



OFFICE OF THE CHIEF EXECUTIVE OFFICER

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Via e-mail Huntly.Pringle@treasury.gov.za ; Felicitas.Mogase@treasury.gov.za

Office of the Director General
National Treasury

Dear Mr Fuzile

SECTION 12E(4)(A) OF THE INCOME TAX ACT 58 OF 1962

The Law Society of South Africa (LSSA) represents more than 24 000 practising attorneys and almost 6 000 candidate attorneys countrywide. It is the umbrella body of the attorneys' profession in South Africa and its constituent members are the Black Lawyers Association (BLA), the National Association of Democratic Lawyers (NADEL) and the four statutory provincial law societies, namely the Cape Law Society (CLS), the KwaZulu-Natal Law Society (KSNLS), the Law Society of the Northern Provinces (LSNP) and the Law Society of the Free State (FSLs).

We would be grateful if you would consider the following submission, on behalf of attorneys, in relation to section 12E(4)(a) of the Income Tax Act 58 of 1962 ("Act").

1. Definition of "small business corporation"

- 1.1. The definition of "small business corporation" in section 12E(4)(a) of the Act is fundamental to the special income tax dispensation for small business corporations. Companies qualifying as small business corporations may be eligible for certain upfront capital allowances and may also be subject to income tax at a reduced rate.
- 1.2. Subject to the further provisions of section 12E(4)(a)(i) to (iii), "small business corporation" is defined for purposes of section 12E as –

The Law Society of South Africa brings together the Black Lawyers Association, the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces and the National Association of Democratic Lawyers in representing the attorneys' profession in South Africa.

"any close corporation or co-operative or any private company as defined in section 1 of the Companies Act if at all times during the year of assessment all the holders of shares in that company, co—operative or close corporation are natural persons" (our emphasis)

- 1.3. In terms of section 1 of the Act, "Companies Act" means the Companies Act, 71 of 2008 ("2008 Companies Act"). Prior to amendment by section 23 of Act 7 of 2010 however, the definition of "small business corporation" referred to a "*private company in terms of the Companies Act 1973 (Act 61 of 1973*" ("1973 Companies Act").

2. Personal liability companies under the 2008 Companies Act

- 2.1. The introduction of the 2008 Companies Act brought about significant changes in South African company law. Most relevantly, it introduced a new classification of companies, including express provision for a "personal liability company" being, in terms of section 8(2)(c), a profit company which meets the criteria for a private company and the memorandum of incorporation of which states that it is a personal liability company. (our emphasis)

- 2.2. The classification system is however based on the distinction between profit and non-profit companies and the definition of "private company" in section 1 of the 2008 Companies Act is therefore –

"a profit company that –

(a) is not a public, personal liability or state-owned company; and

(b) satisfies the criteria set out in section 8(2)(b)" (our emphasis)

- 2.3. The criteria in section 8(2)(b) concern the transferability of the company's securities and the prohibition against offering such securities to the public. As mentioned above, a personal liability company must meet these same criteria. In terms of the above definition however a personal liability company does not qualify as a private company under the 2008 Companies Act.

3. Impact on personal liability companies

- 3.1. The attorneys' profession is regulated *inter alia* by the Attorneys Act 53 of 1979 (Attorneys Act). Prior to May 2015, section 23 of the Attorneys Act permitted the carrying on of an attorneys' practice by a company, provided *inter alia* that the company was incorporated and registered as a private company in terms of the 1973 Companies Act and that the memorandum of

association of the company provided for the personal liability of its directors. An attorney or firm of attorneys which carried on business as a personal liability company was therefore able to qualify as a small business corporation in terms of section 12E on the basis that it constituted a private company.

- 3.2. Section 23 of the Attorneys Act was subsequently amended to replace the references to a private company providing for personal liability in terms of its articles of association with references to a personal liability company as contemplated in the 2008 Companies Act.
- 3.3. However, on the basis that section 12E(4)(a) of the Act, as amended by Act 7 of 2010 refers to a private company as defined in the 2008 Companies Act, from the deemed commencement date of such amendment (i.e. 1 January 2009), a firm of attorneys which had previously qualified as a small business corporation, could no longer do so.
- 3.4. It is our understanding that the amendment of section 12E(4)(a) of the Act may have had a similar impact on other professions which permit their members to carry on a practice through personal liability companies.
- 3.5. It is submitted that it could not have been the intention of the legislature to exclude personal liability companies from the special income tax dispensation for small business corporations, since section 12E expressly provides for the inclusion of qualifying small business corporations which derive income from the rendering of a "personal service" (defined in relation to a company, co-operative or close corporation as any service *inter alia* in the field of law).
- 3.6. Furthermore we understand, on the basis of submissions from our members, that it has until recently, and subsequent to the commencement of the amended section 12E(4)(a), been the practice of the South African Revenue Service (SARS) to assess personal liability companies carrying on attorneys practices on the basis that they may qualify as small business corporations.

4. Proposal

- 4.1. In order to address what in our view was an inadvertent exclusion of personal liability companies from the definition of "small business corporation", we propose that section 12E be amended by the insertion of the words "*or personal liability company*" following the words "*or any private company*" in the definition of "small business corporation" in section 12E(4)(a).

Please contact Ms Lizette Burger (Lizette@lssa.org.za) if there is any further information that you require in relation to the above proposal.

Kindly acknowledge receipt hereof.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Nic Swart', enclosed in a thin black rectangular border.

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