KEY *Notes*

EDITION 1, FEBRUARY 2019

TAX ADMINISTRATION LAWS AMENDMENT ACT, NO. 22 OF 2018

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The Tax Administration Laws Amendment Act, No. 22 of 2018 (“*TALAA 2018*”) and the Taxation Laws Amendment Act, No. 23 of 2018 (“*TLAA 2018*”) were signed into law and published in the Government Gazette on 17 January 2019. The promulgation of these Amendment Acts follows a period of public comment and consultation which started in July 2018.

The *TALAA 2018* and *TLAA 2018* cover a multitude of complex tax related amendments, primarily of a technical or administrative nature. Our focus in this edition of KeyNotes is on those amendments which may be of relevance or interest to our retirement fund clients.

HARMONISATION OF ANNUITISATION PROVISIONS APPLICABLE TO PENSION AND PROVIDENT FUNDS

The legislation to harmonise the annuitisation provisions applicable to pension and provident funds have again been deferred. The effective date of implementation (previously 1 March 2019) has been moved back by another two years, i.e. to 1 March 2021, pending further consultation with NEDLAC. The *TLAA 2018* adds yet another deadline for the Minister of Finance to table a report on the issue in the National Assembly by no later than 31 August 2020.

TAX TREATMENT OF TRANSFERS TO PENSION PRESERVATION OR PROVIDENT PRESERVATION FUNDS AFTER REACHING NORMAL RETIREMENT AGE BUT BEFORE RETIREMENT DATE

Prior to 1 March 2018, members retiring from a pension or provident fund had the option to elect that all or part of their benefit be commuted for cash (subject to legislated maxima), with the balance being paid as a pension (either from the fund or purchased from a registered insurer, subject to the rules of each fund). Changes were made to the Income Tax Act, 1958 (“*ITA*”) with effect from 1 March 2018 to allow members of pension and provident funds, on retirement from employment, to transfer their benefits into a retirement annuity fund on or after reaching normal retirement age ***(Note)***.

This option allowed members to preserve their retirement benefits until such time as they wished to commence receipt of a pension. At that stage, transfers to preservation funds on retirement were not allowed.

Note: "*Normal retirement age*", as defined in the *ITA*, does not have the meaning generally assigned to it in retirement fund rules. In respect of a member of a pension or provident fund the normal retirement age is defined as "*the date on which the member becomes entitled to retire from employment for reasons other than sickness, accident, injury or incapacity through infirmity of mind or body*" or "*the date on which that member becomes permanently incapable of carrying on his or her occupation due to sickness, accident, injury or incapacity through infirmity of mind or body*". As such, the normal retirement age (in the above context) is the age at which a member may, for any reason, retire from the service of their employer (in terms of the rules of the fund).

The TLAA 2018 has amended the ITA effective 1 March 2019 to allow for transfers (subject to the rules of each fund), as follows after a member retires from service:

- From a pension fund to a pension preservation fund; and
- From a provident fund to a provident preservation fund.

National Treasury has indicated that the intention of the above amendments was to increase the choices available to retirees, where such individuals have retired from service but have decided to defer their retirement.

National Treasury is cognisant of the potential of unintended consequences (leakage from the retirement system) as a result of the above amendments. As such, the *TLAA 2018* specifies that the single allowable withdrawal generally applicable to withdrawal amounts transferred into preservation funds will not apply to retirement amounts transferred from a pension or provident fund. The member must retire from the preservation fund to receive his or her benefits.

Our thoughts: In our view, it is the responsibility of the Boards of preservation funds to ensure that rules and appropriate checks and balances are in place to ensure that withdrawals are not permitted. It cannot fall to the Boards of occupational pension and provident funds (from which members transfer) to ensure that each preservation fund to which a member may elect to transfer after retirement will comply with the requirements of the ITA.

Members may be better served (in terms of lower administration and investment fees and no commissions payable) to become deferred retirees in their retirement fund, if the rules of the fund permit this.

