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Without Prejudice

In the 2019 Budget presented by Minister Mboweni before parliament on 20 February 2019, there are a number of changes that are proposed which will ultimately affect business. While there are no increases in the corporate tax rate (28%), capital gains tax rates or value-added tax, it is likely that the introduction of the new tax measures will significantly affect business.

It appears that there is a trend towards widening the scope of the various identified anti-avoidance provisions contained in the applicable tax legislation. Some of the identified abusive behaviour on the part of taxpayers include:

Share buybacks

Taxpayers have been identified as abusing the newly introduced amendments in 2018. These arrangements involve the target company distributing a substantial dividend to its current company shareholder and subsequently issuing shares to a third party. As a result, the value of the current company shareholder's holding in the shares of the target company is diluted but these shares are not immediately sold. The previous amendments introduced the concept of an "extraordinary dividend" in cases where a dividend was declared prior to the sale of the shares. A disposal was thus a pre-requisite for the avoidance provisions to apply. The new amendments, which will take effect on 20 February 2019, will presumably address the time period in which the disposal takes place. It will be interesting to note how long it is stipulated that shares must be held without triggering any anti-avoidance provisions.

Controlled foreign companies

It is proposed that additional measures be introduced to prevent schemes where controlled foreign companies (that are part of a group) are interposed in the supply chain between South African connected parties and independent non-resident customers or suppliers. This proposal seems to follow from the recent decision of the Supreme Court of Appeal case of *Sasol Oil* where there were a complex set of

arrangements between group companies for the back to back sale of crude oil. SARS did not succeed in its contention that there was a simulated transaction, alternatively an abnormal transaction falling foul of the general anti-avoidance provisions, and now appears to be seeking to address the identified legislative shortfall in curbing perceived abusive behaviour.

Debt-funded share acquisitions

Legislative amendments will be introduced to address shareholders claiming special interest deductions for newly established companies. The existing provisions allow for a deduction in relation to the acquisition of shares where specified criteria are satisfied, including that there is a so-called "operating company". It seems that a new company will not be considered to "operate" and any deduction will be limited.

Venture capital companies

Following the substantial legislative changes in 2018, it has been identified that some taxpayers are attempting to undermine other aspects of the regime to benefit from excessive tax deductions. There is no indication of what the further abusive behaviour may be in this regard. It is proposed that the provisions be further reviewed. It will be interesting to note the outcome of this review given that last year the proposals created upheaval in the industry and there were many comments submitted on the draft legislation. The new changes to the law may create further uncertainty, specifically in circumstances where the venture capital company regime has a time horizon of ending on 30 June 2021.

Base Erosion Profit Shifting

In line with international trends, it is stated that it is intended to expand the work already under way to combat base erosion and profit shifting. Presumably this will mean that further consideration will be given to cross-border transaction and the identification of potential abusive behaviour.

Aligned with this is the proposal that the "permanent establishment" definition in the Income Tax Act be reviewed. The definition currently refers to Article 5 of the OECD Model Tax Convention and the question will be how this is to be amended.

Transfer pricing

Government proposes to review the scope of the transfer pricing rules to determine whether the definitions in the Income Tax Act should be changed in line with the OECD definition. It is unclear as to the extent of the review and what will be proposed at this stage but there could be a number of changes introduced.

At this stage the specifics of the amendments to the legislation are unknown but it is clear that the amendment bills which will be published later in the year will contain a number of changes that seek to address what has been identified as abusive behaviour. For taxpayers, the ability to legitimately structure and plan their affairs becomes more difficult and requires knowledge of the ongoing changes that are made to the already extensive tax compliance requirements.

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