

16 June 2011

Dear Mr AG Wicomb  
Committee Secretary  
Standing Committee on Finance

Via email: [awicomb@parliament.gov.za](mailto:awicomb@parliament.gov.za)

Via fax: 086 657 4896

### **Submission to the Parliamentary Standing Committee on Finance**

It is with great credit that the National Treasury and SARS are open to be persuaded by public comments and consultations.

In recognition of this and pursuant to the Media Statement dated 2 June 2011 issued by the National Treasury (the "Media Statement"), I thus hereby submit my public comments, on behalf of Bendels Consulting, to the Parliamentary Standing Committee on Finance (the "SCOF").

Prior to making my submissions, I hereby formally place on record that Bendels Consulting is a niche tax law practice that specializes in the provision of tax law advice relating to healthcare. Accordingly, all comments made in this submission relate to medical matters. Bendels Consulting is a wholly independent tax law practice and is not affiliated, formally or informally, to any special interest group(s) in the stated industry. All comments and submissions made herein should thus be read in that context.

As requested in the Media Statement, it is herein noted that for the ease of processing of comments, submissions below have been made in the order listed as per the explanatory memorandum.

Unless otherwise stated, all statutory references made below are to the Income Tax Act No. 58 of 1962, as amended.

#### **JOHANNESBURG**

**T** +27 11 881 5749 **F** +27 11 881 5611  
**A** 2nd Floor, West Tower Maude Street  
Nelson Mandela Square, Sandton, 2196

#### **CAPE TOWN**

**T** +27 21 526 0444 **F** +27 21 526 0311  
**A** 1<sup>st</sup> Floor Foyer 3 The Colosseum  
Century Way, Century City, Cape Town, 7441

**E** [ebendel@bendelsconsulting.co.za](mailto:ebendel@bendelsconsulting.co.za)  
**W** [www.bendelsconsulting.co.za](http://www.bendelsconsulting.co.za)

## **1. EXPLANATORY MEMORANDUM – DRAFT TAXATION LAWS AMENDMENT BILL 2011**

### **2.6 Medical Tax Credits**

[Key provisions: Section 6A; Section 18(2)(c)]

1. It is submitted that the rationale stated for the proposed change from medical deductions to medical tax credits is sound since it is more closely aligned to a progressive marginal tax rate system. In order for the stated equality to be obtained it is a necessary requirement that the taxpayer is a member of a duly registered medical scheme (as is clear from the draft Section 6A). The explanatory memorandum states that the net effect of a deduction in respect of low-taxed workers is an effective savings of 18 per cent of the contributions.

2. Without prejudice to the above, it is my respectful submission that many, low-taxed workers who are most in need of fiscal assistance, will obtain no benefit from the proposed change. This assertion is made on the basis that individual taxpayer's (or the majority of them) who are paying tax at an effective tax rate of 18% are not able to afford the privilege of being a member of a medical scheme.

3. It is submitted that this position is further amplified for millions of individuals who are not even in the fortunate position of paying tax. Any and all health-care reforms and improvements thereto should be made for the benefit of all South Africans and the country as a whole, it is herein submitted. For a more detailed discussion on the above issues, the SCOF is referred to my comments made under NHI below.

4. When the Media Statement was issued on 2 June 2011 it was noted (point 2, page 3) that a discussion document covering the changes would be **“(due out next week)”**. With the greatest respect and no doubt due to valid and good substantive reasons, such document was issued on Saturday 17<sup>th</sup> June 2011, the day after the preparation of this submission. In view of this, I have not had the opportunity to consider the discussion document at any great length. My submissions made under this cover should thus be read in this context. As invited, I shall be making separate detailed comments to Ms Suzan Papo at the email address [suzan.papo@treasury.gov.za](mailto:suzan.papo@treasury.gov.za) in relation to the Discussion Document. I have not noted any deadline for submissions and accordingly respectfully request that the SCOF provide the public with the deadline date for such comment.

