

# Legal Report August 2020

Insurance

Financial Planning

Retirement

Investments

Wealth

*Newsletter of Sanlam Corporate: Legal*

## 1. Draft Taxation Laws Amendment Bill, 2020

The draft Taxation Laws Amendment Bill, 2020 (“draft Bill”) has been published for comment by 31 August 2020. Some of the most important amendments affecting retirement funds are the following (“Act” refers to the Income Tax Act):

### **Annuitisation of retirement benefits from provident funds and provident preservation funds**

*[Applicable provisions: The definitions of the various types of retirement funds in section 1 of the Act]*

All indications are that T-day, i.e. the compulsory annuitisation of at least two-thirds of a retirement benefit from a provident fund or provident preservation fund, is going ahead on 1 March 2021 since the draft Bill does not propose any change to the implementation date (1 March 2021).

Certain changes of a technical nature have been proposed to the so-called “vested rights” provisions in the definitions of the various types of retirement funds in the Act. However the retirement fund industry believes that more changes are required in order to ensure that there will be absolute clarity as to how the T-day provisions must be implemented.

The concept of “vested rights” referred to above entails that a member’s accumulated retirement savings in retirement funds on 1 March 2021 (and growth thereon) that originate from a provident fund or provident preservation fund, will not have to be annuitised upon retirement. For a member of a provident fund or provident preservation fund who is 55 or older on 1 March 2021, contributions made to the provident fund, or transfers made to the provident preservation fund, on or after 1 March 2021 (and growth thereon) can also be taken as a lump sum provided that he/she remains in the provident fund or provident preservation fund of which he/she is a member on 1 March 2021.

### **Postponement: Disregarding tax rebates if pensioner has other source of remuneration**

*[Applicable provision: Paragraph 2B of the Fourth Schedule to the Act]*

Paragraph 2B briefly entails that, if a taxpayer receives remuneration from more than one source (including a pension from a retirement fund or insurer), the tax rebates applicable to the taxpayer are not to be taken into account by the retirement fund or insurer when calculating the taxes to be withheld on the pension. Any pay-as-you-earn (PAYE) excessively withheld will be refunded by SARS upon assessment.

The draft Bill proposes that the implementation of paragraph 2B be postponed from 1 March 2021 until 1 March 2022.

### **Clarifying deductions in respect of contributions to retirement funds**

*[Applicable provisions: Paragraph 5(1)(a) and 6(1)(b)(i) of the Second Schedule to the Act]*

Paragraphs 5(1)(a) and 6(1)(b)(i) of the Second Schedule to the Act make provision for a deduction of retirement fund contributions that did not qualify for a deduction in terms of section 11F of the Act, when calculating the amount of lump sum benefits to be included in the member's gross income. These paragraphs refer to "own contributions", which inadvertently prevents employer contributions to a retirement fund on behalf of employees (made on or after 1 March 2016) from qualifying for a deduction under either paragraph. It is proposed that the Act be amended to remove this anomaly, by replacing the reference to "a person's own contributions" with a reference to "any contributions". The effective date for the proposed amendments is 1 March 2016, which aligns with the effective date of section 11F.

### **Withdrawing retirement funds upon emigration**

*[Applicable provisions: The definitions of "Pension Preservation Fund", "Provident Preservation Fund" and "Retirement Annuity Fund" in section 1 of the Act]*

Currently, the definitions of "pension preservation fund", "provident preservation fund" and "retirement annuity fund" in section 1 of the Act make provision for payment of lump sum benefits when a member of any of these funds withdraws from the fund due to him/her emigrating from South Africa, on condition that such emigration is recognised by the South African Reserve Bank for exchange control purposes.

As stated in the 2020 Budget Review, the government will be modernising the foreign exchange control system and one of the changes will be the phasing out of the concept of emigration for exchange control purposes. The draft Bill proposes that the definitions of the aforesaid funds be amended to replace the requirement that the emigration must be recognised by the Reserve Bank for exchange control purposes with a new test. The proposed new test will allow payment of lump sum benefits when a member ceases to be a South African tax resident (as defined in the Act), and such member has remained non-tax resident for at least three consecutive years. The proposed implementation date of these amendments is 1 March 2021.

Sanlam has provided comments on the draft Bill via industry bodies.

## **2. FSCA Communication 47 of 2020 (RF)**

The purpose of Communication 47 of 2020 which was issued on 21 August 2020 is to provide further clarification in respect of conflicts of interest relating to principal officers of retirement funds who are also in the employ of service providers to the fund, and to extend the period for compliance with Directive 8 in this regard.

