case this would be a paragraph *(c)* inclusion of the full cash value.

The APMS vehicle scheme had very specific facts that were considered by the court to arrive at a judgment. These facts are briefly set out together with the views of the court to illustrate the distinction between paragraph *(c)* and paragraph *(i)* benefits.

Salary structuring by APMS

The APMS vehicle scheme entailed the following:

- Employees elected to structure a portion of their remuneration in the form of a right to use a vehicle.
- The employer purchased the vehicle from a dealer and became the owner of the vehicle, even though the vehicle was registered in the name of the employee (presumably for administrative purposes, even though this is not specifically stated in the SCA judgment). It is unclear from the judgment whether ownership transferred to the employee at any time even though it is implied in paragraph 14.
- In order to enjoy the right of use of the vehicle, an amount was deducted from the employee's cash remuneration. This amount was calculated by reference to the purchase price, a notional interest that would have been paid had the employer financed the vehicle as well as running costs and insurance premiums incurred by the employer. The balance between these costs and the foregone amounts were indicated on an account statement.
- Adjustments were made for the correction of any difference between actual operating costs and the amount foregone, with shortfalls being paid in by the employee and credits being available to withdraw in cash.

The Commissioner contended that the terms of the scheme in relation to insurance premiums, which one document suggested were borne by the employee, and the mechanism that created a right to withdraw credits from the notional account indicated that the employee did not forego the right to the cash salary. Based on the evidence presented by the taxpayer, the court concluded that neither of these aspects was detrimental to the taxpayer's view that there was an antecedent divestment by the employee of the right to the cash salary. As such, the court held that this particular scheme by APMS constituted a valid salary restructuring and that the benefit therefore fell within paragraph *(i)* of the definition of gross income, as opposed to paragraph *(c)*.

In arriving at the judgment, Cachalia JA observed:

> "It is a question of fact in each case whether a salary sacrifice was achieved."

The lesson to be taken from this case is that the commercial rationale and documented terms of the remuneration package are of critical importance to be able to prove an antecedent divestment of the right to a cash salary.

BCR049: Considerations for the deduction of insurance premiums

Binding Class Ruling 49 (BCR049) deals with a very specific set of facts, which will be briefly outlined in this article. This ruling was issued in the context of mining rehabilitation insurance policies issued by an insurer to mining companies. The focus of this article is to outline the broad principles applicable to any such or similar type of insurance policies from the perspective of the insured when considering whether the premiums paid will be deductible for income tax purposes. These principles may equally be relevant for insurance products used in other industries.

Background and context of BCR049

The Mineral and Petroleum Resources Development Act requires mining entities to submit an environmental management programme and make financial provision for rehabilitation of the land where the activities are carried out.

Such entities can make financial provision in a number of ways, including by depositing funds with the government, transferring funds into a mine rehabilitation trust or taking out certain guarantees in respect of rehabilitation costs. The guarantee can be in the form of an insurance policy providing the necessary guarantee. Section 37A of the Income Tax Act (Act) makes specific provision for amounts transferred into a closure rehabilitation company or trust to be deductible. From a commercial perspective, such payments may however put the cash flow position of the mining company under pressure. Insurance products where the mining company could incur the costs of rehabilitation over a period of time in the form of premiums may be preferable from a cash flow perspective.

The insurer applied for BCR049 on behalf of its clients (mining companies). In brief, the terms of the specific insurance policy issued by the insurer in respect of which the ruling was obtained is as follows:

- The product is a guarantee insurance policy as defined in the Short Term Insurance Act that is issued to the mine owner.
- The insurer, to the extent of the liability, issues a guarantee to the Department of Mineral Resources (DMR) for a 3-year period of the mine owner's environmental management plan (EMP) in terms of which the insurer will assume the obligation on behalf of the mine owner. If the mine owner fails to execute its obligations towards the DMR, the insurer will make payment.
- If however the insurer is required to make payment to the DMR, the mine owner will become liable for an additional premium to the insurer equal to the excess of the amount paid to the DMR over premiums actually paid to date.