#### **JOHANNESBURG**

**T** +27 11 881 5749 **F** +27 11 881 5611  
**A** 2nd Floor, West Tower Maude Street  
Nelson Mandela Square, Sandton, 2196

#### **CAPE TOWN**

**T** +27 21 526 0444 **F** +27 21 526 0311  
**A** 1<sup>st</sup> Floor, Foyer 3 The Colosseum  
Century Way, Century City, Cape Town, 7441

**E** [ebendel@bendelsconsulting.co.za](mailto:ebendel@bendelsconsulting.co.za)  
**W** [www.bendelsconsulting.co.za](http://www.bendelsconsulting.co.za)

## **2.8 ROAD ACCIDENT FUND PAYOUTS**

[Key provision: Section 10(1)(gB)]

The proposed introduction of the exemption for compensation paid in terms of section 17 of the Road Accident Fund Act, 1996 (Act No. 56 of 1996) (the “RAF”) is most welcome. I hereby submit, however, that many additional tax changes should be made in respect of RAF. Some of these changes/ideas are addressed separately below.

## **2. ADDITIONAL TAX LAW MATTERS SUBMITTED**

### **2.1 Special Trusts (section 1 paragraph (a))**

With effect from 1 March 2009, section 18(3) was substantially amended (the deletion of the “handicapped persons” definition was replaced by a new “disability” provision). At the same time, however, the definition of a Special Trust in section 1, as contemplated in paragraph (a) of the said definition remained unchanged. It is hereby respectfully submitted that the definition of a paragraph (a) Special Trust should be amended so as to align it with the definition of “disability” as contained in section 18(3).

### **2.2 Medical expense deductions (section 18(1))**

#### **Preamble**

Notwithstanding section 23, section 18(1) allows for the deduction of certain expenses (for the sake of convenience, herein referred to as “qualifying medical expenses”) by any taxpayer who is a natural person (my emphasis).

It is common cause that road accident fund settlements (among other claims such as medical malpractice, negligence, workmen’s compensation claims etc.) are placed in trust in order to protect the natural person. It follows from this that there are two parts to this issue:

1. maintaining, growing and/or sustaining the value of the assets for as long as is practically possible while at the same generating sufficient income, and
2. minimizing the expenses of the trust.

It is clear that both (1) and (2) above should be consistent so as to allow the natural person to achieve an acceptable net after tax result.

In relation to 2.2.1 above, the proposed change to the exemption of annual receipts from the RAF (2.8 of the explanatory memorandum discussed above) should provide some assistance in addressing after tax income receipts.

When addressing 2.2.2 above, I herein submit substantial concerns arise regarding the tax deductibility of qualifying medical expenses. As a natural concomitant, Trusts created for “disabled” persons by their very nature incur and pay substantial amounts of qualifying medical expenses.

But, yet such qualifying medical expenses, as a matter of current tax law, are not tax deductible in accordance with the provisions as set out in section 18. It is clear from the wording of section 18(1) that only natural persons are entitled to tax deductions by virtue of section 18.

In the circumstances described above, it is submitted that the tax treatment is anomalous. An amendment to the section 18 is respectfully requested in order to redress the clear and unfettered imbalance which exists at present. The alternative of having a *curator bonis* is in most cases not a viable and/or constructive long-term option. It is submitted that there are a number of permissible tax planning ways in which to ensure tax equality. But, it is my opinion that the costs involved in implementing such plans would be done to the financial detriment of the natural person.

I thus commend an amendment to be made to the pre-amble of section 18(1). In full recognition of tax abuse, due care and consideration would need to be given prior to introducing any such amendment and Bendels Consulting would be glad to add further input on this for consideration by Parliament.

### **Section 18(1)(d)**

With effect from 1 March 2009, several changes were made to section 18(1)(d), the most noteworthy of which is as set out below.

1). The insertion to “any expenditure **that is prescribed by the Commissioner** (my emphasis) (other than expenditure recoverable by the taxpayer or his or her spouse)....” is an amendment which is of serious concern to stakeholders and many affected taxpayers.

The South African Revenue Service issued for public comment, a List of Qualifying Physical Impairment or Disability Expenditure (the “First Prescribed List”). Even though the First Prescribed List became effective from 1 March 2009, the First Prescribed List was only made available to the public for comment several months after 1 March 2009. The due date for submission of public comments was in October 2009 yet the First Prescribed List became effective as of 1 March 2009.

Credit has already been given in this submission to the National Treasury and SARS for being open to be persuaded by public comments and public consultations. This is regrettably an example where I rescind such credit.