In FSCA Communication 7 of 2019 (PFA) which was issued during December 2019, the FSCA, relying on paragraph 4.1(a) of Directive PF No. 8, stated that the simultaneous employment of a principal officer of a fund by a service provider to the fund is impermissible. Paragraph 4.1(a) of the Directive provides that any gratification which, objectively viewed, creates a conflict of interest with the fiduciary duty of a person towards the fund, is automatically prohibited. A gratification is defined in the Directive as including "any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity". Communication 7 of 2019 stated that a principal officer owes fiduciary duties to the fund and therefore the FSCA is of the view that the simultaneous employment of the principal officer by a service provider to the fund is not permissible.

In Communication 47 of 2020 the FSCA states that "the legal validity of Directive 8 has been called into question by a few entities and individuals, insofar as it accords fiduciary duties to principal officers, and in that it precludes principal officers from being in the employ of sponsors and/or service providers to funds". The FSCA has obtained legal advice from senior counsel regarding the legality of Directive 8, including whether principal officers owe fiduciary duties to the funds they serve and whether they may be remunerated by the service providers to the funds. The FSCA says that the legal advice it obtained confirms its views that a principal officer owes a fiduciary duty to a

fund and may not simultaneously be in the employ of a service provider to the fund as this constitutes a conflict of interest.

Note should be taken of paragraphs 4.1 and 4.2 of Communication 47 of 2020, which provide as follows:

*“4.1 In order to afford all funds the opportunity to regularise the appointment of an independent principal officer, the Authority hereby grants funds and relevant parties an extension until 28 February 2021 within which to regularise the appointment of an independent principal officer, subject to the conclusion of an Enforceable Undertaking in this regard. In instances where there is no co-operation, or no agreement can be reached, the Authority will be obliged to take the necessary regulatory action.*

*4.2 Funds and principal officers that are aware that they are or might be in breach of Directive 8 must approach the Authority as soon as possible if they have not yet been approached.”*

### **3. Levies on financial institutions**

The annual levies payable by financial institutions (including retirement funds) for the levy year 1 April 2020 to 31 March 2021 have been published in Notice 443 of 2020 and, compared to the levies for the previous levy year, have been increased by 3%.

The levies which are relevant for the pension/provident fund industry are as follows:

#### **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 317.02 plus an additional amount of R15.58 per fund member and in respect of every other person who receives regular periodic payments from the fund (excluding any member or person whose benefit in the fund remained unclaimed and beneficiaries of death benefits), or
  - R3 017 755,

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 317.02, plus an additional amount of R15.58 per member of such fund and in respect of every other person who receives regular periodic payments from the fund (excluding any member or person whose benefit in the fund remained unclaimed and beneficiaries of death benefits).

#### **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 407.20, plus an additional amount of R655.40 per retirement fund under its administration and an amount of R0.79 per member and in respect of every other person who receives regular periodic payments from the fund, but excluding any member or person whose benefit in the fund remained unclaimed and beneficiaries of death benefits.

#### **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 R6.79 per member of such

fund and any person who receives regular periodic payments from the fund, but excluding any member or person whose benefit in the fund remained unclaimed.

#### **4. OPFA Communication 2 of 2020: Internal dispute resolution procedures**

The Office of the Pension Funds Adjudicator (“OPFA”) has recently published OPFA Communication 2 of 2020 on its website, which sets out their position regarding the internal dispute resolution process that will be given effect to from 1 September 2020. The Communication states that the OPFA often receives complaints which have not first been lodged with the retirement fund or administrator concerned in order to allow the fund or administrator an opportunity to attempt to resolve the matter internally before requiring the OPFA to investigate the complaint. Sanlam has always been of the view that section 30A of the Pension Funds Act requires that a complaint must first be lodged with the fund concerned.

The OPFA Communication states, *“Having due regard to representations that have been made to the OPFA regarding the interpretation of section 30A(1) and (2) of the Act, as well as the principles that financial institutions must abide by in relation to their obligations to treat customers fairly, the OPFA has formed the view that it would be in the best interests of all stakeholders, especially members of retirement funds, that the retirement fund concerned be given the opportunity to resolve the complaint directly with the complainant. In the event that the complaint is not resolved to the satisfaction of the complainant within a period of 30 days, the complainant may register a complaint with the OPFA.”*

In future, complaints to the OPFA will only be investigated after the retirement fund concerned has been given the opportunity to resolve the complaint directly with the complainant. If the complaint has not first been lodged with the retirement fund or administrator concerned, the OPFA will submit the complaint to the fund or administrator for resolution. The OPFA must be informed that the complaint has been resolved to the satisfaction of the complainant within a period of 30 days, failing which the OPFA will actively seek such confirmation and if no such confirmation is forthcoming, the complaint will be investigated by the OPFA without the need for the complainant to relog the complaint.

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