As a result of the fact that the harmonisation of annuitisation provisions applicable to pension and provident funds has yet to be implemented, transfers from pension funds to provident preservation funds or from retirement annuity funds to pension, provident or preservation funds is still not permitted by tax legislation.

TAX TREATMENT OF TRANSFERS OF ACTUARIAL SURPLUS BETWEEN AND WITHIN RETIREMENT FUNDS

Previous changes to the ITA, effective 1 March 2017, resulted in the unintended consequence of creating a taxable fringe benefit (in the hands of members) in respect of any transfers of actuarial surplus (in an employer surplus account) between or within retirement funds (which transfers were for the benefit of members).

Example: As an example, a benefit enhancement to a group of members (or all members) funded out of an employer surplus account would, technically, have resulted in a taxable fringe benefit in the hands of these members. This is clearly problematic in general, but more pronounced where the sum of the enhancement and ordinary contributions would have resulted in total contributions exceeding the maximum tax deductible amount (namely the lesser of R350 000 and 27.5% of the greater of a member's taxable income and remuneration). In such cases, a member may have had to pay tax on a benefit completely unrelated to current remuneration.

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National Treasury has confirmed that the above was not in line with legislative intent and the *TLAA 2018* therefore amends the ITA retrospectively to 1 March 2017 to remove the anomaly. As such, with effect from 1 March 2017, the following transfers or allocations from an employer surplus account will not result in a taxable fringe benefit in the hands of members:

- Allocations in terms of Section 15E(1)(b) of the Pension Funds Act, 1956 ("*PFA*"), i.e. the payment of pensions, or an increase in pensions in course of payment, so as to compensate members for the loss of any subsidy from the employer of their medical costs after retirement;
- Allocations in terms of Section 15E(1)(d) of the PFA, i.e. improving the benefits payable to all members, or a category of members; and
- Transfers in terms of Section 15E(1)(e) of the PFA, i.e. transferring part, or all, of the employer surplus account to the employer surplus account in another fund.

Our thoughts: Where members have been negatively affected by the application of the provisions of the ITA as it previously stood, employers should obtain tax and / or legal advice to recover any overpaid tax or to assist employees and former employees in recovering any overpaid tax.

Alignment of Tax Treatment of Withdrawals from Preservation Funds upon Emigration or Repatriation on Expiry of Work Visa

Prior to the *TLAA 2018*, the ITA only allowed members of retirement annuity funds the option to access and withdraw the full value of their post-tax retirement benefits upon emigration or repatriation on expiry of a work visa. Members of pension preservation or provident preservation funds were, however, restricted from doing so.

In order to promote a uniform approach on the tax treatment of all retirement funds, the *TLAA 2018* has amended the ITA to align the treatment of post-tax benefits from "preservation" vehicles. As such, the definitions of *preservation pension fund* and *preservation provident fund* have, with effect from 1 March 2019, been amended to make provision for members of such funds to be entitled to withdraw their full lump sum benefit, subject to taxation thereon, when they emigrate from South Africa (and such emigration is recognised by the South African Reserve Bank for the purposes of exchange control) or upon repatriation on expiry of their work visas.

Housekeeping

New definitions with effect from 1 April 2018 which may require amendments to fund rules:

- ***"Financial Sector Conduct Authority"*** as a result of the replacement of the Financial Services Board with the Financial Sector Conduct Authority in terms of the Financial Sector Regulation Act, 2017. Some of the functions of the Financial Services Board have been transferred to the South African Reserve Bank.
- ***"Financial Sector Regulation Act"*** as a result of promulgation of this Act with effect from 1 April 2018.

The definition of ***"Financial Services Board"*** was deleted with effect from 1 April 2018, as a consequence of the above. The formal posts of "Registrar" and "Chief Actuary" no longer exist at the regulator.

If you have any questions or would like more information on how the above may affect your retirement fund, please contact your Keystone consultant directly.

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Our consulting actuaries share a common vision that independent, focussed consulting advice, provided by an experienced team, will result in better outcomes for retirement fund members and pensioners.

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