The position has unfortunately, with deep regret and of concern to stakeholders and the many affected taxpayers, been exacerbated by SARS issuing a new Prescribed List (the “Second Prescribed List”). The Second Prescribed List is due to become effective from 1 March 2011 but it is not yet in the public domain.

The Second Prescribed List was only issued to stakeholders (it is noted herein that Bendels Consulting is not a stakeholder) on 13 May 2011. Stakeholders were given less than one month to submit comments on the Second Prescribed List despite the fact that it is due to become effective from 1 March 2011.

There are changes and major issues regarding the Second Prescribed List. For the sake of brevity I shall herein refrain from providing detailed comments, save for stating that it is **unanimous** from the various stakeholders and affected taxpayers that I have spoken and corresponded with (and in my own respectful opinion) that any Prescribed List cannot and must not be all inclusive and/or exhaustive.

Just one example, relates to the non-inclusion (or exclusion) of expenses relating to stem-cell treatment, which many taxpayers (or their children undergo), at great expense in the hope of an improvement in the individual’s life. The pace at which modern medical science is developing means that a historic, or retrospective, list of expenditure can and should only be used as a broad guide.

My respectful request on this point is that the implementation of any new Prescribed List should be deferred until all stakeholders and the public have had sufficient time to reflect on all relevant matters. The matters are complex in tax law as well as medical science. It is noted herein that stakeholders and affected taxpayers (and in many cases even their tax law advisors), in my personal experience, are not always well placed to comment on tax law matters relating to medical issues and the implications thereof.

**JOHANNESBURG**

**T** +27 11 881 5749 **F** +27 11 881 5611  
**A** 2nd Floor, West Tower Maude Street  
Nelson Mandela Square, Sandton, 2196

**CAPE TOWN**

**T** +27 21 526 0444 **F** +27 21 526 0311  
**A** 1<sup>st</sup> Floor, Foyer 3 The Colosseum  
Century Way, Century City, Cape Town, 7441

**E** ebendel@bendelsconsulting.co.za  
**W** www.bendelsconsulting.co.za

## **Section 18(2)(b)**

As noted above, the “old” (more limiting) definition of “handicapped person” was repealed and replaced by the new definition of “disability” in section 18(3).

The consequence for tax purposes of a taxpayer, his or her spouse or child having a “disability” as defined in section 18(3) is that all qualifying medical expenses are tax deductible by virtue of section 18(2)(b).

An issue that arises for many taxpayers is where guardians and/or siblings are supporting the person with the section 18(3) “disability”. For example, the person with the “disability” may be 50 year’s old and both his/her parents have passed, or are unable to provide any financial support.

In these cases, section 18(2)(b) does not provide the same relief to the guardians or siblings as section 18(2)(b) is clear in its ambit that it only applies to the taxpayer, his or her spouse or child with a disability.

It is my respectful submission that this may have been an unintended oversight on the part of Parliament and/or not considered when the law was implemented. In any event, I commend Parliament to make the change which in my respectful opinion is anomalous. Again, abuse of tax law must be considered in this context.

## **PARAGRAPH 12 SEVENTH SCHEDULE**

### **Paragraph 12A and 12B**

#### **PARAGRAPH 12A**

Broadly, paragraph 12A(1) provides for all medical aid contributions paid by an employer on behalf of an employee to be taxable as a fringe benefit in accordance with the Seventh Schedule.

But, sub-paragraph 5(d) of paragraph 12A provides that no value shall be placed on the on the benefit where the person is entitled to a rebate under section 6(2)(b). A person is entitled to rebate under section 6(2)(b) if he or she is over the age of 65.

#### **PARAGRAPH 12B**

Similar to paragraph 12A(1), paragraph 12B(1) provides for a fringe benefit to accrue where medical costs are paid by an employer, directly or indirectly, in respect of an employee, his or her spouse or child or other relatives or dependants.

As in paragraph 12A above, no value shall be placed on the benefit where the person is entitled to a rebate under section 6(2)(b) – sub-paragraph 12B(3)(b)(iv).

### **RATIONALE FOR PARAGRAPH 12A AND 12B EXCLUSIONS**

The rationale for the exclusion from fringe benefits tax for persons over the age of 65 is considered, in my opinion, to be sound. The reason for this submission is that the inclusion of the amounts as fringe benefits under the Seventh Schedule would have no net tax effect (apart from timing). This is because all qualifying medical expenses for taxpayers over the age of 65 are tax deductible by virtue of section 18(2)(a).