Overview of the relevant legislation

Operating costs, such as incurring insurance premiums, would generally be deductible under section 11*(a)* of the Act. During 2012 the National Treasury introduced legislation to prevent the deduction of contributions paid in respect of certain investment type of products that were packaged and labelled as insurance premiums. This prohibition on the deduction of such premiums is included in section 23L and is based on the IFRS classification of the product, which generally considers the substance of the arrangement rather than its legal form or label. While this provision was initially written to consider the IFRS treatment of the policy from the perspective of the insurer, it was amended with effect from 1 April 2014 to rather be based on the accounting treatment of the policyholder. As it currently reads, section 23L(2) determines that no deduction is allowed in respect of any premium incurred by a person in terms of a policy to the extent that the premium is not taken into account as an expense for the purposes of financial reporting pursuant to IFRS in either the current year of assessment or a future year of assessment. Such an insurance premium will not be taken into account as an expense by the policyholder, if the substance of the arrangement is an investment that is capitalised under the accounting standards IAS 39 or IFRS 9.

Ruling provided in BCR049

Based on the above description of the product made available by the applicant insurer to its clients, it is submitted that the recognition of premiums already paid, should the mine owner default on its DMR obligations, may suggest that the product can act similar to a savings plan for the mine owner in many respects. This in turn could pose a risk from the perspective of section 23L that prohibit the deduction of premiums paid to investment like insurance products.

In the case of the insurance product that BCR049 relates to SARS ruled, without any additional conditions or assumptions, that the premium incurred by the mine owner in respect of the policy described above will be deductible under section 11(a) read with section 23(g) and this deduction will not be prohibited by section 23L. This implies that the insurance premiums are treated as an expense rather than an investment under IFRS.

As with all rulings, the ruling given in BCR049 is likely to be fact specific and cannot blindly be followed by other taxpayers or insurers. Other insurers may be well advised to obtain tax advice (by implication IFRS advice) and consider applying for a similar ruling to give their clients the assurance that premiums will be tax deductible, which in turn directly impact on the pricing of their product from the client's perspective.

Special Economic Zones incentive comes into effect

The 2013 Taxation Laws Amendment Act introduced a number of provisions into the South African tax legislation to give effect to a Special Economic Zone (SEZ) incentive. The purpose of the SEZ policy was aimed at improving and replacing the Industrial Development Zones (IDZ) programme that failed to achieve its intended objectives. The favourable tax regime was delayed until the overaching enabling legislation for the SEZ policy, the Special Economic Zones Act (Act 16 of 2014) (SEZ Act), became effective. The proclamation for the commencement of the SEZ Act was published on 9 February 2016. The tax incentive regime took effect from this date. This article provides an overview of the tax benefits for businesses that fall within this incentive.

Special Economic Zones

The SEZ incentive covers the existing IDZ's as well as zones identified in certain regions in each province. Each such zone is to have a specific sectoral focus. Information of the IDZ's, proposed SEZ's and further SEZ's in the pipeline is avaialble on the Department: Trade & Industry's website.[1]

An overview of the tax incentives offered

Certain income tax, VAT and employment tax incentive benefits are available to taxpayers operating business in a SEZ.

Income tax concessions

The income tax concessions are available to qualifying companies, as defined in section 12R of the Income Tax Act. In short, this would be a company incorporated and effectively managed in South Africa that carries on business from a fixed place situated in a SEZ, where at least 90 percent of the income of that company is derived from the business or provision of services within one or more SEZs. Despite a company meeting the definition of a qualifying company, the benefits of the concessions in sections 12R and 12S are not available to a company conducting certain activities listed under specified SIC manufacturing codes (activities related to production of spirits, wines, liquor, malts, tabacco products, weapons and ammunition as well as bio-fuels that negatively impact food security in South Africa.

This first income tax concession is a reduced tax rate of 15% that will apply to the qualifying company. This concession is however only available to qualifying companies that do not incur more than 20% of deductible expenditure or do not receive more than 20% of their income from connected persons who are residents or permanent establishments in South Africa of non-resident connected persons. This requirement to qualify for the tax rate reduction may make it extremely difficult, if not impossible, to integrate the qualifying entity in a SEZ into a group's value chain.

Section 12S of the Income Tax Act provides for an allowance of 10 per cent on the cost of new and unused buildings owned by the qualifying company that is used for purposes of its trade and producing income within a SEZ. This compares favourably with similar building allowances contained in section 13*quin* that provide for a 20 year write-off period.

The income tax concessions have a sunset clause that effectively provides for a lifespan of 10 years from the date that concession commences.

Employment tax incentive (ETI) concession

ETI benefits are generally only available to employers in respect of person between the ages of 18 and 29 being employed by them. Section 6*(a)*(ii) of the ETI Act however also allows employers to claim ETI benefits in respect of employees employed by an employer operating through a fixed place of business located within a special economic zone designated by notice by the Minister of Finance in the Gazette if that employee renders services to that employer mainly within that special economic zone.

Value added tax

Concessions similar to those currently available to activities carried out in a customs controlled area situated in a IDZ will also be extended to SEZs.

