

Glacier comments on the proposed deemed withdrawal when tax residency ceases

By Annalise de Meillon Muller, Manager: Distribution & Sales Support at Glacier by Sanlam

A proposal to address the possible forfeit of SA taxing rights, made in the recent Budget Speech, is causing some uncertainty.

The proposal

The new proposal is covered in our lead story in this newsletter, but to recap, this links to the 1 March 2021 commencement of the new rules around access, prior to retirement, to the retirement benefit in a retirement annuity and a preservation fund. SA tax residents can now only access their retirement benefit as a lump sum prior to retirement, when they have ceased being an SA tax resident for a continuous period of three years (excluding the normal one withdrawal allowed in a preservation fund specifically).

Treasury is proposing that the day before a fund member ceases to be tax resident (whether by virtue of the ordinarily resident test or the physical presence test), the member will be deemed to have withdrawn the lump sum at the withdrawal tax tables. The payment of this tax due is, however, deferred until the member receives a payment from the retirement fund.

At the time of the future event, the tax calculation will again be done according to either the withdrawal tax table (withdrawal prior to retirement) or the retirement tax table (retirement from the fund), depending on the nature of the exit event. Any difference between the tax payment on record (that is due) and the amount determined at the time of the current event will be a credit. This means that due tax for the previously deemed withdrawal will be deducted from the total (the total being the due tax at the time of the event plus the outstanding tax deferred). It is further proposed that the final tax due at commutation will be deducted from the benefit before the fund pays it out.

Uncertainty and what we currently know

Firstly, what does this mean for the interest accrued on the outstanding taxes and will the credit

include this interest? In light of the sensitivity and the intention of retirement savings, we can hope that the final wording of the legislation might address the interest component on due taxes directly and in favour of the taxpayer. When the draft Taxation Laws Amendment Bill of 2021 comes out, there is an extensive public commentary process that would allow for the industry to question this aspect specifically.

Secondly, how will the day before ceasing to be a tax resident be determined and what is the expectation of the taxpayer in this regard? Practical guidance to taxpayers and the industry is required around this. SARS recently published a document on their website that confirms the onus is on the taxpayer to let SARS know that they have ceased to be tax resident and provide the retirement fund with proof as well. Evidence could likely include the provision of a residency certificate of a foreign jurisdiction.

What is important

What's important to note is that what was announced is still only a proposal and needs to be legislated before it can take effect. What National Treasury is proposing could still look significantly different when finally legislated. Prior to being legislated, the proposed amendment in the Income Tax Act will also need to be made available for comment to the public. Therefore, a fairly long consultation process will need to be followed.

The 1 March changes, even without the above proposal around a deeming provision on the day before tax residency ceases, already means that for people permanently leaving SA, the playing fields are level between a retirement annuity fund and preservation fund UNLESS the preservation fund member withdraws the full benefit prior to starting the exit from SA process – if there is still one allowable withdrawal available for the particular fund member. If this route is taken, the only difference from a tax perspective is that the due tax on the withdrawal tax table is due immediately without the uncertainty of the interest accruing component discussed above. If this route is no longer available or desirous then there is no difference between the retirement annuity fund and preservation fund access after the commencement of the exit from SA process.

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16 February 2022 – Update: Taxation Laws Amendment Act

In an effort to prevent retirement interests from escaping taxation in South Africa after an individual ceases to be resident, the draft Taxation Laws Amendment Bill (TLAB) had proposed the insertion of a new section in the Income Tax Act 58 of 1962 ('the Income Tax Act'). A natural person would have been deemed to have disposed of (i.e. withdrawn) their retirement fund interest in a pension fund, pension preservation fund, provident fund, provident preservation fund and/or

retirement annuity fund on the day before they cease to be tax resident in South Africa, resulting in a South African tax liability.

Following consultation with the public and industry stakeholders, the proposed tax liability on the deemed disposal of a natural person's retirement interest on the day before they cease to be tax resident in South Africa has been withdrawn by the Taxation Laws Amendment Act, 20 of 2021 ('TLAA'). The TLAA was promulgated on 19 January 2022 and is now law. The proposed section 9HC will be considered in the next legislative cycle in order to address some of the complexities raised during the commentary period.

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Glacier Financial Solutions (Pty) Ltd.

A member of the Sanlam Group

Private Bag X5 | Tyger Valley 7536 | Email client.services@glacier.co.za | Tel +27 21 917 9002 / 0860 452 364 | Fax +27 21 947 9210 | Web www.glacier.co.za | Reg No 1999/025360/07

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Private Bag X8 | Tyger Valley 7536 | Tel +27 21 950 2600 | Fax +27 21 950 2126 | Web www.smmi.com *|*Reg No 2002/030939/07
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Glacier International is a division of Sanlam Life Insurance Limited
Sanlam Life Insurance Ltd. | Email life@sanlam.co.za | Tel + 27 21 916 5000 / 0860 726 526 | Fax +27 21 947 9440
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