The point at issue raised herein is that all qualifying medical expenses are also fully tax deductible by virtue of section 18(2)(b) i.e. where a section 18(3) “disability” exists.

The above situation is anomalous as a matter of law and Parliament is respectfully requested to review and amend this. With due respect and concern to taxpayers over the age of 65, it is my respectful submission that the changes which should be made are the deletion of paragraphs 12A(5)(d) and 12B(3)(b)(iv) to the Seventh Schedule.

The above submission is respectfully made due to the complexities of the Prescribed List and the potential for abuse. Employers, in my experience, are reticent to get involved in personal medical tax matters for their staff. Additionally, the Prescribed List is, with due respect, not something employers are familiar with. The tax benefit (albeit timing in nature) may additionally result in discriminatory issues where employees have “disabilities” or a “disability” within the family.

### **NATIONAL HEALTH INSURANCE**

My comments made in 2.6.3 in relation to **medical tax credits** have reference. The submission which I have made in the 2.6.3 above is made on the assumption that all the relevant stakeholders (it is noted herein that Bendels Consulting is not a stakeholder so I am unable to express any opinion any assumptions made) would have no doubt considered my submission on this point.

I envisage and respectfully request that the above, among a multitude of other issues will, as a consequence of South Africa’s unique position due to the dark days of our apartheid era, require innovative thinking and that the issues will be addressed at length as a much wider issue when addressing the NHI initiatives/intentions. A call for a white paper is firmly suggested as the lessons learnt (healthcare systems already in place) from developed countries like the United States, Ireland, Canada

and the United Kingdom are substantially different from those faced by South Africa as a consequence of our history.

The NHI is set to become one of South Africa's biggest fiscal issues over the next 15 to 20 years (or more). My understanding of advances made in modern medical science results in many more premature births. The concomitant effect of this is that, in my experience, a number of these children are born with "disabilities". At the other extreme, life expectancies could also increase due to advanced medical measures and intensive care treatments. When coupled together, the two issues are set to require substantial financing in the future, in my respectful opinion.

As part of the Budget 2011 Tax proposals, it is noted that Government expects that the NHI will be phased in over 14 years. Very little was stated with regard to funding the NHI. It was, however, stated that announcements regarding specific funding instruments will be made in the 2012 Budget Speech.

Two funding issues stated in the 2011 Budget was a deduction from payroll and an increase in the rate of VAT. It is my respectful opinion that any increase in VAT is likely to be counter-productive as any such increase is likely to affect those in need of NHI the most.

In recognition of the importance of the NHI to all South Africans as we continue to emerge from the dark days of apartheid, I authored an article entitled: "*THE LONG WALK TO...HEALTHCARE – NHI*". The article was published in the May/June 2011 edition of TaxTalk. The article is attached hereto as Annexure A.

Since writing the article, I have become aware that many Road Accidents are caused by drivers using cellular telephones.

### **SAVINGS AND INCENTIVES**

My article attached as Annexure A refers to certain tax incentives relating to health-care. There are many other more innovative and effective methods which could be introduced and incentives are herein encouraged, subject to the proviso that they are drafted and implemented so as to substantially limit any tax abuse.

### **CONCLUSION**

Two points in conclusion is that when the Minister of Finance presents his 2012 Budget, our Income Tax Act will turn 50. No gifts are expected, however, a "wholesale" review of our taxation act is something that in my respectful opinion should be tabled for future consideration. The last such review was The Katz

Commission 20 years ago, however, South Africa's position is now substantially different to what it was then. I commend such a review as time allows.

I would again like to express my gratitude on behalf of Bendels Consulting for being given the opportunity to engage with the National Treasury and SARS. I trust and hope that the engagement process and invitation extended to all members of the public will result in a fairer tax system for all South Africans and South Africa.

