

# Legal Report July 2019

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*Newsletter of Sanlam Employee Benefits: Legal*

## 1. Levies on financial institutions (including retirement funds)

The annual levies payable by financial institutions (including retirement funds) for the levy year 1 April 2019 to 31 March 2020 have been published:

### 1.1 Levy on retirement funds

(a) The levy on retirement funds registered in terms of the Pension Funds Act (excluding a retirement annuity fund, pension preservation fund, provident preservation fund and a commercial umbrella fund) is an amount of:

- R1 278.66 plus an additional amount of R15.13 per fund member and in respect of every other person who receives regular periodic payments from the fund (excluding any member or such person, whose benefit in the fund remained unclaimed and beneficiaries), or
- R2 929 859,

whichever total amount is the lesser.

(b) The levy in respect of a commercial umbrella fund, pension preservation fund and provident preservation fund is an amount of R1 278.66, plus an additional amount of R15.13 per member of such fund and in respect of every other person who receives regular periodic payments from such fund (excluding any member or such person, whose benefit in the fund remained unclaimed and beneficiaries).

### 1.2 Levy on fund administrators

The levy in respect of an administrator approved in terms of section 13B of the Pension Funds Act is an amount of R8 162.33, plus an additional amount of R636.31 per retirement fund (as referred to in 1.1 above) under its administration and an amount of R0.77 per member and in respect of every other person who receives regular periodic payments from such fund, but excluding any member or such person, whose benefit in the fund remained unclaimed and beneficiaries.

### **1.3 Levy for Pension Funds Adjudicator**

The levy for the Pension Funds Adjudicator in respect of a retirement fund registered in terms of the Pension Funds Act, including also a pension preservation fund, provident preservation fund, retirement annuity fund and commercial umbrella fund, is an amount of R6.59 per member of such fund and any other person who receives regular periodic payments from such fund, but excluding any member or such person, whose benefit in the fund remained unclaimed.

## **2. Draft Taxation Laws Amendment Bill, 2019 (TLAB)**

### **2.1. Aligning the effective date of tax neutral transfers between retirement funds with the effective date of all retirement reforms**

The compulsory annuitisation requirement for provident funds and provident preservation funds was postponed a number of times over the last few years. When the last postponement (from 1 March 2019 to 1 March 2021) was effected, an oversight occurred in that the provision for tax neutral transfers between all types of retirement funds, and in particular transfers from a pension/pension preservation fund to a provident/provident preservation fund, were not also postponed to 1 March 2021. The draft TLAB proposes that the oversight be rectified with effect from 1 March 2019.

### **2.2. Exemption relating to annuities from a provident or provident preservation fund**

Currently a member's non-deductible contributions to a pension, pension preservation or retirement annuity fund (that have not been off-set against any lump sum received) are allowed as an exemption when determining the taxable portion of annuities provided/purchased by such fund upon retirement. The exemption however does not apply in respect of annuities from a provident or provident preservation fund. The draft TLAB proposes that the exemption be extended to annuities provided/purchased by provident or provident preservation funds. In terms of the draft amendment, the exemption will however apply only if at least two-thirds of the retirement benefit is applied to provide/purchase a pension.

The proposed amendment will apply in relation to annuities received on or after 1 March 2020.

### **2.3. Tax treatment of bulk payments to former members of closed funds**

Paragraph 2C of the Second Schedule to the Income Tax Act provides, among others, that lump sum benefits payable after exit from a retirement fund, and as a result of an event as prescribed by the Minister of Finance, are tax exempt. In 2009 the Minister of Finance published a notice in the Government Gazette prescribing the relevant events. In terms of the notice, extraordinary lump sum payments by a retirement fund resulting from any of the following situations qualify for tax exemption:

- So-called undisclosed secret profits received by an administrator prior to 1 January 2008 and paid to the fund concerned.
- Surplus apportionment (similar to that required in terms of section 15B of the Pension Funds Act) by a fund not required to register in terms of the Pension Funds Act, e.g. a fund established by law.

- Certain unclaimed benefits becoming payable by a preservation fund to which these benefits were transferred.

The explanatory memorandum to the draft TLAB states that when the said notice was published by the Minister of Finance, some retirement funds were no longer registered and the extraordinary lump sum payments are currently still held or controlled by the respective fund administrators. Since the notice makes provision for the extraordinary lump sum payments only if made by registered active retirement funds, the draft TLAB proposes that the exemption will also apply if these extraordinary lump sums are paid by the fund administrator on behalf of a deregistered fund. The amendment will apply from a date to be determined by the Minister of Finance by notice in the Government Gazette.

#### **2.4. Reviewing the tax treatment of surviving spouse pensions**

The explanatory memorandum to the draft TLAB states that if a retirement fund member dies and a spouse's pension becomes payable by the fund to a surviving spouse who also receives a salary or other income, that salary or other income is added to the spouse's pension to determine his or her tax liability on assessment. According to the memorandum, the result of the assessment is often that the surviving spouse has a tax liability that exceeds the employee's tax withheld by the employer and fund concerned during the year of assessment, since the aggregation of income pushes him/her into a higher tax bracket. This creates a cash flow burden for the surviving spouse.

In order to alleviate the financial burden in this regard, the explanatory memorandum to the draft TLAB proposes that the normal tax rebates applicable to such surviving spouse not be taken into account by the retirement fund when calculating the taxes to be withheld on the spouse's pension. Any PAYE excessively withheld will be refunded upon assessment. The proposal will only be applicable in instances where recipients of the spouse's pension also receive other employment income. The explanatory memorandum states that retirement funds would be required to apply for an annual tax directive from SARS - the directive will advise the fund whether or not the fund should be disregarding the tax rebates when calculating the taxes due on amounts paid by it.

Despite the above statements in the explanatory memorandum, the wording of the draft amendment does not refer to a spouse's pension paid by a retirement fund. It appears that in respect of all annuities paid by a fund, normal tax rebates will have to be disregarded when deducting employees' tax, unless SARS "pursuant to an application by that fund and having regard to the circumstances of the case, issues a directive that the amount must not be disregarded".

As the amendment currently reads, it would further seem to apply only to pensions paid by a retirement fund, and not to member-owned pensions paid by a long-term insurer outside the fund. As the financial burden described in the explanatory memorandum could also arise in the case of a spouse's pension outside the fund, there seems to be no clear reason for restricting the amendment to pensions paid directly by a retirement fund. We will have to wait for the final TLAB to see if this aspect will be addressed.

The proposed amendment will come into operation on 1 March 2020.

### **3. Tax directives where a retirement fund lump benefit did not accrue for tax purposes**

In terms of a letter of SARS dated 22 July 2019 an application for a tax directive and submission of a recognition of transfer form (ROT02) are no longer required if:

- A member dies and the full retirement interest is used to provide an annuity (including a living annuity); or
- Upon retirement, a member's full retirement interest is used to provide an annuity (including a living annuity); or
- An annuitant is transferred from one insurer to another in accordance with Directive 135 issued in terms of insurance legislation. Directive 135 refers to a situation where a member owned living annuity provided by one insurer is replaced by a living annuity or life annuity of another insurer.

*Retirement funds or other clients requiring more information should not hesitate to contact their consultant.*