One tax rate today, tomorrow another?

By Louis Botha and Heinrich Louw

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Since the first version of the Draft Taxation Laws Amendment Bill, 2016 (First Draft TLAB) and the Explanatory Memorandum thereto (Memorandum) were released on 8 July 2016, the proposed amendments applicable to trusts and employee share schemes received most of the attention.

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However, another proposed amendment with potentially far-reaching consequences that has received little attention since the release of the First Draft TLAB is one which could lead to a taxpayer paying tax at one rate today and another rate tomorrow, as and when the Minister of Finance (Minister) says so.

The proposed amendment

In terms of the First Draft TLAB, it was proposed that the Minister would have the power to amend the tax rates applicable in terms of various pieces of legislation, simply by announcing the amendment in the annual national budget speech. Furthermore, this amended rate would come into effect from the date announced by the Minister in the budget speech and will continue to apply for a period of 12 months from that date, unless Parliament passes legislation giving effect to that announcement within that 12-month period.

A similar amendment was already made to the Transfer Duty Act, No 40 of 1949, but was now proposed with respect to the following pieces of legislation:

- Income Tax Act, No 58 of 1962;
- Estate Duty Act, No 45 of 1955;
- Value-Added Tax Act, No 89 of 1991 (VAT Act);
- Skills Development Levies Act, No 9 of 1999 (SDL Act);
- Securities Transfer Tax Act, No 25 of 2007;
- Unemployment Insurance Contributions Act, No 4 of 2002 (UIC Act); and
- Mineral and Petroleum Resources Royalty Act, No 28 of 2008.

Issues raised and National Treasury's response

An obvious shortcoming of the proposal in the First Draft TLAB which was raised during public hearings, as highlighted in the Draft Response Document from National Treasury and SARS (Response Document), was that the provision constituted a delegation by Parliament of its legislative power to the Minister. In terms of s77 of the Constitution of the Republic of South Africa, 1996 (Constitution), a money bill is required to be passed by Parliament.

In the Response Document, the problem was acknowledged and it was indicated that the proposed provisions would be amended to bring them in line with the Constitution. The wording of the charging provisions was amended and the provisions in the second version of the Draft Taxation Laws Amendment Bill, 2016 state that the rate changes announced by the Minister may be applied from the date announced subject to Parliament passing the relevant legislation giving effect to that rate change within 12 months of the announced effective date.

Comment

The implementation of the proposed amendments to the abovementioned legislation in its current form, could lead to a number of practical problems for taxpayers. An amendment in the rate of VAT in terms of s7 of the VAT Act, is one example that illustrates the problems that could arise.

In terms of s27 of the VAT Act, VAT vendors must submit VAT returns every month, every second month, every six months or every twelve months depending on the category in which they fall. In terms of s28, a VAT vendor must submit its VAT return within 25 days after the end of the relevant period.

Currently, s7 of the VAT Act expressly states that VAT vendors must account for VAT at the rate of 14% on the value of the supply. If the Minister were to announce in the 2017 budget speech on 28 February 2017 (a hypothetical date) that the VAT rate will increase to 15% from 1 April 2017, Parliament will have to pass legislation to this effect within 12 months of 28 February 2017.

If the legislation is not passed in time in accordance with s77 of the Constitution, VAT vendors will in theory be entitled to refunds on the basis that they should have levied VAT at the rate of 14% during this period instead of at the rate of 15%. The challenges that taxpayers have faced in obtaining their refunds from SARS, has been widely reported on recently. Similar problems could arise if the rates in terms of the SDL Act and UIC Act were amended and the necessary legislation is not passed in time, considering that payments in terms of this legislation must be paid by employers on a monthly basis.

Furthermore, the retrospective application of the legislation may also be open to constitutional challenge. In terms of s77(3) of the Constitution, all money bills must be considered in accordance with the procedure established by s75 of the Constitution and an act of Parliament must provide for a procedure to amend money bills before Parliament. The Money Bill Amendment Procedure and Related Matters Act, No 9 of 2009 (Money Bill Act) was passed by Parliament in this regard.

Section 11 of the Money Bill Act states that a revenue bill, being one which amends tax rates, among other things, must be referred to the National Council of Provinces, as stipulated in s75 of the Constitution. Neither s75 and s77 of the Constitution, nor the provisions of the Money Bill Act allow for implementation of legislation prior to the process in terms of these sections being followed.

The consequences of not complying with the constitutional provisions regarding the enactment of legislation could be far-reaching and could even lead to the entire legislation being declared invalid as was the case in *Tongoane and Others v Minister for Agriculture and Land Affairs and Others 2010, where the Communal Land Rights Act, No 11 of 2004 was declared invalid by the Constitutional Court as the incorrect procedure had been followed in enacting the legislation.*

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