Yours sincerely,

Eugene Bendel LLM (Tax Law – UCT, 1993)  
CEO, Bendels Consulting

Annexure A: The long walk to...healthcare - NHI (TaxTalk article; May/June 2011)

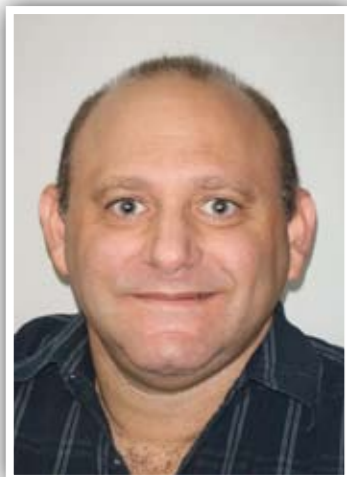
**JOHANNESBURG**

**T** +27 11 881 5749 **F** +27 11 881 5611  
**A** 2nd Floor, West Tower Maude Street  
Nelson Mandela Square, Sandton, 2196

**CAPE TOWN**

**T** +27 21 526 0444 **F** +27 21 526 0311  
**A** 1<sup>st</sup> Floor Foyer 3 The Colosseum  
Century Way, Century City, Cape Town, 7441

**E** ebendel@bendelsconsulting.co.za  
**W** www.bendelsconsulting.co.za



# THE LONG WALK TO... HEALTHCARE — NHI

Eugene Bendel | ebendel@bendelsconsulting.co.za

## 1. Background

Following on from the efforts of his predecessor, the Minister of Finance, Mr Pravin Gordhan, once again, delivered a reasonable Budget on 23 February 2011.

However, much has been deferred until the 2012 Budget and with good reason. Making major proposals to changes in our tax system at a time of such economic uncertainty warranted a budget which erred, if anything, on the side of caution.

It is noteworthy that when the 2012 Budget is delivered, our Income Tax Act will effectively turn 50. The fact that our country has changed so significantly since the Katz Commission, it is now well and truly time for our tax system to be reviewed and appropriately consolidated.

Notwithstanding this, the National Health Insurance (NHI) should not be delayed until any such tax consolidation takes place.

The NHI has been spoken and written about for some time now and it has been stated, announcements about specific funding instruments will be made in the 2012 Budget.

Inextricably linked to the NHI are the current complex income tax provisions relating to the tax deduction for medical expenses. It was announced in the 2011 Budget that medical expense deductions (as contemplated in section 18 of the Act) will be converted into tax credits, effective 1 March 2012. It was noted that a discussion paper regarding the conversion would be issued by the end of March 2011. At the time of writing, the discussion paper has not yet been published and I am unable to express an opinion.

The purpose of this article is to highlight what I believe are some of the macro issues which could be considered in order to create better healthcare for the majority of South Africans. I make these respectful submissions in my capacity as a specialist tax law adviser in the area of healthcare and am in no way privy to any plans which the government may, or may not, have regarding financing the NHI.

Furthermore, as an independent tax law adviser, I am an entirely neutral commentator. Any opinions, suggestions, ideas and observations expressed are solely mine and made in the hope that South Africa can create a viable, sustainable and successful State healthcare system for the benefit of all

South Africans.

It is clear that the government is not promising South Africans an overnight fix to our State healthcare which is desperately in need of immediate antidotes. Haste, however, will not achieve the intended results. The government's pragmatic and conservative approach is thus commendable.

Government is expecting to phase in the NHI over 14 years. Such period may seem a long-time to many commentators and, more appropriately, to the millions of South Africans who are in desperate need and deserving of better healthcare.

Realism, however, has to be the order of the day as South Africa has a considerable way to go in achieving a well financed, sustainable and good healthcare system.

Even the most developed countries around the world have grappled, at pains, with healthcare reforms. As the title of this article alludes, South Africa's position is considerably different to that of America, the United Kingdom and France, for example. Accordingly, any comparison to the healthcare systems and any reforms made (or proposed) in those countries are considered inappropriate in the South African context. This in no way suggests that South Africa cannot learn from healthcare systems around world, however, our continued emergence from the dark days of apartheid places South Africa at the other end of the spectrum when dealing with State healthcare, among many other issues (such as job creation, education, housing).

## 2. Financing the NHI

Addressing some specifics about financing the NHI, government is contemplating an increase in the rate of VAT to partially fund the NHI. Such an increase would be counter-productive. This is because any increase is likely to affect those most in need of health care. For this reason, I have not assessed what percentage increase in VAT would be required in any event to make a significant contribution to the financing of the NHI.

