

# asap

Legal and Technical Update

January 2016 ASAP 1

## Taxation Laws Amendment Act

(version 1.2)

The Act was promulgated on 8 January 2016.

This document summarises all the significant amendments as it relates to retirement funds and estate planning. A separate document will be circulated shortly with a more in depth discussion of the retirement fund changes that are being introduced.

## Estate Duty Act Amendment

1 January 2016

Section 3(2)(bA) is introduced to the Estate Duty Act. This section will provide for a new inclusion in the gross estate value when determining the dutiable estate.

Where a person dies after 1 January 2016, **any contributions made** by that person **to any retirement fund** (pension, provident and retirement annuity fund) on or after 1 March 2015, that:

- did not qualify as a tax deduction under sections 11(n) or (k), or
- was not applied as an exemption under section 10C of the Income Tax Act, or
- was not deducted from a taxable lump sum in terms of paragraph 2 of the Second Schedule to the Income Tax Act, shall be included in the gross estate.

The aim of this amendment is to prevent taxpayers from using retirement funds to avoid the payment of estate duty.

Since retirement funds have been excluded from the dutiable estate of a deceased person, taxpayers made large contributions to retirement annuity funds with the main objective to avoid the payment of estate duty.

As the contributions were excessively large, it would not have qualified as tax deductions during the lifetime of the taxpayer.

Upon the death of the member the beneficiaries would be entitled to receive a lump sum or an annuity or both. When electing a lump sum, it would be taxed in the hands of the deceased resulting in the previously disallowed contributions being paid out tax-free.

Therefore the beneficiary would receive a large lump sum amount free from estate duty and income tax due to this loophole.

### Note:

- The date of death is the trigger – so where a client died after 1 March 2015 but before 1 January 2016, this amendment would not be relevant to them. If however the client dies on or after 1 January 2016, all contributions made on or after 1 March 2015 will be impacted by this amendment.

## Access to retirement annuity funds prior to retirement where the member is a foreign national

1 March 2016

The definition of a retirement annuity will be amended, with effect from 1 March 2016 allow access to the funds prior to retirement for foreign nationals or non-residents.

At the moment only persons that formally emigrate (recognised and processed via the SA Reserve Bank) can access their retirement annuity fund as a lump sum, prior to retirement (income tax is paid based on the withdrawal tax table).

This provision is amended with effect from 1 March 2016. The amended paragraph provides for the following:

A member will have full access to the retirement annuity fund prior to retirement, if:

- The member ceases to be a resident (tax resident), or
- The member departs from SA at the expiry of a working visa or a visitation visa as contemplated in the definition of a visa in the Immigration Act.

The administrative requirements will be communicated once provided by Treasury and SARS.

### **Taxation of deceased estates** **1 January 2016**

Section 25 of the Income Tax is amended to bring the income tax rules applicable to deceased estates in line with the capital gains tax rules.

Prior to the amendment, the estate functioned like a conduit in that most of the income received or expenses incurred were attributed to the ascertained heirs or legatees.

However, this is in conflict with the general principle that a person can only be taxed on income or claim expenses incurred by that person. The capital gains tax rules is based on the premise that all assets of the deceased, are disposed of by the deceased in favour of his/her deceased estate upon death.

The result of the change will be that all income earned by the estate will be subject to income tax in the estate with similar roll-over relief when passed on to an heir or legatee as is applicable to capital gains tax.

### **Retirement fund amendments** **1 March 2016**

The suggested amendments in respect of the contributions made to retirement funds were placed on hold last year until 1 March 2016.

This Amendment Act has confirmed the implementation date of 1 March 2016.

### **Employer contributions to pension and provident funds**

Contributions made by an employer to an employee's retirement fund will be tax deductible under section 11(l) for that employer. No limitation will apply.

### **Employee retirement fund contributions**

All contributions made to a retirement fund by an employer on behalf of an employee will be included in the employee's gross income in terms of paragraph 2(l) of the Seventh Schedule as a fringe benefit and is therefore taxable.

In terms of the section 11(k), individual taxpayers will be entitled to deduct all contributions made to all retirement funds – including pension, provident and retirement annuity funds, and including those contributions made by the employer on their behalf and taxed as fringe benefits in their hands.

The taxpayer will be entitled to a tax deduction equal to 27.5% of the greater of:

- Remuneration, or
- Taxable income (which is restricted to taxable income from trade only – therefore excluding passive income).

An overall annual monetary cap of R350 000 applies.

All contributions that were not deductible due to it being in excess of the above limits, will be carried over to the following tax year and will be deductible as if it was made in that following year (still limited to the abovementioned limitations).

### **Provident fund annuitisation** **(also provident preservation fund)**

#### **Note:**

- The rules relating to access upon **resignation and retrenchment** will remain unchanged – therefore full access is possible upon resignation and retrenchment.



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At retirement, lump sum access will be limited to 1/3 and the remaining 2/3 must be applied to provide for a monthly pension (similar to pension and retirement annuity funds).

The annuitisation requirement will not apply in respect of a member's vested right in the provident fund as at 1 March 2016, including the future growth on that amount. Therefore the fund value in the provident fund as at 1 March 2016 will not be affected by this change at all. The annuitisation will only apply in respect of new contributions made after 1 March 2016 and the growth on this that accrues after 1 March 2016.

The vested right will remain protected against the annuitisation rule even if it is transferred to another provident, provident preservation fund, pension, pension preservation or retirement annuity fund.

The annuitisation requirement will also not apply if the member of the provident fund is older than 55 years of age as at the effective date and he/she remains a member of the same fund until retirement. Thus, even new contributions will be protected and the old rules will apply in respect of that member's fund. The only deductions that can be made are in respect of allowable fees and charges and also in respect of allowable deductions in terms of the Pension Fund Act.

Where a provident fund member is over 55 years of age and that member transfers the provident fund benefits to another approved fund (pension, provident, preservation or retirement annuity fund), the vested right upon date of transfer will be protected, including the growth. Any future contributions and growth will not be protected against annuitisation.

For example, if a member is 55 years of age on 1 March 2016 and is a member of a provident fund and that member transfers the fund value from that provident fund to another approved

fund on 1 March 2017, the value up until 1 March 2017 will be protected (including growth on that value). Only new contributions and the growth on the contributions made after that date will be subject to the new annuitisation rules.

### Portability between retirement funds

Due to the changes to the provident funds, as discussed above, a natural outflow is that transfers from pension and pension preservation funds to provident and provident preservation funds will be possible.

### Increase of the *de minimis* rule at retirement

Where a member's fund value in a pension fund, pension preservation fund or retirement annuity fund on retirement is R247 500 (currently R75 000) or below, the full benefit will be accessible as a cash lump sum.

Where the non-vested portion of a provident fund or provident preservation fund retirement benefit is R247 500 or less (i.e. the portion that is required to be annuitized), this benefit can be taken as a lump sum.

The lumps sum will be taxed according to the retirement tax table.

### Note:

- The minimum amount applies per registered fund.
- The minimum amount will not automatically apply to **living annuities** as the living annuity definition in the Income Tax Act does not set out the actual amount, but refers to an amount determined by the Minister of Finance as published in the Government Gazette. Therefore, for the *de minimis* rule to apply to living annuities, the publication will first have to take place. We will keep you informed of any developments in this regard.