

SUBMISSION TO THE FINANCE STANDING COMMITTEE

Comments on the publication of the initial batch of the draft Taxation Laws Amendment Bill 2019

21 June 2019

The Alternative Information and Development Centre (AIDC) notes with interest the release of the initial batch of the draft Taxation Laws Amendment Bill (TLAB) 2019 in anticipation of the publication of the full text in July. As an organisation striving towards a wage-led development path, we are concerned with the decreasing share of value added (GDP) that goes to workers in the form of remuneration, and corporate profit shifting arrangements, both contributing to the erosion of the South African tax base. Consequently, we are concerned with forfeited investment in social goods and services from lost tax revenue.

This submission is one of several that AIDC has made to the Finance Standing Committee. And, that is part of our broader work around tackling tax and wage evasion¹. Consequently, in this commentary, we address the amendments released to the public on 10 June 2019 by the National Treasury. In particular, we pay specific attention to the amendment which attempts to address abusive arrangements aimed at avoiding the anti-dividend stripping provisions, as that is of direct interest to AIDC.

Section 22B and Paragraph 43A anti-dividend stripping amendment

Dividend stripping has been enabled by the disposal requirement in s22(2) of the Income Tax Act because it provides a restructuring opportunity for companies; therefore enabling them to devise schemes where the shares are retained for at least 18 months before the shares are disposed for a nominal consideration². In this regard, we welcome that this has come to the attention of the National Treasury.

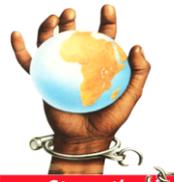
We wish to state that the substitutions proposed as amendments in s22(2) and paragraph 43A respectively tighten the anti-avoidance provisions in the existing legislation. We particularly welcome the addition of subsection (3A) to subsection (3) of section 22B and the addition of subparagraph (3A) to paragraph 43A of the Eight Schedule. Our comment in this respect would be to caution against overly complex and complicated pieces of legislation which might have unintended effects.

¹ See our investigation into Lonmin following the 2012 massacre, which highlights the concept of wage evasion by illustrating that the company was in a financial position to pay a living wage of R12 500

<http://aidc.org.za/download/Illicit-capital-flows/BermudaLonmin04low.pdf>

² As pointed out in the Tax and Exchange Control of the below law firm after the 2019 Budget Speech

<https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2019/Tax/downloads/Special-Edition-Budget-Speech-Alert-2019-20-February-2019.pdf>



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Furthermore, whilst acknowledging the positive steps, our contention lies with the more structural parts contained in s22B, and thus the need for deeper reforms.

Therefore, in addition to our standing position that South Africa needs a General Anti-Avoidance Tax Act (GAATA) which we reiterate in the concluding comment of this submission, we set out four specific points in relation to the initial batch of draft Taxation Laws Amendment Bill 2019 on dividend stripping:

1. First, we think that the 18-month window incentivises abusive arrangements since in essence companies only need to defer disposal transactions over one financial year (leaving six months into the second financial period). In that regard, the disposal period in relation to which exempt dividends are received ought to be amended to *at least 24 months* to discourage the abuse of this anti-avoidance rule as two financial periods/years would need to lapse first.
2. Second, the scope of extra-ordinary dividends as defined, ought to be expanded. Whilst the idea behind “extra-ordinary dividends” serves as useful indicator to identify a dividend stripping arrangement by using a 15% threshold above the market value of the shares, we think that this measurement is insufficient in so far as it determines the amount included into the taxpayer’s income. This is particularly important considering the fact that taxpayers involved in this avoidance arrangement sought to avoid the full tax consequences arising from the disposal of shares. For instance, the capital gains tax inclusion into taxable income is set at 80% of the capital gains. Therefore, we are of the view that companies engaged in dividend stripping must have included into their income, more or less, the same amount that would have been included from the disposal of shares had a dividend not been declared prior to the disposal of the shares.
3. As a general rule, we think that there must be established criteria in the legislation which sets out and aims to identify bona fide corporate restructuring; especially when the restructuring defers taxes which would have otherwise been collected, such as capital gains tax on share disposals. This is important as the deferral does not necessarily lead to tax collection in the long run due to increased risk of eroding the tax base.
4. Therefore, we also call on this set of amendments to be conducted closely with the aims of the corporate rules in section 42-47 of the Income Tax Act, as these rules also provide legal loopholes for companies to engage in tax-avoidance schemes.

The need for a General Anti-Avoidance Tax Act (GAATA)

As the Finance Standing Committee knows, Section 80 in the Tax Income Act is supposed to deal effectively with all forms of tax avoidance. As far as we are aware, it has never led to any prosecution. The idea that any transaction or arrangement that has “tax avoidance as its sole or main purpose” (the definition of an impermissible tax avoidance arrangement in section 80A) must fail to achieve its anti-social purpose as set out in section 80B of the Act, should also apply to dividend stripping. That this rule is never used by the authorities points to the need for a separate General Anti-Avoidance Tax Act (GAATA). Perhaps this would spare lawmakers from constantly changing the complicated legislation, only to see corporations finding new ways to defeat the purpose of those changes.