The precise mechanism for raising finance and adequately allocating expenditure which the government has in mind is unclear. An NHI fund should be introduced onto our statute books as soon as possible.

### 2.1 Public-private partnership

Any successful NHI fund will require a public-private partnership. In

this context, contributors to the NHI should include private hospitals, pharmaceutical companies and suppliers to the healthcare industry. Possible by an indirect tax based on a predetermined percentage of turnover, or any other more appropriate measure.

Notwithstanding the fact that such indirect taxation would appear to be detrimental to the various sectors of the healthcare fraternity, the salient benefits are noteworthy of comment.

Once the NHI is adequately funded, State patients (or those patients not covered by medical schemes) should be able to receive medical care in private hospitals, paid for out of the NHI fund, where no suitable State healthcare facility is available or provided.

For the pharmaceutical and medical supply industries, any increase in investment, with the concomitant increase and improvement in the State healthcare system should have a positive impact on their businesses. It stands to reason that the demand from the State will increase exponentially for their product offerings.

### 2.2 Increased funding for the Road Accident Fund

The first area of consolidation (bearing in mind the stated requirement for tax consolidation referred to in point 1 above) is the amalgamation of the Road Accident Fund (RAF) into the NHI fund.

A considerable amount of the State's healthcare costs is expended on road accidents – it is understood that the RAF is inadequately funded. Such position is, wholly unsurprising as the financial contributor to the fund is the fuel levy. When reflecting on the sources and causes of road accidents, there are many other sectors of the economy which should be contributors to the fund. These include (but are not limited to):

Motor manufacturers, motor dealers, suppliers to the motor industry, car rental companies, vehicle financiers, motor vehicle insurers, construction companies and the alcohol industry (notwithstanding the considerable efforts that companies like

SAB Miller make in discouraging drinking and driving, the sad reality is that many road accidents are caused by drivers who are under the influence of alcohol).

### 2.3 Tax incentives

Two additional but significant financing instruments could include incentivised savings.

Firstly, it is recognised that historically disadvantaged individuals (HDI) are not saving sufficiently for their futures. Viewed in isolation, such position will create a substantial social security burden on our State for future generations. It is, therefore, submitted that an incentive that could be considered. For example; for every R100 which an HDI invests in the NHI fund will be supplemented by, say R5, by the government. Time limits as to investments (and early withdrawal issues) in the NHI fund and the definition of a HDI would need to be carefully considered.

The second incentive could be for a further tax-free interest exemption to be made available for funds invested in the NHI fund. Probably more beneficial for the country, as a whole, would be converting

the current interest exemption for savings only made in the NHI fund – the current exemption could also be increased. It is clearly envisaged that interest paid on any savings made in the NHI would be at market-related interest rates, or slightly higher in order to attract sufficient investments.

An initial public bond offering in this regard could also be considered. This should provide the NHI with the proverbial shot-in-the-arm so as to allow government to make some relatively short-term decisions (and funding allocations) for the benefit of a much improved State healthcare system.

## 3. Summary

I have set out a limited number of my submissions and potential ideas which could be considered in relation to creating a successful NHI. Many of the ideas and submissions made above may be unworkable, unpractical or plain and simply inappropriate. In any event, each and every one of them will require substantial thought and consideration.

The Minister of Finance said, when delivering his Budget on 23 February 2011, that the Treasury would carefully consider the pros and cons of each of their ideas regarding the NHI. As with any major changes in tax law, there will be winners and losers.

I am aware that many of the submissions made above raise cons, such as any perceived negative impact the indirect tax could have on the construction industry. But the salient features do need to be considered when making assessments as the construction industry will benefit from greater investment in building hospitals and/or improving existing healthcare facilities.

I am also acutely aware that the road to a good State healthcare system will, out of necessity, be a long and winding one. Time will tell as to how the government approaches the matter and the Minister's 2012 Budget will no doubt come under close scrutiny, quite aside from it being a 50th anniversary Budget – I believe we can expect no gifts in the 2012 Budget.

Each and every issue, view, opinion, submission or any other matter expressed in the article above are solely those of the author. The author accepts no responsibility of whatever nature for any action which any party may take pursuant to the publication of the said article.