Concluding thoughts

The above tax benefits may go some way in making the SEZ regime attractive, even though certain aspects, for example, the limitation on connected person transactions may turn out to be a significant weakness. It should be noted that the benefits of the SEZ regime go further than merely a favourable tax treatment.The non-tax benefits are set out in the SEZ Act as well as the regulations contained in the proclamation (Proclamation 6 of 2016).

It has been suggested by numerous commentators and researchers that the success of an incentive such as this is likely to be determined by a combination of the specific benefits provided but also the larger economic environment within which it operates. Wider government initiatives to make South Africa an attractive investment destination may therefore also affect the success of the SEZ regime.

[1] http://www.thedti.gov.za/industrial_development/docs/SEZ_Bulletin2015_16.pdf

IT 12951: Observations on prescription and the burden of proof

Chapter 5 of the Tax Administration Act (TAA) allows SARS to perform tax audits and these form a critical part of the tax administration process. Issues around possible prescription of periods that information requests relate to and disputes over the nature of evidence required often arise during audits.

An appeal by a taxpayer was recently considered in the Durban tax court case reported as IT 12951 and VAT855. The judgment deals with a number of fact specific issues that arose during the audit of the taxpayer that was liquidated; the details of these matters are not considered in this article. The article rather deals with two more general matters considered by the court, namely prescription and fulfilling the burden of proof, and the views expressed in relation to these that may be of value to other taxpayers.

Prescription and the exceptions thereto

During the periods that the audit related to the prescription rules for income tax purposes were contained in section 79 of the Income Tax Act (ITA). These rules were subsequently replaced by section 99 of the Tax Administration Act, but the main elements of the prescription rules for a tax assessed by SARS remain similar. Section 99, as far as relevant, reads:

> **"99. Period of limitations for issuance of assessments.**—(1) An assessment may not be made in terms of this Chapter—
> (*a*) three years after the date of assessment of an original assessment by SARS …
> (2) Subsection (1) does not apply to the extent that—
> (*a*) in the case of assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to— (i) fraud;
> (ii) misrepresentation; or
> (iii) non-disclosure of material facts"

The question whether SARS could apply the equivalent of section 99(2) of the TAA was decided as a point *in limine* by Vached J.

The facts of the case were that more than three years had lapsed since the date of the original assessment before the additional assessments were issued. Unless SARS was satisfied that there was misrepresentation that resulted in the tax chargeable not being assessed, the additional assessment could not be made. In the letter of audit findings and response to a request for reasons for the assessment, SARS relied on the taxpayer not fulfilling the burden of proving the deductible expenditure as the ground for not allowing the deduction. For certain aspects, but not all, the fact that the claiming of certain deduction amounted to misrepresentation and therefore resulted in the lifting of the prescription veil was first mentioned in the notice of disallowance of the objection.

From prior case law Vached J pointed out that the Commissioner had to satisfy himself of the existence of misrepresentation that caused this tax not to be assessed in order to rely on the exception to the prescription rule. This process would inherently include an element of timing in the sense that SARS had to make this determination prior to raising the additional assessment, rather than it being implied as an afterthought. Based on the fact that the misrepresentation that caused the additional assessment was not raised during the audit as part of the letter of findings or as part of the reasons for the assessment, Vached J concluded that in this instance SARS failed to show that it satisfied itself of the fact that the taxpayer fell within the exception to the prescription rule. In addition it was noted that SARS did not clearly indicate that a causal relationship existed between the misstatement and the non-assessment at any stage.

It is submitted that the above decision illustrates that the manner in which SARS approaches prescription, including the timing when this aspect is raised during the process to make an additional assessment is something that taxpayers and advisors should pay attention to, as it may play a role in determining whether a taxpayer is protected by the statutory indemnity of prescription or not.

Fulfilling the burden of proof

Section 102 of the TAA places the burden of proving a taxpayer's entitlement to a deduction on the taxpayer. In practice, this requirement is applied by SARS as that a taxpayer has to provide documentary evidence that supports all the elements necessary to meet the requirements of section 11(a) of the ITA (or other relevant deduction). The taxpayer in this particular case claimed a deduction of employee costs based on certain assumptions relating to its business without being able to provide documentary evidence. Vached J allowed the deduction of these expenses (employee costs) based an explanation by a credible witness and the following reasoning:

> "The nature of the taxpayer's business supports these contentions on a balance of probabilities. In my view, given the nature of the appellant's operations, as testified to by Mr X, the general human and business probabilities sustain the claim. I have already found Mr X to be a credible witness and have no reason to reject his ipse dixit on this score."

This approach taken in the tax court illustrates that it may be worthwhile to include business reasoning as part of argument when responding to findings or disputing assessments and to persevere with this. The burden of proof is not necessarily limited to prescribed or requested supporting documentation.

Retirement reform: Fringe benefit for employer contributions and related deductions

After implementation have been delayed for a year and there still being much controversy around the new retirement tax regime, the revised regime will take effect from 1 March 2016. Most of the controversy and discussion to date have been around the deductibility of contributions to retirement funds and the requirement to annuitise the benefits from provident funds. The focus of this article is on the practical implementation from 1 March 2016 onwards, more specifically the effect that the new regime should have on employees' tax. This part of the picture has recently been completed by the publication of a regulation relating to the determination of fringe benefits arising from defined benefit plan contributions.

Overview of PAYE impact

Employer contributions

The first main difference between the existing retirement regime and the new one relates to the treatment of employer contributions. In terms of paragraph 2(l) of the Seventh Schedule of the Income Tax Act (Act) now specifically includes any contribution made by an employer to a pension fund, provident fund or retirement annuity fund for the benefit of an employee as a fringe benefit. The value of this fringe benefit to be included in the taxable income of the employee is determined in terms of paragraph 12D of the Seventh Schedule and depends on whether the benefits payable to the members of the particular retirement fund consist *solely* of defined contribution components (in which case the fringe benefit is the amount of the contribution made by the employer) or whether such benefits include components other than defined contribution components (in which case the fringe benefit is determined with reference to a formula that bases the benefit on a value factor applied to the retirement funding income of the employee). The latter type of retirement funds would generally refer to defined benefit type of funds, as opposed to defined contribution plans. The regulation that was published on 7 January 2016 states how the benefit factor should be determined. This entails a combination of the following components that are reflected in the benefits the member will become entitled to:

- A defined contribution component;
- A defined benefit component;
- The underpin component;
- A risk benefit component.

The regulation prescribes formulas to be used to determine each of these components. The Seventh Schedule requires that the board of a fund that does not solely consist of defined contribution benefits must provide the employer of a contribution certificate in respect of the benefits no later than one month before the start of the year of assessment. This certificate can be used by the employer in determining the fringe benefit amount.

Deductions available for contributions

The second significant aspect of the new regime for employees' tax purposes is that, as it did before, paragraph 2(4) of the Fourth Schedule allows the following deduction from the employee's remuneration when determining the basis to withhold employees' tax:

> "any contribution by the employee concerned to any pension fund or provident fund which the employer is entitled or required to deduct from that remuneration, but limited to the deduction to which the employee is entitled under section 11 (*k*) having regard to the remuneration and the period in respect of which it is payable*"*

It also allows a deduction for:

> "at the option of the employer, any contribution to a retirement annuity fund by the employee in respect of which proof of payment has been furnished to the employer, but limited to the deduction to which the employee is entitled under section 11 (*k*) having regard to the remuneration and the period in respect of which it is payable" and

> "any contribution made by the employer to any retirement annuity fund for the benefit of the employee, but limited to the deduction to which the employee is entitled under section 11 (*k*) having regard to the remuneration and the period in respect of which it is payable"

The revised section 11*(k)* allows a deduction for the employee for any amount contributed to a pension fund, provident fund or retirement annuity fund in terms of the rules of that fund but the total deduction may not exceed the lower of:

- 27,5% of the greater of remuneration or taxable income (both excluding lump sums); or
- R350 000.

Importantly, any amount contributed by the employer must, to the extent included in the employee's income as a fringe benefit, be deemed to have been contributed by the employee for purposes of the above deduction. This is however the contribution amount, as opposed to the fringe benefit amount in the case of defined benefit plans.

About PvdZ Consulting (Pty) Ltd

Pieter van der Zwan consults a wide spectrum of clients on tax and IFRS matters through PvdZ Consulting (Pty) Ltd. He qualified as a chartered accountant in 2009, finishing first and second in the respective SAICA and IRBA qualifying exams in the process of qualifying for the designation. He holds a masters degree in taxation from the University of Pretoria and is currently the co-ordinator and presenter of the MCom Tax programme at the North-West University, where he is an associate professor.

PvdZ Consulting (Pty) Ltd provides the following services:

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- Tax opinions and notes;
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- Assistance in drafting correspondence for purposes of objection, appeal or other requests to SARS; and
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Should your company require any of the above services, consider contacting me for high quality advice coupled with personal service.

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